

MAINE STATE LEGISLATURE

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AGREEMENT

BETWEEN

STATE OF MAINE

DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES

AND

MARTIGNETTI COMPANIES OF MAINE, LLC

This Agreement ("Agreement") is entered into on this fourteenth day of May 2004 ("Effective Date") by and between the State of Maine, Department of Administrative & Financial Services, with offices in Augusta, Maine ("Department") and Martignetti Companies of Maine, LLC, a limited liability company, with offices in Augusta, Maine ("Company").

RECITALS

WHEREAS, the Maine Legislature found it to be in the public interest to seek efficiencies and cost savings from privatizing the State's wholesale liquor business pursuant to 28-A M.R.S.A. § 88 ("Enabling Legislation"); and

WHEREAS, the State has the exclusive authority to regulate the wholesale and retail prices of all liquor sold in the State of Maine; and

WHEREAS, the State has the exclusive authority through listing and delisting of products to determine which liquor products are offered for sale in the State of Maine; and

WHEREAS, the Maine Legislature has declared through the Enabling Legislation that the private entity awarded the right to distribute liquor shall be immune from antitrust action so long as the entity is in compliance with the rules of the Bureau of Alcoholic Beverages & Lottery Operations ("BABLO") and all other applicable laws and regulations; and

WHEREAS, through the Enabling Legislation the Maine Legislature authorized the Commissioner of the Department ("Commissioner") to enter into a contract for the sale, franchise, license or lease of the State's wholesale liquor activities associated with distributing and selling spirits and fortified wines; and

WHEREAS, through the Enabling Legislation the Maine Legislature directed the Commissioner to effect the transfer of the State's wholesale liquor business through a process designed to encourage vigorous bidding; and

WHEREAS, the Commissioner undertook through a series of public hearings, meetings, site visits, and other means to gather information necessary to develop the criteria for eligibility to be considered for serving as the State's wholesale liquor provider and to develop the scope of services to be provided by, and the responsibilities to be assigned to, the State's wholesale liquor provider; and

WHEREAS, the Commissioner met with, reported and provided information to, the Maine Legislature's Joint Select Committee to Study the Implementation of the Privatization of the State's Wholesale Liquor Business ("Joint Select Committee") regarding the process to be followed in effecting the transfer of the wholesale liquor business; and

WHEREAS, all stakeholders (including suppliers, agency stores, and the Maine Department of Public Safety), interested persons and entities and potential bidders had a full opportunity to provide information and express their opinions to the Commissioner and the Joint Select Committee on the process to be followed in effecting the transfer of the wholesale liquor business; and

WHEREAS, on November 7, 2003, the Department issued a Request for Proposal ("RFP") to effect the transfer of the wholesale liquor business, held a conference of bidders on November 21, 2003, and responded in writing to over 270 questions posed by potential bidders, stakeholders, and others with regard to the RFP process; and

WHEREAS, after a review of the written bid proposals submitted and interviews with bidders, on January 16, 2004 the Department awarded the contract for the transfer of the wholesale liquor business to the Company ("Contract Award"); and

WHEREAS, the Department and the Company now intend to formally enter into a contract to effect the transfer of the State's wholesale liquor business; and

WHEREAS, following the contract award to the Company by the Department the two unsuccessful bidders brought appeals of the award which have been consolidated and are now pending in the Kennebec County Superior Court Docket No. AP-04-21 and AP-04-22 ("Appeal").

NOW THEREFORE, in consideration of the foregoing and the mutual promises, undertakings and agreements set forth in this Agreement, the Department and the Company agree as follows:

1. **License.** The Department grants to Company and Company hereby accepts from Department an exclusive license to distribute and sell spirits and non-exclusive license to distribute and sell fortified wines (spirits and fortified wines being collectively "Liquor"

or "Product") at the wholesale level within the State of Maine during the Term as defined in Section 4 below ("Wholesale Liquor Business"). Pursuant to the terms of this Agreement, Company shall have, on the exclusive and non-exclusive bases described in the preceding sentence, the right to purchase Liquor from suppliers, sell Liquor at the wholesale level, and to the extent described herein to profit from the Wholesale Liquor Business.

2. **License Fee.** In consideration of the Department's grant of a license of the Wholesale Liquor Business to Company and its undertakings as set forth in this agreement, Company agrees to pay to Department a license fee in the amount of One Hundred Twenty-Five Million Dollars (\$125,000,000) ("License Fee"). The Company shall pay the License Fee to the Department through three (3) installments. The first installment in the amount of Twenty-Five Million Dollars (\$25,000,000) shall be paid by Company to Department at the execution of this Agreement ("First Installment Payment"). The second installment in the amount of Fifty Million Dollars (\$50,000,000) shall be paid by Company within seven (7) days of execution of this Agreement ("Second Installment Payment"). The third installment in the amount of Fifty Million Dollars (\$50,000,000) shall be paid to Department on July 1, 2004 (or such later date the Department is legally able to permit the Company to commence operation of the Wholesale Liquor Business under this Agreement) ("Third Installment Payment"). The License Fee shall be paid by wire transfer pursuant to instructions provided to the Company by the Department.

3. **Security.** To secure the Company's obligation to pay the License Fee under this Agreement, the Company shall maintain in effect, according to the terms thereof, the Standby Letter of Credit No. 15145115B issued on December 17, 2003 by Fleet National Bank in the amount of Five Million Dollars (\$5,000,000) ("Letter of Credit"). Upon payment of the Third Installment Payment the Department shall immediately execute all documents necessary to effectuate the cancellation of the Letter of Credit.

4. **Term.** This Agreement shall become effective upon the Effective Date set forth above; however, the Company's performance obligations and right to participate in the benefits of the Wholesale Liquor Business shall extend for a term of ten (10) years from July 1, 2004 through June 30, 2014 ("Term"). The Department, in its sole discretion and subject to approval by the Maine Legislature as required by the Enabling Legislation, may enter into negotiations with the Company to extend the Term for two successive periods of five (5) years each, or one extension for a period of ten (10) years. Either Party may request a meeting with the other to discuss an extension of the Term at any time during the Term upon sixty (60) days notice. Nothing in this Section is intended to or shall be construed to preclude the Department from bidding competitively the Wholesale Liquor Business at the end of the Term or in the event of the early termination of this Agreement under such conditions as provided herein.

5. **Employment of State Employees.** The Company agrees to offer employment for a period of two (2) years from the commencement of the Term to current employees of BABLO whose positions have been eliminated as a result of the transfer of the Wholesale

Liquor Business, specifically, those employees named in Exhibit A attached hereto ("BABLO Employees"). Employment of the BABLO Employees shall be on commercially reasonable terms, consistent with the terms offered to other employees of the Company for equivalent work, including, without limitation, Company's rights of termination.

6. **Transition Period.** The Department and the Company shall work cooperatively between the Effective Date and the commencement of the Term ("Transition Period"), and thereafter, to provide a smooth transition of the Wholesale Liquor Business from the State to the Company.

7. **Warehousing.** The Company shall provide sufficient warehouse space to maintain Product inventory and to prepare and dispatch Product orders. The Company shall provide warehousing ("Warehouse Facilities"). The Warehouse Facilities shall be located in Gorham, Maine, or some other location within the State of Maine, as approved by BABLO, which approval shall not be unreasonably withheld, conditioned, or delayed. Further, within fifteen (15) days of the execution of this Agreement, the Company shall present to the Department for approval a warehousing plan, which shall include a detailed floor plan identifying general locations for Product, bottle pick area, shipping and receiving doors, and other key service locations; warehouse staffing; hours of service; operating procedures; management approach; security measures; and fire protection. The Department shall approve or reject the warehousing plan within ten (10) days of receipt, such approval not to be unreasonably withheld, conditioned, or delayed. In the event the Department rejects the warehousing plan, the Department and the Company shall work together to develop a warehousing plan acceptable to the Department. The Department shall have the right to visit and inspect the Warehouse Facilities upon reasonable notice to the Company.

8. **Non-discrimination.** The Company recognizes that it has an obligation, as the entity selected to manage and operate the State's Wholesale Liquor Business, to manage and operate the business in a manner consistent with applicable law, including regulations adopted by BABLO and other State agencies regarding advertising, marketing, pricing, and distribution of Liquor. The Company further recognizes that the State, acting through the Department and BABLO, has an obligation, and is committed to assuring that the interests of suppliers, agency stores, liquor industry stakeholders and the people of the State of Maine are protected against unlawful dealing by the Company in its management and operation of the Wholesale Liquor Business and the Company shall act in a responsible manner in furtherance of such objectives. The Company agrees that within thirty (30) days of the execution of this Agreement that it shall adopt internal policies to promote fairness and high quality in its delivery of services, as shall not conflict with its obligations hereunder, and such policies shall be approved by BABLO, which approval shall not be unreasonably withheld, conditioned or delayed. The Company and the Department agree that, to meet their respective obligations as required by the Agreement and applicable law, it is essential that all transactions between the Company and its subcontractors on one hand and the Department, suppliers and agency stores on the other related to the operation of the Wholesale Liquor Business are

reasonably transparent and conducted in an open manner that does not interrupt the business of the Company.

A. The Company shall provide equitable treatment to the suppliers regarding the receipt, storage, storage space and ancillary services for Product stored at the Company's Warehouse Facilities. The Company agrees that bailment charges will apply equally to all suppliers and provide incentive for suppliers to manage inventory efficiently to ensure fresh and current Product levels. The Parties agree that commencing July 1, 2004, the bailment charges shall be those set forth in Exhibit B, attached hereto and made a part hereof. The Company may request changes to Exhibit B. No changes to bailment charges may be made without the express written approval of BABLO, which consent shall not be unreasonably withheld, conditioned, or delayed. Upon such approval, the new bailment charges shall automatically replace Exhibit B.

B. The Company shall abide by any applicable laws and regulations regarding equitable treatment of suppliers in special pricing for Products. The Company shall not engage in marketing, promotional or special pricing activity that results in a preference for a Product based on the identity of the supplier or broker of the Product. The Company agrees to post on-line and keep current the applicable BABLO price of all Products, and also to identify the Products that are being offered at a special price.

C. The Company shall abide by any applicable laws and regulations regarding equitable treatment of agency stores with regard to Product delivery and educational outreach, inventory diversity, marketing, sales promotion, seasonal favorite distribution and sales support opportunities.

D. The Company agrees to develop and institute a "Responsible Drinking" campaign that is integrated into marketing and advertising initiatives of the Company when appropriate in the Company's discretion, including a "Responsible Drinking" campaign for selected holidays.

E. The Company shall work cooperatively with suppliers to realize revenue potential; seek to increase consumer awareness of Product options, seasonal specials and new Products; and maintain a high level of communication with agency stores.

9. **Transportation/Recycling.** The Company shall provide trucking for the shipping of Product from Warehouse Facilities to agency stores as shall be carried out by its trucking subcontractor according to the performance standards of this Agreement. The Company shall contract for bottle redemption services to pick up empty Product containers at agency stores and redemption centers according to the performance standards of this Agreement.

10. **Product Ownership.** Product delivered to and stored at Warehouse Facilities shall be the property of the supplier. The Product shall become the property of the State upon removal from Warehouse Facilities for shipment to an agency store. The Product

shall become the property of the agency store upon receipt of delivery. The Company shall at no time take legal title to the Product.

11. **Payment for Product Distributed from Warehouse.** The Company shall direct suppliers to invoice the Company for Product distributed by the Company from Warehouse Facilities. The Company shall pay invoices from suppliers based upon such reasonable payment terms as agreed upon between the Company and the suppliers.

12. **Payment for Product by Agency Stores.** The Company shall invoice agency stores for Product ordered and delivered no sooner than the third business day after Product is delivered. Agency stores shall pay Company for Product ordered and delivered within three (3) business days of receipt of Product and an invoice.

13. **Payment of Taxes.** The Company shall be responsible for calculating and paying any and all taxes imposed on Product sold to agency stores as required by law. The Company shall pay premium taxes to the Department on Product sold to agency stores during the previous month on the tenth business day of the following month. The Company agrees to calculate premium taxes daily on all Product shipped and delivered and to carry out the calculations and obligations hereunder pursuant to the requirements of 28-A M.R.S.A. § 1703 ("Premium Tax"). The only tax currently applicable to the sale of Product and the Wholesale Liquor Business is the Premium Tax.

14. **Product Orders by Agency Stores.** The Company shall provide multiple options for agency stores to submit orders for Product. These options may include, but are not necessarily limited to, first-class mail orders, telephone orders, facsimile orders and on-line orders. The Company has represented that an agency store will be permitted to place orders until 9:00 P.M. two (2) business days before the agency store's designated delivery day. The Company has represented and agrees that its on-line ordering system will be available on a 24/7/365 basis, excluding any reasonably necessary system downtime; that the system will enable suppliers, the Department, and agency stores to review inventory levels, order volumes, and order status; and that the system will be operable by July 1, 2004.

15. **Minimum Order Size and Delivery.** The Company shall make available two shipments of Product per week for each agency store as hereafter provided. First, the Parties agree that the minimum order size for the first delivery in any week to an agency store shall be for a minimum of ten (10) cases ("Minimum First Delivery"). In addition, for any agency store that has ordered a Minimum First Delivery, the Company agrees to make a second delivery provided the second delivery is for an order for a minimum of ten (10) cases. To the extent permitted by applicable law, the Company, if requested by agency stores, agrees to deliver to a designated agency store a Minimum First Delivery that is comprised of Product ordered by more than one (1) agency store ("Aggregate Delivery"). The Company agrees that by agreeing to accept delivery at a designated agency store, the agency store shall be deemed to have met the Minimum First Delivery requirement for the purpose of receiving one delivery per week. The Company has represented and agrees that each agency store shall have a designated delivery day or

days and a stated expected period of day for delivery and that delivery will be made on the day and during the timeframe designated, provided that the agency store meets its designated order deadline as agreed to by the Company and the agency store.

16. **Bottle Pick.** The Company represents and agrees that it will "bottle pick" (i.e. accept orders and ship individual bottles of Product in less than full case amounts) for all Products except fifty (50) ML bottles, which must be ordered by the package or sleeve; provided, however, that all fortified wines may be ordered by the bottle and that the top forty-five (45) brands of spirits as designated by the Department from time to time must be ordered by the case. The cost of bottle pick shall be an expense of the Company and shall not be included in Supplier Costs as defined in Section 25.

17. **Product Delivery.** The Company agrees to provide delivery service to agency stores, to assist in the unloading of Product and to provide in-store delivery. The Company shall include with each order delivered a packing list identifying Product, code, quantity delivered, and whether delivery includes cases or split cases. The Company shall allow sufficient time at delivery to permit the agency store to check that the order delivered matches the Product and cases ordered.

18. **Warehouse Pick Up.** The Company agrees to permit agency stores to pick up orders at Warehouse Facilities five (5) days per week during normal business hours upon one day notice to the Company. The minimum order size for a warehouse pick up shall be five (5) cases. The agency stores must identify an order as a pick up order at the time the order is placed.

19. **Warehouse Inventory Control.** The Company shall establish and maintain an automated inventory management and information system to control inventory at Warehouse Facilities. The system shall be designed to permit review of inventory levels by suppliers, the Department, and agency stores on a real time basis. The system shall include a mechanism for notification of suppliers and the Department when reorder points are reached. The Company acknowledges that the current reorder point is six (6) weeks. The Department shall have the right to audit the system and to designate other State entities or non-state auditors to conduct audits of the system. The Company shall actively work with suppliers to maintain an adequate and balanced inventory for all Product consistent with Company's inventory management plans and anticipated sales needs. The Company shall work to ensure that suppliers deliver Product in sufficient quantity to enable the Company to fill agency store orders. The Company may adopt a policy for the removal of any Product de-listed by BABLO and may charge suppliers a fee for the removal of such Product. The policy and fee are subject to prior approval by BABLO which shall not be unreasonably withheld, conditioned, or delayed.

20. **Product Allocation.** The inventory management and information system established and maintained by the Company shall be designed to enable the Company to notify suppliers and agency stores when any Product is in short supply and to allocate Product fairly among agency stores.

21. **Order Error Rate and Correction.** The Company shall establish and maintain an order control system that minimizes the risk of order error and provides for a timely and simple method for reporting order errors. The Company has represented and agrees that an agency store that reports an order error on the day of delivery, or within one (1) business day of delivery, shall be given a return authorization number that will prevent the item from appearing on the agency store's invoice. Any item identified for which a return authorization has been issued will be picked up for return on the next scheduled delivery to the agency store. The Department and the Company agree that errors reported after one (1) business day after delivery may appear on the invoice to the agency store and that payment will be due in accordance with the payment schedule set forth in this Agreement. For any item delivered in error, the Company may issue a return authorization and issue a credit after the item is picked up for return.

22. **Bottle Redemption.**

A. The Company shall provide or arrange through its subcontractor for bottle redemption services in accordance with 32 M.R.S.A. § 1861 et seq. ("Maine Returnable Beverage Container Law"). The services shall include the pick up of empty beverage containers at agency stores, licensed redemption centers, on premise accounts and military installations. The Company shall arrange for pick up with such frequency as to avoid a backlog of containers at the places of pick up. The Company, or its subcontractor, shall reimburse the redeeming entity the statutory redemption fee plus the statutory handling fee as provided in the Maine Returnable Beverage Container Law.

B. The Company shall charge agency stores a redemption fee consistent with the Returnable Beverage Container Law, currently fifteen Cents (\$.15) per container. This charge shall be itemized separately on each invoice. The Company shall manage the redemption fees collected in accordance with the Maine Returnable Beverage Container Law.

C. The Company shall be responsible for ensuring that redemption stickers are affixed to all Product prior to distribution to agency stores.

D. The Company shall be responsible for ensuring that empty boxes are provided to agency stores and redemption centers, when available, for collection of empty beverage containers and may establish sorting and other reasonable criteria for picking up such containers.

E. The Company has represented that it will prepare weekly summaries designating the number of cases, bags and/or units picked up and will deliver or arrange for delivery of empty beverage containers to a recycler for processing or on-site crushing. The Company further represents that it will prepare weekly summaries of the name and address of each recycler to which empty beverage containers are delivered.

23. **Service to Agency Stores.** The Company shall perform its obligations under this Agreement in a manner which permits agency stores to be kept routinely and reasonably

informed with regard to orders, deliveries, stock outages, Product allocation, special pricing, promotional and marketing opportunities and such other matters as required by law, as reasonably directed by the Department or reasonably necessary for the provision of high quality service.

24. **Complaint Procedure.** The Company shall develop a plan ("Complaint Plan") to handle complaints from agency stores, suppliers and consumers. The Complaint Plan shall include a process for receiving complaints, for notification to BABLO and for resolution of complaints. The Company shall present the Complaint Plan to BABLO for review within forty-five (45) days of the Effective Date of this Agreement.

25. **Pricing.** The State has the exclusive authority to regulate the wholesale and retail prices of all spirits and fortified wines sold by the Company. The wholesale and retail prices are established solely by BABLO in accordance with pricing rules adopted by BABLO. The Company may propose price adjustments or changes in accordance with the rules adopted by BABLO. The Company shall undertake to promptly notify agency stores of all price changes. The Department agrees that its pricing of Product shall guaranty to the Company a Gross Profit in each partial and full fiscal year of the Company (January 1 through December 31) ("Fiscal Year") during the Term of not less than thirty-six and eight tenths percent (36.8%) of Net Wholesale Sales ("Gross Profit Percentage Guaranty"). "Gross Profit" is defined as the difference between the Net Wholesale Sales received by the Company from agency stores and the sum of Supplier Costs and Premium Tax. "Net Wholesale Sales" is defined as gross sales invoiced by Company to agency stores, less bottle redemption fees to the extent included in gross sales. "Supplier Costs" is defined as the total cost paid by Company for Product, including but not limited to supplier invoice cost (which includes net cost of Product, freight, supplier's insurance, applicable bailment and other similar charges), import duties and fees, taxes, and any similar charges paid directly by the Company. A formula demonstrating the calculation of Gross Profit Percentage Guaranty and resulting Gross Profit is set forth in Exhibit C attached hereto.

If the Department fails to maintain the Gross Profit Percentage Guaranty in any partial or full Fiscal Year then the amount of Gross Profit to which the Company was entitled but did not receive during such period shall be carried forward as an obligation owing to the Company ("Gross Profit Deficiency"). The Department agrees to adjust pricing of Product to ensure that any Gross Profit Deficiency is recaptured by the Company as soon as practicable during the subsequent Fiscal Year. Company may withhold and offset any Gross Profit Overage (as defined in Section 28) owing to the Department in satisfaction of any Gross Profit Deficiency in the current Fiscal Year or carried forward from prior Fiscal Years. If at the end of the Term any Gross Profit Deficiency remains owing without sufficient Gross Profit Overage to cover the obligation then the Department agrees to promptly pay to the Company any amount owing.

26. **Specials.** The Company may propose to BABLO to offer special pricing for Product in accordance with rules adopted by BABLO. The Company shall not implement special pricing without the prior approval of BABLO. The Department,

through BABLO, shall promptly notify the Company of its approval for special pricing for Product. The Company shall work diligently with suppliers in an attempt to ensure that an adequate supply of specially priced Product is available for distribution to agency stores. The Department and the Company agree that price reductions related to special pricing shall not negatively impact the Gross Profit Percentage Guaranty. The Department and the Company agree that the Company has no obligation, and may not be required by the Department or agency stores, to match a discount that may be requested by a supplier with regard to a specially priced Product.

27. **Marketing.** The Company may undertake marketing campaigns as shall not violate regulations promulgated by BABLO or the Maine Department of Public Safety.

28. **Revenue Sharing.** The Company agrees to pay to the Department an amount equal to fifty percent (50%) of the amount of Gross Profit Overage in any partial or full Fiscal Year of the Company as exceeds the Company's Gross Profit Baseline as set forth in Exhibit D attached hereto ("Revenue Sharing Plan"). "Gross Profit Overage" is defined as the difference between Gross Profit and the "Gross Profit Baseline" for each corresponding Fiscal Year set forth in the Revenue Sharing Plan. In the event the Gross Profit of the Company fails to meet the Gross Profit Baseline in any Fiscal Year, the Company shall have no obligation to pay any Gross Profit Overage to the Department in that Fiscal Year. The Company shall make payment to the Department of the Department's share of the Gross Profit Overage within one hundred twenty (120) days of the end of the Fiscal Year. The Parties agree that for purposes of calculating any Gross Profit Overage from July 1, 2004 through December 31, 2004 ("First Revenue Sharing Period") the Gross Profit Baseline for such partial Fiscal Year shall be as referenced in FY04 (\$15,952,800) and for January 1, 2014 through June 30, 2014 ("Last Revenue Sharing Period") the Gross Profit Baseline for such partial Fiscal Year shall be as referenced in FY14 (\$18,240,272). The Revenue Sharing Plan may only be modified through mutual written agreement of the Parties.

29. **Insurance.** The Company (or its subcontractor as reasonably appropriate) at its expense shall maintain such insurance as will protect the Company from claims resulting from the Company's business operations and activities, specifically, general liability and fire; warehouseman's legal liability; and cargo legal liability insurance. The Company (or its subcontractor as reasonably appropriate) shall also provide insurance coverage in order to protect the State against loss or damage to the Product during the period that the Product is being transported from the bailment Warehouse Facilities to the receipt of Product at the agency store. In addition, the Company shall maintain in effect such bonds as may be required by the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives. All insurance shall be maintained in reasonable amounts. The Company shall provide to the Department proof of the required insurance prior to the commencement of the Term. The Company shall promptly notify the Department of the cancellation of any insurance obtained and shall take steps to immediately obtain equivalent insurance.

30. **Licenses.** The Company shall obtain and maintain in effect all licenses and permits required by Federal and State law to permit the Company to engage in the

business of wholesale liquor distribution. The Company shall promptly notify the Department in the event the Company receives notice from a Federal or state regulator of a license or permit violation, whether or not the violation would result in the loss of a license or permit. The Company shall not hold a retail license to sell liquor for off-premise consumption in the State during the term of this Agreement.

31. **Broker's License/Sales Representative.** The Parties agree that, during the Term, neither the Company nor its members shall hold a broker's license or a sales representative's license for the sale of Liquor (except fortified wines) in Maine and shall not provide broker's services in Maine for the sale of Liquor (except fortified wines).

32. **Audit and Accounting.** The Company shall implement and maintain an accounting system for the Wholesale Liquor Business and maintain its financial records in accordance with generally accepted accounting principles. The Department, or its duly designated representatives, shall have the right upon not less than forty-eight (48) hours prior written notice to inspect all accounting systems and examine all financial and accounting records related to the Company's operation and management of the Wholesale Liquor Business during the Company's normal working hours and the Department covenants that its inspection will not interfere with the Company's normal operation of its business. The Company shall submit to the Department within one hundred twenty (120) days of the close of its fiscal year audited financial statements of the Company for the preceding fiscal year, certified by an independent certified public accountant. The Company shall include with the audited financial statements, an opinion of the auditor, the auditor's report on internal controls, its findings and recommendations and management letters. The report and audit shall be at the Company's expense. The Department, in its discretion, shall have the right to conduct further audits. This Section 32 shall survive the termination of this Agreement for a period of three (3) years.

The Parties agree that their duly appointed agents will meet within thirty (30) days after the delivery of audited financial statements for the preceding fiscal year to review and agree upon Gross Profit Overage and Gross Profit Deficiency calculations for such preceding year.

33. **Access to Records.** The Company shall maintain copies of all books, documents, payroll records, papers, accounting records and other documents and materials related to the Company's operation and management of the Wholesale Liquor Business and make such documents and materials available for review and inspection by the Department at the Company's offices at all reasonable times during normal working hours during the Term of this Agreement and for such subsequent period of time as specified under Maine Uniform Accounting and Auditing Practices for Community Agencies (MAAP) rules. The Company shall allow inspection of documents and materials related to the Company's operation and management of the Wholesale Liquor Business by the Department or any authorized representative of the State of Maine or Federal government during the Company's normal working hours upon forty-eight (48) hours prior written notice, and shall furnish copies of such records if requested provided that the Department's inspection shall not interfere with the Company's normal operation of its

business. To the extent the foregoing rights of access extend to the Company's organizational documents (including but not limited to its operating agreement and its investor subscription agreements), loan agreements or income tax returns, unless otherwise mutually agreed by the Parties, the Department may not copy or otherwise record the contents of such material.

34. Independent Capacity/Agent. The Parties agree that in the performance of this Agreement the Company shall act in the capacity of an independent contractor; provided, however, the Company shall act in the capacity of an agent of the State for the purpose of purchasing Product from suppliers and for accepting payment from and providing Product to agency stores.

35. Subcontracts. The Company may enter into subcontracts for the provision of services under this Agreement. All subcontractors (and subcontracts), including their substitution for existing subcontractors, are subject to approval by BABLO which approval shall not be unreasonably withheld, conditioned or delayed. The granting of approval shall not relieve the Company of its obligations under this Agreement and the Company shall remain liable for the performance of all obligations under this Agreement.

36. Assignment. The Company shall not sell, transfer, assign or otherwise dispose of this Agreement or any portion thereof, or its right, title or interest therein, without the express written consent of the Department, which consent shall not be unreasonably withheld, conditioned or delayed. The Company shall provide sufficient information to the Department upon which it can make an informed decision regarding whether the Company has complied with this Section 36 and whether the prospective purchaser, transferee, assignee, or other proposed responsible party has reasonably adequate financial capacity, technical ability, and experience to undertake the Company's obligations set forth in this Agreement. The Company shall make available to the Department all documents related to the sale, transfer, assignment or other disposition of this Agreement. The Company may, however, without the consent of the Department, assign or otherwise transfer its rights and obligations hereunder, in whole or in part to (i) any affiliate of the Company or (ii) any entity surviving a transaction involving the sale, merger, consolidation, or reorganization of the Company, or in which all or substantially all of the Company's assets are sold. Any assignee or holder of rights or benefits under this Agreement shall be subject to all of the terms and provisions of this Agreement.

The Department acknowledges and agrees that the Company from time to time without the approval or consent of the Department, may grant security interests in this Agreement and/or the Company's rights thereunder, as security for one or more financings by the Company; provided that no sale, transfer or assignment of this Agreement or of any right, title or interest of the Company therein pursuant to the security interest shall take effect without the Department's consent as required under this Section 36.

37. **Equal Employment Opportunity.** During the performance of this Agreement, the Company agrees as follows:

A. The Company shall not discriminate against any employee or applicant for employment relating to this Agreement because of race, color, religious creed, sex, national origin, ancestry, age, physical or mental disability, unless related to a bona fide occupational qualification. The Company shall take affirmative action to ensure that applicants are employed and employees are treated during employment, without regard to their race, color, religion, sex, age, national origin, or physical or mental disability.

Such action shall include but not be limited to the following: employment, upgrading, demotions, or transfers; recruitment or recruitment advertising; layoffs or terminations; rates of pay or other forms of compensation; and selection for training including apprenticeship. The Company agrees to post in conspicuous places available to employees and applicants for employment notices setting forth the provisions of this nondiscrimination clause.

B. The Company shall, in all solicitations or advertisements for employees placed by or on behalf of the Company relating to this Agreement, state that all qualified applicants shall receive consideration for employment without regard to race, color, religious creed, sex, national origin, ancestry, age, physical or mental disability.

C. The Company shall send to each labor union or representative of the workers with which it has a collective bargaining agreement, or contract, or understanding, whereby it is furnished with labor for the performance of this Agreement a notice to be provided by the contracting department or agency, advising the said labor union or workers' representative of the Company's commitment under this Section and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

D. The Company shall inform the contracting Department's Equal Employment Opportunity Coordinator of any discrimination complaints brought to an external regulatory body (Maine Human Rights Commission, EEOC, Office of Civil Rights) against their agency by any individual as well as any lawsuit regarding alleged discriminatory practice.

E. The Company shall comply with all aspects of the Americans with Disabilities Act (ADA) in employment and in the provision of service to include accessibility and reasonable accommodations for employees and clients.

F. Contractors and subcontractors with contracts with the Company in excess of \$50,000 shall also pursue in good faith affirmative action programs.

G. The Company shall cause the foregoing provisions to be inserted in any subcontract for any work covered by this Agreement so that such provisions shall be binding upon each subcontractor, provided that the foregoing provisions shall not apply to contracts or subcontracts for standard commercial supplies or raw materials.

38. **Employment and Personnel.** The Company shall not engage any person in the employ of any State Department or Agency in a position that would constitute a violation of 5 M.R.S.A. § 18 or 17 M.R.S.A. § 3104. The Company shall not engage on a full-time, part-time or other basis during the period of this Agreement, any other personnel who are or have been at any time during the period of this Agreement in the employ of any State Department or Agency, except regularly retired employees, without the written consent of the State Purchases Review Committee. Further, the Company shall not engage on this project on a full-time, part-time or other basis during the period of this Agreement any retired employee of the Department who has not been retired for at least one year, without the written consent of the State Purchases Review Committee. The Company shall cause the foregoing provisions to be inserted in any subcontract for any work covered by this Agreement so that such provisions shall be binding upon each subcontractor, provided that the foregoing provisions shall not apply to contracts or subcontracts for standard commercial supplies or raw materials.

39. **State Employees Not to Benefit.** No individual employed by the State at the time this Agreement is executed or any time thereafter shall be admitted to any share or part of this Agreement or to any benefit that might arise there from directly or indirectly that would constitute a violation of 5 M.R.S.A. § 18 or 17 M.R.S.A. § 3104. No other individual employed by the State at the time this Agreement is executed or any time thereafter shall be admitted to any share or part of this Agreement or to any benefit that might arise there from directly or indirectly due to his employment by or financial interest in the Company or any affiliate of the Company, without the written consent of the State Purchases Review Committee. The Company shall cause the foregoing provisions to be inserted in any subcontract for any work covered by this Agreement so that such provisions shall be binding upon each subcontractor, provided that the foregoing provisions shall not apply to contracts or subcontracts for standard commercial supplies or raw materials.

40. **Termination**

A. The Department shall have the right to terminate this Agreement in the event of a material breach or default by the Company of its obligations hereunder that is not cured within thirty (30) days from the date of receipt by the Company of written notice of such breach from the Department. If the breach or default, by its nature, cannot be cured within such thirty (30) day period, then the Company shall have such additional time (not to exceed ninety (90) additional days) as may be necessary to cure the breach or default, provided the Company has exercised reasonable commercial efforts and taken appropriate actions to begin cure of the breach or default within the initial thirty (30) day cure period. For the purposes of this Section, a material breach or default shall include,

but not be limited to, the failure of the Company to maintain required Federal and state licenses or permits with sufficient continuity as necessary for performance of the Wholesale Liquor Business; the repeated and documented failure (made known to Company), without good cause, to maintain sufficient inventory in Warehouse Facilities to fill agency store orders; the repeated and documented failure (made known to Company), without good cause, to maintain an adequate inventory for all listed Product; the repeated and documented failure (made known to Company), without good cause, to make deliveries to agency stores on the designated delivery day or days; and, the repeated and documented failure (made known to Company) to perform the terms of this Agreement as results in substantial jeopardy to the suppliers, agency stores, or the State.

B. The Department shall have the right to terminate this Agreement immediately upon written notice to the Company, in the event (i) the Company, or any director, officer or employee of the Company is convicted of a criminal offense directly related to the warehousing, marketing, distribution or sale of alcoholic beverages while carrying out the Wholesale Liquor Business; or (ii) proceedings in bankruptcy are commenced against the Company or if a receiver is appointed and such case or proceeding shall continue undismissed, or unstayed and in effect, for a period of one hundred twenty (120) days. Notwithstanding the foregoing, if a conviction of an employee, officer or director, relates to individual and/or personal actions of such employee, officer or director and not the policy or directive of the Company and, upon such conviction, Company shall terminate or otherwise remove such employee, officer or director and take such other steps to reasonably ensure the propriety of the Company's operation of the Wholesale Liquor Business, then, the Department shall not have a right to terminate this Agreement pursuant to the foregoing clause (i) of this Section 40(b).

C. The Company shall have the right to terminate this Agreement in the event of a material breach or default by the Department of its obligations hereunder that is not cured within sixty (60) days from the date of receipt by the Department of written notice of such breach from the Company. If the breach or default, by its nature, cannot be cured within such sixty (60) day period, then the Department shall have such additional time (not to exceed one hundred eighty (180) additional days) as may be necessary to cure the breach or default, provided the Department has exercised reasonable commercial efforts and taken appropriate actions to begin cure of the breach or default within the initial sixty (60) day cure period. For the purposes of this Paragraph D, a material breach or default shall include the failure of the Department, because of Governmental Action, as defined in Section 42, to maintain the Gross Profit Percentage Guarantee over a full Fiscal Year of the Company.

D. The Parties acknowledge and agree that the Company is paying the License Fee in the expectation of operating the Wholesale Liquor Business for the Term and would not pay such amount for a lesser term; that each of the Parties wishes to limit its exposure for damages in the event of a termination; and that either Party's damages in the event of any termination of this Agreement will be difficult to calculate with accuracy. The Parties agree that in the event of termination of this Agreement pursuant to any of Sections 40, 41 and 42(C), the Company shall be entitled to the liquidated sum

of One Hundred Twenty-Five Million Dollars (\$125,000,000), multiplied by a fraction, the numerator of which is the number of months remaining in the Term on the effective date of termination and the denominator of which is 120 ("Termination Refund"). The Termination Refund shall be in lieu of any other damages incurred by either party as a result of termination of the Agreement, including consequential, special, or punitive damages and any other monetary relief. In addition to the foregoing, the Parties shall be entitled to retain or to be paid any amounts accrued as of the effective date of termination under any other provision of this Agreement.

41. Termination by Legislative Action. The Parties affirmatively acknowledge and understand that the Maine Legislature might at some future time repeal the Enabling Legislation, or amend the Enabling Legislation in a manner that substantially and materially impairs the rights granted to the Company under this Agreement ("Legislative Action"). In the event of such Legislative Action the Company may terminate this Agreement. In the event of such Legislative Action or proposed Legislative Action, the Department agrees to take such steps that are within its authority to apprise the Maine Legislature of the impact on the Company, suppliers, agency stores and stakeholders of such action. Such steps shall include, but are not limited to, the Commissioner presenting written and oral testimony to the Maine Legislature and affixing to any legislation that would nullify the respective performance obligations of the Parties a fiscal note apprising the Legislature of the potential financial liability of the State to the Company resulting from such legislation. In the event of such Legislative Action and this Agreement is not terminated by the Company, the Department agrees that, unless the Legislature mandates that the Department operate the Wholesale Liquor Business, it will not undertake to operate the Wholesale Liquor Business and will not issue another RFP, or enter a contract with another provider, without first offering to the Company the opportunity to continue to conduct the Wholesale Liquor Business on terms consistent with this Agreement for the balance of the Term. This Section 41 shall survive the termination of the Agreement.

42. Effect of Governmental Action.

A. In the event the Maine Legislature enacts legislation other than as set forth in Section 41, including any new tax imposed on the sale of Product, or BABLO or another State agency adopts regulations directly related to the Wholesale Liquor Business (collectively "Governmental Action") that negatively impact the reasonable profitability of the Company over time, the Parties agree to enter into negotiations to amend the Revenue Sharing Plan to compensate the Company for this impact pursuant to the dispute resolution process set forth in Section 44.

B. The Parties agree that in the event of Governmental Action as set forth in this Section, and pending the outcome of dispute resolution or litigation as set forth in Section 44, the Company may withhold and offset any Gross Profit Overage that has not been paid to the State against any alleged negative impact to profitability suffered or anticipated to be suffered by the Company as a result of such Governmental Action.

C. If the Parties are unable to agree to an amendment to the Revenue Sharing Plan, either Party may, consistent with Section 44, pursue whatever legal remedies may be available, provided if the Company seeks to terminate this Agreement because of Governmental Action that is unresolved under this Section, its compensation shall be determined in accordance with Section 40(D).

D. In the event of proposed Governmental Action, the Department agrees to take such steps that are within its authority to apprise the Maine Legislature or the State Agency of the impact on the Company and the State. Such steps shall include, but are not limited to, the Commissioner presenting written and oral testimony to the Maine Legislature and the Commissioner or the Commissioner's delegatee presenting written or oral testimony to the State agency, including affixing to any legislation a fiscal note apprising the Legislature of the potential financial impact on the Company and the State.

43. **Transition on Termination.** In the event of termination of the Agreement by either Party as provided herein, upon the conclusion of the Term, or in the event a new entity is selected to serve as the State's wholesale liquor provider, or as the result of a successful Appeal or other legal challenges to the Agreement or the Wholesale Liquor Business, the Parties agree to work cooperatively to promote a smooth transition and uninterrupted service to agency stores. The Department and Company shall work cooperatively to satisfy their other obligations hereunder to effect termination of this Agreement. Notwithstanding the forgoing, the Parties acknowledge that the Company is not required to commit its subcontractors, infrastructure, intellectual property, software licenses, trade secrets, or other rights, property, or capital as part of the transition of service.

44. **Dispute Resolution.** The Parties agree to attempt to resolve any dispute, claim or controversy ("Dispute") relating to this Agreement as follows:

- a. The Parties shall attempt in good faith to dispose of any Dispute by mutual agreement through a meeting between the Parties held within ten (10) calendar days of written notice of the Dispute being given to the other Party by the Party aggrieved and with the meeting requested in such notice.
- b. Notwithstanding the foregoing requirement to meet regarding a Dispute, neither Party shall be prevented from seeking injunctive relief or other immediate redress.
- c. If a Dispute is not resolved through a meeting, then either Party may pursue whatever legal remedies may be available.

45. **Compliance with Law.** The Parties shall comply with all applicable Federal, State and local laws, rules and regulations in performance of their obligations under this Agreement.

46. **Governing Law.** This Agreement shall be governed in all respects by the laws of the State of Maine ("State"). Any legal proceedings regarding this Agreement shall be

brought in the State of Maine. The Company hereby consents to personal jurisdiction in the State of Maine.

47. State Held Harmless/Defense By State. The Company agrees to indemnify and hold harmless the State, its officers, agents and employees from any and all claims, costs, expenses, injuries, liabilities, losses and damages of every kind and description (hereinafter in this Section referred to as "Claims") resulting from or arising out of the negligent, wrongful, or unlawful performance of this Agreement by the Company, its employees, agents, or subcontractors. Claims to which this indemnification applies include, but are not limited to: (i) Claims suffered or incurred by any contractor, subcontractor, materialman, laborer and any other person, firm, corporation or other legal entity (hereinafter in this Section referred to as "Person") providing work, services, materials, equipment or supplies as a result of the Company's performance of this Agreement; (ii) Claims arising out of a violation or infringement of any proprietary right, copyright, trademark, right of privacy or other right arising out of publication, translation, development, reproduction, delivery, use, or disposition of any data, information or other matter furnished or used as a result of the Company's performance of this Agreement; (iii) Claims arising out of a libelous or other unlawful matter used or developed as a result of the Company's performance of this Agreement; (iv) Claims suffered or incurred by any Person injured or damaged as a result of the Company's performance of this Agreement; and (v) all legal costs and other expenses of defense incurred by the Department against any Claims itemized in the foregoing clauses (i) through (iv). This indemnification does not extend to a Claim that results primarily and directly from (i) the Department's negligent, wrongful, or unlawful act; (ii) action by the Company or Person taken in reasonable reliance upon an instruction or direction given by an authorized individual acting on behalf of the Department or the State in accordance with this Agreement; or (iii) action by the Company or Person taken in reasonable reliance upon pricing, marketing, advertising or other State laws or regulations related to the Wholesale Liquor Business.

In the event that any Claim is threatened or brought against the State as related to this Agreement, including Product pricing, or other issues related to the Wholesale Liquor Business, the Department shall immediately notify and provide such information to the Company ("Claimant Information"). Upon reviewing such Claimant Information the Company shall assess whether it has any obligation pursuant to this Section 47. The Company shall notify the Department promptly of its decision. In the event the Claim requires or could reasonably require the Company to indemnify the State then the Company shall have the option, at its own expense, to employ counsel reasonably acceptable to the State to assist the State in its defense against such Claim and to participate in any compromise, settlement, or other disposition of such Claim; provided, however, that no compromise or settlement of any Claim admitting liability or imposing any obligations upon the Company may be affected without the prior written consent of the Company. The State shall cooperate fully in the defense of such Claim, making available such records, information, and witnesses reasonably necessary for the defense of such Claim.

Without limiting the obligation of the Department to assert any other defense to a Claim for which the Company has or may have a duty to indemnify hereunder, the Department agrees that it will assert any applicable defenses under the Maine Tort Claims Act, including any applicable immunities or limitations on liability under that Act.

In the event of any legal challenge to the Enabling Legislation or to the Agreement based in whole or in part on asserted anti-trust violation, the State agrees to defend such challenge, to immediately notify the Company in writing regarding the action, and to fully cooperate with and include the Company in the defense to the extent requested by the Company.

48. **Notice of Claims.** The Company shall give the Department immediate notice in writing of any legal action or suit filed related in any way to this Agreement or which may affect the performance of duties under the Agreement, including prompt notice of any claim made against the Company by any subcontractor which may result in litigation related in any way to the Agreement or which may affect the performance of Company's duties under the Agreement.

49. **Agreement Approval.** This Agreement must have the approval of the State Controller and the State Purchases Review Committee before it can be considered a valid and enforceable contract, and both signatures reflecting approval are set forth below.

50. **Severability.** The invalidity or unenforceability of any provision or part thereof of this Agreement shall not affect the remainder of the provision or any other provisions. This Agreement shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.

51. **Force Majeure.** Performance of an obligation by the Company under this Agreement shall be excused in the event that performance of that obligation by the Company is prevented by an act of God, act of war, riot, fire, explosion, flood or other catastrophe, sabotage, severe shortage of fuel, power or raw materials, change in law, court order, national defense requirement, strike or labor dispute, or any other cause beyond such Company's reasonable control, and could not reasonably be avoided by the Company. The time period for performance of the obligation excused under this Section shall be extended by the period of the excused delay together with a reasonable period to reinstate compliance with the terms of this Agreement. Nothing in this Section 51 is intended to, or to be construed as, relieving the Company from the payment obligations set forth in Section 2.

52. **Amendments.** This Agreement may be amended only by a written document signed by both Parties expressly amending the Agreement. Any amendment is subject to approval by the State Purchases Review Committee.

53. **Unwind Provisions.** The Parties acknowledge that the Appeal of the Contract Award has placed the State of Maine in potential fiscal crisis due to the State's reliance on the License Fee to balance the budget for the State's fiscal year 2003-2004 and fiscal

year 2004-2005. Accordingly, in consideration of the Company's agreement to pay the License Fee with the Appeal pending, the Department agrees to the Unwind Provisions under the circumstances described below as a means of refunding to Company monies paid in consideration for the Wholesale Liquor Business and costs expended in transitioning the Wholesale Liquor Business from the State to the Company and in preparing to perform upon commencement of the Term.

A. In the event that the Appeal, or other legal action, shall result in final order not subject to further appeal that invalidates the Contract Award for the transfer of the Wholesale Liquor Business to the Company or declares invalid or void this Agreement ("Final Order"), the Department agrees as follows:

(1) In a manner consistent with the Final Order, State law and regulations, Department shall issue a second RFP ("Second RFP") and to include in the Second RFP an express requirement that the successful bidder ("Successful Bidder"), if other than the Company or a parent company or affiliate of the Company, shall, as a condition of securing a contract ("New Contract") from the Department to operate the Wholesale Liquor Business, pay to the Company an amount ("Unwind Payment") equal to the sum set forth in Exhibit E attached hereto.

(2) The New Contract shall expressly provide that the Successful Bidder shall not acquire any rights to the Wholesale Liquor Business unless and until the Successful Bidder shall have paid the Unwind Payment to the Company. In the event the Unwind Payment is not fully paid by the Successful Bidder, the Department shall refund to Company any balance of the Unwind Payment.

(3) If permitted by applicable law, in the event the Department shall receive any funds from a Successful Bidder under a New Contract and the Successful Bidder shall not have paid the Unwind Payment to the Company, Department shall (i) immediately notify Company that it has received funds, (ii) hold such funds in trust for Company, and (iii) immediately pay over to Company the amount received by Department and Department acknowledges that it shall not have any rights to any amounts paid to it under the New Contract unless and until Company shall have received the Unwind Payment in full.

B. In the event of the issuance of a Final Order or Interim Order (as defined below), the Department agrees that pending the payment of the Unwind Payment by the Successful Bidder the Department agrees that, unless the Legislature mandates that the State operate the Wholesale Liquor Business, it will not undertake to operate the Wholesale Liquor Business and will not enter into a contract with another provider without first offering to the Company the opportunity to conduct the Wholesale Liquor Business in accordance with this Agreement.

C. In the event of any interim order that prohibits the transfer to or operation by Company of the Wholesale Liquor Business pursuant to this Agreement ("Interim Order"), the Department agrees that, unless prohibited by such Interim Order, it will not

undertake to operate the Wholesale Liquor Business and will not enter into a contract with another provider without first offering to the Company the opportunity to conduct the Wholesale Liquor Business in accordance with this Agreement.

D. In the event of either a Final Order or Interim Order, the Department agrees to take such steps that are within its authority to apprise the Maine Legislature of the impact of such court action on the Company, suppliers, agency stores and stakeholders. Such steps shall include, but are not limited to, the Commissioner presenting written and oral testimony to the Maine Legislature and affixing to any legislation that would nullify the respective performance obligations of the Parties as set forth in this Section 53 a fiscal note apprising the Legislature of the potential financial liability of the State to the Company resulting from such legislation.

E. The Parties intend that this Section 53 shall survive independently of the Agreement in the event that the effect of an Order is to invalidate, void, or otherwise cancel the Agreement.

F. The Department and the Company agree to execute, and/or cause to be executed, and delivered, such instruments, certificates or documents, and to take all such actions, as may reasonably be required to implement or effectuate the provisions of this Section 53.

54. **Entire Agreement.** This document contains the entire Agreement of the Parties and there are no agreements, oral, written or implied, except as set forth herein, and neither Party shall be bound by any statement or representation not contained herein. The failure of any Party to insist in any one or more instances upon strict performance of any of the terms or provisions of the Agreement, or to exercise any option or election under the Agreement, shall not be construed as a waiver or relinquishment for the future of such terms, provisions, options or elections, but the same shall continue in full force and effect, and no waiver by any Party or any one or more of its rights or remedies under the Agreement shall be deemed to be a waiver of any prior or subsequent rights or remedy under the Agreement or at law.

55. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original for all purposes, but all of which together shall constitute one and the same agreement.

56. **Notices.** All notices or other communications required or permitted under this Agreement shall be in writing and may be given by personal delivery, by overnight express delivery, or by registered or certified U. S. mail, postage prepaid, return receipt requested, properly addressed as follows:

To the Department:

Commissioner
Department of Administrative & Financial Services.
78 State House Station
Augusta, Maine 04333-0078

To BABLO:

Director
Bureau of Alcoholic Beverages & Lottery Operations
8 State House Station
Augusta, Maine 04333-0008

To Martignetti Companies of Maine, LLC:

D. Dean Williams
President
Martignetti Companies of Maine, LLC
31 Fir Street
PO Box 1113
Manchester, NH 03105

Either Party may change the person or address to which notices are to be sent by notice in writing directed to the other Party.

57. **Captions.** The captions used in this Agreement are for reference purposes only and shall not affect the interpretation or meaning of this Agreement.

58. **Drafting of Agreement.** Each Party has consulted with counsel in the drafting and preparation of this Agreement and, therefore, in any interpretation hereof, this Agreement shall not be construed against any Party as the draftsman thereof.

59. **Successors and Assigns.** This Agreement shall be binding upon, and shall run to the benefit of, the Parties, their successors and assigns.


60. **Corporate Guarantee.** Martignetti Companies, a Massachusetts business trust with a principal place of business in Norwood, Massachusetts ("Martignetti") hereby guarantees the Company's financial performance under this Agreement and has pledged to support the operation and management of the Company. Martignetti is a signatory to

[the balance of this page is left blank intentionally]

the Agreement as the guarantor of the performance of the Company to the full extent described herein.


WHEREFORE, the Parties by their duly authorized representatives have executed this Agreement, on the dates indicated below.

STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE
& FINANCIAL SERVICES


Rebecca M. Wyke
Commissioner

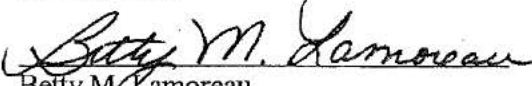
Dated: 5-14-04

APPROVED:


Edward A. Karass
State Controller

Dated: May 14, 2004

APPROVED:


Betty M. Lamoreau
Director of Purchases

Dated: 5-14-04

MARTIGNETTI BUSINESS
TRUST

By _____
Carmine A. Martignetti
Its: Trustee

Dated: _____

By _____
Carl J. Martignetti
Its: Trustee

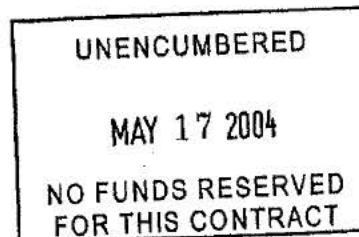
Dated: _____

MARTIGNETTI COMPANIES
OF MAINE, LLC

By _____
D. Dean Williams
Its: President

Dated: See Attached

Martin E. Wilson



the Agreement as the guarantor of the performance of the Company to the full extent described herein.

WHEREFORE, the Parties by their duly authorized representatives have executed this Agreement, on the dates indicated below.

STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE
& FINANCIAL SERVICES

Rebecca M. Wyke
Commissioner

Dated: _____

APPROVED:

Edward A. Karass
State Controller

Dated: _____

APPROVED:

Betty M. Lamoreau
Director of Purchases

Dated: _____

MARTIGNETTI BUSINESS
TRUST

By _____
Carmine A. Martignetti
Its: Trustee

Dated: _____

By _____
Carl J. Martignetti
Its: Trustee

Dated: _____

MARTIGNETTI COMPANIES
OF MAINE, LLC

By _____
D. Dean Williams
Its: President

Dated: 5.14.2004

the Agreement as the guarantor of the performance of the Company to the full extent described herein.

WHEREFORE, the Parties by their duly authorized representatives have executed this Agreement, on the dates indicated below.

STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE
& FINANCIAL SERVICES

Rebecca M. Wyke
Commissioner

Dated: _____

APPROVED:

Edward A. Karass
State Controller

Dated: _____

APPROVED:

Betty M. Lamoreau
Director of Purchases

Dated: _____

MARTIGNETTI BUSINESS
TRUST

By Carmin A. Martignetti
Carmin A. Martignetti
Its: Trustee

Dated: MAY 14, 2004

By Carl J. Martignetti
Carl J. Martignetti
Its: Trustee

Dated: MAY 14, 2004

MARTIGNETTI COMPANIES
OF MAINE, LLC

By _____
D. Dean Williams
Its: President

Dated: _____

Michael E. Wilson

Wholesale Liquor Distribution

Exhibit A:

BABLO Personnel

Bruce Mercier
Auditor III
Pay Range 25/08 D

David Tibbetts
Retail Store Supervisor
Pay Range 23/08 D

Omer Gagne
Management Analyst I
Pay Range 21/08 B

Gardner Morrill
Account Clerk II
Pay Range 12/08 A

Wholesale Liquor Distribution

Exhibit B:

Bailment Rates

See Attachment 2.2 C consisting of three (3) pages.

LAW WAREHOUSES, INC. - MAINE BAILMENT RATES
EFFECTIVE JULY 1, 2004

BASIC BAILMENT CHARGES:**HANDLING:**

Covers the ordinary labor and duties incident to the unitized (slipsheet, pallet, or clamp) unloading of cases; verifying case quantities against a proper packing slip and carrier bill of lading; placing into storage; administrative receiving; case or unitized picking; and the unitized loading of outbound orders. Handling is charged upon receipt of goods and calculated on a "per code per receipt" basis.

Codes of	1 - 180 cases	\$ 0.95 per case
Codes of	181 - 209 cases	\$ 0.85 per case
Codes of	300 - 659 cases	\$ 0.75 per case
Codes of	870+	\$ 0.65 per case
Codes received as bottles (returns)		\$ 0.15 per bottle
Cases received uncoded or other <u>unsaleable</u> status		\$ 5.00 per line item surcharge

STORAGE:

Storage is calculated on an anniversary basis and initially charged upon receipt. For each 14-calendar day from date of receipt, the number of cases in storage is charged according to the table below on a "per code per receipt" basis.

Upon receipt		\$ 0.10 per case for 14 days
Cases in inventory	14 - 84 days from receipt	\$ 0.10 per case per 14 days
Cases in inventory	85 - 182 days from receipt	\$ 0.22 per case per 14 days
Cases in inventory	183 - 365 days from receipt	\$ 0.62 per case per 14 days
Cases in inventory	366+ days from receipt	\$ 1.08 per case per 14 days
Any case on an unsaleable status (e.g.: uncoded):		\$ 0.62 per case per 14 days

Upon receipt		\$ 0.01 per bottle for 14 days
Bottles in inventory	14 - 84 days from receipt	\$ 0.01 per bottle per 14 days
Bottles in inventory	85 - 182 days from receipt	\$ 0.03 per bottle per 14 days
Bottles in inventory	183 - 365 days from receipt	\$ 0.08 per bottle per 14 days
Bottles in inventory	366+ days from receipt	\$ 0.15 per bottle per 14 days
Any bottle on an unsaleable status (e.g.: uncoded):		\$ 0.15 per bottle per 14 days

MANUAL SUPPLIER ORDERS:

Manually processing supplier/broker generated orders as samples or for transfer out-of-state.

Orders received Manually (e.g.: facsimile)	\$ 0.13 per case / \$25.00 min
	\$ 0.02 per bottle / \$25.00 min

MULTI-PACKS (Codes Listed as Full Pallet In - Full Pallet Out):

Handling:	\$ 4.65 per pallet
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Storage:

Storage is calculated on an anniversary basis and initially charged upon receipt. For each 14-calendar day from date of receipt, the number of pallets in storage is charged according to the table below on a "per code per receipt" basis.

Upon receipt		\$ 3.60 per pallet for 14 days
Pallets in inventory	14 - 84 days from receipt	\$ 3.60 per pallet per 14 days
Pallets in inventory	85 - 182 days from receipt	\$ 9.35 per pallet per 14 days
Pallets in inventory	183 - 365 days from receipt	\$23.38 per pallet per 14 days
Pallets in inventory	366+ days from receipt	\$28.06 per pallet per 14 days
Any pallet on an unsaleable status (e.g.: uncoded):		\$28.06 per pallet per 14 days

LAW WAREHOUSES, INC. - MAINE BAILMENT RATES
EFFECTIVE JULY 1, 2004

ACCESSORIAL SERVICE CHARGES:

ADVERTISING MATERIAL:

Handling:	\$ 0.48 per small carton \$ 1.23 per large carton
Storage:	\$ 0.13 per small carton per month \$ 1.05 per large carton per month
Shipping:	\$ 7.50 per outbound order

ANNUAL PHYSICAL INVENTORY:

\$ 0.13 per case
\$ 0.09 per bottle

BLANKETS:

Handling:	\$23.00 per blanket
Storage:	\$ 5.75 per blanket per month

DESTRUCTION OF INVENTORY:

Minimum charge involved for immediate destruction of small lots. The minimum will be waived if we are allowed to accumulate product until we have a full load. Rate subject to change based on disposal fees.

<56 cases per code	\$ 3.10 per case
56+ cases per code	\$ 2.85 per case
Minimum	\$ 100.00 per order

EXTRA OFFICE SERVICE CHARGE:

Labor used for office services and other unusual office or data information services not included in the normal administration of receipts, shipments, or inventory.

Regular Time	\$ 32.50 per person, per hour
Overtime	\$ 48.00 per person, per hour
Sunday/Holiday	\$ 60.00 per person, per hour

EXTRA WAREHOUSE LABOR:

Labor used for handling services not included in the normal processing of a receipt or shipment, nor listed separately below.

Regular Time	\$ 32.50 per person, per hour
Overtime	\$ 48.00 per person, per hour
Sunday/Holiday	\$ 60.00 per person, per hour

EXTRA WAREHOUSE LABOR & EQUIPMENT:

Labor and equipment used for handling services not included in the normal processing of a receipt or shipment, nor listed separately below.

Regular Time	\$ 81.85 per person, per hour
Overtime	\$ 75.50 per person, per hour
Sunday/Holiday	\$ 87.00 per person, per hour

**LAW WAREHOUSES, INC. - MAINE BAILMENT RATES
EFFECTIVE JULY 1, 2004**

ACCESSORIAL SERVICE CHARGES (continued):

FACSIMILE CHARGE:

\$ 1.00 per page

LABELING:

Labor and materials used to apply product code labels to uncoded cases.
Labor and materials used to apply "bottle bill" stickers to bottles.

<56 cases per code	\$2.50 per case
56-99 cases per code	\$2.00 per case
100-299 cases per code	\$1.25 per case
300+ cases per code	\$0.75 per case
Minimum per code	\$15.00

LABELING - BOTTLE BILL STICKERS:

Labor and materials to apply Bottle bill stickers to bottles.

\$ 2.00 per case / \$15.00 min

RELABELING:

Labor and materials to apply product code labels to improperly coded cases.

\$ 1.00 per case / \$15.00 min

DUPLICATE LABELS:

Labor and materials to create labels that were not needed.

\$ 0.30 per label

PALLET PURCHASE CHARGE:

\$10.00 per pallet

SPECIAL DOCUMENTATION RUNS:

(e.g.: Extra Inventories, Invoices, Shipping Orders)

\$25.00 per run

MINIMUM INVOICE CHARGE:

\$25.00 per monthly invoice

LIABILITY FOR CARE OF GOODS:

For cases in its possession and for which it has issued a warehouse receipt for storage subject to applicable rates herein, the warehouseman shall be liable for loss or damage only when caused by his failure to exercise such care for them as a reasonably careful owner of similar goods would exercise, but, he shall not be liable for any loss or damage to the goods which could not have been avoided by the exercise of such care. The measure of liability of the warehouseman shall, in all cases, be limited as to each package to a value not exceeding \$75,000 per case. Catastrophic Loss is defined as any loss with a combined loss across all suppliers and all products of \$50,000 or more. In the event of such loss, the Limit of Liability will be \$750.00 per NABCA Code per occurrence. All parties to this agreement will hold contractor harmless from liability for loss or damage over this amount and waive rights of subrogation.

Addendum to Exhibits C and D

Example: Gross Profit Guaranty and Revenue Sharing

	Year 2	Year 3	Year 4	Year 5	Year 6	
Net Wholesale Sales	\$88,000	\$91,520	\$102,000	\$106,080	\$110,323	
Supplier Costs and Premium Tax	56,320	56,285	65,280	65,770	69,724	Total
Actual Gross Profit	\$31,680	\$35,235	\$36,720	\$40,310	\$40,599	\$184,545
% Margin	36.0%	38.5%	36.0%	38.0%	36.8%	
Gross Profit Guaranty	\$32,384	\$33,679	\$37,536	\$39,037	\$40,599	
Gross Profit Percentage Guaranty	36.8%	36.8%	36.8%	36.8%	36.8%	
Gross Profit Deficiency	\$704	\$0	\$816	\$0	\$0	
Gross Profit Baseline	\$32,145	\$32,627	\$33,116	\$33,613	\$34,117	
Gross Profit Overage	\$0	\$2,608	\$3,604	\$6,697	\$6,482	
% Share with State	50.0%	50.0%	50.0%	50.0%	50.0%	
State Share of Gross Profit Overage	\$0	\$1,304	\$1,802	\$3,349	\$3,241	
Less: Gross Profit Deficiency	704	704	816	0	0	
Amount Paid to the State	0	600	986	3,349	3,241	
Amount of Gross Profit Deficiency Applied to Next Year	704	0	0	0	0	

<u>Memo: Amount Received by Martignetti Companies of Maine, LLC (M of M LLC)</u>						Total
Lesser of Gross Profit or Baseline	\$31,680	\$32,627	\$33,116	\$33,613	\$34,117	\$165,154
Deficiency Applied to M of M LLC	0	704	816	0	0	1,520
Gross Profit Overage	\$0	\$2,608	\$3,604	\$6,697	\$6,482	\$19,390
50% M of M LLC Share	50.0%	50.0%	50.0%	50.0%	50.0%	—
M of M LLC Share of Overage	\$0	\$1,304	\$1,802	\$3,349	\$3,241	\$9,695
Total to M of M LLC	\$31,680	\$34,635	\$35,734	\$36,962	\$37,358	\$176,369
State Revenue Sharing	\$0	\$600	\$986	\$3,349	\$3,241	\$8,175

Total \$184,545

Note: all figures are for illustrative purposes only.

Wholesale Liquor Distribution
Contract Negotiations

Exhibit C

BABLO shall maintain a Gross Profit Percentage Guaranty of 36.8% between the Net Wholesale Sales to agency stores and the sum of Supplier Costs and Premium Tax as defined in paragraph 25. The percentage shall be calculated monthly and annually as follows:

$$\frac{\text{Multiplied Times}}{\text{Equals}} = \frac{\text{Net Wholesale Sales to Agency Stores}}{\text{Gross Profit Guaranty}} \times \text{Gross Profit Percentage Guaranty}$$

Example:

Net Wholesale Sales for FY05	\$88,000,000
	<u>36.8%</u>
Gross Profit Guaranty	\$32,384,000

This amount shall be compared to the actual Gross Profit.

Example:

Net Wholesale Sales for FY05	\$88,000,000
<u>Supplier Costs and Premium Tax</u>	<u>55,000,000</u>
Actual Gross Profit	\$33,000,000

Gross Profit Guaranty \$32,384,000

Guaranty has been met +\$616,000

BABLO shall adjust prices quarterly to Agency Stores on individual products to achieve the 36.8% Gross Profit Percentage Guaranty or higher, based on review of the monthly calculations. Annually, the Gross Profit amounts shall be calculated and in the event the annual Gross Profit for the fiscal year is less than 36.8%, the Company shall be entitled to remedies allowed by paragraph 25.

Wholesale Liquor Distribution
Contract Negotiations

Exhibit D:

Revenue Sharing Plan

The State and Company agree that Gross Profit in excess of the Gross Profit Baseline defined below shall be shared with the State at an amount equal to 50% of the Gross Profit Overage. Gross Profit Baseline is the minimum amount of gross profit to be achieved by the Company before any overage exists. The Gross Profit Overage is the difference between Gross Profit and the Gross Profit Baseline. The calculation shall be made as follows:

Net Wholesale Sales
Minus Supplier Costs and Premium Tax
Equals Gross Profit

Minus Gross Profit Baseline
Equals Gross Profit Overage

If the Gross Profit Overage is a negative number, no profit sharing shall occur. If the Gross Profit Overage is positive, 50% of the Gross Profit Overage shall be transferred to the State except as otherwise provided in the Agreement. The State's 50% share of the Gross Profit Overage will be reduced by any current year or prior year's unsatisfied Gross Profit Deficiency.

Gross Profit Baseline:

FY04	\$15,952,800
FY05	\$32,144,892
FY06	\$32,627,066
FY07	\$33,116,472
FY08	\$33,613,219
FY09	\$34,117,417
FY10	\$34,629,178
FY11	\$35,148,616
FY12	\$35,675,845
FY13	\$36,210,983
FY14	\$18,240,272
Total	\$341,476,760

Example:

Net Wholesale Sales from Sales FY05	\$88,000,000
- Supplier Costs and Premium Tax	55,000,000
= Gross Profit.....	\$33,000,000
-Gross Profit Baseline.....	\$32,144,892
= Profit Overage	\$855,108

X 50% State Share.....\$427,554

Wholesale Liquor Distribution
Contract Negotiations

Exhibit E:

Unwind Payment Calculation

The State and Company agree that in the event of contract termination as a result of circumstances in Section 53, the New Bidding Process shall expressly provide that any successful bidder other than the Company or a parent company or affiliate of the Company ("Successful Bidder") shall, as a condition of securing a contract from the Department to operate the Wholesale Liquor Business, pay to the Company an amount (the "Unwind Payment") determined below:

First Installment Payment	\$25,000,000
Second Installment Payment	\$50,000,000
Third Installment Payment	\$50,000,000
First Year interest Expense	\$ 5,937,500
Value of Assets	\$10,045,460
Property, Plant, Equipment	\$ 160,000
<hr/>	
Total	\$141,142,960
<hr/>	

This amount shall be the amount of payment due to the Company through December 31, 2004. For each month thereafter, the amount of payment due shall be reduced by a direct declining amount of \$1,238,097 per month.

Example: Contract termination on June 30, 2005

$$\$141,142,960 - (6 \times \$1,238,097) = \$133,714,378$$

FIRST AMENDMENT TO AGREEMENT

This is the First Amendment to Agreement ("First Amendment") with an effective date of May 14, 2004 ("Effective Date") to an agreement between the State of Maine Department of Administrative & Financial Services, with offices in Augusta, Maine ("Department") and Martignetti Companies of Maine, LLC, a Maine limited liability company, with offices in Augusta, Maine ("Company") to amend the Agreement referenced below. The Department and the Company may be referred to herein individually or collectively as the "Party" or "Parties".

RECITALS

WHEREAS, the Parties entered into Agreement Between State of Maine Department of Administrative & Financial Services and Martignetti Companies of Maine, LLC effective May 14, 2004 ("Agreement") whereby Department granted to Company a license pursuant to 28-A M.R.S.A. § 88 ("Wholesale Liquor Business") following the Department's award of the contract to Company ("Contract Award");

WHEREAS, upon execution of the Agreement, the ownership of the Company was as referenced in the Martignetti bid proposal submitted to the Department on December 18, 2003 ("Former Membership");

WHEREAS, subsequent to execution of the Agreement the equity membership interests in the Company have changed to reflect a new allocation, specifically: Northern Beverage, LLC 33.33%, a Maine limited liability company, and LGB Spirit LLC 66.66%, a Delaware limited liability company ("Current Membership");

WHEREAS, the Current Membership has committed to capitalizing the Company through a greater degree of equity investment than was proposed by the Former Membership;

WHEREAS, the Current Membership has committed to procuring dismissal of the appeals challenging the Contract Award, such appeals as have been consolidated and are now pending in the Kennebec County Superior Court Docket No. AP-04-21 and AP-04-22 ("Appeal"); and

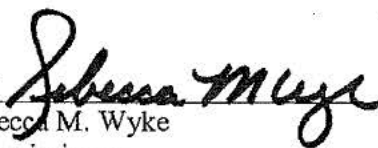
WHEREAS, the Current Membership intends to subcontract with Pine State Trading Co., a Maine corporation, for the purpose of obtaining warehousing and transportation services as related to the Wholesale Liquor Business.

NOW THEREFORE, in consideration of the foregoing and the mutual promises, undertakings and agreements set forth in this First Amendment, the Department and the Company agree as follows:

1. **Release of Guaranty.** Section 60 of the Agreement is hereby deleted in its entirety and the Department fully releases the guaranty by Martignetti Companies.
2. **Balance Sheet.** Company has provided the Department with a pro forma balance sheet that reflects the Company's expectation of the capitalization of the Company on July 1, 2004.
3. **Pledge.** Department acknowledges that there are no limitations or restraints under the Agreement with regard to any pledge of the membership interests in the Company as made to a bank or other financial institution or creditor by any of the members of the Former Membership or the Current Membership.
4. **Amendments.** This First Amendment and the Agreement may be amended only by a written document signed by both Parties expressly amending the Amendment and the Agreement. Any amendment is subject to approval by the State Purchases Review Committee.
5. **Entire Agreement.** Except as specifically amended and set forth herein, the Parties agree that the provisions of the Agreement shall remain in full force and effect.
6. **Captions.** The captions used in this First Amendment are for reference purposes only and shall not affect the interpretation or meaning of this First Amendment.
7. **Drafting of Agreement.** Each Party has cooperated in the drafting and preparation of this First Amendment and, therefore, in an interpretation hereof, this First Amendment shall not be construed against any Party as the draftsman thereof.

WHEREFORE, the Parties by their duly authorized representatives have executed this First Amendment, on the dates indicated below.

STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE
& FINANCIAL SERVICES

By: 
Rebecca M. Wyke
Commissioner

Dated: 5-14-04

MARTIGNETTI COMPANIES
OF MAINE, LLC

By: _____
D. Dean Williams
Chief Executive Officer

Dated: _____

APPROVED:

Edward A. Karass
Edward A. Karass
State Controller

Dated: May 14, 2004

APPROVED:

Betty M. Lamoreau
Betty M. Lamoreau
Director of Purchases

Dated: 5-14-04

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STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE
& FINANCIAL SERVICES

MARTIGNETTI COMPANIES
OF MAINE, LLC

By: *Rebecca M. Wyke*
Rebecca M. Wyke
Commissioner

By: _____
D. Dean Williams
Chief Executive Officer

Dated: 5-14-04

Dated: SOE ATTACHED

APPROVED:

John C. Wilson

UNENCUMBERED

MAY 17 2004

NO FUNDS RESERVED
FOR THIS CONTRACT

Edward A. Karass
Edward A. Karass
State Controller

Dated: May 14, 2004

APPROVED:

Betty M. Lamoreau
Betty M. Lamoreau
Director of Purchases

Dated: 5-14-04

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STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE
& FINANCIAL SERVICES

By: _____
Rebecca M. Wyke
Commissioner

Dated: _____

MARTIGNETTI COMPANIES
OF MAINE, LLC

By: 
D. Dean Williams
Chief Executive Officer

Dated: 5-14-2004

APPROVED:



