

FOOD AND BEVERAGE SERVICE AGREEMENT

BY AND BETWEEN CITY OF WAITE PARK AND SOUTHERN HOSPITALITY CONCESSIONS, INC.

THIS AMPHITHEATER FOOD AND BEVERAGE SERVICE AGREEMENT (this “**Agreement**”) is made and entered into as of this ____ day of _____, 2021, by and between the **CITY OF WAITE PARK**, a municipal corporation under the laws of the State of Minnesota (hereinafter the “**City**” or “**Owner**”) and **SOUTHERN HOSPITALITY CONCESSIONS, LLC**, a limited liability company organized under the laws of the State of Delaware (hereinafter the “**Concessionaire**”)(collectively the “**Parties**”).

RECITALS

- A. WHEREAS, the City is a Statutory City organized under Minnesota Statute Chapter 412, with the authority to provide for the economic development and general welfare of the City, in accordance with statutory authority, including the ability to enter contracts; and
- B. WHEREAS, the City is in the final stages of constructing The Ledge, Waite Park Amphitheater, (“The Ledge”), on City-owned real property located at 1700 Parkway Drive, Waite Park, MN 56387 (the “Property”); and
- C. WHEREAS, pursuant to 2018 Laws of Minnesota, Chapter 214, Art. 1, Section 21, Subdivision 30, the City was awarded a grant from the State of Minnesota in the amount of \$5 million (the “State Grant”) for the purpose of redeveloping a former quarry site on the Property as a regional park, including the construction, establishment and equipment of The Ledge amphitheater thereon (the “Project”), as set forth in that certain Grant Agreement – Construction Grant for the Waite Park Amphitheater – Former Quarry Redevelopment Project, SPAP 18-0025-P-FY18, dated May 30, 2018 (the “State Grant Agreement”); and
- D. WHEREAS, under the provisions of Minnesota Statutes, Sections 471.15 to 471.191, the City is authorized to redevelop the Property as a regional park and construct an amphitheater thereon, and to thereafter expend funds for the operation and maintenance of the regional park and amphitheater and the operation of the Governmental Program (as defined in the State Grant Agreement) as a part of its program of public recreation, and to directly operate such program; and
- E. WHEREAS, the City entered into that certain Amphitheater Use Agreement with New West Presentations, Inc. and Mammoth, Inc. dated December 12, 2019, for the scheduling, operation, and production of music and entertainment events by traveling artists (“National Events”) at The Ledge (the “Operator Agreement”), including providing Concession Services (as defined below) during National Events; and

- F. WHEREAS, the City will independently schedule government, community, and private events (“Local Events” and “Private Events”) as described in the Operator Agreement and defined below, and operate the Amphitheater for Local and Private Events; and
- G. WHEREAS, Pursuant to Minnesota Statutes, Section 412.221, subd. 2, and 2018 Laws of Minnesota, Chapter 214, Art. 1, Section 21, Subdivision 30, the City is authorized to enter into this Agreement for the operation of Food and Beverage Services during Local Events in furtherance of the Governmental Program; and
- H. WHEREAS, the Concessionaire has substantial experience and expertise in managing, operating, and providing concession operations to similarly sized outdoor entertainment venues and catering to private events of various sizes; and
- I. WHEREAS, the City has determined the Concessionaire possesses the personnel and resources to assist the City in carrying out the Governmental Program (as defined below) by managing, operating, and providing all Food and Beverage Services at the Amphitheater during Local and Private Events, in accordance with the State Grant Agreement (as defined below); and
- J. WHEREAS, the City will be required, as a condition of accepting the State Grant (as defined below), to carry out the Governmental Program (as defined below) by continuing to use the Property as a regional park and operate the Amphitheater thereon for the benefit of the public.

In consideration of the terms and conditions of this Agreement, the City and Concessionaire agree as follows:

ARTICLE ONE
Defined Terms

As used in this Agreement, the following terms shall have the specific meanings set forth in the Operator Agreement, as defined herein, unless otherwise indicated below:

1.1 “Agreement” shall mean this Food and Beverage Service Agreement by and between the City and the Concessionaire, as the same may be amended, modified or supplemented from time to time.

1.2 “Catered Event” shall mean any event at the Amphitheater where food and beverage, including alcoholic beverages, are provided to a private group during Local and Private Events.

1.3 “Catering Gross Revenues” shall mean all revenues of every kind and description arising from or relating to the operation, management, and provision of Catering Operations.

1.4 “Catering Operations” shall mean the exercise and operation of Catering Rights at the Amphitheater.

1.5 “Catering Rights” shall mean the right to manage and conduct catering and banquet sales and services at the Amphitheater during Local and Private Events, including the right to manage the subcontracting of catering and banquet services to licensed third parties.

1.6 “Concession Gross Revenues” shall mean all revenues of every kind and description arising from or relating to the operation, management, and provision of Concession Operations.

1.7 “Concession Operations” shall mean the exercise and operation of Concession Rights at the Amphitheater.

1.8 “Concession Advertising Rights” shall mean, collectively, all advertising and promotional activity, signage, designations, messages and displays of every kind and nature, whether now existing or developed in the future, in connection with the operation of Food and Beverage Services during non-National Events, except as provided below, including permanent, non-permanent, and transitory signage, or advertising displayed on permanent or non-permanent advertising panels or on structures, fixtures, or equipment (such as canopy advertising); advertising on or in schedules, admission tickets; all other print and display advertising; advertising display items worn or carried by Concessionaires or personnel engaged in the operation of any non-National Event; logo, slogan, or other forms of advertising affixed to or included with cups or other Concession-connected items; advertising of Concessions; and other Concession promotional or premium items. Concession Advertising Rights shall not include Pouring Rights or the ability to advertise any beverage wholesaler or manufacturer other than in coordination with Bernick’s and in accordance with the Pouring Rights Agreement.

1.9 “Concession Rights” shall mean the right to sell, display, distribute and store Concessions at the Amphitheater during Local and Private Events as requested by the City.

1.10 “Concession Service Areas” include all areas, permanent and temporary, from which food and beverages are sold to the public.

1.11 “Concessions” shall mean all food and beverages, including alcoholic beverages, novelties and merchandise, or other such products sold to the public by the Concessionaire at the Amphitheater.

1.12 “Concessionaire Expenses” shall mean all ordinary and necessary business expenses incurred by the Concessionaire with respect to the operation, management and provision of Food and Beverage Services at the Amphitheater, particularly with respect to the performance of the Concessionaire’s duties hereunder, including but not limited to the following:

- (a) all compensation, salaries, benefits and payroll taxes of personnel hired or retained by or on behalf of the Concessionaire to carry out the Concessionaire’s responsibilities hereunder;

(b) all out of pocket expenditures and overhead and administrative costs incurred by the Concessionaire in connection with its responsibilities hereunder;

(c) all federal, state and local taxes on the Concessionaire's operations, including any sales taxes and liquor taxes payable with respect to Food and Beverage Services, or by the Concessionaire by Law or under this Agreement; Real or Personal Property Taxes, if any, required to be paid by the Concessionaire as provided by Section 7.7 hereof;

(d) all expenses for obtaining, maintaining, and causing to be maintained all necessary Permits for the operation of Food and Beverage Services at the Amphitheater;

(e) all expenses for obtaining and maintaining the Concessionaire's Property;

(f) sales and use taxes to the extent not already included in any of the categories above;

(g) amortization and depreciation of the Concessionaire's Property and of any repairs, replacements, modifications, additions, or upgrades to any of the systems, equipment, property, and installations comprising the Concessionaire's Property that are in the nature of Capital Improvements;

(h) all costs and expenses incurred to obtain and maintain the liquor licenses referred to in Section 4.8 hereof;

(i) all costs and expenses to maintain the insurance that the Concessionaire is required to maintain under this Agreement; and

(j) the fair market value of goods and services provided to the Concessionaire for the operation of Food and Beverage Services at the Amphitheater that were paid by non-cash exchanges included in the Annual Gross National Events Revenues under clause (f) thereof.

1.13 "Concessionaire Property" means personal property, furniture, furnishings, removable trade fixtures, supplies and equipment paid for by or on behalf of the Concessionaire or from other nonpublic sources contributed on behalf of the Concessionaire and that are not funded by the City, including any repairs, replacements, modifications, additions or upgrade to any of such systems, equipment, property and installations, and all inventory, supplies, working capital, and personal property.

1.14 "Expiration Date" means December 31, 2024.

1.15 "Food and Beverage Service" shall mean the management, operation, and provision of all Catering Operations and Concession Operations, as defined herein.

1.16 “Food Preparation Areas” shall mean the areas of the Ledge, excluding Concession Service Areas, used to store, prepare, or provide other goods for Food and Beverage Services.

1.17 “Local Event” shall mean any event at the Amphitheater that is not a National Event, typically of a civic, community, educational or cultural nature, and sponsored by the City or other governmental, educational or non-profit institution, and which is scheduled in accordance with Section 3.4.1 hereof, except a “Special Community Event” is not a Local Event.

1.18 “Operator Agreement” means that certain agreement by and between the City, New West Presentations (“Operator”), and Mammoth, Inc. (“Scheduling Agent”) entitled “Amphitheater Use Agreement,” in the form consistent with **Exhibit A**.

1.19 “Operator’s Property” shall mean personal property, furniture, furnishings, removable trade fixtures, supplies and equipment paid for by or on behalf of the Operator or from other nonpublic sources contributed on behalf of the Operator and that are not funded by the City, including any repairs, replacements, modifications, additions or upgrade to any of such systems, equipment, property and installations, and all inventory, supplies, working capital, and personal property, including a point of sale (“POS”) system provided by the Operator at its cost.

1.20 “Party” or “Parties” shall mean any or all of the City and the Concessionaire.

1.21 “Pouring Rights Agreement” means the certain agreement by and between the City and Chas A. Bernick, Incorporated entitled “Waite Park Amphitheater “The Ledge” Use Agreement—Pouring Rights,” in the form consistent with **Exhibit B**.

1.22 “Private Event” shall mean an event held at the Amphitheater in which the sponsor of the event has exclusive use of the Amphitheater or a portion thereof for such event and no admissions tickets are charged and the event is not open to the public.

1.23 “Renewal Term” shall have the meaning set forth in Section 2.3 below.

1.24 “Special Community Event” shall mean a City-sponsored community event focused on food and/or beverage samples, tasting, or consumption, limited to four per year.

1.25 “State Grant” means the \$5 million grant awarded to the City pursuant 2018 Laws of Minnesota, Chapter 214, Art. 1, Section 21, Subdivision 30 for the purpose redeveloping a former quarry site on the Property as a regional park and to predesign, design, construct, furnish, and equip a public open-air stage and related facilities, as set forth in the State Grant Agreement.

1.26 “State Grant Agreement” means that certain agreement by and between the City and the State of Minnesota Department of Employment and Economic Development entitled “Grant Agreement – Construction Grant for the Quarry Amphitheater, in the form consistent with **Exhibit C**.

1.27 “Term” shall have the meaning set forth in Section 2.2 below.

ARTICLE TWO
Grant of Rights; Term

2.1 **Grant.**

(a) The City, for and in consideration of the payments and agreements of the Concessionaire contained herein, hereby grants to the Concessionaire and its agents, the exclusive right to occupy and use the Amphitheater for the purpose of providing Food and Beverage Services during Local Events and Private Events, including Concession Advertising Rights, the exclusive Catering Rights and Concession Rights, together with the non-exclusive right to occupy and use the Amphitheater for the purpose of assisting the City in providing Food and Beverage Services during Special Community Events, as requested by the City, for the duration of the Term, subject to the terms, conditions and provisions of this Agreement.

(b) The Concessionaire shall have no rights to use the Amphitheater other than those rights specifically granted in this Agreement. The City does not relinquish the right of access to the Amphitheater; provided, however, that such access by the City shall not unreasonably interfere with the use of the Amphitheater by the Concessionaire or Concessionaire's agents, including approved third-party vendors, pursuant to this Agreement. A reservation by the City of some specific right in this Agreement shall not be construed as granting to the Concessionaire any rights not mentioned or not specifically reserved by the City in this Agreement.

(c) The Concessionaire acknowledges that it will be one among many users of the Amphitheater. The Concessionaire will make reasonable accommodations for other users of the Amphitheater in order to maximize use of the Amphitheater and to realize the purposes of the Act and Governmental Program and consistent with the provisions of Section 3.4 below.

(d) The Concessionaire, having toured the Ledge, hereby represent as of the date of this Agreement that nothing has come to its attention to cause it to believe that the Amphitheater will not be, as of the Commencement Date, in all material respects fit for their intended purposes and reasonably suitable for use hereunder.

2.2 **Term.** The term of this Agreement shall commence on the Effective Date and end on the Expiration Date (the "Term"), unless either; (a) sooner terminated as provided in this Agreement, or (b) renewed as provided in Section 2.3. Except as otherwise provided in this Agreement, termination of this Agreement prior to the Expiration Date requires the agreement of the City and the Concessionaire.

2.3 **Renewal.** This Agreement may be renewed for up to three successive five year term(s) (each a "Renewal Term") and the Expiration Date shall be adjusted accordingly for the Renewal Term(s), upon the Concessionaire making written application for such a renewal term to the City no later than 180 days in advance of the Expiration Date, and provided that the City determines, in its sole discretion pursuant to Article Eight herein, that (1) the Concessionaire has the means and resources to and will continue to manage and provide Food and Beverage

Services at the Amphitheater in furtherance of the Governmental Program; and (2) the City wants the Concessionaire to continue to manage and provide Food and Beverage Services at the Amphitheater in furtherance of the Governmental Program. The City shall notify the Concessionaire in writing of its approval or denial of an application for a renewal term no later than 90 days in advance of the Expiration Date. In the event that (a) the Concessionaire fails to deliver to the City such renewal notice within such 180-day period; or (b) City does not respond to such timely renewal notice 90 days prior to the Expiration Date, then this Agreement shall be deemed terminated. Nothing herein shall require the City to renew this Agreement beyond the initial term; the City may, at its sole option and discretion, allow this Agreement to expire at the end of the Term or any Renewal Term as applicable, and thereafter directly manage and operate Food and Beverage Services at the Amphitheater, or contract with some other entity or entities to do so, as a part of the Governmental Program. Unless agreed otherwise by the Parties, the Agreement shall terminate on the Expiration Date.

ARTICLE THREE

Amphitheater Ownership and Use

3.1 Ownership. The City shall own or control the Amphitheater and the Properties.

3.2 Concessionaire's Permitted Use. The Concessionaire shall have the right to manage, operate, and provide Food and Beverage Services during Local and Private Events, and during Special Community Events by request of the City. In providing Food and Beverage Services for such Events, the Concessionaire shall use reasonable efforts consistent with industry standards to not allow any activity that is unlawful, creates any nuisance or fire hazard, or will damage or otherwise have a deleterious effect upon the Amphitheater or the reputation of the Amphitheater or the City. No part of the Amphitheater will be used in a manner which is a restricted use as set forth in **Exhibit D**. The Concessionaire shall use the Amphitheater in compliance with all applicable Laws.

3.3 Use and Scheduling. The City shall have use of the Amphitheater at all times when the Amphitheater is not being used by the Operator for National Events pursuant to the Operator Agreement. The City shall be responsible for scheduling and permitting all Local, Private, and Special Community Events. The Concessionaire shall coordinate and cooperate with the City in providing Food and Beverage Services to all Local, Private, and Special Community Events, as requested by the organizer or City, either by directly providing the Food and Beverage Services or by subcontracting the Catering Services in accordance with Article 10.

3.4 City Reserved Rights.

3.4.1 Operator Agreement. The City reserves all rights so reserved in the Operator Agreement and listed in this section.

3.4.2 Pouring Rights. The City shall have the right to market and enter into a contract for the sale of the Pouring Rights to the Amphitheater, subject to the Commissioner's written approval thereof. Thereafter, the Concessionaire shall honor the

terms of any such contract for the sale of the Pouring Rights and shall observe the sponsor's rights thereunder in all respects, including in the provision of all Food and Beverage Services and all Advertising. The Concessionaire will coordinate and cooperate with the sponsor of the Pouring Rights in the ordering, purchasing, and selling of all covered beverages, requesting of new or alternative products, the storage of products at the Ledge, and the upkeep of all sponsor-provided equipment.

3.4.3 Capital Improvements. The City reserves for itself the right to make Capital Improvements to the Properties in its sole discretion. The City may allow the Concessionaire to make Capital Improvements to the Properties at the Concessionaire's Expense pursuant to the procedure set forth in Section 12.2.

ARTICLE FOUR

Operations and Management

4.1 City Responsibilities. The City shall be responsible for the City Responsibilities listed in Section 4.1 of the Operator Agreement.

4.2 Concessionaire's Responsibilities. The Concessionaire shall take all actions reasonably necessary or desirable to assist the City in the management, operation, and provision of Food and Beverage Services, at the Amphitheater, in accordance with all Laws and the terms and conditions of this Agreement. The Concessionaire shall provide, perform, and take, or cause to be provided, performed, or taken, in coordination with the Facility Manager, such services and actions, as may be reasonably necessary or advisable to successfully, operate, manage, and provide Food and Beverage Services during Local, Private, and Special Community Events. Except as otherwise provided in this Agreement, the Concessionaire shall be solely responsible for all costs associated with the management, operation, and provision of Food and Beverage Services at the Amphitheater consistent with the Governmental Program, including without limitation all Concessionaire Expenses. The City shall not be obligated to pay for any expenses associated with the management, operation, or provision of Food and Beverage Services at the Amphitheater unless specifically set forth in this Agreement. Without limiting the generality of the foregoing, the Concessionaire's obligations and responsibilities shall include:

- (a) payment of all Concessionaire Expenses;
- (b) collection of all Concessions Gross Revenues and Catering Gross Revenues;
- (c) providing all working capital, inventory, equipment, supplies and personal property, including a point of sale ("POS") system needed for the successful operation of Food and Beverage Services, provided that if any such equipment, supplies or personal property is available from the City, the Concessionaire shall use such equipment pursuant to the City's policies governing the use of such equipment and not incur expenses to purchase or rent the same from a third-party unless the Concessionaire determines, in its discretion, that the equipment, supplies or personal property available from the City is not suitable for providing Food and Beverage Services;

(d) arranging for, coordinating, and supervising any subcontractor or vendor in connection with the management, operation, and provision of Food and Beverage Services;

(e) arranging for personnel reasonably needed to staff and maintain its Foods Service operations, including adequate staffing of Concession Service Areas during all events, and personnel reasonably needed for ID Check, wristbanding, training, and managing the execution of applicable ID check security protocols, and such other personnel necessary for the successful management, operation, and provision of Food and Beverage Services;

(f) arranging for, selling, marketing, and establishing the price of any rates, rentals, fees, or other charges for goods and services related to Food and Beverage Services, including promotional pricing, subject to the approval of the City through the Facility Manager;

(g) ordering, stocking, preparing, paying for all goods and services related to Food and Beverage Services, and maintaining title to said goods;

(h) obtain, maintain or cause to be maintained all necessary Permits for the operation of Food and Beverage Services at the Amphitheater;

(i) developing and maintaining, in cooperation with the Facility Manager, an Annual Maintenance Plan consistent with the Parties' responsibilities under this Agreement, the implementation of which shall keep and maintain the Amphitheater's Concession Service Areas and Food Preparation Areas in good condition and repair and in a safe, clean, attractive, and high-quality manner consistent with and meeting the standards and specifications established by similarly situated venues;

(j) developing, maintaining and implementing among itself and all subcontractors or vendors, a policy for the secure management of cash on the Property and accurate accounting thereof; and

(k) coordinating with the Facility Manager regarding public relations and other promotional programs for the Amphitheater.

4.3 Staffing. The Concessionaire shall employ sufficient persons of sufficient expertise, training, and qualification and solicit or otherwise retain independent contractors as the Concessionaire determines in their sole discretion is necessary to fulfill their respective obligations under this Agreement to safely, effectively, and efficiently manage, operate, and provide all Food and Beverage Services at the Amphitheater in furtherance of the Governmental Program. The Concessionaire shall have sole control over the operation, direction, and supervision of their staff, subject to the terms of this Agreement. The Concessionaire shall provide competent and adequate instruction, training, and supervision of all activities carried out on the Properties, and for ensuring that such personnel have all required licenses, certifications,

or approvals as may be required by Laws. The Concessionaire shall list any vacant or new positions they may have at any time during the initial term of this Agreement or any Renewal Term with the State Workforce Centers as required by Minnesota Statutes, Section 116L.66.

4.4 Reimbursement to City. To the extent the Concessionaire fails to timely pay costs and expenses under this Article, and the City pays any such costs on behalf of the Concessionaire, the Concessionaire shall reimburse the City for the same within thirty (30) days of the date the City bills the Concessionaire therefore.

4.5 Environmental. The Concessionaire shall not permit on the Properties and will take precautions against the presence of Hazardous Materials as the result of its use and occupancy of the Properties, except to the extent specifically authorized by Governmental Authorities, any Required Environmental Permit, or pursuant to Environmental Laws from and after the Commencement Date. The Concessionaire and its agents shall comply with applicable Environmental Laws relating to their respective use or occupancy of the Amphitheater.

4.6 Liquor Licenses.

4.6.1 The Concessionaire, with the cooperation of the City, shall itself obtain and maintain all intoxicating liquor licenses that are reasonably required for the Amphitheater and the City shall support any reasonable legislative changes required in order for the Concessionaire to do so. In the event applicable Laws do not allow the Concessionaire to obtain such licenses, the City shall obtain and maintain all intoxicating liquor licenses that are reasonably required for the Amphitheater and permit their use for the benefit of the Concessionaire. In all provision of Food and Beverage Services, the Concessionaire shall comply with the terms of all intoxicating liquor licenses that are reasonably required for the Amphitheater.

4.6.2 The Concessionaire specifically agrees that it will take all steps required by the State of Minnesota to ensure that all persons involved in the sale, use, consumption, or distribution of alcoholic beverages on or about the Amphitheater during Food and Beverage Services operated and provided by the Concessionaire have received the required State of Minnesota training for serving and distributing alcohol. Such training shall include checking proper identification before selling alcohol, not serving to minors, recognizing the signs of excessive consumption, and how to refuse to serve someone. The Concessionaire also agrees to adhere to all Laws relating to or governing the sale, use, consumption or distribution of alcoholic beverages. Any failure or negligence on the part of the Concessionaire to comply with any rules, regulations or training relating to the sale, use, consumption or distribution of alcoholic beverages shall be the exclusive and sole liability of the Concessionaire, and in no way shall any liability be transferred to the City.

4.6.3 The Concessionaire shall be solely responsible for carrying liquor liability (dram shop) coverage regardless of whether Concessionaire obtains the licenses to sell, use, consume, or distribute alcoholic beverages, or the City obtains such licenses. Concessionaire shall carry such liquor liability coverage for the duration of this

Agreement and shall have limits with minimum per occurrence limits of Two Million and No/100 Dollars (\$2,000,000.00) and minimum aggregate limits of Five Million and No/100 Dollars (\$5,000,000.00). These limits may be met with the purchase of an umbrella or excess policy. For example, the foregoing insurance requirements can be satisfied with liquor liability coverage with limits of Two Million and No/100 Dollars (\$2,000,000.00) and an excess liability coverage of Three Million and No/100 Dollars (\$3,000,000.00).

4.7 Advertising. The provisions on Advertising and Advertising Rights in this Agreement shall become effective upon execution of this Agreement. The Concessionaire will have the right to exercise all Concession Advertising Rights. The Concessionaire shall pay all expenses and taxes associated with the exercise of such Advertising Rights and Advertising. The Concessionaire will not exercise Advertising Rights or produce Advertising, except in accordance with this Agreement and the Advertising Standards attached hereto as **Exhibit E**, without the prior written consent of the City.

4.8 Standard of Care. Services provided by the Concessionaire under this Agreement will be conducted in a manner consistent with that level of care and skill ordinarily exercised by members of the food and beverage industry in operating services of similar size in similar locales. The Concessionaire shall be liable to the fullest extent permitted under applicable law, without limitation, for any injuries, loss, or damages proximately caused by Concessionaire's breach of this standard of care. The Concessionaire shall put forth reasonable efforts to complete their duties in a timely manner. The Concessionaire shall not be responsible for delays caused by factors beyond their control or that could not be reasonably foreseen at the time of execution of this Agreement. The Concessionaire shall be responsible for costs, delays or damages arising from unreasonable delays in their performance of their duties.

ARTICLE FIVE

Operating Dates for Food and Beverage Services

5.1 Concession Operating Dates. The Concessionaire agrees to provide Concession Services on all dates as required by the City for Local, Private, and Special Community Events. On such dates, Concessionaire shall open at least a mutually-agreed upon minimum number of Concession Service Areas by the time of the advertised door opening.

5.2 Catering Operating Dates. The Concessionaire agrees to provide Catering Services on all dates as required by the City for Local or Private events, except for those events for which the Concessionaire agrees to waive their exclusive Catering Rights to allow the City or other third-party to provide food and non-alcoholic beverages. Should the Concessionaire waive their exclusive Catering Rights, the Concessionaire must provide the City at least seven (7) business days prior to the Local or Private with written notice of said waiver

ARTICLE SIX

Repair and Maintenance

6.1 Food and Beverage Services Operations and Cleanup. The Concessionaire shall be responsible for conducting setup and cleanup of any used Concession Service Areas and Food Preparation Areas prior to and following every provision of Food and Beverage Services.

6.2 Responsibility for Damage. The Concessionaire shall bear maintenance or repair costs for damage to the Properties caused by acts or omissions of the Concessionaire, its agents, employees, contractors, guests or invitees, ordinary wear and tear excepted.

6.3 Ordinary Maintenance. The City shall be responsible for conducting Ordinary Maintenance and Emergency Repairs on the Amphitheater and the Properties.

ARTICLE SEVEN
Financial Provisions

7.1 Payments by Concessionaire. The Concessionaire shall pay to the City (a) the Concession Operations Fee, (b) the Food Preparation Area Operating Fee, and (c) any other sums and charges expressly required to be paid to the City by the Concessionaire pursuant to the terms of this Agreement.

7.2 Concession Operations Fee and Food Preparation Area Operating Fee.

(a) During the Term and subject to Sections 7.2(c) and 7.2(d), the Concessionaire shall pay a Concession Operations Fee to the City for every Event at which the Concession Service Areas are used to provide Concession Services at the rates found below. The Concession Operations Fee shall be charged based on either (1) the number of ticketed attendees for ticketed events or (2) the number of attendees used to estimate food and beverage needs for non-ticketed events.

Attendance	Operations Fee Per Attendee
0-50	\$0.50
51-250	\$0.75
251-1,000	\$1.00
1,001-2,500	\$1.50
2,501+	\$2.00

(b) During the Term and subject to Sections 7.2(c) and 7.2(d), the Concessionaire shall pay to the City for every Event at which Food and Beverage Services are provided by Concessionaire or by a subcontractor of the Concessionaire a Food Preparation Area Operating Fee of \$.50 per person based on the (1) the number of

ticketed attendees for ticketed events or (2) the number of attendees used to estimate food and beverage needs for non-ticketed events.

(c) The Concession Operations Fee and the Food Preparation Area Operating Fee shall increase annually based on CPI Increases, or, in the alternative, the increase shall be two percent (2%) per year, whichever is less.

(d) The City shall use the Concession Operations Fee and the Food Preparation Area Operating Fee solely for the purpose of reimbursing itself for the Owner's Expenses paid by the City and amounts that the City has advanced under this Agreement because of the Concessionaire's failure to make any payments required for the operation and maintenance of the Amphitheater or the Properties. In the event that the Concession Operations Fee and the Food Preparation Area Operating Fee in any year exceeds the total of (i) the Owner's Expenses in that year and (ii) any unreimbursed Owner's Expenses from previous years, the amount of such excess shall not be paid to the City, or if paid, shall be refunded by the City to Concessionaire at the latest time specified in Section 7.5 herein. In no event shall the Concession Operations Fee and the Food Preparation Area Operating Fee continue to be paid or applied past the expiration of the Term or any Renewal Term.

7.3 Capital Costs Payment.

(a) For each year during the Term, the Concessionaire shall pay into the Capital Expenditure Reserve Fund a sum equivalent to \$0.10 per person for every person served, as calculated under 7.2(b). The Concessionaire shall pay the Capital Costs Payment to the Capital Concessions Expenditure Reserve Fund by the end of each year during the Term and may elect to pay such amount in monthly, quarterly, or annual installments, as the Concessionaire may determine.

(b) The Concessionaire shall, in its judgment and discretion, but only after reasonable consultation with the City, make the final determination as to how to spend the Capital Cost Payments in the Capital Concessions Expenditure Reserve Fund. Such funds are held for the benefit of the Concession Service Areas, Food Preparation Areas, and meeting areas of the Amphitheater. Upon termination or expiration of this Agreement, any balance remaining in the Capital Concessions Expenditure Reserve Fund shall remain the property of the Concessionaire, but shall be transferred to the City and applied to the operating costs of the Project or as otherwise permitted by the State Grant Agreement ("Allowable Payments"). To the extent any portion of such balance remaining in the Capital Expenditure Reserve Fund at termination cannot be applied by the City for Allowable Payments, it shall be transferred to the Concessionaire and remain the property of the Concessionaire.

7.4 Timing of Payments. The Concessionaire shall make or cause to be made all payments to the City pursuant to this Article in two annual installments, the first on or before

July 15 of every year during the Term and the second on or before the date which is the later of (i) fifteen (15) business days after submitting the Annual Financial Report to the City pursuant to Section 8.5.2; or (ii) forty-five (45) days after the conclusion of the final Event at the Amphitheater each year.

7.5 Personal Property Taxes. The Properties are currently exempt from Personal Property Taxes. The City and the Concessionaire currently believe that the Properties, including the use of the Amphitheater as currently contemplated in the Governmental Program, will continue to be exempt from Personal Property Taxes at all times during the Term or any Renewal Term of this Agreement, and shall reasonably cooperate with each other to maintain such exemption. In the event the Properties, or either of them, become subject to any Personal Property Taxes as a result of the use of the Properties authorized in this Agreement, the Concessionaire will pay such Personal Property Taxes subject to the Concessionaire's right to contest, at its expense, any assessment of Personal Property Taxes, and the City shall, at the Concessionaire's expense, reasonably support such contest by the Operator.

7.6 Tax Compliance. The Concessionaire shall be responsible for collecting, accounting for, and remitting any sales taxes, liquor taxes, operating fees or other taxes or fees assessed on catering sales, concession sales, advertising, or other operations and activities conducted by the Concessionaire at the Amphitheater. The City and any other Governmental Authority shall have the right to audit and inspect Concessionaire's records to the extent necessary to insure the Concessionaire's compliance with any tax obligations caused by the Concessionaire's use of the Amphitheater.

7.7 Renegotiation of Payments. Subject to the provisions of Section 8.11(g) and Section 19.19, after the initial year of the Term, either Party may initiate renegotiation of the financial provisions of this Article by providing 90 days' written notice to the other Parties. Thereafter, in the event that the Owner's Expenses exceed the total amount of Concession Operations Fee and the Food Preparation Area Operating Fee by ten percent (10%) or more in any year after the initial year of the Term, the City may initiate renegotiation of the financial provisions of this Article by providing 90 days' written notice to the other Parties. The City may invoke this provision one time every two years following the initial year of the Term. Each Party shall negotiate in good faith following receipt of any Party's notice under this Section 7.9, and any changes to the financial provisions shall be made by amendment subject to Section 19.19.

ARTICLE EIGHT

Governmental Program Management and Oversight

8.1 Initial Report. The Concessionaire shall cooperate with the Operator and Scheduling Agent's provision to the City of an initial program evaluation report summarizing the Operator's and Scheduling Agent's planned use of and activities with respect to the Amphitheater and the Properties in furtherance of the Governmental Program, including all

projected revenues and Concessionaire Expenses for each year of the Term and such other information as may reasonably be requested by the City.

8.2 Annual Budgets. The Concessionaire shall provide the City annual proposed budgets for their provision of Food and Beverage Services in furtherance of the Governmental Program on or before July 1st, preceding any year during the Term or any Renewal Term. The annual proposed budget shall list all projected revenues and Concessionaire Expenses by category, with such detail as the City may reasonably require. The annual proposed budget shall reflect all Food and Beverage Service revenues projected to be received with respect to the Properties, specifically including all revenues to be collected and retained by the Concessionaire pursuant to this Agreement. If the City objects in writing to the proposed annual budget or any part thereof, the Concessionaire shall respond promptly to each such objection and work with the City to resolve any differences in a manner reasonably acceptable to all Parties. A final annual budget for Food and Beverage Services will be submitted by the Concessionaire to the City prior to December 1st each year for the approval of the City's governing body. The Concessionaire shall assume responsibility for the management, operation, and provision of Food and Beverage Services at the Amphitheater as provided in this Agreement and shall not incur expenses in excess of the approved annual budget, except as the approved annual budget may be revised.

8.3 Concession Capital Improvement Plan. After the initial year of the Term, the Concessionaire shall provide to the City annually, together with the Annual Budget required in Section 8.2, a Concession Capital Improvement Plan that identifies for each year remaining in the Term at a minimum (a) the Concession Capital Improvements proposed to be completed, (b) cost estimates for each such proposed Concession Capital Improvement, and (c) a timetable for completion of each such proposed Concession Capital Improvement. If the City objects in writing to the proposed Concession Capital Improvement Plan or any part thereof, the Concessionaire shall respond promptly to each such objection and work with the City to resolve any differences in a manner reasonably acceptable to all Parties. The Concessionaire shall submit a final annual Concession Capital Improvement Plan to the City prior to December 1st each year for the approval of the City's governing body. Thereafter, Concession Capital Improvements shall be made in accordance with Article Twelve hereof.

8.4 Concessionaire Financial Reports.

8.4.1 Event-Specific Reports. Within thirty (30) days after the conclusion of every Event where Food and Beverage Services were provided by the Concessionaire, the Concessionaire shall provide to the City financial statement(s) detailing the financial performance and impact of the Food and Beverage aspects of the Event that includes at least the following information:

- (a) detailed statement of the total amount of Concessionaire Expenses incurred and paid by the Concessionaire related to the Event;

(b) detailed statement of Catering Gross Revenue and Concessions Gross Revenue collected by Concessionaire, or Concessionaire's agents, in connection with or attributable to the Food and Beverage Service at the Event; and

(c) calculation of the net profit or loss generated by the Food and Beverage Services at the Event.

8.4.2 Annual Financial Reports. Within thirty (30) days after the conclusion of the last Event in any year during the Term or any Renewal Term under this Agreement, the Concessionaire shall provide to the City financial statements detailing the financial performance and impact of the provision of Food and Beverage Services for that year that includes at least the following information:

(a) detailed statement of the total amount of Concessionaire Expenses incurred and paid by the Concessionaire under this Agreement for such year;

(b) detailed statement of the Annual Gross Food and Beverage Revenues for such year; and

(c) detailed statement of the Annual Net Food and Beverage Income for such year.

8.5 Annual Status Reports. The Concessionaire shall cooperate with the Operator and Scheduling Agent in their delivery to the City, within ninety (90) days after the end of each calendar year during the Term or any Renewal Term, a report detailing the Concessionaire's use of and activities related to the Properties in furtherance of the Governmental Program during the preceding year, including providing the following information:

(a) names and addresses of the Concessionaire's Board of Directors;

(b) documentation that the Concessionaire continues to be organized as corporation, active and in good standing under the laws of Delaware and registered with the Minnesota Secretary of State;

(c) names and addresses of all of the Concessionaire's respective employees providing services related to the Governmental Program and/or the Properties; and

(d) report on the physical condition of the Concession Service and Food Preparation Areas of the Amphitheater and an itemization of needed repairs and improvements.

8.6 Determination of Continued Governmental Use. The Concessionaire shall provide any additional records or other information reasonably requested by the City in order to

allow the City to annually determine that the Concessionaire are using and conducting their activities with respect to the Properties in furtherance of the Governmental Program and for no other purpose.

8.7 Audit. The City may audit the financial statements delivered by the Concessionaire to City pursuant to this Agreement, either on an independent basis or in conjunction with the City's annual audit. As determined by the City in its reasonable discretion, and upon written notice to the Concessionaire of such determination, the City will retain a reputable auditing firm, acceptable to the City, to conduct an audit of the Concessionaire's financial statements related to the Properties at the City's expense. The audit report shall include the following information:

- (a) the financial condition of the Concessionaire and their ability to perform their obligations under this Agreement;
- (b) the status of all Concessionaire projects related to the Governmental Program;
- (c) the status of all subcontracts to which the Concessionaire are parties relative to the Properties; and
- (d) such other matters relating to the Concessionaire's revenues and expenses relative to the Governmental Program, which may affect the interests of the City, and such other information as the City may require.

8.8 State Grant Agreement Requirements. In addition to the requirements related to the State Grant and the State Grant Agreement set forth elsewhere in this Agreement, the provisions set forth in this Section are required under the State Grant Agreement.

- (a) The Parties acknowledge and recognize that this Agreement is subject to the terms and conditions of the State Grant Agreement. Accordingly, this Agreement must be approved in writing by the Commissioner, and absent such approval it is null and void and of no force or effect. The Parties agree to cooperate to obtain all necessary approvals and signatures under the State Grant Agreement.
- (b) The Parties acknowledge and recognize that the terms, conditions and provisions of the State Grant Agreement control over any inconsistent provisions in this Agreement.
- (c) The Parties acknowledge that the City is a public body with authority under the Act to own the Amphitheater and operate the Governmental Program.

(d) This Agreement may be terminated by the City if there is an Event of Default by the Concessionaire, or in the event that the City is no longer authorized by law to own the Property or operate the Amphitheater.

(e) This Agreement will automatically and immediately terminate upon a termination of the Governmental Program or change in the Governmental Program that no longer allows the City to continue to own or operate the Amphitheater for the Governmental Program. The City will give the Concessionaire as much notice as possible and, to the extent permitted by Law, the Parties shall use good faith efforts to enter into a new agreement with the same or substantially similar terms as this Agreement.

(f) The Concessionaire are prohibited from creating or allowing any voluntary lien or encumbrance or any involuntary lien or encumbrance upon the Amphitheater or Properties, except with the advance written consent of the Commissioner.

(g) Any changes, alterations, or modifications to this Agreement must be agreed to, in writing, by the Commissioner.

8.9 Compliance as to Bonds.

(a) Subject to direction from Minnesota Management and Budget and the requirements of Section VIII.6. of the G.O. Compliance Checklist for Use Contracts for the Project, if interest on any bonds issued by the State for the Project is intended to be excludable from gross income for federal income tax purposes (“Tax-Exempt Bonds”) and if the City or the Commissioner determines, based upon the written notice of nationally recognized bond counsel, that any action under this Agreement creates a significant risk that interest on any Tax-Exempt Bonds will not be excludable from gross income for federal income tax purposes, the Parties shall negotiate in good faith to agree on alternative action to avoid such a result. In no event shall the foregoing agreement require any Party to amend or modify any material term of this Agreement.

(b) The Concessionaire irrevocably waives any claim for depreciation or investment credit with respect to the Properties and the Amphitheater and shall not deduct any payments to the City provided for in this Agreement as rent.

8.10 State Right to Access Records. The Parties shall each take any such actions and provide any records or other information related to the Properties to the Commissioner as the Commissioner shall determine necessary to ensure that the interest to be paid on the GO Bonds supporting the Grant is exempt from federal taxation.

ARTICLE NINE

Utilities

9.1 Utilities and Services. The City shall be responsible for contracting for all utilities serving the Properties, including but not limited to, electricity, fuel oil, gas services, telephone, trash collection, water, sewer service, storm sewer service, cable or satellite television, internet connection fees or any other like utilities.

9.2 No Warranty. The City does not warrant that any of the services referred to above or any other services that City provides upon or to the Properties will be free from interruption. The Concessionaire acknowledges that any one or more of such services may be suspended if there is Force Majeure, or if repairs or improvements must be made for reasons beyond the City's control. Any such interruption or discontinuance of services shall never be deemed an eviction or disturbance of the Concessionaire's use and possession of the Property, or any part thereof, or render the City liable to the Concessionaire for damages or relieve the Concessionaire from performance of the Concessionaire's obligations under this Agreement.

ARTICLE TEN **Subcontracting and Assignment**

10.1 Assignment. The Concessionaire shall not assign their responsibilities under this Agreement to any third party without first obtaining the written consent of the City to such assignment.

10.2 Subcontracting. The City acknowledges that as a part of its management, operating, and provision of Food and Beverage Services, the Concessionaire is required to (i) license vendors or third party designees for purposes of providing Food and Beverage Services and to provide access to those vendors or designees to areas inside or within proximity of the Amphitheater for purposes of vending or otherwise providing Food and Beverage services; and (ii) lease any equipment for use or operation in the provision of Food and Beverage Services in the Amphitheater. Such licensing and provision of products and services shall be in accordance with the terms of this Agreement.

10.3 Third Party Beneficiary. The City shall be a third-party beneficiary of any assignment, license, or subcontract entered into by the Concessionaire with respect to the Governmental Program and/or the Properties.

10.4 Subordination of Third-Party Contracts. Any assignment, license or subcontract entered into by the Concessionaire with respect to the Governmental Program or the Properties shall be subject to the terms of this Agreement. This Agreement shall prevail.

ARTICLE ELEVEN **Subordination**

11.1 Subordination. This Agreement is subject and subordinate to all present or future financial encumbrances on the Properties and is further subject to all present and future easements, conditions and encumbrances of record, and to all applicable Laws. Further, this Agreement shall be subordinate to the provisions of and requirements of the State Grant Agreement and any other existing or future agreement between the City and the State of Minnesota relative to the State Grant, the Project or the development, operation, or maintenance of the Amphitheater. Such subordination shall be self-executing without further act on the part of City or Concessionaire; provided, however, that the Concessionaire shall each at any time hereafter, at the request of the City or any lien holder, or any purchaser of the Property, execute any instruments that may be required, and the Concessionaire hereby irrevocably authorize the City to execute and deliver in their name any such instrument if the Concessionaire fails to do so.

ARTICLE TWELVE

Alterations and Capital Improvements

12.1 No Representations. The City has made no promise to alter, remodel, repair or improve the Properties after the Effective Date and has made no representation of the condition of the Properties or the suitability of the Properties for the purpose stated herein other than what is contained in this Agreement.

12.2 Capital Improvements. Subject to the City's right to make Capital Improvements to the Properties pursuant to Section 3.5.5 (provided that the City will not unreasonably interfere with the use and operation of the Amphitheater or the Properties in performing any such Capital Improvement) and the provisions of this Agreement, the Concessionaire shall construct Concession Capital Improvements identified in the Concession Capital Improvement Plan with funds in the Concession Capital Expenditure Reserve Fund in accordance with this Article. Unless initiated by the City or otherwise agreed by both Parties, Concession Capital Improvements under this Section shall be at the sole expense of the Concessionaire.

12.3 Concession Capital Expenditure Reserve Fund.

12.3.1 Establishment.

(a) The Concession Capital Expenditure Reserve Fund shall be established by the Concessionaire. The fund shall be entitled "Amphitheater Concession Capital Expenditure Reserve Fund" and shall be utilized for the purpose of funding Concession Capital Improvements.

(b) The City's representative will have the right to review and be consulted on all uses of the Amphitheater Concession Capital Expenditure Reserve Fund.

12.3.2 Deposits into the Concession Capital Expenditure Reserve Fund by Concessionaire. The Concessionaire shall deposit the Concession Capital Cost Payment into the Concession Capital Expenditure Reserve Fund when due. Any investment income

earned on the amounts in the Concession Capital Expenditure Reserve Fund shall be added to the principal of the Concession Capital Expenditure Reserve Fund and used as provided in this Agreement.

12.3.3 Payment for Concession Capital Improvements. The funds in the Concession Capital Expenditure Reserve Fund shall not be used for Ordinary Maintenance or Alterations, but shall be used solely for the payment of Concession Capital Improvements as set forth herein. Subject to the terms of this Agreement, the cost of Concession Capital Improvements shall be paid from the Concession Capital Expenditure Reserve Fund. To the extent that funds in the Concession Capital Expenditure Reserve Fund are not sufficient to pay for any authorized Concession Capital Improvements, the City may pay the additional cost of such Concession Capital Improvements from sources other than the Concession Area Operating Fee, subject to the approval of the City's governing body. If the City does not approve any such expenditures, the Concessionaire may elect to pay any such expenditures, but is not required to pay for such expenditures.

12.4 Other Alterations. The Concessionaire shall not make any Capital Improvements or Alterations to the Amphitheater or the Properties not identified in the Concession Capital Improvement Plan without the written consent of the City. Consent shall be obtained by submitting a written description to the City of the proposed Alteration, including its location, size, proposed use, funding source, and any other information that may be required by the City. The City may approve, disapprove, require more information, or require certain modifications to the proposed Alteration in its sole judgment and discretion. The Concessionaire's final written proposal including a clear indication of the City's assent and signed by the City shall constitute written consent of the City. Unless otherwise agreed by both Parties, approved Alterations under this Section shall be at the sole expense of the Concessionaire. Nothing herein shall limit the Concessionaire's ability to make temporary or other minor alterations that will not alter the Properties or the Amphitheater in a permanent way or affect the ongoing operation of the Governmental Program.

12.5 Insurance and Security. The Concessionaire shall require appropriate insurance, faithful performance bonds, and labor and material bonds for all contractors who work on the Properties, and shall allow no mechanic's liens to be incurred or filed against the Properties.

12.6 Lien Waivers. The Concessionaire shall provide lien waivers to the City from any contractors or subcontractors furnishing material, service or labor to any alteration or improvement, which the City may, in its discretion, require in advance of approving the alteration or improvement.

12.7 Protection from Liens. The Concessionaire shall promptly pay for all alterations and improvements that are requested by the Concessionaire and approved by the City under this Agreement, and shall promptly pay all laborers employed and all subcontractors furnishing material or services to the Concessionaire for such alterations and improvements. The Concessionaire hereby covenants and agrees that the Concessionaire will not permit or allow any mechanics' or materialmen's liens to be placed on the City's interest in the Properties during the term hereof. Notwithstanding the previous sentence, however, in the event any such lien shall be so filed against the City's interest, the Concessionaire shall take all steps necessary to remove it within 120 days of its being filed. The Concessionaire may contest any such mechanic's liens and

prosecute all proceedings for the purpose of such contest pursuant to Minn. Stat. § 514.01, *et seq.* provided the Concessionaire first posts a surety bond, in favor of and insuring the City, in an amount equal to 125% of the amount of any such lien, or otherwise protect the City from foreclosure of the Properties.

12.8 Improvements Property of the City. Any Concession Capital Improvements or Alterations made to the Amphitheater or the Properties shall become a part thereof and remain the property of the City and be surrendered with the Amphitheater and Properties to the City without compensation to the Concessionaire on the Expiration Date.

ARTICLE THIRTEEN **Representations and Warranties**

13.1 Representations and Warranties of City.

(a) The City represents and warrants that the City is a municipal corporation organized and existing under and by virtue of and pursuant to the laws of the State of Minnesota and has the power to enter into this Agreement and carry out its obligation hereunder.

(b) On the conditions that the City is able to secure the State Grant funding and required matching funds from non-State sources to fund the Project, the City shall undertake reasonable efforts to construct the Project in accordance with the Amphitheater Final Plans.

13.2 Representations and Warranties of Concessionaire. The Concessionaire makes the following representations and warranties:

(a) The Concessionaire is organized as a limited liability company, active and in good standing under the laws of Delaware, and registered with the Minnesota Secretary of State, and has the power and authority to enter into this Agreement and to perform its obligations hereunder and is not in violation of the laws of the State of Minnesota or any other State.

(b) The Concessionaire shall maintain its status as a limited liability company, active and in good standing under the laws of Delaware, and registered with the Minnesota Secretary of State, at all times from and after the Effective Date while the Term or any Renewal Term are in effect.

(c) Neither the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, nor the fulfillment of or compliance with the terms and conditions of this Agreement is prevented, limited by or conflicts with or results in a breach of, the terms, conditions or provision of any contractual restriction,

evidence of indebtedness, agreement or instrument of whatever nature to which the Concessionaire is now a party or by which it is bound, or constitutes a default under any of the foregoing.

(d) The Concessionaire will cooperate with the City with respect to any litigation commenced with respect to the Property, so long as the Concessionaire is not an adverse party to such litigation.

(e) Whenever any Event of Default occurs and if the City shall employ attorneys or incur other expenses for the collection of payments due or to become due or for the enforcement of performance or observance of any obligation or agreement on the part of the Concessionaire under this Agreement, and the City prevails in such action, the Concessionaire agrees that it shall, within 30 business days of written demand by the City, pay to the City the reasonable fees of such attorneys and such other expenses so incurred by the City.

(f) The Concessionaire shall promptly advise the City in writing of all litigation or claims affecting any part of the Properties and all written complaints and charges made by any governmental authority materially affecting the Properties or materially affecting the Concessionaire or its activities.

(g) The Concessionaire has the resources and capability to satisfy its obligations under this Agreement to manage, operate, and provide Food and Beverage Services at the Amphitheater as required herein.

(h) The Concessionaire shall not create any lien, encumbrance, easement, license, right-of-way, covenant, condition or restriction that would encumber the title to the Amphitheater or Properties, without the prior written approval of the City, to be granted or withheld in its sole discretion.

(i) The Concessionaire acknowledges the City's contributions to the Project and to thereafter maintaining the Amphitheater during the Term and any renewal Term as otherwise specified in this Agreement, and further warrants that the Concessionaire will not to seek subsidies or other financial assistance from the City to cover any Concessionaire Expenses or other expenses made the responsibility of the Concessionaire hereunder.

ARTICLE FOURTEEN **Destruction or Damage**

14.1 Concessionaire Obligations. The Concessionaire agrees:

(a) That it will obtain all necessary state and local permits for its operations as necessary.

(b) That it will operate in accordance with all federal, state and local laws and regulations.

(c) That it will be solely responsible for security of the Concessionaire's Property and any items of City-owned property placed under the Concessionaire's control during any Event and for any loss, damage, or destruction thereof occurring during any Event.

(d) That during each Event at which it provides Food and Beverage Services it will keep the Properties in such repair as at the commencement of the said Event, reasonable wear and tear and damage by fire or extended coverage perils only excepted.

(e) That it will not injure, overload or suffer to be injured or overloaded the Properties or any part thereof.

(f) That it will not make or suffer any unlawful, improper or offensive use of the Properties (as reasonably determined by the City's City Council in light of the purposes of this Agreement, the Project, and the Governmental Program) or any use thereof contrary to any Law, or which shall be injurious to any person or property or which shall be liable to endanger or affect any insurance on the said Properties.

14.2 Casualty Damage.

(a) The City shall have no liability to the Concessionaire if all or a substantial portion of the Amphitheater is partially or wholly destroyed by fire or casualty, or if the Amphitheater cannot be used because of a valid governmental order prohibiting its use.

(b) In the event of total or partial destruction rendering the Amphitheater not suitable for Events or of a valid governmental order prohibiting use of the Amphitheater for Events, this Agreement will be suspended immediately as to Events until the governmental order ceases to prohibit use for Events or the Amphitheater is repaired. The City shall notify the Concessionaire, within ninety (90) days from the date the Amphitheater is no longer suitable for Events, whether the City will rebuild or repair the Amphitheater. If the City decides to rebuild or repair the Amphitheater, this Agreement will continue to be suspended until the Amphitheater is suitable for Events and the City shall notify the Concessionaire of the City's best estimate of when the Amphitheater will be suitable for Events again. For each six (6) month period while this Agreement is suspended, the Term shall be extended by six (6) months, if permitted under the State Grant Agreement. During any such period of suspension, the Concessionaire shall only be responsible for the necessary Concessionaire Expenses related to the Amphitheater so long as the City or its contractors have not taken possession of the Amphitheater to repair such damage. If the City decides not to rebuild the Amphitheater, this Agreement shall terminate and the City shall pay over to the Concessionaire any unapplied available insurance proceeds related to the Concessionaire's Property.

14.3 Restoration. In the event of partial destruction of the Amphitheater, the Amphitheater shall be deemed suitable for Events, if eighty percent (80%) of the Amphitheater seats can be used, if access to the Amphitheater is not obstructed, if the supporting areas (stage, back stage, restrooms, concession areas and points of sale) are useable, as reasonably determined by the City, and if use is deemed safe by competent authority. In such event, this Agreement shall continue in full force and effect with no reduction in the Management Fee or in the other payments due from the Concessionaire to the City or in any payments due from the City to the Concessionaire pursuant to this Agreement. All insurance proceeds from the insurance carried pursuant to Section 17.1 shall be applied to the restoration of the Amphitheater in the event of any partial destruction. The City shall restore the Amphitheater as soon as reasonably practicable, but no later than within one (1) year of the City's receipt of the insurance proceeds relating to such damage or destruction; otherwise, the Concessionaire may terminate this Agreement and the City shall pay over to the Concessionaire any unapplied available insurance proceeds related to Concessionaire's Property.

ARTICLE FIFTEEN

Indemnification

15.1 Concessionaire Indemnification of City. The Concessionaire shall indemnify, protect, save, hold harmless and insure the City, and its respective officers, employees and members and agents, from and against any and all claims and demands for, or litigation with respect to, all damages which may arise out of or be caused by the Concessionaire's or its agents, employees, contractors or subcontractors with respect to the Concessionaire's performance of its obligations under this Agreement or its presence on or use of the Properties, or that of the Concessionaire's employees, members, board, officers, agents, volunteers, clients and invitees. The Concessionaire shall defend the City against the foregoing, or litigation in connection with the foregoing, at the Concessionaire's expense, with counsel reasonably acceptable to the City. The City, at its expense, shall have the right to participate in the defense of any Claims or litigation and shall have the right to approve any settlement, which approval shall not be unreasonably withheld. The indemnification provision of this Section shall not apply to damages or other losses proximately caused by or resulting from the negligence or willful misconduct of the City or any of its officials, employees or agents. All indemnification obligations shall survive termination, expiration or cancellation of this Agreement.

15.2 Assumption of Risk. The Concessionaire knows, understands, and acknowledges the risks and hazards associated with using the Properties for the purposes stated herein and hereby assumes any and all risks and hazards associated therewith. The Concessionaire hereby irrevocably waives any and all claims against the City or any of its officials, employees or agents for any bodily injury (including death), loss or property damage incurred by the Concessionaire as a result of the Concessionaire's use of the Properties, and hereby irrevocably releases and discharges the City and any of its officials, employees or agents from any and all claims of liability.

15.3 City Indemnification. The City shall indemnify the Concessionaire against any and all claims and demands for damages which may arise out of or be caused by the City's use of the Properties or any defective conditions on the Premises not caused or contributed to by the Concessionaire.

15.4 No Third-Party Right of Action. Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against the Concessionaire or the City. The services of the Concessionaire under this Agreement are being performed solely for City's benefit, and no other entity shall have any claim against the Concessionaire because of this Agreement or the performance or nonperformance of services provided hereunder.

15.5 Additional Indemnification by Concessionaire. Due to the fact that the Concessionaire will be selling and distributing alcoholic beverages during Local, Private, and Special Community Events, the Concessionaire specifically agrees to defend and hold harmless the City and its respective officers, employees and members and agents, from any and all liability for claims for injury, death or property damage, relating to or resulting from the sale, use, consumption or distribution of alcoholic beverages on or about the Amphitheater or Properties during any Event at which alcoholic beverages were provided by the Concessionaire.

ARTICLE SIXTEEN
Compliance with Laws, Ordinances and Regulations

16.1 Throughout the Term of this Agreement, the Concessionaire, at their sole cost and expense, shall promptly comply with all present and future Laws.

16.2 The Concessionaire shall likewise observe and comply with, or shall cause to be observed and complied with, all the requirements of all policies of comprehensive general liability, fire and other insurance at any time in force with respect to the Properties.

ARTICLE SEVENTEEN
Insurance

17.1 City's Required Insurance. The City shall maintain property insurance on the Amphitheater located on the Property, at the City's expense. The City shall name the Concessionaire as additional insureds.

17.2 Concessionaire's Required Insurance. The Concessionaire shall maintain, at the Concessionaire's expense, insurance on the Concessionaire's property located in and upon the Properties and shall assume the risk of loss to such property on the Properties. The Concessionaire shall further maintain, at the Concessionaire's expense, the following insurance policies covering its operations, activities and presence on the Properties in the listed amounts:

Worker's Compensation	Statutory Limits
Employer's Liability	\$500,000 each accident \$500,000 disease policy limit \$500,000 disease each employee

Comprehensive General Liability	\$2,000,000 property damage and bodily injury per occurrence \$4,000,000 general aggregate \$4,000,000 Products – Completed Operations Aggregate
Comprehensive Automobile Liability	\$1,000,000 combined single limit each accident (shall include coverage for all owned, hired and non-owned vehicles)
Liquor Liability (Dram Shop)	\$5,000,000 aggregate
Umbrella or Excess Liability	\$1,000,000

17.3 Additional Requirements.

(a) All policies required of the Concessionaire in this Article shall be written on an “occurrence” form (“claims made” and “modified occurrence” forms are not acceptable) and shall apply on a “per project” basis.

(b) With the exception of the Worker’s Compensation policies, all policies required of the Concessionaire in this Article shall insure the defense and indemnity obligations assumed by the Concessionaire, as applicable, under this Agreement, and shall name the City as an additional insured under the policy.

(c) All policies required of the Concessionaire in this Article shall contain a provision that coverages afforded thereunder shall not be canceled or non-renewed, nor shall coverage limits be reduced by endorsement, without 30 days prior written notice to the City.

17.4 Certificates of Insurance. True, accurate and current certificates of insurance, showing evidence of the required insurance coverages, shall be provided to the City by the Concessionaire prior to the Effective Date and will be attached hereto as **Exhibit F**.

17.5 Effect of Failure to Provide Insurance. If the Concessionaire fails to provide the insurance required by this Article or to require the specified insurance from subcontractors, as applicable, then such Party will defend, indemnify and hold harmless the City and the City’s officials, agents and employees from any loss, claim, liability and expense (including reasonable attorney’s fees and expenses of litigation) to the extent necessary to afford the same protection as would have been provided by the specified insurance. The stated indemnity continues until all applicable statutes of limitation have run.

If a claim arises within the scope of the stated indemnity, the City may require the Party to:

- a. Furnish and pay for a surety bond, satisfactory to the City, guaranteeing performance of the indemnity obligation; or

- b. Furnish a written acceptance of tender of defense and indemnity from the Party's insurance company.

The indemnifying Party will take the action required by the City within 15 days of receiving notice from the City.

Notwithstanding the foregoing, the City reserves the right to terminate this Agreement pursuant to Article Eighteen in the event that insurance requirements are not maintained or required as provided herein during the term of this Agreement.

ARTICLE EIGHTEEN

Default and Remedies

18.1 Concessionaire Default. If the Concessionaire shall default in the payment of any sum required to be paid by the Concessionaire under this Agreement and such default shall continue for 15 days after written notice to the Concessionaire, or if the Concessionaire shall default in the observance or performance of any other covenants or conditions in this Agreement, which the Concessionaire is required to observe or perform, and such default shall continue for 30 days after written notice to the Concessionaire, or if a default involves a Hazardous Condition and is not cured by the Concessionaire immediately upon written notice to the Concessionaire, or if the interest of the Concessionaire in this Agreement shall be levied upon under execution or other legal process, or if any voluntary petition in bankruptcy or for corporate reorganization or any similar relief shall be filed by the Concessionaire, or if any involuntary petition in bankruptcy shall be filed against the Concessionaire under any federal or state bankruptcy or insolvency act and shall not have been dismissed within 30 days following the filing thereof, or if a receiver shall be appointed for the Concessionaire or any of the property of the Concessionaire by any court and such receiver shall not be dismissed within 30 days from the date of appointment, or if the Concessionaire shall make an assignment for the benefit of creditors, or if the Concessionaire shall abandon or vacate the Property, then the City may treat the occurrence of any one or more of the foregoing events as a breach of this Agreement and thereupon at its option may, without notice or demand of any kind to the Concessionaire or any other person, terminate this Agreement and immediately resume exclusive possession of the Properties, in addition to all other rights and remedies provided at law or in equity.

18.2 City Default. If the City shall default in the payment of any sum required to be paid by the City to the Concessionaire under this Agreement, or if the City shall default in the observance or performance of any of the other covenants, obligations or conditions in this Agreement, which the City is required to observe or perform, and such default shall continue for 30 days after written notice to the City, then the Party affected by the City's default may treat the occurrence of any one or more of the foregoing events as a breach of this Agreement and thereupon at its option may terminate this Agreement, in addition to all other rights and remedies provided at law or in equity.

ARTICLE NINETEEN
Miscellaneous

19.1 Voluntary and Knowing Action. The Parties, by executing this Agreement, state that they have carefully read this Agreement and understand fully the contents thereof; that in executing this Agreement they voluntarily accept all terms described in this Agreement without duress, coercion, undue influence, or otherwise, and that they intend to be legally bound thereby.

19.2 Authorized Signatories. The Parties each represent and warrant to the other that (1) the persons signing this Agreement are authorized signatories for the entities represented, and (2) no further approvals, actions or ratifications are needed for the full enforceability of this Agreement against it; each party indemnifies and holds the other harmless against any breach of the foregoing representation and warranty.

19.3 Relationship of Parties. With respect to the Concessionaire's management, operating and production responsibilities under this Agreement, the Concessionaire at all times and for all purposes hereunder, shall be an independent contractor and is not an employee of the City for any purpose. No statement contained in this Agreement shall be construed so as to find the Concessionaire to be an employee of the City, and the Concessionaire shall not be entitled to any of the rights, privileges, or benefits of employees of the City, including but not limited to, workers' compensation, health/death benefits, and indemnification for third-party personal injury/property damage claims.

The Concessionaire shall comply with the applicable provisions of all Federal and State tax laws.

The Concessionaire shall at all times be free to exercise initiative, judgment and discretion as to how to best perform or provide services identified herein.

The Concessionaire is responsible for hiring sufficient workers to perform the services/duties required by this Agreement, withholding their taxes and paying all other employment tax obligations on their behalf.

The authority of the Concessionaire with respect to the Properties shall be limited to those matters which are specifically addressed in this Agreement.

19.4 Notices. All notices required under the terms of this Agreement shall be deemed to have been properly served or given three days after their deposit in the United States mail if sent by registered or certified mail, return receipt requested, postage prepaid, or two days after deposit in a nationally recognized overnight courier service, addressed to the City, the Concessionaire or the Scheduling Agent at the addresses identified in Article One or to such other address within the continental limits of the United States and to the attention of such Party as the Parties may from time to time designate by written notice to the other Parties.

19.5 Condemnation. If all or any part of the Properties are taken in condemnation proceedings instituted under power of eminent domain or is conveyed in lieu thereof under threat of condemnation, any money paid because of such condemnation or conveyance shall be paid to the City.

19.6 Records—Availability and Retention. Pursuant to Minn. Stat. § 16C.05, subd. 5, the Concessionaire agrees that the City, the State Auditor, or any of their duly authorized representatives at any time during normal business hours and as often as they may reasonably deem necessary, shall have access to and the right to examine, audit, excerpt, and transcribe any books, documents, papers, records, etc., which are pertinent to the accounting practices and procedures of the Party and involve transactions relating to this Agreement. The Concessionaire agrees to maintain these records for a period of six years from the Expiration Date.

19.7 Governing Law. This Agreement shall be deemed to have been made and accepted in Stearns County, Minnesota, and the laws of the State of Minnesota shall govern any interpretations or constructions of the Agreement without regard to its choice of law or conflict of laws principles.

19.8 Data Practices. The Parties acknowledge that this Agreement is subject to the requirements of Minnesota's Government Data Practices Act, Minnesota Statutes, Section 13.01 *et seq.*

19.9 Nondiscrimination. The Concessionaire shall not discriminate against any employee, applicant for employment, or user or participant in the Governmental Program. The Concessionaire and their employees and agents shall not discriminate because of race, religion, color, creed, age, disability, sex, national origin, sexual orientation, or status with regard to public assistance, or as otherwise prohibited by state or federal law, against any person by refusing to furnish such person any service or privilege offered to or enjoyed by the general public, nor shall the Concessionaire or their employees and agents publicize the facilities provided under this Agreement in any manner that would directly or inferentially reflect on the acceptability of the patronage of any person because of race, religion, color, creed, age, disability, sex, national origin, sexual orientation, status with regard to public assistance, or other protected status as described in state or federal law. The provisions of any applicable law or ordinance relating to civil rights and discrimination shall be considered part of this Agreement as if fully set forth herein.

19.10 Dispute Resolution. The Parties agree to negotiate all disputes between them in good faith for a period of 30 days from the date of notice of dispute prior to proceeding to formal dispute resolution or exercising their rights under law. Any claims or disputes unresolved after good faith negotiations shall first be submitted to mediation utilizing the Minnesota District Court Rule 114 Roster. The Concessionaire further agrees to require an equivalent dispute resolution process governing all contractors, subcontractors, suppliers, consultants, and fabricators concerned with the Project, the Governmental Program and/or the Properties.

19.11 Force Majeure. The Parties shall each be excused from performance under this Agreement while and to the extent that either of them are unable to perform, because of a Force

Majeure. In the event any Party is rendered unable wholly or in part by Force Majeure to carry out its obligations under this Agreement then the Party affected by Force Majeure shall give written notice with explanation to the other Parties immediately.

19.12 Interest by City Officials. No elected or appointed official, officer, or employee of the City or the City shall during his or her tenure or employment and for one year thereafter, have any interest, direct or indirect, in this Agreement or the proceeds thereof.

19.13 No Waiver. Any Party's failure in any one or more instances to insist upon strict performance of any of the terms and conditions of this Agreement or to exercise any right herein conferred shall not be construed as a waiver or relinquishment of that right or of that Party's right to assert or rely upon the terms and conditions of this Agreement. Any express waiver of a term of this Agreement shall not be binding and effective unless made in writing and properly executed by the waiving Party.

19.14 Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision. Any invalid or unenforceable provision shall be deemed severed from this Agreement to the extent of its invalidity or unenforceability, and this Agreement shall be construed and enforced as if the Agreement did not contain that particular provision to the extent of its invalidity or unenforceability.

19.15 Headings, Captions and Recitals. Headings and captions contained in this Agreement are for convenience only and are not intended to alter any of the provisions of this Agreement and shall not be used for the interpretation of the validity of the agreement or any provision hereof. The recitals set forth at the beginning of this Agreement are a part of this Agreement.

19.16 Survivability. All covenants, indemnities, guarantees, releases, representations and warranties by any Party or Parties, and any undischarged obligations of the City or the Concessionaire arising prior to the expiration of this Agreement (whether by completion or earlier termination), shall survive such expiration.

19.17 Exhibits. The exhibits attached to this Agreement are considered an integral part of it as if fully set forth within it.

19.18 Entire Agreement. All prior understandings, letters of intent, discussions and agreements are merged in the governing terms of this Agreement, which is a complete and final written expression of the intent of the Parties. Every warranty or representation binding upon the City is set forth in this Agreement. The City makes no further warranties or representations and the Concessionaire has not relied on any other warranties or representations, express or implied, relative to the condition of the Properties, the Governmental Program, or the terms of this Agreement. In the event of a conflict or inconsistency between the terms of this Agreement and those of any other agreement between the Parties, the terms of this Agreement shall govern.

19.19 Modification/Amendment. Any alterations, variations, modifications, amendments or waivers of the provisions of this Agreement shall only be valid when they have been reduced to writing, and signed by an authorized representative of each of the City and the Concessionaire, and approved by the Commissioner.

19.20 Execution. This Agreement may be executed simultaneously in two or more counterparts that, when taken together, shall be deemed an original and constitute one and the same document. The signature of any Party to the counterpart shall be deemed a signature to the Agreement, and may be appended to, any other counterpart. Facsimile and email transmissions of executed signature pages shall be deemed as originals and sufficient to bind the executing Party.

[Remainder of page left intentionally blank]

IN TESTIMONY WHEREOF, as of the day and year first hereinabove written the Parties have executed this Agreement.

**OWNER:
CITY OF WAITE PARK**

BY: _____
_____, Its Mayor

BY: _____
_____, Its City Clerk

STATE OF MINNESOTA)
) ss.
COUNTY OF STEARNS)

The foregoing instrument was acknowledged before me this ____ day of _____, 2021, by _____ and by _____, respectively the Mayor and City Clerk of the City of Waite Park, a municipal corporation and political subdivision of the State of Minnesota, on behalf of the corporate body and pursuant to the authority granted by its City Council.

Notary Public

Approved by:

**COMMISSIONER OF MINNESOTA
MANAGEMENT & BUDGET**

By: _____

Date: _____

EXHIBIT A

Operator Agreement

[Operator Agreement attached hereto]

EXHIBIT B

Pouring Rights Agreement

[Pouring Rights Agreement attached hereto]

EXHIBIT C

State Grant Agreement

[Grant Agreement attached hereto]

EXHIBIT D

RESTRICTIONS ON AMPHITHEATER USE

1. No part of the Amphitheater or the Properties shall be utilized for: (a) adult oriented materials or uses associated with sexually oriented businesses, as that term is defined in Section 78.2 of the Waite Park City Code or successor provisions thereto (the “Code”), (b) the sale, lease, trade or other transfer of firearms; (c) any sales of drug related paraphernalia; (d) activities not permitted by any license required to be held by the Operator; (e) pawnshop, as that term is defined in Section 75.2 of the Code; (f) massage parlor; or (f) tattoo parlor.
2. No part of the Amphitheater or the Properties shall be used for outdoor storage of any kind except as expressly permitted by the City.
3. No part of the Amphitheater or the Properties shall be used for the storage or disposal of garbage, refuse, or debris, except to the extent that such storage or disposal is an “accessory use” to the Amphitheater, as defined and provided for in the Code.
4. No freestanding broadcasting towers nor telecommunications antennas shall be erected on any part of the Properties except as expressly permitted by the City; provided, however, that this restriction shall not prohibit the installation of concealed antennas, wiring, metal or carbon filter elements, and satellite dishes used to receive radio, television, or electromagnetic waves.
5. No sale of alcohol or liquor for off premises consumption shall be made on the Amphitheater or the Properties.

EXHIBIT E

ADVERTISING STANDARDS

“Advertising Standards” shall mean the standards set forth below which shall apply to all Advertising:

- (a) the term during which any such Advertising Rights shall apply shall, at the option of and upon notice from the City, expire no later than the expiration of the Term (whether on its scheduled Expiration Date or by earlier exercise of any termination rights in this Agreement);
- (b) any exercise of Advertising Rights by the Concessionaire shall be in compliance with all Laws;
- (c) the Concessionaire shall not display advertising on the Amphitheater or the Properties or any portion thereof which:
 - (1) is contrary to law or promotes any unlawful activity or purpose;
 - (2) is reasonably likely to be offensive to the general public;
 - (3) does not meet national network television broadcast standards for advertising;
 - (4) contains advertising related to tobacco products; or
 - (5) contains political advertising.
- (d) the Concessionaire shall not display the name of any entity that is engaged in any of the activities listed in paragraph (c) above the Amphitheater or the Properties;
- (e) all Advertising shall comply with all signage, zoning and similar Laws;
- (f) signage must at all times comply with the requirements contained in Chapter 53 of the Waite Park City Code and any other applicable Laws; and
- (g) the Concessionaire shall not permit any name to be given to the Amphitheater or the Properties, or any portion thereof that is the name of or a tribute to a living person.

EXHIBIT F

CERTIFICATES OF INSURANCE

[Certificates to be attached hereto on or before operation]