

**MANAGEMENT AGREEMENT BETWEEN  
THE CITY OF MIAMI BEACH, FLORIDA  
AND  
THE RHYTHM FOUNDATION, INC.  
FOR THE MANAGEMENT OF THE NORTH SHORE BAND SHELL**

**THIS AGREEMENT**, is made and executed as of this 23 day of OCT, 2019 (“Effective Date”), by and between the CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida, whose address is 1700 Convention Center Drive, Miami Beach, Florida 33139 (“City”), and THE RHYTHM FOUNDATION, INC., a Florida not-for-profit corporation, whose principal address is 7275 Collins Avenue, Miami Beach, FL 33141 (“TRF”).

**RECITALS**

**WHEREAS**, City is the owner of the North Shore Band Shell, located at 7275 Collins Avenue, Miami Beach, Florida 33141; and which is more particularly described and depicted in Exhibit “A,” attached hereto and made a part hereof (the “Band Shell” or the “Facility”); and

**WHEREAS**, TRF is a Florida not-for-profit (501(c)3) arts organization which seeks to increase international awareness and cultural exchange through the presentation of live music and related media programming; and

**WHEREAS**, on April 23, 2014, the City issued Invitation to Negotiate No. 2014-215-LR for Band Shell Management Services (the “ITN”); and

**WHEREAS**, on September 10, 2014, the City Commission adopted Resolution No. 2014-28722, authorizing the administration to negotiate with TRF, as the top-ranked proposer pursuant to the ITN, for the management and operation of the Facility; and

**WHEREAS**, on June 5, 2019, the City Commission adopted Resolution No. 2019-30846 accepting the recommendation of the City Manager waiving by 5/7<sup>th</sup> vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City, and approving and authorizing the City Manager to execute a management agreement between the City and The Rhythm Foundation for management of the City’s North Shore Band Shell, for a period of five (5) years, with two (2) successive two (2) year renewal options; and

**WHEREAS**, City desires to engage TRF, and TRF desires to accept the engagement, to provide management services for the Facility on the terms and conditions set forth herein.

**NOW THEREFORE**, recognizing the aforesaid recitals as true and correct and incorporating herein, and in consideration of the mutual covenants and conditions herein contained, it is agreed by the parties hereto as follows:

## **SECTION 1. DEFINITIONS.**

For purposes of this Agreement, the following terms have the meanings referred to in this Section 1:

"Affiliate" -- an entity that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a specified entity. For purposes of this definition, "control" means ownership of equity securities or other ownership interests which represent more than 51% of the voting power in the controlled entity.

"City" -- as defined in the first paragraph of this Agreement.

"City Commission" -- the governing and legislative body of the City.

"City Manager" -- the chief executive officer of the City, or such person who shall be the City Manager's designee, as defined below and as may, from time to time, be authorized in writing by the City Manager to act for him/her with respect to any or all matters pertaining to this Agreement. City Manager's designee shall be the City's Parks and Recreation Department Director.

"Commencement Date" -- as defined in Section 2.

"Contract Year" -- each one year period beginning October 1st, and ending September 30th.

"Effective Date" -- provided that this Agreement has been executed by City and TRF, the date set forth in the first paragraph of this Agreement.

"Event" -- all uses at the Facility which involve a scheduled show with a beginning and ending time, typically all within the same day. With respect to a "Series" (as such term is hereafter defined), each show within the Series shall constitute an Event.

"Event Expenses" -- any and all expenses incurred or payments made by TRF in connection with the occurrence of an Event at the Facility including, but not limited to, costs for staffing, and costs relating to set-up and clean-up.

"Expiration Date" -- as defined in Section 2

"Facility" -- as defined in the Background Section of this Agreement, and as depicted in Exhibit "A" hereto.

"Facility Rentals" -- temporary use of the Facility at specific interval of time pre-determined and agreed upon by TRF.

"Fiscal Year" -- each City fiscal year beginning October 1st and ending September 30th.

"Governmental Requirements" -- all laws, ordinances, rules, regulations, statutes, policies and procedures (including administrative guidelines), and other legal requirements of any governmental body or authority or any agency thereof (including, without limitation, federal, State, County, and City).

"Net Operation Loss/Profit" -- with respect to a Fiscal Year, the excess, if any, of Operating Expenses for such Fiscal Year over Operating Revenues for such Fiscal Year, in the case of a loss; and the excess, if any, of Operating Revenues for such Fiscal Year over Operating Expenses for such Fiscal Year, in the case of a profit.

“Operating Expenses” -- any and all expenses and expenditures of whatever kind or nature incurred, directly or indirectly, by TRF in operating, managing, maintaining, and promoting the Facility including, but not limited to: employee compensation, employee benefits, supplies, materials, costs of any independent contractors, advertising costs, all costs of maintaining the Facility (as required by this Agreement), marketing and public relations costs and commissions, janitorial and cleaning expenses, dues and membership costs, amounts expended to procure and maintain permits and licenses, sales taxes imposed upon rentals, professional fees directly relating to the operation of the Facility, printing costs, Event Expenses, postage and freight costs, equipment rental costs, computer equipment leases and line charges, telephone and telecommunications services, artist and talent fees, show settlement charges, security expenses, travel and entertainment expenses in accordance with TRF’s normal policies, the cost of employee uniforms, safety and medical expenses, exterminator costs, costs relating to the maintenance of signage, costs associated with compliance of Governmental Requirements, all premiums for insurance carried by TRF pursuant to Section 14, and all other costs of operating the Facility. Operating Expenses **shall not**, however, include any costs of litigation between City and TRF, or any costs that are specified in this Agreement as costs to be paid by City. All Operating Expenses shall be determined in accordance with generally accepted accounting principles consistently applied and recognized on a full accrual basis.

“Operating Revenues” -- any and all revenues of every kind or nature derived from operating, managing or promoting the Facility including, but not limited to: concession fees, rentals, revenues from merchandise sales, advertising sales, equipment rentals, box office revenues, food service and concession revenues (However, if such revenues are collected in the first instance by and retained by the concessionaire, only the amount of such revenues paid by the concessionaire to TRF shall be included as Operating Revenues), commissions or other revenues from decoration and set-up, security and other subcontractors (However, if such revenues are collected in the first instance by and retained by such subcontractors, only the amount of such revenues paid by such contractors to TRF shall be included as Operating Revenues), revenues generated from separate agreements with TRF Affiliates pertaining to the Facility, interest revenues, and any other miscellaneous operating revenues; all as determined in accordance with generally accepted accounting principles consistently applied and recognized on a full accrual basis. For the sake of clarity, the parties acknowledge that revenues from the sale of tickets for Events at the Facility **are not** Operating Revenues, but are instead revenues of the promoter and/or performer of each such Event. To the extent that TRF collects such ticket sale revenue on behalf of a promoter and/or performer, such ticket sale revenue shall be the source of funds from which TRF collects the rental charges and other event reimbursements owed by the promoter and/or performer for use of the Facility, which such charges and reimbursements are Operating Revenues hereunder. Operating Revenues shall also **not** include any revenues from name-in-title rights (i.e., the right to name the exterior or interior of the Facility or any portion thereof, except as set forth in subsection 8.3 hereof), and any signage related thereto, all of which

are specifically reserved to the City.

“Quarterly/Quarter(s)” – October 1<sup>st</sup>, January 1<sup>st</sup>, April 1<sup>st</sup> and July 1<sup>st</sup> of each Fiscal Year.

“Series” -- a sequence of Events which may or may not involve the same production elements, but can be characterized by a unifying theme and schedule.

“TRF” -- as defined in the first paragraph of this Agreement.

## **SECTION 2. TERM.**

2.1 Initial Term. This Agreement shall be for a period of five (5) years, commencing retroactively on October 1, 2019 (Commencement Date), and which shall end on September 30, 2024 (Expiration Date), unless earlier terminated pursuant to the provisions of this Agreement.

2.2 Renewal Term(s). At its sole option and discretion, the City, through its City Manager, may extend this Agreement for two (2) successive two (2) year terms (each a “Renewal Term”) by giving written notice to the Manager of such intention not less than ninety (90) days prior to the expiration of the Initial Term or an exercised Renewal Term. The Initial Term and any successive Renewal Terms, if approved by the City Manager, may collectively be referred to as the “Term”.

2.2.1 Notwithstanding anything in this Section 2, in the event TRF decides not to renew the Agreement, it shall provide the City Manager with written notice of its intent not to renew at least 365 days prior to the Expiration Date, or ninety (90) days written notice prior to the expiration date of the then current Renewal Term, as the case may be.

## **SECTION 3. NORTH SHORE BAND SHELL.**

The Facility subject to this Agreement shall be those facilities and spaces more specifically described in Exhibit “A.”

## **SECTION 4. OPERATION AND MANAGEMENT OF THE BAND SHELL.**

4.1 General Scope. City hereby engages TRF to operate, manage, maintain, promote and market the Facility during the Term, upon the terms and conditions hereinafter set forth.

4.2 Manager of the Facility. TRF accepts the engagement and agrees to operate, manage, maintain, promote and market the Facility, at a minimum, in a manner and quality consistent with the Comparable Facilities defined in Section 5.1 hereof. Subject to the terms of this Agreement, TRF shall be, as agent for the City, the sole and exclusive manager of the City to operate, manage, maintain, promote and market the Facility during the Term. In such capacity, except as otherwise expressly reserved under this Agreement to the City, and/or except for such matters as are subject to the approval of the City or City Manager, TRF shall have exclusive authority over the management and operation of the Facility.

4.3 Permitted Uses. TRF shall use the Facility solely and exclusively as a venue for its not-for-

profit cultural presentation company. The Facility shall be used primarily as a venue for top-quality cultural entertainment. The venue may also be used as a live theatrical entertainment venue and public auditorium, or any combination thereof, and for such ancillary uses as are customarily related to such primary use including, without limitation, broadcasting, recording, filming, private parties or functions, food and beverage concessions; in each case in conjunction with an Event then being held; and sale of merchandise related to any Event then being held. TRF shall be responsible for ensuring that any requisite special event permits, which the City of Miami Beach may require for Events at the Facility, are properly secured. Such uses shall include only the following:

- a. Performance venue
- b. Events facility
- c. Rehearsal space
- d. TRF administrative offices;
- e. Food and beverage concession;
- f. Sale of merchandise related to an Event then being held;
- g. Private parties and/or functions in conjunctions with an Event then being held;
- h. As an ancillary use, third party rentals as may occur from time to time;
- i. Facility for film / television / photographic/ audio productions;

The Facility does not include dedicated parking for the building. Patrons of Events may park in public parking lots and garages if and to the extent available, upon paying the applicable parking charges. No other uses shall be permitted without the prior written approval of the City Manager, which approval may be granted or withheld in his sole discretion. Any such other use which the City Manager approves must, however, be in accordance with (i) the Articles of Incorporation and other charter documents of TRF; (ii) all laws and regulations applicable to not-for-profit entities; (iii) all applicable Governmental Requirements; and (iv) all ad valorem tax exempt uses of property under Chapter 196, Florida Statutes.

4.4 Prohibited Uses. It is understood and agreed that the Facility shall be used by TRF during the Term only for the stated purposes in Section 4.3, and for no other purposes or uses whatsoever, without express written permission of the City Manager. Notwithstanding anything contained in Section 4.3, or any other term or condition of this Agreement: (1) TRF will not make or permit any use of the Facility that, directly or indirectly, is forbidden by any Governmental Requirement, or that may be dangerous to life, limb or property; and (2) TRF may not commit waste on the Facility, use the Facility for any illegal purpose, commit a nuisance on the Facility, or allow any toxic, hazardous or dangerous substance to be brought into the Facility or stored therein (other than small quantities of materials customarily used in the operation of a live theatrical performance and production venue, which shall be used and stored in compliance with Governmental Requirements). In the event that TRF uses the Facility for any purposes not expressly permitted herein, then the City, through its City Manager, may declare this Agreement in default and, in

addition to all other remedies available to City, restrain such improper use by injunction or other legal action, with or without notice to TRF.

#### 4.5 Operational Rules for Facility.

On December 17, 2014, the City of Miami Beach Commission passed Resolution No. 2014-28874, attached as Exhibit "H" hereto, requiring certain operational guidelines for the Facility, including the following:

4.5.1 Amplified Sound and Live Entertainment: The City will be installing an audio sound system designed to maintain the audio levels at a maximum level of 105 dBC ("House Sound System"). TRF will only be permitted to use such House Sound System in connection with any Events held at the Facility and, at all times, the sound levels may not exceed 105dBC. Additionally, TFR shall be responsible for ensuring that users of the Facility do not use temporary sound equipment for any Event held at the Facility.

4.5.2 Facility Hours of Operation: 10:00 am to 10:00 pm.; provided, however, that the City Manager shall have the discretion to extend the hours of operation on a case by case basis to 11:00 pm on the weekends (Friday or Saturday) and to 12:30 am on New Year's Eve. Any extension of the hours of operation under this Subsection 4.5.2 shall be given in writing by the City Manager in advance of the scheduled Event.

#### 4.6 Cessation/Suspension of Approved Use(s) and/or Business Activity(ies).

Notwithstanding anything contained in this Agreement, and except for the Permitted Uses expressly set forth in Section 4.3, and in the event that another particular use(s) and/or business activity(ies) has(ve) been approved by the City Manager, and the City Manager thereafter, upon reasonable inquiry, determines that the continuation of such use(s) and/or activity(ies) is(are), or may be, inconsistent, contrary to, and/or detrimental to the Permitted Uses set forth in this Agreement, and/or to the health, safety and/or welfare of the residents of and visitors to the City of Miami Beach, then the City Manager, upon thirty (30) days prior written notice to TRF of same, may revoke, suspend, and/or otherwise disallow the objectionable uses(s) and/or business activity(ies), and TRF shall immediately cease and desist in providing, and/or continuing with, said use(s) and/or business activity(ies) within the time period and in the manner prescribed in the City, subject to such additional guidelines, as may be determined and established by the City Manager, in his/her sole and reasonable discretion and judgment.

### **SECTION 5. SCOPE OF SERVICES.**

5.1 General. TRF shall perform and furnish management services, personnel, and systems and materials, as are appropriate or necessary to operate, manage, supervise, maintain, promote and market the Facility in a manner consistent with the operations, management, promotions and marketing of other similar first-class facilities such as Daytona Beach Band Shell in Daytona Beach, Florida, and ArtsPark

Amphitheater in Hollywood, Florida (“Comparable Facilities”).

5.2 Required Number of Events; Reports; Continuous Operation; Conclusion of Events. In order to ensure the continuous operation of the Facility and, commencing as of the Effective Date, TRF shall cause at least 35 Events to be held at the Facility for each Contract Year during the Term. The aforesaid 35 Events shall be calculated by counting each separate Event in a Series.

5.2.1 Annual Benchmarks

5.2.1.1 TRF shall operate a minimum of 35 new Events per year at the Facility. These 35 new Events shall take precedence over any private rentals of the Facility.

5.2.1.2 In addition to its own produced Events, TRF shall collaborate with other cultural and quality presenting organizations to develop consistent Events at the Facility.

5.2.1.3 TRF shall create and implement consistent marketing materials, including, but not limited to, public relations, social media campaigns, and paid marketing outreach, to ensure that both the North Beach community and South Florida residents in general are aware of programs taking place at the Facility. A detailed plan and budget illustrating marketing efforts will be submitted Quarterly, within fifteen (15) days from the end of each Quarter, with the first report due (for the January, 2020 Quarter) on or before April 15, 2020.

5.2.1.4 TRF shall survey Event goers and community businesses to ensure that TRF’s programming at the Facility continues to benefit North Beach residents and businesses, as well as Miami Beach residents as a whole. The overall satisfaction target shall be 90%. Surveys must be conducted in a format which is auditable.

5.2.1.5 TRF shall submit to the City, every Quarter, within fifteen (15) days from the end of each Quarter, commencing with the January, 2020 Quarter, a detailed report (“Programmatic Quarterly Report”) setting forth the following information:

- i. The number of Events hosted during the previous Quarter, including the charge to the public for the event, if any.
- ii. The number in attendance at the Event.
- iii. The number of Facility Rentals and the charge for said Facility Rentals.
- iv. A detailed plan and budget illustrating the marketing efforts.
- v. The Events scheduled or anticipated for the upcoming Quarter.

5.3 TRF shall cause the Facility to be available to open on a year round basis, subject to closures for reasonable periods for rehearsal, set design, repairs, maintenance and alterations. All Events and all uses shall conclude prior to 10:00 p.m. on weeknights, and may be extended to 11:00 p.m. on weekends (Friday and Saturday) and 12:30 a.m. on New Year’s Eve, if approved in advance by the City

Manager, in writing; provided, however, that TRF's employees and/or contractors may be permitted to remain at the Facility beyond 10:00 pm on weekdays or 11:00 pm on weekends, however, no later than midnight in the event that same is necessary for purposes of taking down and/or dismantling a production, cleaning the Facility after a performance, etc., so long as TRF's activities at the Facility during this time do not disrupt and/or negatively impact the surrounding neighborhood. In the event of such disruption, the City Manager shall have the right to either strictly enforce the hours of operation, or impose reasonable guidelines upon TRF as a condition to keeping the Facility open for the aforesaid purposes (beyond 10:00 pm) **TRF SHALL PROVIDE SURROUNDING CONDOMINIUMS WITH 30 DAYS ADVANCE WRITTEN NOTICE WHEN SCHEDULED EVENTS WILL INVOLVE AMPLIFIED SOUND.**

5.4 Booking Policies. The City and TRF agree and acknowledge that the Facility will be primarily used by TRF to provide top-quality cultural and entertainment to the City's residents and visitors, but that TRF may also, from time to time, rent the Facility to third party presenters consistent with the terms herein. Except as otherwise provided herein, TRF shall have the sole authority to approve the scheduling of any Event in the Facility and Events requiring or having co-promotions and may refuse to book any type or category of Events for any reason whatsoever, so long as the event is consistent with Section 4 of this Agreement and applicable Governmental Requirements. TRF shall have no obligation to book any type or category of Events (or specific Event) that are inappropriate or unprofitable, as reasonably determined by TRF, or which may in any way interfere with the day to day activities of area residents and businesses. **Notwithstanding the preceding, or any other term or condition of this Agreement, the City Manager shall have the right to prohibit certain Events or uses from occurring at the Facility, upon the City Manager's reasonable determination that such Event or use might present unreasonable safety concerns, or violate (or otherwise not comply with) Governmental Requirements.** Notice of any such determination shall be sent by written notice to TRF within thirty (30) days after the City Manager has received the Quarterly booking report from TRF that specifies the potential Event.

5.5 Specific Services. Without limiting the generality of the foregoing, TRF shall perform all of the following services, all without the necessity of first obtaining City's approval (except where otherwise expressly required in this Agreement), and all of which shall be performed by TRF, **at a minimum**, in a manner consistent with the management and operation of the Comparable Facilities:

5.5.1. employ, supervise, and direct all employees and personnel consistent with the provisions of this Agreement. All employees and/or subcontractors shall be employees and/or subcontractors of TRF, its Affiliates, or third parties, **and not of City.** TRF shall be solely responsible for assuring that the Facility is adequately staffed with competent, qualified personnel to fulfill its responsibilities under this Agreement;

5.5.2. administer relationships with all third parties (including, without limitation, entering into contracts and licenses for the food and beverage concessionaire at the Facility) for the use, day to day

maintenance and operation of the Facility, initiate and participate in any and all negotiations, renewals and extensions relating to such third party relationships, and enforce contractual agreements concerning any such third party relationships;

5.5.3. negotiate, execute in its name as agent for the City, deliver and administer any and all licenses, occupancy agreements, sponsorship agreements (excluding name-in-title agreements), rental agreements, booking commitments, concession agreements (excluding valet parking agreements), supplier agreements, service contracts (including, without limitation, contracts for cleaning, decorating and set-up, general maintenance stage equipment, staffing and personnel needs, including guards and ushers, telephone, extermination and other services which are necessary or appropriate, and all other contracts and agreements in connection with the management, maintenance, promotion and operation of the Facility; provided that (1) if any such license, agreement, commitment or contract has a term that extends beyond the remaining Term, such license, agreement, commitment or contract shall provide that it is automatically assigned to City as of the expiration or termination date of this Agreement and that the City Manager may terminate any such agreement without payment thereafter at any time upon not less than ten (10) days written notice; (2) TRF shall have the sole authority to approve the scheduling of any Event to be held at the Facility, subject to the limitations and requirements of this Agreement; and (3) any contract entered into between TRF and a subsidiary and/or Affiliate company shall be at terms and for prices customarily charged by such subsidiary and/or Affiliate company for comparable goods and services elsewhere at rates that are competitive within the industry;

5.5.4. maintain the Facility (excluding all structural components thereof and maintenance and replacement of all electrical HVAC, life safety, mechanical, plumbing and other systems and equipment) in a good and clean condition consistent with other Comparable Facilities and in compliance with all Governmental Requirements, ordinary wear and tear, and casualty loss excepted. Maintenance responsibility shall include, without limitation, preventative and any and all other maintenance and as required in Exhibit "B" to this Agreement (entitled "City of Miami Beach Minimum Specifications for Maintenance of the North Shore Band Shell"). TRF shall keep on-site maintenance manuals and records reflecting all of TRF's maintenance activities, all of which shall be available for inspection by the City Manager or designee upon request. TRF shall submit to the City Manager or designee periodic (not less than Quarterly) reports specifying all maintenance work performed during such period, which reports shall be used by the City's Parks and Recreation Department as part of an annual City maintenance inspection and review, **TRF warrants and represents to City that, prior to the Effective Date, TRF inspected the Facility, and TRF hereby accepts the Facility "as-is, where-is and with all faults."**

5.5.5. rent, lease, or purchase all equipment and maintenance supplies necessary or appropriate for the day-to-day operation and maintenance of the Facility;

5.5.6. establish and adjust prices, rates and rate schedules for the aforesaid licenses,

agreements and contracts, and any other commitments relating to the Facility to be negotiated by TRF in the course of its management, operation, booking and promotion of the Facility. The prices, rates and rate schedules for the rental of the Facility, set forth in the attached Exhibit "C", have been approved by the City Manager or designee. Any subsequent change to the rates or rate schedule shall be submitted to the City Manager or designee for review and written approval, prior to TRF's implementation of same;

5.5.7 pay when due, all Operating Expenses from TRF's own funds;

5.5.8 after consultation with the City Manager and the City Attorney, and subject to approval by the City Attorney or his designee, institute as agent for the City, the costs of which shall be included as Operating Expenses, such legal actions or proceedings necessary or appropriate in connection with the operation of the Facility (using legal counsel approved by the City Attorney), including, without limitation, to collect charges, rents or other revenues due to the City or to cancel, terminate or sue for damages under, any license, use, advertisement or concession agreement for the breach thereof or default thereunder by any licensee, user, advertiser, or concessionaire at the Facility; institute on TRF's a own behalf (and not as agent for City) without consultation or approval of the City, the costs of which shall be included as Operating Expenses, such legal actions or proceedings necessary or appropriate in connection with the operation of the Facility, including, without limitation, to collect charges, rents or other revenues due to the City or TRF or to cancel, terminate or sue for damages under, any license, use, advertisement or concession agreement for the breach thereof or default thereunder by any licensee, user, advertiser, or concessionaire at the Facility;

5.5.9 maintain a master set of all Event records, booking records and schedules for the Facility (which shall be available for inspection by the City Manager upon request);

5.5.10 provide day-to-day administrative services in support of its management activities to ensure that the Facility shall be operated, managed, and maintained and performed in a first class manner consistent with similar first class facilities including, but not limited to, acquisition of services, equipment, supplies and facilities; maintenance and property management; personnel management; record-keeping; collections and billing; and similar services;

5.5.11 engage in advertising, solicitation, and promotional activities necessary to effectively market the Facility and Events, and manage related social media platforms for the Facility. Any marketing materials created for the Facility will remain the exclusive property of the City. In connection with its activities under the terms of this Agreement, TRF will be permitted to use the logo and brand identity of the City of Miami Beach, and of the Facility, as approved by the City Manager;

5.5.12. act as a collection agent for the City on sales taxes as required from for-profit facility rentals of the Facility and remit to the State of Florida such sales taxes;

5.5.13. comply with all City Agreements;

5.5.14. except as otherwise approved by the City Manager, TRF shall not license or allow

the use of any portion of the Facility except as permitted under Section 3 and, in such case, only for short-term users (i.e., less than fourteen (14) consecutive days). TRF shall require that all users of the Facility provide certificates of insurance evidencing appropriate insurance and any other insurance required by the applicable license, use or occupancy agreement. Copies of these certificates shall be furnished to the City Manager or City Manager's designee prior to any Event or use. Such insurance shall be kept in force at all times by all licensees, users, lessees and concessionaires. All liability policies shall name the City and TRF as additional insureds. TRF shall also require all users of the Facility to execute (among the terms of the license or occupancy agreement) an agreement to indemnify, defend and hold harmless the City. TRF standard license or occupancy agreement shall, at a minimum, include the insurance and indemnity requirements contained herein; shall further be subject to the prior review and approval of the City Manager and City Attorney's Office; and – if and when approved – shall be attached as Exhibit "D" hereto.

#### **SECTION 6. COMPENSATION TO THE CITY FOR USE OF THE FACILITY (USE FEE).**

6.1. Base Use Fee. For the initial term of the Agreement, TRF shall pay City an annual use fee for the right to use the Facility in the amount of \$1.00, in consideration of TRF's not for profit status and its investments in programming, staffing, marketing and improvements. All payments are payable annually, commencing on the Commencement Date and thereafter on the first day of each Contract Year. The Base Use Fee (and all other amounts due hereunder) shall be paid to City in legal tender of the United States of America at the following address: Parks and Recreation Department, 1701 Meridian Avenue Suite 401, Miami Beach, Florida 33139, Attention: Cynthia Casanova, Assistant Director; or at such other place that City may from time to time designate by notice in writing.

6.2. Additional Fees and Charge. In addition to the Base Use Fee as set forth in section 6.1, TRF shall also be responsible for payment of the following Additional Fees and Charges:

6.2.1 Operating Expenses. TRF shall pay all costs and expenses related to Operating Expenses, except with respect to utilities for which the City is responsible, as more specifically set forth in Section 20 herein. TRF hereby irrevocably and unconditionally guarantees to the City that Operating Revenues shall at all times be sufficient to pay as and when due all Operating Expenses and any and all other amounts that TRF is obligated to pay pursuant to this Agreement, and further covenants and agrees that if at any time there are insufficient Operating Revenues to pay all of the foregoing amounts, as and when required, TRF shall immediately pay the difference from TRF's own funds. This obligation is absolute and unconditional and shall even apply if Operating Revenues are reduced or limited by facts or circumstances not contemplated by the parties or for reasons beyond the parties' control. The provisions of this section 6 shall survive any termination or expiration of this Agreement.

6.2.2 Free Charitable Use

The Cultural Arts Council may issue up to twelve (12) rental waivers per calendar year to qualified

nonprofit organizations for use of the North Beach Bandshell. Venue waivers are available for nonprofit arts organizations that will present performing arts activities in Miami Beach. These performing arts activities include: theater, dance, music, cabaret, opera, performance art, multi-disciplinary works and film. Venue waivers will cover rental fees for up to four days per week. Venue waivers are funded by the Community Benefit fund and administered by the Tourism and Culture Department following review and recommendation by the Miami Beach Cultural Arts Council. Although City shall not owe a fee, rent or other payment strictly for the Charitable Use, (1) City shall promptly (within ten (10) business days after receipt of invoice thereof) reimburse The Rhythm Foundation for all actual costs incurred by The Rhythm Foundation to facilitate the Charitable Use, including, without limitation, The Rhythm Foundation's standard charges for janitorial, clean-up, crowd and traffic control, set-up and tear-down costs and fees and charges (including for materials, labor and other services) directly necessitated by the occurrence of any Charitable Use; (ii) The Rhythm Foundation shall retain exclusive rights to the operation of all concessions and other operations at the Facility during any Charitable Use, including, without limitation, food and beverage concessions and sales, including alcoholic beverages (but City Manager shall have the right to prohibit the sale of alcoholic beverages during any Charitable Use) and all proceeds of sales and concession operations shall be Operating Revenues (City shall have no right to retain or reserve any portion thereof nor to operate in competition therewith); The Rhythm Foundation will ensure that the pricing for any concessions shall not exceed the normal pricing therefor charged at standard Events at the Facility; and (iii) any Charitable Use Event shall be scheduled in accordance with The Rhythm Foundation's scheduling needs so as not to conflict with or impair The Rhythm Foundation's ability to maintain its anticipated schedule of Events; but shall otherwise be scheduled at a time convenient for the City, with The Rhythm Foundation reasonably cooperating with City in coordinating all scheduling (but in any case, The Rhythm Foundation shall not be obligated to permit any Charitable Use unless scheduling thereof was memorialized in writing signed by the parties in advance of the Charitable Use Event); and (iv) City shall not be entitled to "roll over" or "carry forward" any unused Charitable Use from a prior Fiscal Year, such that, in the event during any Fiscal Year no such Charitable Use Event occurs for any reason, including reasons which were completely outside the parties' reasonable control, then, City shall be deemed irrevocably to have waived its right or entitlement to the benefit of the Charitable Use Event that otherwise could have occurred during the prior Fiscal Years). The Rhythm Foundation shall have the right to promulgate reasonable rules from time to time concerning the Charitable Use so long as they are consistent with the terms hereof and rules imposed upon other Events at the Facility.

6.2.2 Sales Tax. TRF shall pay and include any and all additional sums for applicable sales and use tax, now or hereafter prescribed by State, federal or local law, concurrent with and to the extent any sales tax is imposed in connection with any payment due hereunder by TRF.

6.2.3 Notwithstanding this Section 6, TRF shall not be responsible for paying for major capital improvements or infrastructure within the Facility.

#### **SECTION 7 – INTENTIONALLY OMITTED.**

#### **SECTION 8 - RIGHTS RESERVED TO CITY.**

8.1 Rights of Entry. Representatives, contractors and employees of the City shall have the right to enter all portions of the Facility to inspect same, to observe the performance of TRF of its obligations under this Agreement, to install, remove, adjust, repair, replace or otherwise handle any equipment, utility lines, or other matters in, on, or about the Facility, or to do any act or thing which the City may be obligated or have the right to do under this Agreement. Nothing contained in this subparagraph is intended or shall be construed to limit any other rights of the City under this Agreement. The City shall not unreasonably interfere with the activities of TRF hereunder, and the City's actions shall be conducted such that disruption of TRF work shall be kept to a minimum and there shall be no disruption of any Event by City (the City's actions in its proprietary capacity of the foregoing, shall not diminish any rights of City in its governmental capacity).

8.2 Signage. Exterior marquee messaging will be controlled by TRF and will list only Events taking place within the Facility, in addition to recognition of sponsors. **TRF shall include City requested public information messages.** TRF shall provide, at its sole expense and responsibility, any required signs within the Facility. All signage shall be approved by the City Manager or designee, and shall be in accordance with all applicable Municipal, County, State and Federal laws and regulations. Any signage shall be subject to the prior approval of the City Manager or designee as to size, shape and placement of same.

8.3 Interior Signage. TRF shall be entitled to all non-permanent interior signage (i.e. signage having a total duration not to exceed twelve consecutive (12) months) relating to an Event, including, without limitation, temporary banners, and all proceeds derived therefrom shall be Operating Revenues; provided, however, that the names affixed thereon are subject to the City Manager's or designee's prior written approval, which shall not unreasonably be withheld, conditioned or delayed. In no event may any such signage include the names of any company selling the following types of products ("Prohibited Names"): guns, tobacco or sexual products. **Any and all other naming right not expressly provided for in this subsection 8.3, and any revenues derived therefrom, shall be owned and controlled exclusively by the City.** TRF shall submit an invoice for each payment of such City Contribution and also submit the corresponding reports due for that particular Quarter. The City, in its sole discretion, may condition payment of the City upon TRF providing the requisite reports under this Agreement, including, without limitation, those reports set forth in Sections 5 and 12 of this Agreement due on January 15<sup>th</sup>, April 15<sup>th</sup>,

July 15<sup>th</sup>, and October 1<sup>st</sup>.

8.4 General Requirement. All signage (whether interior, exterior, permanent and/or temporary) shall comply with all applicable Governmental Requirements, and shall be maintained by TRF in good condition.

#### **SECTION 9. LIMITED FUNDING BY CITY.**

During the Term, and subject to funding appropriation and approval during the City's annual budgetary process, the City will provide an annual contribution ("City Contribution") toward the operation of the Facility, payable on a quarterly basis, due fifteen days from the end of each quarter (October 15<sup>th</sup>, July 15<sup>th</sup>, April 15<sup>th</sup> and January 15<sup>th</sup>), as more particularly described herein. The City Contribution for the first Contract Year will be \$45,000.00, with quarterly payments of \$11,250.00. The City Contribution, in subsequent Contract Years, including during any Renewal Terms which may be approved, at the City's sole option and discretion, will be increased annually, effective October 1<sup>st</sup> of each Contract Year (the "Effective Date of Adjustment"), by the percentage of change published by the Miami-Fort Lauderdale-West Palm Beach, FL, CPI-U 12 month percent changes, all items index, not seasonally adjusted ("CPI"), or 3%, whichever is smaller. The CPI increase shall be determined by multiplying the City Contribution being paid by the percentage of change for the Effective Date of Adjustment. Should the CPI become unavailable, a reasonable substitute designated by the City shall be used. The City Contribution shall continue to be paid in quarterly installments, based upon the amount established for the previous Contract Year, until the CPI index is published and the new City Contribution is established. The new City Contribution shall be payable retroactively to the Effective Date of Adjustment, within forty-five (45) days from receipt of an approved invoice from TRF of the new quarterly City Contribution. Notwithstanding the foregoing, the annual CPI increase shall not exceed three percent (3%). If the CPI has a negative change, the City Contribution shall remain the same for the upcoming Contract Year.

Except as set forth in this Section 9, and other costs which the City has expressly agreed to pay under the terms of this Agreement, the City will have no other funding or other payment obligations with respect to the Facility or its Operating Expenses or its operations. Additionally, TRF and City have entered into this Agreement with the expectation and belief that, as of the Effective Date, no governmental body will impose any ad valorem taxes upon the Facility nor any sales, income, excise or other taxes. Notwithstanding the preceding sentence, the City makes no representation to TRF, either expressed or implied, that any or all of such taxes may or may not be imposed at any time during the Term of the Agreement.

#### **SECTION 10. RECEIPTS AND DISBURSEMENTS**

TRF shall establish and maintain in one or more depositories, one or more operating, payroll and

other bank accounts for the operation and management of the Facility, as TRF shall determine. All Operating Revenues collected by TRF from the operation of the Facility shall be deposited into the accounts and all Operating Expenses shall be paid by TRF as agent for the City from the accounts. Any amounts remaining in the operating accounts upon expiration or termination of this Agreement for any reason, after payment of all other amounts that TRF is required to pay under this Agreement through the date of expiration or termination, shall be promptly paid to TRF.

#### **SECTION 11. ALTERATIONS, MAINTENANCE, AND REPAIRS.**

11.1 TRF shall not make any additions, improvements, or alternations (collectively "Alterations") to the Facility without the City Manager's or designee's prior written consent. The cost of all Alterations made by TRF shall be borne solely by TRF from its own funds and shall not constitute Operating Expenses, unless otherwise agreed to by the City under the category of Capital Improvements or Maintenance. The City Manager shall not unreasonably withhold, condition or delay his/her consent to any Alterations except that the City Manager may withhold consent, in his/her sole and absolute discretion, with respect to any Alterations that change the structural elements or life-saving systems or that affect the exterior of the Facility; Notwithstanding anything to the contrary, however, TRF shall not under any circumstances be permitted to make any Alterations that: (i) affect the structural portions of the Facility, or (ii) fail to comply with any applicable Governmental Requirements; or (iii) interfere in any material manner with the proper functioning of any mechanical, electrical, plumbing, HVAC, life safety or other systems, facilities or equipment of the Facility. Except as required pursuant to Section 5.5.4, it is understood by the parties hereto that TRF shall not be responsible, nor required to pay for, any other costs related to capital improvements or infrastructure (i.e. including, but not limited to, plumbing and sewer lines, major electrical, structural, HVAC, roof, etc.) with regard to the Facility.

11.2 TRF shall obtain all required permits for Alterations performed by, through or under TRF and shall perform or cause to be performed such Alterations in compliance with all Governmental Requirements. Under no circumstances shall TRF make any Alterations which incorporate any Hazardous Substances including, without limitation, asbestos-containing construction materials, into the Facility. Any request for City Manager's consent to any proposed Alterations by, through or under TRF shall be made in writing and shall contain plans or other written materials describing the work in detail reasonably satisfactory to City Manager, provided that architectural plans shall not be required unless required for the issuance of a building permit. The City Manager shall provide or deny consent within twenty (20) business days following receipt of TRF's written request, the failure to provide or deny consent within such twenty (20) business day period shall be deemed a consent. Should the work proposed by TRF and consented to by City Manager modify the basic floor plan of the Facility and the building permit therefor require architectural plans, then TRF shall, at its expense, furnish City with as-built drawings and CAD disks for

such work. Unless the City Manager otherwise agrees in writing, all Alterations made or affixed to the Facility (excluding moveable trade fixtures, equipment, personal property and furniture) (including without limitation, all upgrades constructed pursuant to subparagraph (b)), shall become the property of City and shall be surrendered with the Facility at the expiration or termination of this Agreement. With respect to Alterations costing in excess of \$200,000, the City Manager may require TRF to obtain a payment bond for the work.

11.3 Maintenance. TRF shall, at its sole cost and expense, have sole responsibility for basic maintenance to be performed on a regular basis on all facilities, improvements, and facilities and utilities infrastructure equipment at the Facility, as well as any necessary repairs to the perimeter walls and gates. Any other repairs or replacement of the same is the responsibility of the City. TRF shall, at its sole cost and expense, and to the satisfaction of the City, keep and maintain the Facility, and all improvements thereon, in good, clean, and sanitary order. The City shall, at its sole cost and expense, have the sole responsibility for maintaining the grounds of the North Shore Band Shell and surrounding park. To that end, the parties herein acknowledge, and TRF herein agrees to be bound by, the minimum maintenance standards set forth in Exhibit "B" to this Agreement, entitled "City of Miami Beach Minimum Specifications for Maintenance of the North Shore Band Shell." It is further understood that TRF shall provide the City with a Quarterly maintenance report, in a format to be approved by the City Manager or his designee, setting forth any repairs made to the Facility during the reported Quarter.

11.4 Personal Property. A list of existing City-owned personal property included in the Agreement for use by TRF during the Term hereof is attached and incorporated herein as Exhibit "E". TRF hereby accepts such equipment in its "as-is" condition, and without any warranty(ies) and, at its sole cost and expense, acquire and maintain all replacement and such other equipment and, at its sole cost and expense, acquire and maintain all replacement and such other equipment as may be necessary to maintain the Facility in a condition which satisfies those maintenance standards set forth in Exhibit "B", but shall not have an obligation to improve the condition of the existing City-owned personal property beyond the "as-is" condition in which it was accepted, all of which shall be noted on the inventory. TRF shall have the right, at the initial inventory and at any point thereafter, to decline the use and responsibility for any existing City-owned personal property not useful for its operation of the Facility, and may turn such existing City-owned personal property over to the City in the condition in which it was accepted. Any personal property purchase with Operating Revenues shall become City-owned personal property and included in the inventory for the Facility. The City shall have the right to periodically take an inventory of any or all City-owned equipment at the Facility.

## **SECTION 12. RECORDS, AUDITS AND REPORTS.**

12.1 Records and Audits. TRF shall keep full and accurate accounting books and records

relating to all Operating Revenues and Operating Expenses, all in accordance with generally accepted accounting principles. TRF shall give the City such books and records during reasonable business hours and upon reasonable advance notice. All books and records shall be made available on-site at the Facility or electronically. TRF shall keep and preserve for at least three (3) years following each Fiscal Year, or for as long as such records are required to be retained pursuant to Florida Public Records Law (whichever is longer), all sales slips, rental agreements, purchase order, sales books, credit card invoices, bank books or duplicate deposit slips, and other evidence of Operating Revenues and Operating Expenses for such period. In addition, on or before 120 days following each Fiscal Year, TRF shall furnish to the City a line item (i.e., by categories) statement of Operating Costs and Operating Revenues (and profit or loss) for the Facility for the preceding Fiscal Year, and including the number of tickets sold and Events held, including any Facility Rentals, prepared in accordance with generally accepted accounting principles certified as accurate by TRF's Chief Accounting Officer or Chief Financial Officer.

12.2 The City Manager shall have the right at any time, and from time to time, to cause independent auditors or the City's own accountants or auditors to audit all of the books of TRF relating to Operating Revenues, Operating Expenses, tickets and Events including, without limitation, cash register tapes, credit card invoices, duplicate deposit tapes, and invoices. No costs incurred by the City in conducting such audit shall be considered an Operating Expense.

12.3 Annual Plan. Commencing on October 1, 2019, and thereafter on October 1<sup>st</sup> of each Contract Year during the term herein, TRF shall provide to the City an annual management plan, which shall include the annual operating budget for the then current Fiscal Year but may not have a complete booking plan or event schedule. The annual plan shall include information regarding TRF'S anticipated operations for such Fiscal Year, including planned operating and maintenance activities, anticipated capital improvements and capital equipment purchases and an anticipated budget therefore, anticipated Events at the Facility (to the extent known at such time), and planned equipment and furnishings purchases. TRF shall have the right from time to time to make any changes it deems necessary or appropriate to any such annual plan so long as the annual plan is consistent with TRF'S fulfillment of its obligations hereunder.

12.4 Programmatic Plan. Accompanying TRF's proposed annual budget shall be the Facility Programmatic Plan for the next fiscal year, detailing the then-known activities planned, and the number of residents and visitors anticipated to be impacted.

12.5 Major Capital Repairs. Accompanying TRF's proposed annual budget shall be a detailed list of then-known major capital repairs anticipated for the Facility, which remain the sole responsibility of the City.

### **SECTION 13. INDEMNIFICATION.**

TRF shall indemnify, hold harmless and defend (with counsel approved by the City Attorney) the

City, its officers, agents, servants and employees from and against any and all claims, liabilities, demands, causes of action, costs and expenses (including reasonable attorneys' fees at trial and all levels of appeal) of whatsoever kind or nature ("Claims") arising out of (i) errors, omission or negligent act or willful misconduct of TRF, its agents, servants, contractors, or employees; (ii) any default by TRF under this Agreement; or (iii) any other claim arising, directly or indirectly, from the operation or management of the Facility or any Event held therein or rental or use of the Facility; provided that there is expressly excluded from the foregoing obligations any Claims to the extent resulting solely from the gross negligence or willful misconduct of the City, its officers, agents (excluding TRF), contractors (excluding TRF) and employees. The provisions of this Section 13 shall survive expiration or termination of this Agreement.

#### **SECTION 14. INSURANCE REQUIREMENTS.**

TRF shall maintain, at TRF's sole cost and expense, the following types of insurance coverage at all times throughout the Term of this Agreement:

14.1 General liability insurance with not less than the following limits:

- |                                     |             |
|-------------------------------------|-------------|
| • General aggregate                 | \$2,000,000 |
| • Products (completed operation     |             |
| • aggregate)                        | \$2,000,000 |
| • Personal and advertising (injury) | \$1,000,000 |
| • (Per occurrence)                  | \$1,000,000 |
| • Fire damage                       | \$ 100,000  |
| • Medical Expense                   | \$ 5,000    |
| • Liquor Liability (aggregate)      | \$2,000,000 |
| • (Per occurrence)                  | \$1,000,000 |

14.2 Workers Compensation Insurance shall be required under the Laws of the State of Florida

14.3 Fire Insurance for the Facility shall be the responsibility of the City.

14.4 Builder's Risk. TRF shall carry Builder's Risk insurance during any period of construction of Alterations or any other period of construction by, through or under TRF.

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days written notice to City and then subject to the prior written approval of the City's Risk Manager. TRF shall provide the City with a Certificate of Insurance for each such policy, which shall name the City as an additional named insured. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should TRF fail to obtain, maintain or renew the

policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by TRF to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If TRF does not repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, and such failure shall be deemed an event of default hereunder.

TRF shall be the named insured under all such policies. The City shall be an additional insured under the insurance policies described in subsections 14.1, 14.3 and 14.4 hereof, as its interests may appear, and all such insurance policies shall contain a provision covering the indemnification liabilities hereunder.

The terms of insurance policies referred to in Section 14 shall preclude subrogation claims against TRF, the City and their respective officers, employees and agents.

#### **SECTION 15. OWNERSHIP OF ASSETS.**

Ownership. The ownership of the Facility and all buildings and real estate, all existing (and replacements thereof) technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property located at the Facility at the time of the commencement of this Agreement shall remain with the City. Any and all technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property purchased by TRF for use at the facility shall remain property of TRF. Any and all technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property purchased by TRF through funds received from grants which were applied for solely by the City or in partnership with the City for use at the facility shall remain property of the City. Ownership of and title to all intellectual property rights of whatsoever value held in the City's name shall remain in the name of the City. The ownership of data processing programs and software owned by the City shall remain with the City, and the ownership of data processing programs and software owned by TRF shall remain with TRF. TRF shall not take or use, for its own purposes, customer lists or similar materials developed by the City for the use of the Facility, unless prior written consent is granted by the City Manager. Ownership of equipment, furnishings, materials, or fixtures not considered to be real property purchased by TRF with Operating Revenues for use at and for the Facility shall vest in the City automatically and immediately upon purchase or acquisition ("City Property"). The assets of the City as described herein shall not be pledged, liened, encumbered or otherwise alienated or assigned. Notwithstanding anything to the contrary contained in this Agreement, any personality, furnishings, and movable equipment that is not a fixture and is not integral to the operation of the Facility purchased by TRF with outside funds, (funds which are not a part of Operating Revenue) and used at the Facility shall be the sole property of TRF. Ownership of and title to all intellectual property rights of whatsoever value related to marketing and promotional materials, designs, slogans, social media profiles, and web pages will remain

the exclusive property of the City.

#### **SECTION 16. USE BY THE CITY.**

The City shall have the right to use the Facility, or any part thereof, subject to availability, for the benefit of the community for such purposes including, but not limited to, meetings, City-sponsored special events, Movie Nights, Parks and Recreation events, and other purposes, as deemed necessary by the City Manager or his designee, in his sole and absolute discretion, without the payment of any rental or use fee, except that the direct out-of-pocket expenses incurred in connection with such uses shall be paid by the City.

#### **SECTION 17. ASSIGNMENT/SUBLET.**

17.1 Except as otherwise specifically provided in this Section 17, TRF may not voluntarily or by operation of law, assign, encumber, pledge or otherwise transfer all or any part of TRF's interest in this Agreement or subcontract its management duties hereunder without the City's prior written consent, which may be granted or withheld in City's sole and absolute discretion. Any attempt by TRF to assign all or any part of its interest and any attempt to subcontract its management duties hereunder without first having obtained City's prior written approval shall be void and of no force or effect. In the event of any assignment, transfer, encumbrance or subcontract, TRF shall nevertheless remain liable for all obligations hereunder and the transferee shall be jointly and severally liable for all obligations thereafter arising under this Agreement. Any transfer of a controlling interest in TRF (whether in a single transaction or multiple transactions) shall be considered an assignment of this Agreement. TRF specifically recognizes that City selected TRF to be the manager of the Facility as a result of the City's evaluation of TRF's specific qualifications and experience in operating similar first class facilities.

17.2 The provisions of subsection 17.1 above shall not prevent TRF in the performance of its management duties hereunder to grant licenses and concessions and rental agreements for Events and entering into concessions agreement for the concession operations at the Facility.

#### **SECTION 18. SECURITY.**

TRF shall provide reasonable security to protect the Facility and its equipment, materials and facilities, including any City equipment, furnishings, and fixtures used by TRF, and shall be solely responsible to the City for any loss or damage to any City equipment, furnishings, and fixtures so used by TRF.

#### **SECTION 19. PERMITS; LICENSES; TAXES; APPLICABLE LAWS.**

TRF agrees to obtain and pay for all permits and licenses necessary for the conduct of its business,

including a liquor or beer and wine license for the Facility, and agrees to comply with all laws governing the responsibility of an employer with respect to persons employed by TRF. TRF shall also be solely responsible for payment of any and all taxes levied on the Facility and its operations. In addition, TRF shall comply with all rules, regulations and laws of the City; Miami-Dade County; the State of Florida; and the U.S. Government now in force or hereafter to be adopted.

## **SECTION 20 UTILITIES; RESPONSIBILITY FOR TAXES AND ASSESSMENTS.**

20.1 Utilities. The City shall be solely responsible for and shall pay (whether to the City or directly to the utility) before delinquency, of all charges for all water and sewer, and electricity utilities used at the Facility. Any other utilities, including the connection of a phone line, shall be the responsibility of TRF.

20.2 Procedure If Taxes Assessed. TRF agrees to, and shall pay before delinquency, all taxes and assessments of any kind assessed or levied, whether upon TRF or the Facility, by reason of this Agreement or by reason of any use(s) and/or activity(ies) of TRF upon or in connection with the Facility. The parties acknowledge that TRF's operation and use of the Facility is for public purposes, and therefore anticipate that, as of the Effective Date, no ad valorem taxes should be assessed by the Miami-Dade County Tax Appraiser. If, however, taxes are assessed by the Property Tax Appraiser, TRF has the right to terminate this agreement without penalty by providing 90 days notice to the City, at which point the City shall be solely responsible for such payment(s).

## **SECTION 21. FORCE MAJEURE.**

No party will be liable or responsible to the other party for any delay, damage, loss, failure, or inability to perform caused by "Force Majeure" if notice is provided to the other party within ten (10) days of date on which such party gains actual knowledge of the event of "Force Majeure" that such party is unable to perform. The term "Force Majeure" as used in this Agreement means the following: an act of God, strike, war, public rioting, lightning, fire, storm, flood, explosions, epidemics, landslides, lightning storms, earthquakes, floods, storms, washouts, civil disturbances, explosions, and any other cause whether of the kinds specifically enumerated above or otherwise which is not reasonably within the control of the party whose performance is to be excused and which by the exercise of due diligence could not be reasonably prevented or overcome (it being acknowledged that under no circumstances shall a failure to pay amounts due and payable hereunder be excusable due to a Force Majeure).

Neither party hereto shall be under any obligation to supply any service or services if and to the extent and during any period that the supplying of any such service or services or the provision of any component necessary therefore shall be prohibited or rationed by any Governmental Requirements.

In the event of substantial damage to or destruction of the Facility by reason of fire, storm or other

casualty or any eminent domain action or other regulatory action that, in either case, shall render a substantial part of the Facility inoperable for a period of at least ninety (90) days or in TRF's or the City's reasonable opinion the Facility can no longer be operated in a reasonably profitable manner as a result of the damages or action for a period of at least ninety (90) days from the happening of the fire, other casualty or regulatory action, either party may terminate this Agreement upon written notice to the other. Upon any such termination, the provisions of Section 31 shall apply; and provided City shall receive the entire amount of all insurance proceeds or eminent domain award as applicable.

#### **SECTION 22. INSPECTION.**

TRF agrees that the Facility may be inspected at any time upon reasonable notice by authorized representatives of the City, or by any other State, County, Federal or municipal officer or agency having responsibilities for inspections of such operations and/or Facility.

#### **SECTION 23. WAIVER OF INTERFERENCE.**

TRF hereby waives all claims for compensation for loss or damage sustained by reasons of any interference with its operation and management of the Facility by any public agency or official as a result of their enforcement of any laws or ordinances or of any of the rights reserved to the City herein. Any such interference shall not relieve TRF from any obligation hereunder.

#### **SECTION 24. NO LIENS.**

TRF agrees that it will not suffer, or through its actions or anyone under its control or supervision, cause to be filed upon the Facility any lien or encumbrance of any kind. In the event any lien is filed, the TRF agrees to cause such lien to be discharged within ten (10) days therefrom, and in accordance with the applicable law and policy. If this is not accomplished, the City may automatically terminate this Agreement, without further notice to TRF.

#### **SECTION 25. TRF EMPLOYEES, MANAGERS AND BOARD OF DIRECTORS.**

25.1 The City and TRF recognize that in the performance of this Agreement, it shall be necessary for TRF to retain qualified individuals to effectuate and optimize TRF's management and operation of the Facility. TRF shall select, train and employ at the Facility such number of employees as is necessary or appropriate for TRF to satisfy its responsibilities hereunder. TRF shall recruit employees consistent with standards employed at comparable first class facilities, and TRF shall have authority to hire, terminate and discipline any and all personnel employed by TRF working at the Facility. Any such personnel, whether employees, agents, independent contractors, volunteers, and/or other, employed, retained, or otherwise engaged by TRF for such purpose(s), shall not be deemed to be agents, employees, partners, joint ventures,

or associates of the City, and shall not obtain any rights or benefits under the civil service or pension ordinances of the City or any rights generally afforded classified or unclassified employees of the City; further they shall not be deemed entitled to the Florida Worker's Compensation benefits as employees of the City. Additionally, TRF, and/or its employees shall never have been convicted of any offense involving moral turpitude or felony. Failure to comply with this subsection shall constitute cause for termination of this Agreement.

25.2 TRF shall assign to the Facility a competent staff member experienced in the operations of similar facilities, who will be located on-site with regular and posted hours during the Term. The staff member will be supervised by a general manager who is experienced in operating and managing similar facilities. The staff member shall be accessible to the City Manager at all reasonable times to discuss the management, operation, and maintenance of the Facility. "Accessible" shall mean available either in person, by phone and/or e-mail during business and/or operation hours and within a reasonable time frame during non-business hours in the event of an emergency. The City Manager may also request that the staff member be replaced and TRF shall duly consider all such request but shall but not be obligated to replace the staff member.

#### **SECTION 26. NO IMPROPER USE.**

TRF will not use, nor suffer or permit any person to use in any manner whatsoever, the Facility for any purpose in violation of any Federal, State, County, or municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. TRF shall not use the Facility for any unlawful purpose and shall comply with all laws, permitting, and licensing requirements now in force or hereafter adopted, applicable to the Facility or the activities, uses, and/or business(es) conducted on the Facility. TRF agrees not to knowingly use the Facility for, or to permit operation of any offensive or dangerous activity, nuisance or anything against public policy. Any criminal activity in the Facility knowingly caused by or knowingly permitted by TRF shall result in automatic termination of this Agreement. Except as may result from acts of force majeure, TRF agrees that it will not allow the Facility to become unoccupied or vacant. TRF shall take appropriate precautions to prevent fire on the Facility, maintaining existing fire detection devices and extinguishing equipment at all times. Fire detection devices and extinguishing equipment to be provided and maintained by the City.

#### **SECTION 27. NO DANGEROUS MATERIALS.**

TRF agrees not to use or permit in the Facility the storage of illuminating oils, oil lamps, turpentine, gasoline (except for small containers [5 gallons or less] for machinery), benzene, naphtha, or other similar substances, or explosives or any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida.

## **SECTION 28. NO CLAIM AGAINST CITY OFFICERS, EMPLOYEES, INDIVIDUALS.**

It is expressly understood and agreed by and between the parties hereto that all individuals, employees, officers, and agents of the City are acting in a representative capacity and not for their own benefit; and that neither TRF nor any occupant shall have any claim against them or any of them as individuals in any event whatsoever in conjunction with any acts or duties which are reasonably related to the performance of their duties.

## **SECTION 29. DEFAULT AND TERMINATION.**

29.1 TRF's Defaults. The occurrence of any one or more of the following events shall constitute an event of Default by TRF.

29.1.1 The failure by TRF to make any payment required to be made by TRF as and when due, which continues for more than ten (10) days after written notice from City;

29.1.2 The failure or inability by TRF to observe or perform any of the covenants or provisions of this Agreement to be observed or performed by TRF, which continues for more than thirty (30) days after written notice from City Manager; provided, however, if the nature of the failure is such that more than such period is reasonably required for its cure, then TRF shall not be deemed to have committed an Event of Default if TRF commences the cure within such period and thereafter diligently pursues the cure to completion and actually completes the cure within an additional sixty (60) day period;

29.1.3 Except as permitted pursuant to Section 17 of this Agreement, the assignment, encumbrance, pledge, or transfer of this Agreement, whether voluntarily or by operation of law, or any subcontract of TRF's duties hereunder, which continues for more than fifteen (15) business days after written notice thereof from City Manager;

29.1.4 (i) The making by TRF of any general assignment for the benefit of creditors; (ii) the filing by or against TRF of a petition to have TRF adjudged a Chapter 7 debtor under the Bankruptcy Code, or any Code or to have debts discharged or a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against TRF, the same is dismissed within sixty (60) days); (iii) the appointment of a trustee or receiver to take possession of substantially all of TRF's assets located at the Facility or of TRF's interest in this Agreement, if possession is not restored to TRF within sixty (60) days; or (iv) the attachment, execution or other judicial seizure of substantially all of TRF's assets located at the Facility or of TRF's interest in this Agreement, where the seizure is not discharged within sixty (60) days.

29.2 City Remedies. If an Event of Default by TRF occurs, then in addition to any other remedies available to City, City may exercise the following remedies:

29.2.1 City may terminate this Agreement by written notice to TRF, in which case this Agreement shall terminate and TRF shall immediately surrender possession of the Facility to City. Upon

termination, City shall be entitled to recover from TRF: (1) Operating Expenses that remain unpaid through the date of termination; (2) all other amounts that TRF is required to pay under this Agreement through the date of termination.

29.2.2 City may seek specific performance of any of TRF's obligations hereunder or seek injunctive relief;

29.2.3 City may exercise any other remedies available at law or in equity.

29.2.4 The various rights and remedies reserved to City in this Agreement or otherwise shall be cumulative and, except as otherwise provided by Florida law, City may pursue any or all of its rights and remedies at the same time.

29.3 TRF's Remedies. If an Event of Default by City occurs, then TRF may exercise either of the following remedies:

TRF may terminate this Agreement by providing the City with one hundred eighty (180) days prior written notice, in which case this Agreement shall terminate and TRF shall immediately surrender possession of the Facility to City. Upon termination, TRF shall be entitled to recover from City all amounts owed by City to TRF as of the termination date and the provisions of Section 31 shall apply; or

29.4 Late Payments. Any payment owed to City or TRF under this Agreement including, without limitation, any other payment owed to City or TRF under this Agreement that is not received by City or TRF within ten (10) days following notice of such amount being due shall bear interest at the rate of eighteen percent (18%) per annum or the highest rate allowable by law ("Default Rate") from the date due until fully paid.

29.5 IN THE EVENT THAT TRF CEASES TO BE A NOT-FOR-PROFIT CORPORATION, THIS AGREEMENT SHALL BE AUTOMATICALLY TERMINATED.

### **SECTION 30. [INTENTIONALLY DELETED].**

### **SECTION 31. TERMINATION.**

31.1 Termination for Convenience by City. The City reserves and retains the right, at its sole option and discretion, to terminate this Agreement, without cause and without penalty, with regard to TRF's rights and responsibilities with respect to the operation, management, maintenance, promotion and marketing of the Facility, upon one hundred eighty (180) days prior written notice to TRF.

31.2 Effect of Termination. In the event this Agreement expires or is terminated for any reason: (1) All Operating Expenses and all other obligations for the period up to the date of expiration or termination shall be paid using funds on deposit in the account(s) described in Section 10 and to the extent such funds are not sufficient, TRF shall pay all such amounts from its own funds; (2) After all amounts referenced in subparagraph (1) have been paid, TRF may retain all remaining Operating Revenues (if any).

Upon the expiration of this Agreement or a termination for any reason, all further obligations of the parties hereunder shall terminate except for the obligations which for all periods up to the date of expiration or termination and such other obligations as are stated to survive or be performed after such expiration or termination. All of the foregoing reimbursement and the payment obligations are to be made within thirty (30) days after the termination date. The provisions of this Subsection 31.2 regarding the above reimbursement and payment obligations of the City shall survive the termination of this Agreement.

31.3 Surrender of Facility. Upon termination or expiration of this Agreement TRF shall surrender and vacate the Facility upon the effective date of such termination (or expiration). The Facility and all equipment and furnishings shall be returned to the City in a good and clean condition consistent with other similar Comparable Facilities and in compliance with all Governmental Requirements, ordinary wear and tear, and casualty loss excepted.

## **SECTION 32. NOTICES.**

All notices from the City to TRF shall be deemed duly served if mailed by registered or certified mail to TRF at the following address:

The Rhythm Foundation, Inc.  
PO Box 414625  
Miami Beach Florida 33141  
Attention: James Quinlan, Chairman

All notices from TRF to the City shall be deemed duly served if mailed to:

City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: City Manager

With copies to:

City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: John Rebar, Parks and Recreation Department Director

TRF and the City may change the above mailing addresses at any time upon giving the other party written notification. All notice under this Agreement must be in writing.

## **SECTION 33. NO DISCRIMINATION.**

33.1 The TRF agrees that there shall be no discrimination on account of actual or perceived race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial status, age, disability, ancestry, height, weight, domestic partner status, labor organization membership, familial situation, or political affiliation in the operations referred to by this Agreement; and further, there

shall be no discrimination regarding any use, service, maintenance or operation of the Facility. All facilities located on the Facility shall be made available to the public, subject to the right of TRF to establish and enforce reasonable rules and regulations to provide for the safety, orderly operation and security of the facilities.

33.2 No Discrimination in Employment; Affirmative Action. In connection with the performance of work under this Agreement, TRF shall not refuse to hire, discharge, refuse to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, solely because of race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial status and age or disability.

#### **SECTION 34 [INTENTIONALLY DELETED].**

#### **SECTION 35. LIMITATION OF LIABILITY.**

The City desires to enter into this Agreement only if in so doing the City can place a limit on its liability for any cause of action for money damages due to an alleged breach by the City of this Agreement, so that its liability for any such breach never exceeds the sum of \$10,000. TRF hereby expresses his willingness to enter into this Agreement with TRF's recovery from the City for any damage action for breach of contract to be limited to a maximum amount of \$10,000, less the amount of all funds actually paid by the City to TRF pursuant to this Agreement.

Accordingly, and notwithstanding any other term or condition of this Agreement, TRF hereby agrees that the City shall not be liable to TRF for damages in an amount in excess of \$10,000, which amount shall be reduced by the amount actually paid by the City to TRF pursuant to this Agreement, for any action or claim for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of the limitation placed upon the City's liability as set forth in Section 768.28, Florida Statutes.

#### **SECTION 36. NOT A LEASE.**

It is expressly understood and agreed that no part, parcel, building, structure, equipment or space is leased to TRF; that this Agreement is a management agreement and not a lease; and that TRF's right to operate and manage the Facility shall continue only so long as the TRF complies with the undertakings, provisions, agreements, stipulations and conditions of this Agreement.

#### **SECTION 37. MISCELLANEOUS.**

37.1 Venue/Waiver of Jury Trial. This Agreement shall be governed by, and construed in

accordance with, the laws of the State of Florida, both substantive and remedial, without regard to principals of conflict of laws. The exclusive venue for any litigation arising out of this Agreement shall be Miami-Dade County, Florida, if in state court, and the U.S. District Court, Southern District of Florida, if in federal court. BY ENTERING INTO THIS AGREEMENT, CITY AND TRF EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO, OR ARISING OUT OF, THIS AGREEMENT.

37.2 No Partnership or Joint Venture. Nothing herein contained is intended or shall be construed in any way to create or establish the relationship of partners or a joint venture between the City and TRF. None of the officers, agents or employees of TRF shall be or be deemed to be employees of the City for any purpose whatsoever.

37.3 Entire Agreement. This Agreement and all Exhibits attached hereto contain the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, proposals or other expressions of intent with respect thereto. The Exhibits attached hereto are incorporated into and made a part of this Agreement. No other agreements, representations, warranties or other matters, whether oral or written, will be deemed to bind the parties hereto with respect to the subject matter hereof.

37.4 Written Amendments. This Agreement shall not be altered, modified or amended in whole or in part, except in writing executed by each of the parties hereto. The City Manager, on behalf of the City, shall have authority to approve any changes to this Agreement.

37.5 Binding Upon Successors and Assigns; No Third-Party Beneficiaries.

37.5.1 This Agreement and the rights and obligations set forth herein shall inure to the benefit of, and be binding upon, the parties hereto and each of their respective permitted successors and permitted assigns.

37.5.2 This Agreement shall not be construed as giving any person, other than the parties hereto and their successors and permitted assigns, any legal or equitable right, remedy or claim under or in respect of this Agreement or any of the provisions herein contained, this Agreement and all provisions and conditions hereof being intended to be, and being, for the sole and exclusive benefit of such parties and their successors and permitted assigns and for the benefit of no other person or entity.

37.6 Section Headings and Defined Terms. The headings contained herein are for reference purposes only and shall not in any way affect the meaning and interpretation of this Agreement. The terms defined herein and in any agreement executed in connection herewith include the plural as well as the singular and the singular as well as the plural, and the use of masculine pronouns shall include the feminine and neuter. Except as otherwise indicated, all agreements defined herein refer to the same as from time to time amended or supplemented or the terms thereof waived or modified in accordance herewith and therewith.

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original copy of this Agreement, and all of which, when taken together, shall be deemed to constitute but one and the same agreement.

37.7 Severability. The invalidity or unenforceability of any particular provision, or part of any provision, of this Agreement shall not affect the other provisions or parts hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions or parts were omitted.

37.8 Non-Waiver. A failure by either party to take any action with respect to any default or violation by the other of any of the terms, covenants, or conditions of this Agreement shall not in any respect limit, prejudice, diminish, or constitute a waiver of any rights of such party to act with respect to any prior, contemporaneous, or subsequent violation or default or with respect to any continuation or repetition of the original violation or default.

37.9 Certain Representations and Warranties.

37.9.1 The City represents, warrants, and covenants to TRF the following: (i) City has full legal right, power and authority to enter into and perform its obligations hereunder; and (ii) this Agreement has been duly executed and delivered by the City and constitutes a valid and binding obligation of the City, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally or by general equitable principles.

37.9.2 TRF represents and warrants to the City the following: (i) TRF has full legal right, power and authority to enter into and perform its obligations hereunder, and (ii) this Agreement has been duly executed and delivered by TRF and constitutes a valid and binding obligation of TRF, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally or by general equitable principles.

37.10 Governing Law. This Agreement will be governed by and construed in accordance with the internal laws of the State of Florida, without giving effect to otherwise applicable principles of conflicts of law.

**SECTION 38. TRF'S COMPLIANCE WITH FLORIDA PUBLIC RECORDS LAW.**

38.1 TRF shall comply with Florida Public Records law under Chapter 119, Florida Statutes, as may be amended from time to time.

38.2 The term "public records" shall have the meaning set forth in Section 119.011(12), which means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business of the City.

38.3 Pursuant to Section 119.0701 of the Florida Statutes, if TRF meets the definition of “Contractor” as defined in Section 119.0701(1)(a), TRF shall:

38.3.1 Keep and maintain public records required by the City to perform the service;

38.3.2 Upon request from the City’s custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes or as otherwise provided by law;

38.3.3 Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed, except as authorized by law, for the duration of the contract term and following completion of the Agreement if TRF does not transfer the records to the City;

38.3.4 Upon completion of the Agreement, transfer, at no cost to the City, all public records in possession of the Consultant or keep and maintain public records required by the City to perform the service. If the Consultant transfers all public records to the City upon completion of the Agreement, TRF shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If TRF keeps and maintains public records upon completion of the Agreement, the Consultant shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City’s custodian of public records, in a format that is compatible with the information technology systems of the City.

#### 38.4 REQUEST FOR RECORDS; NONCOMPLIANCE.

38.4.1 A request to inspect or copy public records relating to the City’s contract for services must be made directly to the City. If the City does not possess the requested records, the City shall immediately notify the Consultant of the request, and TRF must provide the records to the City or allow the records to be inspected or copied within a reasonable time.

38.4.2 TRF’s failure to comply with the City’s request for records shall constitute a breach of this Agreement, and the City, at its sole discretion, may: (1) unilaterally terminate the Agreement; (2) avail itself of the remedies set forth under the Agreement; and/or (3) avail itself of any available remedies at law or in equity.

38.4.3 A Concessionaire who fails to provide the public records to the City within a reasonable time may be subject to penalties under s. 119.10.

#### 38.5 CIVIL ACTION.

38.5.1 If a civil action is filed against TRF to compel production of public records relating to the City’s contract for services, the court shall assess and award against TRF the reasonable costs of enforcement, including reasonable attorneys’ fees, if:

a. The court determines that TRF unlawfully refused to comply with the public records request within a reasonable time; and

b. At least 8 business days before filing the action, the plaintiff provided written notice of the public records request, including a statement that TRF has not complied with the request, to the City and to TRF.

38.5.2 A notice complies with subparagraph (1)(b) if it is sent to the City's custodian of public records and to TRF address listed on its contract with the City or to the Concessionaire's registered agent. Such notices must be sent by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery, which may be in an electronic format.

38.5.3 A Concessionaire who complies with a public records request within 8 business days after the notice is sent is not liable for the reasonable costs of enforcement.

**38.6 IF TRF HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO TRF'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT:**

**CITY OF MIAMI BEACH**

**ATTENTION: RAFAEL E. GRANADO, CITY CLERK**

**1700 CONVENTION CENTER DRIVE**

**MIAMI BEACH, FLORIDA 33139**

**E-MAIL: [RAFAELGRANADO@MIAMIBEACHFL.GOV](mailto:RAFAELGRANADO@MIAMIBEACHFL.GOV)**

**PHONE: 305-673-7411**

**SECTION 39. PROHIBITIONS REGARDING SALE OR USE OF EXPANDED POLYSTYRENE FOOD SERVICE ARTICLES.**

Pursuant to Section 82-7 of the City Code, as may be amended from time to time, effective August 2, 2014, the City has prohibited the use of expanded polystyrene food service articles by City Contractors, in connection with any City contract, lease, concession agreement or Special event permit. Additionally, pursuant to Section 82-385 of the City Code, as may be amended from time to time, no polystyrene food service articles will be allowed in the right-of-way, and no polystyrene food service articles can be provided to sidewalk café patrons.

*Expanded polystyrene* is a petroleum byproduct commonly known as Styrofoam. Expanded polystyrene is more particularly defined as blown polystyrene and expanded and extruded foams that are thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including,

but not limited to, fusion of polymer spheres (expandable bead foam), injection molding, foam molding, and extrusion-blown molding (extruded foam polystyrene).

*Expanded polystyrene food service articles* means plates, bowls, cups, containers, lids, trays, coolers, ice chests, and all similar articles that consist of expanded polystyrene.

Additionally, Concessionaire agrees to comply (and ensure compliance by its vendors) with Section 46-92 (c) of the City Code, which states that it is unlawful for any person to carry **any** expanded polystyrene product onto any beach or into any park within the City or for any business to provide single use plastic straws or single use plastic stirrers with the service or delivery of any beverage to patrons on the beach except that this prohibition shall not apply to a person or patron with a disability or medical condition that impairs the consumption of beverages without a single-use plastic beverage straw or plastic stirrer; provided however, TRF agrees not to sell, use, provide food in, or offer the use of expanded polystyrene food service articles at the Facility or in connection with this Agreement. TRF shall ensure that all vendors operating in the Facility abide by the restrictions contained in this Section. A violation of this section shall be deemed a default under the terms of this Agreement. This subsection shall not apply to expanded polystyrene food service articles used for prepackaged food that have been filled and sealed prior to receipt by the TRF or its vendors.


#### **SECTION 40. COCA-COLA.**

The City has entered into an agreement with Coca-Cola Bottling, effective September 1, 2011 – September 1, 2021, to be the exclusive provider of non-alcoholic beverages and coffee products. TRF shall only purchase, from the City's Bottler, Coca-Cola beverages as listed in the attached Exhibit "G" and as may be updated from time to time.

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed; all as of this day and year first written above.

ATTEST:

CITY OF MIAMI BEACH

  
10/23/19  
Rafael E. Granado, City Clerk

  
Jimmy L. Morales, City Manager



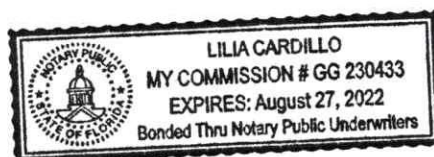
STATE OF FLORIDA       )  
                                      )  
COUNTY OF MIAMI-DADE   )


SS:

The foregoing instrument was acknowledged before me this 23 day of October, 2019, by Dan Gelber, Mayor, and Rafael E. Granado, City Clerk, or their designees respectively, on behalf of the CITY OF MIAMI BEACH, known to me to be the persons described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this 23 day of October, 2019.

  
Notary Public, State of Florida at Large  
Commission No.:  
My Commission Expires:



APPROVED AS TO  
FORM & LANGUAGE  
FOR EXECUTION  
  
Notary  Date 10/27/19

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed; all as of this day and year first written above.

ATTEST:

CITY OF MIAMI BEACH

[Signature] 10/23/19  
Rafael E. Granado, City Clerk

[Signature]  
Jimmy L. Morales, City Manager

STATE OF FLORIDA       )  
                                      )  
COUNTY OF MIAMI-DADE )

SS:



The foregoing instrument was acknowledged before me this 23 day of October, 2019, by Dan Gelber, Mayor, and Rafael E. Granado, City Clerk, or their designees respectively, on behalf of the CITY OF MIAMI BEACH, known to me to be the persons described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this 23 day of October, 2019.

[Signature]

Notary Public, State of Florida at Large

Commission No.:

My Commission Expires:



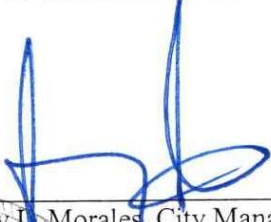
APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION  
[Signature] 10/9/19  
City Attorney      Date

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed; all as of this day and year first written above.

ATTEST:

CITY OF MIAMI BEACH

  
Rafael E. Granado, City Clerk

  
Jimmy L. Morales, City Manager




STATE OF FLORIDA       )  
                                      )  
COUNTY OF MIAMI-DADE )

SS:

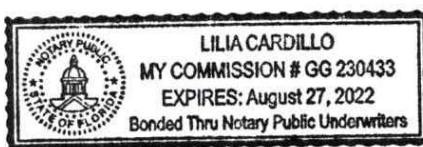
The foregoing instrument was acknowledged before me this 23 day of October, 2019, by Dan Gelber, Mayor, and Rafael E. Granado, City Clerk, or their designees respectively, on behalf of the CITY OF MIAMI BEACH, known to me to be the persons described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this 23 day of October, 2019.

  
Notary Public, State of Florida at Large

Commission No.:

My Commission Expires:



APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION

  
City Attorney      10/9/19      Date

ATTEST:

THE RHYTHM FOUNDATION, INC.

JAMES QUINLAN, Chairman  
Name/Title

James Quinlan, Chairman

STATE OF FLORIDA )

) SS:

COUNTY OF MIAMI-DADE )



Nina Alexandra Montoya  
Commission # FF979146  
Expires: April 5, 2020  
Bonded thru Aaron Notary

The foregoing instrument was acknowledged before me this 10<sup>th</sup> day of October, 2019, by James Quinlan, as Chairman and \_\_\_\_\_, as \_\_\_\_\_ on behalf of The Rhythm Foundation, Inc., known to me to be the persons described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this 10<sup>th</sup> day of October, 2019.

[Signature]  
Notary Public, State of Florida at Large

Commission No.: FF979146

My Commission Expires: April 5, 2020



Nina Alexandra Montoya  
Commission # FF979146  
Expires: April 5, 2020  
Bonded thru Aaron Notary

**EXHIBIT A**  
**SITE PLAN AND LEGAL DESCRIPTION OF THE FACILITY**

**LEGAL DESCRIPTION:**

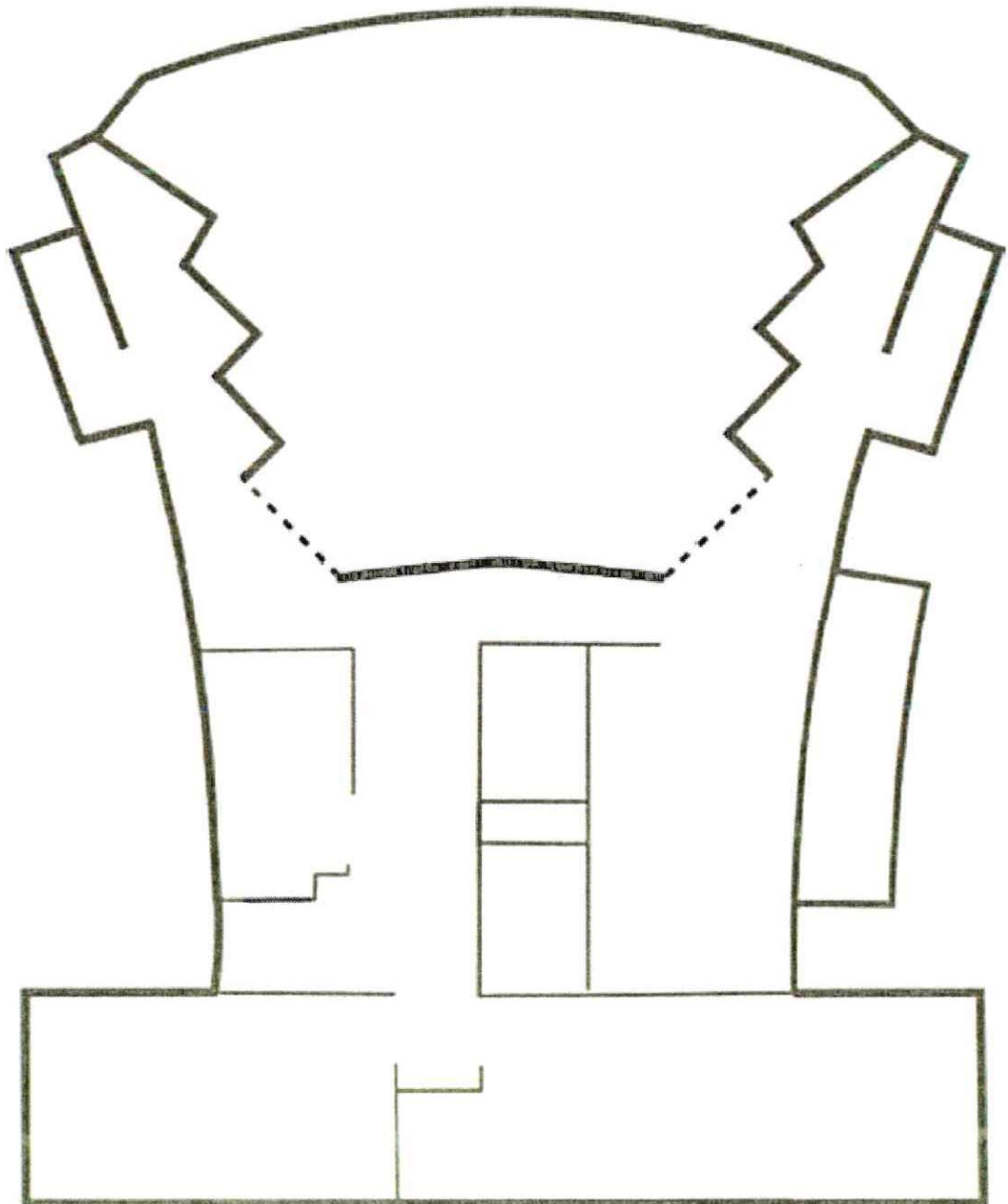
The area delineated on the Site Plan, attached hereto and incorporated herein as Exhibit A-1, located at the North Shore Park, which is located in a portion of land more particularly described as:

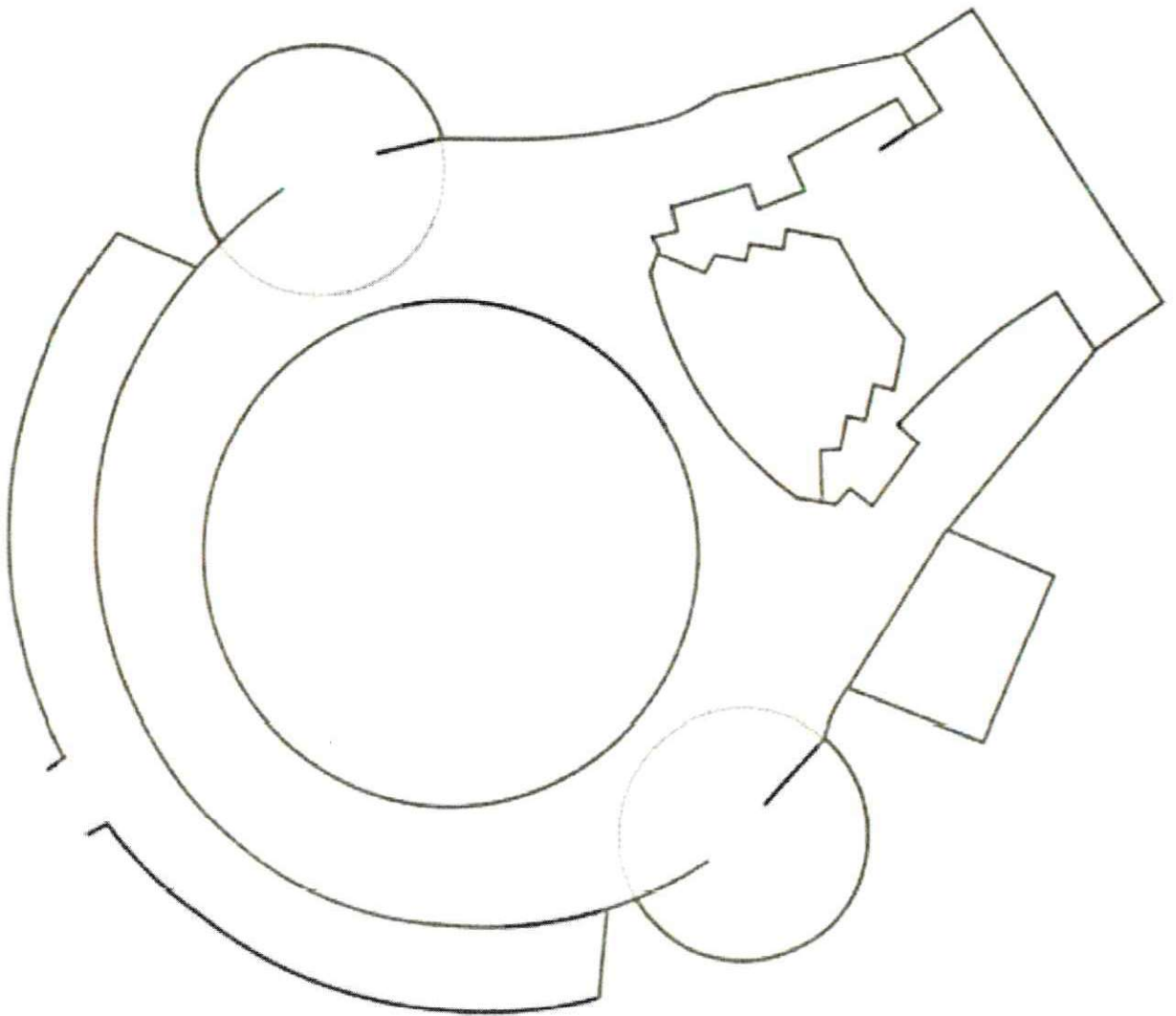
A portion of land located in section 2, Township 5.3 South Range 42 East, bounded as follows: bounded on the North by the South right-of-way line of Third Street (now 73<sup>rd</sup> Street) and its easterly extension as shown in PLAT OF TOWNSITE OF HARDING, Plat Book 34, Page 40, of the Public Records of Miami-Dade County, Florida; bounded on the South by the South line of government Lot 6, Section 2, Township 53 South Range 42 East (now South line of 72<sup>nd</sup> Street) and its easterly extensions as shown in NORMANDY BEACH SOUTH, Plat Book 21, Page 54, of the Public Records of Miami-Dade County, Florida; bounded on the East by the Erosion Control Line of the Atlantic Ocean, as recorded in Plat Book 105, at Page 62, of the Public Records of Miami-Dade County, Florida and bounded on the West by the East right-of-way line of Collins Avenue as shown according to Florida Department of Transportation Finished Project ID 2507471. Said land located in the City of Miami Beach, Miami-Dade County, Florida.

EXHIBIT A -1  
BAND SHELL SITE PLAN



USE AGREEMENT  
BACKSTAGE MAP





**EXHIBIT B**  
**CITY OF MIAMI BEACH**  
**MINIMUM MAINTENANCE SPECIFICATIONS**  
**FOR MAINTENANCE OF THE NORTH SHORE BAND SHELL**

These minimum operating and maintenance standards are intended to be considered as a whole and intended to provide an overall standard for the Facility. Individual discrepancies, as well as deviations, from any individual standard shall not be considered a default of the Agreement; it is the intention of the parties that this Exhibit is merely a guide and that TRF is only expected to use good faith efforts to endeavor to meet the standards set forth herein. In the event of a conflict between the terms or conditions of the Agreement and the terms or conditions of this Exhibit, the terms and conditions of the Agreement shall control.

**PERSONNEL**

TRF shall have the sole responsibility to recruit and employ a full-time general manager and any necessary administrative and accounting personnel that are responsible for the overall management and operation of the Facility.

TRF shall have the sole responsibility to recruit and employ sufficient personnel to maintain the following functions: general and event security; janitorial, housekeeping and cleaning for both event and non-event cleanup (including graffiti removal); painting and general overall maintenance of the Facility to ensure that the Facility is being maintained consistent with other Comparable Facilities.

The City shall have the sole responsibility for maintenance of capital systems, electrical systems, plumbing; and air conditioner operation;

TRF shall have the sole responsibility to recruit and employ personnel as it deems necessary for the staging and coordinating of Events and productions.

TRF shall maintain personnel policies that assure employment practices do not discriminate on the basis of race, color, religion, military status, marital status, physical or mental disability, national origin, age, gender, or sexual preference.

**GENERAL SECURITY**

TRF shall provide for the overall security of the Facility, including during non-event hours.

**EMERGENCY PROCEDURES**

TRF shall assign an employee and a backup employee to act as an Emergency Liaison to the City. This individual will be required to use good faith efforts to attend any and all meetings, held by the City, that deal with emergency situations, such as extreme weather events, terrorist acts, etc. The Liaison will serve as the point of contact during any emergency crisis.

TRF shall develop and implement a Hurricane Preparedness Procedure, a copy of which shall be provided to the City.

**JANITORIAL, CLEANING AND HOUSEKEEPING**

The Facility shall be reasonably clean and stocked with supplies (i.e. toilet paper, soap, etc.) at all times. This includes general cleaning during non-event times, as well as during Events.

Restrooms are to be cleaned during Events and on a periodic basis during non-event times to assure that they are in a functional and reasonably sanitary condition.

The City shall have the responsibility for Sanitation and Waste as it relates to emptying of the dumpster and servicing trash receptacles within the park area. The dumpster will be serviced at current service levels. Any additional dumpster services and the collection of and depositing of trash within the Band Shell will be the responsibility of TRF

At the City's responsibility, treatment for pests and rodents (except termites) shall occur on a Quarterly basis as needed to prevent infestation or as required by applicable Code.

Flooring shall be cleaned and polished on an as needed basis.

Windows shall be maintained in a reasonably clean condition and cleaned on an as needed basis.

Entrance doors and mirrors shall be maintained in a reasonably clean condition and cleaned on an as needed basis.

### **LANDSCAPING**

The City shall maintain all exterior landscaping

### **EXTERIOR LIGHTING**

The Facility shall remain illuminated regularly after dark. The City shall maintain all exterior lighting.

### **EQUIPMENT MAINTENANCE AND GENERAL MAINTENANCE**

Equipment shall be maintained in a good and workmanlike manner in order to maintain in full force and affect all dealer's and manufacturer's warranties. TRF shall develop an annual schedule for equipment inspection and preventative maintenance.

Upon termination, cancellation, and/or expiration of the Agreement, TRF shall provide all records maintained in accordance with Section 5.5.4. All existing warranties that are transferable will be transferred to the City.

TRF shall post and maintain, as required by any applicable governmental code and/or regulation, any and all required professional licenses, certifications, and/or permits.

The City shall maintain and inspect all building safety systems including but not limited to: smoke, fire, and CO detector systems, backup generator operation, emergency battery backup functions, emergency lighting, emergency egress, special needs and blackout preparedness equipment. All building safety systems shall be tested on at least an annual basis or as required by federal, state or local codes and regulations and maintained in operating condition at all times.

The City shall develop and implement a plan for inspection and maintenance for the Facility's HVAC systems. This shall include inspection of all HVAC controls on a Quarterly basis to verify proper setting and operation as well as any adjustments and/or maintenance that may be appropriate, including, but not limited to filter replacement, blower and/or heat exchanger, proper operation of air intakes/vents, fan units, ducts, etc.

TRF has the sole responsibility of maintaining the paint on the interior of the Facility.

EXHIBIT C  
RENTAL RATES FOR FACILITY



USE AGREEMENT  
RATE SHEET

RENTAL RATES (10 HRS\*)

\*INCLUDING LOAD IN / OUT

PUBLIC EVENTS

FOR PROFIT COMPANY	\$3,500
NON PROFIT ORGANIZATION	\$2,500

PRIVATE EVENTS

(INCLUDES HOUSE MANAGER, 2 SECURITY  
GUARDS, AUDIO

FOR PROFIT COMPANY	\$7,500
ENGINEER, CLEANING FEE	

(INCLUDES HOUSE MANAGER, 2 SECURITY  
GUARDS, AUDIO

NON PROFIT ORGANIZATION	\$6,500
ENGINEER, CLEANING FEE	

STAFFING RATES (PER HOUR)

TECHNICAL STAFF

AUDIO ENGINEER	\$50
STAGE TECHNICIAN	\$30
LIGHTING DESIGNER	\$35

FRONT OF HOUSE STAFF

HOUSE MANAGER	\$25
STAGE MANAGER	\$25
CONCESSIONS MANAGER	\$30
SECURITY GUARD	\$22
DOOR PERSON	\$20
MERCHANDISE PERSON	\$20
HOSPITALITY PERSON	\$15
HOUSE LABOR	\$15
USHER	\$10

SERVICE RATES

CLEANING

POST SHOW CLEAN UP	\$300
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**EXHIBIT D**  
**TRF STANDARD AGREEMENT**

USE AGREEMENT  
TERMS SHEET

THIS LICENSE AGREEMENT ("Agreement") made this \_\_\_\_ day of \_\_\_\_, \_\_\_\_\_, between THE RHYTHM FOUNDATION ("TRF") located at P.O. Box 414625, Miami Beach, Florida, 33141, FID: 65-0102768, on behalf of The NORTH BEACH BANDSHELL ("VENUE") located at 7275 Collins Ave, Miami Beach, Florida, 33141, and ("RENTER") as

Corporate Name:	
Contact:	
Address:	
City, State, Zip Code:	
Telephone:	
Email:	
Website:	

is for the RENTER's limited, temporary, and revocable license for the use of the venue described below and to conduct the event(s) /performance(s) regarding as follows:

Event / Artist / Performance / Engagement Name and description type, as applicable: (collectively referred to as "USE AGREEMENT")

Description below is subject to change based on information provided.

CATEGORY	DESCRIPTION				COST
Space Rental:					
Event Name:					
Date / Time:					
Load In Date / Time (s):					
Load out Date / Time (s):					
Total Use					
Review Date:					
Security Deposit:					
Tax Status (Check one):	<input type="checkbox"/> Non-Profit	<input type="checkbox"/> For Profit			
Admission (Check one):	<input type="checkbox"/> Ticketed	<input type="checkbox"/> Free			
Fundraiser (Check one):	<input type="checkbox"/> Advocacy	<input type="checkbox"/> Political	<input type="checkbox"/> N/A		
Audience (Check one):	<input type="checkbox"/> Public	<input type="checkbox"/> Private	<input type="checkbox"/> Production		
Event Type	<input type="checkbox"/> Athletic	<input type="checkbox"/> Community	<input type="checkbox"/> Exposition	<input type="checkbox"/> Festival	
	<input type="checkbox"/> Screening	<input type="checkbox"/> Standard Concer	<input type="checkbox"/> Theatre	<input type="checkbox"/> Wedding	
	<input type="checkbox"/> Conference	<input type="checkbox"/> Photo	<input type="checkbox"/> Filming	<input type="checkbox"/> Limited	
Additional Comments					

Initials: \_\_\_\_/\_\_\_\_

## USE AGREEMENT

This Agreement is entered into this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between The Rhythm Foundation, Inc. ("TRF") and \_\_\_\_\_ ("Renter").

### 1. TERM

TRF hereby grants to Renter the privilege and license to use The North Beach Bandshell, located at 7275 Collins Avenue Miami Beach, FL 33141 ("Facility"). This Agreement shall commence upon the full execution and terminate upon fulfillment of all the responsibilities and obligations of the parties.

### 2. USE PERIOD

Renter shall be permitted to enter and occupy the Facility, excluding "Production Office", "Janitor Closets" and "Storage Facilities", during the Use Period for the purposes of presenting an event ("Event"). Unless otherwise agreed to in writing by TRF, the Event shall be held at no other times at the Facility. The Use Period shall consist of the period of time required for set-up, presentation, and dismantle of the Event. In consideration of an additional fee, TRF may allow Renter a longer period. Any equipment or stage props left in the Facility after the expiration of the time allowed for dismantle may be disposed of by TRF without any right of claim by the Renter. Staffing rates will apply based on services required, staff must be present at all times that Renter or their representatives are on site.

### 3. PERMITTED USE

This Agreement solely authorizes Renter to the temporary use of the Facility for the limited purposes set forth herein and for no other purpose. The parties hereby agree that the provision of this Agreement do not constitute a lease. TRF retains dominion, possession, and control of the Facility. This Agreement confers no exclusive possession of the Facility. The Renter cannot exclude TRF from the Facility.

Renter shall not allow any of the foregoing into the facility or the surrounding property at any time, without TRF's prior written consent: interactive physical games and attractions, mechanical rides, body art and piercing services, exotic animals, and pyrotechnics.

Renter understands that the Venue Occupancy at any one time is 1,350 persons.

Anything to the contrary notwithstanding, the Renter may sell tickets to All Ages and market event to the public as "All Ages".

### 4. USE RATE

In consideration of the use of the Facility, Renter agrees to pay TRF rental charge detailed on the first page of this Agreement as well as all costs incurred by the performance (including but not limited staffing, equipment rental, and other fees as described in the attached Payment and Fees Schedule). This total does not reflect any additional charges that may be levied against

## USE AGREEMENT

Renter. The total fee is to be paid no later than thirty days (30) prior to the beginning of the Use Period, unless otherwise agreed to in writing with TRF. Payment of additional charges shall be made within two (2) business days following the occurrence of the Event giving rise to such payment.

### 5. SECURITY DEPOSIT

A security deposit of \$1,000 per event day is due at the time of execution of this contract. Dates will not be reserved for any rental without the payment of a deposit. Dates can be reserved for a maximum of one year. The Security Deposit is provided towards Renter's performance under this Agreement and full payment of all amounts due hereunder, including the cost of any damage repairs, replacement or restoration, payment of any Additional Charges, or to defray any other unusual but reasonable expense borne by TRF as a consequence of Renter's use of the Facility and/or presentation of an Event. TRF shall return the Security Deposit, or the unexpended portion thereof, to the Renter upon full satisfaction of all of Renter's obligations hereunder according to the Payment & Fees Schedule at the Adjusted Final Settlement. If Security Deposit is not sufficient to fully restore damages caused by this use, Renter agrees to provide necessary repairs or payments within thirty (30) days to fully restore the venue and/or the in-house equipment to the condition in which it was received. Except where this Agreement is terminated for cause, Renter shall be entitled to a refund of the Deposit, or so much thereof as has not been applied, upon termination of the Agreement, after satisfaction of all amounts due by Renter hereunder, if any. Should the rental agreement be canceled within 60 days of the event, the Renter agrees to forfeit the full security deposit amount.

### 6. CONDITION OF FACILITY/REMOVAL OF RENTER'S EFFECTS

Renter has inspected the Facility and accepts it in "as-is" condition. Commencement of the use of the Facility by Renter shall be conclusive that the Facility was in good repair and in satisfactory condition, fitness, and order when such use commenced. Renter shall not paint, drill into, or in any way mark or deface any part of the Facility. Renter agrees to tear down and remove all of Renter's effects immediately after the presentation of an Event and/or expiration of the Term. TRF will have the full right to collect and have custody of all articles and personal property left on the Facility or at the Facility after the expiration of the Use Period. Any property so left will be deemed abandoned by Renter and may be disposed of by TRF, as TRF sees fit, without any liability for any loss, damages or costs associated with such disposal, which liability will rest solely with Renter. Any costs incurred by TRF in removal of effects or in the repairing of any damage to Facility caused by the Event will be fully charged to the Renter.

### 7. EVENT PERSONNEL

Renter shall be responsible for all staffing costs in connection with the use of the Facility, see attached Payment & Fees Schedule for Staffing Guidelines, Rates & Responsibilities. TRF reserves the right to schedule staffing to ensure quality customer experience, public

## USE AGREEMENT

safety, venue cleanliness & execution of all services provided. An estimate of staffing costs is in the attached Payment & Fees Schedule.

### 8. IN HOUSE EQUIPMENT

Use of the In House Sound and Lighting and any other furniture, fixtures, and equipment are available to the Renter at no additional charge. No additional amplified sound system is permitted for use within the venue. The removal of speakers from their original setting is prohibited. It is acknowledged by Renter that final authority over operation of in-house equipment rests with TRF. Changing of the original positioning or focusing of lighting equipment, or reprogramming of the lighting computer or audio console can only be done with TRF's approval and supervision. Renter shall pay for any technical labor involved in returning the equipment to its original standard design. Any violations of this section may result in the immediate termination of this Agreement and will subject Renter to liability for all damages arising from, or in connection with, said violation.

### 9. BOX OFFICE

TRF shall manage all Box Office operations including but not limited to online event creation, online ticket sales, day of show ticket sales, box office management and staffing of personnel. Third party ticket outlets and consignment sales may be allowed by written agreement and TRF inventory control. Settlement from Box Office proceeds to take place at the Adjusted Final Settlement based on the attached Payment & Fee Schedule. TRF requires 20 complimentary tickets to all events at the North Beach Bandshell. TRF charges a \$3.00 per ticket fee for all tickets sold.

### 10. VENUE SPONSORSHIPS AND SIGNAGE

Renter understands that TRF has entered into signage and sponsorship relationships related to the Facility for which TRF will retain all proceeds. TRF reserves all rights to display signage in accordance with its Venue Sponsor agreements. Renter will not mark, cover or attempt to modify any of the signage erected in accordance with its Venue Sponsor agreements at, on or near the Facility. All active Venue Sponsors can be found in attached Sponsor Guidelines.

### 11. BRANDING, SIGNAGE & SPONSORS

Renter shall only display or erect any lettering, signs, pictures, notices, or advertisements in consultation and approval of TRF staff. TRF reserves the right of discretion regarding the location of all Branding & Signage. Sponsors must adhere to the rules laid out in the Sponsor Guidelines.

## USE AGREEMENT

### 12. EVENT ADVERTISING AND PROMOTION

Renter shall be responsible for costs associated with all advertising and promotional materials in connection with the Event. Renter acknowledges and agrees that TRF shall in no way be responsible for the actual results from and/or the success, financial or otherwise, of the Event.

### 13. THIRD PARTY CHARITABLE DONATIONS

Renter may allow Third Party Charitable Donations. Renter acknowledges and agrees to comply with all applicable laws, regulations, and ordinances imposed by any governmental authority in collecting said donations. Renter further agrees that it will be solely responsible for all liability related to said donations.

### 14. PARKING

TRF shall not be obligated to provide or cause to be provided any parking whatsoever. TRF shall not be responsible, under any circumstances, for any loss or damage occurring to automobiles brought onto the Facility by Renter's employees, subcontractors, or guests.

### 15. MUNICIPAL SERVICES

The Venue (TRF) reserves the right to hire, within reason, additional services as required by The City of Miami Beach. Costs associated with CMB additional services will be the sole responsibility of the Renter to be paid based on the attached Payment & Fee Schedule.

### 16. MERCHANDISE AND CONCESSIONS

TRF's designated food and beverage concessionaire shall sell all food and beverages and retain one hundred percent (100%) of the profits therefrom, and TRF's designated merchandise vendor shall sell all merchandise with seventy percent (70%) going to Renter and thirty percent (30%) retained by TRF, less taxes. In the event that Alcoholic Beverages are being sold, age verification will take place at the entrance of the venue by designated staff.

### 17. BOOTH / COMMERCIAL SPACE

Renter agrees to give notice to TRF to ensure successful execution and proper distribution of in house utilities and equipment, whose approval is not to be unreasonable withheld, should Renter desire to sell booth / commercial space ("Booth Space") at the Facility to vendors or exhibitors or otherwise permit vendors or exhibitors at the Facility ("Vendors") in connection with the Event. Renter will assume sole control and responsibility for (i) all operations of all Vendors relating to the Event and (ii) requiring Vendors to comply with any applicable Facility rules and regulations. Renter will be solely responsible for the payment of any and all taxes or other fees associated with the payments received from the Vendors of the use of the Booth Space. All Vendors must adhere to attached Payment & Fee Schedule regarding submission of Indemnification form and delivery of all necessary Licensure and Insurance based on needs described in this agreement. In addition to any other indemnification requirements set forth herein, Renter shall indemnify, defend, be solely liable for and hold, waive and release the TRF parties (herein described), harmless from and against any and all claims, lawsuits, injuries, or losses arising out of the installation, operation, and removal of or in any manner related to the booth space and booth vendors.

## USE AGREEMENT

### 18. RISK OF LOSS

Renter understands and agrees that TRF shall not be liable for any loss, injury, or damage to any personal property or equipment brought into the Facility by Renter or by anyone whomsoever not under the control or direction of TRF, during the time that the Facility is under the control of, or occupied by the Renter. All personal property placed or moved in the Facility shall be at the risk of Renter or the owner thereof. Renter further agrees that it shall be responsible to provide security whenever personal property either owned or used by the Renter, its employees, agents or subcontractors is placed in the Facility, including any property or equipment necessary for set-up and dismantle, whether or not the Facility is open to the general public.

### 19. INDEMNIFICATION

In addition to any other indemnification requirements set forth herein, Renter agrees to defend, indemnify, shall be solely liable for and hold, waive and release TRF and the City of Miami Beach ("city") and each of their respective parents, members, partners, affiliates, divisions and subsidiaries, and each of their respective officers, directors, shareholders, employees, agents and representatives (collectively, "releasees") harmless from and against any and all claims, suits, losses, injuries, liability, and damages (including reasonable attorneys' fees and court costs) arising or alleged to have arisen out of (a) any act or omission of renter, its employees, agents, volunteers, contractors, patrons, guests, invitees, participants and performing artists; and/or (b) the presentation or performance of the event and/or (c) renter's breach of any of the provisions of this agreement. The parties agree, however, that the foregoing indemnity, waiver and release does not include any claims, demands, suits, liabilities, expenses, etc. that arise out of TRF's or the city's sole negligence or willful misconduct.

Renter agrees to use and occupy the facility and to place material, equipment, and other property therein at its own risk and hereby releases the TRF parties from all claims for any damage or injury arising therefrom. Renter will require all third-party service providers and contractors to provide signed indemnification agreement consistent with the indemnification requirements stated in this agreement and in the attached "Service Provider / Vendor Application" The indemnification, waiver and release provisions contained throughout this agreement shall survive the termination of this agreement.

Renter will be solely responsible for the conduct and activities of Renter's employees, agents, contractors, guests and invitees and, for purposes of the Agreement, such conduct and activities of Renter. Renter and its employees, agents, contractors, guests, and invitees

## USE AGREEMENT

will abide by all reasonable rules and regulations adopted by TRF for the use, occupancy, and operation of the Facility. Renter's obligations under this Section shall survive the expiration or termination of this Agreement.

### 20. INSURANCE

Renter will maintain and pay all premium costs for, and will ensure that all of Booth Vendors and other contractors of Renter maintain and pay for the following insurance coverages in amounts not less than specified throughout the duration of the Term:

1. **Commercial General Liability Insurance** for limits of not less than \$1,000,000.00 per occurrence Bodily Injury and Property Damage combined; \$1,000,000.00 per occurrence Personal and Advertising Injury; \$2,000,000.00 aggregate Products and Completed Operations Liability; \$100,000.00 Fire Legal Liability, and \$2,000,000.00 general aggregate limit per event. The policy shall be written on an occurrence basis.
2. **Umbrella Liability Insurance** at not less than \$2,000,000.00 limit providing excess coverage over all limits and coverages noted in attached Insurance Requirements. This policy shall be written on an occurrence basis.
3. **Statutory Workers' Compensation** including Employer's Liability Insurance, subject to limits of not less than \$500,000.00, affording coverage under applicable worker's compensation laws. Renter will cause, if allowed by law, its workers' compensation carrier to waive Insurer's right of subrogation with respect to the TRF Parties. Workman's Compensation is not required of Vendors with less than three employees. In this instance, an official letter from the Vendor stating that they have less than three employees is required.

Policies 1 and 2 above shall list TRF and the City of Miami Beach as "Additional Insureds" with respect to any and all claims arising from Renter's operations. Further, coverage for the "Additional Insureds" will apply on a primary basis irrespective of any other insurance, whether collectible or not. Should any additional premium be charged for such coverages or waivers, Renter will be responsible to pay said additional premium charge to their insurer. Renter will deliver to TRF satisfactory evidence of the described insurance coverage on a certificate form approved by TRF or, if required, copies of the policies. All required insurance will be placed with carriers licensed to do business in the State of Florida, have a rating in the most current edition of A.M. Best's Property Casualty Key Rating Guide that is reasonably acceptable to TRF and will provide thirty (30) days written notice of cancellation or nonrenewal.

The insurance obligations stated in this Section are independent of, and shall not be affected by the scope or validity of, any other indemnity, waiver, release or insurance provisions in other sections of this Agreement.

Renter will ensure that all of its contractors (including, without limitation, sponsors and Booth Vendors arranged by Renter) who will be entering the Facility to engage in any business activity (including, without limitation, sampling, distributing, vending or other commercial activity) will comply with the foregoing insurance requirements and provide satisfactory evidence thereof prior to the Event.

## USE AGREEMENT

### 21. LICENSING AND PERMITS

Renter will be responsible for obtaining and paying for all licenses or permits necessary for holding the Event, including, but not limited to, tax requirements and any permits required by governmental authorities. All costs associated with Permitting and Licensing are to be paid by Renter based on Payment & Fee Schedule.

### 22. DEFAULT

If Renter, after having been given the opportunity to cure, fails to comply with any term(s) or condition(s) of this Agreement, or fails to perform any of its obligations hereunder, then Renter shall be in default. Upon the occurrence of a default hereunder, TRF, in addition to all remedies available to it by law, may by notice to Renter, terminate this Agreement whereupon all deposits, payments, advances, or other compensation paid by the Renter to TRF shall be retained by TRF. Notwithstanding any provision herein, or any rule or regulation providing otherwise, if the Renter cancels the event thirty (30) or less days from the commencement of the Use Period this shall be a default by the Renter. Renter will automatically forfeit and owe the entire Use Rate, as described on the first page of this Agreement as well as the amount due for any contracted services already rendered on behalf of Renter. The Renter shall have no recourse against TRF due to the Renter's cancellation of the event thirty (30) or less days preceding the Use Period. The forfeiture of the Use Rate shall not apply if the cancellation occurs due to a Force Majeure.

### 23. TRF'S TERMINATION RIGHTS

Termination Right: TRF, at the request of CMB, shall have the right to cancel the presentation of an Event at any time if, in the exercise of its reasonable discretion, CMB determines that the presentation of such Event, at the scheduled time, is not in the best interest of TRF or the City of Miami Beach ("CMB") due to concerns of Public Safety, Quality of Life or in case of Emergency.

Termination for Cause: TRF shall have the right to terminate this Agreement, without notice or liability to Renter, upon the occurrence of an event of default so long as the Renter has been given written notice of the default and reasonable opportunity to cure said default in each instance.

Force Majeure: TRF shall not be liable for any failure to perform its obligations where such failure is caused by conditions beyond its control, including, but not limited to, Acts of Nature (including fire, flood, earthquake, storm, hurricane, or other natural disaster), war, invasion, act of foreign enemies, events in foreign countries that affect the City of Miami Beach and its citizens, hostilities (whether war is declared or not), riots, street celebrations or protests, military or usurped power of confiscation, terrorist activities, nationalization, government sanctions or restrictions, blockage, embargo, labor dispute, strike, lockout or interruption, of the failure of services such as electricity or telephone.

### 24. MISCELLANEOUS PROVISIONS

This Agreement shall be construed and enforced according to the laws of the State of Florida.

Title and paragraph are for convenient reference and are not a part of this Agreement.

No waiver or breach of any provision of this Agreement shall constitute a

## USE AGREEMENT

waiver of any subsequent breach of the same or any other provision hereof, and no waiver shall be made effective unless made in writing.

Should any provision, paragraph, sentence, word, or phrase contained in this Agreement be determined by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable under the laws of the State of Florida or the City of Miami Beach, such provision, paragraph, sentence, word, or phrase shall be deemed modified to the extent necessary in order to conform with such laws, or if not modifiable, then same shall be deemed severable, and in either event, the remaining terms and provisions of this Agreement shall remain unmodified and in full force and effect or limitation or its use. This Agreement and any references Addendums and attachments constitute the sole and entire agreement between the parties hereto. No modification or amendment hereto shall be valid unless in writing and executed by properly authorized representatives of the parties hereto.

### 25. NONDISCRIMINATION

Renter represents and warrants to TRF that Renter does not and will not engage in discriminatory practices and that there shall be no discrimination in connections with Renter's use of the Facility or presentation of the Event on account of race, color, sex, sexual preference, religion, age, disability, marital status, or national origin. Renter further covenants that no individual shall, solely by reason of his/her race, color, sex, sexual preference, religion, age, disability, marital status, or national origin, be excluded from participation in, be denied services, or be subject to discrimination in connection with the use of the Facility under this Agreement.

### 26. ASSIGNMENT

Renter may assign this Agreement, in whole or in part with written approval from TRF.

### 27. NOTICES

All notices or other communications required under this Agreement shall be in writing and shall be given by hand-delivery, electronic mail, or by registered or certified US Mail, return receipt requested, addressed to the other party at the address indicated herein or to such other address as a party may designate by giving notice in the matter herein provided. Notice shall be deemed given on the day on which personally delivered; or, if by mail, on the fifth day after being posted or the date of actual receipt, whichever is earlier.

### 28. ENTIRE AGREEMENT

This instrument, together with its attachments and all other instruments incorporated herein by reference constitute the sole and only agreement of the parties hereto relating to the use of the Facility. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force or effect.

### 29. COUNTERPARTS

This Agreement may be executed in two or more counterparts, each of which shall constitute an original, but all of which, when taken together, shall constitute one and the same agreement.

## USE AGREEMENT

### 30. INSPECTIONS

The Renter will allow TRF inspectors, agents, or representatives the ability to monitor its compliance with safety precautions as required by federal, state, or local laws, rules, regulations, and ordinances. By performing these inspections TRF, its agents, or representatives are not assuming and liability by virtue of these laws, rules, regulations, and ordinances. The Renter shall have no recourse against TRF, its agents, or representatives from the occurrence, nonoccurrence, or results from such inspection(s).

### 31. AMERICANS WITH DISABILITIES ACT

Renter shall affirmatively comply with all applicable provisions of the Americans with Disabilities Act ("ADA") in the course of providing any work, labor or services funded by TRF including Titles I and II of the ADA (regarding non-discrimination on the basis of disability) and all applicable regulations, guidelines, and standards. Additionally, Renter shall take affirmative steps to ensure the nondiscrimination in employment of disabled persons.

### 32. COMPLIANCE WITH LAWS

Renter accepts this Agreement and hereby acknowledges that Renter's strict compliance with all applicable federal, state, and local laws, ordinances and regulations is a condition of this Agreement, and Renter, and any of its employees, agents, or performers, shall comply therewith as the same presently exist and as they may be amended hereafter. This Agreement shall be construed and enforced in accordance to the laws of the State of Florida. Further, the Renter, and any of its employees, agents or performers, hereby agrees to comply with all regulations regarding travel to and from the United States as promulgated by the US Department of Treasury Office of Foreign Assets Control, and the US Department of State.

Violation of any federal, state and local law shall subject the Renter to immediate cancellation of this Agreement.

\_\_\_\_\_  
The Rhythm Foundation

Name: \_\_\_\_\_

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

Date: \_\_\_\_\_

\_\_\_\_\_  
Renter

Name: \_\_\_\_\_

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

Date: \_\_\_\_\_



## LICENSE AGREEMENT

### Insurance Requirements

All productions and vendors that go into the North Beach Bandshell require General Liability Insurance with the following limits:

*For all events*

General aggregate	\$2,000,000
Products (completed operation aggregate)	\$2,000,000
Personal and advertising Injury	\$1,000,000
Per Occurrence	\$1,000,000
Fire Damage	\$100,000
Medical Expense	\$5,000

*If applicable:*

Automobile Liability providing coverage for all Owned, Hired and Non Owned Autos	\$1,000,000
--	-------------

*If vendor is dispensing alcohol:*

Liquor Liability (aggregate)	\$2,000,000
Per Occurrence	\$1,000,000

**Workers Compensation Insurance shall be required** under the Laws of the State of Florida. If the vendor has less than three employees and thus is exempt from Worker's Compensation, a letter attesting to the fact must be submitted.

In every case, the following entities must be listed as additionally insured:

**The City of  
Miami Beach  
1700  
Convention  
Center Drive  
Miami Beach,  
FL 33139**

**The Rhythm  
Foundation PO Box  
414625  
Miami Beach, FL 33141**

**EXHIBIT E**  
**CITY OF MIAMI BEACH OWNED PROPERTY INCLUDED IN THE AGREEMENT**



**NORTH BEACH  
BANDSHELL**

**CITY OWNED  
EQUIPMENT**

Item:	Brand:	Model:	Serial No:
Theater Control	Element	4330A1020	434401078
Computer Screen #1	Kristel-LP	LED19-023-P	20100603180
Computer Screen #2	Kristel-LP	LED19-023-P	20100700858
Computer Mouse	Kensington		SA1034A001657
Aluminum benches			

**HOUSE CONSOLE:**

Yamaha QL5 | 48x16

**FLOOR MONITORS:**

4 -- QSC KW122

**F.O.H. SYSTEM:**

12 – Meyer Sound | MINA  
Compact Curvilinear Array Loudspeaker

3 – Meyer Sound | 700 – HP  
UltraHigh – Power Subwoofer

**LIGHTING:**

16 – Chauvet IP65 ColorDash Par H12IP LED Wash Light

16 – Chauvet IP65 ColorDash Par H7IP LED Wash Light

11 – Medium PAR 64 (1K)

1 – Opto Branch 4 4way DMX Distributor ETC

Element Lighting Console

**EXHIBIT F**  
**CITY PREDETERMINED SCHEDULED EVENTS FOR FACILITY**

City of Miami Beach Parks and Recreation Department – Hispanic Heritage Events (September)  
City of Miami Beach International Tennis Federation Events (October)  
City of Miami Beach Turkey Give-Aways (November)  
City of Miami Beach Toy Drives (December)  
City of Miami Beach Parks and Recreation Department – Black History Event (February)  
City of Miami Beach Youth Music Festival (March)

\*\*\*other City events to be scheduled in conjunction with The Rhythm Foundation\*\*\*

**EXHIBIT G**  
**COCA COLA AGREEMENT AND PRODUCT LIST**

Execution Version

*The Coca-Cola Company*COCA-COLA PLAZA  
ATLANTA, GEORGIA

March 16, 2017

City of Miami Beach  
Attention: Ms. Gisela Torres  
1700 Convention Center Drive, Fourth Floor  
Miami Beach, Florida 33139

Re: Sale of the Assets of Coca-Cola Refreshments USA, Inc. to Coca-Cola Beverages Florida, LLC

Dear Ms. Torres:

Reference is hereby made to that certain agreement (the "Agreement"), dated March 14, 2012, by and among the City of Miami Beach, Florida (the "City"), Coca-Cola Refreshments USA, Inc. d/b/a Florida Coca-Cola Bottling Company ("CCR") and The Coca-Cola Company, acting by and through Coca-Cola North America, attached hereto as Exhibit A.

As you know from our prior communications, CCR has transferred certain of its assets to Coca-Cola Beverages Florida, LLC ("CCBF"). In connection with such transfer, CCR formally requests the City's consent to: (i) assign all of CCR's right, title and interest in and to the Agreement to CCBF, including those rights noted in the Agreement as non-assignable by CCR, as of February 25, 2017 (the "Assignment Effective Date") and (ii) CCBF's assumption of all of CCR's obligations and liabilities under the Agreement from and after the Assignment Effective Date (collectively, the "Assignment"). CCBF hereby accepts the Assignment and further assumes and agrees to perform all of the duties and obligations of the Bottler under the Agreement, subject to the Agreement's terms, from and after the Assignment Effective Date.

By consenting to the Assignment, the City acknowledges and agrees that the Agreement shall remain in full force and effect after completion of the Assignment and that there is no default or breach by any party under the Agreement in connection with, or as a result of, the Assignment, and the City agrees to release CCR from all liabilities and obligations under the Agreement arising after the completion of the Assignment.

From and after the Assignment Effective Date, all references to the Bottler or "CCR" under the Agreement shall be construed to refer to CCBF. The address for notices to Sponsor, as set forth in Section 10 of Attachment A to the Agreement shall be as follows:

Coca-Cola Beverages Florida, LLC  
10117 Princess Palm Avenue, Suite 400  
Tampa, Florida 33610  
Attention: Thomas Benford, Executive Vice President  
tbenford@cocacolaflorida.com

With a copy to:  
Deborah Pond, Vice President and General Counsel  
dpond@cocacolaflorida.com  
at the address above

We would greatly appreciate that you indicate your consent by countersigning in the space below.

*[Signature page follows]*

Sincerely,

**THE COCA-COLA COMPANY, ACTING BY AND  
THROUGH COCA-COLA NORTH AMERICA**

By: J.A.M. Douglas, Jr.  
Name: J.A.M. Douglas, Jr.  
Title: President, Coca-Cola North America  
Date: March 16, 2017

**COCA-COLA REFRESHMENTS USA, INC. D/B/A  
FLORIDA COCA-COLA BOTTLING COMPANY**

By: J.A.M. Douglas, Jr.  
Name: J.A.M. Douglas, Jr.  
Title: President, Coca-Cola North America  
Date: March 16, 2017

**COCA-COLA BEVERAGES FLORIDA, LLC**

By: Deborah Pond  
Name: DEBORAH POND  
Title: VICE PRESIDENT & GENERAL COUNSEL  
Date: 3.17.17

**ACCEPTED, ACKNOWLEDGED AND AGREED**

**CITY OF MIAMI BEACH, FLORIDA**

By: [Signature]  
Name: [Signature]  
Title: [Signature]  
Date: 3/28/17

**ATTEST:**

[Signature]  
Rafael E. Granado, City Clerk

**APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION**

[Signature] 3-23-17  
City Attorney RAY Date

March 14, 2012

Mayor Matti Herrera Bower  
Mayor of City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, FL 33138

Dear Mayor:

This letter confirms the agreement made by and among the City of Miami Beach, Florida ("City"), Coca-Cola Refreshments USA, Inc. d/b/a Florida Coca-Cola Bottling Company ("Bottler") and Coca-Cola North America, a division of The Coca-Cola Company ("Company", and collectively with Bottler, "Sponsor"), which sets forth certain exclusive rights granted to Bottler by City, as set forth in the Term Sheet and Exhibits attached thereto, all of which are attached hereto as Attachment A.

1. Term Sheet and Definitive Agreement

The Term Sheet and Exhibits attached thereto are hereby incorporated herein in their entirety. This letter and the Term Sheet, together with any other attachments referenced in either, will constitute a legally binding agreement (the "Agreement") when this letter is signed by all parties in the spaces provided below. All capitalized terms not defined in this letter shall have the meanings assigned to them in the Term Sheet. This letter shall prevail in the event of any conflict between the provisions of this letter and the Term Sheet.

2. Advertising Rights

(a) City agrees that Bottler's advertising shall be positioned at all times in such a manner that the advertising message is in no way obscured (electronically or otherwise) and is clearly visible to the general public. The Products shall be prominently listed on any menu boards located at the Facilities and all Equipment (as such term is defined herein) dispensing Products shall be prominently identified with the appropriate trademarks/logos.

(b) City further agrees that all Products will be dispensed in Sponsor's Equipment and that no other trademarked, equipment, coolers or containers will be permitted.

3. Product Rights

(a) City shall purchase or shall cause its Concessionaires to purchase, all Products, (and cups, lids and carbon dioxide, if applicable) directly from Bottler.

(b) City hereby grants to Bottler the exclusive Beverage rights at the Facilities, except as may be otherwise provided for in this Agreement and Exhibits.

(c) If City contracts a concessionaire, City will cause concessionaire to purchase from Bottler all requirements for Beverages (and cups, lids and carbon dioxide, if applicable). Such purchases will be made at prices and on terms set forth in Bottler's existing agreement with concessionaire, if any. If no agreement exists between concessionaire and Bottler, such purchases will be made at prices and on terms set forth in this Agreement. City acknowledges that there will be no duplication of allowances, funding or benefits (including pricing) to City or concessionaire if concessionaire has an existing agreement with Bottler.

4. Equipment and Service

(a) Bottler Equipment and Service: During the Term, Bottler will loan to City, pursuant to the terms of Bottler's equipment placement agreements, at no cost, that Beverage vending equipment reasonably required and as mutually agreed upon to dispense Products at the Facilities ("Bottler Equipment"). In addition, Bottler will provide at no charge regular mechanical repair reasonably needed for Bottler Equipment, as further outlined in Exhibit 7 to the Term Sheet. Prior to Bottler's installation of Bottler's Equipment at a particular Facility, the City shall provide Bottler with written confirmation that it has conducted an inspection of the electrical service at such Facility and that, based on such inspection, the City finds that the electrical service at the Facility is proper and adequate for installation of Bottler's Equipment. Notwithstanding the preceding, if at any time following Bottler's installation of Bottler's Equipment at a Facility, Bottler's Equipment is damaged as the direct result of defective electrical service at the Facility, then the City will reimburse Bottler for the cost of repair or replacement, as the case may be, of Bottler's Equipment, pursuant to the filing of a claim with the City's self-insurance fund. Notwithstanding the preceding, the City shall not be responsible nor liable to Bottler under this subsection for any damages to Bottler's Equipment which is not caused as a direct result of defective electrical service at a Facility (including, without limitation, any damage to Bottler's Equipment which is caused due to the negligence or misconduct of Bottler's employees, contractors, and/or agents, or from any other cause or act other than faulty electrical service).

(b) Fountain Equipment and Service: During the Term, Company will loan to City, pursuant to the terms of Company's equipment placement agreement, at no cost, that Fountain Beverage dispensing equipment reasonably required and as mutually agreed upon to dispense a quality fountain Beverages at the Facilities ("Fountain Equipment")(collectively, Bottler Equipment and Fountain Equipment are called "Equipment"). No ice makers or water filters will be provided. All Fountain Equipment provided by Company will at all times remain the property of Company and is subject Company's equipment agreement, but no lease payment will be charged. To the extent that Fountain Equipment loaned from Company under this Agreement is located at Facilities that are owned, controlled or managed by a concessionaire of City or other persons not party to this Agreement, City will include provisions in its agreements with such concessionaires that recognize that the Fountain Equipment is owned by Company and that obligates the concessionaires to honor the terms and conditions such equipment agreement.

Company (or Bottler) will provide at no charge regular mechanical repair reasonably needed for Fountain Equipment. Any removal, remodel, relocation or reinstallation of dispensing equipment, flavor changes, summerize/winterize, line changes, or service necessitated by damage or adjustments to the equipment resulting from misuse, abuse, failure to follow operating instructions, service by unauthorized personnel, unnecessary calls (equipment was not plugged in, CO<sub>2</sub> or fountain syrup container was empty), or calls that are not the result of mechanical failure (collectively "Special Service Calls"), are not considered regular service and will not be provided free of charge. Charges for Special Service Calls will be charged at Company's (or Bottler's) then current rate and will be invoiced on a semi-annual basis. Charges will include labor, travel time, parts, and administrative costs.

5. Competitive Products Prohibited.

(a) City agrees that it will not knowingly permit any Competitive Products to be sold, distributed, served, sampled, marketed, advertised, or promoted in any manner at the Facilities, or in association with City, the Facilities or the City trademarks, during the Term, except as outlined in this Agreement.

(b) City agrees that City will not grant any rights, or enter into any contractual or other relationship, whereby City, the Facilities, and/or the City trademarks will be, or have the potential to be, associated in any manner, with any Competitive Products, except as outlined in this Agreement and the Term Sheet.

(c) ~~If City learns of any Competitive Products being marketed, advertised, or promoted in any manner which implies an association with City, Facilities or City trademarks (hereinafter referred to as "Ambush Marketing"), City will promptly notify Bottler in writing of the Ambush Marketing; and also will promptly use its efforts, and cooperate in good faith with Bottler, to prevent or stop such Ambush Marketing in order to protect the exclusive associational rights granted to Bottler under this Agreement.~~

(d) Special Promotional Events Exception. See Exhibit 8.

(e) The City will provide Bottler with no less than thirty (30) calendar days prior written notice of each event which it intends to designate as a Special Promotional Event.

(f) The private, personal consumption of Competitive Products by athletes, coaching staff, musicians, actors, comedians, or other entertainment personalities appearing and performing at the Facility is allowed and will not be considered a Special Promotional Event. City shall use efforts to ensure such consumption is limited to private areas and may not be permitted in any area of the Facility to which the public or any member of the print or electronic media has legal access.

(g) Product availability at Facilities for private events. A private event at a Facility shall mean the use of a Facility, either through the rental of the Facility or through the issuance of a City-approved Special Event Permit, by a person(s) or business entity (ies) (i.e. such as a corporation) which is not open or accessible to the general public either free or via a purchased ticket. For example purposes only, private events may include, but not be limited, to the following: weddings, bar mitzvah/bat mitzvah and corporate events. Product availability and exclusivity at private events shall be handled as follows: Only Products will be sold, distributed, sampled or otherwise served at Facilities at any time. Notwithstanding the foregoing, Competitive Products may be distributed at no cost by the user of the Facility for private events, provided that Products will continue to be the only Products sold, distributed, sampled, or otherwise served by Facilities concession operations.

(h) Product availability at Facilities as it relates to charitable events (including, events produced by not-for-profit entities with valid tax exemption from the IRS) at Facilities or at City-Permitted Special Events (e.g., Relay for Life, Aids Walk, American Cancer Society), shall be handled as follows: Only Products will be sold, distributed, sampled or otherwise served at Facilities at any time. Notwithstanding the foregoing, Competitive Products may be distributed at no cost by the charitable organization using the Facility provided that Products will continue to be the only Products sold, distributed, sampled, or otherwise served by Facilities concession operations and that Bottler had opportunity to supply Products for the charitable event and declined.

6. Consideration.

(a) Pricing. Pricing (including price increases) will be implemented as outlined in the Term Sheet.

(b) Credit Card Readers and Funding. Bottler and City will mutually agree to install credit card readers in select Beverage dispensers, which are identified as high traffic locations. Bottler will pay for the credit card readers in an aggregate amount of not to exceed Ten Thousand Dollars (\$10,000). This funding will be earned over the Term of the Agreement. City shall have no responsibility to fund any overage for payment of the credit card readers should they exceed Ten Thousand Dollars (\$10,000). Bottler shall be responsible for all maintenance and repair of the credit card readers. Upon termination or expiration of the Agreement, City shall return all credit card readers to Bottler.

7. Trademarks; Approvals.

(a) City acknowledges that The Coca-Cola Company is the owner of all right and title in the trademarks "Coca-Cola", "Diet Coke", "Sprite", "DASANI", "Minute Maid", "POWERADE", "Fanta" "vitaminwater" "Full Throttle", "NOS" and other trademarks of The Coca-Cola Company, and it acquires no rights whatsoever in these trademarks

by virtue of this Agreement. City agrees to submit all proposed uses of The Coca-Cola Company marks to Sponsor for approval prior to use, but such approval shall not be unreasonably withheld.

(b) Bottler acknowledges that City is the owner of all right and title in the service mark "MiamiBeach" and that Bottler acquires no rights whatsoever in the service mark by virtue of this Agreement. Bottler shall have the right to use the City's service mark during the Term in connection with its marketing activities at the Facilities. Bottler agrees to submit all proposed uses of City's service marks to City for approval prior to use, but such approval shall not be unreasonably withheld.

#### 8. Termination

(a) Notwithstanding the other provisions of this Agreement, if any federal, state or local law, rule, regulation or order prohibits, restricts or in any manner interferes with the sale or advertising of Beverages at any time during the Term of this Agreement, and the City fails to cure such breach within thirty (30) days following written notice of same from Bottler then, at its option, Bottler may terminate this Agreement and City shall (i) return any Equipment, and (ii) pay to Bottler the unearned portion of pre-paid Sponsorship Fees for the Agreement Year in which the termination occurs (pro-rated through the date of termination), if any, as well as any other upfront funding deemed earned over the Term, if any, prorated through the date of termination.

(b) City represents and warrants that it has full right and authority to enter into this Agreement and to grant and convey to Bottler the rights set forth herein. In the event of expiration or revocation of such authority, and if the City fails to cure such breach within thirty (30) days following revocation of full right and authority, then at its option, Bottler may terminate this Agreement, and City shall (i) return any Equipment; and (ii) pay to Bottler the unearned portion of pre-paid Sponsorship Fees for the Agreement Year in which the termination occurs (pro-rated through the date of termination), if any, as well as any other upfront funding deemed earned over the Term, if any, pro-rated through the date of termination.

(c) If Bottler breaches any of its material obligations under this Agreement, and fails to cure such breach within thirty (30) days following written notice of same from the City, then City may terminate this Agreement and Bottler shall remove all Equipment from the Facilities, and the City shall be entitled to retain the earned portion of any pre-paid Sponsorship Fees for the Agreement Year in which the termination occurs (pro-rated through the date of termination), if any; other upfront funding deemed earned over the Term, if any, prorated through the date of termination; and any fees or payments due for the Agreement year in which the termination occurs, such as commission fees, if any.

(d) Notwithstanding the above, nothing in this section shall operate to restrict any other remedies that either party may have against the other in the event of a material breach by a defaulting party.

#### 9. Insurance

The Bottler acknowledges that the City is self-insured, as provided in Attachment B to this Agreement.

Bottler shall, at its sole cost and expense, obtain, provide and maintain, during the Term, the following types and amounts of insurance, which shall be maintained with insurers licensed to sell insurance in the State of Florida and have a B+ VI or higher rating in the latest edition of AM Best's Insurance Guide:

- 1) Commercial General Liability. A policy including, but not limited to, commercial general liability, including bodily injury, personal injury, property damage, in the amount of \$1,000,000 per occurrence. Coverage shall be provided on an occurrence basis.

2) ~~Workers' Compensation per the statutory limits of the State of Florida and Employer's Liability Insurance.~~

3) Automobile Liability - \$1,000,000 combined single limit for all owned/non-owned/hired automobiles.

Said policies of insurance shall be primary for Sponsor/Bottler's negligence only to and contributing with any other insurance maintained by Bottler or City, and all shall name City of Miami Beach, Florida as an additional insured on the commercial general liability and automobile liability policies. Sponsor shall provide thirty (30) days written notice to City prior to policy cancellation.

Bottler shall file and maintain certificates of the above insurance policies with the City's Risk Management Department showing said policies to be in full force and effect at all times during the Term.

10. Notices

Any notice or other communication under this Agreement must be in writing and must be sent by registered mail or by an overnight courier service (such as Federal Express) that provides a confirming receipt. A copy of the notice must be sent by fax when the notice is sent by mail or courier. Notice is considered duly given when it is properly addressed and deposited (postage prepaid) in the mail or delivered to the courier. Unless otherwise designated by the parties, notice must be sent to the following addresses:

(A) **Notice to Sponsor.**

Coca-Cola Refreshments USA, Inc. d/b/a Florida Coca-Cola Bottling Company  
3350 Pembroke Road  
Hollywood, Florida 33021  
Attention: V.P. Market Unit, South Florida  
Fax: 954-986-3173  
Ticket Addressee: V.P. Market Unit, South Florida  
Fax: 954-986-3173

With a copy to: Coca-Cola Refreshments USA, Inc.  
2500 Windy Ridge Pkwy  
Atlanta, Georgia 30339  
Attention: General Counsel

(B) **Notice to City.**

City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, Florida 33138  
Attention: Hilda Fernandez  
Fax: 305-673-7782

11. Governing Law

This Agreement and any dispute arising out of or relating to this Agreement shall be governed by and construed in accordance with the laws of the State of Florida, without reference to its conflict of law rules.

12. Compliance with Law

Each of the parties hereto agrees that it will, in its performance of its obligations hereunder, fully comply with all applicable laws, regulations and ordinances of all relevant authorities and shall obtain all licenses, registrations or other approvals required in order to fully perform its obligations hereunder.

13. Retention of Rights

No party shall obtain, by this Agreement, any right, title or interest in the trademarks of the other, nor shall this Agreement give any party the right to use, refer to, or incorporate in marketing or other materials the name, logos, trademarks, service marks or copyrights of the other, except as may be expressly provided and authorized herein.

14. Jury Waiver

EACH PARTY, TO THE EXTENT PERMITTED BY LAW, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY ACTION OR OTHER LEGAL PROCEEDING ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT AND THE TRANSACTIONS IT CONTEMPLATES. THIS WAIVER APPLIES TO ANY ACTION OR LEGAL PROCEEDING, WHETHER ARISING IN CONTRACT, TORT OR OTHERWISE.

15. Entire Agreement

This Agreement and its exhibits contains the entire agreement between the parties with respect to the subject matter hereof. This Agreement may not be assigned without the prior written consent of all parties; provided, however, that Bottler may assign this Agreement in connection with its reorganization or the sale of all or substantially all of its assets. All amendments to or waivers of this Agreement must be in writing signed by all the parties.

The Coca-Cola Company, acting by and through  
its Coca-Cola North America Division

By: Susanne Geldart

Print Name: Susanne Geldart

Title: Sr. VP, Southeast Region Sales  
3/26/12

City of Miami Beach

By: Matti H. Bower

Print Name: Matti H. Bower

Title: Mayor  
3/16/12

Coca-Cola Refreshments USA, Inc. d/b/a Florida  
Coca-Cola Bottling Company

By: Sally Forsyth

Print Name: SALLY FORSYTH

Title: REGION CONTROLLER  
3/22/12

APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION



Robert Parden

ATTEST

[Signature]  
City Attorney

3-15-12  
Date

Attachment A

TERM SHEET

**EXCLUSIVE NON-ALCOHOLIC BEVERAGE AGREEMENT**

**CITY OF MIAMI BEACH AND COCA-COLA REFRESHMENTS USA, INC.  
and COCA-COLA NORTH AMERICA, A DIVISION OF THE COCA-COLA  
COMPANY**

**1. DEFINITIONS:**

Bottler: Coca-Cola Refreshments USA, Inc. d/b/a Florida Coca-Cola Bottling Company

Company: Coca-Cola North America, a division of The Coca-Cola Company

Sponsor: Collectively, "Bottler" and "Company"

City: City of Miami Beach

Agreement: Exclusive Non-Alcoholic Beverage Agreement

Facilities: Includes the following Miami Beach property, including any land, building, structures and/or other facilities thereon: Miami Beach Golf Club; the Normandy Shores Golf Club; The Fillmore Miami Beach at the Jackie Gleason Theater (upon the expiration of the current management agreement); the Miami Beach Convention Center; all currently existing City of Miami Beach owned parks and recreational facilities; all currently existing City of Miami Beach owned public parking garages which are either directly operated by the City, through its Parking System, or by a third party who, pursuant to a management or concession agreement with the City, is contractually authorized to operate and manage such garage on behalf of the City; all currently existing public beachfront concessions which are either directly operated by the City or by a third party who, pursuant to a concession or management agreement with the City, is contractually authorized to operate and manage such concession on behalf of the City; and any additional future Facilities or expansion of existing or future Facilities, including but not limited to, the concession facilities at 21<sup>st</sup> and 46<sup>th</sup> street and at South Pointe Park and the Miami Beach Convention Center facility expansion, except as may be otherwise be excluded in the Agreement.

Beverage: all non-alcoholic beverages of any kind including but

	<p>not limited to coffee products; tea products; concentrated energy drinks, including those in small servings; protein-enhanced dairy beverages; frozen drinks (e.g. ICEE) and smoothies made from concentrate; and the pre-mix and/or post-mix syrups used to prepare fountain Beverages. "Beverage" or "Beverages" shall not include dairy products except as noted above (e.g. milk, yogurt, ice cream), water drawn from the public water supply, or unbranded juice squeezed fresh at the Facilities.</p> <p><u>Products:</u> Beverage products purchased directly from Bottler, or with written Bottler approval from, or Bottler's authorized distributor, or sold through vending machines owned and stocked exclusively by Bottler.</p> <p><u>Competitive Products:</u> Beverages which are not Products.</p>
<b>2. AGREEMENT TERM:</b>	The Term shall begin January 1, 2012 and will continue until December 31, 2021 (the "Term"). When used in this Term Sheet, the term "Agreement Year" means each consecutive twelve-month period during the Term, beginning with the first day of the Term.
<b>3. EFFECTIVE DATE:</b>	January 1, 2012
<b>4. EXPIRATION DATE:</b>	December 31, 2021 as to all Facilities
<b>5. SPONSORSHIP FEE:</b>	<p>\$3,725,000 for the Term of the Agreement.</p> <ul style="list-style-type: none"> <li>First installment of \$800,000 (includes sponsorship fee for Agreement Year One and signing bonus) will be paid within sixty (60) days of execution of the Agreement by all parties. The portion pertaining to the signing bonus (\$475,000) will be deemed earned over the Term and the portion pertaining to the sponsorship fee for the Agreement Year One (\$325,000) shall be deemed earned evenly on a monthly basis during the first Agreement Year.</li> <li>\$325,000 due each Agreement Year thereafter during the Term of the Agreement, due upon the anniversary date of the Agreement and will be deemed earned over the Agreement Year. (Subject to purchase of a minimum of 22,500 cases of bottles/cans per year.)</li> </ul>
<b>6. COMMISSIONS:</b>	Commissions to be paid quarterly in arrears by Bottler to City based upon cash collected less taxes and as per the Commission Rate Structure according to Bottler's sales records. (Exhibit 1)
<b>7. COMMUNITY: SUPPORT/</b>	Bottler will provide City with a total of \$17,500 in cash for the

<b>COMPLIMENTARY PRODUCT:</b>	<p>purchase of equipment or other products (mutually agreed upon)</p> <p>Bottler shall provide City, upon City's request, with up to 450 standard physical cases of complimentary Product (12 ounce CSD cans and/or DASANI 12 ounce bottles) per Agreement year for a Product bank to be used by the City. If City does not request complimentary Product by the end of each year, any remaining complimentary Product shall be retained by Bottler with no further obligation to Account. Bottler will provide complimentary Product donation report upon Account's request.</p>
<b>8. ADVERTISING &amp; SPONSORSHIP:</b>	<p>Bottler has the exclusive right to advertise Products (i) at the Facilities and (ii) in connection with the Facilities. No permanent or temporary advertising, signage or trademark visibility for Competitive Products are permitted anywhere at the Facilities, except as permitted pursuant to the Agreement. Advertising rights are further delineated in <b>Exhibit 2</b>. Bottler has the exclusive right to advertise the Products as the "Official" or "Exclusive" soft drink, sports drink, dairy-based protein drink, water, tea, energy drink, and/or juice or juice drink, etc. of the Facilities, of the City of Miami Beach and of South Beach. Bottler will be the exclusive advertiser of Products associated with the Facilities.</p>
<b>9. PRODUCT RIGHTS:</b>	<p>Bottler has the exclusive right to sell or distribute Products at the Facilities. No Competitive Products may be sold, dispensed, sampled or served anywhere at the Facilities, or on the City's public rights-of-ways, except as may otherwise be provided for in this Agreement.</p>
<b>10. EXCEPTIONS:</b>	<p>Except for those Facilities specifically enumerated in Section 1., "Facilities" shall NOT include any City of Miami Beach property (including any City-owned land, buildings, structures, and/or other facilities thereon) which—as of the Effective Date—is used, occupied, controlled, and/or managed and operated by a third party (or parties) pursuant to any of the following agreements between the City and such third party(ies): (i) lease agreement; (ii) concession agreement; (iii) operation and management agreement; (iv) development agreement; (v) easement agreement; (vi) license and/or use agreement; (vii) revocable permit; and/or (viii) any other written instrument between the City and such third party(ies) which establishes a contractual right on behalf of such third party(ies) for the use and/or occupancy of City property. This shall include, but not be limited to, any City property occupied by a tenant through a lease or rental agreement (including, without limitation, leases or rental agreements for office,</p>

retail, and/or commercial uses(s) in City-owned buildings); any City property managed and operated, and/or otherwise used, by a third party(ies) pursuant to a management agreement or concession agreement; private upland owner beachfront concessions which are issued a permit by the City (and which are neither operated directly by the City, nor by a third party on behalf of and pursuant to a contract with the City); sidewalk cafes which are issued a permit to operated pursuant to the City's Sidewalk Café Ordinance, as may be amended from time to time; "public-private" projects developed and constructed pursuant to a Development Agreement (pursuant to the requirements of the Florida Local Government Development Agreement Act under Chapter 163, Florida Statutes); any hotel or retail development related to the expansion of the Miami Beach Convention Center that is not managed as part of the Convention Center operations (e.g. adjacent commercial retail, hotel, etc.); public bus shelter advertising managed by a third party under contract with the City; and advertising permitted pursuant to the City's current agreement for the public bike-share concession. Notwithstanding the preceding, the City will: i) make reasonable good faith efforts to meet with the bike-share concessionaire and negotiate an amendment to the existing bike-share concession agreement, which must also be subject to agreement by the bike-share concessionaire, to prohibit the bike-share concessionaire from advertising Competitive Products; ii) if City renews the bike-share concession agreement with the bike-share concessionaire, then, as a condition to such renewal, the City Manager will recommend that such renewal be conditioned that such renewal include a term prohibiting the bike-share concessionaire from advertising Competitive Products; and iii) no advertising of Competitive Products shall be permitted on bike-share station kiosks during the Term should the City, after the Effective Date, approve advertising for placement on bike-share kiosks. Should the City enter into any new bike-share agreements during the Term, no advertising of Competitive Products shall be permitted on the bicycles used for that bike-share agreement(s).

Further, for the following locations which are under a pre-existing concession and/or use agreement (i.e. in effect prior to the Effective Date of the Agreement) with a Competitive Products supplier, those Facilities will come under this Agreement after such Competitive Products agreement is terminated or expires, or until such time as the concession or use agreement with the City for those Facilities is terminated, expires or is subject to any renewal provisions. The current

list of such facilities, and their expiration dates, are as follows:

- 1) 21<sup>st</sup> Street/46<sup>th</sup> Street Beachfront Concession/Tim Wilcox, Inc. – 11/30/2012
- 2) South Pointe Park Concession/Blissberry – 11/30/2012
- 3) Normandy Isle Pool Concession Stand/E. Gomez – 11/09/2011

City agrees that it will not knowingly permit any Competitive Products to be sold, distributed, served, sampled, marketed, advertised or promoted at the Facilities, or in association with City, except, and as further explained, in Exhibit 8:

- Third party exhibitor set ups at Facilities or during City-Permitted Special Events in accordance with the City's Special Event Permit Guidelines, as same may be amended from time to time.
- Charitable events at Facilities or at City-Permitted Special Events where Competitive Product are donated to the charitable event;
- Availability at City-Permitted Special Events only within Special Event Permit Area (as such term is defined in the City's Special Event Permit Guidelines, as same may be amended from time to time).
- Up to four (4) sponsorship events at the Miami Beach Golf Club, and up to four (4) sponsorship events at the Normandy Shores Golf Club each Agreement year;
- up to three (3) sponsorship events at the Miami Beach Convention Center each Agreement Year (the number limitation for the sponsorship events at the Miami Beach Convention Center is subject to a review after three (3) Agreement Years);
- a mutually agreed upon number of sponsorship events at the Fillmore Miami Beach at the Jackie Gleason Theater (upon expiration of the existing management agreement); and
- up to four (4) City-issued Special Event Permits for a "City Approved Major Sponsorship Public Event", each Agreement Year, which includes an event sponsored by a manufacturer, distributor, or marketer of Competitive Products under a master sponsorship agreement with the owner or operator of the sponsorship event; an event conducted on a national or regional multi-market basis; and/or an event where a competitor is the presenting, title or other primary sponsor of the event. The number limitation for City-Issued Special Events is subject to a review after three (3) Agreement Years.

	<p>Whenever possible, City will make reasonable good faith efforts to encourage third party users of the Golf Courses and Convention Center, and Special Event organizers, to use Bottler's Products for their non-alcoholic beverage needs. Since third party organizers who apply for Special Event Permits will be permitted to sell only Bottler's Products, City will amend City's Special Events Permit Application and City will provide Sponsor contact information through the City's Special Events Permit Application process.</p>
<b>11. MARKETING PROGRAM:</b>	<p>Bottler agrees to provide Account with annual in-kind marketing support fund with an approximate retail value of Two Hundred Thousand Five Hundred Dollars (\$200,500) as further delineated in <b>Exhibit 3</b>.</p>
<b>12. RECYCLING PARTNER:</b>	<p>Bottler shall be designated the official "Recycling Partner" of Account. In consideration of this designation, Bottler shall provide, at their cost, the services/products delineated in <b>Exhibit 4</b>, with a minimum total value of \$15,000, and up to \$25,000 over the entire Term</p>
<b>13. VENDING PROGRAM/OTHER EQUIPMENT</b>	<p>City agrees that Bottler shall place a minimum of sixty-five (65) Product vending machines in mutually agreed upon locations at the Facilities, and Bottler will loan to City at no cost, Beverage dispensing equipment as reasonably required and as mutually agreed upon to dispense Products at the Facilities, and in accordance with <b>Exhibit 5</b>.</p>
<b>14. CITY SUPPORT:</b>	<p>In consideration of the partnership, City grants to Bottler: Twenty-six (26) rounds of golf each Agreement Year (max of eight during peak season; no more than twelve at Miami Beach Golf Course; benefit does not roll over); a minimum of four (4) free tickets to at least six (6) ticketed events at Facilities each Agreement Year, subject to availability (e.g. Art Basel Miami Beach, Auto Show, South Beach Comedy Festival at the Fillmore, etc.). Additional tickets will be provided as available. Benefit does not roll over.</p>
<b>15. PRICING:</b>	<p>Bottle/Can Pricing: City is entitled to purchase bottle/can Products from Bottler in accordance with the price schedule set forth in <b>Exhibit 6</b>; prices shall remain in effect until July 31, 2012. Thereafter, such prices will be subject to an annual increase of no more than four percent (4%) over the previous Agreement Year's price.</p> <p>Fountain Products or Georgia Coffee Pricing: Bottler will sell fountain Products to City at the National Account prices, as</p>

	<p>announced by the Bottler in January of each year. Georgia Coffee pricing shall be provided quarterly based on commodity markets.</p> <p>Purchasing: All Product shall be purchased directly from Bottler, except for those Products that Bottler identifies can be purchased from an authorized Coca-Cola distributor.</p>
<b>16. TERMINATION:</b>	<p>If City breaches any of its material obligations set forth in this Agreement, and fails to cure such breach within thirty (30) days following written notice of same from Bottler, then, Bottler may terminate this Agreement, and City shall (i) return any Equipment, and (ii) pay to Bottler the unearned portion of any pre-paid Sponsorship Fees for the Agreement Year in which the termination occurs (pro-rated through the date of termination).</p> <p>If Bottler breaches any of its material obligations set forth in this Agreement, and fails to cure such breach within thirty (30) days following written notice of same from City, then, City may terminate this Agreement, and Bottler shall (i) remove any Equipment, and (ii) pay to City the earned portion of any pre-paid Sponsorship Fees or other fees or payments due for the Agreement year in which the termination occurs (pro-rated through the date of termination).</p> <p>City shall not be in default in the event of any claim filed in relation to City's restriction on Competitive Product sampling; provided, however, the Bottler shall have the following remedies: 1) ability to renegotiate financial terms, as appropriate, within a specified time (e.g. 90 days); or, 2) failing to negotiate terms acceptable to both parties within specified time, Bottler may terminate the Agreement, and City shall (i) return any Equipment, and (ii) pay to Bottler the unearned portion of any pre-paid Sponsorship Fees for the Agreement Year in which the termination occurs (pro-rated through the date of termination). Nothing in this section shall operate to restrict either party's other remedies in the event of a material breach by the other.</p>
<b>17. MAINTENANCE &amp; SERVICE:</b>	<p>Bottler agrees to provide reasonable service and maintenance for the equipment during the Term. City shall allow Bottler to enter its premises for the purpose of inspection or performance of such maintenance and repair, or necessary replacement or return of the equipment. Bottler and City will establish a mutually agreed upon refund bank and customer service program, as delineated in Exhibit 7.</p>
<b>18. REPORTS/AUDITING:</b>	<p>Bottler will provide an annual business review report within 90</p>

	days following each Agreement Year during the Term, Commission reports will be provided monthly. The format of such reports shall be mutually agreed upon. City has the right to audit/inspect account statements with reasonable prior notice to Bottler and during normal business hours. If City requests an audit, City agrees to pay for such audit. Account records must be retained for a minimum of two (2) Agreement Years after the payment of the annual Sponsorship Fee is paid, in addition to the current Agreement Year of the Term, and for two (2) Agreement Years following expiration or termination of the Agreement.
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Exhibit 1 to Term Sheet

COMMISSIONS

Workplace Facilities (City Hall, Police Station, and other City Facilities):

<u>Product</u>	<u>Vend Price</u>	<u>Commission Rate</u>
20 oz. PET carbonated/NESTEA®	\$1.25	30%
20 oz. PET Minute Maid®	\$1.25	30%
20 oz. PET DASANI®	\$1.25	30%
300 ml PET DASANI®	\$0.75	30%
20 oz. PET POWERADE®	\$1.50	30%
20 oz. PET vitaminwater®	\$1.75	15%
16 oz. cans Energy Beverages	\$2.00	30%
16.5 oz. PET FUZE ®	\$2.00	15%
15.2 oz. PET Minute Maid® Juices to Go	\$1.50	15%

All other public locations (such as South Beach):

<u>Product</u>	<u>Vend Price</u>	<u>Commission Rate</u>
20 oz. PET carbonated/NESTEA®	\$1.50	30%
20 oz. PET Minute Maid®	\$1.50	30%
20 oz. PET DASANI®	\$1.50	30%
300 ml PET DASANI®	\$1.00	30%
20 oz. PET POWERADE®	\$1.75	30%
20 oz. PET vitaminwater®	\$2.00	15%
16 oz. cans Energy Beverages	\$2.25	30%
16.5 oz. PET FUZE®	\$2.25	15%
15.2 oz. PET Minute Maid® Juices to Go	\$1.75	15%

In Agreement Years Four and Seven, the Vend Prices will increase by twenty-five cents for each Product listed above. For example, in Agreement Year Four, 300ml. DASANI will increase to \$1.00 Vend Price and then in Agreement Year Seven, 300ml. DASANI will increase an additional twenty-five cents to \$1.25. The Commission Rates will not change during the Term of this Agreement. There are two vend rates (one for workplace and one for public locations) that will be outlined in the final formal agreement between the parties, but note that commission rates will remain the same.

Commissions are paid based upon cash collected after deducting taxes, deposits, recycling fees, other handling fees, communication charges and credit and debit card fees, if any. Commissions shall not be payable on any sales from vending machines not filled or serviced exclusively by Bottler. Bottler may adjust the vend prices and/or commission rates as necessary to reflect changes in its costs, including cost of goods, upon prior written notice and approval by City. Commissions will be paid each month following the month in which they are earned, with an accounting of all sales and monies in a form reasonably satisfactory to the City, and shall become immediate property of City.

ADVERTISING RIGHTS

(Except as otherwise noted, the following rights may not be transferred or assigned by Bottler)

1. Recognition of Bottler as the "Official Non-Alcoholic Beverage Sponsor" of City. Official status will include Official Status Recognition for City across all non-alcoholic beverage categories i.e. "Coca-Cola Official Soft Drink of Miami Beach" and Official Status Recognition for South Beach across all non alcoholic beverage categories (i.e. "POWERADE Official Sports Drink for South Beach")
2. Official Sponsor Status (for Products) of all City-produced citywide Special Events, whether now existing or as may exist in the future (i.e. including, without limitation, and for example purposes only Sleepless Nights); Bottler to have highest sponsorship level and benefits available other than presenting or title sponsorship. In addition, Bottler will be recognized as the "Title Sponsor" of City's "Fire on the 4<sup>th</sup> Annual Independence Day Celebration" each Agreement Year during the Term.
3. Recognition of Bottler as the "Official Recycling Partner" for the City of Miami Beach & South Beach
4. Joint Bottler/City Logo placement on City and City-related websites (e.g. Miami Beach Convention Center, Miami Beach Golf Club, Normandy Shores Golf Club, Miami Beach Culture web site (MBCulture.com); and any other City websites, whether now existing or as may exist in the future, to such extent as permitted by any federal or state regulations on .gov domains. City will use reasonable commercial efforts to include joint Bottler/City Logo on all printed convention and tourism materials, as appropriate and available.
5. Waiver of any Special Event Permit and/or Permit Application Fees for Bottler's use of certain Account Facilities for up to two (2) mutually agreed upon events per Agreement Year, based on availability. For purposes of the Special Event Permit and/or Permit Application Fee waiver, these Facilities shall include public beachfront areas and Parks and Recreation facilities where Special Events are permitted. All other fees and costs of production, including but not limited to, taxes, security, sanitation, etc., shall be the responsibility of Bottler. Right may not be transferred or assigned.
6. Waiver of any rental or use fees for Bottler's use of certain City Facilities for up to (two) 2 mutually agreed upon events per Agreement Year, based on availability. For purposes of the rental or use fee waiver, these Facilities shall include the use of meeting room space or ballroom space at the Miami Beach Convention Center. All other fees and costs of production, including but not limited to taxes, security, audio/visual, decoration, etc., shall be the responsibility of the Bottler. Right may not be transferred or assigned.
7. Unlimited, royalty-free Product sampling at City produced and/or sponsored events; Royalty-free Product sampling permits per Agreement Year, as follows: 48 permits each Agreement Year, but permits will be limited to not more than six (6) permits in any one month period. Right may not be transferred or assigned. If Sponsor does not use all 48 permits by the end of each Agreement Year, any remaining permits will not roll-over to the following Agreement Year, but will be forfeited.
8. Mutual agreement on the development and use of a joint logo between Bottler and Account.
9. Right to use mutually agreed upon joint logo on any point-of-sale, marketing materials, and/or signage that may be mutually agreed upon.
10. Royalty-free advertisement in City's magazine (i.e. MB Magazine); minimum of a quarter page each issue; larger ad size as may be available. Right may be transferred or assigned.
11. Royalty-free prominent advertisement in any Special Promotional Event programs or collaterals produced for City-produced citywide Special Promotional Events (i.e. including, without limitation, July 4<sup>th</sup> and Sleepless Nights). City shall use best efforts to provide a full page ad.

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12. ~~The right to brand City's public beach concession area(s) with approved Bottler and City joint branding graphics (e.g. concession stands, storage shed, umbrellas, etc.), subject to proposed branding meeting all necessary administrative and regulatory approvals. Implementation of any approved branding shall be at the Bottler's expense. All trademark usage must be pre-approved prior to usage. The erection of any other signage other than vending machine display shall be subject to approval by the City.~~
  13. One Royalty-free joint City/Bottler message PSA advertising panel at the 5<sup>th</sup> and Alton bus shelter; production/installation costs paid by Bottler. Minimum of full use of one PSA ad panel for the entire term of the Agreement.
  14. Minimum of one (1) Royalty-free advertising panel at the 5<sup>th</sup> and Alton bus shelter, on a space availability (remnant) basis; production/installation costs paid by Bottler. Right may be transferred or assigned.
  15. Minimum of one (1) one-month Royalty-free electronic joint City/Bottler message PSA run on Atlantic Broadband and Welcome Channel; Additional months based on ongoing availability;
  16. Minimum of one (1) unlimited run on MBTV of City/Bottler message PSA;
  17. Royalty-free POF ticket ad based on space availability; production costs paid by Bottler. Right may be transferred or assigned.

The parties agree to perform such additional marketing activities, as the parties may mutually agree upon to drive traffic to the Facilities and to increase Product sales.

**MARKETING PROGRAM**

Bottler shall provide City for approval with the proposed annual marketing plan for promotion of the partnership no later than ninety (90) days prior to the beginning of each Agreement Year, except for the first Agreement Year when the marketing plan shall be provided to the City within ninety (90) days after execution of Agreement. The annual value of the marketing plan shall be no less than \$200,500, as determined in good faith by Bottler and based on generally accepted marketing values. Some examples of activation may include the following; however, actual marketing programs will depend on availability of these programs.

- Inclusion of the City in the My Coke Rewards program, or other customer reward program offered by Bottler, through an annual promotional program (e.g. sweepstakes); estimated value \$100,000, or equivalent value. Activation based on availability
- Truck-back promotions program - value: \$24,000/year based on availability
- Box Topper program or other similar high-visibility promotional program; value: \$25,000/year
- Neck Ringer program: a Neck Ringer program shall be available with a minimum distribution of neck ringers
- Touring Program: Bottler will bring the Open Happiness Tour, or such other promotional touring program offered by Bottler, to the City based on availability.
- Bottler to develop and implement at least five (5) strategic marketing partnerships with the Account and the Bottler's other sponsorship partners during the Term of the Agreement. Such strategic marketing partnerships may include, but are not limited to, cross promotion, product, tickets, etc., with other brands or products currently under a sponsorship or other promotional/marketing agreement with the Bottler.
- Lebron James Event/celebrity event; value: \$45,000 based on availability, or equivalent value

City acknowledges the intent of the Bottler to develop a joint marketing logo incorporating the Bottler's mark and the City's mark. Bottler shall obtain approval from the City, in writing, of the joint logo for use in promotion of the Agreement, including, but not limited to, its use in all commercial, marketing, media advertisements, web sites and promotional products.

A party's use of the other party's marks in promotions, on products and signage, shall be first approved by the other party in writing, and all uses of a party's marks shall be acknowledged as that party's intellectual property and include appropriate trademark notices.

The parties agree to perform those additional marketing activities, as the parties may mutually agree upon to drive traffic to the Facilities and to increase Product sales. City agrees to provide Bottler with reasonable marketing assets inventory (e.g., to be used with a My Coke Rewards national consumer sweepstakes, or other such similar sweepstakes) for mutually agreed upon promotions each year during the Term to promote Bottler Products and City.

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Exhibit 4 to Term Sheet

RECYCLING PARTNERSHIP

Bottler shall be designated the official "Recycling Partner" of City.

Bottler shall provide, at its cost, the following services/products (value of \$15,000-\$25,000):

- Assess, consult and offer a Recycling Program Plan for bottle/can recycling initiatives
- Propose messaging strategy for the City's bottle/can recycling initiatives (within 90 days after execution of Agreement)
- Provide Temporary recycling bins for special events (minimum of 30) to City at Bottler's cost;
- Provide Recycling bins for placement in Facilities or agreed upon public areas (minimum of 15) to City at Bottler's cost; design subject to review and approval of City;
- Place reverse vending machines (crushers) in vending banks in the Facilities; minimum of five (5) crushers placed during the first five Agreement Years of the Term, at Bottler's cost.
- Use of Recycling Educational Vehicle (REV,) or other Education Recycling material, at City events; scheduled at least one time every 18 months during the Term.

VENDING PROGRAM

Bottler shall place, at their cost, all vending machines in agreed upon locations pursuant to the following:

- 1) Bottler shall provide to City within 90 days after execution of Agreement the proposed equipment plan for the Agreement Term; to include the machine allocation plan by type (e.g. interactive vending machines, glass front etc.) and location; equipment replacement schedule; and vend front replacement and schedule for existing vending machines that need the vend front replaced. All equipment shall be UL energy star rated.
- 2) Bottler shall install vending machines within 180 days after the proposed equipment plan has been approved by all parties. Both parties agree that the installation of vending machines shall be completed within 180 days after the proposed equipment plan has been approved by all parties. Agreement execution. The already approved beach thematic vend fronts will be used unless other mutually agreed upon vend fronts have been selected and approved, and if beach thematic vend fronts are available. The vend fronts shall include advertising panels for use by the City, as approved by Bottler, provided that the vending machines are equipped with advertising panel(s). Bottler shall pay all costs for the production and installation of the City vend front advertising panels. A minimum of two (2) and a maximum of four (4) City vend panel ads shall be produced/installed each Agreement Year.
- 3) Bottler shall provide within 90 days after execution of Agreement the proposed credit card reader installation plan and schedule. All credit card reader installation shall be completed within Agreement Year One.
- 4) City shall provide all electrical power necessary to operate the vending machines, and City shall pay up to \$200 for the cost of any electrical modifications or connections necessary to accommodate any new vending machine placement, upon mutual agreement of the proposed location for the placement of the vending machine.
- 5) All vending machines remain the property of the Bottler.
- 6) Bottler shall provide a product list to the City to be included in the vending program. Any changes to the Product list shall be provided to the Account prior to Product placement in a vending machine. Bottler shall work with the City's Parks and Recreation Department to identify the appropriate vending products for inclusion in vending machines located in any City park. The City's Park and Recreation Department shall provide approval, in writing, of the Products to be sold in the vending machines placed in City parks.
- 7) Bottler shall maintain vending machines reasonably well-stocked with Products.

**Exhibit 6 to Term Sheet**

**INITIAL PRICE SCHEDULE\***

<u>Package</u>	<u>Price per case</u>
20 oz. CSD	\$17.85
12 oz. CSD	\$9.46
15.2 oz. MMJTG	\$23.36
12 oz. DASANI®	\$8.88
1 liter CSD	\$16.29
20 oz. DASANI®	\$10.82
20 oz. vitaminwater®	\$27.00
8 oz. CSD	\$16.00
20 oz. NESTEA®/ Minute Maid® Refreshment	\$17.85
20 oz. POWERADE®	\$19.00
16 oz. Monster®	\$34.00
2 liter CSD	\$12.35
16.9 Honest Tea®	\$12.60
500 ml Gold Peak®	\$13.99
8 oz. aluminum bottle	\$16.48

<u>Post-Mix</u>	<u>Price per gallon</u>
5 gallon BIB CSD and NCB	\$12.24
2.5 gallon BIB CSD and NCB	\$12.78
5 gallon BIB Unsweet NESTEA®	\$11.82
2.5 gallon BIB Unsweet NESTEA®	\$12.40
5 gallon BIB Premium NCB	\$12.75
2.5 gallon BIB Premium NCB	\$13.30
5 gallon BIB Frozen Dispensed	\$13.88
2.5 gallon BIB Frozen Dispensed	\$14.26

<u>Cups</u>	
24 ounce	\$52.89 per 1,200

<u>Lids</u>	
24 ounce	\$34.55 per 2,000

<u>CO2</u>	
20 lb. cylinder	\$25.00 per cylinder (plus \$75.00 deposit)

\*All prices are per standard physical case and exclusive of taxes, deposits, handling fees, and recycling fees.

**Georgia 64 Oz Brew: Price per Case and package size:** (Prices effective for the period: 1/1/2012-3/31/2012) (All coffee is priced FOB to Distributor, prices do not include any distributor markup.)

<u>Product</u>	<u>Package</u> <u>(Frac)</u>	<u>Small Filters</u>	<u>Large Filters</u>
Dark Roast	100, 2.75 oz	\$110.38	\$110.38
Light Roast	123, 2.25 oz	\$117.87	\$117.87
Decaf	75, 2.00 oz	\$67.95	\$67.95
Organic	75, 2.75 oz	\$110.10	\$110.10

MAINTENANCE & SERVICE

During the Term, Bottler will loan to Account, pursuant to the terms of Bottler's equipment placement agreements, at no cost, that Beverage equipment reasonably required and as mutually agreed upon to dispense Beverages at the Facilities.

Bottler agrees that all equipment shall be new or in "like new" condition and that it shall operate and manage the equipment, services and facilities offered in a first-class manner. Bottler shall provide City with the Maintenance Plan and Schedule for all Bottler equipment within 90 days of execution of Agreement, to include the Bottler's plan and schedule for servicing the City.

Bottler shall provide throughout the Term of this Agreement, at Bottler's expense, all repairs, replacements and technical services necessary to maintain and preserve the Bottler's equipment in a decent, safe, healthy and sanitary condition satisfactory to City and in compliance with applicable laws.

Bottler warrants that it shall correct all mechanical problems with vending machines no later than four (4) business days after notice and no later than twenty-four (24) hours after notice for all other dispensing equipment.

Acts of vandalism to Bottler's equipment will be reported to Bottler immediately and addressed within four (4) business days. If the vending machine is repairable, the vending machine will be repaired within four (4) business days. If the vending machine is not repairable, vending machine will be condemned and swapped within seven (7) business days.

Bottler is the only party allowed to make repairs on Bottler-owned equipment.

All vending machines shall display a "service hotline" sticker to expedite calls. A toll free ("1-800") number shall be provided and a 24-four hour per day, seven days a week continuously operating telephone answering service shall be provided.

A reimbursement fund in the amount adequate to handle all necessary refunds between service calls shall be made available to City at designated location(s) mutually agreed upon by City and Bottler. Each person requesting a refund shall complete a form which shall be maintained by the City and provided to the Bottler as required. The reimbursement fund shall be checked by the Bottler no less than once a month and replenished as needed. Information on refunds shall be provided on each machine.

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Exhibit 8

The term "Special Promotional Events" ("Event") shall mean and is limited to the following: concerts; theatrical or comedic performances; conventions; trade shows; religious events; athletic events; or other special events occurring at a Facility that meet the following requirements: (i) they are sponsored by a manufacturer, distributor, or marketer of Competitive Products under a master sponsorship agreement with the owner or operator of the subject Event (including, without limitation, a concert or theatrical production company, or a trade show or convention production company, but NOT including in any instance the City or its affiliates or agents); (ii) they are conducted on a national or regional multi-market basis; (iii) they are NCAA collegiate championship athletic events; and, (iv) the event sponsorship agreement referred to in subsection (i) above requires on-site temporary signage for Competitive Products.

The term "Special Promotional Events Exceptions" shall refer to those exceptions granted under the Agreement, for each Agreement year, to permit the following fifteen (15) Special Promotional Events at the following Facilities: (i) four (4) events at the Miami Beach Golf Club; (ii) four (4) events at the Normandy Shores Golf Club (The Miami Beach Golf Club and Normandy Shores Golf Club may also be referred to collectively herein as "Golf Courses"); (iii) three (3) events at the Miami Beach Convention Center ("Convention Center"); and (iv) four (4) City Approved major Sponsorship Public Special Events (as defined below); provided, however, that the number limitation for City Approved Major Sponsorship Public Special Events shall be revisited and reviewed by the parties, in good faith, at the conclusion of the third Agreement Year.

- a. **Golf Courses and Convention Center/Special Promotional Events Exception.** In any Agreement Year, temporary signage (such as, but not limited to, banners) for Competitive Products may be displayed at each of the Golf Courses during up to four (4) Special Promotional Events, and during up to three (3) Special Promotional Events at the Convention Center ; PROVIDED, HOWEVER, that: (i) Sponsor's Beverage availability, marketing, advertising, promotional, and other rights under this Agreement will not otherwise be affected during any such Event; (ii) Competitive Products may be distributed at no cost, but no Competitive Products will be sold or otherwise made available during the Event(except as permitted in this exception); (iii) no blockage of any signage or other trademark/service mark display Sponsor may have at the Facility will occur during the Event, except for incidental blockage due to the construction and/or placement of a person, stage or other structure necessary to and actually used during the Event; or, in the case of NCAA championship events , religious events or political conventions where no advertising is allowed and all advertisers are treated equal with all signage covered in the seated area of the Facility; (iv) all temporary signage for Competitive Products will be promptly removed from the Facility upon the conclusion of the Event; and (v) at no time will the Competitive Products make any statements, or use any temporary signage, that uses the trademarks/service marks of the City of Miami Beach, South Beach, Golf Courses or the Convention Center, nor in any way associate these Competitive Products with the City of Miami Beach, "South Beach," the Golf Courses, or the Convention Center. The Special Promotional Events at the Golf Clubs and the Convention Center must occur over a period of no more than twenty-four (24) hours. The twenty-four hours does not include set up or tear down time required, or NCAA Championship events or political conventions which may exceed the aforesaid time limitation. The Convention Center may use the three one day

(one day = twenty-four hours) in the aggregate in each Agreement Year during the Term. Aggregate, as used in this paragraph, shall mean the total of twenty-four hours multiplied by the total number of Special Promotional Events permitted, as provided for herein. For example purposes only, the Miami Beach Convention Center are provided three Special Promotional Event Exceptions per Agreement Year. As such, the three Special Promotional Events may occur in the Miami Beach Convention Center for a total of 72 hours in an Agreement year (24 hours x 3 events = 72 hours/year).

- b. City Approved Major Sponsorship Public Special Events/Special Promotional Events Exception. In any Agreement Year, temporary signage (such as, but not limited to, banners) for Competitive Products may be displayed during up to four (4) Special Promotional Events for City Approved Major Sponsorship Public Special Events. The term "City Approved Major Sponsorship Public Special Event" shall refer to a City-approved public event (i.e. where public access is allowed either via no cost or via pre-purchased ticket) held on City property, and permitted pursuant to the City's approved Special Event Permit process, as same may be amended from time to time during the Term of this Agreement (for example purposes only, this may include, but not be limited to events such as Super Bowl Pepsi Jam and Red Bull Illume); and may also include an event sponsored by a manufacturer, distributor or marketer of Competitive Products pursuant to a sponsorship agreement with the owner, operator or promoter of the event; an event conducted on a national or regional multi-market basis; and/or an event where a Competitive Product is the naming, presenting, title, brought to you by, or other primary sponsor of the Event. Temporary signage for Competitive Products at City Approved Major Sponsorship Public Events may be displayed as an Event "naming sponsor", Event "presented by" sponsor, Event "brought to you by" sponsor, or as a sponsor represented as a "Gold" or "Platinum" (or such other equivalent) sponsor of the Event; PROVIDED, HOWEVER, that: (i) Sponsor's Beverage availability, marketing, advertising, promotional, and other rights under this Agreement will not otherwise be affected during any such Event; (ii) no blockage of any signage or other trademark/service mark display Sponsor may have at the Facility will occur during the Event, except for incidental blockage due to the construction and/or placement of a person, stage or other structure necessary to and actually used during the Event; or, in the case of NCAA championship events, religious events or political conventions where no advertising is allowed and all advertisers are treated equal with all signage covered in the seated area of the Facility; and (iii) all temporary signage for Competitive Products will be promptly removed from the Facility upon the conclusion of the Event. At no time will the Competitive Products make any statements or use any temporary signage that uses the trademarks/service marks of the City of Miami Beach, "South Beach," or the Facilities, or in any way associate these Competitive Products with the City of Miami Beach Facilities. Notwithstanding the above, Competitive Products may be distributed, sampled or made available during a City Approved Major Sponsorship Public Special Event for which there is a Special Promotional Events Exception. Such distribution, sampling or availability shall occur ONLY within the approved site plan for the event. However, should concession service (sales) for any non-alcoholic beverage other than Products be required or necessary for the event, and there are no existing concessions at the location of the City Approved Major Sponsorship Public Special Event for which there is a Special Promotional Events Exception, the City Manager shall submit a letter to Sponsor requesting that Sponsor grant a waiver to permit such sale at the Event; outlining the details of the exception and the business reasons for the request and such request shall require Sponsor's prior written approval. Sponsor reserves the right to not approve the limited waiver for this purpose. Sponsor will notify the City Manager of whether the request for waiver will be approved within twenty (20) business days of Sponsor receiving the City Manager's letter. -

The Special Promotional Event Exception for a City Approved Major Sponsorship Public Special Event must occur over a period of no more than seventy-two (72) hours. The seventy-two hours does not include set up or tear down time required, or NCAA Championship events or political conventions which may exceed the aforesaid time limitation. The seventy-two hours may be used in the aggregate in each Agreement Year during the Term. Aggregate, as used in this paragraph, shall mean the total of seventy-two hours multiplied by the total number of Special Promotional Events Exceptions, as provided for herein. As such, the four Special Promotional Events may occur on public property for a total of 288 hours in an Agreement year (72 hours x 4 events = 288 hours/year).

- c. Other permitted Exceptions. Exhibitors at Conventions or trade shows, or third party exhibitor set ups at Facilities shall have the right to serve Competitive Products within their booth provided that same is limited to the duration of the corresponding event and, provided further, that the Competitive Products are not marketed, advertised or promoted in association with the City of Miami Beach and/or the Facilities, and their respective trademarks. For example purposes only, a Cadillac booth at the Auto Show in the Convention Center would be allowed to give away bottled water with the Cadillac Logo. Notwithstanding, Sponsor's Products would continue to be the only Products allowed to be sold, distributed or sampled at the Facility's concession operations.
- d. Competitive Beverages may also be permitted to be distributed, at no cost, at third party events that are not affiliated with the City, but where the City has permitted the event through the issuance of a City of Miami Beach Special Events Permit, subject to the City's notification to Sponsor prior to the event; and, provided further, that the third party event operator is not a manufacturer, distributor or seller of a Competitive Product; that the Competitive Products are not marketed, advertised or promoted in association with the City of Miami Beach or the Facilities, and their respective trademarks; that no Competitive Products will be sold during such event; and that the distribution of the Competitive Product is limited to Special Event Permit Area (as such term is defined in the City's Special Event Permit Guidelines, as same may be amended from time to time through the Term of this Agreement). For example purposes only, a third party event contemplated under this paragraph might include, but not be limited to, a walkathon or marathon where one of the event sponsors might request to be permitted to distribute free bottled water to the event participants. Notwithstanding the above, Sponsor shall have first right of refusal to provide donated Beverages through a sponsorship agreement to the non-profit events, permitted by the City through the issuance of a City of Miami Beach Special Events Permit, known as the White Party, Winter Party and Miami Beach Pride (based on the level of non-alcoholic Beverages provided for the White Party, Winter Party and Miami Beach Pride events in 2012.) for the sale of these Beverages by these three (3) events as part of their annual charity fundraisers. If Sponsor elects to participate, Sponsor will notify the organizer six (6) months prior to start date of White Party, Winter Party and Miami Beach Pride events. If at any time during the Term the Sponsor cannot or does not provide donated non-alcoholic Beverages through a sponsorship agreement to these three (3) non-profit events for this purpose, these three (3) events shall be permitted to secure Competitive Products for use and sale consistent with the use and sale of non-alcoholic Beverages in the 2012 White Party, Winter Party and Miami Beach Pride events.

Per Section 9 of Term Sheet, No Competitive Products may be sold, dispensed, sampled or served anywhere at the Facilities, or on the City's public rights-of-ways, unless otherwise expressly spelled out in the Agreement.

# Pricing - Bottle/Cans August 1, 2018-July 31, 2019

Proposed Product Type	Pack/Size	2018/2019 Case Price
Carbonated Soft Drinks Bottles	24/20oz	\$23.49
Dasani Water	24/20oz	\$14.24
Fuze Tea/ MM Refreshments	24/20oz	\$23.49
Carbonated Soft Drinks Cans	24/12oz	\$12.45
Glaceau Vitamin Water	24/20oz	\$35.53
Glaceau Vitamin Water Zero	24/20oz	\$35.53
PowerAde	24/20oz	\$25.00
Minute Maid Juices	24/12oz	\$30.74
Energy Drinks (Monster, NOS, Full Throttle)	24/16oz	\$44.74
Dasani Water	24/12oz	\$11.69
Carbonated Soft Drinks 1 Liter Bottles	12/1L	\$21.44
Coca-Cola Glass Bottles	24/8oz	\$21.05
Coca-Cola Aluminum Bottles	24/8.5oz	\$21.69
Carbonated Soft Drinks 2 Liter	8/2L	\$16.25
Gold Peak Tea	12/18oz	\$18.41
Honest Tea	12/16oz	\$16.58
CO2 Tank	20lb tank	\$29.59



Please note that annual price increase goes into effect August 1, 2018

MIAMI BEACH

-Confidential -





## ORDERS/SERVICE

888-204-2653(COKE)



**CARBONATED SOFT DRINKS**  
24/8oz. PROPRIETARY BOTTLES  
 COCA-COLA, DIET COKE, SPRITE



CORE POWER 11.5oz  
 CHOCOLATE, VANILLA, LIGHT STRAWBERRY BANANA, LIGHT CHOCOLATE, BANANA



24/10oz. BOTTLES  
 SEAGRAMS GINGER ALE, TONIC, CLUB SODA.

24/7.5OZ MINI-CAN  
 COKE, COKE ZERO, DIET COKE, SPRITE, FANTA ORG, ALE

24/20oz. PROPRIETARY BOTTLES  
 COCA-COLA, COCA-COLA ZERO, DIET COKE, CAFFEINE FREE DIET COKE, CHERRY COKE, SPRITE, SPRITE ZERO, BARQ'S ROOT BEER, PIBB XTRA, FANTA ORANGE, FANTA PINEAPPLE, FANTA GRAPE, FANTA STRAWBERRY, CHERRY COKE ZERO, VANILLA COKE, MELLO YELLO, SEAGRAMS ALE

12/1 LITER BOTTLES (PROPRIETARY BOTTLES.  
 COCA-COLA, DIET COKE, SPRITE, SEAGRAMS GINGER ALE, TONIC, CLUB SODA.

8/2 LITER BOTTLES  
 COCA-COLA, COCA-COLA ZERO, CAFFEINE FREE CLASSIC, DIET COKE, CAFFEINE FREE DIET COKE, CHERRY COKE, SPRITE, DIET SPRITE ZERO, FUZE W/LEM, BARQ'S ROOT BEER, SEAGRAMS GINGER ALE, FANTA ORANGE, FANTA GRAPE, FRESCA,  
**3% JUICE:** MINUTE MAID LEMONADE.

24/12oz. CANS  
 COCA-COLA, COCA-COLA ZERO, CAFFEINE FREE CLASSIC, DIET COKE, DIET COKE WITH LIME, CAFFEINE FREE DIET COKE, CHERRY COKE ZERO, SPRITE, SPRITE ZERO, FRESCA, FRESCA BLACKCHERRY CITRUS, FRESCA PEACH CITRUS, TAB, DIET BARQ'S ROOT BEER, FUZE LEMON, DIET FUZE W/LEM, PIBB XTRA, SEAGRAMS CLUB SODA, TONIC WATER, GINGER ALE, FANTA GRAPE, FANTA ORANGE, FANTA ORANGE ZERO, VANILLA COKE, VANILLA COKE ZERO, MELLO YELLO.  
**3% JUICE:** MINUTE MAID LEMONADE, MINUTE MAID PINK LEMONADE & MINUTE MAID FRUIT PUNCH, ORANGEADE

**MINUTE MAID**  
24/12.oz BOTTLES  
 ORANGE, APPLE, CRAN GRAPE, CRAN APP RAS, RUBY RED, STRWPASS, TROPICAL BLEND, PEACH MANGO

**MINUTE MAID (FRUIT DRINKS)**  
24/20oz BOTTLES  
 FRUIT PUNCH, LEMONADE, PINK LEMONADE,

**TUM-E. YUMMIES** 12/10.1oz BOTTLES  
 BIG BRY BLST, EDGY ORG BRST, EPIC APL FLIP, FRT PNCH PARTY, RED RBY ZING

**FUZE TEAS**  
 SWT W/LEM. REDSTWRBRY. SWT NO LEM  
**PEACE TEA - 12/23oz CANS**  
 RAZZLEBERRY, CADDYSHACK SNO-BERRY., GREEN TEA, SWT LEMON, TX STYLE, PEACH  
**16 oz. 12 pack HUBERTS**  
 MANGO LEMONADE, BLACKBERRY LEMONADE, WATERMELON LEM. STRAWBERRY LEM. ORIGINAL LEMONADE.

**McCafe - 13.7oz**  
 CARAMEL, MOCHA, VANILLA



**ORIGINS**  
 Georgia Peach  
 California Raspberry

24/355ML BOTTLE  
 COKE, SPRITE, FANTA ORG



**Dunkin Donuts 13.7oz 12/cs**  
 Mocha  
 French Vanilla  
 Original  
 Espresso  
 Cookies & Cream





**Coca-Cola**



#### HONEST TEA – HONEST ADE

HONEY GREEN, POMEGRANATE BLUE, HALF AND HALF, ORANGE MANGO, PEACH WHITE,  
GLASS: LEMON GROVE MAPLE BLACK TEA, MOROCCAN MINT GREEN TEA, JUST GREEN TEA  
MINUTE MAID SPARKLING 16.9oz

MIXED BERRY, TROPICAL CITRUS, FRUIT PUNCH, FIZZY LEMONADE

#### GOLD PEAK TEA

12/18.5 PLASTIC BOTTLES

LEM SWT, DIET, GREEN, UNSWT/NO LEMON, SWT, LEMONADE ICED TEA



#### POWERADE ION

(SPORTS DRINKS)

24/20oz BOTTLES

FRUIT PUNCH, MTN BLAST, STRWBRY LEM, ORANGE, GRAPE, LEMON LIME,

POWERADE ZERO WITH ION4 - 20oz 8pk

MIXED BERRY, STRAWBERRY, GRAPE, FRUIT PUNCH

#### DASANI

24/20oz BOTTLES, 24/24oz FLACAP BOTTLES, 12/ 1 LITER BOTTLES, 12/ 1.5 LITER BOTTLES

24/12 oz BOTTLES, DASANI DROPS 1.9OZ – STRWKIWI, PKLEM, MIXBRY, PAPPCOCO



#### GLACEAU (VITAMIN WATER)

VITAMIN WATER 12oz, 20oz, 32OZ

ENERGY-TROP CITRUS, ESSENTIAL-ORANGE,

FOCUS-KIWI STRAW, POWER C-DRAGONFRUIT, REVIVE-FRT PCH,

XXX-ACAI POM BLUEBRY

VITAMIN WATER ZERO – XXX-ACAI POM BLUEBRY, SQUEEZED LEMONADE, RISE ORANGE,

GLOW, RISE, GO-GO MIXED BRY

SMART WATER – 20OZ, 700ML, 1 LIT, 1.5 LIT

SMART WATER SPARKLING 1 LITER

#### DASANI SPARKLING



FULL THROTTLE, BLUE AGAVE, (ENERGY DRINK- REGULAR & SUGAR FREE)

FULL THROTTLE UNLEADED (Zero Carbs)

24/16oz CANS.

#### NOS

24/16oz CANS, REG.

22OZ REG.



#### MONSTER – MONSTER COFFEE

16oz CANS, 24OZ CANS, (ORIG W / NITROUS OXIDE, 8.3OZ CANS, 18.6OZ IMPORT, 24OZ

ORIGINAL, LO CARB, ABSOLUTE ZERO, ULTRA ZERO, ASSAULT, KHAOS, REHAB, REH ROJO, REH ORG, REH GRN TEA

REHAB PROTEIN, BALLR BLND, DUBB, 15OZ JAVA MONSTER- LOCA MOCHA, MEAN BEAN



#### ZICO (PURE COCONUT WATER)

12/16.9oz PLASTIC BOTTLES

NATURAL, CHOCOLATE, JALAPENO MANGO,, WATERMELON RASB.

NATURAL

12/1 LITER

NATURAL, CHOCOLATE

DIET COKE 12oz SLEEK CANS

FEISTY CHERRY, TWISTED MANGO, GINGER LIME, BLOOD ORANGE



14 oz. Rich Chocolate, Very Strawberry,  
Smooth Vanilla, Dairy'licious White



# POST-MIX FLAVORS



## 5.0 GALLON BAG IN THE BOX

Coca-Cola, Diet Coke, Sprite



## 2.5 GALLON BAG IN THE BOX

Cherry Coke, Caffeine Free Diet Coke, Coca-Cola Zero Sugar, Minute Maid Lemonade, HI-C Poppin' Pink Lemonade, Minute Maid Lemonade Light, Fanta Orange Soda, HI-C Flashin' Fruit Punch, Barq's Root Beer, Diet Sprite Zero, Seagrams Ginger Ale, Seagrams Tonic, Powerade Lemon-Lime, Powerade Mountain Blast, Powerade Fruit Punch, Southern Sun Sour Mix, Southern Sun Orange 35%, MM Orchards Best Orange Blend, MM Orchards Best Pineapple, MM Orchards Best Cranberry, MM Orchards Best Apple.

## 2.5 GALLON BAG IN THE BOX TEA

Gold Peak Southern Style Sweet Tea, Gold Peak Unsweet Tea, Gold Peak Green Tea, Gold Peak Raspberry Tea, FUZE Raspberry Tea, FUZE Lemon Tea, FUZE Sweet Tea, FUZE Unsweetened Tea.



## TRADEMARK CUPS & LIDS (SIZE & QUANTITY)

Cups – 16oz=1000, 24oz=1000, 32oz=480, 44oz=480

Lids – 16/24oz =2000, 32oz=960, 44oz=960

CO2 – 20lbs



Flavors may vary by market and are subject to change.

**EXHIBIT H**  
**RESOLUTION NO. 2019-30846**

**RESOLUTION NO.        2019-30846**

**A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ACCEPTING THE WRITTEN RECOMMENDATION OF THE CITY MANAGER (AS SET FORTH IN THE CITY COMMISSION MEMORANDUM ACCOMPANYING THIS RESOLUTION) AND WAIVING, BY 5/7<sup>TH</sup> VOTE, THE COMPETITIVE BIDDING REQUIREMENT, FINDING SUCH WAIVER TO BE IN THE BEST INTEREST OF THE CITY; AND APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE A NEW MANAGEMENT AGREEMENT WITH THE RHYTHM FOUNDATION, INC. FOR THE MANAGEMENT OF THE CITY'S NORTH SHORE BAND SHELL, FOR A PERIOD OF FIVE (5) YEARS, WITH TWO (2) SUCCESSIVE TWO (2) YEAR RENEWAL OPTIONS, AT THE CITY'S OPTION, BASED UPON THE ESSENTIAL TERMS SET FORTH IN THIS RESOLUTION, SUBJECT TO FINAL NEGOTIATION OF THE AGREEMENT BY THE CITY ADMINISTRATION, AND SUBJECT TO LEGAL REVIEW AND FORM APPROVAL BY THE CITY ATTORNEY.**

**WHEREAS**, on September 10, 2014, the Mayor and City Commission adopted Resolution Number 2014-28722, accepting the written recommendation of the City Manager pertaining to the ranking of proposals pursuant to ITN 2014-215-LR for Band Shell Management Services and authorizing the Administration to enter into negotiations with The Rhythm Foundation, Inc. as the top-ranking proposer; and

**WHEREAS**, on February 19, 2015, the City and The Rhythm Foundation, Inc. executed the Management Agreement for the management of the North Shore Band Shell (the "Agreement") for an initial term of two (2) years (which commenced retroactively on October 1, 2014) with three (3) additional one (1) year renewal terms; and

**WHEREAS**, on September 30, 2019, the Agreement is set to expire; and

**WHEREAS**, the Rhythm Foundation is a Florida, not-for-profit 501(c)3 arts organization which seeks to increase international awareness and cultural exchange through the presentation of live music and related media programming; and

**WHEREAS**, since entering into the Agreement, The Rhythm Foundation, Inc. has cemented the Band Shell as an exciting cultural anchor in the North Beach area being voted as the "Best Venue for Local Acts" in 2016 by the New Times; and

**WHEREAS**, the Rhythm Foundation, Inc. continues to present a well-rounded series of concerts, free community and civic events, cultural programs, popular music and large productions that welcomes the entire South Florida community to the Band Shell; and

**WHEREAS**, the Administration recommends keeping key components of the existing Agreement that includes:

1. The City will continue to provide up to \$45,000 annually toward the operation of the facility (the "City's Annual Contribution");
2. The Rhythm Foundation, Inc. must program the facility at a minimum of 35 events annually, including programming for the City's monthly food truck events

- and other City-sponsored events;
3. The Rhythm Foundation, Inc. must continue to use the House Sound System in connection with any events held at the facility and, at all times, the sound levels may not exceed 105dBC;
  4. Facility Hours of Operation will continue to be from 10:00 am to 10:00 pm with the City Manager having the discretion to extend the hours of operation on a case by case basis to 11:00 pm on the weekends (Friday and Saturday); and
  5. The Rhythm Foundation shall continue to provide surrounding condominiums with 30 days advance written notice when scheduled events will involve amplified sound; and

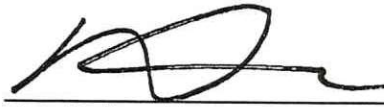
**WHEREAS**, the Administration recommends incorporating the following changes in the new Agreement:

1. An Initial Term of five years and two successive two-year Renewal Terms, at the City's option;
2. Approval of extending the hours of operation up to 12:30 am on New Year's Eve;
3. Including annual CPI adjustment (not to exceed 3%) to the City's Annual Contribution;
4. Any and all technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property purchased by The Rhythm Foundation through funds received from grants which were applied for solely by the City or in partnership with the City for use at the facility, shall remain property of the City; and
5. Including language regarding Free Charitable Use allowing for 2 occasions during the term of the contract and any renewal term, for use of the North Shore Band Shell by a qualified, charitable arts organization having been reviewed and recommended by the City's Cultural Arts Council through the rental fee waiver grant program funded by the Community Benefit Fund administered by the Tourism and Culture Development Department for live arts and cultural productions, including theater, dance, music, cabaret, opera, performance art, multi-disciplinary works and film; and

**WHEREAS**, the City Manager recommends that the Mayor and City Commission waive the formal competitive bidding requirement, by a 5/7<sup>th</sup> vote, as permitted under section 2-367(e) of the City Code, as being in the best interest of the City, and authorize the City Manager to execute a new management agreement with The Rhythm Foundation, Inc, based upon the essential terms of their existing agreement, with the modifications recommended by the Administration herein.

**NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA**, that the Mayor and City Commission hereby accept the written recommendation of the City Manager (as set forth in the City Commission Memorandum accompanying this Resolution) and waive, by 5/7<sup>th</sup> vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City; and approve and authorize the City Manager to execute a new Management Agreement with The Rhythm Foundation, Inc. for the management of the City's North Shore Band Shell, for a period of five (5) years, with two (2) successive two (2) year renewal options, at the City's option, based upon the essential terms set forth in this Resolution, subject to final negotiation of the agreement by the City Administration, and subject to legal review and form approval by the City Attorney.

PASSED and ADOPTED this 5<sup>th</sup> day of June, 2019.



Dan Gelber, Mayor

ATTEST:



June 19, 2019

Rafael E. Granado, City Clerk



APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION

  
City Attorney

5/29/19  
Date

# MIAMI BEACH

## COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission  
FROM: Jimmy L. Morales, City Manager  
DATE: June 5, 2019

SUBJECT: A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ACCEPTING THE WRITTEN RECOMMENDATION OF THE CITY MANAGER (AS SET FORTH IN THE CITY COMMISSION MEMORANDUM ACCOMPANYING THIS RESOLUTION) AND WAIVING, BY 5/7TH VOTE, THE COMPETITIVE BIDDING REQUIREMENT, FINDING SUCH WAIVER TO BE IN THE BEST INTEREST OF THE CITY; AND APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE A NEW MANAGEMENT AGREEMENT WITH THE RHYTHM FOUNDATION, INC. FOR THE MANAGEMENT OF THE CITY'S NORTH SHORE BANDSHELL, FOR A PERIOD OF FIVE (5) YEARS, WITH TWO (2) SUCCESSIVE TWO (2) YEAR RENEWAL OPTIONS, AT THE CITY'S OPTION, BASED UPON THE ESSENTIAL TERMS SET FORTH IN THIS RESOLUTION, SUBJECT TO FINAL NEGOTIATION OF THE AGREEMENT BY THE CITY ADMINISTRATION, AND SUBJECT TO LEGAL REVIEW AND FORM APPROVAL BY THE CITY ATTORNEY.

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### RECOMMENDATION

#### CITY MANAGER'S RECOMMENDATION

The City Manager recommends that the Mayor and City Commission waive the formal competitive bidding requirement, by a 5/7th vote, as permitted under section 2-367(e) of the City Code, as being in the best interest of the City.

### ANALYSIS

On September 10, 2014, the Mayor and City Commission adopted Resolution Number 2014-28722 (Exhibit A), accepting the written recommendation of the City Manager pertaining to the ranking of proposals pursuant to ITN 2014-215-LR for Band Shell Management Services and authorizing the Administration to enter into negotiations with The Rhythm Foundation, Inc. as the top-ranking proposer.

On February 19, 2015, the City and The Rhythm Foundation executed the Management Agreement for the management of the North Shore Band Shell (the "Agreement") for an initial term of two (2) years (which commenced retroactively on October 1, 2014) with three (3) additional one (1) year renewal terms (Exhibit B). The Agreement is set to expire on September 30, 2019.

The Rhythm Foundation, Inc. is a Florida, not-for-profit 501(c)3 arts organization which seeks to increase international awareness and cultural exchange through the presentation of live music and related media programming. Since entering into the Agreement, The Rhythm Foundation has cemented the Band Shell as an exciting cultural anchor in the North Beach area being voted as the "Best Venue for Local Acts" in 2016 by the New Times. The Rhythm Foundation, Inc. continues to present a well-rounded series of concerts, free community and civic events, cultural programs, popular music and large productions that welcomes the entire South Florida community to the Band Shell. Such events have included global, musical and cultural events such as the Transatlantic Music Festival, Axis of Love, Global Cuba Fest, Seaside Sessions, and the Afroroots Music Fest. Free, local community events have included the City's monthly Food Trucks and Music Fest, Dance Band Nights, annual concerts by the Nautilus Middle School Jazz Band and Miami Beach Senior High Rock Ensemble, and Parks and Recreation events such as celebrations for Hispanic Heritage and Black History months. The Rhythm Foundation has also been an instrumental partner with the City of Miami Beach in the success of the increasingly popular Miami Beach Youth Music Festival now in its 3<sup>rd</sup> year with over 3,000 attendees supporting local youth music initiatives.

Key components of the existing Agreement that will be included in the new Agreement includes:

- The City will continue to provide up to \$45,000.00 annually toward the operation of the facility.
- The Rhythm Foundation, Inc. must program the facility at a minimum of 35 events annually, including programming for the City's monthly food truck events and other City-sponsored events.
- The Rhythm Foundation, Inc. must continue to use the House Sound System in connection with any events held at the facility and, at all times, the sound levels may not exceed 105dBC.
- Facility Hours of Operation will continue to be from 10:00 am to 10:00 pm with the City Manager having the discretion to extend the hours of operation on a case by case basis to 11:00 pm on the weekends (Friday and Saturday).
- The Rhythm Foundation, Inc. shall continue to provide surrounding condominiums with 30 days advance written notice when scheduled events will involve amplified sound.
- Including language regarding Free Charitable Use allowing for 2 occasions during the term of the contract and any renewal term, for use of the North Shore Band Shell by a qualified, charitable arts organization having been reviewed and recommended by the City's Cultural Arts Council through the rental fee waiver grant program funded by the Community Benefit Fund administered by the Tourism and Culture Development Department for live arts and cultural productions, including theater, dance, music, cabaret, opera, performance art, multi-disciplinary works and film.

The Administration is recommending the following edits to the Agreement:

- An Initial Term of five (5) years and two (2) successive two (2) year renewal terms.
- Approval of extending the hours of operation up to 12:30 am on New Year's Eve.
- Including CPI language as it relates to adjusting the rate of the annual \$45,000.00 City contribution toward the operation of the facility.
- Any and all technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property purchased by The Rhythm Foundation, Inc. through funds received from grants which were applied for solely by the City or in partnership with

the City for use at the facility, shall remain property of the City.

### **CONCLUSION**

The Administration recommends accepting the written recommendation of the City Manager and waiving, by 5/7<sup>th</sup> vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City; and approving and authorizing the City Manager to execute a Management Agreement between the City and The Rhythm Foundation, Inc. for management of the City's North Shore Band Shell, for a period of five (5) years, with two (2) successive two (2) year renewal options, subject to final negotiation of the agreement by the City Administration, and subject to legal review and form approval by the City Attorney; and further authorizing the Mayor and City Clerk to execute the final agreement.

### **Legislative Tracking**

Parks and Recreation

### **ATTACHMENTS:**

#### **Description**

- Exhibit A – Resolution No. 2014-28722
- Exhibit B – 2015 Management Agreement Between the City and The Rhythm Foundation
- Exhibit C – Draft 2019 Management Agreement Between the City and The Rhythm Foundation
- Resolution

**RESOLUTION NO. 2014-28722**

**A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ACCEPTING THE RECOMMENDATION OF THE CITY MANAGER PERTAINING TO THE RANKING OF PROPOSALS, PURSUANT INVITATION TO NEGOTIATE NO. 2014-215-LR (THE ITN), FOR BAND SHELL MANAGEMENT SERVICES; AUTHORIZING THE ADMINISTRATION TO ENTER INTO NEGOTIATIONS WITH THE RHYTHM FOUNDATION, INC.; AND IF UNSUCCESSFUL IN NEGOTIATING AN AGREEMENT WITH THE RHYTHM FOUNDATION, INC., AUTHORIZE THE ADMINISTRATION TO NEGOTIATE WITH THE FANTASY THEATRE FACTORY, INC. AND THE MARKET COMPANY, INC.; AND FURTHER AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE AN AGREEMENT UPON CONCLUSION OF SUCCESSFUL NEGOTIATIONS BY THE ADMINISTRATION.**

**WHEREAS**, Invitation to Negotiate No. 2014-215-LR (the ITN) was issued on April 23, 2014, with an opening date of June 26, 2014; and

**WHEREAS**, a voluntary pre-proposal meeting was held on May 14, 2014; and

**WHEREAS**, the City received a total of three (3) proposals; and

**WHEREAS**, on August 18, 2014, the City Manager via Letter to Commission (LTC) No. 290-2014, appointed an Evaluation Committee (the "Committee"), consisting of the following individuals:

- Cynthia Casanova, Parks Facilities Manager, Parks & Recreation Department
- Mark Milisits, Leasing Specialists, Tourism, Culture & Economic Development
- Charles Million, City of Miami Beach Cultural Arts Council

Alternates:

- Carlos DaCruz, Office Associate V, Parks & Recreation Department

**WHEREAS**, the Committee convened on August 21, 2014 to consider the proposals received; and

**WHEREAS**, the Committee was provided an overview of the project; information relative to the City's Code of Silence Ordinance and the Government Sunshine Law; general information on the scope of services, references, and a copy of each proposal; and engaged in a question and answer session after the presentation of each proposer; and

**WHEREAS**, the Committee was instructed to score and rank each proposal pursuant to the evaluation criteria established in the ITN; and

**WHEREAS**, the Committee's ranking was as follows: The Rhythm Foundation, Inc., as the top-ranked firm; Fantasy Theatre Factory, Inc., second highest ranked; and The Market Company, Inc., the third highest ranked; and

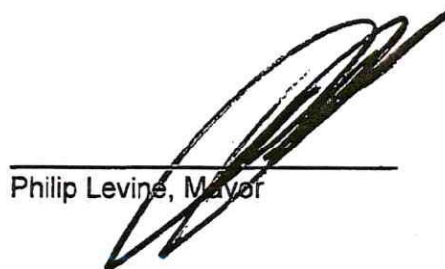
**WHEREAS**, after reviewing all the submissions and the Evaluation Committee's rankings, the City Manager exercised his due diligence and is recommending that the Administration be authorized to enter into negotiations with The Rhythm Foundation, Inc.; and further authorize the City Manager to execute an Agreement upon conclusion of successful negotiations by the Administration. The Administration recommends that if successful negotiations cannot be reached with The Rhythm Foundation, Inc., that the Mayor and City Commission authorize the Administration to negotiate with the Fantasy Factory Theatre, Inc. and The Market Company, Inc.

**NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA**, that the Mayor and City Commission hereby accept the recommendation of the City Manager pertaining to the ranking of proposals, pursuant to Invitation to Negotiate (ITN) No. 2014-215-LR, for Band Shell Management Services; authorize the Administration to enter into negotiations with the top-ranked proposer, The Rhythm Foundation, Inc.; and if unsuccessful in negotiating an agreement with The Rhythm Foundation, Inc., authorize the Administration to negotiate with the Fantasy Factory Theatre, Inc. and The Market Company, Inc.; and further authorize the Mayor and City Clerk to execute an agreement upon conclusion of successful negotiations by the Administration.

**PASSED AND ADOPTED** this 10 day of September 2014.

**ATTEST:**

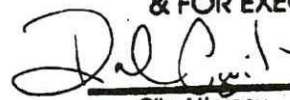
  
\_\_\_\_\_  
Rafael E. Granado, City Clerk

  
\_\_\_\_\_  
Philip Levine, Mayor

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**APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION**

  
\_\_\_\_\_  
City Attorney *AM* Date 9/3/14

## COMMISSION ITEM SUMMARY

## Condensed Title:

A Resolution Of The Mayor And City Commission Of The City Of Miami Beach, Florida, Accepting The Recommendation Of The City Manager Pertaining To The Ranking Of Proposals, Pursuant To Invitation to Negotiate (ITN) No. 2014-215-LR, For Band Shell Management Services.

## Key Intended Outcome Supported:

Supporting Data (Surveys, Environmental Scan, etc): N/A

## Item Summary/Recommendation:

On April 23, 2014, the City Commission approved the issuance of the ITN, which was issued on April 24, 2014, with an opening date of June 26, 2014. A pre-proposal conference was held on May 14, 2014. The City received three (3) proposals from Fantasy Theatre Factory, Inc., The Market Company and The Rhythm Foundation.

On August 18, 2014, the City Manager appointed an Evaluation Committee (the "Committee"), which convened on August 21, 2014 to consider proposals received. The Committee was instructed to score and rank each proposal pursuant to the evaluation criteria established in the RFQ. The results of the evaluation committee process were presented to the City Manager for his recommendation to the City Commission.

While the ITN process allows for negotiations with multiple proposers, the results of the evaluation process indicate that The Rhythm Foundation is overwhelmingly the most qualified proposer; therefore, after reviewing the submissions and the Evaluation Committee's rankings of proposals received, the City Manager recommends that the Mayor and the City Commission, pursuant to Invitation to Negotiate (ITN) No. 2014-215-LR, for Band Shell Management Services, authorize the Administration to enter into negotiations with The Rhythm Foundation; and further authorize the City Manager to execute an Agreement upon conclusion of successful negotiations by the Administration. The Administration recommends that if successful negotiations cannot be reached with The Rhythm Foundation, that the Mayor and City Commission authorize the Administration to negotiate with the Fantasy Factory Theatre and The Market Company.

**RECOMMENDATION**

The Administration recommends that the Mayor and the City Commission, pursuant to Invitation to Negotiate (ITN) No. 2014-215-LR, for Band Shell Management Services, authorize the Administration to enter into negotiations with The Rhythm Foundation; and further authorize the City Manager to execute an Agreement upon conclusion of successful negotiations by the Administration. The Administration recommends that if successful negotiations cannot be reached with The Rhythm Foundation, that the Mayor and City Commission authorize the Administration to negotiate with the Fantasy Factory Theatre and The Market Company.

**RECOMMENDATION**

Adopt the Resolution.

## Advisory Board Recommendation:

## Financial Information:

Source of Funds	Amount	Account
OBPI	1 \$45,000	011-0950-000312 (FY 14/15)
Total	\$45,000	

Financial Impact Summary: Listed expenditure is based on FY 14/15 anticipated approved budgeted amounts.

## City Clerk's Office Legislative Tracking:

Alex Denis, Extension 6641

## Sign-Offs:

Department Director	Assistant City Manager	City Manager
AD MS JR	KGB MT	JLM

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# MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, [www.miamibeachfl.gov](http://www.miamibeachfl.gov)

## COMMISSION MEMORANDUM

TO: Mayor Philip Levine and Members of the City Commission

FROM: Jimmy L. Morales, City Manager

DATE: September 10, 2014

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ACCEPTING THE RECOMMENDATION OF THE CITY MANAGER PERTAINING TO THE RANKING OF PROPOSALS, PURSUANT TO INVITATION TO NEGOTIATE NO. 2014-215-LR (THE ITN), FOR BAND SHELL MANAGEMENT SERVICES.**

### ADMINISTRATION RECOMMENDATION

Adopt the Resolution.

### FUNDING

Account No. 011-0950-000312 (FY 14/15) - \$45,000

### BACKGROUND

The City of Miami Beach is seeking a public or private (not-for-profit or for-profit) entity to manage the North Beach Band Shell and activate the facility with year-round programming. The successful proposer must program the facility a minimum of 35 events annually, including programming for the monthly food truck events. Annual programming must include a combination of free and paid ticketed events.

In exchange for these services, the City will provide up to \$45,000 annually toward the operation of the facility, continue to provide day-to-day maintenance, as well fund all capital improvements. The City is also budgeting for the purchase of a tent to cover the open air portion of the band shell to be used to shade attendees from inclement weather.

Proposers were encouraged to submit proposals that will address the needs of the community and provide both daytime and nighttime uses if possible. Collaborations in order to provide a wide array of community offerings including, but not limited to, music, theater, dance, and other performing arts were encouraged.

### RFP PROCESS

On April 23, 2014, the City Commission approved the issuance of the ITN, which was issued on April 24, 2014, with an opening date of June 26, 2014. A pre-proposal conference was held on May 14, 2014. The City received three (3) proposals.

- Fantasy Theatre Factory, Inc.
- The Market Company
- The Rhythm Foundation

The Market Company, has produced and managed the Lincoln Road Farmers Market since 1997. It also runs the Normandy Village Marketplace and Espanola Way Weekend Festival which includes artistic presentations. The Market Company produces ten (10) additional markets each year throughout Miami-Dade County.

#### **MANAGER'S DUE DILIGENCE & RECOMMENDATION**

While the ITN process allows for negotiations with multiple proposers, the results of the evaluation process indicate that The Rhythm Foundation is overwhelmingly the most qualified proposer; therefore, after reviewing the submissions and the Evaluation Committee's rankings of proposals received, the City Manager recommends that the Mayor and the City Commission, pursuant to Invitation to Negotiate (ITN) No. 2014-215-LR, for Band Shell Management Services, authorize the administration to enter into negotiations with The Rhythm Foundation; and further authorize the City Manager to execute an Agreement upon conclusion of successful negotiations by the Administration. The Administration recommends that if successful negotiations cannot be reached with The Rhythm Foundation, that the Mayor and City Commission authorize the Administration to negotiate with the Fantasy Factory Theatre and The Market Company.

#### **CONCLUSION**

The Administration recommends that the Mayor and the City Commission, pursuant to Invitation to Negotiate (ITN) No. 2014-215-LR, for Band Shell Management Services, authorize the Administration to enter into negotiations with The Rhythm Foundation; and further authorize the City Manager to execute an Agreement upon conclusion of successful negotiations by the Administration. The Administration recommends that if successful negotiations cannot be reached with The Rhythm Foundation, that the Mayor and City Commission authorize the Administration to negotiate with the Fantasy Factory Theatre and The Market Company.



JLM / KGB / MT / MS / AD

T:\AGENDA\2014\July\Procurement\ITQ 2014-215-LR Band Shell Management Services - Memo.doc

**MANAGEMENT AGREEMENT BETWEEN  
THE CITY OF MIAMI BEACH, FLORIDA  
AND  
THE RHYTHM FOUNDATION, INC.  
FOR THE MANAGEMENT OF THE NORTH SHORE BAND SHELL**

**THIS AGREEMENT**, is made and executed as of this 19 day of February, 2015 ("Effective Date"), by and between the CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida, whose address is 1700 Convention Center Drive, Miami Beach, Florida 33139 ("City"); and THE RHYTHM FOUNDATION, INC., a Florida not-for-profit corporation, whose principal address is 407 LINCOLN ROAD #6E, MIAMI BEACH, FL 33139 ("TRF").

**RECITALS**

**WHEREAS**, City is the owner of the North Shore Band Shell, located at 7275 Collins Avenue, Miami Beach, Florida 33141; and which is more particularly described and depicted in Exhibit "A," attached hereto and made a part hereof (the "Band Shell" or the "Facility"); and

**WHEREAS**, TRF is a Florida not-for-profit (501(c)3) arts organization which seeks to increase international awareness and cultural exchange through the presentation of live music and related media programming; and

**WHEREAS**, on April 23, 2014, the City issued Invitation to Negotiate No. 2014-215-LR for Band Shell Management Services (the "ITN"); and

**WHEREAS**, on September 10, 2014, the City Commission adopted Resolution No. 2014-28722 authorizing the administration to negotiate with TRF, as the top-ranked proposer pursuant to the ITN, for the management and operation of the Facility; and

**WHEREAS**, City desires to engage TRF, and TRF desires to accept the engagement, to provide management services for the Facility on the terms and conditions set forth herein.

**NOW THEREFORE**, recognizing the aforesaid recitals as true and correct and incorporating herein, and in consideration of the mutual covenants and conditions herein contained, it is agreed by the parties hereto as follows:

**SECTION 1: DEFINITIONS.**

For purposes of this Agreement, the following terms have the meanings referred to in this Section 1:

**"Affiliate"** -- an entity that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a specified entity. For purposes of this definition, "control" means ownership of equity securities or other ownership interests which represent more than 51% of the voting power in the controlled entity.

provisions of this Agreement. All employees and/or subcontractors shall be employees and/or subcontractors of TRF, its Affiliates, or third parties, and not of City. TRF shall be solely responsible for assuring that the Facility is adequately staffed with competent, qualified personnel to fulfill its responsibilities under this Agreement;

5.5.2. administer relationships with all third parties (including, without limitation, entering into contracts and licenses for the food and beverage concessionaire at the Facility) for the use, day to day maintenance and operation of the Facility, initiate and participate in any and all negotiations, renewals and extensions relating to such third party relationships, and enforce contractual agreements concerning any such third party relationships;

5.5.3. negotiate, execute in its name as agent for the City, deliver and administer any and all licenses, occupancy agreements, sponsorship agreements (excluding name-in-title agreements), rental agreements, booking commitments, concession agreements (excluding valet parking agreements), supplier agreements, service contracts (including, without limitation, contracts for cleaning, decorating and set-up, general maintenance stage equipment, staffing and personnel needs, including guards and ushers, telephone, extermination and other services which are necessary or appropriate, and all other contracts and agreements in connection with the management, maintenance, promotion and operation of the Facility; provided that (1) if any such license, agreement, commitment or contract has a term that extends beyond the remaining Term, such license, agreement, commitment or contract shall provide that it is automatically assigned to City as of the expiration or termination date of this Agreement and that the City Manager may terminate any such agreement without payment thereafter at any time upon not less than ten (10) days written notice; (2) TRF shall have the sole authority to approve the scheduling of any Event to be held at the Facility, subject to the limitations and requirements of this Agreement; and (3) any contract entered into between TRF and a subsidiary and/or Affiliate company shall be at terms and for prices customarily charged by such subsidiary and/or Affiliate company for comparable goods and services elsewhere at rates that are competitive within the industry;

5.5.4. maintain the Facility (excluding all structural components thereof and maintenance and replacement of all electrical HVAC, life safety, mechanical, plumbing and other systems and equipment) in a good and clean condition consistent with other Comparable Facilities and in compliance with all Governmental Requirements, ordinary wear and tear, and casualty loss excepted. Maintenance responsibility shall include, without limitation, preventative and any and all other maintenance and as required in Exhibit "B" to this Agreement (entitled "City of Miami Beach Minimum Specifications for Maintenance of the North Shore Band Shell"). TRF shall keep on-site maintenance manuals and records reflecting all of TRF's maintenance activities, all of which shall be available for inspection by the City Manager upon request. TRF shall submit to the City Manager periodic (not less than Quarterly) reports specifying all maintenance work performed during such period, which reports shall be used by the City's Parks and Recreation Department as part of an annual City maintenance

inspection and review, TRF warrants and represents to City that, prior to the Effective Date, TRF inspected the Facility, and TRF hereby accepts the Facility "as-is, where-is and with all faults."

5.5.5 rent, lease, or purchase all equipment and maintenance supplies necessary or appropriate for the day-to-day operation and maintenance of the Facility;

5.5.6 establish and adjust prices, rates and rate schedules for the aforesaid licenses, agreements and contracts, and any other commitments relating to the Facility to be negotiated by TRF in the course of its management, operation, booking and promotion of the Facility. The prices, rates and rate schedules for the rental of the Facility, set forth in the attached Exhibit "C", have been approved by the City Manager. Any subsequent change to the rates or rate schedule shall be submitted to the City Manager for his review and written approval, prior to TRF's implementation of same;

5.5.7 pay when due, all Operating Expenses from TRF's own funds;

5.5.8 after consultation with the City Manager and the City Attorney, and subject to approval by the City Attorney or his designee, institute as agent for the City, the costs of which shall be included as Operating Expenses, such legal actions or proceedings necessary or appropriate in connection with the operation of the Facility (using legal counsel approved by the City Attorney), including, without limitation, to collect charges, rents or other revenues due to the City or to cancel, terminate or sue for damages under, any license, use, advertisement or concession agreement for the breach thereof or default thereunder by any licensee, user, advertiser, or concessionaire at the Facility; institute on TRF's a own behalf (and not as agent for City) without consultation or approval of the City, the costs of which shall be included as Operating Expenses, such legal actions or proceedings necessary or appropriate in connection with the operation of the Facility, including, without limitation, to collect charges, rents or other revenues due to the City or TRF or to cancel, terminate or sue for damages under, any license, use, advertisement or concession agreement for the breach thereof or default thereunder by any licensee, user, advertiser, or concessionaire at the Facility;

5.5.9 maintain a master set of all Event records, booking records and schedules for the Facility (which shall be available for inspection by the City Manager upon request);

5.5.10 provide day-to-day administrative services in support of its management activities to ensure that the Facility shall be operated, managed, and maintained and performed in a first class manner consistent with similar first class facilities including, but not limited to, acquisition of services, equipment, supplies and facilities; maintenance and property management; personnel management; record-keeping; collections and billing; and similar services;

5.5.11 engage in advertising, solicitation, and promotional activities necessary to effectively market the Facility and Events, and manage related social media platforms for the Facility. Any marketing materials created for the Facility will remain the exclusive property of the City. In connection with its activities under the terms of this Agreement, TRF will be permitted to use the logo and brand identity of the City of Miami Beach, and of the Facility, as approved by the City Manager;

5.5.12. act as a collection agent for the City on sales taxes as required from for-profit facility rentals of the Facility and remit to the State of Florida such sales taxes;

5.5.13. comply with all City Agreements;

5.5.14. except as otherwise approved by the City Manager, TRF shall not license or allow the use of any portion of the Facility except as permitted under Section 3 and, in such case, only for short-term users (i.e., less than fourteen (14) consecutive days). TRF shall require that all users of the Facility provide certificates of insurance evidencing appropriate insurance and any other insurance required by the applicable license, use or occupancy agreement. Copies of these certificates shall be furnished to the City Manager or City Manager's designee prior to any Event or use. Such insurance shall be kept in force at all times by all licensees, users, lessees and concessionaires. All liability policies shall name the City and TRF as additional insureds. TRF shall also require all users of the Facility to execute (among the terms of the license or occupancy agreement) an agreement to indemnify, defend and hold harmless the City. TRF standard license or occupancy agreement shall, at a minimum, include the insurance and indemnity requirements contained herein; shall further be subject to the prior review and approval of the City Manager and City Attorney's Office; and – if and when approved – shall be attached as Exhibit "D" hereto.

## **SECTION 6. COMPENSATION TO THE CITY FOR USE OF THE FACILITY (USE FEE).**

6.1. **Base Use Fee.** For the initial term of the Agreement, TRF shall pay City an annual use fee for the right to use the Facility in the amount of \$1.00, in consideration of TRF's not for profit status and its investments in programming, staffing, marketing and improvements. All payments are payable annually, commencing on the Commencement Date and thereafter on the first day of each Contract Year. The Base Use Fee (and all other amounts due hereunder) shall be paid to City in legal tender of the United States of America at the following address: Parks and Recreation Department, 1701 Meridian Avenue Suite 401, Miami Beach, Florida 33139, Attention: Elizabeth Valera, Deputy Director; or at such other place that City may from time to time designate by notice in writing.

6.2. **Additional Fees and Charge.** In addition to the Base Use Fee as set forth in section 6.1, TRF shall also be responsible for payment of the following Additional Fees and Charges:

6.2.1. **Operating Expenses.** TRF shall pay all costs and expenses related to Operating Expenses, except with respect to utilities for which the City is responsible, as more specifically set forth in Section 20 herein. TRF hereby irrevocably and unconditionally guarantees to the City that Operating Revenues shall at all times be sufficient to pay as and when due all Operating Expenses and any and all other amounts that TRF is obligated to pay pursuant to this Agreement, and further covenants and agrees that if at any time there are insufficient Operating Revenues to pay all of the foregoing amounts, as and when required, TRF shall immediately pay the difference from TRF's own funds. This obligation is absolute and unconditional and shall even apply if Operating Revenues are reduced or limited by facts or

circumstances not contemplated by the parties or for reasons beyond the parties' control. The provisions of this section 6 shall survive any termination or expiration of this Agreement.

6.2.2 Sales Tax. TRF shall pay and include any and all additional sums for applicable sales and use tax, now or hereafter prescribed by State, federal or local law, concurrent with and to the extent any sales tax is imposed in connection with any payment due hereunder by TRF.

6.2.3 Notwithstanding this Section 6, TRF shall not be responsible for paying for major capital improvements or infrastructure within the Facility.

#### **SECTION 7 - INTENTIONALLY OMITTED.**

#### **SECTION 8 - RIGHTS RESERVED TO CITY.**

8.1 Rights of Entry. Representatives, contractors and employees of the City shall have the right to enter all portions of the Facility to inspect same, to observe the performance of TRF of its obligations under this Agreement; to install, remove, adjust, repair, replace or otherwise handle any equipment, utility lines, or other matters in, on, or about the Facility, or to do any act or thing which the City may be obligated or have the right to do under this Agreement. Nothing contained in this subparagraph is intended or shall be construed to limit any other rights of the City under this Agreement. The City shall not unreasonably interfere with the activities of TRF hereunder, and the City's actions shall be conducted such that disruption of TRF work shall be kept to a minimum and there shall be no disruption of any Event by City (the City's actions in its proprietary capacity of the foregoing, shall not diminish any rights of City in its governmental capacity).

8.2 Signage. Exterior marquee messaging will be controlled by TRF and will list only Events taking place within the Facility. TRF shall include City requested public information messages. TRF shall provide, at its sole expense and responsibility, any required signs within the Facility. All signage shall be approved by the City Manager, and shall be in accordance with all applicable Municipal, County, State and Federal laws and regulations. Any signage shall be subject to the prior approval of the City Manager as to size, shape and placement of same.

8.3 Interior Signage. TRF shall be entitled to all non-permanent interior signage (i.e. signage having a total duration not to exceed twelve consecutive (12) months) relating to an Event, including, without limitation, temporary banners, and all proceeds derived therefrom shall be Operating Revenues; provided, however, that the names affixed thereon are subject to the City Manager's prior written approval, which shall not unreasonably be withheld, conditioned or delayed. In no event may any such signage include the names of any company selling the following types of products ("Prohibited Names"): guns, tobacco or sexual products. Any and all other naming right not expressly provided for in this subsection 8.3, and any revenues derived therefrom, shall be owned and controlled exclusively by the City.

8.4 General Requirement. All signage (whether interior, exterior, permanent and/or temporary) shall comply with all applicable Governmental Requirements, and shall be maintained by TRF in good condition.

#### **SECTION 9. LIMITED FUNDING BY CITY.**

During the first Fiscal Year of the initial term of this Agreement (From October 1, 2014 through September 30, 2015), the City shall provide funding to TRF, in the amount of \$30,000.00 ("City Contribution(s)"), payable within fifteen (15) days following the end of each Quarter, with the first payment, in the amount of \$7,500.00, due April 15, 2015; \$11,250.00 due on July 15, 2015, and \$11,250.00 due on October 15, 2015. TRF shall submit an invoice for each payment of such City Contribution and also submit the corresponding reports due for that particular Quarter. The City, in its sole discretion, may condition payment of the City upon TRF providing the requisite reports under this Agreement, including, without limitation, those reports set forth in Sections 5 and 12 of this Agreement. Thereafter, subject to funding availability, the City shall provide a City Contribution, in an amount up to \$45,000.00 annually, during the balance of the Initial Term and any Renewal Terms (should said Renewal Terms be granted, at the sole option of the City), toward the operation of the Facility. Except as set forth in this Section 9, and other costs which the City has expressly agreed to pay under the terms of this Agreement, the City will have no other funding or other payment obligations with respect to the Facility or its Operating Expenses or its operations. Additionally, TRF and City have entered into this Agreement with the expectation and belief that, as of the Effective Date, no governmental body will impose any ad valorem taxes upon the Facility nor any sales, income, excise or other taxes. Notwithstanding the preceding sentence, the City makes no representation to TRF, either expressed or implied, that any or all of such taxes may or may not be imposed at any time during the Term of the Agreement.

#### **SECTION 10. RECEIPTS AND DISBURSEMENTS**

TRF shall establish and maintain in one or more depositories, one or more operating, payroll and other bank accounts for the operation and management of the Facility, as TRF shall determine. All Operating Revenues collected by TRF from the operation of the Facility shall be deposited into the accounts and all Operating Expenses shall be paid by TRF as agent for the City from the accounts. Any amounts remaining in the operating accounts upon expiration or termination of this Agreement for any reason, after payment of all other amounts that TRF is required to pay under this Agreement through the date of expiration or termination, shall be promptly paid to TRF.

#### **SECTION 11. ALTERATIONS, MAINTENANCE, AND REPAIRS.**

11.1 TRF shall not make any additions, improvements, or alternations (collectively "Alterations") to the Facility without the City Manager's prior written consent. The cost of all Alterations made by TRF shall be borne solely by TRF from its own funds and shall not constitute Operating

Expenses, unless otherwise agreed to by the City under the category of Capital Improvements or Maintenance. The City Manager shall not unreasonably withhold, condition or delay his/her consent to any Alterations except that the City Manager may withhold consent, in his/her sole and absolute discretion, with respect to any Alterations that change the structural elements or life-saving systems or that affect the exterior of the Facility; Notwithstanding anything to the contrary, however, TRF shall not under any circumstances be permitted to make any Alterations that: (i) affect the structural portions of the Facility, or (ii) fail to comply with any applicable Governmental Requirements; or (iii) interfere in any material manner with the proper functioning of any mechanical, electrical, plumbing, HVAC, life safety or other systems, facilities or equipment of the Facility. Except as required pursuant to Section 5.5.4, it is understood by the parties hereto that TRF shall not be responsible, nor required to pay for, any other costs related to capital improvements or infrastructure (i.e. including, but not limited to, plumbing and sewer lines, major electrical, structural, HVAC, roof, etc.) with regard to the Facility.

11.2 TRF shall obtain all required permits for Alterations performed by, through or under TRF and shall perform or cause to be performed such Alterations in compliance with all Governmental Requirements. Under no circumstances shall TRF make any Alterations which incorporate any Hazardous Substances including, without limitation, asbestos-containing construction materials, into the Facility. Any request for City Manager's consent to any proposed Alterations by, through or under TRF shall be made in writing and shall contain plans or other written materials describing the work in detail reasonably satisfactory to City Manager, provided that architectural plans shall not be required unless required for the issuance of a building permit. The City Manager shall provide or deny consent within twenty (20) business days following receipt of TRF's written request, the failure to provide or deny consent within such twenty (20) business day period shall be deemed a consent. Should the work proposed by TRF and consented to by City Manager modify the basic floor plan of the Facility and the building permit therefor require architectural plans, then TRF shall, at its expense, furnish City with as-built drawings and CAD disks for such work. Unless the City Manager otherwise agrees in writing, all Alterations made or affixed to the Facility (excluding moveable trade fixtures, equipment, personal property and furniture) (including without limitation, all upgrades constructed pursuant to subparagraph (b)), shall become the property of City and shall be surrendered with the Facility at the expiration or termination of this Agreement. With respect to Alterations costing in excess of \$200,000, the City Manager may require TRF to obtain a payment bond for the work.

11.3 Maintenance. TRF shall, at its sole cost and expense, have sole responsibility for basic maintenance to be performed on a regular basis on all facilities, improvements, and facilities and utilities infrastructure equipment at the Facility, as well as any necessary repairs to the perimeter walls and gates. Any other repairs or replacement of the same is the responsibility of the City. TRF shall, at its sole cost and expense, and to the satisfaction of the City, keep and maintain the Facility, and all improvements

12.2 The City Manager shall have the right at any time, and from time to time, to cause independent auditors or the City's own accountants or auditors to audit all of the books of TRF relating to Operating Revenues, Operating Expenses, tickets and Events including, without limitation, cash register tapes, credit card invoices, duplicate deposit tapes, and invoices. No costs incurred by the City in conducting such audit shall be considered an Operating Expense.

12.3 Annual Plan. Commencing on June 1, 2015, and thereafter on June 1<sup>st</sup> of each Contract Year during the term herein, TRF shall provide to the City an annual management plan, which shall include the annual operating budget for the then current Fiscal Year but may not have a complete booking plan or event schedule. The annual plan shall include information regarding TRF'S anticipated operations for such Fiscal Year, including planned operating and maintenance activities, anticipated capital improvements and capital equipment purchases and an anticipated budget therefore, anticipated Events at the Facility (to the extent known at such time), and planned equipment and furnishings purchases. TRF shall have the right from time to time to make any changes it deems necessary or appropriate to any such annual plan so long as the annual plan is consistent with TRF'S fulfillment of its obligations hereunder.

12.4 Programmatic Plan. Accompanying TRF's proposed annual budget shall be the Facility Programmatic Plan for the next fiscal year, detailing the then-known activities planned, and the number of residents and visitors anticipated to be impacted.

12.5 Major Capital Repairs. Accompanying TRF's proposed annual budget shall be a detailed list of then-known major capital repairs anticipated for the Facility, which remain the sole responsibility of the City.

### **SECTION 13. INDEMNIFICATION.**

TRF shall indemnify, hold harmless and defend (with counsel approved by the City Attorney) the City, its officers, agents, servants and employees from and against any and all claims, liabilities, demands, causes of action, costs and expenses (including reasonable attorneys' fees at trial and all levels of appeal) of whatsoever kind or nature ("Claims") arising out of (i) errors, omission or negligent act or willful misconduct of TRF, its agents, servants, contractors, or employees; (ii) any default by TRF under this Agreement; or (iii) any other claim arising, directly or indirectly, from the operation or management of the Facility or any Event held therein or rental or use of the Facility; provided that there is expressly excluded from the foregoing obligations any Claims to the extent resulting solely from the gross negligence or willful misconduct of the City, its officers, agents (excluding TRF), contractors (excluding TRF) and employees or the use of the Facility by the City, its officers, agents (excluding TRF), and employees, pursuant to Section 16 hereof. The provisions of this Section 13 shall survive expiration or termination of this Agreement.

#### **SECTION 17. ASSIGNMENT/SUBLET.**

17.1 Except as otherwise specifically provided in this Section 17, TRF may not voluntarily or by operation of law, assign, encumber, pledge or otherwise transfer all or any part of TRF's interest in this Agreement or subcontract its management duties hereunder without the City's prior written consent, which may be granted or withheld in City's sole and absolute discretion. Any attempt by TRF to assign all or any part of its interest and any attempt to subcontract its management duties hereunder without first having obtained City's prior written approval shall be void and of no force or effect. In the event of any assignment, transfer, encumbrance or subcontract, TRF shall nevertheless remain liable for all obligations hereunder and the transferee shall be jointly and severally liable for all obligations thereafter arising under this Agreement. Any transfer of a controlling interest in TRF (whether in a single transaction or multiple transactions) shall be considered an assignment of this Agreement. TRF specifically recognizes that City selected TRF to be the manager of the Facility as a result of the City's evaluation of TRF's specific qualifications and experience in operating similar first class facilities.

17.2 The provisions of subsection 17.1 above shall not prevent TRF in the performance of its management duties hereunder to grant licenses and concessions and rental agreements for Events and entering into a concessions agreement for the concession operations at the Facility.

#### **SECTION 18. SECURITY.**

TRF shall provide reasonable security to protect the Facility and its equipment, materials and facilities, including any City equipment, furnishings, and fixtures used by TRF, and shall be solely responsible to the City for any loss or damage to any City equipment, furnishings, and fixtures so used by TRF.

#### **SECTION 19. PERMITS; LICENSES; TAXES; APPLICABLE LAWS.**

TRF agrees to obtain and pay for all permits and licenses necessary for the conduct of its business, including a liquor or beer and wine license for the Facility, and agrees to comply with all laws governing the responsibility of an employer with respect to persons employed by TRF. TRF shall also be solely responsible for payment of any and all taxes levied on the Facility and its operations. In addition, TRF shall comply with all rules, regulations and laws of the City; Miami-Dade County; the State of Florida; and the U.S. Government now in force or hereafter to be adopted.

#### **SECTION 20 UTILITIES; RESPONSIBILITY FOR TAXES AND ASSESSMENTS.**

20.1 Utilities. During the initial term only, The City shall be solely responsible for and shall pay (whether to the City or directly to the utility) before delinquency, of all charges for all water and sewer, and electricity utilities used at the Facility. Any other utilities, including the connection of a phone line, shall be the responsibility of TRF.

**SECTION 14. INSURANCE REQUIREMENTS.**

TRF shall maintain, at TRF's sole cost and expense, the following types of insurance coverage at all times throughout the Term of this Agreement:

14.1 General liability insurance with not less than the following limits:

• General aggregate	\$2,000,000
• Products (completed operation	
• aggregate)	\$2,000,000
• Personal and advertising (injury)	\$1,000,000
• (Per occurrence)	\$1,000,000
• Fire damage	\$ 100,000
• Medical Expense	\$ 5,000
• Liquor Liability (aggregate)	\$2,000,000
• (Per occurrence)	\$1,000,000

14.2 Workers Compensation Insurance shall be required under the Laws of the State of Florida

14.3 Fire Insurance for the Facility shall be the responsibility of the City.

14.4 Builder's Risk. TRF shall carry Builder's Risk insurance during any period of construction of Alterations or any other period of construction by, through or under TRF.

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days written notice to City and then subject to the prior written approval of the City's Risk Manager. TRF shall provide the City with a Certificate of Insurance for each such policy, which shall name the City as an additional named insured. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should TRF fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by TRF to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If TRF does not repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, and such failure shall be deemed an event of default hereunder.

TRF shall be the named insured under all such policies. The City shall be an additional insured under the insurance policies described in subsections 14.1, 14.3 and 14.4 hereof, as its interests may appear, and all such insurance policies shall contain a provision covering the indemnification liabilities hereunder.

The terms of insurance policies referred to in Section 14 shall preclude subrogation claims against TRF, the City and their respective officers, employees and agents.

#### **SECTION 15. OWNERSHIP OF ASSETS.**

**Ownership.** The ownership of the Facility and all buildings and real estate, all existing (and replacements thereof) technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property located at the Facility at the time of the commencement of this Agreement shall remain with the City. Any and all technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property purchased by TRF for use at the facility shall remain property of TRF. Ownership of and title to all intellectual property rights of whatsoever value held in the City's name shall remain in the name of the City. The ownership of data processing programs and software owned by the City shall remain with the City, and the ownership of data processing programs and software owned by TRF shall remain with TRF. TRF shall not take or use, for its own purposes, customer lists or similar materials developed by the City for the use of the Facility, unless prior written consent is granted by the City Manager. Ownership of equipment, furnishings, materials, or fixtures not considered to be real property purchased by TRF with Operating Revenues for use at and for the Facility shall vest in the City automatically and immediately upon purchase or acquisition ("City Property"). The assets of the City as described herein shall not be pledged, liened, encumbered or otherwise alienated or assigned. Notwithstanding anything to the contrary contained in this Agreement, any personality, furnishings, and movable equipment that is not a fixture and is not integral to the operation of the Facility purchased by TRF with outside funds, (funds which are not a part of Operating Revenue) and used at the Facility shall be the sole property of TRF. Ownership of and title to all intellectual property rights of whatsoever value related to marketing and promotional materials, designs, slogans, social media profiles, and web pages will remain the exclusive property of the City.

#### **SECTION 16. USE BY THE CITY.**

The City shall have the right to use the Facility, or any part thereof, subject to availability, for the benefit of the community for such purposes including, but not limited to, meetings, City-sponsored special events, Movie Nights receptions, and other purposes, as deemed necessary by the City Manager, in his sole and absolute discretion, without the payment of any rental or use fee, except that the direct out-of-pocket expenses incurred in connection with such uses shall be paid by the City. In addition, TRF shall honor all existing booked rentals and pre-determined Events scheduled at the Facility as outlined in Exhibit "F", attached hereto and made a part hereof.

Event Expenses, postage and freight costs, equipment rental costs, computer equipment leases and line charges, telephone and telecommunications services, artist and talent fees, show settlement charges, security expenses, travel and entertainment expenses in accordance with TRF's normal policies, the cost of employee uniforms, safety and medical expenses, exterminator costs, costs relating to the maintenance of signage, costs associated with compliance of Governmental Requirements, all premiums for insurance carried by TRF pursuant to Section 14, and all other costs of operating the Facility. Operating Expenses shall not, however, include any costs of litigation between City and TRF, or any costs that are specified in this Agreement as costs to be paid by City. All Operating Expenses shall be determined in accordance with generally accepted accounting principles consistently applied and recognized on a full accrual basis.

"Operating Revenues" -- any and all revenues of every kind or nature derived from operating, managing or promoting the Facility including, but not limited to: concession fees, rentals, revenues from merchandise sales, advertising sales, equipment rentals, box office revenues, food service and concession revenues (However, if such revenues are collected in the first instance by and retained by the concessionaire, only the amount of such revenues paid by the concessionaire to TRF shall be included as Operating Revenues), commissions or other revenues from decoration and set-up, security and other subcontractors (However, if such revenues are collected in the first instance by and retained by such subcontractors, only the amount of such revenues paid by such contractors to TRF shall be included as Operating Revenues), revenues generated from separate agreements with TRF Affiliates pertaining to the Facility, interest revenues, and any other miscellaneous operating revenues; all as determined in accordance with generally accepted accounting principles consistently applied and recognized on a full accrual basis. For the sake of clarity, the parties acknowledge that revenues from the sale of tickets for Events at the Facility are not Operating Revenues, but are instead revenues of the promoter and/or performer of each such Event. To the extent that TRF collects such ticket sale revenue on behalf of a promoter and/or performer, such ticket sale revenue shall be the source of funds from which TRF collects the rental charges and other event reimbursements owed by the promoter and/or performer for use of the Facility, which such charges and reimbursements are Operating Revenues hereunder. Operating Revenues shall also not include any revenues from name-in-title rights (i.e., the right to name the exterior or interior of the Facility or any portion thereof, except as set forth in subsection 8.3 hereof), and any signage related thereto, all of which are specifically reserved to the City.

"Proposal Documents" -- shall mean City of Miami Beach Invitation to Negotiate No. 2014-215-LR for Band Shell Management Services, together with all amendments thereto, issued by the City (the "ITN"), and the Consultant's proposal in response thereto ("Proposal"), all of which are hereby incorporated and made a part hereof; provided, however, that in the event of an express conflict between the Proposal Documents and this Agreement, the following order of precedent shall prevail: this Agreement; the ITN; and the Proposal.

"Quarterly/Quarter(s)" -- October 1<sup>st</sup>, January 1<sup>st</sup>, April 1<sup>st</sup> and July 1<sup>st</sup> of each Fiscal Year.

On August 18, 2014, the City Manager appointed an Evaluation Committee (the "Committee"), consisting of the following individuals:

- Cynthia Casanova, Parks Facilities Manager, Parks & Recreation Department
- Mark Millits, Leasing Specialists, Tourism, Culture & Economic Development
- Charles Million, City of Miami Beach Cultural Arts Council

**Alternates:**

- Carlos DaCruz, Office Associate V, Parks & Recreation Department

The Committee convened on August 21, 2014, to consider the proposal received. The Committee was provided an overview of the project, information relative to the City's Code of Silence Ordinance and the Government Sunshine Law. The Committee was also provided general information on the scope of services, references, and a copy of each proposal. The Committee was instructed to score and rank the proposal pursuant to the evaluation criteria established in the RFP.

The evaluation process resulted in the following:

ITN 2014-215-LR Band Shell Management Services	Cynthia Casanova	Ranking	Mark Millits	Ranking	Charles Million	Ranking	LOW AGGREGATE TOTALS	Final Rankings
Fantasy Theatre Factory, Inc.	75	2	80	2	82	2	6	2
The Market Company	45	3	67	3	74	3	9	3
The Rhythm Foundation	98	1	95	1	96	1	3	1

In determining responsiveness and responsibility of the firms, the Department of Procurement Management verified compliance with the minimum requirements established in the ITN, and financial capacity as contained in the Dun & Bradstreet Supplier Qualifier Report.

The Rhythm Foundation, is a Miami-Beach based non-profit organization, established in 1988 to promote international cultural exchange through the presentation of live music. Special focus is given to those cultures of greatest interest to South Florida residents and visitors, allowing better understanding between communities. The Rhythm Foundation has grown to become one of the largest independent presenting organizations of its kind in the United States, with year-round programming and a budget of over \$1,000,000. They provide similar services to the Hollywood Community Redevelopment Agency for the Hollywood ArtsPark Experience; the City of Miami's Little Haiti Cultural Center for their Big Night in Little Haiti; and the City of Boca Raton's for the Boca Brazilian Beat.

Fantasy Theatre Factory, Inc., is a non-for-profit professional theater and cultural arts institution founded in 1978, and incorporated in 1982. Its primary mission is to make the arts and culture more accessible to people of all cultures and backgrounds. Fantasy Theatre Factory produces all street entertainers and specialty skills acts for the annual Art Deco Weekend festival; yearly theatre for young audiences at schools, parks, museum and numerous other venues throughout the City, as well as, Miami-Dade and Broward Counties.

"City" -- as defined in the first paragraph of this Agreement.

"City Commission" -- the governing and legislative body of the City.

"City Manager" -- the chief executive officer of the City, or such person who shall be the City Manager's designee, as defined below and as may, from time to time, be authorized in writing by the City Manager to act for him/her with respect to any or all matters pertaining to this Agreement. City Manager's designee shall be the City's Parks and Recreation Department Director.

"Commencement Date" -- as defined in Section 2.

"Contract Year" -- each one year period beginning October 1st, and ending September 30th.

"Effective Date" -- provided that this Agreement has been executed by City and TRF, the date set forth in the first paragraph of this Agreement.

"Event" -- all uses at the Facility which involve a scheduled show with a beginning and ending time, typically all within the same day. With respect to a "Series" (as such term is hereafter defined"), each show within the Series shall constitute an Event.

"Event Expenses" -- any and all expenses incurred or payments made by TRF in connection with the occurrence of an Event at the Facility including, but not limited to, costs for staffing, and costs relating to set-up and clean-up.

"Expiration Date" -- as defined in Section 2

"Facility" -- as defined in the Background Section of this Agreement, and as depicted in Exhibit "B" hereto.

"Facility Rentals" -- temporary use of the Facility at specific interval of time pre-determined and agreed upon by TRF.

"Fiscal Year" -- each City fiscal year beginning October 1st and ending September 30th.

"Governmental Requirements" -- all laws, ordinances, rules, regulations, statutes, policies and procedures (including administrative guidelines), and other legal requirements of any governmental body or authority or any agency thereof (including, without limitation, federal, State, County, and City).

"Net Operation Loss/Profit" -- with respect to a Fiscal Year, the excess, if any, of Operating Expenses for such Fiscal Year over Operating Revenues for such Fiscal Year, in the case of a loss; and the excess, if any, of Operating Revenues for such Fiscal Year over Operating Expenses for such Fiscal Year, in the case of a profit.

"Operating Expenses" -- any and all expenses and expenditures of whatever kind or nature incurred, directly or indirectly, by TRF in operating, managing, maintaining, and promoting the Facility including, but not limited to: employee compensation, employee benefits, supplies, materials, costs of any independent contractors, advertising costs, all costs of maintaining the Facility (as required by this Agreement), marketing and public relations costs and commissions, janitorial and cleaning expenses, dues and membership costs, amounts expended to procure and maintain permits and licenses, sales taxes imposed upon rentals, professional fees directly relating to the operation of the Facility, printing costs,

"Series" -- a sequence of Events which may or may not involve the same production elements, but can be characterized by a unifying theme and schedule.

"TRF" -- as defined in the first paragraph of this Agreement.

## **SECTION 2. TERM.**

2.1 Initial Term. This Agreement shall be for an initial term of two (2) years, which shall be deemed to have commenced retroactively on October 1, 2014 (Commencement Date), and which shall end on September 30, 2016 (Expiration Date), unless earlier terminated pursuant to the provisions of this Agreement.

2.2 Renewal Term(s). At its sole option and discretion, the City, through its City Manager, may extend this Agreement for up to two (3) additional one (1) year terms, and/or multi-year terms, but in no event to exceed five (5) years in total, (each such one year term, or multi-year term, as the case may be, a Renewal Term), by providing TRF with not less than 365 days prior written notice prior to the Expiration Date, or not less than ninety (90) days written notice prior to the expiration date of a Renewal Term, as the case may be.

2.2.1 Notwithstanding anything in this Section 2, in the event TRF decides not to renew the Agreement, it shall provide the City Manager with written notice of its intent not to renew at least 365 days prior to the Expiration Date, or ninety (90) days written notice prior to the expiration date of the then current Renewal Term, as the case may be.

## **SECTION 3. NORTH SHORE BAND SHELL.**

The Facility subject to this Agreement shall be those facilities and spaces more specifically described in Exhibit "A."

## **SECTION 4. OPERATION AND MANAGEMENT OF THE BAND SHELL.**

4.1 General Scope. City hereby engages TRF to operate, manage, maintain, promote and market the Facility during the Term, upon the terms and conditions hereinafter set forth.

4.2 Manager of the Facility. TRF accepts the engagement and agrees to operate, manage, maintain, promote and market the Facility, at a minimum, in a manner and quality consistent with the Comparable Facilities defined in Section 5.1 hereof. Subject to the terms of this Agreement, TRF shall be, as agent for the City, the sole and exclusive manager of the City to operate, manage, maintain, promote and market the Facility during the Term. In such capacity, except as otherwise expressly reserved under this Agreement to the City, and/or except for such matters as are subject to the approval of the City or City Manager, TRF shall have exclusive authority over the management and operation of the Facility.

4.3 Permitted Uses. TRF shall use the Facility solely and exclusively as a venue for its not-

for-profit cultural presentation company. The Facility shall be used primarily as a venue for top-quality cultural entertainment. The venue may also be used as a live theatrical entertainment venue and public auditorium, or any combination thereof, and for such ancillary uses as are customarily related to such primary use including, without limitation, broadcasting, recording, filming, private parties or functions, food and beverage concessions; in each case in conjunction with an Event then being held; and sale of merchandise related to any Event then being held. TRF shall be responsible for ensuring that any requisite special event permits, which the City of Miami Beach may require for Events at the Facility, are properly secured. Such uses shall include only the following:

- a. Performance venue
- b. Events facility
- c. Rehearsal space
- d. TRF administrative offices;
- e. Food and beverage concession;
- f. Sale of merchandise related to an Event then being held;
- g. Private parties and/or functions in conjunctions with an Event then being held;
- h. As an ancillary use, third party rentals as may occur from time to time;
- i. Facility for film / television / photographic/ audio productions;

The Facility does not include dedicated parking for the building. Patrons of Events may park in public parking lots and garages if and to the extent available, upon paying the applicable parking charges. No other uses shall be permitted without the prior written approval of the City Manager, which approval may be granted or withheld in his sole discretion. Any such other use which the City Manager approves must, however, be in accordance with (i) the Articles of Incorporation and other charter documents of TRF; (ii) all laws and regulations applicable to not-for-profit entities; (iii) all applicable Governmental Requirements; and (iv) all ad valorem tax exempt uses of property under Chapter 196, Florida Statutes.

4.4 Prohibited Uses. It is understood and agreed that the Facility shall be used by TRF during the Term only for the stated purposes in Section 4.3, and for no other purposes or uses whatsoever, without express written permission of the City Manager. Notwithstanding anything contained in Section 4.3, or any other term or condition of this Agreement: (1) TRF will not make or permit any use of the Facility that, directly or indirectly, is forbidden by any Governmental Requirement, or that may be dangerous to life, limb or property; and (2) TRF may not commit waste on the Facility, use the Facility for any illegal purpose, commit a nuisance on the Facility, or allow any toxic, hazardous or dangerous substance to be brought into the Facility or stored therein (other than small quantities of materials customarily used in the operation of a live theatrical performance and production venue, which shall be used and stored in compliance with Governmental Requirements). In the event that TRF uses the Facility for any purposes not expressly permitted herein, then the City, through its City Manager, may declare this Agreement in default and, in addition to all other remedies available to City, restrain such improper use

by injunction or other legal action, with or without notice to TRF.

4.5 Operational Rules for Facility.

On December 17, 2014, the City of Miami Beach Commission passed Resolution No. 2014-28874, attached as Exhibit "H" hereto, requiring certain operational guidelines for the Facility, including the following:

4.5.1 Amplified Sound and Live Entertainment: The City will be installing an audio sound system designed to maintain the audio levels at a maximum level of 105 dBC ("House Sound System"). TRF will only be permitted to use such House Sound System in connection with any Events held at the Facility and, at all times, the sound levels may not exceed 105dBC. Additionally, TFR shall be responsible for ensuring that users of the Facility do not use temporary sound equipment for any Event held at the Facility.

4.5.2 Facility Hours of Operation: 10:00 am to 10:00 pm.; provided, however, that the City Manager shall have the discretion to extend the hours of operation on a case by case basis to 11:00 pm on the weekends (Friday or Saturday). Any extension of the hours of operation under this Subsection 4.5.2 shall be given in writing by the City Manager in advance of the scheduled Event.

4.6 Cessation/Suspension of Approved Use(s) and/or Business Activity(ies). Notwithstanding anything contained in this Agreement, and except for the Permitted Uses expressly set forth in Section 4.3, and in the event that another particular use(s) and/or business activity(ies) has(ve) been approved by the City Manager, and the City Manager thereafter, upon reasonable inquiry, determines that the continuation of such use(s) and/or activity(ies) is(are), or may be, inconsistent, contrary to, and/or detrimental to the Permitted Uses set forth in this Agreement, and/or to the health, safety and/or welfare of the residents of and visitors to the City of Miami Beach, then the City Manager, upon thirty (30) days prior written notice to TRF of same, may revoke, suspend, and/or otherwise disallow the objectionable uses(s) and/or business activity(ies), and TRF shall immediately cease and desist in providing, and/or continuing with, said use(s) and/or business activity(ies) within the time period and in the manner prescribed in the City, subject to such additional guidelines, as may be determined and established by the City Manager, in his/her sole and reasonable discretion and judgment.

**SECTION 5. SCOPE OF SERVICES.**

5.1 General. TRF shall perform and furnish management services, personnel, and systems and materials, as are appropriate or necessary to operate, manage, supervise, maintain, promote and market the Facility in a manner consistent with the operations, management, promotions and marketing of other similar first-class facilities such as Daytona Beach Band Shell in Daytona Beach, Florida, and ArtsPark Amphitheater in Hollywood, Florida ("Comparable Facilities").

5.2 Required Number of Events; Reports; Continuous Operation; Conclusion of Events. In order to ensure the continuous operation of the Facility and, commencing as of the Effective Date, TRF shall cause at least 35 Events to be held at the Facility for each Contract Year during the Term. The aforesaid 35 Events shall be calculated by counting each separate Event in a Series.

5.2.1 Annual Benchmarks

5.2.1.1 TRF shall operate a minimum of 35 new Events per year at the Facility (The City's Movie Nights shall not count towards the benchmark.) These 35 new Events shall take precedence over any private rentals of the Facility. Since TRF will not commence to operate the Facility until after the Effective Date of this Agreement (instead of October 1, 2014) and the City has been operating the Facility and presenting Events prior to the Effective Date, during the first year of the Initial Term (ending September 30, 2015), only, this benchmark shall be reduced to 21 new Events, instead of 35.

5.2.1.2 In addition to its own produced Events, TRF shall collaborate with other cultural and quality presenting organizations to develop consistent Events at the Facility.

5.2.1.3 TRF shall create and implement consistent marketing materials, including, but not limited to, public relations, social media campaigns, and paid marketing outreach, to ensure that both the North Beach community and South Florida residents in general are aware of programs taking place at the Facility. A detailed plan and budget illustration marketing efforts will be submitted Quarterly, within fifteen (15) days from the end of each Quarter, with the first report due (for the January, 2015 Quarter) on or before April 15, 2015.

5.2.1.4 TRF shall survey Event goers and community businesses to ensure that TRF's programming at the Facility continues to benefit North Beach residents and businesses, as well as Miami Beach residents as a whole. Survey questions shall be approved in writing by the City Manager in advance. The overall satisfaction target shall be 90%. Surveys must be conducted in a format which is auditable. Additionally, on a monthly basis, responses to the survey questions shall be provided to the City Manager.

5.2.1.5 TRF shall submit to the City, every Quarter, within fifteen (15) days from the end of each Quarter, commencing with the January, 2015 Quarter, a detailed report ("Programmatic Quarterly Report") setting forth the following information:

- i. The number of Events hosted during the previous Quarter, including the charge to the public for the event, if any.
- ii. The number in attendance at the Event.
- iii. The number of Facility Rentals and the charge for said Facility Rentals.
- iv. A detailed plan and budget illustrating the marketing efforts.

v. The Events scheduled or anticipated for the upcoming Quarter.

5.3 TRF shall cause the Facility to be available to open on a year round basis, subject to closures for reasonable periods for rehearsal, set design, repairs, maintenance and alterations. All Events and all uses shall conclude prior to 10:00 p.m. on weeknights, and may be extended to 11:00 p.m. on weekends (Friday and Saturday), if approved in advance by the City Manager, in writing; provided, however, that TRF's employees and/or contractors may be permitted to remain at the Facility beyond 10:00 pm on weekdays or 11:00 pm on weekends, however, no later than midnight in the event that same is necessary for purposes of taking down and/or dismantling a production, cleaning the Facility after a performance, etc., so long as TRF's activities at the Facility during this time do not disrupt and/or negatively impact the surrounding neighborhood. In the event of such disruption, the City Manager shall have the right to either strictly enforce the hours of operation, or impose reasonable guidelines upon TRF as a condition to keeping the Facility open for the aforesated purposes (beyond 10:00 pm) **TRF SHALL PROVIDE SURROUNDING CONDOMINIUMS WITH 30 DAYS ADVANCE WRITTEN NOTICE WHEN SCHEDULED EVENTS WILL INVOLVE AMPLIFIED SOUND.**

5.4 Booking Policies. The City and TRF agree and acknowledge that the Facility will be primarily used by TRF to provide top-quality cultural and entertainment to the City's residents and visitors, but that TRF may also, from time to time, rent the Facility to third party presenters consistent with the terms herein. Except as otherwise provided herein, TRF shall have the sole authority to approve the scheduling of any Event in the Facility and Events requiring or having co-promotions and may refuse to book any type or category of Events for any reason whatsoever, so long as the event is consistent with Section 4 of this Agreement and applicable Governmental Requirements. TRF shall have no obligation to book any type or category of Events (or specific Event) that are inappropriate or unprofitable, as reasonably determined by TRF, or which may in any way interfere with the day to day activities of area residents and businesses. **Notwithstanding the preceding, or any other term or condition of this Agreement, the City Manager shall have the right to prohibit certain Events or uses from occurring at the Facility, upon the City Manager's reasonable determination that such Event or use might present unreasonable safety concerns, or violate (or otherwise not comply with) Governmental Requirements.** Notice of any such determination shall be sent by written notice to TRF within thirty (30) days after the City Manager has received the Quarterly booking report from TRF that specifies the potential Event.

5.5 Specific Services. Without limiting the generality of the foregoing, TRF shall perform all of the following services, all without the necessity of first obtaining City's approval (except where otherwise expressly required in this Agreement), and all of which shall be performed by TRF, at a minimum, in a manner consistent with the management and operation of the Comparable Facilities:

5.5.1. employ, supervise, and direct all employees and personnel consistent with the

thereon, in good, clean, and sanitary order. The City shall, at its sole cost and expense, have the sole responsibility for maintaining the grounds of the North Shore Band Shell and surrounding park. To that end, the parties herein acknowledge, and TRF herein agrees to be bound by, the minimum maintenance standards set forth in Exhibit "B" to this Agreement, entitled "City of Miami Beach Minimum Specifications for Maintenance of the North Shore Band Shell." It is further understood that TRF shall provide the City with a Quarterly maintenance report, in a format to be approved by the City Manager. Setting forth any repairs made to the Facility during the reported Quarter.

11.4 Personal Property. A list of existing City-owned personal property included in the Agreement for use by TRF during the Term hereof is attached and incorporated herein as Exhibit "E". TRF hereby accepts such equipment in its "as-is" condition, and without any warranty(ies) and, at its sole cost and expense, acquire and maintain all replacement and such other equipment and, at its sole cost and expense, acquire and maintain all replacement and such other equipment as may be necessary to maintain the Facility in a condition which satisfies those maintenance standards set forth in Exhibit "B", but shall not have an obligation to improve the condition of the existing City-owned personal property beyond the "as-is" condition in which it was accepted, all of which shall be noted on the inventory. TRF shall have the right, at the initial inventory and at any point thereafter, to decline the use and responsibility for any existing City-owned personal property not useful for its operation of the Facility, and may turn such existing City-owned personal property over to the City in the condition in which it was accepted. Any personal property purchase with Operating Revenues shall become City-owned personal property and included in the inventory for the Facility. The City shall have the right to periodically take an inventory of any or all City-owned equipment at the Facility.

## **SECTION 12. RECORDS, AUDITS AND REPORTS.**

12.1 Records and Audits. TRF shall keep full and accurate accounting books and records relating to all Operating Revenues and Operating Expenses, all in accordance with generally accepted accounting principles. TRF shall give the City such books and records during reasonable business hours and upon reasonable advance notice. All books and records shall be made available on-site at the Facility or electronically. TRF shall keep and preserve for at least three (3) years following each Fiscal Year, or for as long as such records are required to be retained pursuant to Florida Public Records Law (whichever is longer), all sales slips, rental agreements, purchase order, sales books, credit card invoices, bank books or duplicate deposit slips, and other evidence of Operating Revenues and Operating Expenses for such period. In addition, on or before 120 days following each Fiscal Year, TRF shall furnish to the City a line item (i.e., by categories) statement of Operating Costs and Operating Revenues (and profit or loss) for the Facility for the preceding Fiscal Year, and including the number of tickets sold and Events held, including any Facility Rentals, prepared in accordance with generally accepted accounting principles certified as accurate by TRF's Chief Accounting Officer or Chief Financial Officer.

20.2 Procedure If Taxes Assessed. TRF agrees to, and shall pay before delinquency, all taxes and assessments of any kind assessed or levied, whether upon TRF or the Facility, by reason of this Agreement or by reason of any use(s) and/or activity(ies) of TRF upon or in connection with the Facility. The parties acknowledge that TRF's operation and use of the Facility is for public purposes, and therefore anticipate that, as of the Effective Date, no ad valorem taxes should be assessed by the Miami-Dade County Tax Appraiser. If, however, taxes are assessed by the Property Tax Appraiser, TRF has the right to terminate this agreement without penalty by providing 90 days notice to the City, at which point the City shall be solely responsible for such payment(s).

#### **SECTION 21. FORCE MAJEURE.**

No party will be liable or responsible to the other party for any delay, damage, loss, failure, or inability to perform caused by "Force Majeure" if notice is provided to the other party within ten (10) days of date on which such party gains actual knowledge of the event of "Force Majeure" that such party is unable to perform. The term "Force Majeure" as used in this Agreement means the following: an act of God, strike, war, public rioting, lightning, fire, storm, flood, explosions, epidemics, landslides, lightning storms, earthquakes, floods, storms, washouts, civil disturbances, explosions, and any other cause whether of the kinds specifically enumerated above or otherwise which is not reasonably within the control of the party whose performance is to be excused and which by the exercise of due diligence could not be reasonably prevented or overcome (it being acknowledged that under no circumstances shall a failure to pay amounts due and payable hereunder be excusable due to a Force Majeure).

Neither party hereto shall be under any obligation to supply any service or services if and to the extent and during any period that the supplying of any such service or services or the provision of any component necessary therefore shall be prohibited or rationed by any Governmental Requirements.

In the event of substantial damage to or destruction of the Facility by reason of fire, storm or other casualty or any eminent domain action or other regulatory action that, in either case, shall render a substantial part of the Facility inoperable for a period of at least ninety (90) days or in TRF's or the City's reasonable opinion the Facility can no longer be operated in a reasonably profitable manner as a result of the damages or action for a period of at least ninety (90) days from the happening of the fire, other casualty or regulatory action, either party may terminate this Agreement upon written notice to the other. Upon any such termination, the provisions of Section 31 shall apply; and provided City shall receive the entire amount of all insurance proceeds or eminent domain award as applicable.

#### **SECTION 22. INSPECTION.**

TRF agrees that the Facility may be inspected at any time upon reasonable notice by authorized representatives of the City, or by any other State, County, Federal or municipal officer or agency having responsibilities for inspections of such operations and/or Facility.

**SECTION 23. WAIVER OF INTERFERENCE.**

TRF hereby waives all claims for compensation for loss or damage sustained by reasons of any interference with its operation and management of the Facility by any public agency or official as a result of their enforcement of any laws or ordinances or of any of the rights reserved to the City herein. Any such interference shall not relieve TRF from any obligation hereunder.

**SECTION 24. NO LIENS.**

TRF agrees that it will not suffer, or through its actions or anyone under its control or supervision, cause to be filed upon the Facility any lien or encumbrance of any kind. In the event any lien is filed, the TRF agrees to cause such lien to be discharged within ten (10) days therefrom, and in accordance with the applicable law and policy. If this is not accomplished, the City may automatically terminate this Agreement, without further notice to TRF.

**SECTION 25. TRF EMPLOYEES, MANAGERS AND BOARD OF DIRECTORS.**

25.1 The City and TRF recognize that in the performance of this Agreement, it shall be necessary for TRF to retain qualified individuals to effectuate and optimize TRF's management and operation of the Facility. TRF shall select, train and employ at the Facility such number of employees as is necessary or appropriate for TRF to satisfy its responsibilities hereunder. TRF shall recruit employees consistent with standards employed at comparable first class facilities, and TRF shall have authority to hire, terminate and discipline any and all personnel employed by TRF working at the Facility. Any such personnel, whether employees, agents, independent contractors, volunteers, and/or other, employed, retained, or otherwise engaged by TRF for such purpose(s), shall not be deemed to be agents, employees, partners, joint ventures, or associates of the City, and shall not obtain any rights or benefits under the civil service or pension ordinances of the City or any rights generally afforded classified or unclassified employees of the City; further they shall not be deemed entitled to the Florida Worker's Compensation benefits as employees of the City. Additionally, TRF, and/or its employees shall never have been convicted of any offense involving moral turpitude or felony. Failure to comply with this subsection shall constitute cause for termination of this Agreement.

25.2 TRF shall assign to the Facility a competent staff member experienced in the operations of similar facilities, who will be located on-site with regular and posted hours during the Term. The staff member will be supervised by a general manager who is experienced in operating and managing similar facilities. The staff member shall be accessible to the City Manager at all reasonable times to discuss the management, operation, and maintenance of the Facility. "Accessible" shall mean available either in person, by phone and/or e-mail during business and/or operation hours and within a reasonable time frame during non-business hours in the event of an emergency. The City Manager may also request that

the staff member be replaced and TRF shall duly consider all such request but shall but not be obligated to replace the staff member.

**SECTION 26. NO IMPROPER USE.**

TRF will not use, nor suffer or permit any person to use in any manner whatsoever, the Facility for any purpose in violation of any Federal, State, County, or municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. TRF shall not use the Facility for any unlawful purpose and shall comply with all laws, permitting, and licensing requirements now in force or hereafter adopted, applicable to the Facility or the activities, uses, and/or business(es) conducted on the Facility. TRF agrees not to knowingly use the Facility for, or to permit operation of any offensive or dangerous activity, nuisance or anything against public policy. Any criminal activity in the Facility knowingly caused by or knowingly permitted by TRF shall result in automatic termination of this Agreement. Except as may result from acts of force majeure, TRF agrees that it will not allow the Facility to become unoccupied or vacant. TRF shall take appropriate precautions to prevent fire on the Facility, maintaining existing fire detection devices and extinguishing equipment at all times. Fire detection devices and extinguishing equipment to be provided and maintained by the City.

**SECTION 27. NO DANGEROUS MATERIALS.**

TRF agrees not to use or permit in the Facility the storage of illuminating oils, oil lamps, turpentine, gasoline (except for small containers [5 gallons or less] for machinery), benzene, naphtha, or other similar substances, or explosives or any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida.

**SECTION 28. NO CLAIM AGAINST CITY OFFICERS, EMPLOYEES, INDIVIDUALS.**

It is expressly understood and agreed by and between the parties hereto that all individuals, employees, officers, and agents of the City are acting in a representative capacity and not for their own benefit; and that neither TRF nor any occupant shall have any claim against them or any of them as individuals in any event whatsoever in conjunction with any acts or duties which are reasonably related to the performance of their duties.

**SECTION 29. DEFAULT AND TERMINATION.**

29.1 TRF's Defaults. The occurrence of any one or more of the following events shall constitute an event of Default by TRF.

29.1.1 The failure by TRF to make any payment required to be made by TRF as and when due, which continues for more than ten (10) days after written notice from City;

29.1.2 The failure or inability by TRF to observe or perform any of the covenants or

provisions of this Agreement to be observed or performed by TRF, which continues for more than thirty (30) days after written notice from City Manager; provided, however, if the nature of the failure is such that more than such period is reasonably required for its cure, then TRF shall not be deemed to have committed an Event of Default if TRF commences the cure within such period and thereafter diligently pursues the cure to completion and actually completes the cure within an additional sixty (60) day period;

29.1.3 Except as permitted pursuant to Section 17 of this Agreement, the assignment, encumbrance, pledge, or transfer of this Agreement, whether voluntarily or by operation of law, or any subcontract of TRF's duties hereunder, which continues for more than fifteen (15) business days after written notice thereof from City Manager;

29.1.4 (i) The making by TRF of any general assignment for the benefit of creditors; (ii) the filing by or against TRF of a petition to have TRF adjudged a Chapter 7 debtor under the Bankruptcy Code, or any Code or to have debts discharged or a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against TRF, the same is dismissed within sixty (60) days); (iii) the appointment of a trustee or receiver to take possession of substantially all of TRF's assets located at the Facility or of TRF's interest in this Agreement, if possession is not restored to TRF within sixty (60) days; or (iv) the attachment, execution or other judicial seizure of substantially all of TRF's assets located at the Facility or of TRF's interest in this Agreement, where the seizure is not discharged within sixty (60) days.

29.2 City Remedies. If an Event of Default by TRF occurs, then in addition to any other remedies available to City, City may exercise the following remedies:

29.2.1 City may terminate this Agreement by written notice to TRF, in which case this Agreement shall terminate and TRF shall immediately surrender possession of the Facility to City. Upon termination, City shall be entitled to recover from TRF: (1) Operating Expenses that remain unpaid through the date of termination; (2) all other amounts that TRF is required to pay under this Agreement through the date of termination.

29.2.2 City may seek specific performance of any of TRF's obligations hereunder or seek injunctive relief;

29.2.3 City may exercise any other remedies available at law or in equity.

29.2.4 The various rights and remedies reserved to City in this Agreement or otherwise shall be cumulative and, except as otherwise provided by Florida law, City may pursue any or all of its rights and remedies at the same time.

29.3 TRF's Remedies. If an Event of Default by City occurs, then TRF may exercise either of the following remedies:

TRF may terminate this Agreement by written notice to City, in which case this Agreement shall terminate and TRF shall immediately surrender possession of the Facility to City. Upon termination, TRF shall be entitled to recover from City all amounts owed by City to TRF as of the termination date and the

provisions of Section 31 shall apply; or

29.4 Late Payments. Any payment owed to City or TRF under this Agreement including, without limitation, any other payment owed to City or TRF under this Agreement that is not received by City or TRF within ten (10) days following notice of such amount being due shall bear interest at the rate of eighteen percent (18%) per annum or the highest rate allowable by law ("Default Rate") from the date due until fully paid.

29.5 IN THE EVENT THAT TRF CEASES TO BE A NOT-FOR-PROFIT CORPORATION, THIS AGREEMENT SHALL BE AUTOMATICALLY TERMINATED.

### SECTION 30. [INTENTIONALLY DELETED].

### SECTION 31. TERMINATION.

31.1 Termination for Convenience by City. The City reserves and retains the right, at its sole option and discretion, to terminate this Agreement, without cause and without penalty, with regard to TRF's rights and responsibilities with respect to the operation, management, maintenance, promotion and marketing of the Facility, upon one hundred eighty (180) days prior written notice to TRF.

31.2 Effect of Termination. In the event this Agreement expires or is terminated for any reason: (1) All Operating Expenses and all other obligations for the period up to the date of expiration or termination shall be paid using funds on deposit in the account(s) described in Section 10 and to the extent such funds are not sufficient, TRF shall pay all such amounts from its own funds; (2) After all amounts referenced in subparagraph (1) have been paid, TRF may retain all remaining Operating Revenues (if any). Upon the expiration of this Agreement or a termination for any reason, all further obligations of the parties hereunder shall terminate except for the obligations which for all periods up to the date of expiration or termination and such other obligations as are stated to survive or be performed after such expiration or termination. All of the foregoing reimbursement and the payment obligations are to be made within thirty (30) days after the termination date. The provisions of this Subsection 31.2 regarding the above reimbursement and payment obligations of the City shall survive the termination of this Agreement.

31.3 Surrender of Facility. Upon termination or expiration of this Agreement TRF shall surrender and vacate the Facility upon the effective date of such termination (or expiration). The Facility and all equipment and furnishings shall be returned to the City in a good and clean condition consistent with other similar Comparable Facilities and in compliance with all Governmental Requirements, ordinary wear and tear, and casualty loss excepted.

### SECTION 32. NOTICES.

All notices from the City to TRF shall be deemed duly served if mailed by registered or certified

mail to TRF at the following address:

The Rhythm Foundation, Inc.  
407 Lincoln Road #6E  
Miami Beach Florida 33139  
Attention: Laura Quinlan, Executive Director

All notices from TRF to the City shall be deemed duly served if mailed to:

City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: City Manager

With copies to:

City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: John Rebar, Parks and Recreation Department Director

TRF and the City may change the above mailing addresses at any time upon giving the other party written notification. All notice under this Agreement must be in writing.

### **SECTION 33. NO DISCRIMINATION.**

33.1 The TRF agrees that there shall be no discrimination as to race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial status, or disability in the operations referred to by this Agreement; and further, there shall be no discrimination regarding any use, service, maintenance or operation of the Facility. All facilities located on the Facility shall be made available to the public, subject to the right of TRF to establish and enforce reasonable rules and regulations to provide for the safety, orderly operation and security of the facilities.

33.2 No Discrimination in Employment; Affirmative Action. In connection with the performance of work under this Agreement, TRF shall not refuse to hire, discharge, refuse to promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial status and age or disability.

### **SECTION 34 [INTENTIONALLY DELETED].**

### **SECTION 35. LIMITATION OF LIABILITY.**

The City desires to enter into this Agreement only if in so doing the City can place a limit on its liability for any cause of action for money damages due to an alleged breach by the City of this Agreement, so that its liability for any such breach never exceeds the sum of \$10,000. TRF hereby expresses his willingness to enter into this Agreement with TRF's recovery from the City for any damage

action for breach of contract to be limited to a maximum amount of \$10,000, less the amount of all funds actually paid by the City to TRF pursuant to this Agreement.

Accordingly, and notwithstanding any other term or condition of this Agreement, TRF hereby agrees that the City shall not be liable to TRF for damages in an amount in excess of \$10,000, which amount shall be reduced by the amount actually paid by the City to TRF pursuant to this Agreement, for any action or claim for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of the limitation placed upon the City's liability as set forth in Section 768.28, Florida Statutes.

#### **SECTION 36. NOT A LEASE.**

It is expressly understood and agreed that no part, parcel, building, structure, equipment or space is leased to TRF; that this Agreement is a management agreement and not a lease; and that TRF's right to operate and manage the Facility shall continue only so long as the TRF complies with the undertakings, provisions, agreements, stipulations and conditions of this Agreement.

#### **SECTION 37. MISCELLANEOUS.**

37.1 Venue/Waiver of Jury Trial. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Florida, both substantive and remedial, without regard to principals of conflict of laws. The exclusive venue for any litigation arising out of this Agreement shall be Miami-Dade County, Florida, if in state court, and the U.S. District Court, Southern District of Florida, if in federal court. BY ENTERING INTO THIS AGREEMENT, CITY AND TRF EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO, OR ARISING OUT OF, THIS AGREEMENT.

37.2 No Partnership or Joint Venture. Nothing herein contained is intended or shall be construed in any way to create or establish the relationship of partners or a joint venture between the City and TRF. None of the officers, agents or employees of TRF shall be or be deemed to be employees of the City for any purpose whatsoever.

37.3 Entire Agreement. This Agreement and all Exhibits attached hereto contain the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, proposals or other expressions of intent with respect thereto. The Exhibits attached hereto are incorporated into and made a part of this Agreement. No other agreements, representations, warranties or other matters, whether oral or written, will be deemed to bind the parties hereto with respect to the subject matter hereof.

37.4 Written Amendments. This Agreement shall not be altered, modified or amended in whole or in part, except in writing executed by each of the parties hereto. The City Manager, on behalf of

the City, shall have authority to approve any changes to this Agreement.

37.5 Binding Upon Successors and Assigns; No Third-Party Beneficiaries.

37.5.1 This Agreement and the rights and obligations set forth herein shall inure to the benefit of, and be binding upon, the parties hereto and each of their respective permitted successors and permitted assigns.

37.5.2 This Agreement shall not be construed as giving any person, other than the parties hereto and their successors and permitted assigns, any legal or equitable right, remedy or claim under or in respect of this Agreement or any of the provisions herein contained, this Agreement and all provisions and conditions hereof being intended to be, and being, for the sole and exclusive benefit of such parties and their successors and permitted assigns and for the benefit of no other person or entity.

37.6 Section Headings and Defined Terms. The headings contained herein are for reference purposes only and shall not in any way affect the meaning and interpretation of this Agreement. The terms defined herein and in any agreement executed in connection herewith include the plural as well as the singular and the singular as well as the plural, and the use of masculine pronouns shall include the feminine and neuter. Except as otherwise indicated, all agreements defined herein refer to the same as from time to time amended or supplemented or the terms thereof waived or modified in accordance herewith and therewith.

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original copy of this Agreement, and all of which, when taken together, shall be deemed to constitute but one and the same agreement.

37.7 Severability. The invalidity or unenforceability of any particular provision, or part of any provision, of this Agreement shall not affect the other provisions or parts hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions or parts were omitted.

37.8 Non-Waiver. A failure by either party to take any action with respect to any default or violation by the other of any of the terms, covenants, or conditions of this Agreement shall not in any respect limit, prejudice, diminish, or constitute a waiver of any rights of such party to act with respect to any prior, contemporaneous, or subsequent violation or default or with respect to any continuation or repetition of the original violation or default.

37.9 Certain Representations and Warranties.

37.9.1 The City represents, warrants, and covenants to TRF the following: (i) City has full legal right, power and authority to enter into and perform its obligations hereunder; and (ii) this Agreement has been duly executed and delivered by the City and constitutes a valid and binding obligation of the City, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally or by general equitable principles.

37.9.2 TRF represents and warrants to the City the following: (i) TRF has full legal

right, power and authority to enter into and perform its obligations hereunder, and (ii) this Agreement has been duly executed and delivered by TRF and constitutes a valid and binding obligation of TRF, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally or by general equitable principles.

37.10 Governing Law. This Agreement will be governed by and construed in accordance with the internal laws of the State of Florida, without giving effect to otherwise applicable principles of conflicts of law.

### **SECTION 38. TRF'S COMPLIANCE WITH FLORIDA PUBLIC RECORDS LAW.**

Pursuant to Section 119.0701 of the Florida Statutes, if TRF meets the definition of "Contractor" as defined in Section 119.0701(1)(a), the Concessionaire shall:

- a) Keep and maintain public records that ordinarily and necessarily would be required by the public agency in order to perform the service;
- b) Provide the public with access to public records on the same terms and conditions that the public agency would provide the records and at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law;
- c) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law; and
- d) Meet all requirements for retaining public records and transfer to the City, at no City cost, all public records created, received, maintained and/or directly related to the performance of this Agreement that are in possession of TRF upon termination of this Agreement. Upon termination of this Agreement, the Concessionaire shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. All records stored electronically must be provided to the City in a format that is compatible with the information technology systems of the City.

For purposes of this Article, the term "public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business of the City.

TRF failure to comply with the public records disclosure requirement set forth in Section 119.0701 of the Florida Statutes shall be a breach of this Agreement.

In the event TRF does not comply with the public records disclosure requirement set forth in Section 119.0701 of the Florida Statutes, the City may, at the City's sole discretion, avail itself of the remedies set forth under this Agreement and available at law.

**SECTION 39. PROHIBITIONS REGARDING SALE OR USE OF EXPANDED POLYSTYRENE  
FOOD SERVICE ARTICLES.**

Pursuant to Section 82-7 of the City Code, as may be amended from time to time, effective August 2, 2014, the City has prohibited the use of expanded polystyrene food service articles by City Contractors, in connection with any City contract, lease, concession agreement or Special event permit. Additionally, pursuant to Section 82-385 of the City Code, as may be amended from time to time, no polystyrene food service articles will be allowed in the right-of-way, and no polystyrene food service articles can be provided to sidewalk café patrons.

*Expanded polystyrene* is a petroleum byproduct commonly known as Styrofoam. Expanded polystyrene is more particularly defined as blown polystyrene and expanded and extruded foams that are thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including, but not limited to, fusion of polymer spheres (expandable bead foam), injection molding, foam molding, and extrusion-blown molding (extruded foam polystyrene).

*Expanded polystyrene food service articles* means plates, bowls, cups, containers, lids, trays, coolers, ice chests, and all similar articles that consist of expanded polystyrene.

Additionally, Concessionaire agrees to comply (and ensure compliance by its vendors) with Section 46-92 (c) of the City Code, which states that it is unlawful for any person to carry any expanded polystyrene product onto any beach or into any park within the City or for any business to provide plastic straws with the service or delivery of any beverage to patrons on the beach.

TRF agrees not to sell, use, provide food in, or offer the use of expanded polystyrene food service articles at the Facility or in connection with this Agreement. TRF shall ensure that all vendors operating in the Facility abide by the restrictions contained in this Section. A violation of this section shall be deemed a default under the terms of this Agreement. This subsection shall not apply to expanded polystyrene food service articles used for prepackaged food that have been filled and sealed prior to receipt by the TRF or its vendors.

**SECTION 40. COCA-COLA.**


The City has entered into an agreement with Coca-Cola Bottling, effective September 1, 2011 – September 1, 2021, to be the exclusive provider of non-alcoholic beverages and coffee products. TRF shall only sell Coca-Cola beverages as listed in the attached Exhibit “G” and as may be updated from time to time.

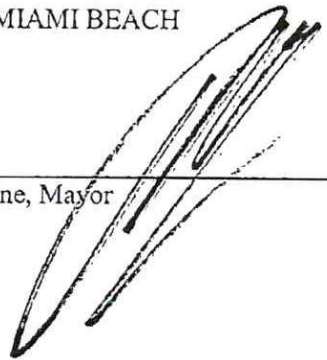
MANAGEMENT AGREEMENT BETWEEN CITY AND TRF  
FOR THE MGMT OF THE NORTH SHORE BAND SHELL

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed; all as of this day and year first written above.

Attest:

CITY OF MIAMI BEACH

  
Rafael E. Granado, City Clerk

  
Philip Levine, Mayor



STATE OF FLORIDA

COUNTY OF MIAMI-DADE )

The foregoing instrument was acknowledged before me this 19 day of February, 2015, by Mayor Philip Levine, Mayor, and Rafael E. Granado, City Clerk, or their designees respectively, on behalf of the CITY OF MIAMI BEACH, known to me to be the persons described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

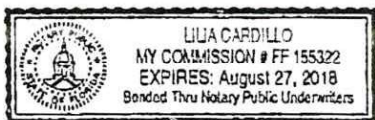
WITNESS my hand and official seal, this 19 day of February, 2015.




Notary Public, State of Florida at Large

Commission No.:

My Commission Expires:



APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION

  
City Attorney

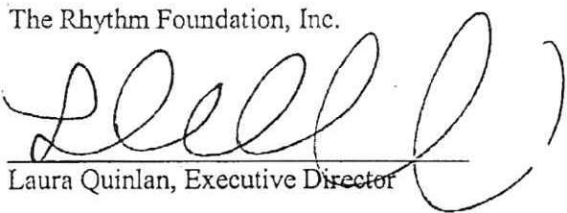
2-6-15  
Date

MANAGEMENT AGREEMENT BETWEEN CITY AND TRF  
FOR THE MGMT OF THE NORTH SHORE BAND SHELL

Attest:

The Rhythm Foundation, Inc.

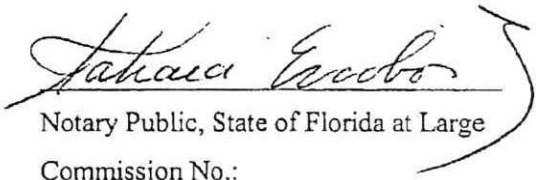
\_\_\_\_\_  
Name/Title

  
\_\_\_\_\_  
Laura Quinlan, Executive Director

STATE OF FLORIDA            )  
  )       SS:  
COUNTY OF MIAMI-DADE    )

The foregoing instrument was acknowledged before me this 12 day of February, 2015, by Laura Quinlan, as Executive Director and \_\_\_\_\_, as \_\_\_\_\_ on behalf of The Rhythm Foundation, Inc., known to me to be the persons described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this 12 day of February, 2015.

  
\_\_\_\_\_  
Notary Public, State of Florida at Large

Commission No.:

My Commission Expires:



Tatiana Escobar  
Commission # FF087923  
Expires: JAN. 30, 2018  
WWW.AARCNNOTARY.com

**MANAGEMENT AGREEMENT BETWEEN  
THE CITY OF MIAMI BEACH, FLORIDA  
AND  
THE RHYTHM FOUNDATION, INC.  
FOR THE MANAGEMENT OF THE NORTH SHORE BAND SHELL**

**THIS AGREEMENT**, is made and executed as of this \_\_\_\_ day of \_\_\_\_\_, 2019 ("Effective Date"), by and between the CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida, whose address is 1700 Convention Center Drive, Miami Beach, Florida 33139 ("City"), and THE RHYTHM FOUNDATION, INC., a Florida not-for-profit corporation, whose principal address is 407 LINCOLN ROAD #6E, MIAMI BEACH, FL 33139 ("TRF").

**RECITALS**

**WHEREAS**, City is the owner of the North Shore Band Shell, located at 7275 Collins Avenue, Miami Beach, Florida 33141; and which is more particularly described and depicted in Exhibit "A," attached hereto and made a part hereof (the "Band Shell" or the "Facility"); and

**WHEREAS**, TRF is a Florida not-for-profit (501(c)3) arts organization which seeks to increase international awareness and cultural exchange through the presentation of live music and related media programming; and

**WHEREAS**, on April 23, 2014, the City issued Invitation to Negotiate No. 2014-215-LR for Band Shell Management Services (the "ITN"); and

**WHEREAS**, on September 10, 2014, the City Commission adopted Resolution No. 2014-28722 authorizing the administration to negotiate with TRF, as the top-ranked proposer pursuant to the ITN, for the management and operation of the Facility; and

**WHEREAS**, (Pending Commission Action)

**WHEREAS**, City desires to engage TRF, and TRF desires to accept the engagement, to provide management services for the Facility on the terms and conditions set forth herein.

**NOW THEREFORE**, recognizing the aforesated recitals as true and correct and incorporating herein, and in consideration of the mutual covenants and conditions herein contained, it is agreed by the parties hereto as follows:

**SECTION 1. DEFINITIONS.**

For purposes of this Agreement, the following terms have the meanings referred to in this Section 1:

**"Affiliate"** -- an entity that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a specified entity. For purposes of this definition, "control" means ownership of equity securities or other ownership interests which represent more than

51% of the voting power in the controlled entity.

"City" -- as defined in the first paragraph of this Agreement.

"City Commission" -- the governing and legislative body of the City.

"City Manager" -- the chief executive officer of the City, or such person who shall be the City Manager's designee, as defined below and as may, from time to time, be authorized in writing by the City Manager to act for him/her with respect to any or all matters pertaining to this Agreement. City Manager's designee shall be the City's Parks and Recreation Department Director.

"Commencement Date" -- as defined in Section 2.

"Contract Year" -- each one year period beginning October 1st, and ending September 30th.

"Effective Date" -- provided that this Agreement has been executed by City and TRF, the date set forth in the first paragraph of this Agreement.

"Event" -- all uses at the Facility which involve a scheduled show with a beginning and ending time, typically all within the same day. With respect to a "Series" (as such term is hereafter defined), each show within the Series shall constitute an Event.

"Event Expenses" -- any and all expenses incurred or payments made by TRF in connection with the occurrence of an Event at the Facility including, but not limited to, costs for staffing, and costs relating to set-up and clean-up.

"Expiration Date" -- as defined in Section 2

"Facility" -- as defined in the Background Section of this Agreement, and as depicted in Exhibit "B" hereto.

"Facility Rentals" -- temporary use of the Facility at specific interval of time pre-determined and agreed upon by TRF.

"Fiscal Year" -- each City fiscal year beginning October 1st and ending September 30th.

"Governmental Requirements" -- all laws, ordinances, rules, regulations, statutes, policies and procedures (including administrative guidelines), and other legal requirements of any governmental body or authority or any agency thereof (including, without limitation, federal, State, County, and City).

"Net Operation Loss/Profit" -- with respect to a Fiscal Year, the excess, if any, of Operating Expenses for such Fiscal Year over Operating Revenues for such Fiscal Year, in the case of a loss; and the excess, if any, of Operating Revenues for such Fiscal Year over Operating Expenses for such Fiscal Year, in the case of a profit.

"Operating Expenses" -- any and all expenses and expenditures of whatever kind or nature incurred, directly or indirectly, by TRF in operating, managing, maintaining, and promoting the Facility including, but not limited to: employee compensation, employee benefits, supplies, materials, costs of any independent contractors, advertising costs, all costs of maintaining the Facility (as required by this Agreement), marketing and public relations costs and commissions, janitorial and cleaning expenses, dues and membership costs, amounts expended to procure and maintain permits and licenses, sales taxes

imposed upon rentals, professional fees directly relating to the operation of the Facility, printing costs, Event Expenses, postage and freight costs, equipment rental costs, computer equipment leases and line charges, telephone and telecommunications services, artist and talent fees, show settlement charges, security expenses, travel and entertainment expenses in accordance with TRF's normal policies, the cost of employee uniforms, safety and medical expenses, exterminator costs, costs relating to the maintenance of signage, costs associated with compliance of Governmental Requirements, all premiums for insurance carried by TRF pursuant to Section 14, and all other costs of operating the Facility. Operating Expenses **shall not**, however, include any costs of litigation between City and TRF, or any costs that are specified in this Agreement as costs to be paid by City. All Operating Expenses shall be determined in accordance with generally accepted accounting principles consistently applied and recognized on a full accrual basis.

"Operating Revenues" -- any and all revenues of every kind or nature derived from operating, managing or promoting the Facility including, but not limited to: concession fees, rentals, revenues from merchandise sales, advertising sales, equipment rentals, box office revenues, food service and concession revenues (However, if such revenues are collected in the first instance by and retained by the concessionaire, only the amount of such revenues paid by the concessionaire to TRF shall be included as Operating Revenues), commissions or other revenues from decoration and set-up, security and other subcontractors (However, if such revenues are collected in the first instance by and retained by such subcontractors, only the amount of such revenues paid by such contractors to TRF shall be included as Operating Revenues), revenues generated from separate agreements with TRF Affiliates pertaining to the Facility, interest revenues, and any other miscellaneous operating revenues; all as determined in accordance with generally accepted accounting principles consistently applied and recognized on a full accrual basis. For the sake of clarity, the parties acknowledge that revenues from the sale of tickets for Events at the Facility **are not** Operating Revenues, but are instead revenues of the promoter and/or performer of each such Event. To the extent that TRF collects such ticket sale revenue on behalf of a promoter and/or performer, such ticket sale revenue shall be the source of funds from which TRF collects the rental charges and other event reimbursements owed by the promoter and/or performer for use of the Facility, which such charges and reimbursements are Operating Revenues hereunder. Operating Revenues shall also **not** include any revenues from name-in-title rights (i.e., the right to name the exterior or interior of the Facility or any portion thereof, except as set forth in subsection 8.3 hereof), and any signage related thereto, all of which are specifically reserved to the City.

"Proposal Documents" shall mean City of Miami Beach Invitation to Negotiate No. 2014-215-LR for Band Shell Management Services, together with all amendments thereto, issued by the City (the "ITN"), and the Consultant's proposal in response thereto ("Proposal"), all of which are hereby incorporated and made a part hereof; provided, however, that in the event of an express conflict between the Proposal Documents and this Agreement, the following order of precedent shall prevail: this Agreement; the ITN; and the Proposal.

"Quarterly/Quarter(s)" – October 1<sup>st</sup>, January 1<sup>st</sup>, April 1<sup>st</sup> and July 1<sup>st</sup> of each Fiscal Year.

"Series" -- a sequence of Events which may or may not involve the same production elements, but can be characterized by a unifying theme and schedule.

"TRF" -- as defined in the first paragraph of this Agreement.

## **SECTION 2. TERM.**

2.1 Initial Term. This Agreement shall be for a period of five (5) years, commencing on October 1, 2019 (Commencement Date), and which shall end on September 30, 2024 (Expiration Date), unless earlier terminated pursuant to the provisions of this Agreement.

2.2 Renewal Term(s). At its sole option and discretion, the City, through its City Manager, may extend this Agreement for two (2) successive two (2) year terms (each a "Renewal Term") by giving written notice to the Manager of such intention not less than ninety (90) days prior to the expiration of the Initial Term or an exercised Renewal Term. The Initial Term and any successive Renewal Terms, if approved by the City Manager, may collectively be referred to as the "Term".

2.2.1 Notwithstanding anything in this Section 2, in the event TRF decides not to renew the Agreement, it shall provide the City Manager with written notice of its intent not to renew at least 365 days prior to the Expiration Date, or ninety (90) days written notice prior to the expiration date of the then current Renewal Term, as the case may be.

## **SECTION 3. NORTH SHORE BAND SHELL.**

The Facility, subject to this Agreement shall be those facilities and spaces more specifically described in Exhibit "A."

## **SECTION 4. OPERATION AND MANAGEMENT OF THE BAND SHELL.**

4.1 General Scope. City hereby engages TRF to operate, manage, maintain, promote and market the Facility during the Term, upon the terms and conditions hereinafter set forth.

4.2 Manager of the Facility. TRF accepts the engagement and agrees to operate, manage, maintain, promote and market the Facility, at a minimum, in a manner and quality consistent with the Comparable Facilities defined in Section 5.1 hereof. Subject to the terms of this Agreement, TRF shall be, as agent for the City, the sole and exclusive manager of the City to operate, manage, maintain, promote and market the Facility during the Term. In such capacity, except as otherwise expressly reserved under this Agreement to the City, and/or except for such matters as are subject to the approval of the City or City Manager, TRF shall have exclusive authority over the management and operation of the Facility.

4.3 Permitted Uses. TRF shall use the Facility solely and exclusively as a venue for its not-for-profit cultural presentation company. The Facility shall be used primarily as a venue for top-quality

cultural entertainment. The venue may also be used as a live theatrical entertainment venue and public auditorium, or any combination thereof, and for such ancillary uses as are customarily related to such primary use including, without limitation, broadcasting, recording, filming, private parties or functions, food and beverage concessions; in each case in conjunction with an Event then being held; and sale of merchandise related to any Event then being held. TRF shall be responsible for ensuring that any requisite special event permits, which the City of Miami Beach may require for Events at the Facility, are properly secured. Such uses shall include only the following:

- a. Performance venue
- b. Events facility
- c. Rehearsal space
- d. TRF administrative offices;
- e. Food and beverage concession;
- f. Sale of merchandise related to an Event then being held;
- g. Private parties and/or functions in conjunctions with an Event then being held;
- h. As an ancillary use, third party rentals as may occur from time to time;
- i. Facility for film / television / photographic / audio productions;

The Facility does not include dedicated parking for the building. Patrons of Events may park in public parking lots and garages if and to the extent available, upon paying the applicable parking charges. No other uses shall be permitted without the prior written approval of the City Manager, which approval may be granted or withheld in his sole discretion. Any such other use which the City Manager approves must, however, be in accordance with (i) the Articles of Incorporation and other charter documents of TRF; (ii) all laws and regulations applicable to not-for-profit entities; (iii) all applicable Governmental Requirements; and (iv) all ad valorem tax exempt uses of property under Chapter 196, Florida Statutes.

4.4 Prohibited Uses. It is understood and agreed that the Facility shall be used by TRF during the Term only for the stated purposes in Section 4.3, and for no other purposes or uses whatsoever, without express written permission of the City Manager. Notwithstanding anything contained in Section 4.3, or any other term or condition of this Agreement: (1) TRF will not make or permit any use of the Facility that, directly or indirectly, is forbidden by any Governmental Requirement, or that may be dangerous to life, limb or property; and (2) TRF may not commit waste on the Facility, use the Facility for any illegal purpose, commit a nuisance on the Facility, or allow any toxic, hazardous or dangerous substance to be brought into the Facility or stored therein (other than small quantities of materials customarily used in the operation of a live theatrical performance and production venue, which shall be used and stored in compliance with Governmental Requirements). In the event that TRF uses the Facility for any purposes not expressly permitted herein, then the City, through its City Manager, may declare this Agreement in default and, in addition to all other remedies available to City, restrain such improper use by injunction or other legal action, with or without notice to TRF.

**4.5 Operational Rules for Facility.**

On December 17, 2014, the City of Miami Beach Commission passed Resolution No. 2014-28874, attached as Exhibit "H" hereto, requiring certain operational guidelines for the Facility, including the following:

**4.5.1 Amplified Sound and Live Entertainment:** The City will be installing an audio sound system designed to maintain the audio levels at a maximum level of 105 dBC ("House Sound System"). TRF will only be permitted to use such House Sound System in connection with any Events held at the Facility and, at all times, the sound levels may not exceed 105dBC. Additionally, TFR shall be responsible for ensuring that users of the Facility do not use temporary sound equipment for any Event held at the Facility.

**4.5.2 Facility Hours of Operation:** 10:00 am to 10:00 pm.; provided, however, that the City Manager shall have the discretion to extend the hours of operation on a case by case basis to 11:00 pm on the weekends (Friday or Saturday) and to 12:30 am on New Year's Eve. Any extension of the hours of operation under this Subsection 4.5.2 shall be given in writing by the City Manager in advance of the scheduled Event.

**4.6 Cessation/Suspension of Approved Use(s) and/or Business Activity(ies).** Notwithstanding anything contained in this Agreement, and except for the Permitted Uses expressly set forth in Section 4.3, and in the event that another particular use(s) and/or business activity(ies) has(ve) been approved by the City Manager, and the City Manager thereafter, upon reasonable inquiry, determines that the continuation of such use(s) and/or activity(ies) is(are), or may be, inconsistent, contrary to, and/or detrimental to the Permitted Uses set forth in this Agreement, and/or to the health, safety and/or welfare of the residents of and visitors to the City of Miami Beach, then the City Manager, upon thirty (30) days prior written notice to TRF of same, may revoke, suspend, and/or otherwise disallow the objectionable uses(s) and/or business activity(ies), and TRF shall immediately cease and desist in providing, and/or continuing with, said use(s) and/or business activity(ies) within the time period and in the manner prescribed in the City, subject to such additional guidelines, as may be determined and established by the City Manager, in his/her sole and reasonable discretion and judgment.

**SECTION 5. SCOPE OF SERVICES.**

**5.1 General.** TRF shall perform and furnish management services, personnel, and systems and materials, as are appropriate or necessary to operate, manage, supervise, maintain, promote and market the Facility in a manner consistent with the operations, management, promotions and marketing of other similar first-class facilities such as Daytona Beach Band Shell in Daytona Beach, Florida, and ArtsPark Amphitheater in Hollywood, Florida ("Comparable Facilities").

5.2 Required Number of Events; Reports; Continuous Operation; Conclusion of Events. In order to ensure the continuous operation of the Facility and, commencing as of the Effective Date, TRF shall cause at least 35 Events to be held at the Facility for each Contract Year during the Term. The aforesaid 35 Events shall be calculated by counting each separate Event in a Series.

5.2.1 Annual Benchmarks

5.2.1.1 TRF shall operate a minimum of 35 new Events per year at the Facility ~~(The City's Movie Nights shall not count towards the benchmark.)~~ These 35 new Events shall take precedence over any private rentals of the Facility. ~~Since TRF will not commence to operate the Facility until after the Effective Date of this Agreement (instead of October 1, 2014) and the City has been operating the Facility and presenting Events prior to the Effective Date, during the first year of the Initial Term (ending September 30, 2015), only, this benchmark shall be reduced to 21 new Events, instead of 35.~~

5.2.1.2 In addition to its own produced Events, TRF shall collaborate with other cultural and quality presenting organizations to develop consistent Events at the Facility.

5.2.1.3 TRF shall create and implement consistent marketing materials, including, but not limited to, public relations, social media campaigns, and paid marketing outreach, to ensure that both the North Beach community and South Florida residents in general are aware of programs taking place at the Facility. A detailed plan and budget illustration marketing efforts will be submitted Quarterly, within fifteen (15) days from the end of each Quarter, with the first report due (for the January, 2020 Quarter) on or before April 15, 2020.

5.2.1.4 TRF shall survey Event goers and community businesses to ensure that TRF's programming at the Facility continues to benefit North Beach residents and businesses, as well as Miami Beach residents as a whole. ~~Survey questions shall be approved in writing by the City Manager in advance.~~ The overall satisfaction target shall be 90%. Surveys must be conducted in a format which is auditable. ~~Additionally, on a monthly basis, responses to the survey questions shall be provided to the City Manager.~~

5.2.1.5 TRF shall submit to the City, every Quarter, within fifteen (15) days from the end of each Quarter, commencing with the January, 2020 Quarter, a detailed report ("Programmatic Quarterly Report") setting forth the following information:

- i. The number of Events hosted during the previous Quarter, including the charge to the public for the event, if any.
- ii. The number in attendance at the Event.
- iii. The number of Facility Rentals and the charge for said Facility Rentals.
- iv. A detailed plan and budget illustrating the marketing efforts.

v. The Events scheduled or anticipated for the upcoming Quarter.

5.3 TRF shall cause the Facility to be available to open on a year round basis, subject to closures for reasonable periods for rehearsal, set design, repairs, maintenance and alterations. All Events and all uses shall conclude prior to 10:00 p.m. on weeknights, and may be extended to 11:00 p.m. on weekends (Friday and Saturday) and 12:30 a.m. on New Year's Eve, if approved in advance by the City Manager, in writing; provided, however, that TRF's employees and/or contractors may be permitted to remain at the Facility beyond 10:00 pm on weekdays or 11:00 pm on weekends, however, no later than midnight in the event that same is necessary for purposes of taking down and/or dismantling a production, cleaning the Facility after a performance, etc., so long as TRF's activities at the Facility during this time do not disrupt and/or negatively impact the surrounding neighborhood. In the event of such disruption, the City Manager shall have the right to either strictly enforce the hours of operation, or impose reasonable guidelines upon TRF as a condition to keeping the Facility open for the aforesated purposes (beyond 10:00 pm) **TRF SHALL PROVIDE SURROUNDING CONDOMINIUMS WITH 30 DAYS ADVANCE WRITTEN NOTICE WHEN SCHEDULED EVENTS WILL INVOLVE AMPLIFIED SOUND.**

5.4 Booking Policies. The City and TRF agree and acknowledge that the Facility will be primarily used by TRF to provide top-quality cultural and entertainment to the City's residents and visitors, but that TRF may also, from time to time, rent the Facility to third party presenters consistent with the terms herein. Except as otherwise provided herein, TRF shall have the sole authority to approve the scheduling of any Event in the Facility and Events requiring or having co-promotions and may refuse to book any type or category of Events for any reason whatsoever, so long as the event is consistent with Section 4 of this Agreement and applicable Governmental Requirements. TRF shall have no obligation to book any type or category of Events (or specific Event) that are inappropriate or unprofitable, as reasonably determined by TRF, or which may in any way interfere with the day to day activities of area residents and businesses. **Notwithstanding the preceding, or any other term or condition of this Agreement, the City Manager shall have the right to prohibit certain Events or uses from occurring at the Facility, upon the City Manager's reasonable determination that such Event or use might present unreasonable safety concerns, or violate (or otherwise not comply with) Governmental Requirements.** Notice of any such determination shall be sent by written notice to TRF within thirty (30) days after the City Manager has received the Quarterly booking report from TRF that specifies the potential Event.

5.5 Specific Services. Without limiting the generality of the foregoing, TRF shall perform all of the following services, all without the necessity of first obtaining City's approval (except where otherwise expressly required in this Agreement), and all of which shall be performed by TRF, **at a minimum**, in a manner consistent with the management and operation of the Comparable Facilities:

5.5.1. employ, supervise, and direct all employees and personnel consistent with the provisions of this Agreement. All employees and/or subcontractors shall be employees and/or subcontractors of TRF, its Affiliates, or third parties, **and not of City**. TRF shall be solely responsible for assuring that the Facility is adequately staffed with competent, qualified personnel to fulfill its responsibilities under this Agreement;

5.5.2. administer relationships with all third parties (including, without limitation, entering into contracts and licenses for the food and beverage concessionaire at the Facility) for the use, day to day maintenance and operation of the Facility, initiate and participate in any and all negotiations, renewals and extensions relating to such third party relationships, and enforce contractual agreements concerning any such third party relationships;

5.5.3. negotiate, execute in its name as agent for the City, deliver and administer any and all licenses, occupancy agreements, sponsorship agreements (excluding name-in-title agreements), rental agreements, booking commitments, concession agreements (excluding valet parking agreements), supplier agreements, service contracts (including, without limitation, contracts for cleaning, decorating and set-up, general maintenance stage equipment, staffing and personnel needs, including guards and ushers, telephone, extermination and other services which are necessary or appropriate, and all other contracts and agreements in connection with the management, maintenance, promotion and operation of the Facility; provided that (1) if any such license, agreement, commitment or contract has a term that extends beyond the remaining Term, such license, agreement, commitment or contract shall provide that it is automatically assigned to City as of the expiration or termination date of this Agreement and that the City Manager may terminate any such agreement without payment thereafter at any time upon not less than ten (10) days written notice; (2) TRF shall have the sole authority to approve the scheduling of any Event to be held at the Facility, subject to the limitations and requirements of this Agreement; and (3) any contract entered into between TRF and a subsidiary and/or Affiliate company shall be at terms and for prices customarily charged by such subsidiary and/or Affiliate company for comparable goods and services elsewhere at rates that are competitive within the industry;

5.5.4. maintain the Facility (excluding all structural components thereof and maintenance and replacement of all electrical HVAC, life safety, mechanical, plumbing and other systems and equipment) in a good and clean condition consistent with other Comparable Facilities and in compliance with all Governmental Requirements, ordinary wear and tear, and casualty loss excepted. Maintenance responsibility shall include, without limitation, preventative and any and all other maintenance and as required in Exhibit "B" to this Agreement (entitled "City of Miami Beach Minimum Specifications for Maintenance of the North Shore Band Shell"). TRF shall keep on-site maintenance manuals and records reflecting all of TRF's maintenance activities, all of which shall be available for inspection by the City Manager or designee upon request. TRF shall submit to the City Manager or designee periodic (not less than Quarterly) reports specifying all maintenance work performed during

such period, which reports shall be used by the City's Parks and Recreation Department as part of an annual City maintenance inspection and review. TRF warrants and represents to City that, prior to the Effective Date, TRF inspected the Facility, and TRF hereby accepts the Facility "as is, where is and with all faults."

5.5.5 rent, lease, or purchase all equipment and maintenance supplies necessary or appropriate for the day-to-day operation and maintenance of the Facility;

5.5.6 establish and adjust prices, rates and rate schedules for the aforesaid licenses, agreements and contracts, and any other commitments relating to the Facility to be negotiated by TRF in the course of its management, operation, booking and promotion of the Facility. The prices, rates and rate schedules for the rental of the Facility, set forth in the attached Exhibit "C", have been approved by the City Manager or designee. Any subsequent change to the rates or rate schedule shall be submitted to the City Manager or designee for review and written approval, prior to TRF's implementation of same;

5.5.7 pay when due, all Operating Expenses from TRF's own funds;

5.5.8 after consultation with the City Manager and the City Attorney, and subject to approval by the City Attorney or his designee, institute as agent for the City, the costs of which shall be included as Operating Expenses, such legal actions or proceedings necessary or appropriate in connection with the operation of the Facility (using legal counsel approved by the City Attorney), including, without limitation, to collect charges, rents or other revenues due to the City or to cancel, terminate or sue for damages under, any license, use, advertisement or concession agreement for the breach thereof or default thereunder by any licensee, user, advertiser, or concessionaire at the Facility; institute on TRF's a own behalf (and not as agent for City) without consultation or approval of the City, the costs of which shall be included as Operating Expenses, such legal actions or proceedings necessary or appropriate in connection with the operation of the Facility, including, without limitation, to collect charges, rents or other revenues due to the City or TRF or to cancel, terminate or sue for damages under, any license, use, advertisement or concession agreement for the breach thereof or default thereunder by any licensee, user, advertiser, or concessionaire at the Facility;

5.5.9 maintain a master set of all Event records, booking records and schedules for the Facility (which shall be available for inspection by the City Manager upon request);

5.5.10 provide day-to-day administrative services in support of its management activities to ensure that the Facility shall be operated, managed, and maintained and performed in a first class manner consistent with similar first class facilities including, but not limited to, acquisition of services, equipment, supplies and facilities; maintenance and property management; personnel management; record-keeping; collections and billing; and similar services;

5.5.11 engage in advertising, solicitation, and promotional activities necessary to effectively market the Facility and Events, and manage related social media platforms for the Facility. Any marketing materials created for the Facility will remain the exclusive property of the City. In

connection with its activities under the terms of this Agreement, TRF will be permitted to use the logo and brand identity of the City of Miami Beach, and of the Facility, as approved by the City Manager;

5.5.12. act as a collection agent for the City on sales taxes as required from for-profit facility rentals of the Facility and remit to the State of Florida such sales taxes;

5.5.13. comply with all City Agreements;

5.5.14. except as otherwise approved by the City Manager, TRF shall not license or allow the use of any portion of the Facility except as permitted under Section 3 and, in such case, only for short-term users (i.e., less than fourteen (14) consecutive days). TRF shall require that all users of the Facility provide certificates of insurance evidencing appropriate insurance and any other insurance required by the applicable license, use or occupancy agreement. Copies of these certificates shall be furnished to the City Manager or City Manager's designee prior to any Event or use. Such insurance shall be kept in force at all times by all licensees, users, lessees and concessionaires. All liability policies shall name the City and TRF as additional insureds. TRF shall also require all users of the Facility to execute (among the terms of the license or occupancy agreement) an agreement to indemnify, defend and hold harmless the City. TRF standard license or occupancy agreement shall, at a minimum, include the insurance and indemnity requirements contained herein; shall further be subject to the prior review and approval of the City Manager and City Attorney's Office; and – if and when approved – shall be attached as Exhibit "D" hereto.

## **SECTION 6. COMPENSATION TO THE CITY FOR USE OF THE FACILITY (USE FEE).**

6.1. Base Use Fee. For the initial term of the Agreement, TRF shall pay City an annual use fee for the right to use the Facility in the amount of \$1.00, in consideration of TRF's not for profit status and its investments in programming, staffing, marketing and improvements. All payments are payable annually, commencing on the Commencement Date and thereafter on the first day of each Contract Year. The Base Use Fee (and all other amounts due hereunder) shall be paid to City in legal tender of the United States of America at the following address: Parks and Recreation Department, 1701 Meridian Avenue, Suite 401, Miami Beach, Florida 33139, Attention: Cynthia Casanova, Assistant Director; or at such other place that City may from time to time designate by notice in writing.

6.2 Additional Fees and Charge. In addition to the Base Use Fee as set forth in section 6.1, TRF shall also be responsible for payment of the following Additional Fees and Charges:

6.2.1 Operating Expenses. TRF shall pay all costs and expenses related to Operating Expenses, except with respect to utilities for which the City is responsible, as more specifically set forth in Section 20 herein. TRF hereby irrevocably and unconditionally guarantees to the City that Operating Revenues shall at all times be sufficient to pay as and when due all Operating Expenses and any and all other amounts that TRF is obligated to pay pursuant to this Agreement, and further covenants and agrees that if at any time there are insufficient Operating Revenues to pay all of the foregoing amounts, as and

when required, TRF shall immediately pay the difference from TRF's own funds. This obligation is absolute and unconditional and shall even apply if Operating Revenues are reduced or limited by facts or circumstances not contemplated by the parties or for reasons beyond the parties' control. The provisions of this section 6 shall survive any termination or expiration of this Agreement.

6.2.2 Sales Tax. TRF shall pay and include any and all additional sums for applicable sales and use tax, now or hereafter prescribed by State, federal or local law, concurrent with and to the extent any sales tax is imposed in connection with any payment due hereunder by TRF.

6.2.3 Notwithstanding this Section 6, TRF shall not be responsible for paying for major capital improvements or infrastructure within the Facility.

#### **SECTION 7 - INTENTIONALLY OMITTED.**

#### **SECTION 8 - RIGHTS RESERVED TO CITY.**

8.1 Rights of Entry. Representatives, contractors and employees of the City shall have the right to enter all portions of the Facility to inspect same, to observe the performance of TRF of its obligations under this Agreement, to install, remove, adjust, repair, replace or otherwise handle any equipment, utility lines, or other matters in, on, or about the Facility, or to do any act or thing which the City may be obligated or have the right to do under this Agreement. Nothing contained in this subparagraph is intended or shall be construed to limit any other rights of the City under this Agreement. The City shall not unreasonably interfere with the activities of TRF hereunder, and the City's actions shall be conducted such that disruption of TRF work shall be kept to a minimum and there shall be no disruption of any Event by City (the City's actions in its proprietary capacity of the foregoing, shall not diminish any rights of City in its governmental capacity).

8.2 Signage. Exterior marquee messaging will be controlled by TRF and will list only Events taking place within the Facility. **TRF shall include City requested public information messages.** TRF shall provide, at its sole expense and responsibility, any required signs within the Facility. All signage shall be approved by the City Manager or designee, and shall be in accordance with all applicable Municipal, County, State and Federal laws and regulations. Any signage shall be subject to the prior approval of the City Manager or designee as to size, shape and placement of same.

8.3 Interior Signage. TRF shall be entitled to all non-permanent interior signage (i.e. signage having a total duration not to exceed twelve consecutive (12) months) relating to an Event, including, without limitation, temporary banners, and all proceeds derived therefrom shall be Operating Revenues; provided, however, that the names affixed thereon are subject to the City Manager's or designee's prior written approval, which shall not unreasonably be withheld, conditioned or delayed. In no event may any such signage include the names of any company selling the following types of products ("Prohibited Names"): guns, tobacco or sexual products. **Any and all other naming right not expressly provided**

for in this subsection 8.3, and any revenues derived therefrom, shall be owned and controlled exclusively by the City.

8.4 General Requirement. All signage (whether interior, exterior, permanent and/or temporary) shall comply with all applicable Governmental Requirements, and shall be maintained by TRF in good condition.

#### **SECTION 9. LIMITED FUNDING BY CITY.**

During the first Fiscal Year of the initial term of this Agreement (From October 1, 2014 through September 30, 2015), the City shall provide funding to TRF, in the amount of \$30,000.00 ("City Contribution(s)"), payable within fifteen (15) days following the end of each Quarter, with the first payment, in the amount of \$7,500.00, due April 15, 2015; \$11,250.00 due on July 15, 2015, and \$11,250.00 due on October 15, 2015. TRF shall submit an invoice for each payment of such City Contribution and also submit the corresponding reports due for that particular Quarter. The City, in its sole discretion, may condition payment of the City upon TRF providing the requisite reports under this Agreement, including, without limitation, those reports set forth in Sections 5 and 12 of this Agreement. During the term of the Agreement, subject to funding availability, the City shall provide a City Contribution, in an amount up to \$45,000.00 annually, during the balance of the Initial Term and any Renewal Terms (should said Renewal Terms be granted, at the sole option of the City), toward the operation of the Facility. The City Contribution, in subsequent years, will increase and be adjusted annually, effective October 1<sup>st</sup> of each Business Year (the "Effective Date of Adjustment"), by the percentage of change published in the Producer price indexes for the net output of selected industries and their products, not seasonally adjusted (1982-84=100 unless otherwise indicated) or 3%, whichever is smaller. The CPI increase shall be determined by multiplying the City Contribution being paid by the percentage of change for the Effective Date of Adjustment. Should the CPI become unavailable, a reasonable substitute designated by the City shall be used. The City Contribution shall continue to be paid in quarterly installments, based upon the amount established for the previous Business Year, until the CPI index is published and the new City Contribution is established. The new City Contribution shall be payable retroactively to the Effective Date of Adjustment, within forty-five (45) days from receipt of an approved invoice from TRF of the new quarterly City Contribution. Notwithstanding the foregoing, the annual CPI increase shall not exceed three percent (3%). If the CPI has a negative change, the City Contribution shall remain the same for the upcoming Business Year.

Except as set forth in this Section 9, and other costs which the City has expressly agreed to pay under the terms of this Agreement, the City will have no other funding or other payment obligations with respect to the Facility or its Operating Expenses or its operations. Additionally, TRF and City have entered into this Agreement with the expectation and belief that, as of the Effective Date, no governmental body will impose any ad valorem taxes upon the Facility nor any sales, income, excise or other taxes. Notwithstanding the preceding sentence, the City makes no representation to TRF, either expressed or

implied, that any or all of such taxes may or may not be imposed at any time during the Term of the Agreement.

#### **SECTION 10. RECEIPTS AND DISBURSEMENTS**

TRF shall establish and maintain in one or more depositories, one or more operating, payroll and other bank accounts for the operation and management of the Facility, as TRF shall determine. All Operating Revenues collected by TRF from the operation of the Facility shall be deposited into the accounts and all Operating Expenses shall be paid by TRF as agent for the City from the accounts. Any amounts remaining in the operating accounts upon expiration or termination of this Agreement for any reason, after payment of all other amounts that TRF is required to pay under this Agreement through the date of expiration or termination, shall be promptly paid to TRF.

#### **SECTION 11. ALTERATIONS, MAINTENANCE, AND REPAIRS.**

11.1 TRF shall not make any additions, improvements, or alternations (collectively "Alterations") to the Facility without the City Manager's or designee's prior written consent. The cost of all Alterations made by TRF shall be borne solely by TRF from its own funds and shall not constitute Operating Expenses, unless otherwise agreed to by the City under the category of Capital Improvements or Maintenance. The City Manager shall not unreasonably withhold, condition or delay his/her consent to any Alterations except that the City Manager may withhold consent, in his/her sole and absolute discretion, with respect to any Alterations that change the structural elements or life-saving systems or that affect the exterior of the Facility. Notwithstanding anything to the contrary, however, TRF shall not under any circumstances be permitted to make any Alterations that: (i) affect the structural portions of the Facility, or (ii) fail to comply with any applicable Governmental Requirements; or (iii) interfere in any material manner with the proper functioning of any mechanical, electrical, plumbing, HVAC, life safety or other systems, facilities or equipment of the Facility. Except as required pursuant to Section 5.5.4, it is understood by the parties hereto that TRF shall not be responsible, nor required to pay for, any other costs related to capital improvements or infrastructure (i.e. including, but not limited to, plumbing and sewer lines, major electrical, structural, HVAC, roof, etc.) with regard to the Facility.

11.2 TRF shall obtain all required permits for Alterations performed by, through or under TRF and shall perform or cause to be performed such Alterations in compliance with all Governmental Requirements. Under no circumstances shall TRF make any Alterations which incorporate any Hazardous Substances including, without limitation, asbestos-containing construction materials, into the Facility. Any request for City Manager's consent to any proposed Alterations by, through or under TRF shall be made in writing and shall contain plans or other written materials describing the work in detail reasonably satisfactory to City Manager, provided that architectural plans shall not be required unless required for the issuance of a building permit. The City Manager shall provide or deny consent within

twenty (20) business days following receipt of TRF's written request, the failure to provide or deny consent within such twenty (20) business day period shall be deemed a consent. Should the work proposed by TRF and consented to by City Manager modify the basic floor plan of the Facility and the building permit therefor require architectural plans, then TRF shall, at its expense, furnish City with as-built drawings and CAD disks for such work. Unless the City Manager otherwise agrees in writing, all Alterations made or affixed to the Facility (excluding moveable trade fixtures, equipment, personal property and furniture) (including without limitation, all upgrades constructed pursuant to subparagraph (b)), shall become the property of City and shall be surrendered with the Facility at the expiration or termination of this Agreement. With respect to Alterations costing in excess of \$200,000, the City Manager may require TRF to obtain a payment bond for the work.

11.3 Maintenance. TRF shall, at its sole cost and expense, have sole responsibility for basic maintenance to be performed on a regular basis on all facilities, improvements, and facilities and utilities infrastructure equipment at the Facility, as well as any necessary repairs to the perimeter walls and gates. Any other repairs or replacement of the same is the responsibility of the City. TRF shall, at its sole cost and expense, and to the satisfaction of the City, keep and maintain the Facility, and all improvements thereon, in good, clean, and sanitary order. The City shall, at its sole cost and expense, have the sole responsibility for maintaining the grounds of the North Shore Band Shell and surrounding park. To that end, the parties herein acknowledge, and TRF herein agrees to be bound by, the minimum maintenance standards set forth in Exhibit "B" to this Agreement, entitled "City of Miami Beach Minimum Specifications for Maintenance of the North Shore Band Shell." It is further understood that TRF shall provide the City with a Quarterly maintenance report, in a format to be approved by the City Manager or his designee, setting forth any repairs made to the Facility during the reported Quarter.

11.4 Personal Property. A list of existing City-owned personal property included in the Agreement for use by TRF during the Term hereof is attached and incorporated herein as Exhibit "E". TRF hereby accepts such equipment in its "as-is" condition, and without any warranty(ies) and, at its sole cost and expense, acquire and maintain all replacement and such other equipment and, at its sole cost and expense, acquire and maintain all replacement and such other equipment as may be necessary to maintain the Facility in a condition which satisfies those maintenance standards set forth in Exhibit "B", but shall not have an obligation to improve the condition of the existing City-owned personal property beyond the "as-is" condition in which it was accepted, all of which shall be noted on the inventory. TRF shall have the right, at the initial inventory and at any point thereafter, to decline the use and responsibility for any existing City-owned personal property not useful for its operation of the Facility, and may turn such existing City-owned personal property over to the City in the condition in which it was accepted. Any personal property purchase with Operating Revenues shall become City-owned personal property and included in the inventory for the Facility. The City shall have the right to periodically take an inventory of

any or all City-owned equipment at the Facility.

## **SECTION 12. RECORDS, AUDITS AND REPORTS.**

12.1 Records and Audits. TRF shall keep full and accurate accounting books and records relating to all Operating Revenues and Operating Expenses, all in accordance with generally accepted accounting principles. TRF shall give the City such books and records during reasonable business hours and upon reasonable advance notice. All books and records shall be made available on-site at the Facility or electronically. TRF shall keep and preserve for at least three (3) years following each Fiscal Year, or for as long as such records are required to be retained pursuant to Florida Public Records Law (whichever is longer), all sales slips, rental agreements, purchase order, sales books, credit card invoices, bank books or duplicate deposit slips, and other evidence of Operating Revenues and Operating Expenses for such period. In addition, on or before 120 days following each Fiscal Year, TRF shall furnish to the City a line item (i.e., by categories) statement of Operating Costs and Operating Revenues (and profit or loss) for the Facility for the preceding Fiscal Year, and including the number of tickets sold and Events held, including any Facility Rentals, prepared in accordance with generally accepted accounting principles certified as accurate by TRF's Chief Accounting Officer or Chief Financial Officer.

12.2 The City Manager shall have the right at any time, and from time to time, to cause independent auditors or the City's own accountants or auditors to audit all of the books of TRF relating to Operating Revenues, Operating Expenses, tickets and Events including, without limitation, cash register tapes, credit card invoices, duplicate deposit tapes, and invoices. No costs incurred by the City in conducting such audit shall be considered an Operating Expense.

12.3 Annual Plan. Commencing on October 1, 2019, and thereafter on June 1<sup>st</sup> October 1<sup>st</sup> of each Contract Year during the term herein, TRF shall provide to the City an annual management plan, which shall include the annual operating budget for the then current Fiscal Year but may not have a complete booking plan or event schedule. The annual plan shall include information regarding TRF'S anticipated operations for such Fiscal Year, including planned operating and maintenance activities, anticipated capital improvements and capital equipment purchases and an anticipated budget therefore, anticipated Events at the Facility (to the extent known at such time), and planned equipment and furnishings purchases. TRF shall have the right from time to time to make any changes it deems necessary or appropriate to any such annual plan so long as the annual plan is consistent with TRF'S fulfillment of its obligations hereunder.

12.4 Programmatic Plan. Accompanying TRF's proposed annual budget shall be the Facility Programmatic Plan for the next fiscal year, detailing the then-known activities planned, and the number of residents and visitors anticipated to be impacted.

12.5 Major Capital Repairs. Accompanying TRF's proposed annual budget shall be a detailed list of then-known major capital repairs anticipated for the Facility, which remain the sole responsibility

of the City.

### **SECTION 13. INDEMNIFICATION.**

TRF shall indemnify, hold harmless and defend (with counsel approved by the City Attorney) the City, its officers, agents, servants and employees from and against any and all claims, liabilities, demands, causes of action, costs and expenses (including reasonable attorneys' fees at trial and all levels of appeal) of whatsoever kind or nature ("Claims") arising out of (i) errors, omission or negligent act or willful misconduct of TRF, its agents, servants, contractors, or employees; (ii) any default by TRF under this Agreement; or (iii) any other claim arising, directly or indirectly, from the operation or management of the Facility or any Event held therein or rental or use of the Facility; provided that there is expressly excluded from the foregoing obligations any Claims to the extent resulting solely from the gross negligence or willful misconduct of the City, its officers, agents (excluding TRF), contractors (excluding TRF) and employees or the use of the Facility by the City, its officers, agents (excluding TRF), and employees, pursuant to Section 16 hereof. The provisions of this Section 13 shall survive expiration or termination of this Agreement.

### **SECTION 14. INSURANCE REQUIREMENTS.**

TRF shall maintain, at TRF's sole cost and expense, the following types of insurance coverage at all times throughout the Term of this Agreement:

14.1 General liability insurance with not less than the following limits:

• General aggregate	\$2,000,000
• Products (completed operation aggregate)	\$2,000,000
• Personal and advertising (injury)	\$1,000,000
• (Per occurrence)	\$1,000,000
• Fire damage	\$ 100,000
• Medical Expense	\$ 5,000
• Liquor Liability (aggregate)	\$2,000,000
• (Per occurrence)	\$1,000,000

14.2 Workers Compensation Insurance shall be required under the Laws of the State of Florida

14.3 Fire Insurance for the Facility shall be the responsibility of the City.

14.4 Builder's Risk. TRF shall carry Builder's Risk insurance during any period of construction of Alterations or any other period of construction by, through or under TRF.

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days written notice to City and then subject to the prior written

approval of the City's Risk Manager. TRF shall provide the City with a Certificate of Insurance for each such policy, which shall name the City as an additional named insured. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should TRF fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by TRF to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If TRF does not repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, and such failure shall be deemed an event of default hereunder.

TRF shall be the named insured under all such policies. The City shall be an additional insured under the insurance policies described in subsections 14.1, 14.3 and 14.4 hereof, as its interests may appear, and all such insurance policies shall contain a provision covering the indemnification liabilities hereunder.

The terms of insurance policies referred to in Section 14 shall preclude subrogation claims against TRF, the City and their respective officers, employees and agents.

#### **SECTION 15. OWNERSHIP OF ASSETS.**

Ownership. The ownership of the Facility and all buildings and real estate, all existing (and replacements thereof) technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property located at the Facility at the time of the commencement of this Agreement shall remain with the City. Any and all technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property purchased by TRF for use at the facility shall remain property of TRF. Any and all technical and office equipment and facilities, furniture, displays, fixtures, vehicles and similar tangible property purchased by TRF through funds received from grants which were applied for solely by the City or in partnership with the City for use at the facility shall remain property of the City. Ownership of and title to all intellectual property rights of whatsoever value held in the City's name shall remain in the name of the City. The ownership of data processing programs and software owned by the City shall remain with the City, and the ownership of data processing programs and software owned by TRF shall remain with TRF. TRF shall not take or use, for its own purposes, customer lists or similar materials developed by the City for the use of the Facility, unless prior written consent is granted by the City Manager. Ownership of equipment, furnishings, materials, or fixtures not considered to be real property purchased by TRF with Operating Revenues for use at and for the Facility shall vest in the City automatically and immediately upon purchase or acquisition ("City Property"). The assets of the City as described herein shall not be pledged, liened, encumbered or otherwise alienated or assigned.

Notwithstanding anything to the contrary contained in this Agreement, any personality, furnishings, and movable equipment that is not a fixture and is not integral to the operation of the Facility purchased by TRF with outside funds, (funds which are not a part of Operating Revenue) and used at the Facility shall be the sole property of TRF. Ownership of and title to all intellectual property rights of whatsoever value related to marketing and promotional materials, designs, slogans, social media profiles, and web pages will remain the exclusive property of the City.

**SECTION 16. USE BY THE CITY.**

The City shall have the right to use the Facility, or any part thereof, subject to availability, for the benefit of the community for such purposes including, but not limited to, meetings, City-sponsored special events, Movie Nights, Parks and Recreation events, and other purposes, as deemed necessary by the City Manager, in his sole and absolute discretion, without the payment of any rental or use fee, except that the direct out-of-pocket expenses incurred in connection with such uses shall be paid by the City. ~~In addition, TRF shall honor all existing booked rentals and pre-determined Events scheduled at the Facility, as outlined in Exhibit "F", attached hereto and made a part hereof.~~

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**SECTION 17. ASSIGNMENT/SUBLET.**

17.1 Except as otherwise specifically provided in this Section 17, TRF may not voluntarily or by operation of law, assign, encumber, pledge or otherwise transfer all or any part of TRF's interest in this Agreement or subcontract its management duties hereunder without the City's prior written consent, which may be granted or withheld in City's sole and absolute discretion. Any attempt by TRF to assign all or any part of its interest and any attempt to subcontract its management duties hereunder without first having obtained City's prior written approval shall be void and of no force or effect. In the event of any assignment, transfer, encumbrance or subcontract, TRF shall nevertheless remain liable for all obligations hereunder and the transferee shall be jointly and severally liable for all obligations thereafter arising under this Agreement. Any transfer of a controlling interest in TRF (whether in a single transaction or multiple transactions) shall be considered an assignment of this Agreement. TRF specifically recognizes that City selected TRF to be the manager of the Facility as a result of the City's evaluation of TRF's specific qualifications and experience in operating similar first class facilities.

17.2 The provisions of subsection 17.1 above shall not prevent TRF in the performance of its management duties hereunder to grant licenses and concessions and rental agreements for Events and entering into a concessions agreement for the concession operations at the Facility.

**SECTION 18. SECURITY.**

TRF shall provide reasonable security to protect the Facility and its equipment, materials and facilities, including any City equipment, furnishings, and fixtures used by TRF, and shall be solely responsible to the City for any loss or damage to any City equipment, furnishings, and fixtures so used by TRF.

**SECTION 19. PERMITS; LICENSES; TAXES; APPLICABLE LAWS.**

TRF agrees to obtain and pay for all permits and licenses necessary for the conduct of its business, including a liquor or beer and wine license for the Facility, and agrees to comply with all laws governing the responsibility of an employer with respect to persons employed by TRF. TRF shall also be solely responsible for payment of any and all taxes levied on the Facility and its operations. In addition, TRF shall comply with all rules, regulations and laws of the City; Miami-Dade County; the State of Florida; and the U.S. Government now in force or hereafter to be adopted.

**SECTION 20 UTILITIES; RESPONSIBILITY FOR TAXES AND ASSESSMENTS.**

20.1 Utilities. During the initial term only, The City shall be solely responsible for and shall pay (whether to the City or directly to the utility) before delinquency, of all charges for all water and sewer, and electricity utilities used at the Facility. Any other utilities, including the connection of a phone line, shall be the responsibility of TRF.

20.2 Procedure If Taxes Assessed. TRF agrees to, and shall pay before delinquency, all taxes and assessments of any kind assessed or levied, whether upon TRF or the Facility, by reason of this Agreement or by reason of any use(s) and/or activity(ies) of TRF upon or in connection with the Facility. The parties acknowledge that TRF's operation and use of the Facility is for public purposes, and therefore anticipate that, as of the Effective Date, no ad valorem taxes should be assessed by the Miami-Dade County Tax Appraiser. If, however, taxes are assessed by the Property Tax Appraiser, TRF has the right to terminate this agreement without penalty by providing 90 days notice to the City, at which point the City shall be solely responsible for such payment(s).

#### **SECTION 21. FORCE MAJEURE.**

No party will be liable or responsible to the other party for any delay, damage, loss, failure, or inability to perform caused by "Force Majeure" if notice is provided to the other party within ten (10) days of date on which such party gains actual knowledge of the event of "Force Majeure" that such party is unable to perform. The term "Force Majeure" as used in this Agreement means the following: an act of God, strike, war, public rioting, lightning, fire, storm, flood, explosions, epidemics, landslides, lightning storms, earthquakes, floods, storms, washouts, civil disturbances, explosions, and any other cause whether of the kinds specifically enumerated above or otherwise which is not reasonably within the control of the party whose performance is to be excused and which by the exercise of due diligence could not be reasonably prevented or overcome (it being acknowledged that under no circumstances shall a failure to pay amounts due and payable hereunder be excusable due to a Force Majeure).

Neither party hereto shall be under any obligation to supply any service or services if and to the extent and during any period that the supplying of any such service or services or the provision of any component necessary therefore shall be prohibited or rationed by any Governmental Requirements.

In the event of substantial damage to or destruction of the Facility by reason of fire, storm or other casualty or any eminent domain action or other regulatory action that, in either case, shall render a substantial part of the Facility inoperable for a period of at least ninety (90) days or in TRF's or the City's reasonable opinion the Facility can no longer be operated in a reasonably profitable manner as a result of the damages or action for a period of at least ninety (90) days from the happening of the fire, other casualty or regulatory action, either party may terminate this Agreement upon written notice to the other. Upon any such termination, the provisions of Section 31 shall apply; and provided City shall receive the entire amount of all insurance proceeds or eminent domain award as applicable.

#### **SECTION 22. INSPECTION.**

TRF agrees that the Facility may be inspected at any time upon reasonable notice by authorized representatives of the City, or by any other State, County, Federal or municipal officer or agency having responsibilities for inspections of such operations and/or Facility.

**SECTION 23. WAIVER OF INTERFERENCE.**

TRF hereby waives all claims for compensation for loss or damage sustained by reasons of any interference with its operation and management of the Facility by any public agency or official as a result of their enforcement of any laws or ordinances or of any of the rights reserved to the City herein. Any such interference shall not relieve TRF from any obligation hereunder.

**SECTION 24. NO LIENS.**

TRF agrees that it will not suffer, or through its actions or anyone under its control or supervision, cause to be filed upon the Facility any lien or encumbrance of any kind. In the event any lien is filed, the TRF agrees to cause such lien to be discharged within ten (10) days therefrom, and in accordance with the applicable law and policy. If this is not accomplished, the City may automatically terminate this Agreement, without further notice to TRF.

**SECTION 25. TRF EMPLOYEES, MANAGERS AND BOARD OF DIRECTORS.**

25.1 The City and TRF recognize that in the performance of this Agreement, it shall be necessary for TRF to retain qualified individuals to effectuate and optimize TRF's management and operation of the Facility. TRF shall select, train and employ at the Facility such number of employees as is necessary or appropriate for TRF to satisfy its responsibilities hereunder. TRF shall recruit employees consistent with standards employed at comparable first class facilities, and TRF shall have authority to hire, terminate and discipline any and all personnel employed by TRF working at the Facility. Any such personnel, whether employees, agents, independent contractors, volunteers, and/or other, employed, retained, or otherwise engaged by TRF for such purpose(s), shall not be deemed to be agents, employees, partners, joint ventures, or associates of the City, and shall not obtain any rights or benefits under the civil service or pension ordinances of the City or any rights generally afforded classified or unclassified employees of the City; further they shall not be deemed entitled to the Florida Worker's Compensation benefits as employees of the City. Additionally, TRF, and/or its employees shall never have been convicted of any offense involving moral turpitude or felony. Failure to comply with this subsection shall constitute cause for termination of this Agreement.

25.2 TRF shall assign to the Facility a competent staff member experienced in the operations of similar facilities, who will be located on-site with regular and posted hours during the Term. The staff member will be supervised by a general manager who is experienced in operating and managing similar facilities. The staff member shall be accessible to the City Manager at all reasonable times to discuss the management, operation, and maintenance of the Facility. "Accessible" shall mean available either in person, by phone and/or e-mail during business and/or operation hours and within a reasonable time frame during non-business hours in the event of an emergency. The City Manager may also request that

the staff member be replaced and TRF shall duly consider all such request but shall but not be obligated to replace the staff member.

#### **SECTION 26. NO IMPROPER USE.**

TRF will not use, nor suffer or permit any person to use in any manner whatsoever, the Facility for any purpose in violation of any Federal, State, County, or municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. TRF shall not use the Facility for any unlawful purpose and shall comply with all laws, permitting, and licensing requirements now in force or hereafter adopted, applicable to the Facility or the activities, uses, and/or business(es) conducted on the Facility. TRF agrees not to knowingly use the Facility for, or to permit operation of any offensive or dangerous activity, nuisance or anything against public policy. Any criminal activity in the Facility knowingly caused by or knowingly permitted by TRF shall result in automatic termination of this Agreement. Except as may result from acts of force majeure, TRF agrees that it will not allow the Facility to become unoccupied or vacant. TRF shall take appropriate precautions to prevent fire on the Facility, maintaining existing fire detection devices and extinguishing equipment at all times. Fire detection devices and extinguishing equipment to be provided and maintained by the City.

#### **SECTION 27. NO DANGEROUS MATERIALS.**

TRF agrees not to use or permit in the Facility the storage of illuminating oils, oil lamps, turpentine, gasoline (except for small containers [5 gallons or less] for machinery), benzene, naphtha, or other similar substances, or explosives or any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida.

#### **SECTION 28. NO CLAIM AGAINST CITY OFFICERS, EMPLOYEES, INDIVIDUALS.**

It is expressly understood and agreed by and between the parties hereto that all individuals, employees, officers, and agents of the City are acting in a representative capacity and not for their own benefit; and that neither TRF nor any occupant shall have any claim against them or any of them as individuals in any event whatsoever in conjunction with any acts or duties which are reasonably related to the performance of their duties.

#### **SECTION 29. DEFAULT AND TERMINATION.**

29.1 TRF's Defaults. The occurrence of any one or more of the following events shall constitute an event of Default by TRF.

29.1.1 The failure by TRF to make any payment required to be made by TRF as and when due, which continues for more than ten (10) days after written notice from City;

29.1.2 The failure or inability by TRF to observe or perform any of the covenants or

provisions of this Agreement to be observed or performed by TRF, which continues for more than thirty (30) days after written notice from City Manager; provided, however, if the nature of the failure is such that more than such period is reasonably required for its cure, then TRF shall not be deemed to have committed an Event of Default if TRF commences the cure within such period and thereafter diligently pursues the cure to completion and actually completes the cure within an additional sixty (60) day period;

29.1.3 Except as permitted pursuant to Section 17 of this Agreement, the assignment, encumbrance, pledge, or transfer of this Agreement, whether voluntarily or by operation of law, or any subcontract of TRF's duties hereunder, which continues for more than fifteen (15) business days after written notice thereof from City Manager;

29.1.4 (i) The making by TRF of any general assignment for the benefit of creditors; (ii) the filing by or against TRF of a petition to have TRF adjudged a Chapter 7 debtor under the Bankruptcy Code, or any Code or to have debts discharged or a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against TRF, the same is dismissed within sixty (60) days); (iii) the appointment of a trustee or receiver to take possession of substantially all of TRF's assets located at the Facility or of TRF's interest in this Agreement, if possession is not restored to TRF within sixty (60) days; or (iv) the attachment, execution or other judicial seizure of substantially all of TRF's assets located at the Facility or of TRF's interest in this Agreement, where the seizure is not discharged within sixty (60) days.

29.2 City Remedies. If an Event of Default by TRF occurs, then in addition to any other remedies available to City, City may exercise the following remedies:

29.2.1 City may terminate this Agreement by written notice to TRF, in which case this Agreement shall terminate and TRF shall immediately surrender possession of the Facility to City. Upon termination, City shall be entitled to recover from TRF: (1) Operating Expenses that remain unpaid through the date of termination; (2) all other amounts that TRF is required to pay under this Agreement through the date of termination.

29.2.2 City may seek specific performance of any of TRF's obligations hereunder or seek injunctive relief;

29.2.3 City may exercise any other remedies available at law or in equity.

29.2.4 The various rights and remedies reserved to City in this Agreement or otherwise shall be cumulative and, except as otherwise provided by Florida law, City may pursue any or all of its rights and remedies at the same time.

29.3 TRF's Remedies. If an Event of Default by City occurs, then TRF may exercise either of the following remedies:

TRF may terminate this Agreement by written notice to City, in which case this Agreement shall terminate and TRF shall immediately surrender possession of the Facility to City. Upon termination, TRF shall be entitled to recover from City all amounts owed by City to TRF as of the termination date and the

provisions of Section 31 shall apply; or

29.4 Late Payments. Any payment owed to City or TRF under this Agreement including, without limitation, any other payment owed to City or TRF under this Agreement that is not received by City or TRF within ten (10) days following notice of such amount being due shall bear interest at the rate of eighteen percent (18%) per annum or the highest rate allowable by law ("Default Rate") from the date due until fully paid.

29.5 IN THE EVENT THAT TRF CEASES TO BE A NOT-FOR-PROFIT CORPORATION, THIS AGREEMENT SHALL BE AUTOMATICALLY TERMINATED.

### **SECTION 30. [INTENTIONALLY DELETED].**

### **SECTION 31. TERMINATION.**

31.1 Termination for Convenience by City. The City reserves and retains the right, at its sole option and discretion, to terminate this Agreement, without cause and without penalty, with regard to TRF's rights and responsibilities with respect to the operation, management, maintenance, promotion and marketing of the Facility, upon one hundred eighty (180) days prior written notice to TRF.

31.2 Effect of Termination. In the event this Agreement expires or is terminated for any reason: (1) All Operating Expenses and all other obligations for the period up to the date of expiration or termination shall be paid using funds on deposit in the account(s) described in Section 10 and to the extent such funds are not sufficient, TRF shall pay all such amounts from its own funds; (2) After all amounts referenced in subparagraph (1) have been paid, TRF may retain all remaining Operating Revenues (if any). Upon the expiration of this Agreement or a termination for any reason, all further obligations of the parties hereunder shall terminate except for the obligations which for all periods up to the date of expiration or termination and such other obligations as are stated to survive or be performed after such expiration or termination. All of the foregoing reimbursement and the payment obligations are to be made within thirty (30) days after the termination date. The provisions of this Subsection 31.2 regarding the above reimbursement and payment obligations of the City shall survive the termination of this Agreement.

31.3 Surrender of Facility. Upon termination or expiration of this Agreement TRF shall surrender and vacate the Facility upon the effective date of such termination (or expiration). The Facility and all equipment and furnishings shall be returned to the City in a good and clean condition consistent with other similar Comparable Facilities and in compliance with all Governmental Requirements, ordinary wear and tear, and casualty loss excepted.

### **SECTION 32. NOTICES.**

All notices from the City to TRF shall be deemed duly served if mailed by registered or certified

mail to TRF at the following address:

The Rhythm Foundation, Inc.  
407 Lincoln Road #6E  
Miami Beach Florida 33139  
Attention: Laura Quinlan, Executive Director

All notices from TRF to the City shall be deemed duly served if mailed to:

City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: City Manager

With copies to:

City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: John Rebar, Parks and Recreation Department Director

TRF and the City may change the above mailing addresses at any time upon giving the other party written notification. All notice under this Agreement must be in writing.

### **SECTION 33. NO DISCRIMINATION.**

33.1 The TRF agrees that there shall be no discrimination as to race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial status, or disability in the operations referred to by this Agreement; and further, there shall be no discrimination regarding any use, service, maintenance or operation of the Facility. All facilities located on the Facility shall be made available to the public, subject to the right of TRF to establish and enforce reasonable rules and regulations to provide for the safety, orderly operation and security of the facilities.

33.2 No Discrimination in Employment; Affirmative Action. In connection with the performance of work under this Agreement, TRF shall not refuse to hire, discharge, refuse to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, solely because of race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial status and age or disability.

### **SECTION 34 [INTENTIONALLY DELETED].**

### **SECTION 35. LIMITATION OF LIABILITY.**

The City desires to enter into this Agreement only if in so doing the City can place a limit on its liability for any cause of action for money damages due to an alleged breach by the City of this Agreement, so that its liability for any such breach never exceeds the sum of \$10,000. TRF hereby expresses his willingness to enter into this Agreement with TRF's recovery from the City for any damage

action for breach of contract to be limited to a maximum amount of \$10,000, less the amount of all funds actually paid by the City to TRF pursuant to this Agreement.

Accordingly, and notwithstanding any other term or condition of this Agreement, TRF hereby agrees that the City shall not be liable to TRF for damages in an amount in excess of \$10,000, which amount shall be reduced by the amount actually paid by the City to TRF pursuant to this Agreement, for any action or claim for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of the limitation placed upon the City's liability as set forth in Section 768.28, Florida Statutes.

#### **SECTION 36. NOT A LEASE.**

It is expressly understood and agreed that no part, parcel, building, structure, equipment or space is leased to TRF; that this Agreement is a management agreement and not a lease; and that TRF's right to operate and manage the Facility shall continue only so long as the TRF complies with the undertakings, provisions, agreements, stipulations and conditions of this Agreement.

#### **SECTION 37. MISCELLANEOUS.**

37.1 Venue/Waiver of Jury Trial. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Florida, both substantive and remedial, without regard to principals of conflict of laws. The exclusive venue for any litigation arising out of this Agreement shall be Miami-Dade County, Florida, if in state court, and the U.S. District Court, Southern District of Florida, if in federal court. BY ENTERING INTO THIS AGREEMENT, CITY AND TRF EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO, OR ARISING OUT OF, THIS AGREEMENT.

37.2 No Partnership or Joint Venture. Nothing herein contained is intended or shall be construed in any way to create or establish the relationship of partners or a joint venture between the City and TRF. None of the officers, agents or employees of TRF shall be or be deemed to be employees of the City for any purpose whatsoever.

37.3 Entire Agreement. This Agreement and all Exhibits attached hereto contain the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, proposals or other expressions of intent with respect thereto. The Exhibits attached hereto are incorporated into and made a part of this Agreement. No other agreements, representations, warranties or other matters, whether oral or written, will be deemed to bind the parties hereto with respect to the subject matter hereof.

37.4 Written Amendments. This Agreement shall not be altered, modified or amended in whole or in part, except in writing executed by each of the parties hereto. The City Manager, on behalf of

the City, shall have authority to approve any changes to this Agreement.

37.5 Binding Upon Successors and Assigns; No Third-Party Beneficiaries.

37.5.1 This Agreement and the rights and obligations set forth herein shall inure to the benefit of, and be binding upon, the parties hereto and each of their respective permitted successors and permitted assigns.

37.5.2 This Agreement shall not be construed as giving any person, other than the parties hereto and their successors and permitted assigns, any legal or equitable right, remedy or claim under or in respect of this Agreement or any of the provisions herein contained, this Agreement and all provisions and conditions hereof being intended to be, and being, for the sole and exclusive benefit of such parties and their successors and permitted assigns and for the benefit of no other person or entity.

37.6 Section Headings and Defined Terms. The headings contained herein are for reference purposes only and shall not in any way affect the meaning and interpretation of this Agreement. The terms defined herein and in any agreement executed in connection herewith include the plural as well as the singular and the singular as well as the plural, and the use of masculine pronouns shall include the feminine and neuter. Except as otherwise indicated, all agreements defined herein refer to the same as from time to time amended or supplemented or the terms thereof waived or modified in accordance herewith and therewith.

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original copy of this Agreement, and all of which, when taken together, shall be deemed to constitute but one and the same agreement.

37.7 Severability. The invalidity or unenforceability of any particular provision, or part of any provision, of this Agreement shall not affect the other provisions or parts hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions or parts were omitted.

37.8 Non-Waiver. A failure by either party to take any action with respect to any default or violation by the other of any of the terms, covenants, or conditions of this Agreement shall not in any respect limit, prejudice, diminish, or constitute a waiver of any rights of such party to act with respect to any prior, contemporaneous, or subsequent violation or default or with respect to any continuation or repetition of the original violation or default.

37.9 Certain Representations and Warranties.

37.9.1 The City represents, warrants, and covenants to TRF the following: (i) City has full legal right, power and authority to enter into and perform its obligations hereunder; and (ii) this Agreement has been duly executed and delivered by the City and constitutes a valid and binding obligation of the City, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally or by general equitable principles.

37.9.2 TRF represents and warrants to the City the following: (i) TRF has full legal

right, power and authority to enter into and perform its obligations hereunder, and (ii) this Agreement has been duly executed and delivered by TRF and constitutes a valid and binding obligation of TRF, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally or by general equitable principles.

37.10 Governing Law. This Agreement will be governed by and construed in accordance with the internal laws of the State of Florida, without giving effect to otherwise applicable principles of conflicts of law.

**SECTION 38. TRF'S COMPLIANCE WITH FLORIDA PUBLIC RECORDS LAW.**

Pursuant to Section 119.0701 of the Florida Statutes, if TRF meets the definition of "Contractor" as defined in Section 119.0701(1)(a), the Concessionaire shall:

- a) Keep and maintain public records that ordinarily and necessarily would be required by the public agency in order to perform the service;
- b) Provide the public with access to public records on the same terms and conditions that the public agency would provide the records and at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law;
- c) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law; and
- d) Meet all requirements for retaining public records and transfer to the City, at no City cost, all public records created, received, maintained and/or directly related to the performance of this Agreement that are in possession of TRF upon termination of this Agreement. Upon termination of this Agreement, the Concessionaire shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. All records stored electronically must be provided to the City in a format that is compatible with the information technology systems of the City.

For purposes of this Article, the term "public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business of the City.

TRF failure to comply with the public records disclosure requirement set forth in Section 119.0701 of the Florida Statutes shall be a breach of this Agreement.

In the event TRF does not comply with the public records disclosure requirement set forth in Section 119.0701 of the Florida Statutes, the City may, at the City's sole discretion, avail itself of the remedies set forth under this Agreement and available at law.

**SECTION 39. PROHIBITIONS REGARDING SALE OR USE OF EXPANDED POLYSTYRENE  
FOOD SERVICE ARTICLES.**

Pursuant to Section 82-7 of the City Code, as may be amended from time to time, effective August 2, 2014, the City has prohibited the use of expanded polystyrene food service articles by City Contractors, in connection with any City contract, lease, concession agreement or Special event permit. Additionally, pursuant to Section 82-385 of the City Code, as may be amended from time to time, no polystyrene food service articles will be allowed in the right-of-way, and no polystyrene food service articles can be provided to sidewalk café patrons.

*Expanded polystyrene* is a petroleum byproduct commonly known as Styrofoam. Expanded polystyrene is more particularly defined as blown polystyrene and expanded and extruded foams that are thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including, but not limited to, fusion of polymer spheres (expandable bead foam), injection molding, foam molding, and extrusion-blown molding (extruded foam polystyrene).

*Expanded polystyrene food service articles* means plates, bowls, cups, containers, lids, trays, coolers, ice chests, and all similar articles that consist of expanded polystyrene.

Additionally, Concessionaire agrees to comply (and ensure compliance by its vendors) with Section 46-92 (c) of the City Code, which states that it is unlawful for any person to carry any expanded polystyrene product onto any beach or into any park within the City or for any business to provide plastic straws with the service or delivery of any beverage to patrons on the beach.

TRF agrees not to sell, use, provide food in, or offer the use of expanded polystyrene food service articles at the Facility or in connection with this Agreement. TRF shall ensure that all vendors operating in the Facility abide by the restrictions contained in this Section. A violation of this section shall be deemed a default under the terms of this Agreement. This subsection shall not apply to expanded polystyrene food service articles used for prepackaged food that have been filled and sealed prior to receipt by the TRF or its vendors.

**SECTION 40. COCA-COLA.**

The City has entered into an agreement with Coca-Cola Bottling, effective September 1, 2011 – September 1, 2021, to be the exclusive provider of non-alcoholic beverages and coffee products. TRF shall only sell Coca-Cola beverages as listed in the attached Exhibit "G" and as may be updated from time to time.

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed; all as of this day and year first written above.

Attest:

CITY OF MIAMI BEACH

Rafael E. Granado, City Clerk

Dan Gelber, Mayor

STATE OF FLORIDA )

) SS:

COUNTY OF MIAMI-DADE )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2019, by Mayor Dan Gelber, Mayor, and Rafael E. Granado, City Clerk, or their designees respectively, on behalf of the CITY OF MIAMI BEACH, known to me to be the persons described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

Notary Public, State of Florida at Large

Commission No.:

My Commission Expires:

MANAGEMENT AGREEMENT BETWEEN CITY AND TRF  
FOR THE MGMT OF THE NORTH SHORE BAND SHELL

Attest:

The Rhythm Foundation, Inc.

\_\_\_\_\_  
Name/Title

\_\_\_\_\_  
Laura Quinlan, Executive Director

STATE OF FLORIDA )

) SS:

COUNTY OF MIAMI-DADE )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2019, by  
Laura Quinlan, as Executive Director and \_\_\_\_\_ as \_\_\_\_\_  
on behalf of The Rhythm Foundation, Inc., known to me to be the persons described in and who executed  
the foregoing instrument, and acknowledged to and before me that they executed said instrument for the  
purposes therein expressed.

WITNESS my hand and official seal, this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
Notary Public, State of Florida at Large

Commission No.:

My Commission Expires:

**EXHIBIT A**

**SITE PLAN AND LEGAL DESCRIPTION OF THE FACILITY**

**LEGAL DESCRIPTION:**

The area delineated on the Site Plan, attached hereto and incorporated herein as Exhibit A-1, located at the North Shore Park, which is located in a portion of land more particularly described as:

A portion of land located in section 2, Township 5.3 South Range 42 East, bounded as follows: bounded on the North by the South right-of-way line of Third Street (now 73<sup>rd</sup> Street) and its easterly extension as shown in PLAT OF TOWNSITE OF HARDING, Plat Book 34, Page 40, of the Public Records of Miami-Dade County, Florida; bounded on the South by the South line of government Lot 6, Section 2, Township 5.3 South Range 42 East (now South line of 72<sup>nd</sup> Street) and its easterly extensions as shown in NORMANDY BEACH SOUTH, Plat Book 21, Page 54, of the Public Records of Miami-Dade County, Florida; bounded on the East by the Erosion Control Line of the Atlantic Ocean, as recorded in Plat Book 105, at Page 62, of the Public Records of Miami-Dade County, Florida and bounded on the West by the East right-of-way line of Collins Avenue as shown according to Florida Department of Transportation Finished Project ID 2507471. Said land located in the City of Miami Beach, Miami-Dade County, Florida.

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BAND SHELL SITE PLAN

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**EXHIBIT B**  
**CITY OF MIAMI BEACH**  
**MINIMUM MAINTENANCE SPECIFICATIONS**  
**FOR MAINTENANCE OF THE NORTH SHORE BAND SHELL**

These minimum operating and maintenance standards are intended to be considered as a whole and intended to provide an overall standard for the Facility. Individual discrepancies, as well as deviations, from any individual standard shall not be considered a default of the Agreement; it is the intention of the parties that this Exhibit is merely a guide and that TRF is only expected to use good faith efforts to endeavor to meet the standards set forth herein. In the event of a conflict between the terms or conditions of the Agreement and the terms or conditions of this Exhibit, the terms and conditions of the Agreement shall control.

**PERSONNEL**

TRF shall have the sole responsibility to recruit and employ a full-time general manager and any necessary administrative and accounting personnel that are responsible for the overall management and operation of the Facility.

TRF shall have the sole responsibility to recruit and employ sufficient personnel to maintain the following functions: general and event security; janitorial, housekeeping and cleaning for both event and non-event cleanup (including graffiti removal); painting and general overall maintenance of the Facility to ensure that the Facility is being maintained consistent with other Comparable Facilities.

The City shall have the sole responsibility for maintenance of capital systems, electrical systems, plumbing; and air conditioner operation;

TRF shall have the sole responsibility to recruit and employ personnel as it deems necessary for the staging and coordinating of Events and productions.

TRF shall maintain personnel policies that assure employment practices do not discriminate on the basis of race, color, religion, military status, marital status, physical or mental disability, national origin, age, gender, or sexual preference.

**GENERAL SECURITY**

TRF shall provide for the overall security of the Facility, including during non-event hours.

**EMERGENCY PROCEDURES**

TRF shall assign an employee and a backup employee to act as an Emergency Liaison to the City. This individual will be required to use good faith efforts to attend any and all meetings, held by the City, that deal with emergency situations, such as extreme weather events, terrorist acts, etc. The Liaison will serve as the point of contact during any emergency crisis.

TRF shall develop and implement a Hurricane Preparedness Procedure, a copy of which shall be provided to the City.

**JANITORIAL, CLEANING AND HOUSEKEEPING**

The Facility shall be reasonably clean and stocked with supplies (i.e. toilet paper, soap, etc.) at all times. This includes general cleaning during non-event times, as well as during Events.

Restrooms are to be cleaned during Events and on a periodic basis during non-event times to assure that they are in a functional and reasonably sanitary condition.

The City shall have the responsibility for Sanitation and Waste as it relates to emptying of the dumpster and servicing trash receptacles within the park area. The dumpster will be serviced at current service levels. Any additional dumpster services and the collection of and depositing of trash within the Band Shell will be the responsibility of TRF

At the City's responsibility, treatment for pests and rodents (except termites) shall occur on a Quarterly basis as needed to prevent infestation or as required by applicable Code.

Flooring shall be cleaned and polished on an as needed basis.

Windows shall be maintained in a reasonably clean condition and cleaned on an as needed basis.

Entrance doors and mirrors shall be maintained in a reasonably clean condition and cleaned on an as needed basis.

#### **LANDSCAPING**

The City shall maintain all exterior landscaping

#### **EXTERIOR LIGHTING**

The Facility shall remain illuminated regularly after dark. The City shall maintain all exterior lighting.

#### **EQUIPMENT MAINTENANCE AND GENERAL MAINTENANCE**

Equipment shall be maintained in a good and workmanlike manner in order to maintain in full force and affect all dealer's and manufacturer's warranties. TRF shall develop an annual schedule for equipment inspection and preventative maintenance.

Upon termination, cancellation, and/or expiration of the Agreement, TRF shall provide all records maintained in accordance with Section 5.5.4. All existing warranties that are transferable will be transferred to the City.

TRF shall post and maintain, as required by any applicable governmental code and/or regulation, any and all required professional licenses, certifications, and/or permits.

The City shall maintain and inspect all building safety systems including but not limited to: smoke, fire, and CO detector systems, backup generator operation, emergency battery backup functions, emergency lighting, emergency egress, special needs and blackout preparedness equipment. All building safety systems shall be tested on at least an annual basis or as required by federal, state or local codes and regulations and maintained in operating condition at all times.

The City shall develop and implement a plan for inspection and maintenance for the Facility's HVAC systems. This shall include inspection of all HVAC controls on a Quarterly basis to verify proper setting and operation as well as any adjustments and/or maintenance that may be appropriate, including, but not limited to filter replacement, blower and/or heat exchanger, proper operation of air intakes/vents, fan units, ducts, etc.

TRF has the sole responsibility of maintaining the paint on the interior of the Facility.

EXHIBIT C  
RENTAL RATES FOR FACILITY

DRAFT

**EXHIBIT D**  
**TRF STANDARD AGREEMENT**

DRAFT

**EXHIBIT E**  
**CITY OF MIAMI BEACH OWNED PROPERTY INCLUDED IN THE AGREEMENT**

Item	Brand	Model	Serial No:
Theater Control	Element	4330A1020	434401078
Computer Screen #1	Kristel-LP	LED19-023-P	20100603180
Computer Screen #2	Kristel-LP	LED19-023-P	20100700858
Computer Mouse	Kensington		SA1034A001657
Aluminum benches			

DRAFT

**EXHIBIT F**  
**CITY PREDETERMINED SCHEDULED EVENTS FOR FACILITY**

DRAFT

**EXHIBIT G**  
**COCA COLA AGREEMENT AND PRODUCT LIST**

DRAFT

**EXHIBIT H**  
**RESOLUTION NO. 2014-28874**

DRAFT