

METROPOLITAN EXPOSITION-RECREATION COMMISSION

Resolution No. 94-9

Authorizing the General Manager to execute a Broadway Series Agreement with Dan Bean Presents, Inc.

**The Metropolitan Exposition-Recreation Commission finds:**

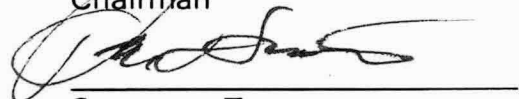
1. That recent experience with "Phantom of the Opera" and other musical theatre productions demonstrates audience support for touring presentations of top quality Broadway dramatic or musical attractions, and shows such events to produce significant earned revenue for PCPA;
2. That a subscription series would provide a regular schedule of attractions for interested audiences, along with a framework of scheduling and marketing which makes presentation of such costly touring shows financially viable;
3. That the presenter has the experience, reputation and financial resources necessary to produce a Broadway Series in this market;
4. That the Commission has the authority to enter into such an agreement through its General Manager;

**BE IT THEREFORE RESOLVED** that the General Manager is authorized to negotiate and contract with Dan Bean Presents, Inc., for a Broadway Series Agreement on behalf of the Commission for the Portland Center for the Performing Arts.

Passed by the Commission on March 15, 1994.



Chairman



Secretary-Treasurer

APPROVED AS TO FORM:

Daniel B. Cooper, General Counsel

By: 

Mark B. Williams  
Senior Assistant Counsel

## BROADWAY SERIES AGREEMENT

This Agreement is made and entered into this 15<sup>th</sup> day of MARCH, 1994, by and between the Metropolitan Exposition-Recreation Commission ("Commission," "Metro ERC," or "MERC") and Dan Bean Presents, Inc. ("Presenter"), collectively known as, "the Parties."

### INDEX

	RECITALS .....	2
1.	DEFINITIONS .....	2
2.	ENGAGEMENT .....	4
3.	RELATIONSHIP OF THE PARTIES .....	4
4.	TERM OF THE AGREEMENT .....	4
5.	PRESENTER PROMOTION RIGHTS AND FINANCIAL ARRANGEMENTS ..	5
6.	DUTIES OF THE PRESENTER .....	7
7.	RESPONSIBILITIES OF THE COMMISSION .....	8
8.	POWERS RESERVED TO THE COMMISSION .....	8
9.	ACCOUNTING .....	9
10.	INSURANCE, INDEMNIFICATION, AND WAIVER OF SUBROGATION ....	9
11.	TAXES AND FEES .....	11
12.	DEFACEMENT OF FACILITY .....	11
13.	NON-DISCRIMINATION .....	11
14.	IMPOSSIBILITY .....	11
15.	NON-EXCLUSIVE USE .....	12
16.	DEFAULT BY PRESENTER AND COMMISSION REMEDIES .....	12
17.	ASSIGNMENT .....	13
18.	HAZARDOUS SUBSTANCES .....	13
19.	STANDARD PCPA PERMIT .....	14
20.	TERMS AND CONDITIONS .....	14
21.	ACTIONS AND LAWSUITS .....	14
22.	SEVERABILITY .....	14
23.	WAIVER .....	15
24.	ATTORNEYS' FEES .....	15
25.	DELIVERY OF NOTICES .....	15
26.	MISCELLANEOUS .....	16

**WITNESSETH:**

**RECITALS**

1. The Commission is a subdivision of Metro, a municipal corporation.
2. Presenter is an Oregon corporation.
3. Presenter wishes to present a subscription season of Broadway Shows at the Portland Center for the Performing Arts (PCPA), one of the Commission's facilities.
4. Commission wishes to present quality entertainment to the residents of the Metro region, and wishes to secure successful Broadway productions at the PCPA, in order to defray ongoing budget deficits at the PCPA.
5. Presenter represents to Commission that it possesses the necessary capital, experience, skills, contacts, and expertise to present a subscription season of high quality Broadway Shows at the PCPA that will result in quality entertainment and a desirable financial arrangement for Commission.

NOW, THEREFORE, in consideration of the mutual covenants of the Parties hereto, and upon the express terms and conditions hereinafter set forth, it is agreed by and between them as follows:

1.

**DEFINITIONS**

The following terms are defined as follows:

a. "Broadway Show" shall mean any top quality legitimate touring dramatic or dramatic musical attraction, with or without a story line, of professional Broadway caliber. "Broadway Show" shall not include any presentations by Resident Companies of the PCPA.

b. "Commission," "Metro ERC," or "MERC," shall mean the Metropolitan Exposition-Recreation Commission, a subdivision of Metro, a municipal corporation organized under the 1992 Metro Charter.

c. "Director" or "PCPA" director shall mean the individual responsible for the overall day-to-day management of the Portland Center for the Performing Arts.

d. "General Manager" shall mean the chief executive officer responsible for the overall day-to-day management of the Commission's facilities, as well as any individual to whom the General Manager has delegated any responsibilities.

e. "PCPA" shall mean the Portland Center for the Performing Arts, in Portland, Oregon.

f. "Presenter" shall mean Dan Bean Presents, Inc., the entity responsible for making all arrangements concerning the promoting of a Broadway Show, including assuming any related financial risks.

g. "Resident Companies" shall mean nonprofit groups which have achieved resident company status pursuant to applicable Metro ERC policies.

h. "Single Tickets" shall mean tickets to a single performance, and not an entire season of shows.

i. "Subscription Season" shall mean a minimum of five, one-week, eight-show performance presentations of Broadway Shows for which tickets can be purchased at the same time, for the same seats for one performance of each presentation by a subscriber. It is understood between the Parties that, during the initial year of this Agreement, the subscription series may consist of less than five, one-week, eight-show performance presentations. All other requirements of this Agreement shall nevertheless apply in full force and effect during the initial year.

j. "Tour Merchandise" shall mean the official items sold by the tour to the ticket-buyers at each show. These items include but are not limited to t-shirts, sweatshirts, programs, pins, buttons, hats, etc. "Tour Merchandise" does not include "concessions and food service."

k. "User Fee" shall mean a charge levied on each ticket sold to spectator seated events located in the Portland Center for the Performing Arts. The User Fee shall be retained by the Commission. In no event shall the User Fee be considered rent paid by the Presenter. The User Fee shall not apply to unsold or complimentary tickets. The User Fee shall be included as part of the total ticket price printed on the ticket. Current Commission Resolutions impose the User Fee on all paid admissions as follows:

Tickets priced \$10.01 and under	\$ .50 User Fee
Tickets priced \$10.01 to \$22.00	\$1.00 User Fee
Tickets priced \$22.01 and above	\$1.50 User Fee

l. "Year," "Fiscal Year," or "Accounting Year," shall mean the period commencing July 1 of each year and ending June 30 of the following year.

2.

### ENGAGEMENT

Subject to the terms of this Agreement and the direction of the Commission's General Manager or such other Commission personnel as he/she may designate, the Presenter shall promote and present a Broadway Show Subscription Series at the PCPA. This engagement is further subject to the relevant terms and conditions of any existing and subsequent use agreements between the Commission and Licensees, Users, or Permittees authorized to promote, conduct events at, or otherwise use the PCPA.

3.

### RELATIONSHIP OF THE PARTIES

The Commission and the Presenter have entered into this Agreement for the purpose of establishing an independent contractor relationship between the Commission and the Presenter. This Agreement is not, nor should it be construed as, a lease or an agreement in the nature of a lease. In the event that any governmental authority of competent jurisdiction determines that Presenter has a leasehold interest in any of Commission's facilities, Presenter shall be responsible for payment of any property or other taxes which may result. No covenant of quiet enjoyment shall be implied in this Agreement. Any right of use conferred on Presenter shall not be exclusive. It is further understood and agreed by and between the Parties that nothing herein shall constitute or be construed to be an employment, partnership, joint venture, or joint employer relationship between the Commission, its successors or assigns on the one part, and the Presenter, its successors or assigns on the other part. It is further agreed that the Presenter will provide its own Workers' Compensation insurance or self-insurance program as required or permitted by Oregon law. The Presenter shall, subject to the terms and provisions of this Agreement, have complete and independent control and discretion over the operation of the services contemplated by this Agreement.

4.

### TERM OF THE AGREEMENT

The term of this Agreement shall be from the date of execution until June 30, 1997, unless sooner terminated by the mutual agreement of the Parties or as provided for herein.

The Commission shall have the option at the end of the initial term of this Agreement to extend this Agreement for two additional one-year terms, based on the same conditions as set out in the original Agreement. The Commission will give one year's written notice to the Presenter prior to the expiration of the original Agreement or renewal term in order to exercise either renewal option.

**PRESENTER PROMOTION RIGHTS AND FINANCIAL ARRANGEMENTS**

Subject to the provisions of this Agreement, the Commission shall grant to the Presenter the non-exclusive right to promote Broadway Shows at the PCPA, as follows:

a. **Broadway Subscription Series.** Presenter shall contract for, promote, arrange, market, and present a Subscription Series of Broadway Shows at the PCPA. It is agreed and understood that said series will take place either at the Civic Auditorium or the Arlene Schnitzer Concert Hall. Presentation of the series or portions thereof at other PCPA venues shall only be permitted if written permission from Commission is obtained, which may be granted at the Commission's sole option and discretion.

b. **Scheduling.** Commission will give Presenter scheduling priority equal to that enjoyed by Commission's Resident Companies, consistent with other obligations of the Commission. Presenter shall give PCPA its desired dates each year, as soon as possible. ✓

c. **Rent.** Presenter shall pay a flat \$15,000 per eight-show performance week as rent to Commission for the use of either the Civic Auditorium or Arlene Schnitzer Concert Hall, provided, however, that the minimum guaranteed rental payable to Commission by Presenter in any given year shall be \$75,000. The \$75,000 minimum guaranteed rent for the first year of this Agreement shall be paid to the Commission upon execution of this Agreement. Thereafter, the \$75,000 minimum guaranteed rent for each subsequent year of this Agreement, or any extensions thereof, shall be due and payable no later than July 1 of each year. The Parties understand and agree that the annual \$75,000 minimum guaranteed rent for each year of this Agreement is due and payable in advance, and shall not be refundable under any circumstances. Rental owed by Presenter to Commission over and above the minimum guaranteed rent shall be payable pursuant to Commission's standard event settlement procedures.

d. **Ticketing.** Presenter has selected Ticketmaster Oregon as the official ticketing service to be used for the sales of subscriptions and single tickets for all shows. All proceeds from single ticket sales or sales of any tickets for less than a full subscription series shall be handled pursuant to the Commission's standard policies and procedures for ticket sales, which are incorporated herein by reference. Commission shall notify Presenter in writing in the event of any changes in said procedures. All proceeds from full season subscription ticket sales shall be placed in an Oregon bank account or certificate(s) of deposit acceptable to Commission. Withdrawals from said account or certificate(s) of deposit shall require the approval and signatures of both Presenter and Commission, provided, however, that Commission shall have access to said accounts or certificate(s) of deposit without Presenter's approval or signature in the event that Commission or its designee(s) determine that Presenter is in default of this Agreement. Withdrawals shall be made only for the purpose of payment of deposits and other expenses necessary for presentation of the

Broadway Show Subscription Series, unless Commission exercises its right of access in the event of a determination of default by Presenter, in which case Commission may apply said funds towards any of Presenter's obligations under this Agreement. Commission shall receive for its sole use 50 percent of the interest or other earnings from said account or certificate(s) of deposit. Presenter and Commission shall execute any further forms or documents necessary to effectuate the terms herein.

e. Commission Profit Participation. Commission's profit participation shall be in addition to any rental or other sums payable to Commission under this Agreement. Presenter's profits shall be determined by subtracting all reasonable show costs typical of presenting Broadway Shows, including but not limited to User Fees, advertising, building expenses, ticket commissions paid by Presenter, stagehand and wardrobe bills, insurance, equipment rentals, talent and royalty payments. Presenter and Commission agree that reasonable business and accounting practices shall be utilized in determining Presenter's net profit. Commission may examine and audit Presenter's books and records at any reasonable time, consistent with Article 9 herein. Commission shall be entitled to receive a sum equal to 15 percent of Presenter's net profits per eight-show performance week during the initial three-year term of this Agreement. Commission's share shall increase in any extension years of this Agreement from 15 percent to 20 percent of Presenter's net profits.

f. Settlement. Standard PCPA procedures for settlement shall apply. The Parties understand that said procedures provide for weekly settlement. Subscription sales revenue shall be included in weekly settlement on a pro-rated basis for that week's performances.

g. Tour Merchandise. Presenter shall have the right to sell tour merchandise at the PCPA during Broadway Show events. During the first two years of this Agreement, Commission shall receive 15 percent of the gross sales of any Tour Merchandise sales. Thereafter, Commission shall receive 20 percent of the gross sales. Commission shall negotiate in good faith with Presenter for the establishment of a permanent tour merchandise store at the PCPA.

h. Sponsorships/Complimentary Tickets. Presenter shall have the right to enter into commercially reasonable sponsorship agreements which mutually benefit the Parties. Presenter shall act reasonably in entering into any such agreements, and shall not do so with the purpose or effect of reducing Commission's net compensation under this Agreement. Presenter may issue complimentary tickets in commercially reasonable numbers in order to mutually benefit the Parties, and shall not issue complimentary tickets with the purpose or effect of reducing Commission's net compensation under this Agreement. Commission shall have the right to disapprove a commercially unreasonable issuance of complimentary tickets.

i. Subscription and Mailing List. To the extent Commission has the power to do so, Commission shall provide, or have Ticketmaster provide, Presenter with any

and all lists of past customers of subscription series' and Broadway presentations Commission has access to for the purpose of procuring new subscribers per this Agreement. It is understood between the Parties that Commission does not have access to the lists maintained by its resident companies, and cannot provide them. Commission shall retain the proprietary rights to any subscription lists that it provides to Presenter, or arranges to be provided to Presenter. Presenter shall have the proprietary right to any subscription lists it subsequently creates on its own. It is further understood between the Parties that Commission can only protect proprietary information of Presenter to the extent permitted by Oregon law.

j. Office Space. Commission shall negotiate in good faith with Presenter for suitable office space at the PCPA.

k. "Mega-Hits" or "Blockbusters". The Parties agree that presentation of such productions at the PCPA is crucial to the PCPA's survival, and therefore Presenter shall cooperate with Commission by releasing scheduled dates in order to allow such productions to appear at the PCPA. Commission shall make reasonable efforts to enable Presenter to sell tickets to any "Mega-Hit" or "Blockbuster" productions at the PCPA. In the event of a dispute between the Parties, the Commission's judgment as to whether a particular production is a "Mega-Hit" or "Blockbuster" shall be final.

## 6.

### DUTIES OF THE PRESENTER

Subject at all times to the terms of this Agreement and the reserved powers of the Commission, the duties of the Presenter shall include the following:

a. Decisions. Presenter shall make all decisions regarding selection of Broadway Shows to be presented, the length of the Subscription Season, (provided, that the length of the Subscription Season shall not be less than five weeks unless agreed to by Commission), subscription budget, and general business decisions related to the Subscription Season.

b. Accounting. All accounting and expense paying for the Subscription Series shall be paid by the Presenter. Presenter shall pay any Commission pass-through costs as per the standard PCPA Permit, attached and incorporated herein as Exhibit "A".

c. Advertising. All marketing decisions and execution of advertising shall be done by Presenter. All such expenses shall be borne by Presenter.

d. Ticket Prices/Scaling the House. All ticket pricing and scaling decisions will be made by Presenter, and executed by PCPA.



7.

**RESPONSIBILITIES OF THE COMMISSION**

The Commission shall be responsible for performing the following duties and functions:

- a. The Commission shall furnish the Presenter all necessary event information to adequately plan for all events at the PCPA, to assist the Presenter in accomplishing its services and responsibilities.
- b. The Commission shall cooperate with the Presenter in obtaining all necessary licenses and permits.
- c. The Commission shall conduct business with the Presenter in an efficient and professional manner.

8.

**POWERS RESERVED TO THE COMMISSION**

In the event of a dispute between the Presenter and the Commission, the decision of the Commission and/or its designee(s) concerning the operation or management of the PCPA shall be final and binding on both Parties. By way of illustration and not as a limitation, the reserved powers of the Commission include:

- a. The final determination of all policies and procedures relative to the operation and management of the PCPA.
- b. Sole discretion to cancel, terminate or interrupt any event, and cause the patrons to be dismissed during any event. The Commission shall not be liable to the Presenter or any third parties for any loss or cost occasioned by any such determination or action by the General Manager, the PCPA Director, or their designee(s) taken in good faith for the benefit or protection of the Commission and the public generally or the PCPA.
- c. The power to have access to any areas of the PCPA at any time.
- d. The power to terminate or suspend this Agreement for acts of default by the Presenter in accordance with any item of Article 16 herein.
- e. The power to change, modify, or increase Commission's User Fee, provided that Commission shall not increase the User Fee applicable to productions for which Presenter has entered into a binding written contract after Presenter has supplied

Commission with a copy of such contract. Commission shall notify Presenter in writing prior to any increase in the User Fee.

f. The Commission must approve in advance and in writing any agreements for subcontracting which may be proposed by the Presenter throughout the life of this Agreement.

g. The Commission may, at its discretion, conduct a performance review and/or audit of Presenter's compliance with this Agreement on an annual basis or more frequently as appears necessary to the Commission or its designee(s).

9.

### ACCOUNTING

The Presenter shall, with respect to all business done under this Agreement, keep true and accurate accounting records, books, and data, which shall among other things show all gross receipts derived from all tickets sold, and shall establish and maintain accounting procedures that are acceptable to the Commission or its designee(s). The Commission and its designee(s) shall have the right at all reasonable times during normal business hours to inspect all books of accounts and ledgers of the Presenter related to this Agreement, and the right to make or cause to be made audits of these accounts. Further, the Commission reserves the right, and the Presenter agrees to allow its systems, hardware and programs pertaining to this Agreement or business done pursuant to this Agreement to be inspected by the Commission or its designee(s), at any reasonable time.

10.

### INSURANCE, INDEMNIFICATION, AND WAIVER OF SUBROGATION

a. Indemnification. Presenter shall defend, indemnify, and hold the City of Portland, the Metropolitan Exposition-Recreation Commission, Metro, their agents, elected and appointed officials, and employees, (the Indemnitees) harmless from any and all claims, demands, damages, actions, losses and expenses, including attorneys' fees, and court costs, arising out of or in any way connected with the fact of this Agreement, Presenter's performance of this Agreement, or any event which was presented or which was supposed to be presented pursuant to this Agreement. In the event that Presenter refuses or fails to defend as required herein, the Indemnitees may, at their sole option, settle or defend any claims, and may maintain an action in any court of competent jurisdiction against Presenter for the full costs of any settlement, judgment, or defense, including all expenses and attorneys' fees.

b. Insurance. Presenter shall, at its sole cost and expense, procure and maintain through the term of this Agreement the following insurance requirements:

1. **Comprehensive General Liability with the Broad Form** Comprehensive General Liability endorsement providing coverage against claims for bodily injury or death and property damage occurring in or upon or resulting from the facilities licensed hereunder, such insurance to offer immediate protection to the limit of not less than \$1,000,000 and such insurance shall include Blanket Contractual Liability coverage which insures contractual liability under the indemnification of the Commission and Metro by Presenter as set forth below;

2. Any Comprehensive General Liability insurance policy required by this Agreement shall name as additional insured: the City of Portland, Metropolitan Exposition-Recreation Commission, Metro, and the members, officers, directors, agents and employees of each entity.

3. Presenter shall maintain with respect to each such policy or agreement evidence of such insurance endorsements as may be required by the Commission and shall at all times deliver and maintain with the Commission a certificate with respect to such insurance in a form acceptable to the Commission.

4. Presenter agrees to provide all required certificates of insurance to the Director of the PCPA within 30 days of the first performance date of each show presented pursuant to this Agreement. Failure to do so shall constitute immediate breach of this Agreement by Presenter. It is agreed in that event that Commission, at its sole option, may terminate this Agreement. Commission may exercise any or all options available to it pursuant to this Agreement.

5. The Parties agree that the specified coverage of limits of insurance in no way limit the liability of the Presenter. Presenter shall obtain the written agreement on the part of each insurance company to notify Commission at least thirty (30) days prior to cancellation or non-renewal of any such insurance.

6. Should Presenter fail to provide and maintain adequate Liability Insurance by the date listed in paragraph b. above, at its option, the Commission may provide adequate coverage under its Special Events policy and/or invoke any or all of its rights under paragraph 15. Presenter shall be invoiced for the cost of any coverage provided by Commission.

c. **Waiver of Subrogation.** Each party hereto hereby waives any and every claim which arises or may arise in its favor and against the other party hereto during the terms of this Agreement or any extension or renewal thereof for any loss of or damage to any of its property, which loss or damage is covered by valid and collectible fire and extended coverage insurance policies to the extent that such loss or damage is recovered under said insurance policies. Said waivers shall be in addition to, and not in derogation of, any other waiver or release contained in this Agreement with respect to any loss or damage to property of the Parties hereto. Inasmuch as the waiver will preclude the assignment of

any aforesaid claim by way of subrogation (or otherwise) to an insurance company (or any other person), Presenter is advised to give each insurance company written notice of the terms of such waiver, and to have insurance policies properly endorsed, if necessary.

11.

#### TAXES AND FEES

Presenter agrees to pay promptly all sales, use, excise and any other taxes required by any governmental authority and shall obtain at its own expense all permits and licenses required by law in connection with its use of the PCPA.

12.

#### DEFACEMENT OF FACILITY

It is understood and agreed that the Commission provides the authorized areas of the PCPA to Presenter "as is", and that the Presenter will make, at its own expense, all changes, alterations, installations and decorations therein that are previously agreed to by Commission, and that Presenter will restore, at its own expense, the PCPA to the same condition in which it existed prior to any alterations made therein. Presenter shall be responsible for any costs to repair or replace property at the PCPA damaged or lost during the term of this Agreement. Ordinary wear and tear is excepted.

13.

#### NON-DISCRIMINATION

Presenter agrees not to discriminate against any employee or applicant for employment because of race, creed, ancestry, sexual orientation, disability, color, sex, marital status, age, religion or national origin, and further agrees not to discriminate for the same aforementioned reasons against any person or persons in connection with admission, services, or privileges offered to or enjoyed by the general public.

14.

#### IMPOSSIBILITY

The Commission shall not be liable for failure to perform as agreed herein where such performance is rendered impossible or financially impractical due to labor strikes, walkouts, acts of God, inability to obtain necessary materials, products and services, civil commotion, fire, casualty, or similar cause beyond the Control of the Commission. Commission agrees to notify Presenter promptly upon acquiring knowledge of the occurrence

of an event or condition which will, or which is likely to, give rise to the likelihood that performance will be rendered impossible or impracticable under this article.

15.

**NON-EXCLUSIVE USE**

Commission shall have the right to use or permit the use of any portion of the PCPA not granted to Presenter under this Agreement to any person, firm or entity regardless of the nature of the use of such other space. This right shall be subject to Commission's prudent business judgment.

16.

**DEFAULT BY PRESENTER AND COMMISSION REMEDIES**

Presenter shall be in default of this Agreement if Presenter fails to pay any amounts due under the Agreement or any other written agreement between Presenter and Commission, breaches any provisions of this Agreement or any other written agreement between Presenter and Commission, including payment of fees and maintenance of required insurance in strict accordance with this Agreement, violates any applicable laws or ordinances during its use of the PCPA, violates any Commission rules or policies, or should dissolve or cease doing business as a going concern or become insolvent or bankrupt. Upon such default by Presenter, the Commission may have one or more of the following remedies, in its sole discretion:

a. Declare the entire amount of the balance due per the terms of the Agreement payable.

b. Reenter any licensed area(s) without being liable for damage therefore and relet the licensed area(s) or any portion thereof, or operate the same for the balance of the Agreement's term, receive sums due and apply them first to any expenses of making the Commission whole and, second, to any expenses incurred for reentering the premises and reletting any licensed area(s).

c. Terminate the Agreement by giving the Presenter written notice of such termination, which shall not excuse breaches of the Agreement which have already occurred, and may reenter the licensed area(s) as in b. above.

d. Pursue any other remedies available to the Commission either at law or equity. No single or partial exercise of a right or remedy shall preclude any other or further exercise of a right or remedy.

e. Commission shall have the right, without resorting to any legal action, to withhold from any and all sums, receipts or deposits which may be in the possession of the Commission for or on behalf of Presenter, such sums as are necessary, in Commission's sole opinion, to apply to any claims Commission may have against Presenter, or to protect Commission against any loss, damage, or claim which may result from Presenter's performance or failure to perform under this Agreement.

f. Commission may, at its sole option, also terminate any other contract(s) with Presenter.

17.

### ASSIGNMENT

It is agreed and understood between the Parties that Presenter has been chosen by Commission for its unique abilities and services, and therefore Presenter may not assign this Agreement or any interest therein without the prior written approval of the Commission. Any attempted assignment without such written prior approval shall be null and void.

18.

### HAZARDOUS SUBSTANCES

Presenter, its officers, employees and agents, and any performers, customers, invitees or other participants in the event(s) covered by the Agreement are prohibited from bringing any hazardous substance into the PCPA or onto Commission property and are prohibited from allowing any hazardous substance to be brought into the PCPA or onto Commission property. As used in this paragraph, "hazardous substance" has the meaning given that term in ORS 466.540(9). If any governmental authority or other third party demands that a cleanup plan be prepared and that a cleanup be undertaken because of any release of hazardous substances that occurs as a result of Presenter's use of the PCPA or entry on Commission property, Presenter shall, at Presenter's expense, prepare and submit the required plan and all related bonds and other financial assurances, and Presenter shall carry out all such cleanup plans. Presenter agrees to indemnify Metro, Metropolitan Exposition-Recreation Commission, the City of Portland and their respective members, officers, directors, agents, elected and appointed officials, and employees against any claims, costs and expenses of any kind, whether direct or indirect, incurred voluntarily or pursuant to any state or federal law, statute, regulation or order, for the clean up, extraction, detoxification or neutralization of any release of any hazardous substance associated with or arising from the Presenter's use of the Authorized Areas or entry on Commission property. As used in this paragraph, "release" has the meaning given that term in ORS 466.540(4). Presenter's obligations under this paragraph survive termination or expiration of the Agreement.

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19.

**STANDARD PCPA PERMIT**

For each event performed pursuant to this Agreement, Presenter shall execute a standard PCPA Permit, a copy of which is attached and incorporated herein by reference as Exhibit "A." Commission reserves the right to make changes in the standard PCPA Permit from time to time, as deemed necessary by Commission. Where the terms of the standard PCPA Permit vary from the terms of this Agreement, this Agreement shall govern.

20.

**TERMS AND CONDITIONS**

Commission's Terms and Conditions are hereby incorporated into this Agreement by reference. Commission reserves the right to change such Terms and Conditions from time to time.

21.

**ACTIONS AND LAWSUITS**

Any actions or lawsuits by one party to the Agreement against the other arising out of the Agreement or of conduct, acts or activities of the Parties hereunder will be governed by Oregon Law and shall be maintained in the Circuit Court of the State of Oregon, in and for Multnomah County, or if jurisdiction is proper, the United States District Court for the District of Oregon. No such action against the Commission may be maintained except in the State of Oregon. Presenter consents to the maintenance of any such action by the Commission against it in the Circuit Court of the State of Oregon, in and for Multnomah County, or if jurisdiction is proper, the United States District Court for the District of Oregon.

22.

**SEVERABILITY**

If any provision of this Agreement or the Terms and Conditions, which have been incorporated into the Agreement by reference, shall be declared invalid or unenforceable, the remainder of the provisions shall continue in force and effect to the fullest extent permitted by law.

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23.

WAIVER

The failure by the Commission to insist upon strict and prompt performance of the terms and conditions of this Agreement shall not constitute a waiver of the Commission's right to strictly enforce such terms and conditions thereafter. No waiver by the Commission of any default shall operate as a waiver of any other default on a future occasion or the same default. No delay or omission by the Commission in exercising any right or remedy shall operate as a waiver thereof, and no single or partial exercise of a right or remedy shall preclude any other or further exercise thereof, or the exercise of any other right or remedy.

24.

ATTORNEYS' FEES

In case any lawsuit or action is instituted by either party hereto arising out of this Agreement, the prevailing party in such litigation, including any appeal, shall be entitled, in addition to the costs and disbursements provided by statute, to reasonable attorneys' fees as determined by the court on trial or appeal. In the event that either party hereto employs in-house counsel, or if the Commission employs in-house counsel supplied to it by Metro, said prevailing party shall be entitled to recover the full reasonable fair market value of their counsel's services. The prevailing party shall also be entitled to recover its full reasonable costs of litigation, including the expense of depositions and expert witnesses.

25.

DELIVERY OF NOTICES

Any notice, request, demand, instruction, or any other communications to be given to any party hereunder shall be in writing, sent by registered or certified mail as follows:

To Commission: Metropolitan Exposition-Recreation Commission  
Attn: General Manager  
P. O. Box 2746  
Portland, OR 97208

Copy to: Portland Center for the Performing Arts  
Attn: PCPA Director  
1111 S.W. Broadway  
Portland, OR 97205

////



Copy to: Metro  
Attn: General Counsel  
600 N.E. Grand Avenue  
Portland, OR 97232

To Presenter: Dan Bean Presents, Inc.  
Attn: Daniel N. Bean, President  
1515 Dexter Avenue N. #350  
Seattle, WA 98109

Copy to: Steve Bean  
Attorney at Law  
Bean & Gentry  
320 N. Columbia  
Olympia, WA 98507

Copy to: Barry P. Caplan  
Sussman Shank Wapnick Caplan & Stiles  
1000 S.W. Broadway, Suite 1400  
Portland, OR 97205

26.

#### MISCELLANEOUS

a. Presenter's Assumption of Responsibility. The Presenter expressly assumes full responsibility for all persons connected with Presenter's use of the Facility, including all its employees, agents, members, invitees and contractors.

b. Time is of the Essence. Time is of the essence to this Agreement.

c. Entire Agreement. Except as specifically provided herein, this document contains the complete and exclusive agreement between the Parties, and is intended to be a final expression of their agreement. No promise, representation or covenant not included in this document has been or is relied upon by any party. No modification or amendment of this Agreement shall be in force or effect unless in writing executed by all Parties hereto.

d. Headings. The headings used in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Agreement nor the extent of any provision thereof.


e. No Third Party Beneficiaries. This Agreement is not intended to benefit any individual, corporation, or other legal entity other than Commission, Presenter,

and the Indemnitees. This Agreement shall not be deemed to vest any rights in, nor shall it be deemed to be enforceable by, any other parties in any proceeding whatsoever.

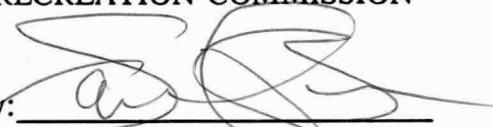
f. Parking. Parking is not available at the PCPA, other than whatever on-street or independent garage parking may be available from time to time. Commission makes absolutely no guarantees or representations as to the availability or continued availability of on-street or independent garage parking.

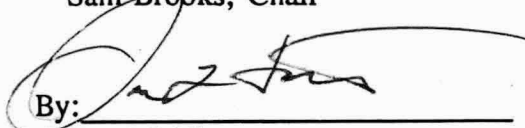
g. Concessions/Food Service. Concessions/Food Service shall be defined as the selling or dispensing of foodstuffs, beverages (alcoholic and non-alcoholic), flowers, tobaccos, or edible products of any kind. The sale and/or distribution of the aforementioned items are solely the exclusive right of the Commission or its contracted agent.

DAN BEAN PRESENTS, INC.

By:   
Daniel N. Bean, President

METROPOLITAN EXPOSITION-  
RECREATION COMMISSION

By:   
Sam Brooks, Chair

By:   
Ben Middleton  
Secretary/Treasurer

APPROVED AS TO FORM:  
Daniel B. Cooper, General Counsel

By:   
Mark B. Williams  
Senior Assistant Counsel

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## MERC STAFF REPORT

Agenda Item/Issue: Authorization and Approval of Broadway Series Agreement

Resolution No. 94-9

Date: March 15, 1994 Presented By: Harriet Sherburne

**Background and Analysis:** In recent months there has been expressed interest from a number of sources in presentation of a subscription series of Broadway shows in PCPA facilities. Successful experience with "Phantom of the Opera" and a number of top quality touring shows has illustrated the significant financial benefits to PCPA in housing such productions. The General Manager and liaison Commissioners for PCPA have reviewed the subscription series concept along with the credentials of presenters, to pursue this opportunity for expanded business. It was determined that Dan Bean has the credentials and resources necessary to undertake a series of the size and quality sought by the Commission. A non-exclusive agreement has been negotiated for a term of 3 years, with annual subscription series to be comprised of a minimum five one-week, eight-show performance presentations. The first season of the Agreement is 1994-95 and may contain fewer than 5 shows, because of scheduling limitations of the existing PCPA calendar as well as availability and routing of top quality touring shows.

**Fiscal Impact:** The presenter will pay \$75,000 minimum guaranteed rent each year, paid in advance. In addition, there will be profit participation for the Commission. Commissions will be paid on sale of all tour merchandise. Standard user fee will be paid on all tickets sold for events. The annual subscription series will generate additional revenue in subsequent fiscal years, beginning 1994-95.

**Discussion with Commission Liaison and/or User Groups:** The MERC Commission has been kept abreast of the process through the Liaison Committee and staff reports. Resident Companies and commercial users of PCPA facilities have been kept informed through correspondence and discussions.

**Recommendation:** The Committee recommended that the MERC Commission authorize the General Manager to negotiate and execute the Broadway Series Agreement with Dan Bean Presents, Inc., for the Portland Center for the Performing Arts.