

## MANAGEMENT SERVICES AGREEMENT

### For Discussion Purposes Only

**This Management Services Agreement** (“Agreement”) is dated \_\_\_\_\_, 2009 (“Effective Date”), between Michigan State University, through its Wharton Center for Performing Arts (“MSU”), and City Opera House, L.L.C., a Michigan limited liability company (“COH”).

#### Recitals

- A. COH and the City of Traverse City (the “City”) entered into the Opera House Lease dated September 30, 2003 (as amended, the “Lease”) with respect to the property known as the City Opera House located in the 100 block of East Front Street, Traverse City, Michigan (the “Property”).
- B. COH was formed for the purpose of entering into the Lease and to develop, finance, rehabilitate, own, maintain and operate the Property in order to obtain long term appreciation, cash income and return of capital.
- C. Under the terms of the COH Operating Agreement dated October 24, 2003, the Managing Member of COH is Traverse City Opera House Restoration Group, L.L.C., a Michigan limited liability company (“TCOHRG” or “Managing Member”). TCOHRG has the authority as Managing Member of COH to manage and control the business of COH and, subject to the approval of the Lender, if any, and the consent of National City Community Development Corporation (“NCCDC”), to select a “Management Agent” to manage the operation of the Property.
- D. Under the terms of the Lease, COH is required to enter into a management agreement with a person or entity approved by the City providing a “Management Agent” with responsibility for the management of the Property and the business of the City Opera House.
- E. The mission of MSU’s Wharton Center is to enrich the lives of Michigan residents and strengthen the value of the arts in everyday life by serving as a leading resource for renowned arts entertainment and education programs.
- F. COH desires that MSU, through its Wharton Center, provide certain management services for COH and serve as “Management Agent” and MSU is willing to do so, subject to the terms and conditions of this Agreement.

Now, therefore, the parties hereby agree as follows:

1. **Term.** The term of this Agreement commences on the Effective Date and shall terminate on June 30, 2013 (“Term”), subject to earlier termination or an extension as provided in this Agreement.
2. **Services.** During the Term of this Agreement, MSU shall be the Management Agent for COH, provided that, notwithstanding anything to the contrary in the Lease, the COH Operating Agreement or any other document or agreement, the responsibilities and liabilities of MSU while serving as Management Agent are limited to those explicitly agreed to by MSU in this Agreement. Notwithstanding that MSU will be the Management Agent during the Term of this Agreement and may provide certain services prior to July 1, 2010, MSU shall not be responsible for establishing any portion of the budget for COH prior to July 1, 2010, nor shall MSU have any financial responsibility or liability for fundraising or budget shortfalls in connection with the operation and management of the Property for any time period prior to July 1, 2010. MSU will seek prior consent from COH for any expenditure necessary for the operation of the Property and completion of the events scheduled to take place prior to July 1, 2010 that would exceed the budget established by COH for the time period prior to July 1, 2010, but will have no obligation or liability if COH does not provide such consent and the Operation of the Property and completion of such scheduled events is negatively affected in any manner.
3. **Fees.** Commencing July 1, 2010, MSU shall receive a management fee in the amount of \$75,000 per fiscal year (“Management Fee”), which fee shall be included in the Budget (as defined below). In addition, within ninety (90) days after the end of each fiscal year, COH shall pay MSU an annual performance bonus equal to twenty-five percent (25%) of the Net Revenue (“Bonus”) for such fiscal year. Neither the Management Fee, nor the Bonus shall be paid for services provided prior to July 1, 2010. For purposes of this Agreement:
  - a. “Net Revenue” shall mean the excess gross revenues remaining after all components of the Budget have been satisfied; and
  - b. a fiscal year shall commence on July 1 and end on the following June 30, provided however that the first partial fiscal year under this Agreement shall commence on January 1, 2010 and end on June 30, 2010 and no portion of the Management Fee shall be owed for that time.
4. **Budget and Programming Plan.** On or before May 1 of each year, MSU shall deliver to COH an annual operations budget in the form of Exhibit A to this Agreement (the “Budget”) and a programming plan consisting of, but not limited to, proposed performances, rental dates and amounts of such rentals (“Programming Plan”) for the operation of the Property for the upcoming fiscal year. COH shall have thirty (30) days after receipt of the proposed Budget and Programming Plan to request amendments to or a meeting to discuss the proposed Budget and Programming Plan (“Review Period”). A proposed Budget or Programming Plan shall not be considered final unless mutually

accepted by COH and MSU, such approval not to be unreasonably withheld. If COH has not responded before expiration of the Review Period, the proposed Budget and Programming Plan shall be deemed accepted by COH. Amendments to the Budget and Programming Plan may be made throughout the fiscal year if done in writing and signed by both MSU and COH, subject to the same review and approval terms for the initial proposed Budget set forth in this paragraph.

5. **Management by MSU.** MSU shall manage and operate the Property in accordance with the approved Budget and Programming Plan. MSU shall have sole control over events at the Property, including but not limited to, rentals, scheduling, booking and box office. MSU shall also be responsible for coordinating and overseeing maintenance and repairs of the Property, but in no event shall MSU have any liability for the costs and expenses of the Excluded Maintenance and Repairs listed in Exhibit B. COH and TCOHRG delegate to MSU the authority to enter into contracts on behalf of COH for purposes of operating and maintaining the Property in accordance with the terms of this Agreement, provided that MSU shall not have the authority to enter into, on behalf of COH, any contract that would have a term that extends beyond the Term of this Agreement or exceeds \$50,000 in obligations to COH in the aggregate.
6. **Records.** MSU shall maintain the financial records for the operation of the Property in a manner consistent with the practices used for the operation of its own facilities. Within forty-five (45) days after and as of the end of each month, MSU shall deliver to COH a balance sheet, income statement, budget reconciliation and, if requested by COH, a statement of cash flow, in each case, for the month then ending and that portion of the fiscal year then ending for the operations of the Property, such financial statements to be prepared in accordance with Generally Accepted Accounting Principles, as determined by the Governmental Accounting Standards Board and the accounting principles applicable to MSU in its own operations.
7. **Relationship of the Parties.** The relationship of COH and MSU is that of independent contractors and this Agreement shall not be construed to create any partnership, joint venture, or agency relationship between the parties. MSU shall be responsible for the engagement, disengagement, discipline and management of all MSU employees and any contract employees provided by Access Point (“Leasing Agency”), an employee leasing agency (“Leased Employees”). MSU shall agree to treat Leased Employees in accordance with the agreement with the Leasing Agency and pay all fees to the Leasing Agency for the Leased Employees, which fees shall be included in the Budget. To the extent that MSU determines that additional staffing is required to operate the Property, MSU may utilize its own employees and include the expenses associated with such employees in the proposed Budget or an amendment to the current Budget to be approved by COH.
8. **Revenue Shortfall.** Commencing July 1, 2010, if the revenues from the operation of the Property are insufficient to cover the costs and expenses contained in the Budget, MSU shall be financially responsible for such deficit within a reasonable amount of time

following discovery of such Budget shortfall. MSU shall not allow any lien to attach to any of the Property or other property of COH and remain attached without diligently pursuing discharge or termination of such lien..

9. **Fundraising.** MSU and COH shall have separate responsibilities for fundraising to support their independent responsibilities under this Agreement. Fundraising responsibilities shall be more specifically described in the Development Agreement between MSU and COH dated around the Effective Date (“Development Agreement”), which shall be based on the terms described in Exhibit C to this Agreement, subject to negotiation and agreement by MSU and COH. Funds donated, given or otherwise contributed to MSU shall be used as permitted in the Development Agreement.

10. **Community Access.** MSU shall continue to provide access for community users in reasonable proportion to the Programming Plan to aid COH in meeting its established responsibilities of creating financial stability and acting as steward of the Property (“Community Access”).

11. **Termination.**

a. MSU may terminate this Agreement for any reason upon three hundred sixty-five (365) days’ prior written notice to COH. MSU may terminate this Agreement immediately upon notice by MSU to COH of the following, after COH has been given ten (10) business days following receipt of such notice to cure such default: (i) material default by COH under this Agreement or the Development Agreement, (ii) termination of the Lease, (iii) TCOHRG ceases to be the Managing Member of COH or (iv) the City Opera House becomes untenable for any reason or is otherwise not available for scheduled programming.

b. COH may terminate this Agreement for any reason upon three hundred sixty-five (365) days’ prior written notice to MSU. COH may terminate this Agreement immediately upon notice by COH to MSU of the following, after MSU has been given ten (10) business days following receipt of such notice to cure such default: (i) material default by MSU under this Agreement or the Development Agreement..

12. **Insurance.** COH shall maintain insurance covering property and casualty and commercial general liability insurance for the Property in the following amounts (TBD). MSU shall maintain commercial general liability insurance that covers its activities under this Agreement. Evidence of insurance coverage shall be provided by each party prior to the execution of this Agreement and on an annual basis thereafter.

13. **Indemnification.**

a. To the extent permitted by law, COH shall indemnify and hold harmless MSU, its officers, directors, trustees, and employees from and against any and all loss,

injury, liability, claim, damage or expense (including without limitation reasonable attorneys' fees and court costs) incurred by it to the extent such loss, injury, liability, claim, damage or expense is caused by: (i) the negligent actions or willful misconduct of COH or its officers, directors, trustees, and employees in conjunction with the performance of this Agreement or (ii) the material breach of this Agreement by COH, provided that COH is given the opportunity to assume control of the defense of any claim or litigation which involves potential indemnification liability.

- b. To the extent permitted by law, MSU shall indemnify and hold harmless COH, its officers, directors, trustees, and employees from and against any and all loss, injury, liability, claim, damage or expense (including without limitation reasonable attorneys' fees and court costs) incurred by it to the extent such loss, injury, liability, claim, damage or expense is caused by: (i) the negligent actions or willful misconduct of MSU or its officers, directors, trustees, and employees in conjunction with the performance of this Agreement, (ii) the material breach of this Agreement by MSU, provided that MSU is given the opportunity to assume control of the defense of any claim or litigation which involves potential indemnification liability.
  - c. Neither party shall be liable for incidental or consequential damages incurred by the other party due to a breach of this Agreement.
14. **Renewal.** The parties agree to discuss their intent to renew their relationship at least twelve months prior to the end of the Term.
15. **Governing Law.** This Agreement shall be governed by and interpreted and enforced in accordance with the laws of the State of Michigan.
16. **Amendment.** This Agreement may be amended or modified only by a written agreement executed by authorized representatives of COH and MSU.

**17. Confidential Information.**

- a. All Confidential Information will be kept confidential by the receiving party, and will not, without the prior written consent of the disclosing party or as required by law, be disclosed by the receiving party, and will not be used in any manner other than in connection with the performance of this Agreement. COH and MSU may each transmit Confidential Information to its officers, directors, trustees, employees, consultants, attorneys and agents for purpose of performing its obligations under this Agreement, provided that such parties are informed of the confidential nature of the information.
- b. "Confidential Information" means any information which is designated as confidential by the disclosing party in writing or which the receiving party knew

or should have reasonably known was confidential. Confidential Information also includes all financial statements and projections, profit and margin information, customer lists, business plans, marketing plans and strategies, pricing strategies, trade secrets, and other proprietary knowledge, data and information owned, held, or known by the disclosing party. Confidential Information does not include information that (i) at the time of disclosure was generally available to the public or thereafter has become generally available to the public through no breach of this Agreement; (ii) can be shown by written records that it was in the receiving party's possession prior to the time of disclosure and was not acquired, directly or indirectly, from the disclosing party; (iii) can be shown by written records that it was discovered or developed independently without use or knowledge of the Confidential Information; or (iv) can be shown by written records that it was obtained from a third party that reasonably believed it was under no obligation of confidentiality to the disclosing party.

18. **Ticketing System.** MSU agrees to continue to utilize COH's preferred ticketing system ("TREAT") for all ticketing purposes. MSU may integrate such system into MSU's system to the extent possible while still utilizing TREAT as a primary ticketing system.

19. **Control of Property.**

- a. MSU acknowledges and agrees that any improvements to the Property and personal property purchased on behalf of COH with designated funds included in the Budget or funds provided directly by COH shall be the sole and exclusive property of COH. MSU hereby assigns and shall execute any documents reasonably requested by COH to assign the same to COH. Personal property owned or inventoried by MSU and brought to the Property by MSU shall remain the property of MSU.
- b. All intellectual property rights relating to works of authorship, names, logos, trademarks, service marks and other tangible materials created under this Agreement shall be jointly owned by COH and MSU, unless otherwise agreed prior to the development of such works or materials. Neither party shall license, sell or otherwise use any jointly-owned intellectual property without the consent of the other party, except as permitted in this Agreement. All intellectual property rights owned by COH and MSU in any works of authorship, names, logos, trademarks, service marks and other tangible materials created prior to this agreement or created independently by, for or at the direction of either party during the Term, shall be owned by such party, and the performance or display of any such work of authorship, name, logo, trademark, service mark or other tangible material on the Property shall not affect such party's ownership nor grant any ownership rights to the other party.

20. **Announcement.** Neither COH nor MSU shall publicly announce this Agreement or issue press releases concerning the Property without providing the other party an opportunity to review, edit and approve any such announcement or release prior to its release. Neither COH nor MSU shall use the name, trademarks, service marks, logos, mascots, nicknames or any other recognized reference to the other party without the prior written consent of the other party. Every communication, advertisement or other form of publicity made by a party concerning the City Opera House shall acknowledge the participation of the other party and shall use such names, marks or other indicia of the parties and the City Opera House as agreed upon by the parties.
21. **Entire Agreement.** This Agreement and any other agreements referenced herein constitute the entire agreement of the parties and shall supersede all previous communications, representations, or agreements, either verbal or written, between the parties concerning this subject matter.
22. **Enforceability.** If any provision of this Agreement is held to be illegal or unenforceable, that provision shall be considered severed from this Agreement and shall not affect the legality or enforceability of the remaining provisions of this Agreement unless either party is unable to perform without the severed provision or unless the omission would destroy the intent of the parties.
23. **Waiver.** Waiver of any part of this Agreement shall not be a waiver of any other part, nor shall any waiver of a breach of this Agreement in whole or in part constitute a waiver of any other succeeding breach.
24. **Assignment.** This Agreement shall be binding on the party's successors and assigns. No party may assign this agreement without the written consent of the other. Such consent will not be unreasonably withheld by MSU if COH reorganizes its operations or structure during the Term.
25. **Discrimination.** In connection with the performance of services under this Agreement, the parties agree to comply with the provisions of the Elliott-Larsen Civil Rights Act (MCLA 37.2101 et.seq.) and the Persons with Disabilities Civil Rights Act (MCLA 37.1101 et. seq.) and specifically agree not to discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position, or because of race, color, religion, national origin, age, gender, height, weight, veteran status, marital or familial status.

**CITY OPERA HOUSE, L.L.C.**

By: Traverse City Opera House Restoration Group, L.L.C.

Its: Managing Member

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

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

**MICHIGAN STATE UNIVERSITY**

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

Its: Kim A. Wilcox  
Provost and Vice President for Academic Affairs

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

Its: Michael Brand  
Executive Director, Wharton Center for Performing Arts

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

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



**EXHIBIT A**

**FORM OF BUDGET**

(spreadsheet form is attached below)

**City Opera House (Traverse City)  
Operating Budget 2010-11  
July 1, 2010-June 30, 2011**

	<u>Budget FY 2010</u>
<b>Revenues</b>	
Ticket Sales TCOH/WC Present	\$0.00
Ticket Sales Act One School Series	0.00
Ticket Sales Act One Family Series	0.00
Box Office Fees	0.00
Sponsorships	0.00
Facility Users Rent	0.00
Facility Box Fees	0.00
Contributions	0.00
Program Ad Sales	0.00
Liquor Revenue	0.00
Catering Revenue	0.00
Merchandise Revenue	0.00
<b>Total</b>	<u>\$0.00</u>
<b>Expenses</b>	
<b>Salaries</b>	
Wharton Mgt. Fee	\$0.00
Staff Salaries	0.00
Student Labor	0.00
On-Call Labor	0.00
Fringe	0.00
Subtotal	<u>\$0.00</u>
<b>Operations</b>	
Utilities	\$0.00
Rent	0.00
Taxes	0.00
Facility Maintenance	0.00
Insurance	0.00
Interest Expense	0.00
Office Supplies	0.00
Information Tech/Office Equip	0.00
Travel	0.00
Other ( including industry memberships/dues)	0.00
Subtotal	<u>\$0.00</u>
<b>Production (Shows + Act One School &amp; Family Series)</b>	

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Artist Fees	\$0.00
Royalties/Splits	0.00
Advertising	0.00
Stagehands	0.00
Ushers/Catering	0.00
Musicians	0.00
Equipment/Equipment Rentals	0.00
Other	0.00
Subtotal	<u>\$0.00</u>
<b>Total Expenditures</b>	<b>\$0.00</b>
<b>Revenue Over Expenditures</b>	<b>\$0.00</b>

DRAFT

**EXHIBIT B**

**EXCLUDED MAINTENANCE AND REPAIRS**

**Roof repair and replacement**

**HVAC replacement**

**Elevator replacement**

**Replacement of chair inventory**

**Replacement of Fire Curtain**

**Replacement of Orchestra Chairs**

**Replacement of Stage Floor**

**Other items for which the expense would be a capitalized cost under GAAP**

**Items currently on COH Capital List to include:**

**Completion of decorative painting**

**Restrooms on third floor**

**Dressing rooms for backstage support**

**Accessible access to backstage support**

**Repair, replacement or purchase of large ticket items over \$5,000 to be included in Capital discussion with COH Board. Wharton Center will prepare a master list of venue inventory with expected life span.**

EXHIBIT C

**Basic Terms for Negotiation of Development Agreement**

**Strategies will be developed and implemented by Wharton Center and the COH Board to address COH Capital needs. Based on decisions by WC/COH Board funders will be identified and approached in tandem.**

**Funders will have the option to contribute to COH programs and operations by making a contribution to either WC or COHAA, depending upon the desire of the donor. The donor's wishes will be strictly adhered and considered internally restricted if the donor so designates.**

**Wharton Center and COH will coordinate all fund raising efforts that are intended to benefit the COH and agree to share information regarding resource development.**

**Wharton Center will be responsible for developing corporate sponsorships along with the development of annual fund, creating Circle Giving levels that will include membership benefits. Funding sources will include Corporate, Foundations and Individual and will be credited to the annual operations budget.**

**Wharton Center will approach friends of MSU and Alumni in support of endowed funds for the MSU Federal Credit Union Institute for Arts & Creativity activities in North West Michigan.**

**All funds raised will be used for support of Traverse City Opera House and Wharton Center's Educational mission.**