

## SECOND ENROLLMENT PVC PARTICIPATION AGREEMENT

### (First Amendment)

**THIS SECOND ENROLLMENT PVC PARTICIPATION AGREEMENT** (First Amendment) (referred to hereinafter as the "PVC Participation Agreement") is made and entered into as of the date stated on the signature page, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado acting for and on behalf of the Department of Aviation ("City"), and **BROOKSTONE STORES, INC.**, a corporation formed under the laws of New Hampshire and authorized to do business in Colorado ("Concessionaire") d/b/a/ **Brookstone**.

### WITNESSETH:

**WHEREAS**, the Parties hereto entered into an agreement (AR85003) dated March 14, 2008, ("Original Agreement") for the operation of a concession at Denver International Airport ("Airport" or "DIA"), and

**WHEREAS**, the City has created the "Premium Value Concessions Program" ("PVC Program") described in Rule 45 of the Airport Rules and Regulation, as amended, ("PVC Rules") to reward certain categories of concessionaires that operate first-class concessions at the Airport and achieve the high performance standards defined in the PVC Rules. To concessionaires that achieve the high performance standards defined in the PVC Rules at the time their existing agreements terminate, the City will offer a new concession agreement that is consistent with the concession policy then in effect for either (i) the same particular minor merchandise category as the terminating concession, or (ii) if in the Manager's sole discretion, it is deemed advisable to change from that particular minor category, the City will offer the right to change the concept to one that is consistent with the Airport's goals; and

**WHEREAS**, at the inception of the PVC Program, concessionaires meeting the eligibility criteria were extended an offer to join the program with the stipulation that failure to exercise that option or to decline it would bar the concessionaire from the PVC Program, except through a new concession agreement obtained from the Airport through its contracting process; and

**WHEREAS**, twenty-five eligible concessionaires accepted the City's offer and enrolled seventy locations for participation in the PVC Program. Accordingly, as more than twenty concessions eligible for the PVC Program agreed to participate via executed amendments to their concession agreements, the primary condition was met that allowed the PVC Program to commence March 1, 2012; and

**WHEREAS**, upon reflection and discussion with the Airport concession community the Airport has decided to offer a second enrollment opportunity for eligible concessionaires under the following conditions:

- a) Concessions with agreement terms expiring through July 31, 2013 (PVC Phase 1, see Section 6) are not eligible for enrollment;
- b) Companies who elect to enroll in the PVC Program must enroll all eligible concession locations under that company's ownership or control at DIA;

- c) All PVC Program decisions made prior to enrollment date are considered final and not eligible for re-negotiation and/or appeal;
- d) New PVC Program participants will pay a pro-rata share of the monthly PVC Program fees, in arrears from March 1, 2012 going forward based on the total number of participating locations and the estimated yearly Program costs;
- e) Existing PVC Program participants will receive a one-time credit on their monthly bill to reflect the payment of fees collected in accordance with Item "d" above;
  - (i) The exact amount of the one-time credit will be determined by DIA Commercial Division based upon the total number of participating locations and the estimated yearly Program costs;
- f) Existing PVC Program participants will receive a pro-rata reduction in subsequent monthly fees commensurate with a larger participant pool;
- g) New PVC Program participants will pay a processing fee of 10 percent of the total amount collected in accordance with Item "d" above;
- h) New PVC Program participants are solely responsible for understanding all aspects, terms, and requirements of Rule 45 Premium Value Concession Program;
- i) The PVC Program's Third Party Administrator will provide new PVC Program participants with all previously distributed Program materials;
- j) The second enrollment offer will be for a limited two week time period, and concessionaires that reject, or fail to respond in a timely fashion to the offer shall be ineligible and have no future opportunity to join the PVC Program, unless through a new agreement obtained from the Airport through its contracting process; and

**WHEREAS**, Concessionaire is willing to accept and meet the conditions of this second enrollment offer and desires to participate in the PVC Program; and

**WHEREAS**, in addition to providing for participation in the PVC Program, the Parties have agreed to update the holding over provision to clarify that the compensation will not increase after the Original Agreement expires when the City asks Concessionaire to hold over to avoid interrupting services to the traveling public;

**NOW, THEREFORE**, for and in consideration of the premises and other good and valuable consideration, and as a condition precedent to Concessionaire's acceptance of the City's Second Enrollment offer, Concessionaire agrees to amend the Original Agreement as follows:

1. Concessionaire represents that the Original Agreement does not expire on or before July 31, 2013.
2. Concessionaire agrees to amend all eligible concession agreements under Concessionaire's ownership or control at the Airport in order to cause each of those concession locations to be enrolled into the PVC Program. Final determination of the eligibility of any of Concessionaire's locations will be made by the City.

3. Concessionaire accepts all PVC Program decisions made prior to the date this PVC Participation Agreement is executed as final and Concessionaire shall neither re-negotiate nor appeal any such decisions.

4. Concessionaire agrees that it shall contribute Concessionaire's pro-rated share of the PVC Program Costs as described in Section 8 (Cost of Premium Value Concessions Programs) of the PVC Rules. PVC Program Costs shall be payable to the City in advance, without setoff, deduction, prior notice or abatement on the first day of every month following the execution of this PVC Participation Agreement. In addition, Concessionaire agrees to pay a pro-rata share of the monthly PVC Program fees, in arrears from March 1, 2012 going forward to and including the date this PVC Participation Agreement is executed based on the total number of participating locations and the estimated yearly PVC Program costs (hereinafter, "Payments in Arrears"). Said Payments in Arrears represent Concessionaire's pro-rated share of the cost of administering the PVC Program that Concessionaire would have paid if Concessionaire's locations had been enrolled in the PVC Program, when the PVC Program Costs were first pro-rated among the total number of participating locations on March 1, 2012. Concessionaire also agrees to pay to the City a one-time processing fee of ten percent (10%) of the Payments in Arrears at the time this PVC Participation Agreement is executed. These Payments in Arrears shall be paid to the City in twelve equal installments, in advance, without setoff, deduction, prior notice or abatement, on the first day of each month following the execution of this PVC Participation Agreement. Concessionaire agrees that these Payments in Arrears and the processing fee are obligations that remain due and owing until paid regardless of whether Concessionaire remains in the PVC Program.

5. Concessionaire understands and acknowledges that existing PVC Program participants will receive a one-time credit on their monthly bill to reflect the payment of fees collected from concessionaire in accordance with paragraph 4 above. The exact amount and the timing of the one-time credit will be determined by DIA's Commercial Division based upon the total number of participating locations and the estimated yearly PVC Program costs. In addition, Concessionaire acknowledges that existing PVC Program participants will receive a pro-rata reduction in subsequent monthly fees commensurate with a larger participant pool.

6. Concessionaire is solely responsible for understanding all aspects, terms, and requirements of the PVC Rules.

7. The PVC Program's Third Party Administrator will provide Concessionaire with all previously distributed Program materials.

8. Concessionaire understands and acknowledges that this second enrollment offer will be for a limited two week time period, and concessionaires that reject, or fail to respond in a timely fashion to the offer shall be ineligible and have no future opportunity to join the PVC Program, unless through a new agreement obtained from the Airport through its contracting process.

9. Therefore having met the required conditions and otherwise being deemed eligible to accept this second enrollment offer, effective as of the date this PVC Participation Agreement is executed, and subject to the following, Concessionaire agrees to participate in the PVC Program and abide by the requirements of the PVC Rules.

10. For Concessionaire's participation in the PVC Program, the Parties agree that Concessionaire's major and minor merchandise categories, as described in the PVC Rules, and the PVC Square footage shall be as follows:

Major Merchandise Category: Retail

Minor Merchandise Category: Specialty Retail

Square Footage: 702.1

11. The City shall not be obligated to expend more for the PVC Program than is actually collected from concessionaires pursuant to Section 7 (Cost of the Premium Value concessions Program) of the PVC Rules. All services and personnel related to the PVC Program, including the Third Party Administrator as defined in Section 3 (Third Party Administrator) of the PVC Rules, shall be under the exclusive control and supervision of the Airport.

12. Concessionaire may withdraw from the PVC Program only if its annual obligation for the PVC Program for any location exceeds \$15,000 per concession location. Inflation adjustments shall be calculated using the Consumer Price Index for all Urban consumers (CPI-U) for the West urban Region.

13. In the sole and absolute discretion of the Manager, this PVC Program may be terminated if the number of participating concession locations falls below 20, or for any other reason, upon 30 days' written notice to Concessionaire. Return to Concessionaire of any of its participation fees shall be in accordance with the procedures stated in the PVC Rules.

14. In the event of a conflict between any provision of the PVC Rules and the Original Agreement, the Original Agreement as modified or revised herein shall govern.

15. Effective as of the date of execution, Section 4.03, Holding Over, of the Original Agreement is hereby amended by deleting it entirely and replacing it with the following:

#### **4.03 HOLDING OVER**

**A. Holding Over.** If Concessionaire holds over after the Expiration Date, or any extension or early termination of this Agreement as herein provided, and the City and Concessionaire have not otherwise agreed to the terms and provisions of such holding over, thereafter Concessionaire's occupancy shall be deemed by the City to be either a month-to-month holdover tenant at the same rental as was in effect immediately prior to the Expiration Date, or a tenant at sufferance, at a monthly rental, payable in advance, equal to 150% of the monthly Compensation provided for in Section 5 of this Agreement, and Concessionaire shall otherwise remain bound by all terms, conditions, covenants, and agreements hereof.

**B. Permitted Holdover.** The City may, at its option, allow Concessionaire to hold over under this Agreement on a month-to-month basis. A holdover by Concessionaire shall be deemed permitted until expiration of thirty (30) days after notice to vacate has been given by the City unless the City shall have entered into a binding agreement to deliver possession to another

concessionaire on a date that is less than thirty (30) days following the Expiration Date. It is agreed and understood that any holding over of Concessionaire after the termination of this Agreement with the City's consent shall not renew and extend the Term but shall operate and be construed as a month-to-month permit and Concessionaire agrees to pay to the City fees and other payments that are in effect at the end of the regular Term of the Agreement unless the City has given prior notice of any increased fees. Such increase in fees may be given at any time with notice of not less than thirty (30) days. Concessionaire shall be liable to the City for all loss or damage on account of any such holding over against the City's will after the termination of this Agreement, whether such loss or damage may be contemplated at this time or not. It is expressly agreed that acceptance of the foregoing payment to the City in the event that Concessionaire fails or refuses to surrender possession shall not constitute a waiver by the City of its right to immediate possession.

**C. Month -to -Month Tenancy.** If Concessionaire is deemed to be a holdover tenant, Concessionaire and the City agree that the tenancy may be terminated at any time by thirty (30) days prior written notice from either Party to the other.

**D. No Right to Holdover.** Nothing herein shall be construed to give Concessionaire the right to hold over at any time, and the City (after expiration or termination of this Agreement, as the case may be), may exercise any and all remedies at law or in equity to recover possession of the Concession Spaces, as well as any damages incurred by City on account of such holding over.

**E. Tenant at Sufferance.** In the event that the City deems Concessionaire a tenant at sufferance, the City will notify Concessionaire, in writing, that Concessionaire is a tenant at sufferance. Thereafter, the City may take immediate action to evict Concessionaire without further notice and may otherwise exercise any other rights and remedies available to it at law or in equity.

16. Except as modified or revised herein, all terms, conditions, covenants and provisions of the Original Agreement shall remain in full force and effect as if fully set forth herein.

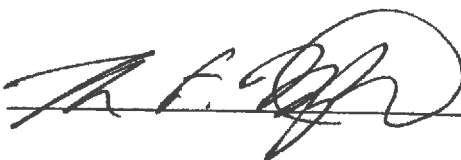
17. This PVC Participation Agreement is expressly subject to and shall not be or become effective or binding on the City until it is approved by the City Council, if required by the City's Charter, and fully executed by all signatories of the City and County of Denver. This PVC Participation Agreement may be signed in two or more counterparts, each of which shall be deemed to be an original signature page, and may be signed electronically by the Parties in the manner specified by the City.

**[SIGNATURE PAGES FOLLOW]**

Contract Control Number: PLANE-AR85003-01

Contractor Name: Brookstone Stores, Inc.



By: 

Name: Thomas F. Moynihan  
(please print)

Title: Vice President, CFO  
(please print)

ATTEST: [if required]

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

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)

.....



**Contract Control Number:**

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

**CITY AND COUNTY OF DENVER**

ATTEST:

By \_\_\_\_\_

\_\_\_\_\_

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

By \_\_\_\_\_

By \_\_\_\_\_

By \_\_\_\_\_

