

## SECOND AMENDMENT AND TERMINATION OF AGREEMENT

**THIS SECOND AMENDMENT AND TERMINATION OF AGREEMENT** (“Second Amendment”) is made and entered into on the date of the City’s signature page by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (“City”), and **CONCESSIONS COLORADO, LLC**, a Colorado limited liability company (the “Concessionaire” incorrectly referred to at times as “Consultant”) d/b/a ***New Belgium Spoke***.

### RECITALS

- A. The Parties entered into an Agreement dated November 2, 2010 (AR18001) for the operation of a concession at Denver International Airport (“Airport” “DEN”) and a First Amendment to Agreement dated September 2, 2014 (collectively, the “Original Agreement”).
- B. On or about October 17, 2013, the Commercial Division of the Airport received Concessionaire’s Financial Hardship Relief Request asking the Airport to consider waiving the monthly Minimum Annual Guarantee (MAG) of \$250,000 required by the Original Agreement. Based on financials submitted by Concessionaire, the Concession Division’s analysis, various conversations with Concessionaire, and documentation revealing a greater than 60% decline in the numbers of departing and enplaning passengers at the Regional Jet area the Commercial Division found that a catastrophic condition existed and granted Concessionaire’s request.
- C. The Airport was in discussions with both Frontier and Spirit Airlines in an effort to relocate some passenger enplanements to this area of the concourse and reduce air carrier operating costs, so the potential for passengers to return to this area was possible. After performing an analysis, which included reviewing the degradation of the overall return on the owner’s investments in the combined locations, the Parties executed a First Amendment and agreed to broaden Concessionaire’s permitted use and adjust the rent by waiving the monthly MAG payments from 1/1/2013 through 12/31/2015. The Amendment allows the relief to continue if “the catastrophic condition continues to exist...”
- D. Since then, further investigation shows as a result of fleet and scheduling changes made by both Republic/Frontier and Great Lakes Airlines, passenger enplanements on the Concourse A, Regional Jet Facility (A-RJF), have dropped significantly over the past 24 months. Even with the introduction of Boutique Air, no projected lift in these passenger enplanements is forecasted. Due to continued decline in passenger enplanements and the recent Gate Optimization Program direction, no additional passenger enplanements are forecasted for this area.
- E. Concessionaire’s performance continues to be lackluster with no anticipated relief. Concessionaire indicates they have net operating losses equaling \$529,964 since they opened. Accordingly, Concessionaire has asked the Airport to purchase the JV’s leasehold improvements, which has a remaining Net Book Value as of 8/31/2014 of \$362,187, and allow the concession to close effective July 31, 2015.

- F. Concessionaire believes “this requested relief is in line with industry norms when airport authorities have elected to terminate a concessions lease due to actual or virtual closing of a terminal or concourse.”
- G. Both parties agree that termination of the concession serves everyone’s best interest. With a desire to amicably resolve all outstanding issues related to termination of this Agreement, the Parties have entered into discussions of the financial settlement Concessionaire has proposed and now stipulate to the following:
- a. As requested by Concessionaire, the Airport has taken commercially reasonable steps to aid the Concessionaire in stemming potential losses by agreeing to waive the MAG requirement and by waiving the mid-term refurbishment requirement which was due in December 2014.
  - b. The steps were reasonable, within the control of the Airport and in keeping with the terms of the Original Agreement as it was written and subsequently amended. No provision exists that requires the City to protect Concessionaire for potential decreases in passenger volume or compensate Concessionaire for the net book value of its improvements due to early closure of the concession. Moreover, the City has itself seen losses in rent revenue of approximately \$325,000 through June 30, 2015 by agreeing to waive the MAG requirement.

**NOW, THEREFORE**, for the foregoing reasons and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties hereby agree to amend the Original Agreement as follows:

1. The Parties mutually agree to close the New Belgium Spoke location Sunday July 26, 2015 and to relieve each other of further obligations under the Agreement except as provided in this Second Amendment.
2. The Parties agree that the City will not pay Concessionaire the financial net book value of its improvements because: 1) both parties agreed to mutually close the location; 2) both parties agree to walk away from incurring or collecting additional financial revenues & operational costs; 3) the City has been impacted by the loss of revenues from this concession location, and; 4) because at the time the Original Agreement was executed, the Parties never intended for the City to pay the Concessionaire for its unamortized net book value and; 5) doing so would set an unwanted precedent.
3. Accordingly, the Original Agreement shall terminate effective as of July 31, 2015 (the “Termination Date”) and both the City and Concessionaire shall be and hereby are released from any further liability or obligation under the Agreement, except as provided in this Second Amendment.
4. Upon the termination of this Agreement Concessionaire covenants and agrees to surrender possession of the Concession Space to City in broom clean condition and good state of repair, ordinary wear and tear excepted. Ordinary wear and tear shall not include deterioration that could have been prevented by proper maintenance practices, or by Concessionaire performing all of Concessionaire's

obligations under this Agreement. Concessionaire covenants and agrees to cooperate with the City's Termination procedures described in Section 6.16.

5. The Parties further agree and Concessionaire covenants by the Termination Date, Concessionaire shall have paid the City all amounts due under this Agreement and fully performed all of its other obligations under this Agreement, including: (a) delivery of all keys to any doors and to any Improvements located on the Concession Space to the City; (b) removal of Concessionaire's Equipment; (c) surrender of the Concession Space as required in Section 4.02; and (d) performance of any other obligations required to be performed pursuant to this Agreement prior to termination under this Agreement.
6. If the Manager's authorized representative determines in his commercially reasonable judgment upon such termination, that the Concession Space was not surrendered in accordance with the preceding standard, then Concessionaire, at its sole cost, shall have the option of either of the following actions: (i) bringing such specified Improvements up to the above referenced standard or (ii) removing the entire Improvements or such portion thereof as is specified by the City. Either option shall be completed by Concessionaire within 10 days of such termination or within such additional time as is granted by the City.
7. If all or any portion of the Improvements are removed by Concessionaire either at any time during the Term, Concessionaire shall at its expense restore any City property damaged to conditions existing prior to the installation of such Improvements or applicable portions thereof, and upon Concessionaire's failure to do so the City may cause such removal and restoration to be done at Concessionaire's expense.
8. Concessionaire shall retain title to and shall remove, at its sole cost, prior to the termination of this Agreement, all of Concessionaire's Equipment. Concessionaire shall remove Concessionaire's Equipment in a manner and at times that do not interrupt other business at the Airport or operations of the Airport. Concessionaire agrees, at its sole cost, at or prior to the termination of this Agreement, to repair any injury or damage done to the Concession Space, or other City-owned property, resulting from the removal of Concessionaire's Equipment, in good and workmanlike fashion and to place the Concession Space in the same condition as the Concession Space would have been if such Concessionaire's Equipment had not been installed, ordinary wear and tear excepted.
9. If Concessionaire fails to remove any of Concessionaire's Equipment by the termination of this Agreement, City at its option, may take immediate title to and retain any such Concessionaire's Equipment at no cost to the City. In the alternative, the City may dispose of all or any portion of Concessionaire's Equipment and retain any proceeds therefrom. In addition, if City removes any such Equipment, the Concessionaire agrees to indemnify and hold City harmless from all costs, losses, expenses or damages incurred in relation to the removal of such Equipment, including without limitation all costs of associated remedial actions, fines or penalties, reasonable attorney fees, engineering fees and other professional expert fees plus a twenty percent (20%) administrative fee. In the event of a dispute as to the affixed or non-affixed nature of any of Concessionaire's

Equipment, the Parties agree that the City's determination shall be final and shall not be subject to mediation or any other form of dispute resolution or litigation.

10. After this Second Amendment is executed if the City determines it to be necessary, the Parties will walk through the Concession Space to ascertain Concessionaire's compliance with the requirements for surrender of the Concession Space described above. As soon as the City is satisfied that Concessionaire has (a) paid the City all amounts due under this Agreement; (b) surrendered the Concession Space as required in Section 4.02; (c) delivered keys to any doors and to any Improvements located on the Concession Space to the City; (d) removed Concessionaire's Equipment; (e); repaired any injury or damage done to the Concession Space, or other City-owned property, resulting from the removal of Concessionaire's Equipment; and, (f) and has fully performed all remaining obligations required of Concessionaire by this Second Amendment, the City will release Concessionaire's Performance Surety.
11. The Parties understand and agree that all terms and conditions of the Original Agreement, (such as the indemnity agreement set forth herein) which by reasonable implication contemplate continued performance or compliance beyond the termination of this Agreement, shall survive the termination of this Agreement and shall continue to be fully enforceable as provided herein.
12. This Second Amendment to Agreement shall not be or become effective or binding on the City until approved by the City and County of Denver, if required by the City's Charter, and fully executed by all signatories of the City and County of Denver. This Second Amendment may be signed in two or more counterparts, each of which shall be deemed to be an original signature page and further may be signed electronically by the Parties in the manner specified by the City.

**[SIGNATURE PAGES FOLLOW]**

**Contract Control Number:**

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

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

Title: \_\_\_\_\_  
(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 \_\_\_\_\_

