

**RETENTION AGREEMENT
(Waxie)**

Between

**THE CITY OF ONTARIO,
a California municipal corporation**

and

**WAXIE'S ENTERPRISES, INC.
an Arizona corporation
dba Waxie Sanitary Supply**

[Dated as of May 16, 2017 for reference purposes only]

This RETENTION AGREEMENT (Waxie) ("**Agreement**") is entered into by and between THE CITY OF ONTARIO, a California municipal corporation ("**City**") and WAXIE'S ENTERPRISES, INC., an Arizona corporation ("**Waxie**"), as of **May 16, 2017**, for reference only. The City and Waxie are sometimes each, individually, referred to in this Agreement as a "**Party**" and, collectively, as the "**Parties.**" The City and Waxie enter into this Agreement with reference to the following facts ("**Recitals**"):

RECITALS

WHEREAS, Waxie owns that certain real property in the City of Ontario, County of San Bernardino, commonly known as **905 N. Wineville, Ontario, CA 91764-5595** ("**Property**"); and

WHEREAS, Waxie, dba Waxie Sanitary Supply, currently operates a distribution and showroom facility out of an approximately 120,000 square foot facility at the Property ("**Business**"); and

WHEREAS, the conduct of the Business in the City has resulted in the creation of new job opportunities for City and area residents and assisted the City in establishing and maintaining a jobs/housing balance within the City, thereby creating social, economic and environmental benefits;

WHEREAS, Waxie is looking at its long term growth projections and its long term corporate expansion plans. City desires that Waxie not look outside the City for any future growth opportunities as that could result in a significant loss of jobs within the community; and

WHEREAS, City and Waxie are interested in entering this Retention Agreement to provide certain incentives to ensure the retention of and potential future expansion of the Business in Ontario on the Property; and

WHEREAS, the continued operation of the Business within the City will result in the retention of existing jobs, allow for the potential increase in job opportunities at the Business, foster a business and civic environment that may attract additional businesses and investment and create additional job opportunities in the City and further increase the jobs/housing balance in the City.

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES SET FORTH IN THIS AGREEMENT, THE CITY AND WAXIE AGREE, AS FOLLOWS:

1. Incorporation of Recitals. The Recitals of fact set forth above are true and correct and are incorporated into this Agreement in their entirety by this reference.

2. Effective Date of this Agreement.

2.1 This Agreement is dated **May 16, 2017** for reference purposes only. This Agreement will not become binding on the Parties unless and until the first date on which all of the following occur, if at all ("**Effective Date**"):

2.1.1 Waxie has delivered a copy of this Agreement and the Official Action to the City, each signed by the appropriately authorized representatives of Waxie; and

2.1.2 This Agreement is approved by the City Council of the City at a public meeting of the City following all legally required noticing and public hearings and such approval is evidenced by a resolution adopted by the City Council of the City; and

2.1.3 This Agreement is signed by the authorized representative(s) of the City.

2.2 If all conditions precedent to the Effective Date are not satisfied on or before June 1, 2017, then no part of this Agreement shall become binding on or enforceable against any Party and any prior signatures or approvals of this Agreement by either the City or Waxie shall be void and of no force or effect.

2.3 Parties to Retention Agreement.

2.3.1 The City. The address of the City is 303 East B Street, Ontario, California 91764, Attention: Al C. Boling; telephone 909-395-2396; facsimile: 909-395-2189; with copies to John Brown, City Attorney, 2855 East Guasti Road, Suite 400, Ontario, CA 91761, Telephone: (909) 989-8584.

2.3.1.1 The City represents and warrants to Waxie that, to the City's actual current knowledge:

2.3.1.2 The City is a public body, corporate and politic, exercising governmental functions and powers and organized and existing under the laws of the State of California;

2.3.1.3 The City has taken all actions required by law to approve the execution of this Retention Agreement;

2.3.1.4 The City's entry into this Retention Agreement and/or the performance of the City's obligations under this Retention Agreement does not violate any contract, agreement or other legal obligation of the City;

2.3.1.5 The City's entry into this Retention Agreement and/or the performance of the City's obligations under this Retention Agreement does not constitute a violation of any state or federal statute or judicial decision to which the City is subject;

2.3.1.6 There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of the City's obligations under this Retention Agreement;

2.3.1.7 The City has the legal right, power and authority to enter into this Retention Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance of this Retention Agreement has been duly authorized and no other action by the City is requisite to the valid and binding execution, delivery and performance of this Retention Agreement, except as otherwise expressly set forth herein; and

2.3.1.8 The individual executing this Retention Agreement is authorized to execute this Retention Agreement on behalf of the City.

2.3.1.9 The representations and warranties set forth above are material consideration to Waxie and the City acknowledges that Waxie is relying upon the representations set forth above in undertaking Waxie's obligations set forth in this Retention Agreement.

2.3.1.10 As used in this Retention Agreement, the term "City's actual current knowledge" shall mean, and shall be limited to, the actual current knowledge of the City Manager as of the Effective Date, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation.

2.3.1.11 All of the terms, covenants and conditions of this Retention Agreement shall be binding on and shall inure to the benefit of the City and its nominees, successors and assigns.

2.3.2 Waxie. The address of Waxie for purposes of this Retention Agreement is 905 N. Wineville, Ontario, California 91764-5595; telephone 800-443-3469; facsimile 909-942-3199.

2.3.2.1 Waxie represents and warrants to the City that, to its actual current knowledge:

2.3.2.2 Waxie is a duly formed California corporation, qualified and in good standing to do business under the laws of the State of California;

2.3.2.3 The individual(s) executing this Retention Agreement is/are authorized to execute this Retention Agreement on behalf of Waxie;

2.3.2.4 Waxie has taken all actions required by law to approve the execution of this Retention Agreement;

2.3.2.5 Waxie's entry into this Retention Agreement and/or the performance of its obligations under this Retention Agreement does not violate any contract, agreement or other legal obligation of Waxie;

2.3.2.6 Waxie's entry into this Retention Agreement and/or the performance of its obligations under this Retention Agreement does not constitute a violation of any state or federal statute or judicial decision to which Waxie is subject;

2.3.2.7 There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of Waxie's obligations under this Retention Agreement;

2.3.2.8 Waxie has the legal right, power and authority to enter into this Retention Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance of this Retention Agreement have been duly authorized and no other

action by Waxie is requisite to the valid and binding execution, delivery and performance of this Retention Agreement, except as otherwise expressly set forth herein; and

2.3.2.9 Waxie and its managerial personnel possess sufficient experience and qualifications necessary to conduct Waxie's Sales Activities (hereinafter defined) as required by this Retention Agreement.

2.3.2.10 The representations and warranties set forth herein are material consideration to the City and Waxie acknowledges that the City is relying upon the representations set forth above in undertaking the City's obligations set forth above.

2.3.2.11 As used in this Retention Agreement, the term "actual current knowledge of Waxie" shall mean, and shall be limited to, the actual current knowledge of Charles Wax, as of the Effective Date, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation.

2.3.2.12 All of the terms, covenants and conditions of this Retention Agreement shall be binding on and shall inure to the benefit of Waxie and its permitted nominees, successors and assigns. Wherever the term "Waxie" is used herein, such term shall include any permitted nominee, assignee or successor of Waxie.

2.3.2.13 The qualifications and identity of Waxie are of particular concern to the City, and it is because of such qualifications and identity that the City has entered into this Retention Agreement with Waxie. No voluntary or involuntary successor-in-interest of Waxie shall acquire any rights or powers under this Retention Agreement except as expressly set forth herein.

3. Definitions. All initially capitalized terms used in this Agreement shall have the meanings set forth below or, if not set forth below, where such terms first appear in this Agreement.

3.1 "Base Sales Tax Amount" means an annual total of Eight Hundred Four Thousand Dollars (\$804,000). For purposes of calculating the computation quarter the "Base Sales Tax Amount" shall be Two Hundred One Thousand (\$201,000) quarterly.

3.2 "BOE" means and refers to the State of California Board of Equalization and any successor agency.

3.3 "Business" means and refers to Waxie's continued operation of a facility on the Property for the specific purpose of conducting its retail distribution and showroom business.

3.4 "Business Activities" means and refers all activities (on the Property, via the internet or otherwise) of Waxie's officers, directors, employees, agents or consultants that result in the sale or lease of any tangible personal property and that are subject to the payment of local sales and use taxes pursuant to the Sales Tax Law.

3.5 "CEQA" means and refers to the California Environmental Quality Act, California Public Resources Code Sections 21000, *and et seq.*

- 3.6** “**City**” means and refers to the City of Ontario, a California municipal corporation.
- 3.7** “**City Attorney**” means and refers to the City Attorney of the City of Ontario, California.
- 3.8** “**City Council**” means and refers to the City Council of the City of Ontario, California.
- 3.9** “**City Manager**” means and refers to the City Manager of the City of Ontario, California.
- 3.10** “**Computation Quarter**” means each calendar quarter beginning on January 1, April 1, July 1, or October 1, as applicable, and ending on the succeeding March 31, June 30, September 30, or December 31, as applicable. The first Computation Quarter within the Eligibility Period shall commence on July 1, 2017 and is referred to herein as “Computation Quarter 1,” with each succeeding Computation Quarter being consecutively numbered.
- 3.11** “**Covenant Payment**” means those contingent payments to be made by the City to the Waxie pursuant to Section 5.1 of this Agreement for the purchase of the Covenants and Waxie’s timely and faithful performance thereunder up to the total payment amount of Five Hundred Thousand Dollars (\$500,000).
- 3.12** “**Covenant Period**” means and refers to the term the Covenants set forth in Section 4 are in effect and shall commence on the Effective Date and continue until the Fifteenth Anniversary of the Effective Date unless otherwise terminated pursuant to this Agreement.
- 3.13** “**Covenants**” means those seven (7) covenants described in Section 4 herein.
- 3.14** “**Effective Date**” shall have the meaning ascribed to the term in Section 2.1 of this Agreement.
- 3.15** “**Eligibility Period**” means the period commencing as of the first (1st) day of Computation Quarter 1 and continuing until last day of the Computation Quarter in which this Retention Agreement is terminated pursuant to the specific provisions of this Retention Agreement.
- 3.16** “**Enforced Delay**” means and refers to delays or defaults in performance due to war; acts of terrorism; insurrection; any form of labor dispute; lockouts; riots; floods; earthquakes; fires; acts of God or of third parties; third party litigation; acts of a public enemy; referenda; acts of governmental authorities (except that the failure of the City to act as required under this Agreement shall not excuse its performance); moratoria; epidemics; quarantine restrictions, freight embargoes; and any other cause outside of the reasonable control of the Party whose performance is delayed.
- 3.17** “**Liquidated Damages**” means, for purposes of Section 7.5, as follows:
- 3.17.1** If the breach occurs during Computation Quarters 1 through 20, an amount equal to Sixty-six percent (66%) of the Covenant Payments paid to Waxie at any time prior to the Computation Quarter in which the breach occurs.

3.17.2 If the breach occurs during Computation Quarters 21 through 40, an amount equal to Forty percent (40%) of the Covenant Payments paid to Waxie at any time prior to the Computation Quarter in which the breach occurs.

3.18 “Local Sales Tax Revenues” means the net Sales Tax received by the City from the BOE pursuant to the application of the Sales Tax Law (as such statutes may hereafter be amended, substituted, replaced, re-numbered, moved or modified by any successor law) attributable to Business Activities in a particular Business Operating Year. Local Sales Tax Revenues shall not include: (i) Penalty Assessments; (ii) any Sales Tax levied by, collected for or allocated to the State of California, the County of San Bernardino, or a district or any entity (including an allocation to a statewide or countywide pool) other than City; (iii) any administrative fee charged by the BOE; (iv) any Sales Tax subject to any sharing, rebate, offset or other charge imposed pursuant to any applicable provision of federal, state or local (except City’s) law, rule or regulation; (v) any Sales Tax attributable to any transaction not consummated within the Eligibility Period; or (vi) any Sales Tax (or other funds measured by Sales Tax) required by the State of California to be paid over to another public entity (including the State) or set aside and/or pledged to a specific use other than for deposit into or payment from the City’s general fund.

3.19 “Official Action” means and refers to the official action of Waxie authorizing its entry into and performance of this Agreement, in substantially the form attached to this Agreement as Exhibit A, executed by Waxie’s authorized representative(s) .

3.20 “Penalty Assessments” means and refers to penalties, assessments, collection costs and other costs, fees or charges resulting from late or underpaid payments of Sales Tax and which are levied, assessed or otherwise collected from Waxie.

3.21 “Prohibited Financial Assistance” means and refers to any direct or indirect payment, subsidy, rebate or other similar or dissimilar monetary or nonmonetary benefit, including, without implied limitation, payment of land subsidies, relocation expenses, financial incentives, public financing, property or sales tax relief or rebates, relief from public improvement obligations, and payment for public improvements to or for the benefit of Waxie by any public or private person or entity.

3.22 “Sales Office” means and refers to means that certain corporate headquarters and administrative office and related functions operated on the Property by Waxie which shall serve as the point of sale from which Waxie shall conduct or conclude internet, telephonic, or direct sales attributable to the Property.

3.23 “Sales Tax” means all sales and use taxes levied under the authority of the Sales Tax Law attributable to Business Activities.

3.24 “Sales Tax Law” means: (i) California Revenue and Taxation Code Section 7200 et seq., and any successor law thereto; (ii) any legislation allowing the City or other public agency with jurisdiction in the City to levy any form of local Sales Tax on the operations of Waxie; and (iii) regulations of the BOE and other binding rulings and interpretations relating to (i) and (ii) hereof.

3.25 “Sales Tax Revenues” means the net Sales Tax actually received by the City from the BOE pursuant to the application of the Sales Tax Law (as such statutes may hereafter be amended, substituted, replaced, re-numbered, moved or modified by any successor law) attributable to the Sales Office in a particular Computation Quarter. Sales Tax Revenues shall not include: (i) Penalty Assessments; (ii) any Sales Tax levied by, collected for or allocated to the State of California, the County of San Bernardino, or a district or any entity (including an allocation to a statewide or countywide pool) other than City; (iii) any administrative fee charged by the BOE; (iv) any Sales Tax subject to any sharing, rebate, offset or other charge imposed pursuant to any applicable provision of federal, state or local (except City’s) law, rule or regulation; (v) any Sales Tax attributable to any transaction not consummated within the Eligibility Period; or (vi) any Sales Tax (or other funds measured by Sales Tax) required by the State of California to be paid over to another public entity (including the State) or set aside and/or pledged to a specific use other than for deposit into or payment from the City’s general fund.

4. Covenants Running with the Land.

4.1 Operating and Use Covenant. Waxie covenants and agrees that for the Covenant Period Waxie shall operate, or cause to be operated upon the Property, the Business in a commercially reasonable business manner, consistent with all applicable provisions of federal, state and local laws and regulations. Waxie covenants to the City to cause the Business to be open for business to the general public and to continuously operate the Business on the Property throughout the entirety of the Covenant Period. For purposes of this Section 4.1, “continuously operate” means the Business shall not cease to operate for a period of ninety (90) consecutive calendar days. Waxie shall exercise commercially reasonable efforts to maximize the amount of Sales Tax Revenue, provided, however, Waxie shall be under no obligation or requirement to change, modify, revise or amend its business practices or procedures existing as of the Effective Date that take place in other jurisdictions. Waxie’s obligations pursuant to the immediately preceding sentence include, without limitation, the obligation to obtain all federal, state and local licenses and permits required for the operation of the business and to advertise, market and promote the business in a commercially reasonable fashion. For the Covenant Period, Waxie may use the Property only for the purposes of the operation of the Business and conducting Waxie’s Sales Activities in accordance with this Retention Agreement. City agrees and acknowledges that Waxie may lease a portion of the Property to another entity until such time that Waxie is prepared to expand its business operations and that the lease and/or operation of a business by a third party shall not be inconsistent with or prohibited by this Agreement provided that Waxie maintains its existing presence on the Property.

4.2 Covenant to Designate City as Point of Sale. Waxie covenants and agrees that during the Covenant Period Waxie shall maintain such licenses and permits as may be required by any governmental agency to conduct Waxie’s Sales Activities related to the Business and shall consummate at the Business all taxable sales transactions resulting from Waxie’s Sales Activities and identify the City as such in all reports to the California State Board of Equalization (“BOE”) in accordance with the Bradley-Burns Uniform Local Sales and Use Tax Law (Revenue and Taxation Code 7200, et seq.), as it may be amended or substituted. The foregoing notwithstanding, Waxie shall be under no obligation or requirement to change, modify, revise or amend its business practices or procedures existing as of the Effective Date that take place in other jurisdictions. The City acknowledges that Waxie currently and may in the future operate additional sale and distribution centers in the State of California and Waxie’s activities from such other sale and

distribution centers are not intended to be included in the scope of this Retention Agreement. Waxie shall maintain the appropriate master sales permits applicable to and required for the operation of the Business. Waxie shall consummate all taxable sales transactions for Waxie's Sales Activities at the Business, consistent with all applicable statutory and BOE regulatory requirements applicable to Waxie's Sales Activities and the designation of the City as the "point of sale" for all Waxie's taxable sales occurring as a result of Waxie's Sales Activities.

4.3 Waxie's Additional Obligations Regarding Repairs and Alterations to Sales Office. Waxie covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 4.1, the Waxie shall maintain, or cause to be maintained, the Sales Office in good condition, ordinary wear and tear excepted, and free from the accumulation of trash or other debris and agrees to promptly remove, or cause the removal of, all graffiti upon the Sales Office. Waxie shall also maintain or cause to be maintained the landscaping upon the Property in a good condition.

4.4 Covenant Against Solicitation and Acceptance of Economic Incentives During the Term of the Operating Use Covenant. Waxie covenants and agrees that, for the Covenant Period, Waxie will not directly or indirectly solicit or accept any Financial Assistance from any other public or private person or entity, if such Financial Assistance is given for the purpose of causing or would result in Waxie's breach of any of the Covenants of this Agreement. For purposes of this Section 4.4 the term "Financial Assistance" means any direct or indirect payment, subsidy, rebate, or other similar or dissimilar monetary or non-monetary benefit, including, without implied limitation, payment of land subsidies, relocation expenses, public financings, property or sales tax relief, rebates, exemptions or credits, relief from public improvement obligations, and payment for public improvements to or for the benefit of Waxie and relating solely to the Property and/or the Business.

4.5 Use of Property. Waxie covenants and agrees that the Property shall be put to no use other than those uses specified in the City's General Plan, the Specific Plan, zoning ordinances, and this Retention Agreement as the same may be amended from time to time. Nothing in this Section 4.5 shall limit, expand, modify or otherwise affect any right of Waxie or Waxie to continue any legal nonconforming use upon the Property following changes in the City's General Plan or zoning ordinances.

4.6 Jobs Covenant and Operational Covenant. Waxie covenants and agrees that Waxie will retain the existing workforce on the Property subject to future market forces and possibly create the potential for additional job growth on the Property.

4.7 Covenant Not to Discriminate. Waxie covenants to the City that it will not discriminate against any employee or applicant for employment because of sex, marital status, race, color, religion, creed, national origin, or ancestry, and that it will comply with all applicable local, state and federal fair employment laws and regulations. Waxie further covenant and agree that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, ancestry or national origin in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property, nor shall Waxie itself, or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use of

occupancy of tenants, lessees, subtenants, sublessee or vendees of the Property. Failure of Waxie to comply with the covenant of this Section 4.7 shall be deemed to be a material breach of this Agreement by Waxie and the City shall be entitled to pursue any remedy or damages available under this Agreement, at law, or in equity for such breach.

5. Covenant Payments.

5.1 Statement of Intent. The consideration to be paid to Waxie in exchange for the Covenants and Waxie's performance of its obligations set forth in this Retention Agreement, and subject to satisfaction of all conditions precedent thereto, shall consist of City's payment of an amount equal to Twenty-five percent (25%) of the Sales Tax Revenues attributable to the Property in excess of the Base Sales Tax Amount for each Computation Quarter during the Eligibility Period up to the total Covenant Payment amount of Five Hundred Thousand Dollars (\$500,000).

5.2 Contingent Obligation. The City's obligations under this Section 5 are contingent on a Computation Quarter-to-Quarter basis and, for each Computation Quarter, City's obligations to make any payments hereunder are expressly contingent upon Waxie having, for the entirety of such Computation Quarter, completely fulfilled its material obligations under this Retention Agreement, including, without limitation, the Covenants. Should such condition precedent not be satisfied for each Computation Quarter, then City shall have no obligation under this Section 5.2 to make any Covenant Payments to Waxie in such Computation Quarter.

5.3 Computation Quarter Covenant Payments. Within thirty (30) days following the end of each Computation Quarter, Waxie shall submit to City certified copies of its quarterly reports to the California State Board of Equalization ("BOE") which sets forth the amount of sales taxes paid to the BOE during the Computation Quarter arising from Waxie's Sales Activities conducted at the Sales Office. Within one hundred twenty (120) days following the end of each Computation Quarter, City shall pay to Waxie any Computation Quarter Covenant Payment due for such Computation Quarter.

5.4 No Carry Forward or Back. The determination of the Covenant Payment(s) shall be determined and calculated on a Computation Quarter to Computation Quarter basis. Except as provided in Section 5.5, no Sales Tax Revenue which is generated in a Computation Quarter other than the Computation Quarter for which the Covenant Payment is being determined shall be used or considered in the calculation of any Covenant Payment which may be due for that Computation Quarter.

5.5 BOE Determination of Improperly Allocated Local Sales Tax Revenues. If, at any time during or after the Eligibility Period of this Retention Agreement, the BOE determines that all or any portion of the Sales Tax Revenues received by the City were improperly allocated and/or paid to the City, and if the BOE requires repayment of, offsets against future sales tax payments, or otherwise recaptures from the City those improperly allocated and/or paid Sales Tax Revenues, then Waxie shall, within thirty (30) calendar days after written demand from the City, repay all Covenant Payments (or applicable portions thereof) theretofore paid to Waxie which are attributable to such repaid, offset or recaptured Sales Tax Revenues. If Waxie fails to make such repayment within thirty (30) calendar days after the City's written demand, then Waxie shall be in breach of this Retention Agreement and such obligation shall accrue interest from the date of the

City's original written demand at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded monthly, until paid. Additionally, the City may deduct any amount required to be repaid by Waxie under this Section 5.5 from any future Covenant Payments otherwise payable to Waxie under this Retention Agreement. This Section 5.5 shall survive the expiration or termination of this Retention Agreement.

5.6 Not a Pledge of Sales Tax. Waxie acknowledges that the City is not making a pledge of Sales Tax Revenues, or any other particular source of funds; the definition of Sales Tax Revenues, as used herein, is used merely as a measure of the amount payment due hereunder and as means of computing the City's payment in consideration for the Covenants. It is acknowledged by Waxie that the City's obligation to make payments is specifically contingent upon receipt by the City of the Sales Tax Revenues derived from operation of the Sales Office.

6. Nonliability of the City or City Officials and Employees. No council member, official, contractor, consultant, attorney or employee of the City shall be personally liable to Waxie, any voluntary or involuntary successors or assignees, or any lender or other party holding an interest in the Property, in the event of any default or breach by the City, or for any amount which may become due to Waxie or to a successors or assignees, or on any obligations arising under this Agreement.

7. Defaults

7.1 Waxie Default. City shall provide Waxie with written notice of Waxie's failure ("Waxie Default") to strictly abide by any material provision of this Retention Agreement, including, without limitation, the Covenants. Waxie shall have thirty (30) days from the date of such notice to either cure such Waxie Default, or, if such Waxie Default cannot be reasonably cured during such thirty (30) day period, to commence to cure within said thirty (30) day period and diligently prosecute such cure to completion thereafter.

7.2 City Default. Waxie shall provide City with written notice of City's failure ("City Default") to strictly abide by any material provision of this Retention Agreement. City shall have thirty (30) days from the date of such notice to either cure such City Default, or, if such City Default cannot be reasonably cured during such thirty (30) day period, to commence to cure within said thirty (30) day period and diligently prosecute such cure to completion thereafter.


7.3 General Remedies for Default. Waxie or City (as applicable) shall have the right to seek all available legal and equitable remedies, including, without implied limitation, general and consequential damages, unless otherwise expressly provided to the contrary herein. Unless prohibited by law or otherwise provided by a specific term of this Retention Agreement, the rights and remedies of the City and the Waxie under this Retention Agreement are nonexclusive and all remedies hereunder may be exercised individually or cumulatively, and the City may simultaneously pursue inconsistent and/or alternative remedies. Either Party may, upon the Default of the other Party and in addition to pursuing all remedies otherwise available to it, terminate this Retention Agreement and all of its obligations hereunder without cost, expense or liability to itself.

7.4 The City's Rights to Terminate its Obligations under Section 5.1 The City's obligations under Section 5.1 shall automatically terminate without cost, expense, or liability to City, upon the occurrence of any one or more of the following: (i) Waxie Default; or (ii) upon the final determination by a court of competent jurisdiction that any one or more of the Covenants are void, voidable, invalid, or even unenforceable for any reason whatsoever, including, without limitation, legal infirmity. Termination of the City's obligations under Section 5.1 in accordance with subsection (i) of this Section 7.4 shall not operate to forgive, modify, discharge or excuse Waxie's obligations arising under this Retention Agreement.


7.5 Liquidated Damages.

7.5.1 Waxie Default With Respect to Obligations Under Sections 4.1 and 4.2. The Parties acknowledge that the consideration to the City for its entry into this Retention Agreement and the performance of its obligations hereunder include the City's receipt of Sales Tax Revenues, employment and other payroll taxes, property taxes, and other direct and indirect financial and non-financial benefits arising from the operation Waxie's Sales Activities and the location of the Sales Office in the City in accordance with Section 4 of this Retention Agreement. Waxie agrees that the City will suffer damages if Waxie commits any Waxie Default with respect to any of its obligations arising under Sections 4.1 and 4.2. The Parties agree that the exact determination of such damages would be impracticable and extremely difficult to quantify. Accordingly, the Parties have determined that Liquidated Damages (as determined pursuant to Section 3.1.7) represents a reasonable estimate of the damages which would be suffered by the City if Waxie commits any Waxie Default with respect to any of its obligations set forth in Sections 4.1 and 4.2. Accordingly, as its sole and exclusive monetary remedy for an Waxie Default with respect to any of its covenants and obligations set forth in Sections 4.1 and 4.2, the City shall be entitled to (1) terminate this Retention Agreement and the entirety of its obligations hereunder, including any accrued and unpaid Covenant Payments, and (2) receive from Waxie the applicable amount of Liquidated Damages as provided by Section 3.1.7.

7.5.2 ACKNOWLEDGEMENT OF REASONABLENESS OF LIQUIDATED DAMAGES. UPON AN WAXIE DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 4.1 AND 4.2, FOLLOWING NOTICE AND OPPORTUNITY TO CURE, THE CITY AND WAXIE ACKNOWLEDGE AND AGREE THAT IT WOULD BE EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN THE AMOUNT OF DAMAGES THAT WOULD BE SUFFERED BY THE CITY WITH RESPECT TO SUCH DEFAULT. HAVING MADE DILIGENT BUT UNSUCCESSFUL ATTEMPTS TO ASCERTAIN THE ACTUAL DAMAGES THE CITY WOULD SUFFER, THE PARTIES AGREE THAT THE LIQUIDATED DAMAGES AMOUNT AS DETERMINED IN ACCORDANCE WITH SECTION 3.1.7 REPRESENTS A REASONABLE ESTIMATION OF THOSE DAMAGES. THEREFORE, UPON AN WAXIE DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 4.1 AND 4.2, AS ITS SOLE AND EXCLUSIVE REMEDY FOR SUCH DEFAULT, THE CITY SHALL BE ENTITLED TO (1) RECEIPT OF THE LIQUIDATED DAMAGES AMOUNT CALCULATED IN ACCORDANCE WITH SUBSECTION 3.1.7, WHICH WAXIE SHALL PAY WITHIN TEN (10) DAYS FOLLOWING WRITTEN DEMAND FROM THE CITY, AND (2) TERMINATE THIS AGREEMENT AND THE ENTIRETY OF ITS OBLIGATIONS HEREUNDER, INCLUDING ANY ACCRUED BUT YET UNPAID COVENANT PAYMENTS.



Initials of Authorized
City Representative



Initials of Authorized
Waxie Representative

8. GENERAL TERMS

8.1 Tax Consequences. Waxie acknowledges that it may experience tax consequences as a result of its receipt of the payments provided for in this Retention Agreement and agrees that it shall bear any and all responsibility, liability, costs, and expenses connected in any way therewith.

8.2 Rights Not Granted Under Retention Agreement This Retention Agreement is not, and shall not be construed to be a Development Agreement under Government Code Section 65864 et seq. This Retention Agreement is not, and shall not be construed to be, an approval or an agreement to issue permits or a granting of any right or entitlement by the City concerning the Sales Office, Waxie's Sales Activities or any other project, development, or construction by the Waxie in the City. This Retention Agreement does not, and shall not be construed to, exempt Waxie from the application and/or exercise of the City's or City's power of eminent domain or its police power, including, but not limited to, the regulation of land uses and the taking of any actions necessary to protect the health, safety, and welfare of its citizenry.

8.3 Consent. Whenever consent or approval of any party is required under this Retention Agreement, that party shall not unreasonably withhold, delay or condition such consent or approval unless otherwise allowed by a specific provision of this Retention Agreement.

8.4 Notices and Demands. All notices or other communications required or permitted between the City and Waxie under this Retention Agreement shall be in writing, and may be (i) personally delivered, (ii) sent by United States registered or certified mail, postage prepaid, return receipt requested, (iii) sent by telecopier, or (iv) sent by nationally recognized overnight courier service (e.g., Federal Express), addressed to the Parties at the addresses provided in Article 1, subject to the right of either party to designate a different address for itself by notice similarly given. Any notice so given by registered or certified United States mail shall be deemed to have been given on the second business day after the same is deposited in the United States mail. Any notice not so given by registered or certified mail, such as notices delivered by telecopier or courier service (e.g., Federal Express), shall be deemed given upon receipt of the same by the party to whom the notice is given.

8.5 Nonliability of the City or City Officials and Employees No board member, official, contractor, consultant, attorney or employee of the City or City shall be personally liable to Waxie, any voluntary or involuntary successors or assignees, or any lender or other party holding an interest in the Property, in the event of any default or breach by the City, or for any amount which may become due to the Waxie or to its successors or assignees, or on any obligations arising under this Retention Agreement.

8.6 Conflict of Interests. No board member, official, contractor, consultant, attorney or employee of the City or City shall have any personal interest, direct or indirect, in this Retention Agreement nor shall any such board member, official or employee participate in any decision

relating to this Retention Agreement which affects his/her personal interests or the interests of any corporation, partnership or association in which he/she is directly or indirectly interested.

8.7 Pledge or Hypothecation of Covenant Payments. Waxie may assign any Covenant Payment(s) due in accordance with the terms of this Retention Agreement (but not any other right or obligation of this Retention Agreement) upon thirty (30) days' prior written notice to City as collateral for any loan or financing obtained by the Waxie in connection with the Property; provided that nothing in this Section 8.7 shall be deemed to limit the operation of Section 8.16. Without limiting the general applicability of the foregoing, Waxie acknowledges that Waxie's lender and any transferee of Waxie's lender shall be subject to the transfer restrictions of Section 8.16.

8.8 Entire Agreement; Good Faith Negotiations. This Retention Agreement contains all of the terms and conditions agreed upon by the Parties and supersedes any previous agreements between the Parties concerning the subject matter of this Retention Agreement. No other understanding, oral or otherwise, regarding the subject matter of this Retention Agreement shall be deemed to exist or to bind any of the parties hereto. All prior written or oral offers, counteroffers, memoranda of understanding, proposals and the like are superseded by this Retention Agreement.

The Parties acknowledge that this Retention Agreement is the product of mutual arms-length negotiations and that each party has been, or has had the opportunity to have been, represented by legal counsel in the negotiation and drafting of this Retention Agreement. Accordingly, the rule of judicial construction which provides that ambiguities in a document are to be construed against the drafter of that document shall have no application to the interpretation or enforcement of this Retention Agreement. In any action or proceeding to interpret and/or enforce this Retention Agreement, the trier of fact may refer to extrinsic evidence not in conflict with any specific provision of this Retention Agreement to ascertain and give effect to the intent of the Parties hereto.

8.9 Time Deadlines Critical; Extensions and Delays; No Excuse Due to Economic Changes. Time is of the essence in the performance of the City's and Waxie's obligations under this Retention Agreement. In addition to specific provisions of this Retention Agreement providing for extensions of time, times for performance hereunder shall be extended where delays or defaults are due to war; insurrection; any form of labor dispute; lockouts; riots; floods; earthquakes; fires; acts of God or of third parties; third party litigation; acts of a public enemy; referenda; acts of governmental authorities (except that the failure of the City to act as required hereunder shall not excuse its performance); moratoria; epidemics; quarantine restrictions; and freight embargoes (collectively, "Enforced Delays") provided, however, that the Party claiming the extension notify the other Party of the nature of the matter causing the default; and, provided further, that the extension of time shall be only for the period of the Enforced Delays. However, deadlines for performance may not be extended as provided above due to any inability of the Waxie to obtain or maintain acceptable financing for the operation of the Sales Office.

ANYTHING IN THIS RETENTION AGREEMENT TO THE CONTRARY NOTWITHSTANDING, WAXIE EXPRESSLY ASSUMES THE RISK OF UNFORESEEABLE CHANGES IN ECONOMIC CIRCUMSTANCES AND/OR MARKET DEMAND/CONDITIONS AND WAIVES, TO THE GREATEST LEGAL

EXTENT, ANY DEFENSE, CLAIM, OR CAUSE OF ACTION BASED IN WHOLE OR IN PART ON ECONOMIC NECESSITY, IMPRACTICABILITY, FRUSTRATION OF PURPOSE, CHANGED ECONOMIC CIRCUMSTANCES OR SIMILAR THEORIES.

WAXIE EXPRESSLY AGREES THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS, EITHER OF WAXIE SPECIFICALLY OR THE ECONOMY GENERALLY, OR CHANGES IN THE MARKET CONDITIONS OR DEMANDS, SHALL NOT OPERATE TO EXCUSE OR DELAY THE STRICT OBSERVANCE OF EACH AND EVERY OF THE OBLIGATIONS, COVENANTS, CONDITIONS AND REQUIREMENTS OF THIS RETENTION AGREEMENT. WAXIE EXPRESSLY ASSUMES THE RISK OF SUCH ADVERSE ECONOMIC OR MARKET CHANGES, WHETHER OR NOT FORESEEABLE AS OF WAXIE'S EXECUTION OF THIS RETENTION AGREEMENT.

WAXIE'S INITIALS 

8.10 Attorneys' Fees. In the event of the bringing of an arbitration, action or suit by a Party hereto against another Party hereunder by reason of any breach of any of the covenants or agreements or any intentional inaccuracies in any of the representations and warranties on the part of the other Party arising out of this Retention Agreement or any other dispute between the Parties concerning this Retention Agreement or the Property, then, in that event, the prevailing party in such action or dispute, whether by final judgment or arbitration award, shall be entitled to have and recover of and from the other Party all costs and expenses of suit or claim, including actual attorneys' fees. Any judgment, order or award entered in any final judgment or award shall contain a specific provision providing for the recovery of all costs and expenses of suit or claim, including actual attorneys' fees (collectively, the "Costs") incurred in enforcing, perfecting and executing such judgment or award. For the purposes of this Section 8.10, "Costs" shall include, without implied limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (i) post judgment motions and appeals, (ii) contempt proceedings, (iii) garnishment, levy and debtor and third party examination, (iv) discovery; and (v) bankruptcy litigation. This Section 4.10 shall survive any termination of this Retention Agreement.

8.11 Amendments to This Retention Agreement. Any amendments to this Retention Agreement must be in writing and signed by the appropriate authorities of both the City and Waxie. The City Manager is authorized on behalf of the City to approve and execute minor amendments to this Retention Agreement, including, but not limited to, the granting of extensions of time to Waxie, not to exceed ninety (90) days in the aggregate.

8.12 Jurisdiction and Venue. Any legal action or proceeding concerning this Retention Agreement shall be filed and prosecuted in the appropriate California state court in the County of San Bernardino, California. Both Parties hereto irrevocably consents to the personal jurisdiction of that court. The City and Waxie each hereby expressly waive the benefit of any provision of federal or state law or judicial decision providing for the filing, removal, or change of venue to any other court or jurisdiction, including, without implied limitation, federal district court, due to any diversity of citizenship between the City and Waxie, due to the fact that the City is a party to such action or proceeding or due to the fact that a federal question or federal right is involved or alleged

to be involved. Without limiting the generality of the foregoing, the City and Waxie specifically waive any rights provided to it pursuant to California Code of Civil Procedure Section 394. Waxie acknowledges that the provisions of this Section 8.12 are material consideration to the City for its entry into this Retention Agreement, in that the City will avoid the potential cost, expense and inconvenience of litigating in a distant forum.

8.13 Interpretation. The City and Waxie acknowledge that this Retention Agreement is the product of mutual arms-length negotiation and drafting and that both Parties have been represented by legal counsel in the negotiation and drafting of this Retention Agreement. Accordingly, the rule of construction which provides that ambiguities in a document shall be construed against the drafter of that document shall have no application to the interpretation and enforcement of this Retention Agreement. In any action or proceeding to interpret or enforce this Retention Agreement, the finder of fact may refer to any extrinsic evidence not in direct conflict with any specific provision of this Retention Agreement to determine and give effect to the intention of the Parties.

8.14 Counterpart Originals; Integration. This Retention Agreement may be executed in duplicate originals, each of which is deemed to be an original, but when taken together shall constitute but one and the same instrument. This Retention Agreement and any exhibits represent the entire understanding of the Parties and supersedes all negotiations, letters of intent, memoranda of understanding or previous agreements between the parties with respect to all or any part of the subject matter hereof.

8.15 No Waiver. Failure to insist on any one occasion upon strict compliance with any of the terms, covenants or conditions hereof shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any rights or powers hereunder at any one time or more times be deemed a waiver or relinquishment of such other right or power at any other time or times.

8.16 Successors and Assigns. The terms, covenants and conditions of this Retention Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and assigns. Except as provided in this Section 8.16, Waxie shall neither transfer nor convey Waxie's interest in the Property or the Sales Office without the express written consent of the City, which shall not be unreasonably withheld, conditioned or delayed. In determining whether to approve of such a sale, transfer, conveyance or assignment of the Waxie's interest in the Property, the City shall evaluate: (i) the financial ability of the proposed transferee to own and operate the Sales Office, or portion so transferred, and to meet the Waxie's obligations under this Retention Agreement; (ii) the fitness and experience of the proposed transferee and its managerial personnel to own and operate the Sales Office or portion so transferred thereof; and (iii) the ability of the proposed transferee to maintain a level of quality and service comparable to that maintained by the Waxie for the Sales Office. Upon the permitted sale, transfer or conveyance by Waxie of its interest therein, such Waxie shall thereupon be relieved of its obligations under this Retention Agreement from and after the date of sale, transfer or conveyance except with respect to any defaults in the performance of its obligations hereunder or thereunder which occurred prior to such sale, transfer or conveyance, and the transferee shall thereafter be solely responsible for the performance of all of the duties and obligations of Waxie under this Retention Agreement.

8.17 No Third Party Beneficiaries. The performance of the respective obligations of the City and Waxie under this Retention Agreement are not intended to benefit any party other than the City or Waxie, except as expressly provided otherwise herein. No person or entity not a signatory to this Retention Agreement shall have any rights or causes of action against any party to this Retention Agreement as a result of that party's performance or non-performance under this Retention Agreement, except as expressly provided otherwise herein.

8.18 No Effect on Eminent Domain Authority. Nothing in this Retention Agreement shall be deemed to limit, modify, or abridge or affect in any manner whatsoever the City's or City's eminent domain powers with respect to the Property, the Sales Office, or any other property owned by Sales Office.

8.19 Warranty Against Payment of Consideration for Retention Agreement. Waxie warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Retention Agreement. Third parties, for the purposes of this Section 8.19, shall not include persons to whom fees are paid for professional services if rendered by attorneys, financial consultants, accountants, engineers, architects and the like when such fees are considered necessary by Waxie.

8.20 Severability. The City and Waxie declare that the provisions of this Retention Agreement are severable. If it is determined by a court of competent jurisdiction that any term, condition or provision hereof is void, voidable, or unenforceable for any reason whatsoever, then such term, condition or provision shall be severed from this Retention Agreement and the remainder of the Retention Agreement enforced in accordance with its terms.

8.21 Further Acts and Releases. The City and Waxie each agree to take such additional acts and execute such other documents as may be reasonable and necessary in the performance of their obligations hereunder.

8.22 Estoppels. At the request of Waxie or any holder of a mortgage or deed of trust secured by all or any portion of the Property, the City shall promptly execute and deliver to Waxie or such holder a written statement of the City as to any of the following matters as to which Waxie or such holder may inquire: (i) that no default or breach exists, or would exist with the passage of time, or giving of notice, or both, by Waxie pursuant to this Retention Agreement, if such be the case; (ii) the total amount of Covenant Payments made by the City to Waxie pursuant to this Retention Agreement prior to the date of such written statement; (iii) the amount of any Covenant Payments earned by or due and owing to Waxie pursuant to this Retention Agreement as of the date of such written statement; (iv) the Covenant Payments for a particular Computation Quarter; (v) if the City has determined that Waxie is in default or breach hereunder, the nature of such default and the action or actions required to be taken by Waxie to cure such default or breach; and (vi) any other matter affecting the rights or obligations of Waxie hereunder as to which Waxie or such holder may reasonably inquire. The form of any estoppel letter shall be prepared by Waxie or such holder at its sole cost and expense and shall be reasonably acceptable in form and content to the City and Waxie. The City may make any of the representations described above based on the actual current knowledge of the then-current City Manager.

8.23 Indemnity. Waxie shall defend (using counsel of City's choosing), indemnify and hold harmless the City, its elected officials, officers, employees and agents from and against any and all third party claims, losses, proceedings, damages, causes of action, liability, cost and expense (including reasonable attorney's fees) arising from, in connection with or related to this Agreement or the functions or operations of the Sales Office (other than to the extent arising as a result of the City's active negligence or willful misconduct). The City shall fully cooperate in the defense of any such actions and upon written request of Waxie shall provide to Waxie such documents and records in possession of the City that are relevant to such actions and not otherwise protected by law. Notwithstanding the foregoing, should any third party bring any such action or proceeding Waxie shall have the right to terminate this Agreement, and as of such date of termination, all unaccrued liabilities of the parties under this Agreement shall cease except for Waxie's obligation of indemnity owed to the City as provided in this Section 8.23. For purposes of clarification, should Waxie exercise its termination right as provided in this Section 8.23, the same shall not be considered a Default and the City shall have no claims against Waxie for liquidated damages.

8.24 State of California Legislation Impact on Covenant Payment. Waxie acknowledges that the California legislature has in the past adopted certain legislation which diverted to the State of California a portion of the Sales Tax Revenues which were otherwise payable to the City. Waxie acknowledges that it is possible that the legislature may enact similar legislation in the future which would cause a corresponding reduction of and/or delay in the payment of the Sales Tax Revenues and that such reduction will cause Waxie a corresponding reduction and/or delay in the payment of the Covenant Payments due to Waxie during such time as such legislation is in effect. Furthermore, Waxie acknowledges that it is possible that the legislation described above, or some variant thereof, may be enacted and effective during one or more subsequent times during the Eligibility Period and may materially and negatively impact the amount of Sales Tax Revenues and, accordingly, Covenant Payments. The City does not make any representation, warranty or commitment concerning the future actions of the California legislature with respect to the allocation of Sales Tax Revenues to the City. Waxie agrees that it is undertaking its obligations under this Retention Agreement after having considered, and is expressly assuming the risk of, the possibility of the enactment of such legislation.

The foregoing paragraph notwithstanding, City acknowledges that the California legislature may provide for the payment to City of other revenues for the purpose of offsetting any losses in Sales Tax Revenues resulting from the enactment of legislation of the type described in the immediately preceding paragraph. City agrees that, should the California legislature provide for such offsetting revenues, then for purposes of this Retention Agreement and the computation of any Covenant Payments which may become due to Waxie hereunder, City will consider any such offsetting revenues which are (i) indexed to Sales Tax and offset the loss of Sales Tax Revenues to the City on a dollar for dollar basis, (ii) actually received by the City, and (iii) not subject to any restrictions on use beyond those which are otherwise generally applicable to sales tax revenues received by California municipalities, to be Sales Tax Revenues within the meaning of this Retention Agreement.

[Signatures on Following Pages]

**SIGNATURE PAGE
TO
RETENTION AGREEMENT
(WAXIE)**

The City and Waxie sign this Agreement by and through the signatures of their authorized representatives set forth below:

CITY:

THE CITY OF ONTARIO,
a California municipal corporation

By: _____

City Manager

WAXIE:

WAXIE'S ENTERPRISES,
INCORPORATED,
an Arizona corporation

By: _____

Its: _____

By: _____

Its: _____

ATTEST:

Sheila Maertz
City Clerk

APPROVED AS TO LEGAL FORM:

BEST BEST & KRIEGER LLP

By: _____

City Attorney

**EXHIBIT A
TO
RETENTION AGREEMENT
(WAXIE)**

Form of Official Action

[Attached Behind This Page]

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)

County of SAN DIEGO)On MARCH 15TH, 2017 before me, HARRY D. BABB III, A NOTARY PUBLIC,
Date Here Insert Name and Title of the Officerpersonally appeared CHARLES WAX
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Harry D. Babbs III
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached DocumentTitle or Type of Document: RETENTION AGREEMENT Document Date: _____

Number of Pages: _____ Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

- ☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

Signer's Name: _____

- ☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____