

**FIFTH AMENDMENT  
TO  
LEASE AND CONCESSION AGREEMENT**

THIS FIFTH AMENDMENT TO LEASE AND CONCESSION AGREEMENT (this “Fifth Amendment”) is entered into this \_\_\_\_ day of \_\_\_\_\_, 2022, by and between THE CITY OF SEATTLE (the “City”), a first-class city of the State of Washington, and BH MUSIC CENTER (“Tenant”), a Washington nonprofit corporation.

**RECITALS**

A. The City and the Seattle Symphony Orchestra, a Washington nonprofit corporation (“Symphony”), executed a Master Agreement in October 1995, which was amended by a First Amendment executed in June 1996 (together, the “Amended Master Agreement”). The Amended Master Agreement provided for the development and construction of a new downtown concert hall for primary use by the Symphony and detailed the terms under which the parties would cooperate to finance and construct the new facility. In September 1996, the Symphony, with the City’s approval, assigned its interests under the Amended Master Agreement and the related Design and Construction Agreements to Tenant.

B. In September 1997, the City and Tenant executed a Lease and Concession Agreement (the “1997 Agreement”), pursuant to which the City leased to Tenant the facility to be constructed under the Amended Master Agreement. In August 1998, the City and Tenant executed a First Amendment to & Restatement of the Lease and Concession Agreement (the “First Amendment and Restatement”), which amended and restated the 1997 Agreement (the 1997 Agreement, as amended and restated by the First Amendment and Restatement, the “Agreement”).

C. Tenant completed construction of the facility commonly known as Benaroya Hall on the leased premises.

D. Effective November 4, 2008, the City and Tenant amended the Agreement (the “Second Amendment”) adjusting Tenant’s concession payments to reflect the City’s lower borrowing costs, decreasing Tenant’s contribution to the capital renewal fund, and increasing the cap on City’s reimbursement of certain costs.

E. Effective December 5, 2012, the City and Tenant amended the Agreement to adjust the timing and amount of concession payments (the “Third Amendment”).

F. Effective April 1, 2014, the City and Tenant amended the Agreement to provide for improvements to the sound, electrical and mechanical systems at Benaroya Hall and to provide for funding and additional concession payments (the “Fourth Amendment”).

G. Under the Agreement, as amended, the City owns the premises leased to Tenant, including the real property, Benaroya Hall, including alterations and improvements other than Tenant's personal property, and Tenant operates and maintains Benaroya Hall and associated public amenities and spaces and makes alterations Tenant deems advisable and necessary for operation of the Premises, all on the terms further outlined under the Agreement.

H. Beginning February 2020, the novel coronavirus (COVID-19) resulted in a series of public health orders and other impacts that caused Tenant to experience adverse financial impacts.

I. In order to address the unprecedented impacts of the COVID-19 pandemic (the "pandemic"), by letters dated June 8, 2020 and October 22, 2020, the City and Tenant agreed to abatement of certain payments and deferral of other payments while anticipating that the Agreement would be amended at an appropriate time in the future.

J. The City and Tenant mutually desire to make certain amendments to the Agreement to better provide for long term capital maintenance of Benaroya Hall and the premises, and to provide for Tenant's use of the Premises to provide enhanced public benefits.

K. The City and Tenant also mutually desire to make amendments to the Agreement to memorialize measures previously taken to mitigate the impacts of the pandemic on Tenant.

NOW, THEREFORE, in consideration of the mutual covenants set forth below and for other good and valuable consideration, the receipt and sufficient of which are hereby acknowledged, the City and Tenant agree as follows:

## **AGREEMENT**

### **1. Effective Date**

This Fifth Amendment shall be effective upon the date when signed by an authorized representative of each party following an authorizing ordinance of Seattle City Council ("Effective Date").

### **2. Definitions**

The definitions given to capitalized terms used in the recitals are incorporated into this Fifth Amendment. All capitalized terms that are not defined in this Fifth Amendment shall have the meanings given to them in the Agreement. From and after the date of this Fifth Amendment, all references to the "Agreement" means the 1997 Agreement as amended by the First Amendment and Restatement, the Second Amendment, Third Amendment, Fourth Amendment, and this Fifth Amendment. Additionally, all references in the Agreement to the ESD Director shall be deemed to refer to the City of Seattle's Director of Finance and Administrative Services, also referred to in this Fifth Amendment as "the FAS Director".

### **3. Concession Payments**

The “Base Payment” and “2014 Alterations” are both components of the annual Concession Payments due from Tenant to the City under Section 9.A of the Agreement as most recently amended by the Fourth Amendment and set forth in Exhibit C-2 to the Fourth Amendment.

(a) The Base Payment portion of the Concession Payments that were due on or before September 2020 and September 2021 in the aggregate amount of \$1,520,000 are hereby abated.

(b) The City acknowledges that the 2014 Alterations portion of the Concession Payments that were due on or before October 15, 2020; April 15, 2021; October 15, 2021; and April 15, 2022, in the aggregate amount of \$241,100 were temporarily deferred and that Tenant’s payment of the deferred amounts on or before September 30, 2022, shall be deemed timely.

(c) As of September 1, 2022, in consideration of Tenant’s obligation to provide the Capital Renewal Fund deposits under Section 4 and to provide the Public Benefit Rent under Section 5, the Base Payment portion of the Concession Payments shall no longer be due or payable. The Concession Payment Schedule attached as Exhibit C-2 to the Fourth Amendment is hereby deleted in its entirety and replaced with the Concession Payment Schedule attached as Exhibit C-3 to this Fifth Amendment and made a part of the Agreement.

(d) Tenant shall continue to pay the 2014 Alterations portion of the Concession Payment in an amount equal to the City’s principal and interest payments on the 2014 Bonds as reflected on Exhibit C-3 to this Fifth Amendment. Payments are due on or before April 15<sup>th</sup> and October 15<sup>th</sup> of each year through 2024.

(e) The City acknowledges that it abated the 2014 Alteration portion of the Concession Payment that was due on April 15, 2020, in the amount of \$107,650, on June 8, 2022.

### **4. Capital Renewal Fund Deposits**

(a) Tenant shall not be required to make the annual deposit in the amount of \$175,000 (as adjusted under Section 16.C of the Agreement) to the Capital Renewal Fund for 2020 and 2021 respectively.

(b) Section 16.B of the Agreement, last amended by the Second Amendment, is deleted in its entirety and replaced with the following:

Beginning September 1, 2022, and thereafter annually for the remainder of the Initial Term, Tenant shall make an annual deposit in the amount of \$935,000 to the Capital Renewal Fund required to be established under Section 16.A of the Agreement, which annual amount remains subject to adjustment under Section 16.C of the Agreement.

(c) Effective September 1, 2022, a new Section 16.D is added to the Agreement as follows:

Tenant shall use the Capital Renewal Fund solely for purposes outlined under Section 17. On or before October 15<sup>th</sup> of each year remaining in the Initial Term, Tenant shall provide the City with evidence reasonably acceptable to the FAS Director that shows the required annual deposit to the Capital Renewal Fund has been made. Additionally, Tenant shall provide the FAS Director with an annual report detailing all expenditures made from the Capital Renewal Fund for any project that is approved under Section 12 and 17. In addition to any other remedy allowable at law or equity, if Tenant fails to make the required annual deposit in the Capital Renewal Fund, or if Tenant uses the Capital Renewal Fund for expenditures not allowed under this Agreement, the City reserves the right to withhold O & M payments due under Section 11. Additionally, if this Agreement is terminated early due to Tenant default, all amounts in the Capital Renewal Fund shall be immediately due and payable to the City, in addition to any other damages allowed at law, including but not limited to payments to the Capital Renewal Fund that would have been made during the balance of the Initial Term.

## **5. Public Benefit Rent**

Section 8 of the Agreement is hereby deleted in its entirety and replaced with the following:

### **8. RENT.**

#### **A. Rent.**

In consideration for Tenant's use of the Premises and associated concession rights, Tenant's obligation to pay rent shall be fulfilled through providing public benefits as described under Section 8.B. Rent, including Public Benefit Rent, for any and all Extended Terms shall be determined pursuant to Section 2.

#### **B. Public Benefit Rent.**

##### **(1) Annual Requirement**

Beginning with the calendar year 2023 and continuing each year during the Initial Term and any and all Extended Terms, Tenant shall provide no less than \$1,200,000 annually in Public Benefit Rent. "Public Benefit Rent" includes, but is not limited to, the value of (a) discounted tickets to youth, senior, educational and nonprofit groups; (b) the net difference between the rental rate paid to Tenant by entities exempt from income taxation under 26 U.S.C.501(c)(3) and the rental rate paid to Tenant by non-exempt entities for the same spaces and comparable use period(s); (c) the discount provided for on-site performing arts education and performance programs designed to make the performing arts accessible to the public; and (d) the provision of other services or benefits that provide a direct benefit to the public that the FAS Director reasonably determines are eligible for treatment as Public Benefits. The value attributed by Tenant to the Public Benefit Rent must be net of donations or subsidies provided by other entities to support Tenant's Public Benefit Rent programs. In no event may Public Benefit Rent be used

to reduce Tenant's Concession Payments or other deposits, payments, transfers required by the Agreement. Public Benefit Rent shall be prorated on a daily basis for any partial year within the Initial Term and any Extended Term.

(2) Anticipated Annual Public Benefit Rent Statement

Beginning on or before September 30, 2023, and thereafter on or before September 1 of each year during the Initial Term, Tenant shall provide to the FAS Director a written statement that describes the anticipated Public Benefit Rent for the subsequent calendar year (the "Anticipated Public Benefit Rent"), together with an estimate of the value for each eligible category (e.g., discounted or free tickets for various events and programs, discounted rental rates, provision of other eligible services or benefits).

Within thirty (30) days of receipt, the FAS Director shall review Tenant's statement of Anticipated Public Benefit Rent for the upcoming year and shall either approve or communicate in writing any objections to any items included in the statement based upon the standard established under Section 8.B(1). If the FAS Director notifies Tenant of any objections, within thirty (30) days of receiving such notice, Tenant shall submit to the FAS Director an alternative proposal that addresses the FAS Director's objections. Within thirty (30) days of receipt of Tenant's alternative proposal, the FAS Director shall have the right to object to any item in the alternative proposal, and this process may continue until the FAS Director has no further timely objections and the FAS Director has approved the Anticipated Public Benefit Rent for that year.

(3) Year-end Report

On or before October 31, 2024, and on or before each October 31 annually thereafter during the Initial Term, Tenant shall provide to the FAS Director a report detailing the actual Public Benefit Rent provided during the preceding calendar year, together with an estimate of the value. Tenant shall not be entitled to carry forward any excess public benefits for any year in the Initial Term or any Extended Term, even if Tenant's actual cost of providing the public benefits in a particular year exceed the required Public Benefit Rent amount in Section 8.B(1). The FAS Director shall provide Tenant with a written objection if the FAS Director determines that any Public Benefit Rent claimed by Tenant (i) is not consistent with the approved Anticipated Public Benefit Rent statement, or (ii) is not consistent with the requirements of Section 8.B(1), or (iii) does not appropriately value the Public Benefit Rent provided by Tenant. Tenant shall keep accurate records and accounts supporting the provided and the basis for calculating their associated value, all of which shall be subject to reasonable inspection and copying by the City upon request.

(4) Remedies

If Tenant fails to provide the required Public Benefit Rent in any year, the FAS Director shall have the right to elect any of the following remedies: (i) require Tenant to pay the City the difference between the Public Benefit Rent required and the value of the Public Benefits delivered in cash; or (ii) extend the time period for Tenant to provide the required Public Benefit Rent; or (iii) accept Public Benefits that were not included in the applicable approved

Anticipated Public Benefit Statement but that provide equivalent value, as determined by the FAS Director.

(5) Dispute Resolution

Any dispute regarding Public Benefit Rent, including, but not limited to, the eligible type of benefits or the valuation of the Public Benefit Rent, shall be subject to the dispute resolution procedures in Section 28 of the Agreement.

**6. Reaffirmation of Agreement; Definitions**

The Agreement, as modified by all Amendments, shall remain in full force and effect and is hereby ratified and reaffirmed. All capitalized terms that are not defined in this Fourth Amendment shall have the meaning provided in the Agreement (including terms that are defined in any Amendment).

**7. Entire Agreement**

The Agreement, together with this Amendment and its Exhibit C-3 embodies the entire agreement of City and Tenant with respect to the subject matter thereof and described above and supersedes or incorporates all prior negotiations and agreements, written or oral.

**8. Counterparts**

This Amendment may be executed in multiple counterparts, each of which shall be deemed an original and all of which together shall be one document.

**9. Governing Law**

This Amendment shall be governed in all respects by the laws of the State of Washington.

IN WITNESS WHEREOF, the undersigned have caused this Amendment to be executed as of the day and year first set forth above.

**City:**

**THE CITY OF SEATTLE**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Tenant:**

**BH MUSIC CENTER**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Acknowledgement for City

STATE OF WASHINGTON

ss.

COUNTY OF KING

On this \_\_\_ day of \_\_\_\_\_, 2022, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn personally appeared \_\_\_\_\_, known to me to be the \_\_\_\_\_ of the Department of Finance and Administrative Services of **THE CITY OF SEATTLE**, the party that executed the foregoing instrument as City, and acknowledged said instrument to be the free and voluntary act and deed of said party, for the purposes therein mentioned, and on oath stated that he/she was authorized to execute said instrument.

WITNESS my hand and official seal hereto affixed the day and year in the certificate above written.

\_\_\_\_\_  
[Signature]    [Printed Name]

NOTARY PUBLIC in and for the State of Washington residing at \_\_\_\_\_.  
My commission expires \_\_\_\_\_.

Acknowledgement for BH Music Center

STATE OF WASHINGTON

ss.

COUNTY OF KING

On this \_\_ day of \_\_\_\_\_, 2022, before me, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_, to me known to be the \_\_\_\_\_ of **BH MUSIC CENTER**, the entity that executed the foregoing instrument; and acknowledged to me that she signed the same as the free and voluntary act and deed of said entity for the uses and purposes therein mentioned and that he was authorized to execute said instrument for said entity.

WITNESS my hand and official seal the day and year in this certificate above written.

\_\_\_\_\_

*[Signature]*    *[Printed Name]*

NOTARY PUBLIC in and for the State of Washington residing at \_\_. My commission expires \_\_\_\_\_.



**EXHIBIT C-3**

**Amended Concession Payment Schedule<sup>1</sup>**

<b>Year</b>	<b>Date (Base Pmt)</b>	<b>Base Payment</b>	<b>Date (2014 Alterations)</b>	<b>2014 Alterations</b>	<b>Total Annual Revised Concession Payment</b>
1	1997	\$0			
2	1998	\$0			
3	1999	\$575,000			
4	2000	\$592,113			
5	2001	\$609,736			
6	2002	\$627,883			
7	2003	\$646,570			
8	2004	\$665,813			
9	2005	\$685,629			
10	2006	\$706,034			
11	2007	\$482,947			
12	2008	\$0			
13	2009	\$0			
14	2010	\$0			
15	2011	\$0			
16	2012	\$0			
17	9/30/2013	\$381,724			\$381,724
18	9/30/2014	\$381,724	10/15/2014	\$25,990	\$407,714
19	9/30/2015	\$455,590	4/15/2015 10/15/2015	\$98,275 \$21,400	\$575,265
20	9/30/2016	\$540,000	4/15/2016 10/15/2016	\$101,400 \$19,400	\$660,800
21	9/30/2017	\$620,000	4/15/2017 10/15/2017	\$104,400 \$17,275	\$741,675
22	9/30/2018	\$700,000	4/15/2018 10/15/2018	\$107,275 \$15,025	\$822,300

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23	9/30/2019	\$760,000	4/15/2019 10/15/2019	\$110,025 \$12,650	\$882,675
24	9/30/2020	\$760,000	4/15/2020 10/15/2020	\$107,650 \$10,275	\$877,925
25	9/30/2021	\$760,000	4/15/2021 10/15/2021	\$110,275 \$7,775	\$878,050
26	9/30/2022	\$0	4/15/2022 10/15/2022	\$112,775 \$5,150	\$117,925
27	9/30/2023	\$0	4/15/2023 10/15/2023	\$115,150 \$2,400	\$117,550
28	9/30/2024	\$0	4/15/2024	\$122,400	\$122,400
29	9/30/2025	\$0			\$0
30	9/30/2026	\$0			\$0
31	9/30/2027	\$0			\$0
32	9/30/2028	\$0			\$0
33	9/30/2029	\$0			\$0
34	9/30/2030	\$0			\$0
35	9/30/2031	\$0			\$0
36	9/30/2032	\$0			\$0
37	9/30/2033	\$0			\$0
38	9/30/2034	\$0			\$0
39	9/30/2035	\$0			\$0
40	9/30/2036	\$0			\$0
41	9/30/2037	\$0			\$0
	Sum	\$10,950,763		\$1,211,940	\$6,586,003

<sup>1</sup> The amended Base Payment begins in 2022. In years 2020 and 2021, these payments are reflected in the schedule but are abated under section 3a of the Fifth Amendment to the Lease and Concession Agreement.