

EQUIPMENT LEASE AND OPERATION AGREEMENT

THIS EQUIPMENT LEASE AND OPERATION AGREEMENT (this "Lease" or "Agreement") is made effective as of the ____ day of _____, 2017 (the "Effective Date") by and between **CITY OF FOLEY, ALABAMA**, an Alabama municipal corporation ("City"), and **VALLEY ICE, LLC**, an Alabama limited liability company ("Operator").

WHEREAS, the City obtained ice making and ice storing equipment; and

WHEREAS, the Operator is in the ice making, storing, and sales business; and

WHEREAS, the City has determined that the Operator is better suited to perform the services required hereunder than would be the City.

NOW, THEREFORE, FOR AND IN CONSIDERATION of the mutual covenants and benefits to be derived by the parties hereunder, the City and Operator agree as follows:

1. Agreement to Lease. The City does hereby agree to lease and let unto the Operator the ice making, vending and related equipment described on **Exhibit "A"** hereto (the "Equipment"). The City makes no warranty or representation concerning the quality, suitability, or fitness for a particular purpose of the Equipment.

2. Term of Lease. The term of this Agreement will commence on the Effective Date and continue for a period of one (1) year thereafter, unless sooner terminated as provided herein. The term of this Agreement shall automatically renew for additional terms of twelve (12) months each, which renewal terms shall commence on the date following the expiration of the previous term, unless either party provides the other notice of intention not to renew not less than ninety (90) days prior to the expiration of the term then in effect.

3. Rental. On a monthly basis, the Operator shall pay to the City an amount equal to Gross Receipts (as defined below) in excess of sixty-five cents (\$.65) per 10 pound bag of ice sold, in payment of rent for the Equipment and rights granted herein. For purposes of this Agreement, "Gross Receipts" means the total amount received or realized by, or accruing to, the Operator from all sales for cash or credit, of ice made pursuant to or as a result of the rights granted under this Agreement, including all sales to the City or to third parties of ice that are made or generated utilizing the Equipment.

Operator's monthly payment shall be due and payable by the twentieth (20th) day of each calendar month based on Gross Receipts in each previous month. Operator's payment and monthly report shall be addressed to:

City of Foley
Attn: Revenue Department
P.O. Box 1750
Foley, AL 36536

4. Operator's Requirements. The Operator shall provide the following services and shall adhere to the following requirements as part of the consideration to the City:

(a) Scope of Services and Pricing.

(i) Operator will maintain an adequate supply of 10 pound bags of ice in each Merchandiser that is included in the Equipment. The price charged for ice sold from each Merchandiser will be determined by the City.

(ii) Operator will deliver ice in 10 pound bags to the City upon request and on a priority basis utilizing the Equipment at a cost to the City of sixty-five cents (\$.65) per 10 pound bag.

(iii) The City retains the right to utilize the City's personnel to bag ice from the Equipment, in which event the ice will be at no charge to the City.

(iv) Operator may sell ice generated by the Equipment to third parties provided that provisions are made by Operator to maintain an adequate supply of ice in the Merchandisers and to supply the City's ice needs utilizing the Equipment on a priority basis and ahead of any obligations to supply ice to third parties. The price charged for ice sold to third parties shall set by the Operator at a fair market rate.

(v) Operator shall not reduce the amount due to the City as a result of: (a) any error in accounting or cash handling by Operator; (b) any losses after payment to the City resulting from bad checks received from customers or purchasers, or from dishonored credit, charge, or debit card payments; (c) any other dishonored payment by any customer or purchaser; or (d) any arrangement for a rebate or other form of credit or benefit given or allowed to any customer or purchaser.

(vi) Operator does not have any rights of exclusivity with respect to the sale of ice to the City. Operator acknowledges that other vendors may be permitted to sell or provide ice to the City.

(b) General Requirements.

(i) Utilities. The costs of utilities to the Equipment will be paid by the City.

(ii) Personnel/Staffing. All operators of the Equipment and all other personnel providing services pursuant to this Agreement shall be employees of Operator. Operator shall not allow any independent contractor or other non-employee of Operator to

operate the Equipment or to otherwise provide services pursuant to this Agreement, without the prior written consent of the City and subject to compliance by such non-employee with all insurance requirements under this Agreement.

(iii) Responsibility for Personnel Qualifications, Safety and Training. Operator shall be solely responsible for the proper qualifications of all its employee/operators of the Equipment and for the safe and proper operation of the Equipment. Operator shall cause all its personnel to operate and use the Equipment in compliance with all manufacturer operator manuals, warnings and directions for use.

(iv) Signage. No signs, decals or other inscriptions shall be placed upon the Equipment without the express written consent of the City.

(v) Inventory. Operator shall maintain sufficient inventory of ice in each Merchandiser.

(vi) Maintenance and Repairs; Regular Inspections. Operator shall be responsible at its expense for maintaining and repairing the Equipment in good condition and working order during the term of this Agreement. Operator shall regularly inspect and check the Equipment for any damage or required maintenance.

(vii) Operating Costs. Operator shall be solely responsible for all operating costs in connection with its lease and operation of the Equipment (excepting utilities), including labor for its operations.

(viii) Alterations and Modifications Prohibited. Operator shall make no alteration or modification to any safety related component of the Equipment or which may otherwise result in any form of safety hazard or risk of injury. Any other alteration or modification may be made only with the prior written consent of the City.

(ix) Location of Equipment. All Equipment (excluding Merchandisers) shall remain in its current location at Forland Family Market Store during the term of this Agreement unless otherwise determined by the City and subject to a mutually acceptable license or sublease agreement to be entered among Operator, Alescias Forland/Loxley Farm Market, Inc. and the Coastal Alabama Farmers' & Fishermen's Market, Inc. The Merchandisers shall remain in their current locations at the Coastal Alabama Farmers & Fishermans Market and Foley Sportsplex unless otherwise determined by the City.

(x) Improvements to Equipment. If Operator desires to make capital improvements to the Equipment, Operator must present its plan in writing to the City prior to any work being done. If approved in writing, improvements will be made at the Operator's sole expense.

(xi) Protection of Equipment. Operator shall be solely responsible for the security and storage of the Equipment. Operator shall not permit or cause any act or deed to be performed or any practice to be adopted or followed in or about the Equipment which shall cause

or be likely to cause injury or damage to person or property. Operator shall keep the Equipment and adjacent area in a clean and orderly condition.

(c) Compliance with Law.

(i) Operator shall at all times (a) maintain all required business and other operating licenses, permits or other authorizations required in connection with the operation of Operator's business, and (b) observe and comply with all Federal, State, County, City and other local laws, rules, regulations, requirements, ordinances, standards and policies, as now existing or hereafter adopted or amended, including, without limitation, all laws and regulations governing nondiscrimination, protection of the environment and protection of public health and safety (collectively, "Applicable Laws").

(ii) Operator shall give the City immediate written notice of any violation of Applicable Laws by the Operator, including its employees, agents or contractors, and at its sole cost and expense, must promptly rectify any such violation.

(d) Reports and Record Keeping.

(i) Annual Reports. The Operator shall provide the following documentation to the City on an annual basis:

Record keeping policies and procedures applicable to service and sales from Merchandisers and sales to third parties
Optional - Recommendations for Next Year

(ii) Monthly Reports. The Operator shall provide a monthly report to the City in such form and with such supporting documentation as the City may require by the 20th day of each month, which reports will include, but are not limited to, (1) a Gross Receipts/Revenue Report for the preceding month transmitted with City Revenue Remittance Form for each rental payment, (2) number of bags of ice sold and total receipts for each Merchandiser, (3) number of bags of ice sold to third parties (excluding the Merchandiser sales), (4) number of bags of ice sold to the City, and (5) net amount of Gross Receipts retained by Operator (e.g. sixty-five cents (\$.65) per 10 pound bag of ice).

(iii) Record Keeping. During the term of this Agreement and for a minimum period of three (3) years thereafter, Operator shall maintain complete records of its sales and operations pursuant to this Agreement.

5. Insurance.

(a) Property Coverage for Equipment. The City will procure standard property insurance coverage for the Equipment for its estimated value. Operator shall reimburse the City for the cost of this coverage within ten (10) days after request for reimbursement. In the event of any damage to the Equipment during the term of this Agreement, Operator shall reimburse the

City for any out of pocket expenses associated with such damage, including any insurance deductible.

(b) Liability Insurance. Operator shall at all times during the term of this Agreement maintain in full force and effect, at its expense, the following insurance: (i) a comprehensive general liability and automobile liability insurance in the amount of \$1,000,000 per person and \$2,000,000 per occurrence; and (ii) worker's compensation and employers' liability coverage as required by the laws of the State of Alabama. Operator's insurance policies shall name the City as an additional insured and shall otherwise be in a form acceptable to the City. Operator shall furnish the City with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements set forth above. All certificates shall provide for thirty (30) days' written notice to the City prior to the cancellation (or material change) of any insurance referred to therein. All such insurance policies shall be endorsed to prevent rights of subrogation against the City. Operator shall provide complete copies of all insurance policies required above within ten (10) days of the City's written request for said copies. All policies maintained by Operator will be written as primary policies, not contributing with and not supplemental to the coverage that the City may carry.

6. Indemnity. Operator shall indemnify, defend and hold harmless the City, its representatives, officers, agents, boards, departments and employees from and against any and all claims, costs, losses, demands, actions or causes of action, liability, damages and expenses, including reasonable attorney's fees and other costs and expenses of litigation, arising out of or resulting from Operator's provision of services pursuant to this Agreement, Operator's use or operation of the Equipment, or any other act or omission of Operator or its personnel, whether or not caused by or contributed to, or alleged to have been caused by or contributed to, by the active, passive, affirmative, sole or concurrent negligence or breach of any statutory duty, whether non-delegable or otherwise, on the part of the City. This indemnity shall include, but not be limited to, claims or liabilities asserted against the City based upon negligence, strict liability or other liability or by operation of law to any third party, and all costs, attorneys' fees, expenses, and liabilities incurred by the City in the defense of any such claim (including appeals). Operator shall defend any such claim at Operator's expense by counsel approved or selected by the City. Indemnification provided in this Agreement shall further apply to and include claims or actions brought by or on behalf of employees of Operator, and Operator hereby expressly waives any immunity to which Operator may otherwise be entitled under any industrial or workers' compensation laws. Operator duties of indemnification under this Agreement shall survive the expiration or termination of this Agreement.

7. Taxes. Operator shall be solely responsible for all local, state and federal taxes and assessments arising from its lease or use of the Equipment or otherwise arising from Operator's operations and business activities pursuant to this Agreement, including, but not limited to, state and federal payroll taxes and other required withholdings with respect to Operator's employees. Operator shall further be solely responsible for collection and remittance of all applicable sales tax arising from sales of ice generated by the Equipment, including all third party sales, merchandiser sales and any other sales subject to sales tax. Operator shall indemnify and hold the City harmless from all such taxes or assessments.

8. Event of Default. Upon the happening of any one or more of the events as expressed below in (a) to (g) inclusive (which said events shall separately and severally constitute a default hereunder), the City shall have the right at its option of terminating this Agreement (in addition to all other rights and remedies given hereunder or by law or equity):

(a) In the event Operator fails to supply ice in accordance with the requirements of this Agreement unless such failure is due to force majeure under Section 18;

(b) In the event Operator fails to submit rental fees in accordance with the terms of this Agreement;

(c) In the event Operator violates any Applicable Laws with respect to Operator's operations hereunder;

(d) In the event Operator fails to comply with all insurance requirements herein contained;

(e) In the event Operator breaches any of the other terms, conditions or covenants on the part of Operator herein contained and does not cure such breach within ten (10) calendar days of written demand by the City; or if such breach is of such nature that it cannot be completely cured within such period, if Operator does not commence such curing within such ten (10) calendar days and does not thereafter proceed with reasonable diligence and in good faith to cure such breach;

(f) In the event a petition in bankruptcy or a petition under the Bankruptcy Act, or any amendment thereto, is filed by or against Operator and the same is not dismissed within sixty (60) calendar days of such petition, or Operator is adjudged a bankrupt; or

(g) In the event an assignment for the benefit of creditors is made by Operator, or in the event of the appointment of a receiver of Operator's property.

9. Delivery of Equipment upon Expiration or Termination. Operator shall deliver all Equipment, including any approved improvements made thereto, to the City within five (5) calendar days after the expiration or earlier termination of this Agreement, regardless of any dispute between the parties. All Equipment, together with any approved improvements thereof, shall be returned in clean condition and working order.

10. Assignment Prohibited. Operator shall not have the right to assign, sublease, delegate or otherwise transfer any interest or rights arising under this Agreement, in whole or in part, without the City's prior written consent. Any such attempted assignment, sublease, delegation, or transfer without the City's prior written approval shall be null and void. Operator shall not be entitled to encumber, and shall not attempt to encumber, the Equipment in any way.

11. Relationship of Parties. Nothing contained in this Agreement shall be deemed or construed as creating a joint venture, franchise, partnership or other such relationship between the City and Operator for any purposes, and neither party shall refer to itself as the authorized

representative of the other. Neither party is by virtue of this Agreement authorized as an agent, employee or legal representative of the other, and nothing contained herein shall be construed to create a relationship of agency between the City and Operator. Except as specifically set forth herein, neither party shall have power to control the activities and operations of the other, nor to bind or commit the other. The means and methods employed by Operator in connection with its activities shall be the sole responsibility of Operator, and the City shall not exercise any kind of control and does not have the right to exercise any kind of control over Operator, its agents and employees. All personnel utilized by Operator are and shall be deemed the employees of Operator and in no manner employees of the City. The Operator shall be responsible in full for any payment due its employees, including without limitation all wages, withholdings, worker's compensation or other benefits and costs.

12. Notice. Any and all notices required to be given by one party to the other hereunder, shall be given to the following addresses:

City of Foley:
407 E. Laurel Avenue
Foley, Alabama 36535

Operator:
Valley Ice, LLC

Except for any notices, demands, requests or other communications required under applicable law to be given in another manner, whenever the parties give or serve any notices, demands, requests or other communications with respect to this Agreement, each such notice, demand, request or other communication shall be in writing and shall be delivered personally, mailed by certified or registered mail or sent by a nationally recognized courier service such as Federal Express, and properly addressed in accordance with this paragraph and shall be deemed given upon receipt or refusal to accept. Any party may change its address for such notices by delivering or mailing to the other party hereto, as aforesaid, a notice of such change.

13. Waiver of Jury Trial. The City and Operator hereby waive, to the fullest extent permitted by applicable law, any right it may have to a trial by jury in respect of any action, suit, proceeding or counterclaim arising out of or in connection with this Agreement.

14. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto and it is understood and agreed that all undertakings, negotiations, representations, promises, inducements and agreements heretofore had between these parties are merged herein. No oral statement or prior written matter shall have any force or effect. This Agreement may not be changed or amended orally, but only by an agreement in writing signed by both parties.

15. Severability. If any term, covenant, condition or provision of this Agreement or the application thereof to any person or circumstance shall, at any time or to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or

provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term, covenant, condition and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

16. Construction; Captions. No presumption or burdens of proof shall be created in favor of or against the City or Operator with respect to the interpretation of any term or provision of this Agreement due to the fact that such term or provision was prepared by or on behalf of one of said parties. The captions in this Agreement are for convenience only and are not a part of this Agreement and do not in any way limit or amplify the terms and provisions of the Agreement.

17. Waiver. No requirement, obligation, remedy, term, condition or provision of this Agreement shall be deemed to have been waived unless so waived expressly in writing. The failure on the part of a party to exercise promptly any and all rights given hereunder shall not operate to forfeit any of the said rights nor be deemed a waiver of any rights or remedies so available to such party.

18. Force Majeure. Neither the City nor Operator shall be required to perform any term, condition, or covenant in this Agreement so long as such performance is delayed or prevented by force majeure, which shall mean acts of God, strikes, lockouts, material or labor restrictions by any governmental authority, civil riot, floods, and any other cause not reasonably within the control of City or Operator (excluding financial inability) and which by the exercise of due diligence the City or Operator is unable, wholly or in part to prevent or overcome.

19. Governing Law. The parties hereto agree that the laws of the State of Alabama shall be applied in resolving any interpretations, issues or disputes arising under this Agreement, and exclusive jurisdiction and venue for the resolution of any such interpretations, issues or disputes arising hereunder shall be in the Circuit Court of Baldwin County, Alabama.

[SIGNATURES COMMENCE ON THE NEXT PAGE]

IN WITNESS WHEREOF the undersigned have caused these presents to be executed as of the day and year first above written.

**CITY OF FOLEY, ALABAMA, an
Alabama municipal corporation**

By: _____
As its: _____
Date: _____

**VALLEY ICE LLC, an Alabama limited
liability company**

By: _____
As its: Managing Member
Date: _____

EXHIBIT "A"

(Equipment)

KM-2500SRH3	HOSHIZAKI ICE MAKER
URC-23F	REMOTE CONDENSER
R404A-35610	PRE-CHARGED LINE SET
H9320-52	WATER FILTRATION
2801	MANHARDT ICE DISPENSING BIN
HAM-125 C	HAMER 125 WIRE TIER – COMPLETE
16'X12" CONVEYOR	HYTROL 16'X12" INCLINE CONVEYOR
LR-5X9-AD-C	LEER TRANSPORT UNIT CRATED
85IBAS-VEND	(2) LEER ICE BREAKER VENDING MERCHANDISERS
VIN 7F3B1UJ10HR005172	2017 BYE-RITE UTILITY TRAILER (6'x10')