

# **DPAC Amended and Restated Operating Agreement**

By and Between

The City of Durham, North Carolina

and

DURHAM PERFORMING ARTS LLC  
a Delaware Limited Liability Company

and

JN AMERICA LLC,  
a Delaware Limited Liability Company

and

PROFESSIONAL FACILITIES MANAGEMENT, INC.,  
a Rhode Island Corporation

Dated: \_\_\_\_\_

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## **DPAC AMENDED AND RESTATED OPERATING AGREEMENT**

This DPAC Amended and Restated Operating Agreement (“Agreement”) is made, dated, and entered into as of May \_\_\_\_, 2013 ("Effective Date"), by and among the CITY OF DURHAM ("City") and DURHAM PERFORMING ARTS LLC, a Delaware limited liability company (the "Operator") with offices at 220 Weybosset Street, Providence, Rhode Island 02903. JN AMERICA LLC, a Delaware limited liability company ("JN") with offices at 1450 Broadway, 6th Floor, New York, New York 10018, and PROFESSIONAL FACILITIES MANAGEMENT, INC., a Rhode Island corporation ("PFM") with offices at 220 Weybosset Street, Providence, Rhode Island 02903 have executed this Agreement for the limited purpose of agreeing to the guaranty provisions contained in Article 9. JN and PFM are collectively hereinafter referred to as the "Guarantors".

In consideration of the mutual promises, covenants and conditions contained herein, the receipt and adequacy of which is hereby acknowledged, the City and the Operator hereby agree as follows:

### **1. PURPOSE**

1.1 **City Goals for Operations.** The City is the owner of the 2,712-seat Durham Performing Arts Center ("DPAC"), and through this Agreement contracts with the Operator to operate, schedule and manage all aspects of the DPAC. The Operator shall manage the DPAC so as to achieve the following goals:

1.1.1 To operate the DPAC consistently with sound industry practices, financial principles, and in an open and responsive manner with the objective of producing substantial cultural benefits to the citizens of the City in a financially responsible manner.

1.1.2 To ensure that the management of the DPAC is efficient and that the DPAC Real Property is regularly inspected and properly maintained to prolong the longevity of the facilities.

1.1.3 To contribute to the success of the City's mission to provide leadership as a cultural resource in serving the diverse and developing needs of the City, by:

(a) Contributing to the quality of life within the City and the surrounding communities by accommodating a variety of entertainment events, concerts, family shows, festivals and any other events normally found in similar performing arts halls of the DPAC's size and nature, as well as for other educational, family entertainment, and cultural events appropriate to the City's mission;

(b) Providing (through operations) the City with a viable, nationally-recognized venue which can attract to the community high-quality, national products and touring performing arts events;

(c) Making the facility available to the American Dance Festival ("ADF") for seven weeks during the summer for a rental fee of \$35,000, or a pro-rated portion thereof if ADF elects not to use all of the dates during the seven-week period, plus Facility Rental Chargebacks. Operator shall use its good faith best efforts to negotiate reasonable terms with ADF for such rental, including reasonable escalation in rent based on the CPI Index.

1.1.4 Through highly-skilled, qualified management by an experienced director and staff, to ensure an efficient facility which shall enable the community to realize the potential of the DPAC to provide for area needs, by:

(a) Maintaining open communication with the City on a continuing basis to assist in meeting these objectives; and

(b) Through provision of consumer-oriented service, maintaining a positive public relations climate to engender loyalty among audiences and all constituencies served by the DPAC.

## 1.2 **Previous Agreement.**

1.2.1 The City and the Operator entered into a contract titled "DPAC Operating Agreement by and between the City of Durham, North Carolina and Durham Performing Arts LLC and JN Worldwide LLC, and Professional Facilities Management, Inc.," dated, by signature of the City Manager, April 29, 2007 (the "Original Contract"). The parties amended the Original Contract by an instrument titled "Amendment to DPAC Operating Agreement to put into Effect Certain Duties Required by Naming Rights Agreement with BCBSNC," dated March 7, 2008 (the "1<sup>st</sup> Original Amendment"); by an instrument titled "Second Amendment to DPAC Operating Agreement to put into Effect Certain Duties Required by Naming Rights Agreement with Robert D. Teer, Jr.," dated October 7, 2009 (the "2<sup>nd</sup> Original Amendment"); by an instrument titled "Third Amendment to DPAC Operating Agreement," dated March 17, 2009 (the "3<sup>rd</sup> Original Amendment"); by an instrument titled "Fourth Amendment to DPAC Operating Agreement for Parking Voucher Program and Operation of City Volunteer Program," dated October 7, 2009 (the "4<sup>th</sup> Original Amendment"); and by an instrument titled "Fifth Amendment to DPAC Operating Agreement to Implement Modifications to Naming Rights Agreements," dated July 1, 2010 (the "5<sup>th</sup> Original Amendment").

1.2.2 This Amendment and Restated Operating Agreement shall modify and replace the Original Contract and each of the amendments referred to in Section 1.2.1 in their entirety; except that the 1<sup>st</sup> Original Amendment, the 2<sup>nd</sup> Original Amendment, sections 1 and 2 of the 5<sup>th</sup> Original Amendment, and Exhibit K to the Original Contract shall remain in effect for the limited purpose described in Section 4.9.2 of this Agreement.

## 2. **DEFINED TERMS**

2.1 **[Intentionally Omitted.]**

2.2 **Affiliate.** "Affiliate" means, with respect to any Person in this Agreement other than City:

2.2.1 any Person that directly or indirectly controls, is controlled by, or is under common control with, the Person in this Agreement referenced as having an Affiliate;

2.2.2 any Person that directly or indirectly controls, is controlled by, or is under common control with, a Person described in section 2.2.1;

2.2.3 any Person that beneficially owns or holds a majority of any class of voting securities, or a majority of the equity interest, in a Person described in section 2.2.1 or section 2.2.2;

2.2.4 any Person a majority of which is owned by any Person described in section 2.2.1, section 2.2.2, or section 2.2.3. For purposes of this section 2.2.4, ownership means beneficial ownership of any class of voting securities or beneficial ownership of equity interests.

For purposes of this section 2.2, the term "control" (including, its various forms, such as "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies, whether through the ownership of voting securities, by contract, or otherwise.

2.3 **Annual Cap on Repairs and Maintenance.** "Annual Cap on Repairs and Maintenance" shall mean the maximum amount for which Repairs and Maintenance expenditures are to be treated as an Expense pursuant to Section 2.31. The Annual Cap on Repairs and Maintenance shall be Forty Thousand and No/100 Dollars in the 2012-13 Fiscal Year, which amount will increase annually by the greater of four percent (4%) or the CPI Index.

2.4 **Annual Independent Audit.** "Annual Independent Audit" shall mean the audit of the DPAC operations prepared by the Independent Accountant at the end of each Fiscal Year, or in the event that the first year of operations is less than one full Fiscal Year, at the end of such partial Fiscal Year. The Annual Independent Audit shall contain the Certified Financial Statements including a report of Centralized Services Expenses

2.5 **Annual Facility Fund Cap.** "Annual Facility Fund Cap" shall mean the maximum amount the City shall be required to contribute into the DPAC Facility Fund on an annual basis from DPAC Other Revenue. The Annual Facility Fund Cap will be that amount determined pursuant to Section 5.11.4(b).

2.6 **Box Office Services.** "Box Office Services" shall mean corporate personnel labor for supervision of system upgrade and maintenance for box office computer systems.

2.7 **Business Day.** "Business Day" shall mean a day that is neither a Saturday, Sunday, nor a holiday observed by city government of the City of Durham. See City Code Sections 42-16(a) and 42-16(b), as amended from time to time, for information on such holidays.

2.8 **Capital Expenditures.** "Capital Expenditures" shall mean expenses for routine and non-routine repairs, maintenance, alterations, improvements, renewals or replacements to the DPAC Real Property or FF&E that satisfy the following circumstances: (i) when expenses for Repairs and Maintenance for the Fiscal Year equal or exceed the Annual Cap on Repairs and

Maintenance, and (ii) with respect to the DPAC Real Property and FF&E, they are part of the Plans and Specifications or FF&E list, as amended.

2.9 **Capital Expenditures Budget.** "Capital Expenditures Budget" shall mean an annual budget prepared by Operator and approved by City as provided in Section 4.6.3, reflecting the estimated costs for all Capital Expenditures planned for the next Fiscal Year which, in the reasonable opinion of Operator, are necessary to keep and maintain the DPAC during such Fiscal Year in compliance with the Operating Standards.

2.10 **Centralized Services.** "Centralized Services" shall mean Corporate Accounting Services, Human Resource Services, Box Office Services, Computer Systems Support, and Corporate Programming Services.

2.11 **Centralized Services Fee.** "Centralized Services Fee" shall mean the fee to be paid to Operator for providing Centralized Services as provided in Section 5.3.

2.12 **Centralized Services Fee Annual Cap.** "Centralized Services Fee Annual Cap" shall mean the maximum amount Operator may receive for a Centralized Services Fee as described in Section 5.3. The Centralized Services Fee Annual Cap shall be One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00) beginning in the 2012-13 Fiscal Year, which amount will increase annually by no more than three percent (3%).

2.13 **Certified Financial Statements.** "Certified Financial Statements" shall mean certified audited financial statements consisting of a balance sheet, a statement of earnings and retained earnings, and a statement of cash flows, accompanying footnotes to financial statements and an unqualified certificate of the Independent Accountant to the effect that the financial statements fairly present, in conformity with Generally Accepted Accounting Principles (but subject to this Agreement), the financial position, results of operations, and cash flows of the DPAC for the Fiscal Year then ended.

2.14 **City FF Share.** "City FF Share" shall mean the portion of the Facility Fee that shall be paid by Operator to the City pursuant to Section 5.6.2 for deposit by the City into the DPAC Facility Fund.

2.15 **City Share of Operating Profit.** "City Share of Operating Profit" shall mean the portion of the Operating Profit that shall be paid by Operator to the City pursuant to Section 5.4.

2.16 **Computer Systems Support.** "Computer Systems Support" shall mean services for administrative computer systems, including system review and assessment and oversight of modifications thereto.

2.17 **Corporate Accounting Services.** "Corporate Accounting Services" shall mean payroll, accounts payable, accounts receivable, general ledger, financial statement and internal audit services.

2.18 **Corporate Programming Services.** "Corporate Programming Services" shall mean support services related to programming efforts out of Operator's corporate offices, including administrative time and supplies to coordinate programming decisions for the DPAC.

2.19 **CPI Index.** "CPI Index" shall mean the monthly Consumer Price Index - All Items - All Urban Consumers (base year 1982-1984 = 100) for the South Urban Region - Size B/C (50,000 to 1,500,000) for the United States, published by the United States Department of Labor. If the CPI Index is changed so that the base year differs from that in effect on the Effective Date, the Index shall be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If the CPI Index is discontinued or revised during the Term, such other governmental index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the CPI Index had not been discontinued or revised.

2.20 **Day.** "Day" shall mean calendar day unless otherwise specified.

2.21 **Debt Service Deficiency.** "Debt Service Deficiency" shall mean any annual deficiency between the City's annual debt service obligations for the DPAC Real Property, including any future debt issues provided the proceeds of any future debt issue are used to pay for the cost of constructing Improvements, or Capital Expenditures, or are used to refinance DPAC debt on terms that reduces the annual debt service payment, and the annual amount of that portion of the occupancy tax that is dedicated to the DPAC debt service, which the City receives from the County of Durham.

2.22 **DPAC.** "DPAC" shall have the meaning ascribed to it in Section 1.1.

2.23 **DPAC Capital Expenditure Projection Schedule.** "DPAC Capital Expenditure Projection Schedule" shall mean the currently estimated schedule of projected DPAC Facility capital expenditures attached hereto as Exhibit N.

2.24 **DPAC Defined Area.** "DPAC Defined Area" means all of the area that is in Lot 4 as shown on Exhibit A, but excluding the DPAC building.

2.25 **DPAC Facility Fund.** "DPAC Facility Fund" means the fund the City has established pursuant to Section 5.11.

2.26 **DPAC Other Revenue.** "DPAC Other Revenue" shall mean the City's share of Operating Profit and any Naming Rights Sponsorship Revenue from Existing Naming Rights Sponsorship Agreements.

2.27 **DPAC Plaza.** "DPAC Plaza" means the two exterior plaza areas substantially as depicted in Exhibit B.

2.28 **DPAC Real Property.** "DPAC Real Property" shall mean the DPAC Site and buildings and structures permanently affixed thereto, including all of the integral components and systems of such buildings or structures, including foundation, landscaping, structural,

mechanical, electrical, heating, ventilating, air conditioning, plumbing and vertical transportation. Throughout this Agreement, unless the context requires otherwise, "DPAC" includes the DPAC Real Property.

2.29 **DPAC Site.** "DPAC Site" means the following areas represented in Exhibit A: (i) Lot 4, (ii) the Dumpster access easement in Lot 5, (iii) the 9-foot wide cross access easement between Lots 3 and 4, located in Lot 5, and (iv) the loading dock easement area in Lot 6.

2.30 **Event.** "Event" shall mean any type of individual performance, function or other activity at the DPAC which is open to the public, and for which tickets must be purchased, including community events serving local citizens. For the purposes of determining whether Operator has achieved the 100 minimum Events, ADF Events and City Events shall not be included. See Section 4.2.1 for a definition of "City Events." "ADF Events" are defined as Events occurring at the DPAC which are presented by ADF pursuant to its rental agreement with Operator.

2.31 **Expense.** "Expense" when capitalized shall mean every charge incurred by Operator in managing and operating the DPAC that is reasonably necessary for the proper and efficient operation of the DPAC in accordance with this Agreement, unless any such charge is specifically stated not to be an Expense under any provision of this Agreement. Expenses shall include all Centralized Services charges, all of which shall be incorporated into each Operating Budget in accordance with Section 5.3.

The term "Expense" shall not include:

2.31.1 charges for any construction costs or improvements by City in the development of the DPAC;

2.31.2 charges for any Capital Expenditures:

2.32.3 other recurring or nonrecurring ownership costs, such as DPAC debt service or DPAC financing costs and expenses, administration or servicing costs associated with City's ownership activities (other than as may be specifically provided elsewhere in this Agreement), including legal and accounting fees incurred by City (except as provided in Section 2.31.7), all of which shall be paid by City from its own funds, and not from Gross Revenues;

2.31.4 costs and fees for legal services provided to or for Operator prior to the Effective Date of this Agreement, regardless of whether such legal services are paid for before, on, or after the Effective Date;

2.31.5 costs and fees for legal services provided to or for Operator in connection with matters that are in dispute between City and Operator; all of which shall be paid by Operator from its own funds, and not from Gross Revenues, unless such costs or expenses are incurred by the Operator as a result of City's material breach of its obligations under this Agreement, subject to the applicable notice to be provided to City and City's right to cure, all as provided in Section 3.2;

2.31.6 Centralized Services Fees that exceed the Centralize Services Fee Annual Cap, unless the City has approved such charges in excess of the Centralized Service Fee Annual Cap pursuant to Section 5.3; and

2.31.7 Costs, and fees for legal expenses, incurred by the City, unless such costs or fees are incurred by City as a result of the Operator's material breach of its obligations under this Agreement, subject to the applicable notice to be provided to Operator and Operator's right to cure, all as provided in Section 3.3.

2.32 **Facility Fee.** "Facility Fee" shall mean the surcharge described in Section 5.6.

2.33 **Facility Rental Chargebacks.** "Facility Rental Chargebacks" shall mean the charge to DPAC users for rental of equipment owned by the City or Operator and used in the operation of the DPAC and for labor to cover administrative and overhead costs associated with the rental of such equipment or usage of such labor. Facility Rental Chargebacks shall be treated as part of Gross Revenues.

2.34 **Facility Rental Income.** The basic fee charged to users for the rental of the DPAC.

2.35 **FF&E.** "FF&E" shall mean the furniture, fixtures and equipment specified in Exhibit C, and any additional furniture, fixtures and equipment that the City and Operator agree to add or install in the DPAC. Notwithstanding anything herein to the contrary, FF&E shall not include any inventories of goods for resale, which shall be supplied by Operator and the cost of which shall be paid from Gross Revenues and treated as an Expense.

2.36 **First Class.** (i) For purposes of describing the City's obligation to maintain and repair the DPAC, or to construct Improvements to the DPAC, "First Class" shall mean maintained and equipped or constructed in a manner consistent with other United States performing arts venues that are generally recognized in the industry as being first class venues capable of providing patrons with a quality experience in all material respects. (ii) For purposes of describing Operator's obligation to maintain and operate the DPAC, "First Class" shall mean maintained and operated in a manner consistent with other United States performing arts venues that are generally recognized in the industry as being first class venues capable of providing patrons with a quality experience in all material respects.

2.37 **Fiscal Year.** "Fiscal Year" shall mean the period from July 1 of any year until June 30 of the next calendar year.

2.38 **Force Majeure.** "Force Majeure" shall mean death or physical or other disability of any of the personnel forming part of or used in connection with the production of an Event, the acts or regulations of public authorities or labor unions, labor difficulties, strike, civil tumult, war, fire, severe weather, flood, national or local calamity, acts of public enemy or terrorism, epidemic, interruption or delay of transportation service, interruption of utilities or other municipal services, the breach of contract on the part of any third party, the unlawful act of any

third party, or any cause beyond the reasonable control of the Parties. The City shall not assert in its favor that an event or act is a Force Majeure event or act to the extent that the event or act is substantially caused by the unreasonable act or omission of the City, or its officers, officials, employees, agents, contractors, or subcontractors of all tiers, but excluding the Operator. The Operator shall not assert in its favor that an event or act is a Force Majeure event or act to the extent that the event or act is substantially caused by the unreasonable act or omission of the Operator, or its officers, members, managers, board members, employees, agents, contractors, subcontractors of all tiers, but excluding the City.

2.39 **"Generally Accepted Accounting Principles" or "GAAP"**. "Generally Accepted Accounting Principles" or "GAAP" shall mean those conventions, rules, procedures, and practices, consistently applied, affecting all aspects of recording and reporting financial transactions which are generally accepted by major independent accounting firms in the United States. Any financial or accounting terms not otherwise limited or defined in this Agreement shall be construed and applied according to Generally Accepted Accounting Principles.

2.40 **Gross Revenues**. "Gross Revenues" shall mean all revenues and receipts of every kind derived from Operator's operating the DPAC, including: Net Show Income; Sponsorship Revenue; Net Show Concessions; Net Program Advertising Income; Facility Rental Income from ADF and other tenants; Facility Rental Chargebacks; Premium Seating Club Revenue; Facility Fee income (excluding the City FF Share to be remitted to City in accordance with Section 5.6); Net Service Charge Revenue; proceeds from business interruption or other loss of income insurance; and interest received or accrued with respect to the funds in the operating accounts of the DPAC; provided, however, that Gross Revenues shall not include the following: gratuities to Operator's employees; federal, state or municipal excise, sales or use taxes or any other taxes included as part of the sales price of any goods or services; proceeds from the sale of FF&E; insurance proceeds (other than proceeds from business interruption or other loss of income insurance); condemnation proceeds; or any proceeds from any sale of any part of or interest in the DPAC or from the refinancing of any debt encumbering the DPAC.

2.41 **Human Resource Services**. "Human Resource Services" shall mean the DPAC's pro rata share of cost for administration of Operator's corporate employee benefit plans and policies.

2.42 **Improvement**. "Improvement" shall mean an addition or modification to the DPAC Real Property that satisfies the following criteria: (i) it was not part of the Plans and Specifications or FF&E, as amended from time to time, as of the Effective Date, (ii) it is necessary or customary to the operation of a First Class performing arts venue providing similar programming to the Operator-provided programming at the DPAC, and (iii) it is not either a Capital Expenditure or a Repairs and Maintenance item.

2.43 **Independent Accountant**. "Independent Accountant" means a firm of independent certified public accountants, or an independent certified public accountant, chosen by Operator and approved by City.

2.44 **Legal Requirements.** "Legal Requirements" means all material laws, statutes, ordinances, rules, regulations, permits, licenses, and requirements of all governments or regulatory authorities, that now or hereafter may be applicable to the DPAC and the operation thereof, including those relating to employees, zoning, building, health, safety and environmental matters, and accessibility of public facilities. "Legal Requirements" also includes intellectual rights of third parties including copyright.

2.45 **Major Components.** "Major Components" means the seating hall of the theater, stage, plaza, and atrium of the DPAC.

2.46 **Management Fee.** "Management Fee" shall mean the amount payable to Operator in accordance with Section 5.2.

2.47 **Minor Components.** "Minor Components" means all the physical elements of the DPAC Real Property that are not Major Components.

2.48 **Naming Rights Sponsorships.** "Naming Rights Sponsorships" shall mean sponsorship agreements pursuant to which the sponsor's name will be incorporated into the title of the DPAC (by way of example, "Progress Energy Center for the Performing Arts") or into the Major Components or Minor Components (by way of example, the DPAC atrium has been named the Blue Cross and Blue Shield of North Carolina atrium and the DPAC Plaza has been named the Capitol Broadcasting Company Plaza or CBC Plaza). Sponsorship Revenue is specifically excluded from Naming Rights Sponsorships.

2.49 **Naming Rights Sponsorship Revenue.** "Naming Rights Sponsorship Revenue" shall mean revenue from Naming Rights Sponsorships.

2.50 **Net Program Advertising Income.** "Net Program Advertising Income" shall mean net income from the sale of program advertising.

2.51 **Net Service Charge Revenue.** "Net Service Charge Revenue" shall mean net income from the charging of a ticket service charge.

2.52 **Net Show Concessions.** "Net Show Concessions" shall mean net income .from the sale of food, beverage and novelty sales.

2.53 **Net Show Income.** "Net Show income" shall mean the excess of show revenues over show expenses.

2.54 **Net Show Loss.** "Net Show Loss" shall mean the excess of show expenses over show revenues.

2.55 **Operating Budget.** "Operating Budget" shall mean the annual budget that delineates projected Gross Revenues and Expenses that is submitted to the City for informational purposes in accordance with Section 5.5.

2.56 **Operating Deficit.** "Operating Deficit" shall mean, with respect to any given period of time, an excess of Expenses over Gross Revenue, determined, subject to this Agreement, in accordance with Generally Accepted Accounting Principles.

2.57 **Operating Profit.** "Operating Profit" shall mean, with respect to any given period of time, the excess of Gross Revenues over Expenses, determined, subject to this Agreement, in accordance with Generally Accepted Accounting Principles.

2.58 **Operating Standards.** "Operating Standards" shall mean the operation of the DPAC in a manner (i) consistent with the condition of the DPAC as of the Effective Date (excepting normal wear and tear); (ii) consistent with the requirements and limitations set forth in this Agreement (including those relating to the Operating Budget and Capital Expenditures Budget); (iii) consistent with a First Class performing arts venue of the same or similar size, type and quality of construction; (iv) consistent with then current prudent business and management practices applicable to the operation, repair, maintenance and management of a First Class performing arts venue, including those concerning compliance with Legal Requirements; (v) at least as good as standards applicable to other performing arts venues operated by Operator or its Affiliates; (vi) consistent with keeping the DPAC in a clean, sanitary and attractive condition, and (vii) reasonably calculated to protect and preserve the assets that comprise the DPAC.

2.59 **Parties.** "Parties" shall mean the parties to this Agreement.

2.60 **Person.** "Person" shall mean an individual, corporation, limited liability company, firm, partnership, association, organization, any group acting as a unit, and any body politic or unit of government.

2.61 **Plans and Specifications.** "Plans and Specifications" shall mean those certain plans and specifications relating to the DPAC, amended from time to time, and contained in the DPAC Preventative Maintenance Plan, which coversheet is provided in Exhibit C. This definition does not apply to the use of the uncapitalized term "plans and specifications" in section 4.6.5.

2.62 **Premium Seating Club Revenue.** "Premium Seating Club Revenue" shall mean any and all revenue from the sale of membership or access to a club structure that will entitle the purchaser to special patron benefits.

2.63 **Preventative Maintenance.** "Preventative Maintenance" shall mean the performance of regular and routine facility and equipment inspection tasks in accordance with the DPAC Preventative Maintenance Plan.

2.64 **Preventative Maintenance Plan.** "Preventative Maintenance Plan" shall mean the plan, which defines the Preventative Maintenance tasks the Operator is required to perform pursuant to Section 4.6.10. The Preventative Maintenance Plan Consolidated PMP Task Checklist is attached at Exhibit D.

2.65 **Repairs and Maintenance.** Subject to the definition of Capital Expenditures, "Repairs and Maintenance" means any and all repairs, maintenance, alterations, improvements, renewals or replacements to the DPAC Real Property, FF&E or items to be leased, supplied, maintained and replaced by Operator in accordance with this Agreement other than Capital Expenditures. Repairs and Maintenance shall include drywall patching; exterior and interior repainting, touchup painting; routine maintenance of mechanical, electrical, heating, ventilating, air conditioning, plumbing and vertical transportation systems; replacement of light bulbs and tubes; tile maintenance (including caulk and grout); and concrete maintenance (cleaning and resealing). Repairs and Maintenance expressly excludes Preventative Maintenance tasks required by the Preventative Maintenance Plan.

2.66 **Sponsorships.** "Sponsorships" shall mean advertising, presenting sponsorships, category-related sponsorships, or other operations-related sponsorships of single events or multiple events presented at the DPAC, including cash and in-kind contributions by the sponsor in return for various tagging, tickets, and to-be-defined facility usage benefits. For example, a sponsor may sponsor a Broadway series, a family series, or all community outreach programming. Sponsorships specifically excludes Naming Rights Sponsorships, as that term is defined in Section 2.48.

2.67 **Sponsorship Revenue.** "Sponsorship Revenue" shall mean revenue from Sponsorships.

2.68 **Term.** "Term" has the meaning set forth in Section 3.1.

2.69 **Unit of FF&E.** A "Unit of FF&E" shall mean an individual item of FF&E, or compatible operating system of FF&E items, which is usable for its intended function and cannot be separated without the diminishment in the usability of the item for its intended purpose. By way of example, each theater seat shall each be treated as one Unit of FF&E.

### **3. TERM; TERMINATION; CONTINUOUS OPERATION, NON-ABANDONMENT**

#### **3.1 Term; Option to Extend Term.**

3.1.1 The term of this Agreement ("Term") shall begin on the Effective Date and shall continue until 11:59 p.m. on June 30, 2023 (the "Initial Term"), unless earlier terminated as provided in this Agreement. If the option to renew this Agreement is exercised by Operator as provided in Section 3.1.2, the definition of "Term" throughout this Agreement shall include any renewal period.

3.1.2 Operator shall have the option to renew this Agreement for seven (7) years, which renewal period would commence upon expiration of the Initial Term. In addition, Operator shall have three additional options to renew this Agreement for five (5) years. Each of these three options to renew shall be deemed exercised without providing any notice of renewal unless Operator provides written notice to the City that the Operator will not renew this Agreement, which notice must satisfy the following requirements: (a) Operator must provide written notice on or before one (1) year prior to the expiration date of the then current term; and

(b) the written notice must prominently and explicitly refer to "section 3.1 of the DPAC Operating Agreement," stating Operator's decision to not exercise the option to renew this Agreement. Such option to renew does not restrict City's right to terminate this Agreement in accordance with the provisions of section 3.3.

### 3.2 **Commencement Date of Certain Business Terms.**

3.2.1 The parties agree that certain business terms are difficult to commence on a date other than the first date of the Fiscal Year. Therefore, the parties agree that the Centralized Services Fee and the Centralized Services Fee Annual Cap described in Section 5.3 and the Annual Cap on Repairs and Maintenance Costs described in Section 4.6.1 will be effective retroactively to July 1, 2012.

3.2.2 The split of Operating Profit described in Section 5.4.3 will commence on July 1, 2014. Prior to that time, the split of Operating Profit will be that described in Section 5.4.2.

### 3.3 **Termination.**

3.3.1 The City and Operator shall each have the right to terminate this Agreement upon sixty (60) days advance notice in the event of a material breach of this Agreement by the other Party. Operator shall have the right to terminate this Agreement upon sixty (60) days advance notice in the event City materially breaches its obligation to make a Capital Expenditure that is necessary to allow the Operator to perform its obligations hereunder. The 60-day notices shall describe all of the reasons for the termination. The Agreement shall not be terminated under this subsection 3.3.1(a) for breaches as to which the Party receiving the notice commences correction or cure within 15 days of receiving notice, continues to diligently pursue correction or cure, and during the 60-day period makes substantial progress in correcting or curing (with delays caused by events of Force Majeure being excused with respect to all provisions of this subsection (a)), or (b) for breaches that are corrected or cured during the 60-day period.

3.3.2 In this subsection 3.3.2, the expression "from Holding Events" means from holding Events safely and in accordance with Legal Requirements. Notwithstanding Force Majeure events or acts, and notwithstanding anything to the contrary in this Agreement, if the City either

(i) fails to make all Capital Expenditures that are necessary and which failure prevents the Operator from Holding Events, or

(ii) materially breaches its obligations under this Agreement so that Operator is thereby prevented from Holding Events,

Operator shall have the right to terminate this Agreement by complying with the procedure described in the rest of this subsection 3.3.2. Under this procedure, Operator will give City a "Notice of Potential Termination," which notice must (a) prominently state that it is a

"Notice of Potential Termination" given pursuant to this subsection 3.3.2, (b) state the necessity of making Capital Expenditures, and (c) describe the reasons for and the nature of the Capital Expenditures that are necessary and which failure prevents the Operator from Holding Events, or specify the City's material breaches of its obligations under this Agreement that prevent Operator from Holding Events and how such breaches are preventing Operator from Holding Events. One hundred fifty (150) or more days after giving the Notice of Potential Termination, Operator will give City a "Warning Notice." The Warning Notice must (d) prominently state that it is a "Warning Notice" given pursuant to this subsection 3.3.2, (e) include a copy of the Notice of Potential Termination, and (f) contain a statement of the remaining items referred to in the Notice of Potential Termination that are still preventing the Operator from Holding Events. Twenty (20) or more days after giving the Warning Notice, if any item listed in the statement made under subsection (f) is still preventing the Operator from Holding Events, the Operator will give a Notice of Termination, which notice shall terminate this Agreement on the date the Notice of Termination is given or on such later date as may be specified in the Notice of Termination.

3.3.3 In this subsection 3.3.3, the expression "from Holding Events" means from holding Events safely and in accordance with Legal Requirements. If due to Force Majeure events or acts, and notwithstanding anything to the contrary in this Agreement, Operator is prevented from Holding Events, Operator shall have the right to terminate this Agreement by complying with the procedure described in the rest of this subsection 3.3.3. Under this procedure, Operator will give City a "Notice of Potential Termination," which notice must (a) prominently state that it is a "Notice of Potential Termination given pursuant to this subsection 3.3.3, (b) describe the Force Majeure events or acts that are preventing Operator from Holding Events and how they are preventing Operator from Holding Events. One hundred fifty (150) or more days after giving the Notice of Potential Termination, Operator will give City a "Warning Notice." The Warning Notice must (c) prominently state that it is a "Warning Notice" given pursuant to this subsection 3.3.3, (d) include a copy of the Notice of Potential Termination, and (e) contain a statement of the remaining items referred to in the Notice of Potential Termination that are still preventing the Operator from Holding Events. Twenty (20) or more days after giving the Warning Notice, if any item listed in the statement made under subsection (e) is still preventing the Operator from Holding Events, the Operator will give a Notice of Termination, which notice shall terminate this Agreement on the date the Notice of Termination is given or on such later date as may be specified in the Notice of Termination.

3.3.4 Notwithstanding anything in this Agreement to the contrary, it is agreed that if the DPAC is damaged or destroyed to the extent that the cost of repair or replacement or both exceeds \$10 million and the casualty insurance proceeds necessary to make such repairs or replacements are not available to City as a result of decisions made by third parties not controlled by City (e.g., bond trustee or bond holders), either City or Operator may terminate this Agreement. Such a termination shall be effective 60 days after either Party gives the other Party a notice of termination that specifies this section 3.2.4 as the ground for the termination.

3.3.5 If this Agreement is terminated, the Operator shall be charged the non-profit rental rates to meet Event contract commitments that the Operator has made before the termination to the extent such commitments are with Persons that are independent of the

Operator. In case of termination, the Parties shall act reasonably in turning over the DPAC to City.

3.4 **Peaceful Surrender.** The Operator shall, upon the expiration or earlier termination of this Agreement for any reason, peacefully surrender to the City the DPAC,

3.5 **Continuous Operation; Non-Abandonment.** Regardless of operational results, Operator shall continuously operate the DPAC and comply with its obligations under this Agreement during the Term, and shall not abandon the DPAC.

#### 4. OPERATOR RIGHTS AND RESPONSIBILITIES

4.1 **Operator Control and Responsibility.** Except to the extent expressly provided otherwise in this Agreement, the Operator shall have the sole responsibility for and the sole right of control and supervision of its personnel and contractors, as well as for all of the means, methods, details and other aspects of the management, use and operation of the DPAC. Operator shall at all times provide sufficient staffing to substantially comply with the Operating Standards and otherwise fulfill all of Operator's responsibilities and obligations under this Agreement. All of the Operator's rights and responsibilities in this Agreement extend to the DPAC Real Property, unless expressly provided otherwise in this Agreement.

##### 4.2 **Programming and Marketing.**

4.2.1 **Operator Exclusivity.** The Operator shall have the exclusive right to stage Events in the DPAC, with the exclusion of the time frame committed to ADF pursuant to Section 1.1.3(c) of this Agreement.

4.2.2 **City Events.** Notwithstanding the foregoing, the Operator agrees that the City shall have the right to use the DPAC for up to ten (10) Events per Fiscal Year. The City will have the right to designate one or more non-profit or for-profit Person(s) who may use as many of the ten (10) dates as the City specifies. Any such Person(s) using one or more of the City's ten (10) dates shall be subject to the same insurance requirements as are all other third parties renting or using the DPAC as provided in section 6.1.4(e). Regardless of whether the dates are used by the City or assigned by the City for use by a non-profit or for-profit Person, the rate charged for such usage shall be the non-profit rate as outlined in Exhibit E. The City and the Operator may agree to modify the rates described in Exhibit E without amending this Agreement. An Event that is held in the DPAC by reason of this section is a "City Event." The following procedure is hereby established for reservation of dates for City Events:

(a) On or before the first business day of each Fiscal Year, City shall provide to Operator a list of up to 10 dates during that Fiscal Year that City desires to put on hold for City use. Operator shall place a hold for City on each such date that has not already been booked or put on hold for Operator's Events. Operator shall advise City within ten business days after said first business day of the dates that have been so put on hold and the dates that have been booked. If Operator fails, within that ten-day period, to advise City that a date has been put on

hold or booked, City shall be entitled to use that date, subject to the provisions of sections 4.2.1(b) and 4.2.1(c). City may select alternate dates for any dates so denied, subject to availability in accordance with the foregoing.

(b) From the time that City notifies Operator that it has a confirmed Event for a date that has been reserved by the City in accordance with the foregoing, such date shall be considered unavailable for any other booking opportunity; provided, however, that City and Operator shall work together in good faith to accommodate programming requested by either Party.

(c) If Operator receives a booking opportunity for a date that has been put on hold for City, Operator shall be entitled to book such Event if City does not then have a confirmed Event scheduled for that date. In such event, Operator shall notify City that the hold on the date has been "bumped" and City shall be entitled to select another date to replace the bumped date, subject to availability in accordance with the foregoing.

(d) City use of the DPAC Plaza shall not count toward the allocated annual City Event dates. City shall coordinate any such use of the DPAC Plaza in advance with Operator so as to not disrupt scheduled DPAC programming. City shall be responsible for any needed repairs and maintenance resulting from City use of the DPAC Plaza and shall be responsible for cleaning the DPAC Plaza promptly after any City use. Operator shall inspect the DPAC Plaza promptly thereafter and shall promptly notify the City of all cleaning, repairs and maintenance which Operator should reasonably have been able to identify. City's existing insurance coverage, as the same may be changed from time to time, shall apply to any City use of the DPAC Plaza pursuant to this subsection 4.2.1(d).

4.2.3 **DPAC Programming.** The Operator shall have the right to determine, and the responsibility for determining, the programming mix of all Events to be presented in the DPAC by the Operator, subject to the provisions of this section. The Operator shall also have exclusive authority over the marketing of all Events and shall be solely responsible for all contracts for programming and marketing of all Events, including general marketing, news media relations and advertising, and the promotion and presentation of all Events. Each Fiscal Year, the Operator shall include Broadway Events at the DPAC. In addition, each Fiscal Year, the DPAC programming mix may also include contemporary music concerts, family shows, youth theater, holiday programming, arts programming and outreach programming. All references to Events in this section exclude ADF Events and City Events.

#### 4.2.4 **Operator Event Guarantee.**

(a) The Operator shall use commercially reasonable efforts to maximize DPAC usage subject to Force Majeure and the provisions of this Section 4. The Operator shall present in the DPAC, not including City Events and ADF Events, an average, on a three-year rolling basis, of not fewer than 100 Events per Fiscal Year.

(b) When, despite commercially reasonable actions by Operator, an event of Force Majeure or a material City breach of this Agreement (following any applicable

cure period) including a City material breach of its obligations under this Agreement to timely make a Capital Expenditure, prevents one or more booked Events from being performed in the DPAC in the manner required by this Agreement, and would thereby cause the average required by section 4.2.4(a) not to be attained, Operator shall act in a commercially reasonable manner to try to book Events in order to attain that average for the Fiscal Year in which the booked Event(s) could not be performed.

(c) If the Operator makes the efforts required by section 4.2.4(b), but the average of 100 Events per Fiscal Year is not attained, the requirement in section 4.2.4(a) for that Fiscal Year shall be reduced by one Event for each such booked Event that could not be performed in that Fiscal Year.

(d) If the Operator does not comply with section 4.2.4(a) after reductions to the required average as permitted by section 4.2.4(c), the City may, in its discretion, terminate the Term. The provisions of section 3.3 apply to this termination right.

4.2.5 Operator agrees to participate in a collective effort of the community, local arts groups and live performance theaters to promote the City and County of Durham as a place for live theater and performance, including joint events, package sponsorships whenever reasonably possible, cross-subscription and other cross-marketing efforts.

4.2.6 Operator understands that as the owner of the Carolina Theatre, the City has the objective that the DPAC and the entire Carolina Theatre function as complementary venues. Operator further understands that the Carolina Theatre is one of the jewels of the downtown Durham arts community and is integral to the cultural master plan of the City. As such, Operator shall endeavor to collaborate and cooperate with the Carolina Theatre for the overall benefit of the City of Durham. Operator anticipates offering the Carolina Theatre the opportunity to co-present in the DPAC Events that the Carolina Theatre has history with that have outgrown the capacity of the Carolina Theatre. Operator believes that the Carolina Theatre will provide Operator opportunities to present shows that would be inappropriate in the DPAC, and, therefore, will seek opportunities to present Events in the Carolina Theatre whenever such Events are available that are more appropriately suited, economically or otherwise, to the Carolina Theatre. Operator foresees numerous opportunities to have synergy with the Carolina Theatre by cross-promotion of the respective seasons of the DPAC and the Carolina Theatre and by developing patron benefit programs that cross over between the DPAC and the Carolina Theatre. This section 4.2.6 shall be binding and enforceable only to the extent that it is lawful.

4.3 **Janitorial and Cleaning Services.** Operator shall develop, establish and follow a janitorial and cleaning program sufficient to keep the DPAC Real Property in compliance with the Operating Standards.

4.4 **Security; DPAC Plaza; and DPAC Light Sculpture.**

4.4.1 Operator shall provide reasonable security throughout the DPAC Real Property so that the DPAC Real Property remains at all times in compliance with the Operating Standards. The Operator shall not be responsible for providing security for the video displays

that may be installed in the DPAC Plaza pursuant to the CBC Naming Rights Agreement, other than such security that Operator would provide throughout the DPAC Real Property in order to comply with the Operating Standards even in the absence of the video displays. The Parties recognize that the DPAC Plaza will be open to the public when there are no Events in the DPAC, including times when the DPAC is closed. It is understood that the Operator is not expected to have its employees, agents, or contractors in the DPAC or DPAC Plaza during such closed times for the purpose of responding to allegedly dangerous conditions in the DPAC Plaza that develop during such closed times. It is agreed that the Operator shall not be an insurer of individuals and property of third parties on the DPAC Plaza when there are no Events in the DPAC.

4.4.2 The Operator acknowledges that the City has accepted and installed a work of art in the DPAC Plaza designed by artist Jaume Plensa (the “DPAC Light Sculpture”). The Operator acknowledges that the power source and operational controls for the DPAC Light Sculpture are located within the DPAC Facility. The Operator agrees to operate the DPAC Light Sculpture in accordance with an operating schedule devised by the City. The Operator’s responsibilities shall include turning the DPAC Light Sculpture on and off, and contacting the Federal Aviation Authority (“FAA”) as required by FAA regulations prior to turning it on. The Operator shall be responsible for remote operations and controls of the DPAC Light Sculpture. Subject to City approval, the Operator shall be responsible for devising the operating schedule for the DPAC Light Sculpture and providing the City with advanced notice of the operating schedule and requirements. The Operator shall schedule the operation of the DPAC Light Sculpture to coincide with DPAC performances.

4.5 **Intentionally Omitted.**

4.6 **Repairs and Maintenance, Capital Expenditures, and Preventative Maintenance.**

4.6.1 Operator shall maintain the DPAC Real Property and make or cause to be made all Repairs and Maintenance necessary to keep the DPAC Real Property in compliance with the Operating Standards. The Operator represents and warrants that any Repairs and Maintenance shall be completed in compliance with all Legal Requirements. The cost of Repairs and Maintenance shall be treated as an Expense in determining Operating Profit; provided, however, that in no event shall the responsibilities of Operator include the obligation to repair, or otherwise maintain, the structural integrity of the DPAC. Whenever it becomes necessary to perform Repairs and Maintenance, the Operator will use materials, furniture, fixtures or equipment that are at least equal in quality and performance to that which is described in the Plans and Specifications or FF&E list, as such Plans and Specifications and FF&E list may have been amended from time to time. Notwithstanding the foregoing, if the aggregate cost of Repairs and Maintenance in any Fiscal Year exceeds the Annual Cap on Repairs and Maintenance, any such excessive costs will not be treated as an Expense in determining Operating Profit, but shall instead be paid by the City. The Operator shall be responsible for maintaining a record of all Repairs and Maintenance work performed on the DPAC. The Operator shall provide to the City a monthly report that lists what Repairs and Maintenance work was performed during that month and the cost of such work.

4.6.2 City shall make all Capital Expenditures to the DPAC Real Property that are necessary (i) to keep the DPAC Real Property in compliance with the Operating Standards and (ii) safely operate the DPAC. The City represents and warrants that any Capital Expenditure shall be completed in compliance with all Legal Requirements. Whenever it becomes necessary to make Capital Expenditures, City will use materials, furniture, fixtures or equipment that are at least equal in quality and performance to that which is described in the Plans and Specifications or FF&E list, as such Plans and Specifications or FF&E list may have been amended from time to time.

4.6.3 (a) During each calendar year of this Agreement, Operator shall submit to City no later than January 15 a proposed Capital Expenditures Budget and its suggestions for Improvements for the next Fiscal Year. The Operator shall separately list those items it believes are Improvements as opposed to Capital Expenditures. In preparing and submitting the Capital Expenditures Budget, Operator shall provide details requested by the City and any supporting documentation necessary and reasonably requested by the City to establish the need for the Capital Expenditure and any suggested Improvements and Operator's estimate of its cost, including all estimated soft costs, design fees, construction, permitting, fees, allowances, overhead and contingencies.

(b) If the amount of funds in the DPAC Facility Fund is sufficient to pay for all or some of the approved Capital Expenditures or Improvements suggested by Operator, the City shall have until March 15 to review and approve those items on Operator's proposed Capital Expenditures Budget and suggested Improvements for which funds in the DPAC Facility Fund are sufficient, giving priority to Capital Expenditures over Improvements, such approval not to be unreasonably withheld with respect to Capital Expenditures or Improvements that are required, in Operator's reasonable judgment, to keep the DPAC in compliance with the DPAC Operating Standards. If the funds in the DPAC Facility Fund are not sufficient to pay for all or some of the approved Capital Expenditures and/or Improvements suggested by Operator, then the City shall have until June 30 to review and approve such Capital Expenditures Budget and/or Improvements that the City recommends. If the City disapproves the Capital Expenditures Budget and/or suggested Improvements or any portion thereof, City will promptly provide Operator in writing with specific reasons for its disapproval. Thereafter, the Parties will attempt to resolve in good faith any objections so specified by City. City shall proceed with implementation of any portion of such Capital Expenditures Budget and/or suggested Improvements that are not in dispute and for which there are sufficient funds in the DPAC Facility Fund. If City refuses to make any Capital Expenditures that it is required by this Agreement to make, then City shall assume the liability, if any, caused by that refusal. If City disapproves any Capital Expenditures and/or Improvements because sufficient funds are not available, Operator shall be entitled to renew its request when sufficient funds become available.

4.6.4 The Parties acknowledge and agree that the implementation of approved Capital Expenditures or Improvements may take months or even years to complete, depending upon available funding and the activities taking place at the DPAC. The Parties agree to work diligently and in good faith to arrange a reasonable schedule for the completion of the Capital Expenditures or Improvements that accommodates the City's funding schedule and minimizes disruption to DPAC activities. The City shall be responsible for the procurement of contractors

for City-approved Capital Expenditures or Improvements, provided that City may, in its discretion, use its own forces instead of or in addition to contractors for such work.

4.6.5 (a) Except as otherwise permitted by this Agreement, such as in the event of an emergency provided in Section 4.6.5(b), Operator shall make no Capital Expenditures or Improvements without the express written approval of City. City may, in its sole discretion, delegate authority to Operator to undertake any of the activities contemplated in undertaking a Capital Expenditure or Improvement, on such terms and conditions as are mutually acceptable to the Parties and in conformance with Legal Requirements. If the Operator contracts for any such Capital Expenditures or Improvements, either the City shall make funds available from the DPAC Facility Fund to pay for the Capital Expenditures or Improvements, or Operator shall pay for the Capital Expenditures or Improvements and the City shall reimburse Operator from the DPAC Facility Fund. In the event that a Capital Expenditure must be undertaken which has not been provided for in the Capital Expenditures Budget, Operator shall notify the City General Services Department of such needed Capital Expenditure. Upon notice, City shall promptly and diligently take such actions as are reasonably necessary to complete such Capital Expenditure as quickly as reasonably possible, funding and DPAC schedule permitting.

(b) In an Emergency Situation, if (i) Operator has notified City, including the Director of the Department of General Services, of such needed Capital Expenditure, and (ii) City has not responded within a reasonable period of time, but in any event not later than three (3) Business Days, Operator shall be entitled to undertake such Capital Expenditure, so long as such work is performed in conformance with Legal Requirements. Within a reasonable period of time after receipt from Operator of full and detailed documentation of any Capital Expenditure in the form of contracts, plans and specifications if any, and paid invoices, and other documentation reasonably requested by City, City shall reimburse Operator for Capital Expenditures undertaken by Operator pursuant to this Section 4.6.4(b), provided that Operator has complied with applicable state procurement and contracting statutes. Operator shall take such reasonable measures to notify City of emergency repairs that may be an insurable loss, with the reasonable exigencies of operational needs. "Emergency" as used in this Section 4.6 means circumstances that arise which, in Operator's reasonable opinion, either (i) would necessitate the cancellation of the next scheduled Event after Operator notifies City of such needed Capital Expenditure if the Capital Expenditures are not completed prior to the next scheduled Event, (ii) likely would lead to a substantial number of patron complaints if the next scheduled Event occurs without the Capital Expenditures having been completed, or (iii) likely would lead to complaints from the performers, stage hands, or other personnel that stage, manage, or produce an Event unless such Capital Expenditures are completed prior to the Event.

4.6.6 For purposes of interpreting this Section 4.6.6, but only this Section 4.6.6, the capitalized word "Repair" means "repair, maintenance, alteration, improvement, renewal or replacement." If (i) a Repair is necessary to keep the DPAC in accordance with the Operating Standards, (ii) the Repair is not explicitly defined in this Agreement as a Capital Expenditure or as Repairs and Maintenance, and (iii) Operator and City disagree as to whether it should be treated as a Capital Expenditure or as Repairs and Maintenance, then such Repair may be undertaken and the cost thereof paid out of Gross Revenues as if it were Repairs and Maintenance if Operator expenditures on repairs has not yet reached the Annual Cap on Repairs

and Maintenance; or paid by the City as if it were a Capital Expenditure if Operator expenditures on repairs equals or exceeds the Annual Cap on Repairs and Maintenance. Whichever Party undertakes such a Repair shall make available and subject to audit full and detailed documentation in the form of contracts, plans and specifications if any, and paid invoices upon completion of each such Repair and such other documentation as the other Party reasonably requests. As part of the Annual Independent Audit performed after the end of each Fiscal Year, the Independent Accountant shall determine whether such Repair should be treated as a Capital Expenditure or as Repairs and Maintenance. If the Independent Accountant determines that such Repair was treated as a Capital Expenditure and paid for by City when it should have been treated as Repairs and Maintenance and paid for as an Expense, the Financial Statements shall be adjusted to correctly reflect the cost as an Expense, and the Operator shall reimburse the City for 100% of the cost, at the time that the Operator also remits to the City its share of Operating Profit, or if there is no Operating Profit, at the time that the Operator would have been required to remit the Operating Profit share. If the Independent Accountant determines that such Repair was treated as Repairs and Maintenance and paid for as an Expense when it should have been treated as a Capital Expenditure and paid for by City, the Financial Statements shall be adjusted to remove the cost as an Expense, and the City will reimburse Operator for 100% of the cost, at the time that Operator remits to the City its share of Operating Profit, or if there is no Operating Profit, at the time that the Operator would have been required to remit the Operating Profit share. If the City owes the Operator for Capital Expenditures, the Operator shall have the right to withhold the amount due from the City's share of Operating Profits should they exist.

4.6.7 **Capital Expenditures as Obligation of City: Operator's Liability for Negligence.** Subject to Section 6.2.2, it is agreed that the cost of all Capital Expenditures shall be born solely by City, shall not be paid from Gross Revenues, and shall not be treated as an Expense; provided, however, that, without limiting the effect of the provisions of Section 6.2, it is agreed that Operator shall be solely financially responsible for the cost of all repairs, maintenance, alterations, improvements, renewals or replacements (including Capital Expenditures and Repairs and Maintenance), including fees and legal expenses, to the extent the cost results from negligence of Operator, its employees or independent contractors.

4.6.8 **City's Liability for Negligence.** Without limiting the effect of the provisions of Section 6.2, it is agreed that City shall be solely financially responsible for the cost of all repairs, maintenance, alterations, improvements, renewals or replacements (including Capital Expenditures and Repairs and Maintenance), including fees and legal expenses, to the extent the cost results from negligence of City, its employees or independent contractors.

4.6.9 **Guaranties and Warranties.** Operator acknowledges receipt of copies of all guaranties and warranties relating to the Project in City's possession or control. Operator shall see that all work done to or in the DPAC that is the Operator's responsibility includes obtaining guaranties and warranties that are consistent with industry standards and shall use all reasonable efforts to enforce all such guaranties or warranties. City shall cooperate with Operator in such efforts. During the guaranty or warranty period, Operator shall maintain equipment in accordance with the terms of the guaranty or warranty including, if necessary, the negotiation, execution and administration of maintenance contracts as set forth in Section 4.6.10 below. Operator shall see that all guaranties, warranties, service contracts, and licenses for which it is

responsible pursuant to this Section 4.6.9 are placed in the name of the City, or if placed in the name of the Operator, are assignable to the City.

#### 4.6.10 **Operator's Maintenance Responsibilities.**

(a) **Routine Maintenance.** Operator shall be responsible for performing day-to-day routine maintenance for the DPAC as an Expense in connection with its obligations to maintain the DPAC in accordance with the Operating Standards. This includes, among other things, performing periodic visual inspections of the DPAC and its equipment and components, including HVAC, plumbing and electrical equipment, building finishes, building automated systems, the roof, and the building envelope. Operator will have discretion in determining the frequency of performing the periodic visual inspections, subject to its obligation to maintain the DPAC in accordance with the Operating Standards. The Operator may use the Preventative Maintenance Plan as a guide for making the routine inspections described herein.

(b) **Preventative Maintenance.** Operator shall be responsible for performing the preventative maintenance tasks described in the Preventative Maintenance Plan. These Preventative Maintenance tasks shall not be considered as Repairs and Maintenance and shall be treated as an Expense, except to the extent the Preventative Maintenance Plan requires Operator to perform Repairs and Maintenance as a result of performing the Preventative Maintenance tasks. The Parties agree that the portion of the Preventative Maintenance Plan under the section entitled "Building Fit and Finish" is included within the Preventative Maintenance Plan for the limited purpose of identifying certain areas and components of the DPAC the Operator will include on a regular basis within the visual inspections described in Section 4.6.10(a). Therefore, the Operator shall not be required to follow the suggested frequencies stated under the Building Fit and Finish section of the Preventative Maintenance Plan, and the Operator only needs to report to the City any damage or other issues it finds to the Building Fit and Finish if such damage or other issues are material and significant and are above and beyond the ordinary wear and tear that can be expected for a performing arts center. In addition, the Parties further agree that if any tasks included in the Preventative Maintenance Plan do not contain any frequency, then Operator need not perform that task.

(i) Operator will conduct the inspections required by the Preventative Maintenance Plan (PMP) and shall maintain records of such inspections for a period of time as reasonably required by the City's Department of General Services.

(ii) Operator and the City's General Services Department will conduct a monthly on-site meeting, unless the City's General Services Department and Operator agree to a different schedule, for the purpose of reviewing the PMP tasks and routine maintenance tasks performed during the monthly period and of conferring on any facilities PMP or other practical facility issues. The City may conduct a visual inspection of the DPAC during the monthly meeting(s), or at some other pre-scheduled time. Upon request, Operator shall provide copies of the records of inspections to the City at the City's cost. The City shall have the right to conduct periodic on-site audits and inspections of the all Preventative Maintenance Plan records maintained by the Operator.

(c) Operator shall at all times maintain DPAC equipment in accordance with manufacturer's specifications and standards, including, if necessary, negotiating, executing or causing to be executed in its own name or in the name and on behalf of City (as Operator determines), and administering service contracts and licenses for DPAC operations, including contracts and licenses for health and safety systems maintenance; electricity, gas, telephone, communication, cleaning, elevator and boiler maintenance; air conditioning maintenance; and other service contracts and licenses necessary to comply with the Preventative Maintenance Plan under terms and conditions which are customary in operating and maintaining similar performing arts halls of the DPAC's size and nature. Any contractors retained pursuant to this section 4.6.10(c) shall be bona fide service and repair contractor(s) who possess appropriate State licensure and factory certifications to perform maintenance services and shall be subject to City approval. There may be a regular property review process by the City, but neither the review process nor its findings shall relieve the Operator of its obligations. Operator shall see that all guaranties, warranties, service contracts, and licenses for which it is responsible pursuant to this section 4.6.10 are placed in the name of the City, or if placed in the name of the Operator, are assignable to the City.

(d) Operator acknowledges that the DPAC Preventative Maintenance Plan is the original work of a third party contracted by the City specifically for use at the DPAC. Operator further acknowledges the City has entered into a license agreement, which allows Operator to use the DPAC Preventative Maintenance Plan for the limited purpose of the DPAC. Operator agrees to use the DPAC Preventative Maintenance Plan solely to assist its operations at the DPAC and will indemnify and hold the City harmless if the City suffers damages as a result of Operator's misuse of the DPAC Preventative Maintenance Plan.

4.6.11 **Alterations, Fixtures, Personal Property.** Operator shall not mark, paint or drill into, or in any way mar or deface any part of the DPAC except on stage for theatrical purposes, or make any alterations or improvements, without the prior written consent of the City. Without obtaining the City's consent, the Operator may install fixtures when appropriate to the operation of the DPAC. Any such painting, alterations, and installation must be done in accordance with the Operating Standards. Operator may, prior to the expiration of the Term of this Agreement, remove from the DPAC any of Operator's fixtures that the Operator may have installed pursuant to this section 4.6.11, whether affixed or not; provided, however, that any damage done to the DPAC by the installation or removal of such fixture will be repaired as an Expense, regardless of the cost of such repair, provided, however, that any damage done to the DPAC by the removal of any fixtures by the Operator related to contract termination shall be repaired at Operator's sole cost, and not as an Expense. Any fixtures or personal property remaining in the DPAC after the expiration of the Term shall be the property of City.

#### **4.7 Improvements.**

4.7.1 The Parties have agreed that certain repairs and maintenance and Improvements are necessary to maintain the DPAC Operating Standards and therefore have agreed that the City will complete the following items in accordance with the schedule indicated below:

(a) The City will replace the carpet of the DPAC no later than August 31, 2018. In replacing the carpet, the City will equal or exceed the specifications described in Exhibit F.

(b) The City will replace the seats in the DPAC no later than August 31, 2020. In replacing the seats, the City will use a seat that meets or exceeds the seat specifications provided in Exhibit G.

(c) The City and Operator agree that the DPAC will likely require replacement and/or improvements to most, if not all, of the acoustical and lighting systems by August 31, 2022, which equipment is listed in Exhibit H. Although the Parties cannot predict the precise performance standards and specifications for acoustical and lighting systems that may be available 8 or 9 years from today, the Parties agree to consult with each other to identify and to agree no later than March 15, 2021 upon the lighting and acoustical equipment that needs to be purchased and installed to maintain the DPAC lighting and acoustical systems at a level consistent with the DPAC Operating Standards. The City will purchase and install the replacement lighting and acoustical equipment by August 31, 2022.

4.7.2 If the City materially breaches its obligations as described in this section 4.7, Operator will have the right to make the Capital Expenditures and Improvements specified herein; provided, however, that Operator must abide by all Legal Requirements, if applicable. If Operator proceeds with all or some of the work, Operator will be entitled to use Gross Revenues to pay for the cost of the Improvements and to reimburse Gross Revenues from future City FF Share and future City's share of Operating Profit.

4.7.3 Operator acknowledges that the City is negotiating with the property owner of Lot 5 concerning improvements the property owner desires to make to Lot 5, which improvements will likely affect the operations of the DPAC and will require a modification of the DPAC Site. Operator further acknowledges that the Operator and the City desire and have requested the owner of Lot 5 to include in the Lot 5 improvements certain facilities that will serve as Improvements to the DPAC: additional restrooms for the DPAC, an elevator for the DPAC, and approximately 3,686 square feet that Operator intends to use as a new location for the DPAC President's Club as well as a venue for other meetings and events (the "DPAC Annex Improvements"). If the City and the Lot 5 property owner reach agreement concerning the capital improvements, then City and Operator agree as follows:

(a) The definition of DPAC Site will be modified to include any additional facilities that will benefit the DPAC exclusively, and the parties will amend the Plans and Specifications and the FF&E List to include the additional facilities and all FF&E purchased for the additional facilities;

(b) The Operator will cooperate with the City as the City and the Lot 5 property owner enter into certain agreements that will, among other things, redefine property lines of the DPAC Site, eliminate the DPAC trash easement that encumbers Lot 5, and modify the paths of ingress and egress to the DPAC from the west;

(c) Any additional operating costs of operating the DPAC Annex Improvements will be an Expense, and Operator will pay any such Expenses out of Gross Revenues. The additional Expenses will include any rent or condominium association fees the City would be obligated to pay pursuant to its agreements with the Lot 5 property owner; provided, however, that such rent and condominium association fees shall not exceed \$110,000.00 per year during the first full year of occupancy of the DPAC Annex Improvements (upon request from the City, Operator shall make any payments required for rent or condominium association fees either directly to the Lot 5 property owner on behalf of the City or as a reimbursement to the City if the City makes such payments directly to the Lot 5 property owners);

(d) Operator will arrange for water, electrical and other utility services that the DPAC Annex Improvements will require;

(e) the rights and obligations of each party as defined in this Operator Agreement shall extend to the DPAC Annex Improvements, including, but not limited to, modifications to the Preventative Maintenance Plan to include Operator obligations to perform Preventative Maintenance tasks associated with DPAC Annex Improvements;

(f) Operator will cooperate with the City and with the Lot 5 property owner in developing a new trash and recycling disposal plan that will service the DPAC, which plan may include using new facilities to be constructed in a location off-site from the DPAC Site, and the Operator will include as an Expense the cost of transporting and disposing the DPAC trash and recycling to the new facilities;

(g) the City will pay for FF&E for the President's Club using the DPAC Facility Fund, provided, however, the City shall not be required to pay any more than Two Hundred Thousand and No/100 Dollars (\$200,000.00), and Operator shall pay for any costs that exceed \$200,000.00; and,

(h) there shall be no adjustment to the Management Fee for the assumption of DPAC Annex Improvements.

#### **4.8 Other Operator Rights and Responsibilities.**

4.8.1 **Event Ticketing.** Subject to City's obligation to provide box office computer systems hardware and software, Operator shall establish and manage an event ticketing operation in the DPAC, consistent with the Operating Standards, which shall include telephone, internet and window sales. All Events shall be required to exclusively use these services for ticket sales except for events or functions staged in the DPAC by business and civic groups that rent the DPAC for their private use. The Operator shall use its best efforts to ensure that the box office hours of operation are of sufficient quantity to ensure accessibility by potential DPAC patrons.

#### 4.8.2 **Event Concessions, Souvenirs and Catering.**

(a) To the extent the City has the authority to grant such exclusive right to control by contract, Operator shall have the exclusive right to control the sale of concession items, including refreshments, alcoholic and non-alcoholic beverages, candies, food, snacks, souvenirs (T-shirts, buttons, CDs, program books, etc.), and Event catering, if applicable, in connection with all Events taking place in the DPAC.

(b) Operator shall have the responsibility to establish and manage a first-class concession operation that offers concession items in connection with all Operator-provided Events taking place in the DPAC building or the DPAC Defined Area.

In carrying out its rights and responsibilities under this section 4.8.2, Operator shall have the exclusive right and responsibility to determine which concession items, if any, will be offered for sale and the nature of the catering, if any, that will be provided for each Event. This section is subject to Legal Requirements.

#### 4.9 **Sponsorships and Naming Rights Sponsorships.**

4.9.1 Subject to Section 4.9.2, Section 4.9.4 and Section 4.9.5, the Operator shall have the exclusive right to sell advertising, Sponsorship, and Naming Rights Sponsorships for the DPAC and the DPAC Plaza, including, but not limited to, Major Components and Minor Components of the DPAC Real Property. Except as provided in Section 4.9.2, revenues generated by the sale of advertising, Sponsorships, and Naming Rights Sponsorships will be included in Gross Revenues.

4.9.2 Operator and the City acknowledge that prior to the date of this Agreement the City had entered into certain agreements with Blue Cross Blue Shield of North Carolina, (“BCBSNC”), Robert D. Teer, Jr., (“Teer”), and Capitol Broadcasting Company, Incorporated (“CBC”) for Naming Rights Sponsorships of the atrium, the stage, and the DPAC Plaza, respectively, as well as other agreements for lessor Naming Rights Sponsorships (for Minor Components) all of which are listed in Exhibit I (collectively, referred to as the “Existing Naming Rights Agreements”). The City represents and warrants that Exhibit I represents the entire list of Existing Naming Rights Agreements. Operator and the City further acknowledge that, pursuant to Exhibit K of the Original Contract, the 1<sup>st</sup> Original Amendment, the 2<sup>nd</sup> Original Amendment, and sections 1 and 2 of the 5<sup>th</sup> Original Amendment, which are attached hereto as Exhibits J, K, L, and M, and incorporated herein by reference (the “Naming Rights Amendments”), the City and the Operator defined each Party’s rights and obligations in implementing the City’s Existing Naming Rights Agreements with BCBSNC, Teer, and CBC. The Parties agree to the following with respect to the Existing Naming Rights Agreements:

(a) The Existing Naming Rights Agreements shall continue in full force and effect until the expiration of the current terms of the Existing Naming Rights Agreements.

(b) Operator and City shall continue to be obligated to comply with the terms of the Naming Rights Amendments.

(c) The City shall retain all revenues generated by the BCBSNC, Teer, and CBC Existing Naming Rights Agreements and such revenues will not be included in Gross Revenues. The City shall continue to pay for any costs of fulfillment as specified in the Naming Rights Amendments.

(d) Upon expiration of each of the Existing Naming Rights Agreements, the Operator's exclusive rights described in section 4.9.1 will be expanded to include the portion of the DPAC Facility that is the subject of the expiring Existing Naming Rights Agreement.

#### 4.9.3 The City's Approval Rights of Signage for Naming Rights Sponsorships.

(a) The City shall have certain approval rights with respect to any signage that Operator proposes to offer to any sponsor of Sponsorships and Naming Rights Sponsorship of a Major Component or Minor Component of the DPAC, which approval rights the City shall not unreasonably withhold or delay. The City's approval rights will include the aesthetics of any signage that is proposed to be affixed to the DPAC, including the size, colors, and location and the manner with which such signage is to be affixed to the DPAC. Before soliciting any Naming Rights Sponsorship for Minor Components ("Minor Component List"), Operator shall provide to the City Manager a detailed list of physical elements of the DPAC Real Property for which the Operator wishes to solicit Naming Rights Sponsorships, including a general description of the types and/or categories of signage that may be used for the Minor Components. The City Manager must approve the Minor Components List before the Operator is authorized to solicit or secure Naming Rights Sponsorships for such approved Minor Components. Before executing any Naming Rights Sponsorship for Major Components, the Operator shall seek the City's approval of such items by providing to the City a written representation of the proposed signage and the manner of installation. The City Council must approve all Naming Rights Sponsorships for Major Components before the Operator may execute a Naming Rights Agreement for a Major Component.

(b) Subject to the City review and approval described in Section 4.9.3(a) above, the City will have the right to identify individual or entity names and/or types of goods and services that it does not want to be associated with Naming Rights Sponsorship of a Major Component or Minor Component of the DPAC, which right the City shall exercise reasonably and consistent with the practices of other First Class performing arts venues in the United States of America. By way of example, the City has deemed beer and alcoholic beverages as prohibited, and the Operator agrees to abide by this prohibition. The City and Operator will maintain between them a list of prohibited goods and services (the "Prohibited List"). The City will have the right to propose modifications to the Prohibited List each Fiscal Year by providing to Operator written notice of any proposed modifications by October 15. Any such modification will be effective as of July 1 of the following Fiscal Year and shall not apply to restrict or modify any Naming Rights Sponsorships that exist as of the effective date for the new or modified Prohibited List. If the City does not provide any such written notice by October 15, then Operator must abide by and will have the right to rely on the Prohibited List that existed as of October 15 of that Fiscal Year.

(c) Except for approval of the Minor Components List and the restrictions maintained on the Prohibited List, the City will have no additional right to approve any signage that the Operator proposes to offer to a naming rights sponsor of Minor Components.

(d) The City will have no right to approve any Sponsorship agreements unless the Sponsorship agreement also includes a Naming Rights Sponsorship. The City acknowledges that some Sponsorship agreements will provide to the sponsor a signage opportunity in the DPAC to allow the sponsor to promote its affiliation with the DPAC or DPAC program. The Parties agree that this type of Sponsorship agreement does not involve a Naming Rights Sponsorship and therefore will not require additional City approval. For example, if a company sponsors the Broadway series, this sponsorship will be deemed a Sponsorship and not a Naming Rights Sponsorship even if a sign is installed in the DPAC atrium that publicizes the company's sponsorship of the Broadway series. Or, if a company sponsors the President's Club program, this sponsorship will be deemed a Sponsorship and not a Naming Rights Sponsorship even if the sponsoring company's sponsorship of the President's Club program is recognized by a sign in, on, or about the President's Club lounge.

4.9.4 DPAC Name. The Parties agree to retain the name Durham Performing Arts Center, and the Operator shall market the DPAC using "DPAC" or "Durham Performing Arts Center."

4.9.5 The Operator shall not be allowed to engage in Naming Rights Sponsorship negotiations with Allscript, Time Warner Cable and Red Hat prior to March 1, 2014.

**4.10 Duke University Sponsored Events at the DPAC.** Subject to availability as determined by, and in the discretion of, the Operator, and for up to three (3) Days per Year, the Operator shall allow Duke University to use the DPAC for Duke University sponsored and ticketed Event(s) free of the basic Facility Rental fee normally charged by the Operator. The term "ticketed Event(s)" means Event(s) for which the general public or others must pay for a ticket to attend the subject Event. The Operator shall assume all ticketing responsibilities for the subject Duke University sponsored Event(s). The Operator shall coordinate with Duke University regarding ticket issuance and distribution requirements. The three Days of use may be divided into separate Days for separate Events, provided that all necessary Event set-up, breakdown and performances for all proposed Event(s) does not extend beyond the three Days allocated for use by Duke University. In other words, if a particular Event requires one day for set up, one day for breakdown, and one day for the performance, all 3 allotted Days shall be used. Operator may charge Duke University for other administrative and operating expenses normally charged to holders of Events at the DPAC, including, but not limited to, equipment rental, usher and concessions operations and DPAC ticketing operations.

## 5. FINANCIAL TERMS

### 5.1 Potential Operating Deficits;

Except to the extent that (a) Force Majeure events and acts prevent Operator from holding Events safely and in compliance with Legal Requirements, and (b) except to the extent that City breaches its obligations under this Agreement to make Capital Expenditures that are necessary and which prevent the Operator from Holding Events, Operator shall guarantee all annual Operating Deficits for the DPAC for the duration of the Term. If Operator terminates this Agreement because of City's material breach of this Agreement, the preceding sentence does not require Operator to guarantee Operating Deficits that accrue after the termination. If there is an Operating Deficit in the operation of the DPAC during the Term, Operator shall continue to fulfill all of its obligations in this Agreement and shall not look to the City for additional money to make up any of the Operating Deficit. For instance, if for any reason Gross Revenues are less than the cost borne by Operator to maintain and operate the DPAC as required and to perform all of its other obligations under this Agreement, Operator shall not be entitled to receive any money from the City except whatever money the City is required to pay under this Agreement.

### 5.2 Management Fee.

5.2.1 The Operator shall earn a management fee for providing the services described in this Agreement (the "Management Fee"). During the 2013-14 Fiscal Year, the Management Fee shall be One Hundred, Fifty-Two Thousand, Eighty-One and No/100 Dollars (\$152,081.00), which the Operator may pay itself in in twelve (12) equal monthly installments, in arrears.

5.2.2 The Management Fee shall increase in each succeeding Fiscal Year by the greater of four percent (4%) or the CPI Index.

5.2.3 Management Fee payments shall be treated as an Expense during the Fiscal Year in which any Management Fee payments are made.

5.2.4 Operator will pay other then-current Expenses prior to paying itself the monthly Management Fee. If Gross Revenues are not adequate to pay all of some of the Management Fee and all other Expenses, then the Operator will pay any portion of the Management Fee for which Gross Revenues are available (after first paying other Expenses), and any unpaid Management Fee will be deferred until such time as Gross Revenues are available to pay some or all of the deferred Management Fees.

### 5.3 Centralized Services.

5.3.1 The Operator will be paid a Centralized Services Fee for providing Centralized Services for the benefit of the DPAC. The Centralized Services Fee shall be treated as an Expense.

5.3.2 The Centralized Services Fee will be in an amount to reimburse Operator for its estimated costs in providing the Centralized Services. Operator shall fully account for Centralized Services charges in each Operating Budget. Operator shall ensure that Centralized Services charges represent a fair allocation for Centralized Services charges provided by Operator out of its corporate offices.

5.3.3 The Centralized Services Fee shall not exceed the Centralized Services Fee Annual Cap unless the City approves any such excess in advance and in writing, which approval the City Manager may grant or deny in his or her absolute discretion on behalf of the City. The Centralized Services Fee Annual Cap will increase by three percent (3%) per Fiscal Year.

5.4 **Operating Profit.**

5.4.1 Operator shall retain any Operating Profit in the DPAC operating account until the final Annual Independent Audit has been completed. Operator shall make any distributions of Operating Profit to the City and to itself within ten (10) working days after Operator provides the final Annual Independent Audit to the City in accordance with section 5.7.

5.4.2 Until the Fiscal Year commencing on July 1, 2014, Operating Profit as determined by the final Annual Independent Audit shall be split sixty percent (60%) to Operator (“Operator Share”) and forty percent (40%) to City (“City Share”).

5.4.3 As of July 1, 2014, the City and Operator will split Operating Profit as follows:

<u>Operating Profit</u>	<u>City Share</u>	<u>Operator Share</u>
\$ 0 to \$2,000,000	40%	60%
\$2,000,001 to \$2,300,000	30%	70%
\$2,300,001 to \$3,000,000	40%	60%
\$3,000,001 and above	20%	80%

By way of example, if for a given Fiscal Year the total Operating Profit is \$4,000,000.00 the distribution of Operating Profit share would be as follows:

<u>Operating Profit Ranges for \$4,000,000</u>	<u>City Share</u>	<u>Operator Share</u>
\$ 0 to \$2,000,000	\$800,000	\$1,200,000
\$2,000,001 to \$2,300,000	\$90,000	\$210,000
\$2,300,001 to \$3,000,000	\$280,000	\$420,000
\$3,000,001 and above	\$200,000	\$800,000
<b>Total Distribution:</b>	<b>\$1,370,000</b>	<b>\$2,630,000</b>

5.5 **Operating Budget.** Operator shall exclusively manage the day-to-day operations of the DPAC. The Operating Budget shall be the responsibility of the Operator and funded from Gross Revenues, provided that the preceding clause does not limit section 5.1 (potential Operating Deficits). A copy of the Operating Budget for the ensuing Fiscal Year shall be provided by the Operator to the City for informational purposes not less than sixty (60) days before the end of the prior Fiscal Year.

5.6 **Facility Fee.**

5.6.1 (a) Operator shall charge the Facility Fee on each paid ticket on Events staged in the DPAC exclusive of events or functions staged in the DPAC by business and civic groups that rent the DPAC for their private use. The Facility Fee shall be \$3.00 until June 30, 2018, and, if the FF Conditions (iii)-(v) are satisfied, \$3.50 for the remainder of the Term. In addition, and provided the FF Conditions are satisfied, and provided the City determines in its reasonable discretion that the City FF Share and the City's DPAC Other Revenue are likely to be insufficient to satisfy its projected Capital Expenditures obligations under the Agreement into the reasonably foreseeable future (regardless of any remaining term or potential of any renewal periods), as reflected in the DPAC Capital Expenditure Projection Schedule, the City may increase the Facility Fee. For the purpose of this Section, the "FF Conditions" means (i) no single increase in the Facility Fee will be more than \$0.50 per ticket; (ii) there had been no increase in the Facility Fee during the previous ten (10) years, (iii) the City continues to maintain the DPAC Facility Fund as required by this Agreement and has used the funds in the DPAC Facility Fund in a manner consistent with Section 5.11.2, (iv) the City has contributed into the DPAC Facility Fund one hundred percent (100%) of the City FF Share throughout the Term, and (iv) the City has during the five (5) years preceding the date of the proposed increase in the Facility Fee contributed one hundred percent (100%) of the City's share of Operating Profit to the DPAC Facility Fund.

(b) Notwithstanding the foregoing FF Conditions, the City and Operator acknowledge and agree that either party may recommend to the other an increase or decrease in the Facility Fee if the then-existing circumstances materially cause the Facility Fee to appear inadequate or excessive. Some examples of what might be viewed as a material change in circumstances are: the capital requirements of the DPAC are substantially or materially greater than that projected in the DPAC Capital Expenditures Projection Schedule or the Facility Fee is materially higher than other similarly situated competitive facilities and the difference is material enough to impair the ability of Operator to attract Events or to sell tickets.

5.6.2 Operator shall treat fifty percent (50%) of the Facility Fee (that is, \$1.50 through June 30, 2018, and \$1.75 for the remainder of the Term) as Gross Revenue. Operator shall treat and remit the remaining fifty percent (50%) of the Facility Fee to the City for the City to deposit the City FF Share into the DPAC Facility Fund. If at any time the City fails to contribute the entire City FF Share into the DPAC Facility Fund, the Operator shall give notice to the City of its failure to contribute to the DPAC Facility Fund and demand that the City correct or restore any such resulting deficiency to the DPAC Facility Fund within ninety (90) days of receipt of notice from the Operator. If the City fails to correct or restore the DPAC

Facility Fund deficiency, the Operator shall have the right to reduce the City Share of Operating Profit by an amount equal to the DPAC Facility Fund deficiency.

5.6.3 Notwithstanding anything in this definition to the contrary, nothing in this definition shall prevent the Operator from charging any other surcharges on tickets for Events. All such other surcharges shall be treated as Gross Revenues and shall not be subject to section 5.6.1.

5.6.4 If the City assesses or levies a ticket tax, Facility Fee, or surcharge that exceeds the amounts provided in Section 5.6.1 with the resulting effect that such excessive ticket tax, Facility Fee, or surcharge causes an increase in the economic benefits of this Agreement to the City to the detriment to the Operator, the City will agree to enter into good faith negotiations with the Operator for an amendment of this Agreement to adjust other financial terms of this Agreement in a way to restore the economics for each party to that which is contemplated by this Agreement.

#### 5.7 **Financial Reporting; Annual Independent Audit.**

5.7.1 Operator shall provide to the City by August 10 of each calendar year an unaudited profit and loss statement for the previous Fiscal Year. City recognizes and acknowledges that any such report will be preliminary in nature and likely will require adjustment in the ensuing weeks as Operator compiles and delivers to the City the Annual Independent Audit. Operator also shall provide to the City at the same time a summary of the number and types of Events during the previous Fiscal Year and a listing of the audience size per Event.

5.7.2 Operator shall present to the City, within one hundred, twenty (120) days after the end of each Fiscal Year, a draft Annual Independent Audit. The Parties shall have thirty (30) days thereafter to review and comment. If neither Party provides comments for the Independent Accountant within that 30-day review and comment period, then the draft Annual Independent Audit shall be considered the final Annual Independent Audit. If either Party makes such comments, then the Operator shall present the final Annual Independent Audit to the City no later than thirty (30) days from the end of the 30-day review and comment period. The cost of each Annual Independent Audit shall be treated as an Expense. Any additional audit work (not required as part of the Annual Independent Audit pursuant to other sections of this Agreement) will be paid for solely by the requesting Party. The City's communications to the Auditor will be done through the Operator rather than directly to the Auditor, Notwithstanding the preceding sentence, the City shall be entitled to communicate directly with the Auditor regarding inquiries and clarifications regarding the Annual Independent Audit.

#### 5.8 **Confidentiality of Financial Information.**

5.8.1 The Operator represents to the City that certain financial information provided by the Operator to the City may be considered trade secrets, and that the publication of such information may cause substantial and irreparable harm to the Operator. In particular, the Operator represents to the City that the following specific types of financial information constitutes trade secrets information: revenues and expenses, or any components of revenues or

expenses, and the calculation of Operating Profit. The Operator understands and acknowledges the City desires on occasion to report to the citizens of Durham as to the financial performance of the DPAC and how much the City may collect as a result of either the City FF Share or the City Share of Operating Profit. Notwithstanding the provisions of this Section 5.8 or the Legal Requirements, the Parties agree that the City shall be allowed to disclose to the public the contents of the Operator's Annual Independent Audit report required by Section 5.7. The City may also disclose to the public financial information as to the total amount of the City FF Share or the City Share of Operating Profit or any other City financial or budgetary information related to City expenses and revenues from the DPAC.

5.8.2 Subject to Section 5.8.1, the City agrees to make reasonable efforts to hold in confidence any financial information, including financial results, reported or provided by the Operator to the City, so long as such information meets the definition of confidential information pursuant to the North Carolina Public Records Act and the Operator designates the information as "confidential" or "trade secret" at the time of disclosure to the City.

5.9 **Right to Offset.** To the extent that the Operator claims in good faith that the City owes the Operator money under the Operating Agreement or under any agreement between the Operator and the City to put into effect naming rights agreements with respect to the DPAC, the Operator shall have the right to withhold, pending resolution of those claims, payments that are due to the City.

5.10 **Adjustment to Gross Revenues.** Notwithstanding any provision in this Agreement to the contrary, in the event City materially breaches this Agreement (following any applicable cure period) including a material City breach of its obligations under this Agreement to timely make a Capital Expenditure, the losses of revenue, if any, sustained by Operator as a result of any such breach shall be included in the Gross Revenues for the applicable time period when calculating the Operating Deficit or Operator's share of the Operating Profit, as the case may be.

5.11 **DPAC Facility Fund.**

5.11.1 City will maintain a DPAC Facility Fund for the exclusive benefit of the DPAC Property.

5.11.2 (a) The DPAC Facility Fund shall be used by the City solely for DPAC-related costs incurred as part of the City's fulfillment of its obligations under this Agreement, which are Capital Expenditures, Improvements, any costs incurred by the City for repairs and maintenance as a result of such costs exceeding the Annual Cap on Repairs and Maintenance, the City's direct costs in fulfilling its obligations under the Existing Naming Rights Sponsorship Agreements, and the debt service arising out of any issuance of future debt for Capital Expenditures, Improvements or new construction that benefit the DPAC exclusively. Notwithstanding the above, the City may also use the DPAC Facility Fund to pay for other costs the City may incur in the future that are directly and solely related to the DPAC that are designed to cause a financial benefit to the DPAC that exceeds the cost to the DPAC. The City may not

use the DPAC Facility Fund to pay for any administrative costs or any allocations of management or overhead costs.

(b) The funds in the DPAC Facility Fund at all times shall be owned by the City. The funds in the DPAC Facility Fund shall remain in the DPAC Facility Fund until the funds are used as permitted by this Section 5.11 or until the termination or expiration of this Agreement.

5.11.3 The City will contribute one hundred percent (100%) of the City FF Share into the DPAC Facility Fund.

5.11.4 (a) The City also shall contribute a certain portion of the City's DPAC Other Revenue into the DPAC Facility Fund after the City first uses the City's DPAC Other Revenue to pay any Debt Service Deficiency, which portion will be determined based upon a reasonable determination by the City as to the amount of funding that will be required to fund its continuing obligations under this Agreement, including Capital Expenditures and Improvements for the ensuing ten (10) years as anticipated by the DPAC Capital Expenditure Projection Schedule.

(b) The City has developed the DPAC Capital Expenditure Projection Schedule, and the Parties acknowledge the projections anticipate that approximately \$6 Million of Capital Investment will be required during the period beginning with Fiscal Year 2017 and ending during Fiscal Year 2022. The Parties further acknowledge that it is necessary during the years prior to that time to generate an adequate balance in the DPAC Facility Fund because neither party can project with a high degree of confidence that the amount of the City FF Share and the City's DPAC Other Revenue generated on an annual basis during those years will be adequate to pay for the Capital Expenditures and the City's Debt Service Deficiency. Therefore, the City has determined, and does agree that it will contribute one hundred percent (100%) of the City's share of DPAC Other Revenue, after the City deducts an amount necessary to pay the City's Debt Service Deficiency, into the DPAC Facility Fund from the Effective Date through June 30, 2021; provided that, if, during any three-year period, the average of the amount that the City's share of Other Revenue exceeds the City's Debt Service Deficiency, is greater than Eight Hundred Thousand and No/100 Dollars (\$800,000.00) (the "Annual Facility Fund Cap"), then the City shall have the discretion to elect not to contribute any amounts that exceed the Annual Facility Fund Cap into the DPAC Facility Fund.

(c) In the City's discretion, the City may elect to use the DPAC Facility Fund to account for and hold the occupancy tax revenue the City receives from the County for the DPAC and to account for and pay the City's annual debt service for DPAC debt; provided, however, that the City may not use any Facility Fee proceeds deposited into the DPAC Facility Fund to pay any Debt Service Deficiency for facility debt existing as of the Effective Date.

5.12 **State or Local Taxes on the Sale of Tickets.** After the Effective Date, if either the State of North Carolina or any local government assesses one or more types of tax that applies to the sale of tickets to DPAC performances by Operator (e.g. sales taxes) (hereinafter referred to as the "Ticket Tax Assessment"), and if City receives all or any portion of the revenue

generated by the Ticket Tax Assessment, then Operator shall be entitled to reduce any amounts owed to City from City's share of Operating Profit by an amount equal to Fifty Percent (50%) of the amount received by City from City's portion of the Ticket Tax Assessment. The foregoing shall not apply unless the amount of the Ticket Tax Assessment, either individually or in the aggregate, exceeds Three Percent (3%). The Facility Fee described in section 5.6 shall not be considered a Ticket Tax Assessment.

## **6. INSURANCE AND INDEMNIFICATION**

### **6.1 Insurance. Insurance Coverages.**

6.1.1 By executing this Agreement, the Operator covenants, certifies, and warrants that the following insurance coverages shall be in place and in full force and effect by the first day on which Operator will either, in connection with this Agreement, occupy any portion of the DPAC or the DPAC Site or begin operations on any portion of the DPAC or the DPAC Site.

(a) Workers' Compensation-Insurance shall cover statutory benefits for employees; for owners, partners, and officers; and for relatives who perform work in connection with this Agreement. Insurance shall include Part B, Employer's Liability, coverage at a minimum limit of \$1,000,000.

(b) Commercial General Liability (primary) Insurance shall include the following minimum coverages: premises/operations, products/completed operations, broad form property damage, contractual liability, independent contractors, personal injury, host/liquor liability, and medical payments.

(c) Personal injury coverage shall include libel, slander, defamation, false arrest and malicious prosecution.

Medical payments coverage shall be in an amount not less than \$5,000 per person per accident. An alternative to the preceding sentence, Operator shall have the option to self-fund the equivalent of \$5,000 per person per accident in medical payments coverage, with payments to be without regard to fault. These payments will be treated as Expenses.

The City shall be named as additional insured, and an original of the endorsement to effect the coverage must be attached to the certificate (if by blanket endorsement, then agent may so indicate in the general liability section of the certificate, in lieu of an original endorsement).

(d) Excess/Umbrella Liability-A total coverage limit of \$10,000,000 per occurrence (combined single limit) is required. Limits may be reached by any combination of primary and excess insurance.

(e) Automobile Liability Insurance-Insurance shall cover owned, hired, or non-owned vehicles; combined single limit of \$1,000,000 per accident.

(e1) Crime insurance--Operator shall maintain crime insurance to cover employee dishonesty and loss of money and securities.

(f) Property and Equipment-City and Operator shall each insure its own property and be responsible for uninsured losses of its property.

City shall maintain insurance sufficient to repair or replace the principal buildings constituting the DPAC Real Property and City-owned contents in that building that are necessary to operations. Such insurance shall be not less than the same that the City maintains for its properties other than the DPAC and contents of the DPAC. The City's current insurance coverage is accurately shown in "Exhibit O". Such coverage is subject to change from time to time throughout the Term, but must still satisfy the City requirements for insurance as set forth herein.

Operator shall maintain insurance sufficient to repair or replace Operator's contents in the DPAC or the DPAC Site that are necessary to operations of the DPAC. Such insurance shall be not less than the same that Operator maintains for its other such property.

(g) Business Interruption-Operator shall insure for loss due to business interruption. Such insurance is intended to cover losses of Operating Profit caused by an insured loss. This insurance may take different forms and be in different amounts, and upon request of either party, shall be reviewed by City and Operator to maintain adequate coverage.

(h) Periodic Review of Insurance-Upon request of either party, City and Operator shall review insurance for adequate coverage and limits.

#### 6.1.2 Other Requirements.

(a) Operator agrees to name the City as additional insured on their General Liability and Excess/Umbrella insurance policies. Such insurance is limited to the interests and commitments arising from this Agreement.

(b) Insurance shall be provided by companies approved to do business in the State of North Carolina with a Best rating of A or better.

#### 6.1.3 Evidence of Insurance.

(a) Operator Shall Furnish Evidence of Insurance. Prior to occupying any portion of the DPAC or the DPAC Site or performing work which creates a liability exposure for City, Operator shall obtain the required liability insurance and provide evidence of same to City. Property and business interruption insurance shall be obtained no later than when exposure to loss first arises. When the DPAC is open to the public, or when Operator engages in

commitments that create loss exposures for Operator or City in accordance with this Agreement, Operator shall be fully in compliance with requirements regarding insurance.

Prior to the actual exposure to loss that arises from this Agreement, Operator shall provide to City a certificate showing liability and workers' compensation insurance as required by this Agreement. In addition, Operator shall submit a letter from the broker through which insurance is obtained confirming that the broker has reviewed the insurance requirements in this Agreement and that such insurance is available to Operator immediately upon request to bind the insurance.

When the insurance is bound, Operator shall provide to City a binder evidencing the coverage, and within seven (7) days thereafter, shall provide to City a certificate of insurance.

(b) City Shall Furnish Evidence of Insurance. Prior to Operator's occupancy of any portion of the DPAC or the DPAC Site, City shall provide evidence to Operator that City has obtained the insurance required by this Article 6. Property and business interruption insurance that City is required to obtain pursuant to this Article 6 shall be obtained no later than when exposure to loss first arises.

#### 6.1.4 Duties of Operator. Operator shall:

(a) promptly cause to be investigated all accidents and claims for injury or damage relating to the operation and maintenance of the DPAC or DPAC Site, as they become known to Operator, and promptly report to City any such incident that is material;

(b) promptly cause to be investigated all damage to or destruction of the DPAC or DPAC Site, as it becomes known to Operator, and promptly report to City any such incident that is material, together with the estimated cost of repair thereof.

(c) promptly prepare any and all reports required by any insurance company as the result of an incident mentioned in this Section 6.1.4, acting as the agent for all other named insureds, additional insureds, mortgagees, and loss payees;

(d) promptly retain on behalf of City and with the prior written approval of City, all consultants and experts, including architects, engineers, contractors, accountants, and attorneys, as needed, to assist in analyzing any loss or damage, determining the nature and cost of repair, and preparing and presenting any Proofs of Loss or claims to any insurers, unless such loss is due to claims resulting from a structural defect, or unless City elects to assign an independent adjuster or appraiser for this purpose, in which case Operator shall cooperate fully with the adjuster or appraiser. Such costs of retaining the consultants and experts referred to in this subsection (d) will be a Capital Expenditure to be borne by the City;

(e) before any Person other than the City rents or uses any portion of the DPAC for a performance, function or other activity, including rehearsals, see that said Person

has obtained certificates of insurance demonstrating coverages customary for third party usage of similar performing arts halls of the DPAC's size and nature; and

(f) maintain in effect for the DPAC a bona fide safety program to include employees and the public, and maintain an emergency evacuation plan for the DPAC.

6.1.5 For losses greater than \$25,000, City at its option may engage the services of an independent adjuster or appraiser to evaluate the loss and recovery potential, and Operator shall promptly notify City of such losses. In particular, losses involving objects covered by boiler and machinery insurance, such as compressors, motors, electrical panels, chillers, and boilers, must be inspected by the insurer prior to repairs. Upon learning of the loss, Operator shall see that the office or persons designated by City is contacted immediately regarding the process to be used for emergencies and for losses involving objects covered by boiler and machinery insurance.

6.1.6 The City shall name the Operator as an additional insured for City-sponsored events on the DPAC Plaza on the City's excess liability insurance.

## 6.2 **Indemnification.**

### 6.2.1 Definitions. In this Section 6.2 –

"Claims" are claims, losses, damages, liabilities, fines, penalties, fees, royalties, costs, demands, actions, suits, and judgments of any kind or nature whatsoever, whether at law or in equity, including court costs and reasonable attorney's fees assessed as part of any of said items.

"Management, Use, or Operation of the DPAC" includes the obligations of City or Operator, as applicable, under this Agreement, and City's or Operator's (as applicable) performance and attempted performance of its respective obligations under this Agreement.

"Persons Connected with Operator" are Operator's officers, members, managers, board members, employees, agents, contractors, subcontractors of all tiers, and invitees, but excluding the City.

"Persons Connected with City" are City's officers, officials, employees, agents, contractors, subcontractors of all tiers, and invitees, but excluding Operator.

"Volunteers" are individuals performing services related to the DPAC (including direct services and serving as directors or trustees) who do not receive for those services (i) compensation other than a reasonable reimbursement or allowance for expenses he or she actually incurred, or (ii) anything of value greater than \$500.00 per calendar year.

6.2.2 **Indemnification by Operator.** "City Indemnitees" are defined as City, its officers, officials, employees, agents, Volunteers, and independent contractors, but excluding Operator. Operator shall indemnify, defend, and hold harmless the City Indemnitees from and

against all Claims arising out of, relating to, or resulting from acts or omissions by Operator or Persons Connected with Operator arising out of, relating to, or resulting from the Operator's obligations with respect to Management, Use or Operation of the DPAC or the DPAC Plaza. Without limiting the preceding sentence, and as an additional obligation of Operator, it is agreed that Operator shall indemnify, defend, and hold harmless the City Indemnitees from and against all Claims made by independent contractors, including subcontractors of all tiers, where the independent contractor was engaged by Operator to perform work on or in the DPAC, except to the extent the Claim is the result of a negligent or wrongful act or omission by City. In applying the preceding sentences of this Subsection 6.2.2, the parties recognize that Operator's obligations with respect to the DPAC Plaza are governed by Section 4. In performing its duties under this Section 6.2.2, Operator shall defend City Indemnitees with legal counsel reasonably acceptable to City.

6.2.3 **Indemnification by City.** "Operator Indemnitees" are defined as Operator, its members, directors, officers, employees, agents, Volunteers, and independent contractors, but excluding City. City shall indemnify, defend, and hold harmless the Operator Indemnitees from and against all Claims arising out of, relating to, or resulting from acts or omissions by City or Persons Connected with City arising out of, relating to, or resulting from the City's obligations with respect to Management, Use or Operation of the DPAC or the DPAC Plaza. Without limiting the preceding sentence, and as an additional obligation of City, it is agreed that City shall indemnify, defend, and hold harmless the Operator Indemnitees from and against all Claims made by independent contractors, including subcontractors of all tiers, where the independent contractor was engaged by City to perform work on or in the DPAC, except to the extent the Claim is the result of a negligent or wrongful act or omission by Operator. In performing its duties under this Section 6.2.3, City shall defend Operator Indemnitees with legal counsel reasonably acceptable to Operator.

(a) It is agreed that City's duty to indemnify, defend and hold harmless Operator Indemnitees shall not apply to Claims to the extent that such Claims are directly related to Operator's negligence or Operator's failure to make repairs to the DPAC Plaza which have been brought to Operator's attention.

(b) Notwithstanding the indemnification provisions of Sections 6.2.2 and 6.2.3, the City shall indemnify, defend, and hold harmless the Operator Indemnitees from and against all Claims arising out of, relating to, or resulting from the obligations of the Operator in operating the DPAC Light Sculpture in compliance with Section 4.4.2.

6.2.4 **Notice and Cooperation.** City shall give Operator prompt notice of all Claims for which indemnification is sought by City Indemnitees pursuant to Section 6.2.2, and City shall give Operator full and complete cooperation in the defense or settlement of all such Claims. Operator shall give City prompt notice of all Claims for which indemnification is sought by Operator Indemnitees pursuant to section 6.2.3, and Operator shall give City full and complete cooperation in the defense or settlement of all such Claims.

6.2.5 **Consent to Settlement.** When Operator is required to indemnify, defend, and hold harmless City Indemnitees with respect to a Claim under this Section 6.2, City

shall not unreasonably withhold, condition, or delay its consent to any settlement thereof proposed by Operator under which City Indemnitees would not be required to pay any money or undertake any liability. When City is required to indemnify, defend, and hold harmless Operator with respect to a Claim under this Section 6.2, Operator shall not unreasonably withhold, condition, or delay its consent to any settlement thereof proposed by City under which Operator would not be required to pay any money or undertake any liability.

6.2.6 **Limitation of Liability for Another's Negligence.** Nothing in this Section 6.2 shall require Operator to indemnify or hold harmless City Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of City Indemnitees. Nothing in this Section 6.2 shall require City to indemnify or hold harmless Operator Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of Operator Indemnitees.

6.2.7 **Other Provisions Separate.** This Article is in addition to and shall be construed separately from any other indemnification provisions that may be in this Agreement.

6.2.8 **Survival.** This Section 6.2 shall remain in force despite termination of this Agreement with respect to acts and omissions occurring before termination of this Agreement (whether by expiration of the term or otherwise) and termination of the services of Operator under this Agreement.

## 7. ASSIGNMENT OR SALE, RADIUS RESTRICTION

### 7.1 **Right of First Refusal.**

7.1.1 City shall not, at any time during the Term, sell the DPAC to a competitor of Operator without first giving notice of the proposed sale to Operator. Such a notice is referred to in this Article as "Notice of Sale." For purposes of this Subsection 7.1.1, the DPAC is sold when the deed of conveyance of the fee simple ownership in the DPAC executed by the City as grantor is recorded in the office of Register of Deeds for Durham County. The Notice of Sale shall include the complete terms of the proposed sale and shall include a photocopy of the offer, agreement, or other writing containing the terms.

7.1.2 For a period of thirty (30) days after the City gives Notice of Sale to Operator, Operator shall have the right to give notice to City of Operator's exercise of Operator's right to purchase the DPAC on the same terms, price, and conditions as set forth in the Notice of Sale. The giving of the notice of exercise shall constitute the making of a contract, between City and Operator, to sell and to buy the DPAC in accordance with the Notice of Sale and this Article. If Operator does not give the notice of exercise within the 30-day period, there shall be a conclusive presumption that Operator has elected not to exercise Operator's right under this Section 7.1.

7.1.3 If Operator does not give such notice of exercise, and thereafter, modifications to the proposed sale are made that would change by more than 5% the sale price,

or the amount of the down payment, or the rate of interest that may be paid by the buyer, or would postpone the date of closing by ninety (90) days or more, it is agreed that the modified proposed transaction shall be considered a new proposed sale for purposes of this Section 7.1, and Subsection 7.1.1 shall apply to that new proposed sale. If Operator does not give such notice of exercise, and thereafter, modifications are made that do not change by more than 5% the sale price, or the amount of the down payment, or the rate of interest that may be paid by the buyer, or would postpone the date of closing by less than ninety (90) days, it is agreed that the modified proposed transaction shall not be considered a proposed sale for purposes of this Section 7.1, and Subsection 7.1.1 and Subsection 7.1.2 shall not apply to it. The rate of interest is changed by less than 5% if the new interest rate is between 1.05 times and 0.95 times the originally proposed interest rate. If the DPAC is not sold pursuant to any given Notice of Sale by the closing date allowed by the Notice of Sale, including postponements, if any, totaling less than ninety (90) days, and the Person that proposed to buy the DPAC under that lapsed or breached Notice of Sale proposes again to buy the DPAC, Section 7.1.1 shall apply to the new proposal.

7.1.4 Upon Operator's request, City shall execute and deliver to Operator a Memorandum of the rights granted by this Section 7.1 in a form that can be recorded in the Durham County Register of Deeds.

7.1.5 Time is of the essence with respect to all matters in this Article.

7.1.6 Without limiting the rights of lien holders under any other section of this Agreement, it is agreed that the rights of Operator under this Section 7.1 shall be subject and subordinate to the liens of all deeds of trust affecting title to the DPAC, and to all deeds of trust and liens imposed to provide security for debt incurred for the financing of the construction of the DPAC and for any and all refinancings of that debt that do not extend the final maturity of the debt.

7.2 **Continuance of Agreement after Sale of DPAC.** If the DPAC is conveyed to any Person other than Operator, or if for any reason City ceases to be the DPAC's owner and Operator does not become the owner, this Agreement shall continue in effect, so that Operator shall continue to perform under the Agreement, and the new owner(s) shall have the rights and obligations of City under the Agreement that accrue after the transfer of title in the DPAC. City shall not be liable for any obligations of owner that accrue after the transfer of title in the DPAC, but any obligations of City that accrued before the transfer of title shall remain City's obligations. Where this Agreement specifies that the City Council or City Manager has a particular function but that function is intended only in order to carry out the City's position as owner of the DPAC, the new owner will assign such functions to the persons, entities, or agencies as it deems appropriate.

7.3 **No Assignment without City Consent.** The Operating Agreement and the Operator's rights or obligations under it shall not be assignable, or pledged as security for any debt, by Operator except at the discretion of the City. An assignment of the Operating Agreement shall be deemed to occur in the event Operator transfers 50% or more of its ownership.

7.4 **Radius Restriction.** Neither the City nor Operator may develop or operate a competing theater of between 2000 - 3500 seats within a 50-mile radius of the DPAC. Notwithstanding the radius restriction, the City of Greensboro city limits is exempted from this restriction.

## 8. MISCELLANEOUS PROVISIONS

8.1 **Oversight Committee.** The City Council will appoint a five-person advisory Oversight Committee to monitor the implementation of the Operating Agreement with the Operator. The City Administration will provide staff to the Oversight Committee. The committee will possess professional skills in the key areas of arts and culture, business, finance, facility management and community relations. One member of the Committee shall be a member of the Cultural Master Plan Advisory Committee. Operator shall report in person to the Oversight Committee at least once every six months on the status of DPAC operations. The Oversight Committee will provide a written report to the City after each such presentation by the Operator. The Oversight Committee will have the following responsibilities and will report on them per the above requirement:

8.1.1 Whether the Operator is meeting the provisions in this Agreement.

8.1.2 The areas of this Agreement that are not being met, the reasons for that non-compliance, and the committee's recommendations to satisfy those provisions in the future.

8.1.3 Recommendations for improvement in the operation of the DPAC.

8.1.4 Recommendations for improvements in the coordination with other cultural facilities and organizations in Durham, including the Carolina Theater, the Arts Council and St. Joseph's Foundation.

8.2 **Operator Internship Program.** Operator shall make best efforts to work with the Colleges of Arts and Sciences at Duke University and North Carolina Central University through their respective theater departments to provide opportunities for their students to gain valuable job experiences through the Operator's internship program focusing in the areas of theater technical, operations, marketing, box office and administrative services.

8.3 **Compliance with Plans and Specifications.** The City shall provide the Operator with facilities substantially in compliance with the Plans and Specifications approved by City and Operator, subject to any amendments thereto. Any proposed changes to the Plans and Specifications, as they exist at the time of the execution of this Agreement, shall be subject to the approval of both the City and the Operator, which approval shall not be unreasonably withheld by either party. City and Operator shall exercise this right of approval in an expeditious manner so as to avoid delays in construction.

8.4 **[Intentionally Omitted]**

8.5 **City Access: Right of Inspection.** City shall have the right to access and to inspect the DPAC at reasonable hours with reasonable notice to Operator.

8.6 **Equal Opportunity/Equity Assurance.** The provisions of this Section 8.6 shall apply only to contracts of \$100,000 or more.

8.6.1 **General Requirements.**

(a) Operator shall meet with the Director of the City's Department of Equal Opportunity/Equity Assurance (EO/EA) annually to discuss potential contracting opportunities for goods and services for small disadvantaged businesses certified by the City (SDBEs).

(b) The Director may set project specific goals as the Director determines to be generally applicable under Article III of Chapter 18 (as amended from time to time) in City contracting.

(c) In all solicitations for which goal(s) are established, Operator will not enter into contracts for goods or services without first soliciting bids from SDBEs and requiring bidders to submit a Participation Plan to meet the goal(s). Bidders must state their SDBE participation in a manner like that required by bidders on contracts to be awarded by the City. If a bidder fails to achieve the goal(s), the bidder must submit documentation to Operator of its good faith efforts to achieve the goal(s) within two working days after bid opening. Operator shall take all reasonable actions needed to see that bidders comply with this subsection. Operator shall make bids and documentation of good faith efforts available to the Director.

(d) Operator will notify the Director of EO/EA of upcoming contracting opportunities to ascertain the availability of SDBEs that might be capable of supplying the pertinent goods or services. Each such notice shall be given in a manner and schedule so that the SDBEs will have a reasonable amount of time to respond.

(e) Operator will provide annual reports using the attached form, "Exhibit P" (CITY OF DURHAM SUBCONTRACTOR QUARTERLY RECORD OF PAYMENT REPORT), on all contracting activity to the Director for reporting to the City Council. The reports are due the last day of April (for January - March), July (for April - June), October (for July - September) and January (for October - December).

(f) Operator shall comply with all applicable provisions of Article III of Chapter 18. The failure of Operator to comply with that chapter shall be a material breach of contract which may result in the rescission or termination of this Agreement and/or other appropriate remedies in accordance with the provisions of that chapter, this Agreement, and State law. The Participation Plan submitted by Operator in accordance with that chapter is binding on Operator.

(g) Section 18-59(f) of Article III of Chapter 18 provides, in part, "If the City Manager determines that [Operator] has failed to comply with the provisions of [this

Agreement], the City Manager shall notify [Operator] in writing of the deficiencies. [Operator] shall have fourteen (14) days, or such time as specified in [this Agreement], to cure the deficiencies or establish that there are no deficiencies." It is stipulated and agreed that those two quoted sentences apply only to [Operator's] alleged violations of its obligations under Article III of Chapter 18 and not to [Operator's] alleged violations of other obligations.

8.6.2 **Remedies.** The Parties recognize that the City considers the obligations of Operator under Subsection 8.6.1 above to (1) further an important policy of the City for the benefit of the public; (2) be material to this Agreement, and (3) be part of the reason that the City is willing to enter into this Agreement. The Parties recognize that the City will suffer financial loss if Operator does not comply with its obligations under Subsection 8.6.1. The Parties recognize that the City could terminate this Agreement if Operator materially breaches its obligations under Subsection 8.6.1, and that such a termination would result in monetary losses to the City. The Parties also recognize the delays, expense, and difficulty to both Parties involved in proving or contesting the amounts of those losses. Instead of requiring proof of those amounts, it is agreed that Operator shall be liable for and shall pay the City the amount specified herein as liquidated damages, and not as a penalty. The amounts stated as liquidated damages are agreed to be reasonable estimates of the City's losses and expenses for delays, including administrative costs. The City may collect liquidated damages by retaining moneys otherwise due Operator in the amount of such damages, and by other legal means. Nothing in this Subsection 8.6.2 shall reduce the City's rights under other provisions of this Agreement, any applicable statutes or ordinances, or any applicable principle of law. In its discretion, the City may waive some or all liquidated damages against Operator. Such a waiver is valid only if done by a signed writing that refers specifically to this Subsection 8.6.2 and specifically mentions "liquidated damages." If the City seeks an injunction to require compliance with any portion of Subsection 8.6.1, Operator hereby agrees to waive any contention that the injury from the noncompliance would not be irreparable or that the City has an adequate remedy at law.

The damages shall be as follows:

For Operator's failure to comply with subsection 8.6.1(a): \$200 for the first two weeks of noncompliance; \$300 for the second two weeks of noncompliance; and \$200 for each subsequent week.

For Operator's failure to comply with Subsection 8.6.1 (c), except for failure to make bids and documentation of good faith efforts available to the Director: One percent of the amount of the payments made by Operator under each contract entered into in violation of Subsection 8.6.1(c), unless the goals were met or good faith efforts were made with respect to that contract.

For failure to make bids and documentation of good faith efforts available to the Director as required by Subsection 8.6.1(c): \$100 for the first week of noncompliance; \$200 for the second week; and \$300 for each subsequent week.

For noncompliance with Subsection 8.6.1(d): One percent of the amount of the payments made by Operator under each contract entered into in violation of Subsection 8.6.1(d), unless the goals were met or good faith efforts were made with respect to that contract.

For noncompliance with Subsection 8.6.(e): \$200 for the first two weeks of noncompliance; \$300 for the second two weeks of noncompliance; and \$200 for each subsequent week,

8.6.3 **Definitions.** In this document, words, including "SDBE" and the "Director" shall have the meaning assigned in Article III of Chapter 18, unless the context requires otherwise. "Article III of Chapter 18" means Article III of Chapter 18 of the Durham City Code (Equal Business Opportunities Ordinance).

8.7 **Liveable Wage.** In the event of a finding by the City Manager or a judicial officer that any Service Worker has been paid less than the compensation to which the Service Worker is entitled under the City's liveable wage ordinance, the Operator shall make restitution to the Service Worker for the amount due. The Operator shall also pay liquidated damages to the City in the amount of Fifty Dollars (\$50.00) per day for each employee so underpaid, provided, however, that these damages shall not be assessed for wage underpayment violations to any individual which amount to a total of less than One Dollar (\$1.00) in any payroll period. Should a Service Worker be found to have been discriminated against for seeking to enforce the provisions of the City's liveable wage ordinance, and if the Service Worker has been terminated from employment, he or she shall be reinstated upon an order to do so from the City Manager or a judicial officer. A flyer stating the City of Durham's Liveable Wage amount shall be posted at the DPAC in a location easily seen by all employees. The Operator agrees to comply with applicable provisions of the ordinance, including its severability provisions. Definitions of terms in this section 8.7 are stated in the ordinance. "Service Contractor" means the Operator and all of its subcontractors.

8.8 **Non-Waiver.** No action or failure to act by either Party shall constitute a waiver of any of its rights or remedies that arise out of this Agreement, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

8.9 **Severability.** Any provision of this Agreement that is prohibited or unenforceable shall be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining portions of this Agreement.

8.10 **Notices.** All notices and other communications required or permitted by this Agreement, unless otherwise provided for in this Agreement, shall be in writing and shall be given either by personal delivery, fax, or certified United States mail, return receipt requested, addressed as follows:

To the City:  
Thomas Bonfield  
City Manager  
City of Durham  
101 City Hall Plaza  
Durham, NC 27701  
Fax (919) 560-4949.

With a copy to:  
Director of General Services  
City of Durham  
2011 Fay Street  
Durham, NC 27704  
Fax (919) 560-4196

To the Operator:  
Durham Performing Arts LLC  
c/o Norbert Mongeon  
220 Weybosset Street  
Providence, RI 02903  
Fax (401) 421-5767

With a copy to:  
Elizabeth Myers, Esq.  
Hinckley, Allen & Snyder LLP 50 Kennedy Plaza,  
Suite 1500  
Providence, RI 02903  
Fax (401) 277-9600

To Guarantors:  
Norbert Mongeon  
Vice President  
Professional Facilities Management, Inc.  
220 Weybosset St.  
Providence, RI 02903  
Fax (401) 421-5767

With a copy to:  
Elizabeth Myers, Esq.  
Hinckley, Allen & Snyder LLP  
50 Kennedy Plaza,  
Suite 1500  
Providence, RI 02903  
Fax (401) 277-9600

And:  
Jack Meyer  
JN America LLC  
1450 Broadway 6th Floor  
NY, NY 10018  
Fax (212) 840-3326

With a copy to:  
David Malkin, Esq.  
Law Offices of David Malkin  
950 Third Avenue, 32nd Floor  
New York, NY 10022

8.11 **Change of Address. Date Notice Deemed Given.** A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this Agreement shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

8.12 **Performance of Government Functions.** Nothing contained in this Agreement shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

8.13 **Compliance with Law.** In performing all of their respective obligations under this Agreement, the Operator and the City shall comply with all Legal Requirements.

8.14 **City Policy.** THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE ANT) AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

8.15 **EEO Provisions.** In this section, "the Contractor" means the Operator, and "this Contract" means this Agreement. During the performance of this Contract the Contractor agrees as follows:

8.15.1 The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Contractor shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Contractor shall post in conspicuous

places, available to employees and applicants for employment, notices setting forth these EEO provisions.

8.15.2 The Contractor shall in all solicitations or advertisement for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap.

8.15.3 The Contractor shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding.

8.15.4 In the event of the Contractor's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this Contract, in whole or in part, and the City may declare the Contractor ineligible for further City contracts.

8.15.5 Unless exempted by the City Council of the City of Durham, the Contractor shall include these EEO provisions in every purchase order for goods to be used in performing this Contract and in every subcontract related to this Contract so that these EEO provisions will be binding upon such subcontractors and vendors.

8.16 **No Third Party Rights Created.** This Agreement is intended for the benefit of the City and Operator and not any other person.

8.17 **Modifications. Entire Agreement.** A modification of this Agreement is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless the City Manager or a deputy or assistant City Manager signs it for the City. This Agreement contains the entire agreement between the parties pertaining to the subject matter of this Agreement. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this Agreement.

8.18 **City's Manager's Authority.** To the extent, if any, the City has the power to suspend or terminate this Agreement or the Operator's services under this Agreement, that power may be exercised by City Manager or a deputy or assistant City Manager without City Council action.

8.19 **Principles of Interpretation.** In this Agreement, unless the context requires otherwise: The singular includes the plural and the plural the singular. The pronouns "it" and "its" include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The word "shall" is mandatory.

8.20 **North Carolina Right to Work.** The parties hereto agree and understand that the law in effect as of the date of this Agreement provides that North Carolina is a right to work state

and that the City is prohibited from collective bargaining. The parties agree that changes in those laws shall not affect the obligations of the parties to comply with this Agreement.

8.21 **Parking Voucher Program for DPAC Season Ticket Holders.** In order to promote and incentivize the use of the DPAC by season ticket holders, the City will accept parking vouchers from season ticket holders for DPAC Broadway Series Stage Productions under the following conditions:

(a) **Distribution of City Parking Vouchers to Season Ticket Holders.** The Operator shall create no more than one city parking voucher to be valid for use at certain city parking garages, as described herein, to be used at an Event of a DPAC Broadway Series Stage Production, for each Person that purchases one or more Season Ticket(s) to the DPAC Broadway Series Stage Productions. A “Season Ticket” is defined as one ticket to each Event of each DPAC Broadway Series stage production. It is estimated that a typical DPAC Broadway Series will include a total of six to seven stage productions stage productions. For each Person that purchases more than two Season Tickets for the DPAC Broadway Series, the Operator may distribute an additional city parking voucher to said Person for each pair of Season Tickets purchased in excess of two Season Tickets.

By illustration, if a Person purchases 1, 2 or 3 Season Tickets, Operator may provide only one city parking voucher to that Person. If, however, a Person purchases 4 Season Tickets, Operator may provide two city parking vouchers to that Person. If, however, a Person purchases five Season Tickets, Operator may provide only two city parking vouchers to that Person, but if the same Person purchased six Season Tickets, Operator may provide three city parking vouchers to that Person.

(b) **Use of City Parking Vouchers.** Each City parking voucher that is distributed by the Operator shall identify the DPAC Broadway Series stage production and Event date for which the city voucher is valid. The city parking voucher shall state on its face that it is valid at the following city operated garages, on a first-come, first-serve basis, available spaces permitting: (1) the North Deck Parking Garage (corner of W. Pettigrew Street and Julian Carr Street), (2) Corcoran Street Garage (corner of S. Corcoran Street and Ramseur Street), and (3) Church Street Garage (at N. Church Street and E. Main Street). Each city parking voucher shall be valid on the date of the specified Event for use at the identified parking deck locations no more than 120 minutes before the specified Event and running continuously to 90 minutes after the Event. Upon arriving at one of the listed parking deck locations, the user of the city parking voucher may simply tender the city parking voucher to the parking attendant and use one parking space, as they are available.

(c) **City Parking Voucher Payment Procedure.** After the end of each subject Event for which city parking vouchers are used, the City shall directly, or through its parking management contractor, submit to the Operator the city parking vouchers that were collected from and used at the identified parking locations, including an invoice to the Operator for payment. Each invoice shall identify the number of city parking vouchers used and for which garage location. The City shall charge the Operator Twenty Five Percent (25%) of the city’s then-listed schedule of special event parking fees for the North Parking Garage and One Hundred

Percent (100%) of the city's then-listed schedule of special event parking fees for the Corcoran Street and Church Street Garages. If for example, the special event fee to park in a single space at the North Deck garage is \$4.00, the Operator shall be charged only \$1.00 for each city parking voucher used at that location. If the special event fee to park in a single space at the Corcoran Street and Church Street Garages is \$2.00, the Operator shall be charged \$2.00 for each city parking voucher used at those locations. The Operator shall reimburse the City within thirty (30) days of receipt of the invoice and used city parking vouchers.

**8.22 City Volunteer Program to Promote Performance Arts and Civic Duty.**

In order to promote opportunity for exposure to the performance arts to Durham citizens and encourage civic duty to the City, Operator agrees to establish, administer and manage a City DPAC Volunteer Program under the following conditions:

8.22.1 Operator shall have a written program for the establishment and operations of a City DPAC Volunteer Program. The program shall describe the purpose and objectives of the volunteer program, which shall include a description of the outreach efforts to be made to identify and attract Durham citizens that may benefit the most from participating in such a program. The program shall describe with sufficient detail the roles and civic duties of the volunteers including how the volunteers will be expected to assist guests at the DPAC with directions, checking of tickets and other guest assistance and services, and hours and frequency of service. Finally, the program shall also provide waiver forms, approved by the City Manager, as necessary to protect the City from any liabilities or claims associated with the work to be performed by the volunteers. The City Manager may elect to terminate the volunteer program at any time and in his or her sole discretion with sixty (60) days written notice. The services provided by the City DPAC volunteers shall be offered freely and without pressure or coercion, direct or implied, from Operator or the City. Operator agrees to cover volunteers under any DPAC Operating insurance policy as fully as if the volunteer were employed by the Operator. Additionally, the City DPAC volunteers are "Volunteers" as defined in section 6.2 and are subject to the indemnification provisions of section 6.2.

**8.23 Casino Clause.** Notwithstanding any other provision of this Agreement, and in particular Sections 3.1 and 3.5, Operator may elect to terminate this Agreement in the event a casino is constructed within seventy-five (75) miles of the DPAC, and the casino constructs a live performance venue with a seating capacity between 1,500 seats and 7,500 seats. For purpose of this Section 8.23, a "casino" is defined as a building(s) (excluding the associated live performance venue) that houses and is able to accommodate at least 500 patrons at one time and provides for multiple types of gambling activities. Operator must provide written notice to the City of Operator's desire to terminate this Agreement, which notice shall be effective one (1) year from the date Operator provides such notice. During the 12-month notice period, Operator shall continue to operate and manage the DPAC as provided by this Agreement. If this Agreement is terminated, Operator shall be entitled to operate the DPAC to satisfy any Event contract commitments that Operator had made prior to the effective date of termination as provided in Section 3.3.5.

## 9. GUARANTIES

9.1 **Consideration.** To induce the City to execute this Agreement, Professional Facilities Management, Inc., a corporation organized and existing under the laws of Rhode Island and JN America LLC, a limited liability company organized and existing under the laws of Delaware ("Guarantors") have agreed to enter into the obligations stated in this Article 9. In reliance in part upon those obligations, the City has agreed to execute this Agreement.

### 9.2 **Guaranty.**

9.2.1 Professional Facilities Management, Inc. guarantees to the City an amount equal to fifty percent (50%) of the total dollar amount of the sum of the following obligations of Operator under this Agreement, and JN America LLC guarantees to the City an amount equal to fifty percent (50%) of the total dollar amount of the sum of the following obligations of Operator under this Agreement:

(a) The obligation to guaranty, pursuant to Section 5.1, all Operating Deficits that accrue before termination of this Agreement, regardless of which party terminates this Agreement and regardless of the cause of the termination.

(b) The obligation to reimburse the City for Repairs and Maintenance amounts that the Operator is required to pay pursuant to Section 4.6.6.

(c) The obligation to pay to the City the City's share of Operating Profit, but only for Operating Profits that accrue before termination.

(d) The obligation to pay to the City the City FF Share (pursuant to Section 5.6) that Operator is required to collect before termination.

(e) The obligation to guarantee all Operating Deficits that accrue after termination of this Agreement but only if the termination is due to Operator's material breach of this Agreement, and the City is not in material breach of this Agreement. This obligation to guaranty in this Subsection 9.2.1(e) does not apply to the following that may accrue after termination or that may be required to be collected after termination: Operating Profits, Facility Fees, and the City FF Share. This obligation to guaranty in this Subsection 9.2.1(e) also does not apply to special and consequential damages due to Operator's material breach of this Agreement.

9.2.2 In making a claim against Guarantors under this Section 9.2, City agrees that it has a duty to mitigate its damages and losses with respect to said claims.

9.2.3 Before commencing legal action against Guarantors under this Section 9.2, City shall have obtained a non-appealable, final judgment against the Operator which has not been paid.

9.2.4 All litigation by City against Guarantors under this Section 9.2 shall be commenced in federal court in the Eastern or Middle District of North Carolina if jurisdiction

can be obtained in that court for a decision on the merits. If jurisdiction cannot be obtained over the Guarantors in those federal courts for a decision on the merits, such litigation may be brought in the North Carolina General Court of Justice, and Guarantors hereby consent to jurisdiction over their persons in the General Court of Justice, with venue in Durham County. In all litigation against Guarantors, Guarantors shall be barred and stopped from litigating any issues, claims, and causes of action (including defenses, setoffs, and counterclaims, and including questions of law and questions of fact) that could properly have been, or that were, raised and determined in the litigation between City and Operator, other than issues, claims, and causes of action (including defenses, setoffs, and counterclaims, and including questions of law and questions of fact) that are applicable solely to Guarantors and not to Operator. The statute of limitations that the Guarantors may raise in defense to any claim by the City shall be tolled until the entry of the non-appealable, final judgment against the Operator on that claim.

9.2.5 The guarantees of the two Guarantors are several and not joint.

9.3 **This Article Intended for Benefit of City.** This Article 9 is intended for the benefit of the City and not any other Person.

9.4 **Modifications.** A modification of this Article is not enforceable against the City unless the City Manager or a deputy or assistant City Manager signs it for the City.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed themselves or by their respective duly authorized agents or officers.

*[SIGNATURES APPEAR ON FOLLOWING PAGES]*

**CITY OF DURHAM**

ATTEST:

\_\_\_\_\_

By: \_\_\_\_\_

Preaudit Certification:

**DURHAM PERFORMING ARTS LLC**

By JN America LLC, a Delaware limited liability company, manager of Durham Performing Arts LLC

By \_\_\_\_\_  
Nicholas Scandalios, Manager of JN America LLC

**ACKNOWLEDGMENT BY DURHAM PERFORMING ARTS LLC**

Place of acknowledgment: \_\_\_\_\_ County, State of \_\_\_\_\_

I certify that Nicholas Scandalios personally appeared before me this day in the aforesaid county and state, acknowledging to me that (1) he is a manager of JN America LLC; (2) JN America LLC is a duly organized and existing Delaware limited liability company; (3) JN America LLC is a manager of Durham Performing Arts LLC; (4) Durham Performing Arts LLC is a duly organized and existing Delaware Limited Liability Company; (5) he voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Notary Public

Print or type name of Notary Public: \_\_\_\_\_

My commission expires: \_\_\_\_\_

**DURHAM PERFORMING ARTS LLC**

By Professional Facilities Operations, LLC, a Rhode Island limited liability company,  
manager of Durham Performing Arts LLC

By \_\_\_\_\_  
James Lynn Singleton, Manager of Professional Facilities Operations, LLC

**ACKNOWLEDGMENT BY DURHAM PERFORMING ARTS LLC**

Place of acknowledgment: \_\_\_\_\_ County, State of \_\_\_\_\_

I certify that James Lynn Singleton personally appeared before me this day in the aforesaid county and state, acknowledging to me that (1) he is a manager of Professional Facilities Operations, LLC; (2) Professional Facilities Operations, LLC is a duly organized and existing Rhode Island limited liability company; (3) Professional Facilities Operations, LLC is a manager of Durham Performing Arts LLC; (4) Durham Performing Arts LLC is a duly organized and existing Delaware Limited Liability Company; (5) he voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Notary Public

Print or type name of Notary Public: \_\_\_\_\_

My commission expires: \_\_\_\_\_

**PROFESSIONAL FACILITIES MANAGEMENT INC.**

By \_\_\_\_\_  
James Lynn Singleton, President of Professional Facilities Management Inc.

**ACKNOWLEDGMENT BY PROFESSIONAL FACILITIES MANAGEMENT INC.**

Place of acknowledgment: \_\_\_\_\_ County, State of \_\_\_\_\_

I certify that James Lynn Singleton personally appeared before me this day in the aforesaid county and state, acknowledging to me that (1) he is President of PROFESSIONAL FACILITIES MANAGEMENT, INC.; (2) PROFESSIONAL FACILITIES MANAGEMENT, INC. is a duly organized and existing Rhode Island corporation; (3) he voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Notary Public

Print or type name of Notary Public: \_\_\_\_\_

My commission expires: \_\_\_\_\_

**JN AMERICA LLC**

By \_\_\_\_\_  
Nicholas Scandalios, Manager

**ACKNOWLEDGMENT BY JN AMERICA LLC**

Place of acknowledgment: \_\_\_\_\_ County, State of \_\_\_\_\_

I certify that Nicholas Scandalios personally appeared before me this day in the aforesaid county and state, acknowledging tome that (1) he is a manager of JN AMERICA LLC; (2) JN AMERICA LLC is a duly organized and existing Delaware limited liability company; (3) he voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Notary Public

Print or type name of Notary Public: \_\_\_\_\_

My commission expires: \_\_\_\_\_

# **Exhibit A**

**(DPAC Site)**

**Exhibit B**  
**(DPAC Plaza)**

# **Exhibit C**

**(Plans and Specifications; FF&E)**

# **Exhibit D**

## **(Preventative Maintenance Plan Consolidated PMP Task Checklist)**

# **Exhibit E**

**(Non-Profit Rates)**

# **Exhibit F**

**(Carpet Specifications)**

**Exhibit G**  
**(Seat Specifications)**

# **Exhibit H**

**(List of Acoustical and Lighting Equipment)**

# **Exhibit I**

**(Existing Naming Rights Agreements)**

# **Exhibit J**

**(1<sup>st</sup> Original Amendment)**

# **Exhibit K**

**(2<sup>nd</sup> Original Amendment)**

# **Exhibit L**

**(5<sup>th</sup> Original Amendment)**

# **Exhibit M**

**(Exhibit K to Original Contract)**

# **Exhibit N**

**(DPAC Capital Expenditure Projection Schedule)**

# **Exhibit O**

**(Current City Insurance Coverages)**

# **Exhibit P**

**(City of Durham Subcontractor Annual Record of  
Payment Report)**