

**AGREEMENT BETWEEN CITY OF SUNNYVALE AND
CALIFORNIA THEATRE CENTER FOR
USE OF THEATER FACILITIES AT
THE SUNNYVALE COMMUNITY CENTER
FROM SEPTEMBER 26, 2016 – MAY 31, 2017**

THIS AGREEMENT dated _____, is by and between the CITY OF SUNNYVALE, a Municipal Corporation ("CITY"), and CALIFORNIA THEATRE CENTER, a nonprofit corporation ("CTC").

WHEREAS, CTC has for many years used theater facilities at the Sunnyvale Community Center of CITY for rehearsal and performance of its School and Family Series; and

WHEREAS, the parties desire to continue such arrangement through May 31, 2017, under the terms and conditions specified in this Agreement.

NOW, THEREFORE, THE PARTIES ENTER INTO THIS AGREEMENT.

1. USE OF FACILITIES AND EQUIPMENT BY CTC

- (a) Authorized Uses of Theater Facilities: Subject to the terms and conditions of this Agreement, CITY hereby authorizes non-exclusive use by CTC of the areas of the theater building designated by the City ("Facilities") at the Sunnyvale Community Center, 550 East Remington Drive, Sunnyvale, California for a period commencing on September 26, 2016, and concluding on May 31, 2017. Such Facilities do not include staff offices and spaces currently designated by the City for other uses. Rehearsal, storage limited to shows under this agreement
- (b) Theater Scheduling:
 - (i) Tentative Schedule: CITY shall prepare and deliver to CTC a proposed schedule, subject to change as provided in this section, for CTC's use of the Facilities for summarizing approved dates and times for CTC use not later thirty (30) days after the execution of this agreement.
 - (ii) Schedule updates: CITY shall provide an updated theater schedule in writing or by email on a monthly basis. CTC shall provide a weekly schedule showing all activities scheduled to occur in the Facilities at least seven (7) days in advance of the first day of the week shown on the schedule. CITY's Theater Technical Director must approve any changes in the production schedule at least one (1) month in advance.
 - (iii) CTC understands that its use of the Facilities is non-exclusive and that City may reschedule CTC uses of the Facilities or other City buildings

as necessary to accommodate CITY purposes and functions needs, including but not limited to rentals to other members of the public or entities. If City determines that rescheduling CTC rehearsals is necessary, it will make all reasonable efforts to provide CTC one week's notice before any change in rehearsal schedule, except in the case of emergency issues. If CITY reschedules a rehearsal, CITY shall attempt to provide CTC an alternative rehearsal location depending upon availability. Use of alternate sites will not count toward the maximum number of hours allotted for rehearsals in the theatre.

- (c) Authorized Theater Productions: CTC may have use of theater facilities for the School and Family Series between September 26, 2016 and May 31, 2017. The School and Family Series shall consist of not more than ten (10) productions per year. However, due to physical space and calendar limitations, only nine productions may be new. If a tenth production is approved by the City to be scheduled in the season, it must be a remount or small set production requiring minimal technical rehearsal time of not more than one dress rehearsal and one technical rehearsal only. No set shop build time or set storage space is allowed for the tenth production. A tenth production show must be approved in advance by the CITY's Technical Coordinator.

School and Family Series shows will be performed Monday through Friday, at 9:30 a.m. and 11:00 a.m.; Saturday mornings at 11:00 a.m.; five (5) Saturday or Sunday afternoons at 2:00 p.m.; and five (5) evenings at 7:00 p.m. For morning performances, CTC shall have use of the Theatre beginning at 8:30 a.m. until 1 p.m. For afternoon performances, CTC shall have use of the Theatre beginning at noon until 4:00 p.m. For evening performances, CTC shall have use of the Theatre beginning at 5:00 p.m. until 9:00 p.m. CTC may request to add additional 12:30 p.m. and 2:00 p.m. performances as needed to accommodate demand; requests must be submitted in writing to the CITY and will be approved or denied within seven (7) business days of the request. Requests should be submitted a minimum of thirty (30) days in advance of the proposed show date.

- (d) Limitations on Use: In addition to any other limitations on use described in this agreement, CTC's use of the Facilities for on-site technical productions, performance rehearsals and storage shall be limited to three (3) productions ("shows") in the theater at any given time, with one (1) show performing on stage and two (2) shows in production. A show must perform in the theater a minimum of five (5) consecutive days in order for it to use any of the theater facilities.

CTC's use of space in the theater building for storage or fabrication of sets, costumes, and properties shall be subject to the approval of CITY's Theater

Technical Coordinator. Use of the Facilities for storage, set or costume fabrication, or any other work not associated with a production authorized by this agreement is prohibited.

- (e) Use of City Equipment: With the approval of CITY's Theatre Technical Coordinator, CTC may use equipment owned by CITY, consistent with the CITY's Theatre Policies and Procedures Handbook and other applicable rules.
- (f) Policies and Procedures: CTC shall follow all CITY policies and procedures set forth in the CITY's Theatre Policies and Procedures Handbook and/or communicated by the CITY's Community Services Manager or Technical Coordinator. In the event that CTC fails to adequately clean any of the CITY Facilities including the Set Shop or Concession Stand, per procedures, CITY staff will clean the facilities as necessary and invoice CTC at the CITY's published hourly rate for technical staff labor costs. CTC agrees to promptly pay any charges invoiced pursuant to this section.
- (g) Rehearsals in Theater: CTC shall be entitled to use the theater facility for rehearsals as outlined in section 1.c., subject to the following limitations. The maximum number of hours CTC may use the theater facilities for rehearsal purposes shall be as follows: Six hundred (600) hours during the performance season (September 26, 2016-May 31, 2017). If CTC requests any use of theater facilities in excess of the foregoing limits, it shall be subject to charges by CITY in accordance with CITY's theater building rental rates in effect at the time. CTC shall provide a minimum of one calendar week's notice on cancellation of Theater reservations. Late cancellations will be counted toward CTC's hourly allotment for the year.
- (h) Rehearsals in Other Park Buildings: CTC may use CITY park building facilities (other than the theater building) for rehearsal purposes only, subject to City approval and availability. CITY retains the right to reschedule or displace CTC to give priority over the use of such facilities to persons who pay the CITY for their use. The maximum hours of use by CTC for all non-theater rehearsal facilities shall be one hundred (100) hours during the School and Family Series performance season, subject to the foregoing availability requirements. If CTC requests any use of non-theater facilities in excess of the foregoing limits, it shall be subject to charges by CITY in accordance with CITY's park building rental rates in effect at the time. CTC shall provide a minimum of one week's notice on cancellation of park building reservations. Late cancellations will be counted toward CTC's hourly allotment for the year.
- (i) Non-Performance Public Activities at the Theatre: Non-performance public activities at the Theatre are defined as activities to which members of the public are invited, either at no charge or for a fee, including, but not limited

to, receptions, backstage tours, post-show workshops or children's birthday parties. CTC may conduct non-performance public activities that are one hour or shorter in duration per event. A rental charge will be levied for non-performance public activities which will extend an hour or more following the conclusion of a performance or program. The rental rate will be subject to current facility rental rates. For all activities, CTC will have a minimum of one staff member present at all times. For activities where food is served the facility must be left in good condition, or a cleaning fee will be assessed. All activities pursuant to this section must take place directly before, after or during scheduled rehearsals or performances.

- (j) Mutual Publicity – Printed Material: CTC must recognize the CITY on its website and on all printed materials advertising events to be held on CITY property and on all printed materials to be displayed on CITY property. Recognition in brochures shall consist of the CITY of Sunnyvale logo, printed not less than 7/16" high, and the phrase, "This program is supported in part by the City of Sunnyvale Community Services Division," printed in no less than 10 point type and appearing on either the front or back of the piece as displayed on the rack. Recognition on posters shall be sized proportionally, depending on the finished size of the piece and intended viewing distance. Materials to be displayed in the CITY flyer rack must be pre-approved by the CITY. Materials which do not have pre-approval may be removed from display. CITY will promote public events on the theatre calendar, bulletin board displays, and printed promotional items where appropriate. CTC will be granted the exclusive use of one theater lobby bulletin board and a shared external theater bulletin board to advertise its upcoming productions.
- (k) Mutual Publicity – Internet and Social Media: For CTC Facebook posts referencing the Sunnyvale Theatre, CTC will provide authorization to allow CITY Facebook page to be tagged in that post. For CITY Facebook posts referencing CTC, CITY will provide authorization to allow CTC Facebook page to be tagged in that post. On CTC's website, a link back to the CITY's website is required. The CITY reserves right of approval for all social media references made to the CITY, its property or programming. CITY will promote CTC performances open to the public on its website with a link back to CTC's website.

2. **DEPOSITS, PAYMENTS TO THE CITY, RECORDS AND ACCOUNTS**

- (a) Deposit: Upon execution of this Agreement, CTC shall provide CITY with a deposit of ten thousand dollars (\$10,000.00) to secure CTC's performance under this Agreement. The deposit shall be forfeited if CTC terminates this Agreement for any reason prior to its expiration date. Otherwise, the deposit shall be returned to CTC in a timely fashion upon conclusion of the Agreement. Forfeiture of the deposit shall not preclude CITY from pursuing any other available legal remedies for breach of contract, including, but not

limited to, an action for damages. However, the amount of the deposit shall be credited against any damages that may be recovered by CITY from CTC.

- (b) School and Family Series Fee: For the use of the Theatre for the School & Family Series during the 2016-17 season, CTC shall pay CITY a flat rate of \$74,130, split into four installment payments of \$18,532.50. The CITY will invoice on the following schedule. Payments are due within 30 days of the invoice date.
 - i: Sept/Oct usage = 1st payment due December 1
 - ii: Nov/Dec usage = 2nd payment due February 1
 - iii: Jan/Feb/Mar usage = 3rd payment due April 1
 - iv: Apr/May usage – 4th payment due June 1
- (c) High-maintenance Equipment Charges: For use of certain high-maintenance equipment CTC shall pay an additional charge. CTC shall pay one hundred dollars (\$100) per production run up to 15 performances to use the LCD Projector and one hundred dollars (\$100) per production run up to 15 performances to use the Grand Piano. Other equipment will be invoiced at the then-current rental rates.
- (d) Records and Accounts: CTC must install and maintain a system of records and accounts. CTC shall permit the CITY through its designated representatives to inspect such accounts and all other records of CTC at any time upon request for a period of three years following expiration of the agreement. On or before the 10TH day of each month this contract remains in force, CTC shall deliver to the CITY a statement showing the total amounts of paid attendance during preceding calendar month.
- (e) Late charge: CTC shall pay all fees due the CITY in a timely fashion. CTC shall be assessed late charges if payment is not received by the CITY within ten (10) days after the due date. An additional late fee shall be assessed each month that the fees owed by CTC remain unpaid. The late charge shall be assessed based on the following schedule:
 - i. 10 days after due date = 2% fee of current balance
 - ii. 40 days after due date = 3.5% + 1st late fee.
 The CITY does not waive its right to terminate this Agreement due to non-payment of fees.

3. COMPLIANCE WITH LAWS

- (a) CTC shall not discriminate against any employee or applicant for employment because of race, religion, creed, color, gender, sexual orientation, age (persons 40 years of age or older), disability, national origin, or any other basis to the extent prohibited by federal, state or local law.

- (b) CTC shall comply with all federal, state and city laws; statutes, ordinances, rules, regulations, the orders and decrees of any courts or administrative bodies, or tribunals in any manner affecting the performance of the Agreement.

4. INDEPENDENT CONTRACTOR

CTC is acting as an independent contractor and is not an agent, servant or employee of CITY. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between CITY and CTC. CTC is responsible for paying all required state and federal taxes.

5. INDEMNITY; DAMAGE TO CITY PROPERTY

- (a) CTC agrees to indemnify and hold harmless CITY, its officers and employees from any and all claims, demands, actions, causes of action, losses, damages, liabilities, known or unknown; all costs, and expenses, including reasonable attorneys' fees in connection with any injury, damage to persons or property arising out of or in any way connected with the act, omission or negligence of CTC, its officers, employees, agents, contractors, subcontractors, or any officer, agent, or employee thereof in relation to CTC's use of facilities of CITY pursuant to this Agreement.
- (b) CTC shall not damage or deface the interior or exterior of CITY's theater facility, or the grounds upon which the facility is situated. In the event that during the term of this Agreement, CTC or any of its employees, agents, CTCs or invitees violate any of the theater policies and procedures, or damage or deface the interior, or exterior of CITY's theater facility, or the grounds upon which the facility is situated; CTC shall be obligated to reimburse CITY within thirty (30) days after presentation of an invoice for the actual expense of the repair of the damages, defaced facility or grounds. If CTC contests its responsibility for any alleged damage or defacement, the dispute shall be submitted to a neutral arbitrator mutually agreed upon by CITY and CTC. CTC shall not be obligated to reimburse CITY for the actual expense of the repair unless and until an arbitrator determines that CTC was responsible for the damage or defacement.

6. INSURANCE

CTC shall take out and maintain during the life of this Agreement policies of insurance as specified in Exhibit "A", attached and incorporated by reference, and shall provide all certificates and/or endorsements as specified in Exhibit "A."

7. CITY REPRESENTATIVE

The Superintendent of Community Services, as the City Manager's authorized representative, shall represent CITY in all matters pertaining to the services to be rendered under this Agreement. All requirements of CITY pertaining to the services and materials to be rendered under this Agreement shall be coordinated through the CITY representative.

8. CTC REPRESENTATIVE

The General Director of California Theatre Center shall represent CTC in all matters pertaining to the services and materials to be rendered under this Agreement; all requirements of CTC pertaining to the services, or materials to be rendered under this Agreement, shall be coordinated through the CTC representative.

9. NOTICES

All notices required by this Agreement shall be in writing, and shall be personally delivered, sent by first class mail with postage prepaid, or by commercial courier, addressed as follows:

To CITY: Superintendent of Community Services
CITY OF SUNNYVALE
P. O. Box 3707
Sunnyvale, CA 94088-3707

To CTC: General Director
California Theatre Center
753 East El Camino Real, Suite B
Sunnyvale, CA 94087

Nothing in this provision shall be construed to prohibit communication by more expedient means such as by telephone or facsimile transmission, to accomplish timely communication. However, to constitute effective notice, written confirmation, or an original of a facsimile transmission must be sent by first class mail, by commercial carrier, or hand-delivered. Each party may change the address by written notice in accordance with this paragraph. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of three days after mailing unless such date is a date on which there is no mail service. In that event, communication is deemed to occur on the next mail service day.

10. ASSIGNMENT

This Agreement, and any portion thereof, shall not be assigned or transferred, nor shall any of the CTC's duties be delegated, without the written consent of the

City. Any attempt to assign or delegate this Agreement without the written consent of the City shall be void and of no force or effect. A consent by the City to one assignment shall not be deemed to be a consent to any subsequent assignment.

11. TERMINATION

If CTC defaults in the performance of this Agreement, or materially breaches any of its provisions, CITY may at its option give CTC written notice thereof and shall give CTC not less than thirty (30) days to cure the default. If CTC fails to cure the default, CITY may immediately terminate the Agreement and shall give prompt written notice of termination to CTC.

Upon expiration or termination of this Agreement, CTC shall remove all of its equipment and property from the theater facility and elsewhere on CITY premises. If CTC fails to do so, CITY may store such equipment and property at the expense of CTC and shall have a lien thereon until CTC shall have reimbursed CITY for any and all expenses of moving and storage of such equipment. If CTC fails to reclaim its property and equipment within thirty (30) days of storage, CITY shall have the right to sell it and retain the proceeds of sale as reimbursement of expenses.

12. ENTIRE AGREEMENT; AMENDMENT

This writing constitutes the entire agreement between the parties relating to the services to be performed or materials to be furnished hereunder. No modification of this Agreement shall be effective unless and until such modification is evidenced by writing signed by all parties.

13. MISCELLANEOUS

- (a) Time shall be of the essence in this Agreement.
- (b) Failure on the part of either party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision.
- (c) This Agreement shall be governed and construed in accordance with the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of Santa Clara.
- (d) The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of CTC and the City.
- (e) This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

ATTACHMENT 1

- (f) If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent jurisdiction to be invalid or unenforceable, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect; provided, however, this paragraph shall not be applied to the extent that it would result in a frustration of the parties' intent under this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement.

ATTEST:

CITY CLERK

CITY OF SUNNYVALE ("CITY")

City Clerk

By _____
City Manager

APPROVED AS TO FORM:

Assistant City Attorney

CALIFORNIA THEATRE CENTER ("CTC")

By _____
Gayle Cornelison, General Director

EXHIBIT "A"

INSURANCE REQUIREMENTS FOR CALIFORNIA THEATRE CENTER ("CTC")

CTC shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property that may arise from or in connection with the use of the theater facility by CTC, his agents, representatives, or employees.

MINIMUM SCOPE AND LIMITS OF INSURANCE: CTC shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury, and property damage. If commercial general liability Insurance insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit. ISO Occurrence Form CG 0001 is required.
2. Automobile Liability: \$1,000,000 per accident for bodily injury and property damage. ISO Form CA 0001 is required.
3. Workers' Compensation and Employer's Liability: \$1,000,000 per accident for bodily injury or disease.

DEDUCTIBLES AND SELF-INSURED RETENTIONS

Any deductibles or self-insured retentions must be declared and approved by the City of Sunnyvale. CTC shall guarantee payment of any losses and related investigations, claim administration and defense expenses within the deductible or self-insured retention.

OTHER INSURANCE PROVISIONS

The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

1. The City of Sunnyvale, its officials, employees, agents and volunteers are to be covered as additional insureds with respect to liability arising out of activities performed by or on behalf of the CTC; products and completed operations of CTC; premises owned, occupied or used by the CTC; or automobiles owned, leased, hired or borrowed by the CTC. The coverage shall contain no special limitations on the scope of protection afforded to the City of Sunnyvale, its officers, employees, agents, or volunteers.

2. For any claims related to this project, CTC's insurance shall be primary. Any insurance or self-insurance maintained by the City of Sunnyvale, its officers, officials, employees, agents, and volunteers shall be in excess of CTC's insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City of Sunnyvale, its officers, officials, employees, agents, or volunteers.
4. CTC's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City of Sunnyvale.

ACCEPTABILITY OF INSURERS

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VII, unless otherwise acceptable to the City of Sunnyvale.

VERIFICATION OF COVERAGE

CTC shall furnish the City of Sunnyvale with original a certificate of insurance affecting the coverage required. The certificates are to be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates are to be received and approved by the City of Sunnyvale prior to commencement of work.