

## **FOOD AND BEVERAGE AGREEMENT**

This Food and Beverage Agreement (this "**Agreement**") as of July \_\_\_, 2019, by and between Ovations Food Services, L.P., a limited partnership organized under the laws of the Commonwealth of Pennsylvania d/b/a Spectra Food Services & Hospitality ("**Spectra**"), and City of Santa Clara, California, a chartered California municipal corporation ("**City**").

### **RECITALS**

WHEREAS, City owns a convention center currently known as the "Santa Clara Convention Center" located in Santa Clara, California (the "Facility"); and

WHEREAS, Spectra is in the business of managing and operating food, beverage concessions services and catering services at indoor and outdoor single and multi-purpose facilities; and

WHEREAS, City desires to grant to Spectra the exclusive right and privilege to manage and operate the food, beverage concessions services and catering services at the Facility; and

WHEREAS, Spectra desires to accept the right and privilege to exclusively manage and operate such concessions and catering services at the Facility, subject to the terms and conditions contained herein.

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

### **ARTICLE 1 DEFINITIONS**

Capitalized terms used in this Agreement and not defined elsewhere in this Agreement shall have the following meanings:

"Catering Sales" shall mean any sales of food and/or beverages (including both alcoholic and non-alcoholic beverages) to multiple customers, where payment for the entire function rests with one (or a limited number of) individuals or companies, typically where payment for such items has been arranged for in advance of such function, such as sales in the suites, banquet rooms, picnic areas or conference rooms in the Facility; provided that Catering Sales shall not include Sub-Contractor Sales.

"Concession Alcohol Sales" shall mean the sale of all alcoholic beverages, including distilled spirits, beers, malt beverages and wines, at or from the Facility, other than Catering Sales (such as, by way of example only, sales from permanent or portable concession stands or roving

vendors to individual customers (including, without limitation, by means of “hawking”)); provided that Concession Alcohol Sales shall not include Sub-Contractor Sales.

“Concession Food Sales” shall mean all sales of food and non-alcoholic beverages at or from the Facility not including Catering Sales (such as, by way of example only, sales from permanent or portable concession stands or roving vendors to individual customers (including, without limitation, by means of “hawking”)); provided that Concession Food Sales shall not include Sub-Contractor Sales.

“Food and Beverage Areas” shall have the meaning given to such term in Section 2.1(b) hereof.

“Food and Beverage Services” shall mean the business of managing and providing (or causing to be provided) food, food products, candy, non-alcoholic and alcoholic beverages, novelties, souvenirs and merchandise in the concession areas, seating bowl, picnic areas, luxury boxes, restaurants, lounges, banquet rooms, catering areas, and all other areas of the Facility.

“General Manager” shall have the meaning given to such term in Section 5.1(b) hereof.

“Gross Receipts” shall mean the total of all amounts received by Spectra from the operation of the Food and Beverage Services, including the management charge, any service charges and gratuities, whether such amounts are evidenced by cash, check, credit, charge account, exchange or otherwise, less only retail sales taxes and other direct taxes imposed upon receipts collected from the consumer. Gross Receipts shall include amounts received from the sale of goods at the Facility as well as amounts received from orders taken or received at the Facility (regardless of where such orders are filled).

“Major Repair” shall mean the repair of any piece of equipment, structure or other item that costs, in the aggregate, in excess of one thousand two hundred dollars (\$1,200).

“Management Fee” shall have the meaning given to such term in Section 3.1(a) hereof.

“Monthly Accounting Period” shall mean each 4 or 5 week period during the Term ending on the last Wednesday of each month, except for the month of December, which shall end on December 31.

“Net Loss” shall mean the amount by which Operating Expenses exceed Gross Receipts for the period in question.

“Net Profits” shall mean the amount by which Gross Receipts exceeds Operating Expenses for the period in question.

“Operating Account” shall have the meaning given to such term in Section 10.1 hereof.

“Operating Expenses” shall mean (a) the cost to Spectra of the sale of food and beverage items and the performance of Spectra’s duties under this Agreement, including without limitation (i) personnel and payroll costs, including applicable taxes, benefits, relocation costs, and bonuses with respect to all on-site management, administrative staff, independent contractors, consultants and all other on-site employees, (ii) product costs, (iii) cost of permits and licenses, including without limitation the cost of securing all alcohol permits and licenses, (iv) all taxes paid by Spectra hereunder on the sale of concession items, as described in Section 9.3 below, (v) equipment rental costs, (vi) cost of equipment repairs and maintenance performed by Spectra or a contractor of Spectra, (vii) insurance costs (which shall be allocated by Spectra to the Facility in a reasonable and equitable fashion) and bonding costs, (viii) office supplies, printing costs and postage, (ix) telephone charges, (x) cost of utilities, (xi) cost of cleaning supplies and pest control, (xii) laundry costs, (xiii) armored car and other vehicle expenses, (xiv) legal, accounting, accounts payable processing and audit fees, (xv) cost of service ware and paper supplies, (xvi) trash removal costs, (xvii) dues, subscriptions and membership fees, (xviii) travel, food and lodging costs, (xix) security expenses, (xx) computer costs, (xxi) uniform costs, (xxii) advertising and marketing costs, (xxiii) cost of ice, (xxiv) payments to sub-contractors engaged by Spectra hereunder, (xxv) decorating costs, (xxvi) payroll processing expense, (xxvii) bank charges, (xxviii) temporary housing and relocation expense, (xxix) employment agency fees, (xxx) bad debt expense, (xxxi) PCI-DSS compliance costs; (xxxii) time and labor management system costs, (xxxiii) cost of settling or defending claims asserted against Spectra and arising out of its performance of this Agreement, except to the extent such claims result from Spectra’s or its employees or agents’ gross negligence or willful misconduct, and (xxxiv) any other miscellaneous expenses related to the foregoing, and (b) the Management Fee. The parties specifically acknowledge that the term “Operating Expenses” shall not include any Start-Up Expenses, capital expenditures, debt service, and any expenses incurred in order to provide an initial inventory of food and beverage service ware and/or equipment, the cost and expenses for which shall be borne solely by City (or if paid for by Spectra, shall be reimbursed to Spectra by City upon submission of invoice or otherwise as specifically set forth herein).

“Shortfall” shall have the meaning given to such term in Section 10.2 hereof.

“Start-Up Expenses” shall mean all reasonable out-of-pocket expenses incurred by Spectra in preparing to commence operations at the Facility, including, without limitation, travel costs, expenses related to staffing the Facility for the Food and Beverage Service prior to the first Facility event under this Agreement, obtaining liquor and other required licenses and permits, and otherwise preparing to provide Food and Beverage Service.

“Sub-Contractor Sales” shall mean any sales at or from the Facility from any third party sub-contractor of Spectra.

“Term” shall have the meaning given to such term in Section 4.1 hereof.

## **ARTICLE 2 GRANT OF RIGHTS; SCOPE OF SERVICES**

### **Section 2.1    Concession License.**

(a) City hereby grants to Spectra the exclusive right and privilege to provide Food and Beverage Services at the Facility. Spectra covenants and agrees to exercise the full Food and Beverage Service rights granted hereunder at all events in the Facility in such manner and with such number of personnel as are necessary to provide adequate supplies and service of the food, beverage and other products described herein to patrons of the Facility. City agrees that it will not, without the prior written consent of Spectra, grant to any party other than Spectra or a sub-contractor mutually agreed by City and Spectra, the right to perform any Food and Beverage Services at or upon the Facility.

(b) In connection with the foregoing grant of exclusive rights, City hereby licenses to Spectra the concession stands, souvenir and gift shops, novelty stands, customer serving locations, food preparation areas, vendor commissaries, kitchen and warehouse facilities, and other areas related to the foregoing and/or reasonably required by Spectra to perform the Food and Beverage Service at the Facility (“Food and Beverage Areas”), together with the improvements, equipment, and personal property upon or within such areas, along with the non-exclusive right to use the concourses, spectator seating areas, parking areas, common areas, loading areas, walkways, and other public areas of the Facility, solely for the purpose of providing Food and Beverage Services. Spectra agrees to operate the Food and Beverage Areas with respect to all events at the Facility, during hours as may be reasonably requested by City to adequately meet public demand.

## **ARTICLE 3 COMPENSATION; START-UP EXPENSES**

### **Section 3.1    Fees.**

(a) As consideration for the performance by Spectra of its duties hereunder, City shall pay Spectra a fee for the Term equal to 4.5% of the first \$3,000,000 of Gross Receipts *plus* 5.5% of any Gross Receipts in excess of \$3,000,000 (the “Management Fee”). The Management Fee shall be paid to Spectra on a monthly basis as set forth in Section 3.1(b) below.

(b) On or about the twentieth (20<sup>th</sup>) day following the end of each Monthly Accounting Period, Spectra shall remit to City the Net Profits (if any) to which the City is entitled (after deducting from such Net Profits any Shortfall advanced by Spectra pursuant to Section 10.2 below, any receivables owed by City to Spectra, and any other amounts due to Spectra hereunder) from such Monthly Accounting Period, together with the statements described in Section 10.3 below. The parties shall conduct a settlement within thirty (30) days of the end of the Term at which each shall account to each other for any amounts that were underpaid or overpaid by the parties. Any Net Losses under this Agreement shall be borne by City, and Spectra shall not share in any Net Losses.

(c) The City shall reimburse Spectra for Start-Up Expenses not to exceed One-Hundred Thirty-Four Thousand Dollars (\$134,000) within thirty (30) days of Spectra submitting an invoice for such expenses. Each invoice submitted shall include reasonable supporting documentation evidencing that Spectra incurred the invoiced expense.

#### **ARTICLE 4 TERM; TERMINATION**

Section 4.1 Term. The term ("Term") of this Agreement shall commence on July 27, 2019 (the "Effective Date"), and, unless sooner terminated pursuant to the provisions of Section 4.2 below, ending on December 31, 2019.

Section 4.2 Termination. This Agreement may be terminated (i) by either Spectra or City upon thirty (30) days written notice to the other, if the other party fails to perform or comply with any of the material terms, covenants, agreements or conditions hereof, and such failure is not cured during such thirty (30) day period, (ii) by either Spectra or City by written notice to the other upon the other being judged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of the other shall be appointed and shall not be discharged within one hundred twenty (120) days after appointment, or if either such party shall make an assignment of its property for the benefit of creditors or shall file a voluntary petition in bankruptcy or insolvency, or shall apply for bankruptcy under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State or otherwise, or if such petition shall be filed against either party and shall not be dismissed within one hundred twenty (120) days after such filing, or (iii) as otherwise specifically provided for herein.

#### **ARTICLE 5 PERSONNEL**

Section 5.1 Generally.

(a) Spectra shall employ, train and supervise personnel with appropriate qualifications and experience, in sufficient number to provide all the services appropriate for the duties of such party to be performed under this Agreement. All such personnel shall be employees, agents or independent contractors of Spectra (or a subsidiary or affiliate thereof), as applicable, and not of City. Spectra shall select the number, function, qualifications, and compensation, including salary and benefits, of its employees and shall control the terms and conditions of employment relating to such employees. Spectra agrees to use reasonable and prudent judgment in the selection and supervision of such personnel, and shall strive to employ persons who are courteous and efficient, and who will not use improper language or act in a loud or boisterous manner while performing duties at the Facility. Spectra agrees that it will not discriminate against any employee or applicant for employment for work under this Agreement because of race, religion, color, sex, disability, national origin, ancestry, physical handicap, or age. Except as

specifically set forth in Section 5.1(b) below, City shall have no right to supervise or direct the hiring or firing of any such personnel.

(b) Spectra shall employ as part of its personnel at the Facility an individual with convention center/conference center managerial experience (unless otherwise mutually agreed upon between the parties) to serve as a full-time general manager of Food and Beverage Services (“General Manager”). Hiring of the General Manager by Spectra shall require the prior approval of City, which approval shall not be unreasonably withheld or delayed. The General Manager will have general supervisory responsibility for Spectra at the Facility and will be responsible for day-to-day operations of the Food and Beverage Services, supervision of Spectra employees, and management and coordination of all activities associated with the Food and Beverage Services.

(c) Spectra shall ensure that its non-management employees performing the duties of Spectra at the Facility shall be neatly attired in clean, commercially-attractive uniforms which shall be subject to the approval of City. Spectra shall train all such employees so that they are aware of the high standards for cleanliness, courtesy and service required by Spectra.

(d) All personnel engaged by Spectra to work at the Facility shall be admitted to the Facility without payment of any admission fee, at an entrance to be designated by City. All such personnel shall have the right to park at the Facility without charge in areas designated by City.

## **ARTICLE 6**

### **INVENTORY; EQUIPMENT; SPONSORSHIPS; UTILITIES; PCI COMPLIANCE**

Section 6.1 Inventory. Spectra shall order, stock, prepare, pay for and sell quality food, beverage and other concession and catering products. Consumables shall be first quality, wholesome and pure, and all food and beverage merchandise on hand shall be stored and handled with due regard for sanitation. Spectra shall have sufficient amounts of product prepared and an inventory on the premises so as not to run out of product during an event at the Facility. For the avoidance of doubt, Spectra may retain any and all benefit derived from any rebates associated with its purchase of food, beverage and other concession and catering products during the Term. During all events at the Facility, Spectra shall post signs and provide menus displaying the prices of items offered for sale. Such signs and menus shall be subject to the reasonable approval of City. At the end of the Term, City shall purchase (or shall require the successor food and beverage company at the Facility to purchase) from Spectra any remaining food and beverage, and consumable goods (e.g., cups, napkins, etc.), inventory on hand at the Facility, for the price paid by Spectra for such inventory, as evidenced by written invoices or receipts. Notwithstanding the foregoing, City shall not be obligated to purchase (or to have the successor food and beverage manager purchase) any such inventory that is branded with the Spectra name or logo, or to the extent purchase thereof would be in violation of applicable law.

Section 6.2 Brands/Prices. The brands and price of all products sold by Spectra shall

be determined by Spectra, subject to the reasonable approval of City. Provided price, quality, market acceptability, service and other terms are generally competitive, Spectra agrees to give preference to and feature at the Facility suppliers of products designated by City who purchase advertising from City (or, if applicable, an agent or licensee of City) so long as the giving of such preference does not violate applicable laws, rules or regulations and the features of such product and terms of such transaction are reasonable (as determined by Spectra in its sole discretion).

Section 6.3 Equipment. Spectra shall have the right to use during the Term, all equipment owned or controlled by City existing within the Food and Beverage Areas as of the date hereof and/or subsequently added by City or Spectra to such areas during the Term. City represents that all such equipment is in good working order, and Spectra agrees to exercise reasonable care when using such equipment, so as to avoid any damage to such equipment.

Section 6.4 Utilities. City shall provide to Spectra all utilities necessary for Spectra's operation of the Food and Beverage Services (e.g., electricity, gas and water).

Section 6.5 Data Security Standards Compliance.

(a) Spectra must secure, protect at all times, and implement commercially reasonable measures to prevent, unauthorized access to any personal identifying information, financial account information, and information designated in writing by the City as "restricted City information" (collectively, "Confidential Information"), whether in electronic format or hard copy. At a minimum, Spectra must encrypt and password-protect electronic files, store and process Confidential Information only in North America, and adhere to any security applicable standards. Standards arise from the service and data processed and may include National Institute for Standards and Technology CSF/800-14/800-53/800-82, International Organization for Standardization 15408/27001/27002, International Society for Automation ISA-62443 series, Payment Card Industry PCI-DSS, Underwriters Laboratory, Health Insurance Portability and Accountability Act, Federal Risk and Authorization Management Program FedRAMP, US Department of Justice/Federal Bureau of Investigation Criminal Justice Information Services Security Policy, et al, as applicable based on the scope of Manager's services hereunder. This includes data saved to host locations, computers, connected devices, and storage devices.

(b) When Confidential Information, regardless of its format, is no longer required by Spectra to execute the work required by this Agreement, the information must be redacted or destroyed through appropriate and secure methods, to ensure the information cannot be viewed, accessed, and reconstructed.

(c) Without limiting the foregoing, the parties agree that Spectra shall maintain in Spectra's name the Merchant ID for all credit card transactions processed by Spectra under this Agreement. Credit cards shall be processed through stand-alone credit card terminals provided by Spectra. The cost of any stand-alone credit card terminals that are not already in Spectra's existing inventory shall be considered an Operating Expense. For the avoidance of doubt, credit card terminals provided from Spectra's existing inventory are owned by Spectra and shall remain

Spectra's property in perpetuity, and any credit card terminals purchased as an Operating Expense shall be the property of City. The City shall cause its venue manager to provide a segmented network on which the stand-alone credit card terminals will operate. Spectra shall comply with all current Payment Card Industry Data Security Standards ("PCI-DSS") and guidelines that may be published from time to time by Visa, Mastercard or other associations as they relate to the acceptance and processing of payment cards and any physical storage of payment card data on the part of Spectra. Should the parties choose to utilize a point-of-sale or credit card processing system other than what is described in this paragraph, the parties shall negotiate the terms of PCI-DSS compliance relating to any such system in good faith, and nothing herein shall obligate Spectra to use a system other than the system described in this paragraph unless the parties have agreed in writing to new terms governing PCI-DSS compliance at the Facility.

## **ARTICLE 7 MAINTENANCE**

### **Section 7.1    Maintenance; Sanitation.**

(a)     Spectra shall perform minor, routine servicing on all fixtures, equipment, furniture and other property installed, furnished or supplied by or for the benefit of Spectra so that such items are kept in good order and repair. Spectra shall further make all necessary repairs thereto, provided that any Major Repair or replacements of furniture, fixtures or equipment shall be paid for by City.

(b)     Spectra will maintain the Food and Beverage Areas in a clean and neat condition by cleaning, on a day-to-day basis, the interiors of the Food and Beverage Areas and bars, concession stands and vending stations under its control at the Facility (and within a five (5) foot perimeter of such stands and stations). Spectra shall further clean, as needed, the walls, windows, ceilings, light fixtures and equipment located within the Food and Beverage Areas. Spectra shall deposit in receptacles provided by City all waste, garbage and refuse which shall accumulate in the Food and Beverage Areas. Spectra shall also provide extermination services as may be necessary for the Food and Beverage Areas.

(c)     Spectra shall comply with and observe all federal, state and local laws, ordinances and regulations as to sanitation and the purity of food and beverages or otherwise relating to its operations under this Agreement.

## **ARTICLE 8 [intentionally omitted]**

## **ARTICLE 9 LICENSES; ALCOHOLIC BEVERAGES; TAXES**

Section 9.1    Permits and Licenses. Spectra shall use reasonable commercial efforts to secure and maintain throughout the Term all licenses and permits necessary for the operation of



the Food and Beverage Services, including those required for the sale of alcoholic beverages at the Facility. City shall cooperate with Spectra in connection with filing applications for, and securing and maintaining in good standing, any and all licenses and permits and renewals thereof needed by Spectra to fulfill its obligations hereunder. In the event that Spectra is prevented or unable to sell alcoholic beverages at the Facility, including because it is unable to secure or maintain the necessary licenses or permits to sell alcoholic beverages at the Facility, for any reason except because of its own negligence, failure to comply with applicable laws, or otherwise failure to make reasonable efforts, then at Spectra's request the parties shall re-negotiate in good faith the compensation terms of this Agreement commensurate with the value of the loss of alcoholic beverage sales. If, despite such good faith negotiations, the parties are unable to come to agreement on the revised economic terms of this Agreement, Spectra may terminate this Agreement, without liability to Spectra, upon thirty (30) days written notice to City.

Section 9.2 Alcoholic Beverages. In connection with the sale of alcoholic beverages hereunder by Spectra, Spectra agrees to strictly comply with the laws of the State of California regarding the sale of such beverages to minors. Spectra agrees to adopt an identification policy to verify the age of potential purchasers of alcoholic beverages. Spectra further agrees that it will endeavor not to sell alcoholic beverages to customers who are visibly intoxicated. Spectra will institute and conduct training programs for Spectra employees at the Facility on the proper standards to use to avoid selling alcoholic beverages to customers who are or who appear to be intoxicated.

Section 9.3 Taxes. Spectra shall collect and pay all taxes imposed upon the sale of concession items hereunder, as required by Federal, State or local law. Spectra shall be responsible for and pay all social security, unemployment insurance, old age retirement and other federal and state taxes that are measured by the wages, salaries, or other remuneration paid to persons employed by Spectra. City shall be responsible for and hold Spectra harmless from any and all possessory interest or leasehold taxes which may be levied or are in effect during the Term.

## **ARTICLE 10 OPERATING ACCOUNT; REPORTING**

Section 10.1 Establishment of Operating Account. Spectra shall establish and maintain, in its name, a separate commercial bank account for the Facility ("Operating Account") and shall deposit all Gross Receipts in such account.

Section 10.2 Payment of Expenses; Shortfall. Spectra shall pay all Operating Expenses from the Gross Receipts generated under this Agreement. In the event at any time during the Term, Gross Receipts are insufficient to cover Operating Expenses (a "Shortfall"), Spectra may at its option and in its sole discretion from time to time, either (a) advance its own funds to cover such Shortfall, in which case Spectra shall be reimbursed from the first dollars otherwise due and owing to the City under Section 3.1 of this Agreement, or (b) notify City of such Shortfall in which case City shall be required, within two (2) business days of receiving such notice, to pay to Spectra sufficient funds to cover such Shortfall until it is anticipated that no further Shortfall shall exist.

Any amounts advanced by Spectra under this Agreement towards a Shortfall shall accrue interest at the rate of Prime (as published from time to time in the Wall Street Journal) plus three percent (3%), with such interest accruing from the date of the advancement. Any advances made by Spectra that remain outstanding at the end of the Term shall be paid to Spectra (together with accrued interest) within five (5) days of the end of the Term and, if not paid when due, shall continue to accrue interest until paid in full. Spectra shall be entitled to offset any amounts owing to it by City hereunder against any amounts otherwise payable to City under this Agreement.

Section 10.3 Books and Records. Spectra agrees to maintain separate and independent books and records, in accordance with generally accepted accounting principles, relating to its operations in connection with its management of the Food and Beverage Services, as applicable. Such books and records shall contain documentation regarding the deposit of all Gross Receipts in the Operating Account, and the incurrence by Spectra of all Operating Expenses, including copies of invoices of all products and materials purchased by Spectra hereunder, and copies of payroll summaries, deposit receipts and bank statements relating to the Operating Account. City or its designee shall have the right to inspect such books and records from time to time upon reasonable notice during the ordinary business hours of Spectra.

Section 10.4 Financial Reports. Spectra shall provide to City, within twenty (20) days following the end of each Monthly Accounting Period, financial reports regarding its provision of Food and Beverage Services during such Monthly Accounting Period, including a statement showing Gross Receipts and Operating Expenses for the applicable period. Additionally, Spectra shall provide to City, within twenty four (24) hours following each event at the Facility, a daily Gross Receipts report in a form to be mutually agreed upon.

Section 10.5 Audit. Not more than once during the Term, City shall have the right, at its sole cost, to engage an independent third party to audit the books and records of Spectra for the preceding twelve (12) month period, for the purpose of confirming that the amounts remitted by Spectra to City hereunder are the proper amounts due City. Such audit shall be completed by City or its representatives at Spectra's corporate office, on reasonable advance notice to Spectra, and on dates and times mutually agreed to by the parties. In the event such audit reveals any underpayment to City, Spectra shall promptly pay to City the amount of such deficiency. If such audit reveals any overpayment to City, City shall promptly pay to Spectra the amount of such overpayment.

## **ARTICLE 11 INDEMNIFICATION AND DEFENSE**

Section 11.1 Spectra's Obligation. Spectra's Obligation. To the extent permitted by law, Spectra agrees to protect, defend, hold harmless and indemnify City, its City Council, commissions, officers, employees, volunteers and agents from and against any claim, injury, liability, loss, cost, and/or expense or damage, including all costs and attorney's fees in providing a defense to any such claim or other action, and whether sounding in law, contract, tort, or equity, in any manner arising from, the negligence or willful misconduct of Spectra in connection with

the Services performed by Spectra pursuant to this Agreement – including claims alleging negligence or willful misconduct by Spectra's employees or persons contracting with Spectra to perform any portion of the Scope of Services – and shall expressly include passive or active negligence by City connected with the Services. However, the obligation to defend and indemnify shall not apply if such liability is alleged to be the result of or arise out of City's sole negligence or willful misconduct.

Section 11.2 Employment-related Claims. Spectra's obligation to protect, defend, indemnify, and hold harmless in full City and City's employees, shall extend to those claims brought by Spectra employees against City alleging that City is an employer of the claimants (either alone, or jointly with Spectra), regardless of venue/jurisdiction in which the claim is brought and the manner of relief sought.

Section 11.3 Health Care Coverage. To the extent Spectra is obligated to provide health insurance coverage to its employees pursuant to the Affordable Care Act ("Act") and/or any other similar federal or state law, Spectra warrants that it is meeting its obligations under the Act and will fully indemnify and hold harmless City for any penalties, fines, adverse rulings, or tax payments associated with Spectra's responsibilities under the Act.

## **ARTICLE 12 INSURANCE REQUIREMENTS**

Section 12.1 During the term of this Agreement, and for any time period set forth in Schedule I, Spectra shall provide and maintain in full force and effect, as an Operating Expense, insurance policies as set forth in Schedule I.

## **ARTICLE 13 MISCELLANEOUS**

Section 13.1 Authorization.

(a) Spectra represents and warrants that it has the full right and legal authority to enter into this Agreement and to grant the rights and perform the obligations of Spectra herein, and that, except as otherwise set forth herein, no third party consent or approval is required to grant such rights or perform such obligations hereunder.

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

Section 13.2 Force Majeure. In the event that a party is prevented or delayed in the performance of any of its obligations under this Agreement (not including any payment obligation hereunder) due to circumstances beyond its control, including but not limited to, (a) fire,

earthquake, hurricane, wind, flood, act of God, riot, or civil commotion occurring at the Facility, or (b) any law, ordinance, rule, regulation, or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, war, or governmental law and regulation, or (c) labor dispute which results in a strike or work stoppage affecting the Facility or services described in this Agreement (each, a “*force majeure*” event) , then, subject to Section 4.1 above, performance hereunder by the affected party shall be excused for the period of delay.

Section 13.3 Assignment. Neither party may assign this Agreement without the prior written consent of the other, which consent shall not be unreasonably withheld or delayed; however, Spectra or City may, without the prior written consent of the other, assign this Agreement and/or its rights and obligations hereunder (i) to any person or entity who succeeds (whether by merger, consolidation or sale of assets or equity or the like) to all or substantially all of the business and properties of such party, or (ii) in connection with a corporate restructuring, to any person who is a City, parent, subsidiary or affiliate of such party, and who carries on the business of such party in substantially the same manner. Any assignee of Spectra or City pursuant to the preceding sentence must agree in writing to assume the assignor’s obligations hereunder, in whole or in part (as applicable), in order for such assignment to become effective. This Agreement shall be binding on the parties’ successors and permitted assigns.

Section 13.4 Notices. All notices required or permitted to be given pursuant to this Agreement shall be in writing and delivered personally or sent by registered or certified mail, return receipt requested, or by generally recognized, prepaid, overnight air courier services, to the address and individual set forth below. All such notices to either party shall be deemed to have been provided when delivered, if delivered personally, three (3) days after mailed, if sent by registered or certified mail, or the next business day, if sent by generally recognized, prepaid, overnight air courier services.

If to City:

City of Santa Clara  
Attn: City Manager  
1500 Warburton Avenue  
Santa Clara, CA 95050  
and by [email@rshikada@santaclaraca.gov](mailto:email@rshikada@santaclaraca.gov),  
and [manager@santaclaraca.gov](mailto:manager@santaclaraca.gov)

If to Spectra:

Spectra Food Services & Hospitality  
150 Rouse Blvd  
Philadelphia, PA 19112  
Attn: President

With a copy to:

Spectra Food Services & Hospitality  
150 Rouse Blvd  
Philadelphia, PA 19112  
Attn: Legal Department

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

Section 13.5 Severability. If a court of competent jurisdiction or an arbitrator determines that any term of this Agreement is invalid or unenforceable to any extent under applicable law, the remainder of this Agreement (and the application of this Agreement to other circumstances) shall not be affected thereby, and each remaining term shall be valid and enforceable to the fullest extent permitted by law.

Section 13.6 Prior Agreements. This Agreement (including the schedule(s) attached hereto) constitutes the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior and contemporaneous negotiations, correspondence, conversations, agreements, and understandings concerning the subject matter hereof. Accordingly, the parties agree that no deviation from the terms hereof shall be predicated upon any prior representations, agreements or understandings, whether oral or written.

Section 13.7 Governing Law. The Agreement is entered into under and pursuant to, and is to be construed and enforceable in accordance with, the laws of the State of California, without regard to its conflict of laws principles.

Section 13.8 Amendments. Neither this Agreement nor any of its terms may be changed or modified, waived, or terminated (unless as otherwise provided hereunder) except by an instrument in writing signed by an authorized representative of the party against whom the enforcement of the change, waiver, or termination is sought.

Section 13.9 Waiver; Remedies. No failure or delay by a party hereto to insist on the strict performance of any term of this Agreement, or to exercise any right or remedy consequent to a breach thereof, shall constitute a waiver of any breach or any subsequent breach of such term. No waiver of any breach hereunder shall affect or alter the remaining terms of this Agreement, but each and every term of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof. The remedies provided in this Agreement are cumulative and not exclusive of the remedies provided by law or in equity.

Section 13.10 Relationship of Parties. Spectra is engaged by City hereunder as an independent contractor to perform the services described herein, and nothing contained in this Agreement shall be deemed to create, whether express or implied, a partnership, joint venture, employment, or agency relationship between City and Spectra, except as otherwise expressly set forth in this Agreement.

Section 13.11 Counterparts; Faxed or Emailed Signatures. This Agreement may be executed in counterparts, each of which shall constitute an original, and all of which together shall constitute one and the same document. This Agreement may be executed by the parties and transmitted by facsimile or electronic mail, and if so executed and transmitted, shall be effective as if the parties had delivered an executed original of this Agreement.

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

CITY OF SANTA CLARA, CALIFORNIA  
a chartered California municipal corporation

OVATIONS FOOD SERVICES, L.P. d/b/a  
SPECTRA FOOD SERVICES &  
HOSPITALITY

By: Ovations Food Services, L.L.C. its  
general partner

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

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

Approved as to Form:

\_\_\_\_\_  
BRIAN DOYLE  
City Attorney

## **SCHEDULE I INSURANCE REQUIREMENTS**

Without limiting Spectra's indemnification of the City, and prior to commencing any of the Food and Beverage Services required under this Agreement, Spectra shall provide and maintain in full force and effect during the period of performance of the Agreement as an Operating Expense, the following insurance policies from insurance companies authorized to do business in the State of California. With regard to those claims for which Spectra owes City defense and indemnity, these policies shall be primary insurance as to the City of Santa Clara so that any other coverage held by the City shall not contribute to any loss under Spectra's insurance. The minimum coverages, provisions and endorsements are as follows:

### **A. COMMERCIAL GENERAL LIABILITY INSURANCE**

1. Commercial General Liability Insurance policy which provides coverage at least as broad as Insurance Services Office form CG 00 01. Policy limits are subject to review, but shall in no event be less than, the following:  
  
\$1,000,000 Each Occurrence  
\$2,000,000 General Aggregate  
\$1,000,000 Personal Injury
2. Exact structure and layering of the coverage shall be left to the discretion of Spectra; however, any excess or umbrella policies used to meet the required limits shall be at least as broad as the underlying coverage and shall otherwise follow form.
3. The following provisions shall apply to the Commercial Liability policy as well as any umbrella policy maintained by the Spectra to comply with the insurance requirements of this Agreement:
  - a. Coverage shall be on a "pay on behalf" basis with defense costs payable in addition to policy limits;
  - b. There shall be no cross liability exclusion which precludes coverage for claims or suits by one insured against another; and
  - c. Coverage shall apply separately to each insured against whom a claim is made or a suit is brought, except with respect to the limits of liability.

### **B. BUSINESS AUTOMOBILE LIABILITY INSURANCE**

Business automobile liability insurance policy which provides coverage at least as broad as ISO form CA 00 01 with policy limits a minimum limit of not less than one million dollars (\$1,000,000) each accident using, or providing coverage at least as broad as,

Insurance Services Office form CA 00 01. Liability coverage shall apply to all owned (if any), non-owned and hired autos.

In the event that the Food and Beverage Services being performed under this Agreement involves transporting of hazardous or regulated substances, hazardous or regulated wastes and/or hazardous or regulated materials, Spectra and/or its subcontractors involved in such activities shall provide coverage with a limit of one million dollars (\$1,000,000) per accident covering transportation of such materials by the addition to the Business Auto Coverage Policy of Environmental Impairment Endorsement MCS90 or Insurance Services Office endorsement form CA 99 48, which amends the pollution exclusion in the standard Business Automobile Policy to cover pollutants that are in or upon, being transported or towed by, being loaded onto, or being unloaded from a covered auto.

C. WORKERS' COMPENSATION

1. Workers' Compensation Insurance Policy as required by statute and employer's liability with limits of at least one million dollars (\$1,000,000) policy limit Bodily Injury by disease, one million dollars (\$1,000,000) each accident/Bodily Injury and one million dollars (\$1,000,000) each employee Bodily Injury by disease.
2. The indemnification and hold harmless obligations of Spectra included in this Agreement shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefit payable by or for Spectra or any subcontractor under any Workers' Compensation Act(s), Disability Benefits Act(s) or other employee benefits act(s).
3. This policy must include a Waiver of Subrogation in favor of the City of Santa Clara, its City Council, commissions, officers, employees, volunteers and agents.

D. PROFESSIONAL LIABILITY

Professional Liability or Errors and Omissions Insurance as appropriate shall be written on a policy form coverage specifically designed to protect against negligent acts, errors or omissions of Spectra. Covered services as designated in the policy must specifically include work performed under this agreement. Coverage shall be in an amount of not less than one million dollars (\$1,000,000) per claim or two million dollars (\$2,000,000) aggregate. Any coverage containing a deductible or self-retention must first be approved in writing by the City Attorney's Office, which approval shall not be unreasonably withheld.

E. COMPLIANCE WITH REQUIREMENTS

All of the following clauses and/or endorsements, or similar provisions, must be part of each commercial general liability policy, and each umbrella or excess policy.



1. Additional Insureds. City of Santa Clara, its City Council, commissions, officers, employees, volunteers and agents are hereby added as additional insureds in respect to liability arising out of Spectra's work for City, using Insurance Services Office (ISO) Endorsement CG 20 10 11 85, or the combination of CG 20 10 03 97 and CG 20 37 10 01, or its equivalent.
2. Primary and non-contributing. Each insurance policy provided by Spectra shall contain language or be endorsed to contain wording making it primary insurance as respects to, and not requiring contribution from, any other insurance which the indemnities may possess, including any self-insurance or self-insured retention they may have. Any other insurance indemnities may possess shall be considered excess insurance only and shall not be called upon to contribute with Spectra's insurance.
3. Cancellation.
  - a. Each insurance policy shall contain language or be endorsed to reflect that no cancellation or modification of the coverage provided due to non-payment of premiums shall be effective until written notice has been given to City at least ten (10) days prior to the effective date of such modification or cancellation. In the event of non-renewal, written notice shall be given at least ten (10) days prior to the effective date of non-renewal.
  - b. Each insurance policy shall contain language or be endorsed to reflect that no cancellation or modification of the coverage provided for any cause save and except non-payment of premiums shall be effective until written notice has been given to City at least thirty (30) days prior to the effective date of such modification or cancellation. In the event of non-renewal, written notice shall be given at least thirty (30) days prior to the effective date of non-renewal.
4. Other Endorsements. Other endorsements may be required for policies other than the commercial general liability policy if specified in the description of required insurance set forth in Sections A through E of this Exhibit C, above.

F. **ADDITIONAL INSURANCE RELATED PROVISIONS**

Spectra and City agree as follows:

1. Spectra agrees to ensure that subcontractors, and any other party involved with the Food and Beverage Services, who is brought onto or involved in the performance of the Food and Beverage Services by Spectra, provide the same minimum insurance coverage required of Spectra, except as with respect to limits. Spectra agrees to monitor and review all such coverage and assumes all

responsibility for ensuring that such coverage is provided in conformity with the requirements of this Agreement. Spectra agrees that upon request by City, all agreements with, and insurance compliance documents provided by, such subcontractors and others engaged in the project will be submitted to City for review.

2. Spectra agrees to be responsible for ensuring that no contract used by any party involved in any way with the project reserves the right to charge City or Spectra for the cost of additional insurance coverage required by this Agreement. Any such provisions are to be deleted with reference to City. It is not the intent of City to reimburse any third party for the cost of complying with these requirements. There shall be no recourse against City for payment of premiums or other amounts with respect thereto.
3. The City reserves the right to withhold payments from the Spectra in the event of material noncompliance with the insurance requirements set forth in this Agreement.

#### G. EVIDENCE OF COVERAGE

Prior to commencement of any Food and Beverage Services under this Agreement, Spectra shall, as an Operating Expense, and each and every subcontractor (of every tier) shall, at its sole cost and expense, provide and maintain not less than the minimum insurance coverage with the endorsements and deductibles indicated in this Agreement. Such insurance coverage shall be maintained with insurers, and under forms of policies, satisfactory to City and as described in this Agreement. Spectra shall file with the City all certificates and endorsements for the required insurance policies for City's approval as to adequacy of the insurance protection.

#### H. EVIDENCE OF COMPLIANCE

Spectra or its insurance broker shall provide the required proof of insurance compliance, consisting of Insurance Services Office (ISO) endorsement forms or their equivalent and the ACORD form 25-S certificate of insurance (or its equivalent), evidencing all required coverage shall be delivered to City, or its representative as set forth below, at or prior to execution of this Agreement. Upon City's request, Spectra shall submit to City copies of the actual insurance policies or renewals or replacements. Unless otherwise required by the terms of this Agreement, all certificates, endorsements, coverage verifications and other items required to be delivered to City pursuant to this Agreement shall be mailed to:

EBIX Inc.		
City of Santa Clara, City Manager's Office		
P.O. Box 100085 – S2	or	1 Ebix Way
Duluth, GA 30096		John's Creek, GA 30097

Telephone number: 951-766-2280  
Fax number: 770-325-0409  
Email address: ctsantaclara@ebix.com

I. QUALIFYING INSURERS

All of the insurance companies providing insurance for Spectra shall have, and provide written proof of, an A. M. Best rating of at least A minus 6 (A- VI) or shall be an insurance company of equal financial stability that is approved by the City or its insurance compliance representatives.