

EXCLUSIVE REPRESENTATION AGREEMENT FOR LEASE OF, OR LICENSE TO USE MUNICIPAL PROPERTY

THIS EXCLUSIVE REPRESENTATION AGREEMENT ("Agreement"), dated as of the _____th day of _____, (the "Effective Date") between Bench Strength Partners, Inc. a corporation located at 26 First Street, Pelham, NY 10803 ("BSP") and the City of Duluth, Minnesota, a Minnesota Municipal Corporation having its principal office at 411 West 1st Street, Duluth, Minnesota 55802 ("CLIENT" or "City").

The CLIENT hereby designates BSP as its sole representative and grants BSP the exclusive right to negotiate leases, licenses, lease buyouts or other agreements for the rental of space on CLIENT property for the placement of cellular antennas and related equipment based on the terms and conditions contained herein.

1. **TERM:** The term of this Agreement commences on the date of execution and will end on the 5th anniversary of such date. This Agreement may not be terminated unless a party breaches the agreement or until the second anniversary of the Effective Date. This Agreement may be terminated by CLIENT at any time after such second anniversary. In the event of such a termination, BSP shall be entitled to a fee, computed and payable in accordance with this Agreement, if the CLIENT concludes a new agreement or modification to an existing agreement for the placement of cellular antennas and related equipment within two (2) years from the date of such termination, provided that BSP has, during the first two years of this agreement, either earned a fee as set forth in paragraph 5, or where no fee has been earned but BSP has negotiated with a carrier during the first two years of this agreement and has submitted a proposed lease terms summary or a draft lease renewal or lease amendment to the carrier prior to such termination of this agreement..
2. **SCOPE of AGREEMENT:** CLIENT appoints BSP as its representative for the negotiation of leases, licenses, franchise agreements, master license agreements, lease buyouts or other agreements for the rental of space on CLIENT property for the placement of cellular antennas and related equipment listed on Exhibit A. This agreement also includes the installation of small cell systems on CLIENT property, with the exclusion of small cell systems installed in the Right-of-Way (ROW) by cellular service providers. This agreement covers: (a) renewals on existing leases for cell carriers, (b) new leases for carriers that seek new or additional space on CLIENT property, and (c) renegotiation of existing leases should that occur outside the context of a lease renewal. BSP shall not be responsible for drafting the lease document. Instead, BSP will work with CLIENT counsel and suggest model lease terms for CLIENT's counsel to incorporate into the final lease document, or other form of agreement.
3. **BSP SERVICES:** BSP will provide its best efforts to negotiate leases acceptable to CLIENT. All lease proposals prepared by BSP, and all offers and counter offers received by BSP are subject to the CLIENT approval. CLIENT is not bound to accept leases negotiated by BSP. If BSP reasonably determines that it is necessary, in its sole and absolute discretion, to retain other experts as part of the negotiation process, BSP will engage such experts at its own cost.
4. **CLIENT REFERRALS:** CLIENT shall refer to BSP all inquiries and offers received by CLIENT regarding the lease including any offer to buy out the revenue stream from the lease or offer to lease any CLIENT property for the placement of cellular antennas and related equipment, regardless of whether the location of such offer is listed on Exhibit A. All negotiations for leases on locations

listed on Exhibit A will be conducted solely by BSP or under BSP's direction, subject to CLIENT's review and final approval.

5. **BSP FEES**: CLIENT agrees to compensate BSP, and BSP agrees to accept compensation for its services, based on the Fee Schedule included as part of this agreement as Exhibit B. CLIENT and BSP agree that the Fee Schedule is a success fee structure, and that no fee will be earned by BSP unless specific economic results are achieved, all as more particularly defined on Exhibit B.
6. **PROPERTY INFORMATION**: CLIENT acknowledges that BSP is not responsible to determine whether toxic or hazardous wastes, substances, or levels of radio frequency emissions or undesirable materials or conditions currently exist or that could potentially exist in the future at the locations listed on Exhibit A. CLIENT acknowledges that it is solely CLIENT's responsibility to conduct investigations to determine the presence of such materials or conditions.
7. **INSURANCE**. BSP shall obtain and maintain for the Term of this Agreement the following minimum amounts of insurance from insurance companies authorized to do business in the State of Minnesota.

a) Public Liability and Automobile Liability Insurance with limits not less than **\$1,500,000** Single Limit, shall be in a company approved by the city of Duluth; and shall provide for the following: Liability for Premises, Operations, Completed Operations, and Contractual Liability. **City of Duluth shall be named as Additional Insured by endorsement** under the Public Liability and Automobile Liability, or as an alternate, Coordinator may provide Owners-Contractors Protective policy, naming himself and City of Duluth. **Upon execution of this Agreement**, Coordinator shall provide Certificate of Insurance evidencing such coverage with 30-days' notice of cancellation, non-renewal or material change provisions included.

b) Professional Liability Insurance in an amount not less than \$1,500,000 Single Limit; provided further that in the event the professional malpractice insurance is in the form of "claims made," insurance, 60 days' notice prior to any cancellation or modification shall be required; and in such event, Coordinator agrees to provide the City with either evidence of new insurance coverage conforming to the provisions of this paragraph which will provide unbroken protection to the City, or, in the alternative, to purchase at its cost, extended coverage under the old policy for the period the state of repose runs; the protection to be provided by said "claims made" insurance shall remain in place until the running of the statute of repose for claims related to this Agreement.

c) A certificate showing continued maintenance of such insurance shall be on file with the City during the term of this Agreement

8. **INDEMNITY**. BSP shall defend, indemnify and hold CLIENT and its employees, officers, and agents harmless from and against any and all cost or expenses, claims or liabilities, including but not limited to, reasonable attorneys' fees and expenses in connection with any claims resulting from the BSP's a) breach of this agreement or b) its negligence or misconduct or that of its experts, agents or contractors in performing the Services hereunder or c) any claims

arising in connection with BSP's employees, agents, experts or contractors, or d) the use of any materials supplied by the BSP to the CLIENT unless such material was modified by CLIENT and such modification is the cause of such claim. This Paragraph shall survive the termination of this Agreement for any reason. CLIENT has the discretion and absolute right to choose to enter or not to enter into any new or modified lease agreements. BSP does not guaranty any future lease revenue amounts, as that is specifically conditioned on the terms of any lease agreements accepted by CLIENT. Accordingly, this indemnification shall not be construed to include any loss from the decline of lease revenue that may occur in the future

9. DATA, RECORDS AND INSPECTION.

- a. The CLIENT agrees that it will make available all pertinent information, data and records under its control for BSP to use in the performance of this Agreement, or to assist BSP wherever possible to obtain such records, data and information.
- b. Records shall be maintained by BSP in accordance with requirements prescribed by the CLIENT and with respect to all matters covered by this Agreement. Such records shall be maintained for a period of six (6) years after receipt of final payment under this Agreement.
- c. To the extent applicable to the compensation provisions of this Agreement, BSP will ensure that all costs shall be supported by properly executed payrolls, time records, invoices, contracts, vouchers, or other official documentation evidencing in proper detail the nature and propriety of the charges. All checks, payrolls, invoices, contracts, vouchers, orders, or other accounting documents pertaining in whole or in part to this Agreement shall be clearly identified and readily accessible.
- d. BSP shall be responsible for furnishing to the CLIENT records, data and information as the CLIENT may require pertaining to matters covered by this Agreement.
- e. BSP shall ensure that at any time during normal business hours and as often as the CLIENT may deem necessary, there shall be made available to the CLIENT for examination, all of its records with respect to all matters covered by this Agreement BSP will also permit the CLIENT to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment, and other data relating to all matters covered by this Agreement to the extent applicable to the compensation provisions of this Agreement,
- f. All records provided to BSP shall remain property of the CLIENT and shall be returned to the CLIENT upon the termination of this agreement or upon request.
- g. BSP shall administer any government data according to the provisions of the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13.

BSP REPRESENTATION AND WARRANTIES.

BSP represents and warrants that:

- a. BSP and all personnel to be provided by it hereunder has sufficient training and experience to perform the duties set forth herein and are in good standing with all applicable licensing requirements.
- b. BSP and all personnel provided by it hereunder shall perform their respective duties in a professional and diligent manner in the best interests of the CLIENT and in accordance with the then current generally accepted standards of the profession for the provisions of services of this type.

- c. BSP has complied or will comply with all legal requirements applicable to it with respect to this Agreement. BSP will observe all applicable laws, regulations, ordinances and orders of the United States, State of Minnesota and agencies and political subdivisions thereof.
 - d. The execution and delivery of this Agreement and the consummation of the transactions herein contemplated do not and will not conflict with, or constitute a breach of or a default under, any agreement to which the BSP is a party or by which it is bound, or result in the creation or imposition of any lien, charge or encumbrance of any nature upon any of the property or assets of the BSP contrary to the terms of any instrument or agreement.
 - e. There is no litigation pending or to the best of the BSP's knowledge threatened against BSP affecting its ability to carry out the terms of this Agreement or to carry out the terms and conditions of any other matter materially affecting the ability of the BSP to perform its obligations hereunder.
 - f. BSP will not, without the prior written consent of the CLIENT, enter into any agreement or other commitment the performance of which would constitute a breach of any of the terms, conditions, provisions, representations, warranties and/or covenants contained in this Agreement.
 - g. BSP employees are Independent Contractors to BSP and are not employees of the Clients for purposes of any tax withholding requirements.
10. **CONFLICT OF INTEREST:** BSP believes that each location is unique and that no conflicts of interest currently exist or will arise in the future. However, it is possible that BSP could be engaged to represent a landlord other than CLIENT in the same geographic area of a CLIENT location that is listed on Exhibit A. If that were to occur, BSP will notify CLIENT of that potential conflict and request the CLIENT to consent to BSP's representation of such other landlord unless:
- a. the location for the other landlord is greater than 2 miles from a CLIENT location listed on Exhibit A; OR
 - b. the location for the other landlord is within 2 miles from a CLIENT location listed on Exhibit A, but the representation agreement between BSP and such other landlord is executed after CLIENT's lease for CLIENT's location has been executed, and provided further that the leases for such other landlord are not scheduled to expire within 12 months of a future lease expiration on CLIENT's location(s) listed on Exhibit A.
- BSP also agrees that it will not accept representation of another landlord within 2 miles of any of the CLIENTS location(s) listed on Exhibit A, without consent of CLIENT, until any negotiation of CLIENTS contracts which are then ongoing for renewal or modification has been concluded as evidenced by a new agreement or modification of an existing agreement.
11. **AUTHORITY:** CLIENT represents to BSP that it has the authority to enter and sign this Agreement. The individuals signing this Agreement represent that they are authorized signatories of CLIENT.
12. **PROFESSIONAL ADVICE:** BSP recommends that CLIENT obtain legal, tax, or other professional advice relating to this Agreement and the leases that may result from services rendered pursuant to this Agreement. **SURVIVAL:** This Agreement is binding upon the parties hereto and their respective successors and assigns.
13. **MISCELLANEOUS:** Unless the context clearly indicates the contrary, words in this Agreement used in this singular number shall include the plural number and words in this Agreement used in the

plural number shall indicate the singular number. This Agreement shall be governed by the laws of the State of Minnesota, without giving effect to said State's principles of conflicts of law.

14. **ENTIRE AGREEMENT:** This Agreement including Exhibits A and B constitutes the entire agreement between CLIENT and BSP and supersedes all prior discussions. No modification of this Agreement will be effective unless made in writing and signed by both CLIENT and BSP. This Agreement shall be binding upon and inure to the benefit of the successors and permitted assigns of the respective parties thereto.

15. **NOTICES:** Notices to CLIENT and BSP shall be delivered to the addresses noted below.

Bench Strength Partners, Inc.
26 First Street
P. O. Box 8581
Pelham, NY 10803

City of Duluth Information Technology Office
411 West 1st Street
City Hall, Room 210A
Duluth, Minnesota 55802

16. **APPLICABLE LAW:** This Agreement, together with all of its articles, terms and provision, is made in the State of Minnesota and shall be construed and interpreted according to the laws of the State of Minnesota. The appropriate venue and jurisdiction for any litigation hereunder shall be in a court located in St. Louis County, Minnesota. However, litigation in the federal courts involving the parties shall be in the appropriate federal court within the State of Minnesota. The parties to this Agreement waive any objections to the jurisdiction of these courts, whether based on convenience or otherwise.

17. **WAIVER OF BREACH:** The waiver by the CLIENT or BSP of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition herein contained.

18. **SEVERABILITY:** In the event any provision of this Agreement shall be deemed invalid or unenforceable, the remaining provisions shall continue in force and effect and shall be binding upon the parties to this Agreement.

19. **CIVIL RIGHTS ASSURANCES:** BSP, as part of the consideration under this Agreement, does hereby covenant and agree that:

- a) No person on the grounds of race, color, creed, religion, national origin, ancestry, age, sex, marital status, status with respect to public assistance, sexual orientation, and/or disability shall be excluded from any participation in, denied any benefits of, or otherwise subjected to discrimination with regard to the work to be done pursuant to this Agreement.

- b) That all activities to be conducted pursuant to this Agreement shall be conducted in accordance with the Minnesota Human Rights Act of 1974, asamended (Chapter 363), Title 7 of the U.S. Code, and any regulations and executive orders which may be affected with regard thereto.

20. INDEPENDENT CONTRACTOR:

- a) It is agreed that nothing herein contained is intended or should be construed in any manner as creating or establishing the relationship of copartners between the parties hereto or as constituting BSP as an agent, representative or employee of the City for any purpose or in any manner whatsoever. The parties do not intend to create any third party beneficiary of this Agreement. BSP shall not be considered employees of the City, and any and all claims that may or might arise under the Worker's Compensation Act of the State of Minnesota on behalf of BSP's employees while so engaged, and any and all claims whatsoever on behalf of BSP's employees arising out of employment shall in no way be the responsibility of City. Except for compensation provided in Section II of this Agreement, BSP's employees shall not be entitled to any compensation or rights or benefits of any kind whatsoever from City, including without limitation, tenure rights, medical and hospital care, sick and vacation leave, Worker's Compensation, Unemployment Insurance, disability or severance pay and P.E.R.A. Further, City shall in no way be responsible to defend, indemnify or save harmless BSP from liability or judgments arising out of intentional or negligent acts or omissions of Coordinator or its employees while performing the work specified by this Agreement.
- b) The parties do not intend by this Agreement to create a joint venture or joint enterprise, and expressly waive any right to claim such status in any dispute arising out of this Agreement.
- c) BSP expressly waives any right to claim any immunity provided for in Minnesota Statutes Chapter 466 or pursuant to the official immunity doctrine

20. **ASSIGNMENT:** BSP represents that it will be the sole provider of the services set forth herein; and further agrees that it will neither assign, transfer or subcontract any rights or obligations under this Agreement without prior written consent of the City. City shall not assign, transfer, or subcontract any rights or obligations under this Agreement without prior written consent of BSP.

Executed, this _____th day of _____

BENCH STRENGTH PARTNERS, INC.

CITY OF DULUTH, MINNESOTA



BY: _____

BY: _____

Name: Francis P. Clerkin

Name: _____

Title: Partner

Title: Mayor

Attest _____
City Clerk

Countersigned:

City Auditor

Approved as to form:

City Attorney

EXCLUSIVE REPRESENTATION AGREEMENT FOR LEASE OF OR LICENSE TO USE MUNICIPAL PROPERTY

EXHIBIT A – SCHEDULE OF LOCATIONS

This Exhibit A to the agreement dated _____, _____ (“Agreement”) between the City of Duluth, Minnesota (“CLIENT”) and Bench Strength Partners, Inc. (“BSP”) describes the location(s) for which the CLIENT has designated BSP to act as CLIENT’s Exclusive Representative.

LOCATION(S):

1. Elevated water tower (Orphanage) located at East Mankato Street & Minneapolis Avenue, Duluth, MN with a 5 year term commencing on the date of execution of the exclusive representation agreement including exhibits A & B.
2. Elevated water tower (proctor) located at Vinland Street & Portal Avenue, Duluth, MN, with a 5 year term commencing on the date of execution of the exclusive representation agreement including exhibits A & B.
3. Elevated water tower (Highland) located at North Basswood Avenue & Olive Street, Duluth, MN, with a 5 year term commencing on the date of execution of the exclusive representation agreement including exhibits A & B.
4. Elevated water tower (Hawks Ridge) located at East Skyline Parkway, Duluth, MN, with a 5 year term commencing on the date of execution of the exclusive representation agreement including exhibits A & B.
5. Chester Park located at 1805 East Skyline Parkway, Duluth, MN, with a 5 year term commencing on the date of execution of the exclusive representation agreement including exhibits A & B.

EXCLUSIVE REPRESENTATION AGREEMENT FOR LEASE OF OR LICENSE TO USE MUNICIPAL PROPERTY

EXHIBIT B – FEE SCHEDULE

This Exhibit B to the agreement dated _____, 20 (“Agreement”) between the City of Duluth, Minnesota (“CLIENT”) and Bench Strength Partners, Inc. (“BSP”) describes the conditions upon which a fee will be earned by BSP and the terms concerning the timing of payment of such fee.

- FEE SCHEDULE:** BSP shall earn a fee for providing the services described in the Agreement, but only if such services result in an executed agreement or agreement amendment between CLIENT and a Tenant. Fees are earned only on the Increased Revenues from said agreement to be paid to CLIENT by Tenant: (a) over the Term of the new agreement or (b) the term of the agreement amendment or (c) the remaining term of an existing agreement, the financial terms of which have been modified, or (d) on the value or increased value of any provisions, as the case may be. The Term of the new agreement or the agreement amendment is the initial fixed term as defined in the agreement or the agreement amendment. Renewal options or extensions of the new agreement are discussed in paragraph 2 below. The “Increased Revenue” is defined as the total rent or any fee scheduled to be paid over the Term of the new agreement or amended agreement plus any additional monetary enhancements discussed in paragraph 6 below, minus the Baseline Rent, defined as the product of (i) the annual rental (or license fee) in effect at the conclusion of the existing agreement or license agreement or the amount of such annual rent scheduled to be paid in the current year in the case of an amendment and (ii) the term, in years, of the new agreement, or the remaining years of an amended agreement. The Fee Percentages applied to the Increased Revenue shall be those on the schedule below. The Fee Percentages within each range of Increased Revenue shall be applicable only to the Increased Revenue within that range of percentage increases.

| Increased Revenue | | BSP Fee |
|-------------------|--------------|-------------------|
| <u>From</u> | <u>Up To</u> | <u>Percentage</u> |
| 0% | 20% | 0% |
| 20.01% | 30% | 15% |
| 30.01% | 40% | 20% |
| 40.01% | 50% | 25% |
| 50.01% | or above | 30% |

For example, if a new agreement was executed and the Increased Revenue was 20% more than the Baseline Rent, no fee would be earned. If the Increased Revenue were 35% more than the Baseline Rent, the fee earned by BSP would be the sum of (i) the BSP Fee Percentage (20%) applied to the Increased Revenue between 30% and 40%, plus (ii) the BSP Fee Percentage (15%) applied to the Increased Revenue between 20% and 30%.

2. **REPLACEMENT TENANTS:** In the event that BSP negotiates an agreement with a new Tenant and such Tenant replaces the space leased by an existing Tenant that elects not to renew their agreement, BSP shall earn a fee on the agreement with the Replacement Tenant on the same terms as described in paragraph 1 above, and in such event the Baseline Revenue shall be based on the revenue of the Tenant that is being replaced by the new Tenant.

3. **ADDITIONAL TENANTS:** (a) In the event that BSP negotiates an agreement with a Tenant not currently leasing space on a particular CLIENT property or is on the CLIENT property but not currently paying any revenues and such Tenant is in addition to and not in replacement of an existing Tenant, BSP shall earn a fee for negotiating such agreement based on the same terms as described in paragraph 1, and in such event the Baseline Revenue shall be based on the average of the annual revenues (“Average Annual Revenue”) then in effect for all other similar agreements at the subject location for the year immediately preceding the commencement of the agreement for the new tenant. Similar agreements being defined as either small cell site installations or macro locations which would include a base equipment station. Any agreements then in effect that have been amended, or entered into as a result of the services provided by BSP pursuant to this Agreement, shall be ignored and the annual revenues of agreements in effect at the specific location prior to agreements resulting from services provided by BSP shall be used in calculating such Average Annual Revenue. (b) In the event BSP is asked by CLIENT to negotiate a new agreement with a Tenant at a location which is not currently listed on Exhibit A, BSP shall earn a fee for negotiating such agreement based on the same terms as described in paragraph 1, and in such event the Baseline Revenue shall be based on the average of the annual revenues (“Average Annual Revenue”) then in effect for all other similar agreements, which are producing revenues at the locations listed on Exhibit A, for the year immediately preceding calendar year prior to the commencement of the agreement for the new tenant except that any agreements then in effect that have been amended, or entered into as a result of the services provided by BSP pursuant to this Agreement shall be ignored and the annual revenue of agreements in effect at the specific location prior to agreements resulting from services provided by BSP shall be used in calculating such Average Annual Revenue.

4. **CANCELLATION CLAUSES:** In the event that CLIENT has the right to cancel an agreement at a time subsequent to the execution of the agreement, BSP shall be paid a fee for the entire agreement term (excluding renewal options) as though such right to cancel did not exist
5. **ENHANCED REVENUE:** In calculating the fees pursuant to paragraph 1 above, the Increased Revenue shall include all incremental revenue and expense reimbursements to which CLIENT is entitled that either stems from agreement provisions that were not present in the existing agreement, or relate to Increased Revenue and expense reimbursements terms for agreement provisions that were present in the existing agreement. Increased Revenue shall also include the value of any assets, the title to which is transferred to CLIENT as a result of the terms negotiated by BSP. The value of such assets shall be based on replacement cost for such asset at the time of the transfer, less depreciation based on the age of such asset using a straight line method of depreciation and a 40 year useful life. (“Replacement Cost New, Less Depreciation” method or “RCNLD”).
6. **LEASE AUDIT FEE:** In the case that BSP’s review of the agreement terms and the payment history under such agreement terms determines that there are unpaid or underpaid rents or fees due to the CLIENT, which have not been paid in the previous 3 months BSP shall be entitled to 25% of all such unpaid or underpaid rents which BSP collects on behalf of the CLIENT. The payment for such collections will not be considered as Increased Revenue, as defined in section 1 of this agreement and the 25% fee will be paid within 30 days of the receipt of the past due payments to the CLIENT. Any unpaid or underpaid rents which are uncovered by the CLIENT, during the term of the Agreement, will not be subject to the Lease Audit Fee provisions.
7. **TIME OF PAYMENT:** Fees earned by BSP pursuant to this Agreement shall be earned upon execution of the agreement or agreement amendment, or upon exercise of any renewal options. In the case of a new agreement, agreement amendment or agreement renewal, CLIENT shall pay BSP its fee by allocating one hundred percent (100%) of the Increased Revenues scheduled to be received by CLIENT under the agreement until the fee computed pursuant to paragraph 1 has been fully paid. The first such payment shall be made within 30 days of the receipt of the amounts paid pursuant to the terms of the new agreement or agreement amendment. Additional payments shall be made to BSP within 30 days of receipt of any of the Increased Revenues until the total fee earned by BSP has been paid. In the case of a renewal option, such fee shall be paid in the same manner as a new agreement or agreement renewal described above.

8. ASSIGNMENT. CLIENT shall not assign any rights or obligations under this Agreement, including but not limited to, fees received from a third party pursuant to this Agreement, without prior written consent of BSP.