

Boucher Brothers Miami Beach, LLC
Amended and Restated Public Beachfront Concession Agreement

**AMENDED AND RESTATED CONCESSION AGREEMENT BETWEEN
CITY OF MIAMI BEACH, FLORIDA
AND
BOUCHER BROTHERS MIAMI BEACH, LLC
FOR
MANAGEMENT AND OPERATION OF PUBLIC BEACHFRONT CONCESSIONS**

THIS AMENDED AND RESTATED CONCESSION AGREEMENT ("Agreement") made this ____ day of _____, 2019, is effective as of July 1, 2019 (the "Effective Date"), between the **CITY OF MIAMI BEACH**, a municipal corporation of the State of Florida ("City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **BOUCHER BROTHERS MIAMI BEACH, LLC**, a limited liability company of the State of Florida, with offices at 1451 Ocean Dr., Suite 205, Miami Beach, Florida 33139 ("**Concessionaire**").

WHEREAS, the City granted to Concessionaire, and Concessionaire accepted from the City, the exclusive right to operate certain described concessions within the Concession Areas (as said term is hereinafter defined) pursuant to that certain Concession Agreement between the parties executed on February 2, 2012, as amended by Amendment No. 1 to Concession Agreement dated November 15, 2016 (the "Original Agreement");

WHEREAS, in accordance with Section 1.03(f) of the City Charter, on April 30, 2019, the City's Planning Board approved the terms of the proposed Agreement; and

WHEREAS, on May 8, 2019, the Mayor and City Commission adopted Resolution No. 2019-_____, approving this Agreement to extend the term thereof, provide for two (2) additional five (5) year renewal terms, and modify other terms and conditions, as specified more fully herein;

WHEREAS, in furtherance of the foregoing, the parties desire to amend and restate in its entirety the Original Agreement, to accomplish the purposes outlined herein; and

WHEREAS, as of the Effective Date, the Original Agreement is hereby amended and restated in its entirety and of no further force and effect, and shall be superseded and replaced in its entirety by this Agreement, and subject to all the terms and conditions herein contained and fairly implied by the terms hereinafter set forth.

NOW, THEREFORE, the City and Concessionaire agree as follows:

SECTION 1. TERM.

- 1.1 This Agreement shall be for an initial term of seven (7) years and six (6) months, commencing on the Effective Date (the "Commencement Date"), and ending on December 31, 2026 ("Initial Term").
- 1.2 Provided that Concessionaire is not in default under the Agreement, the Concessionaire shall have the option to renew this Agreement for two (2) additional, consecutive five (5) year terms (each a "Renewal Term" and collectively with the Initial Term, the "Term"), exercisable by written notice to the City Manager or his or her designee from Concessionaire, which notice shall be given in the fourth Agreement year (as such term is defined in **Subsection 1.3** hereof) of the Initial Term and the Renewal Term, and then no later than 180 days prior to the expiration of such Term.

Additionally, any such renewal shall require Concessionaire to purchase new equipment, the types and quantities of which shall be subject to the prior written approval of the City Manager or his/her designee with respect to any new types of equipment proposed to be purchased. Concessionaire shall provide the City Manager or his/her designee, at least 180 days prior to the expiration of the Initial Term and any Renewal Term, (i) a schedule of any equipment which was replaced during the Initial Term or any Renewal Term, evidencing to the reasonable satisfaction of the City Manager or his/her designee, having

expended a minimum investment of \$400,000; and, ii) an itemized list of proposed new equipment which must be purchased by no later than the end of the third Agreement year of the applicable Renewal Term, evidencing a minimum investment in such new equipment in the amount of \$200,000; which proposed \$200,000 investment in new equipment shall be reviewed and approved by the City Manager or his/her designee prior to commencement of any Renewal Term.

- 1.3 For purposes of this Agreement, the “Term” shall be defined as the Initial Term and any Renewal Term(s), and an “Agreement year” shall be defined as each one (1) year period during the Term, commencing on January 1st, and ending on December 31st.

SECTION 2. CONCESSION AREA(S).

The City hereby grants to Concessionaire the exclusive right, during the Term, to operate certain concessions, as described herein, in the following Concession Areas.

It is acknowledged and agreed that, at such time as the Concession Areas referenced in **Subsections 2.3** and/or **2.4** hereof have been rendered serviceable and approved to be activated by the City Manager or his or her designee, at the City Manager’s (or designee’s) sole discretion, then the Concessionaire shall have the option of activating its concession services within these areas upon written notice to the City Manager or his/her designees and approval of the numbers and type of equipment to be deployed by Concessionaire which shall be added as **Exhibit 2.3** and/or **2.4**, as the case may be, to this Agreement:

- a) The Concessionaire shall notify the City Manager or his/her designees in writing, of the Concessionaire’s intent to have one (or both, as the case may be) of the Concession Areas referenced in **Subsections 2.3** and/or **2.4** put into service (the “Activation Notice”).
- b) Concessionaire shall have thirty (30) days from receipt of approval from the City Manager or his/her designees and approval of the numbers and type of equipment to be deployed by Concessionaire to activate.

2.1 Lummus Park

This Concession Area is limited to the beach area bounded on the south by the northernmost line of the 5th Street right-of-way; bounded on the north by the southernmost line of the 14th Lane right-of-way; bounded on the west by a line 50 feet east from the easternmost edge of the Dune; and bounded on the east by either a line 60 feet west of the Mean High Water Line (MHWL), or by a line 5 feet west of the westernmost lifeguard stand (located within this Concession Area), whichever is further east. In addition, the City desires for the Concessionaire to provide healthy food concession options to the public and more specifically to anyone using the Muscle Beach area. Accordingly, this Concession Area is extended to include the Muscle Beach public exercise gym area west of the dunes and is limited to providing healthy food and beverage concession services for the public through deployment and use of a food trailer as provided in **Exhibit 3.2.1** hereto, which illustrates the food trailer (which shall be permanently installed during the Term) that has been approved for deployment and use along with menus, pricing and programming set forth on **Exhibit 3.2.1**. Notwithstanding the foregoing, subject to the approval of the City Manager or his or her designee, the Concessionaire may substitute food trailer(s) with food truck(s), including, without limitation, the Hot Food Trailers.

2.1.1 13th to 14th Street Zone:

With regard to the area bounded to the north by a line 50 feet to the north of the midpoint between 13th and 14th Streets; bounded to the south by a line 50 feet to the south of the midpoint between 13th and 14th Streets; and bounded to the east and west by the easternmost and westernmost boundaries of this Concession Area, Concessionaire shall not deploy any Beach Equipment (as hereinafter defined) within this Zone unless specifically requested by an individual patron(s).

2.1.2 9th to 10th Street Zone:

With regard to the area bounded to the north by a line 50 feet to the north of the midpoint between 9th and 10th Streets; bounded to the south by a line 50 feet to the south of the midpoint between 9th and 10th Streets; and bounded to the east and west by the easternmost and westernmost boundaries of this Concession Area, Concessionaire shall not deploy any Beach Equipment, within this Zone, unless specifically requested by an individual patron(s).

2.1.3 Southern Handicap Zone:

With regard to the area bounded to the north by a line 50 feet north of the southern boundary of this Concession Area; to the south by the southern boundary of this Concession Area; and bounded to the east and west by the easternmost and westernmost boundaries of this Concession Area, Concessionaire shall not deploy any Beach Equipment within this Zone, unless specifically requested by a handicapped patron(s).

2.1.4 Northern Handicap Zone:

With regard to the area bounded to the south by a line 50 feet south of the northern boundary of this Concession Area; to the north by the northern boundary of this Concession Area; and bounded to the east and west by the easternmost and westernmost boundaries of this Concession Area, Concessionaire shall not deploy any Beach Equipment within this Zone, unless specifically requested by a handicapped patron(s).

The City and Concessionaire agree and acknowledge that the public's use of the beach within the Concession Areas is of prime consideration. Accordingly, the Concessionaire shall use best efforts to strive to maintain approximately forty nine (49%) percent of the beach frontage within the entire Lummus Park beach area free and clear of Concessionaire's Beach Equipment and Watersports Equipment (as hereinafter defined) and any other facilities and equipment, so that such portion of the beach may remain free and clear for the public's use and enjoyment.

2.2 Ocean Terrace and Adjacent Areas

This Concession Area is limited to the beach area bounded on the south by the northernmost line of the 72nd Street right-of-way; bounded on the north by the southernmost line of the 77th Street right-of-way; bounded on the west by a line 50 feet east from the easternmost edge of the Dune; and bounded on the east by either a line 60 feet west of the Mean High Water Line (MHWL), or by a line 5 feet west of the westernmost lifeguard stand (located within this Concession Area), whichever is further east. In addition, the City desires for the Concessionaire to provide free of charge Beach Equipment to seniors age 65 years and older on Tuesdays (and such other days as may be hereafter negotiated by the parties) in the area between 72nd Street and 73rd Street. The parties acknowledge **Exhibit 2.2** sets forth the storage area located at 77th Street in this Concession Area.

2.3 North Beach Oceanside Park

This Concession Area, should it become serviceable during the Term, as determined pursuant to the procedures established in **Subsections 2(a) and (b)**, is limited to the beach area bounded on the south by the northernmost line of the 79th Street right-of-way; bounded on the north by the southernmost line of the 87th Street right-of-way; bounded on the west by the trash receptacle line; and bounded on the east by a line west of the westernmost lifeguard stand, and subject to **Section 9**, hereof, such other areas provided that Ocean Rescue concurs that the activation is not in line of sight of lifeguards.

2.4 South Pointe Park Beach

This Concession Area, should it become serviceable during the Term, as determined pursuant to the procedures established in **Section 2(a) and (b)**, is limited to the beach area bounded on the south by a

line 50 feet north of the of the South Pointe Park Pier; bounded on the north by lifeguard stand, bounded on the west by a line 50 feet east from the easternmost edge of the Dune; and bounded on the east by either a line 60 feet west of the Mean High Water Line (MHWL), or by a line 5 feet west of the westernmost lifeguard stand (located within this Concession Area), whichever is further east, and is subject to **Section 9** hereof.

2.5 Allison Park

The City desires for the Concessionaire to provide Beach Equipment at the portion of the 6400 Block of Collins Avenue seaward of Allison Park (the "Allison Park Concession Area") to service the temporary Sabrina Cohen Adaptive Beach Program and, if relocated, its permanent location at the portion of the 5300 Block of Collins Avenue, seaward of the City-owned municipal parking lot at 5301 Collins Avenue where the Sabrina Cohen Adaptive Recreation Center will be constructed ("53rd Street Concession Area"). Accordingly, the Allison Park Concession Area shall be limited to the beach area immediately east of Allison Park; bounded on the west by a line 50 feet east from the easternmost edge of the Dune; and bounded on the east by either a line 60 feet west of the Mean High Water Line (MHWL), or by a line 5 feet west of the westernmost lifeguard stand (located within this Concession Area), whichever is further east, which shall have the types and numbers of Beach Equipment and applicable price list is set forth on **Exhibit 3.1** hereto. If the Sabrina Cohen Adaptive Beach Program is relocated to a permanent location at 5301 Collins Avenue, upon approval of the City Manager or his or her designee, Concessionaire shall have the right to provide the Beach Equipment at the 53rd Street Concession Area and, at Concessionaire's option, to continue operations at the Allison Park Concession Area. **Exhibit 3.1** shall be amended to reflect the foregoing.

2.6 Lifeguard Stand/Lifeguard Stand Zone

City and Concessionaire acknowledge that there are lifeguard stands within the Concession Areas. As such, City and Concessionaire agree that in the event additional lifeguard stands are added within the Concession Areas during the Term, the size of the buffer areas around the lifeguard stands shall be reduced so as not to further reduce the size of a corresponding Concession Area.

Except as otherwise may be permitted pursuant to **Section 2.3** hereof, Concessionaire shall not use or deploy any Beach Equipment, Watersports Equipment, or any other facilities and/or equipment on or within those portions of the beach where lifeguard stands are located, including the area extending from the easternmost foot of the Dune to the shoreline, and bounded by a line one hundred (100) feet (each) to the north and south of a lifeguard stand.

2.7 Public Use

Notwithstanding the Concession Areas granted to Concessionaire in this Section 2, Concessionaire hereby acknowledges and agrees that such Concession Areas, along with any and all other public beachfront areas not specifically identified herein, are public and, as such, must remain open, accessible and available for the use and enjoyment of the public, whether or not the public chooses to use any of Concessionaire's facilities and/or equipment, purchase its products, or engage in any of the services it provides. In the event that a member of the public is within a particular Concession Area, Concessionaire agrees to use good faith, diligent efforts to allow for his/her quiet and peaceful enjoyment of same.

2.8 Buffer Zones

City and Concessionaire acknowledge that there are certain areas within Lummus Park Beach, Ocean Terrace Beach, North Beach Oceanside Park, Allison Park and South Pointe Park Beach, that either lie outside of the respective defined Concession Areas, or where Concessionaire's use is limited and/or restricted, including Lifeguard Facility Zones (as defined in **Subsection 2.6**); Handicap Zones (as defined in **Subsections 2.1.3 and 2.1.4**), and other defined zones (as defined in **Subsections 2.1.1 and 2.1.2**); all of which are designed to facilitate public access to the ocean and shoreline, and create buffer zones between the Concession Areas and Lifeguard stands.

City and Concessionaire acknowledge that buffer zones around lifeguard stands shall not apply to areas of the beach that do not fall within a defined Concession Area. One such example would be the beachfront adjacent to a private upland owner's property (unless the City's Rules and Regulations for Beachfront Concessions, as same may be amended from time to time, expressly provide otherwise).

SECTION 3. USE(S).

Concessionaire is hereby authorized to conduct the following kinds of businesses and provide the following kinds of services within the Concession Areas, all of which shall be provided at Concessionaire's sole cost and expense:

3.1 Rental of Beach Equipment

This shall mean, and generally include, the rental of beach beds, beach chairs (including lounge chairs), pads, umbrellas, sun canopies, and such other related equipment as approved by the City Manager or his/her designee pursuant to this Agreement. For purposes of this Agreement, the term "Beach Equipment" shall also include beach lockers as approved and authorized by the City pursuant to the Beach Locker Program contemplated in **Subsection 3.1.7** hereof.

The City herein approves the rental of Beach Equipment, and the prices for same, as set forth in **Exhibit 3.1**. Any amendments to **Exhibit 3.1**, whether as to type(s) of Beach Equipment to be rented, or as to changes in prices for same, must be approved in writing by the City Manager or his/her designee prior to such changes being implemented within the Concession Area(s) (and, if approved, an updated **Exhibit 3.1** will be incorporated into this Agreement), provided, that, Concessionaire shall be entitled within its reasonable discretion to charge market pricing for luxury offerings of Beach Equipment (Nova Umbrella, the Luxury Cabana, Luxury Daybed and Luxury Lounge) pursuant to **Exhibit 3.1** hereof and such other luxury products as may be approved by the City Manager or his or her designee.

- 3.1.1 The condition and quality of Beach Equipment shall at all times be maintained in good working order and condition, and in a first-class manner which is equal to, or better than, the condition and quality of beach equipment found in public beach concessions in other world class beach resorts on par with the City of Miami Beach. It is the City's intent, and Concessionaire hereby agrees and acknowledges same, to continue develop and promote world class public beach concession facilities and operations that would be comparable to those found at other world class public beach concession facilities. Accordingly, Concessionaire shall not only, at a minimum, maintain all Beach Equipment placed within the Concession Areas in good working order and condition, but shall adhere, as indicated in this subsection, to the highest ongoing maintenance standards for same.

Attached as **Exhibit 3.1.1** is a full inventory of all Beach Equipment contemplated for use as of the Commencement Date, including types and numbers (per item) for each of the Concession Area, which shall be maintained in a first-class manner. Throughout the Term, all Beach Equipment shall be replaced no later than the fifth year after purchase, unless it is necessary, due to the condition of Beach Equipment, to replace such Equipment prior to the fifth year after purchase.

- 3.1.2 The design, type, material, and color of any and all Beach Equipment together with photos of the City-approved Beach Equipment is attached and incorporated as **Exhibit 3.1.2**. Concessionaire shall not change, alter, or modify the design, type, material, and color of any City-approved Beach Equipment without the prior written consent of the City Manager or his/her designee (and, if so approved, an updated **Exhibit 3.1.2** will be incorporated into this Agreement).
- 3.1.3 With regard to an individual Concession Area, all Beach Equipment within that Area shall be placed substantially in accordance with the City-approved site plans for such Area. The approved

site plan for each Concession Area is attached and incorporated as **Exhibit 3.1.3** and each individual Concession Area shall be labeled on the Exhibit. Concessionaire shall not deviate from or alter an approved site plan without the prior written consent of the City Manager or his/her designee.

- 3.1.4 The set-up of Beach Equipment placed within a Concession Area shall be substantially in accordance with the approved site plan for that Area. Subject to **Section 3.7(d)**, the "Set-Up Period" shall commence daily no earlier than sunrise (or, in the event of inclement weather, as soon thereafter as such weather permits). During the Set-Up Period, Concessionaire shall be permitted to set up to the maximum number of Beach Equipment allowable for that particular Area (as defined in **Subsection 3.1.3**). In addition to conformance with the approved site plan, daily placement of Beach Equipment during the Set-Up Period shall be in accordance with, and shall not exceed, the maximum number, per Concession Area, set forth in **Subsection 3.1.3**.
- 3.1.5 The parties acknowledge that Concessionaire's patrons may themselves relocate chairs and other Beach Equipment within a Concession Area, and/or to an immediately adjacent Buffer Zone. Such relocation shall generally be permitted; provided, that, in the aggregate, Concessionaire shall not materially alter, and use good-faith, diligent efforts not to allow to be materially altered, the configuration of a particular Concession Area (from what is set forth in the approved site plan for that Area) and/or an adjacent Buffer Zone. In such event, Concessionaire shall be responsible for promptly correcting any material alteration made by the patrons (when they leave) to bring the Concession Area back into substantial conformance with the approved site plan.

Moreover, if Concessionaire elects to replace a certain number of standard chairs with luxury chairs (above the number of luxury chairs currently permitted under this Agreement, but not to exceed the aggregate maximum number of chairs permitted under this Agreement), and if at any time thereafter a patron desires a standard chair which is unavailable, due to such replacement, then Concessionaire shall provide the patron with a luxury chair at the standard chair rate.

Notwithstanding anything in this **Subsection 3.1.5**, the City's Ocean Rescue Division shall at all times have the sole and absolute discretion to require Concessionaire, and/or Concessionaire's patrons, to relocate chairs and other Beach Equipment in the event that such chairs and/or Beach Equipment in any way impede and/or obstruct sightlines, or have any other effect whatsoever which would directly or indirectly impede the performance of Ocean Rescue activities. Concessionaire will use good-faith, diligent efforts to cooperate with Ocean Rescue to promptly ensure compliance with the preceding requirement.

- 3.1.6 The City and Concessionaire agree and acknowledge that the public's use of the beach is a prime consideration and must be balanced with the services to be provided to the public, and the respective financial remunerations to City and Concessionaire pursuant to this Agreement. Accordingly, notwithstanding the approved site plans and maximum numbers set forth in **Subsection 3.1.3** hereof, Concessionaire further agrees that, notwithstanding its right to set up its maximum numbers during the Set-Up Period, if during the period of time between the Set-Up Period and 1:00PM Eastern Standard Time (or 2:00PM daylight savings time, as applicable) on any day during Concessionaire's hours of operation, more than twenty-five percent (25%) of Concessionaire's maximum number of chairs are vacant ("vacant" being defined for purposes of this subsection as not being rented), then Concessionaire shall remove, at 1:00PM EST (or 2:00PM daylight savings time, as applicable) that day, from the particular area, that number of chairs that equates to the difference between the percentage of vacant chairs and twenty-five percent (25%) of such chairs. For example, assuming that 100 chairs are the maximum, if 100 chairs are set up in an area during the Set-Up Period, and 60 are rented and 40 are vacant then, at 1:00PM EST (or 2:00PM, as applicable), Concessionaire must remove 15 chairs, which equals the difference between the actual number of vacant chairs minus 25% of the maximum number

of chairs allowable during the Set-Up Period. If chairs are removed as provided in the preceding sentence, Concessionaire may, later that same day, increase the number of chairs based upon demonstrated increased demand; provided, however, that in no event shall the increased number of chairs in any particular Concession Area exceed the maximum number for that Area by more than twenty percent (20%), without the prior written consent of the City Manager or his/her designee.

City and Concessionaire may meet, as provided in the last paragraph of **Section 6** hereof, to review and, subject to mutual agreement, revise the maximum numbers set forth in **Subsection 3.1.3**.

- 3.1.7 The approved plan, design, and pricing for Concessionaire's Beach Locker Program is set forth in **Exhibit 3.1.7** hereto. Any changes in the Beach Locker Program plan, design, and/or pricing must be approved, in writing, by the Manager or his/her designee prior to such changes being implemented (and an updated exhibit will be incorporated into this Agreement).
- 3.1.8 The Concessionaire shall provide outdoor ashtrays in accordance with the Public Beachfront Outdoor Ashtray Program contemplated in **Subsection 3.9.5**.
- 3.1.9 Subject to the City's rights in **Subsection 16.3** hereof, Concessionaire shall be permitted to engage in corporate and other team building events (the "Team Building Events") at the Concession Areas and shall annually obtain a master special events permit and shall, as to each Team Building Event that differs from those covered by the master special events permit (including any proposed Team Building Event that contemplates (i) amplified sound, (ii) cooking/food service, (iii) alcoholic beverage service, (iv) temporary installation of structures requiring permits from agencies having jurisdiction, (v) hours of operation which extend beyond the timeframes set forth in **Section 9** hereof, (vi) dates for the proposed Team Building Event that conflict with those high impact periods in which the City does not issue special event permits (i.e., Spring Break) or with exclusive arrangements City may have made with other event organizers, including, without limitation, Art Basel, Super Bowl, South Beach Wine & Food Festival, Air & Sea Show, Miami Beach Pride, and similar events) obtain the approval of the City's office of Tourism & Culture Department and the City Manager or his or her designee, as applicable. Such Team Building Events are designed to facilitate lighthearted activities that serve to break down barriers inherent in the workplace and foster healthier relationships through teamwork and to stimulate simulate problem-solving, trust, cooperation, mutual support, commitment, open and effective communication, and accountability. The Team Building Events as described herein shall be consistent with the approved site plans in **Exhibit 3.1.9** hereof.

With respect to Team Building Events requiring additional approval from the Tourism & Culture Department office and the City Manager or his or her designee as provided above (including proposed events which include elements such as those set forth in Section 3.1.9(i) through (v)), Concessionaire shall submit to the office of Tourism & Culture Department its request for approval of the proposed Team Building Event, along with all supporting documentation required by the City's Special Event Guidelines, at least thirty (30) days prior to the date of the proposed Team Building Event.

With respect to the Team Building Events which do not require additional approval in accordance with this Section, Concessionaire shall provide the Tourism & Culture Department with at least fourteen (14) days prior written notice of such Team Building Events (which notice may be via email), along with the pertinent details relating to each proposed event, such as number of participants, proposed uses, times, and location), provided, that, if an event is booked within such 14-day period, then such event shall be subject to approval by the office of Tourism & Culture Department on a case-by-case basis.

With respect to all Team Building Events Concessionaire agrees to pay the corresponding permit fees and/or user fees applicable to each Team Building Event pursuant to the City's Special Event Guidelines.

- 3.1.10 Private upland sand sifting services shall be subject to any applicable third-party approvals that may be required, including regulatory approvals by any agencies having jurisdiction. In the event any such approvals are obtained and Concessionaire contracts with upland hotel properties to provide private sand sifting services, Concessionaire shall, as additional consideration under this Agreement, pay the City the sand sifting fees as stipulated in Section 4.2 ("Sand Sifting Fees"), which sand sifting services shall be done in compliance with **Section 3.7(d)** hereof. (the "Sand Sifting Fees"), provided, that, Concessionaire may subcontract such sand sifting in accordance with **Subsection 10.1.1** hereof.

3.2 Food and Beverage Service.

- 3.2.1 Concessionaire shall prepare, or cause to be prepared, for sale within the Concession Areas, such cooked, prepared, and/or prepackaged foods and non-alcoholic beverages, as those set forth in the attached **Exhibit 3.1**. The three (3) Hot Food Trailers (as hereinafter defined) are permitted to heat the food by means of battery power, solar power and/or propane gas systems. No other actual cooking and heating from Concessionaire's on-site facilities shall be allowed, unless approved by the City Manager or his/her designee pursuant to **Subsection 3.2.8**. The City herein approves the types of food and beverages, and prices for same, as set forth in **Exhibit 3.1**. Any amendments to **Exhibit 3.1**, whether as to type of food and beverages to be sold, or as to changes in prices for same, must be approved, in writing, by the City Manager or his/her designee prior to such changes being implemented within the Concession Area(s) (and, if approved, an updated **Exhibit 3.1** will be incorporated into this Agreement). As specified above in this Subsection 3.2.1, Concessionaire shall be entitled to operate (a) one (1) food trailer at Muscle Beach to provide healthy food concession options west of the dunes as set forth on **Exhibit 3.2.1**, which includes an illustration of the food trailer (with the approved menu and pricing set forth on **Exhibit 3.1**); and (b) two (2) food trailers daily in the locations set forth on **Exhibit 3.2.1**, which also includes an illustration of the Hot Food Trailers (collectively with the other food trailer described in described in Exhibit 3.2.1, the "Hot Food Trailers"). The proposed menus and pricing shall be submitted for the approval of the City Manager or his or her designee and, as approved, attached hereto as part of **Exhibit 3.1**. Concessionaire shall also be permitted to utilize the EazyO app for delivery of food and beverages within the Concession Areas provided, that, (i) the only food and beverage menu items offered on the EazyO app are those permitted to be provided by Concessionaire under this Agreement within the Concession Areas; (ii) no items whatsoever, other than those provided for under this Agreement, shall be offered on the EazyO app within the Concession Areas; (iii) the City shall be entitled to receive its percentage of gross receipts in accordance with **Subsection 4.2** for all additional revenue, if any, received by Concessionaire in conjunction with use of the EazyO app within the Concession Areas.
- 3.2.2 Concessionaire shall be permitted to utilize no more than five (5) motorized, ice cream carts in the Lummus Park Concession Area (as defined in **Subsection 2.1**), to dispense ice cream and other frozen foods and non-alcoholic beverages. The design, size, type, material, and color of such carts are set forth in **Exhibit 3.2.2** hereof. The location of same is designated within Concessionaire's approved site plan (as referenced in **Exhibit 3.1.3**). A photo (or photo(s)) of the City-approved carts are incorporated herein as **Exhibit 3.2.2**. Concessionaire shall not change, alter, or modify such City-approved carts without the prior written consent of the City Manager or his/her designee (and, if so approved, an updated **Exhibit 3.2.2** will be incorporated into this Agreement). Such ice cream carts will be deployed within the time frames set forth in **Subsection 3.7(d)** and operated in compliance with **Subsection 10.7** hereof. Except for daily deployment and removal, all carts shall be stationary once located within the Lummus Park Concession Area as provided in **Exhibit 3.1.3**.

- 3.2.3 Concessionaire acknowledges that, as of the Commencement Date, Concessionaire itself is providing the food and beverage services contemplated under this Agreement. Notwithstanding the preceding sentence, Concessionaire may, at any time during the Term, subcontract with another entity ("Subconcessionaire") to provide food and beverage services, within the Concession Areas, in the manner and to the extent contemplated under this **Subsection 3.2**, subject to the following: i) Concessionaire shall submit a minimum of three (3) potential Subconcessionaires for the City Manager's or the City Manager's designee's prior review and written approval; and ii) any proposed contract or agreement with a City-approved Sub-Concessionaire shall also be subject to the prior written approval of the City Manager or his/her designee.
- 3.2.3 Because the parties agree and acknowledge that the provision of food and beverage services are a vital and principal component of this Agreement, there shall be no interruption in Concessionaire's provision of food and beverage services at any time during the Term (except during inclement weather and/or Events of Force Majeure, as defined herein).
- 3.2.4 All food and beverages sold within the Concession Areas will be properly prepared and served in compliance with all applicable health and sanitary standards, laws and regulations. Concessionaire shall use products to serve food and beverage that are environmentally friendly. The use of Styrofoam containers and plastic (or other non-biodegradable) straws is strictly prohibited.
- 3.2.5 The quality of food and beverages contemplated in **Subsection 3.2.1**, and food and beverage service, will be first-rate and comparable to similar food and beverage operations at public beach concessions in other world class beach resorts on par with the City of Miami Beach.
- 3.2.6 In addition to Concessionaire's general maintenance obligations for the Concession Areas, as set forth in **Section 10** hereof, all food and beverage dispensing facilities, and the immediately surrounding 50-foot areas, shall at all times be maintained in a clean and sanitary manner. All food and beverage dispensing facilities where heating of food occurs (if allowed pursuant to **Subsection 3.2.8**) shall be properly cleaned, and Concessionaire shall ensure that products used to prepare or heat food are properly disposed of. At least one supervisory employee must possess a Food Service Management Certification issued by a County Public Health Department in Florida. In addition, each food and beverage dispensing facility must be licensed by the Florida Department of Business Regulation, Division of Hotels and Restaurants, the Department of Agriculture, and as may further be required by State law and/or by corresponding agencies.
- 3.2.7 Food and beverage services shall be offered daily to patrons at all times during the Concession Areas' hours of operation (as set forth in **Section 9**); provided, however, that if Concessionaire can show, to the City Manager or his/her designee's reasonable satisfaction, that, if either an increase or decrease in demand for such service exists in a Concession Area, then, in that event, Concessionaire may request, which request shall be subject to the City Manager or his/her designee's prior written consent, an extension or decrease, in the hours of service for that Area.
- 3.2.8 Notwithstanding **Subsection 3.2.1**, the City Manager or his/her designee may, in their sole discretion, allow food heating by means of battery power, solar power, or propane gas systems at other facilities not permitted to do so under **Subsection 3.2.1**, subject to the following: (i) Concessionaire shall submit a request, in writing, to the City Manager or his/her designee, requesting approval to allow heating, and listing where such heating is proposed to occur (i.e. in which Concession Area); (ii) such request shall include a list of the food that requires heating and what type of heating process is proposed; (iii) Prior to any such approval of Concessionaire's request, the City Manager or his/her designee shall advise the Ocean Drive Association (ODA),

and obtain an advisory, non-binding recommendation from the ODA; (iv) Concessionaire shall obtain all necessary regulatory reviews and approvals to permit the type of heating proposed (including without limitation, review and approval from the City's Planning Department and Fire Department), with all such costs to obtain such approvals to be borne solely by Concessionaire; and (v) if approved, use, handling, and storage of batteries, solar power, or propane must comply with all applicable codes and standards. Notwithstanding the preceding, the City may, upon ninety (90) days prior written notice to Concessionaire, rescind any such approval for heating of food, with or without cause, and without any liability to the City under this Agreement.

3.3 Sale of Beach-Related Sundries and Skin Care Products

Beach-related sundries shall generally include the sale of those items identified in **Exhibit 3.1**, in accordance with the price ranges set forth therein. Any amendments to **Exhibit 3.1**, whether as to changes and/or additions of items to be offered for sale, or in the respective price ranges for same, must be approved in writing by the City Manager or his/her designee, prior to such changes and/or additions being implemented (and an updated **Exhibit 3.1** will be incorporated into this Agreement).

Skin Care Products shall include those lotions, oils and other skin care products identified in **Exhibit 3.1**, in accordance with the prices for same set forth therein. Any amendments to **Exhibit 3.1**, whether as to types of Skin Care Products to be sold, or as to changes in prices for same, must be approved in writing by the City Manager or his/her designee, prior to such changes being implemented (and an updated **Exhibit 3.1** will be incorporated into this Agreement).

3.3.1 Notwithstanding the City's approval of the sale of Beach-Related Sundries and Skin Care Products pursuant to this Subsection, the City Manager may subsequently elect, in his sole option and discretion (and with or without cause), to rescind such approval, upon ninety (90) days prior written notice to Concessionaire, and without any liability to the City under this Agreement.

3.4 Watersports Equipment Rentals

Watersports Equipment Rentals shall include the rental of both motorized and non-motorized watersport equipment, as provided for in this Section.

3.4.1 City and Concessionaire agree and acknowledge that, for the active watersports channel existing within the Lummus Park Concession Area (at 9th street), as of the Effective Date, Watersports Equipment rentals only includes, and is only permitted for, the following Watersports Equipment: twelve (12) waverunners, two (2) chase boat waverunners, one (1) parasail boat, two (2) banana boat, and a total of six (6) stand-up paddle boards and/or kayaks.

Concessionaire shall, throughout the Term, provide City of Miami Beach residents with a twenty percent (20%) discount for Watersports Equipment rentals from the Ocean Terrace Concession Area.

Subject to the water channel (located in the Ocean Terrace Concession Area) as set forth below, Concessionaire shall provide motorized Watersports Equipment, and shall be entitled to continue to provide non-motorized kite boarding during the periods in which wind conditions permit, in each such case in accordance with the types and numbers of Watersports Equipment and pricing set forth on **Exhibits 3.1.2 and 3.1**. Notwithstanding the foregoing, Concessionaire shall only be entitled to provide motorized Watersports Equipment or non-motorized watersports (kiteboarding, kayaks, and/or stand-up paddle boards), but not both, on any particular day, as determined by Concessionaire.

Concessionaire shall be permitted to operate a non-motorized watersports channel located equidistant between the Ocean Rescue towers at the Ocean Terrace Concession Area at the 7400 block and 7700 block (a minimum of 400 feet from each tower) (the "Ocean Terrace

Watersports Operations”). The types and number of non-motorized watersports equipment to be used at this location and prices therefor are attached hereto as **Exhibits 3.1.2 and 3.1**. Concessionaire is further approved to subcontract the Ocean Terrace Watersports Operations to TKS Concessions, LLC. In the event that Concessionaire determines to take over operations of the Ocean Terrace Watersports Operations from the subcontractor, it shall provide written notice of the effective date thereof to the City Manager or his or her designee.

Any future requests for new and/or additional Watersports Equipment (other than the Watersports Equipment referenced in the first and second paragraphs of this Section 3.4.1) must be approved, in writing, by the City Manager or his/her designee prior to implementation of same. The City herein approves the rental of Watersports Equipment, in the types and numbers defined in this Subsection, and the prices for same, as set forth in **Exhibit 3.1**. Any amendments to **Exhibit 3.1**, whether as to type(s) or number(s) of Watersports Equipment, or as to changes in prices for same, must be approved, in writing, by the City Manager or his/her designee prior to such changes being implemented (and an updated **Exhibit 3.1** will be incorporated into this Agreement).

Concessionaire acknowledges that, as of the Commencement Date, Concessionaire itself is providing the Watersports Equipment (other than the services provided by TKS Concessions, LLC for the Ocean Terrace Concession Area) contemplated pursuant to this **Subsection 3.4** hereof. Notwithstanding the preceding sentence, Concessionaire may, at any time during the Term, subcontract with BouYah Watersports Miami Beach, LLC, an Affiliate of Concessionaire (“BouYah”) to provide Watersports Equipment in accordance with this **Subsection 3.4**, within the applicable Concession Areas and as provided in this **Subsection 3.4** of this Agreement and in the manner and to the extent contemplated under this **Subsection 3.4**, subject to the prior approval of the City Manager or his or her designee, provided, that, Concessionaire shall remain liable to pay the Watersports Equipment Rentals fee (based upon the gross receipts relating to such Watersports Equipment Rentals) directly to the City in accordance with **Subsections 4.1 and 4.2**, as the case may be. For purposes of this Agreement, an Affiliate means any person, entity or group (currently existing or hereafter created or acquired) controlling, controlled by or under common control with, the specified person or entity, and “control” of a person or entity (including, with correlative meaning, the terms “control by” and “under common control with”) means the power to direct or cause the direction of the management, policies or affairs of the controlled person, whether through ownership of securities or partnership or other ownership interests, by contract or otherwise.

3.4.2 City and Concessionaire agree and acknowledge that Watersports Equipment rentals shall only be permitted from designated watersports channel(s) approved by the City.

3.4.2.1 Concessionaire agrees, at its sole cost and expense, to provide one off-duty police officer subject to the availability of such police officer during (i) certain City-designated major event periods (as such major event periods may be determined by the City Manager or his/her designee, and as to which the City shall provide a list, no later than ninety (90) days from the commencement of each Agreement year, with the dates of such major events/event periods that the City knows of for such Agreement year, and which list may be amended by the City from time to time); and, (ii) federal holidays, to monitor the motorized Watersports Equipment channel during all times that such channel is operating.

3.4.2.2 Concessionaire’s future use of any alternate or additional watersports channel(s) is subject to the prior written approval of the City Manager or his/her designee, who shall first obtain a non-binding recommendation from the City’s Marine Authority Board.

- 3.4.2.3. All watersports channels shall be used as an access route through which users of Watersports Equipment may leave the beachfront and enter open water. Said channel(s) shall be a minimum of fifty (50) feet in width and shall extend 300 feet east, perpendicular to the shore line, and be marked by removable high visibility orange colored buoys which shall be a minimum of eighteen (18) inches in diameter. There shall be a minimum of eight (8) buoys on each side of the channel, equally spaced. All buoys shall be clearly marked "IDLE SPEED" in six (6") inch high letters. Specifications or a sample of the line to be used for the channel buoys must be sent to the appropriate regulatory agency for approval prior to use.
- 3.4.2.4 Motorized Watersports Equipment shall not exceed "idle speed" within the channel.
- 3.4.3 All Watersports Equipment operations must have a "chase" watercraft and properly certified concession staff, readily available to operate same. The chase watercraft must be positioned at the eastern end of the watersport channel, if any rented watercraft are in the water, unless the chase watercraft is being used for other customary life safety related functions related to the watersport operation(s). The chase watercraft must be capable of catching, and performing, a proper rescue of all Watersports Equipment which is available for rent. The chase watercraft must be readily available for use and be safely located on shore, or within the channel, unless monitoring or recalling a patron. In addition to these requirements, all chase watercraft operators shall wear high visibility yellow colored personal floatation devices when operating the chase watercraft. When the chase watercraft is on shore, said high visibility yellow colored personal floatation device shall be placed on top of the chase watercraft, in order to identify same. All concession staff must be properly certified (complete boater's education course approved by the NASBLA or pass the State of Florida "How to Boat Smart" course), and wear the required identification badge to reflect same, and staff must be readily available at all times that the concession is operating.
- 3.4.4 The operation of all Watersports Equipment at the Lummus Park Concession Area and Ocean Terrace Concession Area shall be conducted east of the 300-foot swimming area ("guarded area") and no closer than 400 feet of any lifeguard stand. Concessionaire is responsible for instructing clients on the safe operation of Watersports Equipment, including advising them to stay away from all "guarded areas." The guarded area extends 300 feet east of the shoreline and 100 feet from the nearest bather or swimmer.
- 3.4.5 The Concessionaire must instruct all users as to all safety precautions, including avoidance of swimmers and bathers, and inform said users of any and all municipal, County, State and Federal requirements associated with the use of the respective watersport equipment.
- 3.4.6 All Concession activities, including the placement and/or use of chairs, umbrellas, sun canopies, or other Beach Equipment, food and beverage service dispensing facilities, Watersports Equipment, and any and all other equipment and facilities of Concessionaire, shall not obstruct the view of a lifeguard. Concessionaire shall promptly comply with any request from a lifeguard to relocate any item(s) that obstructs his/her view.
- 3.4.7 Concessionaire shall not knowingly permit (a) anyone under the minimum age, as required by Federal, State, County, or municipal law (unless appropriate written consent of the parent or guardian is provided pursuant to such applicable law), nor (b) anyone patently under the influence of alcohol or other mood altering drug, to rent or use any Watersports Equipment. Concessionaire shall not knowingly permit anyone under the age of eighteen (18) to rent Watersports Equipment. Concessionaire shall not knowingly permit anyone under the age of 16 without parental or appropriate guardian consent to operate motorized Watersports Equipment. Concessionaire shall not knowingly permit a person 21 years of age or younger to operate a marine vessel of 10 horse

power or more, unless such person has in his/her possession aboard the vessel, a photo identification and proof of completion of a boater education course approved by the State of Florida and/or the National Association of State Boating Law Administrators.

- 3.4.8 Concessionaire shall supply all users of Watersports Equipment with the appropriate United States Coast Guard approved "personal flotation device" in appropriate sizes. Proper "personal flotation devices" must be "speed rated".
- 3.4.9 All Watersports Equipment and chase watercraft shall be maintained at Concessionaire's sole cost and expense and shall meet the registration and licensing requirements of the State of Florida, and any other governing agency. Concessionaire agrees that all motorized Watersport Equipment shall be at minimum of commercial grade and quality. All motorized Watersport Equipment shall be no more than two (2) model years old. The City reserves the right to request proof of title or other proof of purchase related to such Watersports Equipment in order for the City to properly monitor this requirement. To assure that all Watersport Equipment is at all times maintained in accordance with the highest industry standards, the City reserves the right to request periodic service and/or maintenance reports to be provided and, if required, certified or otherwise guaranteed by Concessionaire, at its sole cost and expense. All of Concessionaire's motorized Watersport Equipment shall have fuel injected four (4) stroke engines.
- 3.4.10 All motorized Watersports Equipment shall be equipped with "kill-switches" in proper working order.
- 3.4.11 All Watersports Equipment shall be clearly marked to identify the Concessionaire with ten-inch (10") high, one and one-half inch (1 ½") thick, contrasting numbers.
- 3.4.12 Any fueling of Watersports Equipment or chase watercraft on the beach must comply with FDEP, Miami-Dade County DERM and USCG Regulations.
- 3.4.13 Concessionaire must be equipped, on site, with operating fire extinguisher and cellular/wireless type telephone.
- 3.4.14 Concessionaire must provide renters or users a thorough demonstration of the operation of the rented Watersports Equipment and use of all safety equipment, including, but not limited to, handling characteristics of Watersports Equipment. Furthermore, all renters and users must be instructed as to the location and proper usage of all on-board safety equipment including, but not limited to fire extinguisher(s) if applicable.
- 3.4.15 Concessionaire must inform all Watersports Equipment renters or users as to the locations of known diving areas and reefs, how to identify a diving flag, and instruct them to maintain a minimum 100' distance from dive flags, swimmers, other boaters, markers and marked areas.
- 3.4.16 Concessionaire shall have, at a minimum during peak usage ("peak usage" defined as anytime in which twelve (12) motorized Watersports Equipment items are present at the subject Concession Area), three (3) employees on site while the Watersports Equipment concession is open; provided, however, that this number may be increased from time to time, if required by the City Manager or his/her designee. Concessionaire shall have at least one (1) CPR/AED certified employee on duty at all times during which the Watersports Equipment concession is open.
- 3.4.17 Any and all Watersports Equipment concession activities shall only be conducted when the weather and wind conditions and the conditions of the surf permit for the safe operation of same, provided, that, it is acknowledged and agreed that weather, wind and surf conditions may change rapidly and it is acknowledged and agreed that Concessionaire is not responsible or liable for

weather, wind or water conditions and Concessionaire shall be permitted to also post a disclaimer to such effect at the Watersports Welcome Station. Concessionaire shall inform each and every prospective patron that if the Ocean Rescue Division of the City of Miami Beach Fire Department (Ocean Rescue) determines that conditions are unsafe or hazardous, he or she may be required to immediately come to shore and discontinue using the Watersports Equipment. In the event that conditions are of such a nature that the Ocean Rescue deems them unsafe or hazardous to the individuals who are operating Watersports Equipment, or to the swimmers and bathers in the vicinity of said Equipment, the Ocean Rescue shall request that Concessionaire cease operating its respective Watersports Equipment concession. Once it is concluded that unsafe or hazardous conditions exist, the Ocean Rescue shall notify Concessionaire. Notwithstanding the foregoing, the City acknowledges and agrees that there are inherent risks associated with use of the beach and ocean areas and/or the use of Beach Equipment and Watersports Equipment, and that in the course of using the City's public beaches, or the Concessionaire's services, persons may expose themselves to risks known and unknown, including the risk of physical injury and death. With the exception of Concessionaire's obligation to instruct users on the basic operation of the Watersports Equipment and water safety precautions in accordance with **Subsections 3.4.5 and 3.4.14** hereof, it is acknowledged and agreed that Concessionaire, its officers, directors, members, managers, employees, agents, beach attendants and agents are not lifeguards nor responsible for, and cannot guarantee or control, the surf, sand, weather, water or wind conditions at the Concession Areas, or the competency or manner in which persons undertake activities in or around the City's public beaches or Concession Areas, including, without limitation, activities which may involve inherent personal risk to their safety or health. This **Section 3.4.17** shall survive termination of this Agreement or expiration of the Term.

- 3.4.18 Concessionaire agrees and understands that the maximum horsepower of any motorized Watersports Equipment intended to be used for rental purposes shall not exceed 110 horse power, and chase watercraft shall not exceed 140 horse power. However, in the event the 110 or 140 horse power models are no longer manufactured and/or cost prohibitive, then the City Manager or his/her designee may approve, at their sole discretion, other comparable equipment.
- 3.4.19 Concessionaire agrees and understands that in the event of any accident or collision involving any of its Watersports Equipment which involves an injury to persons (whether minor or major), it must complete and submit a written report to the City's Marine Patrol, with copies to the City's Ocean Rescue Division and Office of Asset Management, within twenty-four (24) hours of the incident occurring, or upon notification thereof by a third party(ies).
- 3.4.20 In the event the City Manager or his/her designee determine, at their sole option and discretion, that the provision of motorized or non-motorized Watersports Equipment is no longer desired, then the City Manager may revoke Concessionaire's right to provide one or both of these services, with or without cause, and without any liability to the City under this Agreement, upon ninety (90) days prior written notice to Concessionaire. Any minimum guarantee paid by Concessionaire to the City for motorized Watersports Equipment and/or, such non-motorized Watersports Equipment, shall be prorated and/or adjusted accordingly as of the date of revocation of approval for said motorized and/or non-motorized Watersports Equipment service(s), and no further payment shall be required for same during the Term, unless the City Manager reinstates the motorized and/or non-motorized Watersports Equipment service(s), at which time the payment provisions of **Section 4** shall once again apply to such reinstated motorized and/or non-motorized Watersports Equipment. Because a minimum guarantee on this service(s), is paid in advance, City agrees to refund such pro-rated minimum guarantee (for such motorized and/or non-motorized Watersports Equipment services only) to Concessionaire upon sixty (60) days written demand from Concessionaire.

- 3.4.21 Concessionaire shall maintain any area where Watersports Equipment is placed within the Concession Area clean and free of litter and debris. Any spillage of any chemical or liquid by Concessionaire or its employees, other than water, shall be cleaned immediately and Concessionaire shall take whatever necessary steps are necessary to remediate, using customary and reasonable efforts, any soiled or impacted area.

3.5 Concession Facilities and Concession Storage Facilities

- 3.5.1 The design, materials, color, etc. of Concessionaire's dispensing facilities and storage facilities must be approved by the City's Planning Department, and receive design review approval prior to the Effective Date. The facilities already approved by the City are incorporated herein as **Exhibit 3.5.1**. The size of Concessionaire's food and beverage trailers shall be no larger than 8 feet by 12 feet; provided, however, if heating as permitted by **Subsection 3.2.1** is done in any such trailers, then the size of that food and beverage trailer shall be no greater than 8 feet by 20 feet. The location of facilities is set forth within Concessionaire's approved site plan (as referenced in **Exhibit 3.1.3**). Concessionaire shall not deviate from or change the type, design, and/or location of its proposed dispensing or storage facilities without the prior written consent of the City Manager or his/her designee.
- 3.5.2 The written plan for storage and removal of Concessionaire's Beach Equipment, dispensing facilities, and Watersports Equipment is set forth in **Exhibit 3.5.2**, which plan includes the use of any storage facilities contemplated in **Subsection 3.5.1** above. Any change thereto shall be subject to approval of the City Manager or his/her designee. In addition, the City has agreed that, subject to availability and the approval of the City Manager or his or her designee, Concessionaire shall be permitted to store its Beach Equipment, dispensing facilities, and Watersports Equipment at mutually agreed upon areas within the load in bays at the Miami Beach Convention Center to the extent Concessionaire is required to remove such equipment and facilities pursuant to **Section 3.6** hereof or similar storm-related event. Notwithstanding the foregoing, Concessionaire shall maintain off-site storage facilities in the event that the Miami Beach Convention Center is unavailable or does not have sufficient space to accommodate all such Beach Equipment, dispensing facilities, and Watersports Equipment. The City shall advise Concessionaire in writing on a timely basis if the Miami Beach Convention Center is unavailable or does not have sufficient space to accommodate all such Beach Equipment, dispensing facilities, and Watersports Equipment, which, in the latter case, will advise of the space that is available.
- 3.5.3 In the event that, at any time during the Term, the State of Florida determines that Concessionaire's dispensing and storage facilities (for purposes of this subsection, the "facilities") do not comply with State law (but excluding the Miami Beach Convention Center), then Concessionaire shall, at its sole cost and responsibility, immediately take such actions, as reasonably necessary, to bring same into compliance, including, without limitation, revising its storage plan and/or either altering or removing the non-complying facilities from the Concession Areas. Concessionaire herein further acknowledges that it shall not hold the City liable for any expenses and/or other damages incurred as a result of Concessionaire's non-compliance with State requirements pursuant to in this subsection (including, without limitation, any cost or other liabilities incurred by Concessionaire as a result of removal of the facilities or, in the alternative, bringing such facilities into compliance with State law.

3.6 Hurricane Evacuation Plan.

Concessionaire agrees that fifty percent (50%) of all its storage and dispensing facilities, Beach Equipment, Watersports Equipment, and any other equipment and facilities used in the concession operations will be removed from the beachfront immediately within eight (8) hours of the issuance of a Hurricane Watch by the Miami-Dade County Office of Emergency Management, and stored in accordance with **Subsection 3.5.2** above, and the remaining fifty percent (50%) of the above-referenced facilities and equipment will be removed from the beachfront immediately within eight (8) hours of the

issuance of a Hurricane Warning by the Miami-Dade County Office of Emergency Management, and stored in accordance with **Subsection 3.5.2** above. Concessionaire's hurricane preparedness/evacuation plan, which includes the location, and proof of ownership and/or control by Concessionaire (either through a deed, lease or other form reasonably satisfactory to the City Manager or his designee), of its proposed hurricane storage facilities, are attached as **Exhibit 3.6** to this Agreement.

3.7 Sea Turtles.

Concessionaire agrees and understands that the State of Florida has advised that, in order to place facilities and/or equipment on the beach, surveys for marine turtle nesting activity must be ongoing or beginning April 1st – October 31st, of each year. The Concession Area(s) are currently surveyed by the Beach Maintenance Division of the Miami-Dade County Parks and Recreation Department.

- a. It is the responsibility of the Concessionaire to abide by any order issued by the State of Florida and/or cooperate with Miami-Dade County to ensure that nesting surveys may be conducted in accordance with the conditions set forth by the State.
- b. In the event an unmarked marine turtle nest is exposed, or a dead, injured, or sick marine turtle is discovered, the Florida Marine Patrol (1-800-DIAL-FMP) shall be notified immediately such that appropriate conservation measures may be taken.
- c. Except for the headlights required to be used by Concessionaire pursuant to **Subsection 10.7.2**, no temporary lighting associated with the concession will be permitted at any time during the marine turtle nesting season and no permanent lighting is authorized.
- d. The placement and removal of facilities and equipment on the beach seaward of 230 feet from the high water line shall be conducted during daylight hours (Set-Up to take place daily after inspection of the particular Concession Area by the Miami-Dade Sea Turtle Conservation representative each morning and removal within one (1) hour before sunset) and shall not occur in any location prior to completion of the necessary marine turtle protection measures.
- e. The beach area seaward of the 230-foot setback from the high water line should be cleared of all furniture and equipment, except lifeguard equipment, at nights during the turtle-nesting season.
- f. Disturbing the existing beach (other than as contemplated by this Agreement), Dune topography and vegetation is prohibited.

3.8 City Business Tax Receipts.

Concessionaire shall obtain, at its sole cost and expense, any Business Tax Receipts (BTR's) required by City law, as amended from time to time, for the each of its proposed uses, as contemplated in **Section 3** of the Agreement. BTR's shall be obtained for each proposed use within a particular Concession Area. For example, in the Lummus Park Concession Area, the Concessionaire would be required to obtain four (4) BTR's, one each for: (i) rental of Beach Equipment; (ii) food and beverage service; (iii) sale of Beach-Related Sundries/Skin Care Products; and (iv) rental of Watersports Equipment.

3.9 Value-Added Enhancements.

The Concessionaire agrees to provide the following Value-Added Enhancements throughout the Term:

- 3.9.1 An annual donation to the City, in the amount of seven thousand five hundred dollars (\$7,500) per year, to be utilized by the City for scholarships and contributions to philanthropic organizations, with an emphasis on marine-related and children-related recipients. The City shall make the sole and final determination as to the recipient organization(s).
- 3.9.2 An annual donation to the City, in the amount of seven Thousand five hundred dollars (\$7,500) per year, to be utilized by the City in support of environmental organizations and programs. The City shall make the sole and final determination as to the recipient organization(s).

- 3.9.3 Concessionaire agrees that its existing security deposit of \$68,500 shall be released by the City in the amount of thirteen thousand seven hundred dollars (\$13,700 per year, for a total of five (5) years), with such annual amount to be used by the City for the purpose of hosting an event for the benefit of Miami Beach seniors, with the details for any such events to be determined by the City at its sole discretion.

The monetary donations in **Subsections 3.9.1** and **3.9.2** above shall be submitted to the City, in full, at the commencement of each Agreement year during the Term.

- 3.9.4 Concessionaire has established and will maintain, at its sole cost and expense, a lounge chair “promotional towel program” in the “Luxury” areas of the Concession Areas, that provides for the promotion of the City of Miami Beach. Said promotional towel program provides for a minimum of 600 imprinted lounge chair towels, which shall be replaced with 600 new imprinted towels at least once during the Initial Term, and twice during each Renewal Term. The design and content of the imprinted message is set forth on **Exhibit 3.9.4** hereof. Any change thereto is subject to approval by the City Manager or his/her designee. In order to preserve the City’s approval rights in the preceding sentence, Concessionaire shall provide written notice to the City Manager or his/her designee at least thirty (30) days prior to ordering any altered promotional towels. Concessionaire’s notice shall include the proposed design to be used by Concessionaire for the promotional towel program. The City Manager or his/her designee shall have thirty (30) days from receipt of Concessionaire’s notice to approve or disapprove of the proposed design and content of the imprinted message, or otherwise submit an alternative design for the imprinted message. If the City Manager or his/her designee fails to approve or disapprove the proposed design and/or content of the imprinted message, or submit an alternative design for the imprinted message, within such thirty (30) day period, the City shall be deemed to have waived its approval rights under this subsection.
- 3.9.5 Concessionaire shall provide, at its sole cost and expense, enhanced beach cleanliness as follows: Concessionaire shall provide assistance in the supervision of cleanliness in Lummus Park, including the area outside of the Concession Area(s), beginning at the west foot of the sand dunes and extending westerly to, and including the east sidewalk of, Ocean Drive; said supervision to include coordination with the City’s Sanitation Department for the collection of any litter garbage or debris that is identified by the Concessionaire, including notification of overflowing trash receptacles; notification to the Public Works Department of any issues regarding the operation of any beach showers and the cleanliness of beach restrooms; and coordination with the Code Compliance Division in identifying and reporting littering, illegal vendors, graffiti on City property or any other City Code violation.
- 3.9.6 Concessionaire shall provide, at its sole cost and expense, a public beachfront outdoor ashtray program at the Lummus Park Concession Area and the south side of Marjory Stoneham Park. Such program shall require the Concessionaire’s purchase, daily placement/removal, and maintenance of no fewer than twenty (20) outdoor ashtrays (maximum cost of \$100.00 per outdoor ashtray) for the use of the general public. The make and model of the outdoor ashtrays, and a photo of same are set forth in **Exhibit 3.9.6** hereof, and any change thereto shall be submitted to the City Manager or his/her designee for their approval prior to purchase and placement. The outdoor ashtrays shall be placed daily along the existing public trash can line, at a distance to be mutually determined by the Concessionaire and the City Manager or his/her designee, in all public beachfront areas (i) adjacent to the Concession Areas; and (ii) adjacent to “areas outside of the Concession Areas” (as such term is defined in Section 10.1). The outdoor ashtrays shall be placed in such a manner as not to interfere with the servicing of the public trash cans. Such ashtrays are to be placed and removed daily consistent with the current schedule for the placement and removal of Concessionaire’s Beach Equipment. A site plan indicating the placement of the outdoor ashtrays is included as **Exhibit 3.9.6**. Concessionaire shall replace any

damaged outdoor ashtray, and shall ensure that at no time no fewer than twenty (20) outdoor ashtrays are available for use. Should the City Manager or his/her designee determine, in their sole discretion, that additional outdoor ashtrays are necessary to meet the required placement requirements in this section (e.g. distance, frequency), such additional outdoor ashtrays shall also be purchased, placed/removed and maintained by the Concessionaire, but in no event shall the number of additional ashtrays (including replacement of damaged ashtrays) exceed an additional ten (10) during the Term (in addition to the twenty (20) required pursuant to this subsection). In addition, to the foregoing, Concessionaire shall also provide at its cost individual, disposable ashtrays for all patrons smoking within each Concession Area. Said ashtrays shall be branded consistent with the Miami Beach litter campaign.

- 3.9.7 Concessionaire shall also offer a personal beach storage vault rental program at a cost of up to \$5.00 each, to any concession patrons wishing to store personal items.
- 3.9.8 Concessionaire shall provide three (3) Team Building Events (for a maximum of 100 participants at each event, with the City advising Concessionaire in writing of the exact number of participants at least five (5) days prior to the event) annually at no cost to the City which shall be held at the Concession Area designated by the City on mutually agreed upon dates. The City shall provide Concessionaire ninety (90) days written notice of the proposed date, number of participants and which type of event (as selected from Concessionaire's website).
- 3.9.9 Concessionaire shall accommodate the Convention Center Headquarter Hotel and its hotel guests at the Lummus Park Concession Area on substantially equal terms and conditions as it provides to upland private properties on Miami Beach.
- 3.9.10 Concessionaire is also in the process of negotiating with a service provider to provide Wi-Fi services at the Concession Areas to allow real time download speeds similar to a T1 connection, whereby patrons at the Concession Areas would be able to access the Wi-Fi in return for payment of a daily connection fee. Any such service provider is subject to the approval of the City Manager or his or her designee. If implemented, the Concessionaire shall pay to the City a fee based upon the revenue generated from Concession Area patrons to be mutually determined at such time as Concessionaire has a proposed service agreement for approval by the City Manager or his or her designee, which shall be payable in accordance with **Section 4** hereof (the "Connection Fees"). The pricing for such Wi-Fi services, and the Connection Fees payable to the City, shall be memorialized in a duly executed amendment to this Agreement.

SECTION 4. CONCESSION FEES.

4.1 Minimum Guarantee (MG):

In consideration of the City's execution of this Agreement and granting the rights provided herein, but subject to reduction as may (only) expressly be provided in this Agreement, Concessionaire shall pay to the City a Minimum Guaranteed Annual Concession Fee (MG), in the total amount of \$900,000, for food and beverage sales, Beach Equipment rentals, the sale of Beach-Related Sundries/Skin Care Products, and Watersports Equipment Rentals, which MG shall increase to \$1,200,000 effective January 1, 2020.

Fifty percent (50%) of the MG for each Agreement year shall be due and payable to the City on January 1st of each such Agreement year during the Term, and the remaining fifty percent (50%) of the MG for that Agreement year shall be due and payable to the City on July 1st of each such Agreement year during the Term.

4.2 Percentage of Gross (vs.) MG (PG):

For each Agreement year during the Term, Concessionaire shall pay to the City the difference between the MG provided in **Subsection 4.1** above, and a percentage of the gross receipts that exceeds the

amount of the MG for food and beverage sales, the sale of Beach-Related Sundries/Skin Care Products, Beach Equipment rentals, Watersports Equipment rentals, Sand Sifting Fees, Team Building Events Fees, Advertising/Sponsorship Fees and City Displacement Fees (the "Percentage of Gross" (PG)), as follows:

<i>Food and Beverage Sales</i>	15%
<i>Beach-related Sundries/Skin Care Products Sales</i>	20%
<i>Beach Equipment Rentals</i>	20%
<i>Watersports Equipment Rentals</i>	20%
<i>Sand Sifting Fees</i>	20%
<i>Team Building Events Fees</i>	25%
<i>Advertising/Sponsorships Fees</i>	50%
<i>City Displacement Fee</i>	30%

The payment of the PG shall be due and payable to the City no later than May 31st after each Agreement year.

The MG shall be adjusted for each Renewal Term (i.e., on January 1, 2027 and January 1, 2032) by an amount equal to the average PG for the prior five (5) Agreement years (that is, the aggregate five-year PG divided by five (5)) and memorialized in **Exhibit 4.2** to be attached to this Agreement.

- 4.3 The amount in excess of the MG due by Concessionaire for Watersports Equipment rentals for a Agreement year shall be waived during the time the City is conducting, or having conducted, any sand excavation project within less than one city block of the watersports channel which materially affects use of the watersports channel in Lummus Park and, as applicable, the 79th Street Water Channel or otherwise makes it unsafe to conduct such activities, as follows: prorated for every day that the watersports channel is materially affected, such prorated amount to be equal to the average daily revenues collected over the previous three (3) year period during those affected dates ("Watersports Waiver"). Concessionaire agrees and acknowledges that the Watersports Waiver shall be Concessionaire's sole remedy for damages and/or other compensation from the City due to any alleged adverse impact sustained by the concession operations, and the City shall have no further liability or obligation to Concessionaire with regard to this matter. Notwithstanding the foregoing, the provisions of **Subsection 4.2** with respect to Watersports Equipment rentals shall be reinstated, commencing with the next applicable day, at such time as the City Manager, in his/her sole judgment and reasonable discretion, has determined that adequate beach accretion has occurred so as to render the Watersports Waiver invalid. For purposes of this **Subsection 4.3** only, a watersports channel shall be deemed "materially affected" when Concessionaire's average daily revenue resulting from the use of the affected channel is reduced by at least fifteen percent (15%) from the amount equal to the average daily revenues collected over the previous three (3) year period for such channel. The City agrees to provide written notice to Concessionaire at least ten (10) days prior to commencement of any such sand excavation project.
- 4.4 The term "gross receipts" is understood to mean all income collected or accrued, derived by the Concessionaire under the privileges granted by this Agreement, excluding amounts of any Federal, State, or City sales tax, use tax, resort tax or other tax, governmental imposition, assessment, charge or expense of any kind, collected by the Concessionaire from customers and required by law to be remitted to the taxing or other governmental authority. The term "gross receipts" shall also include all income collected, accrued or derived by the Concessionaire from the sale of food, beverages and any other products sold by Concessionaire at a special event at such Concession Area and, in the case of a special event under **Section 16** hereof in which Concessionaire is not providing the food and beverage service at a Concession Area, any Displacement Fee (less the City Displacement Fee attributable thereto) or Alternative Consideration (as such terms are defined in **Subsection 16.2.1**) received by Concessionaire.
- 4.5 Interest for Late Payment.

Any payment which Concessionaire is required to make to City which is not paid on or before the respective date provided for in this Agreement shall be subject to interest at the rate of twelve percent 12% per annum, from the due date of payment until such time as payment is actually received by the City.

4.6 Sales and Use Tax.

It is also understood that the required Florida State Sales and Use Tax shall be added to Concessionaire's payments and forwarded to the City as part of said payments. It is the City's intent that it is to receive all payments due from Concessionaire as net of such Florida State Sales and Use Tax. Notwithstanding the foregoing, in the event the Concessionaire obtains an opinion from the Florida Department of Revenue that payments made to a municipality are not subject to sales tax, then Concessionaire shall not be required to pay sales tax.

SECTION 5. MAINTENANCE AND EXAMINATION OF RECORDS.

Concessionaire shall maintain current, accurate, and complete financial records on an accrual basis of accounting related to its operations pursuant to this Agreement. Systems and procedures used to maintain these records shall include a system of internal controls and all accounting records shall be maintained in accordance with generally accepted accounting principles and shall be open to inspection and audit, but not photocopying, by the City Manager or his/her designee upon reasonable prior request and during normal business hours. Such records and accounts shall include a breakdown of gross receipts, expenses, and profit and loss statements. Concessionaire shall maintain accurate receipt-printing cash registers or a like alternative in all Concession Areas which will record and show the payment for every sale made or service provided in such Areas. Concessionaire shall also maintain such other records as would be required by an independent CPA in order to perform an agreed upon procedures of annual gross receipts and profit and loss statement pursuant to generally accepted accounting principles. In addition, it is acknowledged and agreed that Concessionaire is in the process of implementing an electronic and primarily cashless Point of Sale system (the "POS System") to provide greater control and monitoring, which (i) will allow for revenue reports and trends analysis, (ii) will streamline the sales transaction process, (iii) allow for guest reservations, and (iv) will provide the City with full access to monitor revenues in real time. Concessionaire has agreed to invest a minimum of \$250,000 during the Initial Term and \$250,000 during each Renewal Term to purchase, implement, maintain and support the POS System. It is anticipated that the POS System will be implemented on or about January 1, 2020. After full implementation, Concessionaire further agrees to provide the City with 24/7 access for real time review, inspection and audit of records.

Upon request of the City, Concessionaire shall submit a monthly report of gross receipts to the City's Finance Department's Revenue Supervisor, and shall submit any such report no later than thirty (30) days following the City's request.

SECTION 6. INSPECTION AND AUDIT.

Concessionaire shall maintain financial records pertaining to its operations pursuant to this Agreement for a period of three (3) years after the conclusion of any Agreement year, and such records shall be open and available to the City Manager or his/her designee, as deemed necessary by the City Manager or his/her designee, but shall not be subject to photocopying without the Concessionaire's prior consent. Concessionaire shall maintain all such records at its principal office, currently located at 1451 Ocean Dr., Suite 205 Miami Beach, Florida 33139. If moved to another location outside of the City of Miami Beach, all such records shall be relocated, at Concessionaire's expense, to a location in Miami Beach, within ten (10) days' written notice from the City Manager or his/her designee.

The City Manager or his/her designee shall be entitled to audit, but not photocopy (unless first having obtained Concessionaire's consent), Concessionaire's records pertaining to its operations pursuant to this Agreement as often as it deems reasonably necessary throughout the Term of this Agreement, and three (3) times within the

three (3) year period following termination of this Agreement, regardless of whether such termination results from the natural expiration of the Term or for any other reason. The City shall be responsible for paying all costs associated with such audits, unless the audit(s) reveals a deficiency of five percent (5%) or more in Concessionaire's statement of gross receipts for any Agreement year or years audited, in which case the Concessionaire shall pay to the City, within thirty (30) days of the audit being deemed final (as specified below), the cost of the audit and a sum equal to the amount of the deficiency revealed by the audit, plus interest at the rate of 12% per annum; provided, however, the audit shall not be deemed final until Concessionaire has received the audit and has had a reasonable opportunity to review the audit and discuss the audit with the City. These audits are in addition to periodic audits by the City of Resort Tax collections and payments, which are performed separately. Nothing contained within this Section shall preclude the City's audit rights for Resort Tax collection purposes.

Concessionaire shall submit no later than May 31st after the end of each Agreement year, an annual statement of gross receipts, in a form consistent with generally accepted accounting principles. Additionally, such statement shall be accompanied by a report from an independent CPA firm which shall perform certain agreed upon procedures, as described in the attached **Exhibit 6**. Any modifications to the agreed upon procedures due to implementation of the POS System pursuant to **Section 5** above shall be subject to the approval of the City Manager or his or her designee and **Exhibit 6** shall be amended.

It is Concessionaire's intent to stay informed of comments and suggestions by the City regarding Concessionaire's performance under this Agreement. Within thirty (30) days after the end of each Agreement year, Concessionaire and the City Manager or his/her designee may meet to review Concessionaire's performance under the Agreement for the previous Agreement year. At the meeting, Concessionaire and City may discuss quality, operational, maintenance and any other issues regarding Concessionaire's performance under the Agreement.

SECTION 7. TAXES, ASSESSMENTS, AND UTILITIES.

7.1 Concessionaire agrees to, and shall pay before delinquency, all taxes (including but not limited to Resort Taxes, as applicable) and assessments of any kind assessed or levied upon Concessionaire by reason of this Agreement, or by reason of any business or activities conducted by Concessionaire in connection with the Concession Areas. Concessionaire will have the right, at its own expense, to contest the amount or validity, in whole or in part, of any tax and/or assessment by appropriate proceedings diligently conducted in good faith. Concessionaire may refrain from paying a tax or assessment to the extent it is contesting the assessment or imposition of same in a manner that is in accordance with law; provided, however, if, as a result of such contest, additional delinquency charges become due, Concessionaire shall be responsible for such delinquency charges, in addition to payment of the contested tax and/or assessment if so ordered.

Concessionaire shall also pay for any fees imposed by law for licenses or permits for any business(es) or activities of Concessionaire conducted in the Concession Areas.

Concessionaire shall pay before delinquency any and all charges for utilities used by, for, or on behalf of the operations contemplated herein (including, but not limited to, water, electricity, gas, heating, cooling, sewer, telephone, ice machine, trash collection, etc.).

City acknowledges that Concessionaire shall also be permitted to use, but shall pay for, all utilities with respect to its operations at 10th Street and Ocean Drive, including costs associated with operating an ice machine, running water, and electrical.

7.2 Procedure If Ad Valorem Taxes Assessed.

Notwithstanding **Subsection 7.1**, the parties are proceeding under the assumption that, as the operations contemplated herein are for public purposes, historically no ad valorem taxes have been assessed by the Miami-Dade County Tax Appraiser. If, however, such taxes are validly assessed at any time during

the Term, the City and Concessionaire shall use reasonable efforts to achieve and equitable solution to address payment of same.

SECTION 8. EMPLOYEES AND INDEPENDENT CONTRACTORS.

- 8.1 In connection with the performance of its responsibilities hereunder, Concessionaire shall select, train, and employ (or otherwise retain) such number of employees and/or independent contractors, as is reasonably necessary or appropriate for Concessionaire to satisfy its responsibilities hereunder. Concessionaire shall have the authority to hire, terminate and discipline any and all personnel employed (or otherwise retained) by the Concessionaire to satisfy its responsibilities hereunder. Concessionaire shall select the number, function, qualifications, compensation, including benefits (if any), and may, at its discretion and at any time, adjust or revise the terms and conditions relating to such employees and/or independent contractors. None of the employees or contractors of Concessionaire shall be deemed to be employees or contractors of the City for any purpose whatsoever.
- 8.2 Concessionaire and its employees and/or independent contractors shall wear uniforms approved by the City and a duty roster of employees on duty at the concession huts, during all hours of operation when such employee or independent contractor are on duty. The Concessionaire shall hire people to work in its concession operation who are neat, clean, well-groomed and who shall comport themselves in a professional and courteous manner. The Concessionaire and any persons hired by it shall never have been convicted of a felony. The Concessionaire shall have an experienced manager(s) overseeing the concession operations and Concession Areas at all times. The name (or names) of the Concessionaire's manager(s) shall be provided to the City Manager or his/her designee, on or before the Effective Date, and shall be updated, as necessary.

SECTION 9. HOURS OF OPERATION.

All Concession Areas and concession operations thereon shall be open every day of the year, weather or Events of Force Majeure permitting, and, subject to **Subsection 3.7(d)** above, set-up may occur no earlier than sunrise with opening to the public no earlier than one (1) hour after sunrise daily, and break down may occur no later than one (1) hour before sunset daily, provided, that, Concessionaire shall, at its option, be entitled to cease rentals of Concessionaire's Equipment at 5:00 p.m. in order for an orderly wind down of operations. Sunrise and sunset shall be established on a daily basis by the National Weather Service. Any change in the hours of operation shall be at the City Manager's or his/her designee's sole option and discretion, and any request by Concessionaire for an increase or decrease in same shall be subject to the prior written approval of the City Manager or his/her designee.

Notwithstanding anything herein to the contrary, if North Beach Oceanside Park Concession Area and/or at the South Pointe Park Beach Concession Areas are activated pursuant to **Subsection 2.3** and/or **2.4** hereof, such operations may be permitted with reduced hours of operation and reduced services, as may be determined by the City Manager or his/her designee pursuant to the procedures established under **Subsections 2(a) – (b)** hereof.

SECTION 10. MAINTENANCE.

- 10.1 The Concessionaire accepts the use of the Concession Areas in their "AS IS, WHERE IS" condition. Concessionaire assumes sole responsibility and expense for maintenance, including the collection and daily removal of litter, garbage and debris of the following areas: (1) the Concession Areas, including all facilities and equipment thereon; (2) any Buffer Zone (as defined in **Subsection 2.7** hereof) immediately adjacent to any portion of the Concession Areas; (3) any Lifeguard Facility Zone (as defined in **Subsection 2.5** hereof) immediately adjacent to any portion of the Concession Areas; (4) any Handicap Zone immediately adjacent to any portion of the Concession Areas; (5) the area within fifty (50) feet of any of the Concessionaire's storage areas located outside of a Concession Area; (6) the area

within ten (10) feet of any outdoor ashtray required to be placed and maintained by Concessionaire pursuant to this Agreement (and including ashtrays provided by Concessionaire pursuant to the Public Beachfront Outdoor Ashtray Program contemplated in **Subsection 3.9.5**, and ashtrays provided by Concessionaire for use by its patrons); (7) any area within fifty (50) feet of a food and beverage dispensing facility; and (8) the Dune area landward and adjacent to any portion of the Concession Areas (NOTE: for purposes of this **Section 10**, and of any other section of the Agreement which references the term "areas outside of the Concession Areas," that term shall be deemed to reference and include only the specific areas described in clauses (2) through (8) above).

10.1.1 As an additional requirement of its maintenance responsibilities, Concessionaire shall provide throughout the Term, at its sole cost and expense, sand sifting equipment, whether manual or motorized, and staff appropriately trained and/or certified to operate same, within all Concession Areas and those "areas outside of the Concession Areas" as defined in **Subsection 10.1**, but **not** including the Area defined in Subsection 10.1(8) above. Sand sifting shall occur as mutually agreed by Concessionaire and the City in each Concession Area and in each of the areas outside of the Concession Areas. Concessionaire has provided the City Manager or his/her designee with photographs and specifications of the sand sifting equipment it is currently employing as set forth in **Exhibit 10.1.1** hereof. If any new sand sifting equipment is employed, Concessionaire shall provide photographs and specifications of such sand sifting equipment for approval by the City Manager or his or her designee. Upon approval, **Exhibit 10.1.1** shall be amended. In exchange for the Sand Sifting Fees payable by Concessionaire to the City, the City agrees that the Concessionaire shall be permitted to park such sand sifting equipment in a new enclosure located at 10th Street as no cost, as outlined on **Exhibit 10.1.1** hereto. Concessionaire acknowledges that, as of the Commencement Date, Concessionaire itself is providing the sand sifting services contemplated pursuant to **Subsection 10.1.1** under this Agreement. Notwithstanding the preceding sentence, Concessionaire may, at any time during the Term, subcontract with another entity ("Subconcessionaire") to provide sand sifting services, within the Concession Areas and as provided in **Subsection 3.1.10** of this Agreement, in the manner and to the extent contemplated under this **Subsection 10.1.1**, subject to the prior approval of the City Manager or his or her designee, provided, that, Concessionaire shall remain liable to pay the Sand Sifting Fees (based upon the gross receipts relating to such sand sifting services) directly to the City in accordance with **Subsections 4.1 and 4.2**, as the case may be.

10.2 Garbage Receptacles; Recycling Plan; outdoor ashtrays; and Fenced Storage Area.

With respect to litter, garbage, and debris removal caused by the Concessionaire's operations, the Concessionaire shall provide, at its sole cost and expense, receptacles within the confines of the Concession Areas, and shall provide a sufficient number of these receptacles for its own use and for the use of its patrons and the public in general. The Concessionaire has provided the City Manager or his/her designee with a recycling plan for litter, garbage, and debris collected within the Concession Areas as set forth in **Exhibit 10.2** hereof.

Concessionaire shall provide ashtrays for use by the Concessionaire's patrons; this requirement is in addition to the Concessionaire's obligation to implement and maintain the Public Beachfront Outdoor Ashtray Program contemplated in **Subsection 3.9.6**.

The disposal of the contents of the Concessionaire's garbage receptacles and ashtrays, and removal of litter, garbage, and debris within the Concession Areas, shall be done on a daily basis, and shall be the sole responsibility of the Concessionaire. The Concessionaire shall be permitted to utilize the dumpster area on the north side of the 10th Street Auditorium. Any modifications to the foregoing shall require the prior written approval of the City Manager or the City Manager's designee.

Determination of the "number" of receptacles shall at all times be made by the City Manager or his/her designee at their sole discretion, and Concessionaire shall agree to be bound by same. Notwithstanding

the foregoing, with respect to litter, garbage and debris created by the public or other persons in the “areas outside of the Concession Areas,” as defined in **Subsection 10.1**, and the contents of the public beachfront outdoor ashtrays, the Concessionaire shall remove such litter, garbage and debris to the City’s waste receptacles for disposal by the City.

10.2.1 Concessionaire shall be permitted to operate and maintain, including landscaping, at Concessionaire’s sole cost and expense, a twenty-five (25) foot by twenty-five (25) foot fenced storage area adjacent to the dumpster area on the north side of the 10th Street Auditorium, in accordance with **Exhibit 10.2.1**, to be used for storage **only**. Any additional or alternate storage area(s) shall be approved by the City’s Planning Department or such other applicable authority as may be deemed necessary by the City Manager or his/her designee.

10.2.2 In addition to the area described in **Subsection 10.2.1** above, and subject to all regulatory reviews and approvals that may be required, if any, Concessionaire shall also be permitted to operate and maintain, including landscaping, at Concessionaire’s sole cost and expense, the storage area located south of 10th Street Auditorium adjacent to the Ocean Rescue Storage Area in accordance with **Exhibit 10.2.1**. Any additional or alternate storage area shall be approved by the City’s Planning Department, or such other applicable authority as may be deemed necessary by the City Manager or his/her designee.

10.3 Facilities/Equipment/Furnishings.

Concessionaire must provide and maintain, at its own cost and expense, all facilities, equipment, and furnishings required to operate the concession. In the event any of the aforesaid items are lost, stolen, or damaged during the Term, they shall be repaired or, if irreparable, replaced, at the sole cost and expense of the Concessionaire, within fifteen (15) days of written notice from the City Manager or his/her designee, provided, that, if any such item reasonably requires more than such 15-day period to repair or replace, Concessionaire shall not be in default of this **Section 10.3**, provided, that, it commences to repair and replace promptly after notice thereof from the City and pursues such repair or replacement with all due diligence. This requirement is in addition to Concessionaire’s obligation for the periodic replacement of Beach Equipment (under **Subsection 3.1.1**) and Watersports Equipment (under **Subsection 3.4.10**)

10.4 Orderly Operation.

Concessionaire shall keep a neat and orderly operation at all times, and shall be solely responsible for the necessary housekeeping services to properly maintain the Concession Areas and all facilities, equipment and furnishings thereto. There shall be no living quarters, nor shall anyone be permitted to live, within any Concession Areas and/or any facilities thereon, provided, that, if Concessionaire becomes aware of any such living quarters or that someone is living in the Concession Area, its only obligation is to notify the Miami Beach Police Department promptly. Concessionaire shall make available all of its facilities, equipment and furnishings for inspection during hours of operation by the City Manager or his/her authorized representative.

10.5 No Dangerous Materials.

Concessionaire agrees not to use or permit the storage in the Concession Areas of gasoline, fuel oils, diesel, illuminating oils, oil lamps, combustible powered electricity producing generators, turpentine, benzene, naphtha, propane (unless approved pursuant to **Subsection 3.2.8**), natural gas, or other similar substances, combustible materials, or explosives of any kind (but excluding propane gas to the extent permitted by **Section 3.2.1** hereof), or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida. Any such substances or materials found within the Concession Areas shall be immediately removed. This subsection shall not apply to any substances permitted by the City’s Rules and Regulations for Beachfront Concession Operations, as same may be amended from time to time; provided the use and storage of such substances comply with such Rules and Regulations.

Notwithstanding any contrary provisions of this Agreement, Concessionaire, shall indemnify and hold City harmless from any loss, damage, cost, or expense of the City, including, without limitation, reasonable attorney's fees, incurred as a result of, arising from, or connected with the placement by Concessionaire of any "hazardous substance" or "petroleum products" on, under, in or upon the Concession Areas, as those terms are defined by applicable Federal and State Statute, or any environmental rules and environmental regulations promulgated thereunder. The provisions of this **Subsection 10.5** shall survive the termination or earlier expiration of this Agreement.

10.6 Security.

Concessionaire shall be solely responsible for providing such reasonable security measures as Concessionaire, in its professional experience and judgment, may deem commercially reasonable to protect any of its facilities, equipment, and furnishings within the Concession Areas. Under no circumstances shall the City be responsible (i) for any stolen or damaged facilities, equipment, or furnishings; **nor** shall the City be responsible for (ii) any stolen or damaged personal property of Concessionaire's patrons, guests, invitees, employees, contractors, and/or any other third parties; provided that, as to clause (ii), the foregoing is not intended to impose any affirmative duty on Concessionaire for any such theft or damage.

10.7 Vehicles on the Beach.

Concessionaire's vehicles shall include (i) any "on-road" vehicles and/or trailers licensed in accordance with applicable County, State and Federal law, to operate on public streets and roadways; and (ii) any "off-road" vehicles such as golf carts and all terrain vehicles ("ATV's"); and (iii) the ice cream carts permitted by **Section 3.2.2** and Hot Food Trailers permitted by **Section 3.2.1** (collectively for clauses (i) through (iii) shall be referred collectively herein as "Vehicles"). Concessionaire's on road vehicles shall only be allowed on the beachfront for purposes of supplying the concession operations and to deploy and remove the Watersports Equipment at the beginning and close of operations each day, and must be removed from the beachfront immediately thereafter. No parking of an on-road vehicle on any of the beachfront is permitted, except when engaging in the activities set forth herein. Said supplying and deployment/removal operations shall only be permitted during regular hours of operation, and shall be completed safely and expeditiously as provided for in this Section. No Vehicles will be permitted on the beach after sunset or prior to sunrise. Access to the beach for all Vehicles shall only be permitted via specifically designated beach and dune crossovers authorized, in writing, by the City Manager or his/her designee for such use, and nearest to the concession operation, as referenced in **Exhibit 10.7**.

10.7.1 A total of sixteen (16) Vehicles (which count shall not include the Hot Food Trailers or ice cream carts and may include such combination of the type of Vehicles specified in (i) through (ii) above as Concessionaire may deem necessary, but which total number of Vehicles shall in no event exceed sixteen (16) are herein permitted, and shall be properly marked and identified in accordance with the applicable guidelines for Vehicles provided in this Section. In order to contain vehicular traffic on the beach to a minimum, the City Manager or his/her designee must approve any additional Vehicles to be used by Concessionaire prior to such use. The vehicle model, make, year and license plate information for the sixteen (16) approved Vehicles (or any subsequently approved additional vehicles) are set forth on **Exhibit 10.7.1** and updated accordingly.

10.7.2 Vehicles operated on the beachfront shall not exceed 5 M.P.H., and shall only operate in the immediate vicinity of the concession or to-and-from the nearest pre-determined and assigned access ramp. After transporting equipment to, or removing equipment from, a Concession Area, the Vehicles shall be removed from the beachfront area and parked in a legally authorized location. Driving Vehicles on the beachfront area shall be kept to a minimum. No vehicular traffic will be permitted on the beach, at any time or for any purpose, other than as stated herein. Driving an on-road vehicle from one Concession Area, concession facility, and/or concession location to another to service, supervise, or for any other reason other than permitted in this subsection, is prohibited. Concessionaire, when using an on-road vehicle, must exit to the street using the

closest approved beach access point to access other locations. All Vehicles must have a tire-to-ground pressure of ten pounds per square inch (10 p.s.i) or less. Prior to entering the beach area, drivers will turn on their Vehicle headlights and flashers, if available. Both the passenger and driver's side front windows of the Vehicle shall be rolled down while operating said Vehicle on the beach.

- 10.7.3 Eighteen-inch (18") high cones, orange in color, shall be placed in front of, and at the rear of any on-road vehicle when parked temporarily anywhere on the beachfront for the purpose of deploying, servicing or removing the Hot Food Trailers and any Watersports Equipment. The on-road vehicle operator must inspect the on-road vehicle's perimeter and surrounding area, prior to turning the on-road vehicle's ignition switch, to assure a clear path of egress and only proceed with extreme caution. On-road vehicles must always remain on the "hard-packed" sand area, unless otherwise provided for in this **Section 10.7**. Driving or parking Vehicles on any "soft-sand" area is prohibited. The only exception to this rule is for a Concession Area that has been authorized to conduct Watersports Equipment rental activities, and where Concessionaire is in the process of deploying, servicing, or removing Watersports Equipment from such Concession Area. Said deployment, servicing, or removal of Watersports Equipment must be conducted with no less than one (1) additional concession employee that will be positioned on the beachfront, to directly supervise and guide, said deployment, service, or removal operation, to ensure the safety of the beach-going public. Additionally, during any deployment, service, or removal operation, the Concessionaire shall be responsible for placing no less than eight (8), eighteen-inch (18") high cones, orange in color, no less than four (4) on the northernmost boundary and no less than four (4) on the southernmost boundary of the projected path (from hard-packed sand to the shore line) of the Vehicle, to create a clear non-obstructed path perpendicular to the shoreline, of no less than twenty-five feet (25'-0") in width (when measured from north to south). The Vehicle driver and supervising concession employee must independently inspect the Vehicle perimeter, surrounding area, and path (once marked) prior to turning the Vehicle's ignition switch, to assure a clear path of ingress to the shoreline or egress to the hard-packed sand and only then, proceed with the respective operation with extreme caution to ensure the safety of all beach-going patrons.
- 10.7.4 All Vehicles must have signage, on each side, with the Concessionaire's name in 4" high letters on a contrasting background.
- 10.7.5 Use of a cellular phone by the driver while the Vehicle is in motion is prohibited. Vehicle gear shift must be placed in the "park" position and the emergency break engaged prior to any use of a cellular telephone by the driver.
- 10.7.6 Anyone operating a Vehicle for or on behalf of Concessionaire must have a current valid Florida Driver's License. Concessionaire, its employees, and contractors, are prohibited from driving their personal vehicles, whether said vehicle is a motor vehicle, small off-road vehicle, or any other type of vehicle (e.g., motorcycle), on the beach at any time.
- 10.7.7 **Any Vehicle not provided for in this Subsection 10.7, or not approved by the City, will be required to leave the beachfront immediately. Three (3) or more notices from the City of this violation may, at the discretion of the City Manager, lead to the City's termination of this Agreement, upon thirty (30) days written notice to Concessionaire, and without liability to the City.**
- 10.7.8 No Vehicle or any trailer attached thereto may be parked or left unattended on the beach, at any time or for any reason.
- 10.7.9 Concessionaire agrees and understands that in the event of any accident or collision involving any of its Vehicles which involves an injury to person(s) (whether minor or major), it must complete

and submit a written report to the City's Risk Management Officer, with copies to the City's Office of Asset Management, within twenty-four (24) hours following the occurrence of such an accident or collision, or upon notification thereof by a third party(ies).

10.8 Inspection.

The Concessionaire agrees that the Concession Areas, and all facilities, equipment, furnishings, and operations thereon, may be inspected at any time during hours of operation by the City Manager or his/her authorized designee(s), or by any other municipal, County, State agency or official having responsibilities for inspections of such operations. The Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference (which interference, if by the City, must be reasonable) with the concession operation by the City, or any public agency or official, in enforcing their duties or any laws or ordinances. Any such interference shall not relieve the Concessionaire from any obligation to perform hereunder.

SECTION 11. INSURANCE.

Concessionaire shall maintain, at its sole cost and expense, the following types of insurance coverage at all times throughout the Term:

- a. Comprehensive General Liability:
 - (i) except as specifically provided for in clause (a)(ii) below, comprehensive general liability in the minimum amount of Five Million Dollars (\$5,000,000) per occurrence for bodily injury and property damage. This policy must also contain coverage for premises operations, products and contractual liability (which may be met with a combination of comprehensive general liability and excess liability).
 - (ii) for all Watersports Equipment rentals, as defined in Section 3.4, comprehensive general liability in the minimum amount of One Million Dollars (\$1,000,000) per occurrence for bodily injury and property damage. This policy must also contain coverage for premises operations, products and contractual liability.
- b. Workers Compensation Insurance shall be required in accordance with the Laws of the State of Florida.
- c. Automobile Insurance shall be provided covering all owned, leased, and hired vehicles and non-ownership liability for not less than the following limits:

Bodily Injury	\$1,000,000 per person
Bodily Injury	\$1,000,000 per accident
Property Damage	\$1,000,000 per accident

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days prior written notice to the City, and then only subject to the prior written approval of the City Manager or his/her designee. Prior to the Effective Date, Concessionaire shall provide City with a Certificate of Insurance for each such policy. Except for Workers' Compensation, ALL POLICIES SHALL NAME THE CITY OF MIAMI BEACH FLORIDA 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 Concessionaire 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 Concessionaire to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If Concessionaire fails to repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) per annum until paid, and such failure shall be deemed an event of default hereunder.

The terms of insurance policies referred to in this Section 11 shall preclude subrogation claims against

Concessionaire, the City, and their respective officers, employees, contractors and agents.

SECTION 12. INDEMNITY.

- 12.1 In consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its officers, officials, employees, contractors, and agents, from and against any claim, demand or cause of action of whatsoever kind or nature arising out of the negligent act or willful misconduct of Concessionaire, its officers, directors, members, managers, employees, contractors (including, without limitations, any sub-concessionaires), or agents, in the performance of services under this Agreement.
- 12.2 In addition, in consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its officers, officials, employees, contractors, or agents, from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of Concessionaire, its officers, directors, employees, contractors (including, without limitations, any sub-concessionaires), or agents, not included in **Subsection 12.1** above and for which the City, its officers, officials, employees, contractors or agents, are alleged to be liable.
- 12.3 **Subsections 12.1 and 12.2** shall survive the termination or expiration of this Agreement. **Sections 12.1 and 12.2** shall not apply, however, to any such liability that arises as a result of the willful misconduct or gross negligence of the City, its officers, officials, employees, contractors, or agents.
- 12.4 Force Majeure.
Neither party shall be obligated to perform hereunder and neither party shall be deemed to be in default if performance is prevented by:
- a. fire which renders at least thirty percent (30%) of the Concessionaire's cumulative facilities and equipment unusable and which is not caused by negligence of Concessionaire;
 - b. an Event of Force Majeure; or
 - c. 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.

For purposes of this Agreement, an "Event of Force Majeure" means any which renders a party unable to comply with any of the provisions of the Agreement by reason of any act beyond the reasonable control of such party, including, but not limited to, hurricane, earthquake, windstorm, natural disaster, tropical depressions, riptides, red tides, action of the elements, algae blooms, seaweed inundations, significant beach erosion, fires, explosions, strikes or other labor disputes, oil spills or other environmental issues adversely impacting the concession area provided for in the City Agreement, significant beach renourishment projects (but only to the limited extent any such renourishment project effects a displacement of a Concession Area), flood, restrictions or restraints imposed by law, rules or regulations of a public authority, acts of military authorities, terrorism, war or civil disorder, riots, civil disturbances, sabotage, accident, acts of God, an epidemic such as Ebola or Zika, quarantines, communicable disease such as SARS and swine flu epidemics or any other mutually-agreed upon matters or conditions beyond the control of either party. The parties hereto acknowledge that Concessionaire's obligations and benefits hereunder may be negatively affected by an Event of Force Majeure. If an Event of Force Majeure occurs during an Agreement year, and provided further that Concessionaire's minimum guarantee (MG) payment(s) to the City for that contract year (as adjusted for pro rata reductions of the MG as specified below) is greater than the applicable percentage guarantee (PG) payment, then the City Manager or his/her designee, in their sole discretion, may extend the Term of this Agreement for a reasonable period

of time based on the period of the Event of Force Majeure and the period of time following the Event of Force Majeure that may be required to restore the Concession Areas and/or remediate any delay, damage, loss, failure or inability to perform as a consequence of the Event of Force Majeure; provided, however, such extension shall take effect only if Concessionaire agrees to such extension.

In the event that the Event of Force Majeure adversely impacts a significant portion of the Concession Areas for a period of more than thirty (30) days, then there shall be a pro rata reduction in the MG for such Agreement year(s). For example, if the Event of Force Majeure continues for a period of six (6) months during any Agreement year, then the MG would be reduced by fifty percent (50%) for such Agreement year, with a year end true-up due to the payment of fifty percent (50%) of the MG on January 1st of each Agreement year by Concessionaire.

12.5 Labor Dispute.

In the event of a labor dispute which results in a strike, picket, or boycott affecting the Concession Areas described in this Agreement, Concessionaire shall not thereby be deemed to be in default or to have breached any part of this Agreement, unless such dispute shall have been caused by illegal labor practices or violations by Concessionaire of applicable collective bargaining agreements and there has been a final determination of such fact which is not cured by Concessionaire within thirty (30) days following such determination or, if compliance with such final determination is not reasonably susceptible to being cured within such period, then Concessionaire shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes such cure.

12.6 Waiver of Loss from Hazards.

The Concessionaire hereby expressly waives all claims against the City or its officers, officials, employees, contractors or agents, for loss or damage sustained by the Concessionaire resulting from any Event of Force Majeure contemplated in **Subsection 12.4** and Labor Dispute in **Subsection 12.5** above, and the Concessionaire hereby expressly waives all rights, claims, and demands against the City or its officers, officials, employees, contractors, or agents, and forever releases and discharges the City and its officers, officials, employees, contractors, or agents, from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

SECTION 13. DEFAULT, TERMINATION AND PENALTIES

Subsections 13.1 through 13.3 shall constitute events of default under this Agreement. An event of default by Concessionaire shall entitle City to exercise any and all remedies described as City's remedies under this Agreement, including, but not limited, to those set forth in **Subsection 13.4 and Section 14**. An event of default by City shall entitle Concessionaire to exercise any and all remedies described as Concessionaire's remedies under this Agreement, including, but not limited to, those set forth in **Subsection 13.5**.

13.1 Bankruptcy.

If either the City or Concessionaire shall be (a) adjudged bankrupt or insolvent, or (b) if any receiver or trustee of all or any part of the business property of either party shall be appointed, or if any receiver of all or any part of the business property shall be appointed and in any such case shall not be discharged within ninety (90) days after appointment, or (c) if either party shall make an assignment of its property for the benefit of creditors, or (d) shall file a voluntary petition in bankruptcy or insolvency, or shall apply for reorganization or arrangement with its creditors under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State, or otherwise, or (e) if such petitions shall be filed against either party and shall not be dismissed within ninety (90) days after such filing, then the other party may immediately, or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.2 Default in Payment.

In the event Concessionaire fails to submit any payment within five (5) days of its due date, there shall be a late charge of \$50.00 per day for such late payment, in addition to interest at the highest rate allowable by law (currently 12% per annum). If any payment and accumulated penalties are not received within fifteen (15) days after the payment due date, and such failure continues three (3) days after written notice thereof, then the City may, without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.3 Non-Monetary Default.

In the event that Concessionaire or the City fails to perform or observe any of the covenants, terms or provisions under this Agreement, and such failure continues thirty (30) days after written notice thereof from the other party hereto, such non-defaulting party may immediately or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract. Notwithstanding the foregoing, in the event that a default is not reasonably susceptible to being cured within such period, the defaulting party shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default, but in no event shall such extended cure period exceed ninety (90) days from the date of written notice thereof. In the event Concessionaire cures any default pursuant to this subsection, it shall promptly provide City with written notice of same.

13.4 City's Remedies for Concessionaire's Default.

If any of the events of default by Concessionaire as set forth in this Section shall occur, the City may, after notice (if required) and the expiration of applicable cure periods, as provided above, at its sole option and discretion, institute such proceedings as in its opinion are necessary to cure such defaults and to compensate City for damages resulting from such defaults, including, but not limited to, the right to give to Concessionaire a notice of termination of this Agreement. If such notice is given, the Term of this Agreement shall terminate upon the date specified in such notice from City to Concessionaire, but in no event shall the City specify a surrender date that is less than ten (10) days from the date the notice is delivered to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area(s) to City pursuant to the provisions of **Subsection 13.7**. Upon the termination of this Agreement, all rights and interest of Concessionaire in and to the Concession Area(s) and to this Agreement, and every part thereof, shall cease and terminate (other than those provisions which by their terms survive such termination) and City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement. In addition to the rights set forth above, City shall have the rights to pursue any and all of the following:

- a. the right to injunction or other similar relief available to it under Florida law against Concessionaire; and or
- b. the right to maintain any and all actions at law or suits in equity or other proper proceedings to obtain damages resulting from Concessionaire's default.

13.5 If an event of default, as set forth in this Section, by the City shall occur, the Concessionaire may, after notice (if required) and the expiration of the applicable cure periods, as provided above, at its sole option and discretion, terminate this Agreement upon written notice to the City and/or sue for damages. Said termination shall become effective upon receipt of a written notice of termination by the City, but in no event shall Concessionaire specify a termination date that is less than sixty (60) days from the date of the written termination notice. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Areas to City pursuant to the provisions of **Subsection 13.6**.

13.6 Surrender of Concession Areas.

At the expiration of this Agreement, or earlier termination in accordance with the terms of this Agreement, Concessionaire shall surrender the Concession Areas in the same condition as the Concession Areas were prior to the commencement of this Agreement, reasonable wear and tear excepted (including any

beach erosion not directly caused by Concessionaire and/or its operation). Concessionaire shall remove all its facilities, equipment, fixtures, personal property, etc. upon seventy-two (72) hours of receipt of written notice from the City Manager or his designee unless a longer time period is agreed to by the City. Concessionaire's obligation to observe or perform this covenant shall survive the expiration or other termination of this Agreement. Continued occupancy of the Concession Area(s) after termination of this Agreement and expiration of such 48-hour period shall constitute trespass by the Concessionaire and may be prosecuted as such. In addition, the Concessionaire shall pay to the City one thousand dollars (\$1,000) per day as liquidated damages for such trespass and holding over.

13.7 Penalties in Lieu of Default.

Notwithstanding the City's right to declare the Concessionaire in default, as an alternative means of ensuring compliance with certain non-monetary terms of this Agreement for which the parties agree and acknowledge that the cure period provided for defaults herein is an inadequate remedy, the City Manager or his/her designee may issue a fine to the Concessionaire for violations of provisions in the Sections and Subsections described in **Exhibit 13.7**, in the amounts contained therein.

SECTION 14. [INTENTIONALLY LEFT BLANK]

SECTION 15. ASSIGNMENT.

Except as otherwise provided in **Subsections 3.1.10, 3.2.3, 3.4.1 and 10.1.1** and in this **Section 15**, Concessionaire shall not assign; sublease; grant any concession or license (other than the sub-concession for food and beverages which shall be governed pursuant to the procedures in **Subsection 3.2** hereof); or otherwise transfer all or any portion of this Agreement and/or of the Concession Area(s) (all of the foregoing are herein after referred to collectively as "transfers"), without the prior written consent of the City Manager or his/her designee, which consent shall not be unreasonably withheld.

If there is a change in control of Concessionaire, then any such change in control shall constitute a "transfer" for purposes of this Agreement and shall be approved by the Manager or his or her designee prior to consummation of such change in control. "Change in control", for purposes hereof, shall mean a change of the ownership, directly or indirectly, of greater than thirty-three and four tenths percent (33.4%) of the voting or ownership interest or right to profits in such Concessionaire to any non-Affiliate, by means of one or more transfers, sales, mergers, consolidations, dissolutions or otherwise; provided, that, the foregoing shall not be deemed to include (i) a pledge or collateral assignment of the profits of Concessionaire in connection with any financing, provided such pledge or collateral assignment is subordinate to the rights of the City to the fees payable to the City pursuant to **Section 4** hereof; (ii) any transfer to other owners of Concessionaire or to trusts the beneficiaries of which are any owner(s) of Concessionaire or member(s) of their immediate family; or (iii) a change in the ownership of Concessionaire through a registered public offering of shares in Concessionaire (clauses (i), (ii) and (iii) above collectively are referred to herein as the "Transfer Exclusions"). Notwithstanding the City Manager's delegated authority to approve any matter as specified herein, the City Manager may elect to have the City Commission determine any matter or approval contemplated under this Agreement (within the timeframe therefor as if the approval was being determined by the City Manager).

Concessionaire shall notify the City of any proposed transfer that is not a Transfer Exclusion prior to consummation of same for the approval of the City or the City Manager or his/her designee, as applicable, and the City or the City Manager or his/her designee, as applicable, shall respond within thirty (30) days. In the event that any such transfer is approved, the transferee shall agree to be bound by all the covenants of this Agreement required of the transferor hereunder. Any transfer made without complying with this Section shall be null, void, and of no effect and shall constitute an act of default under this Agreement. Notwithstanding any such consent, or any permitted transfer under any provision of this Section, each approved transferee shall automatically become liable for all obligations of the transferor hereunder with respect to that portion of the Agreement so transferred, and the City shall be permitted to enforce the provisions of this Agreement directly against any

transferee of the Concessionaire without proceeding in any way against any other person. In addition, if Concessionaire makes a series of transfers which cumulatively equals thirty-three and four tenths percent (33.4%), then it shall be required to follow the procedures outlined in this paragraph as to the transfer which results in a cumulative transfer of thirty-three and four tenths percent (33.4%).

SECTION 16. SPECIAL EVENTS / SPONSORSHIPS.

- 16.1 With the exception of the Team Building Events as permitted by **Section 3.1.9**, Concessionaire's proposed uses, as defined in **Section 3** herein, do not contemplate the production, promotion or sponsorship by the Concessionaire of special events in any of the Concession Areas. In the event Concessionaire does produce, promote, or sponsor a special event in the City (other than Team Building Events), it shall comply with by the City's Special Events Permit Requirements and Guidelines, as same may be amended from time to time, including the payment of all required fees.
- 16.2 The City Manager or his/her designee shall evaluate requests for special events permits on a case by case basis in accordance with the City's Special Events Permit and Film and Print Permit Requirements and Guidelines, as may be amended from time to time (the "Guidelines"). In the event that a special event and/or film permit is requested by an entity, other than the Concessionaire, and the proposed special event and/or film production is scheduled to occur within a Concession Area, as such Concession Area is delineated in **Exhibit 3.1.3**, and would cause the operations within that particular Concession Area to cease wholly or partly, and provided that the Concessionaire is not in default under the Agreement at the time of the request, the Concessionaire agrees to cooperate with the City and the special event or film permittee to allow use of such Concession Area during the period of the special event or film production, including set-up and break-down time.
- 16.2.1 Should the Concessionaire be displaced from all or any portion of a Concession Area due to a special event or film production, then the Concessionaire shall be entitled to a "Displacement Fee" (as hereinafter defined). For purposes of this subsection only, "displacement" shall mean that the Concessionaire cannot provide the food and beverage services, sales of Beach-Related Sundries/Skin Care Products, rental of Beach Equipment, rental of Watersports Equipment, or Team Building Events from a section of a Concession Area, and the services provided by the Concessionaire cannot be otherwise reasonably accommodated by the relocation of the services to another section of the Concession Area, as approved by the City Manager or his/her designee.

The Displacement Fee for each section will be calculated by the City Manager or his/her designee and Concessionaire at the start of each Agreement year. The Displacement Fee shall be based upon the average of daily revenues generated by the Concessionaire in the section of the Concession Area from which Concession Services will be displaced, and shall be based upon the average of the last three (3) full years of revenues for that section of the Concession Area, multiplied by the number of days that Concessionaire is displaced, provided, that, for any newly activated Concession Areas without a prior three-year history of revenues, the Displacement Fee for such areas will be mutually agreed upon by Concessionaire and the City Manager or his or her designee. The City shall cause the Displacement Fee is to be paid directly to the Concessionaire by the special event permittee or film production (as the case may be), and Concessionaire shall pay to the City the City Displacement Fee with respect thereto. The Concessionaire may waive all or a portion of the Displacement Fee, at its sole option, in exchange for other consideration(s) of equal value from the special event permittee or film production, as may be negotiated directly between the Concessionaire and the special event permittee or film production ("Alternative Consideration"), but shall nonetheless pay the City the City Displacement Fee based upon the full amount of the Displacement Fee.

- 16.2.2 Notwithstanding anything to the contrary, if a special event or film production occurs in a Concession Area, Concessionaire shall not be liable for any damage to the Concession Area or

“areas outside of the Concession Areas” as defined in **Subsection 10.1**, any acts or omissions of the special event permittee or film production crews, charge, fee or other expense, governmental or otherwise, in connection with such special event or film production, nor for waste clean-up, removal, or other obligations under this Agreement with respect to the area used by the special event permittee or film production during the permitted time.

16.3 City Special Events.

Notwithstanding **Subsections 16.1 and 16.2** above, and in the event that the City, at its sole discretion, deems that it would be in the best interest of the City, the City reserves the right to displace the Concessionaire for City-produced special events and/or City-produced productions. In such cases, the City may require that Concessionaire cease and desist operations during the term of, and in the area of the City-produced special event and/or production. No displacement fee shall be paid by the City to the Concessionaire for a City-produced special event/production occurring in a Concession Area. If the Concessionaire is not required to close, or chooses to remain open without interference to the City-produced special event and/or production, Concessionaire agrees to cooperate with the City. If the Concessionaire is allowed to remain open during City-produced special events and/or productions, the Concessionaire may be allowed to have in operation its normal daily complement of equipment and staff. "Normal" shall be defined as equipment and staff, approved by the City, that the Concessionaire has available for the public on a normal day, 365 days per year. Such equipment or staff shall not be increased or altered during City-produced special events and/or productions without the prior written consent of the City Manager or his/her designee. To the extent that the normal daily complement of equipment and staff is displaced by the City-produced special event and/or production, the Concessionaire may reallocate such displaced equipment and staff on a pro-rata basis within the portion of the Concession Areas not being utilized by the special event or production.

16.5 Sponsorships; Co-Branding.

16.5.1 The City reserves unto itself all present and future rights to negotiate all forms of endorsement and/or sponsorship agreements based on the marketing value of any City trademark, property, brand, logo and/or reputation (hereinafter referred to in this subsection as a “City Mark” or the “City Marks”). Any and all benefits derived from an endorsement and/or sponsorship agreement based on the marketing value of a City Mark, including any monetary contributions, shall belong solely and exclusively to the City.

16.5.2 Concessionaire shall be specifically prohibited from entering into, or otherwise creating, endorsements or sponsorship agreements with third parties which are based solely or in any part on the marketing value of a City Mark. This shall include, for example purposes only, any agreement between the Concessionaire and a food and beverage and/or skin care product company for the designation of a product(s) as the official product(s) of Miami Beach, South Beach, etc.

16.5.3 The prohibition on Concessionaire entering into endorsements or sponsorship agreements, pursuant to this **Subsection 16.5**, shall not be deemed to include nor prohibit the Concessionaire’s right (a) to sell advertising for display in locations not plainly visible to the general public (but visible to beachgoers), such as the underside of umbrellas, menu display boards contained within a kiosk or hut) and, subject to the approval of the City Manager or his or her designee and the City Commission, such other advertising; or (b) to offer the exclusive sale, rental or use of any particular brand or product that would otherwise be permitted for use or sale pursuant to this Agreement, subject to the Concessionaire’s disclosure of same, as required pursuant to this paragraph, and subject to the City’s rights in the following paragraph. Moreover, the City will not limit Concessionaire’s ability to negotiate a reduced rate for purchase from any vendor whose product(s) Concessionaire uses or offers for sale or rent pursuant to this Agreement, provided that the value of such reduced rates shall be treated as “gross receipts” subject to Advertising/Sponsorship Fees pursuant to Section 4.2. Prior to entering into any such agreements or arrangements, Concessionaire shall provide the City with an itemized list describing such agreements or

arrangements which may be imminently entered into or made, which list shall be updated by Concessionaire within thirty (30) days of a particular brand or product being added or deleted, as the case may be. Any gross receipts derived by Concessionaire under this paragraph are defined as the Advertising/Sponsorship Fees for purposes of **Subsections 4.1 and 4.2** hereof. Notwithstanding the preceding, attached hereto as **Exhibit 16.5-A** is an itemized list describing any agreements or arrangements which have been entered into or made, or which may be imminently entered to or made, pursuant to a written contractual agreement or verbal agreement, that Concessionaire has made, or intends to imminently make, regarding the exclusive sale, rental, or use of any brand or product. It shall also be Concessionaire's sole responsibility and obligation to update **Exhibit 16.5-A** within thirty (30) days of a particular brand or product being added, or deleted, as the case may be. All agreements or arrangements which may be imminently entered into or made, and the proposed terms and duration for such agreements or arrangements, are subject to the approval of the City Manager's or his or her designee, at the City Manager's or designee's discretion.

16.5.4 Notwithstanding the above (including the rights given to Concessionaire in the preceding paragraph) but subject to the next succeeding paragraph, should the City enter into any exclusive endorsement and/or sponsorship agreement for products sold, rented, distributed, or otherwise used by the Concessionaire, then Concessionaire shall be required to sell, rent, distribute, or use ONLY the products under the City's exclusive endorsement and/or sponsorship agreement, and may not sell, rent, distribute, or otherwise use products produced by the City's exclusive sponsor's competitors in that product category. Concessionaire acknowledges that as of the date of this Agreement, the City has entered into an exclusive sponsorship agreement with Coca-Cola Beverages Florida, LLC with respect to non-alcoholic beverage products; and an exclusive license agreement with Destination Brands International LLC with respect to suncare products.

Notice of any new exclusive endorsement/sponsorship agreement entered into by the City for any products sold, rented, distributed, or otherwise used by the Concessionaire shall be provided by the City to the Concessionaire at least sixty (60) days prior to the commencement of any such exclusive endorsement/sponsorship agreement by the City (the "City Notice"). However, it is understood that the Concessionaire may as of the date of the City Notice have existing agreements for the sale, rental, distribution or use of the product(s) that may be competitive products of the City's exclusive sponsor. In those instances, Concessionaire shall be entitled to continue to perform under any existing agreement(s) at the Concession Areas approved by the City pursuant to Section 16.5.3 for the balance of the term(s) thereof, but shall not renew such agreement(s) in the event that the City has entered into such exclusive endorsement/sponsorship agreement pursuant to the City Notice. Concessionaire shall, within forty-five (45) days of receipt of the City Notice, provide the City with information as to the existing agreements, the remaining term thereof, and the estimated costs for cancellation/termination of such agreement(s), to permit the City to either (1) reimburse Concessionaire its cancellation costs and require the Concessionaire to comply with the City's exclusive endorsement/sponsorship agreement, or (2) exclude the Concessionaire's existing agreements, if any, from the exclusivity provided to any prospective sponsor, for the balance of the term of Concessionaire's existing agreement.

16.5.5 The City also acknowledges that, prior to receipt of the City Notice by Concessionaire of any exclusive endorsement and/or sponsorship agreement, as provided in this Subsection 16.5, Concessionaire may have purchased, for example, certain Beach Equipment (including, without limitation, as defined herein, beach chairs, lounge chairs, pads, umbrellas, and sun canopies), and/or Watersports Equipment (including, without limitation, as defined herein, motorized and non-motorized equipment such as wave runners, parasail boats, banana boats, kayaks, and paddle boats) for use in the Concession Areas, and to provide the services contemplated under this Agreement, that may be deemed to be a competitive (or otherwise prohibited) product under one of the aforesaid proposed exclusive endorsement and/or sponsorship agreements that the City may seek to enter into during the Term (for purposes of this Subsection 16.5 only, such Beach Equipment and Watersports Equipment

and other equipment and products required to be provided by Concessionaire hereunder that has been purchased by Concessionaire for the Concession Areas, and to provide the services contemplated under this Agreement, shall be referred to collectively as "Concessionaire's Equipment"). Concessionaire's Equipment shall only be exempt from the requirements of **Subsection 16.5** provided that PRIOR TO the receipt by Concessionaire of the City Notice of its intent to enter into the particular exclusive endorsement and/or sponsorship agreement: (i) the particular Concessionaire's Equipment was already approved by the City Manager or his/her designee, and is referenced in a corresponding exhibit to this Agreement, as the same may be amended in accordance with this Agreement; **and** (ii) as to any new Concessionaire Equipment which has not been acquired by Concessionaire as of the date of receipt of such City Notice, the Concessionaire shall have entered into a binding contract for the purchase of such Concessionaire's Equipment (PRIOR TO the date of receipt of the aforestated City Notice by Concessionaire). As to clause (ii), the City Manager or his/her designee may request such documentation as they deem reasonably necessary including, without limitation, sales slips, invoices, receipts, sales contracts, purchase orders, etc., evidencing proof of Concessionaire's purchase of the particular Concessionaire's Equipment.

16.5.6 It is further understood that, should the City enter into any exclusive endorsement/sponsorship agreement that includes the public beachfront concessions that are the subject of this Agreement, the City shall have the right to place, or allow the placement of, any signage, equipment, logos or graphics, as same may be approved by the City's Planning Department, or the City Manager or his/her designee, on any or all of the following Concessionaire's equipment and facilities: food and beverage dispensing facilities, carts, kiosks, storage containers, Watersports Equipment, Beach Rental Equipment, and Vehicles; provided, however, that the (i) cost and expense to place any such approved signage, equipment, logos or graphics, and to remove such approved signage, equipment, logos or graphics, shall not be the responsibility of the Concessionaire; and (ii) the City shall use, or cause to be used, reasonable care in the placement and removal of such signage, equipment, logos or graphics and, in the event that any of the aforestated Concessionaire's Equipment is/are damaged as a result of the placement or removal of such approved signage, equipment, logos, or graphics, then the City shall be responsible for repairing any such damage, to the extent of restoring the equipment or facility(ies) to the condition it/they existed prior to the placement or removal (as the case may be) of the approved signage, equipment, logos, or graphics, reasonable wear and tear excepted. Concessionaire shall endeavor to ensure that any such signage, equipment, logos or graphics are not unduly obscured or damaged. Notwithstanding the foregoing, it is acknowledged and agreed that Concessionaire's signage, equipment, logos and/or graphics shall not be required to be removed and shall not be obscured by the City's signage, equipment, logos or graphics.

16.5.7 The City desires to promote Miami Beach through, among other things, co-branding with Concessionaire. Concessionaire agrees to reasonably cooperate with the City in the co-branding effort and to incorporate the City's name and/or logo on certain Beach Equipment, food huts, and Food Trailers, in the manner as specified in **Exhibit 16.5-B** hereto with respect to any new Beach Equipment, food huts, and Food Trailers acquired by Concessionaire after the date of the approval of the City Manager or his or her designee. In conjunction with the co-branding rights granted under this Agreement, the City grants to Concessionaire a limited, nonassignable, nonexclusive, royalty-free, revocable license during the Term to use the City's name, trade name, trademarks and/or logo set forth in **Exhibit 16.5-B** (the "City Marks") solely for the purpose of co-branding as set forth herein, provided, however, that the license granted herein shall not include the right to use the City Marks with respect to the sale of any merchandise, novelties, or other products without the prior written consent of the City Manager or his or her designee. The Concessionaire acknowledges and agrees that the license granted hereunder transfers no right, title or interest in and to the City Marks except the limited license hereunder. Prior to use of the City Marks, the Concessionaire shall submit all such material to the City Manager or his or her designee for its prior approval. The Concessionaire agrees to use the City Marks in identical form to the specimens of the City Marks set forth on **Exhibit 16.5-B** hereto without any alteration therefrom. The City represents and warrants to the Concessionaire that the City Marks do not infringe any copyrights, trademarks, rights of

privacy or any other rights of others. No license is granted hereunder for the use of the Marks for any purpose other than strictly in accordance with this Agreement. Upon any termination or expiration of this Agreement, the Concessionaire shall immediately cease all use of the City Marks, provided, that, the Concessionaire shall have the right to continue to use photographs and other images containing the City Marks for archival and promotional purposes on its website.

SECTION 17. NO IMPROPER USE.

The Concessionaire will not use the Concession Areas, or any facilities, furnishings or equipment thereon, for any improper, immoral or offensive purpose, or 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 (in any such case, the "Improper Acts"). In addition, in the event that the Concessionaire has actual knowledge of any person engaged in the Improper Acts, it shall notify the Miami Beach Police Department. The Concessionaire will protect, indemnify, and forever save and keep harmless the City, its officers, officials, employees, contractors, and agents, from and against damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation, or breach of any law, ordinance, rule, order or regulation occasioned by any willful act or omission of the Concessionaire, or any officers, directors, employee, contractors (including any sub-concessionaire) or agents regarding the Concession Areas in violation of the first sentence of this **Section 17**. In the event of any violation by the Concessionaire or if the City or his/her authorized representatives shall deem any conduct on the part of the Concessionaire to be objectionable or improper, the City Manager shall have the right to suspend concession operations should the Concessionaire fail to correct any such violation, conduct, or practice, to the reasonable satisfaction of the City Manager, within twenty-four (24) hours after receiving written notice of the nature and extent of such violation, conduct, or practice, provided, that, if such violation is not susceptible to be cured within such twenty-four (24) hour period, then Concessionaire shall not be subject to suspension provided that it commences to cure such violation within such 24-hour period and completes such cure with all due diligence promptly. Subject to the cure period, any such suspension will continue until the violation is cured. The Concessionaire further agrees not to commence operations during the suspension until the violation has been corrected to the reasonable satisfaction of the City Manager. Notwithstanding the foregoing, Concessionaire is not liable for any acts or omissions of the public.

SECTION 18. PRICE SCHEDULES.

Concessionaire agrees that prices charged for Beach Equipment rentals, sale of food and beverage service, sale of beach sundries/skin care products, and Watersport Equipment rentals will be consistent with the price schedule(s) herein submitted by the Concessionaire and approved by the City, and incorporated herein as **Exhibit 3.1** to this Agreement. All subsequent price approvals and changes must be approved in writing by the City Manager or his/her designee. Prices shall be reasonably consistent with those charged for similar items and services at public beach concessions in other world class beach resorts. The City Manager shall have the final right of approval for all such prices and changes, but said right shall not be arbitrarily or unreasonably exercised. The Concessionaire agrees to refrain from the sale or rental of any item identified as prohibited by the City and to sell or rent only those items approved by the City. The Concessionaire agrees to maintain an adequate supply necessary to accommodate beach patrons.

SECTION 19. NOTICES.

All notices from the City to the Concessionaire shall be deemed duly served upon receipt, if mailed by registered or certified mail with a return receipt to the Concessionaire at the following address:

Boucher Brothers Miami Beach LLC
1451 Ocean Dr Suite 205
Miami Beach, Florida 33139

With copy to:

Abigail C. Watts-FitzGerald

Watts-FitzGerald Law, PLLC
2800 Ponce de Leon Boulevard, Suite 1400
Coral Gables, Florida 33134

All notices from the Concessionaire to the City shall be deemed duly served upon receipt, if mailed by registered or certified mail return receipt requested to the City of Miami Beach at the following addresses:

City Manager
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

With copies to:

Asset Manager
City of Miami Beach
555 17 Street
Miami Beach, Florida, 33139

City Attorney
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

The Concessionaire and the City may change the above mailing address at any time upon giving the other party written notification. All notices under this Concession Agreement must be in writing.

SECTION 20. LAWS.

20.1 Compliance.

Concessionaire shall comply with all applicable City, County, State, and Federal ordinances, statutes, rules and regulations, including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations. The City represents and warrants that the terms and conditions of this Agreement applicable to Concessionaire comply with the City's Rules and Regulations for Beachfront Concession Operations.

20.2 Prohibitions Regarding Sale or Use of Expanded Polystyrene Food Service Articles, Single Use Plastic Beverage Straws, and Single- Use Plastic Stirrers.

20.2.1 Concessionaire hereby agrees and acknowledges that, pursuant to Section 82-7 of the City Code, as may be amended from time to time, Concessionaire shall not sell, use, provide food in, or offer the use of expanded polystyrene food service articles (as defined in City Code Section 82-7) in the Concession Areas. A violation of this section shall be deemed a default under the terms of this Agreement. Notwithstanding the above, this section shall not apply to expanded polystyrene food service articles used for prepackaged food that have been filled and sealed prior to receipt by Concessionaire.

20.2.2 Additionally, Concessionaire agrees and acknowledges that, pursuant to Section 82-8 of the City Code, as may be amended from time to time, Concessionaire shall not sell, use, provide food in, or offer the use of single-use plastic beverage straws or single-use plastic stirrers (as defined in City Code Section 82-8) in the Concession Areas. A violation of this section shall be deemed a default under the terms of this Agreement. Notwithstanding the above, the requirements of Section 82-8 shall not restrict Concessionaire from providing a beverage with, or offering the use of, a single-use plastic beverage straw or single-use plastic stirrer to an individual with a disability or medical condition that impairs the consumption of beverages without a single-use plastic beverage straw or single-use plastic stirrer.

20.3 Equal Employment Opportunity.

Neither Concessionaire nor any Affiliate of Concessionaire performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, religion, sex, gender identity, sexual orientation, disability, marital or familial status or age. Concessionaire will make good faith efforts to utilize minorities and females in the work force and in correlative business enterprises.

20.4 No Discrimination.

Concessionaire shall comply with City of Miami Beach Human Rights Ordinance, codified in Chapter 62 of the City Code, as may be amended from time to time, prohibiting discrimination in employment, housing, public accommodations, and public services, or with respect to any use, service, maintenance, or operation within the Concession Areas, on account of actual or perceived race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, disability, marital and familial status, or age, ancestry, height, weight, domestic partner status, labor organization membership, or political affiliation. All services offered in the Concession Areas shall be made available to the public, subject to the right of the Concessionaire and the City to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the facilities.

SECTION 21. MISCELLANEOUS.

21.1 No Partnership.

Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the City and Concessionaire, it being acknowledged that each of the parties is acting as an independent contractor hereunder.

21.2 Modifications.

With the sole exception of amendments to the exhibits hereto in accordance with the terms of this Agreement, this Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. Concessionaire acknowledges that no modification to this Agreement may be agreed to by the City unless approved by the Mayor and City Commission, except where such authority has been expressly provided herein to the City Manager or his or her designee.

21.3 Complete Agreement.

This Agreement, together with all exhibits incorporated hereto, constitutes all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to the subject matter hereof and Concessionaire's operations, as contemplated herein.

21.4 Headings.

The section, subsection and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.

21.5 Binding Effect.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

21.6 Clauses.

The illegality or invalidity of any term or any clause of this Agreement shall not affect the validity of the remainder of the Agreement, and the Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein unless the elimination of such provision detrimentally reduces the consideration that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.

21.7 Severability.

If any provision of this Agreement or any portion of such provision or the application thereof to any person

or circumstance shall be held to be invalid or unenforceable, or shall become a violation of any local, State, or Federal laws, then the same as so applied shall no longer be a part of this Agreement but the remainder of the Agreement, such provisions and the application thereof to other persons or circumstances, shall not be affected thereby and this Agreement as so modified shall.

21.8 Right of Entry.

The City, at the direction of the City Manager, shall at all times during hours of operation, have the right to enter into and upon any and all parts of the Concession Areas for the purposes of examining the same for any reason relating to the obligations of parties to this Agreement.

21.9 Not a Lease.

It is expressly understood and agreed that no part, parcel, building, facility, equipment or space is leased to the Concessionaire, that it is a concessionaire and not a lessee; that the Concessionaire's right to operate the concession shall continue only so long as this Agreement remains in effect.

21.10 Signage.

Concessionaire shall provide, at its sole cost and expense, any required signs at its concessions. Photographs of all current advertising, signage (including, without limitation, directional signage and signage on offerings of types of equipment and pricing) and postings are attached hereto as **Exhibit 21.10** hereto. All such signage shall be in accordance with all applicable municipal, County, State and Federal laws and regulations. Any new or altered signage posted by Concessionaire on its facilities and equipment shall be subject to the prior approval of the City Manager or his or her designee as to size, shape and placement of same.

21.11 Use of Beach.

The beach is for the use and enjoyment of the public, for recreation and other public purposes and the public's right to such use shall not be infringed upon by any activity of the Concessionaire. Upon execution of this Agreement, Concessionaire acknowledges that all of the beaches are public and, as such, concession operations must not restrict, or appear to restrict, access to the general public, or in any way limit the public nature or ambiance of the beachfront. The Concessionaire will conduct its operations so as to maintain a reasonably quiet and tranquil environment for the adjacent area and shall make no public disturbances.

21.12 Conflict of Interest.

Concessionaire shall perform its services under this Agreement and conduct the concession operations contemplated herein in a manner so as to show no preference for other concession operations/facilities (e.g., particularly concession operations behind private property along the City's beachfront) owned, operated, managed, or otherwise controlled by Concessionaire with regard to its responsibilities pursuant to this Concession Agreement.

21.13 Reasonableness.

Notwithstanding anything to the contrary in this Agreement, including but not limited to references to "sole option" or "sole discretion" or words of similar meaning, in each instance in which the approval or consent or other action of the City Commission or the City Manager or his/her designee is allowed or required in this Agreement, such approval, consent, or other action shall not be unreasonably withheld, conditioned or delayed.

21.14 Procedure for Approvals and/or Consents.

In each instance in which the approval or consent of the City Manager or his/her designee is allowed or required in this Agreement, it is acknowledged that such authority has been expressly provided herein to the City Manager or his/her designee by the Mayor and City Commission of the City. In each instance in which the approval or consent of the City Manager or his/her designee is allowed or required in this Agreement, Concessionaire shall send to the City Manager a written request for approval or consent (the

"Approval Request"). The City Manager or his/her designee shall use good faith efforts to respond to the Approval Request within sixty (60) days from the date of such Request (i.e. to provide written notice to Concessionaire approving of, consenting to or disapproving of the Request) unless a different time period is provided in this Agreement as to the specific request. However, except as otherwise provided in this Agreement (for example, **Subsection 3.9.4**), the City Manager or his/her designee's failure to consider such Request within this time provided shall not be deemed a waiver, nor shall Concessionaire assume that the Request is automatically approved and consented to. The Subsection shall not apply to approvals required herein by the Mayor and City Commission.

21.15 No Waiver.

No waiver of any covenant or condition of this Agreement by either party shall be deemed to imply or constitute a waiver in the future of the same covenant or condition or of any other covenant or condition of this Agreement.

21.16 No Third Party Beneficiary.

Nothing in this Agreement shall confer upon any person or entity, including, but not limited to sub-concessionaires, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by reason of this Agreement.

21.17 Concessionaire's Compliance with Florida Public Records Law

21.17.1. Pursuant to Section 119.0701 of the Florida Statutes, if the Concessionaire meets the definition of "Contractor" as defined in Section 119.0701(1)(a), the Concessionaire shall:

- (1) Keep and maintain public records required by the City to perform the service;
- (2) Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes, or as otherwise provided by law;
- (3) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed, except as authorized by law, for the duration of the contract term and following completion of the Agreement if the Concessionaire does not transfer the records to the City;
- (4) Upon completion of the Agreement, transfer, at no cost to the City, all public records in possession of the Concessionaire or keep and maintain public records required by the City to perform the service. If the Concessionaire transfers all public records to the City upon completion of the Agreement, the Concessionaire shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Concessionaire keeps and maintains public records upon completion of the Agreement, the Concessionaire shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.

21.17.2 Request for Records; Noncompliance.

- (1) A request to inspect or copy public records relating to the City's contract for services under this Concession Agreement must be made directly to the City. If the City does not possess the requested records, the City shall immediately notify the Concessionaire of the request, and the Concessionaire must provide the records to the City or allow the records to be inspected or copied within a reasonable time.
- (2) Concessionaire's failure to comply with the City's request for records shall constitute a breach of this Agreement, and the City, at its sole discretion, may: (1) unilaterally terminate this Agreement; (2) avail itself of the remedies set forth under this Agreement; and/or (3) avail itself of any available

- remedies at law or in equity.
- (3) A Concessionaire who fails to provide the public records to the City within a reasonable time may be subject to penalties under Section [119.10](#).

21.17.3 Civil Action.

- (1) If a civil action is filed against a Concessionaire to compel production of public records relating to the City's contract for services under this Concession Agreement, the court shall assess and award against the Concessionaire the reasonable costs of enforcement, including reasonable attorney fees, if:
- The court determines that the Concessionaire unlawfully refused to comply with the public records request within a reasonable time; and
 - At least eight (8) business days before filing the action, the plaintiff provided written notice of the public records request, including a statement that the Concessionaire has not complied with the request, to the City and to the Concessionaire.
- (2) A notice complies with subparagraph (1)(b) if it is sent to the City's custodian of public records and to the Concessionaire at the Concessionaire's address listed on its contract with the City or to the Concessionaire's registered agent. Such notices must be sent by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery, which may be in an electronic format.
- (3) A Concessionaire who complies with a public records request within eight (8) business days after the notice is sent is not liable for the reasonable costs of enforcement.

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

**CITY OF MIAMI BEACH
ATTENTION: RAFAEL E. GRANADO, CITY CLERK
1700 CONVENTION CENTER DRIVE
MIAMI BEACH, FLORIDA 33139
E-MAIL: RAFAELGRANADO@MIAMIBeachFL.GOV
PHONE: 305-673-7411**

SECTION 22. LIMITATION OF LIABILITY.

The City desires to enter into this Agreement placing the operation and management of the Concession Area(s) in the hands of a private management entity only if so doing the City can place a limit on its liability for any cause of action for breach of this Agreement, so that its liability for any such breach never exceeds the sum of \$100,000.00. Concessionaire hereby expresses its willingness to enter into this Agreement with a \$100,000.00 limitation on recovery for any action for breach of contract. Accordingly, and in consideration of the City's entering into this Agreement, the City shall not be liable to Concessionaire for damages to Concessionaire in an amount in excess of \$100,000.00, for any action 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 limitation placed upon the City's liability as set forth in Florida Statutes, Section 768.28.

SECTION 23. GOVERNING LAW AND VENUE.

This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of Florida. This Agreement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either party with respect to the enforcement of any and all the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Miami-Dade County, Florida. **CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT CITY AND CONCESSIONAIRE MAY HEREIN AFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA(S).**

[SIGNATURES CONTINUED ON NEXT PAGE]

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

PASSED AND ADOPTED THIS _____ day of _____, 2019.

Attest:

CITY CLERK

MAYOR

Witness:

**BOUCHER BROTHERS
MIAMI BEACH, LLC**

Signature

Name and Title of Signatory

H:\Real Est, Hsng & Comm Dev\Asset Management\Concessions\Boucher Brothers Agreement Draft.doc

EXHIBIT LIST

Exhibit 2.2	The existing storage area located at 77 th Street in Ocean Terrace
Exhibit 3.1	Type(s) of Beach Equipment, Watersports Equipment and Beach-Related Sundries and Skin Lotions to be rented and prices; luxury items maximum pricing list; and types of food and beverages and pricing, including for Muscle Beach and Hot Food Trailers
Exhibit 3.1.1	Full inventory of all Beach Equipment contemplated for use as of the Commencement Date, including types and numbers (per item) for each of the Concession Area; , including the types and number of non-motorized watersports equipment for non-motorized watersports channel at Ocean Terrace
Exhibit 3.1.2	Design, type, material, and color of any and all Beach Equipment together with photos of the City-approved Beach Equipment, as well as non-motorized watersports equipment for non-motorized watersports channel at Ocean Terrace
Exhibit 3.1.3	City-approved site plans for each Concession Area and location of ice cream carts
Exhibit 3.1.7	Approved plan, design, and pricing for Concessionaire's Beach Locker Program
Exhibit 3.1.9	Team Building Events description and the approved site plan
Exhibit 3.2.1	Locations of the Hot Food Trailers and pictures of same
Exhibit 3.2.2	The design, size, type, material, and color of the ice cream and photos
Exhibit 3.5.1	Design, materials, color, etc. of Concessionaire's dispensing facilities
Exhibit 3.5.2	Written plan for storage and removal of Concessionaire's Beach Equipment, dispensing facilities, and Watersports Equipment
Exhibit 3.6	Concessionaire's hurricane preparedness/evacuation plan, which includes the location, of its proposed hurricane storage facilities
Exhibit 3.9.4	Miami Beach Towel Promotion Content and Design
Exhibit 3.9.6	Make and model of the outdoor ashtrays and a photo of same as well as placement site plan
Exhibit 6	Accounting Agreed upon Procedures
Exhibit 10.1.1	Photographs and specifications of the current sand sifting equipment and site plan for storage of sand sifting equipment at 10 th Street
Exhibit 10.2	Recycling plan for litter, garbage, and debris collected within the Concession Areas
Exhibit 10.2.1	Fenced storage area adjacent to the dumpster area on the north side of the 10 th Street Auditorium and additional fenced storage area south of 10 th Street Auditorium
Exhibit 10.7	Designated beach and dune permitted access routes to the beach for all Vehicles
Exhibit 10.7.1	Vehicle model, make, year and license plate information for the approved Vehicles
Exhibit 13.8	Penalties in Lieu of Default
Exhibit 16.5-A	Permitted agreements or arrangements
Exhibit 16.5-B	Co-Branding Photos
Exhibit 21.10	Permitted advertising, signage and postings