

# Purchase Change Request



Marshall University  
Office of Purchasing  
One John Marshall Drive  
Huntington, WV 25755-4100

**Order #**  
MU19POUR

FY 2021	Buyer MW	Date 09/16/2020	Account VARIOUS	P.O. Date 11/25/19	Contract
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<b>Document</b> <input type="checkbox"/> Requisition (Cancellation only) <input type="checkbox"/> Regular Purchase Order <input type="checkbox"/> Contract Purchase Order <input checked="" type="checkbox"/> Open End Contract Purchase <input type="checkbox"/> Agreement	<b>Document Action</b> <input type="checkbox"/> Cancellation <input type="checkbox"/> Increase/Decrease <input type="checkbox"/> Unused Balance <input type="checkbox"/> Freight <input checked="" type="checkbox"/> Renewal <input type="checkbox"/> Extension Error	<input type="checkbox"/> Error in Total Amount <input type="checkbox"/> Change of Account <input checked="" type="checkbox"/> Change of Vendor Name/Address <input checked="" type="checkbox"/> Other
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Vendor Name, Address, Phone #, etc.  THE BOTTLING GROUP, LLC 1111 WESTCHESTER AVE WHITE PLAINS, NY 10604  Ph# 304-545-4982	Vendor Code  FEIN# 13-4042452	BOG Unit Name & Address Marshall University Office of Purchasing One John Marshall Drive Huntington, WV 25755-4100
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Item#	Quantity	Description of Change	Unit Price	Extended Price
		<p align="center"><b>Change Order # <u>1</u></b></p> <p>To renew and amend the original contract according to all terms, conditions, and specifications contained in the original contract. The amendment replaces sections of pages 10-13, as defined in the attached documentation.</p> <p>Effective date of renewal: July 1, 2020 through June 30, 2021 Renewal # 1 of 9 Renewals Remaining: (8) eight</p> <p>To update vendor name as follows: Now Reads: Pepsi Beverage Company      Change to Read: The Bottling Group, LLC</p> <p>Add the remittance address for product purchases: Pepsi-Cola P.O. Box 75960 Chicago , IL 606755960</p>		

Reason for Change: To renew and amend the contract, insert a remittance address for product purchases, and to change the vendor's name.	Previous Total	\$ OPEN END
	Increase	\$ _____
	Decrease	\$ _____
	New Total	\$ OPEN END

Approved: *Kacey Brown-Johnik* 9/16/2020  
Authorized Signature Date

N/A  
Attorney General if required Date

**AMENDMENT 1  
MU19 POUR**

This AMENDMENT (“Amendment”) is made effective as of July 1, 2020 and shall replace or supplement, where indicated herein, the applicable terms and conditions contained in the Contract (Original Agreement) between Bottling Group, LLC and its affiliates and/or respective subsidiaries collectively comprising Pepsi Beverages Company, with an office located at 1531 Monroe Avenue, Huntington, West Virginia (“Pepsi”) and Marshall University with its principal place of business at 1 John Marshall Drive, Huntington, WV 25755(the “Customer”).

**1. TERM.**

This Agreement shall be renewed for an additional one-year term (Year 2) beginning on July 1, 2020 and ending on June 30, 2021. This Agreement may be renewed for eight additional one- year terms beginning on July 1 and ending on June 30 of each subsequent renewal period., unless sooner terminated as provided in the Contract.

**2. Section 7 Consideration shall be replaced in it entirely with the below:**

**CONSIDERATION**

In consideration for the advertising, merchandising, promotional rights, and the other related rights and benefits provided to Pepsi by Customer as described herein, and provided Customer is not in breach of this Agreement, Pepsi agrees to pay to Customer:

**A. Annual Student Center Operating Sponsorship Payment**, payable annually pursuant to the following:

Agreement Year	Applicable Time Period	Amount*	Due Date: within 60 days after:
2	July 1, 2020-June 30, 2021	<b>\$75,000</b>	Signature of amendment
3	July 1, 2021- June 30, 2022	\$100,000	July 1, 2021
4	July 1, 2022- June 30, 2023	\$100,000	July 1, 2022
5	July 1, 2023- June 30, 2024	\$100,000	July 1, 2023
6	July 1, 2024- June 30, 2025	\$100,000	July 1, 2024
7	July 1, 2025- June 30, 2026	\$100,000	July 1, 2025
8	July 1, 2026- June 30, 2027	\$100,000	July 1, 2026
9	July 1, 2027- June 30, 2028	\$100,000	July 1, 2027
10	July 1, 2028- June 30, 2029	\$100,000	July 1, 2028

The Annual Sponsorship Payment is earned throughout the Year in which it is paid. In the event Pepsi terminates this Agreement due to the Customer’s failure to cure a breach hereof, the unearned Annual Sponsorship Payment will be repaid to Pepsi pursuant to the terms of Section 10.D (Sponsorship Fees in the Event of Termination.) herein.

**B. Annual Athletic Sponsorship Cash Sponsorship** payable annually pursuant to the following:

Agreement Year	Applicable Time Period	Amount*	Due Date: within 60 days after:
2	July 1, 2020-June 30, 2021	<b>\$48,750</b>	Signature of Amendment
3	July 1, 2021- June 30, 2022	\$65,000	July 1, 2021
4	July 1, 2022- June 30, 2023	\$75,000	July 1, 2022
5	July 1, 2023- June 30, 2024	\$75,000	July 1, 2023
6	July 1, 2024- June 30, 2025	\$75,000	July 1, 2024
7	July 16, 2025- June 30, 2026	\$85,000	July 1, 2025
8	July 1, 2026- June 30, 2027	\$85,000	July 1, 2026

Agreement Year	Applicable Time Period	Amount*	Due Date: within 60 days after:
9	July 1, 2027- June 30, 2028	\$85,000	July 1, 2027
10	July 1, 2028- June 30, 2029	\$85,000	July 1, 2028

The Annual Athletic Sponsorship Payment is earned throughout the Year in which it is paid. In the event Pepsi terminates this Agreement due to the Customer’s failure to cure a breach hereof, the unearned Annual Athletic Sponsorship Payment will be repaid to Pepsi pursuant to the terms of Section 10.D (Sponsorship Fees in the Event of Termination.) herein.

C. **Guaranteed Annual Student Center Operating Commissions**, payable annually pursuant to the following:

Agreement Year	Applicable Time Period	Amount*	Due Date: within 60 days after:
2	July 1, 2020- June 30, 2021	<b>\$75,000</b>	Signature of Amendment
3	July 1, 2021- June 30, 2022	\$100,000	July 1, 2021
4	July 1, 2022- June 30, 2023	\$100,000	July 1, 2022
5	July 16, 2023- June 30, 2024	\$100,000	July 1, 2023
6	July 1, 2024- June 30, 2025	\$100,000	July 1, 2024
7	July 1, 2025- June 30, 2026	\$100,000	July 1, 2025
8	July 1, 2026- June 30, 2027	\$100,000	July 1, 2026
9	July 1, 2027- June 30, 2028	\$100,000	July 1, 2027
10	July 1, 2028- June 30, 2029	\$100,000	July 1, 2028

The Guaranteed Annual Commissions are earned throughout the Year in which they are paid. In the event Pepsi terminates this Agreement due to the Customer’s failure to cure a breach hereof, the unearned Guaranteed Annual Commissions will be repaid to Pepsi pursuant to the terms of Section 10.D (Sponsorship Fees in the Event of Termination.) herein.

(1) Calculation of Commission that may exceed Guaranteed Annual Commissions during any Agreement Year:

The Customer acknowledges and agrees that during each Agreement Year Pepsi shall calculate commission due to the Customer based on the calculation formula set forth below (“*Actual Annual Commissions*”). If at the end of an Agreement Year the Actual Annual Commissions for Products sold through Pepsi’s Full-Service Vending Machines exceeds the Guaranteed Annual Commissions paid for such Agreement Year, then within sixty (60) days after the end of such Agreement Year, Pepsi shall pay the Customer the difference between the Actual Annual Commissions and the Guaranteed Annual Commissions.

**Actual Annual Commission Calculation Formula:**

Actual Annual Commissions, as a percentage of the actual cash (“*cash in bag*” or “*CIB*”) collected by Pepsi from the Vending Machines placed at the Facilities, plus actual amounts received by Pepsi in connection with credit card or debit card sales (collectively with CIB, “*Revenue*”), less any applicable taxes, fees or deposits (“*Commissions*”). Such Commissions shall be at the rate(s) set forth below (the “*Commission Rate*”) and shall be calculated as follows:

$$(\text{Revenue} - \text{applicable taxes/taxes/fees/deposits}) * \text{Commission Rate} = \text{Actual Annual Commission}$$

Product	Minimum Vend Price*	Commission Rate**
15.2oz Ocean Spray	\$2.00	35%
18.5oz Lipton Pure Leaf	\$2.00	35%
20oz Carbonated Soft Drinks	\$1.75	35%
20oz Gatorade	\$2.00	35%
16oz Mt Dew Kickstart	\$2.00	35%



12oz Mt Dew Kickstart	\$2.00	35%
15oz Starbucks DS Energy	\$3.00	35%
* Pepsi shall have the right to increase vend prices by \$0.25 in each of Years four (4), seven(7), and ten (10). **Commission Rate stated above shall only apply to Products sold by Pepsi through its Vending Machines at the beginning of the Term. If Pepsi proposes any new Products to the Customer during the Term, then Pepsi shall have the right to apply a different Commission Rate and/or Minimum Vend Price for such new Product.		

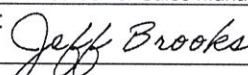
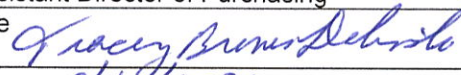
(2) **Change to Commission Rate.** Customer acknowledges and agrees that Pepsi established the Commission Rate based on any applicable sales tax associated with the sale of the Products through the Vending Machines as of the commencement date of this Agreement. If, during the Term, applicable sales taxes should increase by more than five percent (5%), then Pepsi shall have the right to increase the price by the same percentage amount.


(3) **Change to Commission Formula.** In addition to the above, upon mutual written agreement, Customer agrees that Pepsi shall have the right to change its formula/method for calculating Commissions at any time in its reasonable discretion provided that any such formula adjustments shall not result in any change to the Commissions due with respect to the same sales of Products.

(4) **Vend Price.** The minimum vend price necessary for Customer to qualify for any Commissions is set forth above. Upon mutual written agreement, Pepsi shall have the right to change such vend prices as it deems appropriate in light of cost of goods increases or to otherwise stay reasonably consistent with applicable vending prices for similar accounts operating in the relative geography.

(5) **Customer Network Information Technology (“IT”) Services.** It is understood and agreed between the Parties, that Pepsi does not require Customer’s IT Services. It is further agreed that if, during the life of this Contract, this would change and Pepsi would need to utilize Customer’s IT Services that the parties will enter into a separate agreement for the delivery of those services.

Except for the changes provided herein, all other terms and conditions of the Original Agreement remain unchanged and in full force as originally submitted, negotiated and agreed to between Pepsi and Marshall University

<b>Pepsi Beverages Company</b>	<b>Marshall University</b>
By: Jeff Brooks	By: Tracey Brown Dolinski
Title: Foodservice Senior Sales Manager	Title: Assistant Director of Purchasing
Signature: 	Signature 
Date: 9/2/2020	Date: 9/16/2020


<b>Purchase Order</b>	 MARSHALL UNIVERSITY Direct all inquiries regarding this order to: (304) 696-3157	Marshall University Office of Purchasing One John Marshall Drive Huntington WV, 25755-4100	<b>Purchase Order #</b> MU19POUR
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<b>TO:</b>  Pepsi Beverages Company 11551 Shannon Drive Fredericksburg, VA, 22405 Attn: Director, Food Service  FEIN: 13-4042452      PH: 304-545-4982	Vendor Code: _____  Ship to: n/a  Room # <b>Various</b>	THIS ORDER IS SUBJECT TO THE GENERAL TERMS AND CONDITIONS AS SET FORTH HEREIN  WVFIMS Account #: _____
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P.O. Date	FY	Buyer	Ship Via	F.O.B	Terms	Contract #
11/25/19	2020	TBD				

		<p><u>CONTRACT ACCEPTANCE</u></p> <p>On behalf of the Governing Board, MARSHALL UNIVERSITY hereby accepts the quotation of <u>Pepsi Beverages Company</u></p> <p><u>Beverage Sale and Sponsorship Agreement as defined herein</u></p> <p>signed by <u>Jere Gaeger (RFP) and Jeff Brooks (Agreement)</u></p> <p>Title <u>Key Acct. Manager and Food Service Sr. Acct. Manager</u></p> <p>on <u>06/04/2019 and 11/22/19</u></p> <p>Approved as to form this _____ day of _____, _____                  West Virginia Attorney General</p> <p>By: _____                  Chief Counsel</p> <p>Effective August 16, 2019 - June 30, 2020 with the option to renew annually for nine (9) subsequent years through June 30, 2029.</p> <p style="text-align: center;">THIS ORDER IS EXEMPT FROM ALL SALES TAX                  LIMIT EACH INVOICE TO A SINGLE PURCHASE ORDER NUMBER</p>		
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Line No.	Fund	Org.	Account	Encumber Amount		
1.				OPEN END		
2.						
3.						
4.						

Mail Original Invoice and 1 Copy to: Marshall University Accounts Payable One John Marshall Drive Huntington, WV 25755-4500	 Authorized Signature	Total: <b>OPEN END</b>  Date: <b>12/2/19</b>
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## BEVERAGE SALES AND SPONSORSHIP AGREEMENT

This sets forth the agreement ("*Agreement*") between Bottling Group, LLC and its affiliates and/or respective subsidiaries collectively comprising Pepsi Beverages Company, with an office located at 1531 Monroe Avenue, Huntington, West Virginia ("*Pepsi*") and Marshall University with its principal place of business at 1 John Marshall Drive, Huntington, WV 25755 (the "*Customer*").

**WHEREAS**, Pepsi desires the right to be the exclusive supplier of Beverages (as defined below) to the Customer; and

**WHEREAS**, Pepsi has submitted a bid in response to an invitation to bid issued by the Customer for the exclusive right to develop and carry out a program for the sale of its beverage products in all facilities owned or operated by the Customer; and

**WHEREAS**, Pepsi is experienced in installing, operating, servicing and maintaining equipment for dispensing beverage products and the Customer has determined that it is in the best interests of the Customer to contract with Pepsi to provide services for the sale of beverage products; and

**WHEREAS**, Pepsi wishes to identify itself with the Customer and to have its products promoted and sold at the Facilities (as defined below) and further wishes to receive the other promotional benefits provided for by the Customer in this Agreement; and

**NOW, THEREFORE**, in consideration of the terms, covenants and conditions herein contained, and the other mutual promises set forth herein, the parties agree as follows:

### **1. DEFINITIONS.**

**"Approved Cups"** means the disposable cups approved by Pepsi from time to time as its standard trademark cups and other containers approved by Pepsi from time to time and bearing the trademark(s) of Pepsi and/or other Products. In addition, Pepsi agrees that the Customer shall have the right to produce limited-run commemorative plastic cups reasonably acceptable to Pepsi for use at the Facilities and that such cups shall also be considered to be Approved Cups, provided that Pepsi's trademark(s) for Pepsi® shall be included on such commemorative cups. The use and size of Pepsi's trademark(s) on such commemorative cups shall be subject to the prior approval of Pepsi. It is further agreed, that Customer through its Marketing Rights Holder and/or Food Service Provider shall have the right to produce a Souvenir Concessions cup that is not the commemorative cup described herein and may or may not bear the Pepsi trademark(s) to be sold at Athletics Venues.

**"Athletics Venues"** means any building which Marshall University owns and which is predominately used for varsity intercollegiate athletic teams practices or competitions, including but not limited to, the Henderson Center, Joan C. Edwards Football Stadium, Dot Hicks Fields, Cline Indoor Athletic Facility, Veterans Memorial Soccer Complex, Tennis Courts. Athletic venues also includes any Marshall University owed buildings in which the majority of the offices are used by athletic department personnel, including but not limited to, the Shewey Building.



“**Beverage**” or “**Beverages**” means all carbonated and non-carbonated, non-alcoholic drinks, however dispensed, including but not limited to, (i) colas and other flavored carbonated drinks; (ii) fruit juice, fruit juice containing and fruit flavored drinks; (iii) chilled coffee drinks; (iv) chilled tea products; (v) hypertonic, isotonic and hypotonic drinks (sports drinks and fluid replacements); (vi) energy drinks, (vii) packaged carbonated or still water (including spring, mineral or purified), (viii) liquid concentrate teas (“**LCT**”), (ix) frozen carbonated and non-carbonated beverages (“**FB**”), (x) value-added protein beverages and (xi) any future categories of nonalcoholic beverage products that may be distributed by Pepsi. Provided that, exclusivity for beverages in Athletics Venues is subject to the contract with the Marketing Rights Holder.

“**Cases**” shall mean the number of cases of Packaged Products purchased by the Customer from Pepsi, initially delivered in quantities of 24, 15, and 12 bottle/can units, and thereafter in such other size, quantity and type of containers as determined by Pepsi, from time to time.

“**Competitive Products**” shall mean any and all Beverages other than the Products.

“**Customer Marks**” shall mean (i) the Designations (as defined below) and (ii) the Customer’s characters, colors, emblems, designs, identifications, logos, mascots, name, service marks, symbols, trademarks, all trade names, uniforms and other proprietary designations which are owned, licensed to or controlled by the Customer and which relate to the Facilities and which are in existence on at the beginning of the Term or which will be created during the Term. For clarity purposes, Customer Marks shall include, without limitation, characters, colors, emblems, designs, identifications, logos, mascots, name, service marks, symbols, trademarks, all trade names, uniforms and other proprietary designations associated with or related to all intercollegiate athletic teams associated with the Customer, at the beginning of the Term or which will be created during the Term, if any.

“**Designations**” shall include, but not be limited to, the following: “A Proud Sponsor of Marshall University,” “Official Water and Soft Drink of Marshall University” and “Official Sponsor of Marshall University.” Provided that, DESIGNATIONS for beverages regarding Marshall Athletics is subject to the contract with the Marketing Rights Holder.

“**Equipment**” means the following types of equipment owned and operated by Pepsi and used to sell or dispense the Products: (i) full service vending machines (“**Vending Machines**”); (ii) retail single-serve food service equipment and (iii) fountain service equipment.

“**Facilities**” shall mean the entire premises of every facility owned, leased, occupied or operated by the Customer or its Food Service Provider, now or in the future, including all buildings, the grounds, parking lots, dining facilities, snack bars, food carts, book stores, athletic facilities and concession stands, and, for each building, the grounds, parking, lots, dining facilities, unbranded and branded food service outlets and vending areas. “**Facilities**” shall also be deemed to include: Marshall University; and other convenience store operations and restaurants initiated during the Term of this Agreement in space leased to third-party commercial tenants within Customer-owned buildings principally utilized for educational purposes, student activities or student residences. Provided that, Facilities shall not include the Marshall University Bookstore; Starbucks Coffee Company locations operated by Food Service Provider (“Starbucks®”); approved Vendors or Subcontractors for concession in Athletics Venues





(e.g. Rick's Lemonade & Zuls Frozen Lemonade); and the Marshall University Recreation Center ("Rec Center").

**"Food Service Provider"** shall mean Sodexo or any food service provider which may serve at the Facilities at any point during the Term. The Customer acknowledges and agrees that this Agreement, including the pricing, funding and other consideration provided for herein is based on the Customer's current operating model/use of third party Food Service Providers. Thus, in the event that: (i) if the Customer is currently self-operated, the Customer switches to a Food Service Provider, or (ii) if the Customer currently uses a Food Service Provider to operate its concessions, such agreement between the Customer and the current Food Service Provider expires or is terminated, and the Customer enters into a new arrangement with a Food Service Provider; then any such new or subsequent agreement between the Customer and any Food Service Provider (pursuant to either (i) or (ii) above) shall require such Food Service provider to abide by the applicable pricing and other terms set forth in this Agreement to the exclusion of all other benefits, and shall specifically require such Food Service Provider to affirm that it will not be entitled or seek to receive any funding or other benefits/consideration in connection with any agreement such Food Service Provider may separately have with Pepsi or Pepsi's affiliates. In the event that the Customer fails to adhere to this requirement (or the Food Service Provider refuses to abide accordingly), then Customer hereby authorizes Pepsi, and Pepsi shall be entitled to adjust its pricing, funding or other consideration provided to the Customer by an amount equal to the incremental costs incurred by Pepsi as a result of the Customer's change in Food Service Providers.

**"Gallons"** shall mean the number of gallons of the Postmix Products purchased by the Customer from Pepsi.

**"Marketing Rights Holder"**-- shall mean Learfield IMG College (IMG) or any other marketing rights holder which may provide services to Customer at the Facilities at any point during the Term.

**"Packaged Products"** shall mean Beverages that are distributed in pre-packaged form (*i.e.*, Bottles & Cans). A current list of Pepsi's Packaged Products is found in attached Exhibit A which may be amended by Pepsi from time to time.

**"Postmix Products"** shall mean beverage products used to create and dispense fountain beverages. A current list of Pepsi's Postmix Products is found in attached Exhibit A which may be amended by Pepsi from time to time.

**"Products"** shall mean Postmix Products and Packaged Products manufactured, bottled, sold and/or distributed by Pepsi.

**"Readers"** shall mean devices installed on the vending machines designed to accept payments by dollar bills, credit cards, Apple/Android Pay and all forms of Marshall Campus Identification Cards including Marshall Mobile ID for both Apple and Android devices. Devices will have Near Field Communication (NFC) or "Tap to Pay" capability.

**"Year"** or **"Agreement Year"** shall mean each 12-month period during the Term commencing on the first day of the Term or an anniversary thereof.





## 2. TERM.

The initial term of this Agreement shall be begin on August 16, 2019 and expiring on June 30, 2019. This Agreement may be renewed for nine additional one year terms beginning on July 1 and ending on June 30 of each subsequent renewal period., unless sooner terminated as provided herein ("*Term*").

## 3. GRANT OF BEVERAGE AVAILABILITY AND MERCHANDISING RIGHTS.

During the Term, Customer hereby grants to Pepsi the following exclusive Beverage availability and exclusive Beverage merchandising right as set forth and described below. Beverage Availability at the Facilities.

### (1) Grant of Rights.

(a) Pepsi shall have the exclusive right to make Beverages available for sale and distribution throughout the Facilities, including the right to provide all Beverages sold at athletic contests, subject to Customer's contract with the Marketing Rights Holder (*i.e.*, concession stands, sales in stands (hawking) or other means), booster club activities, and all other special events conducted at or any location on the Facilities ("*Special Events*"). The Products shall be the only Beverages sold, dispensed or served at the Facilities (*i.e.*, at concession stands, sales in stands (hawking) or other means), and the Products shall be sold at all food service concession or vending locations located within the Facilities; and

(b) Pepsi shall have the exclusive right to install the Equipment throughout the Facilities. Pepsi shall have the further right to install additional Equipment in buildings and facilities acquired and/or constructed by the Customer after the date of this Agreement. Pepsi shall install the Equipment at its sole expense; *provided, however*, that the Customer will be responsible for all electrical hook-ups and charges related thereto. Pepsi shall have the right to place full trademark panels on all sides of its Equipment. Pepsi, or one of its affiliates, shall retain title to all Equipment.

### Purchasing of Postmix Products.

The Postmix Products shall be purchased by Customer or the Food Service Provider from Pepsi at the prices established by Pepsi from time to time. Current pricing for Postmix Products is as set forth in Exhibit A attached hereto.

### Purchasing of Packaged Products.

The Packaged Products shall be purchased by Customer or the Food Service Provider from Pepsi at prices established by Pepsi from time to time. Current pricing for Packaged Products is as set forth in Exhibit A attached hereto.

### Food Service.

During the Term, Pepsi shall work directly with, Customer and the Food Service Provider for the Facilities, to provide all of its requirements for the Products. Customer shall cause



its Food Service Provider to purchase the Product from Pepsi at prices as determined by Pepsi. The Customer shall cause its Food Service Provider to purchase Products from Pepsi in sufficient quantities to ensure the regular and continuous distribution of the Products at the Facilities. Pepsi shall work directly with Customer and its Food Service Provider to promote sales of the Products through appropriate point-of-sale and other advertising materials bearing the trademarks of the Products at Pepsi's expense.

#### Vending.

Pepsi shall have the right to place no less than sixty (60) Vending Machines at the Facilities for dispensing the Products; *provided, however*, that Pepsi shall work with Customer to identify locations for such equipment. At the conception of the contract, all machines should remain in their current location unless otherwise discussed with the University. Pepsi shall not be assessed common area maintenance fees, or other charges by Customer based on its occupation of the space allocated to Vending Machines. Vending machines provided pursuant to this Agreement shall be serviced and fully stocked on a weekly basis.

#### (6) Concessions at Athletics Venues

During the Term, Pepsi shall work directly with, Customer and the Marketing Rights Holder for the Athletics Venues, to provide all of its requirements for the Products at the Athletics Venues. Accordingly, it is understood between the Parties, that Pepsi has entered into a Marketing Agreement between Bottling Group, LLC and IMG College, LLC commencing July 1, 2019 (the "*Marketing Agreement*").

#### A. Product Merchandising Rights.

During the Term and subject to the terms and conditions contained in this Agreement, Customer grants Pepsi the exclusive right to merchandise Beverages at the Facilities as set forth and described below:

#### Menu Board Advertising.

Customer agrees that Pepsi's trademarks for products shall be listed on the menu boards at concession locations in which Products are served to customers at the Facilities. All brand identification containing Pepsi trademarks and/or service marks for menu boards set forth herein will be prepared and installed by Customer at Customer's sole cost and expense.

#### Approved Cups; Product Hawking and Catering.

Subject to the rights of the Marketing Rights Holder at Athletics Venues, Customer agrees that all Products served, sold or dispensed at concession locations in which Products are served to customers at the Facilities shall be served in Approved Cups and all other Beverages served, sold or dispensed within the Facilities shall be served in either Approved Cups or other disposable cups which do not bear, display or contain the trademarks or service marks of a manufacturer of Competitive Products. Pepsi agrees to make Approved



Cups available for purchase and the Customer shall purchase, and shall require that all concessionaires, Food Service Providers, booster clubs and other third parties selling Beverages at the Facilities purchase all Products, cups, lids and carbon dioxide directly from Pepsi at prices determined by Pepsi. Customer shall cause Products to be “*hawked*” at the Facilities at all events taking place at the Facilities (including, without limitation, at all home games of all intercollegiate athletic teams associated with the Customer, if any), and served as part of the catering selection in private boxes, suite, backstage areas, locker rooms and press areas. Customer further agrees that Products to be “*hawked*” in the stands shall be sold only in Approved Cups. As used herein, “*hawking*” shall refer to the sale of single servings of a product in the seating areas of the Facilities through the use of vendors circulating through such seating areas.

#### **4. GRANT OF ADVERTISING AND PROMOTIONAL RIGHTS.**

During the Term, Customer hereby grants to Pepsi the right to advertise and promote Products in and with respect to the Customer and the Customer Marks upon the terms and conditions contained in this Agreement and as set forth and described below.

##### **A. Advertising**

###### **1) Facilities and Print Advertising.**

Pepsi shall have the right to Facilities and print advertising as mutually agreed between the parties and as further outlined in Exhibit B.

###### **2) Design and Installation of Customer Advertising.**

Pepsi agrees, at its own cost, to provide Customer with the general design of all Customer Advertising. The Customer Advertising shall be constructed and installed by Customer (or an agent thereof) at Customer’s sole cost and expense. All Customer Advertising shall be in conformity with the Customer published Brand Guide(<https://www.marshall.edu/brandguide/>) and the general scheme and plan of the Customer and the surrounding areas.

###### **3) Advertising/Signage Changes/Removal.**

Customer recognizes Pepsi’s right to change, modify, alter or remove its advertising for, or identification of, any of the Products or to discontinue the manufacture of any of the Products. Pepsi may at Pepsi’s sole cost and expense change, modify, alter or remove any Facilities Advertising, menu boards and other Pepsi identification or references to any of the Products necessitated by Pepsi’s changes to or removal of the advertising, trademarks or trade names, designations or identification thereof. Pepsi shall have the right to modify, change, alter or remove the promotional messages appearing thereon and all such modifications, changes, alterations and/or removals shall also be at Pepsi’s sole cost and expense. Customer shall use reasonable efforts to minimize the cost to Pepsi for changing, modifying, altering and/or removing Pepsi’s advertising.





4) Maintenance of Signage.

Pepsi shall maintain all Facility Advertising and other signs and advertising for Products in good order. Pepsi shall effect any necessary repairs reasonably determined by Pepsi at Pepsi's sole cost and expense.

B. Promotional Rights.

General Sponsorship Designation.

Customer hereby agrees that Pepsi shall have the right to promote the fact that Pepsi is an official sponsor of the Customer and that the Products are available at the Facilities, including the right of Pepsi to refer to itself using the Designations. Such promotion may be conducted through the distribution channels of television, radio and print media, on the packaging of (including cups and vessels) and at the point-of-sale of any and all Products wherever they may be sold or served.

Grant of License to Use the Customer Marks for Promotional Activities.

Customer hereby grants to Pepsi a nonexclusive license to use the name of the Facilities and the Customer Marks for the limited purposes of promoting Products within the context of promotional activities. Customer acknowledges that, in order to make full use of the rights granted in this Agreement, Pepsi may conduct the promotional activities through its primary distribution channels in which Pepsi sells Products to the ultimate consumer, such as at the retail level, within drug stores and other retail outlets, by and through mass merchandise campaigns and together with Pepsi's food service accounts and customers. Provided that, Customer retains the right to approve the use of its Name and/or Customer Marks prior to it being used in the context of any promotional activities. Requests for approval should be directed to the Marshall University Office of Communications at ucomm@marshall.edu.

C. Representations, Warranties and Covenants regarding the Ownership and Protection of the Customer Marks and Related Proprietary Rights.

Customer represents and warrants that it is the sole and exclusive owner of all right, title and interests in and to the Customer Marks (including without limitation, all goodwill associated therewith) and Pepsi's use of the Customer Marks pursuant to this Agreement will not infringe the rights of any third parties. Pepsi acknowledges that nothing contained in this Agreement shall provide Pepsi with any right, title or interest to the Customer Marks other than the right to use such Customer Marks granted under this Agreement. Pepsi (on behalf of itself and its affiliates) agrees that it shall not attack the title or any rights of Customer and its affiliates and cooperate with Customer and its affiliates to procure any protection or to protect any of the rights of Customer and its affiliates in and to the Customer Marks. Pepsi shall cause to appear on all materials incorporating the Customer Marks such legends, markings and notices as Customer or its affiliates may request in order to give appropriate notice of any trademarks, service mark, trade name, copyright or other right with respect to the Customer Marks. Pepsi shall not make any alterations or changes



to the design or type of the Customer Marks without the prior written consent of Customer. Requests for approval should be directed to the Marshall University Office of Communications at [ucomm@marshall.edu](mailto:ucomm@marshall.edu). Provided that Pepsi's right to use Customer Marks is subject to any rights previously given to the Marketing Rights Holder as part of its contract with Customer.

**D. Representations, Warranties and Covenants regarding the Ownership and Protection of Proprietary Rights of Pepsi.**

Pepsi represents and warrants that Pepsi is authorized to use certain names, logos, service marks and trademarks of PepsiCo, Inc. (including without limitation, all goodwill associated therewith) (the "***Pepsi Marks***") under a license from PepsiCo, Inc. Customer acknowledges that nothing contained in this Agreement shall provide Customer with any right, title or interest to the names, logos, service marks and trademarks of PepsiCo, Inc. without the prior written approval of PepsiCo, Inc. Customer (on behalf of itself and its affiliates) agrees that it shall not attack the title or any rights of PepsiCo, Inc., Pepsi and its affiliates and cooperate with PepsiCo, Inc., Pepsi and its affiliates to procure any protection or to protect any of the rights of PepsiCo, Inc., Pepsi and its affiliates in and to the Pepsi Marks. Customer shall cause to appear on all materials incorporating the Pepsi Marks such legends, markings and notices as Pepsi or its affiliates may request in order to give appropriate notice of any trademarks, service mark, trade name, copyright or other right with respect to the Pepsi Marks. Customer shall not make any alterations or changes to the design or type of the Pepsi Marks without the prior written consent of PepsiCo, Inc.

**5. GRANT OF OTHER RIGHTS.**

**A. Sampling.**

Customer agrees to permit to conduct, at Pepsi's sole cost and expense, limited sampling of Pepsi products at the Facilities in a form and manner as specifically authorized and approved by Customer and in accordance with rules and procedures established by Customer, in its sole discretion, as may be amended or supplemented from time to time by Customer.

**B. Additional Rights.**

Customer agrees to provide Pepsi with the additional rights set forth on Exhibit B.

**6. EXCLUSIVITY.**

A. During the Term, Customer, its agents, representatives, intercollegiate athletic teams coaches and players, and staff (i) shall not themselves nor shall they permit a third party to, sell, serve, promote, market, advertise, sponsor or endorse Competitive Products at the Facilities or in connection with the Customer, its intercollegiate athletic teams coaches and players, and its staff and (ii) shall ensure that the Products are the only Beverages sold, served, promoted, marketed, advertised, merchandised, or sponsored, at the Facilities or in connection with the Customer, intercollegiate athletic teams coaches and players, and its staff.



B. Customer recognizes that Pepsi has paid valuable consideration to ensure an exclusive associational relationship with the Facilities, Customer, and/or Customer Marks with respect to Beverages and that any dilution or diminution of such exclusivity seriously impairs Pepsi's valuable rights. Accordingly, the Customer will promptly oppose Ambush Marketing (as defined below) and take all reasonable steps to stop Ambush Marketing and to protect the exclusive associational rights granted to Pepsi pursuant to this Agreement. In the event any such Ambush Marketing occurs during the Term, each party will notify the other party of such activity immediately upon learning thereof. As used herein, "**Ambush Marketing**" shall mean an attempt by any third party, without Pepsi's consent, to associate Competitive Products with the Facilities, Customer and/or Customer Marks, or to suggest that Competitive Products are endorsed by or associated with the Facilities, Customer and/or Customer Marks by referring directly or indirectly to the Facilities, Customer and/or Customer Marks.

## 7. CONSIDERATION.

In consideration for the advertising, merchandising, promotional rights, and the other related rights and benefits provided to Pepsi by Customer as described herein, and provided Customer is not in breach of this Agreement, Pepsi agrees to pay to Customer:

A. **Annual Student Center Operating Sponsorship Payment**, payable annually pursuant to the following:

Agreement Year	Applicable Time Period	Amount*	Due Date: within 60 days after:
1	August 16, 2019-June 30, 2020	\$100,000	Signature
2	July 1, 2020-June 30, 2021	\$100,000	July 1, 2020
3	July 1, 2021- June 30, 2022	\$100,000	July 1, 2021
4	July 1, 2022- June 30, 2023	\$100,000	July 1, 2022
5	July 1, 2023- June 30, 2024	\$100,000	July 1, 2023
6	July 1, 2024- June 30, 2025	\$100,000	July 1, 2024
7	July 1, 2025- June 30, 2026	\$100,000	July 1, 2025
8	July 1, 2026- June 30, 2027	\$100,000	July 1, 2026
9	July 1, 2027- June 30, 2028	\$100,000	July 1, 2027
10	July 1, 2028- June 30, 2029	\$100,000	July 1, 2028

The Annual Sponsorship Payment is earned throughout the Year in which it is paid. In the event Pepsi terminates this Agreement due to the Customer's failure to cure a breach hereof, the unearned Annual Sponsorship Payment will be repaid to Pepsi pursuant to the terms of Section 10.D (Sponsorship Fees in the Event of Termination.) herein.

B. **Annual Athletic Sponsorship Cash Sponsorship** payable annually pursuant to the following:





Agreement Year	Applicable Time Period	Amount*	Due Date: within 60 days after:
1	August 16, 2019-June 30, 2020	\$65,000	Signature
2	July 1, 2020-June 30, 2021	\$65,000	July 1, 2020
3	July 1, 2021- June 30, 2022	\$65,000	July 1, 2021
4	July 1, 2022- June 30, 2023	\$75,000	July 1, 2022
5	July 1, 2023- June 30, 2024	\$75,000	July 1, 2023
6	July 1, 2024- June 30, 2025	\$75,000	July 1, 2024
7	July 16, 2025- June 30, 2026	\$85,000	July 1, 2025
8	July 1, 2026- June 30, 2027	\$85,000	July 1, 2026
9	July 1, 2027- June 30, 2028	\$85,000	July 1, 2027
10	July 1, 2028- June 30, 2029	\$85,000	July 1, 2028

The Annual Athletic Sponsorship Payment is earned throughout the Year in which it is paid. In the event Pepsi terminates this Agreement due to the Customer's failure to cure a breach hereof, the unearned Annual Athletic Sponsorship Payment will be repaid to Pepsi pursuant to the terms of Section 10.D (Sponsorship Fees in the Event of Termination.) herein.

C. **Guaranteed Annual Student Center Operating Commissions**, payable annually pursuant to the following:

Agreement Year	Applicable Time Period	Amount*	Due Date: within 60 days after:
1	August 16, 2019-June 30, 2020	\$100,000	Signature
2	July 1, 2020- June 30, 2021	\$100,000	July 1, 2020
3	July 1, 2021- June 30, 2022	\$100,000	July 1, 2021
4	July 1, 2022- June 30, 2023	\$100,000	July 1, 2022
5	July 16, 2023- June 30, 2024	\$100,000	July 1, 2023
6	July 1, 2024- June 30, 2025	\$100,000	July 1, 2024
7	July 1, 2025- June 30, 2026	\$100,000	July 1, 2025
8	July 1, 2026- June 30, 2027	\$100,000	July 1, 2026
9	July 1, 2027- June 30, 2028	\$100,000	July 1, 2027
10	July 1, 2028- June 30, 2029	\$100,000	July 1, 2028

The Guaranteed Annual Commissions are earned throughout the Year in which they are paid. In the event Pepsi terminates this Agreement due to the Customer's failure to cure a breach hereof, the unearned Guaranteed Annual Commissions will be repaid to Pepsi pursuant to the terms of Section 10.D (Sponsorship Fees in the Event of Termination.) herein.

(1) Calculation of Commission that may exceed Guaranteed Annual Commissions during any Agreement Year:

The Customer acknowledges and agrees that during each Agreement Year Pepsi shall calculate commission due to the Customer based on the calculation formula set forth below ("**Actual Annual Commissions**"). If at the end of an Agreement Year the Actual Annual



Commissions for Products sold through Pepsi's Full-Service Vending Machines exceeds the Guaranteed Annual Commissions paid for such Agreement Year, then within sixty (60) days after the end of such Agreement Year, Pepsi shall pay the Customer the difference between the Actual Annual Commissions and the Guaranteed Annual Commissions.

**Actual Annual Commission Calculation Formula:**

Actual Annual Commissions, as a percentage of the actual cash ("*cash in bag*" or "*CIB*") collected by Pepsi from the Vending Machines placed at the Facilities, plus actual amounts received by Pepsi in connection with credit card or debit card sales (collectively with CIB, "*Revenue*"), less any applicable taxes, fees or deposits ("*Commissions*"). Such Commissions shall be at the rate(s) set forth below (the "*Commission Rate*") and shall be calculated as follows:

$$(\text{Revenue} - \text{applicable taxes/taxes/fees/deposits}) * \text{Commission Rate} = \text{Actual Annual Commission}$$

Product	Minimum Vend Price*	Commission Rate**
15.2oz Ocean Spray	\$2.00	35%
18.5oz Lipton Pure Leaf	\$2.00	35%
20oz Carbonated Soft Drinks	\$1.75	35%
20oz Gatorade	\$2.00	35%
16oz Mt Dew Kickstart	\$2.00	35%
12oz Mt Dew Kickstart	\$2.00	35%
15oz Starbucks DS Energy	\$3.00	35%

\* Pepsi shall have the right to increase vend prices by \$0.25 in each of Years four (4), seven(7), and ten (10).  
 \*\*Commission Rate stated above shall only apply to Products sold by Pepsi through its Vending Machines at the beginning of the Term. If Pepsi proposes any new Products to the Customer during the Term, then Pepsi shall have the right to apply a different Commission Rate and/or Minimum Vend Price for such new Product.

(2) **Change to Commission Rate.** Customer acknowledges and agrees that Pepsi established the Commission Rate based on any applicable sales tax associated with the sale of the Products through the Vending Machines as of the commencement date of this Agreement. If, during the Term, applicable sales taxes should increase by more than five percent (5%), then Pepsi shall have the right to increase the price by the same percentage amount.

(3) **Change to Commission Formula.** In addition to the above, upon mutual written agreement, Customer agrees that Pepsi shall have the right to change its formula/method for calculating Commissions at any time in its reasonable discretion provided that any such formula adjustments shall not result in any change to the Commissions due with respect to the same sales of Products.

(4) **Vend Price.** The minimum vend price necessary for Customer to qualify for any Commissions is set forth above. Upon mutual written agreement, Pepsi shall have the right to change such vend prices as it deems appropriate in light of cost of goods increases or to otherwise



stay reasonably consistent with applicable vending prices for similar accounts operating in the relative geography.

(5) **Customer Network Information Technology (“IT”) Services.** It is understood and agreed between the Parties, that Pepsi does not require Customer’s IT Services. It is further agreed that if, during the life of this Contract, this would change and Pepsi would need to utilize Customer’s IT Services that the parties will enter into a separate agreement for the delivery of those services.

## 8. ADDITIONAL CONSIDERATION.

In addition to the consideration specified above, and provided Customer is not in breach of this Agreement, Pepsi shall provide the following further consideration to the Customer:

- A. Pepsi will provide Customer’s athletics department (“Athletics”) annual Product donations of up to a total of **500** cases per Year currently valued at **\$3,500** across the Facilities upon request of the Customer; *provided, however*, that the Customer will administer all requests through a central contact so that the Customer may prioritize the requests. Customer acknowledges and agrees that donated Product requests not used/made in any Year shall not be carried over to the subsequent Year. Should Athletics need more the 500 cases during any Year, Athletics will have the right to purchase additional Product at Pepsi’s cost.
- B. Pepsi will provide an annual Athletic Equipment Budget fund of **\$10,000** annually held and distributed by Pepsi, which includes Gatorade isotonic equipment and camp fund for Product, equipment and staff. Customer acknowledges and agrees the Athletic Equipment Budget Fund shall not be carried over to the subsequent Year. Any unused portion in any Year shall be redeemed for cash and paid to Customer within sixty (60) days at end of that applicable Year.
- C. Pepsi will provide to Athletics an Athletic Equipment Investment \$121,500, including initially providing and maintaining, as deemed necessary by Athletics:

35- Double Door Coolers;

55 – Single Door Coolers;

23 Small Counter Top Coolers; and

11 Other small Coolers.

- D. **Marketing Support.** Each Year during the Term Pepsi agrees to provide Customer with marketing support, valued at up to Twenty-Five Thousand US Dollars (**\$25,000**) (“**Marketing Support**”). The Marketing Support will be used to support University programs/marketing initiatives. The Marketing Support will be held and distributed by Pepsi. Pepsi will collaborate with Student Center Operating to develop programs designed to support University events each Year. Customer acknowledges and agrees that Marketing Support requests not used/made in





any Year shall not be carried over to the subsequent Year and will not be redeemable for a cash payment.

## 9. EQUIPMENT AND SERVICE.

### A. Beverage Dispensing and Other Equipment.

(1) Pepsi shall, based upon Pepsi's survey of the Facilities' needs, provide and install all Equipment at the Facilities for the dispensing of Product during the Term. Title to all Equipment shall be with Pepsi or its affiliates.

(2) During the Term Pepsi will provide, at no charge to the Customer, preventative maintenance and service to the Equipment. Pepsi will service and stock, if necessary, (i) the Equipment and (ii) any additional Equipment determined by the parties to be installed at new locations on the Facilities.

(3) The Equipment may not be removed from the Facilities without Pepsi's written consent, and the Customer agrees not to encumber the Equipment in any manner or permit other equipment to be attached thereto except as authorized by Pepsi. At the end of the Term, Pepsi shall have the right to, and shall upon request of the Customer, remove all Equipment from the Facilities at no expense to the Customer.

(4) Pepsi shall be responsible for collecting, for its own account, all cash monies from the Vending Machines and for all related accounting for all cash monies collected therefrom. The Customer agrees to provide reasonable assistance to Pepsi in apprehending and prosecuting vandals.

(5) Pepsi will install Readers on Vending Machines placed at the Facilities. All Vending Machines will be fitted with Readers, no later than August 15, 2020, that will take all payment methods required herein, including but not limited to, all forms of Marshall Identification Cards (magnetic, swipe or tap) and Marshall Mobile Id (Apple or Android). Provided that, Pepsi will make best efforts to have Readers installed as soon as possible prior to that date. Further, up and until the Readers, as required herein, are installed, Pepsi shall make monthly reports by email to Marshall University's Information Technology Department as the status of the installation of the Readers.

(i) Customer will not be responsible for any transaction or maintenance fees on the Readers affixed to the Vending Machines;

(ii) The parties shall work together to arrange for the collection of monies from the Reader transactions on Vending Machines equipped with Readers;

(iv) On or before the first Monday of each month during the Term, the Parties and/or their authorized agent shall remit payment to the other party for the monies due them and collected by the other party through the Readers during the immediately preceding month;



(vi) Upon mutual written agreement of the parties, Pepsi may remove any glass front Vending Equipment that sells less than eight (8) cases of Product per week or any other Vending Equipment that sells less than two (2) cases of Product per week.

**B. Service to Equipment.**

Pepsi or its designated agents shall be responsible for maintaining, repairing and replacing the Equipment. Pepsi shall provide Customer with a telephone number to request emergency repairs and receive technical assistance related to the Equipment. Pepsi shall respond to each Customer request and use reasonable efforts to remedy the related Equipment problem within fourteen (14) days.

In addition, Pepsi will provide all equipment needed for concessions operations in and current and future Athletics Venues.

**10. REMEDIES FOR LOSS OF RIGHTS - TERMINATION.**

**A. Customer's Termination Rights.**

Without prejudice to any other remedy available to Customer at law or in equity in respect of any event described below, this Agreement may be terminated by Customer at any time effective thirty (30) days following written notice to Pepsi from Customer if:

- (1) Pepsi fails to make any payment due hereunder, and such default shall continue for thirty (30) days after written notice of such default is received by Pepsi; or
- (2) Pepsi breaches or fails to perform any other material term, covenant or condition of this Agreement or any representation or warranty shall prove to have been false or misleading in any material respect and Pepsi fails to cure such breach within forty-five (45) days after written notice of default is delivered to Pepsi. If such cure cannot reasonably be accomplished within such forty-five (45) day period, this provision shall not apply where Pepsi shall have, in good faith, commenced such cure and thereafter shall diligently proceed to completion; *provided, however*, that such cure is completed to the reasonable satisfaction of Customer within ninety (90) days from the date of Pepsi's receipt of such written notice of default.
- (3) Customer reserves the right to terminate this Contract upon thirty (30) days written notice to the Vendor. If this right is exercised, the State agrees to pay the Vendor only for all undisputed services rendered or goods received before the termination's effective date. All provisions are deleted that seek to require the State to (1) compensate Vendor, in whole or in part, for lost profit, (2) pay a termination fee, or (3) pay liquidated damages if the Contract is terminated early.
- (4) Performance of this Contract is contingent upon funds being appropriated by the WV Legislature or otherwise being available for this Contract. In the event funds are not appropriated or otherwise available, the Contract becomes of no effect and is null and void after June 30 of the current fiscal year. If that occurs, the State may notify the Vendor that



an alternative source of funding has been obtained and thereby avoid the automatic termination. Non-appropriation or non-funding shall not be considered an event of default.

**B. Pepsi's Termination Rights.**

Without prejudice to any other remedy available to Pepsi at law or in equity in respect of any event described below, this Agreement may be terminated by Pepsi at any time, effective thirty (30) days following written notice to the Customer if (i) any of the Products are not made available as required in this Agreement by the Customer, their agents or concessionaires; (ii) any of the rights granted to Pepsi herein are materially restricted or limited during the Term of this Agreement; (iii) a final judicial opinion or governmental regulation prohibits, or materially impacts or impairs (e.g., beverage tax or size restriction) the availability or cost of Beverages, whether or not due to a cause beyond the reasonable control of the Customer; or (iv) Customer breaches any or fails to perform any other material term, covenant or condition of this Agreement or any representation or warranty shall prove to have been false or misleading in any material respect. In connection with the foregoing, Pepsi shall give Customer notice of the event and where applicable (for events within Customer's control), shall provide Customer forty-five (45) days to cure such breach. If the identified breach/event is not remedied with the applicable notice period, then Pepsi may terminate this Agreement and recover from the Customer a reimbursement in accordance with Section D below (Sponsorship Fees in the Event of Termination.). In addition to the termination rights set forth herein, in the event of any of the occurrences outlined in subsections (i) – (iii) above, the parties shall have the right, to meet and engage in good faith negotiations to amicably resolve any issues that have arisen giving rise to an alleged breach of this Agreement.. If such negotiations fail, then either party shall have the right to terminate the Agreement upon thirty (30) days' notice.

**C. Additional Termination Rights Available to Pepsi and Customer.**

Without prejudice to any other right or remedy available to either party at law or in equity of any event described below, this Agreement may be terminated by either party if the other party, or any parent of such other party, shall: (i) have an order for relief entered with respect to it, commence a voluntary case or have an involuntary case filed against it under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect (and such order or case is not stayed, withdrawn or settled within sixty (60) days thereafter) it is the intent of the parties hereto that the provisions of Section 365(e)(2)(A) of Title 11 of the United States Code, as amended, or any successor statute thereto, be applicable to this Agreement; or (ii) file for reorganization, become insolvent or have a receiver or other officer having similar powers over it appointed for its affair in any court of competent jurisdiction, whether or not with its consent (unless dismissed, bonded or discharged within 60 days thereafter); or (iii) admit in writing its inability to pay its debts as such debts become due.

In addition, in the event that the Marketing Agreement between Bottling Group, LLC and IMG College, LLC commencing July 1, 2019 (the "**Marketing Agreement**") is terminated due to IMG College LLC's Marketing Rights Agreement with Customer being terminated for any reason, then the Parties agree to meet and discuss this Agreement, as it relates to Marshall's Marketing Rights Holder, and mutually agree upon any modifications or amendments to this Agreement, which are necessitated by such termination. If the parties cannot mutually agree upon the



necessary modifications or amendments within ninety (90) days, then either party may terminate this Agreement upon thirty (30) days written notice to the other.

**D. Sponsorship Fees in the Event of Termination.**

If Pepsi terminates this Agreement pursuant to Section 10 or Customer terminates this Agreement without cause, then Pepsi shall be entitled to from Customer, without prejudice to any other right or remedy available to Pepsi, and Customer shall pay to Pepsi all funding paid by Pepsi to the Customer which remains unearned as of the time of termination. With regard to the Annual Sponsorship Payment, Annual Athletic Sponsorship Payment, and Guaranteed Annual Commissions, the amount of such reimbursement shall be determined by multiplying Annual Sponsorship Payment, Annual Athletic Sponsorship Payment, and Guaranteed Annual Commissions by a fraction, the numerator of which is the number of months remaining in the Year in which the Agreement is terminated at the time such termination occurs and the denominator of which is twelve (12).

**11. TAXES.**

Customer acknowledges and agrees that neither Pepsi nor its affiliates shall be responsible for any taxes payable, fees or other tax liability incurred by the Customer in connection with any fees payable by Pepsi under this Agreement. In addition, Pepsi shall be responsible for the payment of taxes assessed or payable by Pepsi, including but not limited to the collection of soft drink and/or sales tax on Products purchased through Vending Machines. Pepsi shall not be assessed common area maintenance fees, or other charges by Customer based on its occupation of the space allocated to its Equipment.

**12. CONFIDENTIALITY.**

A. Except as otherwise required by law or the rules or regulations of any national securities exchange or the rules or regulation of the Customer, the Customer and Pepsi agree not to disclose Confidential Information (as hereinafter defined) to any third party other than to their respective directors, officers, employees and agents (and directors, officers, employees and agents of their respective affiliates) and advisors (including legal, financial and accounting advisors) (collectively, "**Representatives**"), as needed.

B. "**Confidential Information**" shall include all non-public, confidential or proprietary information that Customer or its Representatives make available to Pepsi or its Representatives or that Pepsi or its Representatives make available to Customer or its Representatives in connection with this Agreement as exempted under W. Va. Code § 29B-1—4(a)(1), as solely determined by Customer.

C. These Confidentiality provisions and the obligations of the parties hereunder will survive the expiration or sooner termination of this Agreement for a period of three (3) years following such date of expiration or termination of this Agreement.

D. **Required Disclosures.** Notwithstanding the foregoing, Customer may disclose Pepsi's Confidential Information to the extent disclosure of such Confidential Information is





required to comply with applicable law, regulation or an order of a court or governmental or regulatory authority. Further, the parties understand and agree, that Customer is a “public body” within the meaning of the West Virginia Freedom of Information Act (“FOIA”), W. Va. Code §29B-1-1, *et. seq.* and is therefore subject to the disclosure requirements of the FOIA Act. This Agreement and other “public records,” as defined therein, may be disclosed without notice to the Pepsi at Customer’s sole discretion. Further, Customer shall not be liable in any way for disclosure of any such records nor shall it be considered an act of act breach of this Agreement.

### **13. REPRESENTATIONS, WARRANTIES AND COVENANTS.**

A. Each party represents and warrants to the other: (1) it has full power and authority to enter into this Agreement and to grant and convey to the other the rights set forth herein; and (2) all necessary approvals for the execution, delivery and performance of this Agreement have been obtained and this Agreement has been duly executed and delivered by the parties and constitutes the legal, valid and binding obligation, enforceable in accordance with its terms, and nothing contained in this Agreement violates, interferes with or infringes upon the rights of any third party; (3) the respective signatory of this Agreement is duly authorized and empowered to bind the party to the terms and conditions of this Agreement for the duration of the Term; and (4) the parties have complied with all applicable laws, ordinances, codes, rules and regulations relating to its entering into this Agreement and its performance hereunder.

B. Each of the parties hereto agree that: (1) the representations, warranties and covenants contained herein shall survive the execution and delivery of this Agreement, and (2) except as expressly set forth herein, neither party has made, and neither party is relying on, any representation or warranty, express or implied, with respect to the subject matter hereof.

C. To the extent that the any intercollegiate athletic team is relocated to a venue which is not within the Facilities as its home venue, Customer agrees that it shall ensure all rights of Pepsi hereunder shall be extended to such alternate venue as to the intercollegiate athletic team and any advertising and pouring rights contained herein.

### **14. INDEMNIFICATION.**

A. Pepsi will indemnify and hold the Customer harmless from any and all suits, actions, claims, demands, losses, costs, damages, liabilities, fines, expenses and penalties (including reasonable attorneys’ fees) arising out of: (i) its breach of any term or condition of this Agreement; (ii) product liability suits resulting from the use or consumption of Products purchased directly from Pepsi; and/or (iii) the negligence or willful misconduct of Pepsi, (excluding claims arising out of the Customer’s negligence or willful misconduct).

B. Defense and Payment of Third Party Claims. Neither party to this agreement shall be obligated, as a matter of contract between the parties to this agreement, to defend or indemnify the other party to this agreement against any claims of third parties. Provided, however, that nothing in this agreement shall be construed to constitute a waiver or diminishment of, or substantive or procedural limitation upon, any claims for common law or statutory contribution or



indemnity that either party to this agreement may have against the other party to this agreement under applicable law.

C. The provisions of this Section shall survive the termination of this Agreement.

## **15. INSURANCE.**

A. Pepsi shall maintain and agrees to maintain, at all times during the Term and for a period of three (3) years thereafter, a comprehensive program of risk retention and insurance with such insurance carriers and in such amounts of insurance coverage reasonably acceptable to the other party. Pepsi agrees to include Customer and its Board of Governors, and its respective officers, directors, employees, agents, representatives and successors and assigns on a certificate of insurance, as additional insureds with respect to the certificate holder's negligence.

B. Customer shall have the right, during the Term from time to time, to request copies of such certificates of insurance and/or other evidence of the adequacy of the above insurance coverages.

## **16. Right of Offset.**

Pepsi reserves the right to withhold payments due hereunder as an offset against amounts not paid by Customer for Products ordered from and delivered by Pepsi pursuant to this Agreement.

## **17. NOTICES.**

Unless otherwise specified herein, all notices, requests, demands, consents, and other communications hereunder shall be transmitted in writing and shall be deemed to have been duly given when hand delivered, upon delivery when sent by express mail, courier, overnight mail or other recognized overnight or next day delivery service, or upon receipt when sent by registered or certified United States mail, postage prepaid, return receipt requested, or when received from a public telegraph company for immediate transmittal, charges prepaid, or by telecopier, with a confirmation copy sent by recognized overnight courier, next day delivery, addressed as follows:

If to Pepsi:

Pepsi Beverages Company  
11551 Shannon Drive  
Fredericksburg, VA, 22405  
Attn: Director, Food Service

With a copy to (which shall not constitute notice):

Pepsi Beverages Company  
1111 Westchester Avenue  
White Plains, NY 10604  
Attn: Legal Department



If to Customer:

Marshall University  
 Office of Purchasing  
 One John Marshall Drive  
 Huntington, WV 25755-4100

### **18. ASSIGNMENT.**

This Agreement or any part hereof or interest herein shall not be assigned or otherwise transferred by either party without the prior written consent of the other party nor shall the same be assignable by operation of law, without the prior written consent of the other party; *provided, however*, that Pepsi may assign and transfer this Agreement (in whole and not in part) to an affiliate without the consent of Customer hereto; *provided, however*, that, (x) such affiliate is capable of fully performing all obligations of the assignor hereunder; (y) such affiliate agrees, under a separate agreement acceptable to the other party and signed by such affiliate, to perform all of the obligations and assume all liabilities of the assignor hereunder; and such affiliate has not be debarred by the State of West Virginia or otherwise legally prohibited from continuing to conduct business with the State of West Virginia or Customer. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective permitted successors and assigns. Customer represents and warrants to Pepsi that any change in the Food Service Provider at the Facilities shall not affect Pepsi's rights or obligations hereunder.

### **19. GOVERNING LAW.**

This Agreement shall be governed by and construed in accordance with the laws of the State of West Virginia.

### **20. FORCE MAJEURE.**

If the performance by either party hereto of its respective nonmonetary obligations under this Agreement is delayed or prevented in whole or in part by acts of God, fire, floods, storms, explosions, accidents, epidemics, war, civil disorder, strikes or other labor difficulties, or any law, rule, regulation, order or other action adopted or taken by any federal, state or local government authority, or any other cause not reasonably within such party's control, whether or not specifically mentioned herein, such party shall be excused, discharged and released of performance only to the extent such performance or obligation is so delayed or prevented by such occurrence without liability of any kind. Nothing contained herein shall be construed as requiring either party hereto to accede to any demands of, or to settle any disputes with, labor or labor unions, suppliers or other parties that such party considers unreasonable.

### **21. RELEASE, DISCHARGE OR WAIVER.**

No release, discharge or waiver of any provision hereof shall be enforceable against or binding upon either party hereto unless in writing and executed by both parties hereto. Neither the failure to insist upon strict performance of any of the agreements, terms, covenants or conditions hereof, nor the acceptance of monies due hereunder with knowledge of a breach of this Agreement, shall be deemed a



waiver of any rights or remedies that either party hereto may have or a waiver of any subsequent breach or default in any of such agreements, terms, covenants or conditions.

## **22. PRIOR NEGOTIATIONS; ENTIRE AGREEMENT.**

This Agreement and the exhibits attached hereto, set forth the entire understanding between the parties in connection with respect to the subject matter hereof, and no statement or inducement with respect to the subject matter by either party hereto or by any agent or representative of either party hereto which is not contained in this Agreement shall be valid or binding among the parties. This provision shall not be read to invalidate or amend any other written agreements between Pepsi and/or any of its affiliates and any affiliate of Customer.

## **23. RELATIONSHIP OF THE PARTIES.**

The parties are independent contractors with respect to each other. Nothing contained in this Agreement will be deemed or construed as creating a joint venture partnership between the parties.

## **24. EFFECT OF HEADINGS.**

The headings and subheadings of the sections of this Agreement are inserted for convenience of reference only and shall not control or affect the meaning or construction of any of the agreements, terms, covenants and conditions of this Agreement in any manner.

## **25. CONSTRUCTION.**

This Agreement has been fully reviewed and negotiated by the parties hereto and their respective legal counsel. Accordingly, in interpreting this Agreement, no weight shall be placed upon which party hereto or its counsel drafted the provision being interpreted. Wherever this Agreement provides for one party hereto to provide authorization, agreement, approval or consent to another party hereto, or provides for mutual agreement of the parties hereto, such authorization, approval, agreement or consent shall, except as may otherwise be specified herein, be given in such party's reasonable judgment and reasonable discretion, and shall be in writing unless otherwise mutually agreed by the parties.

## **26. SEVERABILITY.**

If any term or provision of this Agreement shall be found to be void or contrary to law, such term or provision shall, but only to the extent necessary to bring this Agreement within the requirements of law, be deemed to be severable from the other terms and provisions hereof, and the remainder of this Agreement shall be given effect as if the parties had not included the severed term herein.

## **27. AMENDMENTS.**

No provision of this Agreement may be modified, waived or amended except by a written instrument duly executed by each of the parties hereto. Any such modifications, waivers or amendments shall not require additional consideration to be effective.





## **28. COUNTERPARTS.**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

## **29. FURTHER ASSURANCES.**

Each party hereto shall execute any and all further documents or instruments and take all necessary action that either party hereto may deem reasonably necessary to carry out the proper purposes of this Agreement.

*[signature to appear on the following page]*



**IN WITNESS WHEREOF**, the undersigned have caused this Agreement to be duly entered into as of the date set forth below.

Customer

Bottling Group, LLC

By: Angela White Negley  
Name: Angela White Negley

By: Jeffrey Brooks  
Name: Jeff Brooks

Title: Director / Chief Procurement Officer

Title: Foodservice Senior Sales Manager

Date: 12/2/19

Date: 11/22/2019



### Exhibit A

#### **Current description & pricing for Postmix Products and Packaged Products**

Current pricing and price changes shall be in accordance with Pepsi's agreement with Customer's current Food Service Provider.

Customer acknowledges and agrees (and shall require that any third parties or Food Service Providers purchasing Products through this Agreement agree) that Pepsi shall be entitled to pass-through any incremental fees, deposits, taxes or other governmentally imposed charges (whether local, state, federal or judicially imposed) and that the pass-through of any such governmentally imposed fees, deposits, taxes or charges on the Products shall not be deemed as a price increase subject to any pricing cap or notification restrictions that may be specified in this Agreement.



## Exhibit B

### **Facilities & Printing Advertising and Additional Rights to be Provided to Pepsi**

#### **A. Facilities and Print Advertising.**

- (1) Facilities Advertising.  
Such advertising as may be mutually agreed upon between the parties
  
- (2) Print Advertising.  
Such advertising as may be mutually agreed upon between the parties

#### **B. Additional Rights.**

- (1) Sky Suite Lease & Sky Suite Additional Tickets
- (2) Big Green Dinner Sponsor
- (3) Big Green Booster Contributor
- (4) Capital Campaign Contributor
- (5) Football Chairbacks Purchase
- (6) Big Green Golf Tournament Sponsor