

EXCLUSIVE BEVERAGE AGREEMENT BETWEEN THE CITY OF LA CROSSE AND PEPSI-COLA BOTTLING COMPANY

This *Exclusive Beverage Agreement* (“Agreement”) is made and entered into effective as of this ____ day of February, 2017, by and between **Pepsi-Cola Bottling Company of La Crosse**, a Wisconsin Corporation, 1900 West Avenue South, La Crosse, Wisconsin 54601 (hereinafter “Pepsi”) and **City of La Crosse**, a Wisconsin municipal corporation with offices located at 400 La Crosse Street, La Crosse, Wisconsin 54601 (“City”).

RECITALS:

A. City is the owner and operator of the La Crosse Center (hereinafter “Center”), located at 300 Harborview Plaza, La Crosse, Wisconsin. Unless specifically excepted herein, the parties hereto acknowledge and agree that the City has the legal right to control beverage vending and/or service at the Center.

B. Pepsi is in the business of manufacturing and/or distributing non-alcoholic carbonated and non-carbonated beverages in concentrated, mixed and packaged forms.

C. City has issued a Request for Proposal dated September 1, 2016, soliciting requests for long-term Beverage Partnership Proposals, the primary objective for which is to improve the Center’s beverage services and net revenues by maximizing the availability of products and developing creative strategies to benefit the Center and the successful proposer.

D. City has determined that the best and final offer by Pepsi was the most advantageous to the City and the Center.

E. The Pepsi Proposal, in response to the City’s Request for Proposal is attached hereto, marked EXHIBIT “1”, and made a part hereof by reference.

F. City desires to grant to Pepsi the exclusive right to sell or otherwise provide and promote its beverage products at the Center, pursuant to the terms and conditions contained in this Agreement.

For valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in further consideration of the mutual and dependent promises set forth herein, the parties hereby agree as follows:

TERMS OF AGREEMENT

1. Incorporation Background Recitals.

The background Recitals set forth above are true and correct statements of fact, and are hereby incorporated into this Agreement by reference.

2. Definitions.

As used in this Agreement, the following defined terms shall have the meaning specified below:

2.1 "Beverages" and "Beverage Lines" shall be defined to include all carbonated soft drinks, non-carbonated soft drinks, sparkling/drinking waters, isotonic drinks, juice and juice drinks, all bottled teas offered by Pepsi (except hot teas), herbal drinks, energy drinks, flavored milk (shelf stable) and all other soft drink products which are set out on EXHIBIT "1", which is attached hereto and made a part hereof by reference, plus any new products that may be added or carried by Pepsi, subsequent to the date of this Agreement.

2.2 "Beverage Products" means the Postmix, Premix, and Packaged Products.

2.3 "Fountain Products" means fountain beverage products produced from Postmix or poured as Premix products, including carbonated beverages, non-carbonated beverages and slushy beverages. This shall include regular and diet soft drinks, juice products, water and water related products, teas, and isotonic drinks.

2.4 "Packaged Products" means any packaged beverage products produced or distributed by Pepsi.

2.5 "Postmix Products" means undiluted concentrated beverage syrup distributed by Pepsi for mixing and dispensing at the Center.

2.6 "Premix Products" means bulk quantity beverages distributed by Pepsi for dispensing in individual portions at the Center.

3. Term and Termination.

3.1 Term. The term of this Agreement shall run from January 1, 2017 to midnight on January 10, 2022 (the "Term"). Said term shall supercede any term set forth in EXHIBIT "1".

3.2 Termination for Cause. If, through any cause, a party fails to fulfill in a timely and proper manner its obligations under this Agreement, or if a party violates any of the terms and conditions of this Agreement and such breach or default shall not be cured within thirty (30) days after written notice thereof from the non-defaulting party to the defaulting party, then the non-defaulting party shall have the right to terminate this Agreement.

4. Cash Donations and Promotions.

The cash donations to be made and the promotions provided by Pepsi to the City are as set forth on EXHIBIT "1" and as follows:

4.1 Cash Contributions. The signing bonus of \$10,000 as set forth in EXHIBIT "1" shall be due and payable on or before March 1, 2017. In addition, the \$125,000 total cash contribution as set forth in EXHIBIT "1" shall be payable in annual payments of \$25,000 due each year on or before March 1, commencing with the first payment due on or before March 1, 2017. Any and all payments shall be made without demand and made payable to City of La Crosse at the following address: La Crosse Center, Attn. La Crosse Center Manager, 300 Harborview Plaza, La Crosse, WI 54601. Bonus incentive rebate, if applicable paid by March 31, of each year attained.

4.2 Promotions. All marketing and promotions shall be provided as set forth in EXHIBIT "1" and as mutually agreed upon by the parties.

5. Beverage Vending and Coolers.

City grants Pepsi an exclusive license and right to install, operate, supply and service automatic beverage vending machines (for purposes of this Agreement the term "vending machines" shall include coolers) from Pepsi's Beverage Lines at the Center. Throughout the Term, City shall not grant any other person or entity the right or license to install or operate any piece of vending equipment at the Center which offers or sells any beverage product that is competitive with the Beverage Lines or Beverage Products offered or sold by Pepsi. It is agreed by the parties hereto that, as to all vending machines at the Center, Pepsi shall have the sole right to determine the type of Product and package type to be placed in beverage vending machines.

5.1 Vending and Cooler Equipment. Pepsi shall acquire, install and maintain, at its sole expense, all necessary automatic equipment necessary to provide quality beverage service, as specified in EXHIBIT "1". Pepsi shall retain ownership of its machines. Pepsi shall operate vending machines and coolers during each year during the Term of this Agreement. Pepsi shall promptly respond to reasonable maintenance requests by City. Both parties will mutually agree to added equipment as needed with future La Crosse Center expansion plans.

5.2 Pricing for Purchase of Vending Products from Pepsi. The vending products and the prices for the vending products are as set forth on EXHIBIT "1".

6. Fountain Products.

6.1 Supply. During the Term of this Agreement, the Center shall purchase Premix and Postmix for Fountain Products to be sold or dispensed at the Center exclusively from Pepsi, except as otherwise agreed by Pepsi.

6.2 Fountain Equipment. Pepsi, at its sole expense, shall acquire, install and maintain all Fountain Equipment at the Center, as may be reasonably required to serve the demand at the Center, which Fountain Equipment shall remain the property of Pepsi throughout the Term of this Agreement. Pepsi shall have full responsibility for the costs of any maintenance and repair,

and for the cost of any damage to or loss of Fountain Equipment located at the Center, except for damage or loss caused by the sole gross negligence or intentional acts of the Center's employees or authorized agents. Pepsi shall promptly respond to reasonable maintenance requests by City.

6.3 Pricing. The pricing for Postmix products shall be as set forth on EXHIBIT "1".

6.4 Use of Beverages. The Center shall dispense the Fountain Products exclusively for immediate or imminent consummation and shall not resell such products either to non-Center vendors or to consumers in any form other than as individual services of Fountain Products.

7. Packaged Products

During the Term, the Center shall purchase Packaged Products to be sold or dispensed at the Center exclusively from Pepsi, except as otherwise agreed by Pepsi. The prices for Packaged Products shall be those that are set forth on EXHIBIT "1".

8. Sponsorships.

The Center shall not, during the Term, sell any featured sponsorship opportunities at any event held at the Center to any beverages in competition with the Beverage Lines of Pepsi, except as otherwise agreed by Pepsi.

9. Beverage Signage and Promotion.

Except as permitted under this Agreement, the City shall not authorize the sale, distribution or sampling at the Center of soft drink or other Beverage Products in any product line covered by this Agreement that is not purchased from or distributed by Pepsi, except as otherwise agreed by Pepsi. The City shall not enter into any sponsorship or similar agreements providing any signage at the Center for any soft drink or other Beverage Products in any Product line covered by this Agreement that is not purchased from or distributed by Pepsi, except as otherwise agreed by Pepsi. Pepsi shall have the exclusive right to provide all beverage advertising at the Center, during the Term of this Agreement, except as otherwise agreed by Pepsi. The size, shape, color scheme and any and all other aspects of the signage, including the content thereof, shall be mutually agreed to by the parties hereto.

10. Liability and Insurance.

10.1 Pepsi Obligations. Pepsi shall defend, hold harmless and indemnify City and its respective officers, agents and employees from and against any and all claims or causes of action arising from or relating to Pepsi's performance or breach of the terms of this Agreement, including, but not limited to, the respective acts or omissions of Pepsi's agents or employees. Provided, however, that this indemnity shall not be construed to bar any legal remedies which Pepsi may have against City in the event City shall fail to fulfill its obligations under the terms of this Agreement.

Pepsi shall have and assume complete responsibility for its employees, including, but not limited to, all applicable government relations relating to employment, payment of personnel, and workers' and unemployment compensation.

10.2 City Obligations. To the extent provided by law, City shall be responsible for any and all claims or causes of action relating to its performance of the terms of this Agreement, including, but not limited to, the acts or omissions of its employees or authorized agents. This clause shall not be construed to bar any legal remedies which City may have against Pepsi in the event Pepsi shall fail to fulfill its obligations under the terms of this Agreement.

City shall have and assume complete responsibility for its employees, including, but not limited to, all applicable government relations relating to employment, payment of personnel, and workers' and unemployment compensation.

Nothing in this Agreement shall be construed as City waiving its statutory limitations and/or immunities as set forth under Wisconsin law or other applicable law.

10.3 Insurance. Pepsi shall obtain and maintain, at its sole expense, insurance in such amounts and against such risks both generally and specifically with respect to the performance of services and delivery of goods under this Agreement, including to insure against property damage and personal injury, in accordance with reasonable industry practice. Pepsi shall name the City of La Crosse as an additional insured on such insurance and shall deliver to the City certificates of all insurance required under this Agreement showing the City as a named insured. Said insurance shall not be cancelled, non-renewed nor have any material changes without providing thirty (30) days advanced written notice to the City.

11. Independent Contractors.

Each party to this Agreement is acting as an independent contractor with respect thereto. No party is, and shall not represent itself to be, a partner, principal, joint venturer, employee, officer, director or agent of any other party hereto, or any affiliate of such party. As an independent contractor, no party shall be entitled to bind or to obligate the other party or any affiliate thereof without the prior written consent of such other party in the specific instance. Further, since the parties have not formed a partnership or joint venture, City intends to characterize the cash donations generated pursuant to this Agreement as tax-exempt income.

12. Notices.

All notices, demands, consents or other communications required or permitted hereunder shall be in writing and shall be deemed to have been given when personally delivered or sent by registered or certified mail, return receipt requested, postage prepaid, addressed as follows:

To City: City of La Crosse
400 La Crosse Street
La Crosse, WI 54601
Attn: City Clerk

And to:
La Crosse Center
300 Harborview Plaza
La Crosse, WI 54601
Attn: La Crosse Center Manager

To Pepsi: Pepsi-Cola Bottling Company of La Crosse
1900 West Avenue South
La Crosse, WI 54602-0998
Attn: Matt Kloss, Territory Manager

or to such other addresses as may hereafter be furnished in writing by the respective parties if given in the manner required above. Any notice, demand, consent or communication given hereunder in the manner required above shall be deemed to have been effected and received as of the date personally delivered or, if mailed, five (5) days after the date so mailed.

13. Power and Authority.

Each party hereto covenants to the other party hereto that: (a) the execution, delivery, and performance of this Agreement by such party has been duly authorized by such party and will not violate any agreements with, or rights of, third parties; and (b) this Agreement has been duly executed and delivered by such party and is enforceable against such party in accordance with its terms.

14. Miscellaneous.

14.1 Entire Agreement. This Agreement, including all Exhibits hereto, contains the entire understanding between and among the parties and supersedes any prior understandings and agreements among them respecting the subject matter of this Agreement. This Agreement shall be amended only by formal written supplementary amendment. No oral amendment of this Agreement shall be given any effect. All amendments to this Agreement shall be in writing executed by both parties.

14.2 Compliance With Laws. Pepsi shall comply in every respect with applicable federal, state, and local laws, including, but not limited to, the laws respecting equal opportunity in employment.

14.3 Choice of Law. This Agreement, and all instruments delivered pursuant hereto and incorporated herein, shall be governed by the laws of the State of Wisconsin. Venue for any action arising out of or in any way related to this Agreement shall be exclusively in La Crosse County, Wisconsin. Each party waives its right to challenge venue.

14.4 Force Majeure. The time within which either of the parties hereto shall be required to perform any act or acts under this Agreement, shall be extended to the extent that the performance of such act or acts shall be delayed by acts of God, fire, windstorm, flood, explosion, collapse of structures, riot, war, labor disputes, delays or restrictions by governmental bodies, or any cause beyond the reasonable control of such party, provided, however, that the party entitled to such extension hereunder shall give prompt notice to the other party of the occurrence causing such delay.

14.5 Captions. The captions of the various paragraphs of this Agreement have been inserted for the purpose of convenience of reference only, and such captions are not a part of this

Agreement and shall not be deemed in any manner to modify, explain, enlarge or restrict any of the provisions of this Agreement.

14.6 Counterparts. This Agreement may be executed by the parties hereto individually or in any combination, in one or more counterparts, each of which shall be an original and all of which shall together constitute one and the same Agreement.

14.7 Severability. If any provision of this Agreement, or of any of the documents or instruments delivered pursuant hereto, or any portion of any provision hereof or thereof, shall be deemed invalid or unenforceable pursuant to a final determination of any court of competent jurisdiction, or as a result of future legislative action, such determination or action shall be construed so as not affect the validity or enforceability hereof or thereof, and shall not affect the validity or effect of any other portion hereof or thereof.

14.8 No Waiver. The failure of any party to this Agreement to insist, in any one or more instances, upon performance of any of the terms, covenants, or conditions of this Agreement shall not be construed as a waiver, or relinquishment of the future performance of any such term, covenant, or condition by any other party hereto but the obligation of each other party with respect to such future performance shall continue in full force and effect.

14.9 Assignment; Binding Effect. This Agreement shall extend to, shall inure to the benefit of and shall be binding upon each of the parties hereto, and their respective successors and permitted assigns. This Agreement shall not be assignable or transferable, in whole or in part, by any of the parties hereto, except upon the express prior written consent of the other parties hereto.

14.10 No Personal Liability. Under no circumstances shall any trustee, officer, official, commissioner, director, member, partner or employee of the City have any personal liability arising out of this Agreement and Pepsi shall not seek or claim any such personal liability.

14.11 Conflicts of Interest. Pepsi covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services hereunder. Pepsi further covenants that in the performance of this Agreement no person having any conflicting interest shall be employed. Any interest on the part of Pepsi or its employees must be disclosed to City.

14.12 Non-Discrimination. Pursuant to law, it is unlawful and Pepsi agrees not to willfully refuse to employ, to discharge, or to discriminate against any person otherwise qualified because of race, color, religion, sex, sexual orientation, age, disability, national origin or ancestry, lawful source of income, marital status, creed, or familial status; not to discriminate for the same reason in regard to tenure, terms, or conditions of employment, not to deny promotion or increase in compensation solely for these reasons; not to adopt or enforce any employment policy which discriminates between employees on account of race, color, religion, sex, creed, age, disability, national origin or ancestry, lawful source of income, marital status or familial status; not to seek such information as to any employee as a condition of employment; not to penalize any employee or discriminate in the selection of personnel for training, solely on the basis of race, color, religion, sex, sexual orientation, age, disability, national origin or ancestry, lawful source of income, marital status, creed or familial status.

Pepsi shall include or cause to be included in each subcontract covering any of the services to be performed under this Agreement a provision similar to the above paragraph, together with a clause requiring such insertion in further subcontracts that may in turn be made.

14.13 Political Activities. Pepsi shall not engage in any political activities while in performance of any and all services and work under this Agreement.

14.14 No Third-Party Beneficiary. Nothing contained in this Agreement, nor the performance of the parties hereunder, is intended to benefit, nor shall inure to the benefit of, any third party.

14.15 Good Standing. Pepsi affirms that it is a company duly formed and validly existing and in good standing under the laws of the State of Wisconsin and has the power and all necessary licenses, permits and franchises to own its assets and properties and to carry on its business. Pepsi is duly licensed and qualified to do business and is in good standing in the State of Wisconsin and in all other jurisdictions in which failure to do so would have a material adverse effect on its business or financial condition.

14.16 Subcontracting. None of the services to be performed under this Agreement shall be subcontracted without the prior written approval of the City. If any of the services are subcontracted, the performance of such services shall be specified by written contract and shall be subject to each provision of this Agreement. Pepsi shall be as fully responsible to City for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by it, as it is for acts and omissions of person directly employed by it.

14.17 Survival. All express representations, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason, for a period of twelve (12) months from said completion or termination.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, effective as of the date and year first above written.

Pepsi:

PEPSI-COLA BOTTLING COMPANY OF
LA CROSSE

By: _____
Bonnie Barrier, Vice President General Manager

City:

CITY OF LA CROSSE

By: _____
Tim Kabat, Mayor

By: _____
Teri Lehrke, City Clerk