

**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 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 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



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

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.

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 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.

**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 familiar 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



  
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.

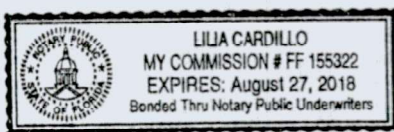
WITNESS my hand and official seal, this 19 day of February, 2015.



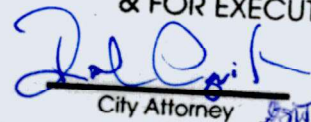
Notary Public, State of Florida at Large

Commission No.:

My Commission Expires:



APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION


  
City Attorney

2-6-15  
Date

Attest:

The Rhythm Foundation, Inc.

\_\_\_\_\_  
Name/Title

  
\_\_\_\_\_  
Laura Quinlan, Executive Director

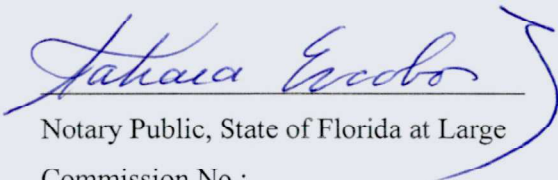
STATE OF FLORIDA )

) 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:

