

## ASSET PURCHASE AGREEMENT

**This Asset Purchase Agreement** (“Agreement”) is dated as of September 5, 2017 (the “Effective Date”), by and between **CITY OF AUBURN**, a Maine municipal corporation with its principal office offices located at 60 Court Street, Auburn, Maine, 04210 (the “City”), and **THE PENALTY BOX, INC.**, a Maine business corporation with a mailing address at 780 Auburn Road, Turner, Maine 04282 (“Seller” or the “Company”).

### **BACKGROUND**

Seller operates an arena concessions and skate rental business at the Norway Savings Bank Arena, 985 Turner Street, Auburn, Maine (the “Concessions Business”).

The Concessions Business is operated pursuant to a Sublease Agreement and First Amendment to Sublease Agreement with the City, copies of which are attached hereto as **Exhibit A** and **Exhibit B**, respectively.

The City desires to purchase and the Seller desires to sell, the entirety of the assets owned by Seller and used in connection with the Concessions Business, including the goodwill relating to the Concessions Business.

The City and the Seller have therefore agreed as follows:

1. Sale of Assets. Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller shall sell, convey, assign, transfer and deliver to City, and City shall purchase and acquire from Seller, free and clear of any encumbrances, all of Seller’s right, title, and interest in and to all of Seller’s property and assets, real, personal, or mixed, tangible and intangible, used in connection with the operation of the Concessions Business (“Assets), but excluding the Excluded Assets identified in Section 1.3. On the Closing Date, City will acquire the following assets of the Company (collectively, the “Assets”):

1.1. Fixed Assets. All restaurant and bar equipment, furniture and fixtures identified listed on **Schedule 1.1** (the “Fixed Assets”);

1.2. Intangibles. Seller shall assign to City all right, title and interest to any intangible personal property now or hereafter owned by Seller pertaining to the Concessions Business, including the right to use any trade name now used in connection with the Concessions Business, any goodwill and other intangible assets of the Concessions Business, including without limitation, all telephone numbers, facsimile numbers, marketing and promotional materials or contracts, signage, maintenance contracts, equipment leases, mailing lists, intellectual property, website domain, Facebook page, and any other social media accounts pertaining to the Concessions Business (the “Intangibles”);

1.3. Excluded Assets. The Assets shall not include any of the following (the “Excluded Assets”):  
(a) cash, securities, demand, savings, or other deposits in any bank or savings and loan institution or other financial institution, any negotiable or non-negotiable instruments, or any other investments;  
(b) insurance policies, insurance benefits, paid insurance premiums, or real estate interests other

than the Sublease; (c) any unpaid vendor rebates accrued through the Closing Date; and (d) all of the Company's automobiles, if any.

1.4. Leases. The City and the Seller agree to terminate their Sublease Agreement, as amended, effective as of the Closing. The Seller shall surrender to the City all of its right, title and interest in and to all leases, subleases and other agreements as stated in **Exhibits A** and **B**. Seller shall assign and City shall re-assume, the obligations of the Customer as defined in the Pepsi Agreement that is incorporated into the sublease, as of the Closing Date. The City shall retain the \$2,500 Security Deposit provided under the sublease. The City and the Seller shall execute a termination of any memoranda of lease recorded by the Seller with respect to Exhibit A or Exhibit B in the Androscoggin County Registry of Deeds and the City shall pay the recording fees.

2. Closing. The closing shall take place at the offices of The Malloy Firm, 178 Court Street, 2<sup>nd</sup> Floor, or at such other time and place as the Parties may agree (the "Closing"), on or before September 15, 2017. Time is of the essence. At the Closing, City shall pay the Asset Purchase Price as provided in Section 3. Simultaneously, Seller shall convey to City good and valid title in and to the Assets as provided in this Agreement, free and clear of all liens.

3. Asset Purchase Price; Payment Allocation.

The purchase price for the Assets shall be \$90,000 ("Asset Purchase Price"). The entirety of the Asset Purchase Price shall be paid by City at Closing by bank or cashier's check or wire transfer to Seller's designated account at Closing. The Asset Purchase Price shall be allocated by agreement of the parties prior to Closing. All parties to this transaction shall report this transaction in a manner consistent with each other for accounting, tax, and reporting purposes.

4. Conditions to Closing.

4.1. City's Contingencies. The Parties recognize that City's ability to consummate the transaction set forth herein is dependent upon the occurrence of the following contingencies, and that the failure of any of the following shall entitle the City to terminate this Agreement without penalty.

4.2. Due Diligence. City's obligation to close is conditioned upon the conditions listed in Paragraph 8 as Conditions to the Obligations of City.

4.3. Concessions Business Leases. Seller shall provide copies of all leases held by the Concessions Business, including any and all subleases, amendments, riders, licenses, work letters, inducement letters, side letters, guaranties of the leases, and letters of credit provided by the Concessions Business as lease security, other than those contained in **Exhibits A** and **B**;

4.4. Contracts and Agreements. Seller shall provide copies of any and all contracts and agreements (including leasing, management, maintenance, repair, service, supply and contracts or agreements of any kind or nature) affecting the Concessions Business (collectively, the "Service Contracts");

4.5. Waiver of Slap Shot, LLC. Seller shall procure and furnish to the City, the waiver of the rights

of Slap Shot, LLC, arising under an Agreement Regarding Sublease between the Seller and Slap Shot, LLC, as of February 3, 2014, and attached hereto as **Exhibit C**.

5. Representations and Warranties of Seller. Seller represents and warrants to and agrees with City as follows:

5.1. Inventory of Fixed Assets and Supplies. All Fixed Assets are sold AS IS, WHERE IS, free and clear of all liens, encumbrances, and other interests.

5.2. Contracts and Commitments. **Schedule 5.2** contains a complete listing of Company's commitments for providing catering or event hosting services, vending machine agreements, and any other service of the Concessions Business as of the Effective Date.

5.3. Machinery and Equipment. All machinery and equipment of the Concessions Business is sold AS IS, WHERE IS..

5.4. Supplier List. On or before Closing, Seller shall provide a true and correct list of all supplier contracts of Seller. All supplier contracts shall be paid in full as of the date of Closing.

5.5. Organization and Authority. Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Maine. Seller has the full corporate power, authority and legal right to own, lease, or otherwise hold its properties and carry on its business as now being conducted.

5.6. Authority Relative to Agreements. Seller has the full power and authority to execute, deliver and perform this Agreement and to consummate the transactions contemplated on their part by this Agreement. All company proceedings on the part of Seller as are necessary to authorize the execution and delivery of this Agreement or the consummation of the transactions contemplated by this Agreement have been taken or will be taken as of Closing. The sale of the Assets as contemplated by this Agreement will not result in a material default under any contract to which Seller is a party, and will not give rise to a right in any third party to accelerate any indebtedness of Seller or alter or terminate any contract or other right of Seller included in the Assets. This Agreement and any other agreement referred to in this Agreement to be executed and delivered by Seller constitute (or will constitute as of Closing) valid and binding obligations of Seller, enforceable in accordance with their respective terms.

5.7. Litigation. There are no actions, suits, proceedings or investigations pending, or threatened, against or affecting Seller or any of its properties, assets or rights, in any arbitration tribunal, court or before any authority. Seller does not know of any basis for any such action, or of any governmental investigation relative to Seller, its properties, or business. Seller has continuously maintained comprehensive liability insurance coverage against the threat of liability claims against it of such types and with such coverages as are customarily carried by similarly situated business operations.

5.8. Tax Matters. All tax returns, declarations of estimated tax, tax reports and similar documents required to be filed by Seller have been filed in a timely fashion with the appropriate

governmental agencies. All tax returns, declarations of estimated tax, tax reports and similar documents were prepared on an appropriate basis; all federal, state, local and foreign taxes, interest, penalties, assessments and deficiencies due were fully paid when due, except for any such assessments being contested by appropriate proceedings diligently pursued. Seller has made all withholdings of tax required to be made under all applicable foreign, federal, state and local tax regulations and such withholdings have been paid to the respective governmental agencies or set aside in accounts for such purposes or accrued, reserved against and entered upon the books of Seller.

5.9. Title to Properties; Absence of Liens and Encumbrances, etc. Seller has good and marketable title to all of the Assets, free and clear of any liens, claims, charges, pledges, options, security interests or other encumbrances.

5.10. Employees. Seller shall provide the City with a complete list of the names and contact information of Seller's employees engaged in the Concessions Business. As of the Effective Date, to the best of Seller's knowledge, no employee of the Seller has any claims against Seller arising out of the operation of the Concessions Business, whether arising under contract, tort, or state, federal, or local statute or ordinance. Seller shall comply with all federal and state requirements with respect to layoffs and terminations of employees prior to Closing. The City shall have no obligation to offer employment to any of Seller's employees but may, in the City's sole and absolute discretion, offer such employment to employees of the Concessions Business following Closing.

5.11. No Violation of Other Agreements. The execution and delivery of this Agreement by Seller or of any other agreement referred to in this Agreement to be executed and delivered, and the performance and compliance by Seller with all of the provisions of this Agreement and the consummation of the transactions contemplated by this Agreement, does not conflict with, or result in any breach of any of the provisions of, or constitute a default (or an occurrence which, by the lapse of time, the giving of notice or both, would constitute a breach or default) under any loan agreement, indenture, mortgage, deed of trust or other agreement or instrument to which any of the Assets are subject; or conflicts with, or results in a breach of any of the provisions of, or constitutes a default under the constituent documents of Seller or any law, judgment, order, writ, injunction, decree, rule, arbitration award or regulation or results in the creation or imposition of any lien, charge, pledge, security interest or other encumbrance upon any of the Assets.

## 6. Representations and Warranties of City.

City represents and warrants to, and agrees with, Seller that City has the full power and authority to execute, deliver and perform this Agreement and any other agreement referred to in this Agreement be executed and delivered by City and to consummate the transactions contemplated on its part by this Agreement. This Agreement and any other agreement referred to in this Agreement to be executed and delivered by City constitute (or will constitute as of Closing) valid and binding obligations of City or City's Assignee, enforceable in accordance with their respective terms.

7. Additional Covenants and Agreements.

7.1.Conduct of Business. The Parties agree that the Concessions Business shall not be operated prior to Closing. The City shall change the locks on the subleased premises. Seller and City shall cooperate to ensure the safety and security of the Assets, but the risk of loss shall be on the Seller. If Seller requires access to the Leased Premises, access shall be arranged directly between Kevin Pratt and Jason Paquin. Seller shall remove all alcohol from the subleased premises prior to Closing. Until the Closing, Seller will maintain insurance on the Assets in such amounts and coverages as exist as of the date hereof and, except for changes which are not material and are made in the ordinary course of business.

7.2.Broker's Fees. Each Party represents to the others that it has not retained, directly or indirectly, any broker or agent with respect to this purchase and sale, and that each Party will indemnify and hold harmless the others from and against all claims relating to brokerage or commission on account of this purchase claimed by any person hired or consulted by such Party.

7.3.Expenses. Whether or not the transaction contemplated by this Agreement is consummated, each Party shall bear all costs and expenses incurred by it in connection with this Agreement. In any action to enforce the terms of this Agreement, or rights otherwise arising under this Agreement or any other agreement provided under this Agreement, the prevailing party shall be entitled to recover its costs and expenses, including reasonable attorneys' fees.

7.4.Additional Agreements. Subject to the terms and conditions of this Agreement, each of the Parties agrees to use its reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective, as soon as reasonably practicable, the transactions contemplated by this Agreement.

7.5.Further Assurances. Upon written request of any Party after the Closing, the other Parties shall promptly execute any document or take any action reasonably necessary to accomplish the purpose and intent of this Agreement and consummate the transactions contemplated by this Agreement.

8. Conditions to the Obligations of City. The obligations of City are subject to the fulfillment to the satisfaction of City, prior to or at the Closing, of each of the following conditions:

8.1.Compliance with Agreement. Seller shall have fulfilled all of the terms, covenants and conditions of this Agreement to be fulfilled by them on or before the Closing.

8.2.Bill of Sale. Seller delivering to City, in form and substance reasonably satisfactory to City, a bill or bills of sale for and assignments of the Assets, duly executed, sufficient to convey to City good and marketable title to the Assets, free and clear of all liens, claims and encumbrances.

8.3.UCC and Title Searches, etc. City receiving, at least two business days prior to the scheduled Closing searches of the records of filings under Article 9 of the Uniform Commercial Code, federal

tax liens, state tax warrants, judgments, liens, executions, bankruptcy filings, the real estate registries, and other searches as City may reasonably deem appropriate.

8.4. Representations and Warranties. The representations and warranties of Seller contained in this Agreement are true and correct on the date of this Agreement and shall also be true and correct at and as of the Closing, with the same force and effect as if made at and as of the Closing; Seller shall have performed or complied with all agreements and covenants required by this Agreement to be performed or complied with by Seller at or prior to the Closing.

8.5. Material Adverse Changes. There shall have been no material adverse change, either actual or threatened, in condition of the Assets whether or not covered by insurance.

8.6. Status of Company. City's attorney shall be reasonably satisfied as to the corporate existence and good standing of Seller, and as to its authority to consummate the transaction.

8.7. Litigation; Other Events. No action, suit or proceeding shall have been instituted by any person who seeks to prohibit, restrict or delay consummation of the transaction contemplated in this Agreement or any of the conditions material to the consummation of the transaction contemplated in this Agreement.

9. Conditions to the Obligations of Seller. Consummation of the transactions contemplated by this Agreement is subject to the fulfillment to the reasonable satisfaction of Seller, prior to or at the Closing, of each of the following conditions:

9.1. Representations True. The representations and warranties of City contained in this Agreement are true and correct in all material respects on the date of this Agreement and shall also be true and correct in all material respects at and as of the Closing, with the same force and effect as if made at and as of the Closing; City shall have performed and complied in all material respects with all of the agreements and covenants required by this Agreement to be performed or complied with by it at or prior to the Closing.

9.2. Compliance with Laws. No action, suit or proceeding shall have been instituted by any person who seeks to prohibit, restrict or delay consummation of the transaction contemplated in this Agreement or any of the conditions material to the consummation of the transaction contemplated in this Agreement.

10. Waiver of Conditions. Notwithstanding anything in this Agreement to the contrary, if any one or more of the conditions specified in this Agreement shall not have been satisfied, the Party for whose benefit such condition is to be satisfied shall have the right, in addition to any other right which may be available to it, to waive such conditions and nevertheless to proceed with the transactions contemplated by this Agreement. In the event of any waiver, the Party exercising its right shall not have the right to proceed against the other Party or Parties for damages resulting from the breach so waived.

11. Survival. All obligations of the Parties and provisions of this Agreement which expressly or by their nature survive termination or expiration or transfer of this Agreement shall continue in full

force and effect in accordance with their respective terms subsequent to and notwithstanding such termination, expiration or transfer for a period of one (1) year after the Closing Date (except representations and warranties with respect to title and taxes, which shall survive for applicable statutes of limitation).

12. Indemnification.

12.1. Indemnification of City. Seller covenants and agrees to indemnify, defend and hold harmless City and City's Assignee from and against all claims, warranty claims, actions, suits, proceedings, judgments, decrees, debts, liabilities, costs, fees and expenses of any kind whatsoever, including reasonable attorneys' fees, which (1) may at any time be asserted by any person, firm, entity or governmental agency arising out of the business or operations of Seller, prior to the Closing Date, or (2) result from a breach of any of the agreements, representations, warranties or covenants made by Seller in this Agreement.

12.2. Indemnification of Seller. City covenants and agrees to indemnify and hold harmless Seller from and against all claims, demands, actions, suits, proceedings, judgments, decrees, debts, liabilities, costs, fees and expenses of any kind whatsoever, including reasonable attorneys' fees, which (1) may at any time be asserted by any person, firm, entity or governmental agency arising out of the business or operations of City on and subsequent to the Closing or (2) result from a breach of any of the agreements, representations, warranties or covenants made by City in this Agreement.

13. Termination.

This Agreement may be terminated as follows:

by City if the Closing has not occurred on or before **September 15, 2017**, or such later date as the parties may agree upon, unless the City is in material breach of this Agreement; or

by Seller if the Closing has not occurred on or before **September 15, 2017**, or such later date as the parties may agree upon, unless the Seller is in material breach of this Agreement.

14. Dispute Resolution. Upon demand by a Party, any disputes which arise under this Agreement shall be submitted to binding arbitration under the JAMS Streamlined Arbitration Rules. The arbitration shall occur in Androscoggin County, Maine or as otherwise agreed upon by the Parties. The Parties shall agree on an arbitrator or, if they cannot after good faith negotiations agree on an arbitrator within 10 days following a demand for arbitration, either Party may apply to the Androscoggin County, Maine Superior Court for the appointment of an arbitrator. The Parties waive any rights they may have to further judicial review of any dispute arising under this Agreement. The cost of all arbitration shall be shared equally between the Parties and each Party shall pay its own legal fees incurred pursuant to the arbitration. Judgment may be entered upon the award of the arbitrators by either Party in any court with jurisdiction over the Parties. Notwithstanding the foregoing, a Party shall have the right to seek an injunction or order requiring specific performance of this Agreement without first making a demand for arbitration.

15. Risk of Loss. The risk of substantial loss or damage to the Assets or any premises occupied by Seller by fire or other casualty, or by taking by eminent domain, until Closing, shall remain with Seller. Upon loss or damage to a substantial portion or all of the Assets or the premises occupied by Seller, City shall have the election of terminating this Agreement without further liability under this Agreement or of completing the purchase and receiving the insurance monies collectible for such loss or damage, or the award for such taking by eminent domain.

16. Miscellaneous.

16.1. Notices. Any notices, requests, demands and other communications required or permitted to be given under this Agreement shall be in writing and delivered by hand or overnight delivery by a nationally recognized overnight courier service, as follows:

If to Seller, at its address first stated above, with a copy to:

Shawn K. Bell, Esq.  
The Bell Firm, P.A.  
810 Lisbon Street  
Lewiston, Maine 04240

If to City, its address first stated above, with a copy to:

Michael S. Malloy, Esq.  
The Malloy Firm  
178 Court Street, P.O. Box 3171  
Auburn, Maine 04212-3171

or to such other address as the Party may from time to time give written notice of to the others. Notice will be given when received or when delivery is refused.

16.2. Entire Agreement. This Agreement, together with the attached Exhibits and Schedules, is intended to be a completely integrated agreement and as such, constitutes the entire agreement among the Parties and supersedes all prior agreements, understandings, negotiations and discussions, both written and oral, among the Parties with respect to the subject matter of this Agreement. This Agreement may not be amended or modified in any way except by a written instrument executed by the Parties.

16.3. Benefits; Binding Effect. This Agreement shall be for the benefit of and binding upon the Parties, their respective heirs, personal representatives, legal representatives and permitted successors and assigns.

16.4. No Waiver. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provisions (whether or not similar), nor shall any such waiver constitute a continuing waiver unless expressly so provided.

16.5. No Third Party Beneficiary. Nothing expressed or implied in this Agreement is intended, or shall be construed, to confer upon or give any person, firm, corporation, partnership, association or other entity, other than the Parties and their respective heirs, personal representatives, legal representatives, successors and assigns, any rights or remedies under or by reason of this Agreement.

16.6. Severability. The invalidity of any one or more of the words, phrases, sentences, clauses, sections or subsections contained in this Agreement shall not affect the enforceability of the remaining portions of this Agreement, all of which are inserted conditionally on their being valid in law, and, in the event that any one or more the words, phrases, sentences, clauses, sections or subsections contained in this Agreement shall be declared invalid, this Agreement shall be construed as if such invalid word or words, phrase or phrases, sentence or sentences, clause or clauses, section or sections or subsection or subsections had to been inserted.

16.7. Counterparts. This Agreement may be executed in any number of counterparts and by Parties in separate counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

The parties are making this Agreement as of the Effective Date.

CITY OF AUBURN

THE PENALTY BOX, INC.

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By: Denise Clavette  
Its Assistant City Manager

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By: Kevin Pratt  
Its President