

FRISCO MARINA CONCESSIONAIRE AGREEMENT AND LICENSE

This Concessionaire Agreement and License (this "Agreement") is made and entered into this 23rd day of March 2021, by and between Sail the Summit, LLC, a Colorado limited liability company, ("Concessionaire") and the Town of Frisco, a Colorado home rule municipal corporation ("Frisco").

WHEREAS, the Frisco Bay Marina (the "Marina") is a facility proudly operated by Frisco pursuant to a special use permit (the "Permit") from the Dillon Reservoir Recreation Committee ("DRReC") and a lease (the "Denver Water Lease") from the City and County of Denver acting by and through its Board of Water Commissioners ("Denver Water"); and

WHEREAS, Frisco operates the Marina, including the provision of boat slips and launching, trailer storage, marketing, winterizing and winter storage, but wishes to contract out the provision of certain other services; and

WHEREAS, it is the goal of the Frisco Town Council to provide visitors and citizens with a quality experience in terms of courteous and friendly service associated with water-related activities;

WHEREAS, Concessionaire is a locally owned business providing sailboat rentals and boat tours based out of the Frisco Bay Marina on Dillon Reservoir.

NOW THEREFORE, in consideration of the mutual promises, covenants and agreements set forth below, Concessionaire and Frisco hereby agree as follows:

1. Sailboat Rental/Sailing Instruction and Tours. Concessionaire shall have the exclusive right to rent sailboats to the public at the Marina under the terms below ("Rental Operations"). Concessionaire shall also have the exclusive right to provide sailing instruction ("Instruction Services") and sailboat tours to the public ("Tour Operations") at the Marina under the terms below. Concessionaire's Rental Operations, Instruction Services, and Tour Operations shall be known collectively as its "Field Operations." Concessionaire shall also have the right to sell promotional products, including but not limited to ball caps, hats, and shirts with the Sail the Summit logo, at the Marina, provided, however, that the design of such promotional products shall have been previously approved by Frisco, which approval shall not be unreasonably withheld, conditioned, or delayed.

2. Service Standards. Concessionaire agrees that in conducting its Field Operations it shall adhere to the following standards of service adopted by the Frisco Town Council. Concessionaire shall:

(a) do nothing to jeopardize, and shall always act in compliance with, the Permit and the Denver Water Lease;

(b) operate in a professional manner and provide quality service with properly maintained equipment that complies with the inspection requirements applicable to all marine equipment;

(c) ensure that its Field Operations are conducted in a timely manner, including but not limited to being open during appropriate times for sailing, seven days a week during the term of this Agreement, and arriving promptly for any scheduled lessons and rentals.

(d) ensure that its employees provide courteous and friendly service to all patrons without regard to age, race, color, sex, sexual orientation, disability, religion or political affiliation;

(e) work cooperatively with and support Frisco and DRReC whenever appropriate with respect to mutually beneficial programs;

(f) maintain any portion of the Marina that it uses in accordance with Marina appearance standards, i.e., clean, tidy and free of debris, in order to project a professional image at all times and maintain all rental equipment and boats in properly functioning order. Any vessel not being utilized or any vessel that is disabled or inoperable during the Summer Season shall either be repaired within 15 days or removed from Marina property.

(g) abide by any parking restrictions at the Marina for concessionaire-owned vehicles and educate Concessionaire's customers on such parking restrictions for customer vehicles, to allow for the orderly flow of traffic throughout the Marina; and

(h) uphold and support applicable programs and policies of Frisco, including the 2018 Frisco Bay Marina and Waterfront Park Master Plan, while serving as a representative of Frisco.

(i) Work in a cooperative and supportive manner with other concessionaires who have contracted to conduct their operations at the Frisco Bay Marina.

These standards of service shall hereinafter be referred to as the "Service Standards."

3. License. For the term of this Agreement, that portion of the Marina provided by Frisco for use by Concessionaire in connection with its Field Operations (the "Marina Facilities") shall consist of such boat docks (or portions thereof) defined as:

Two (2) adjacent slips, separated by a finger if possible, on T Dock, to be determined by Marina General Manager;

Three (3) moorings, located as close to T Dock as reasonably possible;

Boat storage for 3 sailboats and one pontoon boat for the winter; and

Trailer storage for 4 trailers in the summer.

Frisco hereby grants to Concessionaire a license for access to and the use of the Marina Facilities for the purpose of conducting its Field Operations (the "License"). The Marina Facilities shall hereinafter be collectively referred to as the "License Area." Frisco hereby expressly reserves the right to make any use of its respective portions of the License Area that does not unreasonably interfere with the License. Concessionaire shall not use the License Area for any use or purpose other than as expressly provided herein.

Concessionaire agrees that availability of these Marina Facilities is dependent on weather conditions, water levels and the operating needs of the Marina. In the event these Marina Facilities are unavailable, the Town will make reasonable accommodations to provide alternate Marina Facilities for Concessionaire's Field Operations.

4. Term. The term of this Agreement shall be from May 1, 2021 through April 30, 2022. The term of this Agreement may be renewed upon approval of the Frisco Town Council in its sole and absolute discretion.

Concessionaire understands, acknowledges, and agrees that this Agreement does not create an interest or estate in Concessionaire's favor in the property. This Agreement merely grants to the Concessionaire the personal privilege to use the property in strict accordance with the terms of this Agreement.

5. Payments by Concessionaire.

(a) *Reporting requirements.*

(i) Before 5 p.m. on October 1st during the term of this Agreement, Concessionaire shall submit to Frisco's Finance Director a report of Concessionaire's gross revenues collected during the previous season from its Tour Operations and any retail sales allowed under this Agreement ("Gross Revenues Collected"). Concessionaire shall include with each report a signed statement affirming the completeness and accuracy of such report. Such statement may be prepared and certified to be true and correct by Concessionaire's bookkeeper; provided, however, that if the Finance Director has a reasonable objection to the use of Concessionaire's bookkeeper to prepare such statement, Concessionaire will engage an independent certified public accountant or other qualified person reasonably acceptable to the Finance Director to prepare and certify such statement.

The Finance Director shall have the right at any time upon 15 days' written notice to audit all of the books of account, bank statements, documents, records, returns, papers and files of Concessionaire relating to Gross Revenues Collected from operations at the Frisco Bay Marina. Concessionaire, on the 16th day after written notice of the request to audit, shall make copies of all such documents available for examination at the main offices of the Town of Frisco.

If Town determines after an audit that the Gross Revenues Collected for any reporting period as shown by Concessionaire's report(s) have been understated by more than three percent (3%), Concessionaire shall pay to Town the cost of such audit and the amount of any deficiency, plus interest at the rate of 1.5% per month on such amount from ten (10) days after the date of Concessionaire's receipt of invoice by Frisco until paid in full. The Town's right to perform such an audit shall expire three (3) years after Concessionaire's certified reports have been delivered to the Town.

If the audit conducted by the Finance Director shows that the Concessionaire's Gross Revenues Collected reports have been understated more than three percent (3%), Concessionaire shall have the right to have an independent audit conducted at its expense. Such audit shall be completed within thirty (30) days from the date Concessionaire is notified of the results of the Finance Director's audit. The Finance Director and the independent auditor shall attempt to reconcile any discrepancies between the two audits. If the Finance

Director and the independent auditor are unable to reconcile any such discrepancies, either party may enforce its right or remedies under this section by appropriate judicial action as provided by law.

Concessionaire expressly agrees that Finance Director may inspect any sales tax return or report and accompanying schedules and data which Concessionaire may file with Frisco pursuant to Frisco's Retail Sales Tax Ordinance, and Concessionaire waives any claim of confidentiality which it may have in connection therewith.

(b) *Operating fees.*

(i) Concessionaire shall pay 4% of all Gross Revenues Collected (the "Operating Fee") to Frisco. Concessionaire agrees to pay full price for all service work, Slips, Moorings, Dry Storage, and Winter Storage of equipment. Concessionaire agrees to pay DRReC directly all sums due and owing from time to time pursuant to any permit that may be issued by DRReC to Concessionaire.

(ii) On or before the 31st day of October, Concessionaire shall pay to Frisco the Operating Fee that accrued during the immediately previous operating season. Non-payment of the Operating Fee shall constitute a material breach of this Agreement for which Frisco may terminate this Agreement pursuant to Section 7 herein. Concessionaire's Specific Responsibilities. Concessionaire shall be responsible for the following:

(c) *Generally.* Concessionaire shall monitor its Field Operations, meet monthly with Frisco staff to assure continued coordination of activities, and work toward the accomplishment of the Service Standards. Concessionaire shall report solely to the Marina General Manager or, in his or her absence, his or her designee. Concessionaire shall designate a person to serve as the primary contact with Frisco. Until such designation is changed in writing, Mark Schneider shall be the contact person.

(d) *Inventory.* Prior to the commencement of Concessionaire's Field Operations, Concessionaire shall provide a complete inventory of its vessels.

(e) *Safety.*

(i) Concessionaire shall ensure that its vessels are equipped with all safety equipment required by the U.S. Coast Guard and Colorado Parks and Wildlife, as stated in Colorado Boating Statutes and Regulations - C.R.S. § 33-13-106 (3) and(4) Equipment requirements and shall make known to all persons on the vessel the location of such equipment prior to leaving the dock.

(ii) Concessionaire shall screen and qualify all customers to ensure they are qualified to sail or to otherwise operate any rental equipment.

(iii) Concessionaire shall provide to all customers instructions for handling emergency situations and shall require all customers and employees to comply with [Colorado Boating Statutes and Regulations - C.R.S. § 33-13-106 \(4.5\) Equipment requirements](#), while on the water utilizing services or equipment provided by Concessionaire.

(iv) Concessionaire shall train its employees and shall hold safety meetings to ensure that its employees are qualified in emergency protocol and are able to conduct rescues.

(v) Concessionaire shall provide any additional safety measures reasonably required by Frisco from time to time.

(f) *Daily operation.* Concessionaire shall conduct its Field Operations daily during the Dillon Reservoir's summer boating and water recreation season, generally from May through September 9:00am – 6:00pm. The length of the daily services may be longer or shorter depending on weather conditions and time of year, at Concessionaire's discretion, and reservations may be taken at various hours outside these daily hours of operation. Any deviations from these hours of daily operation, however, must be communicated to Marina management prior to 9:00 a.m. on the applicable day.

(g) *Permits.* Concessionaire is responsible for obtaining all permits required by DRReC. Concessionaire shall provide proof of such permitting to Frisco's Finance Director prior to commencing operations for the Term of this Contract.

(h) *Office equipment.* Concessionaire shall provide all office equipment necessary to effectively provide its Field Operations and retail sales, including but not limited to, register, credit card system and cell phones.

(i) *Employees.* Concessionaire shall provide such employees for the Field Operations as it deems necessary. All employee benefits, including FICA and worker's compensation insurance, shall be provided and paid for by Concessionaire.

(i) The Concessionaire hereby certifies that at the time of executing this Agreement it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement and that it will participate in either the E-Verify Program or Department Program as those terms are defined in C.R.S. § 8-17.5-101(3.7) and (3.3), respectively, (the "Programs") in order to confirm the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement.

(ii) The Concessionaire shall not knowingly employ or contract with an illegal alien to perform the work under this Agreement or enter into a contract with a subcontractor that fails to certify to the Concessionaire that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement.

(iii) The Concessionaire has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under the Agreement through participation in either the E-Verify Program or the Department Program.

(iv) The Concessionaire is prohibited from using the Programs procedures to undertake pre-employment screening of job applicants while this Agreement is being performed.

(v) If the Concessionaire obtains actual knowledge that a subcontractor performing the work under this Agreement knowingly employs or contracts with an illegal alien, the Concessionaire shall: (a) notify the subcontractor and Frisco within three (3) days that the Concessionaire has actual knowledge that the subcontractor is knowingly employing or contracting with an illegal alien; and (b) terminate the subcontract with the subcontractor if within

three (3) days of receiving the notice, required pursuant to C.R.S. § 8-17.5-102(2)(III)(A), the subcontractor does not stop employing or contracting with the illegal alien; except that the Concessionaire shall not terminate the contract with the subcontractor if during such three (3) days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

(vi) The Concessionaire shall comply with any reasonable request by the Colorado Department of Labor and Employment (the "Department") made in the course of an investigation that the Department is undertaking pursuant to the authority established in C.R.S. § 8-17.5-102(5).

(vii) Any violation of the provisions of this paragraph shall be deemed to be a material breach of this Agreement and Frisco may immediately terminate this Agreement for cause based on such violation. If this Agreement is so terminated, the Concessionaire shall be liable for actual and consequential damages to Frisco pursuant to C.R.S. § 8-17.5-102(3) and Frisco shall notify the office of the Secretary of State of such violation/termination.

(j) *Insurance.* During the term of this Agreement, Concessionaire shall procure and maintain, at its own expense, the following policy or policies of insurance. Concessionaire shall provide proof of insurance to Frisco's Finance Director prior to commencing operations for the Term of this Contract.

(i) Commercial General Liability insurance with minimum combined single limits of one million dollars (\$1,000,000.00) for bodily injury or death and one hundred thousand dollars (\$100,000.00) for property damage, each occurrence, and one million dollars (\$1,000,000.00) aggregate. The policy shall be applicable to all premises and operations of Concessionaire. The policy shall include coverage for bodily injury, broad form property damage, personal injury (including coverage for contractual and employee acts), blanket contractual, independent contractors, products and completed operations. The policy shall name Frisco, its employees and agents as additional insureds and shall include waiver of subrogation and cross-liability endorsement provisions.

(ii) Workers' Compensation insurance to cover obligations imposed by applicable laws for any employee engaged in the performance of work under this Agreement, and Employers' Liability insurance with minimum limits of six hundred thousand dollars (\$600,000) disease – policy limit, and six hundred thousand dollars (\$600,000) disease – each employee.

(iii) Comprehensive Automobile Liability insurance with minimum combined single limits for bodily injury and property damage of not less than one million dollars (\$1,000,000) each occurrence and one million dollars (\$1,000,000) aggregate with respect to each of Concessionaire's owned, hired and non-owned vehicles assigned to or used in performance of services under this Agreement.

(iv) Every policy required under this Section 6(h) shall be primary insurance, and any insurance carried by Frisco, its officers or its employees, or carried by or provided through any insurance pool of Frisco, shall be excess and not contributory insurance to that provided by Concessionaire. Concessionaire shall be solely responsible for any deductible

losses under any policy required above. Any insured policy required under this Agreement shall be written by a responsible company.

(v) Prior to commencement of this Agreement, Concessionaire shall provide Frisco with a certificate of insurance completed by Concessionaire's insurer as evidence that policies providing the required coverage, conditions and minimum limits are in full force and effect. The certificate shall identify this Agreement and shall provide that the coverage afforded under the policies shall not be canceled, terminated, or materially changed until at least thirty (30) days prior written notice has been given to Frisco.

(vi) Concessionaire shall not be relieved of any liability, claims, demands or other obligations assumed pursuant to this Section 6(h) by reason of Concessionaire's failure to procure or maintain insurance, or by reason of its failure to procure or maintain insurance in sufficient amount, duration, or type. Failure on the part of Concessionaire to procure or maintain policies providing the required coverage, conditions and minimum limits shall constitute a material breach of contract upon which Frisco may immediately terminate this Agreement.

(vii) Concessionaire will notify Frisco of any accident, claim or potential claim involving Concessionaire and/or its Field Operations, within twenty-four (24) hours.

(k) *Marketing.* Concessionaire will share its client list (names, phone numbers and email addresses) with Frisco upon request. Concessionaire will place selected ads in regional publications. Concessionaire shall offer information on services at the Marina that are beyond the scope of Concessionaire's Field Operations and shall direct persons making inquiries about such services to available Marina staff.

(l) *Signage.* Concessionaire must provide on-site signage for its Field Operations at the Marina, which signage shall be subject to Frisco's sign code and Frisco's prior approval as operator of the marina, which approval shall not be unreasonably withheld, conditioned, or delayed.

6. Frisco's Specific Responsibilities. Frisco shall provide the following services or property to the Concessionaire:

(a) *Marketing.* Frisco agrees to list Concessionaire as the exclusive provider of sailboat rental, sailing instruction, and boat touring operations at the Marina. In addition, Frisco will maintain links on Frisco's Internet site to Concessionaire's Internet site. Frisco shall review and shall have the right to approve all advertising and promotional events, races and special programs that Concessionaire wishes to conduct, which approval shall not be unreasonably withheld, conditioned, or delayed.

(b) *Inquiries.* Any inquiries regarding Concessionaire received by Frisco employees via telephone or email shall be directed to Concessionaire (970-485-3911). Anyone making in-person inquiries regarding Concessionaire at a Frisco office shall be directed to Concessionaire (970-485-3911).

(c) *Storage.* For any vessels not being utilized during the Summer Season, Concessionaire shall pay full price for dry storage is stored at the Marina.

(d) *Service Work.* Frisco shall provide Concessionaire assistance for launching and retrieval of its sailboats, or any other service work, at normal published rates for such services. Concessionaire must schedule, in advance, such service with the Marina office or the Marina Service Manager.

7. Termination.

(a) Either party may terminate this Agreement by written notice to the other in the event that the other party is in breach of any of its obligations hereunder. A party shall be deemed to be in breach if it fails to remedy any default or failure to perform hereunder within fifteen (15) days after written notice from the other party of such default or failure, or in the event such default or failure is non-monetary and cannot be remedied within fifteen (15) days, if the party in breach fails to initiate such cure within fifteen (15) days after notice from the other party or fails diligently to pursue such cure thereafter.

(b) Without limiting Frisco's right to declare and give notice of a default or failure to perform by Concessionaire based on Frisco's reasonable determination that Concessionaire is in default or has failed to perform its obligations under this Agreement, including but not limited to, complying with all of the Service Standards and paying fees in a timely manner, Concessionaire shall be deemed to be in breach if Frisco has received three or more bona fide written complaints, each identifying the complainant, within any twelve month period concerning a similar default or failure to perform by Concessionaire. In the event of a breach based upon Frisco's receipt of three or more such written complaints as described herein, Concessionaire shall be deemed to be in breach without the need for Frisco to provide written notice of a default or failure to perform, provided that Frisco has provided Concessionaire with a copy of each of such written complaint within seven days of Frisco's receipt thereof. After receipt of the third such written complaint, Frisco may terminate this Agreement, provided that Concessionaire shall first be given ten (10) days in which to submit written rebuttal evidence that one or more such complaints were not bona fide or were not well-founded, to which evidence Frisco will give due and fair consideration before determining to terminate this Agreement.

(c) The foregoing notwithstanding, this Agreement shall terminate at such time as the Permit is terminated by DRReC or the Denver Water Lease is terminated by Denver Water and the terminated Permit or Denver Water Lease is not reissued or renewed for a succeeding period on terms substantially similar to the existing terms of the Permit and the Denver Water Lease.

(d) Nothing herein shall constitute a multiple fiscal year obligation pursuant to Colorado Constitution Article X, Section 20.

8. Remedies. Any of the foregoing remedies shall not preclude the pursuit of any other remedies herein provided or any other remedies provided by law, nor shall any remedy constitute a forfeiture or waiver of any fees owed to Frisco or to any damages occurring to Frisco by reason of the violation of any of the terms or provisions herein contained.

9. Indemnification.

(a) Concessionaire agrees to indemnify and hold harmless Frisco, its officers, employees and insurers from and against all liability, claims and demands, on account of injury,

loss or damage, including without limitation claims arising from bodily injury, or any other loss of any kind whatsoever, which arise out of or are in any manner connected with this Agreement, if such injury, loss or damage is caused in whole or in part by, or is claimed to be caused in whole or in part by, the act, omission, error, mistake, negligence, or other fault of the Concessionaire, or of any subcontractor of the Concessionaire, or any officer, employee, representative, or agent of the Concessionaire or of any subcontractor of the Concessionaire, or which arise out of any workers' compensation claim of any employee of the Concessionaire or of any employee of any subcontractor of the Concessionaire. The Concessionaire agrees to investigate, handle, respond to and provide defense for and defend against, any such liability claims or demands at the sole expense of Concessionaire or, at the option of Frisco, agrees to pay for, or reimburse Frisco for, the reasonable defense costs incurred by Frisco in connection with any such liability, claims or demands. Concessionaire also agrees to bear all other costs and expenses related thereto, including court costs and reasonable attorney fees, whether or not any such liability, claims or demands alleged are groundless, false or fraudulent. The obligations of Concessionaire shall not extend to any injury, loss or damage which is cause solely by the act, omission or other fault of Frisco, its officers or its employees.

(b) The parties hereto understand and agree that Frisco is relying on, and does not waive or intend to waive by any provision of this Agreement, the monetary limitations (presently \$150,000 per person and \$600,000 per occurrence) or any other rights, immunities and protections provided by the Colorado Governmental Immunity Act, §§ 24-10-101 et seq., C.R.S., as from time to time amended, or otherwise available to Frisco, its officers, or its employees.

10. Assignment. Concessionaire shall not voluntarily, by operation of law or otherwise, assign, encumber or otherwise transfer its rights under this Agreement or any interest herein without the prior written consent of Frisco in each instance. Frisco may withhold such consent in its sole and absolute discretion. Any transfer without Frisco's prior written consent shall constitute a default under this Agreement and shall be void and shall confer no rights upon any third party. Without limiting the generality of the foregoing, if Concessionaire is not a natural person, any change in the parties controlling Concessionaire on the date hereof, whether by sale of stock or other ownership interest, or otherwise, and any merger, dissolution, consolidation or other reorganization of Concessionaire, shall be deemed a transfer. Every assignment of this Agreement to which Frisco consents shall be by an instrument in writing pursuant to which the assignee expressly agrees for the benefit of Frisco to assume, perform and observe all of the Concessionaire's obligations under this Agreement. The consent by Frisco to a transfer shall not relieve Concessionaire from primary liability hereunder (which shall be joint and several with any assignees or other transferees) or from the obligation to obtain the express consent in writing of Frisco to any further transfer.

11. Notice. Whenever a provision is made in this Agreement for notice of any kind, such notice shall be in writing and signed by or on behalf of the party giving the same, and it shall be deemed sufficient notice if personally delivered to the other party or if sent by certified mail, return receipt requested, postage prepaid, to the addresses set forth below for the parties, or to such other address as either party may furnish by notice.

FRISCO

Town of Frisco
P.O. Box 4100
Frisco, CO 80443
Attn: Finance Director

CONCESSIONAIRE

Sail the Summit
P.O. Box 1058
Dillon, CO 80443
Attn: Mark Schneider

12. Entire Agreement. Except as otherwise expressly provided herein, this Agreement sets forth the entire agreement of the parties and supersedes all prior negotiations and understandings.

13. No Third-Party Beneficiary. No term or provision of this Agreement is intended to be, nor shall any such term or provision be construed to be, for the benefit of any person, firm, corporation or other entity not a party hereto, and no such other person, firm, corporation or entity shall have any right or cause of action hereunder.

14. Amendments. This Agreement may only be amended, supplemented or modified in a written document signed by both parties.

15. Colorado Law. This Agreement is to be governed by the laws of the State of Colorado.

12. Counterparts. This Agreement may be executed in two or more counterparts, using manual or facsimile signature, each of which shall be deemed an original and all of which together shall constitute one and the same document.

17. Relationship of Parties. Frisco and Concessionaire agree that nothing in this Agreement is intended, nor shall be deemed, held or construed as creating any partnership, joint venture, employer/employee or other relationship between them other than that of Frisco and Concessionaire as its independent contractor. Concessionaire shall at all times control the means and manner by which Concessionaire performs the work under this Agreement, subject to Frisco's right to monitor, evaluate and improve such work.

[THE NEXT PAGE IS THE SIGNATURE PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

TOWN OF FRISCO, a Colorado municipality,

CONCESSIONAIRE,
Sail the Summit LLC

By: _____
Hunter Mortensen, Mayor

By: _____
Mark Schneider, Manager

Attest:

Deborah Wohlmuth, Town Clerk

