



**Standard Concession Agreement  
Package #4 - Multi-Unit Regionally  
Inspired Fast Casual Dining Hall -  
Concourse A  
201630762**

**Parties and Addresses:**

City and County of Denver: City and County of Denver, Department of Aviation  
Denver International Airport  
Airport Office Building, 9th Floor  
8500 Peña Boulevard  
Denver, CO 80249-6340

Concessionaire: DN/OPTIMAL/TRUGOY DEN, LLC  
250 DELAWARE AVE.  
BUFFALO, NY 14202  
ATTN: KEVIN KELLY  
CC: JOSHUA MCMURRY

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**STANDARD FOOD AND BEVERAGE  
CONCESSION AGREEMENT  
201630762**

This Standard Concession Agreement for the Denver International Airport (“DEN”)’s Concessions Program (“Agreement”) is entered into as of the date stated on City’s signature page, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, for and on behalf of its Department of Aviation (hereinafter “City”) Party of the First Part, and **DN/Optimal/Trugoy DEN, LLC**, a Delaware Limited Liability Company authorized to conduct business in the State of Colorado, dba **The Denver Central Market** (hereinafter referred to as “Concessionaire”), Party of the Second Part (collectively, “Parties”).

For and in consideration of the mutual covenants hereof, the Parties do hereby agree as follows:

**ARTICLE I. SUMMARY OF CONTRACT PROVISIONS**

**SECTION 1.01 SUMMARY OF CONTRACT PROVISIONS**

|                                     |  |
|-------------------------------------|--|
| City Address for Notices:           | ATTN: Chief Executive Officer<br>City and County of Denver<br>Department of Aviation<br>Denver International Airport<br>Airport Office Building, 9th Floor<br>8500 Peña Boulevard<br>Denver, CO 80249-6340   |
| Concessionaire Address for Notices: | DN/Optimal/Trugoy DEN, LLC<br>250 Delaware Ave.<br>Buffalo, NY 14202<br>ATTN: Kevin Kelly<br>CC: Joshua McMurray   |
| Guarantor Name and Notice Address:  | Delaware North Companies Travel Hospitality Services, Inc.<br>250 Delaware Ave.<br>Buffalo, NY 14202<br>ATTN: Kevin Kelly<br>CC: Joshua McMurray<br><br>Optimal Technologies, LLC<br>7500 S. Pitkin Court<br>Centennial, CO 80016<br>ATTN: Zach McNeal<br><br>Trugoy, Inc.<br>8400 Pena Boulevard, Box 492025<br>Denver, CO 80249<br>ATTN: Colleen Forst |

Concession Location(s): See Exhibits A and B:

| Location | Space | Sq. Ft. | PVC Sq. | Min.Invest. per Sq. Ft. | Trade Name | Assets | Hours of Ops |
|----------|-------|---------|---------|-------------------------|------------|--------|--------------|
|----------|-------|---------|---------|-------------------------|------------|--------|--------------|

|   |                  |         |   |               |                           |                 |                     |
|---|------------------|---------|---|---------------|---------------------------|-----------------|---------------------|
|   |                  |         | <b>Ft.</b>  |               |                           |                 |                     |
| A Conc  | R17-2-3-E19-S5-1 | 4,090.4 | 4090.4  | \$ 977.89     | The Denver Central Market | See Exhibit I   | 16                  |
|   |                  | 4,090.4 | 4090.4  |               |                           |                 |                     |
| Support Space(s):   |                  |         | See Exhibit A:  |               |                           |                 |                     |
|   |                  |         | Space   | Type Space    | Sq. Ft.                   | Fd. Cr. Sq. Ft. | Compensational Rate |
|   |                  |         | N/A   | Support Space |                           | 0               | \$ 12               |
| <b>Sub-Total:</b>   |                  |         |   |               | 0                         | 0               |                     |
| Premises Total:   |                  |         | 4,090.4 sq. ft.   |               |                           |                 |                     |
| Effective Date:   |                  |         | TBD   |               |                           |                 |                     |
| Commencement Date:  |                  |         | TBD   |               |                           |                 |                     |
| Package Completion Date:  |                  |         | TBD   |               |                           |                 |                     |
| Expiration Date:  |                  |         | TBD   |               |                           |                 |                     |
| Support Space Compensation  |                  |         | \$ 0 (0 sq. ft. X \$ 12 per ft.)  |               |                           |                 |                     |
| Privilege Fee   |                  |         | Initial MAPF: \$1,050,000   |               |                           |                 |                     |
|   |                  |         | 15%   |               |                           |                 |                     |
| Common Maintenance Services:  |                  |         | Maintenance and repair services performed by City, on behalf of and for the benefit of all Concessionaires to include:<br>N/A |               |                           |                 |                     |
| Common Maintenance Services Fee:                                    |                  |         | \$ 0  |               |                           |                 |                     |
| Concession Services   |                  |         | N/A   |               |                           |                 |                     |
| Concession Services Fee:  |                  |         | \$ 0  |               |                           |                 |                     |
| Total Minimum Capital Investment:                                   |                  |         | \$ 4,000,000 (4,090.4 sq. ft. X \$ 977.89 per sq. ft.)  |               |                           |                 |                     |
| Joint Marketing Fee Rate:   |                  |         | 1 %   |               |                           |                 |                     |
| Common Area Capital Improvement and Maintenance Share [Food Court]: |                  |         | N/A %   |               |                           |                 |                     |
| Surety:   |                  |         | \$ 525,000  |               |                           |                 |                     |
| Major Merchandise Category:   |                  |         |   |               |                           |                 |                     |
| Minor Merchandise Category:   |                  |         |   |               |                           |                 |                     |
| Concessionaire's Brand(s):  |                  |         | Culture meat & cheese / CURIO / SK Provisions / VERO Italian / Sushi-Rama Sushi Bar   |               |                           |                 |                     |
| ACDBE Goal  |                  |         | Percent   |               | 33 %                      |                 |                     |



|           |                          |   |
|-----------|--------------------------|---|
|           | Ownership Participation  | Trugoy, Inc - 16.5%<br>Optimal Concessions, LLC - 16.5% |
|           | Purchasing Participation | 0   |
| MWBE Goal | Percent                  | 25%   |

**SECTION 1.02            MODIFICATIONS TO SUMMARY OF CONTRACT PROVISIONS**

The Parties acknowledge and agree certain provisions stated in the Summary of Contract Provisions are, as of the Effective Date, unknown or estimates. The Parties further acknowledge and agree other provisions stated in the Summary of Contract Provisions are subject to change throughout the Term in accordance with the provisions of this Agreement. The Parties therefore agree to modify the Summary of Contract Provisions by letter executed by the CEO without formal amendment.

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## ARTICLE II. DEFINITIONS

### SECTION 2.01 DEFINITIONS

As referred to or used herein the following terms have the following meanings:

**A. Advertisement:** Includes without limitation any sponsorship or displays of materials, signs, fixtures, or equipment for drawing attention to the goods and services offered by the Concessionaire or to a related event.

**B. Agreement:** Shall mean this agreement between the parties as described in the preamble to this Agreement including all exhibits, appendices, schedules, attachments, and subsequent amendments thereto.

**C. Annual Report:** An audit report prepared annually by an Independent Certified Public Accountant (“CPA”), in accordance with Generally Accepted Auditing Standards expressing an opinion from the Independent CPA on whether the Schedule of Gross Receipts, Privilege Fees, and all other fees and charges payable under this Agreement have been completely and accurately all presented, calculated, reported, and paid according to the terms of this Agreement.

**D. Approved Project:** Concessionaire’s construction, furnishing, fixturing, and remodeling of any portion of the Premises as reviewed and approved by City in accordance with the Tenant Work Permit Handbook.

**E. As Built:** Record documents of the construction, additions, and other modifications constructed by Concessionaire on the Premises including but not limited to Concessionaire’s Contractor’s as built models and drawings in the format as required by DEN’s Design Standards Manual, reconciled project BIM models and drawings in the format as required by DEN’s Design Standards Manual. The reconciled BIM models shall consist of spatially coordinated systems and equipment reflecting the final built condition.

**F. Building Informational Modeling (BIM):** The building informational modeling system used by DEN, as further defined by the Tenant Work Permit Handbook.

**G. Capital Investment:** Those dollars spent by Concessionaire in the actual construction, remodeling, furnishing, fixturing, and equipping of any portion of the Premises, including reasonable architectural and engineering fees relating thereto, in connection with an Approved Project for such portion of the Premises. Capital Investment includes:

- 1. Premises Improvements:** All improvements and equipment that are structural in nature or are affixed to the Premises and cannot be removed without material damage to the Premises including, but not limited to, mechanical, electrical and plumbing work, floors, ceilings, demising walls, store fronts, lighting fixtures, and built-in shelving.
- 2. Trade Fixtures:** All furniture, fixtures, and major equipment installed by Concessionaire, for use in its performance of the Concession, removable from the Premises without causing material damage to the Premises.

**H. Chief Executive Officer (CEO):** The Chief Executive Officer of City's Department of Aviation, formerly the Manager of Aviation, and/or any successor in function and/or title, as amended by Executive Order 140, is the officer appointed by the Mayor to be in full charge and control of the Department including the management, operation, and control of Denver International Airport, the Denver municipal airport system and all other facilities relating to or otherwise used in connection with the foregoing.

**I. City:** The City and County of Denver is a municipal corporation of the State of Colorado, acting for and on behalf of its Department of Aviation, and is the owner of the Denver International Airport and party of the first part to this Agreement.

**J. City's Fiscal Year:** The twelve-month period beginning January 1st of a calendar year through December 31st of the calendar year.

**K. City's Work:** The work to be done by or on behalf of City to prepare the Premises for Concessionaire.

**L. Claim:** Any demand, action, cause of action, suit, proceeding, arbitration, claim, judgment or settlement, or compromise relating thereto which may give rise to a right to indemnification and defense under Article XIV of this Agreement.

**M. Commencement Date:** The first date any Concession Location under this Agreement opens for business.

**N. Commons Areas:** Those areas of DEN not leased, licensed, or otherwise designated or made available by City for exclusive or preferential use by a specific party or parties. Concessionaire's obligation to and responsibility for Commons Areas shall begin to accrue upon delivery of the Concession Location(s) to Concessionaire.

**O. Common Maintenance Services:** Certain maintenance and repair performed by City on behalf of and for the benefit of all concessionaires as further described in Sections 7.16 & 12.03 hereunder.

**P. Concession:** The privileges granted to Concessionaire by City to develop and operate a business to sell related goods and perform services, to the public and related operations thereto, in accordance with the terms and conditions of this Agreement.

**Q. Concession Location(s):** The individual locations within the Premises used for the sale of Concessionaire's goods and services.

**R. Concessionaire:** The legal entity that is the party of the second part to this Agreement who is bound by this Agreement to develop and operate the Concession at DEN. Concessionaire shall include all sub-concessionaires and contract operators of Concessionaire who are actually operating within the Premises with City's written consent or pursuant to City pre-approved subleases with Concessionaire. In all provisions of this Agreement that require a person to comply with a specific provision requiring representation of Concessionaire, this person shall be an authorized official of Concessionaire.

**S. Concessionaire's Operating Obligation(s):** The various maintenance, repair, and operating duties hereunder to be performed by Concessionaire, at its own cost and expense, in the operation of the Concession. The performance of the obligation by the Concessionaire, or payment to a third party for the performance of these obligations, are not Compensation payments or other considerations for the right to occupy real property, but are acknowledgements by the Concessionaire of its obligation to maintain, repair, and otherwise keep the Premises and operate the concession in a First Class manner.

**T. Concession Handbook:** The compilation of DEN's standards, procedures, requirements, directives, delegations of authority, directions and instructions governing the operations of concessionaires and actions of their employees, representatives, agents, contractors, and vendors, which is incorporated herein by reference. City reserves the right to amend the Concession's Handbook during the Term. Any amendment of the Concession's Handbook will be binding on Concessionaire without amendment to this Agreement, provided any amendment of the Concession's Handbook does not conflict with other terms and conditions of this Agreement, in such case this Agreement shall control.

**U. Concession Services:** Concessionaire's Operating Obligations and other maintenance and repair requirements performed by City on behalf of and for the benefit of Concessionaire as listed in the Summary of Contract Provisions and as further described in Section 12.03 hereunder.

**V. Concession Services Fee:** Amounts paid to City by Concessionaire as payment for Concessions Services as further described in Section 5.04 hereunder.

**W. Contract Year:** (a) With respect to the first Contract Year during the Term, the period commencing on the Commencement Date and continuing through the end of City's Fiscal Year in which the Commencement Date occurs, and (b) with respect to each Contract Year thereafter during the Term, each twelve-month period commencing on the first day of City's Fiscal Year and ending on the last day of City's Fiscal Year, provided that if the Term expires or is terminated on a day other than the last day of a Contract Year, the last Contract Year will then end as of the date of such expiration or termination.

**X. Concessionaire's Response:** Concessionaire's response to RFP No. 201630762, and any subsequent information submitted by Concessionaire during the evaluation process as modified and accepted by City.

**Y. Contract:** See Agreement.

**Z. Covenant:** Any agreement, undertaking, commitment, guarantee, warrant, pledge, and/or promise made under this Agreement.

**AA. Critical Dates:** The Effective Date, Commencement Date, Package Completion Date, and Expiration Date shall be the dates stated in the Summary of Contract Provisions.

**BB. Damage(s):** Any compensation for loss or injury, excluding consequential, special, and punitive damages, and/or any loss, liability, claim, damage, cost and

expense, including costs of investigation and defense and reasonable attorneys' fees, whether the action is for money damages, or for equitable or declaratory relief.

**CC.DEN:** The Denver Municipal Airport System of Denver, Colorado as defined in the Denver Revised Municipal Code, and specifically the Denver International Airport, including the passenger transportation facilities at the Denver International Airport, existing or under construction as of the Effective Date of this Agreement, known individually as the Jeppesen Terminal and its appurtenant Concourses A, B, and C, including all user movement areas, areas leased exclusively or preferentially to any third party or parties, common areas and baggage claim areas there in, and interconnecting hallways, concourses, and bridges.

**DD.DEN's Rules and Regulations:** The Denver Municipal Airport System's Rules and Regulations adopted January 11, 1994 for an effective date of March 9, 1994 and modified from time to time by the Chief Executive Officer, or his/her successor in function or title, pursuant to the authority granted in the Denver Revised Municipal Code.

**EE.Denver-Aurora Statistical Area:** The Denver-Aurora, CO Metropolitan Statistical Area, as defined by the U.S. Office of Management and Budget.

**FF.Development Schedule:** The Development Schedule approved by City in accordance with Section 10.04, as reflected in **Exhibit D** attached hereto, that sets forth for the following: (i) the anticipated date(s) of design submittals and reviews for each Concession Location; (ii) the anticipated Shell Space Turnover Date(s) for each Concession Location; (iii) the anticipated date of Substantial Completion of each Approved Project; (iv) the anticipated Required Opening Date(s) for each Concession Location; (v) the expected Package Completion Date for the entire Premises.

**GG.Effective Date:** The date of full execution of this Agreement by City, as set forth on City's signature page.

**HH.Emergency:** A serious, unexpected situation requiring immediate action including, but not limited to, any emergency declared by the CEO.

**II.Encumbrance:** Any burden or impediment on property and or assets.

**JJ.Expiration Date:** The ( ) anniversary of the Package Completion Date.

**KK.Federal Aviation Administration (FAA):** The Federal Aviation Administration established by the federal government under the Federal Aviation Act of 1958, as amended, or such other governmental agency which may be successor in function thereto or be vested with the same or similar authority.

**LL.First Class:** A manner of operation of the Concessions, a standard of quality of materials and construction, a standard of quality of goods and services, and sustainability practices above or comparable to those of upscale shopping centers in the Denver-Aurora Statistical Area and similar high-quality airport and non-airport service establishments.

**MM.General Manager:** An active, qualified, competent, and experienced employee(s) of Concessionaire that oversees and manages the performance of the Concession and represents and acts on behalf of Concessionaire.

**NN.Goods and Services:** The wholesome food, food products, non-alcoholic beverages, alcoholic beverages, merchandise, or consumer services Concessionaire is authorized to sell under this Agreement

**OO.Gross Receipts:** The total amount of monies paid to or earned by Concessionaire at or from the Premises in its performance of the Concession, as further described in Section 5.01.

**PP.Independent CPA:** A Certified Public Accountant licensed in Colorado acceptable to City who is independent and without the appearance of impropriety within the meaning of the American Institute of Certified Public Accounts' Code of Professional Conduct Rule 1.200.001 – 1298.010.16.

**QQ.Joint Marketing Fund:** The central marketing and promotional fund, which in City's sole discretion, will serve the Promotions Program for overall service, retail, and food and beverage concessions at DEN.

**RR.Law:** Any order, writ, injunction, decree, judgment, law, ordinance, decision, ruling, statute, code, rule, or regulation of any Governmental Authority.

**SS.Loss:** Any expense, cost, or damage to person or property.

**TT.Minimum Annual Privilege Fee:** The minimum amount payable by Concessionaire to City each Contract Year as a portion of the Privilege Fee as further described in Section 5.03. The Minimum Annual Privilege Fee is hereinafter referred to as the MAPF.

**UU.Mid-Term Refurbishment:** Refurbishment of the Premises at or about the midpoint of the Term, in accordance with Section 10.10.

**VV.Notice to Proceed:** As it applies to any portion of the Premises, the written notice from City to Concessionaire allowing Concessionaire to commence an Approved Project for such portion of the Premises, and for initial construction, the written notice that establishes the Shell Space Turnover Date and Required Completion Date for such portion of the Premises. Additionally, for all initial construction of each Concession Location, the Notice to Proceed will also reflect the Required Opening Date approved by City in the Development Schedule.

**WW.Open For Business:** The date Concessionaire has met the requirements stated in the Tenant Work Permit Handbook to open for business, to include, but not limited to, the following: (i) delivered documentation satisfactory to City of Substantial Completion of the Concession Location; (ii) obtained written permission from the CEO to remove the construction wall surrounding the Concession Location; and (iii) commenced generating Gross Receipts from the Concession Location.

**XX.Package Completion Date:** The earlier to occur of (a) the Opening For Business of all Concession Locations following completion of all Approved Projects, or (b) the

latest of the dates established under this Agreement for completion of all Approved Projects for all Concession Locations. The expected Package Completion Date shall be reflected in the Development Schedule.

**YY.Percentage Fee:** The monthly fee paid by Concessionaire to City, as a portion of the Privilege Fee, calculated in accordance with Section 5.03.

**ZZ.Personnel:** A sufficient number of properly trained representatives, agents, and employees of Concessionaire to service customers in a timely and efficient manner and to meet Concessionaire's obligations under this Agreement.

**AAA.Premises:** The specific area(s) of DEN that Concessionaire is authorized to occupy and use for the purposes set forth herein.

**BBB.Premises Improvements:** See G.1.

**CCC.POS Terminal(s):** Electronic point-of-sale terminal(s) consistent with the requirements of Section 7.09.

**DDD.Price Benchmark Establishment(s):** City's approved business(s) within the Denver-Aurora Statistical Area used to determine compliance with the Value Pricing comparable in concept, size, ambiance, service style and quality to the Concession Location, and in full compliance with Section 7.03 (B).

**EEE.Price List:** A listing, substantially consistent with **Exhibit B** and as requested by City, of the goods and services to be sold from the Concession Location.

**FFF.Privilege Fee:** The monthly fee paid by Concessionaire to City as consideration for the privilege of operating a concession(s) at DEN comprised of the MAPF and Percentage Fee.

**GGG.Promotions Program:** Activities by City, as described in Section 7.13, to promote the concession program at DEN.

**HHH.Replacement Premises:** Other location(s) within DEN substantially similar to the Premises, as defined in Section 3.03.

**III.Required Completion Date:** The date set forth in a Notice to Proceed by which Concessionaire must achieve Substantial Completion of an Approved Project, except as such date may be extended in accordance with the provisions herein.

**JJJ.Required Opening Date:** The date set forth in the Development Schedule by which Concessionaire must open each Concession Location for business as defined in the Tenant Work Permit Handbook, except as such date may be extended in accordance with the provisions herein.

**KKK.Surety** An irrevocable letter of credit or bond as first approved in writing by City, in a form compliant with Section 16.01, drawn on behalf of City.

**LLL.Shell Space Turnover Date:** The date provided in a Notice to Proceed which makes a portion of the Premises available to Concessionaire to commence the Approved Project in such portion of the Premises.

**MMM.Store Hours:** The hours of operation for the Concession, not less than sixteen (16) hours each day, seven (7) days per week, or as they may be adjusted pursuant to Section 7.04.

**NNN.Substantial Completion:** The stage in the process of any construction or other work when such work is sufficiently complete, as reasonably determined by City, so that (i) in the case of City's Work, Concessionaire is able to take possession of the Premises for the purpose of performing the Approved Project, or (ii) in the case of Approved Project work, Concessionaire has received a Certificate of Occupancy and/or a Temporary Certificate of Occupancy from City and County of Denver Building Department and is able to occupy the Premises for the purpose of opening for business. In no event shall Substantial Completion of any work occur prior to the issuance by City of the Notice to Proceed. It is the intent of the Parties that the application of the term Substantial Completion in the context of this Agreement shall coincide with the application of that term in Colorado Revised Statutes Section 39-1-103(17) (a) (II) (A) and (B), so that the date on which Substantial Completion occurs under this Agreement shall be the same date relative to the imposition and levy of possessory interest taxes.

**OOO.Summary of Contract Provisions:** The statement of key provisions of this Agreement located in Article I of this Agreement.

**PPP.Support Space(s):** The non-selling locations, individually or collectively, within the Premises intended for the support of Concessionaire's operation of the Concession including, but not limited to, offices, commissary, and storage spaces.

**QQQ.Support Space Compensation:** The annual amount payable by Concessionaire to City for the use and occupancy of the Support Spaces, as further described in Section 5.02.

**RRR.Support Space Compensation Rate:** The fair market compensation rate per square foot for the Support Spaces, as further described in Section 5.02.

**SSS.Tenant Work Permit Handbook:** The compilation of City's obligations prior to the Shell Space Turnover Date, standards, procedures, requirements, directions, and instructions governing Concessionaire's construction activities at DEN, which is incorporated herein by reference. City reserves the right to amend the Tenant Work Permit Handbook during the Term. Any such amendment to the Handbook will be binding on Concessionaire without need for amendment of this Agreement, provided any amendment of the Tenant Work Permit Handbook does not conflict with the other terms and conditions of this Agreement, in such case this Agreement shall control.

**TTT.Term:** The period of time beginning on the Package Completion Date and ending on the Expiration Date.

**UUU.Trade Fixtures:** See G.2.



VVV.**TSA:** The U.S. Department of Homeland Security's, Transportation Security Administration, or any successor thereto.

WWW.**Unamortized Investment:** The unamortized amount, as reflected in **Exhibit I**, for that portion of the Premises Improvements or Trade Fixtures at the time such amount is referred to herein, of Concessionaire's Capital Investment or portion thereof, using straight line amortization, calculated on a daily basis, over the period beginning on the latter of (i) the Package Completion Date or (ii) the completion of an Approved Project to which such Capital Investment refers and ending on the earlier of the Expiration Date, termination date, or relocation date.

XXX.**Value Pricing:** Comparable price(s) to similar or equivalent goods and services sold in comparable off-DEN locations within the Denver-Aurora Statistical Area, as described in Section 7.03.

## **SECTION 2.02            CONTRACT CONSTRUCTION**

### A. Exhibits and Appendixes.

The following Exhibits and Appendixes are attached hereto and are hereby incorporated and made a part of this Agreement:

1. Exhibit A, Premises Description
2. Exhibit B, Permitted Uses
3. Exhibit C, Monthly & Quarterly Concession Reports
4. Exhibit D, Development Schedule
5. Exhibit E, Form of Guaranty of Agreement
6. Exhibit F, Insurance Certificate & Surety Forms
7. Exhibit G, ACDBE Commitment Form
8. Exhibit H, City's Work
9. Exhibit I, Schedule of Assets and Amortization
10. Appendix A, Compliance with Nondiscrimination Requirements
11. Appendix C, Standard Federal Assurances And Nondiscrimination In Construction, Maintenance, Operation Of Facilities
12. Appendix D, Standard Federal Assurances And Nondiscrimination In Construction, Use, Or Access To Facilities
13. Appendix E, Title VI List Of Pertinent Nondiscrimination Authorities
14. Appendix 1, Disadvantaged Business Enterprises- Required Statements

15. Appendix 2, ACDBE Nondiscrimination And Assurance Requirements

16. Appendix 3, ACDBE/DBE Policy And Objective Statements

The Parties acknowledge and agree that certain content required to complete the above Exhibits and Appendixes are, as of the Effective Date, unknown. The Parties further acknowledge and agree that other provisions stated in the above Exhibits and Appendixes are subject to change throughout the Term in accordance with the provisions of this Agreement. The Parties therefore agree to modify, as necessary, these Exhibits and Appendixes by letter executed by the CEO without formal amendment.

B. Concessionaire's Response.

Concessionaire and City acknowledge that Concessionaire's Response was valuable consideration in the award of this Agreement to Concessionaire and is an authoritative reference for understanding the intention of the Parties. Accordingly, Concessionaire shall be obligated to meet all specifications described in Concessionaire's Response; provided, however, that where an express provision of this Agreement conflicts with any provision of Concessionaire's Response, this Agreement shall control. Concessionaire's Response is incorporated herein by reference.

C. Interpretations.

As used herein mean as follows:

1. Day(s) shall mean calendar day(s).
2. Month(s) shall mean calendar month(s).
3. The use of any gender shall include all genders.
4. The use of any number(s) shall be construed as the singular or the plural, all as the context may require.
5. Section Heading(s) are for the convenience and reference of the Parties, and do not define or limit the scope of any section or provision.
6. The language of this Agreement shall be construed according to its fair meaning, and not strictly for or against either Party.
7. If any provision in this Agreement is capable of two (2) constructions, one of which would render the provision void and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid.
8. This Agreement and all of its terms and conditions shall be construed, interpreted, and applied in accordance with, governed by, and enforced under the laws of the State of Colorado, as well as the Charter and Ordinances of the City and County of Denver.

9. The Parties agree that venue for any action arising from this Agreement shall be in the District Court for the City and County of Denver.

### **ARTICLE III. PREMISES**

#### **SECTION 3.01 PREMISES DESCRIPTION**

City hereby grants to Concessionaire, as of the first Shell Space Turnover Date under this Agreement, the right to occupy, improve, and use Premises within DEN consisting of the Concession Locations and Support Spaces as listed and depicted in **Exhibit A**, Premises Description, including any improvements made or modifications made thereto. No other part of DEN shall be part of the Premises.

The total estimated areas of the Premises, Concessions Locations, and Support Spaces are listed in the Summary of Contract Provisions. No later than thirty (30) days after the Package Completion Date, Concessionaire shall certify in writing the actual as-built areas of the Premises, Concession Locations, and Support Spaces. The Parties agree to modify the Summary of Contract Provisions and **Exhibit A** to incorporate such as-built areas, such modifications to be confirmed by letter executed by the CEO, without need for formal amendment to this Agreement.

#### **SECTION 3.02 ADDITIONS TO AND DELETIONS FROM THE PREMISES**

City and Concessionaire may, during the Term and by mutual agreement, add additional space(s) or delete space(s) from the Premises. All space(s) added to the Premises pursuant to this Section 3.02 shall be subject to all the terms, conditions, covenants, and other provisions of this Agreement and Concessionaire shall pay to City all compensation, fees, and charges applicable to the additional space(s) in accordance with this Agreement. In the case of additions or deletions of space(s) from the Premises, City will make appropriate adjustments to, compensation, fees, and charges paid to City by Concessionaire. The Parties agree to modify the Summary of Contract Provisions, **Exhibit A**, **Exhibit B**, and **Exhibit I** as necessary, to incorporate space additions to the Premises and space deletions from the Premises by letter executed by the CEO and acknowledged by Concessionaire, without need for formal amendment to this Agreement.

#### **SECTION 3.03 RECLAIMING OF PREMISES FOR AIRPORT PURPOSES**

City reserves the right to reclaim the Premises or portions thereof, when, in the sole and absolute discretion of City, such reclaiming is necessary for the development or operations of DEN or is in the best interest of City. City will make a reasonable effort to identify Replacement Premises, other location(s) within DEN containing substantially the same area, visibility, and exposure to passenger traffic as the portion(s) of the Premises being reclaimed.

City shall exercise such right to reclaim by giving Concessionaire not less than ninety (90) days prior written Notice of Intent to Reclaim Premises specifying the effective date of the reclaiming and identifying Replacement Premises, if any. Concessionaire shall, by written notice given to City no later than thirty (30) days after receipt of Notice of Intent to Reclaim Premises, notify City of its acceptance of the Replacement Premises, if any, whereupon, as of the effective date provided in City's Notice of Intent to Reclaim Premises:

1. All of the terms, covenants, conditions and provisions of this Agreement shall continue in full force and effect and apply to the Replacement Premises;
2. Concessionaire shall move from the Premises, or portion(s) thereof being reclaimed by City, into the Replacement Premises on or before the effective date stated in City's Notice of Intent to Reclaim Premises and shall vacate and surrender possession of the Premises or portion(s) thereof being reclaimed by City;
3. Subject to the other provisions of this Agreement, Concessionaire shall be deemed to have accepted possession of the Replacement Premises in its "as is" condition as of the effective date stated in City's Notice of Intent to Reclaim Premises; and
4. City will pay to Concessionaire moving expenses, limited to the moving of furniture, equipment, and other personal property into the Replacement Premises. Concessionaire shall pay all other costs to improve and fit out the Replacement Premises.

In addition, City will pay to Concessionaire, within fifteen (15) days of the effective date stated in City's Notice of Intent to Reclaim Premises, an amount equal to the Unamortized Investment, consistent with **Exhibit I**, in the portion(s) of the Premises being reclaimed less any of the Unamortized Investment attributable to Trade Fixtures moved to the Replacement Premises.

Concessionaire shall not be compensated and City shall not be liable for any inconvenience to Concessionaire or for any interruption of Concessionaire's business, because of moving to Replacement Premises.

The Parties agree to modify, within ten (10) days of the effective date stated in City's Notice of Intent to Reclaim Premises, the Summary of Contract Provisions, **Exhibit A, Exhibit B, and Exhibit I** as necessary, to delete the portion(s) of the Premises being vacated and incorporate the Replacement Premises, if any. These modifications will be confirmed by letter executed by the CEO and acknowledged by Concessionaire, without need for formal amendment to this Agreement.

Notwithstanding any other provision to the contrary, if no Replacement Premise(s) are available, as determined solely by City, or if Concessionaire fails to respond to City's Notice of Intent to Reclaim Premises within thirty (30) days after receipt of such notice or otherwise rejects the Replacement Premises, or if City deems the use(s) or concept(s) are not appropriate at the Replacement Premises, then this Agreement for the Premises or portion(s) thereof being reclaimed will terminate on the effective date provided in City's Notice of Intent to Reclaim Premises and provisions of this Agreement related to termination shall apply.

### **SECTION 3.04 MINOR MODIFICATIONS TO PREMISES**

City shall have the right to make minor modifications to any portion of the Premises, at the sole discretion of City, to accommodate DEN operations, security renovations, maintenance, or other work to be completed at DEN. Minor modifications are subject to all provisions in Section 3.02.

### **SECTION 3.05            INGRESS AND EGRESS**

Concessionaire will have the right of ingress to and egress from DEN and the Premises for Concessionaire's officers, authorized officials, employees, agents, and invitees, including customers, suppliers of materials, furnishers of services, equipment, vehicles, machinery, and other property. Right of ingress and egress will be subject to FAA Regulations, as amended, applicable laws, and DEN's Rules and Regulations. Moreover, without exception, nothing in this Agreement shall be construed to prevent City from charging the operators of vehicles or carrying passengers and property a fee for the privilege of entering upon DEN, using DEN's roadways, soliciting passengers upon DEN, or otherwise operating vehicles at DEN. City reserves the right to make such charges provided they do not discriminate unreasonably against the operators of vehicles used for carrying officers, employees, passengers, or property of Concessionaire.

### **SECTION 3.06            PREMISES ACCEPTANCE AS IS**

Concessionaire understands, acknowledges, and accepts the Premises in its present condition, "***As Is***" with all faults and with absolutely no warranties as to condition or suitability for use being given by City. City shall have no obligation, liability, responsibility to construct additional improvements or to modify existing conditions, nor to provide services of any type, character, or nature (including any obligation to maintain, repair, or replace utilities or telephone/data service) on or to the Premises during the Term other than as explicitly stated in this Agreement.

### **SECTION 3.07            NO WARRANTY FOR ECONOMIC VIABILITY**

City makes no warranty, promises, or representations as to the economic viability of the Premises, Concessionaire's business concept, or any other matter pertinent to the potential or likelihood for success or failure of Concessionaire's business operations. Concessionaire understands, acknowledges, and accepts that airline gate usage and other aspects of DEN operations are subject to change during the Term without notice and that City makes no warranty regarding the location of airline gate usage. Except as is specifically set forth herein, City shall not, by virtue of the existence of this Agreement, be constrained in connection with its operation of DEN.

## **ARTICLE IV. TERM**

### **SECTION 4.01            TERM**

This Agreement shall be effective and binding upon the Parties as of the Effective Date. The Term of this Agreement shall begin on the Package Completion Date and continue through the Expiration Date, as stated in the Summary of Contract Provisions, unless sooner terminated as herein provided.

### **SECTION 4.02            OPTIONS TO TERMINATE**

If for any reason City fails to deliver possession of any portion of the Premises to Concessionaire within six (6) months after the Effective Date, then City, in the sole and absolute discretion of the CEO, shall have the option at any time thereafter to notify Concessionaire in writing of City's intent to terminate this Agreement. In such event, this Agreement shall terminate on the date as stated in said notice, and both City and

Concessionaire shall be released from any liability or obligation under this Agreement.

If for any reason City has not terminated this Agreement or delivered possession of any portion of the Premises to Concessionaire within nine (9) months after the Effective Date, the Concessionaire, at any time thereafter, may notify City in writing of Concessionaire's intent to terminate this Agreement sixty (60) days after City receives the written notice. However, this Agreement shall remain in full force and effective if City delivers possession of any portion of the Premises within that sixty (60) day period. If City has not delivered possession of any portion of the Premises to Concessionaire within the sixty (60) day period, this Agreement shall terminate at the close of business on the sixtieth (60th) day, and both City and Concessionaire shall be released from any liability or obligation under this Agreement.

#### **SECTION 4.03            CRITICAL DATES**

The Parties agree to meet, no later than thirty (30) days after the Package Completion Date, and determine and finalize the actual Critical Dates for construction under this Agreement, and any obligations resulting from the actual Critical Dates. Thereafter, the Parties agree to update the Summary of Contract Provisions to incorporate the actual Critical Dates, to be confirmed by letter executed by the CEO and acknowledged by Concessionaire, without need for formal amendment to this Agreement.

#### **SECTION 4.04            HOLDOVER**

Any exercise of the privileges granted herein by Concessionaire, with permission of the City, after the Expiration Date shall be on a month-to-month basis with all provisions of this Agreement, including compensation, fees, charges, insurance policies, Surety, and Guarantees remaining in place until such time City gives notice to Concessionaire to surrender the Premises. Notice to surrender will be provided in writing not less than thirty (30) days prior to the anticipated surrender date.

Any exercise of the privileges granted herein by Concessionaire after expiration of the Term or any extension thereof, or after termination of this Agreement without the written approval of City constitutes a trespass, in accordance with D.R.M.C. § 38-115. No occupancy of any portion of the Premises by Concessionaire after the expiration or other termination of this Agreement, without City's written approval, extends the Term of such portion of the Premises. Nothing herein shall be construed to give Concessionaire the right to hold over. In the event of such trespass, Concessionaire shall indemnify City against all damages arising out of the Concessionaire's trespass, including but not limited to, any costs incurred by City to evict Concessionaire, regain possession of the Premises or any portion(s) thereof, and all insurance policies, Surety, and Guarantees required to be obtained and maintained by Concessionaire as set forth in this Agreement shall continue in full force and effect.

#### **SECTION 4.05            PRIVILEGES AND OBLIGATIONS UPON EXPIRATION OR TERMINATION**

Concessionaire covenants, upon termination of this Agreement, with or without cause, to surrender the Premises to City peaceably, quietly and in as good order and condition as the same now or may be hereafter improved by Concessionaire or City, reasonable use and wear thereof and damage by casualty, which damage Concessionaire did not cause and is not required to repair or restore under this Agreement, excepted. Concessionaire covenants

to remove all signage and provide temporary walls to seal all openings of premises that meet the guidelines outlined in the Tenant Work Permit Handbook. Concessionaire also covenants to provide to City any and all keys to doors, window displays, or any area of controlled access within the footprint of the Premises. City shall be entitled to exercise the non-judicial remedy of locking Concessionaire out of the Premises as a means of enforcing City's right of possession, regardless of whether Concessionaire is delinquent in compensation payments, including without limitation, the de-activation of Concessionaire's security badges or credentials; and this right of de-activation shall not, and legally cannot, limit or otherwise affect City's governmental police powers to de-activate security credentials for security or other governmental reasons.

Upon expiration or termination of this Agreement, Concessionaire shall, subject to City's Lien described in Section 5.06, remove all furniture, fixtures and equipment installed by Concessionaire and Concessionaire or brand proprietary property, inventory and other personal property, and leave the Premises in broom clean condition. Additionally, Concessionaire covenants that at the option and upon the written request of City and to the extent permitted by applicable law, Concessionaire shall convey the rights to any permit or license to any designee of City for the designee's use within the Concessions Location on an "**AS IS**" basis without warranties. Any damage to the Premises caused by Concessionaire's removal of such furniture, fixtures, equipment, or property shall be immediately repaired by Concessionaire at Concessionaire's expense and to the satisfaction of City. Notwithstanding the foregoing, if Concessionaire fails to remove such furniture, fixtures, equipment, or property within ten (10) days from the date of termination of this Agreement, then Concessionaire shall be deemed to have abandoned same and City shall have the right, at its option, and in its sole discretion, to take title to said furniture, fixtures, equipment and/or property and sell, contract, salvage, or dispose of the same in any manner permitted by law. Concessionaire shall have no right, interest or claim in or to any proceeds of the sale or other disposition of such items. Concessionaire covenants to reimburse any net expense City incurs in disposing of such items. No act by City shall be deemed an acceptance of a surrender of the Premises. No acceptance of a surrender of the Premises shall be valid unless it is in writing and signed by City. Concessionaire shall certify to City that all modifications to the Premises are reflected in City's BIM system.

The Parties understand and agree all terms and conditions of this Agreement, (such as the indemnity agreement set forth herein) which by reasonable implication contemplate continued performance or compliance beyond termination of this Agreement (by expiration of the term or otherwise), shall survive the expiration or earlier termination of this Agreement and shall continue to be fully enforceable as provided herein.

#### **SECTION 4.06            END OF TERM TRANSITION**

During the final Contract Year, City plans to award and transition to a new concession agreement that may include Privileges to the Premises or portions thereof. If Concessionaire is not selected for the new agreement, City will notify Concessionaire in writing of the exact dates of a transition period. Upon request of City, Concessionaire covenants to remove all signage and provide temporary walls to seal all openings of premises that meet the guidelines outlined in the Tenant Work Permit Handbook. During the final Contract Year of the Term City reserves the right to show the Premises or individual Concessions Locations to prospective tenants. Concessionaire covenants to cooperate fully with City and Concessionaire's successor to ensure an effective and efficient transition of the Premises

and concession operations to the successor. Concessionaire understands, acknowledges, and accepts its responsibility to perform the Concession in a First Class manner during the transition to the successor.

## **ARTICLE V. COMPENSATION, FEES, OTHER CHARGES, REPORTING, AND ACCOUNTING RECORDS**

### **SECTION 5.01 GROSS RECEIPTS**

Gross Receipts include all monies paid or payable to Concessionaire or due or received from customers by Concessionaire for sales made, services rendered, and customer orders fulfilled at or from the Premises, regardless of when or where the customer order is placed (including outside the Premises), and any other receipts, credits, rebates, allowances, internet sales, or revenues of any type arising out of or in connection with Concessionaire's or Concessionaire's sub-concessionaires' or agents' operations at the Premises, including, but not limited to, branding fees, marketing fees, merchandising fees, promotional allowances, performance allowances, retail display allowances, and any other type of ancillary advertising or product placement fees, other allowances and fees, and any amount charged by Concessionaire as a pass through to its customers of the Privilege Fee or any other fee or charge payable per this Agreement. Gross Receipts shall not include:

1. Any taxes imposed by law that are separately stated to and paid by a customer and directly payable to the taxing authority by Concessionaire.
2. Amounts and credits received from suppliers for merchandise returned by concessionaire.
3. Cash and credit card refunds to customers for merchandise returned.
4. Amounts and credits received in settlement of claims for loss of, or damage to, merchandise.
5. Insurance proceeds received from the settlement of claims for the loss of or damages to Concessionaire's property at or on the Premises other than the proceeds from business interruption insurance.
6. Inter-company store transfers.
7. United States Postal Service stamp sales.
8. Uniforms or clothing purchased by employees where such uniforms or clothing are required to be worn by employees.
9. Reimbursements from Concessionaire's sub concessionaires for any taxes, fees, franchise or license fees, utilities or other services paid or provided by Concessionaire for or on behalf of its sub concessionaires; provided, however, that any reimbursement in excess of the actual cost of such taxes, fees, franchise or license fees, utilities or other services shall be included in Gross Receipts.



10. Compensation, fees, and charges paid to Concessionaire by its sub concessionaires pursuant to the provisions of this Agreement; provided, however, that any such payment in excess of the amounts required hereunder shall be included in Gross Receipts.
11. Gift cards sold at the Premises. When a gift card is redeemed or accepted as payment for a purchase at the Premises, the transaction must be reported as part of Gross Receipts.
12. Amounts for coupons and other forms of discounts including complimentary customer services, such that only the amounts actually received are ultimately included in Gross Receipts.
13. Gratuities for services performed by employees paid by Concessionaire or by its customers except to the extent Concessionaire may be entitled to receive a portion of the gratuities.

## **SECTION 5.02            SUPPORT SPACE COMPENSATION**

As consideration for the right and privilege to Support Space as granted herein, Concessionaire covenants to pay to City the fair market compensation for all Support Spaces. City will establish the Support Space Compensation. Support Space Compensation will be paid in monthly installments, in advance and without demand, beginning on the Commencement Date and on the first day of each month thereafter throughout the Term.

The Support Space Compensation to be paid monthly equals the sum of:

1. The total area of Support Spaces occupied by Concessionaire multiplied by one-twelfth (1/12) of the Support Space Compensation Rate.

For any period of less than one month during the Term, the Support Space Compensation will be calculated on a pro rata basis in the same proportion that the number of days in the payment period bears to the total number of days in the month for which the Support Space Compensation is payable. The initial Support Space Compensation Rate is set forth in the Summary of Contract Provisions.

## **SECTION 5.03            PRIVILEGE FEE**

As consideration for the privileges granted herein to operate the Concession at DEN, beginning on the Commencement Date and continuing through the Term, Concessionaire covenants to pay to City for each month, or portion thereof, a Privilege Fee equal to the sum of the MAPF and the Percentage Fee.

A. MAPF. MAPF shall equal:

1. For the period from the Commencement Date through the Package Completion Date, MAPF shall be abated.
2. Beginning on the Package Completion Date and continuing through the Contract Year in which the Package Completion Date occurs, the initial MAPF

amount in the Summary of Contract Provisions is pro-rated to include only the months from the Package Completion Date to the end of that Contract Year.

3. Beginning with the Contract Year following the Contract Year in which the Package Completion Date occurs and each Contract Year thereafter, the MAPF will equal eighty-five percent (85%) of the Privilege Fee paid in the prior Contract Year, but never less than the initial MAPF set forth in the Summary of Contract Provisions. The MAPF applicable to the last Contract Year of this Contract will be pro-rated if such Contract Year is less than twelve (12) months.
- B. Percentage Fee. In addition to the MAPF, Concessionaire covenants to pay a Percentage Fee in an amount equal to Gross Receipts for the month multiplied by the Percentage Fee Rate stated in the Summary of Contract Provisions, but only to the extent that such amount exceeds the MAPF for the Contract Year. If the Percentage Fee calculated in accordance with this Section 5.03 is an amount less than the MAPF, no Percentage Fee shall be payable.
- C. Payment of Privilege Fee. On or before the Package Completion Date, and the first day of each month thereafter, Concessionaire shall pay to City, in advance and without set off, deduction, prior notice, or demand, one-twelfth (1/12th) of the MAPF. For any payment period of less than one month, the MAPF payment shall be paid on a pro rata basis in the same proportion that the number of days in the payment period bears to the total number of days in the month for which the MAPF is payable.

Within ten (10) days after the end of each month during the Term, Concessionaire shall pay to City the Percentage Fee in the amount, if any, by which Gross Receipts for the month multiplied by the Percentage Fee Rate exceeds the sum of MAPF, as shown on the Monthly Concession Report required in Section 5.07.

#### **SECTION 5.04 OTHER FEES AND CHARGES**

- A. Concessions Services Fee. Beginning on the Commencement Date, Concessionaire agrees to pay within ten (10) days after the last day of each month during the Term, as payment for the performance by City on Concessionaire's behalf of the Concessions Services, a Concessions Services Fee in an amount equal to the Concessions Services Fee Rate as stated in the Summary of Contract Provisions.
1. Subject to the terms and conditions set forth in the next paragraph, City and Concessionaire agree that City may modify, upon written notice to Concessionaire, the Concessions Services Fee; provided that such modification may not occur until the end of the first full Contract Year after the Package Completion Date and the end of every third (3rd) Contract Year thereafter.
  2. Notwithstanding the foregoing, if at any time City elects, in its sole discretion, to modify the Concessions Services, the Concession Services Fee may be adjusted accordingly in an amount determined as reasonable by City in its sole judgment. City will provide no less than thirty (30) days' written notice of the effective date of any modification to the Concessions Services Fee to Concessionaire. The Parties agree to modify the Summary of Contract Provisions to reflect any such change in the Concessions Services Fee. Any

modification will be confirmed by letter executed by the CEO, without need for formal amendment to this Agreement.

- B. Joint Marketing Fee. Beginning on the Commencement Date, Concessionaire agrees to pay within ten (10) days after the last day of each month during the Term, as payment for the performance by City of marketing services through the Joint Marketing Fund, a Joint Marketing Fee in an amount equal to the Joint Marketing Fee Rate as stated in the Summary of Contract Provisions multiplied by Gross Receipts during the month.
- C. Commons Area Capital Improvements. When any Concessions Location within the Premises is located in a food court, Concessionaire agrees to pay within ten (10) days after the last day of each month during the Term, a Commons Area Capital Improvements Fee, representing its share of the annual Commons Area Capital Improvements costs in twelfths (1/12) applicable to the Premises, as stated in the Summary of Contract Provisions, multiplied by the total Commons Area Maintenance costs reflected in DEN's Rules and Regulations, Rule 120. The Parties agree Concessionaire's share may increase or decrease during the Term. The Parties agree to update the Summary of Contract Provisions to incorporate any increase or decrease, to be confirmed by letter executed by the CEO and acknowledged by Concessionaire, without need for formal amendment to this Agreement.
- D. Commons Area Maintenance. When any Concessions Location within the Premises is located in a food court, Concessionaire agrees to pay within ten (10) days after the last day of each month during the Term, as payment for City's performance of maintenance of the food court areas, a Commons Area Maintenance Fee, representing its share of the annual Commons Area Maintenance costs in twelfths (1/12) applicable to the Premises, as stated in the Summary of Contract Provisions, multiplied by the total Common Area Maintenance costs reflected in DEN's Rules and Regulations, Rule 120. The Parties agree Concessionaire's share may increase or decrease during the Term. The Parties agree to update the Summary of Contract Provisions to incorporate any increase or decrease, to be confirmed by letter executed by the CEO and acknowledged by Concessionaire, without need for formal amendment to this Agreement.
- E. Utilities. City will provide certain utility connections to the Premises as stated in the Tenant Work Permit Handbook. Concessionaire may connect into or extend, at its cost, such utilities in accordance with Tenant Work Permit Handbook. Beginning on the Shell Space Turnover Date, Concessionaire covenants to pay for all utilities necessary in the operation of the Premises. All charges, including, but not limited to, deposits, installation costs, connection charges, usage, service charges, and applicable taxes for utility services metered directly to the Premises or pro-rated by usage shall be paid by Concessionaire, regardless of whether the utility services are furnished by City or other utility service entities.
- F. Other Fees and Charges. Concessionaire covenants to pay in a timely manner other damages to City, charges and fees as City assesses, in accordance with its procedures and requirements, and that Concessionaire incurs in the normal course of business, including but not limited to telephone, badging, fingerprinting, and Common Maintenance Services Fees, plus any applicable taxes.

## **SECTION 5.05            FAILURE TO MAKE TIMELY PAYMENTS**

Immediately upon Concessionaire's receipt of monies from sales, services, or doing business under this Agreement, the percentages of said monies belonging to City per this Agreement shall immediately vest in and become the property of City. Concessionaire understands, accepts, and agrees to be responsible as a trustee for said monies until the same are delivered to City. Concessionaire also covenants to pay all compensation, damages, charges, and fees under this Agreement independent of any obligation of City. No breach of this Agreement by City shall relieve Concessionaire of its obligation and duty to pay all such obligations when due.

Without waiving any other right or action available to City, in the event Concessionaire is delinquent in the payment of compensation, fees, or charges hereunder or rightly due and owing by an audit of Concessionaire's books and records as provided in Section 5.10, and in the event Concessionaire is delinquent in paying to City any such compensation, fees, or charges for a period of five (5) business days after the payment is due, City reserves the right to charge Concessionaire interest thereon, from the date such compensation, fees, or charges became due to the date of payment, at the Federal Reserve Bank of New York prime rate in effect on the date the compensation, fees, or charges became due plus four percent (FRBNY prime +4%) or 18% per annum, whichever is greater, to the maximum extent permitted by law.

In the event of a dispute as to the amount to be paid, City shall accept the sum tendered without prejudice and, if a deficiency is determined to exist, interest shall apply only to the deficiency.

The right of City to require payment of interest and the obligation of the Concessionaire to pay same shall be in addition to and not in lieu of the right of City to enforce other provisions herein, including termination of this Agreement, and to pursue other remedies provided by law.

The failure of City to take action in the event of a delinquent payment or series of payments shall in no way waive the right of City to take action at a subsequent time. City expects all compensation, fees and charges to be paid on time and Concessionaire agrees to pay on time. Further, any endorsements or statements on a check or letter accompanying such payment for compensation or other charges shall not be deemed an accord and satisfaction or otherwise recognized for any purpose whatsoever.

Notwithstanding other provisions of this Agreement, and without limiting the other provisions of this Agreement concerning, among other things, events deemed to constitute default of Concessionaire, City may terminate this Agreement upon written notice to Concessionaire, in accordance with section 13.02, if (i) there are recurring instances in which Concessionaire's payments required hereunder are not timely or are insufficient to cover sums actually due and payable; or (ii) Concessionaire fails to maintain adequate records and accounts reflecting its business operations at DEN and calculation of Gross Receipts under this Agreement; or (iii) Concessionaire fails or refuses to submit the formal supporting paperwork as required herein.

## **SECTION 5.06            CITY'S LIEN**

City shall have a lien and security interest upon all Trade Fixtures and Personal Property of

the Concessionaire now owned or hereafter acquired by Concessionaire which came in or was placed upon the Premises, to the extent permitted by law, for the purpose of securing the payment of all sums of money that may be due to City from Concessionaire under this Agreement.

This lien shall supersede any other lien including any lien created in connection with Concessionaire's financing. Concessionaire is prohibited from pledging any Trade Fixtures and/or Personal Property without the prior written consent of City.

## **SECTION 5.07 RECORD KEEPING, REPORTS, ANNUAL AUDIT, AND END OF YEAR ADJUSTMENT**

A. Generally Accepted Accounting Principles. Concessionaire covenants to prepare and maintain, in accordance with Generally Accepted Accounting Principles, complete and accurate books and records that include all financial transactions in the performance of this Agreement. Concessionaire's system of accounts shall allow each Concession Location to be distinguished from all other Concession Locations. Concessionaire shall maintain source documents sufficient to support its books, records, and reports. All monies related to this Agreement shall be deposited to and paid from a business bank account(s), the records for which shall be subject to review and audit in accordance with the provisions hereof.

### B. Financial Reports.

1. Daily Gross Receipts. Upon request of City, Concessionaire agrees to report Gross Receipts for periods of less than one month in a format and frequency as requested by City.
2. Monthly Concession Report. No later than ten (10) days after the end of each month after the Commencement Date, Concessionaire shall deliver to City a Certified Monthly Concession Report, in a form as set forth in **Exhibit C** attached hereto, stating Gross Receipts (with any and all sales of liquor separately identified) for said month for each Concession Location, sales for said month by each Concessions Location with subtotals by type of Concession, calculation of Percentage Fee payable for said month, sales per square foot and per enplaned passenger with subtotals by type of Concession, and receipts per square and per enplaned passenger with subtotals by type of concession when information available.
3. Quarterly Income Statements. No later than thirty (30) days after the end of each calendar quarter after the Commencement Date, excluding the fourth (4<sup>th</sup>) quarter, Concessionaire shall deliver to City a Quarterly Income Statement signed by Concessionaire's chief financial officer or other duly authorized official of Concessionaire for each Concession Location, as well as for the total Premises, in a form as set forth in **Exhibit C** attached hereto. The Quarterly Income Statement must include current monthly sales compared to historical sales from the prior year with subtotals by Terminal and/or Concourse Location; current receipt numbers compared to historical receipt numbers from the prior year with subtotals by Terminal and/or Concourse; year-to-date rolling monthly sales and receipt numbers compared to rolling historical sales and receipt

numbers with subtotals by Terminal and/or Concourse; ACDBE sales compared to sales from the prior year; percentage of sales generated by ACDBE operators; and fees paid to Concessionaire's ACDBE firm(s) for the year-to-date.

- C. Annual Audit. No later than February 28 after the end of each year of operation after the Commencement Date, Concessionaire shall, at its sole cost and expense, provide an Annual Report to City prepared by an Independent CPA. There may be no limitation on the scope of the engagement that would preclude the Independent CPA from expressing an unqualified opinion as to the correctness and completeness of the reported Gross Receipts. The engagement will include a Schedule of Gross Receipts and Privilege Fees for each month of the Concessionaire's operations in the Contract Year, prepared in accordance with the comprehensive basis of accounting defined herein and reported in a format acceptable to City. The engagement will be conducted in accordance with Generally Accepted Auditing Standards and shall include an opinion from the Independent CPA on whether the Schedule of Gross Receipts, Privilege Fees and all other fees or charges payable under this Agreement have been completely and accurately presented, calculated, reported, and paid according to the terms of this Agreement. City reserves the right to reject Concessionaire's choice of Independent CPA, where in City's view the Independent CPA does not have the appropriate standing, reputation, or independence from the Concessionaire.
- D. Findings. City reserves the right to challenge any findings or conclusions of the Annual Report if it believes an error may have occurred. In such event, City may conduct its own audit under the provisions in Section 5.10, or may require production of the supporting documentation used to reach the finding or conclusion in question. The resolution by City of any dispute will be final. Delivery of an Annual Report containing a qualified opinion, or an adverse opinion, or a disclaimer of opinion as defined in the Statements on Auditing Standards, as may from time to time be amended or superseded, issued by the Auditing Standards Board of the American Institute of Certified Public Accountants, or any successor board or agency thereto, will be deemed a material breach of this Agreement and, in addition to all other remedies available to City, City may, in its sole discretion, terminate this Agreement.
- E. End of Year Adjustment. If Concessionaire has paid to City an amount greater than Concessionaire is required to pay as Privilege Fee for a Contract Year under the terms hereof, Concessionaire shall be entitled to a credit against Concessionaire's MAPF for the amount of the overpayment. If Concessionaire has paid less than the amount required to be paid as Privilege Fee for such Contract Year, then Concessionaire shall pay the difference to City in the next payment of the MAPF.
- F. Form, Frequency, and Method of Reporting. Acceptance of monthly reports and payments by City does not constitute agreement by City with the amounts reported and paid. City reserves the right to change the form and frequency of reports and statements, including, but not limited to, the Monthly Concession Report, and to require the submission by Concessionaire of other statistics and information pertaining to the Gross Receipts hereunder. Concessionaire agrees to change the form of the required reports and statements as requested by City and to provide any additional statistics and information City may request.

G. City shall have the right at any time to require that reports be delivered electronically using technology and procedures designated by City. If City instructs Concessionaire to deliver any reports and statements required hereunder by computer, e-mail, internet website, or transmission, City shall not be obligated to furnish Concessionaire with the equipment or systems necessary to do so.

#### **SECTION 5.08 PLACE OF PAYMENT**

Concessionaire shall deliver payments required by this Agreement through the Automated Clearing House ("ACH") or Electronic Fund Transfer ("EFT") systems. Instructions for payments are located in the Concessions Handbook or at <https://www.denvergov.org/payments/dia/vendors>.

City may change the designated place of payment upon ten (10) days' written notice to Concessionaire. Concessionaire assumes all risk of loss of payments.

#### **SECTION 5.09 FORM OF PAYMENT**

All payments due under this Agreement shall be paid in lawful money of the United States of America. City may accept payment without prejudice to its right to recover the balance of said amount due and to pursue any other remedies in this Agreement or otherwise.

All payments of Support Space Compensation, MAPF, Percentage Fee, and all other damages, fees, and/or charges shall be made by Automated Clearing House or Electronic Fund Transfer or other method as designated in writing by City. Concessionaire shall provide City with necessary information and authorizations as needed to facilitate such payments.

#### **SECTION 5.10 CITY'S RIGHT TO PERFORM AUDITS, INSPECTIONS, ATTESTATION ENGAGEMENTS**

Notwithstanding Concessionaire's requirement to submit the Annual Report set forth herein, City, or its representative, will have the right through the expiration of the fifth (5th) year after the expiration or termination of this Agreement, through its representatives, to review all books, records, and contracts of Concessionaire and where applicable, all individuals or other business entities who are party to this Agreement, requested by City's representatives to substantiate the accuracy of reported Gross Receipts and Concessionaire's compliance with other provisions of this Agreement. This includes, but is not limited to, financial statements, general ledgers, sales journals, daily or periodic summary reports, inventory and purchasing records, cash register or computer terminal tapes or reports, bank deposit slips, bank statements, cancelled checks, tax reports/returns filed with state or federal entities, discount or rebate/allowance contracts, records of refunds or voids, and joint venture or partnership contracts. Such right of examination shall include cooperation by Concessionaire personnel (including, but not limited to, cooperation in sending confirmations to Concessionaire's suppliers or others, assisting City in obtaining from governmental entities official copies of tax reports/returns, and disclosing all bank or other accounts into which Gross Receipts are deposited) as reasonably considered necessary by City, or its representative, to complete the engagement. There may be no limitation in the scope of the engagement that would hinder City in testing the accuracy and completeness of the reported Gross Receipts. All such books, records, and contracts shall be kept for a minimum period of five (5) years after the close of each Contract Year. Concessionaire waives any claim of

confidentiality that it may have in connection to its books, records, and contracts for the sole purpose of allowing City to use said documents in the course of an engagement. If City requests and Concessionaire fails to furnish any records in a timely manner, City reserves the right to, in addition to all other remedies available hereunder, at law, or in equity, have an independent forensic accounting firm attempt to reconstruct the missing records. Concessionaire covenants to reimburse City for the reasonable cost associated with reconstructing any missing records, including but not limited to, the cost of the independent forensic accounting firm, attorney's fees, and litigation expenses incurred.

Engagements will be conducted at DEN. However, if agreed to by City, the engagement can be conducted at another location, in which event Concessionaire shall reimburse City for transportation, food, and lodging costs associated with the engagement, accrued in accordance with City's policy relating to travel expenses. Concessionaire shall allow City's representatives to photocopy any records the representatives determine to be necessary to conduct and support the engagement. Concessionaire shall provide City's representatives with retrievals of computer-based record or transactions the representatives determine to be necessary to conduct the engagement. Concessionaire shall not charge City for reasonable use of Concessionaire's photocopy machine while conducting the engagement, nor for any cost of retrieving, downloading to storage media and/or printing any records or transactions stored in magnetic, optical microform or other media. Concessionaire shall provide all records and retrievals requested within seven (7) days of the request. Parties recognize that City will incur additional costs if records requested are not provided in a timely manner and that the amount of those costs is difficult to determine with certainty. Consequently, Parties agree City may collect liquidated damages, as set forth in Article VIII, for the records requested and not received. Such damages may be assessed beginning on the eighth (8th) day following the date the request was made. Accrual of such damages will continue until specific performance is accomplished, which includes, but is not limited to, reconstruction of documents that cannot be produced. Payment of liquidated damages will be due within fifteen (15) days from the date of invoice.

If, because of any engagement, it is established that Concessionaire owes additional compensation, fees, or charges to City, Concessionaire will pay the reasonable costs of the engagement and such additional compensation, fees, and charges, and City may assess interest in accordance with Section 5.05. If it is established that Concessionaire underreported Gross Receipts or underpaid fees related to Gross Receipts by three percent (3%) or less for the period under consideration, the entire expense of the engagement will be billed to Concessionaire. Any additional payments due shall be paid plus interest, no later than Concessionaire's next payment of the MAPF, to City. City reserves the right to terminate this Agreement for cause, if Concessionaire fails to pay the amount owed, per the engagement's findings, by Concessionaire's next payment. If it is established that Concessionaire underreported Gross Receipts or underpaid fees related to Gross Receipts by more than three percent (3%) for the period under consideration, in addition to the remedies described above, City shall be entitled to terminate this Agreement for cause upon thirty (30) days written notice, regardless of whether the deficiency is paid. If Concessionaire willfully or fraudulently underreported Gross Receipts or underpaid fees related to Gross Receipts, in addition to the rights described above, City shall be entitled to terminate this Agreement for cause upon thirty (30) days written notice, regardless of whether the deficiency is paid.

Concessionaire will include a provision providing City the same rights to initiate and perform



audits, inspections, or attestation engagements in any sub concessionaire agreement that it enters and cause its sub concessionaires to include the statements in further sub concessionaire agreements.

## ARTICLE VI. PERMITTED USES

### SECTION 6.01 PERMITTED USES

- A. Uses. Concessionaire shall use the Premises only for the purposes of operating the Concession, as further described in this Article VI, and for such other uses as City may agree to in writing. Concessionaire shall use the Support Spaces only for office and administrative purposes related to the operation of the Concession and the storage and preparation of goods necessary for the operation of the Concession. No portion of the Premises shall be used to warehouse, stock or store any goods, wares, or merchandise not intended to be offered for sale at or from the Premises.
- B. Concession Locations. **Exhibit B**, Permitted Uses, which is attached hereto and made a part hereof, sets forth the trade name for each Concession Location and a listing, by general category, of goods and services Concessionaire is allowed to sell from each Concession Location. Such list of the Permitted Uses shall constitute a limitation of the goods and services, which may be sold at each Concession Location.
- C. Permitted Goods, Services and Prices. No later than thirty (30) days prior to the opening of a Concession Location, Concessionaire must submit to City, for its written approval, a Price List. Such Price List must include the prices to be charged to the public for the goods and services.
- D. Once approved by City, the Price List for each Concession Location shall remain in effect through the remainder of the Term. Concessionaire shall not add, delete, or sell any goods or services not included on the Price List, nor change the price of any good or service, without first receiving written approval from City. City's approval shall not be unreasonably withheld or delayed. Written approval shall serve to modify the Price List without need for amendment of this Agreement.
- E. City may, at its discretion, require Concessionaire to add goods or services that are in public demand to the Price List for any Concession Location. Within ten (10) days of a written request by City, Concessionaire shall provide a current Price List.

### SECTION 6.02 NON-EXCLUSIVE RIGHTS

The privileges granted herein for the performance of the Concession shall be non-exclusive. City may, at any time, award space (existing or newly created) to other parties who may have privileges or may sell goods or services similar to those non-exclusively granted herein. City may, in its sole discretion, grant exclusive privileges to other concessionaires to sell goods or services that Concessionaire is not authorized to sell.

In the event of a dispute between Concessionaire and any other party operating at DEN as to the privileges of the parties under their respective Concessions, City shall determine the privileges of each party and Concessionaire agrees to be bound by City's decision.

### **SECTION 6.03            RESTRICTIONS**

Nothing in this Article will be construed as authorizing Concessionaire to conduct any business separate and apart from this Agreement or in areas of DEN other than its Premises. All privileges not specifically granted to Concessionaire for its use of and operations at DEN pursuant to this Agreement are hereby reserved for and to City.

### **SECTION 6.04            PERMITS AND LICENSES**

Concessionaire will obtain and maintain throughout the Term all permits, certificates, licenses, or other authorizations required in connection with the operation of the Concession. Copies of all required permits, certificates, licenses, or other authorizations will be appropriately displayed within the Premises and forwarded to City upon issuance and each renewal.

## **ARTICLE VII. PERFORMANCE AND OPERATING STANDARDS**

### **SECTION 7.01            CITY'S RIGHT TO MONITOR PERFORMANCE**

- A. Performance Audits. It is City's intention Concessionaire's business be conducted in a manner so as to meet the needs of DEN patrons and employees and in a manner that will reflect positively upon the Concessionaire and City. The Concessionaire shall equip, organize, and efficiently manage the Concession to provide First Class goods and services in a clean, attractive, sustainable, and pleasant atmosphere.
- B. City in its sole discretion shall have the right to raise reasonable objections to the condition of the Premises, the quality and quantity of goods and services, the character of the service, the hours of operation, the sustainability practices of Concessionaire, and/or the appearance and performance of service personnel, and to require any such conditions or practices objectionable to City to be remedied by Concessionaire. If requested by Concessionaire, City shall submit its objections in writing and provide Concessionaire an opportunity to reply to the objections. Such reply will be given consideration by City.
- C. City reserves the right to conduct periodic performance audits of the Premises to assure Concessionaire consistently performs all of the operational, safety, sustainability, and compliance standards of this Agreement. Concessionaire acknowledges performance audits will be conducted by City, or its representative, and hereby covenants to cooperate with all performance audits.
  - 1. Performance audits may include minimum objective standards in any or all of the areas of (i) quality and quantity of goods and services; (ii) customer service; and (iii) cleanliness and maintenance. If Concessionaire fails to meet minimum standards in any of these areas, City may, at its discretion, collect liquidated damages as set forth in Article VIII.
  - 2. In order to assure consistent adherence to performance standards throughout the Term, City will use a rolling twelve (12) month cycle in the recording of incidents of failure to meet standards.

3. Repeated violations and deficiencies in performance by Concessionaire may be cause, at City's sole discretion, to terminate this Agreement.

D. Annual Review. No later than ninety (90) days after the end of the first full Contract Year after the Package Completion Date, and at the end of each Contract Year thereafter, Concessionaire and City will meet to review and evaluate the financial, customer service, and operational performance of each Concession Location. During the course of the review, City may determine, in its sole discretion, that the performance of one or more of the Concession Locations is unsatisfactory if one or more of the following occurred during the prior Contract Year:

1. Sales per Enplaned Passenger were less than eighty percent (80%) of the Projected Sales per Enplaned Passenger for the Concession Location, as set forth in Concessionaire's Response to RFP No. 201630762; and/or
2. Sales per Enplaned Passenger were less than eighty-five percent (85%) of Sales per Enplaned Passenger for the same Concession Location during each of the two (2) preceding Contract Years; and/or
3. Scores on any secret shopper survey(s) conducted by City or its representative were less than eighty percent (80%) of the maximum achievable scores for the survey(s); and/or
4. Scores on any operational survey(s) conducted by City or its representative were less than eighty percent (80%) of the maximum achievable scores for the survey(s).

E. Remediation Plan. The Parties agree that the financial Pro Forma, performance standards, and other specific considerations in Concessionaire's Response to RFP 201630762 are material parts of the bargain between the Parties. Concessionaire acknowledges that City relied upon Concessionaire's Response to RFP 201630762 in entering into this Agreement. In the event that City determines, based on the performance criteria specified in this Section 7.01, that a Concession Location performed unsatisfactorily during the prior Contract Year, City will provide written notice to Concessionaire. Within thirty (30) days of receipt of such written notice, Concessionaire shall prepare and submit to City, for its approval, a Remediation Plan, as described below, to improve the performance of the Concession Location.

1. The Remediation Plan shall include, but not be limited to, proposed remedial activities such as staff training, staffing changes, merchandise and service modifications, facility refurbishment and repair, and/or replacement of concept or brand. Upon approval by City, Concessionaire covenants and agrees to implement the approved Remediation Plan and further agrees to submit to City monthly reports on the progress of such implementation. If the approved Remediation Plan includes the replacement of a concept or brand, then City and Concessionaire will enter into good faith negotiations concerning a concept or brand replacement. If the concept or brand replacement is mutually agreed to, the reimbursement for Unamortized Investment and the Capital Investment

required for the concept or brand substitution will be a component of the good faith negotiations.

2. In the event City determines, after six (6) months of implementation of a Remediation Plan, the subject Concession Location is still performing in an unsatisfactory manner, City reserves the right to require Concessionaire to replace the underperforming concept or brand, if not already replaced by the Remediation Plan, at Concessionaire's expense. Within ninety (90) days of receipt of written notice from City requiring a replacement, Concessionaire shall submit to City a proposal for a brand or concept replacement plan. Such replacement plan shall include, but not be limited to, a detailed description of the brand or concept, capital expense required to re-brand, sales projections, and the specific timetable to replace the brand or concept. City, in its sole discretion, reserves the right to approve or deny the proposed replacement plan and require Concessionaire to submit another replacement plan.

## **SECTION 7.02 QUALITY OF GOODS AND SERVICES**

Concessionaire shall ensure that all customers are provided First Class goods and services, and Concessionaire shall keep in stock and have ready for sale at all times of operation, a sufficient supply and variety of goods and services offered for sale at each Concession Location, consistent with the Price List, to meet the demand of customers at DEN.

If City identifies any deficiencies with respect to the operations, including, without limitation, quality, variety, and quantity of goods or services offered, Concessionaire shall be notified in writing by City and shall correct, or cause to be corrected, such problem or problems within seven (7) days, unless City authorizes in writing a longer period. If Concessionaire fails to correct within seven (7) days after written notice is given by City, City may collect liquidated damages as described in VIII.

Concessionaire shall develop and implement creative merchandising techniques to optimize customer satisfaction and Gross Receipts including, without limitation, retail merchandise displays; promotional displays; attractive and durable packaging; and menu boards. Prices for all goods and services shall be displayed and visible to all customers. All retail merchandise and other items sold or kept for sale shall be of high quality and wholesome, and must conform to the fullest extent with all applicable food and drug laws, ordinances and regulations, as well as DEN's Rules and Regulations and Operating Directives. Concessionaire has printed signage and price lists shall include the appropriate use of descriptive terminology that accurately and truthfully describes the goods and services being offered. City reserves the right to approve all menus and product displays. Concessionaire hereby affirms that City, in its sole discretion, has the absolute right to require that Concessionaire discontinue the sale of any goods and services City deems unsatisfactory, distasteful, or inappropriate for any reason and to require Concessionaire to modify menus, signage, and product displays for any reason. If Concessionaire fails to comply with any such City request within one (1) day after written notice from City, City may collect liquidated damages as described in Article VIII.

All franchise standards applicable to a Concession Location shall be met or exceeded. Copies of the franchise standards and performance audit forms shall be sent to City prior to the first day of business at such Concession Location. Concessionaire shall submit to City

copies of all inspections conducted by the franchisor or mystery shopper service hired by the franchisor within ten (10) days of receipt by Concessionaire. Further, every Contract Year during the Term, Concessionaire shall certify all franchise standards applicable to each Concession Location are met or exceeded.

If City approves and accepts Concessionaire's proposal to include a local, regional, or national brand, branded item, or branded concept that Concessionaire is authorized to use at DEN, such brand, term, or concept shall be listed or described in the Summary of Contract Provisions and referred to in this Agreement as "Concessionaire's Brand(s)." Concessionaire acknowledges and agrees that the use of brands is of critical importance in meeting City's purpose for the concessions program at DEN. Therefore, Concessionaire's Brand(s) is a material part of the consideration for this Agreement and may not be unilaterally discontinued or changed by Concessionaire. Any proposed new brand, term, concept, or change in use shall be submitted to City for written approval prior to implementing such new brand concept or change of use.

### **SECTION 7.03            PRICING**

- A. Value Pricing. Concessionaire acknowledges City's objective to provide DEN patrons and employees high quality goods and services at reasonable prices. Accordingly, Concessionaire covenants that all goods and services sold by Concessionaire shall meet the Value Pricing as follows:
1. For merchandise with a pre-printed price affixed by the manufacturer or distributor, the selling price at DEN shall not exceed the pre-printed price;
  2. For nationally and locally branded Concession Locations that are also represented off-DEN in the Denver-Aurora Statistical Area, the selling price for goods and services at DEN shall not exceed the selling price for the same goods and services at the closest off-DEN establishment of the same brand name by more than ten percent (10%); and
  3. For all non-branded, proprietary, or branded Concession Locations not represented off-DEN in the Denver-Aurora Statistical Area, the selling price for goods and services at DEN shall not exceed the average selling price for similar or equivalent goods (of like size and quality) and services at three Price Benchmark Establishments, as described below, by more than ten percent (10%).
- B. Price Benchmark Establishment(s). No less than forty-five (45) days prior to the opening of a Concession Location, Concessionaire must submit to City for its approval the names and addresses of at least three businesses for each of the goods or services, or substantially similar items within the Denver-Aurora Statistical Area that Concessionaire proposes to use as a Price Benchmark Establishment. The businesses must be comparable in concept, size, ambiance, service style, and quality to the Concession Location and, to the extent practical, is the same businesses as identified in Concessionaire's Response. Venues specifically excluded from consideration as comparable businesses include entertainment or sports venues, other transportation terminals, amusement parks, zoos, resorts, and hotels.

Once approved by City, the Price Benchmark Establishment(s) will be used as the basis for price comparisons during the remainder of the Term. In the event any of the Price Benchmark Establishment(s) ceases operations or, in the sole discretion of City, alters its concept, branding, service style, merchandise selection, or menu to no longer be a valid comparison, Concessionaire must propose a substitute Price Benchmark Establishment(s) for approval by City.

If Concessionaire, as described above, cannot determine Price Benchmark Establishment(s), then City, in its sole discretion, will identify local area businesses similar to Concessionaire's business at DEN to be deemed as Price Benchmark Establishment(s).

- C. Price Surveys. No later than thirty (30) days prior to the opening of a Concession Location and prior to the beginning of each Contract Year, Concessionaire shall, at its own expense, prepare a goods and services price survey of the Price Benchmark Establishment(s) that demonstrates, to the satisfaction of City, Concessionaire's compliance with the Value Pricing.
- D. Price Changes. Throughout the Term, Concessionaire may request changes to pricing once every four (4) months, or more frequently as agreed to by City. Requested price changes must be submitted in writing and include such information and data as reasonably requested by City including, but not limited to, the results of price surveys or other economic justification supporting the requested price changes(s). City shall, in its sole discretion, determine which, if any, price changes are consistent with the Value Pricing and shall notify Concessionaire in writing of its approval or rejection of each requested price change. No later than ten (10) days after any adjustment to prices, the Parties agree to modify the Price List to incorporate said price adjustments. Modification will be confirmed by letter executed by the CEO, without need for formal amendment to this Agreement.
- E. DEN Employee Discount. Concessionaire shall offer a ten percent (10%) discount on all food and non-alcoholic beverages purchased by DEN employees and employees of airlines operating at DEN who have been issued (and show at the time the discount is requested) appropriate identification badges. The discount shall be based on Concessionaire's normal non-sale or non-promotional prices. No discount shall be given on food and non-alcoholic beverages with a manufacturer pre-printed price.
- F. Price Conformance. At any time during the Term, City may survey or cause to be surveyed, prices being charged for goods or services offered by Concessionaire. City shall have the right to monitor and test all of Concessionaire's goods and services prices by a shopping service or City personnel. If City concludes, based on the results of the survey, any prices being charged by Concessionaire do not comply with the Value Pricing; City will require Concessionaire to adjust prices to the amounts permitted herein.

Concessionaire will, within three (3) days of written notice from City, adjust any prices that City determines, in its sole discretion, to be inconsistent with the Value Pricing. Failure to rectify any pricing discrepancies within the aforementioned three (3) days shall constitute a material breach by Concessionaire of this Agreement and, in addition to the collection of liquidated damages, as set forth in Article VIII, and all other remedies available to City, City may, in its sole discretion, terminate this Agreement.

## **SECTION 7.04 HOURS OF OPERATION**

- A. Store Hours. Concessionaire shall ensure each Concession Location is open for business, without interruption, during the Store Hours not less than sixteen (16) hours per day, and is providing all goods and services as required by this Agreement. Unless otherwise approved in writing by City, the Parties agree to the Store Hours as stated in the Summary of Contract Provisions.

City may, in its sole discretion, require Store Hours to change during the Term. Concessionaire hereby acknowledges and agrees to operate the Concession Locations as required which, if requested by City, may be twenty- four (24) hours per day seven (7) days per week, including all holidays. Concessionaire may request changes to Store Hours after six (6) full months of operations under this Agreement. City may, in its sole discretion, approve or deny such requested changes.

No later than ten (10) days after a change to Store Hours for any Concession Location, the Parties agree to modify the Summary of Contract Provisions to incorporate the change in Store Hours, which will be confirmed by a letter executed by the CEO without need for formal amendment to this Agreement.

- B. Extension of Store Hours. Concessionaire agrees to remain open beyond Store Hours for certain events including, but not limited to, the following:
1. In the event of a delayed flight on the Concourse in which any Concession Location(s) is located, Concessionaire shall remain continuously open and provide all goods and services as required by this Agreement beyond the then current Store Hours for the Concession Location(s) in the affected Concourse and until the delayed flight departs the gate or City otherwise instructs.
  2. In the event of an emergency, as determined by City, Concessionaire shall remain continuously open and provide all goods and services as required by this Agreement for the Concession Locations beyond the then current Store Hours as instructed by City.
- C. Failure to Open. Failing to open for business within thirty (30) minutes of the required opening time, or closing more than thirty (30) minutes early, shall constitute a violation of this Section for which City may collect liquidated damages as set forth in Article VIII.
- D. Posted Hours. The Concessionaire will prominently post Store Hours for each Concession Location at the Concession Location and in a format approved by City.

## **SECTION 7.05 DELIVERY OF GOODS**

- A. Concessionaire shall make all deliveries of money, coin, supplies, goods, products, and food and beverage items in such manner as specified by DEN's Rules and Regulations and at such times and locations as City may reasonably approve or require. Emergency deliveries may be made at other times subject to prior arrangements with City.
- B. Central Receiving and Distribution. City may implement a Central Receiving and Distribution Center (hereinafter referred to as "CRDC") and may contract, at its

discretion, with a third party to operate the CRDC and provide distribution and delivery services to DEN (hereinafter referred to as "Logistics Manager"). When established, Concessionaire agrees to use, at its own cost and expense, the CRDC and have all deliveries made to the CRDC, except where delivery to a third party is prohibited by law or as otherwise approved in writing by City. Concessionaire agrees to pay Concessionaire's share of the costs of the operation of the CRDC and said distribution and delivery services, as determined by City.

Concessionaire acknowledges that City will not be responsible for, and will have no liability related to the operation of (or the failure to operate), the CRDC or related distribution and delivery services. Concessionaire waives any and all claims against City for operation (or failure to operate) of the CRDC including, but not limited to, lost profits, consequential damages or any other losses or damages whatsoever.

Concessionaire acknowledges the Logistics Manager may establish rules and procedures regarding the operations of the CRDC and the distribution and delivery services to DEN Concourses including, but not limited to, operating hours of CRDC, scheduling and acceptance of Concessionaire's deliveries to the CRDC, scheduling and place of deliveries to DEN Concourses, and transportation of goods and related equipment such as pallets, storage bins, and racks among the Airside Concourses, Terminals, and CRDC. CRDC rules and procedures will be stated in the Concessions Handbook and may be modified from time to time in accordance with this Agreement. Concessionaire agrees to conform to said CRDC rules and procedures.

- C. Transporting Goods. The Logistics Manager will make deliveries to Concession Locations and Concessionaire's Support Spaces as stated in the Concessions Handbook. Concessionaire shall transport inventory among Concession Locations and Storage Spaces in the same building at such times and by such routes stated in the Concessions Handbook. Concessionaire shall make every effort to avoid using the Common Areas for large quantity deliveries during peak periods. Concessionaire shall be responsible for the return of all pallets, storage containers, and other equipment belonging to its suppliers to locations designated for return by the Logistics Manager. Concessionaire shall use City approved sealed, leak-proof, and equipped carts or conveyances, with pneumatic wheels suitable for operating on carpet or other flooring without damage thereto, for transporting good.

## **SECTION 7.06 PERSONNEL**

- A. Staffing. Concessionaire shall hire, train, supervise, and deploy a sufficient number of Personnel to service customers in a timely and efficient manner and to meet Concessionaire's obligations herein.
1. Concessionaire shall closely monitor Personnel to ensure First Class service to customers in compliance with this Agreement. The satisfactory performance of the obligation hereunder shall be determined in the sole discretion of City. Concessionaire shall take all proper steps to discipline Personnel who participate in acts of misconduct on or about the Premises.
- B. General Manager. Concessionaire shall appoint a General Manager to oversee and manage the performance of the Concession, and represent and act on behalf of



Concessionaire. The General Manager shall have full authority to make day-to-day business decisions on behalf of Concessionaire with respect to the Concession including, but not limited to, authority to control the conduct and demeanor of Concessionaire's Personnel. The General Manager shall represent the Concessionaire in dealings with City and shall coordinate all concession activities with City. The General Manager shall be assigned to an office at or near DEN and shall be available during City's regular business hours. The General Manager shall designate a qualified, competent, and experienced subordinate to be in charge and available during his/her absence during Concessionaire's regular operating hours.

- C. Customer Service Training. If City establishes a customer service-training program for the employees of all concessionaires at DEN, City, after first giving reasonable notice to Concessionaire, will require all of Concessionaire's employees to complete the training program.
1. Concessionaire's employees as of the date of implementation of City's customer service training program must complete the training within six (6) months of the date of notice from City.
  2. Concessionaire's employees hired after the date of implementation of City's customer service training program must complete the training within one (1) month of beginning employment.

If established, City customer service training program will be limited to no more than two (2) full working days per employee per year, will be conducted at DEN, and will be evidenced by a Certificate of Completion issued to each employee upon successful completion. City's customer service training program will be offered at no cost to Concessionaire; however, Concessionaire will be responsible for employees' wages, benefits, and other employment costs incurred during and because of the training.

- D. Additional Personnel Requirements. In addition to the Personnel requirements set forth herein, Concessionaire shall ensure that all Personnel engaged in the operation of the Concession shall conform to the applicable rules and procedures stated in the Concessions Handbook and other of DEN's Rules and Regulations and Operating Directives.
- E. City's Right to Object. City shall have the right to object to the demeanor, conduct, and appearance of any Personnel of Concessionaire or any of its invitees or those doing business with it. Immediately upon notice of objection by City, Concessionaire shall take all steps necessary to remedy the cause of the objection. If requested by Concessionaire, City shall present its objections in writing and provide Concessionaire the opportunity to reply to the objections and such reply will be given consideration by City.

## **SECTION 7.07           BADGING AND SECURITY REQUIREMENTS**

All of Concessionaire's Personnel who work at DEN must apply for and be issued a proper security identification badge prior to beginning work at DEN. Concessionaire shall be responsible for ensuring Personnel, vendor, and Contractor compliance with all security rules, regulations, and procedures including, but not limited to, those issued by the FAA, TSA, and City. The rules, regulations, and procedures of the FAA, TSA, and City regarding

security matters may be modified during the Term and Concessionaire covenants to comply with all modifications. Concessionaire shall pay all costs associated with obtaining the required security identification badges and security clearances for its Personnel, including, but not limited to, the costs of training and badging as established by City.

City will collect liquidated damages, as set forth in Article VIII, from Concessionaire for each security identification badge that is lost, stolen, unaccounted for, or not returned to City at the time of security identification badge expiration, employee termination, termination of this Agreement, or upon written request by City. Payment of liquidated damages will be due within fifteen (15) days from the date of invoice.

If any of Concessionaire's Personnel is terminated or leaves Concessionaire's employment, City must be notified immediately, and the security identification badge must be returned to City promptly.

Concessionaire's Personnel who are issued security identification badges shall only utilize such badges and access privileges in connection with the operation of Concessionaire's business as outlined herein. Concessionaire's Personnel shall be informed of this requirement in writing from Concessionaire. Concessionaire's Personnel shall also be informed in writing from Concessionaire of the penalties for violating this requirement, which includes, but is not limited to, termination of a person's employment.

Concessionaire shall submit its written operating and security procedures for its operations hereunder to City for review at least thirty (30) days prior to the Package Completion Date, or if Concessionaire opens any Concessions Location for business earlier than the Package Completion Date, at least seven (7) days prior to opening. Concessionaire shall revise such operating and security procedures as necessary to obtain City's approval.

#### **SECTION 7.08 EMPLOYEE PARKING**

Nothing in this Agreement shall be deemed to require City to provide parking to Concessionaire's Personnel. City may provide parking accommodations to Concessionaire's Personnel in common with employees of other concessionaires and users of DEN, subject to the payment of reasonable charges therefor as may be established from time to time by City. In such event, Concessionaire's Personnel shall be required to park within the designated areas.

#### **SECTION 7.09 POINT OF SALE TERMINALS**

Concessionaire must install a POS Terminal(s) to accurately record all business transactions occurring in each Concession Location for accounting, reporting, and auditing purposes as set forth herein.

All POS Terminals used at DEN must have, at a minimum, the following features:

1. Multiple segregated category addresses to allow for accurate and complete reporting of Gross Receipts by various goods and services categories;
2. The capability of recording transactions by sequential control number to an audit tape or computer file;

3. The capability of recording any discounts that are applied to a transaction;
4. The capability of printing a transaction history to tape or computer file by category of goods or services, time of day, day, month, and year by category;
5. The capability of printing customer receipts showing the transaction amount, the amount tendered, the amount of change due to the customer, and the time and date of the transaction. Additionally, the customer receipt must show Concessionaire's contact information including name, phone number and email address for any customer concerns, complaints, or questions;
6. A fee display of sufficient size and legibility that is placed in a location visible to the customer during a transaction; and
7. A secure transaction audit tape or ASCII transaction file on a removable storage device.

City reserves the right to implement and/or modify a universal point-of-sale system or other technology to work in tandem with Concessionaire's POS Terminals for continual access to each Concession Locations' point of sale data. Concessionaire agrees to cooperate in the implementation of such a universal point-of-sale system or other technology. If City instructs Concessionaire to install any technology, equipment, software, and systems as part of such implementation, City shall not be obligated to pay the cost of or furnish Concessionaire with the technology, equipment, software, or systems necessary to do so.

#### **SECTION 7.10 CASH HANDLING AND CREDIT CARD REQUIREMENTS**

Concessionaire shall at all times observe cash-handling and record-handling procedures in accordance with sound accounting and financial control practices and as necessary to provide timely and accurate reports to City. City may at any time during the Term request a copy of these procedures. City shall have the right to monitor and test all of Concessionaire's procedures and controls and require Concessionaire to make changes to its procedures.

Concessionaire shall comply with the most recent Payment Card Industry Data Security Standard requirements. Concessionaire's Independent CPA must yearly certify Concessionaire's operations are compliant with Payment Card Industry Data Security Standards. City reserves the right to receive reports required by the Payment Card Industry Security Standards Council.

#### **SECTION 7.11 ADVERTISED SALES OR PROMOTIONS**

Concessionaire is required to participate in all advertised sales or promotions, by whatever media outlet, conducted by its parent corporation, its franchisor, or its selected operating brands. Concessionaire is not permitted to participate in or post any type of sign related to liquidations, going out of business, moving sales, or closeouts of particular goods or services.

Concessionaire must make every reasonable effort to ensure that all corporate advertisements that list multiple locations will list DEN as a participating location of the promotion or sales. In the event that participation in a sale or promotion harms Concessionaire, Concessionaire may request, in advance of the sale or promotion, in writing

to City to be exempted from participation.

Concessionaire may not advertise in DEN, except with City's advertising contractor who sells advertising at DEN. Permission will not be granted to Concessionaire for any other advertising at DEN. Concessionaire shall not use nor permit Premises to be used as a medium for third party paid advertising, including sponsorships or any advertising material, sign, fixture, or equipment, whether paid for in-kind, by cash, or by credit.

#### **SECTION 7.12 COMPLAINTS**

Concessionaire must respond to all customer complaints, written or oral, referred to Concessionaire by City within 48 hours of notice. A written copy of Concessionaire's Response shall be delivered to City within the 48-hour period.

#### **SECTION 7.13 CONCESSION PROMOTIONS PROGRAM**

In addition to other compensation, fees, and charges due City under this Agreement, Concessionaire agrees to pay to City, within ten (10) days of the first day of each month during the Term, a Joint Marketing Fee for DEN's Concession Promotions Program.

- A. Joint Marketing Fund. City shall provide or cause to be provided a Joint Marketing Fund to underlying DEN's Concession Promotions Program. Concessionaire shall pay, or cause to be paid, the Joint Marketing Fee, as reflected in the Summary of Contract Provisions, for the Joint Marketing Fund for every month during the Term. City shall not be obligated to expend more for promotions and advertising than is actually collected from Concessionaires. Any promotional services and personnel so provided shall be under the exclusive control and supervision of City. City reserves the right at any time to terminate the Joint Marketing Fund and thereafter, continue to provide marketing and promotional services until the balances remaining in the fund are exhausted.
- B. DEN's Concession Promotions Program. The Promotions Program may include, but is not limited to, the costs of Premium Value Concessions Programs, as described below, and activities with direct application to promoting and monitoring the concessions at DEN such as food, services, and retail merchandise advertising, marketing, public relations, media production and placements, special events, brochures, videos, directories, catalogues, customer service training, mystery shopper programs, and concession surveys relating to consumer satisfaction and market research, as well as the costs of administration of the Promotions Program and Premium Value Concessions Program.
- C. Premium Value Concessions Program.
  - 1. City has created a Premium Value Concessions Program ("PVC Program") pursuant to Rule 45 and Rule 46 of DEN's Rules and Regulations ("PVC Rules") to reward certain categories of concessionaires that maintain the high performance standards as defined in the PVC Rules.
  - 2. Concessionaire acknowledges and accepts that it is required by this Agreement and PVC Rules to participate in the PVC Program. Each Concession Location will be evaluated separately in accordance with the

PVC Rules. The major and minor categories and square footage relating to Concessionaire's participation in the PVC Program are listed on the Summary of Contract Provisions. The actual cost of the PVC Program is paid for out of funds collected through fees paid into the Joint Marketing Fund. Concessionaire agrees that upon written notice from the CEO, Concessionaire shall contribute Concessionaire's pro-rated share of any additional cost of PVC Program, which will be calculated in accordance with the methodology set forth in the PVC Rules. Concessionaire's contribution shall be payable to City in advance without setoff, deduction, prior notice, or abatement.

3. City shall not be obligated to expend more for the PVC Program than is actually collected from Concessionaires. All services related to the PVC Program and all personnel engaged by City to provide services related to the PVC Program, including the services of a Third Party Administrator as defined in the PVC Rules, shall be under the exclusive control and supervision of City.
4. Under certain circumstances described in the PVC Rules, the CEO has the sole and absolute discretion to terminate the PVC Program upon a thirty (30) day written notice to Concessionaire.
5. Concessionaire agrees to waive its right to attorney fees and costs for any litigation between Concessionaire and City over the PVC Program or PVC Rules. Concessionaire covenants to pay all City's reasonable costs and fees in the event of litigation between Concessionaire and City over the PVC Program or PVC Rules resolved in City's favor.
6. In the event of a conflict between any provision of the PVC Rules and this Agreement, the provisions of this Agreement, including the Summary Page, Exhibits, and Appendices appended and attached hereto, shall govern.

City may prohibit Concessionaire from participating in any promotional activities including, but not limited to Grand Opening events, if Concessionaire is in breach of this Agreement.

#### **SECTION 7.14 OPERATING PROCEDURES AND STANDARDS**

- A. City Requirements. The occupancy and use by Concessionaire of the Premises and the privileges herein conferred upon Concessionaire shall be conditioned upon and subject to DEN's Rules and Regulations, and Operational Directives as are now or may hereafter be prescribed by City through the lawful exercise of its powers. Concessionaire covenants to operate the Concession in accordance with the Concessions Handbook.
- B. Health and Safety Standards. Concessionaire shall comply with all health and sanitary regulations adopted by City, State of Colorado, and any other governmental authority with jurisdiction. Concessionaire shall give access for inspection purposes to any duly authorized representatives of all such governing bodies. Concessionaire shall provide City with copies of all inspection reports by other health and sanitary governing bodies within 48 hours of receipt. This paragraph does not require Concessionaire to waive any applicable attorney-client or attorney work product privileges.

- C. Sustainability. City is committed to incorporating sustainable practices into all aspects of DEN operations. Concessionaire shall operate in a manner consistent with DEN's Sustainability Policy, and participate in the sustainability programs outlined in the Concessions Handbook at its own cost and expense.
- D. Additional Compliance. Concessionaire shall comply with all applicable governmental laws, ordinances, regulations, codes, and permits in the conduct of its operations under this Agreement including, but not limited to, TSA regulations regarding products or procedures.
- E. Concessionaire's Standards. Concessionaire shall submit to City a copy of its standards, plans, and manuals for customer service and operation, at least thirty (30) days prior to Commencement Date, and as updated during the Term. Concessionaire shall ensure continuous adherence to Concessionaire's own standards, in addition to other standards as set forth herein.

## **SECTION 7.15            CLEANING AND ROUTINE MAINTENANCE**

- A. General Obligations. Concessionaire shall ensure that the Concession is maintained and operated in a First Class manner and that the Premises are kept in a safe, clean, orderly and inviting condition at all times in a manner satisfactory to City. To comply with these requirements, Concessionaire must regularly review or cause to be reviewed the Premises and its operations at DEN.
- B. Preventive and Routine Cleaning and Maintenance Program. Concessionaire shall be responsible for preventive and routine cleaning and maintenance of all assets within the Premises, whether built by Concessionaire or City, from the commencement date through the expiration of the Term. No less than thirty (30) days prior to the opening of any portion of the Premises, Concessionaire shall establish a preventive and routine cleaning and maintenance program for the Premises including, but not limited to, the list of items below. The provisions of the program shall be subject to the initial written approval of and periodic review by City. Upon request by City, Concessionaire shall provide City a written schedule of Concessionaire's cleaning and maintenance program.
  - 1. Janitorial Service. Concessionaire, at its own cost and expense, shall provide all janitorial services for the Premises in accordance with the Concessions Handbook. Concessionaire shall ensure that the Premises and the Common Areas adjacent to the Premises are kept clean and free from all rubbish and refuse.
  - 2. Pest Control. Concessionaire, at its own cost and expense, is responsible for pest control within the Premises. Concessionaire will contract with a professional pest control service to provide pest control services on a regular basis and at any other times as needed. Concessionaire will coordinate its pest control service with third parties as directed by City. Upon request, Concessionaire must furnish City a copy of its pest control contract, monthly service schedule, and monthly service reports. Concessionaire agrees to coordinate with City and other concessionaires to provide the most effective pest control services for DEN.

- i. City, in its sole discretion, may elect to provide or contract for pest control services on Concessionaire's behalf. If City elects to provide or contract for pest control services on Concessionaire's behalf, Concessionaire covenants to pay its share of the cost of such services, in an amount determined by City. In such cases, Concessionaire must cooperate with City's chosen pest control Contractor.
3. Plumbing. Concessionaire, at its own cost and expense, shall provide routine plumbing services for the Premises in accordance with the Concessions Handbook. Concessionaire shall ensure that activities within the Premises do not damage or harm the central water, plumbing, and sewer infrastructure at DEN. Concessionaire shall properly maintain all water hook-ups within the Premises. Concessionaire must furnish City a copy of its plumbing contract, monthly service schedule, and monthly service reports, as directed by City. Concessionaire agrees to coordinate with City and other concessionaires to provide the most effective plumbing services for DEN. Concessionaire shall coordinate and comply with the cleaning and routine maintenance recommendations of City.
  - i. City, in its sole discretion, may elect to provide or contract for plumbing services on Concessionaire's behalf. If City elects to provide or contract for plumbing services on Concessionaire's behalf, Concessionaire covenants to pay its share of the cost of such services, in an amount determined by City. In such cases, Concessionaire must cooperate with City's chosen plumbing Contractor.
4. Electricity. Concessionaire, at its own cost and expense, shall install and maintain an electric meter and a gas meter for each Concessions Location in accordance with the Concessions Handbook. Concessionaire, at its own cost and expense, shall install and maintain all power circuits and connections required for equipment and mechanical systems used within the Premises. Concessionaire shall ensure that activities within the Premises do not damage or harm the central Electricity or Natural Gas infrastructure at DEN. Concessionaire shall coordinate and comply with the cleaning and routine maintenance recommendations of City.
5. HVAC. Concessionaire, at its own cost and expense, shall install and maintain any ductwork and other HVAC connections for the Premises in accordance with the Concessions Handbook. Concessionaire agrees to maintain the ductwork and other connections within the Premises. Concessionaire shall ensure that activities within the Premises do not damage or harm the central HVAC infrastructure at DEN. Concessionaire shall coordinate and comply with the cleaning and routine maintenance recommendations of City.
6. Grease Removal Systems. If Concessionaire installs grease removal systems, in addition to those provided and maintained by City and used only by Concessionaire, Concessionaire shall, at its own expense, regularly, but not less than four (4) times per year, check and clean its grease removal systems, whether located within the Premises or elsewhere in DEN. Concessionaire agrees to maintain all installed grease removal systems within the Premises.

Concessionaire shall ensure that activities within the Premises do not damage or harm the central grease removal infrastructure at DEN. Concessionaire shall coordinate and comply with the cleaning and routine maintenance recommendations of City.

7. Trash, Waste, and Refuse. Concessionaire, at its own cost and expense, shall comply with any DEN-wide waste diversion programs, including but not limited to recycling, composting, or any future programs for removal and disposal of all trash, waste and other refuse caused as a result of performance of this Agreement. Concessionaire shall use designated locations, containers, and transport routes for trash, waste, and refuse removal and disposal as set forth in the Concessions Handbook. Concessionaire shall ensure that storage, transportation, and disposal of all trash, wastes, and other refuse does not damage or harm any structures or infrastructure at DEN.
  8. Lighting. Concessionaire, at its own costs and expense, shall install and maintain all lighting fixtures and wiring for general illumination of the Premises in accordance with the Concessions Handbook. Concessionaire agrees to maintain the lighting fixtures wiring used for general illumination within the Premises. Concessionaire shall ensure that activities within the Premises do not damage or harm the central Electricity infrastructure at DEN. Concessionaire shall coordinate and comply with the cleaning and routine maintenance recommendations of City.
- C. Routine Refurbishment. On or about the commencement of each Contract Year, representatives of City and Concessionaire shall tour the Premises and jointly agree upon what, if any, routine refurbishment is required to maintain the Premises in First Class condition. Concessionaire shall promptly undertake such refurbishment at its sole cost and expense. If Concessionaire and City cannot jointly agree upon the type and extent of routine refurbishment, City may determine, in its sole discretion, the routine refurbishment required for that Contract Year. For purposes of this Section 7.15 only, "routine refurbishment" shall mean the routine repainting or redecoration of public areas within the Premises including, but not limited to, the replacement or repair of worn carpet, tile, furniture, furnishings, fixtures, or finishes.
- D. Maintenance Personnel and Program. Concessionaire covenants to employ or contract with sufficient personnel to provide necessary equipment to keep the Premises and all furniture, furnishings, fixtures, and equipment clean, neat, safe, sanitary, and in good working order and condition at all times pursuant to the maintenance requirements of this Agreement.
- E. City Sole Judge of Maintenance. City shall be the sole and absolute judge of the quality of Concessionaire's maintenance of the Premises. City or its representative may at any time, without notice, enter the Premises to determine if maintenance satisfactory to City is being performed. Performance by Concessionaire of maintenance pursuant to a written maintenance plan previously approved by City shall be conclusive evidence of satisfactory maintenance unless City determines that there is a present danger or safety hazard within the Premises. If City determines that maintenance is not satisfactory, City shall notify Concessionaire in writing. Concessionaire will perform the required maintenance, to City's satisfaction, within fifteen (15) days after receipt of



written notice or City or its representative shall have the right to enter upon the Premises and perform the maintenance. However, where unsatisfactory maintenance threatens the safety, health, or welfare of the traveling public and/or DEN's facilities, Concessionaire shall immediately perform the maintenance. Where City or its representative performs maintenance, Concessionaire agrees to reimburse City for the cost thereof, plus an administrative fee of fifteen percent (15%) of the maintenance costs without prior quote.

- F. Emergency Repairs. In the event of an emergency repair is required, Concessionaire shall notify City of the repair situation as soon as possible. Following such notice, City may inspect the repair work and require alterations if the repair is not satisfactory to City. In the event of an after-hours emergency repair, Concessionaire agrees City shall have the right to enter any affected portion of the Premises and perform the emergency repair. Concessionaire covenants to pay to City the costs associated with any after-hours emergency repair. All emergency repairs requiring shutdown of any DEN system or utility require prior written approval of City. If any emergency repair affects other tenants at DEN, City may, at in its sole discretion, fix the problem immediately and invoice Concessionaire. Concessionaire covenants to pay to City any proportional costs of emergency repairs completed by City, which Concessionaire may have contributed to the cause of the incident.

#### **SECTION 7.16 COMMON MAINTENANCE**

City shall be responsible for common maintenance of the following central systems located throughout DEN, except for assets, connections, or systems located within the Premises. Concessionaire waives all claims against City for performance of common maintenance at DEN.

- A. Electricity Systems. City will furnish normal and reasonable quantities of electricity and gas to the Premises. Concessionaire covenants to pay to City Concessionaire's share of the costs of such cleaning, maintenance, and repair, in an amount determined by City. City will clean, maintain, and repair, for the benefit of Concessionaire, central Electricity and Natural Gas systems at DEN.
- B. Grease Traps and Interceptors. If Concessionaire uses Grease Traps and Interceptors, City will clean, maintain, and repair, for the benefit of Concessionaire, all grease traps, and grease interceptors located along common sewer lines. Concessionaire covenants to pay to City Concessionaire's share of the costs of such cleaning, maintenance, and repair, in an amount determined by City.
- C. HVAC Systems. City will furnish normal and reasonable quantities of central air from the central HVAC system at DEN to the Premises and all necessary power and electricity for such central air circulation. City will maintain under normal conditions a temperature adequate for comfortable occupancy according to the season. City will clean, maintain, and repair, for the benefit of Concessionaire, central HVAC infrastructure and systems at DEN Concessionaire covenants to pay to City Concessionaire's share of the costs of such cleaning, maintenance, and repair, in an amount determined by City.

- D. Life Safety Systems. City will maintain and repair, for the benefit of Concessionaire, Life Safety systems at DEN. Concessionaire covenants to pay to City Concessionaire's share of the costs of such maintenance and repair, in an amount determined by City.
- E. Sanitary Sewer System. City will furnish water from the central water source to the Premises in reasonable quantities; provided that Concessionaire must comply with all water conservation programs in effect or as adopted. City will clean, maintain, and repair, for the benefit of Concessionaire, central water, plumbing, and sewer infrastructure and systems at DEN. Concessionaire covenants to pay to City Concessionaire's share of the costs of such cleaning, maintenance, and repair, in an amount determined by City.
- F. Trash, Waste and Refuse. City reserves the right, if deemed to be in its best interests, to provide trash, waste and other refuse removal, disposal and recycling services. Concessionaire covenants and agrees to participate in any DEN-wide trash, waste, and other refuse removal, disposal, or recycling program for any type of trash, waste, and refuse at its own cost. In the event City elects to provide these services on behalf of Concessionaire, Concessionaire covenants pay its share of the cost of such trash, waste and other refuse removal, disposal and recycling services, in an amount determined by City.
- G. Exterior Windows and Structures. City will clean, maintain, and repair, for the benefit of Concessionaire, exterior windows and all structural parts of DEN. City's maintenance shall include exterior glass, walls, and roof, but specifically excludes Premises Improvements and Trade Fixtures. Concessionaire covenants to pay to City Concessionaire's share of the costs of such cleaning, maintenance, and repair, in an amount determined by City.

#### **SECTION 7.17 PAGING, AUDIO, VIDEO SYSTEMS, AND FREQUENCY PROTECTION**

If Concessionaire installs, in accordance with the Tenant Work Permit Handbook and with City's approval, any type of radio transceiver or other wireless communications equipment, Concessionaire will provide frequency protection within the aviation air/ground VHF frequency band and the UHF frequency band in accordance with restrictions promulgated by the FAA for the vicinity of FAA Transmitter or Receiver facilities. Frequency protection will also be provided for all other frequency bands operating near Concessionaire's equipment. If frequency interference occurs because of Concessionaire's installation, City reserves the right to shut down Concessionaire's installation until appropriate remedies to the frequency interference are made by Concessionaire. Remedies may include relocation of Concessionaire's equipment to another site. The cost to remedy the frequency interference will be solely at Concessionaire's expense. Concessionaire acknowledges and accepts that any paging or audio systems installed by Concessionaire maybe used by City to announce any notification or emergency at DEN. City shall not be liable to Concessionaire for any use of the paging or audio systems installed by Concessionaire.

#### **SECTION 7.18 SUBMITTALS**

City shall have the right at any time to require that reports, plans, and any other submittals required under this Article VII be delivered electronically using technology and procedures

designated by City. If City instructs Concessionaire to deliver any submittals required hereunder by computer, e-mail, internet website, or transmission, City shall not be obligated to furnish Concessionaire with the equipment or systems necessary to do so.

## **SECTION 7.19 PROHIBITED ACTS**

Unless approved in writing in advance by City, in its sole discretion, Concessionaire shall not install or permit to be installed coin-operated or other medium vending machines on the Premises. City reserves the exclusive right to install and maintain, through independent contractors, vending machines at DEN.

Concessionaire will not place excessive loads on the walls, ceilings, and floor or pavement areas of DEN and will repair any area damaged by excessive loading to the satisfaction of City.

Unless approved in writing in advance by City, in its sole discretion, Concessionaire will not permit the active display or operation on the Premises of any display that flies, flashes, or emits a noise or odor.

Unless approved in writing in advance by City, in its sole discretion, Concessionaire will not keep or display any merchandise on or within, or otherwise obstruct, any part of DEN outside of the Premises. Concessionaire shall keep all service corridors, hallways, stairways, doorways, or loading docks leading to and from the Premises free and clear of all obstructions.

Concessionaire will not interfere or permit interference with the use, operation, or maintenance of DEN including, but not limited to, the effectiveness or accessibility of the drainage, sewerage, water, communications, fire protection, utility, electrical, or other systems installed or located from time to time at DEN. Concessionaire will not do or permit to be done anything that may interfere with free access and passage on the Premises or the public areas adjacent thereto, or hinder police, firefighters, or other emergency personnel in the discharge of their duties. Further, Concessionaire shall not do or permit to be done anything that might interfere with the effectiveness or accessibility of elevators or escalators in or adjacent to the Premises, including lines, pipes, wires, conduits, and equipment connected with or appurtenant thereto.

Concessionaire shall not place any additional lock of any kind upon any window or interior or exterior door in the Premises, or make any change in any existing door or window lock or the mechanism thereof, unless a key therefor is maintained on the portion of the Premises were furnished to or otherwise procured by Concessionaire. If any keys furnished to Concessionaire by City are lost, Concessionaire shall pay City, on demand, the cost for replacement thereof.

Concessionaire will not engage in any activity prohibited by DEN's Rules and Regulations and Operating Directives as may be modified during the Term. In the event Concessionaire fails to adhere to DEN's Rules and Regulations and Operating Directives or fails to prevent any other of the prohibited acts set forth in this Section, City may collect liquidated damages as set forth in Article VIII until such prohibited act is ended. Payment of liquidated damages will be due within fifteen (15) days from the date of invoice. Moreover, if the prohibited act is not corrected as directed by City, City or its representative shall have the right to enter upon the Premises and take corrective action, and Concessionaire agrees to promptly reimburse

City for any related costs, and an administrative fee equal to fifteen percent (15%) of the corrective action costs.

### **ARTICLE VIII. FAILURE TO COMPLY WITH PERFORMANCE/OPERATING STANDARDS**

- A. Violations. Concessionaire acknowledges City's objective to provide the public and air travelers with the level and quality of service as described herein. Accordingly, City has established a series of liquidated damages, as set forth in the table below, that it may assess, in its sole discretion, as liquidated damages for various violations of the provisions of this Agreement, the Concessionaire Handbook, the Tenant Work Permit Handbook, and/or DEN's Rules and Regulations. Concessionaire and City agree that the damages set forth herein are reasonable estimates of the significant but difficult to predict harm, and Concessionaire further agrees to pay to City such liquidated damages in accordance with the rates or in the amounts specified herein upon each occurrence of the specified violation or written demand by City. City will, in its sole discretion, determine the classification of each violation as per day or per occurrence. Concessionaire further acknowledges that the liquidated damages are not exclusive remedies and City may pursue other additional remedies as allowed for in this Agreement and/or at law, in City's sole discretion. City's waiver of any payment provided for in this Section shall not be construed as a waiver of the violation or Concessionaire's obligation to remedy the violation.
- B. Multiple Violations. Except for violations of requirements regarding construction, health and safety, delivery and vendor access infractions, liquidated damages for which shall accrue and be assessed immediately and without notice upon violation, all other liquidated damages shall accrue immediately and be assessed as follows:
1. For the first and second violation of a requirement during any twelve (12) month rolling year, City will provide notice to Concessionaire to correct the violation within thirty (30) days or other the time specified in the notice. After the time specified by City for cure, liquidated damages shall be assessed until Concessionaire corrects the violation. In the event, the violation is not corrected within thirty (30) days of the time specified by City for cure, then such violation will be treated as a breach of this Agreement entitling City the right to seek any other remedies available under this Agreement including, but not limited to, termination.
  2. For the third and subsequent violations of the same requirement during any twelve (12) month rolling year commencing upon the first notice of violation, the liquidated damage shall be immediately assessed with no grace period.
  3. Further, after two (2) violations of the same requirement within any twelve (12) month rolling year, City reserves the right, in its sole discretion, to deem the repeated violations a material breach of this Agreement and to seek any other remedies available to it under this Agreement including, but not limited to, termination of this Agreement.

C. Payment. Payment of liquidated damages will be due within fifteen (15) days from the date of invoice.

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| <b>Liquidated Damages</b>  |  |
|--|--|
| Types of Infractions   | Amounts  |
| 1. Operational Deficiencies<br>2. Pricing Policy Infraction<br>3. Late Pricing Survey<br>4. Late Reporting<br>5. Similar Infractions | \$100 per day until corrected to City's satisfaction.                |
| 1. Late Requested Records  | \$350 per day until provided to City's satisfaction.                 |
| 1. Security Infractions<br>2. Health Code Violations<br>3. Similar Infractions   | \$500 per occurrence.  |
| 1. Late Construction   | \$1000 per day until Concession Location actually open for business. |

If any or all of the provisions of this Article VIII are found to be unenforceable, any affected violation shall then be immediately covered by Article XIII, and City shall have a right to all of the remedies provided in Article XIII.

**ARTICLE IX. FEDERAL AID REQUIREMENTS**

**SECTION 9.01 NON DISCRIMINATION**

Concessionaire covenants to comply with pertinent statutes, Executive Orders, and such rules as are promulgated to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability, be precluded from participating in any activity conducted with or benefiting from Federal assistance. This provision binds Concessionaire and sub tier contractors from the bid solicitation period through the completion of the Agreement. This provision is in addition to that required of Title VI of the Civil Rights Act of 1964.

Concessionaire covenants it will comply with the Title VI List of Pertinent Nondiscrimination Statutes and Authorities, as they may be amended from time to time, which are attached hereto as Appendix E and herein incorporated by reference and made a part of this Agreement.

Further, in connection with the performance of work under this Agreement, Concessionaire agrees not to refuse to hire, discharge, promote, demote, or to discriminate in matters of compensation against any person otherwise qualified solely because of race, creed, color, religion, national origin, gender, age, military status, sexual orientation, gender variance, marital status, and/or physical and mental disability. Concessionaire further agrees to insert the foregoing provision in all subcontracts hereunder.

## **SECTION 9.02 CITY'S ACDBE POLICY**

As a condition of eligibility for financial assistance from the FAA, City through its Division of Small Business Opportunity ("DSBO") developed and implemented an ACDBE Policy and Program for DEN. The ACDBE Program was developed and implemented in accordance with DOT's Final Rule 49 CFR Part 23.

City's Director of DSBO has been delegated as the ACDBE Liaison Officer for DEN. In that capacity, the Director of DSBO is responsible for compliance with all aspects of the ACDBE program. The Director of DSBO has established ACDBE goals for DEN and may also establish ACDBE concession specific goals as a percentage of annual gross receipts for this Agreement. The applicable concession specific ACDBE goal, if any, is stated in the Summary of Contract Provisions of this Agreement. The stated goal was included in a competitive solicitation process in which Concessionaire was recommended to operate in the Premises. During that process, Concessionaire submitted its required **Exhibit G** to meet the ACDBE goal. DSBO found the required **Exhibit G** to be responsive and thus, required **Exhibit G** is attached to this Agreement. During the Term of this Agreement, Concessionaire agrees that it shall in good faith make every effort to meet the stated ACDBE goal.

To carry out its ACDBE responsibilities as they are described in this Agreement and in the Required Form C, Concessionaire agrees to assign this responsibility to a high-level company official accountable directly to Concessionaire's chief executive officer. Concessionaire acknowledges if its actions or failure to act violates its ACDBE responsibilities under this Agreement or the ACDBE regulations of the DOT as they may be adopted or amended from time to time, such actions shall constitute a material breach by Concessionaire of this Agreement and, in addition to all other remedies available to City, City may, in its sole discretion, terminate this Agreement.

## **SECTION 9.03 ACDBE NON-DISCRIMINATION**

- A. Concessionaire and any subcontractor of Concessionaire will not discriminate based on race, color, national origin, or sex in performance of this Agreement. Concessionaire will carry out applicable requirements of 49 CFR Part 23 and 26 in the award and administration of agreements. Failure by Concessionaire to carry out these requirements is a material breach of this Agreement, in addition to all other remedies available to City, City may, in its sole discretion, terminate this Agreement.

- B. This Agreement is subject to the requirements of the U.S. Department of Transportation's regulations 49 CFR Part 23 and 26. Concessionaire agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management Contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23 and 26.
- C. Concessionaire agrees to include the statements in paragraphs (A) and (B) above in any subsequent concessions agreement or Contracts covered by 49 CFR Part 23 and 26 that it enters and cause those businesses to include the statements in further agreements.

#### **SECTION 9.04 ACDBE PARTICIPATION AND COMPLIANCE**

- A. ACDBE Goal. Concessionaire agrees that it will provide for a level of ACDBE participation in this Agreement equal to or greater than thirty three percent (33%) of the total annual Gross Receipts, or clearly demonstrate in a manner acceptable to City its good faith efforts to do so. Concessionaire will Contract with those ACDBEs as identified in **Exhibit G** for each ACDBE presented with Concessionaire's Response and approved by City, or such other ACDBEs certified with City's DSBO as may be approved by City. Concessionaire is required to make good faith efforts to explore all available options to meet the goal to the maximum extent practicable through direct ownership arrangements with ACDBEs.

Concessionaire shall not take any action during the term of this Agreement that may have a materially negative impact upon the Concessionaire's ability to meet its stated ACDBE goal.

- B. ACDBE Termination and Substitution. Concessionaire will not terminate an ACDBE for convenience without City's prior written consent. If an ACDBE is terminated by Concessionaire with City's consent or, if an ACDBE fails to complete its work on this Agreement for any reason, Concessionaire must make good faith efforts, in accordance with the requirements of 49 CFR Part 23.25(e) (1) (iii) and (iv), to find another ACDBE to substitute for the original ACDBE to provide the same amount of ACDBE participation. Concessionaire shall forthwith submit to DSBO and to the CEO a modified ACDBE Good Faith Effort together with a written request for review and approval, setting forth the circumstances in sufficient detail and with appropriate documentation to explain the necessity for the change. In every case, Concessionaire shall substitute a DSBO certified ACDBE, and if it cannot, then Concessionaire shall be required to document that it made good faith efforts to do so.
- C. Reporting Requirements. No later than ten (10) days after the end of each calendar month during the Term, Concessionaire will submit to DSBO, in DSBO's online system or on DSBO's monthly ACDBE Utilization Report form, a report of Concessionaire's total Gross Receipts during the month and the total dollar value of Gross Receipts earned by each ACDBE under this Agreement or the total dollar value of goods and services purchased or leased from each ACDBE during the month, in each case calculated in accordance with the requirements of 49 CFR Part 23. If any reported ACDBE participation is from the purchase and/or lease of goods and services, Concessionaire must submit to DSBO, on DSBO's monthly ACDBE Utilization Report



form, a report of the total dollar value of goods and services procured by the Concessionaire from ACDBE and non-ACDBE (non-minority/woman- owned) firms. Whenever a Joint Venture is used to meet ACDBE goals, Concessionaire shall submit to DSBO an annual financial statement for the preceding year indicating compensation, profit sharing, capital contributions of ACDBE partners, or any other financial information as requested by DSBO relevant to determining ACDBE compliance. Concessionaire shall also disclose annually the ACDBE partner's management involvement and its role in decision making. The annual financial statement shall be on a form satisfactory to DSBO and delivered to DSBO no later than February 28th of the following year. Concessionaire further agrees to submit any other report(s) or information that City is required by law or regulation to obtain from Concessionaire, or which the CEO may request relating to Concessionaire's operations.

- D. Monitoring. DSBO will monitor the compliance and good faith efforts of Concessionaire in meeting the requirements of this Article. Concessionaire covenants to grant City and DSBO access to the necessary records to examine such information as may be appropriate for the purpose of investigating and determining compliance with this Article, including, but not limited to, records, records of expenditures, contracts between Concessionaire and the ACDBE participants, and other records pertaining to the ACDBE participation plan, which Concessionaire will maintain for a minimum of three (3) years following the termination of this Agreement. Concessionaire covenants to grant City and DSBO access to each Concession Location under this agreement for purposes of DSBO monitoring. The extent of ACDBE participation will be reviewed prior to the exercise of any renewal, extension or material amendment of this Agreement to consider whether an adjustment in the ACDBE requirement is warranted. Without limiting the requirements of this Agreement, City reserves the right to review and approve all sub-leases or subcontracts utilized by Concessionaire for the achievement of these goals.
- E. Prompt Payment. Concessionaire agrees to pay each subcontractor under this Agreement for satisfactory performance of its contract no later than ten (10) calendar days from the receipt of each invoice and acceptance of work or services. Concessionaire agrees further to release retainage payments to each subcontractor within ten (10) calendar days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of City. This clause applies to both MWBE/SBE and non-MWBE/SBE subcontractors.
- F. Other Requirements. Concessionaire agrees to comply with Federal, State, and Local Disadvantage Business Programs as fully set forth in **Exhibit G**. Concessionaire's failure to comply with Federal, State, and Local Disadvantage Business Programs shall constitute a material breach by Concessionaire of this Agreement and, in addition all other remedies available to City, City may, in its sole discretion, terminate this Agreement.
- G. Non-Compliance. In the event of Concessionaire's non-compliance with the ACDBE Program or failure to meet the ACDBE goal set forth in Section 9.03(A), or to demonstrate a good faith effort to do so, City may, in addition to pursuing any other available legal remedy, terminate, suspend or cancel this Agreement in whole or in part; and/or suspend or debar Concessionaire from eligibility to contract with City in the

future or to receive bid packages or request for proposal packages or other solicitations, unless Concessionaire demonstrates, within a reasonable time as determined by City, its compliance with the terms of the ACDBE Program or this Article or its good faith efforts to comply.

#### **SECTION 9.05 FAIR LABOR STANDARDS ACT**

This Agreement incorporates by reference the provisions of 29 C.F.R. Part 201, the Federal Fair Labor Standards Act ("FLSA"), with the same force and effect as if given in full text. The FLSA sets minimum wage, overtime pay, recordkeeping, and child labor standards for full and part time workers. Concessionaire agrees to incorporate by reference the provisions of FLSA in all contracts and subcontracts resulting from this Agreement. Concessionaire has full responsibility to monitor compliance to the referenced regulation. Concessionaire must address any claims or disputes arising from this requirement directly with the U.S. Department of Labor – Wage and Hour Division.

#### **SECTION 9.06 OCCUPATIONAL SAFETY AND HEALTH ACT**

This Agreement incorporates by reference the requirements of 29 C.F.R. Part 1910 with the same force and effect as if given in full text. Concessionaire must provide a work environment that is free from recognized hazards that may cause death or serious physical harm to the employee. Concessionaire retains full responsibility to monitor its compliance and any subcontractor's compliance with the applicable requirements of the Occupational Safety and Health Act of 1970 (29 C.F.R. Part 1910). Concessionaire must address any claims or disputes that pertain to a referenced requirement directly with the U.S. Department of Labor – Occupational Safety and Health Administration.

### **ARTICLE X. CONSTRUCTION AND CAPITAL INVESTMENT**

#### **SECTION 10.01 CONSTRUCTION BY CONCESSIONAIRE**

Concessionaire shall not make any improvements or modifications, do any construction work on the Premises, or alter, modify, or make additions, improvements, replacements or repairs, except emergency repairs, to any structure now existing or built without prior written approval of City. Concessionaire shall not install any fixtures, other than Trade Fixtures, without the prior written approval of City. In the event any construction, improvement, alteration, modification, addition, repair, excluding emergency repairs, or replacement is made without City approval, or done in a manner other than as approved, City may, at its discretion, (i) terminate this Agreement in accordance with the provisions herein; or (ii) require Concessionaire to remove the same; or (iii) require Concessionaire to change the same to the satisfaction of City. In case of any failure on the part of Concessionaire to comply, City may, in addition to any other remedies available to it at law or in equity, effect the removal or change referenced above in this Section and Concessionaire shall pay the cost thereof to City plus fifteen percent (15%) of the costs for administration.

#### **SECTION 10.02 DESIGN AND CONSTRUCTION STANDARDS**

In its design and construction work on the Premises, Concessionaire will fully comply with the standards and development guidelines identified in the Tenant Work Permit Handbook. City reserves the right to amend Tenant Work Permit Handbook during the Term. Concessionaire covenants to comply with Tenant Work Permit Handbook in effect as of the date of any construction it undertakes.

### **SECTION 10.03 INITIAL CAPITAL INVESTMENT**

As a valuable consideration for City entering into this Agreement, but not as a payment of compensation or a form of consideration for the right to occupy space at DEN, but rather to relieve City from making expenditures for Premises occupied by Concessionaire for the Term of this Agreement, Concessionaire's Capital Investment expended in the initial construction, furnishing, and equipping of the Premises shall not be less than the Minimum Capital Investment set forth in the Summary of Contract Provisions. If the actual Capital Investment, as certified by the Concessionaire, is less than the Minimum Capital Investment, Concessionaire agrees to pay to City, within thirty (30) days of such determination, the difference between the actual Capital Investment and the Minimum Capital Investment. However, if the actual Capital Investment, as certified by Concessionaire, is less than the Minimum Capital Investment and Concessionaire delivers to City the initial construction, furnishings and equipment of the Premises, as reflected in the Approved Project, City agrees to waive its right to the difference between the actual Capital Investment and Minimum Capital Investment. Any amounts paid to City because of this provision shall not be deemed a Capital Investment for any purpose under this Agreement nor shall it be deemed payment of any compensation or other fees due under this Agreement.

### **SECTION 10.04 DEVELOPMENT SCHEDULE**

No later than seven (7) days after the Effective Date, or at such later date as City may designate, Concessionaire must submit to City, for its approval, a proposed Development Schedule that sets forth for the following for each of the Concession Location:

1. The anticipated date(s) of design submittals and reviews for each Concession Location.
2. The anticipated Shell Space Turnover Date(s) for each Concession Location.
3. The anticipated date of Substantial Completion of each Approved Project.
4. The anticipated Required Opening Date(s) for each Concession Location.
5. The expected Package Completion Date for the entire Premises.

Upon approval by City, the Development Schedule will be attached hereto as **Exhibit D**, Development Schedule, and will be confirmed by letter executed by the CEO, without need for formal amendment to this Agreement.

If for any reason City does not deliver possession of a Concession Location to Concessionaire on or after the approved Shell Space Turnover Date, City shall not be subject to any liability therefor. Such failure to deliver possession of a Concessions Location by the time provided in the Development Schedule will not give rise to any claim for damages by Concessionaire against City or against City's Contractor; nor shall such failure affect the validity of this Agreement or Concessionaire's obligations hereunder. Additionally, the Required Opening Date(s) and expected Package Completion Date, as stated in the Development Schedule, shall be adjusted as appropriate, in City's sole discretion.

## **SECTION 10.05 SUBMITTAL AND APPROVAL OF PLANS**

- A. Submittal of Plans. Prior to Concessionaire's commencement of any construction activities on the Premises at any time during the Term, Concessionaire shall submit plans and specifications that conform to all of the requirements of Tenant Work Permit Handbook to City for review and approval. No construction work shall commence until City has approved the plans and specifications and has issued a Notice to Proceed.

Concessionaire shall submit plans and specifications, in the form and number identified in Tenant Work Permit Handbook, for each of the Concession Locations and Support Spaces in accordance with the Development Schedule. City will review and respond to submittals of plans and specifications within ten (10) days or provide notice to Concessionaire that the review time has been extended. In the event of disapproval by City of any portion of any submittal of plans and specifications, Concessionaire shall promptly make modifications and revisions and re-submit for approval by City.

- B. Disclaimer of Compliance with Laws or Codes. The approval by City of any plans and specifications refers to the conformity of such plans and specifications to City standards. Approval of any plans and specifications by City does not constitute its representation or warranty as to their conformity with applicable laws, statutes, codes, or permits and responsibility therefore at all times remains with Concessionaire.
- C. Approvals Extend to Architectural and Aesthetic Matters. Required approval of City will extend to and include architectural and aesthetic matters. City reserves the right to reject any designs submitted by Concessionaire and to require Concessionaire, at Concessionaire's expense, to make modifications and revisions and to resubmit designs until designs are deemed acceptable and subsequently approved in writing by City.
- D. Design and Permitting. Concessionaire shall be responsible, at its sole cost and expense, for the costs of design and permitting of all improvements within the Premises, and shall not commence any work with respect to an Approved Project until all governmental permits and approvals with respect to the Approved Project have been obtained. At no cost or liability to City, City shall cooperate in all reasonable respects with Concessionaire's efforts to obtain such permits and approvals, which cooperation shall include, without limitation, the execution of such instruments as may be required by governmental authorities in order for Concessionaire to apply for and obtain such permits and approvals.

## **SECTION 10.06 CONSTRUCTION**

Concessionaire shall, at its own cost and expense, commence construction of an Approved Project within ten (10) days of the later to occur of: (i) the Shell Space Turnover Date stated in the Notice to Proceed for such Approved Project; or (ii) receipt of Demolition Permit. Concessionaire agrees that all construction work to be performed, including all workmanship and materials, shall be of First Class quality and in accordance with the Approved Project and the Development Schedule. All construction shall be performed in accordance with the

requirements of this Agreement, the Tenant Work Permit Handbook, and applicable laws, regulations, ordinances, codes and permits including, but not limited to, worker's compensation requirements, City's prevailing wage ordinance, Denver Revised Municipal Code ("D.R.M.C."), §20-76, City's MBE/WBE participation requirements, D.R.M.C. Articles III and VII, and the Americans with Disabilities Act, 42 U.S.C. 12,000 et seq., and its regulations. City and its designees shall have the right from time to time to inspect each Approved Project.

Concessionaire must complete an Approved Project and Open for Business no later than the Required Opening Date for initial construction, and the Required Completion Date for all other Approve Projects, as set forth in the Notice to Proceed for the Approved Project, subject to any extensions that may be approved by City. Concessionaire acknowledges that if it fails to Open for Business by the Required Opening Date or Required Completion Date, the delay may cause City to suffer substantial damages that are extremely difficult to ascertain or prove. Therefore, if Concessionaire fails to either complete the Approved Project or open the Concession Location for business by the Required Opening Date or Required Completion Date, the following will apply:

1. Concessionaire shall pay liquidated damages to City, as set forth in Article VIII, from the Required Completion Date until the date on which the Concession Location actually opens to the public for business; and
2. If the Concession Location is not open for business within thirty (30) days after the Required Completion Date, the failure is an Event of Default and City has the right to exercise any and all remedies herein, at law or in equity including but not limited to, the option to terminate this Agreement or to remove the applicable Concession Location from the Premises.

Notwithstanding the foregoing, the Parties agree that any delay in construction of any improvements due to *force majeure* or acts solely attributable to City shall extend the Required Opening Date and/or Required Completion Date for an Approved Project. Additionally, the initial Package Completion Date, as stated in the Development Schedule, shall be extended if affected by such event, in City's sole discretion. City shall have no liability to Concessionaire for compensation or damages for any such delay.

#### **SECTION 10.07      COMPLETION OF CONSTRUCTION**

For each Approved Project, Concessionaire shall conform to Project Closeout Activities set forth in Tenant Work Permit Handbook. Concessionaire further agrees that it shall deliver to City within one hundred (120) days of the Package Completion Date the following:

1. As Built record documents of the construction, additions and other modifications constructed by Concessionaire on the Premises. Any DEN maintained assets or systems shall be fully connected and include system and equipment loads on and all facility information. Concessionaire shall provide connections and service loads at the point of connection to all DEN systems. During the Term, Concessionaire shall keep said documents current, with all changes or modifications made by Concessionaire in or to the Premises or

additions thereto. Documents shall be forwarded to DEN upon request within fourteen (14) calendar days.

2. A statement certified by Concessionaire's chief financial officer specifying the final Capital Investment and final Design related to each of the Approved Project(s) with the level of detail as requested by City.
3. A certification that construction has been completed in accordance with the approved plans and specifications and in compliance with all laws and other governmental rules, regulations and orders, including but not limited to DSBO approval and the Denver City Auditor's approval.
4. Certified proof demonstrating that no liens exist on the Premises, including but not limited to, a waiver of lien from all construction Contractors and signed releases from all subcontractors that indicate receipt of payment in full for all work performed or Trade Fixtures delivered.

#### **SECTION 10.08 TITLE TO IMPROVEMENTS**

All Premises Improvements made to the Premises by Concessionaire, and any additions and alterations thereto made by Concessionaire, including approved changes and renovations affixed to the realty, shall become the property of City upon their completion and acceptance by City.

#### **SECTION 10.09 SIGNAGE**

Subject to the terms and conditions of Section 10.05, Concessionaire shall have the right to install and maintain signs on the Premises, if the design, installation, and maintenance of all signs shall be subject to the terms of this Section and comply with the Tenant Work Permit Handbook. Concessionaire further acknowledges City's desire to maintain a high level of aesthetic quality in all concession facilities throughout DEN. Therefore, Concessionaire covenants and agrees that in the exercise of its privilege to install and maintain appropriate signs on the Premises, as provided herein, it will submit to City, for its review and approval, the size, design, content, construction or fabrication, and intended location of every sign it proposes to install on or within the Premises. Concessionaire shall not install signs of any type on or within the Premises without prior written approval of City, which approval shall not be unreasonably withheld or denied if the proposal complies with the Tenant Work Permit Handbook and other DEN's Rules and Regulations governing signage.

#### **SECTION 10.10 REFURBISHMENT**

In addition to the ongoing, routine maintenance described in Section 7.15, Concessionaire shall, at its sole cost and expense, commence Mid-Term Refurbishment. The Mid-Term Refurbishment shall include without limitation all refinishing, repair, replacement, and redecorating, repainting, and re-flooring necessary to keep the Premises in First Class condition and shall comply with all other terms and conditions of this Agreement. City and Concessionaire shall jointly determine the scope and extent of the Mid-Term Refurbishment for each Concession Location. If Concessionaire and City cannot jointly agree upon the necessary scope and extent of the Mid-Term Refurbishment for any particular Concession

Location, City may, at its sole discretion, determine the refurbishment required and Concessionaire agrees to be bound by City's determination.

Concessionaire's plans, specifications, and schedule for refurbishment must be in accordance with Tenant Work Permit Handbook. Concessionaire shall submit its plan specifications for refurbishment to City for review and approval no later than the beginning of the fourth (4<sup>th</sup>) or fifth (5<sup>th</sup>) full Contract Year (depending upon whether the agreement lasts for seven [7] or ten [10] years) following the Package Completion Date. The Mid-Term Refurbishment shall be completed prior to the midpoint of the fifth (5<sup>th</sup>) or sixth (6<sup>th</sup>) full Contract Year following the Package Completion Date.

## **ARTICLE XI. DISCLAIMER OF LIENS**

The interest of City in the Premises will not be subject to liens for any work, labor, materials or improvements made by or for Concessionaire to the Premises, whether or not the same is made or done in accordance with an agreement between City and Concessionaire. It is specifically understood and agreed by Concessionaire that in no event will City or the interest of City in the Premises be liable for or subject to any mechanic's, laborer's or materialmen's liens for materials furnished, improvements, labor or work made by or for Concessionaire to the Premises. Concessionaire is specifically prohibited from pledging, liening, or otherwise encumbering any assets located at DEN or any interest in this Agreement without prior, written approval by City. Concessionaire is specifically prohibited from subjecting City's interest in the Premises to any mechanic's, materialmen's, or laborers' liens for improvements made by or for Concessionaire or for any materials, improvements or work for which Concessionaire is responsible for payment. Concessionaire will indemnify, defend, and hold City harmless for any expense or cost associated with any lien or claim of lien that may be filed against the Premises or City, including attorney fees incurred by City. Concessionaire will provide notice of this disclaimer of liens to all Contractors or subcontractors providing any materials or making any improvements to the Premises.

In the event any construction, mechanic's, laborer's, materialmen's or other lien, or notice of lien is filed against any portion of the Premises for any work, labor or materials furnished to the Premises, whether or not the same is made or done in accordance with an agreement between City and Concessionaire, Concessionaire will cause any such lien to be discharged of record within thirty (30) days after notice of filing thereof by payment bond or otherwise or by posting with a reputable title company or other escrow agent acceptable to City, security satisfactory to City to secure payment of such lien, if requested by City, while Concessionaire contests to conclusion the claim giving rise to such lien.

## **ARTICLE XII. MAINTENANCE UTILITES AND REPAIRS**

### **SECTION 12.01 CONCESSIONAIRE'S MAINTENANCE OBLIGATIONS**

Except for such maintenance of the Premises as is to be provided by City hereunder, Concessionaire shall, at its own cost and expense, maintain the Premises and every part thereof, including Trade Fixtures personal property, in good appearance and repair, in a safe First Class condition, and in accordance with Sections 7.14 and 7.15. Concessionaire shall maintain, repair, replace, paint, or otherwise finish all Premises Improvements on the Premises, including, without limitation, walls, partitions, floors, ceilings, windows, doors, glass and all furnishings, fixtures, and equipment therein, whether installed by

Concessionaire or by City. All of the maintenance, repairs, finishing and replacements shall be of quality equal to or better than the original in materials and workmanship. All work, including finishing colors, shall be subject to the prior written approval of City.

If it is determined the maintenance does not comply with this Agreement, City shall so notify Concessionaire in writing. If the maintenance required to be performed as provided in City's notice to Concessionaire is not commenced by Concessionaire within five (5) days after receipt of notice, or is thereafter not diligently executed to completion, City or its representative shall have the right to enter upon the Premises and perform the maintenance, and Concessionaire agrees to promptly reimburse City for the cost thereof, plus an administrative fee equal to fifteen percent (15%) of the maintenance costs.

Concessionaire covenants and agrees that nothing shall be done or kept in the Premises that might impair the value of City's property or that would constitute waste. Any hazardous or potentially hazardous condition on the Premises shall be corrected immediately upon receipt of a verbal or written notice from City. At the sole discretion of City, Concessionaire shall close the Premises or affected portion thereof until the hazardous or potentially hazardous condition is corrected.

Concessionaire covenants to comply with all present and future laws, orders, and regulations, including any rules, regulations and procedures promulgated by City regarding City provided maintenance within DEN in which the Concession Location is located. If any system for City provided maintenance is put in place that can allocate to Concessionaire its proportional share of the cost. Concessionaire must pay its proportional share of the actual costs for City provided maintenance.

## **SECTION 12.02 CITY'S MAINTENANCE AND UTILITY OBLIGATIONS**

City shall provide structural maintenance of DEN and, except as provided below, maintain and repair the exterior windows and walls of the Premises in DEN. However, maintenance of all interior and exterior walls constructed or remodeled by Concessionaire shall be Concessionaire's responsibility. Further, City has establish Common Maintenance Services at DEN, including but not limited to those services identifies in Section 7.16 and set forth in the Summary of Contract Provisions. Concessionaire convents to pay its proportionate share of the Common Maintenance Services provided by City.

City provides utility mains and lines throughout DEN. Concessionaire, at its sole cost, shall tie into the utility mains and lines at the locations as specified by City. Supplemental heated or cooled air, electrical or other utilities required by Concessionaire in excess of what is customarily available in DEN will be, if approved by City, at the expense of Concessionaire.

City may, at City's sole discretion, maintain the utilities within the Premises and in doing so shall be permitted to enter upon the Premises at all times to make any repairs, replacements and alterations when and as may, in the opinion of City, be deemed necessary. Furthermore, Concessionaire will permit City or its representatives access to construct or install over, on, in, or under the Premises, new systems, pipes, lines, mains, wires, conduits, ducts and equipment; provided, however, that City shall exercise such right in a manner that minimizes interference with Concessionaire's operations. Moreover, during an emergency, City, or its agents, may enter the Premises forcibly, if necessary. No such reasonable entry by or on behalf of city shall constitute or cause a termination of this Agreement by Concessionaire.



City agrees that it will at all times maintain and keep utility mains and lines in good repair in DEN and all appurtenances, facilities and services now or hereafter connected therewith. Concessionaire understands, accepts, and agrees that City shall not be liable for Concessionaire's loss for failure to supply any utility services. City reserves the right to temporarily discontinue utility services at such time as may be necessary by reason of accident, unavailability of employees, repairs, alterations, or improvements or whenever by reason of strikes, lockouts, riots, acts of God, or any other happenings beyond the control of City and causes City to be unable to furnish such utility services. City shall not be liable for damages to persons or property for any such discontinuance due to causes beyond the control of City, nor shall such discontinuance in any way be construed as cause for abatement of right or operate to release Concessionaire from any of its obligations hereunder.

City owns and maintains DEN's cabling infrastructure supporting telephone and data transmission generated within, to and from the Premises (hereinafter referred to as "Data Network Distribution System"). Concessionaire may use City's Data Network Distribution System for voice and data connectivity. Concessionaire is required to pay City, or pay a competitive local exchange carrier, for dial tone or internet access for its telephone services and communication systems. City will provide annual maintenance and any needed repairs for the fiber optic cable within the Data Network Distribution System. Relocation of the fiber cable or additional strands of fiber cable will be at Concessionaire's expense. If Concessionaire installs Electronic Visual Information Display systems ("EVIDS"), Concessionaire will be required to use City's Data Network Distribution System. Installation and ongoing maintenance of EVIDS will be at Concessionaire's expense and, at Concessionaire's discretion, may be performed by City or an outside vendor approved by City, subject to a Tenant Work Permit.

### **SECTION 12.03 CITY'S PERFORMANCE OF CONCESSIONAIRE'S OPERATING OBLIGATIONS**

City has determined, in consideration of DEN security, public safety, and operating efficiency, that it may be in City's best interest to perform Concessions Services, as set forth in the Summary of Contract Provisions. City reserves the right to establish a Concessions Services Fee based upon documented actual costs of providing Concessions Services.

City may, in its sole discretion, add to, delete from, or otherwise modify the Concessions Services during the Term. City will provide thirty (30) days written notice of the effective date of any modification to the Concessions Services to Concessionaire. Concessionaire agrees to cooperate with City in the implementation and performance of the Concessions Services.

Concessionaire agrees that City shall not be liable for Concessionaire's loss for failure to supply any Concessions or Common Maintenance Services. City reserves the right to temporarily discontinue any Concessions or Common Maintenance Services at such time as may be necessary by reason of accident, unavailability of employees, repairs, alterations, or improvements or whenever by reason of strikes, lockouts, riots, acts of God, or any other happenings beyond the control of City and causes City to be unable to furnish such services. City shall not be liable for damages to persons or property for any such discontinuance due to causes beyond the control of City, nor shall such discontinuance in any way be construed as cause for abatement of right or operate to release Concessionaire from any of its obligations hereunder, except as otherwise provided in Article XVII.

The Parties agree to modify the Summary of Contract Provisions to reflect modifications in the Concessions Services and Common Maintenance Services. Any such modification will be confirmed by letter executed by the CEO, without need for formal amendment to this Agreement.

### **ARTICLE XIII. DEFAULT, REMEDIES, AND TERMINATION RIGHTS**

#### **SECTION 13.01 EVENTS OF DEFAULT**

Concessionaire will be deemed to be in default of this Agreement upon the occurrence of any of the following:

1. The failure or omission by Concessionaire to perform its obligations under this Agreement or the breach of any terms, conditions, and covenants required herein.
2. The failure to pay, in full, to City within five (5) days of when due any fees, costs, expenses damages, or other charges applicable hereunder except where such failure is cured within (10) days after written notice by City of Concessionaire's failure to pay.
3. Concessionaire's default under any other agreement with City at DEN.
4. The appointment of a Trustee, custodian, or receiver of all or a substantial portion of Concessionaire's assets.
5. The divestiture of Concessionaire's estate herein by operation of law, by dissolution, or by liquidation, not including a merger or sale of assets.
6. The insolvency of Concessionaire; or if Concessionaire will take the benefit of any present or future insolvency statute, will make a general assignment for the benefit of creditors, or will seek a reorganization or the readjustment of its indebtedness under any law or statute of the United States or of any state thereof including the filing by Concessionaire of a voluntary petition of bankruptcy or the institution of proceedings against Concessionaire for the adjudication of Concessionaire as bankrupt pursuant thereto.
7. Concessionaire's cancellation of its Surety without City's prior written consent and does not reestablish it promptly after written notice by City.
8. An assignment, sublease, or transfers Concessionaire's interest under this Agreement by reason of death, operation of law, assignment, sublease, sale in bulk of any of its assets, or otherwise to any other person or business entity other than in compliance with the provisions of this Agreement.
9. If Concessionaire abandons, deserts, vacates, or ceases operations under this Agreement for five (5) consecutive business days, unless undergoing repairs or renovations first been approved by City.
10. Concessionaire's failure to maintain any type of insurance or level of insurance coverage required hereunder (and in the event Concessionaire has

failed to remedy such failure within ten (10) days after notice thereof from City, City may effect such coverage and recover the cost thereof immediately from the Surety or from Concessionaire).

11. Any lien or attachment to be filed against the Premises, DEN, or other City property because of any act or omission of Concessionaire, and such lien or attachment is not discharged or contested by Concessionaire in good faith by proper legal proceedings within fifteen (15) days after receipt of notice thereof by Concessionaire.
12. Concessionaire use, permission to use, or failure to prevent use of any portion of DEN made available to Concessionaire for its use under this Agreement for any illegal purpose.
13. Concessionaire's license or franchise agreement related to the Concession it is authorized to operate at DEN is terminated, expires, or is amended so that compliance with the amended provisions will cause Concessionaire to be in breach of its obligations under this Agreement.
14. Concessionaire's failure to pay any fees or charges required hereunder after the expiration of the (10) day cure period as proscribed hereunder.
15. The conduct of any business or performance of any acts at DEN not specifically authorized in this Agreement or by any other agreement between City and Concessionaire, and Concessionaire's failure to discontinue that business or those acts within thirty (30) days of receipt by Concessionaire of City's written notice to cease said business or acts (which thirty [30] day notice and remedy period shall also satisfy the notice requirement of Section 13.03 below). Nothing in this Section 13.01 shall be construed to grant a right to Concessionaire to cure a default, which by its nature is not capable of being cured.

City reserves the right, in its sole discretion, to treat each Concessions Location individually for the purpose of declaring defaults and exercising remedies under this Agreement.

## **SECTION 13.02 CITY'S REMEDIES**

In the event of any of the foregoing events of default of Concessionaire, and following thirty (30) days' notice by City and Concessionaire's failure to remedy, City, at its election, may exercise any one or more of the following options or remedies, the exercise of any of which will not be deemed to preclude the exercise of any other remedy herein listed or otherwise provided by statute or general law. Unless the default, stated in such notice, is by its nature curable and shall have been cured within such thirty (30) days. Nothing in this Article XIII shall be construed to grant a right to Concessionaire to cure a default, which by its nature is not capable of being cured. City Remedies are as follows:

1. Allow this Agreement to continue in full force and effect and enforce City's right to collect compensation as it becomes due together with past due interest and draw upon the Surety in any amount necessary to satisfy the damages sustained or reasonably expected from Concessionaires default.

2. Upon thirty (30) day notice, terminate Concessionaire's privileges under this Agreement. This notice shall be final and shall at the option of City terminate all of the privileges hereunder of Concessionaire, and City may upon the date in the notice take possession of the Premises, and expel Concessionaire with or without process of law, without liability for trespass, and using such force as may be necessary, and without prejudice to any remedies for damages or breach. In doing so, City will not be deemed to have thereby accepted a surrender of the Premises, and Concessionaire will remain liable for all payments or other sums due under this Agreement up to and including the date of termination, and for all damages suffered by City because of Concessionaire's breach of any of the covenants of this Agreement including, but not limited to, all cost of relicensing, reasonable attorney's fees, repairs, and improvements; or
3. Treat this Agreement as remaining in existence, and reenter and take possession of the Premises and expel Concessionaire and those claiming through or under Concessionaire and remove the effects of as may be necessary with or without process of law, without liability for trespass, using such force as may be necessary, and without prejudice to any remedies for damages or breach. No such reentry shall be construed as an election on City's part to terminate this Agreement. City reserves the right to terminate the Agreement at any time after reentry. Following reentry, City may relicense the Premises, and make alterations, repairs or improvements as City deems appropriate for relicensing. City shall not be responsible for any failure to relicense the Premises or any failure to collect compensation due for such relicensing. City shall not be liable to Concessionaire for any claim for damages resulting from remedial action by City. Concessionaire shall continue to be liable for all amounts due as under this Agreement on the dates specified plus interest thereon at the Past Due Interest Rate together with such amounts as would be payable, including costs, attorney's fees, repairs, and improvements.

No delay, failure, or omission of City to re-enter the Premises or to exercise any right, power, privilege, or option arising from any default nor subsequent acceptance of fees or charges then or thereafter accrued will impair any such right, power, privilege, or option, or be construed to be a waiver of any such default or relinquishment, or acquiescence of the Premises. No option, right, power, remedy, or privilege of City will be construed as being exhausted or discharged by the exercise thereof in one or more instances. It is agreed each and all of the rights, powers, options, or remedies given to City by this Agreement are cumulative and that the exercise of one right, power, option, or remedy by City will not impair its rights to any other right, power, option, or remedy available under this Agreement or provided by law. In the event City terminates this Agreement or reclaims the Premises under this Section 13.03, City has no liability to Concessionaire for any Unamortized Investment.

#### **ARTICLE XIV. INDEMNIFICATION**

To the fullest extent permitted by law, Concessionaire agrees to protect, reimburse, indemnify, and hold City, its agents, employees, and officers free and harmless from and against any and all liabilities, claims, expenses, losses, costs, fines, and damages (including but not limited to attorney's fees and court costs), and causes of action of every kind and character arising out of, resulting from, incident to, or in connection with Concessionaire's

presence on or use or occupancy of Premises or DEN; Concessionaire's acts, omissions, negligence, activities, or operations; Concessionaire's performance, non-performance or purported performance of this Agreement; or any breach by Concessionaire of the terms of this Agreement, or any such acts, omissions, negligence, activities, or operations of Concessionaire's officers, authorized officials, employees, agents, subcontractors, invitees, or any other person directly or indirectly employed or utilized by Concessionaire, that results in any bodily injury (including death) or any damage to any property, including loss of use, incurred or sustained by any party hereto, any agent or employee of any party hereto, any other person whomsoever, or any governmental agency, regardless of whether or not it is caused in whole or in part by the negligence of a party indemnified hereunder provided that Concessionaire need not release, indemnify, or hold harmless City, its officers, officials, agents, and employees from damages resulting from the sole negligence of City's officers, officials, agents, and employees.

In addition to the duty to indemnify and hold harmless, Concessionaire will have the duty to defend City, its agents, employees, and officers from all liabilities, claims, expenses, losses, costs, fines, and damages (including but not limited to attorney's fees and court costs) and causes of action of every kind and character. The duty to defend under this Article is independent and separate from the duty to indemnify, and the duty to defend exists regardless of any ultimate liability of Concessionaire, City, and any indemnified party. The duty to defend arises immediately upon written presentation of a claim to Concessionaire.

Concessionaire recognizes the broad nature of these indemnification, hold harmless, and duty to defend clauses, and voluntarily makes this covenant and expressly acknowledges the receipt good and valuable consideration provided by City in support of this indemnification in accordance with the laws of the State of Colorado. This Article shall survive the termination of this Agreement. Compliance with insurance requirements under this Agreement shall not relieve Concessionaire of its liability or obligation to indemnify, hold harmless, and defend City as set forth in this Article.

## ARTICLE XV. INSURANCE

### SECTION 15.01 INSURANCE TERMS AND CONDITIONS

- A. Required Insurance. Concessionaire covenants and agrees to secure at its own expense and to keep in force at all times hereof, from the Effective Date, insurance against claims for injury to persons or damage to property that may arise from or in connection with the performance of obligations under this Agreement by Concessionaire, its agents, representatives, or employees. The types and amounts of insurance coverage Concessionaire must procure are specified in the Certificate of Insurance for Aviation, attached hereto as **Exhibit F**, and incorporated herein by reference. Insurance requirements set forth on **Exhibit F** do not limit in any way the indemnity covenants contained in this Agreement or the amount or scope of liability of Concessionaire under this Agreement. The amounts listed indicate only the minimum amounts of insurance coverage that City is willing to accept to help insure full performance of all terms and conditions of this Agreement. Concessionaire specifically agrees to comply with each condition, requirement, or specification set forth in **Exhibit F** during all periods when the required coverage is in effect. Insurance must be maintained without any lapse in coverage during the entire Term. Insurance canceled without City's consent or failure by Concessionaire to provide evidence of renewal

within forty-eight (48) hours after written notice by City is a material breach of this Agreement and, in addition to all other remedies available to City, City may, in its sole discretion, terminate this Agreement. If at any time any of the insurance policies shall be or become unsatisfactory to City as to form or substance, or if any of the carriers issuing such policies shall be or become unsatisfactory to City, Concessionaire shall promptly obtain a new and satisfactory replacement policy and give City an updated certificate of insurance that complies with the new insurance requirements of City.

- B. Liquor Liability. If alcoholic beverages are served or sold at DEN by the Concessionaire, the Commercial General Liability insurance shall include Host Liquor Liability Coverage.
- C. Business Interruption Insurance. Concessionaire shall procure and maintain Business Interruption insurance in such amounts as will reimburse Concessionaire for direct or indirect loss of earnings attributable to the perils commonly covered by the Concessionaire's property insurance described in Section 15.02 (A), which shall include losses arising from mechanical failures on or interruption of services to City premises.
- D. Cyber Liability Insurance. Concessionaire shall procure and maintain Cyber Liability coverage in such amounts that will cover claims involving privacy violations, information theft, damage to, or destruction of electronic information, intentional and/or unintentional release of private information, alteration of electronic information, extortion, and network security.
- E. Commercial Crime Insurance. Concessionaire shall procure and maintain Commercial Crime insurance covering, but not limited to, loss arising from employee theft, employee dishonesty, forgery or alteration, robbery, burglary, embezzlement, disappearance, destruction; money orders and counterfeit currency; depositors forgery; computer fraud, on-premises and in-transit.
- F. Mutual Waiver of Subrogation. Concessionaire and City waive any right of action that they and/or their insurance carriers might have against each other (including their respective employees, officers, commissioners, or agents) or against other tenants of DEN for any Loss, to the extent that such Loss is covered by any property insurance policy or policies maintained or required to be maintained pursuant to this Agreement and to the extent that such proceeds (which proceeds are free and clear of any interest of third parties) are received by the party claiming the Loss. Concessionaire also waives any right of action it and/or its insurance carrier might have against City (including its respective employees, officers, commissioners, or agents) for any Loss, whether or not such Loss is insured. If any of Concessionaire's applicable insurance policies do not allow the insured to waive the insurer's rights of subrogation prior to a Loss, Concessionaire shall cause it to be endorsed with a waiver of subrogation that allows the waivers of subrogation required by this Section.
- G. Certificates Required. All certificates required by this Agreement shall be sent directly to the **City and County of Denver, Department of Aviation, Denver International Airport, Concessions Management Section, Airport Office Building, Room 9870, 8500 Pena Boulevard, Denver, Colorado 80249**. City's Contract control number for this Agreement shall be noted on each certificate of insurance. Certificates evidencing

the existence of the policies, in such form as City may require, shall be delivered to City prior to the Shell Space Turn Over Date. Upon written request, Concessionaire agrees to furnish City, at any time thereafter during the Term, the original or a certified copy of said policy or policies.

- H. Concessionaire's Risk. City in no way warrants and/or represents that the minimum limits contained herein are sufficient to protect Concessionaire from liabilities that might arise out of the performance of the terms and conditions of this Agreement by Concessionaire, its agents, representatives, or employees. Concessionaire shall assess its own risks and as it deems appropriate and/or prudent, maintain higher limits and/or broader coverage. Concessionaire is not relieved of any liability or other obligations assumed or pursuant to this Agreement because of its failure to obtain or maintain insurance in sufficient amounts, duration, or types. In no event shall City be liable for any: (i) business interruption or other consequential damages sustained by Concessionaire; (ii) damage, theft, or destruction of Concessionaire's inventory, Improvements, or property of any kind; or (iii) damage, theft, or destruction of an automobile, whether or not insured.
- I. Governmental Immunity. The Parties understand and agree that City, its officers, officials, and employees are relying on and do not waive or intend to waive by any provisions of this Agreement, monetary limitations, or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, §§ 24-10-101 to 120, C.R.S., or otherwise available to City, its officers, officials, and employees.

In the event Concessionaire has failed to remedy any lapse in coverage within ten (10) days after notice thereof from City, City may affect such coverage and recover the cost thereof immediately from the Surety or from Concessionaire. City reserves the right to modify any Insurance Requirements stated herein. The Parties agree to modify the Summary of Contract Provisions to reflect modifications in the Insurance Requirements. Any such modification will be confirmed by letter executed by the CEO, without need for formal amendment to this Agreement.

## **ARTICLE XVI.SURETY FOR PERFORMANCE**

### **SECTION 16.01      FORM OF SURETY**

To secure payment for compensation, fees, charges and other payments required hereunder, Concessionaire will post with City a Surety.

The Surety will be maintained throughout the Term of this Agreement and any holdover or extension until released by City in accordance with Section 16.03 and will be in an amount equal to the sum of the Support Space Compensation plus MAPF payable to City hereunder for a period of six (6) months. The Surety will be issued by a bank or surety provider acceptable to City and authorized to do business in the State of Colorado, and will be in a form and content satisfactory to City. The Surety may be issued for a one (1) year period, provided however, Concessionaire covenants and agrees that evidence of renewal or replacement of the Surety must be submitted annually by Concessionaire to City, without prompt, at least sixty (60) days prior to the expiration date of the instrument. The Surety shall contain language that the issuing financial institution shall notify City in writing within forty-five (45) days of a determination that the Performance Surety is to be terminated and or is

not going to be renewed.

Notwithstanding any provision herein to the contrary, if at any time during the Term City deems the amount of Surety insufficient to properly protect City from loss hereunder because Concessionaire is or has been in arrears with respect to such monetary obligations or because Concessionaire has, in the opinion of City, violated other terms of this Agreement, Concessionaire covenants that after receiving notice, it will increase the Surety to the amount required by City, provided however, the percentage increase shall not exceed five (5%) of the annual percentage increase that has occurred with respect to Concessionaire's Compensation, fees, and charges.

Concessionaire shall furnish the Surety within ten (10) days of the Effective Date as security for the full performance of every provision of this Agreement by Concessionaire. Failure to maintain the Surety as set forth herein shall be an event of Default hereunder.

#### **SECTION 16.02 APPLICATION OF SURETY**

In the event Concessionaire fails to perform the payment terms and conditions of this Agreement, City, in addition to any other rights and remedies available by law or in equity, may, at any time, apply the Surety or any part thereof toward the payment of Concessionaire's obligations under this Agreement. In such an event, within thirty (30) days after notice, Concessionaire will restore the Surety to its original amount. City will not be required to pay Concessionaire any interest on the Surety. Concessionaire understands and agrees that failure to maintain or replenish the Surety shall constitute a material breach of this Agreement and, in addition to all other remedies available to City, City may, in its sole discretion, terminate this Agreement.

#### **SECTION 16.03 RELEASE OF SURETY**

The release of the Surety will be subject to the satisfactory performance by Concessionaire of all terms, conditions, and covenants contained herein throughout the entire Term. Upon termination of this Agreement, the release of Surety will not occur until all compensation, fees, charges, and other payments due to City are satisfied and City has accepted the findings of Concessionaire's audit or has successfully conducted an audit in accordance with the provisions of Section 5.10 of this Agreement. In the event of a dispute as to the condition of the Premises, only the amount in dispute will be retained for remedy. City shall release the Surety without interest within thirty (30) days of meeting the above requirements.

#### **SECTION 16.04 GUARANTY OF AGREEMENT**

This Agreement is contingent upon execution of a Guaranty of Agreement by the person or entity(s) designated, in the form shown in **Exhibit E**, Form of Guaranty of Agreement.

### **ARTICLE XVII. PROPERTY DAMAGE**

#### **SECTION 17.01 COMPLETE DESTRUCTION**

If Premises, the Concourse in which the Premises is located, or any portion thereof is destroyed or damaged to an extent that renders it unusable, City may rebuild or repair any portions of the building structure destroyed or damaged, and if the cause was beyond the control of Concessionaire, Concessionaire's obligation to pay the compensation hereunder



shall abate as to such damaged or destroyed portions during the time they are unusable. If City elects not to proceed with the rebuilding or repair of the building structure, it shall give notice of its intent within ninety (90) days after the destruction or damage. At its option, Concessionaire may then terminate this Agreement effective as of the date of such event.

If City elects to rebuild, Concessionaire must replace all Premises Improvements at its sole cost and in accordance with the Capital Investment, subject to increase for inflation. Such replacements must be in accordance with the performance standards set forth herein. City and Concessionaire shall cooperate with each other in the collection of any insurance proceeds that may be payable in the event of any loss or damage.

#### **SECTION 17.02      LIMITS OF CITY'S OBLIGATIONS DEFINED**

City shall not be liable for the following: (i) any damage to property of Concessionaire or others located on the Premises or in DEN; (ii) the loss of or damage to any property of Concessionaire or of others by theft or otherwise; (iii) any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain, or snow; (iv) leaks from any part of the Premises or DEN; from the pipes, appliances, or plumbing works; from the roof, street, subsurface, or from any other place; or from dampness or by any other cause of whatsoever nature; (v) any such damage caused by other Concessionaires, persons in the Premises, occupants of adjacent property, of DEN, or of the public; (vi) damages caused by operations in construction of any private, public, or quasi-public work; (vii) any latent defect in the Premises or in the building of which they form a part; and (viii) all property of Concessionaire kept or stored on the Premises is at the risk of Concessionaire only.

Further, Concessionaire shall defend and hold City harmless from and hereby waives any claims arising out of damage to the same or damage to Concessionaire's business, including subrogation claims by Concessionaire's insurance carrier. Concessionaire shall give immediate telephone notice to City in case of fire, casualty, or accidents in the Premises or in the building of which the Premises is a part, of defects therein, or in any fixtures or equipment. Concessionaire shall promptly thereafter confirm such notice in writing.

Redecoration, replacement, and refurbishment of furniture, fixtures, equipment, and supplies will be the responsibility of, paid for by Concessionaire, and will be of equivalent quality to that originally installed hereunder. City will not be responsible to Concessionaire for any claims related to loss of use, loss of profits, or loss of business resulting from any partial, extensive, or complete destruction of the Premises regardless of the cause of damage.

#### **SECTION 17.03      ALTERNATE SPACE**

City will use its best efforts to provide Concessionaire with alternate areas acceptable to Concessionaire to continue its operation while City makes repairs to the Premises, in accordance with the terms of this Article, except for damages caused by Concessionaire's acts, omissions, or negligence.

#### **SECTION 17.04      WAIVER OF SUBROGATION**

To the extent insurance permits, and then only to the extent collected or collectable by Concessionaire under its property insurance coverage, Concessionaire waives any and all claims against City and its directors, officers, agents, servants and employees for loss or

damage to property.

## **ARTICLE XVIII. DAMAGING ACTIVITIES**

No goods or materials will be kept, stored, or used in or on the Premises that are flammable, explosive, hazardous (as defined below), or that may be offensive or cause harm to the general public or cause damage to the Premises. Concessionaire is responsible for compliance and shall require its Contractors to comply with all federal, state, and local environmental rules, regulations, and requirements. This includes compliance with DEN's Rule and Regulation, Rule 180 incorporated hereto by reference. Concessionaire shall obtain all necessary federal, state, local, and DEN permits and comply with all permit requirements. Nothing will be done on the Premises other than as provided in this Agreement that will increase the rate of or suspend the insurance on the Premises or on any structure of City. No machinery or apparatus will be used or operated on the Premises that will damage the Premises or adjacent areas; provided, however, that nothing in this Article will preclude Concessionaire from bringing or using on or about the Premises, with approval by City, such materials, supplies, equipment, and machinery as are appropriate or customary in the operation of Concessionaire's business under this Agreement. Concessionaire agrees that nothing shall be done or kept on the Premises that might impair the value of City's property or that would constitute waste.

The term "Hazardous" will mean:

1. Any substance the presence of which requires or may later require notification, investigation or remediation under any environmental law; or
2. Any substance that is or becomes defined as a "hazardous waste", "hazardous material", "hazardous substance", "pollutant" or "contaminant" under any federal, state, or local environmental law, including, without limitation, the Comprehensive Environmental Response, Rights and Liability Act (42 U.S.C. §9601 et seq.), the Resources Conservation and Recovery Act (42 U.S.C. §6901 et seq.) and the associated regulations; or
3. Any substance that is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or otherwise harmful and is or becomes regulated by any governmental authority, agency, department, commission, board, agency or instrumentality of the United States, any state of the United States, or any political subdivision within any state; or
4. Any substance that contains gasoline, diesel fuel, or other petroleum hydrocarbons or volatile organic compounds; or
5. Any substance that contains polychlorinated biphenyls, asbestos, or urea formaldehyde foam insulation; or
6. Any substance that contains or emits radioactive particles, waves or materials, including, without limitation, radon gas.

Concessionaire agrees that nothing shall be done or kept on the Premises and no improvements, changes, alterations, additions, maintenance, or repairs made that might impair the structural soundness of the building; result in an overload of utility, plumbing, or

HVAC systems serving the Terminal and/or Concourses; or interfere with electric, electronic, or other equipment at DEN. In the event of violations hereof, Concessionaire agrees immediately to remedy the violation at Concessionaire's own cost and expense. Concessionaire shall be responsible for any damage caused by Concessionaire to the Premises, DEN, any City property or operations, or the property of any other concessionaire, person, or entity, either by act, omission, or because of the operations of Concessionaire. In the event of such damage, Concessionaire will give City immediate notice thereof, and Concessionaire will immediately make the necessary repairs at its own cost and expense. Concessionaire shall be required to comply with the obligations set forth in Article X with respect to all work required to be performed in accordance with this Section. City reserves the right, if in the best interest of City, to perform the necessary repairs immediately itself. Concessionaire covenants to reimburse City, for the costs and expenses associated with necessary repairs plus an administrative fee of fifteen percent (15%). If Concessionaire more than once in a twelve (12) month period causes the same type of damage, such as a water leakage, electrical service interruption, or other damage, Concessionaire shall submit a Remediation Plan, as set forth in Section 7.01.

#### **ARTICLE XIX. COMPLIANCE WITH LAWS, REGULATIONS, ORDINANCES, AND RULES**

Concessionaire, its officers, authorized officials, employees, agents, subcontractors, or those under its control, will at all times comply with applicable federal, state, and local laws and regulations, DEN's Rules and Regulations, Policies, Procedures and Operating Directives as are now or may hereinafter be prescribed by City, all applicable health rules and regulations and other mandates whether existing or as promulgated from time to time by the federal, state, or local government, or City including, but not limited to, permitted and restricted activities, security matters, parking, ingress and egress, environmental and storm water regulations and any other operational matters related to the operation of DEN. Concessionaire covenants to faithfully observe and comply with the standards, procedures, requirements, directives, delegations of authority, directions and instructions governing the operations of concessions at DEN as identified in both the Concession's Handbook and Tenant Work Permit Handbook, as amended from time to time. Concessionaire's failure to keep and observe said laws, regulations, ordinances, rules, and handbooks shall constitute a material breach of the terms of this Agreement in the manner as if the same were contained herein as covenants.

#### **ARTICLE XX. AIRPORT SECURITY**

Concessionaire, its officers, authorized officials, employees, agents, subcontractors, and those under its control, will comply with safety, operational, or security measures required of Concessionaire or City by the FAA or TSA. If Concessionaire, its officers, authorized officials, employees, agents, subcontractors or those under its control fail or refuse to comply with said measures and such non-compliance results in a monetary penalty being assessed against City, then, in addition to any other remedies available to City, Concessionaire covenants to fully reimburse City any fines or penalties levied against City, and any attorney fees or related costs paid by City as a result of any such violation. This amount must be paid by Concessionaire within fifteen (15) days from the date of the invoice or written notice.

Concessionaire understands and acknowledges that its ability to remain open and conduct operations under this Agreement is subject to changes in alert status as determined by TSA,

which is subject to change without notice. If the security status of DEN changes at any time during the Term of this Agreement, Concessionaire shall take immediate steps to comply and assist its employees, agents, independent Contractors, invitees, successors, and assigns in complying with security modifications that occur as a result of the changed status. At any time, Concessionaire may obtain current information from DEN's Security Office regarding DEN's security status in relation to Concessionaire's operations at the DEN.

#### **ARTICLE XXI. AMERICANS WITH DISABILITIES ACT**

Concessionaire will comply with the applicable requirements of the Americans with Disabilities Act ("ADA") 42 USC § 12000 et seq. and any similar or successor laws, ordinances, rules, standards, codes, guidelines and regulations and will cooperate with City concerning the same subject matter. In the event that compliance cannot be achieved, Concessionaire shall proceed formally to the federal, state, or local agency having jurisdiction for a waiver of compliance.

#### **ARTICLE XXII. FAA APPROVAL**

This Agreement may be subject to approval of the FAA. If the FAA disapproves this Agreement, it will become invalid, and both Parties will bear their own expenses relative to this Agreement, up to the date of disapproval.

#### **ARTICLE XXIII. RIGHT OF FLIGHT**

Concessionaire's right to use the Premises for the purposes set forth in this Agreement shall be secondary and subordinate to the operation of DEN. Concessionaire acknowledges that because of the location of the Premises at DEN, noise, vibrations, fumes, debris, and other interference with the Permitted Use(s) will be caused by DEN operations. Concessionaire hereby waives all rights or remedies against City arising out of any noise, vibration, fumes, debris, and/or interference that is caused by the operation of DEN. City specifically reserves for itself and for the public a right of flight for the passage of aircraft in the airspace above the surface of DEN. Additionally, City reserves for itself the right to cause in said airspace such noise, vibration, fumes, debris, and other interference as may be inherent in the present and future operation of aircraft. Concessionaire expressly agrees for itself, its successors, and assigns, to prevent any use of the Premises, which would interfere with or adversely affect the operation or maintenance of DEN, or otherwise constitute an airport hazard.

#### **ARTICLE XXIV. FEDERAL RIGHT TO RECLAIM**

In the event a United States governmental agency demands and takes over the entire facilities of DEN or the portion thereof wherein the Premises are located, for public purposes, for a period in excess of ninety (90) consecutive days, then this Agreement will terminate and City will be released and fully discharged from any and all liability hereunder. In the event of such termination, Concessionaire's obligation to pay compensation will cease; however, nothing herein will be construed as relieving either Party from any of its liabilities relating to events or claims of any kind whatsoever prior to this termination.

#### **ARTICLE XXV. PROPERTY RIGHTS RESERVED**

This Agreement is subject and subordinate to the terms, reservations, restrictions, and conditions of any existing or future agreements between City and the United States, when

the execution of such agreements has been or may be required as a condition precedent to the transfer of federal rights or property to City for DEN purposes and the expenditure of federal funds for the extension, expansion, or development of DEN. The provisions of the attached Appendices 1 and 2 are incorporated herein by reference and in the event that the FAA or its successors requires modifications or changes to this Agreement as a condition precedent to the granting of funds for the improvement of DEN, or otherwise. Concessionaire understands, accepts, and agrees to consent to such amendments, modifications, revisions, supplements, or deletions of any of the terms, conditions, or requirements of this Agreement as may be reasonably required to satisfy the FAA requirements.

## **ARTICLE XXVI. ASSIGNMENT AND SUBCONTRACT**

Concessionaire may not assign, subcontract, and/or sublease its privileges, interests, or obligations in whole or in part under this Agreement without the prior written consent of City in City's sole and absolute discretion. Concessionaire shall not grant any license or concession hereunder, or permit any other person or persons, company, or corporation to occupy the Premises without first obtaining written consent of City in City's sole and absolute discretion. Any attempt by Concessionaire to in any way directly transfer all or part of its interest in this Agreement (including any attempt to transfer ownership of the equity or voting interest in the stock of Concessionaire if Concessionaire is a corporate entity or the ownership interest in such other entity or control of Concessionaire or Concessionaire's operations through sale, exchange, merger, consolidation, or other such transfer) without prior written consent of City shall, at the option of the CEO, automatically terminate this Agreement and all privileges of Concessionaire hereunder. Subject to the terms and conditions set forth in this Section, and only after it has received City's written approval and consent, Concessionaire shall be permitted to subcontract with respect to all or any portions of the Premises.

Each party to a subcontract and each subcontract, and any contemporaneous or subsequent addendum, amendment, modification or other agreement relating to any such subcontract, must be approved in advance by City. The subcontract must contain substantially the same business terms and conditions as those found in this Agreement, and the subcontract must acknowledge the existence of this Agreement and that the subcontracting parties are jointly bound by the terms and conditions of this Agreement, and state that the subcontracting parties shall comply with the satisfy the requirements and obligations of Concessionaire hereunder. All compensation, fees, charges, or other monies due and payable hereunder which are, pursuant to any subcontract, to be paid by a subcontractor shall not be marked-up by Concessionaire. Sub-lessees must independently operate any subcontracted premises, adhere to, and comply with all of the terms, conditions, requirements, restrictions, obligations and standards set forth herein, including without limitation, all audit standards incorporated herein. Subleasing parties shall be jointly bound by the terms and conditions of this Agreement, and the subcontracting parties shall comply with the requirements and obligations of Concessionaire hereunder.

## **ARTICLE XXVII. CORPORATE TENANCY**

If Concessionaire is a corporation, partnership, or limited liability business organization, the undersigned officer of Concessionaire hereby warrants and certifies to City that Concessionaire is a corporation in good standing, is authorized to do business in the State of Colorado, and the undersigned officer is authorized and empowered to bind the

corporation to the terms of this Agreement by his or her signature thereto.

Further, If Concessionaire is a partnership or other business organization, each member shall be deemed to be jointly and severally liable if such members are subject to personal liability.

No director, officer, or employee of City shall be held personally liable under this Agreement because of its good faith execution or attempted execution.

### **ARTICLE XXVIII. NON-EXCLUSIVE RIGHTS**

This Agreement will not be construed to grant or authorize the granting of an exclusive right within the meaning of 49 USC 40103(e) or 49 USC 47107(a), as may be amended from time to time, and related regulations.

### **ARTICLE XXIX. RIGHT TO DEVELOP AIRPORT**

Concessionaire recognizes that from time to time during the Term, it may be necessary for City to commence or complete extensive programs of construction, expansion, relocation, maintenance, and repair in order for DEN and its facilities to be maintained, improved, completed, and operated in accordance with any present or future master layout plan. Further, Concessionaire acknowledges that such construction, expansion, relocation, maintenance, and repair may inconvenience Concessionaire in its operation at DEN. Concessionaire agrees that no liability shall attach to City, its officers, agents, employees, Contractors, subcontractors, and representatives by way of such inconveniences. Concessionaire agrees to waive any right to claim damages or other consideration therefrom.

It is covenanted and agreed that City reserves the right to further develop or improve DEN and all landing areas and taxiways as it may see fit, regardless of the desires or views of Concessionaire or its subcontractors and without interference or hindrance.

Further, Concessionaire agrees that no liability shall attach to City, its officers, agents, and employees due to any efforts or action toward implementation of any present or future Master Layout Plan for DEN. Concessionaire agrees that no liability shall attach to City, its officers, agents, and employees due to any efforts or action toward implementation of any present or future Concessions Master Plan for DEN. Concessionaire waives any right to claim damages or other consideration arising therefrom.

### **ARTICLE XXX. ADMINISTRATIVE HEARING**

Concessionaire's disputes of all decisions, determinations, or other actions by City arising out of this Agreement shall be resolved by administrative hearing according to the procedures outlined in D.R.M.C. §5-17. However, City shall retain its right to obtain an order of eviction in accordance with applicable state law. Compliance with the procedures of D.R.M.C. § 5-17 shall be a condition precedent to Concessionaire's right to dispute any decision, determinations or other actions by City.

### **ARTICLE XXXI. ATTORNEY'S FEES AND COSTS**

In the event legal action is required by City to enforce this Agreement, City will be entitled to

recover costs and attorneys' fees, including in-house attorney time (fees) and appellate fees.

**ARTICLE XXXII. RIGHT TO AMEND**

In the event that the FAA or its successors requires amendments, modifications, revisions, supplements, or deletions in this Agreement as a condition precedent to the granting of funds for the improvement of DEN, Concessionaire agrees to consent to such amendments, modifications, revisions, supplements, or deletions to this Agreement as may be required to obtain such funds.

**ARTICLE XXXIII. NOTICES AND COMMUNICATIONS**

All notices or communication, whether to City or to Concessionaire pursuant hereto, will be deemed validly given, served, or delivered upon receipt by the party by three (3) days after depositing such notice or communication in a postal receptacle, return receipt requested, or one (1) day after depositing such notice or communication with a reputable overnight courier service, and addressed as follows:

| <b>TO CITY (MAIL DELIVERY):</b>   | <b>TO CONCESSIONAIRE (MAIL DELIVERY):</b>   |
|---|---|
| Attn: Chief Executive Officer<br>Denver International Airport<br>8500 Pena Boulevard<br>Denver, Colorado 80249-6340 | DN/Optimal/Trugoy DEN, LLC<br>250 Delaware Ave.<br>Buffalo, NY 14202<br>ATTN: Kevin Kelly<br>CC: Joshua McMurray<br>Delaware North Companies Travel<br>Hospitality Services, Inc.<br>250 Delaware Ave.<br>Buffalo, NY 14202<br>ATTN: Kevin Kelly<br>CC: Joshua McMurray<br>Optimal Technologies, LLC<br>7500 S. Pitkin Court<br>Centennial, CO 80016<br>ATTN: Zach McNeal<br>Trugoy, Inc.<br>8400 Pena Boulevard, Box 492025<br>Denver, CO 80249<br>ATTN: Colleen Forst |

or to such other address or parties within the State of Colorado as either party may designate in writing by notice to the other Party delivered in accordance with the provisions of this Article.

If the notice is sent through a mail system, a verifiable tracking documentation, such as a certified return receipt or overnight mail tracking receipt, is encouraged.

**ARTICLE XXXIV. BOND ORDINANCES**

This Agreement is in all respects subject and subordinate to any City bond ordinances

applicable to the DEN, and to any other bond ordinances, which should amend, supplement, or replace such bond ordinances. The Parties to this Agreement acknowledge and agree that all property subject to this Agreement that was financed by the net proceeds of tax-exempt bonds is owned by City. Concessionaire agrees not to take any action that would impair or omit to take any action required to confirm the treatment of such property as owned by City for purposes of §142(b) of the Internal Revenue Code of 1986, as amended. In particular, Concessionaire agrees to make and hereby makes an irrevocable election (binding on itself and all successors in interest under this Agreement) not to claim depreciation or an investment credit with respect to any property subject to this Agreement that was financed by the net proceeds of tax-exempt bonds. Concessionaire shall execute such forms and take such other action as City may request in order to implement such election.

At City's sole discretion, through its CEO, City may from time to time reestablish the compensation, fees, and charges provided for herein at intervals of not more than five (5) years and are subject to the requirements of any outstanding bond ordinance pertaining to DEN. City agrees that such reestablished schedule of compensation, fees, and charges shall be reasonable in relation to the cost of providing, operating, and maintaining property, services, and facilities of DEN. If City proposes any changes in the schedule of compensation, fees, and charges, City will give notice thereof to Concessionaire no less than ninety (90) days before the same is to become effective. Concessionaire may decline to pay compensation at the new rate(s) if such proposed compensation, fees, and charges result in an increase of more than five percent (5%) in the dollar amount of compensation paid by Concessionaire under Article V of this Agreement for the previous calendar year. In such a case, Concessionaire shall promptly advise the CEO of its intention to cancel and terminate this Agreement at least sixty (60) days prior to the proposed effective date of such schedule of compensation, fees, and charges. Upon such notice of intent to cancel and terminate, Concessionaire shall surrender the Premises upon a date specified by City within at least one hundred twenty (120) days after Concessionaire advised City. Should Concessionaire fail to give such notice of cancellation and termination, then Concessionaire shall be deemed to have accepted the new rate(s) of compensation as promulgated by City. Failure by City to reestablish the compensation, fees, and charges at a five (5) year interval date shall not waive City's right to reestablish the compensation, fees, and charges at any time thereafter.

#### **ARTICLE XXXV. FORCE MAJEURE**

Neither Party hereto shall be liable to the other for any failure, delay, or interruption in the performance of any of the terms, covenants, understandings, or conditions of this Agreement due to causes beyond the control of that Party, including without limitation strikes, boycotts, labor disputes, embargoes, shortages of materials, acts of God, acts of the public enemy, acts of superior governmental authority, weather conditions, floods, riots, rebellion, sabotage, or any other circumstance for which such Party is not responsible or which is not in its power to control. A lack of funds, however, will never be deemed beyond a Party's power to control, and in no event shall this paragraph be construed to allow Concessionaire to reduce or abate its obligation to pay the any obligation due herein.

#### **ARTICLE XXXVI. RELATIONSHIP OF THE PARTIES**

Concessionaire is and will be deemed an independent Contractor and operator responsible



to all parties for its respective acts or omissions, and City will in no way be responsible therefore. It is further expressly understood and agreed that City shall not be construed by a third party or held by Concessionaire to be a partner, associate, or joint venture partner of Concessionaire in the conduct of its business.

#### **ARTICLE XXXVII. CITY APPROVALS**

Except as otherwise indicated elsewhere in this Agreement, wherever in this Agreement approvals are required to be given or received by City, it is understood that the CEO, or a designee of the CEO, is hereby empowered to act on behalf of City. Further, except as otherwise indicated elsewhere in this Agreement, wherever in this Agreement approvals are required to be given by the CEO, it is understood that the CEO may further delegate such authority through the Concessions Handbook and/or Tenant Work Permit Handbook.

#### **ARTICLE XXXVIII. INVALIDITY OF CLAUSES**

The invalidity of any part, portion, article, paragraph, provision, or clause of this Agreement will not have the effect of invalidating any other part, portion, article, paragraph, provision, or clause thereof, and the remainder of this Agreement will be valid and enforced to the fullest extent permitted by law.

#### **ARTICLE XXXIX. TIME IS OF THE ESSENCE**

Time is of the essence of this Agreement.

#### **ARTICLE XL. TAXES**

Concessionaire will bear, at its own expense, all costs of operating its business including all applicable sales, use, intangible and possessory interest taxes of any kind, against Concessionaire's Premises, the real property and any improvements thereto, Trade Fixtures and other personal property used in the performance of the Concession or estate which are created herein, or which result from Concessionaire's occupancy or use of the Premises or assessed on any payments made by Concessionaire hereunder, whether levied against Concessionaire or City. Concessionaire will also pay any other taxes, fees, or assessments against the Premises or estate created herein. Concessionaire will pay the taxes, fees, or assessments reflected in a notice Concessionaire receives from City within thirty (30) days after Concessionaire's receipt of that notice or within the period prescribed in the tax bill. City will attempt to cause the taxing authority to send the applicable tax bills directly to Concessionaire and Concessionaire will remit payment directly to the taxing authority, in such instance. Concessionaire may reserve the right to contest such taxes, fees, or assessments and withhold payment upon written notice to City of its intent to do so, so long as the nonpayment does not result in a lien against the real property or any improvements thereon or a direct liability on the part of City. Concessionaire shall pay to City, with each payment of Premises compensation, Support Space Compensation, Privilege Fee, and Concession Services Fees to City, all sales or other taxes which may be due with respect to such payments, and upon receipt, City shall remit such taxes to the applicable taxing authorities.

#### **ARTICLE XLI. PATENTS AND TRADEMARKS**

Concessionaire covenants, warrants, and represents that it is the owner of or fully authorized

to use any services, processes, machines, articles, marks, names, or slogans used by it in its operations under this Agreement. Concessionaire will not utilize any protected patent, trademark, or copyright, including any patents, trademarks, or copyrights owned by City, in its operations under this Agreement, unless it has obtained prior proper permission, all releases, and other necessary documents. Concessionaire agrees to indemnify, defend, and hold harmless City, its officers, employees, agents, and representatives from any loss, liability, expense, suit, or claim for damages in connection with any actual or alleged infringement of any patent, trademark, or copyright arising from any alleged or actual unfair competition or other similar claim arising out of the operations of Concessionaire under this Agreement.

## **ARTICLE XLII. AGENT FOR SERVICE OF PROCESS**

It is expressly agreed and understood that if Concessionaire is not a resident of the State of Colorado, or is an association or partnership without a member or partner resident of said State, or is a foreign corporation, then in any such event Concessionaire does designate the Secretary of State, State of Colorado, as its agent for the purpose of service of process in any court action between it and City arising out of or based upon this Agreement, and the service will be made as provided by the laws of the State of Colorado for service upon a non-resident. It is further expressly agreed, covenanted, and stipulated that if for any reason service of such process is not possible, and Concessionaire does not have a duly noted resident agent for service of process, as an alternative method of service of process, Concessionaire may be personally served with such process out of this State, by the registered mailing of such complaint and process to Concessionaire at the address set out in this Agreement. Such service will constitute valid service upon Concessionaire as of the date of mailing. Concessionaire will have thirty (30) days from date of mailing to respond thereto. It is further expressly understood that Concessionaire hereby agrees to the process so served, submits to the jurisdiction of the court, and waives any and all obligation and protest thereto, any laws to the contrary notwithstanding.

## **ARTICLE XLIII. COMPLIANCE WITH PUBLIC RECORDS LAW**

- A. Agreement Subject to Colorado Open Records Act. Concessionaire acknowledges, understands, and accepts that City is subject to the provisions of the Colorado Open Records Act, Colorado Revised Statutes §24-72-201 et seq. Concessionaire acknowledges all documents prepared or provided by Concessionaire under this Agreement may be subject to the provisions of the Colorado Open Records Act. Any other provision of this Agreement notwithstanding, including Exhibits, Attachments, and other documents incorporated into this Agreement by reference, all materials, records, and information provided by Concessionaire to City shall be considered confidential by City only to the extent provided in the Open Records Act, and Concessionaire agrees that any disclosure of information by City consistent with the provisions of the Open Records Act shall result in no liability of City. Concessionaire agrees to defend, indemnify, hold harmless, and fully cooperate with City in the event of a request for disclosure or legal process arising under such act for the disclosure of any documents or information, which Concessionaire asserts is confidential and exempt from disclosure.
- B. Indemnification in Event of Objection. In the event of a request to City for disclosure of such information, time, and circumstances permitting, City will make a good faith

effort to advise Concessionaire of such request in order to give Concessionaire the opportunity to object to the disclosure of any material Concessionaire may consider confidential, proprietary, or otherwise exempt from disclosure. In the event Concessionaire objects to disclosure, City, in its sole and absolute discretion, may file an application to the Denver District Court for a determination of whether disclosure is required or exempted. In the event a lawsuit to compel disclosure is filed prior to City's application, City will tender all such material to the court for judicial determination of the issue of disclosure. In both situations, Concessionaire agrees it will either waive any claim of privilege or confidentiality or intervene in such legal process to protect materials Concessionaire does not wish disclosed. Concessionaire agrees to defend, indemnify, and hold harmless City, its officers, agents, and employees from any claim, damages, expense, loss, or costs arising out of Concessionaire's objection to disclosure including prompt reimbursement to City of all reasonable attorney fees, costs, and damages that City may incur directly or may be ordered to pay by such court.

#### **ARTICLE XLIV. DATA SECURITY**

Concessionaire will establish and maintain safeguards against the destruction, loss, or alteration of City data or third party data that Concessionaire may gain access to or be in possession of in the performance of this Agreement. Concessionaire will not attempt to access, and will not allow its personnel access to, City data or third party data that is not require for the performance of the services of this Agreement by such personnel.

Concessionaire will adhere to and abide by the security measures and procedures established by City. In the event Concessionaire or Concessionaire's subcontractor (if any) discovers or is notified of a breach or potential breach of security relating to City data or third party data, Concessionaire will promptly: (i) notify City of such breach or potential breach; and ii) if the applicable City data or third party data was in the possession of Concessionaire at the time of such breach or potential breach, Concessionaire will investigate and cure the breach or potential breach.

#### **ARTICLE XLV. USE, POSSESSION, OR SALE OF ALCOHOL OR DRUGS**

Concessionaire, its officers, agents, and employees shall cooperate and comply with the provisions of the Federal Drug-Free Workplace Act of 1988 and Denver Executive Order No. 94, or any successor thereto, concerning the use, possession, or sale of alcohol or drugs. Except as may be otherwise authorized by this Agreement, Concessionaire shall also prohibit consumption of alcohol within the Concession Space. Violation of these provisions or refusal to cooperate with implementing this alcohol and drug policy can result in City barring Concessionaire from City facilities or participating in City operations.

#### **ARTICLE XLVI. HAZARDOUS SUBSTANCES**

No goods, merchandise, or material will be kept or stored by Concessionaire at DEN, which are explosive or hazardous; and no offensive or dangerous trade, business or occupation will be carried on therein or thereon. Nothing will be done in the performance of this Agreement that will increase the rate of or suspend any insurance policy or coverage of City. Concessionaire covenants that all materials, equipment, and all other items used in the performance of this Agreement are in compliance with Occupational Safety and Health

Administration (OSHA).

#### **ARTICLE XLVII. CITY'S SMOKING POLICY**

Concessionaire agrees that it will prohibit smoking by its employees and the public in the Premises. Concessionaire further agrees to not sell or advertise tobacco products. Concessionaire acknowledges that smoking is not permitted in DEN buildings and facilities except for designated areas. Concessionaire and its officers, agents, and employees shall cooperate and comply with the provisions of City's Executive Order No. 99 dated December 1, 1993, Executive Order No. 13 dated July 31, 2002, the provisions of D.R.M.C., §§ 24-301 to 317 et seq., and the Colorado Clean Indoor Air Act, C.R.S. §§ 25-14-201 et seq. and DEN's Rules and Regulations Rules 30 and 40.

#### **ARTICLE XLVIII. WAIVERS**

No waiver by City at any time of any of the terms, conditions, covenants, or agreements of this Agreement, or noncompliance therewith, will be deemed or taken as a waiver at any time thereafter of the same or any other term, condition, covenant or agreement herein contained, nor of the strict and prompt performance thereof by Concessionaire. No delay, failure or omission of City to exercise any right, power, privilege or option arising from any default nor subsequent payment of charges then or thereafter accrued, will impair any such right, power, privilege or option, or be construed to be a waiver of any such default or relinquishment thereof or acquiescence therein. No notice by City will be required to restore or revive time as being of the essence hereof after waiver by City or default in one or more instances. No option, right, power, remedy, or privilege of City will be construed as being exhausted or discharged by the exercise thereof in one or more instances. It is agreed that each and all of the rights, powers, options, or remedies given to City by this Agreement are cumulative and no one of them will be exclusive of the other or exclusive of any remedies provided by law, and that the exercise of one right, power, option or remedy by City will not impair its rights to any other right, power, option or remedy.

#### **ARTICLE XLIX. COMPLETE CONTRACT**

This Agreement represents the complete understanding between the Parties, and any prior Contracts or representations, whether written or verbal, are hereby superseded. This Agreement may subsequently be amended only by written instrument signed by the Parties hereto, unless provided otherwise within the terms and conditions of this Agreement.

#### **ARTICLE L. ORDER PRECEDENCE**

The documents listed below are a part of this Agreement and are hereby incorporated by reference. In the event of inconsistency between the documents, unless otherwise provided herein, the terms of the following documents will govern in the following order of precedence:

- A. Terms and Conditions as contained in this Agreement;
- B. RFP No. 201630762
- C. Concessionaire's Response, and any subsequent information submitted by Concessionaire during the evaluation process, as modified and accepted by City.

**ARTICLE LI. BROKER'S COMMISSION**

Concessionaire represents and warrants that it has not caused nor incurred any claims for brokerage commissions or finder's fees in connection with the execution of this Agreement. Concessionaire shall defend, indemnify, and hold City harmless against all liabilities arising from any such claims caused or incurred by it (including the cost of attorney fees in connection therewith).

This Agreement does not, and shall not be deemed or construed to, confer upon or grant to any Third Party or parties (except parties to whom the Concessionaire may assign this Agreement in accordance with the terms hereof, and except any successor to City) any right to claim damages or to bring any suit, action or other proceeding against either City or the Concessionaire because of any breach hereof or because of any of the terms, covenants, agreements and conditions herein.

**ARTICLE LII. NO LIMIT ON CITY'S POWERS**

Nothing in this Agreement shall limit in any way the power and right of City to exercise its governmental rights and powers, including its powers of eminent domain.

**ARTICLE LIII. SIGNATURES**

This Agreement may be executed in one or more counterparts, each of which will be deemed an original and all of which will be taken together and deemed one instrument. This Agreement is expressly subject to and shall not be or become effective or binding on City until approved by City Council, if so required by City's Charter, and fully executed by all signatories of City and County of Denver. The Parties, in the manner specified by City, may sign this Agreement electronically.

**[SIGNATURE PAGES, EXHIBITS, AND APPENDIXES FOLLOW]**

**Contract Control Number:** PLANE-201630762-00

**Contractor Name:** DN/Optimal/Trugoy DEN, LLC

By: K. Kelly

Name: Kevin Kelly  
(please print)

Title: President, Delaware North Companies Travel Hospitality Services, Inc.  
(please print) Manager, DN/Optimal/Trugoy DEN, LLC

**ATTEST: [if required]**

By: Lara K. Seniw

Name: Lara K. Seniw  
(please print)

Title: Sr. Administrative Assistant  
(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 \_\_\_\_\_



**CONCESSIONS HANDBOOK**



**ACKNOWLEDGMENT AND AGREEMENT**

As the Owner/Operator/Regional Manager/General Manager or other designee, I hereby acknowledge and agree to abide by all the terms stated in this Concession's Handbook as amended from time to time.

Per Article XIX of the Standard Concessions Use Agreement, "Concessionaire covenants to faithfully observe and comply with the standards, procedures, requirements, directives, delegations of authority, directions and instructions governing the operations of concessions at DEN as identified in both the Concession's Handbook and Tenant Work Permit Handbook, as amended from time to time. Concessionaire's failure to keep and observe said laws, regulations, ordinances, rules, and handbooks shall constitute a material breach of the terms of this Agreement in the manner as if the same were contained herein as covenants."

It is the responsibility of each Concessionaire to communicate the information contained in this Concession's Handbook to all personnel, contractors, and third party vendors. Violations will be handled via Article VIII and/or other applicable provisions of the Standard Concession's Use Agreement.

The City reserve the right to update this Concession Handbook at any time. Concessionaires will be informed of such updates via letter sent to the email provided.  
Acknowledged and Agreed:

CONCESSIONAIRE: DN/Optimal/Trugoy DEN, LLC

Kevin Kelly

Name

  
Signature

President, Delaware North Companies Travel Hospitality Services, Inc.  
Title Manager, DN/Optimal/Trugoy DEN, LLC

May 3, 2017  
Date

**TENANT WORK PERMIT HANDBOOK**

**ACKNOWLEDGMENT AND AGREEMENT**

As the Owner/Operator/Regional Manager/General Manager or other designee, I hereby acknowledge and agree to abide by all the terms stated in this Tenant Work Permit Handbook as amended from time to time.

Per Article XIX of the Standard Concessions Use Agreement, "Concessionaire covenants to faithfully observe and comply with the standards, procedures, requirements, directives, delegations of authority, directions and instructions governing the operations of concessions at DEN as identified in both the Concession's Handbook and Tenant Work Permit Handbook, as amended from time to time. Concessionaire's failure to keep and observe said laws, regulations, ordinances, rules, and handbooks shall constitute a material breach of the terms of this Agreement in the manner as if the same were contained herein as covenants."

It is the responsibility of each Concessionaire to communicate the information contained in this Tenant Work Permit Handbook to all personnel, contractors, and third party vendors. Violations will be handled via Article VIII and/or other applicable provisions of the Standard Concession's Use Agreement.

The City reserve the right to update this Tenant Work Permit Handbook at any time. Concessionaires will be informed of such updates via letter sent to the email provided.

Acknowledged and Agreed:

CONCESSIONAIRE: DN/Optimal/Trugoy DEN, LLC

Kevin Kelly

Name  
  
Signature

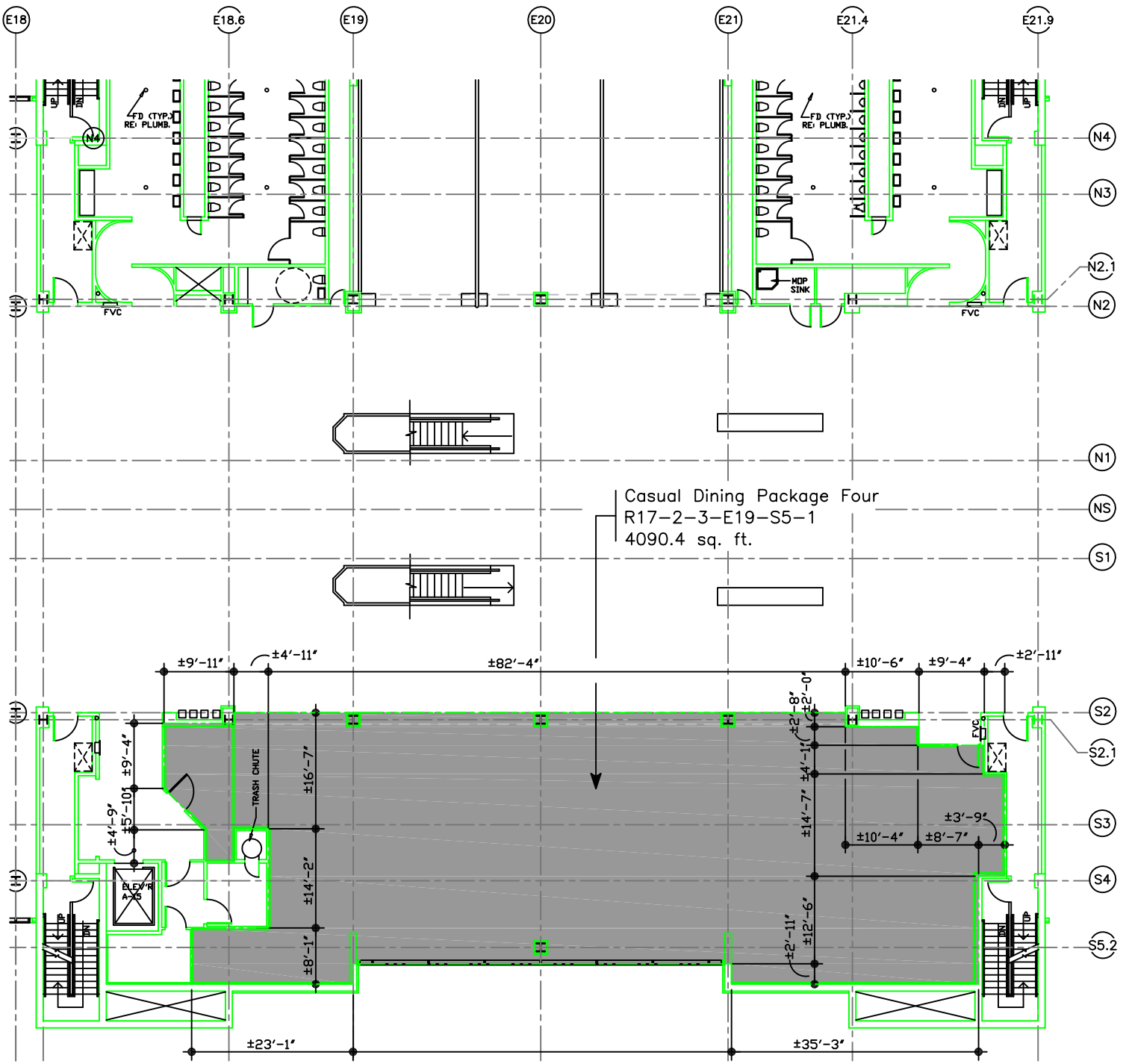
President, Delaware North Companies Travel Hospitality Services, Inc.

Title Manager, DN/Optimal/Trugoy DEN, LLC

May 3, 2017

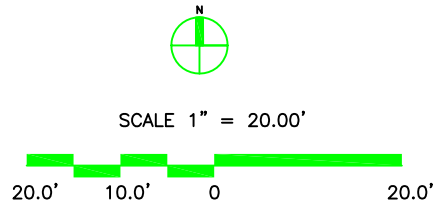
Date

**EXHIBIT A (PREMISES DESCRIPTION)**



Casual Dining Package Four  
 R17-2-3-E19-S5-1  
 4090.4 sq. ft.

- CONC. WALL (BY CITY)
- STUD/GYPSUM WALL (BY CITY)
- GLASS WALL (BY CITY)
- TENANT LEASE LINE
- (H) (C) COLUMNS
- NIC = Not Included  
(In Lease or Sq. Ft. Calc.)



**NOTE:**  
 This exhibit depicts only approximate dimensions and square footage of leased area based upon planning data and is not intended to show dimensions for construction details.

DEN Property Management

|                             |  |         |   |  |
|-----------------------------|--|---------|---|--|
| <p>KEY PLAN CONCOURSE A</p> |  | REVISED | DENVER INTERNATIONAL AIRPORT  |  |
|                             |  |         | Request for Proposal<br>Concourse A Conc. Level<br>Casual Dining Package Four |  |
|                             |  | CC#:    | DATE: 09/20/16  |  |

**EXHIBIT B (PERMITTED USES)**

## PERMITTED USES

### General Conditions

- a. All carry-out menu items must be represented on and relevant to the restaurant's menu and must be packaged in high-quality, easy-to-carry packaging that is consistent with City's sustainability objectives.
- b. Menu offerings should be of high quality and offer good value to the customers.
- c. Vegetarian, Kosher, Halal, gluten-free and other dietary considerations should be included in menu.
- d. Portion sizes should support good health.
- e. Portion-appropriate menu items for children should be available.
- f. There should be at least two vegetarian and gluten-free options available other than a salad offerings.
- g. City encourages the use of local agricultural and food products when available.
- h. The Locations will be managed as a "single-ticket" environment meaning customers can purchase products from any of the concepts and their charges be consolidated onto one invoice, if so desired by the customer.
- i. Utilization of common use areas designed to compliment the proposed concept design(s).
- j. Cross utilization of concept, food (menu), design elements and space management is highly encouraged.

### Merchandising Description

1. The restaurant must offer menus covering all day parts and consistent with the concept themes or brands.
2. Hybrid food/menu models should be considered within the Concession Location and seasonal menu rotation is highly encouraged.
3. Alcohol sales and consumption are allowed to the Concession Location.
4. A bar area should offer a full variety of alcoholic beverages, including a wide variety of Call, Super Call/Top Shelf liquors, a minimum of 6 Regional or Local craft draft beer(s), 3 Domestic draft beer(s), 1 Import draft beer, other Domestic and Import bottled beer(s), and wine by the glass or bottle.

**EXHIBIT C (MONTHLY & QUARTERLY CONCESSIONS REPORTS)**





## MONTHLY CONCESSION REPORT

For the month of: Enter Month/Year here

FROM: Company Name and address

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| TOTAL SALES         |           |              | GROSS RECEIPTS      |           |              |
|---------------------|-----------|--------------|---------------------|-----------|--------------|
| Concession Location | Sales(\$) | Alcohol (\$) | Concession Location | Sales(\$) | Alcohol (\$) |
|                     |           |              |                     |           |              |
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| SALES PER SQ. FT./ENPLANEMENT |                   |                       | RECEIPTS PER SQ. FT./ENPLANEMENT |                      |                          |
|-------------------------------|-------------------|-----------------------|----------------------------------|----------------------|--------------------------|
| Concession Location           | Sales Per Sq. Ft. | Sales Per Enplanement | Concession Location              | Receipts Per Sq. Ft. | Receipts Per Enplanement |
|                               |                   |                       |                                  |                      |                          |
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| PERCENTAGE FEE      |          |          |           |
|---------------------|----------|----------|-----------|
| Concession Location | Rate (%) | Due (\$) | Paid (\$) |
|                     |          |          |           |
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| OTHER FEES              |                                 |                     |           |     |      |
|-------------------------|---------------------------------|---------------------|-----------|-----|------|
| Concession Services Fee | Common Maintenance Services Fee | Joint Marketing Fee | Utilities | CAM | CACI |
|                         |                                 |                     |           |     |      |
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OATH:

The undersigned states that the sales, receipts, and calculations shown by this statement are correct to the best of his or her knowledge and belief, and the percentage shown is due the City and County of Denver in accordance with the Concession Agreement.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Authorized Officer Title

\_\_\_\_\_  
Date





## QUARTERLY INCOME STATEMENT

For Quarter: Enter Quarter and Year

FROM: \_\_\_\_\_ Company Name and Address

| QUARTERLY MONTHLY SALES |             |              |
|-------------------------|-------------|--------------|
| Concession Location     | Current Yr. | Previous Yr. |
|                         |             |              |
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| QUARTERLY MONTHLY RECEIPTS |             |              |
|----------------------------|-------------|--------------|
| Concession Location        | Current Yr. | Previous Yr. |
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| YEAR TO DATE MONTHLY SALES |             |              |
|----------------------------|-------------|--------------|
| Concession Location        | Current Yr. | Previous Yr. |
|                            |             |              |
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| YEAR TO DATE MONTHLY RECEIPTS |             |              |
|-------------------------------|-------------|--------------|
| Concession Location           | Current Yr. | Previous Yr. |
|                               |             |              |
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| ACDBE SALES         |             |              | PERCENTAGE OF ACDBE SALES |             |              |
|---------------------|-------------|--------------|---------------------------|-------------|--------------|
| Concession Location | Current Yr. | Previous Yr. | Concession Location       | Current Yr. | Previous Yr. |
|                     |             |              |                           |             |              |
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| TOTALS              |                         |                            |                            |                               |             |                        |                          |
|---------------------|-------------------------|----------------------------|----------------------------|-------------------------------|-------------|------------------------|--------------------------|
| Concession Location | Quarterly Monthly Sales | Quarterly Monthly Receipts | Year to Date Monthly Sales | Year to Date Monthly Receipts | ACDBE Sales | ACDBE Sales Percentage | Fees Paid To ACDBE Firms |
|                     |                         |                            |                            |                               |             |                        |                          |
|                     |                         |                            |                            |                               |             |                        |                          |
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OATH:

The undersigned states that the sales, receipts, and calculations shown by this statement are correct to the best of his or her knowledge and belief, in accordance with the Concession Agreement.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Authorized Officer Title

\_\_\_\_\_  
Date



**EXHIBIT D (DEVELOPMENT SCHEDULE)**

**EXHIBIT E (FORM OF GUARANTY OF AGREEMENT)**

## ABSOLUTE UNCONDITIONAL GUARANTY

THIS GUARANTY is given by Delaware North Companies, Optimal Technologies, LLC, and Trugoy, Inc. ("Guarantors"), to the City and County of Denver, a Colorado municipal corporation acting for and on behalf of its Department of Aviation, whose address is 8500 Pena Blvd., AOB, Room 9810, Denver, Colorado 80249 ("City").

### RECITALS

**WHEREAS**, DN/Optimal/Trugoy DEN, LLC, a Delaware limited liability company ("Concessionaire"), has or plans to enter into a standard concession agreement ("Contract Control Number – 201630762") ("Concession Agreement") with City for the operation of a concession(s) located at Denver International DEN ("DEN"); and

**WHEREAS**, Guarantors wholly own the limited liability company of Concessionaire.

**NOW THEREFORE**, inducement to City entering into said Concession Agreement, which City would not enter but for this Guaranty, and in consideration of Guarantors' interest in the Concession Agreement, which Guarantors expressly acknowledge, the undersigned Guarantors do hereby, guarantee, covenant, assent and agree as follows:

1. Guaranty of Payment and Performance. Guarantors hereby assent to all terms and conditions of the Concession Agreement heretofore or hereafter made by Concessionaire and jointly, severally and individually, and unconditionally and irrevocably guarantee to City the payment and full performance and observance by Concessionaire of all covenants, conditions, obligations, indebtedness, liabilities, and conditions contained the Concession Agreement.
2. Independent Obligations. Guarantors' liability under this Guaranty is unlimited and the obligations of Guarantors to City shall be continuing until all indebtedness is fully and finally paid. A separate action or actions may be brought and prosecuted against Guarantor, without regard to whether any action is brought against Concessionaire or whether Concessionaire is joined in any such action or actions. No circumstances shall operate to discharge, bar, suspend, or delay City's right to enforce any obligation of Concessionaire to City (including but not limited to the effect of any statute of limitations or the Bankruptcy Code or any similar present or future federal or state law) or have any effect upon the enforceability of Guarantors' obligations to City hereunder.
3. City's Right to Select Remedies. City may proceed against Guarantors hereunder without proceeding against Concessionaire, without proceeding against any other person, or without proceeding against or exhausting any security now or hereafter held by City for the obligations hereby guaranteed, and without pursuing any other right or remedy available to City whatsoever.
4. City's Delays and Waivers. No delay, forbearance, neglect or omission on City's part in exercising any right or remedy shall operate as a waiver of such right or remedy or any other right or remedy. A waiver on any one occasion shall not be construed as a bar to or waiver of any right or remedy on any future occasion. No waiver or consent by City, and no purported amendment of this Guaranty, shall be binding upon City unless it is in writing and signed by City.
5. Waivers by Guarantors; Payment of Collections Expenses. Guarantors waive all presentments, demands for payments or performance, notices of nonpayment or nonperformance, notices of

default, protests, notices of protest, notices of dishonor, notice of acceptance of this Guaranty, and all other notices whatsoever, and agrees to pay on demand all costs and expenses, including reasonable attorney fees, which may be incurred by City in connection with the enforcement of this Guaranty, together with interest at the rate stated in the Concession Agreement.

6. Liability of Guarantors. The liability of the Guarantors shall not be affected by reason of:
  - a. City's delay, waiver, forbearance or neglect in enforcing any covenant against Concessionaire or Guarantors;
  - b. City's failure to notify Guarantors of any default by Concessionaire;
  - c. Any amendment, variation, extension or renewal of the Agreement agreed to by City and Concessionaire whether with or without the notice to or knowledge of Guarantors;
  - d. Any assignment or termination of the Agreement or any subleasing or abandonment by Concessionaire of all or part of the Concession Space or its interest in the Agreement;
  - e. Any other security which City may now or hereafter possess or obtain with respect to the Agreement, or the surrender or release by City of any portion thereof; or,
  - f. Any termination of the Agreement, to the extent that Concessionaire thereafter continues to be liable to City.
7. The Guaranty shall be binding upon each of the Guarantors, their respective heirs, successors, assigns and legal representatives, and shall endure to the benefit of City, its successors, assigns and legal representatives.
8. This Guaranty shall apply to any defaults under the Agreement, whether inchoate or matured, occurring, accruing, or with the passage of time would have occurred or accrued on or before the expiration of the term or any extended term of the Concession Agreement.
9. Applicable Law. This Guaranty shall be construed and enforced in accordance with the laws of the State of Colorado. Wherever possible, each provision of this Guaranty shall be interpreted so as to be effective and valid under applicable law, but if any provision hereof shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty.
10. Consent to Jurisdiction. For purposes of any action relating to this Guaranty, Guarantors hereby consents to the personal jurisdiction of the state and federal courts of the State of Colorado.

[SIGNATURE PAGE FOLLOWS]



IN WITNESS WHEREOF, the undersigned Guarantors, intending to be legally bound, have caused this instrument to be executed as of the day and year listed below.

Executed this 3rd day of May, 2017.

  
\_\_\_\_\_

Guarantor (Delaware North Companies):

\_\_\_\_\_

Guarantor (Optimal Technologies, LLC):

\_\_\_\_\_

Guarantor (Trugoy, Inc.):

STATE OF COLORADO )

) ss.

COUNTY OF \_\_\_\_\_ )

Subscribed, acknowledged and sworn to before me this \_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by

\_\_\_\_\_ and \_\_\_\_\_.

WITNESS my hand and official seal.

My Commission Expires: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

**EXHIBIT F (INSURANCE CERTIFICATE & SURETY FORMS)**

**CITY AND COUNTY OF DENVER  
INSURANCE REQUIREMENTS - DEPARTMENT OF AVIATION**

---

Certificate Holder:

CITY AND COUNTY OF DENVER  
Attn: Risk Management, Suite 8810  
Manager of Aviation  
Denver International Airport  
8500 Pena Boulevard, Room 8810  
Denver CO 80249

**CONTRACT NAME & NUMBER TO WHICH THIS INSURANCE APPLIES: 201630762 – Casual Dining w/Bar  
Package Four**

---

**I. MANDATORY COVERAGE**

Colorado Workers' Compensation and Employer Liability Coverage

Coverage: COLORADO Workers' Compensation

Minimum Limits of Liability (In Thousands)

WC Limits: \$100, \$500, \$100

And Employer's Liability Limits:

Any Policy issued under this section must contain, include or provide for the following:

1. All States Coverage or Colorado listed as a covered state for the Workers' Compensation
2. Waiver of Subrogation and Rights of Recovery against the City and County of Denver (the "City"), its officers, officials and employees.

Commercial General Liability Coverage

Coverage: Commercial General Liability (coverage at least as broad as that provided by ISO form CG0001 or equivalent)

Minimum Limits of Liability (In Thousands):

|  |         |
|--|---------|
| Each Occurrence:                               | \$1,000 |
| General Aggregate Limit:                       | \$2,000 |
| Products-Completed Operations Aggregate Limit: | \$2,000 |
| Liquor Liability                               | \$2,000 |
| Personal & Advertising Injury:                 | \$1,000 |

Any Policy issued under this section must contain, include or provide for the following:

1. City, its officers, officials and employees as additional insureds, per ISO form CG2010 and CG 2037 or equivalents.
2. Coverage for defense costs of additional insureds outside the limits of insurance, per CG0001.
3. Liability assumed under an Insured Contract (Contractual Liability).
4. The full limits of coverage must be dedicated to apply to this project/location, per ISO form CG2503 or equivalent.
5. Waiver of Subrogation and Rights of Recovery, per ISO form CG2404 or equivalent.
6. If alcoholic beverages are served or sold at the Airport by the Concessionaire, the Commercial General Liability insurance shall include Host Liquor Liability coverage.
7. Separation of Insureds Provision required

8. General Aggregate Limit Applies Per: Policy \_\_\_Project \_\_\_Location\_\_\_, if applicable

Commercial Crime Insurance

The minimum limits of Commercial Crime insurance covering but not limited to loss arising from employee theft, employee dishonesty, forgery or alteration, robbery, burglary, embezzlement, disappearance, destruction; money orders and counterfeit currency; depositors forgery; computer fraud, on premises and in transit are:

Minimum Limits of Liability (In Thousands):      Each Occurrence:      \$1,000

Network Security and Privacy Liability:

Concessionaire shall maintain Network Security and Privacy Liability coverage with limits of \$1,000,000 per occurrence and \$1,000,000 policy aggregate covering claims involving privacy violations, information theft, damage to or destruction of electronic information, intentional and/or unintentional release of private information, alteration of electronic information, extortion and network security. If such insurance is maintained on an occurrence form basis, Concessionaire shall maintain such insurance for an additional period of one (1) year following termination of Contract. If such insurance is maintained on a claims-made basis, Concessionaire shall maintain such insurance for an additional period of three (3) years following termination of the Contract. Policy shall include coverage for costs associated with breach notification, credit monitoring, PCI and regulatory fines and penalties.

Business Automobile Liability Coverage

Coverage: Business Automobile Liability (coverage at least as broad as ISO form CA0001)

Minimum Limits of Liability (In Thousands):      Combined Single Limit      \$1,000

Any Policy issued under this section must contain, include or provide for the following:

1. Symbol 1, coverage for any auto. If no autos are owned, Symbols 8 & 9, (Hired and Non-owned) auto liability.
2. If this contract involves the transport of hazardous cargo such as fuel, solvents or other hazardous materials may occur, then Broadened Pollution Endorsement, per ISO form CA 9948 or equivalent and MCS 90 are required.

**II. ADDITIONAL COVERAGE**

Umbrella Liability

Coverage:

|   |                               |         |
|---|-------------------------------|---------|
| Umbrella Liability, Non Restricted Area<br>Minimum Limits of Liability (In Thousands)       | Each Occurrence and aggregate | \$1,000 |
| Umbrella Liability, Unescorted airside access<br>Minimum Limits of Liability (In Thousands) | Each Occurrence and aggregate | \$9,000 |

Any Policy issued under this section must contain, include or provide for the following:

1. City, its officers, officials and employees as additional insureds.
2. Coverage in excess of, and at least as broad as, the primary policies in sections WC-1, CGL-1, and BAL-1.
3. If operations include unescorted airside access at DIA, then a \$9 million Umbrella Limit is required.

Property Coverage

Coverage:            Personal Property, Contents, Fixtures, Tenant Improvements and Betterments

Minimum Limits of Liability (in Thousands):

- o 100% of the Replacement Cost value of Personal Property, Contents, Fixtures, Tenant Improvements and Betterments
- o Covered Cause of Loss – Special Form including glass coverage and signs
- o Replacement Cost Endorsement

Any Policy issued under this section must contain, include or provide for the following:

1. City, its officers, officials and employees as additional insureds.
2. Waiver of Subrogation Applies to City as Landlord for any protected Landlord Property.
3. In the event of payment of any Loss involving Tenant Improvements and Betterments, permanent fixtures, etc, the insurance carrier shall pay the City (as Landlord) its designee first for said property loss

Coverage: Business Interruption Insurance

Concessionaire shall procure and maintain Business Interruption insurance in such amounts as will reimburse Concessionaire for direct or indirect loss of earnings attributable to the perils commonly covered by the Concessionaire's property insurance described above, which shall include losses arising from mechanical failures on or interruption of services to Airport premises.

### **III. ADDITIONAL CONDITIONS**

It is understood and agreed, for the benefit of the City, that the following additional conditions shall apply to all coverage specified herein:

1. All coverage provided herein shall be primary and any insurance maintained by the City shall be considered excess.
2. The City shall have the right to verify or confirm, at any time, all coverage, information or representations contained herein, and the insured and its undersigned agent shall promptly and fully cooperate in any such audit the City may elect to undertake.
3. Advice of renewal is required
4. With the exception of workers compensation, all insurance companies issuing policies hereunder must carry at least an A -VI rating from A.M. Best Company or obtain a written waiver of this requirement from the City's Risk Administrator.
5. Compliance with coverage requirement by equivalent herein must be approved in writing by the City's Risk Administrator prior to contract execution.
6. No changes, modifications or interlineations on these insurance requirements shall be allowed without the review and approval of the Risk Administrator prior to contract execution.
7. The Insured named above shall promptly advise the City in the event any general aggregates or other aggregate limits are reduced below the required per occurrence limits. At the Insured's expense, the Insured will reinstate the aggregate limits to comply with the minimum requirements and shall furnish to the City a new Certificate showing such coverage is in force.

### **IV. NOTICE OF CANCELLATION**

It is understood and agreed that should any Policy issued hereunder be cancelled or non-renewed before the expiration date thereof, or sustain a material change in coverage adverse to the City, the issuing company or its authorized Agent shall give notice to the Department of Aviation in accordance with policy provisions.

ISSUING BANK IDENTIFICATION:  
DATE:

IRREVOCABLE LETTER OF CREDIT NO. \_\_\_\_\_:

BENEFICIARY:  
CITY AND COUNTY OF DENVER  
DEPARTMENT OF AVIATION  
DENVER INTERNATIONAL AIRPORT  
AIRPORT PROPERTY OFFICE/AIRPORT OFFICE BLDG.  
8500 PENA BOULEVARD, ROOM 9870  
DENVER, COLORADO 80249-6340

APPLICANT:

LADIES AND GENTLEMEN:

WE HEREBY ISSUE IN YOUR FAVOR OUR IRREVOCABLE LETTER OF CREDIT FOR THE ACCOUNT OF \_\_\_\_\_, FOR UP TO THE AGGREGATE AMOUNT OF USD \_\_\_\_\_ (\_\_\_\_\_ AND NO/100 U.S. DOLLARS) AVAILABLE SOLELY BY YOUR DRAFT(S) AT SIGHT DRAWN ON US AND ACCOMPANIED BY THE FOLLOWING DOCUMENTS:

1. THE ORIGINAL OF THIS LETTER OF CREDIT AND ALL AMENDMENTS THERETO, IF ANY.
2. BENEFICIARY'S SIGNED AND DATED STATEMENT READING AS FOLLOWS:

"DENVER'S MANAGER OF AVIATION HAS DECLARED A DEFAULT OR VIOLATION UNDER THE \_\_\_\_\_ Agreement BETWEEN THE CITY AND COUNTY OF DENVER AND \_\_\_\_\_, AT DENVER INTERNATIONAL AIRPORT" AND/OR "THE RULES AND REGULATIONS FOR THE MANAGEMENT, OPERATION, CONTROL AND USE OF THE DENVER MUNICIPAL AIRPORT SYSTEM, ADOPTED JANUARY 11, 1994, WITH SUCH AMENDMENTS, REVISIONS, ADDITIONS AND EXTENSIONS AS MAY FROM TIME TO TIME BE ADOPTED ("AIRPORT RULES AND REGULATIONS") AND/OR THE DENVER INTERNATIONAL AIRPORT TENANT DEVELOPMENT GUIDELINES AS FROM TIME TO TIME THEY MAY BE AMENDED, REVISED OR SUPPLEMENTED."

PARTIAL DRAWINGS ARE ALLOWED.

ALL DRAFTS DRAWN MUST BE MARKED "DRAWN UNDER \_\_\_\_\_ BANK, N.A., LETTER OF CREDIT NO. \_\_\_\_\_ DATED \_\_\_\_\_."

WE HEREBY ENGAGE WITH THE DRAWERS, ENDORSERS AND BONA FIDE HOLDERS THAT ALL DRAFTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS CREDIT WILL BE DULY HONORED UPON PRESENTATION FOR PAYMENT OF THIS ORIGINAL LETTER OF CREDIT AND THE ABOVE SPECIFIED DOCUMENT AT THIS OFFICE BEFORE THE CLOSE OF OUR BUSINESS ON OR BEFORE \_\_\_\_\_. PURSUANT TO U.S. LAW WE ARE PROHIBITED FROM ISSUING, TRANSFERRING, ACCEPTING OR PAYING LETTERS OF CREDIT TO

ANY PARTY OR ENTITY IDENTIFIED BY THE OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT. OF TREASURY, OR SUBJECT TO THE DENIAL OF EXPORT PRIVILEGES BY THE U.S. DEPT. OF COMMERCE.

THIS LETTER OF CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY LETTER OF CREDITS (2007 Revision) and/or THE INTERNATIONAL STANDBY PRACTICES (1998), INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO. 600 AND AS TO MATTERS NOT GOVERNED BY THE REFERENCED DOCUMENTS, THIS CREDIT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF COLORADO.

ALL CORRESPONDENCE AND ANY DRAWINGS HEREUNDER ARE TO BE DIRECTED TO

\_\_\_\_\_

\_\_\_\_\_ BANK, N.A.

\_\_\_\_\_  
AUTHORIZED SIGNATURE

Bond No. \_\_\_\_\_

**PERFORMANCE BOND**

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned \_\_\_\_\_, organized under the laws of \_\_\_\_\_ and authorized to transact business in the State of Colorado, hereinafter referred to as the "PRINCIPAL" and \_\_\_\_\_, a \_\_\_\_\_ organized under the laws of the State of \_\_\_\_\_, and authorized to transact business in the State of Colorado, hereinafter referred to as "SURETY," and held and firmly bound unto the CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado, hereinafter referred to as the "OBLIGEE," in the penal sum of \_\_\_\_\_ and \_\_\_/100 Dollars \$ \_\_\_\_\_), lawful money of the United States of America, for the payment of which sum the principal and Surety bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Commencing the \_\_\_ day of \_\_\_\_\_, 20\_\_, and ending the \_\_\_ day of \_\_\_\_\_, 20\_\_.

WHEREAS, the Principal has entered into a written agreement with the Obligee for " \_\_\_\_\_ Agreement between the City and County of Denver and \_\_\_\_\_." At Denver International Airport ("DEN"), and the term of said agreement is as indicated below:

Commencing the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, and ending the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

WHEREAS, the Principal by virtue of entering into said agreement(s), license, permit or permission with the Obligee is, among its others duties, obligated to comply with the Rules and Regulations for the Management, Operation, Control, and Use of the Denver Municipal Airport System, adopted January 11, 1994, with such amendments, revisions, additions and extensions as may from time to time be adopted, ("DEN Rules and Regulation"), the DEN Concession Handbook and DEN Tenant Work Permit Handbook as from time to time they may be amended, revised or supplemented.

NOW, THEREFORE, the condition of this obligation is such, if the Principal shall and will in all particulars well, truly, promptly and faithfully observe, perform and abide by each and every covenant, condition, and part of said agreement, license, permit or permission; Rules and Regulations for the Management, Operation, Control, and Use of the Denver Municipal Airport System, adopted January 11, 1994, with such amendments, revisions, additions and extensions as may from time to time be adopted, ("DEN Rules and Regulation the DEN Concession Handbook and DEN Tenant Work Permit Handbook as from time to time they may be amended, revised or supplemented; and if the Principal shall pay all loss, costs, expenses or damage to Obligee caused by Principal's noncompliance with or breach of any agreements, laws, statutes, ordinances, rules or regulations pertaining to such agreements, licenses, permits, or permissions issued to the Principal, then this obligation shall be and become void, otherwise it shall remain in full force and effect.

PROVIDED, that if this bond is for a fixed term, it may be continued by Certificate executed by the Surety; and

PROVIDED FURTHER, that the said Surety, for value received, hereby stipulates and agrees that any and



all amendments, supplements, extensions of terms or other such changes in the agreement(s) identified above or compliance or noncompliance with the formalities in the said agreement(s) for making such changes shall not affect the Surety's obligations under this bond and the Surety hereby waives notice of any such changes.

[Signature Page Follows]

IN WITNESS WHEREOF, said Principal and said Surety have executed these presents as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Company\_\_\_\_\_

By:

Witness Principal

\_\_\_\_\_ Insurance Company

By:

\_\_\_\_\_, Attorney-in-Fact

**EXHIBIT G (ACDBE COMMITMENT FORM)**



**ACDBE LETTER OF INTENT  
2015 F&B PACKAGE**

**DENVER INTERNATIONAL AIRPORT  
CITY AND COUNTY OF DENVER  
DIVISION OF SMALL BUSINESS OPPORTUNITY**

---

**Name of Proposer/Operator** DN/Optimal/TrugoyDEN, LLC

Address: 250 Delaware Avenue

City: Buffalo State: N\_Y Zip 14202

Telephone: (716) 858-5000 E-mail address KKelly@DelawareNorth.com

**Name of ACDBE Firm:** Trugoy, Inc.-----

Address: 8400 Pena Blvd, Box 492025

City: Denver State: CO Zip 80249

Telephone: (720)341-9110 E-mail address tastaria@comcast.net

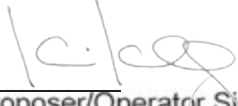
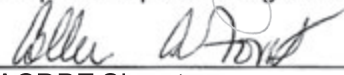
Description of ACDBE role, Goods and Services, or work to be performed by ACDBE firm:

Please see the included Joint Venture Agreement

Estimated dollar value per year of these roles, goods/services, and/or work: \$ 16.5%

**AFFIRMATION:**

The above-named ACDBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

|  |                                     |       |
|--|-------------------------------------|-------|
| By: <u></u> | Kevin Kelly                         |       |
| Proposer/Operator Signature  | President, Delaware North Companies |       |
|  | Travel Hospitality Services, Inc.   | Title |
| By: <u></u> | Colleen Forst                       |       |
| ACDBE Signature  | Owner/President, Trugoy, Inc.       | Title |



**ACDBE LETTER OF INTENT  
2015 F&B PACKAGE**

**DENVER INTERNATIONAL AIRPORT  
CITY AND COUNTY OF DENVER  
DIVISION OF SMALL BUSINESS OPPORTUNITY**

---

Name of Proposer/Operator DN/Optimal/Trugoy DEN, LLC

Address: 250 Delaware Avenue

City: Buffalo State: NY Zip 14202

Telephone: (716) 858-5000 E-mail address KKelly@DelawareNorth.com

Name of ACDBE Firm: Optimal Concessions, LLC

Address: 8400 Pena Blvd, PO Box 492033

City: Denver State: CO Zip 80016

Telephone: (303) 944-1957 E-mail address zmcneal@optimaltechnologies.org

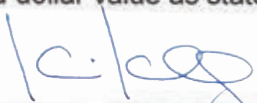
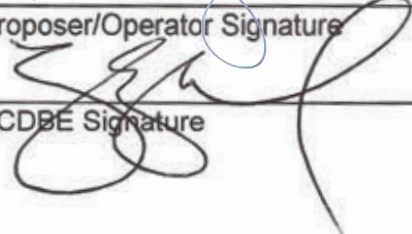
Description of ACDBE role, Goods and Services, or work to be performed by ACDBE firm:

Please see the included Joint Venture Agreement

Estimated dollar value per year of these roles, goods/services, and/or work: \$ 16.5%

**AFFIRMATION:**

The above-named ACDBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

|  |   |
|--|---|
| By: <u></u> | Kevin Kelly<br>President, Delaware North Companies<br>Travel Hospitality Services, Inc. |
| By: <u></u> | Zackary McNeal<br>Owner, Optimal Concessions, LLC                                       |
| Proposer/Operator Signature  | Title   |
| ACDBE Signature  | Title   |



**MWBE COMMITMENT FORM**

**DENVER INTERNATIONAL AIRPORT  
CITY AND COUNTY OF DENVER  
DIVISION OF SMALL BUSINESS OPPORTUNITY**

---

**SECTION A – PROPOSER INFORMATION**


Name of Firm: DN/Optimal/Trugoy DEN, LLC  
Address: 250 Delaware Ave  
City: Buffalo State: NY Zip: 14202  
Contact Person: Kevin Kelly Telephone: (716) 858-5417  
Email: KKelly@DelawareNorth.com

**SECTION B – MWBE COMMITMENT**

The MWBE goal on the build out for this concession is **30%**.

*\*\*\*NOTE: DSBO will only credit MWBE participation that is certified as such by the City and County of Denver, Division of Small Business Opportunity (DSBO).\*\*\**

The undersigned proposer/concessionaire confirms awareness of the MWBE goal for the build out of this concession(s) and commits to the utilization of appropriately certified firms to meet the goal.

By:  Kevin Kelly, President Delaware North Companies  
Proposer Signature Travel Hospitality Services, Inc.  
Title  
DN/Optimal/Trugoy DEN, LLC  
Proposing Entity

**ACDBE COMMITMENT FORM**  
**DENVER INTERNATIONAL AIRPORT**  
**CITY AND COUNTY OF DENVER**  
**DIVISION OF SMALL BUSINESS OPPORTUNITY**

---

Proposal for: Package #4- Multi-Unit Regionally Inspired Fast Casual Dining Hall- Concourse A,  
Solicitation #201630762 Concession

---

**SECTION A – PROPOSER INFORMATION**

Name of Firm: DN/Optimal/Trugoy DEN, LLC

Address: 250 Delaware Ave

City: Buffalo State: New York Zip: 14202

Contact Person: Kevin Kelly Telephone: (716) 858-5417

Email: KKelly@DelawareNorth.com

Is your firm ACDBE Certified:  Yes, *If Certified, Attach Certification Letter*  
 No

**SECTION B – ACDBE COMMITMENT**

The ACDBE goal on this concession is **33%**.

*NOTE: The DSBO will only credit ACDBE participation that is certified as such by the City and County of Denver, Division of Small Business Opportunity (DSBO) or the Colorado Department of Transportation.*

1. The undersigned proposer/concessionaire has satisfied the ACDBE concession requirements in the following manner (please check the appropriate space).
  - The proposer is committed to a minimum of 33% ACDBE utilization on this concession contract which meets or exceeds the ACDBE goal on this concession opportunity. The amount and type of participation proposed will become a firm commitment in the Lease Agreement.
  - The proposer, unable to meet the ACDBE goal, is committed to a minimum of [Click here to enter text](#)% ACDBE utilization on this concession contract and submits its documentation demonstrating good faith efforts.
  - The proposer is unable to meet the ACDBE goal and submits documentation demonstrating good faith efforts.
2. Identify ACDBE sub-concessionaire, ACDBE joint venture partner, ACDBE equity partnership or other legal ACDBE business arrangement that meets ACDBE goal and eligibility standards in 49 CFR Part 23.

**NOTE: An ACDBE Letter of Intent must be submitted for all ACDBE suppliers listed below. Attach copy of the ACDBE Certification Letter for all ACDBEs, regardless of participation type.**

| Name & Address of ACDBE Firm | Role of ACDBE                                    | % Level of Participation |
|------------------------------|--|--------------------------|
| Optimal Concessions, LLC     | See Joint Venture Agreement included in proposal | 16.5                     |
| Trugoy, Inc.                 | See Joint Venture Agreement included in proposal | 16.5                     |
|                              |  |                          |
|                              |  |                          |

(Use Additional Sheets if Necessary)

ACDBE UTILIZATION – VENDOR/SUPPLIERS OPPORTUNITIES

**NOTE: Complete only if suppliers will be used to meet any portion of the ACDBE goal**

List all actual *and* anticipated major vendors/suppliers; include **both** ACDBE and non-ACDBE, to be utilized on the concession (use additional sheets if necessary). Examples: Janitorial services, accounting services, HR services, etc.

**NOTE: The DSBO will only credit ACDBE participation that is certified as such by the City and County of Denver, Division of Small Business Opportunity (DSBO) or the Colorado Department of Transportation.**

| Name and Address of Company | Business Area | Work to be Performed or Goods/Services to be provided | Estimated Amount (\$) | ACDBE                    |                          | LOI & Cert Letter Attached |
|-----------------------------|---------------|---|-----------------------|--------------------------|--------------------------|----------------------------|
|                             |               |   |                       | Y                        | N                        |                            |
| N/A                         |               |   |                       | <input type="checkbox"/> | <input type="checkbox"/> |                            |
|                             |               |   |                       | <input type="checkbox"/> | <input type="checkbox"/> |                            |
|                             |               |   |                       | <input type="checkbox"/> | <input type="checkbox"/> |                            |
|                             |               |   |                       | <input type="checkbox"/> | <input type="checkbox"/> |                            |
|                             |               |   |                       | <input type="checkbox"/> | <input type="checkbox"/> |                            |
|                             |               |   |                       | <input type="checkbox"/> | <input type="checkbox"/> |                            |

|  |  |  |  |                          |                          |  |
|--|--|--|--|--------------------------|--------------------------|--|
|  |  |  |  | <input type="checkbox"/> | <input type="checkbox"/> |  |
|--|--|--|--|--------------------------|--------------------------|--|

(Use Additional Sheets if Necessary)

**SECTION C – GOOD FAITH EFFORTS**

**NOTE: Complete only if the ACDBE goal was not achieved.**

The following items are minimally considered as good faith efforts and demonstrate specific initiatives made in attempting to achieve the concession specific ACDBE goal. Proposers are not limited to these particular areas and may include other efforts deemed appropriate. Please feel free to elaborate on any question below.

| <b>GOOD FAITH EFFORT QUESTIONS</b>   | <b>Y</b>                 | <b>N</b>                 |
|--|--------------------------|--------------------------|
| 1. If applicable, did you attend pre-proposal conference?  | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Did your firm request and obtain a copy of the certified ACDBE firms?   | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Were ACDBE firms contacted or solicited for concession participation?   | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Provide listing of solicited ACDBE firms with whom contact was made? Please identify name of company, contact person, date, phone number and briefly describe nature of solicitation. <b>(Include as an Attachment)</b>   | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Was direct contact made with the City's DSBO office? If yes, please identify date/person contacted and assistance sought. <b>(Include as an Attachment)</b>   | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. Identify all ACDBE support agencies/associations contacted for ACDBE assistance or solicitation (Minority Chambers of Commerce, purchasing councils, contractor groups, etc.). <b>(Please attach copies of solicitation letters of assistance and/or describe, as an Attachment to this section, the personal contact made)</b> | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. Were concession-related opportunities to this project advertised in minority/women newspapers and trade journals? <b>(If yes, please include a copy of the advertisement or detail the name of the publication(s), date of advertisement and describe the solicitation)</b>   | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. Were copies of concession RFP furnished to any ACDBEs?  | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. Identify efforts made to assist interested ACDBEs in obtaining bonding, insurance, or line of credit. <b>(Please detail any assistance that was provided or if they were referred, to whom)</b>   | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. Discuss efforts made to define additional elements of the work proposed to be performed by ACDBEs in order to increase the likelihood of achieving the ACDBE goal.   | <input type="checkbox"/> | <input type="checkbox"/> |
| 11. List, as an Attachment, all ACDBE negotiations and/or bids received but rejected. Identify company name, contact person, telephone number, date, trade area and the reason for rejecting the proposal or bid.  |                          |                          |
| 12. Discuss any other effort(s) aimed at involving ACDBEs <b>(Include as an Attachment):</b>   | <input type="checkbox"/> | <input type="checkbox"/> |



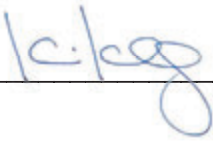
|  |  |  |
|--|--|--|
| <p>(a) Identify any specific efforts to divide work, in accordance with normal industry practices, to allow maximum ACBE participation.</p> <p>(b) Discuss joint ventures initiatives, requesting second-tier ACDBE subcontracting, etc., if any.</p> <p>(c) List all other good faith efforts employed, please elaborate.</p> <p>(d) Discuss types of participation considered. If any methods were not pursued, please provide the rationale behind this decision.</p> |  |  |
|--|--|--|

**SECTION D - AFFIRMATION**

*I HEREBY AFFIRM THAT THE ABOVE INFORMATION IS TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE. I FURTHER UNDERSTAND AND AGREE THAT, THIS DOCUMENT SHALL BE ATTACHED THERTO AND BECOME A BINDING PART OF THE CONCESSION CONTRACT.*

NAME AND TITLE OF AUTHORIZED OFFICIAL:

Kevin Kelly, President  
Delaware North Companies Travel Hospitality Services, Inc.

SIGNATURE:  \_\_\_\_\_

DATE: 1/6/2017



**DENVER**  
THE MILE HIGH CITY

January 23, 2015

Colleen Forst  
Trugoy, Inc DBA TCBY Yogurt  
8400 Pena Blvd. Box 492025  
Denver, CO 80249

Dear Colleen Forst:

**SUBJECT: Airport Concessionaire Disadvantaged Business Enterprise (ACDBE) Certification, Pursuant to 49 CFR Part 23 of the U.S. Department of Transportation's Regulations.**

The Division of Small Business Opportunity is pleased to inform you that Trugoy, Inc DBA TCBY Yogurt is certified as an **Airport Concessionaire Disadvantaged Business Enterprise (ACDBE)** pursuant to the US Department of Transportation's Regulation 49 CFR Part 23. Your firm will be listed on the Colorado Unified Certification Program's (UCP) on-line directory of eligible ACDBEs at [www.coloradodbe.org](http://www.coloradodbe.org). Your firm is certified with the following dates:

**January 22, 2015 to January 21, 2018**

Trugoy, Inc DBA TCBY Yogurt is eligible to participate as an ACDBE on US Department of Transportation financially-assisted projects in Colorado in the NAICS work codes and work specialties appearing below.

**NAICS CODES:**

CO UCP NAICS-991002: LIMITED-SERVICE RESTAURANTS

**WORK SPECIALITY:**

Concession, Food and Beverage (Yogurt)

Your business enterprise is required to maintain an accurate mailing address, email address and telephone number information with DSBO. If any changes occur in the firm's legal structure, ownership, management, control, or work performed, you must notify DSBO immediately. Failure to report any of these changes may result in removal of your business enterprise from the Certification Directory and possible revocation of certification of your business enterprise as an ACDBE.

The anniversary date of your firm's ACDBE certification is January 21, 2016. You will be notified prior to the anniversary date that eligibility must be re-evaluated. It is your responsibility to request and submit a renewal application and all of the documents required within the renewal application in order for your renewal to be processed. Pursuant to 49 CFR 26.83(i), submittal of this information is required to ensure that there is no interruption of your firm's status as a certified ACDBE.

**Office of Economic Development**  
Division of Small Business Opportunity

201 W Colfax Ave, Dept 907  
Denver, CO 80202  
p: 720.913.1999  
f: 720.913.1809  
[www.denvergov.org/dsbo](http://www.denvergov.org/dsbo)

Denver International Airport  
Airport Office Building, Suite 7810  
8500 Pena Blvd  
Denver, CO 80249  
p: 303.342-2180  
f: 303.342.2190  
[www.flydenver.com](http://www.flydenver.com)

You may visit <http://business/flydenver.com/bizops/smallBus.asp> to view upcoming concession bidding opportunities. This letter must be attached to your Letter of Intent (LOI) for bidding opportunities in which you may be utilized for goal participation.

Sincerely,

A handwritten signature in black ink that reads "Chris Martinez". The signature is written in a cursive style with a large, prominent "C" and "M".

Chris Martinez  
Director  
CM/as



Office of Economic Development  
Division of Small Business Opportunity

201 W. Colfax Ave, Dept. 907  
Denver, CO 80202  
p: 720.913.1999  
f: 720.913.1809  
[www.denvergov.org/dsbo](http://www.denvergov.org/dsbo)

Denver International Airport  
Airport Office Building, Suite 7810  
8500 Peña Boulevard  
Denver, CO 80249-6340  
p: 303.342.2180  
f: 303.342.2190  
[www.flydenver.com](http://www.flydenver.com)

September 18, 2015

Zach McNeal  
Optimal Technologies, LLC DBA The CofTea Shop  
7500 S Pitkin Ct  
Centennial, CO 80016

Dear Zach McNeal:

**SUBJECT: Airport Concessionaire Disadvantaged Business Enterprise (ACDBE) Certification, Pursuant to 49 CFR Part 23 of the U.S. Department of Transportation's Regulations.**

The Division of Small Business Opportunity is pleased to inform you that Optimal Technologies, LLC DBA The CofTea Shop is certified as an **Airport Concessionaire Disadvantaged Business Enterprise (ACDBE)** pursuant to the US Department of Transportation's Regulation 49 CFR Part 23. Your firm will be listed on the Colorado Unified Certification Program's (UCP) on-line directory of eligible ACDBEs at [www.coloradodbe.org](http://www.coloradodbe.org). Your firm is certified with the following dates:

**August 25, 2014 to September 16, 2017**

Optimal Technologies, LLC DBA The CofTea Shop is eligible to participate as an ACDBE on US Department of Transportation financially-assisted projects in Colorado in the NAICS work codes and work specialties appearing below.

**NAICS CODES:**

CO UCP NAICS-991002: LIMITED-SERVICE RESTAURANTS  
CO UCP NAICS-991004: SNACK BARS (E.G., COOKIES, POPCORN, PRETZELS), FIXED LOCATION  
CO UCP NAICS-992030: GIFT, NOVELTY, AND SOUVENIR STORES  
CO UCP NAICS-994072: BUSINESS AND PROFESSIONAL SERVICES

**WORK SPECIALITY:**


Airport Concession: Food & Beverage; Restaurant, Hospitality; Coffee, Teas and Tea Ware; IT Services

Your business enterprise is required to maintain an accurate mailing address, email address and telephone number information with DSBO. If any changes occur in the firm's legal structure, ownership, management, control, or work performed, you must notify DSBO immediately. Failure to report any of these changes may result in removal of your business enterprise from the Certification Directory and possible revocation of certification of your business enterprise as an ACDBE.

The anniversary date of your firm's ACDBE certification is September 16, 2016. You will be notified prior to the anniversary date that eligibility must be re-evaluated. It is your responsibility to request and submit a renewal application and all of the documents required within the renewal application in order for your renewal to be processed. Pursuant to 49 CFR 26.83(i), submittal of this information is required to ensure that there is no interruption of your firm's status as a certified ACDBE.

You may visit <http://business/flydenver.com/bizops/smallBus.asp> to view upcoming concession bidding opportunities. This letter must be attached to your Letter of Intent (LOI) for bidding opportunities in which you may be utilized for goal participation.

Sincerely,

A handwritten signature in black ink that reads "Chris Martinez". The signature is written in a cursive, slightly slanted style.

Chris Martinez  
Director  
CM/as



DENVER  
THE MILE HIGH CITY

### JOINT VENTURE AFFIDAVIT

Office of Economic Development  
Division of Small Business Opportunity  
8500 Pena Blvd, AOB #7810  
Denver, CO 80249  
Phone: (303) 342-2180  
Fax: (303) 342-2190

"The Undersigned swears that the foregoing statements are correct and include all material information necessary to identify and explain the terms and operation of our joint venture and the intended participation by each joint venturer in the undertaking. Further, the Undersigned covenant and agree to provide the City current, complete, and accurate information regarding actual joint venture work and the payment thereof and any proposed changes in any of the joint venture arrangements and to permit the audit and examination of the books, records, and files of the joint venture, by authorized representatives of the City or Federal funding agency, if applicable. Any material misrepresentation will be grounds for terminating any contract which may be awarded and for initialing action under Federal or State laws concerning false statements".

Name of Firm: DN/Optimal/Trugoy DEN, LLC

Print Name: Kevin Kelly

Title President, Delaware North Companies  
Travel Hospitality Services, Inc.

Signature: *Kevin Kelly*

Date: 1/6/17

#### Notary Public

County of Erie

State of New York

My Commission Expires:

Subscribed and sworn before me this

6 day of January, 2017

Notary Signature: *Julia Thomas*

Address: 250 Delaware Ave Buffalo NY 14202

**JULIA L. THOMAS**  
Notary Public, State of New York  
Registration #01TH6342832  
Qualified In Erie County  
Commission Expires May 31, 2020

Name of Firm: DN/Optimal/Trugoy DEN, LLC

Print Name: Colleen Forst

Title Owner, Trugoy, Inc.

Signature: *Colleen Forst*

Date: 1-5-17

#### Notary Public

County of Denver

State of Colorado

My Commission Expires: 4-21-18

Subscribed and sworn before me this

5 day of January, 2017

Notary Signature: *Isaac Crawford*

Address: 1 Pena Blvd Denver CO

**ISAAC CRAWFORD**  
NOTARY PUBLIC  
STATE OF COLORADO  
NOTARY ID 20144016808  
My Commission Expires 04-21-2018

Name of Firm: DN/Optimal/Trugoy DEN, LLC

Print Name: Zachary McNeal

Title Owner, Optimal Concessions, LLC

Signature: *Zachary McNeal*

Date: 5 Jan 17

#### Notary Public

County of Denver

State of Colorado

My Commission Expires: 4-21-18

Subscribed and sworn before me this

5 day of January, 2017

Notary Signature: *Isaac Crawford*

Address: 1 Pena Blvd Pena Blvd pruv. CO

**ISAAC CRAWFORD**  
NOTARY PUBLIC  
STATE OF COLORADO  
NOTARY ID 20144016808  
My Commission Expires 04-21-2018



**ACDBE  
JOINT VENTURE ELIGIBILITY FORM**

Office of Economic Development  
Division of Small Business Opportunity  
8500 Pena Boulevard, AOB #7810  
Denver, CO 80249  
Phone: (303) 342-2180  
Fax: (303) 342-2190

**Joint Venture means** an association of two (2) or more business enterprises to constitute a single business enterprise to operate a concessions contract on City property for which purpose they combine their property, capital, efforts, skills and knowledge, and in which each joint venturer is responsible for a distinct, clearly defined portion of the work of the contract, performs a commercially useful function, and whose share in the capital contribution, control, management responsibilities, risks and profits of the joint venture are equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the joint venturers and their relationship and responsibility to the contract.

The Division of Small Business Opportunity (DSBO) requires the following information be provided from participants of a prospective joint venture, to assist DSBO in evaluating the proposed joint venture. This Joint Venture Eligibility form and the Joint Venture Affidavit apply if ACDBEs participate in this joint venture.

Please return this form, the Joint Venture Affidavit, a copy of your Joint Venture Agreement and any other documentation stated as required by DSBO in the RFP, mandatory pre-proposal meeting and/or other correspondence relating to the opportunity for which the Joint Venture will be submitted to: Division of Small Business Opportunity, 8500 Pena Blvd, AOB #7810, Denver, CO 80249, by the proposal deadline stated in the RFP.

If you have questions regarding this process, please contact DSBO at 303-342-2180.

**Joint Venture Information**

|   |               |                             |            |
|---|---------------|-----------------------------|------------|
| Name: DN/Optimal/Trugoy DEN, LLC        |               | Contact Person: Kevin Kelly |            |
| Address: 250 Delaware Avenue            | City: Buffalo | State: NY                   | Zip: 14202 |
| Email Address: KKelly@DelawareNorth.com |               | Phone: (716) 858-5417       |            |

**Joint Venture Participants**

|  |                              |                               |            |
|--|------------------------------|-------------------------------|------------|
| Name: Delaware North Companies Travel Hospitality Services, Inc. |                              | Contact Person: Kevin Kelly   |            |
| Address: 250 Delaware Avenue                                     | City: Buffalo                | State: NY                     | Zip: 14202 |
| Email Address: KKelly@DelawareNorth.com                          |                              | Phone: (716) 858-5417         |            |
| % Ownership: 67%   | ACDBE Certifying Entity: N/A | ACDBE Certification Date: N/A |            |

Type of Work for which Certification was granted: N/A

|  |  |   |            |
|--|--|---|------------|
| Name: Trugoy, Inc.                     |  | Contact Person: Collen Forst                |            |
| Address: 8400 Pena Blvd, PO Box 492025 | City: Denver   | State: CO                                   | Zip: 80249 |
| Email Address: tastaria@comcast.net    |  | Phone: (720) 341-9110                       |            |
| % Ownership: 16.5%                     | ACDBE Certifying Entity: City & County of Denver- Office of Economic Development<br>Division of Small Business Opportunity | ACDBE Certification Date: Through 1/21/2018 |            |

Type of Work for which Certification was granted: 722513 (Limited Service Restaurant) 997299 (All Other Miscellaneous Store Retailers except Tobacco)

|  |  |   |            |
|--|--|---|------------|
| Name: Optimal Concessions, LLC                 |  | Contact Person: Zachary McNeal              |            |
| Address: 8400 Pena Blvd, PO Box 492033         | City: Denver   | State: CO                                   | Zip: 80016 |
| Email Address: zmcneal@optimaltechnologies.org |  | Phone: (303)944-1957                        |            |
| % Ownership: 16.5%                             | ACDBE Certifying Entity: City & County of Denver- Office of Economic Development<br>Division of Small Business Opportunity | ACDBE Certification Date: Through 9/16/2017 |            |

Type of Work for which Certification was granted: 991002 (Limited Service Restaurant) 991004 (Snack Bars) 992030 (Gift, Novelty & Souvenir Stores) 994072 (Business & Professional Services)

**JOINT VENTURE ELIGIBILITY FORM**

**General information**

ACDBE Initial Capital Contributions: \$ See Joint Venture included in proposal % 16.5%

Future capital contributions (explain requirements) (attach additional sheets if necessary): 16.5% - see Joint Venture Agreement

Source of Funds for the ACDBE Capital Contributions: See Joint Venture Agreement  
See Joint Venture Agreement included in proposal

Describe the portion of the work or elements of the business controlled by the ACDBE or DBE (attach additional sheets if necessary):  
See Joint Venture Agreement included in proposal

Describe the portion of the work or elements of the business controlled by non- ACDBE or DBE: (attach additional sheets if necessary)  
See Joint Venture Agreement included in proposal

Describe there roles and responsibilities of each joint venture participant with respect to managing the joint venture (use additional sheets if necessary):

a. ACDBE joint venture participant:

See Joint Venture Agreement included in proposal

b. Non-ACDBE joint venture participant:

See Joint Venture Agreement included in proposal

Describe the roles and responsibilities of each joint venture participant with respect to operation of the joint venture (use additional sheets if necessary):

a. ACDBE joint venture participant:

See Joint Venture Agreement included in proposal

b. Non-ACDBE joint venture participant:

See Joint Venture Agreement included in proposal

Which firm will be responsible for accounting functions relative to the joint venture's business?  
Delaware North Companies Travel Hospitality Services, Inc.

Explain what authority each party will have to commit or obligate the other to insurance and bonding companies, financing institutions, suppliers, subcontractors, and/or other parties?  
See Joint Venture Agreement included in proposal



**JOINT VENTURE ELIGIBILITY FORM**

**General Information**

Please provide information relating to the approximate **number** of management, administrative, support and non-management employees that will be required to operate the business and indicate whether they will be employees of the ACDBE, non-ACDBE or joint venture:

|                         | Non-ACDBE/DBE | ACDBE | Joint Venture |
|-------------------------|---------------|-------|---------------|
| <b>Management</b>       |               |       | 2             |
| <b>Administrative</b>   |               |       | 1             |
| <b>Support</b>          |               |       | 1             |
| <b>Hourly Employees</b> |               |       | 72            |

Please provide the name of the person who will be responsible for hiring employees for the **Joint Venture**.  
All three parties of the Joint Venture will be responsible for hiring employees for the Joint Venture.

Who will they be employed by? The majority partner- Delaware North Companies Travel Hospitality Services, Inc.

|   |   |            |  |           |
|---|---|------------|--|-----------|
| Are any of the proposed joint venture employees currently employees of any of the joint venture partners? | X | Yes<br>(√) |  | No<br>(√) |
|---|---|------------|--|-----------|

If yes, please list the number and positions and indicate which firm currently employs the individual(s), (use additional sheets if necessary)

| Number of employees | 4 | Position            | Employed By                            |
|---------------------|---|---------------------|--|
|                     |   | Regional Manager    | DNC THS                                |
|                     |   | General Manager     | DNC THS                                |
|                     |   | Manager, Ops, Admin | Trugoy, Inc & Optimal Concessions, LLC |
|                     |   | Controller          | DNC THS                                |

**Attached a copy of the proposed joint venture agreement, promissory note and/or loan agreement (if applicable), and any and all written agreements between the joint venture partners.**

List all other business relationships between the joint venture participants, including other joint venture agreements in which the parties are jointly involved.

|     |  |
|-----|--|
| N/A |  |
|     |  |

**\*\*If there are any significant changes in or pertaining to this submittal, the joint venture members must immediately notify the Division of Small Business Opportunity.\*\***

JOINT VENTURE  
LIMITED LIABILITY COMPANY AGREEMENT

OF

DN/Optimal/Trugoy DEN, LLC

DATED AS OF January 9, 2017

**JOINT VENTURE LIMITED LIABILITY COMPANY AGREEMENT  
OF**

**DN/Optimal /Trugoy DEN, LLC**

**THIS JOINT VENTURE LIMITED LIABILITY COMPANY AGREEMENT** is made and entered into as of the   9th   day of January, 2017 (the “**Effective Date**”) by and among **Delaware North Companies Travel Hospitality Services, Inc.** (“**Delaware North**”), with offices at 250 Delaware Avenue, Buffalo, New York, 14202, **Optimal Concessions, LLC** (“**Optimal**”), with offices at 7500 S Pitkin Court, Centennial Colorado, 80016 and **Trugoy, Inc.** (“**Trugoy**”), with an address of 8400 Pena Blvd. Box 492025, Denver, Colorado, 80249 (together the “**Members**”).

**WHEREAS**, the Members caused DN/Optimal/Trugoy DEN, LLC (the “**Company**”) to be formed on January     , 2017, as a limited liability company under the Act and do hereby adopt this Agreement as the limited liability company agreement of the Company;

**WHEREAS**, Delaware North has extensive experience operating concessions at numerous airports;

**WHEREAS**, Optimal and Trugoy are Airport Concessions Disadvantaged Business Enterprises (“**ACDBE**”), as such term is defined in 49 C.F.R. Part 23, certified under the Colorado Unified Certification Program with appropriate NAICS codes for their duties set out herein (the “**NAICS Codes**”);

**WHEREAS**, the Members desire to operate food and beverage concessions in the Denver International Airport (“**Airport**”) under one or more concession agreements with the authority operating that airport (“**Authority**”), as the concessions agreement(s) may be modified or amended from time to time (“**Concession Agreement**”);

**WHEREAS**, the Members intend to share in the capital contributions, control, management, risks, profits and losses of the Company commensurate with their respective ownership interest in accordance with 49 C.F.R. Part 23 and Part 26, as interpreted in the Joint Venture Guidance developed by the U.S. Department of Transportation Federal Aviation Administration, (“**ACDBE Requirements**”), and as further contemplated in this Agreement; and

**WHEREAS**, by executing this Agreement, each of the Members hereby (a) ratifies the formation of the Company and the filing of the Certificate, (b) confirms and agrees to the Members’ status as members of the Company, and (c) continues the existence of the Company for the purposes hereinafter set forth, subject to the terms and conditions hereof.

**NOW, THEREFORE**, in consideration of the premises and the mutual agreements contained herein, the parties hereto agree as follows:

**ARTICLE 1.  
FORMATION AND OFFICES**

**1.1      Formation**

Pursuant to the Act, the Members have formed the Company as a Delaware limited liability company effective upon the acceptance of the filing of the Certificate of the Company with the Secretary of State of Delaware.

**1.2      Principal Office**

The principal office of the Company shall be located at 250 Delaware Avenue, Buffalo, New York, 14202, or at such other place(s) as the Management Committee may determine from time to time.

**1.3      Registered Office and Registered Agent**

The location of the registered office and the name of the registered agent of the Company in the State of Delaware shall be as stated in the Certificate, as determined from time to time by the Management Committee.

**1.4      Purpose of Company**

The purpose of the Company is to operate retail and food & beverage concessions at the Airport (“**Business**”). Subject to the provisions of this Agreement, the Company shall have the power to do any and all acts and things necessary, appropriate, advisable or convenient for the furtherance and accomplishment of the purposes of the Company, including, without limitation, to engage in any kind of activity and to enter into and perform obligations of any kind necessary to or in connection with, or incidental to, the accomplishment of the purposes of the Company, so long as said activities and obligations may be lawfully engaged in or performed by a limited liability company under the Act.

**1.5      Date of Dissolution**

Subject to **Section 10.1**, the duration of the Company shall be perpetual.

**ARTICLE 2.  
DEFINITIONS**

**2.1      Terms Defined Herein**

Capitalized terms not defined elsewhere shall have the meanings specified in this **Section 2.1**.

“Act” means the Delaware Limited Liability Company Act, Title 6, Chapter 18, Delaware Code Annotated, as amended from time to time.

“Administrative Fees” means those fees set forth in **Section 7.2(b)(i)** and **Section 7.2(b)(ii)**.

“Affiliate” of a specified Person (the “Specified Person”) means any Person (a) who directly or indirectly controls, is controlled by, or is under common control with the Specified Person; (b) who owns or controls ten percent (10%) or more of the Specified Person’s outstanding voting securities or equity interests; (c) of whom such Specified Person owns or controls ten percent (10%) or more of the outstanding voting securities or equity interests; (d) who is a director, partner, manager, executive officer or trustee of the Specified Person; (e) in whom the Specified Person is a director, partner, manager, executive officer or trustee; or (f) who has any relationship with the Specified Person by blood, marriage or adoption, not more remote than first cousin.

“Agreement” means this Joint Venture Limited Liability Company Agreement, as amended or restated from time to time.

“Aggregate Compensation” means the total of wages and bonuses paid an employee together with the cost of providing “fringe benefits”, the employer’s share of Social Security, disability and worker compensation taxes and other amounts paid by the Company to or on behalf of an employee. For purposes of this provision, fringe benefits include the cost of providing any and all health, welfare, retirement and life benefits, maintaining pension plans, profit sharing plans and other group or individual benefits, as applicable.

“Anti-Terrorism Law” means (a) the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. Law No. 107-56, 115 Stat. 296 (2001); (b) the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et. seq.* (2003); (c) the Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et. seq.* (2003); and (d) other similar laws enacted or promulgated from time to time; in each case, together with any executive orders, rules or regulations promulgated thereunder, including, without limitation, temporary regulations, all as amended or otherwise modified from time to time.

“Capital Contribution” means the total amount of cash, other property, services rendered, debt evidenced by a promissory note or other obligation to contribute cash or property or perform services. Any reference in this Agreement to the Capital Contribution of a Member shall include the Capital Contribution made by any predecessor holder of the Interest of that Member.

“Capital Expenditures” means all costs and expenses that are capitalized under GAAP associated with design, development, construction and installation of Leasehold Improvements and Concession Assets, including, without limitation, architectural and engineering fees related thereto.

“Certificate of Formation” or “Certificate” means the Certificate of Formation of the Company filed with the Secretary of State of Delaware, as amended or restated from time to time.

“Change in Control” means any merger, consolidation, recapitalization, reorganization, redemption, sale, transfer or issuance of membership interests or other equity securities, amalgamation, tender or exchange offer, business combination, asset sale or other transaction (or series of related transactions) involving either of Optimal or Trugoy, other than any such transaction or transactions following which either Optimal or Trugoy or either of their members continue to own a majority of the combined voting power of the outstanding equity of either Optimal or Trugoy or the other entity surviving or succeeding to the business of either Optimal or Trugoy.

“Code” means the Internal Revenue Code of 1986, as amended from time to time, including the rules and regulations promulgated thereunder.

“Company” means DN/Optimal/Trugoy DEN, LLC

“Concession Assets” means all trade fixtures, equipment, furniture, furnishings, decorations, point of sale, computer, communications and other telecommunications equipment.

“Event of Withdrawal” means an event of bankruptcy (as defined in the Act) or dissolution of a Member or any other event which terminates the continued membership of a Member in the Company.

“Expenses” means all actual expenses and costs (except those capitalized under GAAP) incurred in the operation of the Business at the Airport including, without limitation, the Costs and the Administrative Fees.

“GAAP” means U.S. generally accepted accounting principles, consistently applied.

“Governmental List” means any lists relevant to any Anti-Terrorism Law maintained by the United Nations, North Atlantic Treaty Organization, Organization of Economic Cooperation and Development, U.S. Department of the Treasury’s Office of Foreign Assets Control, Financial Action Task Force, U.S. Securities & Exchange Commission, U.S. Federal Bureau of Investigation, U.S. Central Intelligence Agency, U.S. Internal Revenue Service, or any country or organization, all as may be amended from time to time.

“Gross Sales” means all revenues of the Company computed on an accrual basis under GAAP.

“Interest” refers to all of a Member’s (or an Assignee’s) rights and interests in the Company in such Member’s (or Assignee’s) capacity as a Member (or an Assignee), all as provided in the Certificate, this Agreement and the Act together with the obligations of such Member (or Assignee) to comply with all the terms and provisions of the Certificate, this Agreement and the Act.

“Leasehold Improvements” means all leasehold improvements now existing, or hereafter constructed by the Company, at the Airport including all demising walls, doors and doorways, flooring, floor coverings, walls and wall coverings, dropped ceiling grids and tiles,

soffits, roll down security grills, lighting, all exterior and interior finishes, fixtures, and adequate HVAC, electrical, lighting, plumbing, water, and sewer conduit (to the extent required), wiring, piping, connections, fixtures and accessory devices, and the cost of any demolition work and infrastructure work required in connection with the foregoing.

“Leased Premises” means the premises to be occupied directly by the Company under the Concession Agreement.

“Liquidation Proceeds” means all Property at the time of liquidation of the Company and all proceeds thereof.

“Majority in Interest” means any individual Member or group of Members holding an aggregate of more than 50% of the Percentage Interests held by all Members.

“Members” means those Persons executing this Agreement as members (as defined in the Act) of the Company, including any substitute Members or additional Members, in each such Person’s capacity as a Member of the Company.

“Net Cash” means, with respect to any fiscal period, the cash and cash equivalents of the Company less such cash reserves the Management Committee determines are necessary to pay on a timely basis the Expenses and any other expenses, costs, and obligations (including those that are capitalized under GAAP) of the Company.

“Notice” means a writing, containing the information required by this Agreement to be communicated to a Person in accordance with **Section 14.3**.

“Percentage Interest” of a Member means, at any particular time, a ratio, expressed as a percentage, which is the ratio that the Capital Contribution of such Member bears to the total Capital Contributions of all Members.

“Person” means any natural person, partnership (whether general or limited), trust, estate, association, corporation, custodian, nominee or any other individual or entity in its own or any representative capacity or a limited liability company or foreign limited liability company, in each case, whether domestic or foreign.

“Prime Rate” means the rate of interest identified in The Wall Street Journal as the “Prime Rate” generally in effect in the United States of America at the end of a particular date (or, if that date is not a business day, at the end of the business day immediately preceding that date).

“Prohibited Person” means any Person who (a) is designated by the United States federal government as a terrorist or as a suspected terrorist, whether on a Governmental List, or otherwise, (b) is otherwise subject to trade, anti-money laundering or anti-terrorism restrictions under United States federal or state law from time to time, including, without limitation, under any Anti-Terrorism Law, (c) has been convicted of a felony, fraud or a crime of moral turpitude, (d) has a reputation that would adversely affect the operation and management of the Business, (e) in the good faith determination of Delaware North will cause or has a reasonable likelihood

of causing the Company, Delaware North any of Delaware North's Affiliates to (i) lose a gaming, liquor or racing license, (ii) have a gaming, liquor or racing license restricted or limited in any material fashion, (iii) be unable to be associated with a gaming, liquor or racing licensee, or (f) that is "unstable" within the meaning of any gaming, liquor or racing license held by the Company, Delaware North any of Delaware North's Affiliates or any gaming, liquor or racing laws applicable to the Company, Delaware North any Affiliates of Delaware North.

"Project" means the design, development and construction of Leasehold Improvements (including any necessary demolition and infrastructure) for concession facilities, and the purchase, shipment and installation of the Concession Assets in the Leased Premises required under the Concession Agreement, all as approved by the Authority.

"Property" means all properties and assets that the Company may own or otherwise have an interest in from time to time.

"Transfer" means (a) when used as a verb, to give, sell, exchange, assign, transfer, pledge, hypothecate, bequeath, devise or otherwise dispose of or encumber, and (b) when used as a noun, the nouns corresponding to such verbs, in either case voluntarily or involuntarily, by operation of law or otherwise.

### **ARTICLE 3. CAPITALIZATION OF THE COMPANY**

#### **3.1 Initial Capital Contributions**

Each Member has made on the Effective Date a Capital Contribution to the capital of the Company in proportion to their ownership interest in the Company and in the amount set forth opposite such Member's name on the attached **Schedule A**. Hereafter, the Capital Contributions of the Members shall be reflected in the books and records of the Company. Should any Member be unable to contribute the full amount of its initial Capital Contribution, it may seek a Member Loan, as set out in **Section 3.4**.

#### **3.2 Additional Capital Contributions**

(a) In the event the Management Committee determines from time to time that additional funds are required or are beneficial, necessary, or useful to the Company, then the Management Committee may require additional Capital Contributions from the Members ("**Additional Capital Contribution**"). All Additional Capital Contributions required from the Members shall be in proportion to their respective Percentage Interests at the time of such request.

(b) If the Management Committee requires an Additional Capital Contribution, the Management Committee shall send to each Member a notice that shall set forth, among other things, the amount of the Additional Capital Contribution to be made by each Member, the period within which such Additional Capital Contribution shall be made (which shall not be sooner than fifteen (15) business days after receipt of such notice), and the anticipated use of such funds.



### **3.3 Member Loans**

A “**Member Loan**” shall be a loan from a Member to another Member should a Member be unable to pay its entire initial Capital Contribution or Additional Capital Contribution. Any Member Loan shall bear interest at a rate per annum equal to 6% per annum, it being understood by the parties that any Member Loan shall be on similar terms and conditions that the Non-Contributing Member could obtain from a lending institution in an arms-length third-party transaction. Member Loans must comply in all respects with the ACDBE Requirements. For instance, any applicable Member Loan cannot exceed 90% of the required capital contribution and the term of the loan shall not exceed the term of the Concession Agreement.

### **3.4 Status of Capital Contributions.**

No Member shall have the right to reduce such Member’s Capital Contribution or to receive any distributions from the Company except as provided in **Section 3.3**, **Section 4.1** and **Section 10.2**. No Member shall be entitled to receive or be credited with any interest on the balance of such Member’s Capital Contribution at any time.

## **ARTICLE 4. CASH DISTRIBUTIONS; PROFITS AND LOSSES FOR TAX PURPOSES**

### **4.1 Cash Distributions Prior to Dissolution**

(a) The Management Committee shall have the right to determine how much Net Cash, if any, of the Company shall be distributed among the Members each year and shall make any such distributions to the Members prorata in accordance with their Percentage Interests.

(b) Notwithstanding **Section 4.1 (a)**, subject to sufficient Net Cash being available as determined by the Management Committee, the Management Committee shall distribute quarterly to the Members an amount of Net Cash sufficient for the Members to satisfy their respective quarterly income tax liabilities arising by virtue of the allocations in **Schedule B** hereof, assuming each Member is subject to tax at the highest combined marginal federal, state and local income tax rate applicable to any Member, as reasonably determined by the Management Committee. The amount of any distributions to a Member pursuant to this **Section 4.1(b)** shall be taken into account and shall reduce proportionately the amount of distributions that such Member would otherwise be entitled to receive under this Agreement. At the discretion of the Management Committee, the amount of distributions to be made to the Members pursuant to this **Section 4.1(b)** may be reduced by the amount of distributions previously made to the Members during such period pursuant to **Section 4.1(a)** of this Agreement.

(c) Notwithstanding anything to the contrary herein provided, no distribution hereunder shall be permitted to the extent prohibited by the Act.

(d) No distribution of Net Cash or other cash made to any Member shall be determined a return or withdrawal of a Capital Contribution unless so designated by the Management Committee in its sole and exclusive discretion.

#### **4.2 Persons Entitled to Distributions**

All distributions of Net Cash to the Members under **Section 4.1** hereof shall be made to the Persons shown on the records of the Company to be entitled thereto as of the last day of the fiscal period prior to the time for which such distribution is to be made, unless the transferor and transferee of any Interest otherwise agree in writing to a different distribution and such distribution is consented to in writing by the Management Committee.

#### **4.3 Reserves**

The Management Committee shall have the right to establish, maintain and expend reserves to provide for working capital, leasehold improvements, future investments, debt service and such other purposes as they may deem necessary or advisable. Without limiting the foregoing, the Management Committee may deduct from the Company's operating or investment revenues each calendar year funds for renovations to the Leased Premises as required under the Concession Agreement.

#### **4.4 Allocation of Profits and Losses for Tax Purposes and Special Allocations**

All Profits and Losses for Tax Purposes of the Company and all special allocations of the Company shall be made in accordance with **Schedule B** hereof.

#### **4.5 Withholding Taxes**

If the Company is required to withhold any portion of any amounts distributed, allocated or otherwise attributable to a Member of the Company by applicable U.S. federal, state, local or foreign tax laws, the Company may withhold such amounts and make such payments to taxing authorities as are necessary to ensure compliance with such tax laws. Any funds withheld with respect to a Member by reason of this **Section 4.5** shall nonetheless be deemed distributed to such Member for purposes of this **Article 4** and **Article 10**. If the Company does not withhold from actual distributions any amounts it was required to withhold by applicable tax laws, the Company may, at its option, (i) require the Member to which the withholding was credited to reimburse the Company for withholding required by such laws, including any interest, penalties or additions thereto; or (ii) reduce any subsequent distributions to such Member by such withholding, interest, penalties or additions thereto. The obligation of a Member to reimburse the Company for such amounts shall continue after such Member transfers or liquidates its Interest in the Company. Each Member agrees to furnish the Company with any representations and forms as shall reasonably be requested by the Company to assist in determining the extent of, and in fulfilling, any withholding obligations it may have.

**ARTICLE 5.  
MEMBERS**

**5.1 Meetings of Members; Place of Meetings**

Regular or special meetings of the Members may be held for any purpose or purposes, unless otherwise prohibited by law or by the Certificate, and may be called by the Management Committee or any Member. All meetings of the Members shall be held at the principal offices of the Company as set forth in **Section 1.2** hereof, or at such other place as shall be designated from time to time by the Management Committee and stated in the Notice of the meeting or in a duly executed waiver of the Notice thereof. Members may participate in a meeting of the Members by means of conference telephone or other similar communication equipment whereby all Members participating in the meeting can hear each other. Participation in a meeting in this manner shall constitute presence in person at the meeting.

**5.2 Quorum; Voting Requirement**

The presence, in person or by proxy, of a Majority in Interest shall constitute a quorum for the transaction of business by the Members. The affirmative vote of a Majority in Interest shall constitute a valid decision of the Members, except where a larger vote is required by the Act, the Certificate or this Agreement.

**5.3 Proxies**

At any meeting of the Members, every Member having the right to vote thereat shall be entitled to vote in person or by proxy appointed by an instrument in writing (by means of electronic transmission or as otherwise permitted by applicable law) signed by such Member and bearing a date not more than one (1) year prior to such meeting.

**5.4 Action Without Meeting**

Any action required or permitted to be taken at any meeting of the Members may be taken without a meeting, without prior Notice and without a vote if a consent in writing setting forth the action so taken is signed by Members having not less than the minimum Percentage Interests that would be necessary to authorize or take such action at a meeting of the Members. Prompt Notice of the taking of any action taken pursuant to this **Section 5.4** by less than the unanimous written consent of the Members shall be given to those Members who have not consented in writing. A consent transmitted by electronic transmission by a Member shall be deemed to be written and signed for purposes of this **Section 5.4**. A consent may be executed by facsimile or other electronic reproduction file type (e.g., portable document file (“pdf”)) and may be executed in counterparts.

**5.5 Notice**

Notice stating the place, day and hour of the meeting of Members and, in the case of a special meeting, the purpose for which the meeting is called shall be delivered not less than five (5) days nor more than sixty (60) days before the date of the meeting by or at the direction of

the Managers or Member(s) calling the meeting, to each Member entitled to vote at such meeting. When any Notice is required to be given to any Member hereunder, a waiver thereof in writing signed by the Member, whether before, at, or after the time stated therein, shall be equivalent to the giving of such Notice. A Member may also waive Notice by attending a meeting without objection to a lack of Notice.

#### **5.6 Powers of the Members.**

No Member, acting solely in his, her or its capacity as a Member, shall act as an agent of the Company or have any authority to act for or to bind the Company; provided that, the Members shall have the power to exercise any and all rights or powers granted to the Members pursuant to the express terms of this Agreement. The Members shall also have the power to authorize the Management Committee, by the affirmative vote of a Majority in Interest, to possess and exercise any right or power not already vested in the Management Committee pursuant to this Agreement. Subject to all of the terms and provisions of this Agreement, the Management Committee shall have exclusive responsibility for all of the business and affairs of the Company and shall have the power and authority to do all things necessary or proper to carry out the objects and purposes of the Company. For the avoidance of doubt and notwithstanding Section 6.2, DN's then acting president or any member of the then current Management Committee shall have the power to enter into any agreement for concessions business with the Airport or the Authority for concessions operations at the Airport.

#### **5.7 Other Business Ventures.**

The Members and their Affiliates (including any Manager appointed by such Member serving on the Management Committee) may engage in or possess an interest in other business ventures of every nature and description, independently or with others, whether or not similar to or in competition with the business of the Company, and neither the Company nor the Members shall have any right by virtue of this Agreement in or to such other business ventures or to the income or profits derived therefrom. Unless otherwise agreed to, no Manager serving on the Management Committee shall be required to devote all of his or her time or business efforts to the affairs of the Company, but shall devote so much of his or her time and attention to the Company as is reasonably necessary and advisable to manage the affairs of the Company to the best advantage of the Company.

### **ARTICLE 6.**

#### **MANAGEMENT COMMITTEE; MAJOR DECISIONS; OFFICERS**

##### **6.1 Management Committee**

(a) A management committee (the “**Management Committee**”) is hereby established by the Members. The Management Committee shall be composed of three members selected by Delaware North, one member selected by Optimal, and one member selected by Trugoy. The names of the initial members of the Management Committee (each, a “**Manager**”) are set forth on **Schedule A**. The Members by a vote of a Majority in Interest may, from time to time, amend this **Section 6.1** to increase or decrease the total number of Managers constituting the Management Committee, but the number of Managers subject to

appointment by each Member shall at all times be proportionate to the Members' Percentage Interests.

(b) Subject to the terms and provisions of this Agreement, the Management Committee shall have exclusive responsibility for management of the business and affairs of the Company and shall have the power and authority to do all things necessary or proper to carry out the objects and purposes of the Company. Without limiting the foregoing, the power and authority granted to the Management Committee hereunder shall include the power to make all decisions with regard to the management, operations, assets, financing and capitalization of the Company and the Management Committee shall be responsible for and is hereby authorized to: (i) control the day to day operations of the Company; (ii) lease, construct, improve, develop and maintain the Leasehold Improvements and the Leased Premises, (iii) hire or appoint employees, agents, independent contractors or officers of the Company; (iv) select and engage the Company's accountants, attorneys, engineers and other advisors and consultants; (v) purchase insurance, goods, supplies, equipment, materials and other personal property; (vi) open bank and other deposit accounts and invest funds of the Company; (vii) arbitrate, litigate, compromise and settle claims in favor of or against the Company, (viii) engage in any kind of activity and perform and carry out contracts of any kind necessary to, in connection with, or incidental to the accomplishment of the purposes of the Company, so long as said activities and contracts may be lawfully carried on or performed by a limited liability company under the Act and are in the ordinary course of the Company's Business; and (ix) negotiate, execute and perform all agreements, contracts, leases, loan documents and other instruments and exercise all rights and remedies of the Company in connection with the foregoing.

(c) Except as otherwise provided, each Manager will serve until such Manager's successor is named. All future appointments of Managers shall be made by written notice to the Company and the other Member(s) at least ten (10) business days prior to the date on which such appointment will take effect. Each such appointment of a Manager may be changed or removed at any time by the Member that appointed such Manager by delivery of written notice to the Company and the other Member(s) as required hereunder. A Manager may only be removed by the Member that appointed such Manager; provided that if a Manager becomes a Prohibited Person, the Manager will immediately resign from his or her position and if the Manager fails to resign, the Manager can be removed in the discretion of Delaware North. If a vacancy shall occur in a Manager position, the Member who appointed the Manager whose position shall have become vacant, shall promptly designate a new Manager to the Management Committee to fill such vacancy.

(d) Meetings of the Management Committee shall be held at such time and at such places as the Managers shall determine, but in no event less frequently than once each calendar quarter. In addition, any Member may, upon giving five (5) business days' Notice to the Managers, call a meeting of the Management Committee. No meeting of the Management Committee shall be held without a quorum being present, which shall consist of a majority of the Managers. Managers may participate in a meeting of the Management Committee by means of conference telephone or other similar communication equipment whereby all Managers participating in the meeting can hear each other. Participation in a meeting in this manner shall constitute presence in person at the meeting. Action of the Management

Committee shall require the favorable vote of a majority of all Managers. Each Manager shall have one (1) vote on all Management Committee matters.

(e) Any action required or permitted by this Agreement to be taken at any meeting of the Management Committee may be taken without a meeting, without prior Notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by Managers having not less than the minimum number of votes that would be necessary for the Management Committee to authorize or take such action at a meeting of the Managers. Prompt Notice of the taking of any action taken pursuant to this **Section 6.1(e)** by less than the unanimous written consent of the Managers shall be given to those Managers who have not consented in writing. A consent transmitted by electronic transmission by a Manager shall be deemed to be written and signed for purposes of this **Section 6.1(e)**. A consent may be executed by facsimile or other electronic reproduction file type (e.g., portable document file (“.pdf”)) and may be executed in counterparts. When any Notice is required to be given to any Manager hereunder, a waiver thereof in writing, signed by the Manager, whether before, at or after the time stated therein, shall be equivalent to the giving of such Notice. Further, a Manager may waive Notice of a meeting by attending such meeting without objection to a lack of Notice.

## **6.2 Major Decisions**

No action shall be taken, sum expended, or obligation incurred by the Management Committee, any Officer, or any other party with respect to the following without the unanimous vote of all of the Managers serving on the Management Committee:

- (a) acquisition of any land or an interest therein;
- (b) any material change to the concepts to be used in the Leased Premises, as delineated in the Concession Agreement, other than in the event that such change is required by the Authority;
- (c) making any assignment for the benefit of creditors or any confession of judgment on behalf of the Company;
- (d) entering into any loan agreement with a financial institution for funding in excess of \$100,000;
- (e) entering into any material new business line unrelated with the Company’s purposes hereunder;
- (f) taking any other act which would materially affect the ability of the Company to continue its Business in the ordinary course;
- (g) replacing the tax matters partner;
- (h) entering into any agreement in excess of \$100,000 annually and not contemplated in the annual budget;

- (i) entering into any agreement (whether oral, written, or otherwise) to borrow money, guarantee a debt, pledge Company assets, or give an indemnity on behalf of the Company;
- (j) Additional Capital Contributions in excess of \$100,000 per Member;
- (k) admission of new Members;
- (l) except as provided in **Section 3.3** hereof, issuance and Transfers of Membership Interests in the Company;
- (m) any amendment to the duties of any Member hereunder; or
- (n) any merger, acquisition, divestiture of or by the Company, including the sale of all or substantially all of the assets of the Company.

### **6.3 Officers**

From time to time, the Management Committee shall be entitled to designate one or more persons (who may be employees of Delaware North, Optimal or Trugoy) to have such titles as employees or representatives of the Company as the Management Committee may deem necessary or appropriate. The persons so appointed who have supervisory authority, or if the Company were a corporation would hold the office of vice president or any higher office, are referred to herein as the “Officers.” Each Officer shall have such duties, responsibilities and authority as is granted by the Management Committee. If the Management Committee so approves, an Officer may remain the employee of a Member or an Affiliate of a Member. Each Officer shall be subject to removal by the Management Committee with or without cause or, if such Officer is an employee of a Member or an Affiliate of such Member, by such Member, and upon such Member’s delivery of a notice of such removal to the other Members, such Officer shall thereupon be deemed removed. Nothing in the preceding sentence shall affect the rights of any Officer under any employment agreement between the Company and the Officer.

### **6.4 Business Plan**

Prior to the commencement of each fiscal year of the Company, the Management Committee shall cause to be prepared and shall adopt a business plan, including estimated pro forma financial statements, capital and operating budgets, which shall guide the operation of the Business of the Company during the course of such year (the “**Business Plan**”). While the Business Plan shall provide direction for the Company, it shall not represent binding commitments of the Members or the Management Committee, and failure to implement a provision of a Business Plan or to meet a budget shall not by itself be deemed a breach, a failure of a condition to any obligations, or a default by any Member, Manager or the Management Committee under this Agreement.

### **6.5 Representation for new business**

Notwithstanding any portion of this agreement that may be interpreted to the contrary (including the forgoing Section 6.2 regarding Major Decisions), the Members hereby

agree that the President of Delaware North shall have the power and legal authority to represent the Company and sign on its behalf both the Concessions Agreement, any amendment to the Concessions Agreement, and all supplemental agreements related to securing business with at the Airport, or with the Authority.

## **ARTICLE 7. DUTIES AND RESPONSIBILITIES**

### **7.1 Member Duties**

The Member's duties shall be as set out in **Schedule C**. The parties hereto represent that based on a review of the ACDBE Requirements, the responsibilities of each of Optimal and Trugoy set forth on **Schedule C** reflect a distinct and clearly defined portion of the work required to operate under the Concession Agreement and the responsibilities of each of Optimal and Trugoy exceeds their proportionate ownership in the Company.

### **7.2 Expenses and Capital Expenditures; Administrative Fees**

(a) The Company shall be responsible for all Expenses and Capital Expenditures incurred in connection with the Project and the operation of the Business, and for the payment of any and all obligations of the Business, including, without limitation, obligations to make principal debt reduction payments to third parties pursuant to the terms of any applicable agreements (collectively, the "**Costs**"). To the extent a Member advances any funds for payment of any of the foregoing Costs, such Member shall be promptly reimbursed upon the remittance of the applicable back-up evidencing the payment of such Costs. Each Member and, where applicable, Manager, shall also be entitled to reimbursement from the Company for all reasonable direct out-of-pocket expenses incurred on behalf of the Company upon presentation to the Company of receipts or other appropriate documentation evidencing such expenses.

(b) Each Member shall be reimbursed for Administrative Fees incurred for, or provided to, the Company as follows:

(i) Delaware North shall provide administrative support services to the Company including, but not limited to: tax compliance and planning, payroll and accounting, budgeting assistance and business planning, advertising/promotions, design and construction consultation, and operational support from its corporate employees. Delaware North shall receive an annual administrative fee of two percent (2.0%) of gross sales of the Company (payable in monthly installments on the tenth calendar day of each month during the term of this Agreement) for such services, which the Members agree is fair and reasonable. This administrative fee represents recovery of costs and not profit to Delaware North.

(ii) Optimal shall provide operational, administrative, and management support services to the Company and shall receive an annual administrative fee of one-half of one percent (.5%) of gross sales of the Company (payable in monthly installments on the tenth calendar day of each month during the term of this Agreement) which the



Members agree is fair and reasonable. This administrative fee represents recovery of costs and not profit to Optimal.

(iii) Trugoy shall provide operational, administrative, and management support services to the Company and shall receive an annual administrative fee of one-half of one percent (.5%) of gross sales of the Company (payable in monthly installments on the tenth calendar day of each month during the term of this Agreement) which the Members agree is fair and reasonable. This administrative fee represents recovery of costs and not profit to Trugoy.

(iv) If due to insufficient cash flow, Administrative Fees cannot be paid in any year, such fees shall accumulate from year to year. The Administrative Fees will be reviewed annually by the Management Committee and will be adjusted if such review reveals that an adjustment is necessary for any Member to recover its costs of providing administrative services to the Company.

## **ARTICLE 8. LIABILITY AND INDEMNIFICATION**

### **8.1 Liability of Members and Managers**

(a) A Member shall only be liable to make the payment of the Member's initial Capital Contribution pursuant to **Section 3.1** and the Additional Capital Contributions, if any, required by **Section 3.2** hereof. No Member or Manager shall be liable for any obligations of the Company or any other Member or Manager, unless personally guaranteed by the Member or Manager pursuant to a separate document.

(b) No Member, except as otherwise specifically provided in the Act, shall be obligated to pay any distribution to or for the account of the Company or any creditor of the Company.

### **8.2 Indemnification**

(a) The Members, the Managers, any Officers, and their Affiliates, and their respective stockholders, members, managers, directors, officers, partners, agents and employees (individually and collectively, an "Indemnitee") shall be indemnified and held harmless by the Company from and against any and all losses, claims, damages, liabilities, expenses (including reasonable legal fees and expenses), judgments, fines, settlements and other amounts arising from any and all claims, demands, actions, suits or proceedings, civil, criminal, administrative or investigative (each a "Claim"), in which the Indemnitee may be involved, or threatened to be involved, as a party or otherwise by reason of such Indemnitee's status as any of the foregoing, which relates to or arises out of the Company, its assets, Business or affairs, if in each of the foregoing cases (i) the Indemnitee acted in good faith and in a manner such Indemnitee believed to be in, or not opposed to, the best interests of the Company, and, with respect to any criminal proceeding, had no reasonable cause to believe such Indemnitee's conduct was unlawful, and (ii) the Indemnitee's conduct did not constitute gross negligence or intentional misconduct. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere*, or its equivalent,

shall not, of itself, create a presumption that the Indemnitee acted in a manner contrary to that specified in (i) or (ii) above. Any indemnification pursuant to this **Article 8** shall be made only out of the assets of the Company, and no Manager or Member shall have any personal liability on account thereof.

(b) All calculations of Claims and the amount of indemnification to which any Indemnitee is entitled under this **Article 8** shall be made (i) giving effect to the tax consequences of any such Claim and (ii) after deduction of all proceeds of insurance, net of retroactive premiums and self-insurance retentions, recoverable by the Indemnitee with respect to such Claims.

### **8.3 Expenses**

Expenses (including reasonable legal fees and expenses) incurred by an Indemnitee in defending any Claim described in **Section 8.2** may, from time to time, be advanced by the Company prior to the final disposition of such Claim, in the discretion of the Managers, upon receipt by the Company of an undertaking by or on behalf of the Indemnitee to repay such amount if it shall be ultimately determined that the Indemnitee is not entitled to be indemnified as authorized in this **Article 8**.

### **8.4 Non-Exclusivity**

The indemnification and advancement of expenses set forth in this **Article 8** shall not be exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any statute, the Act, the Certificate, this Agreement, any other agreement, a policy of insurance or otherwise, and shall not limit in any way any right which the Company may have to make additional indemnifications with respect to the same or different Persons or classes of Persons, as determined by the Management Committee. The indemnification and advancement of expenses set forth in this **Article 8** shall continue as to an Indemnitee who has ceased to be a named Indemnitee and shall inure to the benefit of the heirs, executors, administrators, successors and assigns of such a Person.

### **8.5 Insurance**

The Company may purchase and maintain insurance on behalf of the Indemnitees against any liability asserted against them and incurred by them in such capacity, or arising out of their status as Indemnitees, whether or not the Company would have the power to indemnify them against such liability under this **Article 8**.

### **8.6 Duties**

(a) Generally. A Manager and each Officer, in managing the Business or affairs of the Company, will discharge his or her duties:

- (i) in a manner such Manager or Officer believes in good faith to be in the best interests of the Company;
- (ii) in good faith reliance on the provisions of this Agreement;

(iii) without intentional misconduct or a knowing violation of applicable law; and

(iv) without engaging in any transaction for which he receives a personal benefit in violation or breach of any provision of this Agreement.

Except as set forth above, no Manager or Officer shall have any other duty (including fiduciary duty) to the Company or any Member, except for the implied contractual covenant of good faith and fair dealing under applicable Delaware law.

(b) Limitations. Notwithstanding the foregoing subsection (a), a Manager or Officer (i) does not violate a duty or obligation under this Agreement or under applicable law because the Manager's or Officer's conduct furthers the interest of a Member (including in the case of a Manager, the Member that designated the Manager, the Members each acknowledging that each Member has appointed Managers with the expectation that such Manager will represent and serve the interest of the Member appointing him) and (ii) without limiting the foregoing clause (i), has no duty or obligation to consider any interest of or affecting the Company or any Member.

(c) No Duty of Members. No Member has any duty to the Company or any Member solely by reason of acting in its capacity as a Member, except to refrain from (i) any act or omission that constitutes a knowing violation of applicable law or a bad faith violation of the implied contractual covenant of good faith and fair dealing, and (ii) any transaction in which the Member receives a personal benefit in violation or breach of any provision of this Agreement. Thus, without limiting the foregoing, a Member (A) does not violate any duty or obligation under this Agreement or under applicable law because the Member's conduct furthers its interest and (B) has no duty or obligation to consider any interest of or effect on the Company or any other Member.

(d) Override. The provisions of this Agreement (including this **Section 8.6**) replace, eliminate and otherwise supplant those duties (including fiduciary duties) that a Member, Manager or Officer might otherwise have under applicable law or in equity.

(e) Interested Party Transactions. No contract or other transaction between the Company and one or more of its Members, or between the Company and any Affiliate of a Member, or between the Company and any other Person in which one or more of the Members has a financial interest shall be void or voidable or in any way affected solely for this reason, or solely because such Member is, or Managers appointed by such Member are, present at or participate in the meeting which authorizes the contract or transaction, or solely because the Member's or such Manager's votes are counted for such purpose. Managers appointed by any such Member may be counted in determining the presence of a quorum at a meeting of the Management Committee which authorizes the contract or transaction and in determining whether the Managers have voted to authorize and approve such contract or transaction. This **Section 8.6** shall not be construed to impair, invalidate, or in any way affect any contract or other transaction which would otherwise be valid under applicable law.

**ARTICLE 9.**  
**TRANSFERS OF INTERESTS**

**9.1        General Restrictions.**

(a)        Except with the approval of the Management Committee, no Member may Transfer all or any part of this Agreement or such Member's Interest. Any purported Transfer of an Interest or a portion thereof in violation of the terms of this Agreement shall be null and void and of no effect. A permitted Transfer shall be effective as of the date specified in the instruments relating thereto. Any transferee desiring to make a further Transfer shall become subject to all the provisions of this **Article 9** to the same extent and in the same manner as any Member desiring to make any Transfer. A Member may not voluntarily resign from the Company except with the approval of the Management Committee.

(b)        Unless and until admitted as a substitute Member pursuant to **Section 9.2**, a transferee of a Member's Interest in whole or in part shall be an assignee with respect to such Interest or portion thereof and shall not be entitled to participate in the management of the Business and affairs of the Company or to become or to exercise the rights of a Member, including the right to vote, the right to require any information or accounting of the Company's Business or the right to inspect the Company's books and records. Such transferee shall only be entitled to receive, to the extent of the Interest transferred to such transferee, the share of distributions and profits, including distributions representing the return of Capital Contributions to which the transferor would otherwise be entitled with respect to the transferred Interest or portion thereof.

**9.2        Substitute Members.**

No transferee of all or part of a Member's Interest shall become a substitute Member in place of the transferor unless and until:

(a)        the transferee has executed an instrument accepting and adopting the terms and provisions of the Certificate and this Agreement;

(b)        The Management Committee shall have consented (which consent may be unreasonably or arbitrarily withheld, conditioned or delayed) in writing to such transferee becoming a substitute Member;

(c)        Upon satisfaction of all the foregoing conditions with respect to a particular transferee, the Manager shall cause the books and records of the Company to reflect the admission of the transferee as a substitute Member to the extent of the Interest or portion thereof held by the transferee.

**9.3        Effect of Admission as a Substitute Member.**

A transferee who has become a substitute Member has, to the extent of the Interest transferred to such substitute Member, all the right, power and benefit and is subject to all the restrictions and liabilities of a Member under the Certificate, this Agreement and the Act.

Upon admission of a transferee as a substitute Member, the transferor of the Interest so acquired by the substitute Member shall cease to be a Member of the Company to the extent of such transferred Interest. A Person shall not cease to be a Member upon assignment of all such Member's Interest unless and until the transferee becomes a substitute Member.

## **ARTICLE 10. DISSOLUTION AND TERMINATION**

### **10.1      Events Causing Dissolution**

The Company shall be dissolved upon the first to occur of the following events:

- (a)      Within thirty (30) days after the Company is notified that it has not been awarded the Concession Agreement, unless otherwise determined by the Management Committee;
- (b)      Within 180 days after the expiration or termination of the Concession Agreement, unless otherwise determined by the Management Committee;
- (c)      The decision to dissolve by the Management Committee;
- (d)      The sale or other disposition of substantially all of the assets of the Company and the receipt and distribution of all the proceeds therefrom;
- (e)      Upon an Event of Withdrawal of a Member, if within ninety (90) days after such event, the Management Committee agrees to dissolve the Company; and
- (f)      Except as otherwise set forth in this Agreement, upon the occurrence of any other event causing a dissolution of the Company under the provisions of the Act.

### **10.2      Distributions Upon Dissolution.**

Upon the dissolution of the Company as a result of the occurrence of any of the events set forth in **Section 10.1** hereof, the Management Committee shall proceed to liquidate the Company and the Liquidation Proceeds shall be applied and distributed in the following order of priority:

- (a)      First, to the payment of debts and liabilities of the Company in the order of priority as provided by law (including any loans or advances that may have been made by any of the Members to the Company) and any Administrative Fees remaining deferred pursuant to **Section 7.3(b)** and the expenses of liquidation.
- (b)      Second, to the establishment of any reserve which the Management Committee may deem reasonably necessary for any contingent, conditional or unasserted claims or obligations of the Company. Such reserve may be paid over by the Management Committee to an escrow agent to be held for disbursement in payment of any of the aforementioned liabilities and, at the expiration of such period as shall be deemed advisable by

the Management Committee, for distribution of the balance, in the manner hereinafter provided in this **Article 10**.

(c) Finally, the remaining balance of the Liquidation Proceeds, if any, to the Members, prorata in proportion to their respective Percentage Interests.

### **10.3 In-Kind**

Notwithstanding the foregoing, in the event the Management Committee shall determine that an immediate sale of part or all of the Company assets would cause undue loss to the Members or the Management Committee determines that it would be in the best interest of the Members to distribute the assets of the Company to the Members in kind (which distributions do not, as to the in-kind portions have to be in the same proportions as would be if cash were distributed, but all such in-kind distributions shall be equalized, to the extent necessary, with cash), then the Management Committee may either defer liquidation of, and withhold from distribution for a reasonable time, any assets of the Company except those necessary to satisfy the Company's debts and obligations, or distribute the assets to the Members in kind.

### **10.4 Certificate of Cancellation**

When all of the remaining property and assets of the Company have been distributed, the Certificate shall be canceled by filing a certificate of cancellation with the Secretary of State of Delaware.

## **ARTICLE 11.**

### **ADDITIONAL REPRESENTATIONS, WARRANTIES AND COVENANTS**

#### **11.1 Representations, Warranties and Covenants of the Members**

Each Member represents and warrants to the other Members as follows:

(a) it is duly organized and in good standing, it has the requisite corporate, limited liability company, or general partnership power and authority to deliver and execute this Agreement and this Agreement constitutes a legal, valid, and binding obligation, enforceable against it in accordance with its terms;

(b) the execution, delivery, and performance of this Agreement by such Member does not and will not contravene or conflict with (i) any law, order, rule, regulation, writ, injunction, or decree now in effect of any government, governmental instrumentality or court having jurisdiction over such Member, or (ii) any contractual restriction (including restrictive covenants regarding intellectual property) binding on or affecting such Member or its property or assets;

(c) there is no action, proceeding, or investigation pending, or to such Member's knowledge, threatened or affecting such Member, which may adversely affect such Member's ability to fulfill its obligations under this Agreement;

(d) there are no judgments or orders for payment of money rendered against such Member which have been undischarged for a period of ten (10) or more consecutive days and the enforcement of which have not been stayed by reason of pending appeal or otherwise.

(e) there are no facts or circumstances of any kind or nature whatsoever of which such Member is aware which could in any way materially impair or prevent such Member from performing its obligations under this Agreement in any material respect;

(f) to the best of such Member's knowledge, neither such Member nor any holder of a direct ownership interest in such Member is a Prohibited Person or conducts any business or engages in any transaction or dealing with any Prohibited Person, including making or receiving any contribution of funds, goods or services to or for the benefit of any Prohibited Person;

(g) it is acquiring its Interest with the intent of holding the same for investment purposes only, for its own account and without the intent or a view of participating directly or indirectly in any distribution of such Interests within the meaning of the Securities Act of 1933, as amended (the "**Securities Act**") or any applicable state securities laws;

(h) its Interest is being issued and sold in reliance on the exemption from registration contained in Section 4(2) of the Securities Act and exemptions contained in applicable state securities laws, and that its Interest cannot and will not be sold or transferred except in a transaction that is exempt under the Securities Act and those state acts or pursuant to an effective registration statement under the Securities Act and those state acts or in a transaction that is otherwise in compliance with the Securities Act and those state acts;

(i) it has no contractual right under this Agreement for the registration under the Securities Act of its Interest for public sale and that, unless its Interest is registered or an exemption from registration is available, its Interests may be required to be held indefinitely; and

Optimal and Trugoy further represents and warrants that they currently hold, and will hold for the duration of this Agreement, the NAICS Codes necessary for the performance of their duties under this Agreement.

Each Member covenants and agrees that upon reasonable request by the other Members or the Management Committee, from time to time, such Member will deliver to such other Members or the Management Committee a certification addressed to the requesting party confirming such Member's ongoing compliance with the foregoing requirements, or such other evidence as may be reasonably required to enable the requesting party to perform its obligations under Anti-Terrorism Law.

Each Member further covenants and agrees to be responsible for and to pay, in proportion to its respective Percentage Interests, any and all costs, fees, and expenses associated with any request for proposal, bid, or other contract submission process which does not result in the award of a concession agreement or other similar contract to the Company.

Each Member shall indemnify and hold the Company and the other Members harmless from and against any and all claims and liabilities arising out of a breach by the indemnifying Member of any representation, warranty or covenant made by it under this Agreement.

**11.2 Certain Additional Representations, Warranties and Covenants of Optimal and Trugoy**

(a) Optimal hereby represents and warrants to Delaware North that it is a certified Airport Concessions Disadvantaged Business Enterprise in accordance with the ACDBE Requirements, as the same may be amended from time to time (a “**Certified ACDBE**”). Optimal covenants that it shall remain a Certified ACDBE during the term of the Concession Agreement. Notwithstanding the foregoing, Delaware North acknowledges and agrees that if Optimal fails to maintain its status as a Certified ACDBE during the term of the Concession Agreement solely because Optimal exceeded the small business size standard based on gross sales or because owners of Optimal have exceeded the personal net worth standard (a “**Permitted ACDBE Status Change**”), such failure shall not be considered a default by Optimal, during the term of the Concession Agreement then in effect, as long as the Airport continues to count Optimal’s ACDBE participation in the Company.

(b) Trugoy hereby represents and warrants to Delaware North that it is a certified Airport Concessions Disadvantaged Business Enterprise in accordance with the ACDBE Requirements, as the same may be amended from time to time (a “**Certified ACDBE**”). Trugoy covenants that it shall remain a Certified ACDBE during the term of the Concession Agreement. Notwithstanding the foregoing, Delaware North acknowledges and agrees that if Trugoy fails to maintain its status as a Certified ACDBE during the term of the Concession Agreement solely because Trugoy exceeded the small business size standard based on gross sales or because owners of Trugoy have exceeded the personal net worth standard (a “**Permitted ACDBE Status Change**”), such failure shall not be considered a default by Trugoy, during the term of the Concession Agreement then in effect, as long as the Airport continues to count Trugoy’s ACDBE participation in the Company.

**ARTICLE 12.  
DEFAULT/REMEDIES**

**12.1 Mandatory Withdrawal**

(a) Notwithstanding anything to the contrary herein, in the event that (i) any Member fails to make an initial Capital Contribution or an Additional Capital Contribution required by **Article 3** (and the non-defaulting Member has not agreed to make a Member Loan to the Non-Contributing Member), or (ii) either Optimal or Trugoy shall be in breach of **Section 11.2**, which breach remains uncured for a period of thirty (30) days from the date of such breach (the Member subject to (i) or (ii) being referred to as the “**Defaulting Member**”), the non-defaulting Member shall have the right to force the withdrawal (a “**Mandatory Withdrawal**”) of the Defaulting Member. Upon such Mandatory Withdrawal, the following shall thereafter apply:



(A) The Defaulting Member shall have no further rights under this Agreement or any agreement to which the Company is a party except for the right to receive the return of such Defaulting Member's Capital Contributions;

(B) The Manager(s) appointed to the Management Committee by such Defaulting Member shall immediately resign from the Management Committee, effective as of the effective date of the Mandatory Withdrawal; and

(C) The Defaulting Member hereby constitutes and appoints the non-defaulting Member as its true and lawful attorney to make, execute, sign, swear to, acknowledge and file in its name, place and stead:

(1) Any other certificate or instrument which may be required to be filed by the Company under the laws of the State of Delaware or any other jurisdiction as a result of such withdrawal;

(2) Any and all amendments or modifications of this Agreement, including specifically, but without limitation, amendments reflecting the withdrawal of the Defaulting Member or the admission of substituted or additional Members pursuant to **Section 9.2**; and

(3) Such other document or documents or instrument or instruments relating to the Company and in keeping with its stated purpose, including but not limited to any which may be required under any agreement to which the Company is a party or under the laws of any state or of the United States or of any other jurisdiction.

## **12.2 Redemption/Cross-Purchase Event**

(a) Without limiting **Section 12.1**, in the event that:

(i) any Member breaches any representation, warranty, covenant or other obligation under this Agreement, and such breach is not curable or cured within thirty (30) days of notice of such breach by the non-breaching Member (a "**Breach Event**");

(ii) Either of Optimal or Trugoy becomes subject to a Change in Control not approved by the Management Committee (a "**CiC Event**");

(iii) Trugoy or Optimal's participation ceases to count toward the applicable ACDBE goals' required in connection with the Concession Agreement, in accordance with the ACDBE Requirements, for any reason other than a Permitted ACDBE Status Change (an "**ACDBE Default Event**");

(iv) Either of Optimal or Trugoy shall default under any third-party bank loan (the "**Bank**"), which default would permit the Bank to foreclose on either Optimal's or Trugoy's Interest (a "**Foreclosure Event**"); or

(v) Either of Optimal or Trugoy, or an Affiliate of Optimal or Trugoy, or any of their respective directors, officers, members, shareholders or principals (A) pleads guilty or no contest to or is convicted of a felony or a crime involving moral turpitude or (B) takes an action or omits to take an action that, in the reasonable, good faith judgment of the Management Committee, is reasonably likely to cause, the Company, Delaware North or any of Delaware North's Affiliates to be unable to obtain, renew or retain any license or permit required for its business operations, including without limitation, any gaming, liquor or racing license, to have any such license or permit denied, revoked or jeopardized in any way or to result in a material breach of any such license or permit (a "**Character Event**" and collectively with any Breach Event, CIC Event, ACDBE Default Event or Foreclosure Event referred to herein as an "**Event of Default**"),

then such Member's (the "**Affected Member**") Interest (thereafter, the "**Affected Interest**"), shall be subject to the provisions of **Section 12.2(c)**.

(b) Without limiting **Section 12.1** or **Section 12.2(a)**, in the event that Delaware North desires to purchase Optimal's or Trugoy's Interest in the Company for any reason even in the absence of an Event of Default (a "**Redemption Event**"), then such Interest shall be considered an Affected Interest subject to the provisions of **Section 12.2(c)**.

(c) In the case of an Event of Default or a Redemption Event:

(i) Within thirty (30) days after the occurrence of the applicable Event of Default or Redemption Event, as the case may be (the "**Option Period**"), the Management Committee (excluding the Affected Member's appointee(s), who shall have no right to vote on any matter governed by this **Section 12.2**) shall have the option, but not the obligation, to elect to have the Company purchase the Affected Interest, in whole or in part. If desired, the Management Committee shall cause the Company to exercise this option by giving written notice thereof to the Affected Member (the date on which such notice is provided, or if not provided, the date on which notice from the remaining Member is provided pursuant to **Section 12.2(b)(ii)**, is referred to herein as the "**Valuation Date**"). If the Management Committee fails to exercise the Company's option to purchase all or any portion of the Affected Interest, then the remaining Member shall have the option to purchase, in accordance with **Section 12.2(b)(ii)**, any or all of the Affected Interest that was not purchased by the Company. The notice of exercise of this option by the Company shall specify a date for the closing, which shall be held at the location stated in the notice.

(ii) In the event the Company fails to exercise the option to purchase all of the Affected Interest, then the remaining Member shall have the option to purchase the Affected Interest that was not purchased by the Company by providing written notice thereof to the Affected Member. The closing of such purchase shall be held at the principal office of the Company or such other location as agreed to by the parties not more than ninety (90) days after the expiration of the Option Period, unless the Affected Member and remaining Member purchasing the Affected Interest mutually agree upon another closing date.

(iii) If the Company or the remaining Member elects to purchase any or all of the Affected Interest, the purchase price for the Affected Interest shall be the fair market value of the Affected Interest as agreed to by the Company and/or the Remaining Member, as applicable, and the Affected Member. If the parties cannot agree upon a fair market value, the value shall be determined by an appraiser (the “**Appraiser**”) agreed to by the Company and/or the Remaining Member, as applicable, and the Affected Member. If the parties cannot agree as to an Appraiser, then each Member shall select an appraiser, and a third shall be selected by the first two appraisers chosen. The decision of a majority of the appraisers shall be binding on all the parties and such majority of the appraisers shall be deemed to be the “Appraiser” for purposes of this **Section 12.2**. The fair market value of the Affected Interest to be purchased shall be equal to the amount, if any, that the Affected Member would receive if the Property (including the non-liquid assets, valued at their Market Value, were sold as of the Valuation Date, the Company was dissolved and the proceeds from the hypothetical sale of the Property as of the Valuation Date were distributed to the Members in accordance with **Section 10.2**; provided, however, that the Management Committee shall estimate for purposes of such calculation the reasonable selling and liquidation expenses and, except to the extent otherwise taken into account in determining the Market Value of non-liquid assets below, all Company debts, liabilities and obligations as of such date. For purposes of this **Section 12.2**, the “**Market Value**” of the non-liquid assets of the Company shall mean the gross fair market value thereof as determined by the Appraiser. If appraisal of any real property of the Company will be necessary, the Appraiser shall be a member of the American Institute of Real Estate Appraisers or a member of the Society of Real Estate Appraisers or any successor association or body of comparable standing if neither of such associations is then in existence.

(iv) At the closing of any purchase under this **Section 12.2**, the Affected Member, in exchange for the purchase price, shall deliver documents conveying the Affected Interest (effective as of the closing date) to the purchaser (or its designee) free and clear of any liens or encumbrances. The purchaser shall, on the closing date, cause all relevant bank or other financial organizations to fully release the Affected Member from liability under any and all guarantees made by the selling Member for the repayment of the principal amount of, and any interest accrued on, any and all loans made to the Company by such banks or other financial organizations.

## **ARTICLE 13. ACCOUNTING AND BANK ACCOUNTS**

### **13.1 Fiscal Year and Accounting Method**

The fiscal year and taxable year of the Company shall end on the fiscal December year end of Delaware North. The Management Committee shall also determine the accounting method to be used by the Company.

### **13.2 Books and Records**

(a) The books and records of the Company shall be maintained at its principal place of business.

(b) The Company shall keep the following books and records:

(i) A current and past list, setting forth in alphabetical order the full name and last known mailing address of each Member and Manager to the extent provided by the Act, which shall be provided to the Secretary of State of Delaware, without cost, upon his, her or its written request;

(ii) A copy of the Certificate and amendments thereto together with executed copies of any powers of attorney pursuant to which the Certificate or any amendments have been executed;

(iii) Copies of the Company's federal, state and local income tax returns and reports, if any, for the three (3) most recent years or, if such returns and reports were not prepared for any reason, copies of the information and records provided to, or which should have been provided to, the Members to enable them to prepare their federal, state and local tax returns for such period;

(iv) Copies of this Agreement, and all amendments thereto, and copies of any written operating agreements no longer in effect together with executed copies of any powers of attorney pursuant to which such documents have been executed;

(v) Copies of any financial statements of the Company for the three (3) most recent years;

(vi) Copies of writings setting out the amount of cash and a statement of the agreed value of other property or services contributed or agreed to be contributed by each Member;

(vii) Copies of any written promise by a Member to make a contribution to the Company;

(viii) Copies of any written consents by the Members to the admission of any Person as a Member of the Company;

(ix) Copies of any written consents by the Members and Managers to dissolve the Company upon an Event of Withdrawal of any Member; and

(x) Copies of any other instruments or documents reflecting matters required to be in writing pursuant to this Agreement.

(c) Each Member (or such Member's designated representative) shall have the right during ordinary business hours and upon reasonable Notice to inspect and copy (at such Member's own expense) the books and records of the Company required to be kept by **Section 11.2(b)** hereof.

### **13.3      Financial Reports**

(a) As soon as reasonably practical after the end of each fiscal year of the Company, the Company shall cause to be prepared and delivered to each Member [audited] financial statements of the Company.

(b) As soon as reasonably practicable after the end of each fiscal year of the Company, the Company shall cause to be prepared and delivered to each Member all information with respect to the Company necessary for the preparation of the Member's federal and state income tax returns.

### **13.4      Tax Returns and Elections**

The Company shall cause to be prepared and timely filed all federal, state and local income tax returns or other returns or statements required by applicable law. All elections permitted to be made by the Company under federal or state tax laws shall be made by the Management Committee in its discretion; provided, that upon the request of any Member, the Management Committee shall cause the Company to make an election to adjust the basis of Company property pursuant to Code Sections 754, 734(b) and 743(b).

### **13.5      Bank Accounts**

All funds of the Company shall be deposited in a separate bank, money market or similar account(s) approved by the Management Committee and in the Company's name. Withdrawals therefrom shall be made only by Persons authorized to do so by the Management Committee.

## **ARTICLE 14. MISCELLANEOUS**

### **14.1      Title to Property; No Partition**

Title to the Property shall be held in the name of the Company. No Member shall individually have any ownership interest or rights in the Property except indirectly by virtue of such Member's ownership of an Interest. No Member shall have any right to any specific assets of the Company upon the liquidation of, or any distribution from, the Company. The Members agree that the Property is not and will not be suitable for partition. Accordingly, each of the Members hereby irrevocably waives any and all right such Member may have to maintain any action for partition of any of the Property.

### **14.2      Waiver of Default**

No consent or waiver, express or implied, by the Company or a Member with respect to any breach or default by the Company or a Member hereunder shall be deemed or construed to be a consent or waiver with respect to any other breach or default by any party of the same provision or any other provision of this Agreement. Failure on the part of the Company

or a Member to complain of any act or failure to act of the Company or a Member or to declare such party in default shall not be deemed or constitute a waiver by the Company or the Member of any rights hereunder.

### **14.3      Notice.**

(a) Any Notice required or permitted to be given hereunder shall be in writing and shall be (i) personally delivered, (ii) transmitted by postage pre-paid first class certified United States mail, (iii) transmitted by pre-paid, overnight delivery, or (iv) transmitted by facsimile transmission.

(b) All Notices and other communications shall be deemed to have been duly given, received and effective on (i) the date of receipt if delivered personally, (ii) two (2) business days after the date of posting if transmitted by mail, (iii) the business day after the date of transmission if by overnight delivery, or (iv) if transmitted by facsimile transmission, the date of transmission with confirmation by the originating facsimile transmission machine of receipt by the receiving facsimile machine of such transmission.

(c) Any Member may change his, her or its address for purposes hereof by Notice given to the other Members and the Company.

(d) Notices hereunder shall be directed to the last known address of a Member as shown in the records of the Company.

### **14.4      Amendment**

(a) Except as otherwise expressly provided elsewhere in this Agreement, this Agreement shall not be altered, modified or changed except by an amendment approved by the Members.

(b) In addition to any amendments otherwise authorized herein, amendments may be made to this Agreement from time to time by the Management Committee without the consent of the Members (i) to cure any ambiguity or to correct or supplement any provision herein which may be inconsistent with any other provision herein or (ii) to delete or add any provisions of this Agreement required to be so deleted or added by federal, state or local law or by the Securities and Exchange Commission, the Internal Revenue Service, or any other Federal agency or by a state securities or "blue sky" commission, a state revenue or taxing authority or any other similar entity or official.

### **14.5      No Third Party Rights**

None of the provisions contained in this Agreement shall be for the benefit of or enforceable by any third parties, including creditors of the Company. The parties to this Agreement expressly retain any and all rights to amend this Agreement as herein provided, notwithstanding any interest in this Agreement or in any party to this Agreement held by any other Person.

### **14.6      Severability**

In the event any provision of this Agreement is held to be illegal, invalid or unenforceable to any extent, the legality, validity and enforceability of the remainder of this Agreement shall not be affected thereby and shall remain in full force and effect and shall be enforced to the greatest extent permitted by law.

**14.7 Nature of Interest in the Company**

A Member's Interest shall be personal property for all purposes.

**14.8 Binding Agreement**

Subject to the restrictions on the disposition of Interests herein contained, the provisions of this Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective heirs, personal representatives, successors and permitted assigns.

**14.9 Headings**

The headings of the Articles and Sections of this Agreement are for convenience only and shall not be considered in construing or interpreting any of the terms or provisions hereof.

**14.10 Word Meanings**

The words such as "herein," "hereinafter," "hereof," and "hereunder" refer to this Agreement as a whole and not merely to a subdivision in which such words appear unless the context otherwise requires. The singular shall include the plural, and vice versa, unless the context otherwise requires.

**14.11 Counterparts**

This Agreement may be executed in several counterparts, all of which together shall constitute one agreement binding on all parties hereto, notwithstanding that all the parties have not signed the same counterpart.

**14.12 Entire Agreement**

This Agreement contains the entire agreement between the parties and supersedes all prior writings or agreements with respect to the subject matter hereof.

**14.13 Non Disclosure**

Each Member for itself and on behalf of its Affiliates agrees to keep the provisions of this Agreement and all schedules, appendices and exhibits hereto in confidence except pursuant to the requirements of applicable law and shall not publish or otherwise disclose the same at any time without the prior written consent of all the Members.

**14.14 Governing Law and Disputes**

Any controversy or claim arising out of or relating to this Agreement, including the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules. The arbitration hearing shall take place in Buffalo, New York before a single arbitrator. The arbitrator shall only require the parties to disclose documents that they intend to rely on in presentation of their case at the hearing; provided, however, that at the request of a party, the arbitrator may at his or her discretion order the deposition of witnesses. Depositions shall in any event be limited to a maximum of two depositions per party, each of a maximum of four hours duration, unless the arbitrator otherwise determines. Any dispute or objections regarding discovery or the relevance of evidence shall be determined by the arbitrator. All discovery shall be completed within 120 days following the appointment of the arbitrator, unless the arbitrator otherwise determines. No demand for arbitration may be made after the date when the institution of legal or equitable proceedings based on such claim or dispute would be barred by the applicable statute of limitation. The arbitrator is not authorized to award punitive or other damages not measured by the prevailing party's actual damages. The arbitrator shall issue a reasoned award. Judgment upon the arbitrator's award may be entered in any court having jurisdiction. All issues relating to arbitrability or the enforcement of the agreement to arbitrate contained herein shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.), notwithstanding any provision of this Agreement specifying the state law under which this Agreement shall be governed and construed. The arbitration proceedings and arbitrator's award shall be maintained by the parties as strictly confidential, except as is otherwise required by court order or as is necessary to confirm, vacate or enforce the award and for disclosure in confidence to the parties' respective attorneys, tax advisors and senior management. Notwithstanding anything to the contrary in the foregoing, either party may immediately bring a proceeding seeking preliminary injunctive relief in a court having jurisdiction thereof which shall remain in effect until a final award is made in the arbitration.

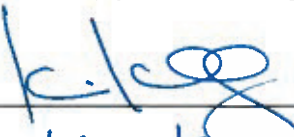
*Remainder of page left intentionally blank. Signature page to follow.*



**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the date first written above.

**MEMBERS**

**DELAWARE NORTH COMPANIES  
TRAVEL HOSPITALITY SERVICES, INC.**

By:   
Name: Kevin Kout  
Title: President

**OPTIMAL CONCESSIONS, LLC**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**TRUGOY GROUP, LLC**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the date first written above.

**MEMBERS**

**DELAWARE NORTH COMPANIES  
TRAVEL HOSPITALITY SERVICES, INC.**

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

Name: \_\_\_\_\_

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

**OPTIMAL CONCESSIONS, LLC**

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

Name: ZACHARY E. MCNEAL

Title: Owner

**TRUGOY GROUP, LLC**

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

Name: \_\_\_\_\_

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

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the date first written above.

**MEMBERS**

**DELAWARE NORTH COMPANIES  
TRAVEL HOSPITALITY SERVICES, INC.**

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

Name: \_\_\_\_\_

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

**OPTIMAL CONCESSIONS , LLC**

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

Name: \_\_\_\_\_

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

**TRUGOY GROUP, LLC**

By: Colleen A. Forst

Name: COLLEEN A. FORST

Title: PRESIDENT

**SCHEDULE A – MEMBERS AND MANAGEMENT COMMITTEE**

| <u>Members</u>   | <u>Percentage Interest</u> | <u>Initial Capital Contribution</u> |
|--|----------------------------|-------------------------------------|
| Delaware North Companies Travel Hospitality Services, Inc. | 67%                        | [____]                              |
| Optimal Concessions, LLC                                   | 16.5%                      | [____]                              |
| Trugoy Group , LLC   | 16.5%                      | [____]                              |

Management Committee

Kevin Kelly (Delaware North)

Robert Beckman (Delaware North)

Jeffrey Friedman (Delaware North)

Zach McNeal (Optimal)

Coleen Forst (Trugoy)

## **SCHEDULE B - TAXES**

### **1. Definitions.**

“Capital Account” means a separate account established by the Company and maintained for each Member in accordance with this **Schedule B**.

“Carrying Value” shall mean with respect to property contributed to the Company by a Member, the fair market of such property at the time of contribution as determined by the Management Committee. The initial Carrying Value of any other property shall be the adjusted basis of such property for federal income tax purposes at the time it is acquired by the Company. The initial Carrying Value of a property shall be reduced (but not below zero) by all subsequent depreciation, cost recovery and amortization deductions with respect to such property as taken into account in determining Profits and Losses for Tax Purposes. The Carrying Value of any property shall be adjusted from time to time in accordance with Section 2(b) of this **Schedule B**, Treasury Regulation Section 1.704-1(b)(2)(iv)(m), and to reflect changes, additions or other adjustments to the Carrying Value for dispositions, acquisitions or improvements of Company properties, as deemed appropriate by the Management Committee.

“Member’s Share of Company Minimum Gain” means an amount determined (i) in accordance with rules applicable to partnerships in Treasury Regulation Section 1.704-2(g) with respect to a nonrecourse liability of the Company in which no Member bears the economic risk of loss and (ii) in accordance with rules applicable to partnerships in Treasury Regulation Section 1.704-2(i) with respect to a nonrecourse liability of the Company in which any Member bears any portion of the economic risk of loss.

“Minimum Gain” means the amount of gain, if any, as set forth in rules applicable to partnerships in Treasury Regulations Section 1.704-2(d) that would be realized by the Company if it disposed of (in a taxable transaction) property subject to a nonrecourse liability of such Company, in full satisfaction of such liability (and for no other consideration).

“Profits and Losses For Tax Purposes” means, for accounting and tax purposes, the Company’s taxable income or loss for any taxable year or period, as determined under the capital accounting rules of Treasury Regulation Section 1.704-1(b)(2)(iv) for purposes of adjusting the Capital Accounts of the Members, including, without limitation, the provisions of paragraphs 1.704-1(b)(2)(iv)(g) and 1.704-1(b)(4) of those regulations relating to the computation of items of income, gain, deduction and loss; provided, however, that any items allocated pursuant to Section 4 of this **Schedule B** shall be excluded from the computation of Profits and Losses for Tax Purposes.

“Treasury Regulations” means the regulations promulgated by the Treasury Department with respect to the Code, as such regulations are amended from time to time, or corresponding provisions of future regulations.

## **2. Maintenance of Capital Accounts.**

The Company shall maintain for each Member a separate account (“**Capital Account**”) in accordance with the rules applicable to partnerships in Treasury Regulation 1.704 1(b)(2)(iv) or any successor Treasury Regulations which by their terms would be applicable to the Company. No Member shall be entitled to receive or be credited with any interest on the balance of such Member’s Capital Account at any time. Consistent with and as permitted in the provisions of Treasury Regulation Section 1.704 1(b)(2)(iv)(f), the Capital Accounts of all Members and the Carrying Values of all Company properties may (as reasonably determined by the Management Committee) be adjusted upwards or downwards to reflect any unrealized gain or unrealized loss with respect to such Company property (as if such unrealized gain or unrealized loss had been recognized upon an actual sale of such property for the amount of its fair market value immediately prior to the event giving rise to revaluation under this Section 2(b) of **Schedule B**, and had been allocated among the Members pursuant to Section 3 of this **Schedule B**).

## **3. Allocation of Profits and Losses For Tax Purposes.**

Except as otherwise provided in Section 4 of this **Schedule B**, all Profits and Losses for Tax Purposes of the Company shall be allocated among the Members in accordance with their respective Percentage Interests.

## **4. Special Allocations.**

4.1 Notwithstanding any other provisions of this Agreement to the contrary, if the amount of any Minimum Gain at the end of any taxable year is less than the amount of such Minimum Gain at the beginning of such taxable year, there shall be allocated to each Member gross income or gain (in respect of the current taxable year and any future taxable year) in an amount equal to such Member’s share of the net decrease in Minimum Gain during such year in accordance with Treasury Regulation Section 1.704 2(f). Such allocation of gross income or gain shall be made prior to any other allocation of income, gain, loss, deduction or Section 705(a)(2)(B) expenditure for such year. Any such allocation of gross income or gain pursuant to this **Section 4.1 of Schedule B** shall be taken into account, to the extent feasible, in computing subsequent allocations of income, gain, loss, deduction or credit of the Company so that the net amount of all items allocated to each Member pursuant to this paragraph shall, to the extent possible, be equal to the net amount that would have been allocated to each such Member pursuant to the provisions of this paragraph if the allocations made pursuant to the first sentence of this paragraph had not occurred. This provision is intended to be a minimum gain chargeback as described in Treasury Regulation Section 1.704 2(f) and shall be interpreted consistent therewith.

4.2 Notwithstanding any other provisions of this Agreement to the contrary, except as provided in **Section 4.1 of this Schedule B**, if there is a net decrease (as determined in accordance with Treasury Regulation Section 1.704 2(i)(3)) during a taxable year in Minimum Gain attributable to a non-recourse debt of the Company for which any Member bears the economic risk of loss (as determined accordance with Treasury Regulation Section 1.704-2(b)(4)), then any Member with a share of the Minimum Gain (as determined in accordance with

Treasury Regulation Section 1.704 2(i)(5)) attributable to such debt (determined at the beginning of such taxable year) shall be allocated in accordance with Treasury Regulation Section 1.704 2(i)(4) items of Company income and gain for such taxable year (and, if necessary, for subsequent years) in an amount equal to such Member's share of the net decrease in the Minimum Gain attributable to such Member in accordance with Treasury Regulation Section 1.704 2(i). Any allocations of items of gross income or gain pursuant to this paragraph shall not duplicate any allocations of gross income or gain pursuant to **Section 4.1 of this Schedule B** and shall be taken into account, to the extent feasible, in computing subsequent allocations of the Company, so that the net amount of all items allocated to each Member pursuant to this paragraph shall, to the extent possible, be equal to the net amount that would have been allocated to each Member pursuant to the provisions of this paragraph if the allocations made pursuant to the first sentence of this paragraph had not occurred. This provision is intended to be a partner minimum gain chargeback as described in Treasury Regulation Section 1.704 2(i)(4) and shall be interpreted consistent therewith.

4.3 Notwithstanding any other provisions of this Agreement to the contrary, except as provided in **Sections 4.1 and 4.2 of this Schedule B**, if any Member unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulation Section 1.704 1(b)(2)(ii)(d)(4), (5) or (6) that reduces any Member's Capital Account below zero or increases the negative balance in such Member's Capital Account (taking into account such Member's deficit restoration obligation), gross income and gain shall be allocated to such Member in an amount and manner sufficient to eliminate any negative balance in such Member's Capital Account (taking into account such Member's deficit restoration obligation) created by such adjustments, allocations or distributions as quickly as possible in accordance with Treasury Regulation Section 1.704 1(b)(2)(ii)(d). Any such allocation of gross income or gain pursuant to this paragraph shall be in proportion with such negative Capital Accounts of the Members. Any allocations of items of gross income or gain pursuant to this paragraph shall not duplicate any allocations of gross income or gain made pursuant to **Section 4.1 or 4.2 of this Schedule B** and shall be taken into account, to the extent feasible, in computing subsequent allocations of income, gain, loss, deduction or credit, so that the net amount of all items allocated to each Member pursuant to this paragraph shall, to the extent possible, be equal to the net amount that would have been allocated to each such Member pursuant to the provisions of this paragraph if such adjustments, allocations or distributions had not occurred. This provision is intended to be a qualified income offset as described in Treasury Regulation Section 1.704 1(b)(2)(ii)(d) and shall be interpreted consistent therewith.

4.4 Any item of Company loss, deduction or Section 705(a)(2)(B) expenditure that is attributable to a non-recourse debt of the Company for which any Member bears the economic risk of loss (as determined in accordance with rules applicable to partnerships in Treasury Regulation Section 1.704-2(b)(4)) shall be allocated to such Member in accordance with Treasury Regulation Section 1.704 2(i).

4.5 In accordance with Section 704(c) and the Regulations thereunder, if property is contributed to the Company or revalued in accordance with Treasury Regulations § 1.704 1(b)(2)(iv)(f), and the fair market value of such property on the date of its contribution or revaluation differs from the adjusted tax basis of such property, then any income, gain, loss and deduction with respect to such property shall, solely for tax purposes, be allocated among the

Members so as to take into account any variation between the adjusted tax basis to the Company of such property for federal income tax purposes and the fair market value of such property on the date of contribution to or revaluation by the Company. Such allocations shall be made using a reasonable method that is consistent with the purpose of Section 704(c) of the Code pursuant to Treasury Regulation Section 1.704-3.

**5. Persons Entitled to Allocations.**

With respect to any period in which a transferee of the interest of a Member is first entitled to a share of the Profits And Losses For Tax Purposes, the Company shall, with respect to such Profits And Losses For Tax Purposes, allocate such items among the Persons who were entitled to such items on a basis consistent with the provisions of the Code and the Treasury Regulations.

**6. Tax Matter Member.**

Delaware North is hereby designated as the Company's "**Tax Matters Member**," which shall have the same meaning as "tax matters partner" under the Code, and in such capacity is hereby authorized and empowered to act for and represent the Company and each of the Members before the Internal Revenue Service and any court with respect to any audit or examination of any Company tax return and before any court and to retain such experts (including, without limitation, outside counsel or accountants) as deemed necessary. The Tax Matters Member shall keep all Members fully informed of the progress of any examination of, audit of or other proceeding related to the affairs of the Company. Each Member and former Member agrees to cooperate with the Tax Matters Member and to do or refrain from doing any or all things reasonably required by the Members in connection with the conduct of such proceedings.

**7. Negative Balance.**

No Member with a negative balance in such Member's Capital Account shall have any obligation to the Company or any other Member to restore said negative balance to zero.



## SCHEDULE C – MEMBER DUTIES

### 1. DELAWARE NORTH

Delaware North shall be responsible for the following functions and such additional functions and duties as are assigned to Delaware North by the Management Committee from time to time:

- (i) Design, development, and construction of the Leased Premises;
- (ii) Purchasing goods, supplies, equipment and material for the Company's daily operations;
- (iii) Handling all legal matters relating to the Company and legal support for day to day operations;
- (iv) Payroll administration and employee benefits management for employees of the Company;
- (v) Company-wide accounting functions;
- (vi) Tax matters related to the Company's operations;
- (vii) Information technology systems and support; and
- (viii) Purchasing and maintaining insurance for the Company.

In addition, Delaware North shall appoint a General Manager (“**General Manager**”) who shall manage, oversee, and direct all concessions matters and provide guidance to its department managers and assistant managers, including such duties as:

- (i) Providing guidance and final approval for each outlets menu mix and changes to the menu mix;
- (ii) Conducting and coordinating on-site training sessions, such as Delaware North's internet based training sessions, new product training, Guest Path® training, and safety programs for compliance with OSHA requirements and Authority rules and regulations and other training to maintain Delaware North's overall quality standards;
- (iii) Reviewing marketing and promotional concepts and compliance with franchisor requirements and brand standards;
- (iv) Providing overall supervision of all employees in accordance with the policies and procedures adopted by the Management Committee, including directly participating in selecting, interviewing, and hiring new employees and making recommendations regarding hiring and firing of employees;

- (v) Conducting sanitation-review and encouraging personnel awareness of procedures pertaining to health and sanitation;
- (vi) Performing weekly and monthly financial performance evaluations and making recommendations to the Joint Venture Operating Committee for improvements;
- (vii) Attending monthly meetings with the Authority's management personnel and quarterly meetings with the Airport director of facilities to review operations; and
- (viii) Across the Company's operations, performing periodic line checks to ensure customer flow, perform table checks, talking to customers to obtain performance feedback, monitoring the temperature of cold and hot products, checking labels and dates on products, monitoring product rotation, assisting with responses to customer complaints and concerns, etc.

## **2. OPTIMAL**

Optimal shall be responsible for:

- (i) Participating in all meetings of the Management Committee;
- (ii) Participating in the review and analysis of the Business Plan;
- (iii) Appointing an assistant manager (“**Assistant Manager**”) to operate a location designated by the Management Committee, who shall be responsible for overseeing daily operations at that location; such manager shall be a qualified individual paid by the Company but selected and directly answerable to Optimal; and
- (iv) Through its Assistant Manager and under the guidance of the General Manager, manage all aspects of the assigned location(s), including the selection, development, and performance of employees, optimizing profits and increasing sales, budget management, implementing standard operating procedures, controlling all aspects of stock management within the outlet, actively promoting the use of up selling techniques within the outlet, monitoring all aspects of food and beverage quality and hygiene, and ensuring adherence with brand standards.

## **3. TRUGOY**

Trugoy shall be responsible for:

- (i) Participating in all meetings of the Management Committee;
- (ii) Participating in the review and analysis of the Business Plan;

- (iii) Appointing an assistant manager (“Assistant Manager”) to a location designated by the Management Committee, who shall be responsible for overseeing daily operations at that location; such manager shall be a qualified individual paid by the Company but selected and directly answerable to Optimal; and
- (iv) Through its Assistant Manager and under the guidance of the General Manager, Optimal shall manage all aspects of the assigned location(s), including the selection, development, and performance of employees, optimizing profits and increasing sales, budget management, implementing standard operating procedures, controlling all aspects of stock management within the outlet, actively promoting the use of up selling techniques within the outlet, monitoring all aspects of food and beverage quality and hygiene, and ensuring adherence with brand standards.

**SCHEDULE D –STORE LOCATION**

**EXHIBIT H (CITY'S WORK)**

[Intentionally Left Blank]

**EXHIBIT I (SCHEDULE OF ASSETS AND AMORTIZATION)**



## APPENDIX A

### COMPLIANCE WITH NONDISCRIMINATION REQUIREMENTS

NOTE: As used below the term "Contractor" shall mean and include Concessionaire, and the term "sponsor" shall mean the "City."

During the term of this Contract, the Contractor, for itself, its assignees and successors in interest (hereinafter referred to as the "Contractor") agrees as follows:

1. **Compliance with Regulations.** The Contractor will comply with the Title VI List of Pertinent Non-Discrimination Statutes and Authorities, as they may be amended from time to time, which are herein incorporated by reference and made part of this Agreement.

2. **Nondiscrimination.** The Contractor, with regard to the work performed by it during this Agreement, will not discriminate on the grounds of race, creed, color, national origin, or sex in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and Regulations, including employment practices when the Agreement covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.

3. **Solicitations for Subcontractors, Including Procurements of Materials and Equipment.** In all solicitations, either by competitive bidding or negotiation, made by the Contractor for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier will be notified by the Contractor of the Contractor's obligations under this Agreement and the Acts and Regulations relative to nondiscrimination on the grounds of race, color, or national origin.

4. **Information and Reports.** The Contractor will provide all information and reports required by the Acts, Regulations, or directives issued pursuant thereto and will permit access to its books, records, accounts other sources of information, and its facilities as may be determined by the sponsor or the Federal Aviation Administration (FAA) to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a Contractor is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor shall so certify to the sponsor or the FAA, as appropriate, and will set forth what efforts it has made to obtain the information.

5. **Sanctions for Noncompliance.** In the event of a Contractor's noncompliance with the nondiscrimination provisions of this Agreement, the sponsor will impose such Contract sanctions as it or the FAA may determine to be appropriate including, but not limited to:

- a. Withholding of payments to the Contractor under this Agreement until the Contractor complies; and/or
- b. Cancelling, terminating, or suspending this Agreement, in whole or in part.

6. **Incorporation of Provisions.** The Contractor will include the provisions of paragraphs one (1) through six (6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations or directives issued pursuant thereto. The Contractor will take action with respect to any subcontract or procurement as the sponsor or the FAA may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the Contractor becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the Contractor



may request the sponsor to enter into such litigation to protect the interests of the sponsor. In addition, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

## APPENDIX C

### STANDARD FEDERAL ASSURANCES AND NONDISCRIMINATION IN CONSTRUCTION, MAINTENANCE, OPERATION OF FACILITIES

As used below, the term “sponsor” will mean City.

Concessionaire, for himself/herself, his/her heirs, personal representatives, successors in interest, and assigns, as part of consideration hereof, does hereby covenant and agree, as a covenant running with the land that:

1. In the event facilities are constructed, maintained, or otherwise operated on the property described in this Agreement for a purpose for which a FAA activity, facility, or program is extended or for another purpose involving the provision of similar services or benefits, the Concessionaire will maintain and operate such facilities and services in compliance with all requirements imposed by the Nondiscrimination Acts and Regulations listed in the Pertinent List of Nondiscrimination Authorities, as may be amended from time to time, such that no person on the grounds of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities.
2. With respect to this Agreement, in the event of breach of any of the above Nondiscrimination covenants, sponsor will have the right to terminate this Agreement, and to enter, re-enter, and repossess said lands and facilities thereon, and hold the same as if this Agreement had never been made or issued.

## **APPENDIX D**

### **STANDARD FEDERAL ASSURANCES AND NONDISCRIMINATION IN CONSTRUCTION, USE, OR ACCESS TO FACILITIES**

As used below, the term "sponsor" will mean City.

- A. Concessionaire for himself/herself, his/her heirs, personal representatives, successors in interest, and assigns, as part of the consideration hereof, does hereby covenant and agree, as a covenant running with the land, that (1) no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over, or under such land, and the furnishing of services thereon, no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that the Concessionaire will use the Premises in compliance with all other requirements imposed by or pursuant to the List of Pertinent Nondiscrimination Authorities.
- B. With respect this Agreement, in the event of breach of any of the above nondiscrimination covenants, sponsor will have the right to terminate this Agreement and to enter, re-enter, and repossess said land and the facilities thereon, and hold the same as if this Agreement had never been made or issued.

## APPENDIX E

### TITLE VI LIST OF PERTINENT NONDISCRIMINATION AUTHORITIES

As used below, the term "Contractor" will mean and include Concessionaire and the term "sponsor" will mean City.

During the performance of this Agreement, the Contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "Contractor") agrees to comply with the following nondiscrimination statutes and authorities; including but not limited to:

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits' discrimination on the basis of race, color, national origin);
- 49 CFR part 21 (Non-discrimination In Federally-Assisted Programs of The Department of Transportation-Effectuation of Title VI of The Civil Rights Act of 1964);
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601 ), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S. C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 *et seq.*), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 USC§ 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal-aid recipients, sub-recipients and Contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 -12189) as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38;
- The Federal Aviation Administration's Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;

- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S. C. 1681 et seq).

## APPENDIX 1

### DISADVANTAGED BUSINESS ENTERPRISES- REQUIRED STATEMENTS

As used below, the term "Contractor" will mean and include Concessionaire, and the term "sponsor" will mean City.

**Contract Assurance (§ 26.13)** – The Contractor or subcontractor will not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The Contractor will carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted Contracts.

Failure by the Contractor to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy, as the recipient deems appropriate.

**Prompt Payment (§26.29)** – The prime Contractor agrees to pay each subcontractor under this prime Contract for satisfactory performance of its Contract no later than thirty (30) days from the receipt of each payment the prime Contractor receives from Contractor. The prime Contractor agrees further to return retainage payments to each subcontractor within thirty (30) days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the sponsor. This clause applies to both DBE and non-DBE subcontractors.

## **APPENDIX 2**

### **ACDBE NONDISCRIMINATION AND ASSURANCE REQUIREMENTS**

(1) This Agreement is subject to the requirements of the U.S. Department of Transportation's regulations 49 CFR part 23. Concessionaire or Contract agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management Contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR part 23.

(2) The Concessionaire or Contractor agrees to include the above statements in any subsequent concession agreement or Contract covered by 49 CFR part 23, that it enters and cause those business to similarly include the statements in further agreements.

### **APPENDIX 3**

#### **ACDBE/DBE POLICY AND OBJECTIVE STATEMENTS:**

This part 23 seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance;
- (b) To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
- (c) To ensure that the Department's ACDBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as ACDBEs;
- (e) To help remove barriers to the participation of ACDBEs in opportunities for concessions at airports receiving DOT financial assistance; and
- (f) To provide appropriate flexibility to airports receiving DOT financial assistance in establishing and providing opportunities for ACDBEs.

#### **Policy Statement**

##### **Section 26.1, 26.23 Objectives/Policy Statement**

City has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. City has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, City has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of City to ensure that DBEs are defined in part 26, have an equal opportunity to receive and participate in DOT-assisted Contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of DOT- assisted Contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted Contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted Contracts; and
6. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

DSBO has been delegated as the DBE Liaison Officer. In that capacity, DSBO is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same



priority as compliance with all other legal obligations incurred by the sponsor in its financial assistance agreements with the Department of Transportation.

Sponsor has disseminated this policy statement to the City and County of Denver and all of the components of our organization. We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT -assisted Contracts.

\_\_\_\_\_  
CHIEF EXECUTIVE OFFICER

\_\_\_\_\_  
DATE