

**MANAGEMENT AGREEMENT**

**between**

**CITY OF BROOKINGS, SOUTH DAKOTA**

**and**

**GLOBAL SPECTRUM, L.P.  
d/b/a SPECTRA VENUE MANAGEMENT**

**Dated: As of August 1, 2021**

## MANAGEMENT AGREEMENT

This Management Agreement is made as of the 1<sup>st</sup> day of August, 2021 (“**Effective Date**”), by and between the City of Brookings, South Dakota ("**City**"), and Global Spectrum, LP, a Delaware limited partnership d/b/a Spectra Venue Management ("**Manager**").

### RECITALS

WHEREAS, City owns a 6,500-seat arena with a 12,000 square foot conference center attached, located in Brookings, South Dakota and known, collectively, as the Swiftel Center (the “**Facility**”); and

WHEREAS, the City desires to engage Manager to manage and operate the Facility on behalf and for the benefit of the City, and Manager desires to accept such engagement, pursuant to the terms and conditions contained herein; and

NOW THEREFORE, for and in consideration of the foregoing, the mutual covenants and promises hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, hereby agree as follows:

### ARTICLE 1 DEFINITIONS

Section 1.1. Definitions. For purposes of this Agreement, the following terms have the meanings referred to in this Section:

**Affiliate:** A person or company that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a specified person or company.

**Agreement:** This Management Agreement, together with all schedules and exhibits attached hereto (each of which are incorporated herein as an integral part of this Agreement).

**Capital Expenditures:** All expenditures for building additions, alterations, repairs or improvements and for purchases of additional or replacement furniture, machinery, or equipment, where the cost of such expenditure is greater than \$5,000 and the depreciable life of the applicable item is, according to generally accepted accounting principles, is in excess of five (5) years.

**City:** shall have the meaning ascribed to such term in the Recitals to this Agreement.

**Commercial Rights:** Naming rights, pouring rights, advertising, sponsorships, the branding of food and beverage products for resale, premium seating (including suites, club seats

and party suites) and memorial gifts at or with respect to the Facility and owned or controlled by the City.

**Commercial Rights Fee:** shall have the meaning given to such term in Section 3.3 hereof.

**CPI:** The “Consumer Price Index” for the Midwest Region (CPI-U Midwest Region), as published by the United States Department of Labor, Bureau of Labor Statistics or such other successor or similar index.

**Effective Date:** shall have the meaning given to such term in the opening paragraph of this Agreement.

**Emergency Repair:** The repair of a condition which, if not performed immediately, creates an imminent danger to persons or property and/or an unsafe condition at the Facility threatening persons or property.

**Event Account:** A separate interest-bearing account in the name of the City and under the City’s Federal ID number in a local qualified public depository, to be designated by the City, where advance ticket sale revenue is deposited by Manager.

**Event of Force Majeure:** An act of God, fire, earthquake, hurricane, flood, riot, civil commotion, terrorist act, terrorist threat, storm, washout, wind, lightning, landslide, explosion, epidemic, inability to obtain materials or supplies, accident to machinery or equipment, epidemics or pandemics, any law, ordinance, rule, regulation, or order of any public or military authority stemming from the existence of economic or energy controls, hostilities or war, a labor dispute which results in a strike or work stoppage affecting the Facility or services described in this Agreement, or any other cause or occurrence outside the reasonable control of the party claiming an inability to perform and which by the exercise of due diligence could not be reasonably prevented or overcome.

**Existing Contracts:** Service Contracts, Revenue Generating Contracts, and other agreements relating to the day-to-day operation of the Facility existing as of the Effective Date, as set forth on Exhibit B attached hereto.

**Facility:** shall have the meaning ascribed to such term in the Recitals to this Agreement, and shall be deemed to include the entire arena complex, including but not limited to the arena, suites, locker rooms, meeting rooms, box office, common areas, lobby areas, executive and other offices, storage and utility facilities, as well as the entrances, ground, sidewalks and parking areas immediately surrounding the Facility and adjacent thereto, as identified on Schedule 1hereto.

**FF&E:** Furniture, fixtures and equipment to be procured for use at the Facility.

**Fixed Management Fee:** The fixed monthly fee the City shall pay to Manager under this Agreement, as more fully described in Section 3.1 of this Agreement.

**Food and Beverage Service:** shall have the meaning given to such term in Section 12.1 hereof.

**General Manager:** The employee of Manager acting as the full-time on-site general manager of the Facility.

**Incentive Fee:** The contingent fee the City shall pay to Manager under this Agreement, if earned, as more fully described in Section 3.2 below.

**Initial Term:** shall have the meaning ascribed to such term in Section 4.1 of this Agreement.

**Laws:** federal, state, local and municipal laws, statutes, rules, regulations and ordinances.

**Management-Level Employees:** The General Manager, Assistant General Manager, Business Manager (or employees with different titles performing similar functions), and any department head employed by Manager to perform services at the Facility (including, if applicable, employees performing the function of the Director of Operations, Director of Sales and Marketing, Director of Security, Finance Director and Event Manager).

**Manager:** shall have the meaning given to such term in the Recitals to this Agreement.

**Marketing Plan:** A plan for the advertising and promotion of the Facility and Facility events, which may contain but not be limited to the following elements: (i) market research, (ii) market position, (iii) marketing objectives, (iv) marketing strategies, (v) booking priorities, (vi) targeted events - local, regional, national and international, (vii) targeted meetings, conventions and trade shows, (viii) industry advertising campaign, (ix) internal and external support staff, (x) advertising opportunities at the local, regional and national level, (xi) attendance at various trade shows, conventions and seminars, (xii) incentive formulas for multiple event presenters, (xiii) suite and club seat sales, (xiv) merchandising and retail, (xv) food and beverage, (xvi) a plan for the sale of commercial rights, including without limitation naming rights, pouring rights, advertising signage, sponsorships (including event sponsorships), branding of food and beverage products for resale, premium seating (including but not limited to suites and club seats), and memorial gifts, (xvii) a plan regarding national, regional and local public relations and media relations, (xviii) development of an in-house advertising agency, and (xix) policies regarding the use of trade/barter.

**Net Operating Income:** the amount by which Revenue exceeds Operating Expenses, provided that for purposes of calculating the Quantitative Fee, the Fixed Management Fee shall not be considered an Operating Expense. If Operating Expenses (excluding the Fixed Management Fee for purposes of calculating the Quantitative Fee) exceed Revenue, then Net Operating Income shall be shown in parenthesis to indicate it is a negative number.

**Operating Account:** A separate interest-bearing account in the name of the City and under the City's Federal ID number in a local qualified public depository, to be designated by the City, where Revenue is deposited and from which Operating Expenses are paid.

**Operating Budget:** A line item budget for the Facility that includes a projection of Revenues and Operating Expenses, presented on a monthly and annual basis.

**Operating Expenses:** All expenses incurred by Manager in connection with its operation, promotion, maintenance and management of the Facility, including but not limited to the following: (i) employee payroll, benefits, relocation costs, severance costs, bonus and related costs, (ii) cost of operating supplies, including general office supplies, (iii) advertising, marketing, group sales, and public relations costs, (iv) cleaning expenses, (v) data processing costs, (vi) dues, subscriptions and membership costs, (vii) the Fixed Management Fee, (viii) printing and stationary costs, (ix) postage and freight costs, (x) equipment rental costs, (xi) minor repairs, maintenance, and equipment servicing, not including expenses relating to performing capital improvements or repairs, (xii) security expenses, (xiii) telephone and communication charges, (xiv) travel and entertainment expenses of Manager employees, (xv) cost of employee uniforms and identification, (xvi) exterminator, snow and trash removal costs, if applicable (xvii) computer, software, hardware and training costs, (xviii) parking expenses, (xix) utility expenses, (xx) office expenses, (xxi) ) audit and accounting fees, (xxii) legal fees, (xxiii) all bond and insurance costs, including but not limited to personal property, liability, and worker's compensation insurance and the performance bond described in Section 11.6 below, (xxiv) commissions and all other fees payable to third parties (*e.g.* commissions relating to food, beverage and merchandise concessions services and commercial rights sales), (xxv) cost of complying with any Laws, (xxvi) costs incurred by Manager to settle or defend any claims asserted against Manager arising out of its operations at the Facility on behalf of City; (xxvii) amount of any deductible or self-insured retention under insurance policies; (xxviii) costs incurred under Service Contracts and other agreements relating to Facility operations, (xxviii) all costs to provide Food and Beverage Service, including without limitation labor, product and liquor licensing costs; and (xxix) Taxes.

The term "Operating Expenses" does not include debt service on the Facility (including loans from the City to the Facility for payment of Operating Expenses, whether occurring prior to or after the Effective Date), Capital Expenditures, Transition Costs, property taxes, insurance on the Facility of contents within the Facility owned by City, or the Incentive Fee, all of which costs shall be borne by City.

**Operating Year:** Each twelve (12) month period during the Term, commencing on January 1 and ending on December 31, except the first (1<sup>st</sup>) Operating Year shall be a shorter period, commencing on the Effective Date and ending on December 31, 2021.

**Operations Manual:** Document to be developed by Manager which shall contains terms regarding the management and operation of the Facility, including detailed policies and procedures to be implemented in operating the Facility, as agreed upon by both the City and the Manager.

**Revenue:** All revenues generated by Manager's operation of the Facility, including but not limited to event ticket proceeds income, rental and license fee income, merchandise income, gross food and beverage income, gross income from any sale of Commercial Rights, gross service income, equipment rental fees, box office income, and miscellaneous operating income, but shall not include event ticket proceeds held by Manager in trust for a third party and paid to such third party.

**Revenue Generating Contracts:** Vendor, concessions and merchandising agreements, user/rental agreements, booking commitments, licenses, and all other contracts or agreements generating revenue for the Facility and entered into in the ordinary course of operating the Facility.

**Service Contracts:** Agreements for services to be provided in connection with the operation of the Facility, including without limitation agreements for ticketing, web development and maintenance, computer support services, FF&E purchasing services, engineering services, electricity, steam, gas, fuel, general maintenance, HVAC maintenance, telephone, staffing personnel including guards, ushers and ticket-takers, extermination, elevators, stage equipment, fire control panel and other safety equipment, snow removal and other services which are deemed by Manager to be either necessary or useful in operating the Facility.

**Taxes:** Any and all governmental assessments, franchise fees, excises, license and permit fees, levies, charges and taxes, of every kind and nature whatsoever, which at any time during the Term may be assessed, levied, or imposed on, or become due and payable out of or in respect of, (i) activities conducted on behalf of the City at the Facility, including without limitation the sale of concessions, the sale of tickets, and the performance of events (such as any applicable sales and/or admissions taxes, use taxes, excise taxes, occupancy taxes, employment taxes, and withholding taxes), or (ii) any payments received from any holders of a leasehold interest or license in or to the Facility, from any guests, or from any others using or occupying all or any part of the Facility.

**Term:** shall have the meaning ascribed to such term in Section 4.1 of this Agreement.

**Transition Budget** shall mean the budget reflecting anticipated Transition Costs attached hereto as Exhibit E.

**"Transition Costs"** shall mean the out-of-pocket costs incurred, or to be incurred, by Manager in connection with its activities related to the transition of management of the Facility to Manager, as set forth in the Transition Budget.

## **ARTICLE 2 SCOPE OF SERVICES**

### **Section 2.1    Engagement.**

(a) City hereby engages Manager during the Term to act as the sole and exclusive manager and operator of the Facility, subject to and as more fully described in this Agreement, and, in connection therewith, to perform the services described in Exhibit A attached hereto.

(b) Manager hereby accepts such engagement, and shall perform the services described herein, subject to the limitations expressly set forth in this Agreement and in the Operations Manual.

(c) In connection with its services hereunder, Manager agrees to have its corporate and/or regional personnel travel to the Facility a total of at least twelve (12) times from the Effective Date to December 31, 2022 to support or oversee Facility operations/personnel. The cost of these twelve (12) visits shall be a Transition Cost and included in the Transition Budget. Following December 31, 2022, Manager agrees to have its corporate and/or regional personnel travel to the Facility as mutually determined by Manager and the City when the annual Operating Budget is developed. The cost of those site visits shall be an Operating Expense. The specific employees Manager who travel to the Facility and the length of stay shall be determined by Manager in its reasonable discretion.

Section 2.2 Limitations on Manager's Duties. Manager's obligations under this Agreement are contingent upon and subject to the City making available, in a timely fashion, the funds budgeted for and/or reasonably required by Manager to carry out such obligations during the Term. Manager shall not be considered to be in breach or default of this Agreement, and shall have no liability to the City or any other party, in the event Manager does not perform any of its obligations hereunder due to failure by the City to timely provide such funds.

### **ARTICLE 3 COMPENSATION**

Section 3.1 Fixed Management Fee. In consideration of Manager's performance of its services hereunder, City shall pay Manager a Fixed Management Fee each month of the Term. Beginning on the Effective Date and continuing through the end of the second (2<sup>nd</sup>) Operating Year (i.e., December 31, 2022), the Fixed Management Fee shall be Six Thousand Two Hundred Fifty Dollars (\$6,250) per month. Beginning in the third (3<sup>rd</sup>) Operating Year (i.e., January 1, 2023), the Fixed Management Fee shall be increased over the Fixed Management Fee from the previous Operating Year in accordance with the percentage increase in the CPI over the previous twelve (12) month period Year (i.e., the difference, expressed as a percentage, between the value of the CPI published most recently prior to the commencement of the preceding Operating Year and the value of the CPI published most recently prior to the commencement of the Operating Year for which the CPI adjustment will apply), provided that in no event shall the CPI increase in any year be more than three percent (3%). The Fixed Management Fee shall be payable to Manager in advance, beginning on the Effective Date, and payable on the first (1<sup>st</sup>) day of each month thereafter (prorated as necessary for any partial months). Manager shall be entitled to pay itself such amount from the Operating Account.

Section 3.2 Incentive Fee. In addition to the Fixed Management Fee, Manager shall be entitled to receive an Incentive Fee each full or partial Operating Year of the Term, beginning with the Operating Year commencing January 1, 2022. The Incentive Fee shall be comprised of both a qualitative based fee (“**Qualitative Fee**”) and a quantitative based fee (“**Quantitative Fee**”), as follows:

- (a) Qualitative Fee. Beginning with the Operating Year commencing January 1, 2022, Manager shall be eligible to earn a Qualitative Fee of up to twenty thousand dollars (\$20,000) in each Operating Year (pro-rated for any Operating Years of less than a full 12 months based on the actual number of days elapsed in such Operating Year out of 365), provided that in order to be eligible for the Qualitative Fee in any Operating Year, the Facility must achieve (or improve upon) the bottom-line figure in the Operating Budget for that Operating Year. The Qualitative Fee shall be determined by the City, in its reasonable and good faith discretion, based on its evaluation of Manager’s performance each Operating Year in each of the following six (6) performance areas (with each area equal to up to the percentage of \$20,000 set forth as follows):

- Results of Customer Satisfaction Metrics (surveys, mystery shopper results, inspections, etc.) (10%)
- Achievement of annual event/fiscal goals (10%)
- Community/Stakeholder involvement (30%)
- Corporate and/or Regional visits (10%)
- Quality of Management, Operations and Food and Beverage Service (10%)
- Net Promoter Score (30%)

If Manager provides any information to the City on its performance in the foregoing categories, the City shall have the right to review and investigate such information to confirm its accuracy.

(b) Quantitative Fee. Beginning with the Operating Year commencing January 1, 2022, Manager shall be entitled to receive a percentage of Net Operating Income in each Operating Year to the extent Net Operating Income is greater than (\$200,000), as set forth below. The Quantitative Fee shall be:

25% of the Net Operating Income from (\$200,000) to \$0  
12.5% of Net Operating Income from \$0 to \$200,000  
17.5% of Net Operating Income in excess of \$200,000

For any Operating Years of less than a full 12-months, the step scale thresholds (loss of \$200,000, loss of \$0 (ie., breakeven) and profit of \$200,000) shall be prorated based on the actual number of days elapsed in such Operating Year out of 365.

The step scale thresholds shall be applied on an incremental basis and not back to dollar one.



By way of example only, if in any Operating Year, Net Operating Income is \$0 (breakeven), then the Quantitative Fee shall be  $(25\% \times \$200,000) = \$50,000$ . If Net Operating Income is \$200,000, the Quantitative Fee shall be  $[(25\% \times \$200,000) + (12.5\% \times \$200,000)] = \$75,000$ . If Net Operating Income is \$300,000, the Quantitative Fee shall be  $[(25\% \times \$200,000) + (12.5\% \times \$200,000) + (17.5\% \times \$100,000)] = \$92,500$

The Incentive Fee earned by Manager (both the Qualitative Fee and Quantitative Fee) shall be paid to Manager no later than ninety (90) days following the end of each Operating Year.

**Section 3.3 Commercial Rights Fee.** In addition to the other fees due Manager hereunder, the City shall pay Manager twenty percent (20%) of the Revenue from Commercial Rights in excess of two hundred thousand dollars (\$200,000) per Operating Year (“**Commercial Rights Fee**”), provided that for the first (1<sup>st</sup>) Operating Year (August 1, 2021 to December 31, 2021), the \$200,000 figure shall be pro-rated for 5 out of 12 months, to equal \$83,333. For the sake of clarity, the parties acknowledge that the Commercial Rights Fee shall be paid on all gross revenue in excess of \$200,000 (or, for the first Operating Year, \$83,333) from the sale of advertising signage, sponsorships, naming/title rights, sub-naming/title rights, pouring rights, branding rights, and other Commercial Rights at the Facility, including those rights that have been secured by the City or any third party (including the predecessor manager of the Facility) prior to the Effective Date to the extent the Revenue from such prior sales is attributable to any period within the Term. For purposes of this paragraph, Revenue shall include trade/barter which results in an expense savings to the City, with such trade/barter valued at its retail price in an arms-length transaction. The City shall have the right to approve any trade/barter valued at over \$5,000. The Commercial Rights Fee shall be paid for the full duration of all contracts for such Commercial Rights, including any time period that extends after the end of this Agreement, provided that if this Agreement is properly terminated by the City under Section 4.2(b) due to an uncured breach or default by Manager, then the commission payable to Manager on Revenue attributable to any period following the date of termination shall be reduced from twenty percent (20%) to ten percent (10%). Payments due under this paragraph shall be made to Manager on an annual basis, within sixty (60) days of the end of each Operating Year, with respect to Revenue received in that year from the applicable Commercial Rights contracts. The provisions of this paragraph shall survive expiration or termination of this Agreement, and such settlements shall continue on an annual basis following the end of the term with respect to Revenue from Commercial Rights received in such years until such time as all Commercial Rights Fees due Manager under this paragraph are fully paid.

**Section 3.4 Transition Costs.** Promptly following the Effective Date (or prior to the Effective Date, as applicable), Manager shall do all things reasonably necessary to transition from the current management of the Facility to the commencement of its management services hereunder. Manager shall incur the first twenty-five thousand dollars (\$25,000) of Transition Costs for its own account (which shall include the cost of the 12 site visits described in Section 2.1(c) above). The City shall reimburse Manager for the Transition Costs, if any, in excess of twenty five thousand dollars (\$25,000), in accordance with the Transition Budget. Manager shall invoice the City for such costs, and the City shall pay such costs within thirty (30)

days of its receipt of each such invoice. Each invoice to be provided by Manager shall be accompanied by reasonable back-up documentation evidencing the incurrence of the Transition Costs. Manager shall provide advance notice to the City if it anticipates that Transition Costs will exceed \$25,000.

Section 3.5 Late Payments. Manager shall have the right to assess interest on any payments of the fees described in this Section that are not made when due. Such interest shall accrue at the rate of six percent (6%) per annum.

## **ARTICLE 4**

### **TERM; TERMINATION**

Section 4.1 Term. The initial term of this Agreement (the “**Initial Term**”) shall begin on the Effective Date, and, unless sooner terminated pursuant to the provisions of Section 4.2 below, shall expire on December 31, 2026. The City may extend the term for an additional five (5) years following the end of the Initial Term by providing written notice of such extension no later than August 31, 2026. If such notice of extension is received timely by Spectra, the term shall end on December 31, 2031. The Initial Term plus any such extension is referred to herein as the “**Term**”. Notwithstanding that the Term doesn’t commence until the Effective Date, this Agreement is binding on the parties upon full execution and delivery hereof.

Section 4.2 Termination. This Agreement may be terminated:

(a) by City upon ninety (90) days’ written notice to Manager in the event of a permanent closure of the Facility, the fact of which is certified by the City in writing to Manager;

(b) by either party upon thirty (30) days written notice, if the other party fails to perform or comply with any of the material terms, covenants, agreements or conditions hereof, and such failure is not cured during such thirty (30) day notification period, provided, however, if such failure cannot reasonably be cured within such thirty (30) day period, then a longer period of time shall be afforded to cure such breach, up to a total of ninety (90) days, provided that the party in default is diligently seeking a cure and the non-defaulting party is not irreparably harmed by the extension of the cure period;

(c) by either party immediately by written notice upon the other party being judged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of the other party shall be appointed and shall not be discharged within one hundred twenty (120) days after appointment, or if either party shall make an assignment of its property for the benefit of creditors or shall file a voluntary petition in bankruptcy or insolvency, or shall apply for bankruptcy under the bankruptcy or insolvency Laws now in force or hereinafter enacted, Federal, State or otherwise, or if such petition shall be filed against either party and shall not be dismissed within one hundred twenty (120) days after such filing; or

(d) by the City upon no less than ninety (90) days' prior written notice if at any time during the this Agreement, the governing body of the City shall fail or refuse to approve or authorize the funds needed hereunder for the following Operating Year, provided that any such termination shall (1) only be effective upon the end of an Operating Year, (2) in the 24 months following the effective date of such termination, the City shall not replace Manager with another private management company, and (3) such a termination shall be without penalty to the City of Brookings but the City shall be obligated to pay Manager amounts due hereunder up to (and including) the date of termination, including without limitation the unamortized amount of the First Contribution, Second Contribution and, if made, Third Contribution, as set forth in Section 11.3 below.

#### Section 4.3 Effect of Termination

(a) In the event this Agreement is terminated by either party for any reason other than a breach or default by Manager under Section 4.2(b) or a bankruptcy or insolvency event pursuant to Section 4.2(c), the City shall reimburse Manager for any actual ordinary and necessary expenses incurred by Manager in withdrawing from the provision of services hereunder following such termination. Such ordinary and necessary expenses shall include costs associated with (i) severance pay, not to exceed six (6) months, for each of Manager's Management-Level Employees, (ii) reasonable household relocation expenses for Manager's Management-Level Employees, to the extent any of such individuals had previously relocated to the Facility (or its surrounding areas) in connection with this Agreement and (iii) other reasonable costs actually incurred by Manager in withdrawing from the provision of services hereunder, such as those incurred in connection with the termination and/or assignment of Service Contracts, Revenue Generating Contracts, or other contracts or leases entered into by Manager pursuant to this Agreement. The City's payment of such expenses will occur only after Manager has provided reasonable evidence of the incurrence of such expenses.

(b) Upon termination or expiration of this Agreement for any reason, (i) Manager shall promptly discontinue the performance of all services hereunder, (ii) City shall promptly pay Manager all fees due Manager up to the date of termination or expiration (subject to proration if the Term ends other than at the end of the Operating Year), (iii) City shall pay to Manager all Operating Expenses incurred by Manager through the end of the Term that have not previously been paid, including costs of accrued but unused vacation time and other end of employment payments due to Manager's employees who will no longer be employed by Manager following the termination of this Agreement, (iv) Manager shall make available to the City all data, electronic files, documents, procedures, reports, estimates, summaries, and other such information and materials with respect to the Facility as may have been accumulated by Manager in performing its obligations hereunder, whether completed or in process, and (iv) without any further action on part of Manager or City, the City shall, or shall cause the successor Facility manager to, assume all obligations arising after the date of such termination or expiration, under any Service Contracts, Revenue Generating Contracts, booking commitments and any other Facility agreements entered into by Manager in furtherance of its duties hereunder.

Any obligations of the parties that are specifically intended to survive expiration or termination of this Agreement shall survive expiration or termination hereof.

## **ARTICLE 5 OWNERSHIP; USE OF THE FACILITY**

### **Section 5.1    Ownership of Facility, Data, Equipment and Materials.**

The City will at all times retain ownership of the Facility, including but not limited to real estate, technical equipment, furniture, displays, fixtures and similar property, including improvements made during the Term, at the Facility. Any data, equipment or materials furnished by the City to Manager or acquired by Manager as an Operating Expense shall remain the property of the City, and shall be returned to the City when no longer needed by Manager to perform under this Agreement. Notwithstanding the above, City shall not have the right to use any third party software licensed by Manager for general use by Manager at the Facility and other facilities managed by Manager, the licensing fee for which is proportionately allocated and charged to the Facility as an Operating Expense; such software may be retained by Manager upon expiration or termination hereof. Furthermore, the City recognizes that the Operations Manual to be developed and used by Manager hereunder is proprietary to Manager, and shall belong to Manager at the end of the Term; City shall not use or maintain copies thereof upon the end of the Term.

Section 5.2    Right of Use by Manager. The City hereby gives Manager the right and license to use the Facility, and Manager accepts such right of use, for the purpose of performing the services herein specified, including the operation and maintenance of all physical and mechanical facilities necessary for, and related to, the operation, maintenance and management of the Facility. The City shall provide Manager with a sufficient amount of suitable office space in the Facility and with such office equipment as is reasonably necessary to enable Manager to perform its obligations under this Agreement. In addition, the City shall make available to Manager, at no cost, parking spaces adjacent to the Facility for all of Manager's full-time employees and for the Facility's event staff.

Section 5.3    Observance of Agreements. The City agrees to pay, keep, observe and perform all payments, terms, covenants, conditions and obligations under any leases, bonds, debentures, loans and other financing and security agreements to which the City is bound in connection with its ownership of the Facility.

Section 5.4    Use by the City. Subject to availability, the City shall have the right to use the Facility or any part thereof rent-free for meetings, seminars, training classes or other non-commercial uses, provided that the City shall promptly reimburse Manager, for deposit into the Operating Account, for any out-of-pocket expenses incurred by Manager (such as the cost of ushers, ticket-takers, set-up and take-down personnel, security expenses and other expenses) in connection with such use. Such non-commercial use of the Facility by the City shall (i) not compete with or conflict with the dates previously booked by Manager for paying events, (ii) not consist of normally touring attractions (such as concerts and family shows), and (iii) be booked

in advance upon reasonable notice to Manager pursuant to the Facilities' approved booking policies. Upon request of the City, Manager shall provide to the City a list of available dates for City use of the Facility. To the extent that Manager has an opportunity to book a revenue-producing event on a date which is otherwise reserved for use by the City, Manager may propose alternative dates for the City's event, and the City shall use best efforts to reschedule its event to allow Manager to book the revenue-producing event. For purposes of calculating Manager's Incentive Fee, Manager shall receive a "paper" credit for an amount equal to the difference between the published Facility rate and the rate (if any) charged to the City for such use of the Facility, but such credit will apply only in the event the City does not move its event and it displaces a revenue-generating event which is not rescheduled at the Facility.

## **ARTICLE 6 PERSONNEL**

Section 6.1 Generally. All Facility staff and other personnel shall be engaged or hired by Manager, and shall be employees, agents or independent contractors of Manager (or an Affiliate thereof), and not of the City. Manager shall select, in its sole discretion but subject to City's right to approve the Operating Budget, the number, function, qualifications, and compensation, including salary and benefits, of its employees and shall control the terms and conditions of employment (including without limitation termination thereof) relating to such employees. Manager agrees to use reasonable and prudent judgment in the selection and supervision of such personnel. Manager agrees to offer employment to all existing employees of the prior manager at the Facility, at wages no less than such staff is being paid immediately prior to the Effective Date, subject to such employees successfully passing background checks (unless Manager has been advised any such employees are not interested in employment with Manager or are prohibited from accepting employment with Manager). The City specifically agrees that Manager shall be entitled to pay its employees, as an Operating Expense, bonuses and benefits in accordance with Manager's then current employee manual, which may be modified by Manager from time to time in its sole discretion. A copy of Manager's current employee manual shall be provided to the City upon request. City shall pay all accrued but unused vacation time to its employees whose employment with City is terminating and whose employment with Manager is commencing. The City has the right to review compensation information for Manager's employees at the Facility, provided the parties agree that such information is confidential and shall not become public information.

Section 6.2 General Manager. Personnel engaged by Manager will include an individual with managerial experience in similar facilities to serve as a full-time on-site General Manager of the Facility. Hiring of the General Manager by Manager shall require the prior approval of the City, which approval shall not be unreasonably withheld or delayed; provided, however, in the event of a vacancy in the General Manager position, Manager may, upon notice to the City, temporarily fill such position with an interim General Manager for up to ninety (90) days without the necessity of obtaining the City's approval. The General Manager will have general supervisory responsibility for Manager and will be responsible for day-to-day operations of the Facility, supervision of employees, and management and coordination of all activities associated with events taking place at the Facility.

Section 6.3 Non-Solicitation/Non-Hiring. During the Term and for a period of one (1) year after the end of the Term, neither City nor any of its Affiliates shall solicit for employment, or hire, any of Manager's Management-Level Employees. The City acknowledges that Manager will spend a considerable amount of time identifying, hiring and training individuals to work in such positions, and that Manager will suffer substantial damages, the exact amount of which would be difficult to quantify, if the City were to breach the terms of this Section by hiring, or soliciting for employment, any of such individuals. Accordingly, in the event of a breach or anticipated breach of this Section by the City, Manager shall be entitled (in addition to any other rights and remedies which Manager may have at law or in equity, including money damages) to equitable relief, including an injunction to enjoin and restrain the City from continuing such breach, without the necessity of posting a bond. Notwithstanding the foregoing, the City is not restricted from hiring any Spectra employee for a position with the City that is unrelated to the Facility and is materially different than the function performed by the Spectra employee at the Facility, provided that the employee approached the City for the position and was not solicited by the City.

## **ARTICLE 7 OPERATING BUDGET**

Section 7.1 Establishment of Operating Budget. Attached hereto as Exhibit C is the existing Operating Budget for the first (1<sup>st</sup>) Operating Year, which the City acknowledges was prepared by parties other than the Manager prior to the Effective Date and without the Manager's input. Manager agrees that at least one hundred eighty (180) days prior to the commencement of each subsequent Operating Year in respect of such year, it will prepare and submit to the City its proposed Operating Budget for such year. The proposed budget may be revised and updated up to the date that is 45 days prior to the first budget ordinance reading for the upcoming Operating Year. Each annual Operating Budget shall include Manager's good faith projection of Revenues and Operating Expenses, presented on a monthly and annual basis, for the upcoming Operating Year. The City agrees to provide Manager with all information in its possession necessary to enable Manager to prepare each Operating Budget.

Section 7.2 Approval of Operating Budget. Each annual Operating Budget shall be subject to the review and approval of the City, which approval shall not be unreasonably withheld or delayed. In order for the City to fully evaluate and analyze such budgets or any other request by Manager relating to income and expenses, Manager agrees to provide to the City such reasonable financial information relating to the Facility as may be requested by the City from time to time. If extraordinary events occur during any Operating Year that could not reasonably be contemplated at the time the corresponding Operating Budget was prepared, Manager may submit an amendment to such budget for review and approval by the City (which approval shall not be unreasonably withheld or delayed). If the City fails to approve any annual

Operating Budget (or any proposed amendment thereto), the City shall promptly provide Manager the specific reasons therefor and its suggested modifications to Manager's proposed Operating Budget or amendment in order to make it acceptable. The parties shall then engage in good faith discussions and use reasonable commercial efforts to attempt to resolve the matter to the mutual satisfaction of the parties, including, if applicable, negotiation of a mutually acceptable modification to the economic terms of this Agreement to enable the Manager to achieve the compensation contemplated by its proposed Operating Budget.

Section 7.3 Adherence to Operating Budget. Manager shall use all reasonable efforts to manage and operate the Facility in accordance with the Operating Budget. However, City acknowledges that notwithstanding the Manager's experience and expertise in relation to the operation of facilities similar to the Facility, the projections contained in each Operating Budget are subject to and may be affected by changes in financial, economic and other conditions and circumstances beyond the Manager's control, and that Manager shall have no liability if the numbers within the Operating Budget are not achieved. Manager agrees to notify the City within thirty (30) days of any material increase (defined as 10% or more) in the bottom line number in the Operating Budget, and any material increase (defined as 10% or more) in total Facility expenses from that provided for in the Operating Budget. In either such case and if requested by City, Manager agrees to work with City to develop and implement a plan (or changes to the then current plan) to limit Operating Expense to be incurred in the remaining months of such Operating Year with the goal of achieving the Operating Budget.

## **ARTICLE 8**

### **PROCEDURE FOR HANDLING INCOME**

Section 8.1 Event Account. Manager shall deposit as soon as practicable following receipt, in the Event Account, all revenue received from ticket sales and similar event-related revenues which Manager receives in contemplation of, or arising from, an event, pending completion of the event. Such monies will be held in escrow for the protection of ticket purchasers, the City and Manager, to provide a source of funds as required for payments to performers and for payments of direct incidental expenses in connection with the presentation of events that must be paid prior to or contemporaneously with such events. Promptly following completion of such events, Manager shall transfer all funds remaining in the Event Account, including any interest accrued thereon, into the Operating Account. Bank service charges, if any, on such account(s) shall be deducted from interest earned.

Section 8.2 Operating Account. Except as provided in Section 8.1, all Revenue derived from operation of the Facility shall be deposited by Manager into the Operating Account as soon as practicable upon receipt (but not less often than once each business day). The specific procedures (and authorized individuals) for making deposits to and withdrawals from such account shall be set forth in the Operations Manual, but the parties specifically agree that Manager shall have authority to sign checks and make withdrawals from such account, subject to the limitations of this Agreement, without needing to obtain the co-signature of a City employee or representative.

## **ARTICLE 9 FUNDING**

Section 9.1 Source of Funding. Manager shall pay all items of expense for the operation, maintenance, supervision and management of the Facility from the funds in the Operating Account, which Manager may access periodically for this purpose. The Operating Account shall be funded with amounts generated by operation of the Facility (as described in Article 8 above), or otherwise made available by the City. To ensure sufficient funds are available in the Operating Account, City will deposit in the Operating Account, on or before the Effective Date, the budgeted or otherwise approved expenses for the 45 day period beginning on the Effective Date. The City shall thereafter, on or before the 1<sup>st</sup> day of each succeeding month following the Effective Date, deposit (or allow to remain) in the Operating Account the budgeted or otherwise approved expenses for each such month, retaining at all times 45 days of projected Operating Expenses in such account. Manager shall have no liability to the City or any third party in the event Manager is unable to perform its obligations hereunder, or under any third party contract entered into pursuant to the terms hereof, due to the fact that sufficient funds are not made available to Manager to pay such expenses in a timely manner.

Section 9.2 Advancement of Funds. Under no circumstances shall Manager be required to pay for or advance any of its own funds to pay for any Operating Expenses. In the event that, notwithstanding the foregoing, Manager agrees to advance its own funds to pay Operating Expenses, City shall promptly reimburse Manager for the full amount of such advanced funds, plus interest at a rate to be mutually agreed. In the event the City is required to borrow money from non-Facility funding sources (such as from the City's general fund) to fund Facility operations, the City shall notify Manager and Manager and the City shall agree on terms of repayment from the Facility Operating Budget to the City, provided that in no event shall repayment of such funds constitute an "above-the-line" Operating Expense that would have an impact on Manager's Incentive Fee calculation. Rather, repayment of any such loan would be budgeted as a "below-the-line" Operating Expense with no impact on the calculation of Manager's Incentive Fee.

## **ARTICLE 10 FISCAL RESPONSIBILITY; REPORTING**

Section 10.1 Records. Manager agrees to keep and maintain, at its office in the Facility, separate and independent records, in accordance with generally accepted accounting principles, devoted exclusively to its operations in connection with its management of the Facility. Such records (including books, ledgers, journals, and accounts) shall contain all entries reflecting the business operations of Manager under this Agreement. The City or its authorized agent shall have the right to audit and inspect such records at any time, but no more than four (4) times per year, upon reasonable notice to Manager and during Manager's ordinary business hours.

Section 10.2 Monthly Financial Reports. Manager agrees to provide to the City, within twenty-five (25) days after the end of each month during the Term, financial reports for the Facility including a balance sheet, aging report on accounts receivable, and statement of



revenues and expenditures (budget to actual) for such month and year to date in accordance with generally accepted accounting principles, provided however the first financial statement Manager shall provide shall be within thirty (30) days following the second (2<sup>nd</sup>) month of the Term, and shall cover the first two (2) months of the Term. In addition, starting with the second (2<sup>nd</sup>) month of the Term, Manager agrees to provide to the City a summary of bookings for each such month, separate cash receipts and disbursements reports for each event held at the Facility during such month, a profit/loss statement for each event held at the Facility in such month, and a profit/loss statement for food and beverage service for such month. Additionally, Manager shall submit to the City, or shall cause the applicable public depository utilized by Manager to submit to the City, on a monthly basis, copies of all bank statements concerning the Event Account and the Operating Account and a monthly bank account reconciliation.

Section 10.3 Audit. Manager agrees to provide to the City, within one hundred twenty (120) days following the end of each Operating Year, a certified audit report on the accounts and records as kept by Manager for the Facility. Costs associated with obtaining such certified audit report shall be an Operating Expense of the Facility. Such audit shall be performed by an external auditor approved by the City and shall be conducted in accordance with generally accepted auditing standards.

## **ARTICLE 11**

### **CAPITAL IMPROVEMENTS; SPECTRA FINANCIAL COMMITMENTS; PERFORMANCE BOND**

Section 11.1 Schedule of Capital Expenditures. Manager shall annually, at the time of submission of the annual Operating Budget to the City, provide to the City a schedule of proposed capital improvements to be made at the Facility, for the purpose of allowing the City to consider such projects and to prepare and update a long-range Capital Expenditure budget.

Section 11.2 Responsibility for Capital Expenditures. The City shall be solely responsible for all Capital Expenditures at the Facility; provided, however, the City shall be under no obligation to make any Capital Expenditures proposed by Manager, and provided further that Manager shall have no liability for any claims, costs or damages arising out of a failure by the City to make any Capital Expenditures. Notwithstanding the foregoing, Manager shall have the right (but not the obligation), upon notice to the City, to make Capital Expenditures at the Facility for Emergency Repairs. In such event, the City shall promptly reimburse Manager for the cost of such Capital Expenditure.

Section 11.3 Capital Contribution. Manager shall contribute three hundred twenty-five thousand dollars (\$325,000), in two (2) installments as follows: \$225,000 to be contributed by January 1, 2022 (“**First Contribution**”), and \$100,000 to be contributed by January 1, 2023 (“**Second Contribution**”). The First Contribution and Second Contribution shall be used for mutually agreed revenue-generating purposes, such as, for example, a booking/marketing fund use to attract events to the Facility, or other revenue-generating projects at the Facility. If the City exercises its right in Section 4.1 to extend the Term for an additional five (5) years through December 31, 2031, Manager shall contribute an additional one hundred thousand dollars (\$100,000) by January 1, 2027 (“**Third Contribution**”) for revenue-generating

projects/improvements at the Facility. Each individual contribution shall amortize on a straight-line basis over the period from the date such contribution is made through December 31, 2031. Upon the expiration or termination (for any reason whatsoever, including without limitation if due to a breach, default or bankruptcy event by or affecting Manager or the City's election not to renew this Agreement following the Initial Term) of this Agreement, the City shall immediately pay to Manager the unamortized amount of the First Contribution, Second Contribution and, if made, Third Contribution.

Section 11.4 Annual Scholarship Commitment. Commencing in the Operating Year starting on January 1, 2022, Spectra shall provide two (2) annual scholarships of one thousand dollars (\$1,000) each (\$2,000 total per Operating Year) to deserving South Dakota State University students who major in subjects related to the venue management industry. Specific criteria for selecting the recipients and award of the scholarships shall be subject to mutual agreement and a process to be developed jointly between Manager, the City and South Dakota State University.

Section 11.5 Annual CVB Commitment. Commencing in the Operating Year starting on January 1, 2022, Spectra shall provide to the Brookings Convention and Visitors Bureau an annual grant of three thousand dollars (\$3,000) to be used for marketing purposes.

Section 11.6 Performance Bond. To secure Spectra's performance hereunder, Spectra shall during the Term secure and maintain a performance bond, in a form and substance mutually agreed by Spectra and the City, and from a surety reasonably acceptable to the City, in the amount of Three Hundred Thousand Dollars (\$300,000). The cost of securing the performance bond shall be an Operating Expense.

## **ARTICLE 12 FOOD AND BEVERAGE**

Section 12.1 Generally. Manager shall have the sole and exclusive right to manage and perform, and Manager hereby agrees to manage and perform, all food and beverage concession and catering service at the Facility ("**Food and Beverage Service**"). Manager may engage sub-contractors to sell food and beverages at the Facility when approved in writing by the City.

Section 12.2 Concession and Catering Areas. Manager shall have the exclusive right to use (or permit a third party to use, as applicable) the concession stands, novelty stands, customer serving locations, food preparation areas, vendor commissaries, kitchen and warehouse facilities, and other food service related areas of the Facility, together with the improvements, equipment and personal property upon or within such areas, for the purpose of providing the Food and Beverage Service (and providing other duties required of Manager hereunder). The City shall provide, at no cost to Manager, all smallwares and equipment reasonably required by Manager to perform the Food and Beverage Service.

Section 12.3 Food and Beverage Duties. In connection with its management and provision of the Food and Beverage Service, Manager shall:

(a) Develop and implement all necessary policies and procedures for the food and beverage operations;

(b) Engage and oversee employees necessary to perform the Food and Beverage Services;

(c) Manage the Food and Beverage Service in compliance with and subject to all federal, state and local laws, ordinances and regulations (including, without limitation, health and sanitation codes and regulations with respect to the sanitation and purity of the food and beverage products for sale);

(d) Arrange for all minor repairs and routine maintenance to the equipment used in the operation of the Food and Beverage Service;

(e) Keep the food and beverage facilities and equipment neat, clean and in a sanitary condition;

(f) Undertake appropriate advertising, marketing and promotion of the food and beverage offerings at the Facility;

(g) Develop menus, portions, brands, prices, themes and marketing approaches. Manager shall be entitled to set the prices for such items for sale, but Manager agrees to confer with the City Contract Administrator and take the City's views into account prior to setting (or changing) such prices; and

(h) Order, stock, prepare, pay for (as an Operating Expense) and sell appropriate foods and beverages.

Section 12.4 Alcohol Licenses and Permits. Manager agrees to apply for all appropriate alcohol licenses and permits, subject to applicable law. The City shall provide reasonable assistance to Manager in such regard. At the end of the Term, Manager shall without charge to City relinquish its rights in, or terminate (as applicable), the alcohol licenses and permits for the Facility.

Section 12.5 Food and Beverage Revenue and Expenses. All revenue to the Facility from operation of the Food and Beverage Service shall be deemed to be Revenue, and shall be deposited by Manager into the Operating Account. All expenses incurred in connection with the provision of the Food and Beverage Service shall be Operating Expenses, payable by Manager with funds from the Operating Account.

## **ARTICLE 13**

### **FACILITY CONTRACTS; TRANSACTIONS WITH AFFILIATES**

Section 13.1 Existing Contracts. The City shall provide to Manager, on or before the Effective Date, copies of all Existing Contracts. Manager shall administer and assure compliance with such Existing Contracts.

Section 13.2 Execution of Contracts. Manager shall have the right to enter into Service Contracts, Revenue Generating Contracts and other contracts related to the operation of the Facility, as agent on behalf of the City. Any such material agreements shall contain standard indemnification and insurance obligations on the part of each vendor, licensee or service provider, as is customary for the type of services or obligations being provided or performed by such parties. Manager shall obtain the prior approval of the City (which approval shall not be unreasonably withheld or delayed) before entering into any such contract (i) with a term that expires after the Term of this Agreement, unless such contract, by its express terms, can be terminated by Manager or City following expiration of the Term without any penalty, (ii) .Service Contracts committing the City to expenses that are not within an approved Operating Budget, (iii) agreements for the sale/license of Commercial Rights for more than \$50,000 of value per Operating Year, and (iv) agreements for the sale of disposition of any City assets for more than \$5,000 per Operating Year.

Section 13.3 Transactions with Affiliates. In connection with its obligations hereunder relating to the purchase or procurement of services for the Facility (including without limitation food and beverage services, ticketing services, Commercial Rights sales, web design services and graphic design services), Manager may purchase or procure such services, or otherwise transact business with, an Affiliate of Manager, subject to the prior approval of the City, such approval not to be unreasonably withheld. Manager shall, at the request of the City, provide reasonable evidence establishing the competitive nature of such prices and services, including, if appropriate, competitive bids from other persons seeking to render such services at the Facility.

## **ARTICLE 14**

### **AGREEMENT MONITORING AND GENERAL MANAGER**

Section 14.1 Contract Administrator. Each party shall appoint a contract administrator who shall monitor such party's compliance with the terms of this Agreement. Manager's contract administrator shall be its General Manager at the Facility, unless Manager notifies City of a substitute contract administrator in writing. City shall notify Manager of the name of its contract administrator within thirty (30) days of execution hereof. Any and all references in this Agreement requiring Manager or City participation or approval shall mean the participation or approval of such party's contract administrator.

## **ARTICLE 15**

### **INDEMNIFICATION**

Section 15.1 Indemnification by Manager. Manager agrees to defend, indemnify and hold harmless the City and its officials, directors, officers, employees, agents, successors and assigns against any claims, causes of action, costs, expenses (including reasonable attorneys' fees) liabilities, or damages (collectively, "**Losses**") suffered by such parties and caused by any

(a) negligent act or omission, or intentional misconduct, on the part of Manager or any of its employees or agents in the performance of its obligations under this Agreement, or (b) breach by Manager of any of its representations, covenants or agreements made herein.

Section 15.2 Indemnification by the City. City agrees to defend, indemnify and hold harmless Manager, its parent, subsidiary and affiliate companies, and each of their respective directors, officers, employees, agents, successors and assigns, against any Losses suffered by such parties, arising out of or in connection with (a) any negligent act or omission, or intentional misconduct, or failure to comply with Laws, on the part of City or any of its employees or agents in the performance of its obligations under this Agreement, (b) a breach by City of any of its representations, covenants or agreements made herein, including without limitation City's obligation to pay any budgeted or otherwise approved expenses in a timely manner, (c) failure by City to pay any amounts due by City or to otherwise perform any obligations of City under any third party contracts, licenses or agreements entered into by Manager in furtherance of its duties hereunder as authorized hereby; (d) any environmental condition at the Facility or on or under the premises on which the Facility is located not caused by Manager, its employees or agents, (e) any structural defect with respect to the Facility, (f) the fact that any time prior to, as of, or after the date hereof the Facility is not or has not been in compliance with all Laws, including, but not limited to, the Americans With Disabilities Act as it now exists and as it may be amended in the future by statute or judicial interpretation, (g) any act or omission carried out by Manager at or pursuant to the direction or instruction of City, its agents or employees, (h) any claims relating to the Facility or its operations accruing or caused by occurrences prior to the Effective Date or following termination or expiration of this Agreement, and (i) any withdrawal liability for a share of unfunded vested benefits under multiemployer plans (as that term is defined in 4001(a)(3) of the Employee Retirement Income Security Act of 1974, as amended).

Section 15.3 Conditions to Indemnification. With respect to each separate matter brought by any third party against which a party hereto ("Indemnatee") is indemnified by the other party ("Indemnitor") under this Article 14, the Indemnitor shall be responsible, at its sole cost and expense, for controlling, litigating, defending and/or otherwise attempting to resolve, through counsel of its choice, any proceeding, claim, or cause of action underlying such matter, except that (a) the Indemnatee may, at its option, participate in such defense or resolution at its expense and through counsel of its choice; (b) the Indemnatee may, at its option, assume control of such defense or resolution if the Indemnitor does not promptly and diligently pursue such defense or resolution, provided that the Indemnitor shall continue to be obligated to indemnify the Indemnatee hereunder in connection therewith; and (c) neither Indemnitor nor Indemnatee shall agree to any settlement without the other's prior written consent (which shall not be unreasonably withheld or delayed). In any event, Indemnitor and Indemnatee shall in good faith cooperate with each other and their respective counsel with respect to all such actions or proceedings, at the Indemnitor's expense. With respect to each and every matter with respect to which any indemnification may be sought hereunder, upon receiving notice pertaining to such matter, Indemnatee shall promptly give reasonably detailed written notice to the Indemnitor of the nature of such matter and the amount demanded or claimed in connection therewith.

Section 15.4 Survival. The obligations of the parties contained in this Article 15 shall survive the termination or expiration of this Agreement.

Section 15.5 Legal Costs. Notwithstanding the other provisions of this Agreement, if legal costs are being incurred by the Manager or the City for a third party claim in respect of which the City is claiming indemnity from the Manager, such legal costs will be considered an Operating Expense unless and until liability of the Manager pursuant to this Agreement is conclusively established by a court of competent jurisdiction with respect to the underlying claim on which the Manager's obligation to indemnify is based. In the event that the liability of the Manager is so conclusively determined, then such legal costs shall be considered as costs of the Manager (and not Operating Expenses) and covered by the indemnity given by the Manager to the City hereunder and the parties shall adjust between them in respect of such legal costs.

## **ARTICLE 16 INSURANCE**

Section 16.1 Types and Amount of Coverage. Manager agrees to obtain insurance coverage in the manner and amounts as set forth in Exhibit D, attached hereto, and shall provide to the City promptly following the Effective Date a certificate of certificates of insurance evidencing such coverage. Manager shall maintain such referenced insurance coverage at all times during the Term, and will not make any material modification or change from these specifications without the prior approval of the City. Each insurance policy shall include a requirement that the insurer provide Manager and the City at least thirty (30) days written notice of cancellation or material change in the terms and provisions of the applicable policy. The cost of all such insurance shall be an Operating Expense.

Section 16.2 Rating; Additional Insureds. All insurance policies shall be issued by insurance companies rated no less than A VIII in the most recent "Bests" insurance guide, and licensed in the State of South Dakota or as otherwise agreed by the parties. All such policies shall be in such form and contain such provisions as are generally considered standard for the type of insurance involved. The commercial general liability policy, automobile liability insurance policy and umbrella or excess liability policy to be obtained by Manager hereunder shall name City as an additional insured. The workers compensation policy to be obtained by Manager hereunder shall contain a waiver of all rights of subrogation against the City. Manager shall require that all third-party users of the Facility, including without limitation third-party licensees, ushers, security personnel and concessionaires, provide certificates of insurance evidencing insurance appropriate for the types of activities in which such user is engaged. If Manager subcontracts any of its obligations under this Agreement, Manager shall require each such subcontractor to secure insurance that will protect against applicable hazards or risks of loss as and in the minimum amounts designated herein, and name Manager and the City as additional insureds.

## **ARTICLE 17 REPRESENTATIONS, WARRANTIES AND COVENANTS**

Section 17.1 Manager Representations and Warranties. Manager hereby represents, warrants and covenants to City as follows:

(a) that it has the full legal right, power and authority to enter into this Agreement and to grant the rights and perform the obligations of Manager herein, and that no third party consent or approval is required to grant such rights or perform such obligations hereunder; and

(b) that this Agreement has been duly executed and delivered by Manager and constitutes a valid and binding obligation of Manager, 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.

(c) that Manager will comply with all Laws applicable to its management of the Facility, provided that Manager shall not be required to undertake any compliance activity, nor shall Manager have any liability under this Agreement therefor, if such activity requires any Capital Expenditure.

Section 17.2 City Representations, Warranties and Covenants. City represents, warrants and covenants to Manager as follows:

(a) that it has the full legal right, power and authority to enter into this Agreement and to grant the rights and perform the obligations of City herein, and that no other third party consent or approval is required to grant such rights or perform such obligations hereunder.

(b) that this Agreement has been duly executed and delivered by City and constitutes a valid and binding obligation of 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.

(c) that the Facility is, as of the Effective Date, in compliance in all respects with all applicable Laws relating to the construction, use and operation of the Facility (including, without limitation, Title III of the American with Disabilities Act), and that there exist no structural defects or unsound operating conditions at the Facility.

## **ARTICLE 18 MISCELLANEOUS**

Section 18.1 Non-Compete. During the Term, without the prior written consent of the City (which shall not be unreasonably withheld), neither Manager nor any subsidiary of Manager shall manage or operate any indoor arena with under 10,000 fixed seats, or a convention/conference center, within a 75-mile radius of the Facility, including without limitation the following venues ("Spectra Foods SD Venues"): Denny Sanford Premier Center

(notwithstanding that it has more than 10,000 fixed seats), Sioux Falls Arena, Sioux Falls Convention Center, and the Sanford Pentagon. The foregoing restriction shall not limit or prevent Manager from (i) providing consulting services, food and beverage services, marketing/sales service for Commercial Rights, or other services ancillary to full management and operation services, at indoor arenas or convention/conference centers within such restricted area, (ii) managing or operating venues that are not indoor arenas or convention centers, such as stadiums, amphitheaters, performing arts centers, ballparks, fairgrounds or other venues that are not indoor arenas or convention/conference centers, and (iii) managing or operating any indoor arena with over 10,000 fixed seats, except for the Premier Center. Manager shall use commercially reasonable efforts to avoid conflicts of interest between its food and beverage operations at the Facility and its food and beverage operations at the Spectra Foods SD Venues.

Section 18.2 PCI Compliance. Manager agrees to comply with all current Payment Card Industry Data Security Standards (“PCI Standards”) and guidelines that may be published from time to time by Visa, MasterCard or other associations as they relate to the physical storage of credit card data. For PCI Standards compliance purposes, City will provide on a segmented network, an appropriate number of wired data connections to the Internet for point of sale devices to be used by Manager and any contractors at the Facility. City shall be responsible for the security of its network, including, without limitation, applicable PCI-DSS compliance, and for procuring and installing point of sale (POS) payment systems that are compliant with the latest PCI-DSS requirements. If at any time either party determines that card account number or other information has been compromised, such party will notify the other immediately and assist in providing notification to the proper parties as deemed necessary.

Section 18.3 No Discrimination. Manager agrees that it will not discriminate against any employee or applicant for employment for work under this Agreement because of race, religion, color, sex, disability, national origin, ancestry, physical handicap, or age, and will take affirmative steps to ensure that applicants are employed, and employees are treated during employment, without regard to race, religion, color, sex, disability, national origin, ancestry, physical handicap, or age.

Section 18.4 Use of Facility Names and Logos. Manager shall have the right to use throughout the Term (and permit others to use in furtherance of Manager’s obligations hereunder), for no charge, the name and all logos of the Facility, on Manager’s stationary, in its advertising of the Facility, and whenever conducting business of the Facility; provided, that Manager shall take all prudent and appropriate measures to protect the intellectual property rights of the City relating to such logos. All intellectual property rights in any Facility logos developed by the Manager or the City shall be and at all times remain the sole and exclusive property of the City. Manager agrees to execute any documentation requested by the City from time to time to establish, protect or convey any such intellectual property rights.

Section 18.5 Facility Advertisements. The City agrees that in all advertisements placed by the City for the Facility or events at the Facility, whether such advertisements are in print, on radio, television, the internet or otherwise, it shall include a designation that the Facility is “Managed by Spectra”.



Section 18.6 Force Majeure; Casualty Loss.

(a) Neither party shall be liable or responsible to the other party for any delay, loss, damage, failure or inability to perform under this Agreement due to an Event of Force Majeure, provided that the party claiming failure or inability to perform provides written notice to the other party within thirty (30) days of the date on which such party gains actual knowledge of such Event of Force Majeure. Notwithstanding the foregoing, in no event shall a party's failure to make payments due hereunder be excusable due to an Event of Force Majeure.

(b) In the event of damage or destruction to a material portion of the Facility by reason of fire, storm or other casualty loss that renders the Facility (or a material portion thereof) untenable, the City shall use reasonable efforts to remedy such situation. If notwithstanding such efforts, such damage or destruction is expected to render the Facility (or a material portion thereof) untenable for a period estimated by an architect selected by the City at Manager's request, of at least one hundred eighty (180) days from the date of such fire, storm or other casualty loss, either party may terminate this Agreement upon written notice to the other, provided that (i) the City shall pay to Manager its costs of withdrawing from services hereunder, as described in Section 4.3(a) above, and (ii) in the event the Facility once again becomes tenable at any time during the Term, this Agreement shall, at the option of Manager, once again become effective and Manager shall manage and operate the Facility under the terms hereof, except that the Term shall be extended for a period of time in which the Facility was closed.

Section 18.7 Assignment; Binding on Successors and Assigns. Neither party may assign this Agreement without the prior written consent of the other, which consent shall not be unreasonably withheld or delayed, except that either party may, without the prior written consent of the other party but upon at least 30 days' written notice to the other party, assign this Agreement in connection with a sale, merger or other business combination involving all or substantially all of its assets or equity interests, and Manager may further assign this Agreement to an Affiliate where such assignment is intended to accomplish an internal corporate purpose of Manager as opposed to materially and substantially altering the method of delivery of services to City. Any purported assignment in contravention of this Section shall be void. This Agreement is binding on successors and permitted assigns of the parties.

Section 18.8 Notices. All notices required or permitted to be given pursuant to this Agreement shall be in writing and delivered personally or sent by registered or certified mail, return receipt requested, or by generally recognized, prepaid, overnight air courier services, to the address and individual set forth below. All such notices to either party shall be deemed to have been provided when delivered, if delivered personally, three (3) days after mailed, if sent by registered or certified mail, or the next business day, if sent by generally recognized, prepaid, overnight air courier services.

If to the City:

If to Manager:

Spectra Venue Management

\_\_\_\_\_  
\_\_\_\_\_

150 Rouse Blvd.  
Philadelphia, PA 19112  
Attn: Chief Operating Officer

With a copy to:

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Spectra Venue Management  
150 Rouse Blvd.  
Philadelphia, Pennsylvania 19112  
Attn: General Counsel

The designation of the individuals to be so notified and the addresses of such parties set forth above may be changed from time to time by written notice to the other party in the manner set forth above.

Section 18.9 Severability. If a court of competent jurisdiction determines that any term of this Agreement is invalid or unenforceable to any extent under applicable law, the remainder of this Agreement (and the application of this Agreement to other circumstances) shall not be affected thereby, and each remaining term shall be valid and enforceable to the fullest extent permitted by law.

Section 18.10 Entire Agreement. This Agreement (including the exhibits attached hereto) contains the entire agreement between the parties with respect to the subject matter hereof, and supersedes and replaces all prior negotiations, correspondence, conversations, agreements, and understandings concerning the subject matter hereof. Accordingly, the parties agree that no deviation from the terms hereof shall be predicated upon any prior representations, agreements or understandings, whether oral or written.

Section 18.11 Dispute Resolution; Governing Law. Prior to either party filing a lawsuit against the other arising out of a dispute under the terms of this Agreement, the parties agree to first elevate the dispute to senior representatives of each party and engage in a good faith attempt to resolve the dispute for at least 15 days. Such good faith attempt may include, if mutually agreed, a mediation or other non-binding form of dispute resolution. Notwithstanding the foregoing, nothing shall limit or prevent a party from seeking an injunction without delay if it believes its interests could be materially and irreparably harmed by the delay. The Agreement is entered into under and pursuant to, and is to be construed and enforceable in accordance with, the laws of the State of South Dakota, without regard to its conflict of laws principles.

Section 18.12 Amendments. Neither this Agreement nor any of its terms may be modified or amended except by an instrument in writing signed by an authorized representative of each of the parties hereto.

Section 18.13 Waiver; Remedies. No failure or delay by a party hereto to insist on the strict performance of any term of this Agreement, or to exercise any right or remedy consequent to a breach thereof, shall constitute a waiver of any breach or any subsequent breach of such term. No waiver of any breach hereunder shall affect or alter the remaining terms of this

Agreement, but each and every term of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof. The remedies provided in this Agreement are cumulative and not exclusive of the remedies provided by law or in equity.

Section 18.14 Relationship of Parties. Manager and City acknowledge and agree that they are not joint venturers, partners, or joint owners with respect to the Facility, and nothing contained in this Agreement shall be construed as creating a partnership, joint venture or similar relationship between City and Manager. In operating the Facility, entering into contracts, accepting reservations for use of the Facility, and conducting financial transactions for the Facility, Manager acts on behalf of and as agent for City (but subject to the limitations on Manager's authority as set out in this Agreement), with the fiduciary duties required by law of a party acting in such capacity.

Section 18.15 No Third Party Beneficiaries. Other than the indemnitees listed in Sections 15.1 and 15.2 hereof (who are third party beneficiaries solely with respect to the indemnification provisions in such sections), there are no intended third party beneficiaries under this Agreement, and no third party shall have any rights or make any claims hereunder, it being intended that solely the parties hereto (and the aforementioned indemnitees with respect to the indemnification provisions hereof) shall have rights and may make claims hereunder.

Section 18.16 Attorneys Fees. If any suit or action is instituted by either party hereunder, including all appeals, the prevailing party in such suit or action shall be entitled to recover reasonable attorney fees and expenses from the non-prevailing party, in addition to any other amounts to which it may be entitled.

Section 18.17 Limitation on Damages. In no event shall either party be liable or responsible for any consequential, indirect, incidental, punitive, or special damages (including, without limitation, lost profits) whether based upon breach of contract or warranty, negligence, strict tort liability or otherwise, and each party's liability for damages or losses hereunder shall be strictly limited to direct damages that are actually incurred by the other party, provided that the foregoing shall not limit or restrict any claim by Manager for the management fees described herein upon a breach or default of this Agreement by City.

Section 18.18 Counterparts; Facsimile and Electronic Signatures. This Agreement may be executed in counterparts, each of which shall constitute an original, and all of which together shall constitute one and the same document. This Agreement may be executed by the parties and transmitted by facsimile or electronic transmission, and if so executed and transmitted, shall be effective as if the parties had delivered an executed original of this Agreement.

IN WITNESS WHEREOF, each party hereto has caused this Management Agreement to be executed on behalf of such party by an authorized representative as of the date first set forth above.

City of Brookings, South Dakota

GLOBAL SPECTRUM, L.P.,  
d/b/a Spectra Venue Management

By: Global Spectrum, LLC, its general  
partner

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**SCHEDULE 1**  
**MAP DEFINING OUTDOOR AREAS UNDER MANAGER'S MANAGEMENT**

## **EXHIBIT A MANAGER DUTIES**

Manager's obligations under the Agreement shall consist of the following obligations, all of which are subject to the terms hereof and the controls and restrictions in the Operations Manual:

(a) Manage all aspects of the Facility in accordance with the Operations Manual and the terms of this Agreement, including but not limited to managing food and beverage service, purchasing, payroll, fire prevention, security, crowd control, routine repairs, preventative maintenance, janitorial services, promotions, advertising, energy conservation, security, box office, admission procedures, parking (if applicable), and general user services.

(b) Establish and adjust prices, rates and rate schedules for user, license, concessions, occupancy, and advertising agreements, and booking commitments. Manager may deviate from the established rate schedule when entering into any such agreements if determined by Manager, using its reasonable business judgment, to be necessary or appropriate with respect to the specific situation.

(c) Procure, negotiate, execute, administer and assure compliance with Service Contracts, Revenue Generating Contracts, and other contracts related to the operation of the Facility.

(d) Require that all material vendors and licensees of the Facility execute vendor/license agreements containing standard indemnification and insurance obligations on the part of each such vendor/licensee.

(e) Provide standard form advertising and sponsorship contracts and user/rental agreements for use at or with respect to the Facility. Manager shall submit such form agreements to the City for review and comment, and the parties shall work together to finalize such forms. Once finalized, Manager shall use such forms in furtherance of its duties hereunder, and shall not materially deviate from the terms contained in such forms without obtaining the prior approval of the City (which shall not be unreasonably withheld). Manager's sole responsibility with regard to providing legal advice or assistance hereunder shall be to provide such standard form contracts.

(f) Operate and maintain the Facility, including the equipment utilized in connection with its operation and any improvements made during the term of this Agreement, in the condition received, normal wear and tear excepted.

(g) Arrange for and otherwise book events at the Facility in accordance with a booking schedule to be developed by Manager.

(h) Hire or otherwise engage, pay, supervise, and direct all personnel Manager deems necessary for the operation of the Facility in accordance with Article 6 of the Agreement,

and conduct staff planning, retention and training programs as determined to be necessary by Manager in its sole discretion.

(i) Maintain detailed, accurate and complete financial and other records of all its activities under this Agreement in accordance with generally accepted accounting principles, which records shall be made available to the City upon request, in accordance with Section 10.1 of the Agreement.

(j) Submit to the City in a timely manner financial and other reports detailing Manager's activities in connection with the Facility, as set forth in Section 10.2 of the Agreement.

(k) Prepare a proposed annual Operating Budget and submit such proposed budget to the City, both in accordance with Article 7 of the Agreement.

(l) Pay all Operating Expenses and other expenses incurred in connection with the operation, maintenance, supervision and management of the Facility from the Operating Account or with funds otherwise made available by the City.

(m) Secure, or assist the City (or any other third party, as applicable) to secure, all licenses and permits necessary for the operation and use of the Facility for the specific events to be held therein, and for the general occupancy of the Facility, including without limitation all necessary food and liquor licenses, and renewals thereof. The City shall cooperate in this process to the extent reasonably required. All costs associated with this process shall be Operating Expenses.

(n) Collect, deposit and hold in escrow in the Event Account any ticket sale revenues which it receives in the contemplation of or arising from an event pending the completion of the event, as more fully described in Section 8.1 of the Agreement.

(o) Collect in a timely manner and deposit in the Operating Account all Revenue, as more fully described in Section 8.2 of the Agreement.

(p) Subject to the City making available sufficient funds in a timely manner, pay all Taxes.

(q) Plan, prepare, implement, coordinate and supervise all public relations and other promotional programs for the Facility.

(r) Prepare, maintain and implement on a regular basis, subject to the City's approval, a Marketing Plan for the Facility.

(s) Market and sell Commercial Rights at or in connection with the Facility.

(t) On an annual basis, cause a written inventory to be taken of all furniture, fixtures, office equipment, supplies, tools and vehicles at the Facility, and deliver a written report

of the foregoing to City. Manager shall document all major damage to, or loss in, such inventory during the Term as soon as such damage or loss is discovered by Manager, and Manager shall promptly notify City of any such damage or loss.

(u) Purchase, on behalf of the City and with City funds, and maintain during the Term, all materials, tools, machinery, equipment and supplies necessary for the operation of the Facility.

(v) As agent for the City, manage risk management and Facility insurance needs, as more fully described in Article 16 of the Agreement.

(w) Make and be responsible for all routine and minor repairs, maintenance, preventative maintenance, and equipment servicing. Manager shall be responsible for ensuring that all repairs, replacements, and maintenance shall be of a quality and class at least equal to that of the item being repaired, replaced or maintained. Any replacement of an item in inventory, or any new item added to the inventory, which is paid for by the City, shall be deemed the property of the City.

(x) Cause such other acts and things to be done with respect to the Facility, as determined by Manager in its reasonable discretion to be necessary for the management and operation of the Facility following the Effective Date.



**EXHIBIT B**  
**EXISTING CONTRACTS**

**EXHIBIT C**  
**OPERATING BUDGET (1<sup>ST</sup> OPERATING YEAR)**

## **EXHIBIT D INSURANCE**

At all times during this Agreement, Manager shall maintain the following insurance coverage:

- (a) commercial general liability insurance (including liquor liability), including products and completed operations, bodily injury and property damage liability, contractual liability, independent contractors' liability and personal and advertising injury liability against claims occurring on, in, or about the Facility, or otherwise arising under this Agreement;
- (b) umbrella or excess liability insurance;
- (c) commercial automobile liability insurance, including coverage for the operation of owned, leased, hired and non-owned vehicles;
- (d) workers compensation and employer's liability insurance as shall be required by and be in conformance with the laws of the State of South Dakota;
- (e) professional liability insurance and self-insured employment practices liability coverage;
- (f) employment practices liability insurance;
- (g) pollution liability; and
- (h) crime coverage.

Such liability insurance shall be maintained in the following minimum amounts throughout the Term:

Commercial General Liability

\$1,000,000 per occurrence

\$1,000,000 personal and advertising injury

\$1,000,000 products-completed operations aggregate

Umbrella or Excess Liability

\$5,000,000 per occurrence and aggregate

Automobile Liability

\$1,000,000 per accident (PI and PD combined single limit)

\$1,000,000 uninsured/underinsured motorist

Workers Compensation

Workers Compensation: Statutory

Employer's Liability: \$100,000 each accident-bodily injury by accident

\$500,000 policy limit-bodily injury by disease

\$100,000 each employee-bodily injury by disease

Professional Liability/Errors & Omissions (Claims Made basis)

\$1,000,000 each occurrence/aggregate

Employment Practices Liability Insurance (Claims Made basis)

\$1,000,000

Pollution Liability (Claims Made basis)

\$1,000,000

Crime Insurance

Coverage on all on-site Manager employees. Limit: \$500,000.00

## **EXHIBIT E**

### **TRANSITION COSTS**

- **\$7,500** for relocation of bringing an Assistant General Manager to the Swiftel Center
- **\$6,000** for staff background checks
- **\$11,500** to cover the costs of regular corporate visits to the Swiftel Center to ensure transition operations are running efficiently and effectively

**The above line-item amounts are estimates only. Spectra is committed to spending up to \$25,000 for Transition Costs, without regard to individual line-items.**