

## CONCESSION SERVICES AGREEMENT

**THIS AGREEMENT** (the “Agreement”) is made and entered into on the \_\_\_\_ day of \_\_\_\_\_, 2020 (the “Effective Date”), by and between, on the one hand, **The City of Pascagoula, Mississippi** (the “City”), and, on the other hand, **TM Concessions, LLC** (the “Operator”). The City and Operator may be severally referred to as a “Party” or collectively referred to as the “Parties.”

### WITNESSETH:

**WHEREAS**, the City desires to contract with an entity to operate, manage, and maintain two (2) concession facilities located at the Pascagoula Sportsplex, 1813 Tucker Street, Pascagoula, Mississippi (the “Park”); and

**WHEREAS**, on March 9, 2020, the City did publish an amended notice soliciting proposals to maintain, operate, and manage said facilities upon the general terms and conditions recited therein; and

**WHEREAS**, upon receipt and review of the proposals received, the City, in its sole and absolute discretion, has determined that based on the criteria stated in its Request for Proposals, Operator’s proposal best fulfills the requirements; and

**WHEREAS**, it is appropriate that the following Agreement be entered into for the safety and convenience of the general public in the use and enjoyment of and the overall enhancement of recreational and educational experience within the Park.

**NOW, THEREFORE**, for and in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby mutually enter and agree to this Agreement, each for itself and its successors and assigns, as follows:

### **Section 1. Concession Services.**

1.1. The City hereby grants the Operator the right to operate, manage, and maintain two (2) concession facilities at the Park (collectively the “Concession Facilities”) upon the terms and conditions contained herein; Operator hereby agrees to operate, maintain, and manage said concession facilities upon the terms and conditions stated herein.

1.2. Operator shall ensure that the Concession Facilities are open and serving during all scheduled games and tournaments. The schedule of said games shall be provided to Operator on a monthly basis, at least fourteen (14) days in advance of the first scheduled game of the month. Schedules shall be delivered by email to the Operator’s email address at [steve.jordan@turfmasterslc.com](mailto:steve.jordan@turfmasterslc.com), or to any other address so designated from time to time in writing by the Operator.

**Section 2. Term.** The term of this Agreement (the “Term”) will begin on the Effective Date and will remain in full force effect through October 31, 2021 (the “Initial Period”), subject to earlier termination as provided for below. At the conclusion of the Initial Period, this Agreement may be renewed with the written agreement of both Parties for successive one (1) year terms, ending on October 31, each year. Notwithstanding the foregoing, either party may terminate this Agreement at any time upon thirty (30) days written notice to the other party.

### **Section 3. Concession Fee.**

3.1. In exchange for the right to operate, manage, and maintain the Concession Facilities, Operator agrees to pay to the City a percentage of Operator’s gross sales from the Concession Facilities (the “Concession Fee”). The percentage Operator agrees to pay to the City shall be tiered based upon the gross sales generated in any given month. In any month where gross sales from the Concession Facilities are less than \$10,000.00, Operator agrees to pay to the City 10% of said gross sales, if any. In any month where gross sales from the Concession Facilities are between \$10,000.00 and \$20,000.00, Operator agrees to pay to the City 15% of said gross sales. And, in any month where gross sales from the Concession Facilities exceed \$20,000.00, Operator agrees to pay the City 20% of said gross sales.

3.2. The Concession Fee for each month shall be payable on the first day of the following month. The Concession Fee may be hand-delivered to the City’s City Manager at 603 Watts Avenue, Pascagoula, Mississippi 39567 or mailed to the City of Pascagoula, c/o City Manager, Post Office Drawer 908, Pascagoula, Mississippi 39568. Operator’s failure to pay the Concession Fee to the City within thirty (30) days of the time the Concession Fee becomes payable shall constitute a material default of this Agreement by Operator and shall entitle the City to terminate this Agreement immediately upon sending written notice to Operator.

3.3. As security for the payments due under this Agreement, Operator grants to the City a security interest in all of Operator’s merchandise, inventory, trade fixtures, office supplies, office furniture and equipment, and all parts, accessories, attachments, replacements, and additions thereto whether now owned or hereinafter acquired by Operator, located, or to be located on or within the Concession Facilities, and all proceeds, including insurance proceeds, thereof. Upon default in the payment of the Concession Fee or any other payment due under this Agreement and upon written notice, the City may sell any or all of such property at public or private sale. The remedy granted to the City in this paragraph shall be cumulative and in addition to the City’s remedies under governing law.

#### **Section 4. Utilities, Repairs, and Maintenance.**

4.1. During the term of this Agreement, the City shall pay for all utilities necessary to operate the Concession Facilities.

4.2. The City shall, at its own expense, maintain the structure of the Concession Facilities, the equipment listed on Exhibit "A," and all other fixtures in the Concession Facilities which belong to the City, unless such maintenance and/or repair is required by reason of the intentional or neglectful acts or omissions of Operator, its employees, agents, invitees, licensees, or contractors, in which case, Operator shall be responsible.

4.3. Operator shall keep all structures, fixtures, and equipment clean, neat, and in a good state of repair, reasonable wear and tear expected.

#### **Section 5. Types of Concession Authorized.**

5.1. Operator shall have the right to use the Concession Facilities only for the sale and distribution of food and non-alcoholic drink items.

5.2. The City may, in its sole discretion, allow and permit other food and beverage vendors, including food trucks, to sell and distribute food and beverages in and around the Park (but not in the Concession Facilities); provided, however, the City shall ensure, to the extent reasonably practicable, that such other vendors do not sell and distribute the same food items at the same time they are being sold and distributed by Operator.

**Section 6. Loss or Damage to Operator's Property.** Operator shall bear the risk of loss for any damage to parts, stock, equipment, inventory, or other personal property owned by Operator or its employees or agents which are located at, on, or within the Concession Facilities. Any insurance for such loss or damage shall be obtained by and paid for by Operator. The City shall have no responsibility or liability for (i) loss or damage to property of the Operator, its employees or agents, or third parties located at, on, or within the Concession Facilities; or (ii) any personal injury to Operator or third parties, including agents or employees of Operator, at or within the Concession Facilities and, in this regard, Operator does hereby indemnify and hold the City harmless from such loss, damage, or injury, pursuant to Section 13 of this Agreement.

#### **Section 7. Termination.**

7.1. Either Party shall have the right to immediately terminate this Agreement, without penalty or prejudice to any other rights and remedies it may have, if:

- a. The other Party fails to perform any material provision of this Agreement and the failure is not corrected within thirty (30) days after the other Party gives the defaulting Party written notice of the breach;
- b. The other Party (i) becomes insolvent, is unable to pay its debts as they mature, or is the subject of a petition in bankruptcy, whether voluntary or involuntary, or of any other proceedings under bankruptcy, insolvency, or similar laws; (ii) is named in, or its property is subject to, a suit for appointment of a receiver; or (iii) is liquidated or dissolved, whether through court proceedings or administratively; or
- c. The other Party suspends, discontinues, or materially alters its business operations.

7.2. This Agreement may be terminated at any time, including during the Initial Period, without penalties or prejudice, by mutual agreement of both Parties in writing.

**Section 8. Remedies Upon Default.** Termination by either Party of this Agreement shall not limit or otherwise effect the remedies of the non-defaulting or non-breaching Party against the defaulting or breaching Party. In the event that either Party is in material default under any of the terms or conditions of this Agreement or has materially breached any of its representations or warranties in this Agreement, the non-defaulting or non-breaching Party shall be entitled to pursue, in addition, to any remedies specifically provided herein, all further remedies then available at law or in equity. In the event that a court of competent jurisdiction finds that Operator is in material default under any of the terms or conditions of this Agreement or has materially breached any of its representations or warranties in this Agreement, the City shall be entitled to recover from Operator all attorneys' fees, expenses, and costs incurred by the City in obtaining such a finding.

**Section 9. Binding Successor Doctrine.** As a political subdivision of the State of Mississippi, the City is subject to the laws of the State of Mississippi. Mississippi law provides that the current City Council of The City of Pascagoula, Mississippi may bind itself contractually for the remainder of its term (approximately sixteen (16) months) but may not bind successor City Councils without express statutory authority (the "Binding Successor Doctrine"). There is no express statutory authority for the City to enter a Concession Services Agreement exceeding sixteen (16) months. Thus, the Parties acknowledge that this Agreement could be voided by a successor City Council pursuant to the Binding Successor Doctrine.

**Section 10. Compliance with Laws.** Operator shall, at its sole cost, meet all requirements of the State and Jackson County Health Departments and shall provide evidence of such compliance, including, but not limited to (i) periodic reviews by the Health Department(s); (ii) immediate remedy of any and all deficiencies cited

by the Health Department(s); and (3) attendance at Health Department food preparation, sales, and sanitation classes. Operator shall submit to the City's City Manager copies of all Health Department notices, licenses, permits, and correspondence immediately upon receipt thereof by Operator.

**Section 11. Holdover Occupancy.** Any holdover at the expiration or termination of this Agreement shall be by sufferance of the City on a month-to-month basis. During such holdover occupancy, Operator shall be bound by all the terms conditions and covenants of this Agreement. Any holdover occupancy may be terminated by Operator upon thirty (30) days' written notice to the City and by the City upon ten (10) days' written notice to Operator. No holding over by the Operator shall operate to extend this Agreement except as set forth in this Section. No holding over shall result in waiver, loss, or diminution of any of the City's rights either under the terms of this Agreement or under applicable law.

**Section 12. Right of Inspection.** The City shall have the right, but not the obligation, at City's cost and expense to inspect, investigate, sample, or monitor the Concession Facilities at any time to determine whether Operator is complying with the terms of this Agreement. In connection therewith, Operator shall provide the City with full access to all relevant facilities, records (including bookkeeping records), and files. If Operator is not in compliance with any of the provisions of this Agreement, the City shall have the right, but not the obligation, without limitation to any of the City's other rights and remedies under this Agreement, to immediately enter on the premises and to discharge Operator's obligations under this Agreement at Operator's expense, notwithstanding any other provision of this Agreement. The City shall endeavor to minimize interference with Operator's business but shall not be liable for any such interference. In the event of non-compliance by Operator, all sums reasonably disbursed, deposited, or incurred by the City in connection therewith, including but not limited to, all costs, expenses, and actual attorneys' fees, shall be due and payable by Operator to the City, on demand by the City, together with interest thereon as provided in this Agreement.

**Section 13. Hold Harmless, Defense, and Indemnity.**

13.1. Operator, on its own behalf, as well as on behalf on its employees, agents, and representatives, acknowledges, stipulates, and accepts the dangers, risks, and potential liabilities associated with the operation, management, and maintenance of the Concession Facilities (the "Permitted Activity"). Operator, its employees, agents, and representatives agree, swear, and affirm to release and hold harmless the City for any and all loss, damage, injury, claim, or liability (including, without limitation, attorneys' fees) arising from their engagement in the Permitted Activity.

13.2. In consideration of the benefits conferred herein, and to the fullest extent permitted by law, Operator shall defend, indemnify, and hold harmless the City, its agents, and employees, and any other person or entity that the City is required to

defend or indemnify (collectively, the “Indemnities”), from and against any and all demands, claims, causes of action, liens, fines, penalties, losses, damages, costs, and expenses (including legal fees), of every kind and nature, regardless of whether in law or in equity, or whether nominal, actual, direct, indirect, consequential, special, punitive, or otherwise (collectively, the “Liabilities”), arising out of, or related to, participation in the Permitted Activity by Operator and its employees, agents, and representatives.

13.3. Upon notice from any of the Indemnities of any Liabilities covered above, Operator shall, at its sole cost, expense, and risk: (1) defend against all Liabilities that may be brought or instituted by any person or entity against any of the Indemnities; (2) pay, satisfy, or otherwise settle all Liabilities, including without limitation, any fine, penalty, award, judgment, or decree that may be rendered against any of the Indemnities; and (3) reimburse each of the Indemnities for all actual legal fees, expenses, costs, and damages, and pay any amounts paid out in satisfying or otherwise settling any Liabilities for which Operator has failed to perform its defense and indemnity obligations, regardless of whether incurred in or out of court or arbitration, on appeal, or as part of any regulatory, administrative, bankruptcy, or other dispute resolution proceeding, or in enforcing this defense and indemnity obligation or any other provision of this Agreement. The defense and indemnity obligations contained herein shall survive the expiration of this Agreement.

13.4. If any portion of Section 13 is determined to be in contravention of applicable law or otherwise invalid or unenforceable, that portion shall be deemed severable and the rest of Section 13 shall be reformed to provide the maximum enforceable defense and indemnity in favor of the Indemnities permitted by applicable law.

**Section 14. General Liability.** The City shall not be liable for any damage to property of Operator or of others entrusted to Operator, nor for the loss of, or damage to, any property of Operator or of others entrusted to Operator by theft or otherwise. The City shall not be liable for any injury or damage to persons or property resulting from fire, water, or rain, or by any other cause of any nature whatsoever.

**Section 15. Liability Insurance.** Operator shall be responsible for providing liability insurance at all times during the term hereof, and shall purchase, pay for, and carry public liability insurance with limits in an amount no less than \$500,000.00 per incident and \$1,000,000.00 in the annual aggregate, and Operator shall furnish to the City within fifteen (15) days of the Effective Date of this Agreement written evidence of the existence of such insurance. The City shall be named in said policy as an additional insured.

## **Section 16. Relationship of the Parties.**

16.1. Operator's relationship with City is that of an independent contractor, and nothing in this Agreement is intended to or shall be constructed as creating a partnership, agency, joint venture, employment, or similar relationship.

16.2. Operator acknowledges that it and all its officers, employees, and agents are not an employee or agent of the City for any purpose whatsoever. Operator shall be responsible for all applicable W-9s and work eligibility verification, earnings reports, and tax payments to government agencies, such as the U.S. Internal Revenue Service and the Social Security Administration, including payment of all wages due to Operator's employees, insurance premiums, license fees, fingerprinting costs, outfitting expenses, and all other obligations or expenses of Operator relative to its employees in performance of the terms, duties, and obligations under this Agreement.

16.3. Operator acknowledges that its personnel, employees, officers, and agents are not entitled to receive any of the fringe benefits received by the City's employees, including, but not limited to, Workers' Compensation insurance.

16.4. Operator shall not have the authority to enter into any contract on the City's behalf or to otherwise bind the City to any agreement, unless expressly authorized to so do in writing by the City.

16.5. Because Operator is an independent Operator, City has no direction or control over the concession services to be performed hereunder, nor over Operator's personnel, and Operator shall at all times remain the employer of its personnel performing the concession services (and shall be liable for each of their actions, omissions, or breaches). Operator shall indemnify the City from any claim made by any of Operator's personnel against City alleging rights or benefits as an employee of City, as set out in Section 13 of this Agreement.

**Section 17. Taxes and Fees.** Operator shall be responsible for the payment of all fees and taxes which may be levied or assessed against the Concession Facilities, the income therefrom, the improvements, the contractual interest created by this Agreement, and any personal property used on or in conjunction with the Concession Facilities, which may be assessed by any lawful authority.

**Section 18. Licenses.** Operator shall, at its expense, obtain all licenses and permits required for the conduct of its business. Operator shall, at its expense, observe and comply with all present and future laws, ordinances, directives, orders, rules, and regulations of governmental authorities having or claiming jurisdiction over the Concession Facilities or the conduct of Operator's business as it pertains to the operation, management, and maintenance of the Concession Facilities.

## **Section 19. Assignment.**

19.1. This Agreement, or any interest therein, shall not be assigned, transferred, or otherwise encumbered under any circumstances by Operator without the prior written consent of the City.

19.2. Subject to the requirements of Section 19.1, and to the extent authorized by law, covenants and conditions herein contained shall apply to and bind the successors and assigns of all the Parties hereto.

## **Section 20. Extent of Agreement, Severability, and Modification.**

20.1. This Agreement represents the entire and integrated agreement between the Parties and supersedes all prior negotiations, representations, or agreement, either written or oral.

20.2 In the event any provision of this Agreement shall be held invalid and unenforceable, the remaining provisions shall be valid and binding upon the Parties. One or more waivers by either Party of any breach of any provision, term, condition, or covenant shall not be construed by the other party as a waiver of any subsequent breach.

20.3 No modification, amendment, or alteration in the terms or conditions contained herein shall be effective unless contained in a written document executed by both Parties.

**Section 21. Force Majeure.** Any delay in the performance of any duties or obligations of either Party will not be considered a breach of this Agreement if such delay is caused by any occurrence or contingency beyond the Party's reasonable control, including, but not limited to, acts of God, weather, labor disputes and strikes, market shortage of materials, riots, war, and governmental requirements (any such event, a "Force Majeure Event"), provided that such Party uses reasonable efforts, under the circumstances, to resume performance as soon as reasonably practicable. The obligations and rights of the Party so excused will be extended on a day-to-day basis for the period of time reasonably necessary to overcome the effects of the underlying cause of the delay.

## **Section 22. Successors, Survival, and Remaining Obligations.**

22.1. City and Operator each binds itself and its successors, executors, administrators, and assigns to the other Party of this Agreement and to the successors, executors, administrators, and assigns, or such Party, in respect to all covenants of this Agreement.



22.2. This Agreement and all covenants and warranties contained herein shall survive indefinitely unless agreed otherwise in writing by the Parties.

22.3. Termination of this Agreement, unless expressly provided herein, shall not relieve or release any Party from any rights, liabilities, or obligations that it has accrued prior to the date of such termination and those rights, liabilities, and obligations expressed herein of the Parties upon the termination of this Agreement.

**Section 23. Notices.**

23.1. Except as stated otherwise herein, any notice required or permitted to be sent to the City hereunder shall be deemed given when deposited in the United States mail, postage prepaid, certified mail, to the City at the address below:

City of Pascagoula  
c/o City Manager  
Post Office Drawer 908  
Pascagoula, Mississippi 39568

23.2. Except as stated otherwise herein, any notice required or permitted to be sent to the Operator hereunder shall be deemed given when deposited in the United States mail, postage prepaid, certified mail, to the Operator at the address below:

TM Concessions, LLC  
3210 Ingalls Avenue  
Pascagoula, Mississippi 39581

**Section 24. Governing Law and Venue.** This Agreement shall be governed and construed in accordance with Mississippi law, without regard to conflict of law principles. In the event any litigation arises between the Parties in connection with this Agreement, venue for such litigation shall lie exclusively in Jackson County, Mississippi, to the exclusion of all other venues.

**Section 25. Representations and Warranties.**

25.1. Each Party represents and warrants to the other Party as of the Effective Date that: (i) it has the full power and authority to make, deliver, enter into, and perform pursuant to the terms and conditions of this Agreement, and (ii) it has taken all necessary action to authorize the execution, delivery, and performance of the terms and conditions of this Agreement.

25.2. Each Party represents and warrants to the other Party that it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendation of the Party

in so doing, and is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions, and risks of this Agreement.

**Section 26. Headings and Section Names.** The headings and section names in this Agreement are for convenience only and shall not be used to interpret or construe the provisions of this Agreement.

**Section 27. Counterparts.** This Agreement and any amendment or supplement hereto or any waiver granted in connection herewith may be executed in any number of counterparts and by the different Parties on separate counterparts and each such counterpart shall be deemed to be an original, but all such counterparts shall together constitute one and the same agreement.

**IN WITNESS WHEREOF,** the Parties hereto have executed and caused this Agreement to be effective as of the Effective Date first written above.

Michael Silverman

By: \_\_\_\_\_  
Michael Silverman, City Manager  
City of Pascagoula, Mississippi

STATE OF MISSISSIPPI

COUNTY OF JACKSON

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid County and State, within my jurisdiction, the within named Michael Silverman, and that he signed and delivered the above and foregoing instrument for and on his behalf after being duly authorized to do so.

SWORN TO AND SUBSCRIBED BEFORE ME, this the \_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
NOTARY PUBLIC

[SEAL]

My Commission Expires: \_\_\_\_\_

Steve Jordan

By: \_\_\_\_\_  
Steve Jordan  
TM Concessions, LLC

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid County and State, within my jurisdiction, the within named Steve Jordan, and that he signed and delivered the above and foregoing instrument for and on his behalf after being duly authorized to do so.

SWORN TO AND SUBSCRIBED BEFORE ME, this the \_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
NOTARY PUBLIC

[SEAL]

My Commission Expires: \_\_\_\_\_

## **EXHIBIT "A"**

### **Large Concession Stand**

- 1 fridge
- 1 freezer
- 1 microwave
- 1 nacho warmer
- 1 hotdog steamer
- 1 chili and Cheese warmer
- 1 popcorn Machine
- 1 snow cone machine
- 1 ice maker
- 1 drink cooler
- 3 workstations-+500 lbs capacity on top shelf about 400 lbs capacity of bottom shelf
- 3 shelves- Commercial Grade 5 tier holds 4,000 lbs
- 1 Countertop Commercial Griddle
- 1 Countertop Commercial Fryer

### **Smaller Concession Stand**

- 1 fridge
- 1 microwave
- 1 nacho warmer
- 1 hotdog steamer
- 1 chili and Cheese warmer
- 1 popcorn Machine
- 1 ice maker
- 1 drink cooler
- 2 workstations
- 2 shelves- Commercial Grade 5 tier holds 4,000 lbs