

## **RESTAURANT MANAGEMENT AGREEMENT**

This Management Agreement ("this Agreement") is made and entered into as of \_\_\_\_\_, \_\_, 20\_\_, between \_\_\_\_\_ LLC a Minnesota limited liability company with its principal offices located at \_\_\_\_\_ ("Owner") and MHC LLC a Minnesota limited liability company, with its principal offices located at 345 St. Peter Street, Suite 2000, St. Paul, MN 55102 ("Manager").

In consideration of the promises, covenants and other good and valuable consideration stated in this Agreement, the receipt and sufficiency of which is hereby acknowledged, Owner and Manager agree as follows:

### **ARTICLE ONE DEFINITIONS**

In addition to the terms that are defined throughout this Agreement, other terms used in this Agreement shall have the meanings set forth in the Appendix of Definitions that is attached to this Agreement.

### **ARTICLE TWO ENGAGEMENT OF MANAGER**

On the terms and subject to the conditions of this Agreement, Owner hereby engages Manager as Owner's exclusive provider and manager of the food and beverage operations for the Facility, and Manager hereby undertakes and agrees to perform, either directly or through its Affiliates or other subcontractors, the services set forth in this Agreement.

### **ARTICLE THREE SERVICES TO BE PERFORMED BY MANAGER**

SECTION 3.1 - MANAGEMENT BY MANAGER: On and after the Commencement Date, Manager shall have the responsibility and duty to direct, supervise, manage, and operate the Facility and to determine the programs and policies to be followed in connection with operation of the Facility. However, Manager agrees to consult with and obtain the approval of Owner on all major programs and policy matters which could substantially affect the type, character, or financial performance of the Facility.

SECTION 3.2 - DUTIES OF MANAGER: Without limiting the generality of Section 3.1, Manager, at Owner's sole cost and expense, shall be responsible for and is hereby granted exclusive authority to do the following:

Manager shall employ, supervise, pay and discharge all employees and personnel necessary, desirable, and appropriate for the operation of the Facility. Each person so hired shall be an "at-will" employee of Manager, and all expenses associated with such employee shall be borne by Owner.

All employment policies and procedures, including, without limitation, salaries, wages, evaluations, overtime, vacations, leaves of absence, employee benefits, and procedures shall be determined by Manager.

Manager shall, in its discretion, and at Owner's cost and expense, provide employees of the Facility with retirement and health insurance benefits that are substantially similar to the retirement and insurance benefits that Manager offers to Manager's employees at other facilities managed or owned by or under common control with Manager or its Affiliates.

The General Manager and other personnel hired to manage the Facility shall be reimbursed by Owner for all reasonable expenses, including business, entertainment, relocation, and travel expenses associated with the operation of the Facility.

Any personnel employed at the Facility may, at the discretion of Manager, be temporarily assigned to other properties operated by Manager or its Affiliates provided that such temporary assignment does not materially affect business operations at the Facility and provided that the Facility shall be reimbursed therefor by Manager, its Affiliates, or the property to which the employee was assigned at a rate of one hundred twenty percent (120%) of the employee's gross salary for the period of temporary assignment. That payment shall be full and final reimbursement to the Facility relating to the temporarily assigned employee's salary, withholdings, plan contributions, pension and retirement benefits, health insurance and other benefits, and the like.

- A. Supervise and maintain complete books and records in substantial accordance with the Uniform Account System in which there shall be properly recorded all receipts and disbursements in connection with the management and operation of the Facility.
- B. Negotiate leases, licenses, permits, and concession agreements incidental to the operation of the Facility. All such leases, licenses, or concession agreements shall be in Owner's name.
- C. To the extent funds are available or are made available by Owner for such purpose pursuant to the terms of this Agreement, keep the Facility and the Furniture and Equipment in good order, repair, and condition, including without limitation making necessary, desirable, or appropriate replacements, improvements, additions, and substitutions to the end that the Facility shall be maintained and adequately furnished, consistent with the standard of a First-Class Facility.
- D. Negotiate and enter into, on behalf of Owner, service contracts required in the ordinary course of business in operating the Facility, including without limitation contracts for electricity, gas, telephone, detective agency protection, waste management, vermin extermination, water, steam, cleaning, elevator and boiler maintenance, air conditioning maintenance, master television service, high speed internet service, laundry and dry cleaning, and other services that Manager deems advisable. All such contracts shall be in Owner's name.
- E. Retain, on behalf of Owner, accountants, lawyers or other professionals reasonably necessary in connection with or in furtherance of the performance of Manager's duties pursuant to this Agreement.

- F. Supervise and purchase, in Owner's name, all inventories, provisions, and operating supplies, which, in the normal course of business, are necessary, desirable, or appropriate to maintain and operate the Facility.
- G. Take such action at law or in equity, in the name of either Manager or Owner, which Manager shall deem necessary, desirable, or appropriate in connection with routine matters, such as, but not limited to, proceedings for collection of amounts due the Facility for services rendered, arising out of the normal course of the operation of the Facility. Manager may not bring any action or proceeding in connection with matters which are not routine or which do not arise during the normal course of the operation of the Facility without the prior consent of Owner. Owner shall have the right to join in all legal action or proceedings in which it is a named party or in which it either has a legal interest or would ultimately be responsible for payment of all or part of any damages claimed whether or not Owner has been named a party.

Any of the matters with respect to which Manager has been granted authority by this Agreement may, at Manager's sole and absolute discretion, be subcontracted to other entities or persons, including, without limitation, Manager's Affiliates.

**SECTION 3.3 – LIMITATION ON MANAGER'S AUTHORITY:** Except as permitted by the Annual Operating Budget, Manager may not, without the prior written consent of Owner, enter into any written contract or agreement on behalf of Owner which is to last for more than one (1) year from its commencement date or obligate Owner to an expenditure of more than Ten Thousand Dollars (\$10,000).

**SECTION 3.4 - OPERATION:** Manager shall operate the Facility and activities in such manner as is customary and usual in the operation of a First-Class Facility, including Supervisory Services, and shall provide such facilities and services at the Facility as are normally provided by managers of First-class Facilities. Manager shall have the right to operate the Facility or grant concessions with respect to any services customarily offered at First-class Facilities.

**SECTION 3.5 - BUDGETS:** Manager shall submit to Owner a proposed Annual Operating Budget for each Fiscal Year. The proposed Annual Operating Budget shall include estimates of revenues and any and all amounts needed for Capital Expenditures, Group Services, Operating Expenses, and Ownership Costs for the Fiscal Year in the format of the monthly operating statements referred to in Article Nine. Manager and Owner shall use their best reasonable efforts to promptly discuss, negotiate and approve the proposed Operating Budget. Manager shall not be liable to Owner for reasonable expenditures made by Manager in excess of any budgeted amounts in the Annual Operating Budget, provided that, such expenditures are made by Manager in good faith and within the exercise of its best professional judgment.

## **ARTICLE FOUR ADVERTISING AND SALES PROMOTION**

Manager shall be responsible for all day-to-day decisions related to the marketing program for the Facility, including without limitation all day-to-day decisions regarding advertising, rates, discounts, sales promotions, and the like. All costs and expenses of the marketing program shall be borne by Owner. Manager shall arrange for all advertising and promotion that Manager reasonably deems necessary, desirable, and appropriate for the successful operation of the Facility.

**ARTICLE FIVE  
OPERATING EXPENSES BORNE BY OWNER**

SECTION 5.1 - EXPENSES INCURRED BY OWNER: All Operating Expenses, Ownership Costs, Capital Expenditures, and all other expenses and deductions of whatever kind and nature arising out of the operation of the Facility shall be borne by Owner.

SECTION 5.2 - EXPENSES INCURRED BY MANAGER ON BEHALF OF OWNER: Everything done by Manager in the performance of its obligations pursuant to this Agreement and all expenses incurred by Manager pursuant to this Agreement shall be for and on behalf of Owner, and borne by Owner, except for services referred to in Sections 6.1 and 6.2, which, except as provided therein, shall be rendered and performed by Manager at Manager's expense.

SECTION 5.3 - DEBTS AND LIABILITIES TO THIRD PARTIES: All debts arising in the course of business for the Facility are and shall be the obligations of Owner, and except as otherwise provided in Section 19.1, Manager shall not be liable for any of such obligations by reason of its management, supervision, and operation of the Facility.

SECTION 5.4 - BONUS POOL BASED ON PERFORMANCE: In addition to regularly scheduled compensation, Manager may design a bonus plan to motivate and reward the individual personnel employed at the Facility for achieving predetermined operating results. Personnel directly involved in the management and performance of the Facility may participate in, and be paid from, such bonus pool, and the total cost of such bonus pool will be borne by Owner and paid from the Agency Account.

**ARTICLE SIX  
EXPENSES TO BE BORNE BY MANAGER**

SECTION 6.1 - SUPERVISORY SERVICES OF MANAGER: The Supervisory Services of Manager's officers, agents, or employees, other than those regularly or temporarily employed at the Facility, shall be provided by Manager at its own expense and not charged to Owner. All reasonable out-of-pocket disbursements and expenses incurred by Manager directly related to the management and operation of the Facility shall be paid by Owner.

SECTION 6.2 - SALARIES OF MANAGER'S OFFICERS: Owner shall not be charged with the salaries or wages of any officers of Manager or any of its Affiliates, except as otherwise specifically provided in this Agreement.

**ARTICLE SEVEN  
COMPLIANCE WITH LAWS**

SECTION 7.1 - COMPLIANCE BY OWNER: At Owner's cost and expense, Owner will comply with and abide by all laws, rules, regulations, requirements, orders, notices, determinations, and ordinances of any federal, state, or municipal authority, including, without limitation, state, and local liquor authorities.

SECTION 7.2 - RIGHT OF OWNER TO CONTEST OR POSTPONE COMPLIANCE: With respect to a violation of any item described in Section 7.1, Owner shall have the right to contest same and postpone compliance pending the determination of such contest, if so permitted by law and not detrimental to the operation of the Facility, but, in such event, Owner shall indemnify

Manager and hold it harmless with respect to and from any loss, cost, damage, or expense, including attorney fees, as a result thereof.

## **ARTICLE EIGHT BANK ACCOUNT AND DISBURSEMENT OF FUNDS - WORKING CAPITAL**

SECTION 8.1 - AGENCY ACCOUNT: All Working Capital furnished by Owner and amounts received by Manager in the operation of the Facility, including without limitation all Gross Sales, shall be deposited in the Agency Account. The Agency Account shall be maintained in Owner's name, in a bank selected by Manager and approved by Owner. Such monies shall not be commingled with the funds of Manager or Owner. Manager shall have sole signing authority with respect to the Agency Account and all funds deposited in the Agency Account.

SECTION 8.2 – DISBURSEMENT OF FUNDS: Manager shall pay all Capital Expenditures and all Operating Expenses, specifically including the fees payable to Manager pursuant to Articles Twelve and Fourteen of this Agreement, and all amounts due Manager pursuant to Articles Ten and Eighteen of this Agreement, from the Agency Account. Subject to the cash flow requirements of the Facility, Manager shall pay Ownership Costs and make Capital Expenditures from the Agency Account if and as specifically requested by Owner.

SECTION 8.3 - WORKING CAPITAL: Upon the execution of this Agreement, Owner and Manager shall agree on the initial "Working Capital" required for the Facility, and Owner shall deposit such amount in the Agency Account as initial Working Capital. Thereafter, Owner shall furnish Manager, from time to time, if and as required and requested in writing by Manager, funds in an amount to constitute sufficient Working Capital for the operation of the Facility. At the time the Annual Operating Budget is approved, Owner and Manager shall agree on the amount of Working Capital to be maintained by Owner during each Fiscal Year. Working Capital shall be replenished from Facility cash flow from time to time. If at any time such cash flow is insufficient to fund the required Working Capital amount, Owner shall, upon written request by Manager, promptly deposit the deficiency amount in the Agency Account.

SECTION 8.4 - WITHDRAWALS FROM BANK ACCOUNTS: Checks or other documents of withdrawal for the Agency Account shall be signed by one (1) or more authorized representatives of the Manager.

SECTION 8.5 – DISTRIBUTION OF FUNDS TO OWNER: As directed by Owner, and only to the extent that there are sufficient funds in the Agency Account to cover all other expenses and obligations described in this Agreement, including without limitation all Operating Expenses, Working Capital, Capital Expenditures, Management Fees, Incentive Fees and Termination Fees, Manager shall from time to time distribute excess funds to Owner.

## **ARTICLE NINE BOOKS AND RECORDS**

Manager shall keep full and adequate books of account and other records reflecting the results of operation of the Facility on an accrual basis, all in accordance with the Uniform Account System. The books of account and all other records relating to or reflecting the operation of the Facility shall be available to Owner and its representative's at all reasonable times for examination, audit, inspection, and transcription. Manager shall provide to Owner an unaudited operating statement reflecting revenues and expenses for each month during which Manager manages the Facility, and an unaudited balance sheet. Such statements shall be provided no

later than the last day of the following month. Upon any termination of this Agreement, and after payment to Manager of any and all monies due and owing to Manager pursuant to this Agreement, including without limitation any Management Fee, Incentive Fee and Termination Fee, all such books and records shall be turned over to Owner at the Facility. Following termination of this Agreement, Manager shall have no further responsibility to update or maintain the books and records. For a period of ninety (90) days following termination, all such books and records shall be available to Manager at all reasonable times for inspection, audit, examination, and transcription.

Owner shall be responsible for preparing and filing all applicable income tax returns.

## **ARTICLE TEN MANAGER NOT OBLIGATED TO ADVANCE FUNDS**

Manager shall not be obligated to advance any of its own funds for the maintenance and operation of the Facility or to or for the account of Owner, nor to incur any liability with respect to the Facility. However, if Manager shall have advanced any funds in payment of any necessary, desirable, and appropriate expenses reasonably related to, the maintenance and operation of the Facility, Owner shall promptly provide reimbursement to Manager upon demand. Owner shall immediately provide all funds disclosed by the Annual Operating Budget as required from Owner to operate the Facility on the date indicated for such provision in the Annual Operating Budget. Except in the case of funds covered by the preceding sentence, funds required for Working Capital (as described in Section 8.3) or emergency or unforeseen circumstances, Manager shall give Owner at least thirty (30) days' notice of any anticipated need for additional funds hereunder.

## **ARTICLE ELEVEN INSURANCE**

**SECTION 11.1 – OWNER OBLIGATION TO PROVIDE INSURANCE:** Owner shall provide and maintain, at Owner's cost and expense, insurance sufficient to furnish Owner and Manager reasonable and adequate protection in connection with the ownership, management, and operation of the Facility on an "all-risk" basis, including without limitation the following:

- A. General commercial liability insurance against claims for bodily injury, death or property damage occurring on, in or about the Facility and the adjoining streets, sidewalks and passageways, with primary limits of not less than one million dollars (\$1,000,000) combined single limit, and not less than One Hundred Thousand Dollars (\$100,000) with respect to property damage.
- B. Excess liability providing for a combined bodily injury, death and property damage occurring on, in or about the Facility and the adjoining streets, sidewalks and passageways, in limits of not less than Two Million Dollars (\$2,000,000).
- C. Liquor liability for not less than One Million Dollars (\$1,000,000).
- D. Such additional insurance as Owner reasonably deems appropriate and necessary to operate the Facility consistent with other First-Class Facilities, including employment practices liability insurance for not less than One Million Dollars (\$1,000,000).

All such insurance policies shall be issued by companies licensed to do business in the state where the Facility is located, which such companies shall have a Best's Rating of not less than "A+" (or equivalent rating if such rating system is no longer used). The deductible or self-insured retention under each such insurance policy shall not exceed Ten Thousand Dollars (\$10,000). All such policies shall provide that the same shall not be cancelled or modified without thirty (30) days prior written notice to the both Manager and Owner, and shall provide for the right of Manager at its option to pay any premium owing thereunder for the purpose of continuing coverage, and shall provide that such insurance shall not be impaired or invalidated by any act, failure to act or violation of declaration or condition in such policies by Owner.

**SECTION 11.2 – MANAGER NAMED AS INSURED:** All insurance shall be in the name of Owner. Manager shall be named as an additional insured on the general public liability policy through endorsements adequately protecting the interest of Manager, including, without limitation, provisions for at least thirty (30) days' written notice to Manager of cancellation or of any material change therein. Upon request, Owner shall provide Manager with certified copies of such insurance policies and shall furnish receipts for all premiums payable in connection therewith at least thirty (30) days prior to the due dates of such premiums.

**SECTION 11.3 – ENDORSEMENT:** All insurance provided and maintained by Owner pursuant to this Article Eleven shall specify an indemnification clause by endorsement naming Manager and Affiliates as additional insureds as follows:

"To protect, indemnify, and save harmless [Manager and Affiliates], its parent, subsidiaries, and Affiliates from and against any loss, damage, liability, or expense, including attorney fees, because of any obligation or loss or damage to person or property incurred or alleged to have been incurred or caused or alleged to have been caused by [Manager] and its affiliated entities, as well as their respective agents or employees, or by guests of the Facility, or as the result of use of the premises, or the sale of any food or services thereon or therefrom."

## **ARTICLE TWELVE MANAGEMENT FEE OF MANAGER**

**SECTION 12.1 - MANAGEMENT FEE:** During each month of each Fiscal Year, Owner shall pay Manager a Management Fee equal to (4%) of Gross Sales. Owner authorizes Manager to pay the Management Fee from the Agency Account on the tenth (10<sup>th</sup>) day of the month following the month in which the Management Fee is earned.

**SECTION 12.2 - INCENTIVE FEE:** Within ninety (90) days following the end of each Fiscal Year during the initial or any extended Term of this Agreement, and in addition to the Management Fee, Owner shall pay Manager an Incentive Fee equal to ten percent (10%) of the amount by which the Gross Operating Profit ("GOP") for each Fiscal Year exceeds the GOP in the Annual Operating Budget for that Fiscal Year. By way of example, and merely to illustrate the manner for calculating the Incentive Fee, if GOP in the Annual Operating Budget for a Fiscal Year is \$10,000 and the actual GOP at the end of that same Fiscal Year is \$25,000, Manager will receive an Incentive Fee in the amount of \$1,500, calculated as follows: \$25,000 (actual GOP), less the \$10,000 (budgeted GOP), multiplied by 10%, equals \$1,500. Manager will not receive any Incentive Fee in a given Fiscal Year if the GOP in that Fiscal Year equal to or less than zero. In the event this Agreement is properly terminated prior to the end of a Fiscal Year, the financial results for that Fiscal Year shall be annualized, as of the effective date of termination, for purposes of calculating the Incentive Fee due to Manager.

**ARTICLE THIRTEEN  
MANAGER'S TRADE NAMES, TRADEMARKS, SYSTEMS, AND EMPLOYEES**

SECTION 13.1- MANAGER'S RIGHTS: All Manager's Trade Names and Systems are exclusively the property of Manager. No provision of this Agreement and no right or remedy of Owner hereunder shall confer upon Owner, or any transferee, assignee, or successor of Owner, or any person, firm, or corporation claiming by or through Owner, the right to use, rent, lease, license, transfer, reproduce, network, display, or distribute the Manager's Trade Names or the Systems or use the Manager's Trade Names in the use and operation of the Facility, and Owner shall have no right to use such Systems or Manager's Trade Names. Manager shall be entitled to enforce its rights under this paragraph by actions for damages or relief by injunction and by the pursuit of any other right or remedy available to Manager at law or equity. This provision shall survive the termination of this Agreement, and Owner shall permanently cease to use, in any manner whatsoever, the Systems and shall return the Systems to Manager and shall be obligated to remove all use of the Manager's Trade Names from the Facility premises within fifteen (15) days after the termination of this Agreement.

SECTION 13.2 - USE OF NAME: Manager shall have the right, but not the obligation, to identify itself as manager of the Facility on any and all websites, advertisements and other materials used in connection with the Facility and the business of Manager and any of its Affiliates, and to post such signs in the lobby or other exterior or interior locations of the Facility as it may desire to so identify itself.

SECTION 13.3 – NON-SOLICITATION OF MANAGER'S EMPLOYEES: Owner recognizes that personnel employed by Manager, including those employed by Manager at the Facility, constitute an important and vital aspect of Manager's business. Owner agrees that during the Term of this Agreement, and for a period of one (1) year following the expiration or termination of this Agreement, Owner shall not, directly or indirectly, without the consent of the Manager (1) recruit, solicit, entice or hire (or assist anyone else in the foregoing activities) any personnel ever employed by Manager, or (2) encourage any such employee of Manager to terminate their employment with Manager.

**ARTICLE FOURTEEN  
TERM OF AGREEMENT AND TERMINATION**

SECTION 14.1 - TERM: This Agreement shall commence upon the Commencement Date and shall continue for a (3 YEARS) year period and will automatically renew unless, at least one hundred eighty (180) days prior to the last day of the then current three-year Term, either Manager or Owner delivers written notice to the other party of its intention not to extend the Term for another five year period.

SECTION 14.2 - TERMINATION: this Agreement may be terminated as follows:

- A. If Owner fails to maintain all funds in the Agency Account required by this Agreement.
- B. If Owner fails to pay when due any Ownership Costs or other expenses described in Article Five of this Agreement.
- C. If Owner makes any sale, lease, transfer or assignment pursuant to Article Eighteen of this Agreement.

- D. If Owner uses the Facility or attempts to use the Facility for any purpose other than as a full-service restaurant and bar that is operated in a manner consistent with comparable First-class Facilities.
- E. If Owner sells, leases, or otherwise transfers or assigns the Facility or any interest in Owner without the prior consent of Manager.
- F. If Owner (i) files a petition seeking relief under the United States Bankruptcy Code, (ii) makes a general assignment for the benefit of creditors; (iii) consents to the appointment of or taking possession by a receiver, liquidator, assignee, sequestrator, trustee or custodian of all or a substantial part of his, her or their property; (iv) admits insolvency or inability to pay its debts generally as such debts become due; (v) fails generally to pay debts as such debts become due; or (vi) takes any action to dissolve or liquidate.
- G. Upon Condemnation, damage or destruction of a portion of the Facility to an extent which interferes with the regular and customary operation of the Facility.
- H. If Manager fails to cure or make reasonable progress toward curing any material breach of this Agreement within ninety (90) days following receipt of written notice of the breach from Owner.

SECTION 14.3 – TERMINATION FEES: In the event of termination pursuant to Section 14.2(A)-(G), Owner shall pay to Manager all of the following:

- A. All Management Fees are due Manager as of the date of termination.
- B. All Incentive Fees that would have been due to Manager as of the end of the Fiscal Year during which the termination occurred.
- C. A “termination fee” in an amount equal to the product of (i) the average monthly Management Fees for the 12-month period preceding the effective date of termination, multiplied by (ii) the number nine (“Termination Fee”). Owner and Manager expressly agree and acknowledge that due to the high level of expertise required by Manager to perform its obligations pursuant to this Agreement and the significant investment and the diversion of resources required by Manager to perform its obligations pursuant to this Agreement, the type and quantity of damages which Manager would suffer as a result of a premature termination of this Agreement are uncertain and difficult to ascertain by any known rule. As such, Owner and Manager expressly agree and acknowledge that the Termination Fee fairly calculate the damages Manager would incur as a result of a premature termination of this Agreement and do not constitute a penalty.
- D. Such other sums as to which Manager shall be entitled under the terms of this Agreement, including without limitation Articles Ten, Eighteen and Nineteen of this Agreement.

**ARTICLE FIFTEEN  
UTILITIES, SERVICES, REPAIRS, MAINTENANCE,  
CAPITAL IMPROVEMENTS, AND RENOVATIONS**

SECTION 15.1 – UTILITIES AND SERVICES: Owner shall be solely responsible for providing the Facility with electricity, gas, water, telephone, sewage, cleaning (including window cleaning), pest control, waste removal, elevator and boiler maintenance, air conditioning, and associated grounds maintenance, cable television service, high speed internet access, and any other services as are customarily provided in the operation of a comparable first-class facility. Owner shall upgrade and provide any additional services deemed reasonably necessary by Manager to ensure the Facility provides all the necessary utilities and services required for operation of a first-class facility.

SECTION 15.2 - REPAIRS, MAINTENANCE, AND CAPITAL IMPROVEMENTS: Manager is authorized, from time to time during any Fiscal Year, to reasonably expend funds from the Agency Account, which in Manager's opinion are necessary, desirable, and appropriate for regular and emergency repairs and maintenance. Manager may make Capital Expenditures from the Agency Account not in excess of Ten Thousand Dollars (\$10,000.00) per Fiscal Year. Capital Expenditures in excess of Ten Thousand Dollars (\$10,000.00), as recommended by Manager, shall be subject to the approval of Owner. If approved, such Capital Expenditures may be made from the Agency Account, and if sufficient funds are not available, Owner shall advance funds for such purposes.

SECTION 15.3 - RENOVATIONS: If, at any time during the term of this Agreement, Owner elects to renovate, rehabilitate, expand, or otherwise alter or modify the Facility, Owner shall give Manager and its Affiliates an opportunity to bid upon the contract for such work and any construction management services to be performed in connection therewith.

**ARTICLE SIXTEEN  
NOTICES**

Any notice, statement, or demand required or permitted to be given under this Agreement shall be in writing, hand delivered to the President of Manager or Owner, as the case may be, or sent by certified mail, return receipt requested, addressed, as the case may be, to Manager or Owner at their respective addresses set forth above, or to such other address as Manager or Owner shall designate in the same manner as herein provided. Unless earlier received through hand delivery, notice shall be deemed to have been received on the date five (5) days after it shall have been mailed, as aforesaid, in any post office or branch post office regularly maintained by the United States Government.

**ARTICLE SEVENTEEN  
ASSIGNMENT BY MANAGER**

Manager shall not assign any or all of its right, title, and interest under this Agreement without prior consent of Owner, except as follows:

- A. Manager shall have the right to assign this Agreement to an Affiliate, provided that such Affiliate shall assume in writing all of Manager's obligations hereunder, and that such assignment and assumption shall not relieve Manager of any such obligations; and

- B. Manager shall also have the right to assign this Agreement to any successor or assignee of Manager which may result from any merger, consolidation, or reorganization, provided that such successor or assignee assumes in writing all obligations of Manager hereunder, and that such assignment and assumption shall not relieve Manager of any such obligations.

**ARTICLE EIGHTEEN  
ASSIGNMENT OR TRANSFER BY OR CHANGE IN OWNER**

SECTION 18.1 - ASSIGNMENT OR TRANSFER BY OWNER: Subject to Manager's termination rights under Section 14.2, Owner may sell, lease, or otherwise transfer or assign, during the term of this Agreement, the Facility or any interest in Owner without the prior consent of Manager, but Owner shall give Manager notice of any such action at least ninety (90) days prior to any such sale, lease, transfer or assignment.

SECTION 18.2 - TRANSFER COSTS: In the event of a sale, lease, or other assignment or transfer of the Facility, or sale or transfer of more than a fifty percent (50%) interest in Owner to any person, firm, or corporation other than a person, firm, or corporation owning more than a fifty-percent (50%) interest in Owner on the date of this Agreement, whether:

- A. Manager is requested to continue to manage the Facility, whether by an assignment or continuation of this Agreement or by execution of a new management agreement; or
- B. Manager's management is terminated;

and, if Manager is requested to make any computer, bookkeeping, accounting, tax, or other changes, entries, transfers, prorations, adjustments, or calculations in connection therewith, the reasonable and necessary costs of Manager in making same shall be paid by Owner and/or the other parties to the assignment or transfer, all of which or whom shall be jointly and severally responsible therefor.

In addition, any reasonable and necessary cost for establishing the books and records of the Facility for the benefit of the assignee or transferee shall be paid to Manager by the assignee or transferee. If the assignee or transferee refuses to make such payment, it shall remain a responsibility of Owner.

**ARTICLE NINETEEN  
INDEMNIFICATION AND LIMITATION OF LIABILITY**

SECTION 19.1 – LIMITATION OF LIABILITY: Manager's liability with respect to the management of the Facility shall be limited to damages suffered as a result of gross negligence or willful misconduct on the part of Manager. Without limiting the generality of the foregoing, Manager shall have no liability to Owner for any damages or negative consequences to the Facility or Owner which result from Manager's good faith performance of its duties pursuant to this Agreement. For example, and without limitation, Manager shall not be liable to Owner for any damages or negative consequences to the Facility or Owner which result from Manager placing suppliers and other vendors to the Facility on a "cash only" basis because of insufficiency of funds in the Agency Account.

SECTION 19.2 - INDEMNIFICATION: Owner shall indemnify, hold harmless, and reimburse Manager, its subcontractors, employees, agents, successors and assigns, and the members, managers, officers, directors, and/or shareholders thereof for, from, and against each and every liability, loss, claim, demand, expense, and damage, including without limitation reasonable attorney fees, imposed on or incurred by Manager, its Affiliates, subcontractors, employees, agents, successors and assigns, and the members, managers, officers, directors, and/or shareholders thereof directly or indirectly relating to, resulting from, or arising out of Manager's management of the Facility. Notwithstanding the foregoing, Owner shall not be required to indemnify Manager against damages suffered as a result of gross negligence or willful misconduct on the part of Manager. Manager shall indemnify, hold harmless, and reimburse Owner, its employees, agents, successors and assigns, and the members, managers, officers, directors, and/or shareholders thereof, for, from, and against each and every liability, loss, claim, demand, expense, and damage, including without limitation reasonable attorney fees, imposed on or incurred by Owner, its employees, agents, successors and assigns, and the members, managers, officers, directors, and/or shareholders thereof directly or indirectly relating to, resulting from, or arising out of Manager's gross negligence or willful misconduct.

SECTION 19.3 - SURVIVAL: Indemnification claims under this Article Nineteen shall be reasonably paid and adjusted upon termination of this Agreement or sale of the Facility by Owner provided, however, Owner's indemnification of Manager shall survive termination of this Agreement or the sale of the Facility. Any payment and adjustment made upon termination or sale shall not relieve Owner of its obligation to indemnify Manager against claims asserted subsequent to termination of this Agreement or the sale of the Facility. In the event of a sale, Owner shall establish reasonably appropriate reserves for the payment of claims asserted subsequent to the sale in an amount determined by mutual agreement of Owner and Manager. Owner's indemnification obligation shall be binding upon its successors and assigns.

## **ARTICLE TWENTY ENVIRONMENTAL REPRESENTATIONS AND INDEMNIFICATION**

SECTION 20.1 - HAZARDOUS SUBSTANCES: Owner hereby represents that any well and/or septic systems serving the Facility are in compliance with all applicable laws and regulations. Owner hereby further represents that, to the best of its knowledge, the Facility is not subject to any federal, state, or local "Superfund" lien proceedings, claims, liabilities, or actions, or the threat or likelihood thereof, for the cleanup, removal, or remediation of any "hazardous substance" from the Facility, and the Facility will be free of all "hazardous substances" as of the Commencement Date, except cleaning supplies and the like which are permitted by and are used in accordance with local, state, and federal statutes and regulations. As used in this Agreement, "hazardous substance" means any substance that is toxic, ignitable, reactive, or coercive and that is regulated by any local government, the State of \_\_\_\_\_, or the United States of America. "Hazardous substance" includes any and all materials or substances that are defined as "hazardous waste", "extremely hazardous waste", "hazardous substance", "toxic substances", "pollutants", or "contaminants" pursuant to state, federal, or local governmental law, including, without limitation, CERCLA, SARA, RCRA, the Clean Water Act, the OSHA Act, or the Toxic Substances Control Act, and any other substance which could be harmful to human health. "Hazardous substance" includes, but is not restricted to, asbestos, mold, petroleum products, nuclear fuel or materials, known carcinogens, urea formaldehyde, foamed-in-place insulation, and polychlorinated biphenyl (PCBs).

SECTION 20.2 - INDEMNIFICATION: Without limiting the generality of Article Nineteen, unless directly caused by gross negligence or willful misconduct on the part of Manager, Owner

shall indemnify, defend, and hold Manager harmless from and against any claim, damage, or expense, including without limitation attorney fees, related to the well or septic systems serving the Facility or arising out of the installation, use, generation, storage, disposal of, or damages caused by any "hazardous substance" on, in, or about the Facility.

## **ARTICLE TWENTY-ONE SUCCESSORS AND ASSIGNS BOUND**

This Agreement shall be binding upon and inure to the benefit of Owner and Manager and their permitted successors and assigns.

## **ARTICLE TWENTY-TWO DISPUTE RESOLUTION**

SECTION 22.1 – DISPUTES SUBJECT TO MANDATORY ARBITRATION: Binding arbitration, administered by the American Arbitration Association, pursuant to the Expedited Procedures set forth in its Commercial Arbitration Rules, shall be the exclusive remedy for any and all disputes, demands or claims between Owner and Manager which involve monetary amounts of Twenty Five Thousand Dollars (\$25,000) or less, including without limitation any such disputes arising out of or related in any way to this Agreement. Unless otherwise agreed to in writing by Owner and Manager, the hearing locale for any such binding arbitration shall be St. Paul, Minnesota.

SECTION 22.2 – ALL OTHER DISPUTES: Any and all disputes, demands or claims between Owner and Manager that are not subject to binding arbitration pursuant to Section 22.1 of this Agreement shall be resolved in the Second Judicial District Court of the State of Minnesota ("the Minnesota Court"), which shall be the sole and exclusive forum for resolution of any and all such disputes, demands or claims of any kind. By signing this Agreement, Owner and Manager consent to the jurisdiction of the Minnesota Court and waive any defense that the Minnesota Court lacks personal jurisdiction over Owner or Manager.

SECTION 22.3 – COSTS AND EXPENSES: In the event that Manager is required to enforce its rights under this Agreement, by way of demand, claim, defense or otherwise, Owner agrees to reimburse Manager for all costs, expenses and reasonable attorney fees incurred in doing so.

SECTION 22.4 - GOVERNING LAW: It is the intention of the parties that this Agreement shall be governed by the laws of the State of Minnesota, and that all questions concerning the validity, intention, and meaning of this Agreement or relating to the rights and obligations of the parties with respect to performance under this Agreement shall be construed and resolved under the laws of such State.

## **ARTICLE TWENTY-THREE MISCELLANEOUS PROVISIONS**

SECTION 23.1 - REPRESENTATION AND WARRANTY OF OWNER: Owner hereby represents and warrants that as of the Commencement Date, Owner owns all right, title and interest in and to the Facility and all Furniture and Equipment located at the Facility.

SECTION 23.2 - NO PARTNERSHIP OR JOINT VENTURE: Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between Owner and Manager.

SECTION 23.3 - ADDITIONAL DOCUMENTS: Each party shall execute, acknowledge, or verify and deliver any and all documents necessary from time to time to carry out the purposes and intent of this Agreement.

SECTION 23.4 – SEVERABILITY: It is the intention of the parties to comply fully with all laws and public policies, and this Agreement shall be construed consistently with such laws and public policies to the extent possible. To the extent that any court of competent jurisdiction is unable to so construe any provision of this Agreement and holds such provision or any part thereof to be invalid, such holding shall in no way affect the validity of the remainder of this Agreement.

SECTION 23.5 - COMPLETE AGREEMENT: this Agreement contains the entire agreement between the parties and supersedes any prior negotiations, representations, understandings, or agreements among them respecting the subject matter. No change, alteration, modification, addition, or qualification to the terms of this Agreement shall be made or be binding unless made in writing and signed by each of the parties.

SECTION 23.6 - NO THIRD-PARTY BENEFIT: this Agreement is intended for the exclusive benefit of Owner and Manager and their respective permitted successors and assigns, and nothing contained in this Agreement shall be construed as creating any right or benefit in or to any third party.

SECTION 23.7 – NON-WAIVER: No failure by any party to insist upon strict compliance with any term of this Agreement, to exercise any option, enforce any right, or seek any remedy upon any default of the other party shall affect or constitute a waiver of the first party's right to insist upon such strict compliance, exercise that option, enforce that right, or seek that remedy with respect to that default or any prior, contemporaneous, or subsequent default, nor shall any custom or practice of the parties at variance with any provision of this Agreement affect, or constitute a waiver of, any party's right to demand strict compliance with all provisions of this Agreement.

SECTION 23.8 – DRAFTING: Manager and Owner acknowledge that both parties have equally participated in the drafting of this Agreement and that if any term, condition or provision of this Agreement is deemed or construed to be ambiguous or vague, such ambiguity or vagueness shall not be construed in favor of or against any party to this Agreement.

SECTION 23.9 - CONSTRUCTION OF AGREEMENT: The captions at the beginnings of the several articles, sections, and subsections of this Agreement are not part of the context hereof, but are merely labels to assist in locating and reading those articles, sections, and subsections, and shall be ignored in construing this Agreement.

SECTION 23.10 - COUNTERPART EXECUTION: this Agreement may be executed in several counterparts and each such executed counterpart shall be considered as an original of this Agreement. Facsimile or imaged signatures will have the same legal effect as originals.

IN WITNESS WHEREOF, Owner and Manager enter into this Agreement as of the date and year first above written.

**Manager:**

\_\_\_\_\_

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

**Its:** \_\_\_\_\_

**Owner:**

\_\_\_\_\_

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

**Its:** \_\_\_\_\_

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## **APPENDIX OF DEFINITIONS**

For the purposes of this Agreement, and in addition to other terms defined throughout this Agreement, the following terms shall have the following meanings:

"Affiliate" means any person or entity that wholly or partially, directly or indirectly controls, is controlled by, or is under common control with Manager, regardless of the extent or degree of such control or common control.

"Agency Account" means the special account or accounts into which all monies received in connection with this Agreement and operation of the Facility, including Gross Sales and Working Capital, shall be deposited.

"Capital Expenditures" means any expenditure for the long-term betterment or improvement of the Facility, including without limitation any renovation, rehabilitation, expansion, alteration, change, addition, or improvement in or to the interior or exterior of the Facility.

"Commencement Date" means \_\_\_\_\_

"First-class Facility" and "First-class Facilities" mean a full-service facility, of like physical characteristics as the Facility, which maintains high standards of cleanliness, maintenance and service, with all services normally provided by managers of comparable facilities, including without limitation trained and uniformed staff, and which commands above average prices for food and beverage products.

"Fiscal Year" means each twelve (12) month period from January 1 through December 31 of each calendar year, except that the first Fiscal Year shall be that period beginning on the Commencement Date and ending on the following December 31.

"Furniture, Fixtures and Equipment" means furniture, furnishings, light fixtures, equipment, fixtures, and personal property of every kind and nature located in or upon the Facility.

For purposes of calculating the Incentive Fee described in Section 12.2 of this Agreement, "Gross Operating Profit" means all Gross Sales, less all Operating Expenses, except it does not include expenses associated with debt, debt service or interest on indebtedness, property and general liability insurance, property taxes, management fees, rent or common area maintenance expenses, depreciation, amortizations or any extraordinary expenses.

"Gross Sales" means all receipts, revenues, income, and proceeds of sales of whatever kind or nature received directly or indirectly from the operation of the Facility.

"Facility" means the real property, improvements, and all appurtenances known as the "\_\_\_\_\_", located at \_\_\_\_\_, including lounges, dining rooms, patios, meeting rooms, and all Furniture, Fixtures and Equipment.

"Manager's Trade Names" means the names, trade names, trademarks, and service marks of Manager, its parent, subsidiaries, and/or Affiliates, or any variations thereof when used alone or in conjunction with some other word or words, or some other design.

"Operating Expenses" means expenses and deductions to be paid from the Agency Account arising out of the actual day-to-day operation of the Facility, including, without limitation, the following:

- A. All salaries, wages, bonuses, other compensation, payroll taxes, employee benefits, unemployment insurance contributions, fringe benefits, medical and health insurance, retirement and pension plans, social security taxes, worker's compensation, and all other employee-related expenses;
- B. Charges for heat, water, light, power, telephone, internet, and other utilities and services;
- C. Repairs to and maintenance of the Facility excluding, however, Capital Expenditures;
- D. The cost of all products sold, including without limitation all food, food stuffs, beverages and consumables incurred in the day-to-day operations of the Facility;
- E. The cost of uniforms, laundry and linens used in operation of the Facility;
- F. Any amounts due Manager pursuant to this Agreement, including without limitation all such amounts due pursuant to Articles Ten, Twelve, Fourteen, Eighteen and Nineteen of this Agreement;
- G. Legal, accounting or other professional fees for services relating to the operation of the Facility or this Agreement, excluding any fees associated with the negotiation or preparation of this Agreement;
- H. Expenditures for all marketing, advertising, sales promotion, and public relations;
- I. Franchise fees, if any;
- J. All administrative and general expenses, including, without limitation, reasonable charges for accounting, computer support and data processing performed by Manager and/or its Affiliates;
- K. Any leasehold rental expenses for equipment, including, without limitation, telephone, internet services, televisions, and satellite dishes;
- L. Debt service (interest and principal) on any mortgage or other loans on the Facility;
- M. Property taxes and assessments;
- N. All insurance premiums, including, without limitation, fire and extended coverage policies, general public liability policies, worker's compensation policies, business interruption policies, fidelity bonds, dram shop and other liquor liability policies, and any other insurance coverage to be maintained pursuant to the terms of this Agreement or otherwise;
- O. Cost of any audits requested or desired by Owner or Manager;

- P. All reasonable business, entertainment, travel, mileage (at current reimbursement rates approved by the Internal Revenue Service) and other reasonable expenses associated with the operation of the Facility incurred by Manager, its employees and agents, the general manager, and other key employees of the Facility; and
- Q. All other reasonable proper and necessary expenses and deductions, of whatever kind or nature, arising out of the operation of the Facility.

“Group Services” shall consist of the actual cost of the services without mark-up or profit to the Manager or any of its affiliates, but shall include a pro-rata portion (allocated on an equitable basis among all properties benefiting therefrom) of:

- A. Salaries and Employee Benefit Costs
- B. Cost of Equipment used in Performing the Group Service
- C. Overhead Costs reasonably allocated thereto of any property providing the Group Service

Costs incurred in providing the Group Services shall be allocated in the manner described in the Annual Operating Budget. The cost for the Group Services shall not exceed the amounts for such services set forth in the Annual Operating Budget. Notwithstanding the foregoing, in no event shall the terms upon which the Manager assesses the allocable portion of the cost of Group Services be less favorable than the terms upon which the Manager assesses other than the allocable costs of Group Services to other properties managed by the Manager.

Cost of Group Services shall be a Direct Operating Cost. In addition, if equipment is installed and maintained at the Facility in connection with the rendition of any Group Services, all costs thereof will be charged as a Direct Operating Cost of the Facility as determined by the Manager in good faith and consistent with GAAP.

"Ownership Costs" means the following costs, which shall be paid by Owner from Owner's separate funds:

- D. Depreciation of the Facility, Furniture, Fixtures and Equipment, and operating supplies;
- E. Capital Expenditures to the extent funds for Capital Expenditures are unavailable in the Agency Account, and deposits to replacement reserve funds; and
- F. Such other costs defined as Fixed Charges in the Uniform Account System and not specifically provided for otherwise in this Agreement.

“Supervisory Services” means supervision of Manager's employees at the Facility by officers, agents or employees of Manager who are not regularly or temporarily employed at the Facility. It does not include other services – such as accounting, purchasing, management information systems, human resources, personnel records and information systems, payroll and financial record systems, national personnel recruiting and training programs, or other group benefits and services – which Manager may provide to the Facility through officers, agents, employees or Affiliates who are not regularly or temporarily employed at the Facility.

"Systems" means any systems, computer software, methods, procedures, techniques, trade secrets, know-how, or any materials or devices constituting any part of the same required by Manager with respect to the Facility.

"Uniform Account System" means the latest published edition of the Uniform System of Accounts for Restaurants, as revised from time to time and as modified by applicable provisions of this Agreement.

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