

**AMENDED AND RESTATED
ADMINISTRATIVE SERVICES AGREEMENT**

between

**BERKLEY RISK ADMINISTRATORS COMPANY, LLC
222 South Ninth Street
Minneapolis, MN 55402**

and

**City of RAPID CITY
300 Sixth Street
Rapid City, SD 57701**

THIS ADMINISTRATIVE SERVICES AGREEMENT (hereinafter referred to as "Agreement") is effective January 1, 2015 and made by and between Berkley Risk Administrators Company, LLC ("Servicing Company") a Minnesota limited liability company with offices at 222 South 9th Street, Minneapolis, Minnesota, 55402 and The City of Rapid City ("Client") a South Dakota municipality with a principal place of business at 300 Sixth Street, Rapid City, South Dakota, 57701.

WHEREAS, Client is authorized to self-insure its liability for providing benefits under South Dakota workers' compensation laws ("Program");

WHEREAS, Servicing Company is licensed to provide services in furtherance of Client's Program and currently provides such services to Client; and

WHEREAS, Client and Servicing Company wish to amend and restate the terms of their agreement and for this Agreement to replace and supersede all prior agreements;

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement, the parties agree as follows:

ARTICLE I. SERVICES PROVIDED BY SERVICING COMPANY

1.01 Claims Administration Services. Servicing Company will handle all self-insured workers compensation claims reported to it by Client during and for the term of this Agreement, or any extension thereof, consistent with the terms of this Agreement and the workers' compensation laws, rules and regulations of the State of South Dakota.

Claims administration services consist of:

- a. Conduct a claims investigation as appropriate for each loss in order to establish compensability. In the course of conducting a claims investigation, the services of independent contractors may be retained and paid from the loss fund account as an allocated loss adjustment expense including independent adjustment companies, managed care providers, medical specialists and legal service providers as necessary to determine claim compensability or otherwise assist in properly resolving such claims. Investigations using outside field adjusters may be performed, at the discretion of the claim examiner.

- b. Establish individual claim files for each reported claim. Claim files shall be subject to review, copying and printing by Client, its representative or designee, at any reasonable time within normal business hours upon reasonable notice.
- c. Assert, or contract with a third party to assert, any subrogation rights of Client in regard to payments for workers' compensation benefits. Client will receive any subrogation recoveries obtained by Servicing Company. Services of independent contractors may be incurred by Servicing Company as an allocated loss adjustment expense.
- d. Set financial reserves to expected or probable outcomes based on industry best practices, and facts and opinions of experts retained during the claim investigation.
- e. Report claims to excess or aggregate reinsurer pursuant to the terms of the Client's policy.
- f. Calculate average weekly wage and wage loss benefits using wage information provided by the Client.
- g. Engage nurse case managers, vocational rehabilitation consultants and return to work coordinators as an allocated loss adjustment expense.
- h. Perform annual claim reviews.

Excluded services: Notwithstanding the above description of claim administration services, Servicing Company does not provide, and Client has elected to retain sole responsibility for performing or outsourcing to a vendor of its choice, the following activities: (i) medical bill re-pricing to applicable fee schedule, (ii) discounts below fee schedule that may be available through a provider network, (iii) compliance with Medicare data collection and reporting requirements required of Client pursuant to Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA). As part of its claims administration services, however, Servicing Company will continue to share with Client the results of any investigation or settlement that is relevant to Client's MMSEA reporting obligations.

1.02 Reports. Servicing Company will provide the following reports in furtherance of the Program administration:

- a. Monthly dashboard reports itemizing all claims processed including payments and reserved amounts.
- b. Upon request, Servicing Company will assist Client with its data submission for aggregate or excess policy renewal (if any).
- c. Any customized reports not listed above and that require additional programming may be provided as mutually agreed upon by Client and Servicing Company at an hourly rate that is mutually agreed upon by Client and Servicing Company.

- d. Use of the Servicing Company's online eTools system is subject to a separate license agreement and is offered at no charge for up to two (2) users. Additional access is available at a charge of \$539 per additional user.

1.03 Loss Control Services. Upon request, Servicing Company may provide loss control services for an additional fee. Any services would be subject to the terms and conditions of this Agreement. Loss control services combine loss analysis with best practices in safety programs, customized for issues particular to Client and designed to help decrease and control workers' compensation losses. Other loss control services may consist of, but are not limited to, the following:

- A. Data analysis of loss information
- B. Injury management
- C. safety program infrastructure evaluation

ARTICLE II. OBLIGATIONS OF CLIENT

2.01 Payments to Servicing Company. Client agrees to pay Servicing Company according to the compensation schedule described in Article III.

2.02 Loss Fund. Client will establish and maintain a bank account for the payment of claims and claim expenses ("Funding Account"). Client warrants it will maintain a sufficient balance in the Funding Account to meet or exceed all expected paid claims and claim expenses for at least two months. Further, Client agrees that the Funding Account will have 'positive pay' or other automatic fraud detection services available.

Servicing Company will have check drafting authority on Client's bank account to fund the Program's medical and indemnity claims and claim expenses.

Client will pay all Program expenses, such as taxes (if any), reinsurance premiums, excess insurance premium, audit fees, and actuary fees separately.

Servicing Company will provide Client with at least 24 hour notice for any check draft in excess of \$10,000.00.

At no time will Servicing Company use its own funds to pay or guarantee funding of claims, allocated loss adjustment expenses, assessments, Program expenses or any other expenses of the Client. Claim expenses include allocated loss adjustment expenses including, but not limited to, legal services and defense costs, independent medical evaluations, photocopy and medical reports, police reports, surveillance, court reporter fees, transcript fees, copies of depositions, expert witness fees, rehabilitation services, assessments, and managed care.

2.03 Notification. Client shall timely notify Servicing Company of any and all revisions to the Program, to provide prompt notice of claims in a verifiable format, and to respond to requests for information or authorization in a timely manner. To the extent payroll information is required by Servicing Company to carry out services under this agreement, Servicing Company may conclusively rely on Client's books and records.

- 2.04 **Legal Advice.** Client understands and acknowledges that Servicing Company does not provide legal advice.
- 2.05 **Authorization.** Subject to the notification requirements described above, Client authorizes and delegates to Servicing Company all necessary authority to provide services described in this Agreement.

ARTICLE III. COMPENSATION TO SERVICING COMPANY

3.01 **Service Fees.** Service fees are as follows:

- A. Flat annual administrative fee: \$5,000 invoiced in full at the beginning of the contract period.
- B. New Claims: All newly reported claims will be handled at the following rates:
- Notice Only..... \$57 per claim
 - Medical Only..... \$207 per claim
 - Indemnity..... \$1285 per claim for the first 12 months and \$350 for each additional 12 month period the claim remains open.
- C. Indemnity claims that are open on or after the effective date of this Agreement will be handled for the following rates.
- Indemnity \$350 per claim to be charged on the Anniversary Date for each 12 month period the claim remains open.
- D. Conditions: Except as provided above, the service fee is calculated and invoiced monthly based on the number and type of claims indexed the prior month. If a claim's type changes, any additional amount due will be invoiced on the next monthly billing. The above fees are for calendar year 2015 only and are subject to an annual escalator thereafter in the amount of three percent (3%). Fees are due and earned when invoiced and are not subject to refund. In the event of termination of this Agreement for any reason, Servicing Company will not be under any continuing obligation to provide any services to or for the benefit of Client. Client will be responsible for service fees to the last day of the month services are rendered, as well as any and all costs associated with retrieval and/or delivery of claims, claim files and Client records to Client's location.

ARTICLE IV. TERM AND TERMINATION

- 4.01 **Term.** This Agreement will be effective January 1, 2015. This Agreement will automatically renew for two successive one-year terms at the conclusion of the initial period not to exceed three (3) years. However, even if this Agreement terminates, Client's acceptance of services beyond the term of this Agreement, if any, will be subject to the terms of this Agreement.
- 4.02 **Early Termination by Either Party.** During the initial term or any period of extension, either party may terminate this Agreement for convenience, and without penalty, by giving ninety (90) days written notice of intent to terminate. The effective date of termination will be ninety (90) days from the date such notice is delivered or mailed.

Either party may terminate this Agreement on less than ninety (90) days written notice upon the occurrence of any one of the following events and in accordance with the following procedures:

- A. Should either party materially breach one or more provisions of this Agreement, the other party may terminate this Agreement by giving written notice stating the reason or reasons for termination. Unless the breaching party fully cures its breach within thirty (30) days from receipt of the written notice, this Agreement will terminate.
- B. This Agreement may also terminate at the option and mutual agreement of the parties upon the execution of an agreement signed by both parties.
- C. This Agreement will terminate effective immediately upon the delivery of written notice to the other party in the event of a conviction of a felony by the other party a judicial or administrative adjudication of the other party's fraud or dishonesty, in the event such other party ceases doing business as a going concern, makes an assignment for the benefit of creditors, admits in writing its inability to pay its debts as they become due, files a voluntary petition in bankruptcy or admits the material allegations of a petition filed against it in any such proceeding.

4.03 Servicing Company's Exclusive Rights of Early Termination. Servicing Company may terminate this Agreement at any time for Client's non-payment of fees due under this Agreement or Client's failure to fund any obligation owed under the Program. Termination will be effective ten (10) days after giving notice of default. Default may be cured by the Client within the ten days. In the event this Agreement terminates by Client's failure to cure any payment default, Client remains liable to Servicing Company for all fees due and owing to Servicing Company up to and including the effective date of termination.

4.04 Procedures on Termination. In the event of termination of this Agreement, Servicing Company will be paid, as provided in Article III, to the last day services are rendered. No further payment of fees from Client to Servicing Company will be required. Servicing Company will render a final accounting of Client's claims account and return all of Client's claims and financial or other records in the possession of Servicing Company. Servicing Company will not be financially responsible for and will not administer any claims existing at the time of termination. Servicing Company will make all records available for Client to pick up at Servicing Company's location. Client will be responsible for any costs associated with the delivery of records to Client's location. Servicing Company may, but is not required, to maintain a duplicate copy of Client's records for its own record retention requirements.

ARTICLE V. INDEMNIFICATION AND CONFIDENTIALITY

5.01 Defense and Indemnification. Client agrees to defend, indemnify and hold Servicing Company, its officers, directors, employees, agents and affiliates harmless from and against any losses, claims, damages, liabilities, cost or expenses, including reasonable attorney's fees (collectively, "Losses"), which arise out of or relate to the Servicing Company's delivery of services to Client; provided, however, that Client shall not be liable under the foregoing indemnity for any Losses, or the portion of such Losses,

caused by Servicing Company's material breach of this Agreement, willful misconduct or gross negligence in carrying out a duty, task or function within its control.

Servicing Company shall indemnify and hold harmless Client, its officers, directors, employees, agents and affiliates from and against Losses, or the share of Losses, caused by Servicing Company's material breach of this Agreement, willful misconduct or gross negligence in carrying out a duty, task or function within its control.

A party seeking indemnification shall give prompt notice of the assertion of any claim or the commencement of any suit. The failure to provide notice shall not relieve the other party of its obligation herein except to the extent that the indemnifying party demonstrates that the defense of such action is prejudiced by the indemnified party's failure to give such notice. The provisions of this section shall survive the expiration or termination of this agreement, including any extensions thereof.

5.02 Limitation and Exclusivity of Damages. EXCEPT AS MAY BE REQUIRED UNDER THE INDEMNIFICATION PROVISION, SERVICING COMPANY AND CLIENT EACH AGREE THAT NO PARTY TO THIS AGREEMENT WILL ASSERT OR HOLD ANY OTHER PARTY LIABLE FOR PUNITIVE DAMAGES, LOST PROFITS, CONSEQUENTIAL, OR INCIDENTAL DAMAGES THAT ARISE OUT OF OR RELATE TO ANY BREACH OF ANY LEGAL DUTY INCLUDING CLAIMS FOR LOSS OF DATA, BUSINESS INTERRUPTION, LOST PROFITS OR LOSS OF BUSINESS OPPORTUNITIES, WHETHER FRAMED AS A BREACH OF CONTRACT OR TORT CLAIM.

SERVICING COMPANY AND CLIENT AGREE THAT EACH'S LIABILITY TO THE OTHER FOR DAMAGES FOR ANY OCCURRENCE OR RELATED OCCURRENCES WILL NOT EXCEED PROVEN DIRECT DAMAGES. THIS LIMITATION OF DAMAGES IS INTENDED TO BE THE EXCLUSIVE MEASURE OF DAMAGES.

5.03 Force Majeure. Neither party shall be liable for any failure or delay in the performance of any service obligation under this Agreement to the extent said failures or delays are proximately caused by causes beyond that party's reasonable control and occurring without its fault or negligence provided that, as a condition to the claim of non-liability, the party experiencing the difficulty shall give the other prompt written notice, with full details following the occurrence of the cause relied upon. Dates by which performance obligations are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.

5.04 Insurance. Client and Servicing Company each represent and warrant to the other that each has and will maintain at its own cost and expense insurance coverage with respect to its operations and its employees to include general liability coverage, automobile liability coverage, employee dishonesty coverage, errors and omissions liability coverage (and/or officer and director liability), and workers' compensation coverage. Each agrees to provide the other with evidence of such coverage as it may from time to time request.

5.05 Non-Public Information. Servicing Company and Client each have obligations to safeguard non-public, personal information under federal and state privacy laws and regulations. Each party agrees to comply with these laws and represents and warrants that it will not take action that will violate these laws or cause the other party to be in violation of such laws.

- 5.06 Confidential Information.** Except as may be authorized by a claimant or as otherwise authorized by law and deemed necessary by Servicing Company in the performance of services, the parties will not at any time, directly or indirectly, use, copy, reveal, report, memorialize, publish, duplicate, or otherwise disclose to any third party in any way whatsoever any information designated and marked as Confidential by the other party without the prior written consent of the other party, which consent will be granted, if at all, in the sole discretion of such party. The parties will receive, maintain, and use any information designated as Confidential in the strictest of confidence and use commercially reasonable efforts keep such information confidential and to prevent the unwarranted disclosure thereof.
- 5.07 Licensing of Data.** Client consents to Servicing Company's use of Client data in combination with data from other sources such that Client data is not individually identifiable ("Aggregate Data") and further grants Servicing Company and its subsidiaries, divisions, affiliates, and related entities a royalty-free, irrevocable, non-exclusive license to use, disclose, reproduce, modify, license and distribute such Client data included as part of any Aggregate Data whether in the form of compilations, analyses or like reports prepared by Servicing Company. The provisions of this section shall survive the expiration or termination of this agreement, including any extensions thereof.

ARTICLE VI. MISCELLANEOUS

- 6.01 Governing Law.** This Agreement will be governed by the laws of the State of South Dakota.
- 6.02 Entire Agreement.** The terms and provisions contained and referenced herein constitute the entire Agreement between the parties and supersede any previous communications, representations or agreements, either oral or written, with respect to the subject matter hereof. This Agreement may not be amended except in a writing signed by both parties.
- 6.03 Counterparts.** This Agreement may be executed simultaneously in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.
- 6.04 Severability.** If any provisions of this Agreement or application to any party or circumstances shall be determined by any court of competent jurisdiction to be invalid and unenforceable to any extent, the remainder of this Agreement, or the application of such provisions or circumstances other than those as to which it is determined to be invalid or unenforceable shall not be affected thereby, and each provision hereof shall be valid and shall be enforced to the fullest extent permitted by law.
- 6.05 Survival.** The provisions of this Agreement regarding Indemnification and Release and Survival will survive the expiration or termination of this Agreement.
- 6.06 Regulatory Compliance.** In the event that any federal, state or local legislative or executive body enacts or promulgates legislation or regulation affecting the obligation of the parties under this Agreement, the parties agree to negotiate in good faith to amend

this Agreement and modify Servicing Company's fee in order to insure compliance with any such legislation or regulation.

- 6.07 Independent Contractor.** Servicing Company is an independent contractor. Nothing in this Agreement will be construed or deemed to create any other relationship between the parties, including one of employment or joint venture.
- 6.08 No Guarantee.** Servicing Company shall not be responsible to Client for guaranteeing that the overall Program undertaken shall provide a profit, or for the financial solvency or performance of the Program, its reinsurers or any other stakeholder.
- 6.09 No Waiver of Rights.** The failure of any party to insist upon the strict observation or performance of any provision of this Agreement or to exercise any right or remedy will not impair or waive any such right or remedy.
- 6.10 Assignment.** This Agreement shall be binding upon and inure to the benefit of the successors of each of the parties hereto, however neither this Agreement nor any rights or obligations hereunder may be assigned, delegated or transferred by either party without the prior written consent of the other party.
- 6.11 Notice.** All notices, certificates or other communications provided for, authorized or required under this Agreement will be sufficiently given and will be deemed given when mailed by U.S. mail, postage prepaid, with proper address indicated below. Notice may also be given, if acknowledged by recipient, using the email address below.

IF TO SERVICING COMPANY: Berkley Risk Administrators Company, LLC
Attn: President
222 South Ninth Street, Suite 1300
Minneapolis, MN 55402

email: legalnotice@berkleyrisk.com

IF TO CLIENT: Rapid City
Attn: Trevor Schmelz, Risk Manager
300 Sixth Street
Rapid, City, SD 57701

email: trevor.schmelz@rcgov.org

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their respective, duly authorized officers.

**BERKLEY RISK ADMINISTRATORS
COMPANY, LLC**

RAPID CITY

By: _____

By: _____

Its: _____

Its: _____

Date: _____

Date: _____

ATTEST:

By: _____
Finance Officer

Date: _____