

MODEL HEALTHY BEVERAGE VENDING AGREEMENT

**Developed by the National Policy & Legal Analysis Network to
Prevent Childhood Obesity (NPLAN)**

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and attorneys should perform an independent evaluation of the issues raised.*

MODEL HEALTHY BEVERAGE VENDING AGREEMENT

INTRODUCTION

The purpose of the “Model Healthy Beverage Vending Agreement” is to help nutrition advocates and school districts use the contracting process to achieve the following goals: (1) improve the nutritional quality of beverages sold on district property; (2) negotiate favorable terms and conditions; (3) develop strategic vendor relations; (4) increase process efficiencies; and (5) improve communication and customer service.

Our goal is to make this document useful to lawyers and non-lawyers alike. Toward that end, we analyzed more than 25 school beverage vending contracts from both large and small school districts and then crafted model clauses that improve upon the existing language. We provide plain English explanations of what each clause means, how it applies to school vending contracts, and how the clause might be applied during contract negotiation. By doing so, we hope to bring balance to what has historically been a lopsided contracting process in which soft drink bottlers have imposed their form contracts on school districts with less than satisfactory results for schools in terms of nutrition and revenue.

As with any document intended as a “model,” our Model Healthy Beverage Vending Agreement has been drafted as if “one size fits all.” In reality, of course, each contract negotiation is a unique transaction reflecting the particular goals and relative bargaining strengths of each of the parties. However, the value of our model contract is that it provides school districts with a blueprint with which to construct the “best of all possible beverage vending contracts” by: (1) collecting in one place contract terms and conditions that ensure the sale of healthy beverages; (2) predicting what may go wrong during contract performance; (3) providing for those contingencies; and (4) protecting the district with tested legal remedies.

Our Model Healthy Beverage Vending Agreement is premised on a few important assumptions that should be made explicit. We assume that the district is seeking to enter into a healthy beverage vending contract as a result of having adopted a “healthy beverage policy” (perhaps as part of its overall school wellness policy); that the district has identified a beverage vendor through a competitive procurement process using either an invitation for bid or request for proposals; that the district has chosen to enter into a contract that exclusively sells one bottler’s brands of beverages in order to maximize the revenue associated with “exclusive” deals; and that the district representative who will be negotiating the contract is fully committed to the goals contained in the healthy beverage policy. If any of these assumptions do not apply, district personnel can adapt the contract language to serve their own purposes.

We hope that our Model Healthy Beverage Vending Agreement will prove useful to those who are tasked with procuring, drafting and negotiating healthy school beverage contracts and that it will ultimately help nutrition advocates and school districts achieve their goals of improving the school food environment, promoting the health of their students, and maintaining a reasonable cash flow.

HEALTHY BEVERAGE VENDING AGREEMENT

This vending agreement is between XYZ UNIFIED SCHOOL DISTRICT (“District”) and ABC BOTTLING COMPANY (“Vendor”).

RECITALS

District issued a request for proposals (RFP) [*Alternative:* or invitation for bid (IFB)] to identify a qualified vendor to provide exclusive vending services for “direct delivery” sales and vending machine services of healthy beverages for the benefit of District’s on-campus Associated Student Body Organizations, District Administrative Offices, and on-campus student stores and cafeterias.

District selected Vendor’s proposal [*Alternative:* bid] on the basis of Vendor’s qualifications in providing healthy beverage products to school districts through the installation, operation, servicing, and maintenance of vending and other equipment and because Vendor offered the best and highest total expected value to District.

District and Vendor desire to confirm the terms and conditions under which Vendor will develop, furnish and carry out a program for the exclusive full-service sales of authorized healthy beverage products and the full-service placement and maintenance of Vendor’s beverage equipment on District property.

The parties therefore agree as follows:

Comments About “Recitals”:

Purpose: The purpose of the recitals section is to “tell the basic story” of the contract and provide whatever background information the parties regard as factually relevant to the transaction. Recitals set the stage of the contract and provide the basic description, context and structure of the transaction. Though recitals are considered subordinate in importance to the terms and conditions detailed in the body of the contract, courts sometimes use them to help determine the intent of the parties in instances where intent is otherwise unknown, vague or ambiguous.

Application: These recitals frame the purpose of the contract in terms of the healthy beverages to be sold and the financial value to be derived by the District from their sale. The recitals are written from the District’s point of view, which places the emphasis on the District’s needs rather than on the Vendor’s. In this they are unlike the recitals found in typical school beverage vending contracts, which usually are drafted by soda companies for their own benefit. Were the parties to end up in litigation over the issue of ambiguity or vagueness about contract purpose, the existence of clear recitals that place healthy beverages at the center of the contract should help guide a court towards an accurate interpretation of the intent of the parties.

Note, too, that the contract is entered into by the District, rather than an individual school principal. State laws often grant legal authority to sign binding contracts only to the governing board of school districts and not to individual schools, their principals, or other on-campus administrators or teachers. Though school boards may be permitted to delegate certain aspects of their authority, such as contract negotiation, to lower-tier administrators (e.g., school superintendents), actual signatory authority remains with the governing body. In California, for example, even if a contract is negotiated by an authorized district administrator, that contract would be void on its face (i.e., not valid) unless and until it is officially ratified by the school board.¹

Negotiation Tip: The overarching premise of this Model Healthy Beverage Vending Agreement is that it resulted from a competitive procurement process initiated by District through either a request for proposal or invitation for bid. See the Appendix 1 fact sheets, which provide information and technical guidance regarding competitive procurement of school beverage agreements.

1.0 HEALTHY BEVERAGE POLICY SPECIFICATIONS SHEET

District has adopted a Healthy Beverage Policy Specifications Sheet (“the Specifications Sheet”), which governs the types of beverages that can be sold on District property. A copy of the Specifications Sheet is attached as Exhibit A to this agreement. In providing beverage products and services under this agreement, Vendor shall comply with the terms of the Specifications Sheet and shall offer for sale only such products as conform to the requirements set forth in that document.

- 1.1. **Permitted Beverage Products:** “Permitted Beverage Products” are those brand name products of Vendor’s that District and Vendor have mutually identified in writing as conforming to the Specifications Sheet and have selected for sales under the terms and conditions set forth in this agreement. This agreement’s Permitted Beverage Products List is attached as Exhibit B.
- 1.2. **Revisions to Policy:** District retains the sole right to revise or delete the Specifications Sheet from time to time during the term of this agreement. If such a revision results in a need to revise the Permitted Beverage Products List, District and Vendor shall mutually revise the Permitted Beverage Products List and amend this agreement in writing by selecting other brand name products of Vendor’s for sale under the terms and conditions set forth in this agreement.
- 1.3. **Adverse Financial Change:** If Vendor can demonstrate that a revision to the Permitted Beverage Products list would materially and adversely affect the financial terms of this agreement, District and Vendor will endeavor to

¹ Santa Monica Unified Sch. Dist. v. Persh, 5 Cal. App. 3d 945 (Cal. Ct. App. 1970).

reach concurrence regarding the potential loss of profitability and will then modify this agreement accordingly. Any impasse or dispute will be resolved in accordance with Section 27.15 of this agreement.

- 1.4. **Product Substitutions/Manufacturers Brand Change:** This agreement does NOT allow for product substitutions unless Vendor obtains prior written authorization from the District representative identified in Section 27.2 of this agreement. If a manufacturer’s product or brand change occurs during the course of this agreement, Vendor’s representative shall not automatically substitute product. Vendor shall submit product specifications and a sample (on request) for District’s approval prior to any shipment. If the District accepts the new brand, all other terms, conditions and prices shall remain in effect.
- 1.5. **Compliance:** Vendor’s Failure to comply with Section 1 of this agreement shall be deemed a material breach of the agreement, which may subject the agreement to immediate termination at District’s sole discretion or to such other remedies as may be specified in this agreement.

Comments about “Healthy Beverage Policy Specifications Sheet” Clause

Purpose: This clause appears at the beginning of the contract to signify its overarching importance to the performance of the contract and to ensure that Vendor only sells certain pre-identified beverages on District property.

Application: The effect of this clause is to create in Vendor an essential duty to sell only products that both comply with the District’s Specifications Sheet and are identified in the Permitted Beverage Products list. Section 1.5 anticipates that Vendor might fail to perform this duty properly (e.g., by stocking vending machines with nonconforming products, either by accident or by design) and protects District’s interests by defining such an act as a “material breach” of the contract. A material breach may be defined as “a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract.”² Vendor’s material breach would, in turn, give to District the right to *enforce* Vendor’s promise to sell only conforming products by employing one or more of the remedies available to District under the agreement or by means of one or more of the remedies available under general contract law.

Sub-clause 1.2 is included to ensure that District can change its policies from time to time without having to obtain prior approval from Vendor to do so.

Negotiation Tip: The “material and adverse financial change” language of sub-clause 1.3 is included as a practical necessity. A commercial entity such as a soft drink bottling company is not likely to agree to a clause that results in lost profitability due

² 23 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 63:3 (4th Ed. 1993).

to changes in a healthy beverage policy over which it has no control. Note that some drafters may intentionally leave this clause out until asked by a vendor to include it. The downside of this approach is that the vendor may consider this tactic to be antagonistic and a time waster since it is foreseeable at the beginning of the negotiation process that the vendor would not agree to a contract provision that is likely to cause it to lose money.

2.0 **SCOPE OF CONTRACT**

- 2.1. **Services:** Vendor shall provide exclusive full-service vending machine services for the sale of Permitted Beverage Products on District property. Vendor's services shall include, but not be limited to furnishing product (as required), stocking vending machine equipment, and servicing and maintaining equipment in accordance with the terms, conditions, requirements and specifications set forth in this agreement.
- 2.2. **Exclusive Rights:** Vendor shall have the exclusive right to make Permitted Beverage Products available for sale and distribution on District property, and District agrees that Vendor's products will be the exclusive Permitted Beverage Products sold, dispensed, served or sampled at all locations on the District property. Vendor's exclusive rights do not, however, extend to beverages that District is required to sell in conjunction with federally assisted meals programs such as the National School Lunch or Breakfast program, or to beverages that may be sold on District property by parties over which District has no control.
- 2.3. **Personal Consumption:** This provision does not apply to Permitted Beverage Products, or any other products, that are purchased off-campus by students, faculty or their guests for personal consumption and not for resale on District property.
- 2.4. **Purchase Requirements:** District agrees that District and all other persons serving Permitted Beverage Products on District property shall purchase 100% of their requirements for Permitted Beverage Products directly from Vendor. Vendor understands that this obligation does not apply to persons or organizations over which District has, for whatever reasons, no control.

Comments About the "Scope of Contract" Clause:

Purpose: Generally, the "scope of contract" clause provides a clear and comprehensive description of the work to be done or the deliverables to be provided under the contract. Here, the clause serves to establish Vendor's duty to provide the District with a full-service vending program and to establish the District's duty to use Vendor as its only source of Permitted Beverage Products. District's promise to use Vendor's products to the exclusion of all others is what makes this an "exclusive" beverage contract. School

districts absolutely can choose not to enter into exclusive vending contracts; however, it is quite possible that the financial value of the contract will diminish if they do.

Application: Why do schools sign exclusive vending contracts? Simply put, money. Exclusive contracts can result in districts obtaining what appear to be large sums of money in the form of vendor “sponsorship” fees or “cash advances.” All contracts, but especially commercial transactions such as vending contracts, are premised on the exchange of something of value (i.e., “consideration”) between the parties. This exchange is what makes agreements legally binding. For vending contracts, vendors appear to be willing to pay schools more money in exchange for receiving the exclusive right to sell and advertise their products on school property. To a vendor, such monopoly rights are worth a premium because exclusivity means that, for the life of the contract, the vendor doesn’t have to compete against rival beverage companies for either point-of-purchase sales or promotion and advertising. This point is illustrated by a recent survey of over 120 school vending contracts³ that showed that 93% of the contracts analyzed were exclusive to a single company.

Negotiation Tip: But what about the 7% of contracts that were not exclusive beverage deals? As this study demonstrates, school vending contracts do not have to be negotiated on an exclusive basis. In fact, there are many good reasons for not doing so.⁴ Despite beverage companies’ preference for exclusive contracts, evidence exists that companies and schools can sign non-exclusive agreements that provide tangible rewards to both sides. For example, the contract between Pepsi Bottling Group and the Los Angeles Unified School District is explicitly not an exclusive contract yet was valued by the parties at the time of signing to be worth \$26 million dollars to LAUSD over 5 years. Another type of non-exclusive beverage contract gives the vendor “primary” (but not exclusive) rights. For example, the contract between Pepsi Bottling Group and Mountain View-Los Altos Union High School District is a primary, not exclusive, rights contract. Primary rights give a vendor preferred status but at the same time don’t foreclose a school’s right to sell products manufactured by other companies.

Additionally, where a third party such as a PTA or booster club uses school property for the benefit of the district and its students (but whose organizational governance is not overseen by the school district), districts may be precluded from giving exclusive rights on those organization’s behalf. In those cases, districts might obtain a negotiating advantage by promising to “encourage” the use of Vendor’s products while stopping just short of actually requiring it.

3.0 TERM

The term of this agreement shall be for five years, commencing on _____, 20____ (the “Effective Date”) and continuing through _____, 20____, unless earlier

³ CENTER FOR SCIENCE IN THE PUBLIC INTEREST & THE PUBLIC HEALTH ADVOCACY INSTITUTE, RAW DEAL: SCHOOL BEVERAGE CONTRACTS LESS LUCRATIVE THAN THEY SEEM 8 (December 2006), *available at* <http://www.cspinet.org/beveragecontracts.pdf>.

⁴ See California Project LEAN “Captive Kids” tool kit. See www.californiaprojectlean.org

terminated pursuant to termination conditions contained in Section _____ below. All indemnification provisions contained in this agreement shall survive beyond the expiration of this agreement.

Comments about the “Term” Clause:

Purpose: By establishing the contract’s beginning and end dates, this clause makes clear when performance under the contract starts and stops. The clause also clarifies that certain promises made in the contract will continue to be binding even after the contract ends, either because the agreement naturally expires or is terminated prematurely by one of the parties.

Application: It is common to see 10-year terms in school vending contracts. Such a long time period is not advisable—even with a healthy beverage contract—because: (1) it ties the hands of future school board members who weren’t on the board when the 10-year contract was signed; (2) locks in disadvantageous terms and conditions or a vendor’s poor performance for a very long time; (3) is anti-competitive and thus contrary to public contracting principles; and (4) in some jurisdictions may be illegal (see, e.g., California Education Code §17596, which states that a 5-year term is the maximum length of time for contracts providing school districts with work, services, apparatus or equipment, while 3 years is the maximum length of time for contracts providing school districts with materials or supplies.

Is a vending contract an agreement for services or an agreement for goods? The California law does not provide a clear answer to this question, and opinions reasonably may differ. Either way, however, what is clear under California law is that a vending contract with a 10-year term is not enforceable after 5 years if categorized as a services contract, or after 3 years if categorized as a supplies contract. Check your state’s laws for a similar provision.

Negotiation Tip: Vendors favor 10-year contract terms—and are likely to offer more money for them—because they privilege vendors with unimpeded access to the much sought after youth demographic. This observation especially holds true for exclusive contracts. Also, 10-year terms enable vendors to avoid competition with other beverage companies, which results in having to make fewer concessions to schools. Districts, too, might also appear at first glance to favor 10-year contract terms in order to save the time and money associated with issuing an RFP or IFB. In the long run though, the obvious benefits provided by a shorter contract (such as contract flexibility and greater financial rewards obtained from a competitive procurement process) can more than make up for any perceived losses.

4.0 PRICES

Vendor shall provide the beverages identified on the Permitted Beverage Products list to District or its concessionaires at the prices set forth on the “Rate Schedule,” which is attached to this agreement as Exhibit C. All rates are firm for the first contract year.

4.1. **Price Adjustment:** For the second, third, fourth and fifth additional contract years, the rates automatically will be increased for the percentage rate indicated in the Exhibit C Rate Schedule or the annual change in the local Consumer Price Index (CPI), whichever is lower, effective _____ [Note: e.g., July 1st of each year]. Should the CPI be used in lieu of the pre-determined increase, the following would apply.

4.1.1. **CPI:** Increases allowed shall be calculated by using the percentage change between the previous year and the current year's CPI, published by the U.S. Department of Labor's Bureau of Labor Statistics. The specific index to be reviewed is the CPI for _____ [Note e.g., Chicago-Gary-Kenosh, IL-IN-WI, or Houston-Galveston-Brazoria, TX] for _____ [Note: e.g., March] of each year using the "Special Aggregate Index category of "All Items less Shelter" under the "All Urban Consumers" column. Vendor's written notification to Vendor shall include a copy of the calculations Vendor used to justify a price increase.

Comments about the "Prices" Clause:

Purpose: Negotiation of beverage prices for both vended and direct-delivery products (e.g., syrup used to make fountain drinks) is entirely appropriate in a commercial transaction such as this, and districts should not accept a "take it or leave it" offer from the vendor as to the initial prices to be charged for either category of product. A balance should be struck between the prices students can afford and overall contract profitability.

First-year prices are firm because, at the time of the negotiation, Vendor has "perfect" knowledge about its manufacturing and delivery costs, as well as its desired profit margin. Such knowledge allows Vendor to lock in prices reflecting those realities. The following years' prices are not firm, however, because costs (and thus prices) invariably fluctuate from year to year.

Application: This clause acknowledges the reality of increasing (or decreasing) prices and gives Vendor the option of using one of two methods to adjust for price on a yearly basis. However, all adjustments in the contract are tied to the widely accepted objective standard found in the Consumer Price Index.

Negotiation Tip: This clause establishes a "low price ceiling" for price increases over the life of the contract because it requires the parties to use the *lower* of two price indicators in establishing the following year's prices. It works like this: at the beginning of the contract, Vendor makes a "best estimate" as to what it thinks its price increases in the second through fifth years will be. These figures are then compared against actual price changes documented by the CPI for the applicable year. Whichever figure is found to be *lower* becomes the figure that establishes the next year's price increase. In this way, District can ensure that yearly price increases remain as low as possible.

5.0 EXISTING AGREEMENTS

By signing this agreement, Vendor expressly agrees that any contracts or other arrangements, whether written or verbal, that currently exist or that Vendor believes may have previously existed between Vendor and District or any of its schools, departments, or personnel regarding: beverage sales; advertising; gifts or donations; past, present, or future financial contributions and support in the District; and all obligations of the District and Vendor arising from such relationships, if any, are automatically terminated effective as of the signing and delivery of this agreement. Neither District nor Vendor shall have any further obligations under such preexisting contracts or arrangements.

Comments about the “Existing Agreements” Clause:

Purpose: This clause ensures that Vendor will not use a preexisting agreement between itself and District as a barrier to implementing the terms of the new contract. If District knew for certain that it had no preexisting agreements with Vendor, this clause would not be necessary.

Application: In many school districts, especially large ones, individual schools within the district may have negotiated their own vending “deal.” Often such deals are no more formal than a handshake between the football coach and the local bottler and lack well defined terms and conditions. This clause forecloses Vendor’s ability to rely on such agreements to District’s detriment and causes Vendor and District to consolidate all vending activities under one unified and comprehensive contract.

Negotiating Tip: If a district doesn’t know with 100% certainty whether it has any preexisting oral or written contracts with Vendor, it is prudent to include this clause in the contract.

6.0 LABELING

All ingredients must be declared on the product label, as required by the Food and Drug Administration. All products provided are required to carry legible, open code dating on each can, bottle or case, and must indicate pack code or expiration date. If any code is encrypted, Vendor must provide the key from the manufacturer to decode the information.

7.0 PUBLIC INFORMATION REQUIREMENTS

All agreement terms, conditions, offers, and disclosures, as well as information or disclosures arising out of this agreement, shall be deemed public information. As such they may be subject to release as public records. District shall not in any way be liable to Vendor for the disclosure of any such records, and District assumes no obligation or responsibility for asserting legal arguments on Vendor’s behalf.

Comments about the “Public Information Requirements” Clause

Purpose: The goal of this clause is to ensure that Vendor cannot prevent the District from disclosing any aspect of the contract to the public at large or to school administrators in other districts, even after the contract is under way. Community access to school beverage contracts is essential because public school beverage contracts are entered into on behalf of the *public* and should be available to all who wish to review any aspect of the deal.

Sometimes, however, school beverage contracts contain “Confidentiality” clauses that are drafted in such a way as to emphasize the non-disclosure of contract information. Towards that end, a typical clause will state “Except as may otherwise be required by law or legal process, neither party shall disclose to any third party the terms or conditions of this agreement or any information respecting sales or revenue of the equipment during the Term or thereafter.”

The language “Except as may otherwise be required by law or legal process” acknowledges the fact that all 50 states have adopted public access laws that provide varying degrees of access to vital documents or information about the government’s (i.e., the school district’s) conduct of its business. However, most such laws also have one or more exemptions from disclosure that apply to commercial or financial information contained within public contracts. Depending on how they are worded, such exemptions can block public access to any financial or trade secrets information that is contained within the contract. Here, Vendor is agreeing that a commercial or financial information exemption would simply not apply to this contract.

Application: This clause states that all contract information is *deemed* to be a public record. By using the word “deem,” the parties are agreeing to treat the contract as a public record even if the state’s public records act would not treat it as such.

For added protection, the clause also provides District with protection from liability should disclosure of information result in some financial loss to Vendor.

8.0 SERVICE AND DELIVERY REQUIREMENTS

- 8.1. **Vending Machine Sales:** Except as provided in Section 8.3, the servicing of vending machines for restocking, maintenance and repair must occur during weekdays from ____ am until ___ pm, excluding school and national holidays.
- 8.2. **Direct Delivery Sales:** Except as provided in Section 8.3, all products designated for direct delivery sales shall be delivered to each school during weekdays from ___ am to ___ pm, excluding school and national holidays. Prior confirmation of each delivery must be given for

permission to enter a school campus. Invoices should accompany the delivery.

- 8.3. **Safety; Excluded Delivery Times:** For the safety and welfare of students and staff, deliveries or servicing should not take place during breakfast or lunch times. All delivery or servicing times shall be scheduled by the Vendor with each individual school or site administrator. Vendor's representatives operating vehicles on District property shall use extreme caution at all times and maintain a safe speed in accordance with District policy.
- 8.4. **Regulatory Standards:** District reserves the right to reject any products, supplies and equipment that are unsafe for their intended use or fail to meet established FDA and OSHA [and state-specific regulatory bodies such as Cal OSHA, if applicable] health and safety requirements and standards.
- 8.5. **Employee Certification:** Vendor shall certify in writing that all of its employees and all subcontract's employees, present or new hires, have not been convicted of a felony (*Note e.g.*, as defined in Education Code Section _____) or are awaiting adjudication of same. This certification shall be provided by Vendor to District prior to any of Vendor's employees, or Vendor's subcontractor's employees, coming in contact with any District pupils.
- 8.6. **Fingerprinting of Vendor Personnel** [*Note Optional Language:* Section 8.6 is intended for states (such as California) where outside vendors must, under certain circumstances, provide fingerprints to the state's Department of Justice, which screens for criminal records.] District has determined under _____ Code Section _____ that in performing services pursuant to this agreement, Vendor's employees may have contact with students. As required under _____ Code Section _____, Vendor shall require its employees, and its subcontractor's employees, who will provide service pursuant to this agreement, to submit their fingerprints in a manner authorized by the _____ [e.g., Department of Justice ("DOJ")] in order for District to conduct a criminal background check to determine whether such employees have been convicted of or have charges pending for a felony as defined under _____ Code Section _____.

Vendor shall not permit any employee or subcontractor's employee to perform services who may come in contact with pupils under this agreement until the DOJ has determined that the employee has not been convicted of a felony or has no felony criminal charges pending as defined in Section _____.

[*Note Optional Language:* As a service to Vendor, the fingerprinting unit of the District’s School Police Services Division will undertake the fingerprinting, criminal record check, and DOJ clearance of Vendor’s personnel at Vendor’s expense. Vendor will contact the Police Services Division at (____) _____ to make all necessary arrangements.]

All records obtained pursuant to Section 8.5 and 8.6 of this agreement shall remain confidential and be retained by the District for a period of 5 years following termination of this agreement.

9.0 INVOICES AND PAYMENTS FOR DIRECT DELIVERY PRODUCTS

Delivery slips or invoices for direct delivery product sales must be furnished on the same day of delivery to each school’s _____ [title of school administrator who is authorized to receive invoices]. Payments to Vendor will be made Net ____ days upon receipt of Vendor’s invoice for the previous month’s billing period. Credit memos shall be issued in a reasonable time but not to exceed ____ days from the date of return products.

10.0 RESPONSIBILITY FOR PRODUCTS, MATERIAL AND EQUIPMENT

Vendor shall be responsible for all products, materials and equipment until they are delivered and accepted by District at the designated delivery point, regardless of the point of inspection. After delivery to and acceptance by the District of the equipment or beverage products specified in this agreement, District shall be responsible for the loss or destruction of or damage to the equipment or supplies only if such loss, destruction, or damage results from the negligence or willful misconduct of officers, agents, or employees of District. Vendor reserves the right upon 30 days’ written notice to District to relocate or remove equipment that is subjected to loss or damage. Vendor shall not be liable for payments of commissions with respect to sales for which money has been stolen.

Comments about the “Responsibility” Clause

Purpose: This clause establishes the point in time at which the obligation to safeguard Vendor’s products and equipment shifts from Vendor to District. This clause is necessary because Vendor retains legal title to all of its equipment (such as vending machines) and products (such as cases of water stocked in a student store) during the term of the contract, yet the equipment and products themselves are located on District property and are under District’s control.

Application: This clause addresses financially important questions such as: “Who has to pay for damages if a vending machine is vandalized? Or is tipped over by an earthquake? What happens if a case of water is stolen from a student store? Or is ruined by flooding in a school basement?” The answer is: “It depends,” based on the language agreed to by the parties. In this clause, the District would be responsible if the equipment or products were damaged or destroyed due to District’s negligence; however, if they were damaged

or destroyed for reasons other than District's negligence, District would not be liable. For example, District might be responsible if one of Vendor's vending machines were vandalized due to District's failure to lock a building known to be accessible to the public after regular school hours. On the other hand, District would likely not be responsible if the same machine fell over of its own accord during an earthquake and was damaged.

Negotiation Tip: As it is foreseeable that Vendor's equipment or products might be damaged or stolen while on District property, it is prudent for the contract to anticipate those problems and to provide the parties with an explicit contractual remedy.

11.0 SAFETY REQUIREMENTS

District reserves the right to reject any products, supplies, and equipment that are unsafe for their intended use or that fail to meet established FDA and OSHA [*Note Optional Language:* and state-specific regulatory bodies (such as Cal OSHA)] health and safety requirements and standards.

12.0 EQUIPMENT

- 12.1. **Energy Efficiency:** All machines provided by Vendor under this agreement shall conserve energy and reduce energy related costs through energy efficiency. To satisfy this requirement, Vendor either can install machines with an Energy Star[®] label (or equivalent) or can utilize energy-saving devices such as the Vending Miser[®] or equivalent. Vendor shall incur all costs associated with energy saving machines or devices. District reserves the right to install energy-saving devices after machines have been placed on District property. District shall do so at its own expense and shall be responsible for any service-related issues that result from such installation.
- 12.2. **Vending Machine Equipment:** Vendor shall provide, install and maintain sufficient vending equipment and supplies necessary to facilitate the continued sale of Permitted Beverage Products. Vending machines shall be new or completely reconditioned at the time of installation. No machine shall be installed that does not meet the energy efficiency requirements set forth in Sub Section 12.1. Automatically operated dispensing machines shall be adequately metered with non-reset meters and shall operate on AC-110 volts. The machines shall be double insulated or grounded. All machines shall be equipped with dollar validators and coin-operated mechanisms with change return, slug rejection and coin-return features.
- 12.3. **Location, Removal and Addition of Vending Machines:** As set forth in Exhibit D to this agreement, District and Vendor have mutually determined the initial number of vending machines to be installed by Vendor under this agreement, as well as the location of those machines on

District property. District reserves the sole right to increase or decrease the number and type of machines at each location. No equipment shall be added or removed by Vendor without prior written approval from District.

12.4. **Americans with Disabilities Act:** All vending machines shall meet the requirements of the Americans with Disabilities Act in that all controls must be located between two and four feet from ground level.

12.5. **Refunds:** Vendor shall set aside a minimum of \$15 per school for possible refunds. This fund shall be checked periodically to ensure the minimum level. Vendor shall provide each school with a form to account for any refunds. At a minimum, this form shall contain fields to enter the date, refunded amount, name of person receiving refund, reason for refund, and the serial number of the machine involved.

Comments about the “Equipment” Clause:

Purpose/Application: Sub-clause 12.1 is included to protect both the environment and the District’s bottom line, as most vending machines use electricity very inefficiently, the cost of electricity is high, and District is the party under the contract responsible for paying all electricity bills. Though a typical vending machine uses about \$400 of electricity per year, that figure can be cut in half if a Vending Miser[®] device is installed on each machine. At a cost of about \$165 per device, Vending Misers[®] will pay for themselves in less than two years.⁵

Sub-clause 12.3 provides that District and Vendor will work together to determine how many vending machines will be installed by Vendor and at what locations. Such cooperation can enhance the value of the contract because vendors have marketing expertise from which schools can benefit. However, districts should not cede ultimate power over these critical decisions to the vendor as doing so can result in a district losing its ability to control what occurs on its property. Moreover, districts should retain control in order to administer their healthy vending program in accordance with their own policies and procedures.

Negotiation Tip: With regard to energy-saving devices, vendors have been known to resist their installation, largely due to the vendor’s ignorance about how such devices work. Providing vendors with some upfront information should allay any fears they have about the utility and function of such devices.

13.0 EQUIPMENT MAINTENANCE AND REPAIR RESPONSE TIME

13.1. **Ordinary Maintenance:** During the term of this agreement, Vendor shall be responsible for the ordinary maintenance and repair of vending

⁵ Tufts Institute on the Environment, *Vending Misers: Facts and Issues*, <http://www.tufts.edu/tie/tci/pdf/VendingMiserHandout.pdf> (last visited June 26, 2007).

equipment and other Vendor-owned equipment that it provides for use on District property.

- 13.2. **Repair Response Time:** Vendor shall respond within ___ hours [*Note e.g., 48 hours*] (excluding weekends and holidays) to all communications from District or one of District's individual school sites regarding defective or inoperable machines. Any defective or inoperable machine will be fixed or replaced within ____ [*Note: e.g., 5*] working days.
- 13.3. **Custodial Schedule:** Vendor shall provide all labor and supplies and maintain an appropriate custodial schedule for each vending area to ensure that all equipment is kept in reasonably clean and sanitary conditions; that the vending area is reasonably free of debris and spills; and that all debris is removed from the building during normal business hours.

Comments about the "Repair Response Time" Clause:

Purpose/Application: Neither District nor Vendor will be able to earn the full value of the contract if vending machines are broken or students don't want to use them because they are dirty. Unfortunately, vendors don't always make repairs or keep equipment clean with any frequency. Consequently, this clause is necessary to create an agreed-upon repair response time, to ensure that Vendor keeps the vending area in a sanitary condition, and to provide District with a way to compel Vendor to take action on both of these promises.

Negotiation Tip: A five-day repair time may not be possible in smaller districts or in rural areas where a vendor must cover a lot of territory. The parties should negotiate whatever time frame is appropriate to the scale of the contract.

14.0 **ELECTRICITY**

- 14.1. **Electrical Power:** District shall furnish, at no cost to Vendor, the electrical power necessary for the operation of the vending machines. Vendor shall provide District with a projection of the maximum aggregate annual electrical consumption per machine. Vendor shall provide information detailing the amperage of the machines and electrical consumption. District will review its power consumption during the term of this agreement, and machines utilizing an unreasonable or excessive amount of power will be replaced by Vendor within 10 business days of Vendor's receipt of District's notification. [*Note Optional Language: All machines must have non-illuminated signage/logo panels.*]
- 14.2. **Electrical Outlets:** District will not be required to relocate any electrical outlets or circuits in order to provide electrical power to vending machines at desired locations. Vendor shall bear all costs associated with any such relocation, unless such relocation is requested solely by District, in which case District shall bear the cost of relocation. Each installed vending

machine shall be connected on its own electrical circuit. Any new electrical circuits required shall be provided by Vendor at no cost to District. Vendor must obtain District's prior written approval for the use of vending machine electrical cords that are longer than 10 feet.

- 14.3. **Electrical Circuits:** For the initial installation of vending machines, Vendor shall obtain prior written permission from District's Maintenance & Operations Department and District's Business Office to install additional electrical outlets or circuits, or to move existing outlets. All requested and approved electrical outlet or circuit additions shall be done by an electrical contractor duly licensed in the State of _____. All work performed must be done in full compliance with state and local building, electrical, and safety codes and regulations. All electrical work shall be subject to District inspection. Any re-work deemed necessary by District inspectors, due to code non-compliance, shall be done at Vendor's sole expense.

15.0 PROMOTION AND ADVERTISING RIGHTS

[*Note* – The following paragraph is for districts that have chosen NOT to permit advertising on school property:]

No promotion, advertising or merchandising rights of any kind whatsoever are granted to Vendor under this agreement. Vendor shall not display or cause to be displayed any identifying marks connected to its products or services, whether trade/service marked or not, anywhere on District property except as those identifying marks are or may be applied directly on a product. All vending machines shall have non-illuminated panels, and such panels shall be decorated with images, colors and logos of District's school mascots, or other images of its choosing. In consideration of the benefits provided by District to Vendor under this agreement, Vendor agrees not to challenge this provision of the contract. If Vendor does challenge this clause, or if this provision is determined to be invalid, illegal or unenforceable, the entire contract shall be void, and the privileges granted hereunder to Vendor shall lapse.

[*Note* -- The following paragraphs are for districts that have chosen TO permit limited advertising of healthy beverages on school property:]

District hereby grants to Vendor the following promotion and advertising rights:

- 15.1. **Vending Machine Panels:** Vendor may affix such logos/advertising imagery to its vending machine panels as may be pre-approved by District in its sole discretion. Pre-approval will be given only to such products as are listed on the Permitted Beverage Products List.

- 15.2. **School Signage:** *[The details of this sub clause are to be determined by the parties.]*
- 15.3. **Other Promotion and Advertising Rights:** *[The details of this sub clause are to be determined by the parties.]*
- 15.4. **Compliance:** Vendor’s failure to comply with Section 15 of this agreement shall be deemed a material breach of the agreement that may subject the agreement to immediate termination at District’s sole discretion.

16.0 REVENUE ENHANCEMENT PAYMENT & PRODUCT SALES COMMISSION

In consideration of the rights and privileges granted to Vendor under this agreement, Vendor agrees to pay District such yearly “Revenue Enhancement Payments” and “Commission on Vending Machine Sales” as are set forth in the Exhibit C “Rate Schedule.”

- 16.1. **Revenue Enhancement Payment:** Revenue enhancement payments shall be paid in installments over the term of the agreement, each installment due within 30 days following the effective date of the agreement for each successive year of the agreement. Vendor shall make payments to:

XYZ Unified School District
 Street Address
 City, State, Zip
 Attention: Name of authorized school administrator

- 16.2. **Commissions on Vending Machine Sales:** Commissions on vending machine sales shall be paid based on cash collected by Vendor, after deducting taxes, recycling fees, and state mandated deposits, if any apply. Vendor shall pay commissions on or about the 30th of each month following the month in which they are earned. Vendor shall make payments to each participating Associated Student Body Department or District administrative office where vending machines are located.

Comments about the “Revenue Enhancement Payments& Product Sales Commission” Clause:

Purpose: In thinking about how much money a school vending contract is worth to a school district, it is important to remember that a beverage contract is NOT a philanthropic donation made by a soda company to a cash-strapped school district to help further the district’s educational goals. For one thing, the profit earned on sales comes directly out of the student’s (and their families) pockets. For another, school vending contracts are actually sophisticated commercial transactions that share much in common

with other types of contracts that have commerce and profit as their twin goals. And, as is true of ALL contracts—but especially of commercial contracts—in order to be enforceable, the contract must be supported by the exchange of something of value between the parties. Here, the exchange of value is Vendor’s receipt of exclusive rights to market and sell its products on District property (which Vendor would otherwise have no right to do), in exchange for District’s receipt of a yearly cash payment (i.e. the Revenue Enhancement Payment) and a commission payment made on each unit sold.

Application: Unlike typical school vending contracts, this clause provides for a straightforward exchange of value between the parties rather than being structured as an upfront “cash advance” or “sponsorship” payment to the school that is then tied to sales quotas over the life of the contract. With sales quotas, schools can only “earn” the full amount promised in the contract if they sell an ever-increasing volume of Vendor’s products. Inherently, cash advances tied to sales quotas are a bad deal for schools because vendors continue to receive extremely valuable marketing and sales rights *every single day* of the contract without suffering any diminution of value to those rights regardless of how many units are sold. Given that the exchange of value between the parties continues to be an equal one over the life of the contract, why should the school earn less money? Logically—and fairly—the appropriate place for schools to earn greater or lesser amounts under the contract is under the commission rate that is tied to unit sales, and not to an upfront cash advance that is tied to sales quotas.

Negotiating Tip: A recent national study, which analyzed 120 school beverage contracts from 16 states, found enormous variation in the upfront cash advances offered and commission rates paid to schools even though the same three parent companies (i.e., Coca-Cola Company, Pepsi-Co, Cadbury Schweppes plc) were behind each of the contracts.⁶ Review of more than 20 vending contracts in California schools and 19 vending contracts in Oregon schools confirms these findings.⁷ Though some of the variation can be attributed to large vs. small (or urban vs. rural school) districts, much of the difference is attributable to the fact that schools lack sophistication when it comes to negotiating commercial transactions, while soda companies are multibillion dollar transnational enterprises rich in legal / commercial expertise and resources. At a minimum, schools should prepare for a vending contract negotiation as rigorously as they would prepare for a new school facilities construction contract or a contentious collective bargaining negotiation.

17.0 FINANCIAL REPORTS

- 17.1. **Financial Reports:** Vendor shall provide the District and the designated contact person of each school where vending machines are located with an accurate and truthful report detailing the total sales per month generated

⁶ CENTER FOR SCIENCE AND THE PUBLIC’S INTEREST & THE PUBLIC HEALTH ADVOCACY INSTITUTE, *supra* note 3.

⁷ California review performed by the author; for Oregon review, *see* NICOLA PINSON, COMMUNITY HEALTH PARTNERSHIP, SCHOOL SODA CONTRACTS: A SAMPLE REVIEW OF OREGON PUBLIC SCHOOL DISTRICTS 11, 2004, available at http://www.communityhealthpartnership.org/images/pages/soda_report/full_report.pdf.

from all vending machines at each school location. This report shall be sent with the monthly commission check and shall specify the calculations Vendor used to determine the commission value, as established in the Exhibit C Rate Schedule. The commission check shall be for the aggregate units sold from all vending machines per school after applicable deductions such as tax [*Note Optional Language*: “and bottle redemption value” for those states that have bottle recycling programs]. An approved report format is attached as Exhibit E to this agreement.

- 17.2. **Additional Monthly Report:** Vendor also shall provide the District Business Office with an accurate and truthful monthly report for all schools. This report shall detail sales activity per school and as an aggregate total. Sales activity shall be distinguished between vending machines and direct delivery sales and further broken down by each product item. This report is due by the second week of the following month to: _____ [name of District business official].

Comments about the “Financial Reports” Clause:

Purpose/Application: District’s receipt of monthly financial reports should be an essential component of District’s comprehensive financial management system. In accordance with Generally Accepted Accounting Principles (GAAP), District’s accounting system includes compliance with policies and procedures related to internal controls over District money and equipment. Monthly financial reports from Vendor help ensure fiscal accountability and accuracy, help District generate reliable financial information, help reduce the risk of Vendor’s fraud and abuse, and ultimately help protect District’s assets.

Negotiating Tip: Districts should not enter into a vending contract unless it contains a financial reporting requirement. There is no valid reason for a vendor to object to such a clause, and it would not be unreasonable to consider it a deal breaker if the vendor refused to include one. If Vendor argues that monthly reports are too burdensome, District might consider allowing Vendor to provide quarterly reports.

18.0 FINANCIAL RECORDS AND AUDIT

- 18.1. **Financial Records:** Vendor shall maintain complete and accurate records of vending transactions for each machine in accordance with accepted industry standards, and will keep such financial records for a period of ____ years⁸ after the close of each year’s operation.

⁸ To a certain extent, the length of time records must be kept is a function of how long the statute of limitations is for breach of contract under whatever law is applicable to the contract. Statutes of limitations vary considerably from state to state. See, e.g.: Delaware—3 years; California—4 years; New York—6 years; Illinois—10 years.

18.2. **District Audit:** Vendor shall make all applicable financial books and records pertaining to this agreement available for audit during normal business hours by the District or its designated auditor. Upon ____ days' written notice to Vendor, District personnel may perform an audit of Vendor's books and records if District believes a discrepancy has occurred regarding the commission checks or other payments made under this agreement. The cost of such an audit shall be borne by Vendor, calculated as follows: number of hours worked by an Audit Supervisor, multiplied by his/her respective hourly rate. The average rate per hour of an Audit Supervisor is \$_____.

District shall audit the school(s) in question along with two additional schools picked at random. District reserves the right to audit all schools at Vendor's expense if impropriety is found during the initial audit. District also may seek any other remedy allowed under this agreement's terms and conditions or under general law. District is not obligated to pay any reimbursement for overpayment by Vendor.

18.3. **Third Party Audit:** At District's discretion, and as an alternative to the audit performed under Section 18.2, District reserves the right to hire a third party auditor at Vendor's expense to perform an audit of Vendor's books and records pertaining to this agreement. District shall provide Vendor with ____ days' written notice prior to the commencement of such an audit. The cost of a third party audit shall be paid by Vendor at the prevailing rates charged by qualified auditors in District's geographical region.

Comments about the "Financial Records and Audit" Clause:

Purpose/Application: District's ability to audit Vendor's financial books and records is just as important to District as its right to receive monthly financial reports—and for all of the same reasons. In fact, each clause reinforces the other by working in tandem to safeguard District's earnings under the agreement.

Negotiating Tip: Just as with monthly financial reports, school districts should not enter into a vending contract unless it provides the district with the right to audit the vendor's financial books and records. There is no valid reason for a vendor to object to such a clause; districts should consider it a deal breaker if the vendor refuses to include one.

19.0 TAXES

Vendor shall be responsible for the remittance of taxes on the sales of Permitted Beverage Products through vending machines on District property. Vendor is not responsible for taxes related to commission income. District shall not assess Vendor for common area maintenance fees, taxes or other charges based on its occupation of the space allocated to vending machines.

20.0 SERVICE PERSONNEL

District shall have the right, in its absolute discretion, to require the removal of Vendor's personnel at any level assigned to the performance of the services provided under this agreement. District shall provide written notice to Vendor of its request for removal of Vendor's personnel, which notice will become effective upon receipt. Such personnel shall be promptly removed from performing services under this agreement at no cost or expense to District. Further, an employee who is removed from the Project for any reason shall not be re-employed under this agreement.

21.0 REQUIRED MEETINGS

Vendor and District representatives shall meet quarterly, and at such other times as may be agreed upon, to plan and coordinate services provided under this agreement with the intent to enhance sales in a manner that is educationally and nutritionally sound, to increase process efficiencies, and improve communication and customer service.

Comments about the "Required Meetings" Clause:

Purpose/Application: One of the best outcomes of a well-drafted vending contract is to foster good working relations between the parties. Requiring the parties to meet on a regularly scheduled basis helps everyone realize this goal.

Negotiation Tip: Fewer meetings per year may be realistic in smaller districts or in rural areas where a vendor must cover a lot of territory. The parties should negotiate whatever meeting schedule is appropriate to the scale of the contract.

22.0 LAWS, PERMITS, TAXES AND REGULATIONS

- 22.1. **Licenses:** Vendor shall obtain all necessary license or permits for its proper performance of this agreement and shall perform in accordance with applicable federal, state and local laws, regulation, ordinances or codes in force where Vendor is providing its services and selling its products. Vendor is responsible for its own applicable taxes, including payroll taxes, and miscellaneous overhead expenses.
- 22.2. **Change in Law or Regulation:** If at any time during the term of this agreement either _____ [Note: e.g., California], federal law, or local law or regulation is revised to materially limit the beverage types, hours of operation, or location of vending machines on District property, Vendor shall act in conformance with such revised law or regulation, and District shall not be responsible for any lost profits which may result there from.

23.0 INDEMNIFICATION

Vendor shall indemnify and defend District, its employees, agents and members of its governing body at all times after the date of this agreement against

- (a) any liability, loss, damages (including punitive damages), claim, settlement payment, cost and expense, interest, award, judgment, diminution of value, fine, fee, and penalty, or other charge, other than any Litigation Expenses (as defined in subsection [b]), arising out of or relating to the services, equipment, or products provided under this agreement; and
- (b) any court filing fee, court cost, arbitration fee or cost, witness fee, and each other fee and cost of investigating and defending or asserting any claim for indemnification under this agreement, including without limitation, in each case, attorneys' fees, other professionals' fees, and disbursements (collectively, "Litigation Expenses").

Comments about the "Indemnification" Clause:

Purpose: In general, indemnification provisions are used in commercial contracts to clarify and fix or limit the monetary risk of the parties to the contract.⁹ Indemnification means the right of one party who is legally responsible for a loss—here, the District (i.e., the indemnitee)—to shift that loss to another party—here, the Vendor (i.e., the indemnitor). The risk of loss is shifted by virtue of the Vendor's obligation to make the District whole for any loss the District sustains. The District's right to this indemnification results from the express contractual promise made by the Vendor in the agreement.¹⁰

Here, the risk of loss for which Vendor will provide indemnification to District is narrowly defined as only such losses as may "arise out of or relate to the services or products provided under this agreement." This means that Vendor has a duty to indemnify District only if District can demonstrate that its losses are tied to Vendor's provision of such items as beverages, paper cups, or vending equipment, or to such services as vending machine repair or beverage delivery.

This clause also includes a separate promise by Vendor to "defend" District against losses and liabilities that District may suffer as a result of the products Vendor provides or the services it delivers. This creates in Vendor a duty to make District whole for costs District expends protecting itself against the kind of damages that are enumerated in the clause.

⁹ MORTON MOSKIN, *COMMERCIAL CONTRACTS: STRATEGIES FOR DRAFTING AND NEGOTIATING* (Aspen Publishers) (2007).

¹⁰ TINA STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 248* (ALM Publishing) (2003).

Application: An example of how an indemnification clause might work in a school vending contract is the following. A District high school student purchases and consumes a container of apple juice from one of Vendor's machines. The student subsequently becomes violently ill and is hospitalized with a suspected case of E. coli poisoning. The student eventually recovers but suffers permanent damage to the lining of his stomach. The student files a multimillion dollar law suit against District and Vendor (along with other parties), claiming that the apple juice was negligently manufactured and that District was in part liable for student's damages because the beverage was purchased on school property.

District denies any wrongdoing and defends itself vigorously against the lawsuit. However, as is often the case with litigation, District eventually settles with the student outside of court because it is cheaper to settle than to litigate. The expenses associated with District's settlement offer, attorney fees and court costs are enormous. Happily, however, District is able to recover from Vendor all of the money it spent on the lawsuit because of the existence of the contract's indemnification clause, which ensures that District is made whole for the losses it sustained.

Negotiation Tip: Note that only Vendor is making a promise of indemnification in this clause. This is a reflection of the fact that, although Vendor is the party to the contract with a series of foreseeable risks associated with its activities, Vendor's performance under the contract will be largely taking place on District's property. Since the legal liability caused by this arrangement could have a huge effect on District's finances, District is the party most in need of the protection offered by an indemnification clause.

That said, Vendor may nonetheless ask District for a "cross indemnification" clause, which means that District would be promising to make Vendor whole for any risk of loss Vendor suffers arising out of or related to District's performance under the agreement. District is well advised to discuss the matter of cross indemnification with its insurance carrier before agreeing to a clause of this nature.

24.0 INSURANCE

24.1. **General Requirement:** Vendor shall secure and maintain such insurances as will protect it and the District from claims under Workers' Compensation laws, and such public liability insurance as will protect it and the District from claims for damages for personal injury, including death, and damage to property, which may arise from operations under this agreement, whether such operations be by Vendor itself or by any of Vendor's subcontractors or anyone directly or indirectly employed by either of them.

24.1.1. **Insurance Rating:** Vendor shall not commence work nor shall it allow any subcontractor to commence work under this agreement until it has obtained all required insurance hereunder and certificates evidencing such insurance have been delivered to

District. All insurance required under this agreement shall be provided by a surety admitted to transact business in the State of _____. Insurance carrier shall possess a current A.M. Best's Key Rating of A Minus (A-) or better, unless such insurance coverage is provided under a self insurance program.

24.2. **Certificates of Insurance:** Vendor shall file a certificate of insurance for all insurance required under this agreement with District's Business Office. Certificates shall include the following language: "This policy shall not be canceled or reduced in required amounts of liability or amounts of insurance until notice has been mailed to District stating the date of cancellation or reduction. The date of cancellation or reduction may not be less than 15 days after the date of mailing the notice."

24.3. **Workers' Compensation Insurance:** Vendor shall provide, during the life of this agreement, Workers' Compensation Insurance or State approved self insurance for all of its employees engaged in work under this agreement, and, in case any of its work is sublet, Vendor shall require the subcontractor to similarly provide Workers' Compensation Insurance for all the latter's employees. Any class of employee or employees not covered by the subcontractor's insurance shall be covered by Vendor's insurance.

In case any class of employees engaged in work under this agreement, on or at the site of the project, is not protected under the Workers' Compensation statute, Vendor shall provide or shall cause its subcontractor to provide, adequate insurance coverage for the protection of such employees not otherwise protected.

24.4. **Public Liability and Property Damage Insurance:** Vendor shall secure and maintain during the life of this agreement Public Liability and Property Damage Insurance to protect itself and the District from all claims for personal injury, including accidental death, as well as from all claims for property damage arising from the operations under this agreement. The minimum amounts of such insurance shall be:

- (A) Commercial General Liability \$X,XXX,XXX per occurrence
- (B) Auto Liability \$X,XXX,XXX combined single limit

24.5. **Fire Insurance:** Vendor shall secure and maintain Fire Insurance on all work, material, equipment, appliances, tools, and structures that are a part of this agreement and subject to loss or damage by fire.

25.0 VENDOR'S FAILURE TO PROVIDE SERVICES OR PRODUCTS

- 25.1. **Vendor's Representation of Performance:** District requires the Permitted Beverage Products and services identified under this agreement be supplied to District in a timely and accurate manner. District has entered into this agreement with Vendor because Vendor has represented that it can meet District's time-related service and product specification needs.
- 25.2. **Obtain Other Services:** If, in District's opinion, Vendor fails to properly or satisfactorily perform the services or provide the Permitted Beverage Products called for under this agreement, or otherwise fails or neglects to comply with the material terms of this agreement, District may make arrangements with other providers to obtain substitute services and/or Permitted Beverage Products.
- 25.3. **Unsatisfactory performance:** Unsatisfactory performance may include but not be limited to: late/non-deliveries; failure to repair vending machines as promised; partial deliveries; delivery of wrong products; delivery of unauthorized substituted products not meeting the specifications identified in this agreement; incorrect pricing; failure to provide revenue as specified in the agreement; or invoicing problems.
- 25.4. **Cure Notice:** Before District may make an arrangement to obtain substitute services or Permitted Beverage Products from another provider, District shall give Vendor final written notification to perform within ____ number of days ("Cure Notice"). With regard specifically to items that are out of stock, the Cure Notice shall allow Vendor a minimum of ____ days (*Note:* or hours) to resolve any issues related to that problem.
- 25.5. **Vendor's Duty to Pay:** If Vendor fails to comply with a Cure Notice, Vendor shall pay District for such reasonable re-procurement costs as District may incur to obtain substitute services or Permitted Beverage Products.
- 25.6. **Other Remedies:** If Vendor fails to perform its services or provide its products as called for under this agreement, District may, in addition to any other remedy available to District, elect to terminate the contract.

Comments about the "Vendor's Failure To Provide Services or Products" Clause:

Purpose: During the procurement phase of the contract District should obtain Vendor's representation that it stands ready, willing and able to provide District with good quality direct sale/vending services and healthy beverage products at certain specified prices and at certain specified commission rates. District then will select Vendor as the winning

bidder on the strength of such representations. In fact, such representations will be the *inducement* that brings District into the deal with Vendor. These representations will then form the core deal between District and Vendor and will be written in to the contract in the form of *operative provisions*.

Application: By this clause, District's is seeking to ensure that Vendor *performs what it promised* to the fullest extent possible. It isn't enough that Vendor agrees to deliver Permitted Beverage Products to District—what if Vendor fails to do so and instead stocks a vending machine with carbonated soda? This clause provides District with an explicit way to compel Vendor to perform as promised and to provide itself with a remedy should Vendor fail to do so. And, by providing District with a remedy that ties contract nonperformance to Vendor's bottom line, Vendor is far more likely to make performance under the contract its number one priority.

26.0 LIQUIDATED DAMAGES

26.1. **Parties Acknowledgments:** The parties acknowledge the following:

- 26.1.1. The purpose of this agreement is to provide healthy beverage products (i.e., "Permitted Beverage Products" as that term is defined under this agreement) to District's on-campus Associated Student Body Organizations, District Administrative Offices, and in student stores and food service areas.
- 26.1.2. District has invested significant amounts of time and resources towards improving student health by implementing a comprehensive health curriculum and by improving the foods and beverages sold on District property.
- 26.1.3. Vendor's delivery of beverages other than the Permitted Beverage Products will directly undermine District's efforts in this regard.
- 26.1.4. The costs to District resulting from the delivery of beverages other than Permitted Beverage Products are not easily measured, and the amount specified in Section 26.2 below represents the parties' reasonable estimate of what District's damages might be.

26.2. **Remedies:** In addition to the remedies provided in Section 25 and Section 26, if Vendor fails to deliver Permitted Beverage Products or to perform the services within the schedule or time as mutually agreed upon by Vendor and individual school, Vendor shall pay to District, as liquidated damages and not as a penalty, an amount equal to ___% of the specified value (order/invoice amount) of the scheduled delivery for each business day delivery of Permitted Beverage Products is delayed or services are not performed within the scheduled time.

Comments about the “Liquidated Damages” Clause:

Purpose: Liquidated damages are an amount which the parties to a contract agree in advance will be paid to compensate the injured party for its anticipated loss or injury caused by a particular contract breach,¹¹ regardless of the level of actual damages involved. A liquidated damages clause offers a number of advantages, including removing the need to prove what actual damages are in cases where that figure is impractical or impossible to calculate. As a general rule, a liquidated damages clause will be enforced by a court so long as the damage amount agreed to in the contract bears a reasonable relationship to the probable loss or harm – in other words, so long as the clause is not viewed as a penalty.

Application: District has devoted great amounts of time and resources towards improving the health of its students. District would suffer harm if Vendor were to sell nonconforming products on District property because the sale of such goods materially would undermine District’s efforts. District will benefit from including a liquidated damages clause because it would be nearly impossible for District to prove what monetary damages it would sustain were a student to purchase an unhealthy beverage while on District property.

Negotiating tip: Note that this clause is framed in terms of the damages District will suffer from having its efforts to improve student health undermined rather than in terms of the health damages students will suffer from having consumed an unhealthy beverage (e.g., diabetes). The reason for this is that the basis of upholding a liquidated damages clause is the principle of just compensation. As a reflection of that principle, liquidated damages are designed to give the nonbreaching party a remedy for *its own* losses and not the losses of a third party (i.e., students and their individual health status). Also note in Subsection 26.2 that no amount is suggested because each liquidated damages clause will need to be drafted/negotiated in light of the economic expectations of the parties particular to the specific deal under consideration.¹²

27.0 GENERAL PROVISIONS

- 27.1. **Authority of the Assistant Superintendent of Business Services** [or other District representative such as the Chief Procurement Officer]: The District has the final approval in all matters relating to or affecting the Scope of Work. Except as expressly specified in the agreement, the Assistant Superintendent of Business Services may exercise any powers, rights or privileges that have been lawfully delegated by the District. Nothing in the agreement shall be construed to bind the District for acts of its employees, including the Assistant Superintendent of Business Services, that exceed the delegation of District.

¹¹MORTON MOSKIN, *supra* note 10.

¹² TINA STARK., *supra* note 11, at 226-27.

- 27.2. **District's Technical Representative:** The Assistant Superintendent of Business Services also will act as the technical representative for all technical aspects related to the performance of the agreement. Vendor shall make such oral or written reports to the Assistant Superintendent of Business Services as may be requested by the District or as specified in the agreement. All contractual matters also shall be addressed to the Assistant Superintendent of Business Services.
- 27.3. **Independent Contractor:** District and Vendor are acting herein as independent contractors and independent employers. Nothing herein shall be interpreted to create or be construed to create a partnership, joint venture, or agency relationship between any of the parties, and no party shall have the authority to bind the other in any respect.
- 27.4. **Notices:** Formal notices, demands, and communication to be given hereunder by either party shall be in writing and shall be delivered in person, by U.S. mail, or electronically, and shall be deemed received as of the date of verifiable delivery. "Verifiable delivery" of electronic transmission shall mean email "delivery status notifications" or fax "transmittal confirmation reports," or their equivalents.
- 27.5. **Announcements.** Vendor shall not issue any press release or make any announcement with respect to this agreement without the prior written consent of District. Despite the previous sentence of this Section, Vendor is entitled to make any disclosures required by law.
- 27.6. **Amendments:** The parties may amend this agreement if such amendment is in writing, if the writing identifies itself as an amendment to this agreement and is signed by both parties to the agreement.
- 27.7. **Waivers:**
- 27.7.1. **No Oral Waivers.** The parties may waive any provision in this agreement only by a writing executed by the party against whom the waiver is sought to be executed.
- 27.7.2. **Effect of Failure, Delay or Course of Dealing.** No failure or delay in exercising any right or remedy or in requiring the satisfaction of any condition under this agreement, and no act omission or course of dealing between the parties operates as a waiver or estoppel of any right, remedy or condition.
- 27.7.3. **Each Waiver for a Specific Purpose:** A waiver made in writing on one occasion is effective only in that instance and only for the purpose stated. A waiver once given is not to be construed as a waiver on any future occasion or against any other person.

- 27.8. **Severability.** Except as provided in Section 15 of this agreement, if any provision of this agreement is determined to be invalid, illegal or unenforceable, the remaining provisions of this agreement remain in full force, if the essential terms and conditions of this agreement for each party remain valid, binding, and enforceable.
- 27.9. **Merger:** This agreement and its Exhibits constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this agreement are expressly merged into and superseded by this agreement. The provisions of this agreement may not be explained, supplemented or qualified through evidence of trade usage or a prior course of dealings. In entering into this agreement, neither party has relied upon any statement, representation, warranty or agreement of the other party, except for those expressly contained in this agreement. There are no conditions precedent to the effectiveness of this agreement, other than any expressly stated in this agreement.
- 27.10. **Force Majeure:** "*Force Majeure* Event" means any act or event, whether foreseen or unforeseen, that meets all three of the following tests: (a) The act or event prevents a party (the "Nonperforming Party"), in whole or in part, from (i) performing its obligations under this agreement; (ii) satisfying any conditions to the obligations of the other party (the "Performing Party") under this agreement, (iii) or frustrates the purpose of this agreement; (b) The act or event is beyond the reasonable control of and not the fault of the Nonperforming Party. (c) The Nonperforming Party has been unable to avoid or overcome the act or event by the exercise of due diligence. Despite the preceding definition of a *Force Majeure* Event, a *Force Majeure* Event excludes economic hardship, changes in market conditions, and insufficiency of funds.
- 27.10.1. **Suspension of Performance.** If a *Force Majeure* Event occurs, the Nonperforming Party is excused from (i) whatever performance is prevented by the *Force Majeure* Event to the extent prevented; and (ii) satisfying whatever conditions precedent to the Performing Party's obligations that cannot be satisfied, to the extent they cannot be satisfied. Despite the preceding sentence, a *Force Majeure* Event does not excuse any obligation by either the Performing Party or the Nonperforming Party to make any payment required under this agreement; provided however, that no payment need be made if corresponding performance is not rendered or a relevant condition is not fulfilled because of a *Force Majeure* Event.

27.10.2. **Resumption of Performance.** When the Nonperforming Party is able to (i) resume performance of its obligations under this agreement, or (ii) satisfy the conditions precedent to the Performing Party's obligations, it shall immediately give the Performing Party written notice to that effect and shall resume performance under this agreement no later than two working days after the notice is delivered.

27.10.3. **Exclusive Remedy.** The relief offered by this *Force Majeure* provision is the exclusive remedy available to the Nonperforming Party with respect to a *Force Majeure* Event.

27.11. Assignment and Delegation:

27.11.1. **No Assignments.** No party may assign any of its rights under this agreement, except with the prior written consent of the other party. That party shall not unreasonably withhold its consent. All assignments of rights are prohibited under this subsection, whether they are voluntary or involuntary, by merger, consolidation, dissolution, operation of law or any other manner. For purposes of this Section, (i) a "change of control" is deemed an assignment of rights; and (ii) "merger" refers to any merger in which a party participates, regardless of whether it is the surviving or disappearing corporation.

27.11.2. **No Delegations.** No party may delegate any performance under this agreement.

27.11.3. **Ramifications of Purported Assignment or Delegation.** Any purported assignment of rights or delegation of performance in violation of this Section is void.

27.12. **Third Party Beneficiaries.** This Agreement does not and is not intended to confer any rights or remedies upon any person other than the signatories.

27.13. **Captions:** The descriptive headings of the articles, sections and subsections of this agreement are for convenience only, do not constitute a part of this agreement, and do not affect this agreement's construction or interpretation.

27.14. **Governing Law:** The laws of the State of _____ (without giving effect to its conflict of laws principles) govern all matters arising out of or relating to this agreement and the transactions it contemplates, including, without limitation, its interpretation, construction, performance, and enforcement.

Comments about the “Governing Law” Clause:

Purpose: This clause states that the contract is to be interpreted and enforced under the law of a particular state that has been pre-selected by the parties. “Choice of law” clauses such as these should not be an afterthought to the contracting process because they can have a significant “real-world” impact on the resolution of issues between the parties.

Application: District is advised to select the law of the state in which it is located, as District’s counsel will likely have little or no knowledge of another state’s laws. Such unfamiliarity probably will necessitate District having to hire out-of-state counsel at great cost to District.

Negotiation Tip: If Vendor’s corporate headquarters is located in a state other than District’s, Vendor may try to use the law of its home state as the contract’s governing law. District should not accede to this request. District’s negotiating position should be that District’s state’s laws are the appropriate ones because the subject matter of the contract (vending goods and services) will be provided within the state in which District is located.

27.15. Dispute Resolution and Forum Selection.

27.15.1.1. **Arbitration:** All controversies and claims arising under or relating to this agreement are to be resolved by arbitration in accordance with the rules of the American Arbitration Association before a panel of three arbitrators selected in accordance with those rules. The arbitration is to be conducted in _____. The arbitrators are to apply _____ law, without regard to its conflict of laws principles. Each party shall submit to any court of competent jurisdiction for purposes of enforcing any award, order or judgment. Any award, order or judgment pursuant to the arbitration is final and may be entered and enforced in any court of competent jurisdiction.

27.15.1.2. **Designation of Forum.** Any party bringing a legal action or proceeding against any other party arising out of or relating to this agreement shall bring the legal action or proceeding in the United States District Court for the [insert District Court location] District of [insert School District’s state name] or in any court of the State of [insert School District’s state name] sitting in [insert School District’s city or county name].

27.15.1.3. **Waiver of Right to Contest Jurisdiction.** Each party waives, to the fullest extent permitted by law, (a) any objection that it may now or later have to the laying of venue of any legal action or proceeding arising out of or relating to this agreement brought in any court of the State of [insert state name] sitting in [insert city or county name], or the

United States District Court for the [insert District location] District of [insert state name]; and (b) any claim that any action or proceeding brought in any such court has been brought in an inconvenient forum.

27.15.1.4. **Submission to Jurisdiction.** Each party to this agreement submits to the nonexclusive jurisdiction of (a) the United States District Court for the [insert District location] District of [insert state name] and its appellate courts, and (b) any court of the State of [insert state name] sitting in [insert city or county name] and its appellate courts, for the purposes of all legal actions and proceedings arising out of or relating to this agreement.

27.15.1.5. **Appointment of the Process Agent.** Vendor irrevocably (a) appoints [insert name of process agent] (the “Process Agent”) as its agent to receive service on behalf of Vendor and its property; and (b) authorizes and directs the Process Agent to accept service on its behalf. Vendor shall pay all costs and expenses of the Process Agent in connection with its service as Process Agent with respect to this agreement.

27.15.1.6. **Service Upon Process Agent.** If process is to be served pursuant to subsection 28.16.4, District shall serve that process by mailing or delivering a copy of the process in care of the Process Agent at [insert address of Process Agent] or any other address as to which the Process Agent has given notice to District.

27.15.1.7. **Alternative Methods of Service of Process.** Nothing set forth in subsection 28.16.4 or subsection 28.16.5 affects the right to serve process in any other manner permitted by law.

27.16. **Rights and Remedies Cumulative:** Any enumeration of District’s rights and remedies set forth in this agreement is not intended to be exhaustive. District’s exercise of any right or remedy under this agreement does not preclude the exercise of any other right or remedy. All of District’s rights and remedies are cumulative and are in addition to any other right or remedy set forth in this agreement, any other agreement between the parties, or which may now or subsequently exist at law or in equity, by statute or otherwise.

ACCEPTED AND AGREED:

XYZ UNIFIED SCHOOL DISTRICT

By: _____
Name
Title
Date: _____

ABC BOTTLING COMPANY

By: _____
Name
Title
Date: _____

EXHIBIT A¹³

XYZ UNIFIED SCHOOL DISTRICT HEALTHY BEVERAGE POLICY SPECIFICATIONS SHEET

Under the Policy, the following types of beverages are **allowed** to be sold on District property:

- A. **Fruit Based Drinks** composed of no less than 50% fruit juices with no added sweeteners, artificial flavors or colors. If juice concentrates are used, Vendor must provide the dilution factor of the juice (i.e., 5 to 1).
- B. **Drinking water** with no additives except those minerals normally added to tap water. Drinking water as above with carbonation but without phosphoric acid is also allowed, as is drinking water as above with essences that are pure flavor and aroma products with a maximum dilution of 0.5 to 1 per 1000. No artificial flavorings, colors or sweeteners are allowed in drinking water.
- C. **Milk and flavored milks** that are pasteurized fluid types of unflavored or flavored, low fat milk (1%), skim milk (fat-free), or cultured fat or nonfat buttermilk, which meet State and local standards for milk. All milk must contain vitamin A and D at levels specified by the Food and Drug Administration and must be consistent with State and local standards for such milk. See 7 CFR Part 220.2. Flavored milks must not contain more than 18 grams of added sweetener per 8 oz and such sweeteners must not be of an artificial type.
- D. **Soy Milk** (fortified with calcium and B12 levels; 15% to 60% of the RDA); Vitamin A and D may be added; no more than 18 grams of added sweetener per 8 oz and such sweeteners must not be of an artificial type.
- E. **Rice Milk** (fortified with calcium and B12 levels; 15% to 60% of the RDA); Vitamin A and D may be added; no more than 18 grams of added sweetener per 8 oz and such sweeteners must not be of an artificial type.
- F. **Electrolyte Replacement Drinks** that do not contain more than 42 grams of added sweetener per 20 oz maximum volume; sodium should not exceed 110 milligrams per 8 oz; osmality should not exceed 400 mOsm; electrolytes and minerals added might include sodium, potassium, chlorine and phosphorous, vitamins added are subject to approval of District's Nutritional Services Section of the

¹³ All technical specifications contained in Exhibit A were developed by the Los Angeles Unified School District for their healthy beverage vending contract entered into with PepsiCola in 2006.

Food Services Division; no artificial flavorings, colors or sweeteners.

Under the Policy, the following types of beverages are **NOT allowed** to be sold on District property:

- A. **Carbonated beverages** except fruit juice and water as listed above.
- B. **Caffeinated Beverages.**
- C. **Beverages Containing Additives** such as herbal and nonvitamin supplements (including without limitation ginkgo biloba, ephedredra, ginseng, guarana, mahuang); and food colorings and flavors not proven safe by the scientific community.
- D. **Beverages Containing Vitamin and/or Mineral Supplements** including without limitation chromium, magnesium, niacin, pantothenic acid, B6, and iron.
- E. **Carbonated Sports Drinks.**
- F. **Beverages in Glass Bottles.**

“**Added Sweetener**” is understood to mean any additive that enhances the sweetness of a beverage including but not limited to the following: sugar (raw, refined, unrefined, cane, brown, turbinado, white); invert sugar; dextrin; sucrose; honey; corn syrup; high fructose corn syrup; aspartame; stevia; saccharin; sucralose; cane juice; and molasses.

Exhibit B

Permitted Beverage Products List

**[NOTE: THIS EXHIBIT HAS BEEN
INTENTIONALLY LEFT BLANK-
CONTENT WILL BE
DETERMINED BY THE PARTIES]**

Exhibit D

Number and Location of Vending Machines

**[NOTE: THIS EXHIBIT HAS BEEN
INTENTIONALLY LEFT BLANK-
CONTENT WILL BE
DETERMINED BY THE PARTIES]**

Exhibit E

**Approved Financial
Report Format**

**[NOTE: THIS EXHIBIT HAS BEEN
INTENTIONALLY LEFT BLANK-
CONTENT WILL BE
DETERMINED BY THE PARTIES]**