

# SPECIFIC PROCEDURES TO AVOID LATE-TERM DISAGREEMENTS

CANDACE BAGGETT, PRESIDENT  
THE CALIBRE GROUP, INC.  
HOUSTON, TX

KANE DOSSETT, CEO  
PARTNERS NATIONAL REAL ESTATE GROUP, INC.  
DALLAS, TX

**The Calibre Group**  
Real Estate Investment Advisors



**Partners  
National**

CORPORATE REAL ESTATE SERVICES

# LEASE PROVISIONS ADDRESSED

- I. Tenant's Termination Option
- II. Tenant's Right of First Refusal
- III. Tenant's Expansion Option (Absent a Third-Party Trigger of ROFR)
- IV. Restoration of Premises



# LEASE PROVISION #1

- I. **Tenant's Termination Option**
- II. Tenant's Right of First Refusal
- III. Tenant's Expansion Option (Absent a Third-Party Trigger of ROFR)
- IV. Restoration of Premises



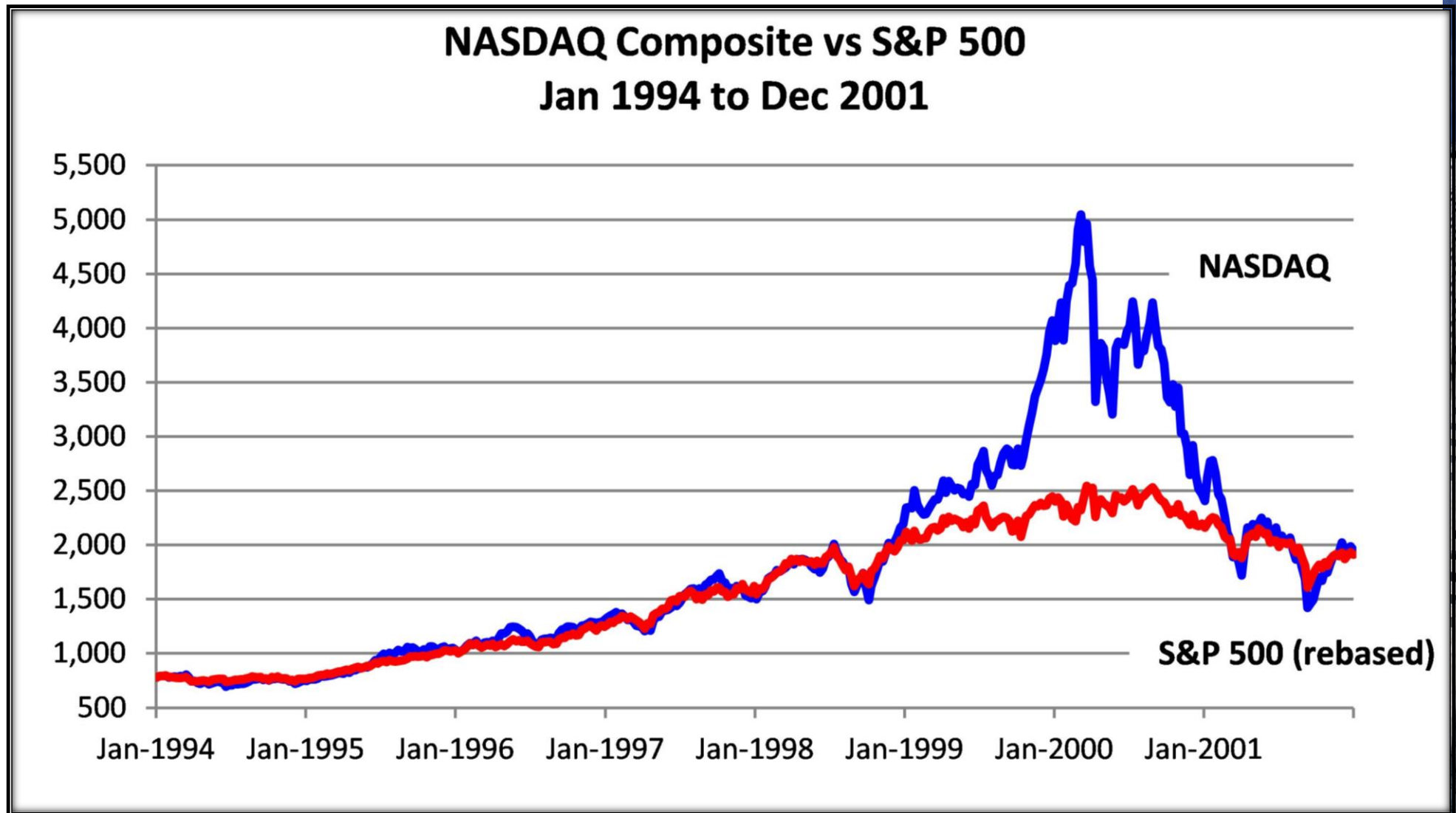
# EMERGENCE OF TENANTS' TERMINATION REQUIREMENTS

- Tech Bubble/Dot-Com crash of early 2000's
- Protection from economic fluctuations
- Flexible leases became a management requirement

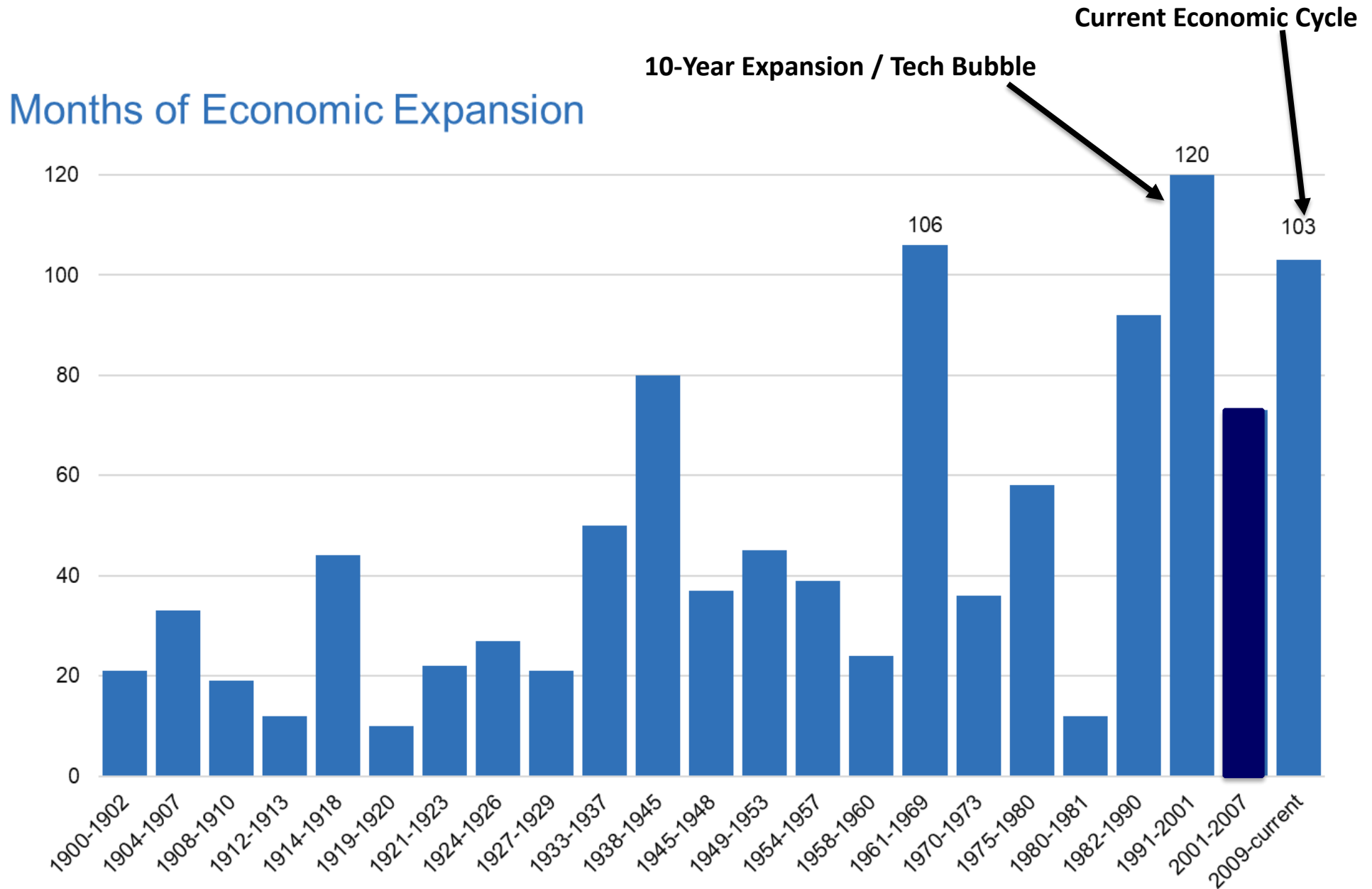




# THE RISE AND FALL: NASDAQ



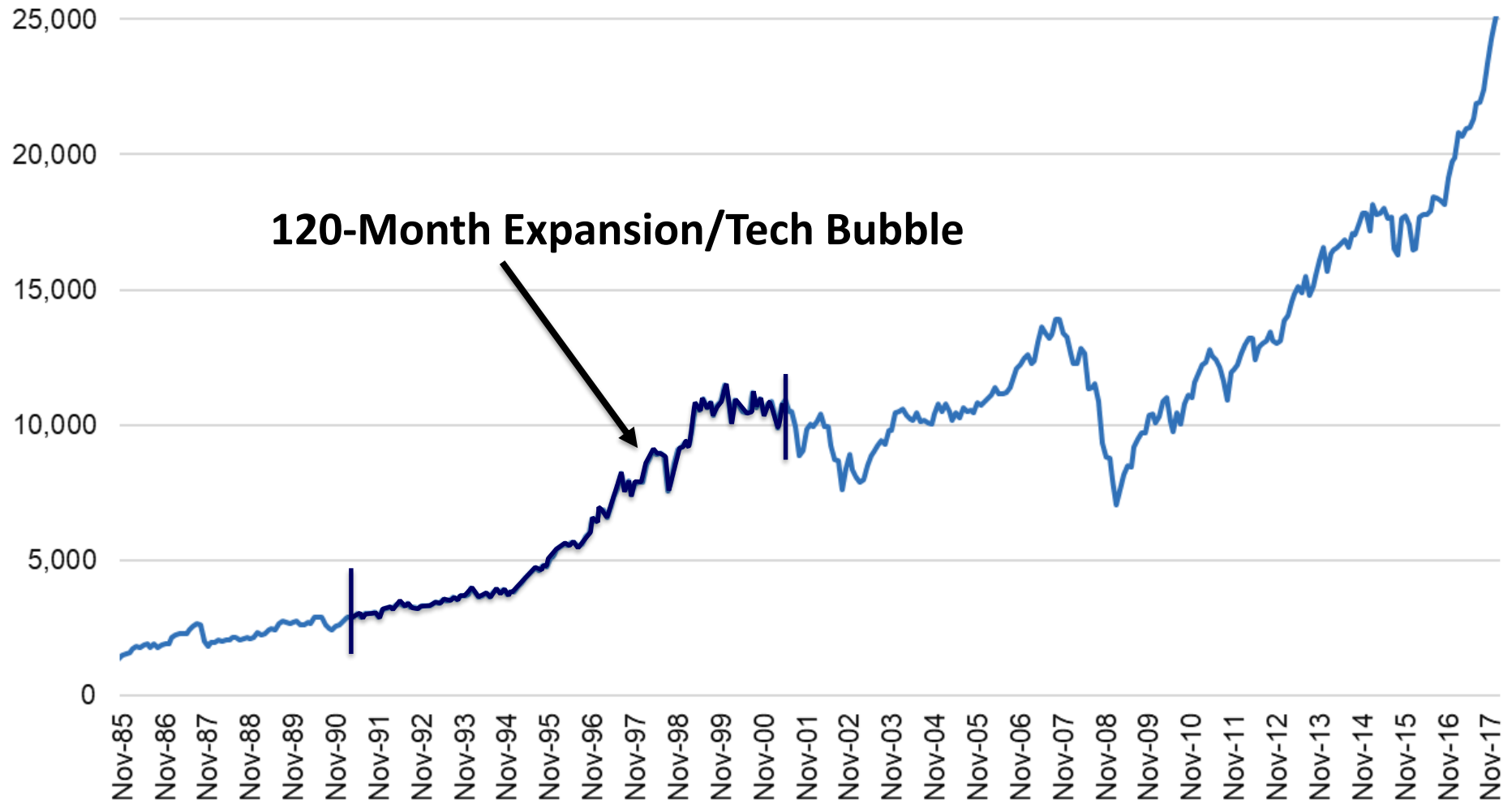
# 3RD LONGEST ECONOMIC EXPANSION



Source: NBER; Meyers Research

# DJIA: 1985 – 2017

## Dow Jones Industrial Average



Source: Yahoo Finance; Meyers

# COMPONENTS OF TERMINATION FEE

1. Tenant Improvement Costs
2. Rent Abatement
3. Leasing Commissions
4. Legal Expenses





# BASIC TERMINATION LANGUAGE

Tenant shall have one option to terminate this Lease with such termination to be effective on the date that is the last day of the sixtieth (60<sup>th</sup>) month of the Term (the “Effective Termination Date”). In order for Tenant to effectuate the lease termination, **Tenant will send to Landlord** no later than nine (9) months prior to the Effective Termination Date: (i) **a notice of Tenant’s election to terminate** the Lease and (ii) **a one-time payment of the unamortized costs of the tenant improvements, commissions, rent abatement, and legal fees** incurred by Landlord in connection with this Lease, with such amortization calculated using an interest rate of seven percent (7%) per annum.



# TENANT'S OMITTED CONCEPTS

- Line-item detail on Tenant's termination penalty
- Opportunity to dispute amount
- Dispute Resolution procedure



# TENANT'S TERMINATION LANGUAGE

Not later than the end of the third (3<sup>rd</sup>) full month after the Lease Commencement Date, Landlord will provide Tenant with a statement (the "Termination Fee Statement") setting forth Landlord's determination of the amount of the termination fee (the "Termination Fee"). Landlord will include the following in the Termination Fee Statement: (i) line-item detail of all expenses incurred and paid by Landlord which Landlord is including in its calculation of Tenant's Termination Fee, (ii) the expenses incurred and paid by Landlord related specifically to the tenant improvement construction with a delineation of which of construction-related expenses are included in Landlord's calculation of the unamortized tenant improvement construction costs, and (iii) reasonable detail concerning the mathematics used by Landlord in calculating the unamortized portion of each line-item included in Tenant's Termination Fee. Within thirty (30) days of Tenant's receipt of Landlord's Termination Fee Statement, Tenant will send to Landlord a response notice ("Tenant's Response Notice") indicating one of the following: (a) Tenant agrees with the amount of the Termination Fee as stated in Landlord's Termination Fee Statement, in which case, in the event Tenant elects to terminate this Lease as provided for herein, Tenant will pay the Termination Fee to Landlord no later than ninety (90) days following Tenant's notice to Landlord of its election to terminate this Lease; (b) Tenant requires additional information from Landlord regarding Landlord's Termination Fee Statement with Tenant's Response Notice to include specificity as to the additional information which Tenant requires, in which case Landlord, within ten (10) business days of its receipt of Tenant's Response Notice, will send such additional information to Tenant; or (c) Tenant disagrees with Landlord's Termination Fee Notice, with Tenant's Response Notice to include specificity as to components of Landlord's Termination Fee Notice with which Tenant disagrees, in which case, Landlord and Tenant will conduct a series of meetings to the extent necessary and will use reasonable efforts to agree on the amount of the Termination Fee during the thirty-day period following Landlord's receipt of Tenant's Response Notice.



# TERMINATION FEE STATEMENT

Not later than the end of the third (3<sup>rd</sup>) full month after the Lease Commencement Date, Landlord will provide Tenant with a statement (the “Termination Fee Statement”) setting forth Landlord’s determination of the amount of the termination fee (the “Termination Fee”).

- Alternative is for statement to be delivered after receipt of Tenant’s notice of termination.



# ADVANTAGES TO EARLY RESOLUTION

- Expense amounts are readily available to Landlord
- Original Landlord is still the owner of Building; Building has not been sold.





# LANDLORD'S TERMINATION FEE STATEMENT SHOULD INCLUDE:

- i. Line-item detail of all expenses in termination fee
- ii. Detail on mathematics used to calculate the unamortized costs



# TENANT'S RESPONSE TO TERMINATION FEE STATEMENT

Within thirty (30) days, Tenant will respond that:

- a. Tenant agrees;
- b. Tenant requires additional information from Landlord; or
- c. Tenant disagrees with Landlord's Termination Fee Notice (with specificity on line-items).



# RESOLUTION PROCEDURES

## After Tenant's response to Landlord:

- a. If Tenant agrees, the matter is shelved until Tenant elects to terminate, in which case the termination payment has been established.
- b. If Tenant requires additional information, Tenant will include specificity, and Landlord, within ten (10) business days, will send additional information to Tenant.
- c. If Tenant disagrees with Landlord's Notice, Tenant will provide Landlord with specificity regarding the disputed line items. During the next 30 days, the parties will use commercially reasonable efforts to come to an agreement on the Termination Fee.



# LIMITATIONS ON TENANT IMPROVEMENT COSTS

Exclude construction costs related to common areas:

- Common area corridor
- Restrooms
- Common electrical room
- Fire suppression system



## A low-angle, vertical photograph of a modern skyscraper. The building's facade is composed of a dense grid of rectangular windows, creating a rhythmic pattern of light and dark. The perspective makes the building appear to converge towards the top of the frame. The sky above is a deep blue, filled with soft, wispy white clouds. The lighting suggests a bright, sunny day.





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# LIMITATIONS ON TENANT IMPROVEMENT COSTS

Exclude Base-building items within Tenant's Premises (or limit included amounts):

- Building standard light fixtures
- Ceiling grid and tile
- Certain HVAC and electrical components

Additional limitations on certain items:

- Construction management fees in excess of a defined percentage of hard costs
- General contractor's overhead and profit in excess of market standards
- Architectural/engineering costs in excess of market standards



# CAPS ON TERMINATION FEE COMPONENTS

## Leasing commissions

- Capped at customary market rates for landlord's and tenant's broker

## Landlord's legal fees

- Capped at a reasonable amount given complexity of transaction



# TERMINATION FEE CASE STUDY - OFFICE LEASE IN BELLEVUE, WA

## Section 6.2 Tenant's Acceleration Option

If Tenant exercises its Acceleration Option, then, within thirty (30) days after Landlord's receipt of Tenant's Acceleration Option, Landlord will deliver to Tenant a statement with the amount of the Acceleration Fee (as defined below) and a reasonably detailed illustration of the calculations of the Acceleration Fee. On or before the date that is one (1) full business day prior to the Accelerated Expiration Date, Tenant shall pay to Landlord the sum of an amount equal to the unamortized portion of all the following: any leasing commissions, the Abated Rent and the Allowance (collectively, the "Acceleration Fee") as a fee in connection with the acceleration of the Second Extended Expiration Date and not as a penalty; provided that the Acceleration Fee shall be increased by an amount equal to the unamortized portion of any leasing commissions, tenant improvements and allowances or other concessions incurred by Landlord in connection with any additional space other than the initial Premises leased by Tenant under the Lease and that is subject to acceleration hereunder, plus two (2) months of the Base Rent applicable to the last year of the Second Extended Lease Term, applicable to such additional space; however, if Tenant exercises its Acceleration Option, in no event will Tenant be required to pay such two (2) months of Base Rent as described above applicable to the initial Premises. Tenant shall remain liable for all Base Rent, Additional Rent (including Tenant's Pro Rata Share of Operating Costs and Taxes) and all other sums due under the Lease, amended hereby, up to and including the Accelerated Expiration Date even though billings for such may occur subsequent to the Accelerated Expiration Date. The unamortized portion of any of the foregoing shall be determined using an interest rate of eight percent (8%) per annum.



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# TERMINATION FEE CASE STUDY

## FEE AMOUNT AS PRESENTED BY LANDLORD

Base Rent: \$121,115.08 (2 Months Rent)

Commissions:  $\$255,114.75 / (72 \text{ month term})$  37 remaining months =  $(\$3543.26 \times 37) = \underline{\$131,110.64}$

Original Lease TI Allowance: \$857,494.79

Second Amendment TI Allowance: \$371,079.00

Third Amendment TI Allowance:  $\$371,076.00 / (72 \text{ month Term})$  37 Remaining Months =  $(\$5153.83 \times 37) = \underline{\$190,691.83}$

Total: \$1,975,879.62



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Abated Rent was not addressed

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**Total: \$1,975,879.62**



# REVISED TERMINATION FEE AMOUNT (30% OF ORIGINAL AMOUNT)

June 28, 2017

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

RE: Notice – Acceleration Option Fee – [REDACTED]  
[REDACTED] Bellevue, WA.

Dear Bob,

We are in receipt of the letter from you, and [REDACTED] dated June 12, 2017, which exercised the Acceleration Option set forth in the Third Amendment to Lease Agreement, Section 6.

[REDACTED] as successor in interest to [REDACTED] accepts the letter exercising the Acceleration Option and has included the Acceleration Fee calculation along with this correspondence. The Acceleration Fee due to Landlord is calculated as **\$593,952.20**, pursuant to Section 6.2 of the Third Amendment to Lease Agreement.

Should you have any questions regarding this matter, please feel free to contact me at [REDACTED]

Best Regards,





# ADDITIONAL CONSIDERATIONS WHEN NEGOTIATING TERMINATION OPTIONS

1. Language requiring Landlord to give a physical address for delivery of termination notice and fee
2. Procedure requiring Landlord to confirm its receipt and acceptance of Tenant's termination notice and that Tenant has satisfied its obligations to complete the lease termination
3. Confidentiality for a set period of time, such period to be determined by Tenant. [*Example: Tenant's employees are not aware of lease termination*]
4. Notice and right-to-cure period if payment of the termination fee is not received by Landlord or if a default occurs



# LEASE PROVISION #2

- I. Tenant's Termination Option
- II. **Tenant's Right of First Refusal**
- III. Tenant's Expansion Option (Absent a Third-Party Trigger of ROFR)
- IV. Restoration of Premises



# TENANT'S RIGHT OF FIRST REFUSAL

- Applicable to Tenant leasing in multi-tenant office building
- Triggered by third-party tenant
- Tenant desires to lease ROFR space on a **coterminous** basis in the event third-party's lease term is longer than Tenant's remaining term, avoiding the scenario of Tenant's having space that expires after its initial lease term.
- If third-party tenant's term is shorter than Tenant's remaining term, incorporate language that Tenant has the right to either **(i) accept ROFR space with the same lease term as the third-party tenant's term** or **(ii) convert term of ROFR space to be coterminous with Tenant's term.**
- TI allowance, rent abatement, and other concessions offered by Landlord are adjusted based on relative length of term.
- Tenant's control is extensive in earlier portion of its lease term and diminishes over time. May not be applicable during last two years of Tenant's lease term.



# TENANT'S RIGHT OF FIRST REFUSAL

## Example:

- 100,000 RSF Tenant in 150,000 RSF building for 10 year term
- Throughout the term (ongoing), any space that is currently vacant or becomes vacant, is subject to ROFR
  1. Years 1 – 2: Terms for ROFR space are identical to base lease (coterminous term, rental rates, and proportionate concessions; smaller tenant may not command same economics)
  2. Years 3 – 7: If ROFR space is > 25,000 RSF and proposed term is > than Tenant's remaining term, Tenant extends the term on all space so the incremental increase in the total rent payable is equal to proposed total rent payable; if space is < 25,000 RSF, Tenant can lease coterminous at proposed rates and proportionate concessions.
  3. Years 8 – 10: Rights diminish; however, if ROFR space is > 25,000 RSF, Tenant can extend its term to equal the proposed total consideration.



# LEASE PROVISION #3

- I. Tenant's Termination Option
- II. Tenant's Right of First Refusal
- III. **Tenant's Expansion Option (Absent a Third-Party Trigger of ROFR)**
- IV. Restoration of Premises



# TENANT'S EXPANSION OPTION (ABSENT THIRD-PARTY TRIGGER OF ROFR)

Procedures for Tenant's expansion at market economics:

1. Tenant will give written notice to Landlord of its requirement to expand, including the projected size of required space and approximate date of occupancy.
2. Landlord will give written notice of all spaces in the Building that do not have an executed lease encumbering the space at time of Tenant's notice and any spaces of which Landlord is aware that an existing tenant prefers to downsize, sublease, or terminate. Landlord will make commercially reasonable efforts to make available the space(s) which are adjacent to Tenant's Premises, or above and below\* the Premises, to accommodate Tenant's expansion requirement.





# TENANT'S EXPANSION OPTION— ABSENT THIRD-PARTY TRIGGER OF ROFR

3. If Landlord does not have adjacent space available, Tenant will have the option to relocate its Premises to an alternative space in the Building\*. If there is no suitable option, Tenant may elect to relocate to another building that is owned or controlled by Landlord or require that Landlord construct a build-to-suit (with the yield and land basis defined)\*. If no suitable option, Tenant may terminate this Lease.
4. The parties will tour the spaces as designated by Tenant, and Tenant will notify Landlord of the space in which Tenant has an interest. Landlord will provide architectural services to assist in determining suitability of such space at no additional cost to Tenant.
5. If Tenant's notice is during years 1 and 2, the economic terms will be identical to those of the initial lease. After year 2, the economic terms will be at the then-market rates and conditions.



# LEASE PROVISION #4

- I. Tenant's Termination Option
- II. Tenant's Right of First Refusal
- III. Tenant's Expansion Option (Absent a Third-Party Trigger of ROFR)
- IV. **Restoration of Premises**



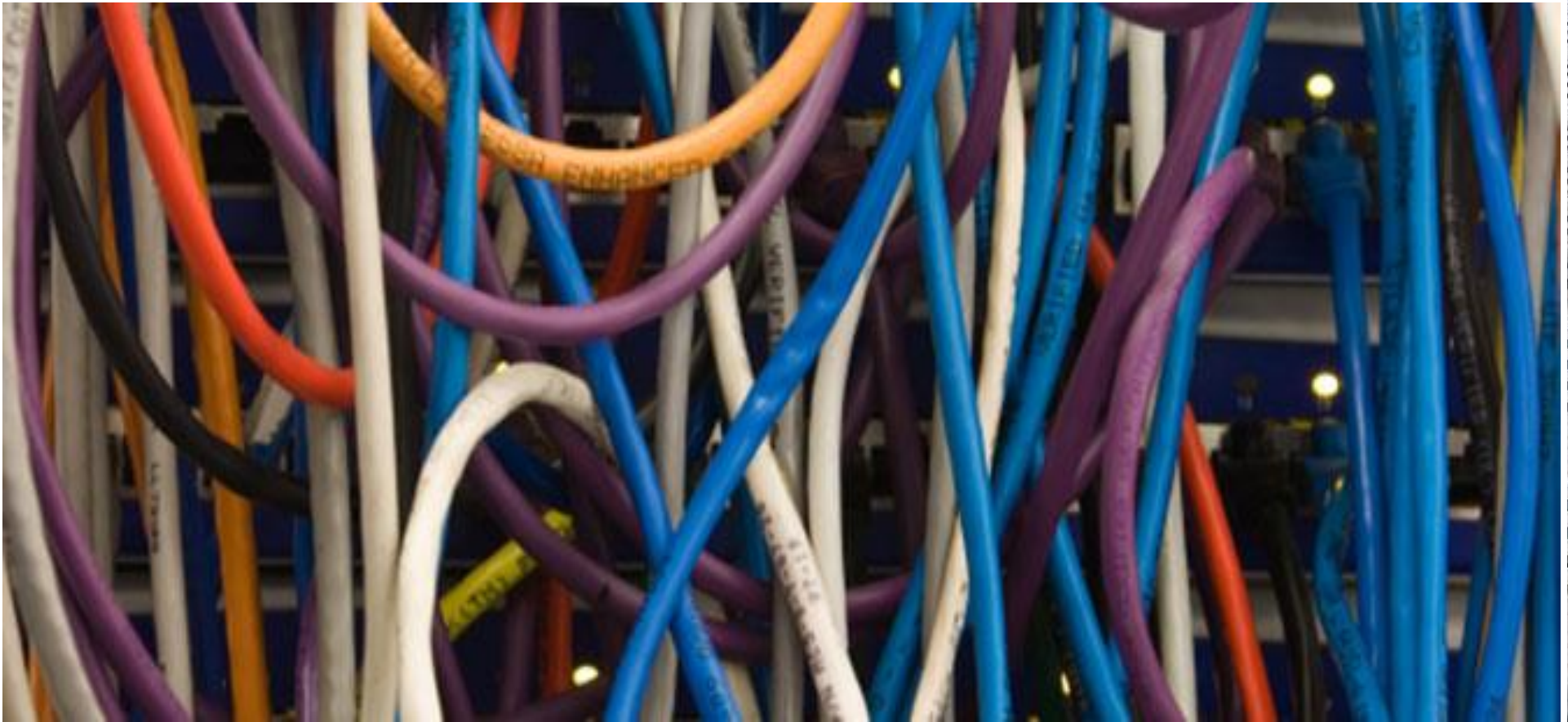
# RESTORATION OF PREMISES

- Address restoration to avoid unexpected costs
- Low-voltage cabling and other non-standard electrical
- Post-commencement alterations
- Timing of work: Tenant may need to factor in time for restoration work prior to termination of lease.



# RESTORATION OF PREMISES

- Low-voltage cabling



# RESTORATION OF PREMISES

## **Tenant's Language:**

At the expiration of the lease term, Tenant shall have no obligation to restore or remove any alternations, additions, or improvements, including cabling.

## **Landlord's Language:**

If Tenant elects to install some unique, non-standard building improvements, Landlord will have the right to notify Tenant when the final construction drawings are submitted for approval that it **may** require Tenant to remove such improvements upon expiration or termination of the Lease.





# RESTORATION OF PREMISES

## Landlord's Alternative Language:

Prior to Lease expiration, Landlord will provide notice that Tenant **may** be required to remove non-building standard alterations, including cabling (collectively referred to as "Required Removables"). Tenant shall have an obligation to remove the Required Removables and shall repair damage caused by the installation or removal of the Required Removables. If Tenant fails to perform its obligation in a timely manner, Landlord may perform such work at Tenant's expense.

Tenant may request that Landlord advise Tenant whether a proposed alteration is a Required Removable. Landlord shall advise Tenant on its determination within ten (10) days.





# RESTORATION OF PREMISES

## Tenant's Considerations:

- Early clarification of “Required Removables”
- Timing of Landlord’s determination
- Opportunity to work with Landlord to substitute a different improvement
- Resolution procedure if parties are unable to agree
- Factor time required for removal of improvements into lease commencement date at new location
- Try to negotiate a grace period (30-60 days) for removal of improvements in order to avoid triggering “hold-over” provision
- If necessary, negotiate a short-term extension with Landlord at current rental rate to avoid “hold-over”



# RELEVANT ECONOMIC INDICATORS

- Market Conditions and Trends
- Development Trends
- Construction Costs
- Job Growth & Unemployment Rates
- Labor Availability
- Housing Affordability, Supply and Trends

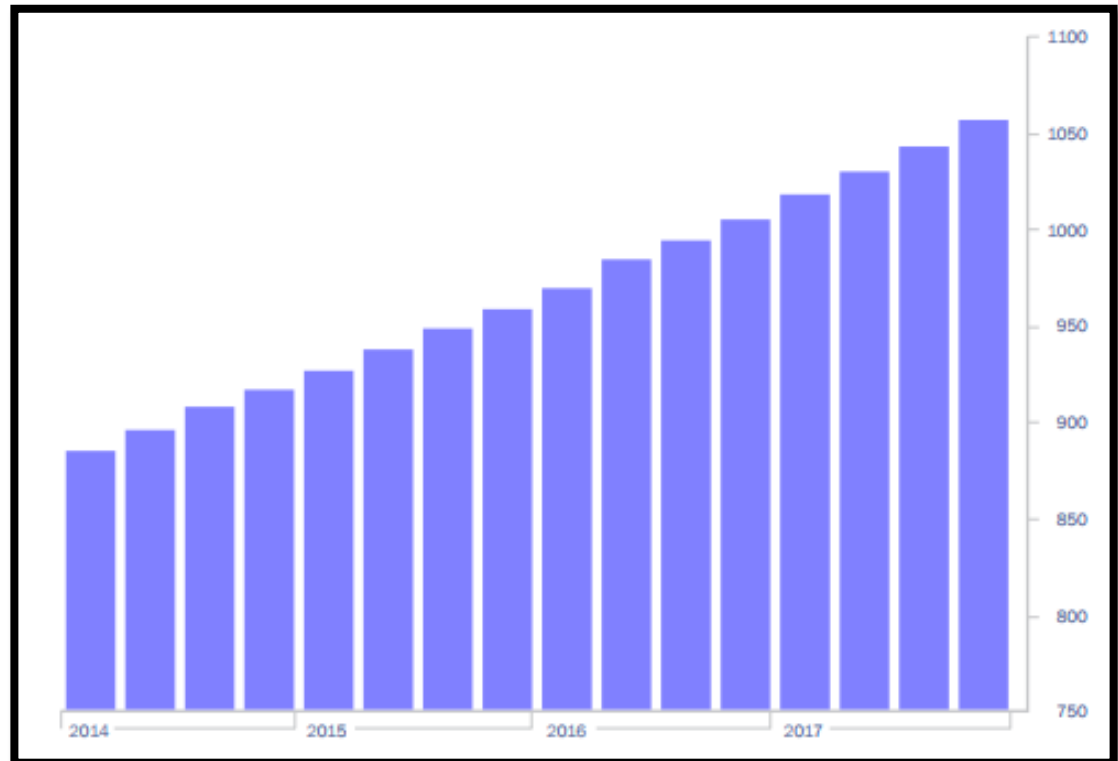


# U. S. CONSTRUCTION COSTS



Quarter	Index	$\Delta\%$
4th Quarter 2017	1058	1.34
3rd Quarter 2017	1044	1.26
2nd Quarter 2017	1031	1.18
1st Quarter 2017	1019	1.29

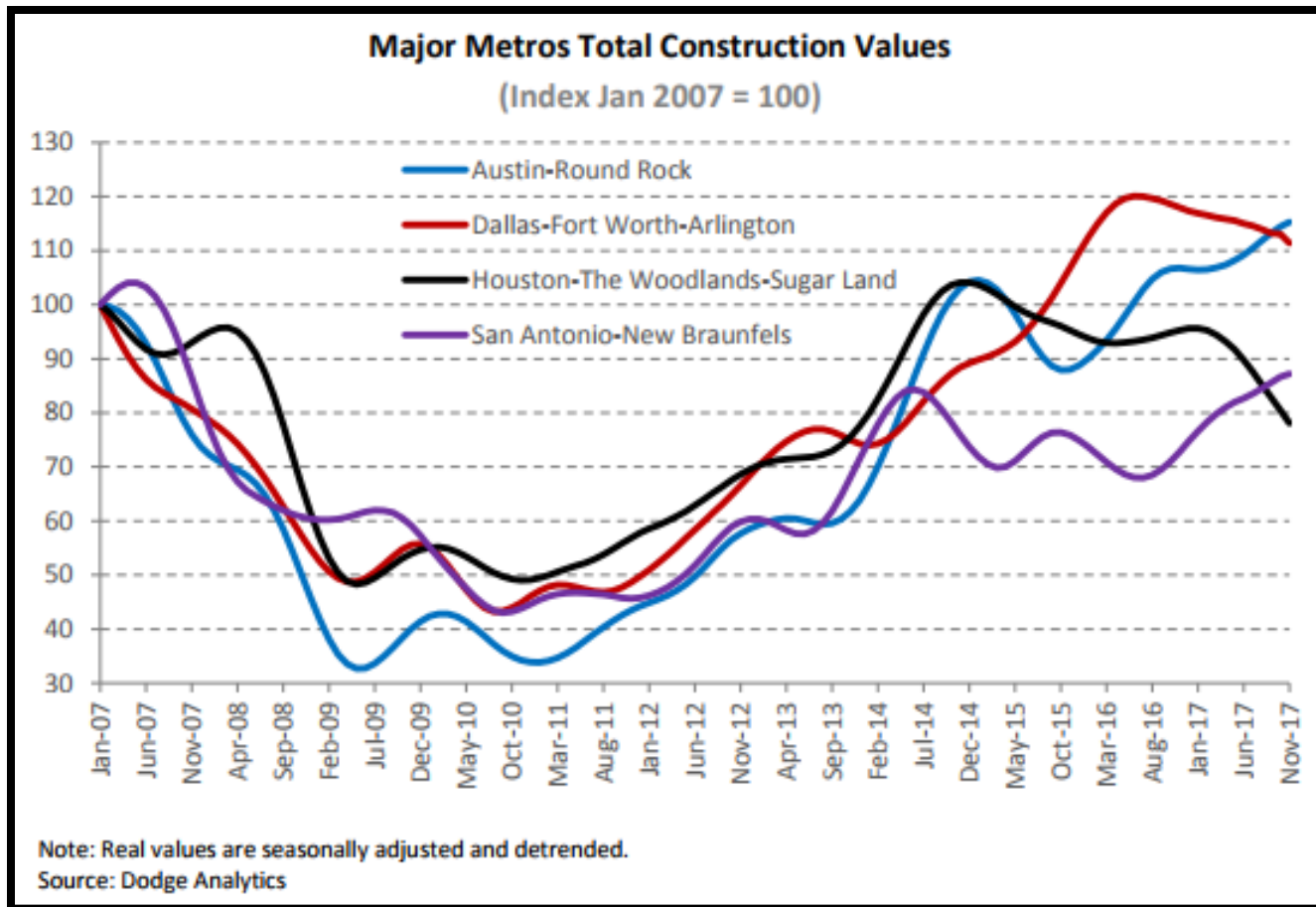
Year	Average Index	$\Delta\%$
2017	1038	5.0
2016	989	4.7
2015	943	4.5
2014	902	4.4
2013	864	4.1
2012	830	2.1
2011	812	1.6
2010	799	-4.0
2009	832	-8.4
2008	908	6.3
2007	854	7.7
2006	793	10.6
2005	717	9.5



**Turner**



# TEXAS CONSTRUCTION COSTS

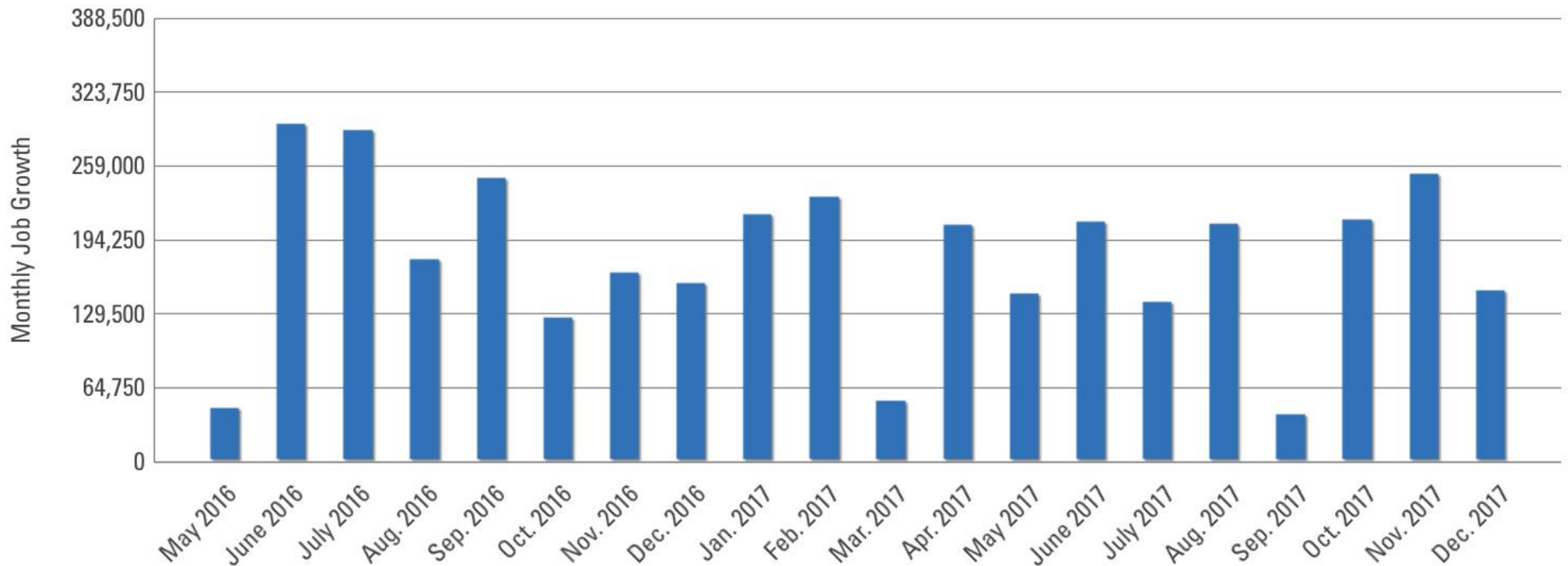


# 87 CONSECUTIVE MONTHS OF GROWTH

UNITED STATES

**Nonfarm Job Growth** (seasonally adjusted, over-the-month change) **↓ 148,000**

Total Nonfarm Employment: **146,445,000** 2018 Forecasted Annual Growth: **2,110,000**

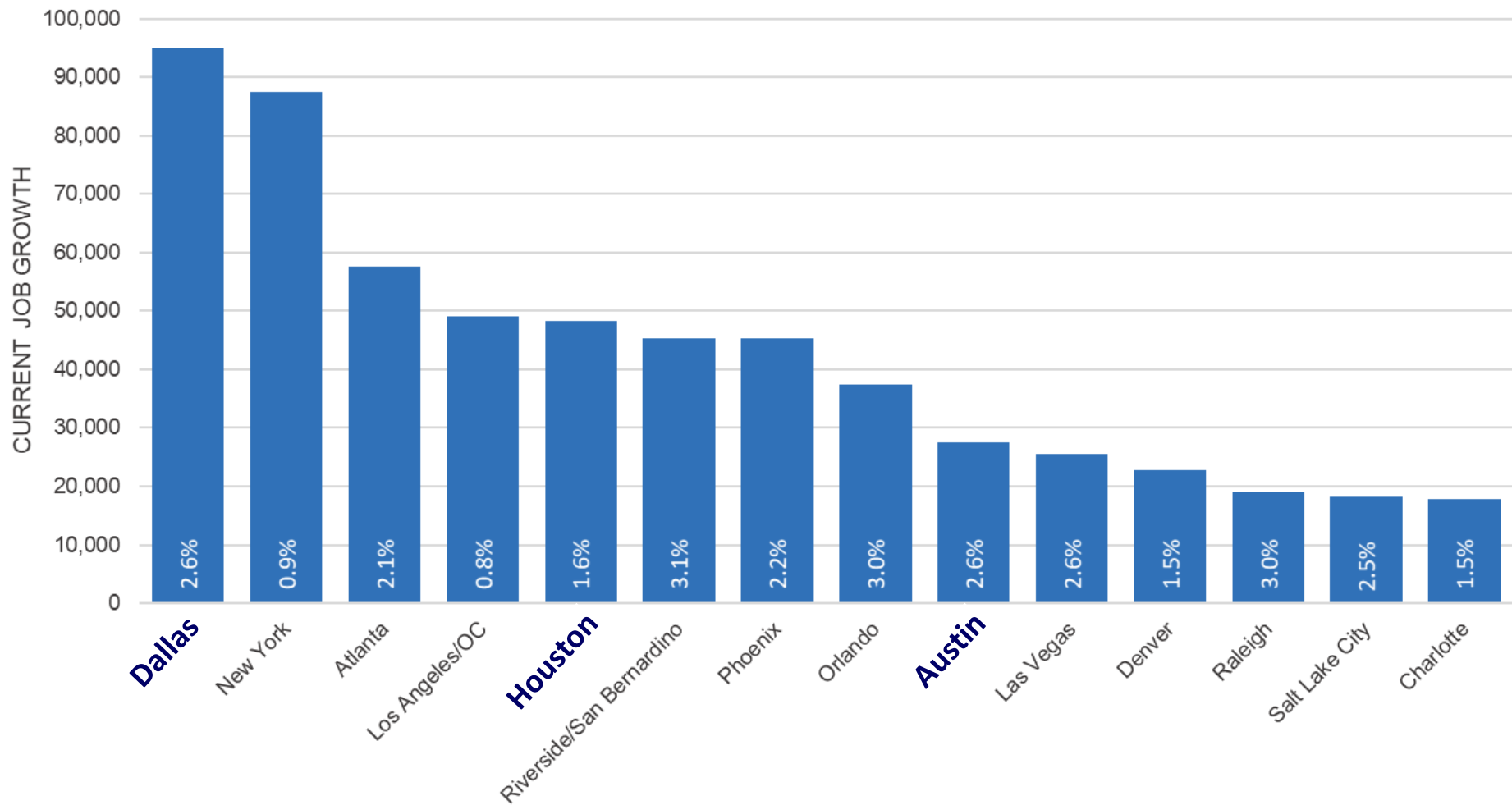


Source: Bureau of Labor Statistics, Moody's Analytics; Zonda by Meyers Research. Data as of January 5, 2018.

# JOB GROWTH & YOY % CHANGE

## Non-Farm Payroll

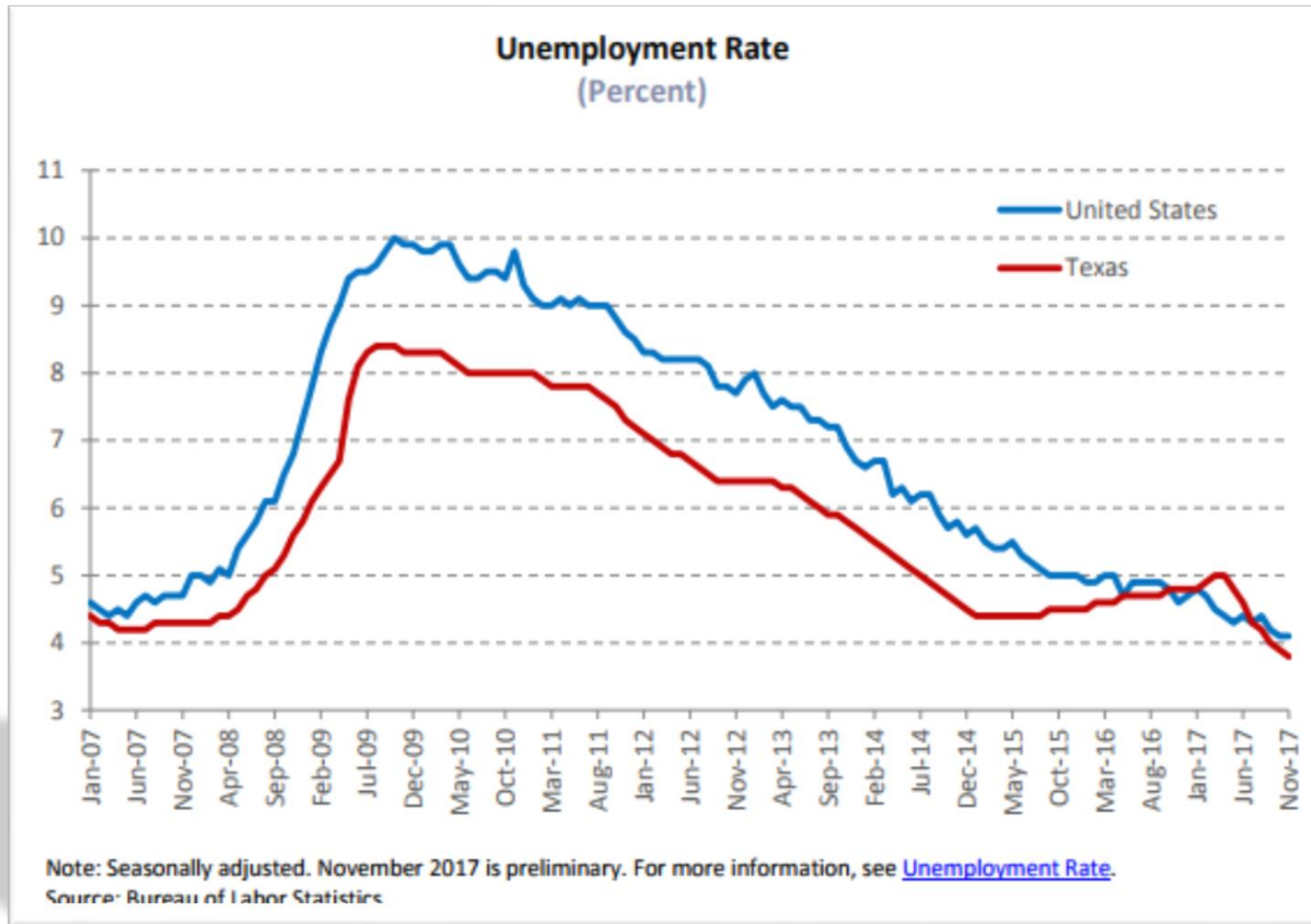
Absolute and YOY percentage change



Source: Bureau of Economic Analysis, Moody's Analytics; Zonda by Meyers Research



# TEXAS UNEMPLOYMENT BELOW 4%



# METRO AUSTIN POPULATION SURGE 1995 - 2016

1995	1,031,557	4.311%	42,632
1996	1,073,037	4.021%	41,480
1997	1,111,264	3.563%	38,227
1998	1,155,579	3.988%	44,315
1999	1,205,898	4.354%	50,319
2000	1,249,763	3.638%	43,865
2001	1,321,316	5.725%	71,553
2002	1,347,822	2.006%	26,506
2003	1,376,030	2.093%	28,208
2004	1,410,058	2.473%	34,028
2005	1,453,358	3.071%	43,300

2006	1,515,485	4.275%	62,127
2007	1,577,856	4.116%	62,371
2008	1,633,870	3.55%	56,014
2009	1,682,338	2.967%	48,468
2010	1,716,289	2.018%	33,951
2011	1,780,819	3.760%	64,530
2012	1,834,319	3.004%	53,500
2013	1,882,856	2.646%	48,537
2014	1,941,389	3.109%	58,533
2015	1,998,104	2.921%	56,715
2016	2,056,405	2.918%	58,301



# 24-44 HEADING TO ORLANDO, DENVER, AND AUSTIN

## Population Increase 2010-2016

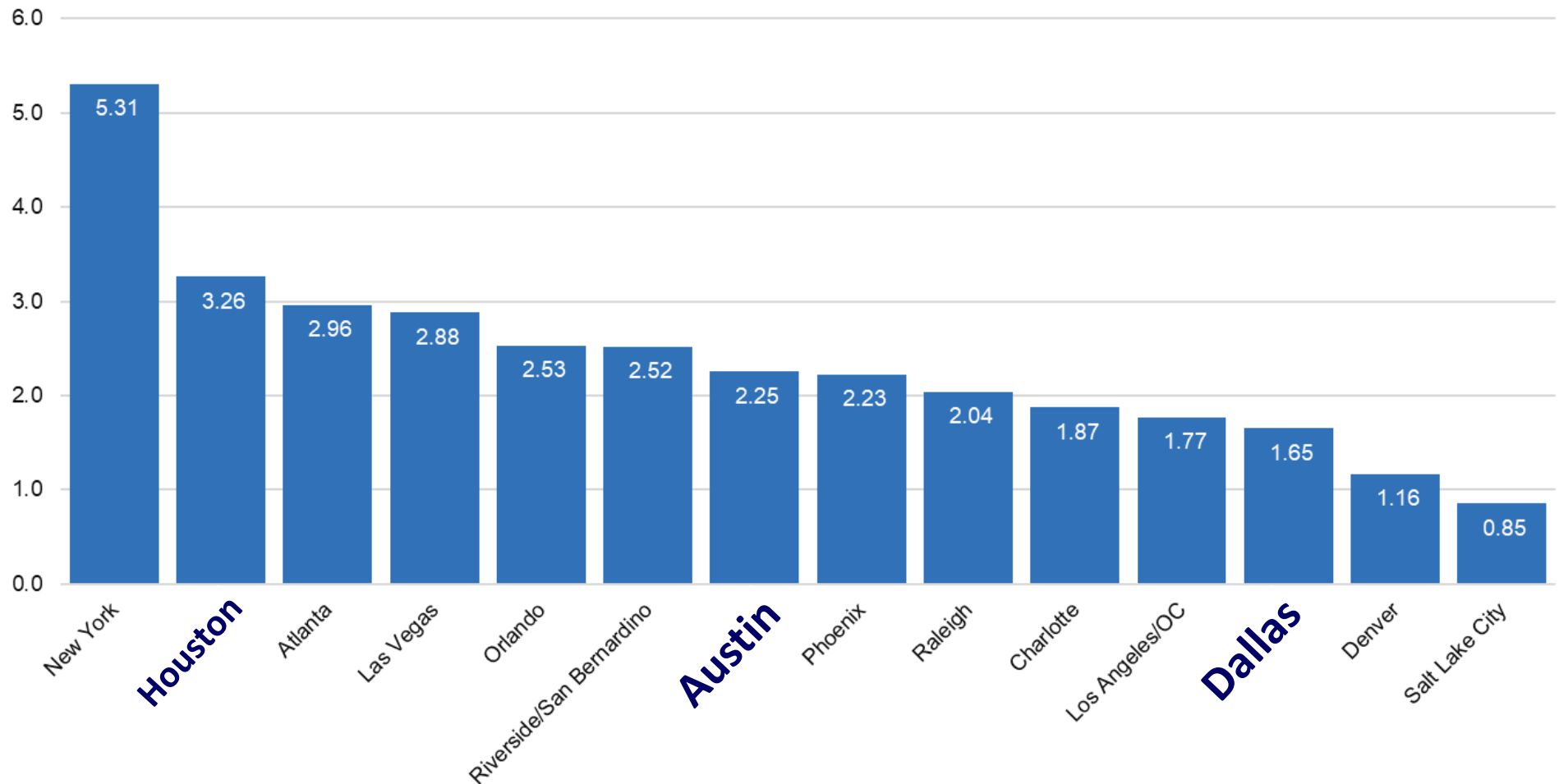
25-44 Years Old

MSA	County	% Increase
Orlando	Osceola County, FL	28%
Denver	Denver County, CA	24%
<b>Austin</b>	<b>Travis County, TX</b>	<b>23%</b>
Washington, DC	District of Columbia, DC	22%
Orlando	Orange County, FL	18%
<b>Austin</b>	<b>Williamson County, TX</b>	<b>18%</b>
<b>Houston</b>	<b>Montgomery County, TX</b>	<b>16%</b>
Seattle	King County, WA	14%
San Francisco	Alameda County, CA	13%
Tampa	Hillsborough County, FL	13%
San Francisco	San Francisco County, CA	13%
<b>Houston</b>	<b>Harris County, TX</b>	<b>11%</b>
Charlotte	Mecklenburg County, NC	11%
Salt Lake City	Salt Lake County, UT	11%
New York	Kings County, NY	10%

Source: U.S. Census; Meyers Research

# LOW HOUSING SUPPLY

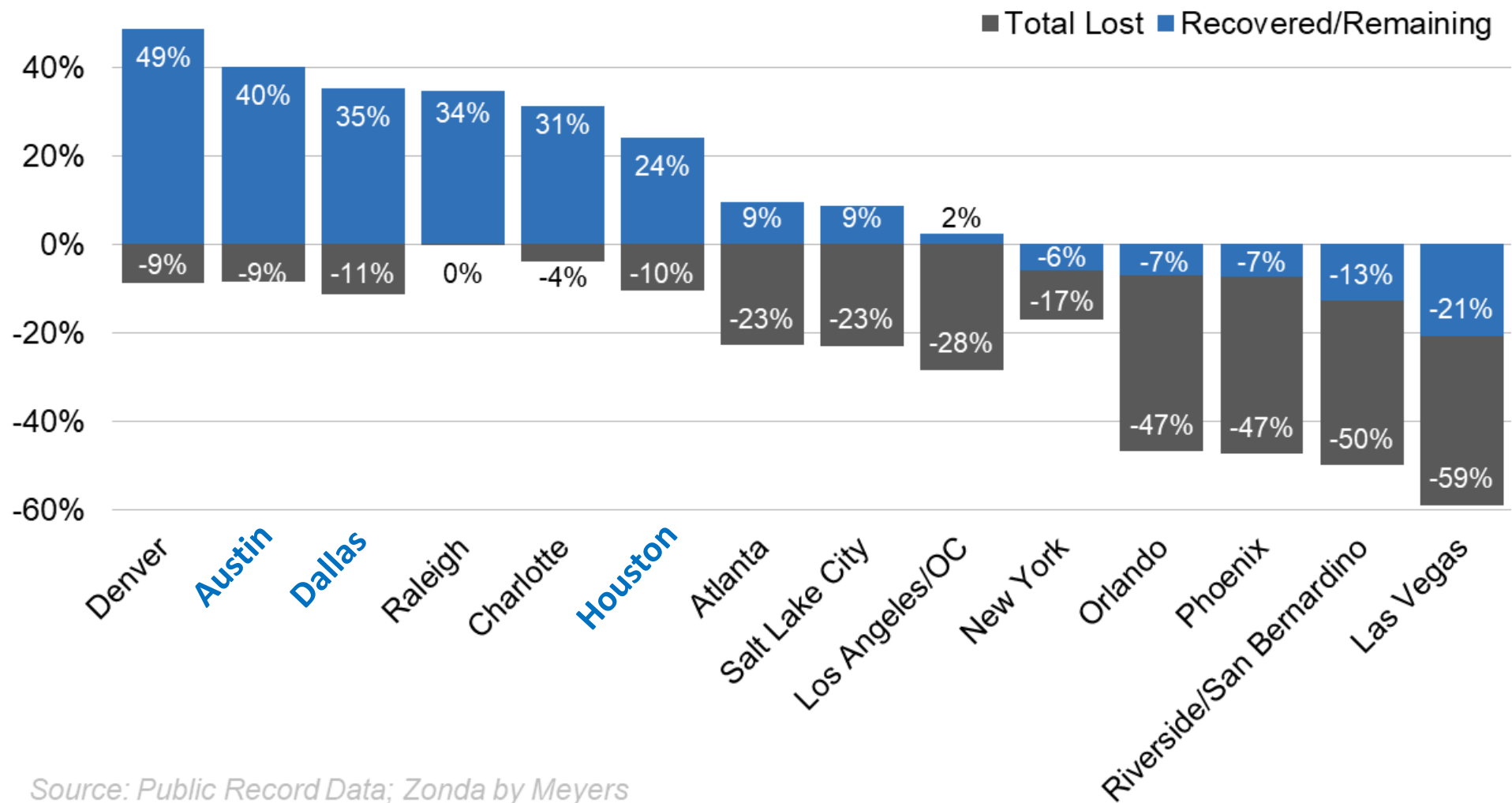
## Months of Supply by MSA



Source: Zillow; Public Record Data; Zonda by Meyers Research

# PRICES IN MANY TOP MARKETS HAVE EXCEEDED THE PREVIOUS PEAK

## Detached Resale Median Price Recovery from Peak



Source: Public Record Data; Zonda by Meyers

# NATIONALLY, WAGES GREW 10%, WHILE HOME PRICES ROSE 40%

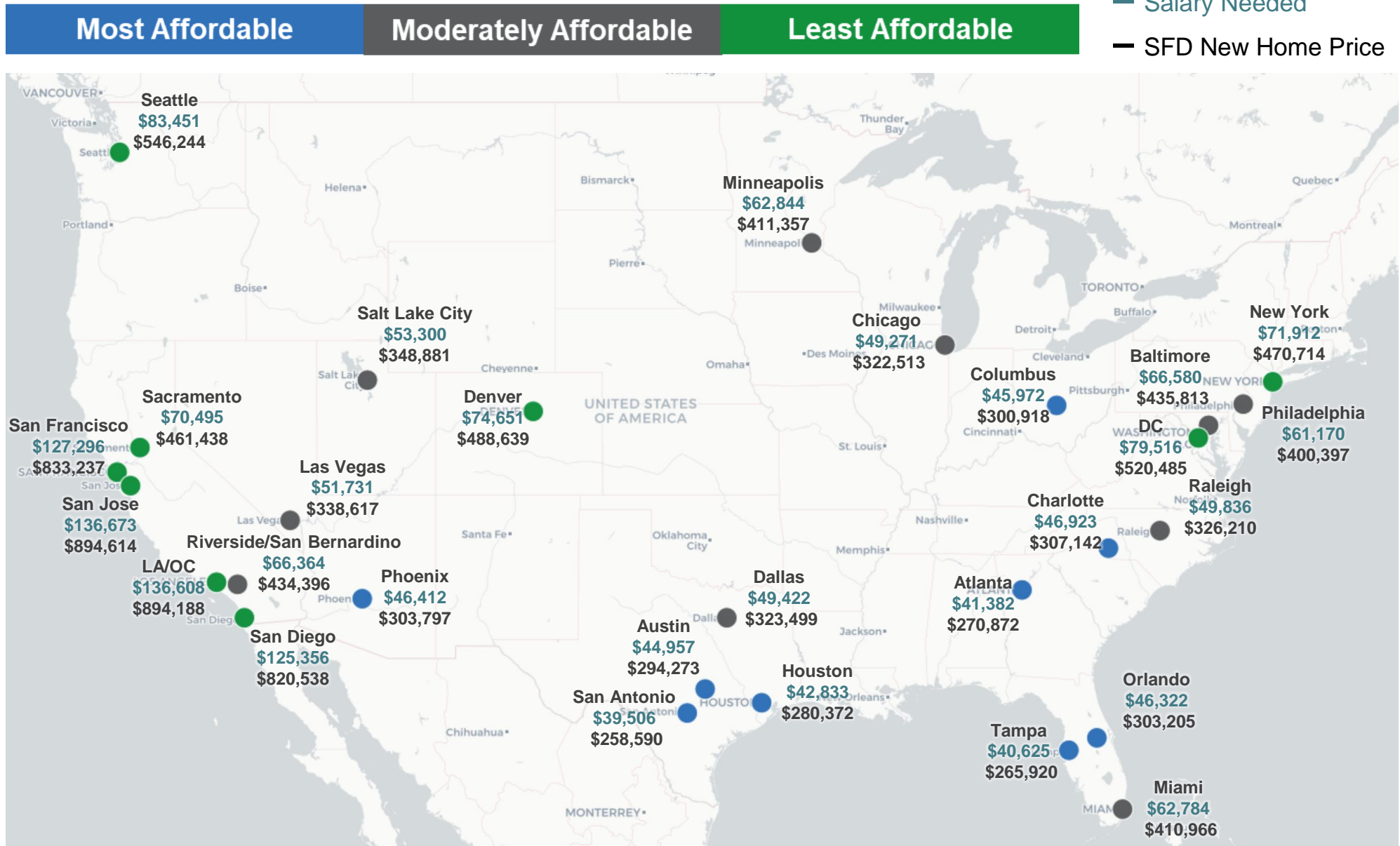
## Wage and Home Price Increase from 2011-2016

Area	Wage	SF New Home Price	SF Existing Home Price
San Francisco	17%	73%	36%
Seattle	12%	67%	26%
Salt Lake City	12%	29%	31%
Denver	11%	47%	42%
Chicago	11%	30%	20%
San Diego	10%	61%	35%
United States	10%	37%	42%
Orange County	10%	41%	33%
<b>Dallas</b>	<b>9%</b>	<b>49%</b>	<b>37%</b>
Charlotte	9%	44%	29%
Tampa	8%	34%	83%
LA County	8%	88%	40%
<b>Austin</b>	<b>7%</b>	<b>38%</b>	<b>37%</b>
Riverside/San Bernardino	7%	45%	62%
Sacramento	6%	61%	52%
Phoenix	6%	47%	71%
Las Vegas	5%	62%	80%

Source: BLS; Public Record Data, Meyers Research



# HOUSING IN TEXAS IS AFFORDABLE



Please call or email us if you have any questions.

CANDACE BAGGETT

713-739-7777

cbaggett@thecalibregroup.com

KANE DOSSETT

214-365-2002

kane@partnersnational.com