

16A

ORDINANCE NO. 017880

**AN ORDINANCE AUTHORIZING THE CITY MANAGER TO SIGN A LEASE BY AND BETWEEN THE CITY OF EL PASO AS LESSOR AND MOUNTAIN STAR SPORTS GROUP, LLC – EL PASO BASEBALL CLUB SERIES AND MOUNTAIN STAR SPORTS GROUP, LLC AS TENANT COVERING LOTS 1 THROUGH 10 AND LOTS 11 THROUGH 40, AND A PORTION OF THE T-ALLEY BLOCK B, STEVENS ADDITION AND A PORTION OF BLOCK 28 AND 48, MILLS MAP ADDITION AND A PORTION OF FRANKLIN STREET, EL PASO, EL PASO COUNTY, TEXAS, CONTAINING 4.8274 ACRES OF LAND MORE OR LESS; A PORTION OF LOTS 30 THROUGH 42, BLOCK C, STEVENS ADDITION, EL PASO, EL PASO COUNTY, TEXAS CONTAINING 0.9521 ACRES OF LAND MORE OR LESS; AND A PORTION OF THE UNION PACIFIC COMPANY RIGHT OF WAY OUT OF BLOCKS 28 AND 48, MILLS MAP ADDITION, EL PASO, EL PASO COUNTY, TEXAS CONTAINING 0.1994 ACRES OF LAND MORE OR LESS (“CITY HALL SITE”).**

**WHEREAS**, by Resolution dated June 26, 2012 the City Council of the City of El Paso authorized the City Manager to take measures to complete the planning for the redevelopment of the site currently occupied by City Hall, the Insights Museum, the Community Garden and parking areas on Franklin Street (“City Hall Site”), as the site of a minor league ballpark;

**WHEREAS**, the City desires to lease approximately 5.9789 acres of land more or less for the operation of a minor league ballpark;

**WHEREAS**, the City has determined that a public purpose will be served by leasing the property in accordance with the terms of the Ballpark Lease Agreement attached hereto as **Exhibit “A”** and made a part hereof, together with certain privileges, rights, uses and interests therein, as hereinafter set out.

**THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

1. That the City Manager is hereby authorized to sign, on behalf of the City of El Paso as Lessor, the Ballpark Lease Agreement with Mountain Star Sports Group, LLC-El Paso Baseball Club Series and Mountain Star Sports Group, LLC, as Tenant covering the following described real property and commonly referred to as the City Hall Site:

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Parcel 1: Lots 1 through 10 and Lots 11 through 40 and a portion of the T-Alley Block B, Stevens Addition recorded in Book 2, Page 60, Plat Records, City of El Paso, El Paso County, Texas and a portion of Block 28 and 48 Mills Map Addition, and a portion of Franklin Street, El Paso, El Paso County, Texas containing 4.8274 acres of land more or less, and more fully described by metes and bounds on Exhibit "A-1" to the Ballpark Lease Agreement;

Parcel 2: A portion of Lots 30 through 42, Block C, Stevens Addition recorded in Book 2, Page 60, Plat Records, City of El Paso, El Paso County, Texas containing 0.9521 acres of land more or less. and more fully described by metes and bounds on Exhibit "A-2" to the Ballpark Lease Agreement; and

Parcel 3: A portion of the Union Pacific Company Right of Way out of Blocks 28 and 48, Mills Map Addition, El Paso, El Paso County, Texas containing 0.1994 acres of land more or less, and more fully described by metes and bounds on Exhibit "A-3" to the Ballpark Lease Agreement.

2. That the City Manager is authorized to sign amendments to the Ballpark Lease Agreement reflecting minor modifications to the Leasehold Estate in form and substance approved by the City Attorney.

3. The City Manager is authorized to sign a Memorandum of Lease in form and substance approved by the City Attorney in connection with this transaction.

[SIGNATURES BEGIN ON THE FOLLOWING PAGE]

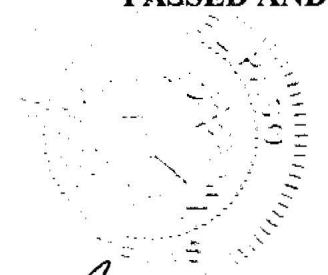
**ORDINANCE NO. 017880**

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PASSED AND APPROVED on this the 18<sup>th</sup> day of September, 2012.

CITY OF EL PASO

  
for Araceli Morgan Kelly  
John F. Cook  
Mayor  
**MAYOR PRO TEMPORE**

ATTEST:

Richarda Duffy Momsen  
Richarda Duffy Momsen,  
City Clerk

APPROVED AS TO FORM:

Sylvia Borunda Firth  
Sylvia Borunda Firth  
City Attorney

APPROVED AS TO CONTENT:

William Studer  
William Studer, Deputy City Manager  
Development and Tourism Department

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**EXHIBIT "A"**

**BALLPARK LEASE AGREEMENT**

**AMONG**

**THE CITY OF EL PASO, TEXAS,**

**MOUNTAIN STAR SPORTS GROUP, LLC—EL PASO BASEBALL CLUB SERIES**

**AND**

**MOUNTAIN STAR SPORTS GROUP, LLC**

CITY CLERK DEPT.  
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## **BALLPARK LEASE AGREEMENT**

This BALLPARK LEASE AGREEMENT, (this "**Agreement**") is made to be effective as of the \_\_\_\_ day of \_\_\_\_\_, 2012 (the "**Effective Date**"), by and among the City of El Paso, a Texas home rule city (the "**City**"), Mountain Star Sports Group, LLC—El Paso Baseball Club Series ("**Tenant**") and Mountain Star Sports Group, LLC, a Texas limited liability company ("**Company**").

### **RECITALS**

WHEREAS, Tenant is the owner of a Triple A Minor League Baseball franchise granted by The National Association of Professional Baseball Leagues, Inc. (the "**NAPBL**") and the corresponding interests in the Pacific Coast League of Professional Baseball Clubs, Inc. or any successor MiLB league ("**PCL**").

WHEREAS, City holds the title or other legal right to the real property described on **Exhibit A** attached hereto and incorporated herein (the "**Real Property**").

WHEREAS, pursuant to an ordinance adopted and approved by the City Council of the City on September 18, 2012, City Council authorized the City Manager of City to sign this Agreement.

WHEREAS, City or a local government corporation created by City and Tenant have entered into (a) that certain Ballpark Development Agreement (the "**Development Agreement**"), whereby City or a local government corporation created by City, has agreed to finance, own, design, develop and construct a new, first class, state-of-the-art, natural turf, open-air Minor League Baseball ballpark and related facilities (and together with the Real Property, the "**Ballpark**"), and (b) that certain Non-Relocation Agreement (the "**Non-Relocation Agreement**") dated effective of even date herewith, whereby the parties thereto agreed to certain restrictions on relocation of the Team (as defined below).

WHEREAS, City has agreed to lease to Tenant, and Tenant has agreed to lease from City, the Ballpark and certain Ballpark parking as more particularly described herein.

NOW THEREFORE, in consideration of the foregoing, the terms and conditions hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

### **ARTICLE I DEFINITIONS**

Unless the context shall otherwise expressly require, capitalized terms used in this Agreement shall have the following meanings:

"**Action or Proceeding**" means any legal action, lawsuit, proceeding, arbitration, investigation by a Governmental Authority, hearing, audit, appeal, administrative proceeding or judicial proceeding.

"**Affiliate**" means, with respect to any specified Person, any other Person who, directly or indirectly, Controls, is under common Control with, or is Controlled by such specified Person.

**"Agreement"** has the meaning given to that term in the introductory paragraph of this Agreement.

**"Antiquities Code"** means the Antiquities Code of Texas as codified in Title 9, Chapter 191 of the Texas Natural Resource Code, as may be amended from time to time.

**"Applicable Laws"** means any and all laws, ordinances, statutes, regulations, judicial decisions, orders, injunctions, writs, rulings, interpretations, rules, permits or certificates of any court, arbitrator or other Governmental Authority and applicable to the Person or Property in question (including any activities or operations occurring on, under, over, upon, at or from such Property in question). Applicable Laws shall include the Antiquities Code, all City Codes, Environmental Laws and any applicable Federal wage requirements.

**"Appropriation"** means with respect to any payment obligation or other monetary obligation of City that may from time to time exist or arise under this Agreement during a fiscal year, the approval and setting aside by City of an adequate amount of funds to satisfy the payment obligation or other monetary obligation of City.

**"Approval"** **"Approve"** or **"Approved"** means (a) with respect to any item or matter for which the approval of City or City Representative, as the case may be, is required under the terms of this Agreement, the specific approval of such item or matter by City pursuant to a written instrument executed by City or City Representative, as applicable, delivered to Tenant, and shall not include any implied or imputed approval, and no approval by City or City Representative pursuant to this Agreement shall be deemed to constitute or include any approval required in connection with any Governmental Functions of City, unless such written approval shall so specifically state; (b) with respect to any item or matter for which the approval of Tenant is required under the terms of the Agreement, the specific approval of such item or matter by Tenant or Tenant Representative, as the case may be, pursuant to a written instrument executed by a duly authorized officer of Tenant or Tenant Representative, as permitted pursuant to the terms of this Agreement, and delivered to City, and shall not include any implied or imputed approval; and (c) with respect to any item or matter for which the approval of any other Person is required under the terms of this Agreement, the specific approval of such item or matter by such Person pursuant to a written instrument executed by a duly authorized representative of such Person and delivered to City or Tenant, as applicable, and shall not include any implied or imputed approval.

**"Ballpark"** has the meaning given to that term in the Recitals.

**"Ballpark Events"** has the meaning given to that term in Section 4.1 hereof.

**"Ballpark Parking Hours"** means the period beginning one (1) hour before the start of an Event and concluding one (1) hour after such Event; provided that Tenant may from time to time provide a written request to City for a modification to the Ballpark Parking Hours (which request may be for a general modification for all Ballpark Events or a specific modification for one or more Ballpark Events) to more closely correspond with the timing of the arrival and departure of Ballpark patrons who are attending a Ballpark Event, which Approval by the City shall not be unreasonably withheld.



**“Ballpark Standard”** means the continuous operation, maintenance and repair of the Ballpark and Ballpark Surface Parking on a full-service basis in a manner consistent with the standards of operations, maintenance and operating and maintenance plans that a Qualified Operator, in accordance with MiLB and PCL requirements, would reasonably be expected to undertake and follow for the operation, maintenance and repair of a Comparable Property.

**“Ballpark Surface Parking”** has the meaning given to that term in Section 5.2 hereof.

**“Baseball Season”** means each annual baseball season during the Term running from March 1 through September 30 of the applicable calendar year and includes, and may be modified from time to time by Tenant to include, all pre-season games, regular season games and playoff games.

**“Business Day”** means a day of the year that is not a Saturday, Sunday, Legal Holiday or a day on which commercial banks are not required or authorized to close in El Paso, Texas.

**“Capital Improvements”** means any work (including all design, architectural, engineering and construction work, together with all labor, supplies, materials, equipment and costs of permits and approvals of Governmental Authorities) that is customarily capitalized under GAAP and is reasonably necessary to repair, restore, refurbish, replace or improve (in each case, in a manner that extends the useful life thereof and is performed to ensure that the Ballpark remains a safe, attractive and first class facility comparable to the Comparable Properties, ordinary wear and tear excepted) any facility, structure, City Personal Property or other component of the Ballpark or the Ballpark Surface Parking, if such work is necessitated by:

(a) any material defects in design, construction or installation of the Ballpark and/or the Ballpark Surface Parking;

(b) Physical Obsolescence;

(c) requirements imposed by Major League Baseball, MiLB and/or the PCL as applicable to the Ballpark;

(e) requirements imposed by Applicable Laws;

(f) requirements or recommendations of any insurance carrier insuring any portion of the Ballpark or the Ballpark Surface Parking;

(g) requirements of any manufacturer, supplier or installer of any component, system or equipment at the Ballpark or the Ballpark Surface Parking stipulated in the operating manuals therefor;

(h) the then-current Capital Improvements Plan; or

(i) any other Capital Improvements mutually agreed upon by City and Tenant.

The term Capital Improvements shall not include any Routine Maintenance.

**“Capital Improvements Plan”** has the meaning given to that term in Section 6.2 hereof and shall address, among other things, any applicable Economic and Technological Obsolescence issues.

**“Capital Repairs Reserve Fund”** means the capital repair, replacement and improvement reserve fund established and funded in accordance with Section 3.9 hereof to assist City in the performance of its obligations regarding Capital Improvements.

**“Casualty”** means, with respect to the Ballpark or the Ballpark Surface Parking, physical damage, physical destruction or other property casualty resulting from any fire or any other Force Majeure Event or other sudden, unexpected or unusual cause.

**“City”** has the meaning given to that term in the introductory paragraph of this Agreement.

**“City Default”** has the meaning given to that term in Section 10.3 hereof.

**“City’s Personal Property”** means any and all movable equipment, furniture, fixtures and other tangible personal property that are owned by City as of the Commencement Date or otherwise purchased as part of the development costs of the Ballpark or Capital Improvements and located on or within the Ballpark or the Ballpark Surface Parking (and that do not constitute fixtures) and can be removed from the Ballpark without damage thereto. The term “City’s Personal Property” includes any replacements of City’s Personal Property by City or otherwise.

**“City Representative”** has the meaning given to that term in Section 2.1 hereof.

**“City Sponsored Events”** has the meaning given to that term in Section 4.3 hereof.

**“City’s Share of Water and Sewer Costs”** has the meaning given to that term in Section 6.1(g) hereof.

**“Civic Center Garage”** means the City’s existing parking garage (or any future replacement facility) primarily built to serve the City’s civic center located in the City’s downtown.

**“Commencement Date”** means the date of the latest to occur: (i) City’s issuance of a certificate of occupancy with respect to the Ballpark or (ii) possession of the Leasehold Estate has been tendered to Tenant by City.

**“Comparable Properties”** means one or more first-class, Triple-A caliber, multi-purpose baseball Ballparks (as mutually agreed upon by the Representatives) that (i) have been constructed within five (5) years of the Commencement Date, (ii) are generally comparable in size, design and quality of construction to the Ballpark and (iii) are located in the United States.

**“Control”** means the possession, directly or indirectly, of the power to direct or cause the direction of management, policies or activities of a Person, whether through ownership of voting securities, by contract or otherwise.

**“Controlling Body of City”** means City Council of City of El Paso, Texas.

**"Concessions"** means any and all food and beverage items sold anywhere at the Ballpark, including without limitation, (i) by Tenant, (ii) in accordance with any Concessions Agreement or (iii) by any third party (without regard to whether such party has entered into a Concessions Agreement).

**"Concessions Agreement"** means any agreement for the management and operation of Concessions that may be entered into by Tenant from time to time during the term of this Agreement.

**"Confidential Information"** has the meaning given to that term in Section 23.11 hereof.

**"Default Rate"** means the "prime rate" as published in the "Money Rates" section of The Wall Street Journal, plus one (1) percentage point; however, if such rate is, at any time during the Term, no longer so published, the "Default Rate" shall mean the average of the prime interest rates that are announced, from time to time, by the three (3) largest banks (by assets) headquartered in the United States that publish a "prime rate," plus one (1) percentage point. In no event shall the Default Rate be in excess of the maximum interest rate allowed by applicable law.

**"Development Agreement"** has the meaning given to that term in the Recitals.

**"Economic and Technological Obsolescence"** means any City Personal Property or other facility, component, structure or surface of the Ballpark or the Ballpark Surface Parking that is not then currently state-of-the-art, and includes without limitation any such property, improvements and/or structures that have become outdated due to technological advances, whether or not the same is Physically Obsolete.

**"Effective Date"** has the meaning given to that term in the introductory paragraph of this Agreement.

**"Encumbrances"** means any defects in, easements, covenants, conditions or restrictions affecting, or Liens or other encumbrances on, the title to the Ballpark or the Ballpark Surface Parking, whether evidenced by written instrument or otherwise evidenced.

**"Environmental Claim"** means any Action or Proceeding regarding the Ballpark (i) arising under an Environmental Law or (ii) related to or arising out of an Environmental Event.

**"Environmental Event"** means the occurrence of any of the following: (i) any noncompliance with an Environmental Law; (ii) an environmental condition requiring responsive action, including an environmental condition at the Ballpark caused by a third party; (iii) any event on, at or from the Ballpark or related to the operation thereof of such a nature as to require reporting to applicable Governmental Authorities under any Environmental Law; (iv) an emergency environmental condition; or (v) the existence or discovery of any spill, discharge, leakage, pumpage, drainage, pourage, interment, emission, emptying, injecting, escaping, dumping, disposing, migration or other release or any kind of Hazardous Materials on, at or from the Ballpark which may cause a threat or actual injury to human health, the environment, plant or animal life.



**“Environmental Law(s)”** means any applicable Federal, state or local statute, law (including common law tort law, common law nuisance law and common law in general), rule, regulation, ordinance, code, permit, concession, grant, franchise, license, policy or rule of common law now in effect or adopted in the future, and in each case as may be amended or replaced, and any judicial or administrative interpretation thereof (including any judicial or administrative order, consent decree or judgment) relating to (i) the environment, health, safety or Hazardous Materials, (ii) the storage, handling, emission, discharge, release and use of chemicals and other Hazardous Materials, (iii) the generation, processing, treatment, storage, transport, disposal, investigation, remediation or other management of waste materials of any kind, and (iv) the protection of environmentally sensitive areas, including the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.; the Hazardous Materials Transportation Act, as amended, 49 U.S.C. §§ 5101 et seq.; the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 et seq.; the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq.; the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.; the Clean Air Act, 42 U.S.C. §§ 7401 et seq.; the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq.; the Endangered Species Act, as amended, 16 U.S.C. §§1531 et seq.; the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Ch. 361 (Vernon 1990); the Texas Clean Air Act, Tex. Health & Safety Code Ann. Ch. 382 (Vernon 1990); the Texas Water Code, Tex. Water Code Ann. (Vernon 1988 and Supp. 1990); the Texas Hazardous Substances Spill Prevention and Control Act, Tex. Water Code Ann. (Vernon 1988 and Supp. 1990); the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§136 et. seq.; and the Emergency Preparedness and Response Community Right-to-Know Act, 42 U.S.C. § 11001.

**“Event”** means any Ballpark Event or City Sponsored Event.

**“Excusable City Delay”** means any City delay that is caused by or attributable to (but only to the extent of) a Force Majeure Event. No City delay arising from the failure to make funds available for any purpose shall ever be an Excusable City Delay unless such failure, inability or refusal itself arises directly from, and is based upon, another event or circumstance which is an Excusable City Delay.

**“Excusable Tenant Delay”** means any Tenant delay that is caused by or attributable to (but only to the extent of) a Force Majeure Event. No Tenant delay arising from the failure to make funds available for any purpose shall ever be an Excusable Tenant Delay unless such failure, inability or refusal itself arises directly from, and is based upon, another event or circumstance which is an Excusable Tenant Delay.

**“Financing”** means the issuance, by City, or a local government corporation formed by City, of one or more series of bonds or other debt obligations, the net proceeds of which are used to pay for the costs of design, construction and development of the Ballpark and/or Ballpark Surface Parking.

**“Fixed Rental”** means (i) \$200,000 per year for the first five calendar years of the Initial Term; (ii) \$220,000 per year for the sixth through tenth calendar years of the Initial Term; (iii) \$242,000 per year for the 11<sup>th</sup> through 15<sup>th</sup> calendar years of the Initial Term; (iv) \$266,200 per calendar year for the 16<sup>th</sup> through 20<sup>th</sup> calendar years of the Initial Term; and (v) \$292,820 per year for each calendar year thereafter throughout the remaining Initial Term.

**"Force Majeure Event"** means any act that (a) materially and adversely affects the affected Party's ability to perform the relevant obligations under this Agreement or delays such affected Party's ability to do so, (b) is beyond the reasonable control of the affected Party, and (c) is not due to the affected Party's fault or negligence. Subject to the satisfaction of the conditions set forth in (a) through (c) above, a Force Majeure Event shall include: (i) natural phenomena, such as storms, floods, lightning and earthquakes; (ii) wars, civil disturbances, revolts, insurrections, terrorism, sabotage and threats of sabotage or terrorism; (iii) transportation disasters, whether by ocean, rail, land or air; (iv) strikes, lockouts or other labor disputes, including a strike or lockout by MiLB players or umpires; (v) fires; (vi) actions or omissions of a Governmental Authority (including the actions of City in its capacity as a Governmental Authority) that were not voluntarily induced or promoted by the affected Party, or brought about by the breach of its obligations under this Agreement or any Applicable Law; (vii) title disputes; and (viii) third party "litigation; *provided, however*, that under no circumstances shall a Force Majeure Event include economic hardship.

**"GAAP"** means generally accepted accounting principles as in effect from time to time in the United States as set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board.

**"Governmental Authority"** means any Federal, state, local or foreign governmental entity, authority or agency, court, tribunal, regulatory commission or other body, whether legislative, judicial or executive (or a combination or permutation thereof), including a local government corporation.

**"Governmental Authorizations"** means all approvals, consents, decisions, authorizations, certificates, confirmations, exemptions, applications, notifications, concessions, acknowledgments, agreements, licenses, permits, import permits, employee visas, environmental permits, decisions, right of ways, and similar items from any Governmental Authority, including a liquor license from the Texas Alcohol and Beverage Commission.

**"Governmental Function"** means any regulatory, legislative, permitting, zoning, enforcement (including police power), licensing or other functions which City is authorized or required to perform in its capacity as a Governmental Authority in accordance with Applicable Laws. The entering into this Agreement and the performance by City of its obligations under this Agreement shall not be considered a "Governmental Function."

**"Hazardous Materials"** means (a) any petroleum or petroleum products, metals, gases, chemical compounds, radioactive materials, asbestos, urea formaldehyde foam insulation, transformers or other equipment that contain dielectric fluid containing polychlorinated biphenyls, lead paint, putrescible and infectious materials, and radon gas; (b) any chemicals or substances defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "extremely hazardous wastes", "restricted hazardous wastes", "toxic substances", "toxic pollutants", "contaminants" or "pollutants", or words of similar import, under any applicable Environmental Law; and (c) any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any applicable Environmental Law or Governmental Authority or which is regulated because of its adverse effect or potential

adverse effect on health and the environment, including soil and construction debris that may contain any of the materials described in this definition.

**“Initial Term”** has the meaning given to that term in Section 3.4 hereof.

**“Insolvency Event”** means, with respect to any Person, (a) such Person’s or any of its subsidiaries’ (i) failure to generally pay its debts as such debts become due, (ii) admitting in writing its inability to pay its debts generally or (iii) making a general assignment for the benefit of creditors; (b) any proceeding being instituted by or against such Person or any of its subsidiaries (i) seeking to adjudicate it a bankrupt or insolvent, (ii) seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors or (iii) seeking the entry of an order for relief or the appointment of a receiver, trustee or other similar official for it or for any substantial part of its property and, in the case of any such proceeding instituted against such Person or any such subsidiary, any such proceeding shall remain undismissed for a period of ninety (90) days or any of the actions sought in such proceeding shall occur; or (c) such Person’s or any of its subsidiaries’ taking any corporate action to authorize any of the actions set forth above in this definition.

**“Lease Expiration Date”** means the date of termination of this Agreement at the conclusion of the Term or sooner pursuant to any applicable provision hereof.

**“Leasehold Estate”** has the meaning given to that term in Section 3.1 hereof.

**“Leasehold Mortgage”** means any mortgage, deed of trust or other instrument in the nature thereof which encumbers any of Tenant’s rights, titles and interests in and to use the Ballpark or the Ballpark Surface Parking (but not City’s real property interest in the Ballpark or the Ballpark Surface Parking), including, without limiting the generality of the foregoing, its right to use and occupy the Ballpark or the Ballpark Surface Parking and all of its rights, titles and interests, if any, in and to any and all improvements to the Ballpark or Ballpark Surface Parking.

**“Legal Holiday”** means any day, other than a Saturday or Sunday, on which City’s administrative offices are closed for business.

**“Lien”** means any mortgage, charge, pledge, lien, privilege, security interest, hypothecation or other encumbrance upon or with respect to any property or assets or any kind, whether real or personal, tangible or intangible, now owned or hereafter acquired.

**“Management Agreement”** has the meaning given to that term in Section 4.6 hereof.

**“Merchandise”** means any goods (other than food or beverage) sold anywhere at the Ballpark, including without limitation, (i) by Tenant, (ii) in accordance with any Merchandise Agreement or (iii) by any third party (without regard to whether such party has entered into a Merchandise Agreement).

**“Merchandise Agreement”** means any agreement for the management and operation of Merchandise that may be entered into by Tenant from time to time during the term of this Agreement.



**"MiLB"** means Minor League Baseball.

**"NAPBL"** has the meaning given to that term in the Recitals.

**"Non-Relocation Agreement"** has the meaning given to that term in the Recitals.

**"Offsite Garage Parking"** has the meaning given to that term in Section 5.2 hereof.

**"Offsite Garage Parking Revenue Hours"** means the period beginning sixty (60) minutes before the start of an Event and concluding sixty (60) minutes after the scheduled start time of such Event.

**"Open Records Act"** has the meaning given to that term in Section 23.11 hereof.

**"Operator"** has the meaning given to that term in Section 4.6 hereof.

**"Opinion Request"** has the meaning given to that term in Section 23.11 hereof.

**"Overall Additional Revenue Cap"** means (i) \$655,000 per calendar year for the first five calendar years of the Initial Term; (ii) \$745,000 per calendar year for the sixth through tenth calendar years of the Initial Term; (iii) \$840,000 per calendar year for the 11<sup>th</sup> through 15<sup>th</sup> calendar years of the Initial Term; (iv) \$940,000 per calendar year for the 16<sup>th</sup> through 20<sup>th</sup> calendar years of the Initial Term; and (v) \$1,040,000 per calendar year for each calendar year thereafter throughout the Initial Term.

**"Parking Fee"** means a seasonal parking fee for each parking space requested by Tenant in the Offsite Garage Parking in accordance with Section 5.5 hereof, to be calculated as follows: (i) for each of the first five calendar years of the Initial Term, \$1.00 for each parking space requested by Tenant multiplied times the number of Season Parking Events during the applicable period; (ii) for each calendar year during the sixth through tenth calendar years of the Initial Term, \$1.10 for each parking space requested by Tenant multiplied times the number of Season Parking Events during the applicable period; (iii) for each calendar year during the 11<sup>th</sup> through 15<sup>th</sup> calendar years of the Initial Term, \$1.21 for each parking space requested by Tenant multiplied times the number of Season Parking Events during the applicable period; (iv) for each calendar year during the 16<sup>th</sup> through 20<sup>th</sup> calendar years of the Initial Term, \$1.33 for each parking space requested by Tenant multiplied times the number of Season Parking Events during the applicable period; and (v) for each calendar year thereafter throughout the remaining Initial Term, \$1.46 for each parking space requested by Tenant multiplied times the number of Season Parking Events during the applicable period.

**"Party"** or **"Parties"** means a party or the parties, respectively, to this Agreement.

**"Permitted Exceptions"** means (i) those certain Encumbrances upon and/or exceptions to the title to the Ballpark or the Ballpark Surface Parking that are referenced and/or described on Exhibit A attached hereto and (ii) the Reservations and all rights to use the Ballpark and the Ballpark Surface Parking pursuant thereto.

**"PCL"** has the meaning given to that term in the Recitals.

**“Person”** means any individual, corporation, limited or general partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or government or any agency or political subdivision thereof or any other form of entity.

**“Physically Obsolete”** or **“Physical Obsolescence”** means any City Personal Property or other facility, component, structure or surface of the Ballpark or the Ballpark Surface Parking that does not comply with Applicable Laws or has become dysfunctional due to defects in design, materials or workmanship or ordinary wear and tear other than as a result of Tenant’s failure to perform its maintenance obligations under this Agreement. For purposes of determining Physical Obsolescence or Physically Obsolete, any City Personal Property or other facility, component, structure or surface of the Ballpark or the Ballpark Surface Parking shall be deemed dysfunctional if such has deteriorated to a degree that cannot be remedied through Routine Maintenance (including replacement necessitated by repeated breakdown of a component despite efforts to repair or restore it short of replacement).

**“Prohibited Messages”** has the meaning given to that term in Section 14.2 hereof.

**“Prohibited Use”** has the meaning given to that term in Section 4.5 hereof.

**“Qualified Operator”** means a nationally recognized multi-purpose project operator (or, if its parent company has and continues to unconditionally guarantee the full payment and performance of all of such multi-purpose project operator’s obligations under or in connection with the Management Agreement, such parent company meets) that (a) as of the effective date of the Management Agreement then in effect, operates, on a full-service basis, either directly or through its subsidiaries at least three (3) facilities that are comparable (or superior) to the Comparable Properties, the Ballpark, Major League Baseball parks or other facilities acceptable to City; and (b) an Insolvency Event with respect to such multi-purpose project operator or, in the case of the foregoing guaranty, its parent company does not exist. Additionally, an Affiliate of any entity meeting the foregoing criteria that it is going to be an Operator shall be a Qualified Operator, provided that the applicable entity meeting the foregoing criteria becomes or remains liable for the obligations of the “Operator” under any Management Agreement.

**“Real Property”** has the meaning given to that term in the Recitals. In addition to the description of real property attached hereto as Exhibit A, the term “Real Property” shall also include any additional real property interests acquired by City and on, over or under which, or pursuant to, the Ballpark is constructed.

**“Related Party”** or **“Related Parties”** means with respect to any Person, such Person’s partners, directors, officers, shareholders, members, agents, employees, consultants, counsel, contractors, subcontractors (of any tier), tenants, subtenants (of any tier), licensees, sublicensees (of any tier), lenders, successors, assigns, legal representatives, elected and appointed officials, and Affiliates.

**“Renewal Option”** has the meaning given to that term in Section 3.5 hereof.

**“Renewal Option Period”** has the meaning given to that term in Section 3.5 hereof.

**“Rent”** means all Fixed Rental.



**“Representative”** means each of City Representative and Tenant Representative or both collectively if used in the plural.

**“Reservations”** has the meaning given to that term in Section 3.3 hereof.

**“Routine Maintenance”** means all work (including all labor, supplies, materials and equipment) that is of a routine nature and is reasonably necessary for the cleaning and routine care of and preventative maintenance and repair for any property, structures, surfaces, facilities, fixtures, equipment, furnishings, improvements and components that form any part of the Ballpark or the Ballpark Surface Parking in a manner reasonably consistent with the standards at other Comparable Facilities; provided however, Routine Maintenance shall not include Capital Improvements. Routine Maintenance shall include the following, together with such other Routine Maintenance described in Section 6.1 hereof: (i) preventative or routine maintenance that is stipulated in the operating manuals for the Ballpark; (ii) periodic testing of building systems, such as mechanical, card-key security, fire alarm, lighting and sound systems; (iii) ongoing trash removal; (iv) routine maintenance procedures for heating, ventilation and air-conditioning, plumbing, electrical, roof and structural systems and vertical lift systems (e.g., escalators and elevators); (v) painting or application of protective materials; (vi) cleaning prior to, during and following, and necessary as a direct result of, all Events (other than any work required to be performed by City for any City Sponsored Events) at the Ballpark; and (vii) routine changing of light bulbs, ballasts, fuses and circuit breakers as they fail in normal use.

**“Season Parking Events”** has the meaning given to that term in Section 5.5 hereof

**“Split Revenues”** has the meaning given to that term in Section 5.6 hereof.

**“Tax Proceeding”** means any audit, examination, investigation, action, suit, claim, assessment, appeal, request for adjustment, or other administrative or judicial proceeding relating to the payment of any taxes described in this Agreement.

**“Team”** means all rights, title and interest, including franchise rights, in the Triple A Minor League Professional Baseball franchise granted by the NAPBL and the corresponding interests in the PCL and known as of the Effective Date as the “Tucson Padres” baseball club.

**“Team Ballpark Event”** means any Ballpark Event directly involving the Team, including home games of the Team.

**“Tenant”** has the meaning given to that term in the introductory paragraph of this Agreement.

**“Tenant Default”** has the meaning given to that term in Section 10.1 hereof.

**“Tenant’s Personal Property”** means any and all movable equipment, furniture, fixtures and other tangible personal property that are owned by Tenant or its subtenants and located on or within the Ballpark or the Ballpark Surface Parking (including trade fixtures, but not other fixtures) and can be removed from the Ballpark without material damage thereto. The term “Tenant’s Personal Property” does not include any of City’s Personal Property or any replacements of City’s Personal Property.

**“Tenant Representative”** has the meaning given to that term in Section 2.2 hereof.

“**Term**” means the Initial Term and any and all Renewal Option Periods exercised by Tenant as provided in Section 3.5.

“**Ticket Fee**” means a fixed admission surcharge of (i) Fifty Cents (\$0.50) for each ticket sold for each Ballpark Event during each of the first five calendar years of the Initial Term; (ii) Fifty-Five Cents (\$0.55) for each ticket sold for each Ballpark Event during each of the sixth through tenth calendar years of the Initial Term; (iii) Sixty-One Cents (\$0.61) for each ticket sold for each Ballpark Event during each of the 11<sup>th</sup> through 15<sup>th</sup> calendar years of the Initial Term; (iv) Sixty-Seven Cents (\$0.67) for each ticket sold for each Ballpark Event during each of the 16<sup>th</sup> through 20<sup>th</sup> calendar years of the Initial Term; and (v) Seventy-Three Cents (\$0.73) for each ticket sold for each Ballpark Event during each calendar year thereafter throughout the remaining Initial Term.

“**Transfer of Majority Interest**” means, with respect to Tenant or Company, any direct or indirect transfer, sale or other transaction (or related transactions) that results in any Person (other than a current Control Person of Tenant or Company, as applicable) becoming the beneficial owner, directly or indirectly, of fifty percent (50%) or more of the securities or interests having ordinary voting power for the election of managers, directors or other comparable Controlling body of Tenant or Company, as applicable.

“**UPTT Garage**” means the existing Union Plaza Transit Terminal garage located at the corner of San Antonio and Durango streets in the City’s downtown.

“**Use Agreement**” means a use, sublease, license, concession, occupancy or other agreement for the use or occupancy of any designated space or designated facilities within the Ballpark for any Permitted Use, but shall not include any of the foregoing for all or substantially all of the Ballpark or for a period greater than the then remaining Term.

## ARTICLE II CITY AND TENANT REPRESENTATIVES

2.1 **City Representative.** City hereby designates City Manager of City or her designee to be the representative of City (the “**City Representative**”), and City shall have the right, from time to time, to change the Person who is City Representative by giving at least ten (10) days prior written notice to Tenant thereof. The only functions under this Agreement of City Representative shall be as expressly specified in this Agreement. Any one of the Persons from time to time serving as City Representative, acting alone and without the joinder of the other persons then serving as City Representative, shall have the power to bind City in those instances in which this Agreement specifically provides for the approval, decision, confirmation or determination of City Representative and in no other instances; *provided, however*, that notwithstanding anything in this Agreement to the contrary, City Representative shall not have any right to modify, amend or terminate this Agreement.

2.2 **Tenant Representative.** Tenant hereby designates Joshua Hunt to be the representative of Tenant (the “**Tenant Representative**”), who shall be authorized to act on behalf of Tenant under this Agreement. Tenant shall have the right, from time to time, to change the Person who is Tenant Representative by giving at least ten (10) days prior written notice to City thereof. Any written approval, decision, confirmation or determination hereunder by Tenant Representative shall be binding on Tenant; *provided, however*, that notwithstanding

anything in this Agreement to the contrary, Tenant Representative shall not have any right to modify, amend or terminate this Agreement.

**ARTICLE III**  
**LEASEHOLD ESTATE TERM; RENT; FEES;**  
**CAPITAL REPAIRS RESERVE FUND**

3.1 Grant of Leasehold Estate. In consideration of and pursuant to the covenants, agreements and conditions set forth herein, City does hereby lease, let, demise and rent unto Tenant, and Tenant does hereby rent and lease from City, on and subject to the terms, conditions and provisions of this Agreement, the Ballpark, the Ballpark Surface Parking, City Personal Property, together with all other rights, titles and interests granted to Tenant under this Agreement (collectively, the “Leasehold Estate”) for the Term set forth herein.

3.2 Delivery of Possession. On the Commencement Date, City will deliver to Tenant possession and occupancy of the Leasehold Estate subject only to (i) the Permitted Exceptions, (ii) the rights and reservations of City under this Agreement including the Reservations and (iii) all Applicable Laws. Subject to Tenant’s rights to access the Ballpark pursuant to the Development Agreement, Tenant shall not have the right to use or occupy any part of the Real Property, the Ballpark or the Ballpark Surface Parking prior to the Commencement Date.

3.3 Reservations. Notwithstanding anything in this Agreement to the contrary, City hereby reserves (and the Leasehold Estate shall not include) the following with respect to the Ballpark and the Ballpark Surface Parking (the “Reservations”):

(a) the right of City to install on, under, over or below the Ballpark and the Ballpark Surface Parking any and all utilities and appurtenances related thereto that it deems necessary; provided, however, that (1) the location and construction of same shall not materially interfere with the operation, or materially change the aesthetics, of the Ballpark by Tenant or the use of the Ballpark Surface Parking by Tenant, each pursuant to the terms of this Agreement and (2) Tenant shall have no obligation to maintain same after construction by City; and

(b) for the benefit of City, the exclusive right to any natural resources in on and under the Ballpark or the Ballpark Surface Parking, including all oil, coal, natural gas and other hydrocarbons, minerals, aggregates and geothermal resources as well as a right to grant leases or to conduct and undertake surface or subsurface extraction of same; provided, however, that no extraction of such natural resources shall (1) be inconsistent or incompatible with the rights or privileges of Tenant under this Agreement, (2) be permitted on the playing surface of the Ballpark or (3) adversely affect the use or surface of, or undermine the support of, the Ballpark or the Ballpark Surface Parking.

3.4 Initial Term. Subject to the terms and conditions hereof, City hereby leases the Ballpark to Tenant for a period commencing on the Commencement Date and ending on September 30 (or such later date as is reasonably necessary to accommodate any Team Ballpark Events (e.g., playoff games)) of that year in which the twenty-fifth (25th) full Baseball Season after the Commencement Date has occurred, unless this Agreement is sooner terminated pursuant to any applicable provision hereof, (the “Initial Term”), unless sooner terminated by law or pursuant to the terms and conditions of this Agreement.



### 3.5 Renewal Periods.

(a) Tenant shall have the option to extend the Initial Term of this Agreement for three (3) consecutive additional periods of five (5) years each (each such option is referred to herein as a “**Renewal Option**” and each such period as a “**Renewal Option Period**”). Each Renewal Option Period, shall commence the day immediately following the expiration of the Initial Term or previous Renewal Option Period, as applicable.

(b) Tenant’s ability to exercise each Renewal Option shall be subject to Tenant delivering to City a written request to discuss the terms and conditions of the Agreement for the upcoming Renewal Option Period on or before twenty four (24) months prior to the expiration of the Initial Term or eighteen (18) months prior to the expiration of any subsequent Renewal Option Period. If Tenant exercises any Renewal Option, all of the terms of this Agreement, other than any contractual provision governing a financial obligation between the City and Tenant, including Rent, Ticket Fees, Parking Fees and other parking and Ballpark revenues, shall apply during the Renewal Option Period. During (i) the twelve (12) month period after an exercise of a Renewal Option with respect to the Initial Term or (ii) the six (6) month period after an exercise of a Renewal Option with respect to a subsequent Renewal Option Period, the Representatives shall enter into exclusive, good faith negotiations on behalf of their respective parties to determine the new financial contractual terms for the applicable Renewal Option Period. In negotiating the renewal terms governing the financial obligations between the Parties, the Parties shall consider relative market size of City and Team relative to other MiLB teams, market demographics, age of the Ballpark and related improvements, the amount of the then-current Rent, Ballpark attendance and the financial performance of Team and Ballpark operations. In the event Tenant does not timely provide notice of its request to exercise a Renewal Option, or in the event that Tenant provides such notice, but the Parties fail to agree upon the terms of a renewal on or before one year before the Lease Expiration Date, then City shall be free to negotiate with, make offers to, entertain offers from, have discussions and communications with and enter into any lease, sublease, license, or similar occupancy agreement with any Person regarding the Ballpark and the Ballpark Surface Parking on terms acceptable to City. Should there be an ongoing Tenant Default, then Tenant shall not be entitled to exercise its Renewal Option.

### 3.6 Fixed Rental.

(a) In consideration of the use and occupancy of the Ballpark by Tenant, and the costs incurred or to be incurred by City to construct the Ballpark, beginning on the Commencement Date, Tenant hereby agrees to pay to City the Fixed Rental in two equal, semi-annual installment payments which aggregate the total amount of Fixed Rental to be paid for the applicable year. Such payments to be made (A) during the first year of the Initial Term, (i) fifteen (15) days after the first regular season home game of the Team at the Ballpark and (ii) the sooner to occur of six (6) months after the first payment or January 1 of the following year; and (B) for every year of the Initial Term thereafter, each January 1 and July 1, as applicable. If the Commencement Date does not allow the Team to play a full Baseball Season at the Ballpark during the first year of the Initial Term, then the Fixed Rental for such year shall be reduced on a pro rata basis equal to the product obtained by multiplying (a) the Fixed Rental for such year by (b) the quotient obtained by dividing (i) the total number of regular season games the Team will play at the Ballpark by (ii) the total number of regular season games originally scheduled to be played by the Team at the Ballpark. If this Agreement terminates on a day other than the

anniversary of the Commencement Date, the Fixed Rental for such partial year shall be proportionately reduced and the remaining Fixed Rental shall be payable, or the excess portion of Fixed Rental previously paid shall be refunded, as applicable, on such date of termination of this Agreement.

3.7 Ticket Fee. In addition to the Fixed Rental, beginning on the Commencement Date, Tenant or Company, as applicable, shall impose and collect, or cause to be imposed and collected the Ticket Fee; provided however, City shall not receive more than the Overall Additional Revenue Cap from the aggregate of the Ticket Fees, the Parking Fees and the Split Revenues in any calendar year. On the fifth (5<sup>th</sup>) Business Day of each month during the Term and on the Lease Expiration Date, Tenant or Company, as applicable, shall remit, or cause to be remitted, to City all Ticket Fees not previously remitted to City subject to the Overall Additional Revenue Cap limitation set forth in the preceding sentence.

3.8 Parking Fee. In addition to the Fixed Rental, beginning on the Commencement Date, Tenant shall pay to the City the Parking Fee in accordance with Section 5.5; provided however, City shall not receive more than the Overall Additional Revenue Cap from the aggregate of the Ticket Fees, the Parking Fees and the Split Revenues in any calendar year. Tenant shall remit all Parking Fees then held by Tenant to City with each Fixed Rental payment made to City subject to the Overall Additional Revenue Cap limitation set forth in the preceding sentence.

3.9 Capital Repairs Reserve Fund. Commencing with the third full payment of the Fixed Rental and continuing throughout the Term, City shall promptly deposit, upon receipt, seventy-five percent (75%) of each Fixed Rental payment into the Capital Repairs Reserve Fund (up to a total, not-to-exceed deposit of One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00) per year). City is authorized to use any amounts in the Capital Repairs Reserve Fund for Capital Improvements. Notwithstanding anything to the contrary contained in this Agreement but subject to Section 23.8 hereof, City shall be required to satisfy its obligations with respect to Capital Improvements without regard to whether the Capital Repairs Reserve Fund is sufficient to cover City's costs and expenses therefor.

#### **ARTICLE IV USE OF THE STADIUM; REVENUE**

4.1 Ballpark Events. Tenant shall be entitled to the use of all or any portion of the Ballpark for all (a) home games (including pre-season, regular season and playoff games) of the Team, (b) practices of the Team, (c) concerts and other entertainment events, (d) meetings and banquets, (e) soccer, football, lacrosse, baseball (e.g., high school and college) and other sporting events, (f) community-oriented events (other than City Sponsored Events) (g) any other for profit events, (h) reasonable periods before and after the events described in subsections (a)-(g) hereof, for field protection, recovery and repair and event move-ins/move-outs and (i) Ballpark routine repairs and maintenance, and for any other lawful purpose that is not a Prohibited Use (collectively, the "Ballpark Events").

#### 4.2 Scheduling.

(a) Notwithstanding anything to the contrary contained in this Agreement, Tenant shall have absolute priority for use of all or any portion of the Ballpark for any and all



Ballpark Events, including without limitation all pre-season, regular season and playoff games of the Team. Subject to the foregoing, City and Tenant acknowledge that within the framework established by this Section 4.2 and Section 4.3 below, the scheduling of City Sponsored Events at the Ballpark will be a cooperative endeavor, and City and Tenant each agree to recognize and, in good faith, attempt to accommodate City with respect to the scheduling of up to ten (10) City Sponsored Events per year.

(b) Prior to each calendar year during the Term, Tenant shall provide City with a schedule of all the dates on which Tenant intends to use the Ballpark for Ballpark Events during such calendar year and a range of dates to be reserved for potential preseason and playoff games, which range shall be reasonable in light of the recent playoff schedules for the league in which the Team then plays.

(c) It is understood by the Parties that the PCL typically publishes the final baseball schedule for each calendar year during the month of December of the preceding calendar year. Tenant shall distribute to City the final schedule within five (5) Business Days after it is received by Tenant.

#### 4.3 City Sponsored Events.

(a) Subject to availability based on Tenant's priority use of the Ballpark described in this Agreement (i) City shall be entitled to use of the public areas of the Ballpark for civic-oriented, community not-for-profit or educational events such as City ceremonies, conferences, conventions, meetings and training sessions, for the benefit of City, (the "City Sponsored Events") and (ii) City shall not attempt to schedule and shall not be authorized to use the Ballpark for any City Sponsored Events, without the prior written consent of Tenant, which may not be unreasonably withheld, conditioned or denied. The City shall not attempt to schedule and shall not be authorized to use the Ballpark for any Ballpark Events, as described in Section 4.1, without the prior written consent of Tenant, which may be withheld in its sole discretion.

(b) Subject to the terms and conditions of Section 4.2 above and this Section 4.3, City shall notify Tenant in writing of City's intent to hold a City Sponsored Event at the Ballpark, which notice shall be given not less than thirty (30) days prior to the proposed City Sponsored Event and shall include a full and complete written description of that event. City shall not attempt to schedule a City Sponsored Event during any Baseball Season until the final schedule for such Baseball Season is published. Notwithstanding anything to the contrary contained herein, and for the avoidance of doubt, if Tenant has previously scheduled an event at the Ballpark on the date of a City Sponsored Event requested by City, Tenant shall have no obligation to make the Ballpark available to City on such date. Tenant shall have no obligation to reschedule a Ballpark Event.

(c) During any City Sponsored Event, Tenant shall, in its sole discretion, have the option of selling Concessions and/or Merchandise, whether through the use of a Concessions Agreement, Merchandise Agreement or otherwise, and Tenant shall be entitled to receive and retain all revenue generated therefrom as described in Section 4.4 hereof. If Tenant does not make such an election and City wishes to provide for the sale and provision of Concessions and/or Merchandise at the Ballpark for City Sponsored Events, City must negotiate an agreement for the sale of Concessions and/or Merchandise, as applicable, at City Sponsored Events with the

then-existing concessionaires, merchandisers and vendors under contract to provide and sell Concessions and Merchandise at the Ballpark pursuant to a Concessions Agreement or Merchandise Agreement, as applicable.

(d) After each City Sponsored Event, City shall re-deliver the Ballpark to Tenant in full compliance with the Ballpark Standard. Without limiting the foregoing, after each City Sponsored Event, City shall be responsible for the timely restoration of all portions of the field at the Ballpark to the official standards of the NAPBL, as may be amended from time to time. City and Tenant, shall from time to time as appropriate during the Term, cooperate and confer in good faith to develop and modify procedures and standards to be implemented by City for City Sponsored Events to ensure that all portions of the field at the Ballpark are adequately protected during the preparation for, and the holding of, City Sponsored Events so that the field meets, or can be timely restored to, the official standards of the NAPBL, as may be amended from time to time, after each City Sponsored Event.

(e) City shall be entitled to the "rent-free" use of the Ballpark for City Sponsored Events; provided, however, that for any City Sponsored Event, City shall be solely responsible for all costs and expenses associated with such event that are over and above the costs to maintain and operate the Ballpark had there been no such City Sponsored Event. City shall pay Tenant for the additional costs associated with such a City Sponsored Event within thirty (30) days after receipt of a reasonably detailed invoice from Tenant, including reasonable back-up documentation as requested.

#### 4.4 Revenue.

(a) Except as otherwise expressly provided by the terms of this Agreement, including Section 4.4(b) below, Tenant shall be entitled to receive and retain all revenues generated from the Team and/or at the Ballpark, including, without limitation, all revenues from Events, ticket sales (except Ticket Fees), parking (except for City's share of parking revenue, discussed in Article V of this Agreement), Concessions, Merchandise, suite, loge box and club seat rentals, interior and exterior Ballpark advertising and signage, sponsorships, any and all naming rights and other advertising, sales of broadcast and telecast rights, internet rights, league expansion fees and team fundraising, and any other sources of revenue.

(b) City shall be entitled to receive and retain all revenues generated from ticket sales for City Sponsored Events and City's share of parking revenues described in Article V of this Agreement.

#### 4.5 Prohibited Uses.

Tenant shall not use, or permit the use of, the Ballpark or the Ballpark Surface Parking for any other, different or additional purpose that is not a Ballpark Event or other use expressly permitted hereunder without first obtaining the Approval of City Representative. Tenant agrees that the Ballpark Events are subject to compliance with all Applicable Laws at any time applicable to the use, occupancy or operation of the Ballpark and the Ballpark Surface Parking and that nothing in this Agreement shall constitute or be deemed to constitute a waiver by City of the performance of its Governmental Functions or of any such Applicable Laws or of the duty of Tenant to comply with such Applicable Laws. Notwithstanding the use of the Ballpark for

Ballpark Events, but as may be otherwise Approved or modified by City Representative from time to time, Tenant agrees that it shall not (collectively, the "**Prohibited Uses**"):

(a) Create, cause, maintain or permit any public or private nuisance in, on or about the Ballpark or the Ballpark Surface Parking;

(b) Use or allow the Ballpark or the Ballpark Surface Parking to be used for the sale or display of any pornographic material or material which is obscene under standards set forth in any Applicable Laws, or operate or allow any Person to operate in, on or about the Ballpark any store or other facility, a principal or significant portion of the business of which is a "adult (sexually) oriented business", as such term is defined in the El Paso City Code, as same may be amended from time to time during the Term;

(c) Use or allow the Ballpark or the Ballpark Surface Parking to be used for any purpose that is violative of Applicable Laws;

(d) Use or allow the Ballpark or the Ballpark Surface Parking to be used for the sale of paraphernalia or other equipment or apparatus which is used primarily in connection with the taking or use of illegal drugs (or their equivalent);

(e) Use or permit the Ballpark or the Ballpark Surface Parking to be used for the public or private sale of guns and other weapons, ammunition, fireworks, or explosives;

(f) Use any portion of the Ballpark or the Ballpark Surface Parking, other than portions designated for same inside the Ballpark building, for storage;

(g) Operate any speakers or amplified music near or on any exterior portions of the Ballpark or in the Ballpark Surface Parking other than during Ballpark Parking Hours, without the Approval of City Representative (but specifically excluding any pre-event sound checks for Ballpark Events and reasonable testing of the Ballpark sound facilities); or

(h) Use or permit the use of the Ballpark or the Ballpark Surface Parking as a casino (or other establishment in which gambling is permitted or games of chance are operated), a massage parlor or a tanning parlor.

The provisions of this Section 4.5 shall inure to the benefit of, and be enforceable by, City and its successors and assigns. No other Person, including any guest or patron of the Ballpark or the Ballpark Surface Parking, shall have any right to enforce the prohibitions as to the Prohibited Uses.

#### 4.6 Operator.

During the Term, Tenant shall be the initial Person who, on a day-to-day basis, is responsible for the operation and policies of the Ballpark and the Ballpark Surface Parking and who operates the Ballpark and the Ballpark Surface Parking in accordance with the Ballpark Standard (the "**Operator**"). Prior to engaging a third party that is not an Affiliate of Tenant to act as Operator and operate the Ballpark and/or the Ballpark Surface Parking, Tenant shall request City Representative's Approval, which request shall include the form of Management Agreement to be executed in connection therewith. City Representative shall respond to any such request within fifteen (15) days after receipt thereof, and any City Representative's



Approval shall not be unreasonably withheld so long as any such third party Operator is a Qualified Operator. Notwithstanding the foregoing, an Operator that is solely operating the Ballpark Surface Parking shall not be required to be a Qualified Operator. In all instances, each management agreement with a third party Operator shall (i) require the Operator to comply with the terms of this Agreement as to the use and operation of the Ballpark and the Ballpark Surface Parking, (ii) provide that City shall be a third party beneficiary and permitted assignee thereof and (iii) not be modified or amended in any material respect without the prior written Approval of City, which Approval shall not unreasonably be withheld. Each such management agreement with a third party Operator of the Ballpark and the Ballpark Surface Parking shall be referred to herein as a "**Management Agreement**." Each Management Agreement shall be subject to City Representative's prior Approval, such Approval not to be unreasonably withheld. If given, such Approval shall be provided no later than fifteen (15) days after such request is made by Tenant.

## **ARTICLE V PARKING**

5.1 **Generally.** The Parties acknowledge and agree that parking for the Ballpark is critical to the long term operating and financial viability of the Team and the Ballpark. Periodically, as determined by the Representatives, the Representatives shall meet in good faith to develop and implement a strategic plan to address parking for the Ballpark. It is the intent of the Parties that the strategic plan will include a plan to maximize the number of parking spaces within the area located one-half (1/2) mile from the outside perimeter of the Ballpark (in every direction), including existing and new surface parking spaces, and on-street metered parking spaces; provided however, City is under no obligation to construct any additional parking other than the Ballpark Surface Parking. The strategic plan shall also include ingress and egress plans, parking access to Ballpark patrons, and shall include measures to maximize parking revenues to be retained by City and Tenant.

5.2 **Parking Spaces.** Beginning on the Commencement Date, City shall make available a minimum of Five Hundred (500) parking spaces, which shall be allocated as follows:

(a) Two Hundred (200) paved parking spaces at (i) City-owned parking lot commonly referred to as the "**City Hall Visitor Lot**" and (ii) the nearby City-owned parking lot to the West along West Franklin Avenue, collectively for the use by Tenant (and, including without limitation, Tenant's guests, employees, patrons, concessionaires, merchandisers, vendors and staff, and members of the Team) at any time on a year round basis, (collectively, the "**Ballpark Surface Parking**"); and

(b) based on the number of spaces requested by Tenant pursuant to Section 5.5 hereof, up to Three Hundred (300) parking spaces in the aggregate from a combination of the Civic Center Garage (at which City shall provide a minimum of Two Hundred (200) parking spaces) and the UPPT Garage for the use by Tenant and patrons of the Ballpark during Ballpark Parking Hours (collectively, the "**Offsite Garage Parking**").

Each parking area is depicted on Exhibit B attached hereto and incorporated herein. Without limiting the foregoing, a minimum of Four Hundred (400) of such parking spaces shall be from a combination of the Ballpark Surface Parking and the Civic Center Garage.

5.3 Offsite Garage Parking Operations and Security. Without limiting the Parties' obligations for operations and maintenance set forth in Section 6 of this Agreement, City at its sole cost and expense shall (a) cause the minimum number of parking spaces described herein for the Offsite Garage Parking to be cleared and made available to Tenant and the Ballpark patrons no later than the commencement of the Ballpark Parking Hours on every day that there is an Event, (b) staff (with City's employees, agents and contractors) the Offsite Garage Parking and collect parking revenues earned during Ballpark Parking Hours and (c) maintain the Offsite Garage Parking and the pedestrian routes between the same and the Ballpark in a clean, well-lit and attractive manner and patrol by police or other security personnel in sufficient numbers in accordance with the Ballpark Standard, as determined by City, to establish public confidence in the convenience of the parking and the personal safety of the users of such parking areas and routes. City and Tenant agree to develop training policies and guidelines for parking staff at the Offsite Garage Parking (including guidelines for the staff positions, training for parking operations and guidelines for staff appearance, including uniforms), which City shall use to train its parking staff; provided that any such policies and guidelines shall not be inconsistent with any Applicable Laws or City contractual commitments that may apply to City in connection therewith).

5.4 Parking Rates. Tenant, in its sole discretion, shall have the right to set the parking rates for the Ballpark Surface Parking. Tenant shall provide its rate (or rates, as applicable) to City from time to time, and City shall post such rates at the corresponding parking areas upon the earlier to occur of (a) the date of the first Event immediately following five (5) Business Days after City receives such rate information or (b) thirty (30) days after the date City receives such rate information. The Representatives shall meet and use reasonable efforts to agree on the parking rate (or rates, as applicable) for the Offsite Garage Parking during Ballpark Parking Hours, and City shall post such rates at the corresponding parking areas upon the earlier to occur of (x) the date of the first Event immediately following five (5) Business Days after the date the Parties agree on such rate information or (y) thirty (30) days after the date City and Tenant agree on such rate information. If the Representatives are unable to agree on any parking rates for the Offsite Garage Parking, and any such dispute remains unresolved for fifteen (15) Business Days after notice of such dispute has been provided by one Party to the other Parties, the rates shall be established for the Offsite Garage Parking during Ballpark Parking Hours by City at a rate equal to the average rate then in effect for comparable private parking within the area located one-quarter (1/4) mile from the outside perimeter of the Ballpark (in every direction). If parking revenues are subject to a City sales tax, City's posting of the rate shall include the rate of the sales tax and the amount of the sales tax included in the posted rate. For example, if the rate for a parking space is Five Dollars (\$5.00), and the amount of the sales tax equals eight and one quarter percent (8.25%), City's posting of the rate shall identify the sales tax rate (8.25%) and indicate that the parking fee includes a sales tax of Thirty-Eight Cents (\$0.38).

5.5 Season Parking. At least ten (10) Business Days prior to the beginning of each Baseball Season, Tenant shall provide City with written notice of the number of parking spaces needed by Tenant for the ensuing twelve month period, in the Offsite Garage Parking, for all Ballpark Events known at the time of such notice and for up to five additional Ballpark Events which do not have to be specifically designated at the time of such notice (collectively, the "Season Parking Events"). As so specifically requested by Tenant in such notice, City shall provide Tenant with up to three hundred (300) parking spaces in the Offsite Garage Parking for each Season Parking Event during such twelve month period. Tenant shall pay to City the

Parking Fee for each parking space requested by Tenant in the Offsite Garage Parking for such twelve month period, subject to the limitations contained in Section 3.8. No other parking fees will be charged by City for the use of such parking spaces during any Season Parking Event during the applicable twelve month period. If Tenant does not timely specify the number of spaces needed for Season Parking Events for any twelve month period, the Parking Fee for such season shall be calculated, and the Tenant shall pay such fee, on the basis 300 spaces times 77 Season Parking Events, subject to the limitations contained in Section 3.8.

#### 5.6 Parking Revenues.

(a) Tenant shall be responsible for collecting and accounting for, and shall be entitled to receive and retain, all parking revenues from the Ballpark Surface Parking at any time.

(b) Except as set forth in Section 5.5 hereof, City shall be responsible for collecting and accounting for, and shall be entitled to receive and retain, all parking revenues from the Offsite Garage Parking at all times; provided however, Tenant and City shall divide all net revenues from the Offsite Garage Parking that are collected during the Offsite Garage Parking Revenue Hours for any Ballpark Event, held during the Term, fifty percent (50%) to City and fifty percent (50%) to Tenant (the "Split Revenues"), with the City receiving an amount no greater than the Overall Additional Revenue Cap from the aggregate of the Ticket Fees, the Parking Fees and the Split Revenues in any calendar year.

(c) City shall furnish Tenant with a monthly accounting statement identifying for the previous month: (i) the gross and net parking revenues collected during the Offsite Garage Parking Revenue Hours for any Event at the Offsite Garage Parking and (ii) the amount of the net parking revenues payable to Tenant.

5.7 Event Staff Parking. To the extent City has City downtown parking lots or garages available, other than the Offsite Garage Parking, that are not in the immediate vicinity of the Ballpark and which are not otherwise used during Ballpark Parking Hours, the City shall use commercially reasonable efforts to make such parking lots or garages available to Tenant for use by its full and part-time employees, concessionaires, merchandisers, vendors and staff, at no cost to Tenant or any such employees, concessionaires, merchandisers, vendors or staff; provided that there is no cost incurred by City in connection with such parking access and that City is under no obligation to provide staffing in connection with such Tenant employee parking.

### ARTICLE VI OPERATION; MAINTENANCE; UTILITIES

#### 6.1 Tenant's Operation and Routine Maintenance of the Ballpark; Utilities.

(a) Except as otherwise provided in this Agreement, Tenant shall be responsible for all aspects of operating the Ballpark and the Routine Maintenance of the Ballpark and shall be responsible for all operating expenses and costs for the Ballpark, including all direct or indirect expenses associated with the Team or Ballpark Events. Without limiting the generality of the preceding sentence, Tenant shall, throughout the Term, at its own expense and at no cost or expense to City, and in compliance with Applicable Laws, do the following Routine Maintenance:



(b) Perform all Routine Maintenance and otherwise keep and maintain, or cause to be kept and maintained, (1) the Ballpark and all City Personal Property located within the Ballpark in good repair, order and condition so that the Ballpark may be operated in accordance with the Ballpark Standard, but in all events in a manner consistent with manufacturers' recommendations, any applicable Casualty or other insurance requirements and as reasonably necessary to avoid or repair waste or damage to any of the foregoing and in compliance with Applicable Laws; and (2) the Ballpark Surface Parking in good repair, order and condition so that the Ballpark Surface Parking may be operated in accordance with the operating and maintenance standards for Ballpark Surface Parking at Comparable Properties, but in all events in a manner reasonably necessary to avoid or repair waste or damage, in compliance with Applicable Laws; and

(c) Promptly make, or cause to be made, all reasonably necessary routine repairs, interior and exterior, foreseen as well as unforeseen, to the Ballpark and the Ballpark Surface Parking, excluding those which constitute Capital Improvements, to keep the foregoing clean, in good working order and condition so that that the Ballpark may be operated in accordance with the Ballpark Standard and so that both the Ballpark and the Ballpark Surface Parking may be operated in compliance with all Applicable Laws.

(d) Tenant shall perform such operation, maintenance and routine repair activities required in this Article VI in a safe, clean, attractive and first class manner comparable to that of the Comparable Properties and in accordance with Ballpark Standard.

(e) Tenant may perform such activities itself or hire contractors or managers to perform all or any portion of the same in compliance with all Applicable Laws. Without limiting the foregoing, if Tenant elects to hire a third party facility management firm other than an Affiliate of Tenant to perform any such activities, Tenant shall follow the procedure set for in Section 4.6 hereof. For the avoidance of doubt, Tenant shall not be required to seek prior approval from City for any concessionaires, merchandisers or other vendors for the Ballpark.

(f) Tenant agrees to do all things reasonably necessary to conduct its affairs and carry on its business and operations in such a manner as to comply in all material respects with any and all Applicable Laws and to duly observe and conform to all valid orders, regulations, or requirements of any Governmental Authority relative to the conduct of its business and its operation of the Ballpark.

(g) Tenant, or the concessionaires, merchandisers and/or vendors for the Ballpark, as appropriate, shall be responsible for obtaining all necessary Governmental Authorizations for operation of the Ballpark, including, but not limited to, licenses and permits to sell food, beverages and alcohol. Tenant shall also be solely responsible for obtaining all necessary Governmental Authorizations or MiLB or PCL authorizations required for the operation of the Team.

(h) Tenant, in its reasonable discretion, shall provide at its sole cost and expense all interior Ballpark security, emergency medical and other necessary staff inside the Ballpark at a level of service appropriate for the applicable Ballpark Event and consistent with the Ballpark Standard. City, in its reasonable discretion, shall provide at its sole cost and expense (using City employees or contract services, as determined by City) all customary police, traffic control, fire prevention, emergency medical, street cleaning, trash removal and other

similar City-provided services, outside and in the general vicinity of the Ballpark, at a level of service consistent with the Ballpark Standard. If City in its sole discretion determines that an emergency public safety issue exists at any Event, City shall have the right to provide additional police or emergency staffing for such Event at City's cost. The Representatives shall meet from time to time to update each other on staffing needs for scheduled Events.

(i) Except as otherwise provided in this Agreement, the Parties shall be responsible for Ballpark utilities as follows:

(i) City shall be responsible for contracting and paying for all electric service to the Ballpark during the Term at rates equal to the most favorable rates paid by City for other City-owned facilities, subject to reimbursement by Tenant for 100% of the costs for such services. Within thirty (30) days after receiving any invoices for such Ballpark electric services, together with such backup documentation as Tenant may reasonably request to verify the requested payment amounts, Tenant shall pay City for such Ballpark electric service. In the event Tenant does not make payment within such 30 day period, City may charge interest equal to the Default Rate on any unpaid amount.

(ii) Tenant shall be responsible for contracting and paying for all water and sewer costs at the Ballpark, subject to City's reimbursement of fifty percent (50%) of the annual water and sewer costs at the Ballpark (collectively, the "City's Share of Water and Sewer Costs"). Additionally, City shall use commercially reasonable efforts to provide reclaimed, treated wastewater ("purple pipe" water) to the Ballpark for irrigation purposes in accordance with the El Paso Water Utilities/Public Service Board's plan for expansion of such purple pipe water service. Within thirty (30) days after receiving any invoices for City's Share of Water and Sewer Costs, together with such backup documentation as City may reasonably request to verify the requested payment amounts, City shall pay City's Share of Water and Sewer Costs then due.

(iii) Tenant shall be responsible for contracting and paying costs and fees for all other utilities to the Ballpark during the Term, including without limitation, water and sewer, telephone and other communications, internet and gas services; provided, however that (1) Tenant shall be reimbursed for City's Share of Water and Sewer Costs, and (2) for electricity, City shall be responsible for contracting for the electricity services and Tenant shall reimburse City for the electricity costs.

## 6.2 City's Obligation with Respect to Capital Improvements; Scheduling of Capital Improvement Repairs.

(a) City shall be responsible for the prompt and timely installation, repair and replacement of all Capital Improvements.

(b) The frequency of, and the work performed in connection with the Capital Improvements, shall be in accordance with the Ballpark Standard.

(c) Within the first year following the Commencement Date, the Representatives shall meet and jointly develop a five (5) year Capital Improvements plan which, at a minimum, will set forth any anticipated Capital Improvements and set forth City's estimated schedule for the Capital Improvements. Such Capital Improvement plan shall be submitted to

the Controlling Body of City for its Approval (when so Approved, the "Capital Improvement Plan"). The Representatives shall meet no less often than once a year thereafter to revisit and modify, as appropriate, the Capital Improvements Plan, and determine when and whether any additional Capital Improvements are reasonably required to be provided by City. Any modifications, amendments or updates to the Capital Improvements Plan shall also be submitted to the Controlling Body of City for its Approval prior to them becoming effective. City and Tenant agree to act reasonably in agreeing on and implementing the Capital Improvements Plan. Any failure of City and Tenant to agree on a Capital Improvements Plan shall not affect City's other obligations with respect to Capital Improvements.

(d) City is authorized to seek reimbursement from the Capital Repairs Reserve Fund for direct costs and expenses incurred by City in satisfaction of its obligations with respect to the Capital Improvements. As requested by Tenant Representative, City Representative shall provide to Tenant copies of all bank statements and notices for the Capital Repairs Reserve Fund received by City, and copies of invoices (along with reasonable back up documentation) for which City is seeking reimbursement. Notwithstanding anything to the contrary contained in this Agreement, City shall be required to satisfy its obligations with respect to Capital Improvements without regard to whether the Capital Repairs Reserve Fund is sufficient to cover City's costs and expenses therefor.

(e) Upon prior written notice to Tenant, City shall have the right to access and use the Ballpark throughout the Term in order to fulfill its obligations with respect to Capital Improvements; provided that such activities do not unreasonably interfere with the permitted use of the Ballpark by Tenant and otherwise comply with the terms and conditions of this Agreement.

6.3 City Inspections; Evaluation of Tenant's Operation, Routine Maintenance. Upon prior written notice to Tenant, City Representative shall be permitted to conduct periodic inspections of the Ballpark. Tenant (or Tenant's representatives) shall be permitted to attend any such inspections.

#### 6.4 Improvements by Tenant.

(a) Tenant shall be permitted to make additions or improvements to the Ballpark, at its expense and in its sole and absolute discretion, as long as such additions or improvements meet the Ballpark Standard. Tenant shall provide the City Representative with prior notice of such proposed improvements and keep the City Representative reasonably advised of the status of such improvements throughout their construction. Notwithstanding anything herein to the contrary, Tenant shall have no obligation to make any Capital Improvements.

(b) In the event City fails to make a Capital Improvement in accordance with the Capital Improvement Plan or otherwise as expressly required by the terms hereof and there is no ongoing dispute with respect to the legitimacy, amount or nature of such Capital Improvement, then Tenant may, but is not obligated to, pay directly the costs of such Capital Improvement and thereafter offset up to 75% of each future Fixed Rental payment otherwise payable to City by the cost of such Capital Improvement until Tenant has been repaid in full; provided however, that the acquisition of any such Capital Improvement by Tenant must be made in accordance with all Applicable Laws. In the event Tenant exercises its right of limited

offset pursuant to this Section 6.4(b), City will not be obligated to make deposits to the Capital Repairs Reserve Fund as otherwise required by Section 3.9 hereof with respect to any amount offset by Tenant against Fixed Rental.

6.5 Tenant's Personal Property. Tenant's Personal Property shall remain the property of Tenant during the Term. Tenant, its assignees, concessionaires, merchandisers or vendors will be entitled to remove Tenant's Personal Property from time to time during the Term and through the Lease Expiration Date.

## ARTICLE VII TAXES

7.1 Tenant Payment of Taxes. Tenant shall be responsible for the payment of any taxes legally imposed, assessed or levied against Tenant's Personal Property and the Leasehold Estate and for the payment of any excise taxes legally imposed, assessed or levied against Tenant on account of tickets, parking, Concessions or Merchandise, and similar sales or transactions related to Tenant's use or occupancy of the Ballpark or any Ballpark Event.

7.2 Ad Valorem Taxes. City and Tenant intend that the Real Property, the Ballpark, the Ballpark Surface Parking, and the Leasehold Estate of Tenant hereunder (for so long as the Ballpark and the Ballpark Surface Parking are owned by City or other Governmental Authority) presently are and shall continue to be exempt from real estate ad valorem taxes ("Property Taxes") as exempt properties under the applicable provisions of the Texas Constitution, the Texas Tax Code, and other Applicable Laws. Tenant is authorized to assert, insist upon, continue, and restate this joint intent to any agency, forum, or court having jurisdiction and at which the question may arise or be presented, and City, at the request and sole expense of Tenant, shall jointly take and pursue such lawful actions with Tenant, including, if necessary, judicial actions, as may be available and appropriate, to protect and defend the Ballpark, the Ballpark Surface Parking, and the Leasehold Estate of Tenant against the levy, assessment or collection of Property Taxes by any Governmental Authority asserting the power to levy, assess, and collect such taxes under Applicable Law. In the event that such Property Taxes are assessed against the Real Property, the Ballpark, the Ballpark Surface Parking or the Leasehold Estate of Tenant hereunder, then Tenant shall pay such Property Taxes before they become delinquent, subject to Tenant's right of contest as provided in this Agreement, and the aggregate of such Property Taxes owing and paid to City as a governmental taxing entity, but not to other taxing jurisdictions, throughout the Term shall be promptly refunded by City to Tenant.

7.3 Joinder of City Not Required. City shall not be required to join in any Tax Proceeding or other Action or Proceeding referred to in this Section unless required by Applicable Law in order to make such Action or Proceeding effective, in which event any such Action or Proceeding may be taken by Tenant in the name of but without expense to City, and **TENANT HEREBY AGREES TO INDEMNIFY, DEFEND AND HOLD CITY HARMLESS FROM ALL COSTS, FEES, EXPENSES, CLAIMS, LOSSES OR DAMAGES BY REASON OF, IN CONNECTION WITH, OR IN ACCOUNT OF, GROWING OUT OF, RESULTING FROM, ANY SUCH ACTION OR PROCEEDING.** To the extent such cooperation is required by the applicable Governmental Authority for such Tax Proceeding, City shall cooperate in any such Tax Proceeding as reasonably requested by Tenant, at Tenant's sole cost and expense, whether or not City is joined pursuant thereto, and



City agrees to take no action that would be materially adverse to Tenant in any such Tax Proceeding where Tenant seeks to reduce its obligation to pay such Property Taxes.

7.4 No City Obligations. Except for costs that City has specifically agreed to pay pursuant to the express terms of this Agreement, (i) City shall not be required to make any expenditure, incur any obligation or incur any liability of any kind whatsoever in connection with this Agreement, the Ballpark, the Ballpark Surface Parking or any Property Taxes and (ii) it is expressly understood and agreed that this is a completely net lease intended to assure City the Rent herein reserved on an absolutely net basis, except as otherwise provided in this Agreement.

7.5 No Target Taxes. Notwithstanding anything herein to the contrary, City shall not impose, or agree to be imposed, any targeted or special taxes, fees or assessments on (a) the Offsite Parking Garage during any Ballpark Events, or (b) the Ballpark, the Ballpark Surface Parking, the Team or Ballpark Events, including, without limitation, special district taxes, fees or assessments.

## **ARTICLE VIII INSURANCE; INDEMNITY**

### **8.1 Insurance.**

(a) Tenant shall, at its sole expense, obtain and maintain during the Term, a Commercial General Liability Policy and Auto Liability Policy of Insurance (for owned, hired and non-owned vehicles of Tenant) which will adequately and sufficiently protect City and Tenant, their agents, representatives and servants from losses arising directly or indirectly from Tenant's and City's use of the Ballpark and Ballpark Surface Parking. City shall be named on the insurance certificate(s) as an additional insured party and Tenant shall use commercially reasonable efforts for the umbrella coverage to follow form to include City as an additional insured. Unless otherwise agreed by City Representative and Tenant Representative in writing, the Commercial General Liability Policy of Insurance shall include the following coverage: (i) commercial general liability, ONE MILLION DOLLARS (\$1,000,000) per occurrence, including fire, products/completed operations, broad form contractual liability, broad form property damage liability, host legal liquor liability and dram shop liability; (ii) TEN THOUSAND DOLLARS (\$10,000) for medical payments per each occurrence; (iii) General Aggregate, TWO MILLION DOLLARS (\$2,000,000), (iv) Products/Completed Operations – Aggregate, TWO MILLION DOLLARS (\$2,000,000), (v) Personal and Advertising Injury, ONE MILLION DOLLARS (\$1,000,000), (vi) Fire Legal Liability, ONE MILLION DOLLARS (\$1,000,000), (vii) commercial umbrella liability policy, TEN MILLION DOLLARS (\$10,000,000) per occurrence/annual aggregate, including host legal liquor liability and dram shop liability in the umbrella policy; (iv) workers' compensation (statutory benefits coverage A) plus employers liability, in the amounts of FIVE HUNDRED THOUSAND (\$500,000) per employee per accident, FIVE HUNDRED THOUSAND (\$500,000) per employee per disease and FIVE HUNDRED THOUSAND (\$500,000) policy aggregate. Such policies shall also include business interruption coverage similar in nature to such coverages in place at Comparable Properties; so long as such business interruption coverage is available at reasonable cost. In the event that at any time City shall determine that such coverage is inadequate when compared to the Comparable Properties, then City may require additional coverage within its reasonable discretion. This clause is in no way intended to limit the liability of Tenant or City under this clause and its hold harmless provisions running towards City or Tenant, but is only to



be considered as a guideline for minimum amounts of insurance that shall be carried in the amounts required herein.

(b) City agrees, at its sole expense, to obtain and maintain property insurance at all times during the Term of this Agreement, insuring all buildings and structures comprising the Ballpark against all risk of direct physical loss or damage to the same extent and with the same coverage as other City owned buildings such as the Civic Center, Plaza Theatre and Convention Center. City may elect to self-insure for any deductibles in said insurance policies. Such insurance coverage may be maintained by any combination of single policies and umbrella policies and shall name Tenant as an additional insured. Such insurance shall include full replacement value cost coverage if it can be obtained at commercially reasonable terms acceptable to City.

(c) Additionally, City shall cause its construction manager or general contractor constructing the Ballpark to maintain additional property insurance written on the so-called "**Builder's Risk Completed Value Non-Reporting Form**" during any period in which any Capital Improvements work being made to the Premises, the anticipated costs of which exceed \$100,000 in the aggregate, with no coinsurance requirement, and containing a provision granting the insured permission to complete and adding the City as the loss payee for such insurance.

(d) All insurance policies of Tenant or City required hereunder (including endorsements thereto) shall (i) be issued by insurance companies authorized to do business in the State of Texas, and rated "**A-VII**" or better by A.M. Best Company (or equivalent); (ii) name the other party and, to the extent communicated to Tenant or City, as applicable, in writing, any other party reasonably required by such party, as "additional insureds" for the Commercial General Liability Policy of Insurance (and for any other insurance policies required to be maintained hereunder for which "additional insured" coverage is available); (iii) be in a form reasonably satisfactory to the other party; (iv) be noncontributing with, and apply only as primary and not as excess to, any other insurance available to the applicable party (to the extent such provision is reasonably available); (v) contain a provision that a party and all additional insureds shall be entitled to recovery under the policy for any loss occasioned to such party by reason of the negligence of the other party or its respective agents, employees or representatives; and (vi) require the insurer to notify Tenant and City, in writing, not less than thirty (30) days prior to any cancellation or termination thereof, except in the event of non-payment of premium in which case the notice period shall be not less than ten (10) days, to the extent the insurer agrees to provide such notices.

(e) Prior to the issuance by City of the use and occupancy permit for the Ballpark, the certificates of insurance verifying the existence of the insurance coverage required in the above paragraphs shall be made available to City and Tenant. Each of City and Tenant shall from time to time upon reasonable request by the other party provide updated certificates of insurance evidencing that all insurance required hereunder is in place and fully paid for in advance.

(f) Each of Tenant and City shall timely pay all premiums due for all insurance policies required hereunder and shall not do anything at the Ballpark that would impair or invalidate any material obligations of any insurer thereunder. If either Tenant or City fails to obtain and pay for any of the insurance policies required hereunder, and such failure continues

for ten (10) days after written notice thereof from the non-defaulting party, then, in addition to all other rights and remedies of the non-defaulting party, the non-defaulting party shall have the right, but not the obligation, to secure the appropriate insurance policies. Any amounts paid by the non-defaulting party in connection with obtaining such insurance shall be immediately due and payable from the defaulting party, and the defaulting party shall pay all such amounts to the non-defaulting party upon demand therefor, together with interest at the Default Rate.

8.2 Waiver of Subrogation. It is the intent of the Parties that the risk of loss or damage arising out of or relating to this Agreement should be borne by insurance to the extent of available coverage. Accordingly, City and Tenant waive all rights against each other (and against the agents, employees, representatives and/or insurers of the other) for any loss or damage to any building, structure, or other tangible property, or any resulting loss of income, or losses under worker's compensation laws and benefits, even though such loss or damage might have been occasioned by the negligence of such other party (its agents, employees and/or representatives); provided, however, that: (a) this waiver of rights shall only be applicable to the extent of insurance proceeds actually paid to the party suffering such loss or damage; and (b) this waiver of rights shall in no way diminish the indemnity obligations of City or Tenant as set forth in Section 8.3 below. Tenant and City shall give written notice of the terms of this mutual waiver of rights to their respective insurers and shall have their insurance policies endorsed, if necessary, to prevent the invalidation of said insurance coverage by reason of this waiver of rights.

8.3 Indemnity.

(a) To the extent allowed by Applicable Law, Tenant shall indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage, including damage by fire or other casualty) incurred by City, Tenant or any other person, and from any and all claims, demands and actions in law or equity (including reasonable attorneys' fees and litigation expenses), arising directly or indirectly out of: (i) Tenant's occupancy, use, operation, maintenance and/or repair of the Ballpark, and/or (ii) Tenant's performance under this Agreement.

(b) To the extent allowed by Applicable Law, City shall indemnify, hold harmless and defend Tenant and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage, including damage by fire or other casualty) incurred by Tenant, City or any other person, and from any and all claims, demands and actions in law or equity (including reasonable attorneys' fees and litigation expenses), arising directly or indirectly out of: (i) City's occupancy, use, operation, maintenance and/or repair of the Ballpark, and/or (ii) City's performance under this Agreement.

(c) City and Tenant's respective obligations contained in this Section 8.3 shall survive expiration or termination of this Agreement.

## ARTICLE IX LOSS OF FACILITIES

### 9.1 Condemnation.

(a) If all of the Ballpark or the use thereof is taken by power of eminent domain, condemned or sold in lieu of condemnation proceedings, this Agreement shall automatically terminate on the earlier to occur of (i) the date on which title to the Ballpark vests in the condemning authority; or (ii) the date on which Tenant is dispossessed of the Ballpark. Except as otherwise required by issues of public safety in the exercise of its Governmental Function, City shall not exercise its power of eminent domain on all or any portion of the Leasehold Estate.

(b) If a portion of the Ballpark or the use thereof is taken by power of eminent domain, condemned or sold in lieu of condemnation proceedings and such taking materially affects Tenant's ability to use or otherwise operate and derive revenue from the Ballpark, Tenant shall have the right to terminate this Agreement effective as of the earlier to occur of (i) the date on which title to the condemned portion of the Ballpark vests in the condemning authority; or (ii) the date on which Tenant is dispossessed of the portion of the Ballpark, by giving written notice to City within sixty (60) days after Tenant's receipt of notice of the partial condemnation.

(c) If a portion of the Ballpark or the use thereof is taken by power of eminent domain, condemned or sold in lieu of condemnation proceedings and Tenant does not terminate this Agreement pursuant to the terms and conditions of Section 9.1(b) above: (i) this Agreement shall be deemed terminated with respect to only the condemned portion of the Ballpark or use thereof; (ii) Tenant's Rent obligations shall be equitably reduced, as determined by the Representatives in good faith, taking into account Tenant's prior use of the condemned portion of the Ballpark and the potential of such portion to generate revenue for Tenant based upon attendance over the previous three (3) year period; and (iii) City shall, at its sole cost and expense, promptly make any Capital Improvements that the Representatives deem reasonably necessary as a result of such condemnation.

(d) Each of Tenant and City shall have the right to seek, at its sole cost and expense, any award to which it might be entitled as a result of any condemnation of all or any portion of the Ballpark or the use thereof. Neither Tenant nor City shall have any rights to any award made to the other.

(e) If all or a portion of the Ballpark or the use thereof is temporarily condemned, this Agreement shall remain in full force and effect, but Tenant's Rent obligations shall be equitably reduced or abated, as determined by the Representatives in good faith, taking into account Tenant's prior use of the condemned portion of the Ballpark and the potential of such portion to generate revenue for Tenant based upon attendance over the previous three (3) year period.

### 9.2 Casualty Damage to the Ballpark.

(a) If, at any time during the Term, the Ballpark or any part thereof shall be damaged or destroyed by Casualty, then Tenant shall promptly secure the area of damage or destruction to safeguard against injury to Persons or property.

(b) If the Ballpark or any portion thereof is damaged or destroyed by Casualty, then neither Tenant nor City, subject to Section 9.2(d) below, shall have the right to terminate this Agreement and City shall promptly use commercially reasonable efforts to restore and repair the Ballpark to a condition substantially similar to that prior to such Casualty and the Term shall be extended by the period of restoration and repair. To that end, City shall use all insurance proceeds available for such purposes. The restoration and repair details shall be undertaken in the same manner involved in the original construction of the Ballpark.

(c) During any period that the Ballpark is totally unusable by Tenant due to Casualty, the Rent, and any other obligations hereunder, shall abate. If only a portion of the Ballpark is rendered unusable by the Casualty, the Rent shall be equitably reduced, as determined by the Representatives in good faith, taking into account Tenant's prior use of the condemned portion of the Ballpark and the potential of such portion to generate revenue for Tenant based upon attendance over the previous three (3) year period.

(d) If the Ballpark or any portion thereof is damaged or destroyed by Casualty and such damage or destruction (i) causes the Ballpark to be unusable by Tenant for Team Ballpark Events, and (ii) such unusable condition cannot be remedied within twelve (12) months after the date of such Casualty (as reasonably determined by City's construction consultants), then, either (i) Tenant or (ii) City if such Casualty takes place within 24 months of the Lease Expiration Date, shall have the right to terminate this Agreement.

(e) Notwithstanding anything in this Section to the contrary, in the event any Casualty to the Ballpark or the Ballpark Surface Parking is caused by the willful misconduct of Tenant, Operator, any Team member, any vendor, any concessionaire or any of the respective Related Parties of such Persons, Tenant shall be responsible for such damage (to the extent the same is not covered by insurance), the Rent shall not abate and Tenant shall promptly use commercially reasonable efforts to restore and repair the Ballpark to a condition substantially similar to that prior to such damage or destruction.



## ARTICLE X DEFAULTS AND REMEDIES

### 10.1 Default by Tenant.

(a) An event of default by Tenant (a “**Tenant Default**”) shall be deemed to have occurred under this Agreement if:

(i) Tenant fails to make any payment of Rent as it falls due and which failure is not cured within ten (10) days after written notice to Tenant of such failure;

(ii) The failure of Tenant to cause the Ballpark and the Ballpark Surface Parking to be operated continuously as required by this Agreement within thirty (30) days after City gives notice to Tenant of such failure (or such longer period as may be reasonably necessary to effect such cure, if such cure cannot be effected within such thirty (30) day period using reasonable efforts);

(iii) The failure of Tenant to cause the Ballpark and the Ballpark Surface Parking to be operated in accordance with the requirements of the Ballpark Standard or Article VI within sixty (60) days after City gives notice to Tenant of such failure (or such longer period as may be reasonably necessary to effect such cure, if such cure cannot be effected within such sixty (60) day period using reasonable efforts);

(iv) Tenant fails to observe or to perform any other material obligation, condition or covenant on its part to be performed or observed in accordance with this Agreement and such failure remains uncured for more than sixty (60) days after Tenant’s receipt of written notice of such failure from City (or such longer period as may be reasonably necessary to effect such cure, if such cure cannot be effected within such sixty (60) day period using reasonable efforts);

(v) Tenant fails to observe or perform any obligation or covenant on its part to be performed or observed under the Non-Relocation Agreement and any such default is not cured within any applicable notice or grace period;

(vi) A “Club Default” or “Event of Default” as defined in the Development Agreement shall have occurred and remained uncured;

(vii) An Insolvency Event has occurred with respect to Tenant; or

(viii) Substantially all of Tenant’s assets are levied upon by virtue of a writ of court of competent jurisdiction; or Tenant ceases to do business in any manner.

10.2 City’s Remedies. Subject to this Section 10.2, upon the occurrence of any Tenant Default, City may, in its sole discretion, pursue any one or more of the following remedies, in addition to any other remedies available to City at law or in equity or as otherwise specified in this Agreement, after delivery of written notice to Tenant:

(i) City may (but under no circumstance shall be obligated to) terminate this Agreement and upon such termination City may forthwith reenter and repossess

the Ballpark and the Ballpark Surface Parking by entry, forcible entry or detainer suit or otherwise, without demand or further notice of any kind and be entitled to recover, as damages under this Agreement, a sum of money equal to the total of (i) the reasonable cost of recovering the Ballpark, (ii) the reasonable cost of removing and storing Tenant's Personal Property or any other occupant's Property, (iii) the unpaid Rent and any other sums accrued hereunder at the date of termination and (iv) any increase in insurance premiums caused by the vacancy of the Ballpark. In the event City shall elect to terminate this Agreement, City shall at once have all the rights of reentry upon the Ballpark, without becoming liable for damages or guilty of trespass.

(ii) City may (but under no circumstance shall be obligated to) terminate Tenant's right of occupancy of all or any part of the Ballpark and the Ballpark Surface Parking and reenter and repossess the Ballpark and the Ballpark Surface Parking by entry, forcible entry or detainer suit or otherwise, without demand or further notice of any kind to Tenant and without terminating this Agreement, without acceptance of surrender of possession of the Ballpark or the Ballpark Surface Parking, and without becoming liable for damages or guilty of trespass, in which event City shall make commercially reasonable efforts to relet the Ballpark and the Ballpark Surface Parking or any part thereof for the account of Tenant for a period equal to or lesser or greater than the remainder of the Term on whatever terms and conditions City, in City's sole discretion, deems advisable. Tenant shall be liable for and shall pay to City all Rent payable by Tenant under this Agreement plus an amount equal to (i) the reasonable cost of recovering possession of the Ballpark and the Ballpark Surface Parking, (ii) the reasonable cost of removing and storing any of Tenant's or any other occupant's property left on the Ballpark and the Ballpark Surface Parking after reentry, (iii) the cost of any increase in insurance premiums caused by the termination of possession of the Ballpark and the Ballpark Surface Parking and (iv) the reasonable cost of any repairs, changes, alterations or additions necessary for reletting, all reduced by any sums received by City through any reletting of the Ballpark and the Ballpark Surface Parking and/or any decreases in insurance premiums resulting from the termination of possession of the Ballpark and the Ballpark Surface Parking; *provided, however*, that in no event shall Tenant be entitled to any excess of any sums obtained by reletting over and above Rent provided in this Agreement to be paid by Tenant to City. For the purpose of such reletting, City is authorized to make any repairs, changes, alterations or additions in or to the Ballpark and the Ballpark Surface Parking that may be necessary. City may sue to recover any sums falling due under the terms of this Section 10.2 from time to time. No reletting shall be construed as an election on the part of City to terminate this Agreement unless a written notice of such intention is given to Tenant by City. Notwithstanding any such reletting without termination, City may at any time thereafter elect to terminate this Agreement for such Tenant Default and exercise any of its rights under Article X of this Agreement.

(iii) City may (but under no circumstance shall be obligated to) enter upon the Ballpark and the Ballpark Surface Parking and do whatever Tenant is obligated to do under the terms on this Agreement, including taking all reasonable steps necessary to maintain and preserve the Ballpark; and Tenant agrees to reimburse City on demand for any expenses which City may incur in effecting compliance with Tenant's obligations under this Agreement (other than expenses of actually operating a business as opposed to maintenance, repair and restoration) plus interest at the Default Rate, and Tenant further agrees that City shall not be liable for any damages resulting to Tenant from such action. No action taken by City under this Section 10.2 shall relieve Tenant from any of its obligations under this Agreement or from any consequences or liabilities arising from the failure to perform such obligations.

(iv) City may exercise any and all other remedies available to City at law or in equity (to the extent not otherwise specified or listed in this Section 10.2), including enforcing specific performance of Tenant's obligation to continuously operate the Ballpark and the Ballpark Surface Parking in accordance with the Ballpark Standard and pursuant to Article VI, and seeking monetary damages, including interest on the unpaid Rent at the Default Rate.

If City should terminate this Agreement in accordance with Section 10.2, Tenant shall assign to City any and all right, title and interest in any contracts entered into by Tenant for supplies, services, concessionaires, merchandisers or other vendors, or other similar agreements necessary for the daily operation of the Ballpark (other than those contracts with an Affiliate of Tenant).

### 10.3 Default by City.

(a) An event of default by City (a "**City Default**") shall be deemed to have occurred under this Agreement if:

(i) City fails to perform or observe any material obligation or condition on its part to be performed or observed in accordance with this Agreement, including without limitation City's obligations to provide municipal services and parking and to be responsible for Capital Improvements, as more particularly described herein, and such failure remains uncured for more than sixty (60) days after City's receipt of written notice of such failure from Tenant (or such longer period as may be reasonably required to effect such cure if such cure cannot be effected within such sixty (60) day period using reasonable efforts); and/or

(ii) A "City Default" or "Event of Default" as defined in the Development Agreement shall have occurred and remained uncured.

(b) Upon the occurrence of a City Default, Tenant shall be entitled to seek all rights and remedies available to it at law, or in equity, including, but not limited to, the right to: (i) seek monetary damages; (ii) terminate this Agreement; and (iii) cure such default on behalf of City and bill City for all reasonable costs incurred by Tenant (including attorneys' fees) to affect such cure.

10.4 Remedies Cumulative. Except as expressly limited in this Article X, the remedies described herein are cumulative and are not intended to be exclusive of any other remedies to which the Parties may be entitled at law or in equity. The failure of a Party to (a) insist in any one or more instances upon the strict performance or observance of any of the obligations or conditions of this Agreement by the other Parties; or (b) exercise any remedy contained herein for any nonperformance or nonobservance of any obligation or condition by the other Parties shall not be considered a waiver of such Party's rights to later insist upon performance of observance or to exercise its remedies. Additionally, the exercise or commencement of the exercise of any right or remedy by a Party shall not preclude the simultaneous or later exercise of any or all other rights and remedies available to such Party.

10.5 No Indirect Damages. IN NO EVENT SHALL ANY OF THE PARTIES BE LIABLE TO THE OTHER PARTIES UNDER ANY PROVISION OF THIS AGREEMENT OR OTHERWISE FOR LOST PROFITS, INCLUDING LOST OR PROSPECTIVE PROFITS, OR

FOR ANY OTHER SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES, IN CONTRACT, TORT OR OTHERWISE, WHETHER OR NOT CAUSED BY OR RESULTING FROM SUCH PARTY'S OWN, SOLE OR CONCURRENT NEGLIGENCE OR THE NEGLIGENCE OF ANY OF ITS AFFILIATES OR RELATED PARTIES; PROVIDED THAT (I) THE FOREGOING SHALL NOT APPLY TO ANY RENT (OR ANY CLAIMS THEREFOR) AND (II) WITHOUT LIMITING THE FOREGOING, THIS LIMITATION OF LIABILITY SHALL NOT APPLY TO CLAIMS OF EACH PARTY ARISING OUT OF THIRD PARTY CLAIMS FOR ANY OF THE FOREGOING.

10.6 No Waivers. No failure or delay of any Party, in any one or more instances (i) in exercising any power, right or remedy under this Agreement or (ii) in insisting upon the strict performance by the other Party of such other Party's covenants, obligations or agreements under this Agreement, shall operate as a waiver, discharge or invalidation thereof, nor shall any single or partial exercise of any such right, power or remedy or insistence on strict performance, or any abandonment or discontinuance of steps to enforce such a right, power or remedy or to enforce strict performance, preclude any other or future exercise thereof or insistence thereupon or the exercise of any other right, power or remedy. The covenants, obligations, and agreements of a defaulting Party and the rights and remedies of the other Party upon a default shall continue and remain in full force and effect with respect to any subsequent breach, act or omission.

10.7 No Accord and Satisfaction. Without limiting the generality of Section 10.5 above, the receipt by City of the Rent with knowledge of a breach by Tenant of any covenant, obligation or agreement under this Agreement shall not be deemed or construed to be a waiver of such breach (other than as to the Rent received). The payment by Tenant of the Rent with knowledge of a breach by City of any covenant, obligation or agreement under this Agreement shall not be deemed or construed to be a waiver of such breach. No acceptance by City or Tenant of a lesser sum than then due shall be deemed to be other than on account of the earliest installment of the amounts due under this Agreement, nor shall any endorsement or statement on any check, or any letter accompanying any check, wire transfer or other payment, be deemed an accord and satisfaction. City and Tenant may accept a check, wire transfer or other payment without prejudice to its right to recover the balance of such installment or pursue any other remedy provided in this Agreement.

## ARTICLE XI DISPUTE RESOLUTION

11.1 Generally. In the event any dispute, controversy or claim between or among the Parties arises under this Agreement or is related in any way to this Agreement or the relationship of the Parties thereunder (a "**Dispute or Controversy**"), including, but not limited to a Dispute or Controversy relating to the effectiveness, validity, interpretation, implementation, termination, cancellation or enforcement of this Agreement, the Parties shall first attempt in good faith to settle and resolve such Dispute or Controversy by mutual agreement in accordance with this Article. In the event a Dispute or Controversy arises, either Representative shall have the right to notify the other Representative that it has elected to implement the following procedures. Within thirty (30) days after delivery of any such notice by one Representative to the other Representative regarding a Dispute or Controversy, the Representatives shall meet at a mutually agreed time and place to attempt, with diligence and in good faith, to resolve and settle the Dispute or Controversy. If a mutual resolution and settlement are not obtained at the meeting of



the Representatives, either Representative may contact City Manager directly to attempt to resolve the Dispute or Controversy. If the Dispute or Controversy is not resolved after the involvement of City Manager, then City and Tenant shall cooperate in a commercially reasonable manner to determine if techniques such as mediation or other techniques of alternate dispute resolution might be useful. If a technique is agreed upon, a specific timetable and completion date for implementation shall also be agreed upon. If such technique, timetable or completion date is not agreed upon within sixty (60) days after the notice of the Dispute or Controversy was first delivered, or if no resolution is obtained through such alternative technique, or if no meeting between the Representatives or City Manager and the Representatives takes place within the forty-five (45) day period following delivery of the initial notice, then each of the Parties may seek injunctive relief or other relief at any time thereafter from any court of competent jurisdiction in El Paso County, Texas.

11.2 Emergency Relief. Notwithstanding any provision of this Agreement to the contrary, each of the Parties may seek injunctive relief or another form of ancillary relief at any time from any court of competent jurisdiction in El Paso County, Texas in the event that a Dispute or Controversy requires emergency relief before the matter may be resolved under the dispute resolution procedures outlined in Section 11.1 above. Notwithstanding the fact that any court of competent jurisdiction may enter an order providing for injunctive or another form of ancillary relief, the Parties expressly agree that such dispute resolution procedures still will govern the ultimate resolution of any portion of the Dispute or Controversy.

## **ARTICLE XII SALE OF OWNERSHIP INTERESTS**

12.1 Transfer of Majority Interest. As long as there is no existing Tenant Default, the prior Approval of City will not be required with respect to any Transfer of a Majority Interest of Tenant or Company as long as such Transfer of Majority Interest complies with the following conditions: (i) the respective duties and responsibilities of Tenant and Company under this Agreement do not change, (ii) any such Transfer of Majority Interest is approved by the PCL and/or MiLB, (iii) the Ballpark will continue to be managed and operated by Tenant or a Qualified Operator, (iv) Tenant and Company will continue to be liable for any and all of their respective obligations under this Agreement and the Development Agreement that arise after the effective date of such Transfer of Majority Interest, (v) no Tenant Default is caused by any such Transfer of Majority Interest, (vi) Tenant, Company and any new Control Person(s) of Tenant and Company, respectively, will continue to be bound by the terms of the Non-Relocation Agreement, and (vii) to the extent permitted by any applicable confidentiality agreements related to such Transfer of Majority Interest, prior notice of such Transfer of Majority Interest is given to City. All other Transfers of Majority Interest of Tenant or Company will require the prior Approval of City, which shall not be unreasonably withheld. To the extent that Tenant or Company, as applicable, have not otherwise provided notice to City of any Transfer of Majority Interest because of contractual confidentiality provisions or otherwise, Tenant or Company, as applicable, shall provide City with notice of any Transfer of Majority Interest in Tenant prior to the first to occur of: any public statement by Tenant or Company with respect to such transfer or the closing of such transfer.

12.2 Other Transfers. As long as there is no existing Tenant Default, transfers of ownership interests in Tenant or Company which do not constitute a Transfer of Majority Interest will not require either City Approval or notice; provided that the aggregate of all such

transfers over the Term does not cause a Transfer of Majority Interest with respect to such entities.

12.3 Continuing Enforceability. Without limiting the foregoing, no transfer of ownership interests in Tenant or Company shall affect the enforceability of this Agreement and Tenant and Company shall continue to be bound by the terms hereof.

### **ARTICLE XIII ASSIGNMENT AND SUBLETTING**

13.1 Assignment by Tenant. The Leasehold Estate and/or Tenant's interest in this Agreement may not be assigned without the prior Approval of City except for an assignment to an Affiliate of Tenant as long as no continuing Tenant Default exists. If Tenant wishes to assign this Agreement to a Person who is not an Affiliate of Tenant, then Tenant shall request City's Approval of such assignment which shall not be unreasonably withheld as long as (i) the duties and responsibilities of the assignee of Tenant under this Agreement do not change, (ii) any such assignment is approved by the PCL and/or MiLB, (iii) the Ballpark will continue to be managed and operated by Tenant or a Qualified Operator, (iv) any such assignee must expressly assume any and all obligations of Tenant under this Agreement, the Development Agreement and agree to be bound by the terms of the Non-Relocation Agreement, and (v) there is no continuing Tenant Default hereunder. Without limiting the foregoing, no assignment hereunder shall affect the enforceability of this Agreement and any assignee shall continue to be bound by the terms hereof and of the Non-Relocation Agreement.

13.2 Assignment by City. City may assign all of its rights and obligations under this Agreement to a Governmental Authority, a local government corporation formed by City or a trustee in connection with the Financing; provided that City remains liable for the City's financial obligations contained herein.

13.3 Assignment by Company. The obligations of Company under this Agreement may not be assigned without prior Approval of City. With respect to a proposed assignment by Company to an Affiliate of Company, such prior Approval of City may be withheld in City's sole discretion. With respect to a proposed assignment by Company to a Person who is not an Affiliate of Company, such prior Approval of City shall not be unreasonably withheld as long as all of the Leasehold Estate is being assigned to the same Person in accordance with Section 13.1 and Company is not in default under the terms of this Agreement, the Development Agreement or the Non-Relocation Agreement.

13.4 No Sublease. Tenant may not sublease all or any portion of its interest in the Ballpark or the Ballpark Surface Parking except for an assignment to an Affiliate of Tenant in accordance with Section 13.1 or in connection with a Use Agreement.

### **ARTICLE XIV NAMING AND ADVERTISING RIGHTS; BROADCASTING RIGHTS; PREMIUM SEATING; CONCESSIONS AND MERCHANDISE**

14.1 Contracting Generally. Tenant shall have the exclusive right to and shall be solely responsible for identifying and entering into third party contracts with all concessionaires, merchandisers and other vendors for the Ballpark.

14.2 Naming Rights. Tenant shall have the exclusive right to name, or contract with a naming sponsor for, all or any part of the Ballpark, from time to time during the Term and to receive and retain all revenues throughout the Term from such naming rights, and to install permanent signage and displays related thereto in, on and about any portion of the Ballpark, including without limitation, Ballpark outfield fences and walls, structures erected above fences and walls, scoreboards, video boards, pedestrian walkway and concourse areas outside and inside the Ballpark and concession, merchandise and catering areas; provided that such naming shall not (a) include racial epithets, barbarisms, obscenities, names relating to any tobacco products, sexually-oriented businesses or enterprises or containing any overt political reference (b) otherwise reasonably cause embarrassment or disparagement to City or (c) include the name of another political subdivision or governmental authority (collectively the “**Prohibited Messages**”).

14.3 Tenant Sponsorships and Advertising. Tenant shall have the exclusive right to (a) all sponsorship revenues of every kind throughout the Term, and (b) sell, contract for, and retain all revenues throughout the Term from advertising, promotional, and pouring rights of every kind in, on or about the Ballpark, and to install permanent signage and displays related thereto in, on and about any portion of the Ballpark, including without limitation, Ballpark outfield fences and walls, structures erected above fences and walls, Ballpark façade, scoreboards, video boards, pedestrian walkway and concourse areas outside and inside the Ballpark and concession and catering areas and other areas within the Ballpark as determined by Tenant; provided that no such signage or displays shall include any Prohibited Messages.

14.4 Broadcasting Rights. Subject to the rights of MiLB and Major League Baseball, Tenant has the exclusive right to (a) all broadcasting or reports of Ballpark Events during the Term, including without limitation, radio, television, cable, internet and other media broadcasts, whether currently existing or developed during the Term, and (b) all revenues therefrom. Tenant has the right to exercise such right at such times and in such manner as it considers appropriate, as determined in Tenant’s sole discretion.

14.5 Premium Seating, Concessions and Merchandise. Subject to the provisions of Sections 17.8 and 17.9 hereof, Tenant has the exclusive right to contract for, market, sell and retain all revenue from the sale of and fees and payments associated with (i) all premium seating at the Ballpark (e.g., luxury suites, boxes and club seats), and (ii) Concessions and Merchandise at the Ballpark.

## ARTICLE XV COVENANTS, REPRESENTATIONS AND WARRANTIES OF TENANT AND CITY

15.1 Tenant Covenants. Tenant, and its successors or assigns, covenants that during the Term (or such shorter period as provided herein):

(a) Tenant shall assure that the Team plays all preseason, regular season and postseason home games at the Ballpark; provided that the Team shall be authorized to play a limited number of neutral site games no more than three (3) baseball home games each Baseball Season as directed and approved by NAPBL, PCL, MiLB and/or the Commissioner of Major League Baseball, as applicable.

(b) Tenant shall use commercially reasonable efforts to ensure that the pricing of tickets for Team Ballpark Events will be in amounts that provide an affordable recreational activity in City;

(c) Tenant shall endeavor to provide attractive and meaningful programs that are designed to maintain the affordability of Team Ballpark Events for families in City, including implementing programs for seniors and minor children during each Baseball Season;

(d) As more particularly described in the Non-Relocation Agreement, Tenant shall not relocate the Team or the home territory of the Team outside of City limits of El Paso, Texas during the Term;

(e) The Team shall include the name "El Paso" as part of the Team's name;

(f) At all times during the Term and in connection with any activity under this Agreement or with respect to the Ballpark, Tenant shall comply with the requirements of the Applicable Laws; and

(g) At all times during the Term, Tenant shall obtain and maintain all Governmental Authorizations necessary for the use and occupancy of the Ballpark and the Ballpark Surface Parking in accordance with the terms of this Agreement.

15.2 Tenant's and Company's Representations and Warranties. As an inducement to City to enter into this Agreement, Tenant and/or Company represent and warrant to City that notwithstanding anything herein to the contrary and as of the Effective Date:

(a) Company is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Texas. The business which Tenant carries on and which it proposes to carry on may be conducted by Tenant. Company is duly authorized to conduct business as a limited liability company in the State of Texas and each other jurisdiction in which the nature of its properties or its activities requires such authorization. Tenant is duly authorized to conduct business as a limited liability company in the State of Texas and each other jurisdiction in which the nature of its properties or its activities requires such authorization.

(b) The execution, delivery and performance of this Agreement by each of Tenant and Company are within Tenant's and Company's powers, respectively, and have been duly authorized by all necessary action of Tenant or Company, as applicable.

(c) Neither the execution and delivery of this Agreement nor the consummation of any of the transactions herein or therein contemplated nor compliance with the terms and provisions hereof or thereof will contravene the organizational documents of Tenant and Company nor any Applicable Laws to which Tenant or Company is subject or any judgment, decree, license, order or permit applicable to Tenant or Company, or will conflict or be inconsistent with, or will result in any breach of any of the terms of the covenants, conditions or provisions of, or constitute a default under, or result in the creation or imposition of a lien upon any of the property or assets of Tenant pursuant to the terms of, any indenture, mortgage, deed of trust, agreement or other instrument to which Tenant or Company is a party or by which Tenant or Company is bound, or to which Tenant or Company is subject.



(d) No consent, authorization, approval, order or other action by, and no notice to or filing with, any court or Governmental Authority or regulatory body or third party is required for the execution, delivery and performance by Tenant or Company of this Agreement except as specified in Section 23.12 hereof.

(e) This Agreement is the legal, valid and binding obligation of Tenant and Company, enforceable against each of Tenant and Company in accordance with its terms, except as limited by applicable relief, liquidation, conservatorship, bankruptcy, moratorium, rearrangement, insolvency, reorganization or similar laws affecting the rights or remedies of creditors generally, as in effect from time to time.

(f) There is no action, proceeding, inquiry or investigation, at law or in equity, before any court, arbitrator, governmental or other board or official, pending or, to the knowledge of Tenant or Company, threatened against or affecting Tenant or Company, which the management of Tenant or Company in good faith believe that the outcome of which would (a) materially and adversely affect the validity or enforceability of, or the authority or ability of Tenant or Company under, this Agreement to perform their respective obligations under this Agreement, or (b) have a material and adverse effect on the consolidated financial condition or results of operations of Tenant or Company or on the ability of Tenant or Company to conduct its business as presently conducted or as proposed or contemplated to be conducted (including the operation of the Ballpark).

(g) Neither Tenant, Company, any Affiliate of Tenant or Company nor any of their respective principals, owners, officers, employees or agents are officials, consultants or employees of City.

(h) Tenant is the owner of all rights (including associated franchise rights), title and interest in the Team and holds substantially all of the assets and Governmental Authorizations necessary for the operation of the Team and the Ballpark and will continue to own such Team and assets throughout the Term unless transferred pursuant to the terms of Articles XII or XIII hereof. During the Term, Tenant shall take all necessary and appropriate actions to maintain membership of the Team in the PCL.

15.3 City Covenants. City, and its successors or assigns, covenants that during the Term:

(a) City shall not offer any financial incentives to, or assist in establishing or locating, any other professional baseball franchise within City. As used in this section, "financial incentives" includes, without limitation, cash payments, tax abatements, transferring interests in real estate or personal property, loans, guarantees, or any other form of financial accommodations.

(b) notwithstanding anything herein to the contrary, City shall retain the right to amend, modify, renegotiate, restate or extend that certain lease agreement between the El Paso Diablos, Inc. and City originally dated December 29, 1989, as amended and modified and which has been subsequently assigned to El Paso Professional Baseball, LP for the use of the stadium currently known as "Cohen Stadium"; and

(c) neither City nor any Affiliate of City, shall, directly or indirectly, develop, finance, facilitate or otherwise participate in the development or approval of any other outdoor concert venue in downtown El Paso that is reasonably anticipated to compete with the Ballpark, with the exception of a soccer stadium for a Major League Soccer team.

The Parties agree that the above restrictions are necessary to allow this transaction to be economically viable for the Parties, and that without these restrictions, the Parties would not be able to accomplish the goal of bringing a Triple A Minor League baseball franchise to City for the benefit of the public.

**15.4 City's Representations and Warranties.** As an inducement to Tenant to enter into this Agreement, City represents and warrants to Tenant that notwithstanding anything herein to the contrary and as of the Effective Date:

(a) City is a municipal corporation duly formed and validly existing under the laws of the State of Texas, with all necessary power and authority to enter into this Agreement and to consummate the transactions herein contemplated;

(b) The execution, delivery and performance of this Agreement by City is within City's powers, respectively, and have been duly authorized by all necessary action of City;

(c) Neither the execution and delivery of this Agreement nor the consummation of any of the transactions herein or therein contemplated nor compliance with the terms and provisions hereof or thereof will contravene any Applicable Laws to which City is subject or any judgment, decree, license, order or permit applicable to City;

(d) Upon the execution of this Agreement by City, City will have caused all governmental proceedings required to be taken by or on behalf of City to authorize City to make and deliver this Agreement and to perform the covenants, obligations and agreements of City hereunder;

(e) This Agreement is the legal, valid and binding obligation of City, enforceable against City in accordance with its terms, except as limited by applicable relief, liquidation, conservatorship, bankruptcy, moratorium, rearrangement, insolvency, reorganization or similar laws affecting the rights or remedies of creditors generally, as in effect from time to time; and

(f) Except as previously disclosed to Tenant in writing, there is no action, proceeding, inquiry or investigation, at law or in equity, before any court, arbitrator, governmental or other board or official, pending or, to the knowledge of City, threatened against or affecting City, which City in good faith believes that the outcome of which would (i) materially and adversely affect the validity or enforceability of, or the authority or ability of City under, this Agreement to perform its obligations under this Agreement, or (ii) have a material and adverse effect on the consolidated financial condition or results of operations of City or on the ability of City to conduct its business as presently conducted or as proposed or contemplated to be conducted.

15.5 Governmental Rule. No Approvals by City or City Representative under this Agreement shall relieve or release Tenant from any Applicable Laws relating to the operation or occupancy of the Ballpark (including Applicable Laws that are procedural, as well as or rather than, substantive in nature). The Approval by City or City Representative of any matter submitted to City or City Representative pursuant to this Agreement, which matter is specifically provided herein to be Approved by City or City Representative shall not constitute a replacement or substitute for, or otherwise excuse Tenant from, such permitting, licensing or approval processes under Applicable Laws; and, conversely, no permit or license so obtained shall constitute a replacement or substitute for, or otherwise excuse Tenant from, any requirement hereunder for the Approval of City or City Representative.

## **ARTICLE XVI QUIET ENJOYMENT**

City covenants that, subject to the terms and conditions of this Agreement, Tenant shall peaceably and quietly have, hold and enjoy the Leasehold Estate and have the right to use the Leasehold Estate in accordance with the terms hereof during the Term. City represents that as of the Effective Date there are no, and as of the Commencement Date there will be no, Liens, judgments or claims to the Ballpark that will affect Tenant's right to occupy and enjoy the Ballpark.

## **ARTICLE XVII GENERAL PROVISIONS**

17.1 Leasehold Mortgages Prohibited. Neither Tenant, Company nor any of their respective successors or assigns shall have the right to grant a Leasehold Mortgage.

17.2 No Broker's Fees or Commissions. Each Party hereto hereby represents to the other Parties hereto that such Party has not created any liability for any broker's fee, broker's or agent's commission, finder's fee or other fee or commission in connection with this Agreement.

17.3 Council Approval. Notwithstanding anything to the contrary set forth in this Agreement, Tenant recognizes and agrees that any contracts or agreements, or amendments thereto, contemplated to be entered into by City under the terms of this Agreement which are entered into after the date of this Agreement will be subject to the prior Approval of the Controlling Body of City, but not Approvals and confirmations expressly permitted in this Agreement to be given by City Representative.

17.4 Recording of Memorandum of Lease. Tenant may file of record a Memorandum of Lease in the form attached hereto as Exhibit C in the Real Property Records of El Paso, Texas upon the Commencement Date. Upon the Lease Expiration Date, Tenant shall execute such instruments reasonably requested by City in recordable form which are sufficient to release of record any rights or interests of Tenant in and to the Ballpark or the Leasehold Estate. In this connection, Tenant irrevocably and unconditionally appoints City as its attorney-in-fact, coupled with an interest, which appointment shall survive the bankruptcy, insolvency or other legal disability of Tenant, to take all actions necessary to perform Tenant's obligations under this Section 17.4.

17.5 Compliance with Applicable Laws and Permitted Exceptions. Tenant shall, (a) throughout the Term and within the time periods permitted by Applicable Law, comply or cause compliance with all Applicable Laws applicable to the Ballpark and the Ballpark Surface Parking, including any applicable to the manner of use or the maintenance, repair or condition of the Ballpark or the Ballpark Surface Parking or any activities or operations conducted in or about the Ballpark or the Ballpark Surface Parking and (b) throughout the Term, comply or cause compliance with the Permitted Exceptions, but with respect to each of the foregoing, Tenant shall not be responsible for any failure to comply with Applicable Law or the Permitted Exceptions to the extent caused by City or its Affiliates. Tenant shall, however, have the right to contest the validity or application of any Applicable Law, and if Tenant promptly contests and if compliance therewith may legally be held in abeyance during such contest, Tenant may postpone compliance until the final determination of such contest, *provided* that such contest is prosecuted with due diligence and that Tenant shall not so postpone compliance therewith in such a manner as to, or if doing so would (i) impair the structural integrity of the Ballpark or the Ballpark Surface Parking, (ii) during such contest, subject City to any fine or penalty or to prosecution for a criminal act, or expose City to any civil liability or (iii) cause the Ballpark or the Ballpark Surface Parking to be condemned or vacated; provided that a Lien against the Ballpark or the Ballpark Surface Parking shall not be imposed by reason of such noncompliance. Tenant shall give City reasonable notice (which in no event shall be less than thirty (30) days) of its intent to carry on such contest, specifying the Applicable Law that Tenant proposes to contest, the name of counsel representing Tenant in such contest and the Excusable Tenant Delay, if any, that such contest will cause in any repair, alteration or improvement of the Ballpark or the Ballpark Surface Parking.

17.6 No City Obligations. Except for costs that City has specifically agreed to pay pursuant to the express terms of this Agreement, (i) City shall not be required to make any expenditure, incur any obligation or incur any liability of any kind whatsoever in connection with this Agreement, the Ballpark or the Ballpark Surface Parking and (ii) it is expressly understood and agreed that this is a completely net lease intended to assure City the Rent herein reserved on an absolutely net basis, except as otherwise provided in this Agreement.

17.7 Tenant's Obligations for Payment of Rent; No Termination. Except as otherwise expressly provided in this Agreement, no happening, event, occurrence or situation during the Term, whether foreseen or unforeseen and howsoever extraordinary or beyond the contemplation of the Parties, shall relieve Tenant from its liabilities to pay Rent or the amounts of any other of its obligations under this Agreement or permit Tenant to terminate this Agreement.

17.8 Access to Ballpark and Ballpark Surface Parking by City. Without limiting City's rights with respect to the Reservations, City shall have the right of access and entry, without charges or fees and with reasonable notice to Tenant, for itself and its authorized representatives, to the Ballpark and the Ballpark Surface Parking at all times, for the purposes of (a) assuring compliance with this Agreement, (b) performing or undertaking any rights or obligations of City under this Agreement and (c) showing the Ballpark and the Ballpark Surface Parking to prospective tenants during the last twelve (12) months of the Term; *provided, however*, that in all instances such access and entry shall be conducted in a manner so as to minimize interference with Tenant's use and operation of the Ballpark and the Ballpark Surface Parking then being conducted by Tenant pursuant to the terms of this Agreement.



17.9 Owner Suite. Tenant shall enter into an agreement with City (a "Owner Suite License Agreement") no later than five (5) Business Days after the Commencement Date under which Tenant grants City a license during the Term to use a suite in the Ballpark (the "Owner Suite"). The Owner Suite will be of a size and in a location reasonably acceptable to City Representative and comparable to the size and location of other owner's suites at the Comparable Properties. The Owner Suite will be used by City and any Affiliate of City for promotional and economic development activities and for other public and civic purposes during events at the Ballpark, but shall not be subleased so as to compete with Tenant's suite licensing at the Ballpark. The Owner Suite License Agreement shall grant the same privileges to City, and be on the same terms and conditions, as Tenant or the Operator grants to the majority of third-Persons for other similarly located suites in the Ballpark, except that, although City shall be obligated to pay for costs and expenses in connection with its use of the Owner Suite, including without limitation its share of food and beverage costs, service charges, telephone expenses, maintenance and repair costs and other charges imposed on the majority of suite users for services, costs and expenses, City shall not be obligated to pay (a) to acquire the Owner Suite, (b) any annual rent with respect thereto or (c) for tickets to any Ballpark Events, except if Team is required to pay a promoter for any such tickets. Tenant shall use commercially reasonable efforts to remove the Owner Suite from the manifest for all events at the Ballpark. City shall be entitled to the number of tickets to any event in the Ballpark equal to the sum of the number of fixed seats and bar seats in the Owner Suite. Parking passes will be provided to City at no charge for events at the Ballpark in the same proportion and on the same terms that other third Person suite holders in similarly located suites have parking rights.

17.10 Complimentary Tickets. During each year of the Term and twice during each Baseball Season (unless otherwise agreed by Tenant and City), Tenant shall accommodate a "City Employee Night" at a mutually agreeable regular season home game of the Team. Tenant shall provide City, at City's option, with up to five hundred (500) tickets for each of such "City Employee Nights," without cost, to be distributed by City to its employees, their families and guests. In no event shall tickets so provided be sold or subjected to a charge or fee by City. Tenant shall use commercially reasonable efforts to provide tickets in contiguous sections and/or blocks of at least one hundred (100) seats (but in all cases subject to then-current availability). Notwithstanding anything to the contrary contained in this Section 17.10, the location of the tickets described herein shall be at Tenant's reasonable discretion, and shall be subject to account inventory availability and demand.

## ARTICLE XVIII SURRENDER OF POSSESSION; HOLDING OVER

18.1 Surrender of Possession. Tenant shall, on or before the Lease Expiration Date, peaceably and quietly leave, surrender and yield up to City the Ballpark and the Ballpark Surface Parking free of subtenancies (including any Subtenants), and in a clean condition and free of debris or as otherwise provided for in this Agreement, subject to the terms of Article IX hereof.

### 18.2 Removal of Tenant's Personal Property.

(a) *Tenant's Obligation to Remove.* All Tenant's Personal Property installed, placed or used in the operation of the Ballpark throughout the Term shall be deemed to be the property of Tenant. All such Tenant's Personal Property shall be removed by Tenant within

thirty (30) calendar days after the Lease Expiration Date, provided that Tenant shall promptly repair any damage to the Ballpark and the Ballpark Surface Parking caused by such removal.

(b) *City's Right to Remove.* Any Tenant's Personal Property which shall remain in the Ballpark and the Ballpark Surface Parking for thirty (30) days after the Lease Expiration Date may, at the option of City, be deemed to have been abandoned by Tenant and either may be retained by City as its Property or be disposed of, without accountability, in such manner as City Representative may determine necessary, desirable or appropriate, and Tenant, upon demand, shall pay the reasonable cost of such disposal, together with interest thereon at the Default Rate from the date such costs were incurred until reimbursed by Tenant, together with reasonable outside counsel's fees, charges and costs.

18.3 Holding Over. In the case of any holding over or possession by Tenant after the Lease Expiration Date without the Approval of City, Tenant shall pay City rent at one hundred fifty percent (150%) of the Rent that would have been applicable during such period of time had this Agreement been in effect. Further, in the event Tenant shall hold over beyond any date for surrender of the Ballpark and the Ballpark Surface Parking set forth in City's written notice demanding possession thereof, Tenant shall reimburse City for all actual expenses and losses incurred by City by reason of City's inability to deliver possession of the Ballpark to a successor tenant, together with interest on such expenses and losses at the Default Rate from the date such expenses are incurred until reimbursed by Tenant, together with City's reasonable outside counsel's fees, charges and costs. The acceptance of Rent under this Section 18.3 by City shall not constitute an extension of the Term of this Agreement or afford Tenant any right to possession of the Ballpark and the Ballpark Surface Parking beyond any date through which such Rent shall have been paid by Tenant and accepted by City. Such Rent shall be due to City for the period of such holding over, whether or not City is seeking to evict Tenant; and, unless City otherwise then agrees in writing, such holding over shall be, and shall be deemed and construed to be, without the Approval of City, whether or not City has accepted any sum due pursuant to this Section 18.3.

## **ARTICLE XIX FORCE MAJEURE EVENT AND EFFECT OF DELAYS**

19.1 Excusable Tenant Delay. Regardless of the existence or absence of references to Excusable Tenant Delay elsewhere in this Agreement, any deadline or time period within which Tenant must fulfill the obligations of Tenant elsewhere in this Agreement shall each be adjusted as appropriate to include that number of days of delay in the performance by Tenant of its obligations hereunder actually resulting from such Excusable Tenant Delay, unless otherwise expressly provided in this Agreement to the contrary; *provided* that (i) the obligation to pay Rent as and when due pursuant to the terms of this Agreement is not subject to adjustment or extension due to Excusable Tenant Delay unless otherwise expressly provided herein to the contrary and (ii) Tenant complies with the requirements of this Article XIX.

With respect to each occurrence of Excusable Tenant Delay, Tenant shall, within fifteen (15) days Tenant's knowledge of the occurrence of such event of Excusable Tenant Delay, give written notice to Representative of the event constituting Excusable Tenant Delay, Tenant's good faith estimate of the Excusable Tenant Delay Period resulting therefrom and the basis therefor, Tenant's good faith estimate of any adjustment resulting therefrom that is to be made to the time for performance, together with reasonable documentation supporting the adjustments proposed.

If City Representative believes that the documentation supplied is not sufficient to justify the delay claimed or adjustments proposed, City Representative shall give written notice to Tenant of the claimed deficiency and Tenant shall have a reasonable period of time to more fully document the delay and adjustments claimed. Only one (1) notice from Tenant shall be required with respect to a continuing Excusable Tenant Delay, except that Tenant shall promptly (and in no event less often every thirty (30) days) give notice to City Representative of any further changes in the additional time for performance claimed by reason of the continuing delay. City Representative shall have the right to challenge Tenant's assertion of the occurrence of an Excusable Tenant Delay, Tenant's good faith estimate of the Excusable Tenant Delay Period or changes in the additional time for performance claimed by reason of the Excusable Tenant Delay if City Representative sends notice to Tenant within thirty (30) days after receipt by City Representative of such claim of Excusable Tenant Delay or notice from Tenant of further changes to such dates as a result of such usable Tenant Delay, as the case may be (which challenge shall be deemed to have been made if City Representative gives notice to Tenant of any claimed deficiency in documentation as provided for above in this Section 19.1).

**19.2 Excusable City Delay.** Regardless of the existence or absence of references to Excusable City Delay elsewhere in this Agreement, any deadline or time period within which City must fulfill the obligations of City in this Agreement shall each be adjusted as appropriate to include that number of days of delay in the performance by City of its Obligations hereunder actually resulting from such Excusable City Delay; provided that (i) the obligation to pay amounts when due pursuant to the terms of this Agreement is not subject to adjustment or extension due to Excusable City Delay unless otherwise expressly provided herein to the contrary and (ii) the City complies with the requirements of this Article XIX.

With respect to each occurrence of Excusable City Delay, City Representative shall, within fifteen (15) Business Days after City's knowledge of the occurrence of such event of Excusable City Delay, give notice to Tenant of the event constituting Excusable City Delay, City Representative's good faith estimate of the Excusable City delay period resulting therefrom and the basis therefor, City representative's good faith estimate of any adjustment resulting therefrom that is to be made in time for performance, together with reasonable documentation supporting the adjustments proposed. If Tenant believes that the documentation supplied is not sufficient to justify the delay claimed or adjustment proposed, Tenant shall give notice to City Representative of the claimed deficiency and City Representative shall have a reasonable period of time to more fully document the delay and adjustments claimed. Only one (1) notice from City Representative shall be required with respect to a continuing Excusable City Delay, except that City representative shall promptly (and in no event less often than every thirty (30) days) give notice to City Representative of any further changes in the additional time for performance claimed by reason of the continuing delay. Tenant's Representative shall have the right to challenge City's assertion of the occurrence of an Excusable City Delay, or City Representative's good faith estimate of the Excusable City Delay Period, or changes in the additional time for performance claimed by reason of Excusable City Delay if Tenant gives notice to City Representative within thirty (30) days after receipt by Tenant of such claim of Excusable City Delay or notice from City Representative of further changes to such dates as a result of such Excusable City Delay, as the case may be (which challenge shall be deemed to have been made if Tenant gives notice to City Representative of any claimed deficiency in documentation as provided for above in this Section 19.2).



19.3 Continued Performance; Exceptions. Upon the occurrence of any Tenant delay or City delay, the Parties shall endeavor to continue to perform their obligations under this Agreement so far as reasonably practicable. Toward that end, Tenant and City each hereby agrees that it shall make all reasonable efforts to prevent and reduce to a minimum and mitigate the effect of any Tenant delay or City delay occasioned by an Excusable Tenant Delay or Excusable City Delay, and shall diligently and continuously use its commercially reasonable efforts to ensure resumption of performance of its obligations under this Agreement after the occurrence of any Excusable Tenant Delay or Excusable City Delay. The Parties shall use and continue to use all commercially reasonable efforts to prevent, avoid, overcome and minimize any City delay or Tenant delay.

## ARTICLE XX ENVIRONMENTAL PROVISIONS

20.1 Remedial Work and Hazardous Materials. From and after the Commencement Date, Tenant shall be responsible for performing or causing to be performed, and for paying the cost of performing, any and all corrective or remedial actions (including all investigation, monitoring, etc.) required by Applicable Law to be performed with respect to any Environmental Event at, in, on or under the Ballpark and the Ballpark Surface Parking occurring from and after the Commencement Date and arising from Tenant's operation of the Ballpark or Ballpark Surface Parking ("Tenant's Remedial Work"). City shall be responsible for performing or causing to be performed, and for paying the cost of performing, any and all corrective or remedial actions (including all investigation, monitoring, etc.) required by Applicable Law to be performed with respect to any Environmental Event at, in, on or under the Ballpark or the Ballpark Surface Parking which are not attributable to Tenant's operation of the Ballpark or Ballpark Surface Parking ("City's Remedial Work"). Prior to undertaking any Tenant's Remedial Work, Tenant shall obtain the Approval of City Representative of the steps Tenant proposes to take with respect to any Tenant's Remedial Work and Tenant shall select, subject to the Approval of City Representative, an independent environmental consultant or engineer to oversee Tenant's Remedial Work. Regulated wastes, such as asbestos and industrial wastes shall be properly characterized, manifested and disposed of at an authorized facility. Tenant shall not cause or permit any Hazardous Materials to be generated, used, released, stored or disposed of in or about the Ballpark or the Ballpark Surface Parking; *provided, however* that Tenant and its Related Parties may use, store and dispose of reasonable quantities of Hazardous Materials at the Ballpark as may be reasonably necessary for Tenant to operate from the Ballpark pursuant to the terms of this Agreement so long as such Hazardous Materials are commonly used, or permitted to be used, by reasonable and prudent Operators in similar circumstances and are stored and disposed of in accordance with industry standards, but in all events in compliance with Environmental Laws. Upon the Lease Expiration Date, Tenant shall surrender the Ballpark to City in the condition required by Tenant's Remedial Work and in compliance with Applicable Laws. During the Term, Tenant shall give City immediate oral and follow-up written notice within seventy-two (72) hours of any actual or threatened Environmental Event. Tenant shall cure such Environmental Event (provided same is the responsibility of Tenant to cure in accordance with the provisions of this Section 20.1) in accordance with all Environmental Laws to the reasonable satisfaction of City and any Governmental Authority and such cure shall be deemed part of Tenant's Remedial Work. Upon any Environmental Event, in addition to all other rights available to City under this Agreement, at law or in equity, City shall have the right, but not the obligation, at its option (i) to require Tenant, at its sole cost and expense, to address



and remedy such Environmental Event, in which event City shall have the right to Approve any actions taken by Tenant to address and remedy the Environmental Event or (ii) if Tenant has failed to commence action to address and remedy the Environmental Event within a reasonable time after notice is given to City, and such failure continues for thirty (30) days after written notice thereof from City to Tenant, to perform, at Tenant's sole cost and expense, any lawful action necessary to address and remedy the same, in which event Tenant shall pay the costs thereof to City, together with interest thereon at the Default Rate until paid, within ten (10) days after written demand therefor.

**20.2 Tenant Release. WITHOUT LIMITING TENANT'S INDEMNITY OBLIGATIONS UNDER THIS AGREEMENT, TENANT HEREBY RELEASES CITY AND ITS AFFILIATES AND RELATED PARTIES FROM AND AGAINST ANY CLAIMS, DEMANDS, ACTIONS, SUITS, CAUSES OF ACTION, DAMAGES, LIABILITIES, OBLIGATIONS, COSTS AND/OR EXPENSES THAT TENANT MAY HAVE WITH RESPECT TO THE BALLPARK OR THE BALLPARK SURFACE PARKING AND RESULTING FROM, ARISING UNDER OR RELATED TO ANY ENVIRONMENTAL EVENT WITHIN THE SCOPE OF TENANT'S REMEDIAL WORK, INCLUDING ANY SUCH CLAIM UNDER ANY ENVIRONMENTAL LAWS, WHETHER UNDER ANY THEORY OF STRICT LIABILITY OR THAT MAY ARISE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, 42 U.S.C.A. § 9601, ET. SEQ., AND THE TEXAS SOLID WASTE DISPOSAL ACT, TEXAS HEALTH AND SAFETY CODE, CHAPTER 361, AS AMENDED.**

**20.3 City Release. WITHOUT LIMITING CITY'S INDEMNITY OBLIGATIONS UNDER THIS AGREEMENT, CITY HEREBY RELEASES TENANT AND ITS AFFILIATES AND RELATED PARTIES FROM AND AGAINST ANY CLAIMS, DEMANDS, ACTIONS, SUITS, CAUSES OF ACTION, DAMAGES, LIABILITIES, OBLIGATIONS, COSTS AND/OR EXPENSES THAT CITY MAY HAVE WITH RESPECT TO THE BALLPARK OR THE BALLPARK SURFACE PARKING AND RESULTING FROM, ARISING UNDER OR RELATED TO ANY ENVIRONMENTAL EVENT WITHIN THE SCOPE OF CITY'S REMEDIAL WORK, INCLUDING ANY SUCH CLAIM UNDER ANY ENVIRONMENTAL LAWS, WHETHER UNDER ANY THEORY OF STRICT LIABILITY OR THAT MAY ARISE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, 42 U.S.C.A. § 9601, ET. SEQ., AND THE TEXAS SOLID WASTE DISPOSAL ACT, TEXAS HEALTH AND SAFETY CODE, CHAPTER 361, AS AMENDED.**

## **ARTICLE XXI NOTICES**

All notices permitted or required to be made hereunder shall be in writing and delivered by hand, overnight courier, certified mail, facsimile or e-mail. Notices shall be deemed given (a) when actually given and received if delivered by hand; (b) one (1) Business Day after delivery to an overnight courier if delivered by an overnight courier; (c) three (3) Business Days after deposit with the United States Postal Service if delivered by certified mail; or (d) when sent if delivered by facsimile or e-mail (as evidenced by facsimile or e-mail confirmation). All such notices shall be addressed to the appropriate Party as follows:

**If to City:**

City of El Paso  
2 Civic Center Plaza, 10<sup>th</sup> Floor  
El Paso, Texas 79901  
Attention: City Manager

with copies of all notices to City relating to defaults, remedies or indemnification being sent to:

City of El Paso  
2 Civic Center Plaza, 9<sup>th</sup> Floor  
El Paso, Texas 79901  
Attention: City Attorney

**If to Tenant or Company:**

Mountain Star Sports Group  
PO Box 12667  
El Paso, Texas 79913-0667

Mountain Star Sports Group  
4401 North Mesa  
El Paso, Texas 79902  
Attention: Joshua Hunt

Each Party may from time to time designate a different address for notices by giving notice to that effect to the other Parties in accordance with the terms and conditions of this Article.

**ARTICLE XXII  
COMPANY GUARANTY**

Notwithstanding anything herein to the contrary, Company hereby unconditionally and irrevocably guarantees to City the due, punctual and full payment and performance of all covenants, agreements, obligations and liabilities of Tenant under this Agreement, the Development Agreement and the Non-Relocation Agreement, whether now existing or hereafter arising, contracted or incurred, as and when such payment or performance shall become due (whether by acceleration or otherwise) in accordance with the terms of this Agreement, the Development Agreement and the Non-Relocation Agreement, including all payments of Rent, Ticket Fees and Parking Fees. The obligations of Company hereunder are continuing, absolute and unconditional, irrespective of any circumstance whatsoever which might otherwise constitute a legal or equitable discharge or defense of a guarantor (other than the defense that the obligations have been paid or satisfied).

## **ARTICLE XXIII MISCELLANEOUS**

23.1 Partial Invalidity. If any Section of this Agreement or its application to any Party or circumstance shall be determined by any court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this Agreement or the application of such Section to persons or circumstances, other than those as to which it is so determined invalid or enforceable to any extent, shall not be affected thereby, and each Section hereof shall be valid and enforceable to the fullest extent permitted by law.

23.2 Obligations of City and Tenant. The obligations and undertakings of City and Tenant under or in accordance with this Agreement are and shall be the obligations solely of City and Tenant. Except as otherwise expressly stated herein, no recourse shall be had, whether in contract, in tort or otherwise against any officer, director, employee, agent, member, volunteer or representative of City or Tenant in his or her individual capacity on account of any obligation or undertaking of or any act or omission by City or Tenant under or pursuant to this Agreement.

23.3 Time of the Essence. Time is of the essence with respect to all Sections of this Agreement.

23.4 Successors and Assigns. This Agreement and all terms and conditions contained herein shall inure to the benefit and be binding upon the successors and permitted assigns of the Parties.

23.5 Entire Agreement. This Agreement (including all exhibits attached hereto), together with the Development Agreement and the Non-Relocation Agreement, constitute the entire and exclusive agreement between City and Tenant with respect to the subject matter contained herein. There are no restrictions, promises, obligations or undertakings between the Parties, other than those set forth or referred to in this Agreement with respect to the subject matter hereof.

23.6 Table of Contents; Headings; Exhibits. The table of contents, if any, and headings, if any, of the various articles, sections and other subdivisions of this Agreement are for convenience of reference only and shall not modify, define or limit any of the terms or provisions of this Agreement. All Appendices and Exhibits attached to this Agreement are incorporated herein by reference in their entirety and made a part hereof for all purposes; *provided, however*, that in the event of a conflict between the terms of the text of this Agreement and any Appendices or Exhibits, the text of this Agreement shall control.

23.7 Anti-Discrimination. In accordance with Applicable Laws, the Parties, in forming their respective obligations hereunder will not discriminate based on race, sex, religion, national or ethnic origin, age or disability.

23.8 Non-Appropriation. Notwithstanding any other provision of this Agreement, City's obligation to pay any money to Tenant under this Agreement is contingent upon an Appropriation of the money by the Controlling Body of City. City's failure to make an Appropriation is not a Default under this Agreement, but Tenant, as its sole and exclusive remedies for such failure, may terminate this Agreement as a result thereof.

23.9 Attorney's Fees. If any Party to this Agreement defaults in the performance of any covenants, obligations or agreements of such Party contained in this Agreement and the other Party hereto places the enforcement of this Agreement, or any part thereof, or the exercise of any other remedy therein provided for such default, in the hands of an attorney who files suit upon the same (either by direct action or counterclaim), the non-prevailing Party shall pay to the prevailing Party its reasonable attorneys' fees and costs of court. In addition to the foregoing award of attorneys' fees to the prevailing Party, the prevailing Party shall be entitled to its attorneys' fees incurred in any post-judgment proceedings to collect or enforce the judgment. This provision is separate and several and shall survive the merger of this Agreement into any judgment on this Agreement

23.10 Nondisturbance. It is understood by the Parties that City has obtained or anticipates obtaining financing for the construction costs for the Ballpark and other related City expenses. City agrees that the Leasehold Estate shall not be disturbed by any creditors, bondholders, underwriters, trustees or other third parties related to the financing during the Term, except upon the occurrence of a Tenant Default.

23.11 Confidentiality and Open Records. Disclosure of the terms of this Agreement will be governed by the Texas Public Information Act, Chapter 552, Texas Government Code (as amended, the "Open Records Act"). City shall maintain the confidentiality of any proprietary information, trade secrets or other confidential materials delivered to it pursuant to this Agreement and designated as confidential by the delivering Party (the "Confidential Information") in accordance with the Open Records Act; provided, however, that Tenant will need to assert the basis for any such exclusion from disclosure under the Open Records Act before the Texas Attorney General if City receives an open records request. City shall promptly give Tenant written notice of any request or demand made upon it for inspection, release or disclosure of any Confidential Information of Tenant. Within three (3) Business Days after Tenant's receipt of such notice from City, Tenant shall notify City in writing whether Tenant desires City to request a determination from the Texas Attorney General (an "Opinion Request") as to whether the requested information must be disclosed pursuant to the Open Records Act; *provided* that City shall only be required to comply with the foregoing to the extent that City, in good faith, believes there is a reasonable basis for claiming that the requested information is subject to an exception under the Open Records Act and the Open Records Act permits City to make an Opinion Request in the circumstance in question. Upon receipt of a request from Tenant for City to make an Opinion Request and provided City is required to act on same pursuant to the terms hereof, City, at Tenant's sole cost and expense, shall provide all commercially reasonable assistance to Tenant necessary to draft the Opinion Request so that it may be completed and filed within the time period prescribed by the Open Records Act. After the Opinion Request is so filed, each Party shall cooperate with each other Party in preparing appropriate responses or filings to the Texas Attorney General and to any other Person with respect to the information request and the Opinion Request, including any commercially reasonable appeals involved with respect thereto, to prevent the disclosure of such information. Each Party shall also cooperate with each other Party and use reasonable efforts to promptly identify any possible third Person whose privacy or property interests may be compromised by any such information request in order to enable City to timely furnish to any such third Person any statutory notice required by the Open Records Act and to seek any applicable exceptions from disclosure under the Open Records Act.



23.12 Review by NAPBL, PCL, MiLB and/or MLB. The Parties acknowledge and agree that one or more of the NAPBL, PCL, MiLB and the Commissioner of Major League Baseball may be required or permitted, pursuant to the Team's franchise agreement or related agreements, constitutions, bylaws, rules or regulations, to review and approve this Agreement. To the extent one or more of such parties has the right to approve this Agreement (or any provision thereof), Tenant shall promptly and diligently pursue such approval. In the event any such party exercises or threatens to exercise any right it may have to withhold its approval of this Agreement, then City and Tenant shall use commercially reasonable efforts to cooperate in good faith with such party(s) to amend this Agreement as may be necessary to obtain such approval. If, despite the Parties' cooperation and commercially reasonable efforts, the Parties are not able to amend the Agreement as required to obtain approval from the NAPBL, PCL, MiLB and/or the commissioner of Major League Baseball, as set forth above, then this Agreement shall be rescinded. Any such approval shall be obtained prior to commencement of construction of the Ballpark.

23.13 Counterparts. This Agreement may be executed in counterparts, each of which when executed and delivered will be deemed an original, and all of which together will constitute one instrument.

23.14 Governing Law. **THIS AGREEMENT AND THE ACTIONS OF THE PARTIES SHALL IN ALL RESPECTS BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS (EXCLUDING PRINCIPLES OF CONFLICT OF LAWS).** In the event of any proceedings regarding this Agreement, the Parties agree that the venue shall be the state courts of Texas located in El Paso County or any Federal court whose jurisdiction includes El Paso County, Texas.

23.15 Limitation to Capacity as City. The Parties acknowledge that all references to "City" herein (which, for the purposes of this provision, shall be deemed to include any references in this Agreement to City as the owner of the fee or other real property interest in the Ballpark) shall refer only to City in its capacity as City under this Agreement. The term "City" and the duties and rights assigned to it under this Agreement, thus exclude any action, omission or duty of City of El Paso, Texas when performing its Governmental Functions. Any action, omission or circumstance arising out of the performance of City's Governmental Functions may prevent City from performing its obligations under this Agreement and shall not cause or constitute a default by City under this Agreement or give rise to any rights or claims against City in its capacity as the "City" hereunder, it being acknowledged that Tenant's remedies for any injury, damage or other claim resulting from any such action, omission or circumstances arising out of City's Governmental Functions shall be governed by the laws and regulations concerning claims against City as a Governmental Authority. In addition, except as otherwise expressly provided herein, no setoff, reduction, withhold, deduction or recoupment shall be made in or against any payment due by Tenant to City under this Agreement as a result of any action or omission of City when performing its Governmental Function.

23.16 Capacity of Persons Acting on Behalf of City. Notwithstanding anything to the contrary in this Agreement, all references in this Agreement to employees, agents, representatives, contractors and the like of City shall refer only to Persons acting in City's capacity as the "City" hereunder and thus all such references specifically exclude any employees, agents, representatives, contractors and the like acting in connection with the performance of City's Governmental Functions. Without limiting the foregoing, all police, fire, permitting,

regulatory, water and power, health and safety and sanitation employees of City shall be deemed to be acting in connection with the performance of City's Governmental Functions.

23.17 No Limitation on City's Governmental Functions. The Parties acknowledge that City is a Governmental Authority in addition to being the owner of the Ballpark, and that no representation, warranty, Approval or agreement in this Agreement by City shall be binding upon, constitute a waiver by or estop City from exercising any of its rights, powers or duties in connection with its Governmental Functions nor will any portion of this Agreement be deemed to waive any immunities granted to City when performing its Governmental Functions, which are provided under Applicable Law. Any consent to jurisdiction by City is only with respect to matters arising in its capacity as a Party to this Agreement and expressly does not constitute a waiver of City's legal immunity or a consent to jurisdiction for any actions, omissions or circumstances, in each case solely arising out of the performance of City's Governmental Functions.

23.18 Non-Liability of City's Officials and Tenant's Employees. No member of any legislative, executive, or administrative body of, or affiliated with, City or its Affiliates, and no official, agent, employee or representative of City or such body or any of its Affiliates (whether acting in the performance of City's Governmental Functions or otherwise) shall be personally liable to Tenant or any Person holding by, through or under Tenant, for any actions taken in his or her capacity as an official, agent, employee or representative of such Person in the event of any default or breach by City, or for any amount which may become due to Tenant or any Person holding by, through or under Tenant, or for any other obligation, under or by reason of this Agreement. No officer, director, shareholder, member, agent, employee or representative of Tenant or its Affiliates shall be personally liable to City or any Person holding by, through or under City, for any actions taken in his or her capacity as an officer, director, shareholder, agent, employee or representative of such Person in the event of any default or breach by Tenant, or for any amount which may become due to City or any Person holding by, through or under City, or for any other obligation, under or by reason of this Agreement.

23.19 Payment on Business Days. If any payment under this Agreement is required to be made on a day other than a Business Day, the date of payment shall be extended to the next Business Day.

23.20 Joint and Several Liability. If Tenant at any time comprises more than one Person, all such Persons shall be jointly and severally liable for payment of Rent and for performance of every obligation of Tenant under this Agreement.

23.21 Relationship of the Parties; No Partnership. The relationship of Tenant and City under this Agreement is that of independent parties, each acting in its own best interests, and notwithstanding anything in this Agreement to the contrary, neither the obligation to pay City any amounts due hereunder nor any other aspect of this Agreement shall create or evidence, nor is it intended to create or evidence, a partnership, joint venture or other business relationship or enterprise between Tenant and City. As such, City shall have no direct supervision of or obligation to the employees of Tenant and any communication of employee matters shall be through Tenant Representative.

23.22 Non-Merger of Estates. The interests of City and Tenant in the Ballpark shall at all times be separate and apart, and shall in no event be merged, notwithstanding the fact that this

Agreement or the Leasehold Estate created hereby, or any interest therein, may be held directly or indirectly by or for the account of the Person who shall own the fee title to the Ballpark or any portion thereof; and no such merger of estates shall occur by operation of law, or otherwise, unless and until all Persons at the time having any interest in the Ballpark shall join in the execution of a written instrument effecting such merger of estates.

23.23 Covenants Running with the Estates in Land. The Parties covenant and agree that all of the conditions, covenants, agreements, rights, privileges, obligations, duties, specifications and recitals contained in this Agreement, except as otherwise expressly stated herein, shall be construed as covenants running with title to the Ballpark, the Ballpark Surface Parking and the Leasehold Estate, respectively, which shall extend to, inure to the benefit of and bind, City and Tenant, and their permitted successors and assigns, to the same extent as if such successors and assigns were named as original parties to this Agreement, such that this Agreement shall always bind the owner and holder of any fee or leasehold interest in or to the Ballpark, the Ballpark Surface Parking or any portion thereof, and shall bind predecessors thereof except as otherwise expressly provided herein.

23.24 Audits. The books and records of each Party pertaining to any obligation of such Party under the terms of this Agreement shall be available for the purpose of the other Parties undertaking reasonable examinations, from time to time, upon reasonable notice; provided however, that (a) any Confidential Information reviewed as a part of such examination shall be reviewed in such a manner such that it remains confidential and (b) City shall have no right to examine any financial information of Tenant which does not directly relate to Ticket Fees. The Parties' respective rights to examine such books and records shall survive termination of this Agreement for a period of one year past the Lease Expiration Date.

23.25 Survival of Existing Claims. Termination of this Agreement shall not alter any existing claim of any Party for breaches of this Agreement occurring prior to such termination and the obligations of the Parties hereto with respect to such existing claims shall survive termination.

*[Signatures and acknowledgements appear on following pages]*

IN WITNESS WHEREOF, the Parties have executed this Agreement to be effective as of the Effective Date.

**CITY OF EL PASO, TEXAS**

By: Joey L. Wilson  
Name: CITY MANAGER  
Its: JOEY L. WILSON  
Date: 10/11/12

**Approved as to Form:**

Sylvia Borunda Firth  
Sylvia Borunda Firth  
City Attorney

**Approved as to Content:**

William F. Studer, Jr.  
William F. Studer, Jr.  
Deputy City Manager for  
Development and Tourism

**MOUNTAIN STAR SPORTS  
GROUP, LLC—EL PASO BASEBALL  
CLUB SERIES**

By: Joshua Hunt  
Name: Joshua Hunt  
Its: Series Manager  
Date: 10/11/12

**MOUNTAIN STAR SPORTS  
GROUP, LLC**

By: Joshua Hunt  
Name: Joshua Hunt  
Its: Manager  
Date: 10/11/12



Prepared for: The City of El Paso  
August 21, 2012  
(Stevens Addition)

### METES AND BOUNDS DESCRIPTION

Description of lots 1 through 10 and lots 11 through 40 and a portion of the T-ALLEY Block B, Stevens Addition recorded in Book 2, Page 60, Plat Records, City of El Paso, El Paso County, Texas and a portion of block 28 and 48, Mills Map Addition and a portion of Franklin Street and being more particularly described by Metes and Bounds as follows:

Commencing for reference at an existing City of El Paso monument lying 10 feet north and east of the centerline intersection of Missouri Avenue and Santa Fe Street from which a found city of El Paso monument lying 10 feet north and 10 feet east of the centerline intersection of Missouri Avenue and Durango Street bears, North 52°23'00" East a distance of 461.61 feet; Thence along the monument line of Santa Fe Street, South 37°37'00" East a distance of 44.90 feet and South 52°23'00" West a distance of 45.00 feet to a point on the intersection of the westerly right of way line of Santa Fe Street with the southerly right of way line of Missouri avenue for the "TRUE POINT OF BEGINNING"

Thence along Santa Fe Street right of way line, South 37°37'00" East a distance of 416.73 feet to a point on the westerly right of way line of Santa Fe Street with the northerly railroad right of way line;

Thence along railroad right of way line, South 52°23'00" West a distance of 150.00 feet to a point;

Thence, North 37°37'00" West a distance of 5.00 feet to a point;

Thence, South 54°14'12" West a distance of 109.97 feet to a point;

Thence, South 57°33'00" West a distance of 70.29 feet to a point;

Thence, North 37°37'00" West a distance of 21.78 feet to a point;

Thence, South 61°49'19" West a distance of 121.65 feet to a point;

Thence, South 52°23'00" West a distance of 20.00 feet to a point;

Thence, South 63°27'12" west a distance of 158.94 feet to a point on the easterly right of way line of Durango Street with the northerly railroad right of way line;


Thence along Durango Street right of way line North 11°33'00" West a distance of 66.24 feet to a point;

Thence, North 00°46'24" West a distance of 121.31 feet to a point;

Thence, North 05°07'05" East a distance of 196.72 feet to a point on the intersection of the easterly right of way line of Durango Street and the southerly right of way line of Missouri Avenue;

Thence along Missouri Avenue right of way line North 52°23'00" East a distance of 428.92 feet to the **TRUE POINT OF BEGINNING** and containing 21,0281.2335 Sq. Ft. 4.8274 acres of land more or less.

Note: A Survey drawing of even date accompanies this description.

  
Tony G. Conde  
R.P.L.S. No. 2665

job #312-17

CONDE, INC.  
ENGINEERING / LAND SURVEYING / PLANNING  
6080 SURETY DRIVE SUITE 100 / EL PASO, TEXAS 79905  
(915) 592-0283 FAX (915) 592-0286

EXHIBIT A-1

Page 2 of 2

Prepared for: The City of El Paso  
September 4, 2012

### METES AND BOUNDS DESCRIPTION

Description of a parcel of land being a portion of lots 30 through 42, Block C, Stevens Addition recorded in Book 2, Page 60, Plat Records, City of El Paso, El Paso County, Texas and being more particularly described by Metes and Bounds as follows:

Commencing for reference at an existing point of intersection monument lying 10 feet northerly of the centerline of Missouri Avenue from which a City of E Paso Monument lying 10 feet north and east of the centerline intersection of Missouri Avenue and Santa Fe Street bears, North 52°23'00" East a distance of 461.61 feet; Thence along the monument line of Missouri Avenue, North 89°30'34" West a distance of 57.00 feet to a point; Thence leaving said monument line, South 00°29'26" West a distance of 185.00 feet to a point on the westerly right of way line of Durango Street, said point being the northeast corner of Lot 42, Block C, Stevens Addition for the **"TRUE POINT OF BEGINNING"**

Thence along the westerly right of way line of Durango Street, South 00°29'26" West a distance of 92.60 feet to a point;

Thence leaving said right of way line, South 48°11'49" West a distance of 17.74 feet to a point;

Thence, South 81°06'26" West a distance of 178.00 feet to a point;

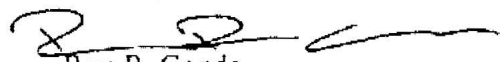
Thence, South 86°26'41" West a distance of 97.72 feet to a point;

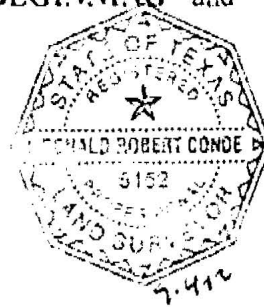
Thence, North 85°02'39" West a distance of 42.79 feet to a point on the easterly line of Lot 30, Block C, Stevens Addition;

Thence along said line, North 00°29'34" East a distance of 137.11 feet to a point for the northwest corner of Lot 30, Block C, Stevens Addition;

Thence along the northerly line of Lots 30 through 42, Block C, Stevens Addition, South 89°30'38" East a distance of 328.88 feet to the **TRUE POINT OF BEGINNING** and containing 41,474 Sq. Ft. 0.9521 acres of land more or less.

Note: A Survey drawing of even date accompanies this description.

  
Ron R. Conde  
R.P.L.S. No. 5152



---

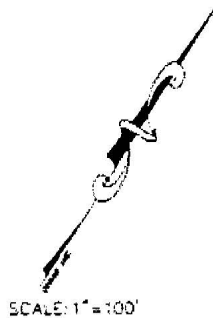
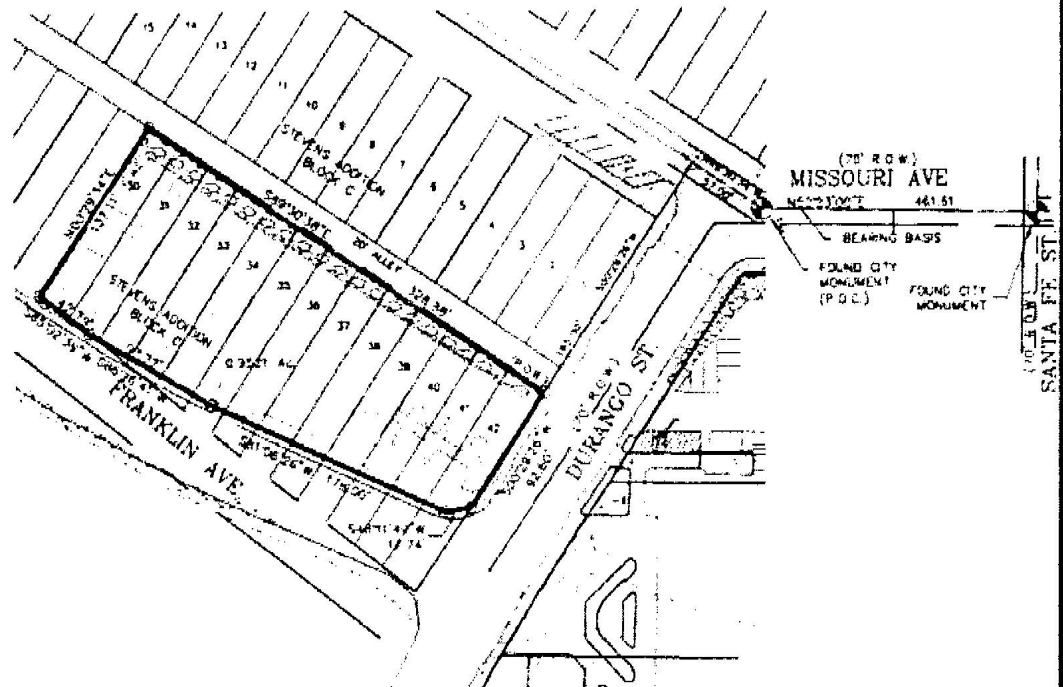
CONDE INC  
ENGINEERING / LAND SURVEYING / PLANNING  
6080 SURETY DRIVE / SUITE 100 / EL PASO, TEXAS 79905  
(915) 592-0283 FAX (915) 592-0286

NOTE:

1. A METES AND BOUNDS DESCRIPTION OF EVEN DATE ACCOMPANIES THIS SKETCH

2. NORTHERLY RIGHT OF WAY LINE OF FRANKLIN AVENUE SUBJECT TO CHANGE DUE TO POSSIBLE STREET VACATION INFORMATION

×	SYMBOL LEGEND
+	FOUND CITY MONUMENT
○	SET 1/2" REBAR W/CAP 5152
	CALCULATED POINT



SCALE: 1"=100'

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ALL RIGHTS RESERVED

JOB # 812-17	DATE SEPTEMBER 4, 2012	FIELD D.C.	OFFICE F.R.
LOCATED IN ZONE C	PARCEL # 480214-00398	DATED 10-15-1982	
RECORDED IN VOLUME 2	PAGE 60	PLAT RECORDS,	EL PASO COUNTY, TEXAS
<p>A PORTION OF LOTS 30-47, BLOCK C, STEVENS ADDITION CITY OF EL PASO, EL PASO COUNTY, TEXAS</p> <p>CONDE INC 6080 SUEFTE SUITE 100 EL PASO, TEXAS 79905</p> <p>CADD FILE: S:\01\STEVENS ADD\81217</p>			



Prepared for: The City of El Paso  
August 21, 2012

### METES AND BOUNDS DESCRIPTION

Description of a parcel of land being a portion of the Union Pacific Company Right of Way-out of Blocks 28 and 48, Mills Map Addition and being more particularly described by Metes and Bounds as follows:

Commencing for reference at an existing City of El Paso monument lying 10 feet north and east of the centerline intersection of Missouri Avenue and Santa Fe Street from which a found City of El Paso point of intersection monument lying 10 feet north of the centerline of Missouri Avenue bears, South 52°23'00" West a distance of 461.61 feet; Thence along the monument line of Santa Fe Street, South 37°37'00" East a distance of 464.59 feet to a point, Thence leaving said monument line, South 52°23'00" West a distance of 45.00 feet to a point on the westerly right of way line of Santa Fe for the **"TRUE POINT OF BEGINNING"**

Thence along the westerly right of way line of Santa Fe Street, South 37°37'00" East a distance of 2.86 feet to a point;

Thence leaving said right of way line, South 52°38'26" West a distance of 120.28 feet to a point;

Thence, South 55°22'29" West a distance of 86.26 feet to a point;

Thence, South 55°09'28" West a distance of 49.39 feet to a point;

Thence, South 57°50'20" West a distance of 100.93 feet to a point;

Thence, South 58°29'04" West a distance of 64.49 feet to a point;

Thence, South 62°30'04" West a distance of 139.33 feet to a point;

Thence, South 23°37'36" East a distance of 1.30 feet to a point;

Thence, South 49°05'38" West a distance of 1.69 feet to a point;

Thence, South 77°04'44" West a distance of 38.09 feet to a point;

Thence, North 78°10'57" West a distance of 32.97 feet to a point on the southerly line of a parcel of land described in volume 1021, page 806, Real property records of El Paso County, Texas;

Thence along said line, North 63°27'12" East a distance of 148.31 feet to a point;

Thence along said line, North 52°23'00" East a distance of 20.00 feet to a point;

Thence along said line, North 61°49'19" East a distance of 121.65 feet to a point;

Thence along said line, South 37°37'00" East a distance of 21.78 feet to a point;

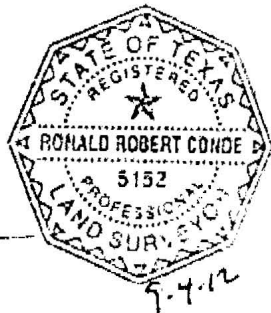
Thence along said line, North 57°33'00" East a distance of 70.29 feet to a point;

Thence along said line, North 54°14'12" East a distance of 110.06 feet to a point

Thence along said line, South 37°37'00" East a distance of 5.00 feet to a point;

Thence along said line, North 52°23'00" East a distance of 150.00 feet to the **TRUE POINT OF BEGINNING** and containing 8.684 Sq. Ft. or 0.1994 acres of land more or less.




Note: A Survey drawing of even date accompanies this description.



job #812-17

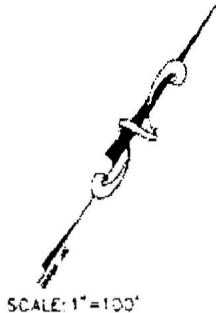
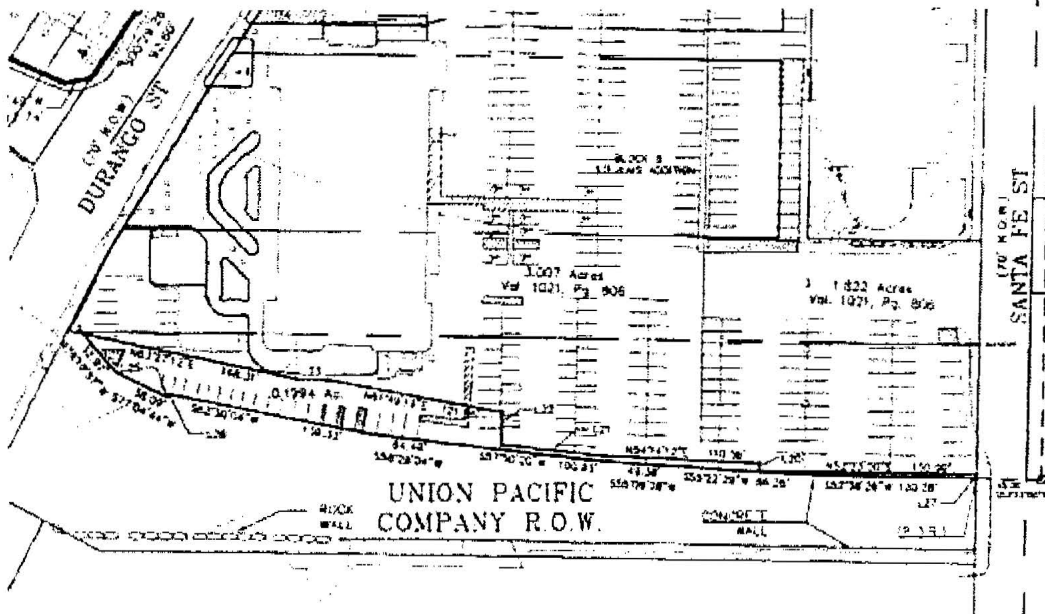
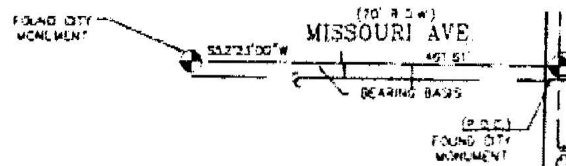
Ron R. Conde  
R.P.L.S. No. 5152

CONDE, INC.  
ENGINEERING / LAND SURVEYING / PLANNING  
6080 SURETY DRIVE SUITE 100 / EL PASO, TEXAS 79905  
(915) 592-0283 FAX (915) 592-0286

SYMBOL LEGEND	
	FOUND CITY MONUMENT
	SET 1/2" REBAR W/CAP 5/16"
	CALCULATED POINT

NOTE  
1. A METES AND BOUNDS DESCRIPTION OF EVEN DATE ACCOMPANIES THIS SKETCH

LINE TABLE		
LINE	LENGTH	BEARING
L20	5.00	S37°37'00"E
L21	70.29	N57°33'00"E
L22	21.78	S37°37'00"E
L23	20.00	N52°23'00"E
L24	86.24	N11°33'00"W
L25	1.69	S43°05'33"W
L26	1.30	S23°37'36"E
L27	2.86	S37°37'00"E



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ALL RIGHTS RESERVED

JOB # 812-17	DATE SEPTEMBER 4, 2012	FIELD D.G.	OFFICE P.R.
LOCATED IN ZONE C	PANEL # 480214-0039 B	DATED 10-15-1992	
RECORDED IN VOLUME N/A	PAGE N/A	PLAT RECORDS, EL PASO COUNTY, TX	
A PORTION OF THE UNION PACIFIC COMPANY ROW OUT OF BLOCKS 28, AND 48, MILLS MAP ADDITION CITY OF EL PASO, EL PASO COUNTY, TEXAS			
CONDE INC. 6080 SURETY SUITE 100 EL PASO, TEXAS 79905		CADD FILE: S:\01\STEVENS\400\81217	

EXHIBIT A-3

Page 3 of 3

**EXHIBIT B**

**DEPICTIONS OF  
BALLPARK SURFACE PARKING**





**EXHIBIT C**

**FORM OF MEMORANDUM OF LEASE**

## MEMORANDUM OF LEASE

THE STATE OF TEXAS           §  
  §  
COUNTY OF EL PASO         §

THIS MEMORANDUM OF LEASE (this "**Memorandum**") is made and entered into effective as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between the **CITY OF EL PASO, TEXAS** ("**City**"), **MOUNTAIN STAR SPORTS GROUP, LLC—EL PASO BASEBALL CLUB SERIES** ("**Tenant**") and **MOUNTAIN STAR SPORTS GROUP, LLC**, a Texas limited liability company ("**Company**").

A. City, Tenant and Company have entered into that certain BALLPARK LEASE AGREEMENT (the "**Lease**") having an execution date of \_\_\_\_\_, 2012, pursuant to which City has leased to Tenant and Tenant has leased from City the real property located in El Paso County, Texas described on Exhibit A attached hereto (the "**Ballpark**") pursuant to the terms and conditions of the Lease; and

B. City, Tenant and Company desire to execute this Memorandum to provide notice of Tenant's and Company's rights, titles and interest under the Lease and in and to the Ballpark.

For good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

**Section 1. Definitions and Usage.** Unless the context shall otherwise require, capitalized terms used in this Memorandum shall have the meanings assigned to them in the Lease, which also contains rules as to usage that shall be applicable herein.

**Section 2. Lease.** The Ballpark has been leased to Tenant pursuant to the terms and conditions of the Lease, which is incorporated herein by reference and deemed set forth herein in full. In the event of any conflict or inconsistency between this Memorandum and the Lease, the Lease shall control.

**Section 3. Lease Term.** City has leased the Ballpark to Tenant for an Initial Term commencing on \_\_\_\_\_, 20\_\_ and ending on September 30 (or such later date as is reasonably necessary to accommodate any Team Ballpark Events (e.g., playoff games)) of that year in which the twenty-fifth (25th) full Baseball Season after the Commencement Date has occurred, unless the Lease is sooner terminated pursuant to any applicable provision thereof.

**Section 4. Successors and Assigns.** This Memorandum and the Lease shall bind and inure to the benefit of the Parties and their respective successors and assigns, subject however, to the provisions of the Lease regarding assignment.

**Section 5. Counterparts.** This Memorandum may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Memorandum shall be binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of the parties reflected hereon as signatories.

EXECUTED AND EFFECTIVE as of the day and year first above written.

**CITY OF EL PASO, TEXAS**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Approved as to Form:**

**Approved as to Content:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**MOUNTAIN STAR SPORTS  
GROUP, LLC—EL PASO BASEBALL  
CLUB SERIES**

**MOUNTAIN STAR SPORTS  
GROUP, LLC**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_