



17620 Fitch Ave, Suite 100
Irvine, CA 92614
Phone (714) 755-5788
Fax (714) 755-5789

This **SERVICE AGREEMENT** ("Agreement"), dated as of **July 24, 2024**, is entered into by and between PACIFIC SYMPHONY, a non-profit association (SYMPHONY) having an office at 17620 Fitch Avenue, Suite 100, Irvine, CA 92614, (714-755-5788), and the **City of Costa Mesa**, a municipal corporation (CITY) having an office at 77 Fair Drive, Costa Mesa, CA 92626.

In consideration of the mutual covenants and obligations hereinafter set forth, SYMPHONY and CITY hereby agree that SYMPHONY will perform as outlined below. All services will take place at Fairview Park.

CONCERT: Tuesday, July 30, 2024, @ 6:00 PM
Carl St.Clair, conductor

COMPENSATION

As compensation for said concert, CITY will pay to SYMPHONY the fee of: TWENTY THOUSAND DOLLARS (\$20,000.00), with \$10,000 due on or before July 30, 2024, and the remainder of TEN THOUSAND DOLLARS (\$10,000) due at settlement within three (3) business days. This fee includes conductor, all orchestra personnel, Pacific Symphony support staff (stage manager, operations staff, librarian, and personnel manager), fees for all soloists and their accommodations, music use for the above performance, all needed instruments, truck rental, and transportation of the orchestra members, technical costs (lighting, sound, video), necessary casual technical and Front of House labor, and any paid marketing/advertising SYMPHONY elects to purchase.

This fee does not include any costs associated with the rental and use of the venue, full-time venue supplied staff, post-concert clean-up of performance space, toilet facilities for audience members, or coverage of city fees.

POSTPONEMENT AND CANCELLATION

A. CITY and SYMPHONY shall be under no liability for failure to present the above-stated services in the event that such failure is caused by or due to the physical inability of the SYMPHONY to perform, or acts of regulations of public authorities, labor difficulties, civil tumult, strike, epidemic, interruption or delay of transportation service, or any other causes beyond the control of both parties. In such instance the parties agree to use best efforts to reschedule such service(s) on mutually acceptable alternative date(s) or alternate venue. If unable to find a mutually acceptable alternative date(s) CITY remains obligated to reimburse SYMPHONY all costs reasonably incurred in reliance of this Agreement by SYMPHONY up to the time of the cancellation.

B. In the event that CITY should choose, for any reason other than outlined above in A, to cancel any portion of the service outlined above, CITY remains obligated to reimburse SYMPHONY all costs reasonably incurred by SYMPHONY in reliance of this Agreement up to the time of the cancellation.

C. Compensation for work in progress shall be prorated based on the percentage of work completed as of the effective date of termination in accordance with the fees set forth herein.

D. If for a reason other than above SYMPHONY fails to perform some or all services outlined above in A, CITY will not be obligated for the original Agreement fee or the pro-rata portion thereof associated with the non-performed service(s).

INDEMNIFICATION

CITY hereby agrees to defend, indemnify, and hold SYMPHONY and its members, managers, directors, employees, and agents harmless from and against any and all losses, liabilities, damages, expenses including attorneys' fees and costs), actions, causes of action or proceedings arising from CITY's breach of any representations, warranties, and agreements hereunder and from any claims of third parties of any kind, nature, or description for personal injuries or property damage in connection with the performance of the Agreement caused by the negligence or willful misconduct of CITY.

SYMPHONY hereby agrees to defend, indemnify, and hold CITY and its members, managers, directors, employees, and agents harmless from and against any and all losses, liabilities, damages, expenses (including attorneys' fees and costs), actions, causes of action or proceedings arising from SYMPHONY's breach of any representations, warranties, and agreements hereunder and from any claims of third parties of any kind, nature, or description for personal injuries or property damage in connection with the performance of the Agreement caused by the negligence or willful misconduct of SYMPHONY.

REPRODUCTION RESTRICTIONS

CITY agrees that the City of Costa Mesa will not broadcast, electronic capture, photography, or any other transmission or reproduction of the performance(s), or any part thereof, by any means unless approved in writing by SYMPHONY in advance of the performance.

ADDITIONAL CITY and SYMPHONY RESPONSIBILITIES

A. CITY and SYMPHONY will share responsibility for the marketing of these concerts including promotion, advertising, and public relations. All marketing materials, regardless of origin, shall contain logos of both Pacific Symphony and the City of Costa Mesa in similar size. All marketing/PR materials subject to review and approval by Pacific Symphony and the City of Costa Mesa.

B. SYMPHONY will provide digital concert programs.

C. CITY will also provide the following:

- Executive toilet facilities for orchestra members and soloists
- Toilet facilities for audience members
- Concert site clean-up personnel
- Police services/security
- Performance site signage
- Coverage of City permit fees
- Promotional support/advertising
- Parking for orchestra members and artistic personnel (min. 50 spaces) with helper in area to verify parking passes with Symphony staff/volunteer.

D. CITY requires, and SYMPHONY agrees, that SYMPHONY will obtain and maintain and keep in full force and effect during the life of this Agreement the minimum scope of insurance coverages as listed in Exhibit A, incorporated herein and attached hereto.

PAYMENT PROVISIONS

All checks or money orders are to be made payable to: Pacific Symphony, Memo-line: City of Costa Mesa-Symphony in the Cities.

Mail payment to:
Pacific Symphony, Attn. Mary Hawkes
17620 Fitch Avenue, Suite 100 I
Irvine, CA 92614

SUCCESSORS AND ASSIGNS

This Agreement may not be assigned by either party without the other's prior express written consent, which may not be unreasonably withheld. SYMPHONY may assign this Agreement without the consent of CITY in connection with a merger, consolidation, reorganization, or other disposition of SYMPHONY, but will provide notice to CITY as early as possible.

COMPLIANCE WITH LAWS

Nothing in this Agreement shall be construed to require the commission of any act contrary to law or contrary to the terms of any applicable collective bargaining agreement.

SEVERABILITY

Wherever there is any conflict between any provision of this Agreement and any applicable statute, law, ordinance, regulation, governmental ruling or applicable collective bargaining agreement, the latter shall prevail, but in such event, the provision of this Agreement affected shall be curtailed and limited only to the extent necessary to bring it within legal or applicable collective bargaining agreement requirements.

PUBLIC RECORDS ACT DISCLOSURE

SYMPHONY has been advised and is aware that this Agreement and all reports, documents, information and data, including, but not limited to, computer tapes, discs or files furnished or prepared by SYMPHONY, or any of its subcontractors, pursuant to this Agreement and provided to City may be subject to public disclosure as required by the California Public Records Act (California Government Code section 7920.000, *et seq.*). Exceptions to public disclosure may be those documents or information that qualify as trade secrets, as that term is defined in the California Civil Code section 3426.1, and of which SYMPHONY informs CITY of such trade secret. The CITY will endeavor to maintain as confidential all information obtained by it that is designated as a trade secret. However, CITY shall not, in any way, be liable or responsible for the disclosure of any trade secret including, without limitation, those records so marked if disclosure is deemed to be required by law or by order of the Court.

CONFLICT OF INTEREST

SYMPHONY and its officers, employees, associates and subconsultants, if any, will comply with all conflict of interest statutes of the State of California applicable to SYMPHONY's services under this agreement, including, but not limited to, the Political Reform Act (Government Code sections 81000, *et*

seq.) and Government Code section 1090. During the term of this Agreement, SYMPHONY and its officers, employees, associates and subconsultants shall not, without the prior written approval of the CITY'S Representative, perform work for another person or entity for whom SYMPHONY is not currently performing work that would require SYMPHONY or one of its officers, employees, associates or subconsultants to abstain from a decision under this Agreement pursuant to a conflict of interest statute.

PROHIBITED EMPLOYMENT

SYMPHONY will not employ any regular employee of CITY while this Agreement is in effect.

NO THIRD PARTY BENEFICIARY RIGHTS

This Agreement is entered into for the sole benefit of CITY and SYMPHONY and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

NON-DISCRIMINATION

During the performance of this Agreement, the parties shall not discriminate on the grounds of race, religious creed, color, national origin, ancestry, age, physical disability, mental disability, medical condition including the medical condition of Acquired Immune Deficiency Syndrome (AIDS) or any condition related thereto, marital status, gender, gender identity, genetic information, gender expression, sex or sexual orientation, military and veteran status, in the selection and retention of employees and subcontractors and the procurement of materials and equipment, except as provided in Section 12940 of the California Government Code. Further, SYMPHONY agrees to conform to the requirements of the Americans with Disabilities Act in the performance of this Agreement.

NON-AGENCY

SYMPHONY is and shall be acting, at all times, as an independent contractor and not as an employee of CITY. SYMPHONY shall have no power to incur any debt, obligation, or liability on behalf of CITY or otherwise act on behalf of CITY as an agent. Neither CITY nor any of its agents shall have control over the conduct of SYMPHONY or its employees, except as set forth in this Agreement. SYMPHONY shall not, at any time, or in any manner, represent that it or any of its agents or employees are in any manner agents or employees of CITY. SYMPHONY shall secure, at its sole expense, and be responsible for any and all payment of Income Tax, Social Security, State Disability Insurance Compensation, Unemployment Compensation, and other payroll deductions for SYMPHONY and its officers, agents, and employees, and all business licenses, if any are required, in connection with the services to be performed hereunder. SYMPHONY shall indemnify and hold CITY harmless from any and all taxes, assessments, penalties, and interest asserted against CITY by reason of the independent contractor relationship created by this Agreement. SYMPHONY further agrees to indemnify and hold CITY harmless from any failure of SYMPHONY to comply with the applicable worker's compensation laws. CITY shall have the right to offset against the amount of any fees due to SYMPHONY under this Agreement any amount due to CITY from SYMPHONY as a result of SYMPHONY's failure to promptly pay to CITY any reimbursement or indemnification arising under this paragraph.

CALPERS ELIGIBILITY INDEMNIFICATION

In the event that SYMPHONY or any employee, agent, or subcontractor of SYMPHONY providing services under this Agreement claims or is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the CITY, SYMPHONY shall indemnify, defend, and hold harmless CITY for the payment of any employee and/or employer contributions for PERS benefits on behalf of SYMPHONY or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of CITY.

COMPLETE AGREEMENT

This Agreement contains the entire agreement between the parties hereto with respect to the subject matter hereof and the parties hereto have made no agreement, representations or warranties relating to the subject matter of this Agreement except as provided herein.

MODIFICATION

No modification of this Agreement shall be enforceable unless made in writing and signed by or on behalf of both parties hereto.

NOTICES

Any notices, documents, correspondence, or other communications concerning this Agreement, or the work hereunder, may be provided by personal delivery or mail and shall be addressed as set forth below. Such communication shall be deemed served or delivered: (a) at the time of delivery if such communication is sent by personal delivery, and (b) 48 hours after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail.

<p>TO CITY: City of Costa Mesa Attn: Monique Villasenor 77 Fair Drive Costa Mesa, CA 92626 (714) 754-5679</p>	<p>TO SYMPHONY: Pacific Symphony Attn: Mary Hawkes 17620 Fitch Ave., Ste. 100 Irvine, CA 92614 (714) 755-5788</p>
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WAIVER

A waiver by either party of any breach of any term or condition of this Agreement shall not be deemed to constitute a waiver of any other breach of the same or any other term or condition.

GOVERNING LAW

This Agreement shall be construed in accordance with and governed by the laws of the State of California.

VENUE

Any action at law or in equity brought by either of the parties hereto for the purpose of enforcing a right or rights provided for by this Agreement shall be tried in the Superior Court of California, County of Orange and the parties hereby waive all provisions of law providing for a change of venue in such proceedings to any other county.

ATTORNEYS' FEES

In the event of arbitration or litigation concerning this Agreement, including without limitation claims of fraud or misrepresentation, the prevailing party shall be entitled to recover from the other party the prevailing party's reasonable attorneys' fees and costs.

FURTHER ASSURANCES

Each party shall take any and all steps and shall execute, acknowledge, and deliver any and all further documents that the other may reasonably request to effectuate the intent and purposes of this Agreement.

EXECUTION IN COUNTERPARTS

For the convenience of the parties, this Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which shall be deemed to be an original, but all of which shall constitute one and the same Agreement.

EXHIBITS INCORPORATED

All Exhibits hereto are incorporated herein as fully as though set forth in full.

Exhibit "A" – City of Costa Mesa's Insurance Requirements


SIGNATORY'S WARRANTY

Any person who executes this Agreement on behalf of CITY hereby expressly represents and warrants that he or she has full and complete authority to do so, knowing that SYMPHONY intends to rely thereon. Any person who executes this Agreement hereby expressly represents and warrants that he or she has full and complete authority to do so.

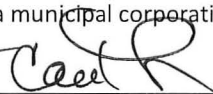
[Signatures on Following Page]


IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their respective authorized officers, as of the date first above written.

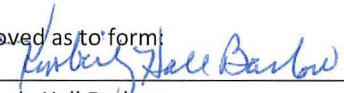
PACIFIC SYMPHONY:
a non-profit association



Sean Sutton
Executive Vice President & Chief Operating Officer
Date: 7/24/24


CITY OF COSTA MESA:
a municipal corporation


Carol Molina
Finance Director
Date: July 26, 2024

Attest:

Brenda Green
City Clerk

Approved as to form:

Kimberly Hall Barlow
City Attorney
Date: 8/6/24

Approved as to Insurance:

Ruth Wang
Risk Management
Date: 7/31/24

Approved as to Content:

Monique Villasenor
Project Manager
Date: _____

Departmental Approval:

Brian Gruner
Parks and Community Services Director
Date: 7-29-24

EXHIBIT A

INSURANCE

1. Minimum Scope and Limits of Insurance. SYMPHONY shall obtain, maintain, and keep in full force and effect during the life of this Agreement all of the following minimum scope of insurance coverages with an insurance company admitted to do business in California, rated "A," Class X, or better in the most recent Best's Key Insurance Rating Guide, and approved by City:

(a) Commercial general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury, or bodily injury with a policy limit of not less than One Million Dollars (\$1,000,000.00) per occurrence, Two Million Dollars (\$2,000,000.00) general aggregate.

(b) Business automobile liability for owned vehicles, hired, and non-owned vehicles, with a policy limit of not less than One Million Dollars (\$1,000,000.00) combined single limit per accident for bodily injury and property damage.

(c) Workers' compensation insurance as required by the State of California. SYMPHONY agrees to waive, and to obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City, its officers, agents, employees, and volunteers arising from work performed by SYMPHONY for the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies.

(d) Professional errors and omissions ("E&O") liability insurance with policy limits of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence and aggregate. Architects' and engineers' coverage shall be endorsed to include contractual liability. If the policy is written as a "claims made" policy, the retro date shall be prior to the start of the contract work. SYMPHONY shall obtain and maintain, said E&O liability insurance during the life of this Agreement and for three years after completion of the work hereunder.

2. Endorsements. The commercial general liability insurance policy and business automobile liability policy shall contain or be endorsed to contain the following provisions:

(a) Additional insureds: "The City of Costa Mesa and its elected and appointed boards, officers, officials, agents, employees, and volunteers are additional insureds with respect to: liability arising out of activities performed by or on behalf of Pacific Symphony pursuant to its contract with the City; products and completed operations of Pacific Symphony; premises owned, occupied or used by Pacific Symphony; automobiles owned, leased, hired, or borrowed by Pacific Symphony."

(b) Notice: "Said policy shall not terminate, be suspended, or voided, nor shall it be cancelled, nor the coverage or limits reduced, until thirty (30) days after written notice is given to the City of Costa Mesa."

(c) Other insurance: "Pacific Symphony's insurance coverage shall be primary insurance as respects the City of Costa Mesa, its officers, officials, agents, employees, and volunteers. Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy."

(d) Any failure to comply with the reporting provisions of the policies shall not affect coverage provided to the City of Costa Mesa, its officers, officials, agents, employees, and volunteers.

(e) SYMPHONY's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

3. Deductible or Self Insured Retention. If any of such policies provide for a deductible or self-insured retention to provide such coverage, the amount of such deductible or self-insured retention shall be approved in advance by CITY. No policy of insurance issued as to which the CITY is an additional insured shall contain a provision which requires that no insured except the named insured can satisfy any such deductible or self-insured retention.

4. Certificates of Insurance. SYMPHONY shall provide to CITY certificates of insurance showing the insurance coverages and required endorsements described above, in a form and content approved by CITY, prior to performing any services under this Agreement.

5. Non-Limiting. Nothing in this Section shall be construed as limiting in any way, the indemnification provision contained in this Agreement, or the extent to which SYMPHONY may be held responsible for payments of damages to persons or property.