

**2019 MANAGEMENT AGREEMENT  
BETWEEN THE CITY OF FRESNO AND ASM GLOBAL**

THIS 2019 MANAGEMENT AGREEMENT (Agreement) is dated as of this \_\_\_\_ day of \_\_\_\_\_, 2019 , (the Effective Date), by and between the CITY OF FRESNO, a municipal corporation organized and existing under the laws of the State of California (City), and ASM Global Fresno, LLC, a Delaware limited liability company (ASM).

**RECITALS**

- A. City is the owner of the Fresno Convention & Entertainment Center (Saroyan Theatre, Selland Arena, Fresno Convention Center, Ernie Valdez Exhibit Hall and Surface Parking Lot located downtown in the City of Fresno (individually and collectively, the Facility).
- B. ASM is in the business of providing management services, including operations and marketing services among other things, for public assembly facilities.
- C. City's Facility was previously managed by SMG, under that certain Amended and Restated Management Agreement dated as of December 5, 2013, which agreement has expired as of the Effective Date of this Agreement.
- D. The City wishes to enter into this Agreement with ASM for the management of its Facility.

**NOW, THEREFORE**, in consideration of the foregoing and of the mutual promises, covenants and agreements herein contained, the parties hereto, intending to be legally bound, hereby agree as follows:

**1. Definitions.** In addition to the capitalized terms defined elsewhere in this Agreement, the following terms have the meanings referred to in this Section:

1.1. "**Affiliate**" means a person that directly or indirectly controls or is controlled by, or is under common control with, a specified person. For purposes of this definition, "control" means ownership of equity securities or other ownership interests that represent more than 50% of the voting power in the controlled person.

1.2. "**Actual Cost Increases**" means any increase in ASM's Operation Expense Budget in excess or of a greater amount than the prior Fiscal Year Budget supported by such documentation as may be reasonably requested by the City Manager.

1.3. "**Approved Budget**" means any budget submitted by ASM that is accepted by the City Manager and approved by the City Council, in accordance with Section 5 hereof.

1.4. "**Capital Equipment**" means any and all furniture, fixtures, machinery or equipment, either additional or replacement .The depreciable life of which, according to generally accepted accounting principles ("GAAP"), is in excess of three (3) years and any other item of expense that, according to

GAAP, is not properly deducted as a current expense on the books of ASM, but rather should be capitalized.

1.5. "**City Council**" means the City Council of the City of Fresno.

1.6. "**City Manager**" means the City Manager of the City.

1.7. "**Commercial Rights**" means naming rights, pouring rights, advertising signage (including event sponsorships), branding of food and beverage products for resale, premium seating (including but not limited to suites and club seats) and memorial gifts, to the extent legally possible.

1.8. "**Contract Administrator**" means the City Manager or his/her designee as designated from time to time in writing by the City Manager.

1.9. "**Fiscal Year**" means a one-year period beginning July 1 and ending June 30.

1.10. "Food and Beverage Services" means to provision of food and beverage services, including catering, concessions and alcoholic and non-alcoholic beverage services at the Facility.

1.11. "**Losses**" means any and all losses, liabilities, claims (including, without limitation, claims for bodily injury, death or damage to property), damages and expenses (including reasonable attorneys' fees).

1.12. "**Net Operating Loss/Profit**" means with respect to a Fiscal Year, the excess, if any, of Operating Expenses for such Fiscal Year over Operating Revenues for such Fiscal Year, in the case of a loss, and the excess, if any, of Operating Revenues for such Fiscal Year over Operating Expenses for such Fiscal Year, in the case of a profit.

1.13. "**Normally Touring Attractions**" means the shows or events that customarily tour facilities similar to the Facility in regional or national markets, including without limitation touring family shows (including without limitation, ice shows and the circus), touring Broadway-type shows, professional wrestling, sporting competitions and exhibition games/matches (including amateur, minor league and professional), and touring gospel, motivational and religious shows.

1.14. "**Operating Expenses**" means the Operating Expenses listed in Section 5.1 of this Agreement and approved by the City Council as part of the Approved Budget.

1.15. "**Operating Revenues**" means any and all revenues of every kind or nature derived, directly or indirectly, from owning, operating, managing or promoting the Facility, all as determined in accordance with generally accepted accounting principles, consistently applied.

1.16. "**Structural Improvements**" means each of following: (i) the roof; (ii) all bearing walls and members; (iii) the foundation; (iv) all permanently paved surfaces; (v) all pipes, wires and optics located within the bearing walls or under the permanently paved surfaces; and (vi) such other elements of the Facility that are commonly understood by an architect to be structural elements.

1.17. **“Non-Structural Improvements”** means any and all building additions, alterations, renovations, repairs or improvements not categorized under Structural Improvements

1.18. **"Surface Parking Lot"** means the surface parking lot located just east of the Fresno Convention and Entertainment Center.

## **2. Engagement of ASM.**

2.1. Subject to the terms and conditions set forth in this Agreement, City hereby engages ASM, on an exclusive basis, as an independent contractor, to manage, operate, and promote the Facility and ASM hereby accepts such engagement. In no event shall ASM hold itself out as, act as, or be the agent of the City, without the City's express written authority. In such capacity, ASM shall have exclusive authority over the day-to-day operation of the Facility and all activities therein. The standard for performance of services by ASM will be in accord with the express provisions of this Agreement, and where not expressed, in accord with generally accepted industry standards.

2.2. **Services to be Performed by ASM.** Without limiting the generality of the foregoing and except as otherwise expressly noted below, ASM shall have the sole right and authority to perform the following tasks without any prior approval by City:

(a) **Services.** Provide or cause to be provided, through itself and/or one or more of its Affiliates and/or third party subcontractors, booking services, catering and concession services, decorating services, maintenance services, and all other services in connection with the management, promotion and operation of the Facility.

(i) **Food and Beverage Services.** AMS shall provide Food and Beverage Services satisfactory to the City, either: (1) through its own forces; or (2) through third party subcontracts which have been duly approved by the City Manager. In providing catering, ASM shall offer multiple types of cuisine at competitive rates to meet the needs of the local Facility user market. ASM may, without penalty to Facility users, allow outside vendors to provide specialty cuisine.

(ii) **Mystery Shopper Program.** ASM shall conduct daily Facility inspections by its on-site staff and "Mystery Shopper Program" inspections at least twice in each Fiscal Year and shall provide the Contract Administrator a copy of the Mystery Shopper report(s) within ten (10) days of its receipt by ASM to allow the City to monitor how the Facility is managed and maintained.(2)

(iii) **Commercial Rights.** Subject to the approval of the City and the City's bond counsel, ASM shall develop, implement and manage a system for selling Commercial Rights at or in connection with the Facility, either itself or through a subcontracted entity, provided that the City approves such subcontractor in advance

(which consent will not be unreasonably withheld). Any amounts due to a third party selling the Commercial Rights shall be an Operating Expense.

(b) **Agreements.** Negotiate, execute in its own name as an independent contractor, deliver and administer any and all licenses, occupancy agreements, rental agreements, booking commitments, advertising and sponsorship agreements, catering and concession agreements, decorating agreements, supplier agreements, service contracts, and all other contracts and agreements in connection with the management, promotion and operation of the Facility, subject to (1) the fact that if any such license, agreement, commitment or contract other than those involving the license, lease or rental of any of the Facility (or any portion thereof) in the ordinary course has a term that extends beyond the remaining Management Term, such license, agreement, commitment or contract shall be approved in advance by City (which approval shall not be unreasonably withheld); and (2) in connection with any licenses, agreements, commitments or contracts for the Facility, ASM will include in such documents the right of ASM to assign all of its rights and obligations under such licenses, agreements, commitments and contracts to the City (or to any successor management company retained by the City) upon the expiration or termination of this Agreement, and upon such expiration or termination, such assignment and assumption shall automatically occur as provided in Section 11.3(b) hereof. ASM, or the concessionaire(s) for the Facility, as appropriate, shall obtain all necessary licenses and permits for operation of the Facility, including, but not limited to, licenses and permits to sell food, beverages and alcohol. ASM shall also be solely responsible for obtaining all necessary permits, licenses or similar authorizations required for the operation.

(c) **Facility Operations.** Except as otherwise provided in this Agreement, ASM shall be responsible for all aspects of the operation of the Facility and shall be responsible for any and all operating expenses, routine maintenance and repairs of the Facility. ASM shall contract and pay for all utilities and services to the Facility. ASM may operate the Facility itself or hire subcontractors to perform all or any portion of the operation of the Facility in compliance with all applicable laws (including all applicable bonding and licensing requirements). ASM agrees to do all things reasonably necessary to conduct its affairs and carry on its business and operations in such a manner as to comply in all material respects with any and all applicable laws of the United States and the State of California and to duly observe and conform to all valid orders, regulations, or requirements of any governmental authority relative to the conduct of its business and the ownership and/or operation of the Facility. ASM shall further comply with any and all provisions and conditions of any development entitlements issued by the City.

(d) **Establishing Prices and Rates.** Establish and adjust prices, rates and rate schedules for the aforesaid licenses, agreements and contracts and any other commitments relating to the Facility to be negotiated by ASM in the course of its management, operation and promotion of the Facility. In determining such prices and rate schedules, ASM shall evaluate comparable charges for similar goods and services at similar and/or competing facilities.

(e) **Parking Fees.** All rate change requests in Parking Fees are subject to review by the City Manager. ASM will provide a copy of the rate change request computation to the City within thirty (30) calendar days following the completion thereof, and City shall then amend City's Master Fee Schedule so as to cause the new rates to go into effect on a date of adoption of City Council

(f) **Operation of Surface Parking Lot.** Operate or cause to be operated the Surface Parking Lot for use as a pay parking lot for automobiles and for no other use unless approved by the City. The Surface Parking Lot shall be operated and maintained as a first class parking facility, open to public use during events, and with established rates approved by the City and staffed by sufficient personnel to ensure safe and efficient ingress and egress of traffic. All ASM employees, subcontractors, and employees of ASM's subcontractors shall park in the Surface Parking Lot. Overnight parking in the Surface Parking Lot shall not be permitted by ASM, except as specifically required to accommodate an event in the course of operations at the Facility.

(g) **Marketing of Convention Center Parking Structure.** ASM shall implement various programs in consultation with the City to package events with parking at the Convention Center Parking Structure and implement other programs in an effort to increase revenues. The City shall reasonably cooperate with ASM regarding such efforts. Any net operating revenues directly attributable to ASM's marketing of the Convention Center Parking Structure shall be factored in as Operating Revenue for the purposes of calculating the Facility's operating budget.

(h) **Use of Funds Supplied by City.** To the extent that Operating Revenues or funds supplied by City are made available ASM shall utilized such funds to: (1) maintain the Facility in the condition received, reasonable wear and tear excepted; and (2) rent, lease or purchase all equipment and maintenance supplies necessary or appropriate for the operation and maintenance of the Facility; provided that City shall be responsible for undertaking all Structural Improvements. To the extent that Operating Revenues or funds supplied by City are made available therefor, pay, when due all Operating Expenses from accounts established pursuant to Sections 5.2 of this Agreement.

(i) **Legal Proceedings.** After consultation with and approval by the Contract Administrator and the City Attorney, institute on behalf of the

Facility and the City at the reasonable expense of the City or as an Operating Expense, with counsel selected by ASM, such legal actions or proceedings as ASM shall deem necessary or appropriate in connection with the operation of the Facility, including, without limitation, to collect charges, rents or other revenues due to ASM as manager of the Facility or to cancel, terminate or sue for damages under, any license, use, advertisement or concession agreement for the breach thereof or default thereunder by any licensee, user, advertiser, or concessionaire at the Facility.

(j) **Promotional Activities.** Engage in such advertising, solicitation, and promotional activities as ASM deems necessary or appropriate to develop the potential of the Facility and the cultivation of broad community support; Work with the Fresno Convention and Visitor's Bureau in such manner as requested by the City.

2.3. **Financial Considerations.** ASM acknowledges that the Facility is financed in large part with the proceeds of one or more series of City bonds (Bonds), the interest of which is intended to be excluded from gross income for federal income tax purposes. In order to assist City in preserving the tax-exempt nature of the Bonds, ASM acknowledges and agrees to that contained in this Section.

(a) In determining whether to grant or withhold any approval of any contract for which approval of City is required under this Agreement, City may consider the effect of such contract for federal tax purposes on the exclusion of interest on the Bonds for federal income tax purposes.

(b) In addition to any other contracts requiring the approval of City, each of the following described contracts must be approved by City before execution thereof by ASM.

(i) Any contract relating to the Facility which grants a leasehold interest, term for years, or other real estate interest in the Facility (other than a revocable license), or grants a long-term right to use the Facility on a basis different from that of the general public, or where the right of the user to the Facility are those of a transient occupant rather than full legal possessory interest in the Facility as a lessee.

(ii) Any contract for the provision of services related to the Facility must, to the extent applicable, comply with the provisions of Revenue Procedure 97-13 and the interpretations thereof.

(c) Contracts for the use of the Facility for shows, programs, conventions and other events, unless such contracts provide for use on a fixed fee basis (excluding the sale of merchandise or concessions in respect thereto which may be on a percentage of merchandise or concession revenues), shall be determined on an event by event basis

by ASM in its best judgment. ASM may request City Manager input on such events at its discretion.

(d) If required by bond counsel to City or counsel to the underwriters, ASM agrees to make modifications to this Agreement so that the same is, in the opinion of such counsel, a qualified management contract for purposes of applicable Revenue Procedures promulgated by the Internal Revenue Service. In the event such modifications shall materially increase ASM's obligations hereunder or materially decrease ASM's right or economic benefits hereunder, ASM and City will cooperate with each other in good faith for a period of thirty (30) days in an effort to amend the Agreement and preserve the economic benefits of both parties hereunder in a manner that is satisfactory to ASM, City and City's bond counsel, each acting in their sole discretion. To the extent the parties do not amend this Agreement within such 30 day period, ASM shall have the right to terminate this Agreement upon not less than ninety (90) days prior written notice to City, which right may be exercised by ASM providing such termination notice to City is within twenty (20) business days after expiration of the 30 day negotiation period. If ASM timely exercises its right of termination under this Paragraph 2(c), ASM shall continue to perform its obligations hereunder through the date of termination and City shall continue to pay ASM all of its management fees, on a prorated basis for the then current Fiscal Year, through the date of termination in accordance with this Agreement.

2.4. **City Access to Facility.** Representatives of the City shall have the right to enter all portions of the Facility to inspect same, to observe the performance of ASM of its obligations under this Agreement, to install, remove, adjust, repair, replace or otherwise handle any equipment, utility lines, or other matters in, on, or about the premises, or to do any act or thing which the City may be obligated or have the right to do under this Agreement or otherwise. In connection with the exercise of such rights, the City will endeavor to provide (but is not obligated to provide) advance notice to ASM for security purposes and to minimize any interference with or disruption of ASM's work under this Agreement. Nothing contained in this Section is intended or shall be construed to limit any other rights of the City under this Agreement nor shall impose or be construed to impose upon the City any independent obligation to construct or maintain or make repairs, replacements, alterations, additions or improvements or create any independent liability for any failure to do so.

### 3. **Management Term**

3.1. The term of this Agreement shall be from the Effective Date for a period of five years unless terminated earlier in the manner ad under conditions herein provided. The parties may extend the term for two (2) additional five (5) year periods upon **mutual** agreement by the City Manager and ASM.

### 4. **Management Fee**

4.1 ASM's compensation for providing the services hereunder shall be an annual fee of One Hundred and Forty-Five Thousand Dollars (\$145,000) (the Management Fee). Commencing on July 1, 2020, the Management Fee shall be adjusted upward annually to reflect the twelve month percentage change in the U.S Bureau of Labor Statistics Consumer Price Index (CPI) (Urban Wage Earners and Clerical Workers for the San Francisco-Oakland-San Jose Area), for the most current month that data is available, or 2.5% whichever is less. The Management Fee shall be payable to ASM in equal monthly installments due on or before the last day of each month, and ASM shall be entitled to draw such amounts from the account described in Section 5.2.

4.2 Food and Beverage Fee. ASM shall be entitled to a Food and Beverage Fee as follows:

(a) Catering Services. There shall be an incentive fee paid in the amount of \$7,500 per \$100,000 of net income from catering operations. The net income will be the gross revenue from operations less direct and indirect costs, as stated on the audited financial statements and is to be paid no less than 30 days after the receipt of the audited financial statements by the City;

(b) Concession Services. There will be an incentive fee paid in the amount of \$7,500 per \$100,000 of net income from concession operations. The net income will be the gross revenue from operations less direct and indirect costs, as stated on the audited financial statements and is to be paid no less than 30 days after the receipt of the audited financial statements by the City.

## **5. Budgets; Bank Accounts.**

### **5.1. Budgets.**

(a) As part of the annual plan described in Section 6.2 herein, ASM will prepare a proposed annual operating budget and annual cash flow budget for each fiscal year using the historical budgetary data and consistent with the budget escalation provisions of this Section. ASM shall submit each Fiscal Year's budget to the City Manager by March 15 of each year. The proposed annual operating budget prepared by ASM shall include projected Operating Expenses and Operating Revenues on a line item basis. The line items shall include, but not be limited to, the following categories:

(i) Projected Operating Expenses:

(A) Employee payroll, benefits, 401(k) contribution, relocation costs, bonus and related costs;

(B) Operating supplies (including general office supplies);

(C) Advertising, marketing, group sales, and public relations;



- (D) Cleaning;
  - (E) Data processing and storage and other related information technology;
  - (F) Dues, subscriptions and memberships;
  - (G) Printing and stationary;
  - (H) Postage and freight;
  - (I) Equipment and rental;
  - (J) Repairs, maintenance, and equipment servicing
  - (K) Security;
  - (L) Telephone and communication;
  - (M) Travel and entertainment;
  - (N) Employee uniforms and identification;
  - (O) Exterminator and trash removal;
  - (P) Training;
  - (Q) Utilities;
  - (R) Professional fees, including accounting and legal fees (including audit expenses);
  - (S) Commissions and other fees payable to third parties;
  - (T) Insurance, to the extent required in Exhibit "A" of this Agreement; and
  - (U) Taxes, including any possessory interest tax arising from any determination by the Fresno County Assessor that the license granted herein under constitutes a taxable interest, except any possessory use tax as a result of ASM's self promoting activities (e.g., booking an event for ASM, whereby ASM benefits beyond the consideration provided hereunder for its services).
  - (V) A reasonable allocation of costs directly associated with ASM and its affiliate companies providing human resources, legal, and finance services for Facility operations.
  - (W) Costs associated with providing Food and Beverage Services, e.g. inventory, labor, licenses, and the like.
- (ii) Projected Operating Revenues:

- (A) Advertising;
- (B) Telephone and fax;
- (C) Parking;
- (D) Rentals;
- (E) Equipment charges;
- (F) Food and beverage;
- (G) Retail sales;
- (H) Electrical;
- (I) Catering;
- (J) Box Office fees;
- (K) Advertising and naming rights;
- (L) Interest;
- (M) Leases; and
- (N) Other miscellaneous forms of revenue.

(b) Operating Revenues do not include applicable excise, sales, occupancy and use taxes, or similar governmental taxes, duties, levies or charges collected directly from patrons or guests, or as a part of the sales price of any goods, services, or displays, such as gross receipts, admission, cabaret, or similar or equivalent taxes, nor any gratuities collected (or to be collected) for the benefit of and paid to any of ASM's personnel. Furthermore, Operating Revenues do not include (i) monies collected (or to be collected) for the benefit of and paid to third parties such as event promoters. The annual budgets referred to in subparagraph (a) that are submitted each year shall only contain (i) increases in the Operating Expenses to the extent consistent with Actual Cost Increases; or (ii) the percentage increase represented by the percentage change in the Consumer Price Index -- All Urban Consumers (CPI-U) -- West Region -- All Items, as published by the Bureau of Labor Statistics of the U.S. Department of Labor, whichever is less. Any proposed operating budget showing increases in Operating Revenue shall be substantiated with sufficient documentation. City Manager shall require all relevant data and documentation required at his sole discretion to substantiate Operating Revenue or Actual Cost Increases in any submitted budget. All budgets submitted are subject to approval by the City Manager before their submission to the City Council for final approval. If the City Manager elects to modify such budgets submitted by ASM, he or she shall notify ASM in writing of such modifications at least ten (10) days prior to his or her submission of such budgets to the City Council for approval. In the event that ASM disagrees with the City Manager's modifications of the annual budget,

ASM shall have the right to notify the City Council of its concerns and request a modification to the annual budget.

(c) Within thirty (30) days before the end of each Fiscal Year, the City shall notify ASM of any changes to the annual operating budget and the annual cash flow budget for the succeeding Fiscal Year proposed by ASM. The budgets, as finally approved by the City Council, shall be the Approved Budget for the following Fiscal Year.

(d) If there are Extraordinary Circumstances (defined as facts or circumstances that are beyond ASM's control); including Structural or Non-Structural Improvements that materially impact the use of any portion of the Facility during any Fiscal Year (such materiality being defined as \$10,000.00 or more); or the sale or disposition of a portion of the Facility which adversely affect Operating Revenues or Operating Expenses during any Fiscal Year, ASM shall have the right to submit to the City Manager for submission to the City Council a revised annual operating budget or annual cash flow budget reflecting impacts of such event. If the City Manager elects not to submit such a revised budget to the City Council or proposes to modify it, ASM shall have the right to petition the City Council for to amend the annual operating budget or annual cash flow budget submitted by the City Manager. If the City Council does not approve such proposed amended budget(s) or modifies such proposed amended budget(s) in a manner which ASM disagrees, then both parties may mediate the issue consistent with Section 12.2 (c). Any amended budget that is so approved by the City Council shall be considered the Approved Budget for such year.

(e) **City Contribution.** By July 1 of each Fiscal Year (beginning Fiscal Year 2020), the City shall advance to ASM the City's entire annual financial contribution to the Facility (the "City Contribution"). For illustrative purposes only, the City Contribution, without additional funding for extraordinary Operating Expenses for the Facility for Fiscal Year 2020, was \$573,500. When determining the annual City Contribution, the City shall not off-set, or otherwise consider, funds contained in separate cash accounts maintained and controlled by ASM, which include revenues from advance ticket sales and event deposits (to be referred to as "Encumbered Cash Accounts").

## 5.2. Receipts and Disbursements.

With the approval of the City, ASM shall establish and maintain in one or more depositories one or more operating, payroll and other bank accounts for the promotion, operation and management of the Facility, which such accounts shall be in the name of the City and with signature authority in a City-designated officer and in such employees of ASM as ASM shall determine. All Operating Revenues collected by ASM shall be deposited into such accounts and Operating Expenses shall be paid by ASM from such accounts. The funding of all of the foregoing accounts shall be made by City to cover all projected Operating Expenses at

the Facility to the extent not covered by the Operating Revenues. ASM will promptly report to the Contract Administrator any material change or variance from the Approved Budget and any change to the total expenses (as opposed to any particular line item expense) from that provided for in the Approved Budget (unless such change or variance is a result of, or offset by, a corresponding increase in Operating Revenues).

### **5.3. Maintenance, Repair and Replacements.**

(a) The City shall be responsible for the timely maintenance, repair and replacement of all Structural Improvements of the Facility during the Term. "Structural Improvements" shall mean each of following: (i) the roof; (ii) all bearing walls and members; (iii) the foundation; (iv) all permanently paved surfaces; (v) all pipes, wires and optics located within the bearing walls or under the permanently paved surfaces; and (vi) such other elements of the Facility that are commonly understood by an architect to be structural elements. In the event there is a disagreement between ASM and the City as to what constitutes "other elements" coming within the provisions of subpart (vi) above, the determination shall be made by an architect with similar industry construction experience reasonably acceptable to the City and ASM and the party whose position is not upheld shall pay the costs of engaging such architect.

(b) Except for maintenance, repairs and replacements that are the obligation of the City under this Agreement, ASM shall be responsible as an Operating Expense for the timely maintenance, repair and replacement of all elements of the Facility that are not Structural Elements, which maintenance, repair and replacement shall be performed (i) in a safe, clean, attractive, and first class manner comparable to that of other facilities of similar design not more than five (5) years older or five (5) years newer than the Facility, ordinary wear and tear excepted, (ii) in a manner that complies with all applicable requirements, and (iii) in a manner consistent with the original design and construction program of the Facility.

(c) Both parties shall have the right to access and use the Facility throughout the Term in order to maintain, repair and replace the Facility as required of them under this Agreement; provided that such activities do not unreasonably interfere with the permitted use of the Facility by the other party.

### **5.4. Operation, Maintenance, and Repair.**

i. ASM and the City shall meet at least once prior to December 31st of each year to confer on general operation, maintenance, repair and replacement standards for the Facility and ASM's and the City's performance related thereto. At any such meeting the City may require ASM, or ASM may require the City, to modify their respective policies and/or approaches to operating, maintaining, repairing and replacing the Facility in order to meet such standards. ASM shall make no permanent additions or

improvements to the Facility without the prior written approval of the City, which approval shall not be unreasonably withheld. Specifically, ASM and City will in good faith agree on a repair and improvement plan for both Non-Structural Improvements and Structural Improvements for the succeeding 12-month period (each, an "Annual Facility Improvement Expense Plan"). If improvements or repairs become necessary during the season, City and ASM shall cooperate to complete such improvements or repairs.

(a) The City shall conduct a yearly walk through of the Facility to be conducted during the month of February. ASM will be notified of the time that the City intends to conduct the walk through and will be permitted to attend the City's inspection of the Facility. In addition to the City's annual February inspection, the City shall be afforded access to the Facility at all reasonable times. If the City determines that ASM has not operated, maintained and repaired the Facility to the standards set forth in this Agreement, the City shall have the right to notify ASM in writing setting forth specifically the manner in which the City believes ASM failed to meet such standards and describing the actions to be taken to cure such failure(s).

i. ASM acknowledges and agrees that the City owns and has title to all improvements that are now or hereafter permanently fixed to the Facility, notwithstanding the fact that the same may have been, or may be, as appropriate, acquired, financed, installed or placed in the Facility by ASM.

ii. Except as otherwise provided herein, title to all trade fixtures, furnishings, equipment, and other personal property in the Facility funded or acquired by ASM, its predecessors, assignees or concessionaires shall remain with ASM (collectively "ASM's Personal Property"). ASM, its assignees or concessionaires will be entitled to remove ASM's Personal Property from time to time during and upon expiration of the Term. Any damage to the Facility caused by ASM's removal of ASM's Personal Property shall be promptly repaired by ASM at its sole cost and expense.

#### **5.5. Emergency Repairs.**

If any repairs are of an emergency nature, ASM shall immediately contact the Contract Administrator to inform him/her of the emergency and make such repairs in accordance with the following: the City shall reimburse ASM for the full amount of the emergency repair by depositing the same in the Facility operating account to replenish such amount utilized from such account. City shall make every effort to provide reimbursement within thirty (30) days of invoice. An emergency repair is defined herein as the repair of a condition which, if not performed immediately, creates an imminent danger to persons or property or would, in ASM's reasonable judgment, significantly impact the operational functions of the Facility (including without limitation the holding of

any scheduled event at the Facility) and was not the result of lack of preventative maintenance, improper operation, or the negligence or willful misconduct of ASM or any of its officers, employees, or agents.

#### **5.6. Limitation of ASM Liability.**

Notwithstanding any provision herein to the contrary, ASM shall have no obligation to fund any cost, expense or liability with respect to the operation, management or promotion of the Facility, and any costs, expenses or liabilities related to the operation, management or promotion of the Facility shall be Operating Expenses.

### **6. Records, Audits, and Reports.**

#### **6.1 Records and Audits.**

ASM shall keep full and accurate accounting records relating to its activities at the Facility and shall provide to the City monthly financial statements in a format agreed upon by the City. ASM shall give the City's authorized representatives access to such books and records maintained at the Facility during reasonable business hours and upon reasonable advance notice. ASM shall keep and preserve for at least three (3) years following each Fiscal Year all sales slips, rental agreements, purchase order, sales books, credit card invoices, bank books or duplicate deposit slips, and other evidence of Operating Revenues and Operating Expenses for such period. Additionally, ASM shall deliver to the City annual financial statements within ninety (90) days after the close of each Fiscal Year with a statement that they were prepared in accordance with generally accepted accounting principles.

ASM shall also supply to City a complete financial audit in compliance with the Government Accounting Standards Board prepared by a reputable Certified Public Accounting firm. The actual cost of such audit shall be paid equally by ASM, as a Facility Operating Expense, and City; except that ASM's share of audit expenses shall never exceed Fifteen Thousand Dollars (\$15,000.00) per year. ASM must submit such audit to City within one hundred twenty (120) days after the close of the Fiscal Year. In the event additional costs and expenses relating to field visits to the Facility by auditors are incurred due to errors and/or omissions in the financial statements prepared and delivered by ASM hereunder, ASM shall be liable for such additional costs and expenses.

#### **6.2 Annual Plan: Actual to Budget Comparison.**

ASM shall provide to City an annual management plan, which shall include the annual operating budget and annual cash flow budget described in Section 5.1 for the next Fiscal Year. The annual plan shall include information regarding ASM's anticipated operations for such Fiscal Year and requested capital equipment and Non-Structural Improvements purchases, and anticipated budgets therefor. The annual plan shall be subject to review, revision and approval by City. As part of the annual plan, but no later than June of each Fiscal Year, ASM shall provide to City with a preliminary "projected

actual to budget" report estimate for the financial performance of the Facility in a form reasonably acceptable to City. By October 1 of each Fiscal Year, ASM shall provide to City a final "actual to budget" report in a form reasonably acceptable to City. Along with the final "actual to budget" report, ASM shall provide a detailed explanation of any Operating Expense that exceeds the Facility Budget.

### **6.3 Monthly Reports and Meetings.**

By the thirtieth day of each month ASM shall provide to City a written monthly operational report in a format reasonably acceptable to City setting out the Facility's anticipated activities and financial condition for the upcoming month and detailed monthly financial, programmatic, and statistical reports for all Facility' activities in the prior month. These reports must include all standard financial reports including those unique to the industry; detailed financial reports on subcontract transactions; information on the activities associated with the operation, management, supervision and maintenance of the Facility; a list of upcoming events; a discussion of operating and maintenance issues and concerns; anticipated changes in management, operations or maintenance activities; and other information as appropriate or as requested by City through the Contract Administrator. ASM and City shall work together to tailor these reports so that all reviewing parties will understand the information provided. ASM shall promptly notify the City Manager when ASM determines that a Facility Operating Expense could cause the Facility not to meet the Approved Budget and may require a budget amendment by the City Council. Moreover, on an annual basis, the City Manager shall schedule a presentation by the Facility General Manager in front of the City Council to discuss overall Facility operations.

### **6.4 Payables and Receivables: Monitoring and Reporting.**

ASM shall make all reasonable efforts to keep accounts payable at ninety (90) days or less. In the event that any account payable exceeds ninety (90) days, ASM will immediately notify the Contract Administrator in writing of such accounts payable, along with an explanation of why this account payable has not been fully satisfied, and a reasonable plan to resolve the matter, which may include a budget amendment approved by the City Council. Accounts receivable aged in excess of ninety (90) days shall be reported to the Contract Administrator and ASM shall use commercially reasonable efforts to collect or write-off the uncollectable balance.

### **6.5 Advisory Board.**

The parties agree to establish and reasonably participate in an advisory board to review Facility operations. The Advisory Board may consist of the City Manager or designee a City Councilmember, the ASM General Manager, and one representative from each of the following: the Fresno Convention and Visitors Bureau, the Fresno Chamber of Commerce, the Downtown Fresno Partnership, and the Fresno area Hotel/Motel Industry (the "Advisory Board"). ASM will make every reasonable effort to respond to the inquiries of the

Advisory Board.

**6.6 Advertising and Naming Rights.**

When agreed upon by City and ASM, ASM shall make available, to City, local industry and legal experts and experts from ASM corporate offices to create a plan for increasing advertising and pursuing naming rights opportunities for the Facility.

**6.7 Co-Promoter Fund.**

Each Fiscal Year, City shall allocate Fifty Thousand Dollars (\$50,000.00), at minimum, to the Co-Promoter Fund to be used exclusively to pay promoters to draw events to the Facility (the "Co-Promoter Fund"). ASM will work with City regarding developing a plan for obtaining additional contributions to the Co-Promoter Fund. ASM will regularly update the Contract Administrator on progress to attract events at the Facility.

**7. Chukchansi Stadium.**

**7.1 Events at Chukchansi Stadium.**

ASM may book and market, on a non-exclusive basis, entertainment events at the Chukchansi Stadium (the "Stadium") consistent with the standards for performance of services in this Agreement and any applicable Sublease Agreement at the Stadium. For each Stadium Event, City shall retain fifty percent (50%) of the net profit and ASM shall retain the remaining fifty percent (50%). The net profit for each Stadium Event shall not be considered Facility Operating Revenue. Accordingly, ASM's share of Stadium Event net profit shall be additional compensation to ASM. Any Operating Expenses incurred for each Stadium Event from the Facility approved budget shall be treated as Stadium Event expense and shall be reimbursed to the Facility from Stadium Event gross revenues.

**7.2 Management, Operation and Promotion.**

For each Stadium Event, ASM shall have exclusive authority over the operations of the Stadium and all activities during each Stadium Event. ASM shall manage the Stadium for each Stadium Event consistent with the standards for performance of services in this Agreement and any applicable Sublease Agreement at the Stadium, and where not expressed herein, in accordance with generally accepted industry standards.

**7.3 Sponsorships and Advertisements.**

ASM may obtain sponsorships and advertisements for each Stadium Event. All funds obtained from such sponsorships and advertisements shall be treated as operating revenues for that particular Stadium Event. If such sponsorships or advertisements are applicable to multiple Stadium Events, such funds shall be allocated by ASM on a per capita basis as reasonably determined by ASM.

**8. ASM Employees.**

**8.1 ASM General Manger & Employment.**



ASM shall assign to the Facility a competent General Manager, with the consultation, and prior written consent, of the City Manager. City shall have the right to direct ASM to remove the Facility's General Manager with ninety (90) days written notice accompanied by a written explanation of the reason(s) for removal. A replacement General Manager shall be subject to the same consultation and approval requirements noted above. City shall not unreasonably withhold approval of the General Manager or replacement General Manager.

ASM may select, train and employ at the Facility such number of other employee(s) as ASM deems necessary or appropriate to satisfy its responsibilities hereunder, and ASM shall have authority to hire, terminate and discipline any and all personnel working at the Facility.

#### **8.2 ASM's Employees Not Considered Employees of City.**

ASM employees at the Facility shall not for any purpose be considered to be employees of City, and ASM shall be solely responsible for their supervision and daily direction and control and for setting, and paying as an Operating Expense, their compensation (including federal, state and local income tax withholding) and any employee benefits, and all costs related to their employment shall be an Operating Expense.

#### **8.3 Restriction on City's Solicitation or Hiring of ASM's Senior Management.**

During the period commencing on the date hereof and ending one (1) year after the expiration or termination of this Agreement, except with ASM's prior written consent, the Owner will not, for any reason, directly or indirectly, solicit for employment, or hire, any of the senior management personnel employed by ASM at the Facility, which encompass the general manager, director-level employees and department heads. In addition to any other remedies which ASM may have, specific performance in the form of injunctive relief shall be available for the enforcement of this provision.

### **9. Indemnification and Insurance.**

#### **9.1 Indemnification.**

(a) **General.** To the fullest extent permitted by law, ASM shall indemnify, defend (at ASM's sole cost and expense), protect and hold harmless City and each of its officers, officials, employees, agents and volunteers, and all of such party's representatives, successors and assigns, and any lender of City with an interest in the Facility (the "Indemnified Party(ies)"), from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, forfeitures, liabilities, costs and expenses (including, without limitation, attorneys' fees, disbursements and court costs, and any and all other professional, expert or consultants' fees and costs and ASM's and City's general and administrative expenses) of every kind and nature whatsoever (individually, a "Claim;" collectively,

"Claims") which may arise from or in any manner relate (directly or indirectly) to, and only to the extent of, the negligent and/or willful acts, errors and/or omissions of ASM, its principals, officers, agents, employees, person(s) under the supervision of ASM, vendors, suppliers, consultants, subconsultants, subcontractors, anyone employed directly or indirectly by any of them or for whose acts they may be liable for any or all of them in performing any work or services to be provided under this Agreement or in the course of conducting ASM's activities at or on behalf of the Facility, provided, however, that the foregoing indemnification shall not extend to Claims to the extent that such Claims relate to (i) any breach or default by the City of its obligations under this Agreement; (ii) the fact that the design or condition of the Facility as of the date hereof is not in compliance with applicable Law, including without limitation the Americans With Disabilities Act, as amended ("ADA"); (iii) changes in the design or condition of the Facility after the date hereof that are not in compliance with applicable Law caused by capital improvements to the Facility contracted for by the City; (iv) any structural defect with respect to the Facility; or (v) any act or omission carried out by ASM at or pursuant to the direction or instruction of the City, its agents or employees. For sake of clarity, the following is an example of how the foregoing indemnity provision (including the above proviso) is intended to operate, as between ASM and the City -- Assume that a third party Claim is made against ASM and the City alleging, among other things, negligence against ASM and the City and it is discovered that in connection with such Claim, (A) the City's actions constituted a breach of one of its obligations under the Agreement; and (B) such breach constitutes 10% of the overall liability of ASM and the City with respect to such Claim. In such instance, ASM's indemnification of the City with respect to such Claim would be reduced by 10% of such overall amount (related to the City's 10% contribution to such liability); however, the City's breach of such obligation would not operate to relieve ASM from its indemnity obligations for the remaining 90% of the amount of such Claim.

## **9.2 Subcontractor Indemnification.**

If ASM should subcontract all or any portion of the work to be performed or services to be provided under this Agreement, ASM shall require each subcontractor to indemnify, defend, protect and hold harmless the Indemnified Parties in accordance with the provisions of this Section 9.

## **9.3 Approved Budget.**

ASM's duty hereunder to indemnify, defend, protect and hold harmless the Indemnified Parties at ASM's sole cost and expense pursuant to Section 9.1 and 9.5 hereof includes that such cost and expense will not be paid from funds in the Approved Budget; except to the extent that (i) ASM prevails in its action as against claimant; and (ii) such cost and expense is not recovered and recoverable by ASM with reasonable due diligence from claimant or from any insurance

proceeds (including, without limitation, proceeds from any policy that ASM is required to maintain hereunder).

#### **9.4 Action to Enjoin or Set Aside Agreement.**

ASM warrants that ASM has the authority to enter into this Agreement and that there is no existing court order or judgment to either (i) enjoin ASM from entering into this Agreement; or (ii) to set aside this Agreement based upon any prior court order related to ASM directly or indirectly. ASM shall also indemnify, hold harmless, protect and defend the Indemnified Parties at ASM's sole cost and expense from and against all Claims arising from all suits of law or actions of every nature to enjoin ASM from entering into this Agreement or to set aside this Agreement as a consequence of any breach by ASM of the warranties in the foregoing sentence. Notwithstanding Section 9.3 above, such cost and expense will not be paid from funds in the Approved Budget.

#### **9.5 Warranty and Indemnification Against Infringement.**

ASM warrants that the materials, equipment, devices or processes (including, without limitation, any software or components of any database system) provided by ASM are free from trademark, copyright and patent infringements. ASM shall also indemnify, hold harmless, protect and defend the Indemnified Parties at ASM's sole cost and expense from and against all Claims arising from all suits of law or actions of every nature for or on account of the infringement of any patents, trademarks or copyrights by reason of the use of any proprietary materials, equipment, devices or processes, originally incorporated, or provided and used, by ASM in the performance of the work or the services provided under this Agreement.

#### **9.6 Insurance.**

ASM shall secure, deliver to the Owner and shall keep in force at all times during the Term such insurance policies as are described in Exhibit "A" hereto.

### **10. Assignment.**

#### **10.1 Assignment.**

Neither this Agreement nor any of the rights or obligations hereunder may be assigned by either party hereto without the prior written consent of the other party hereto. For sake of clarity, the parties acknowledge that the foregoing does not preclude the assignment by ASM of its rights to receive its management and incentive fees hereunder to its lender(s) as collateral security for ASM's obligations under any credit facilities provided to it by such lender(s), provided that such collateral assignment shall not in any event cover ASM's rights to manage, promote or operate the Facility hereunder

### **11. Termination.**

#### **11.1 Termination Upon Default.**

Either party may terminate this Agreement upon a default by the other

party hereunder.

A party shall be in default hereunder if (i) such party fails to pay any sum payable hereunder within thirty (30) days after same is due and payable; or (ii) such party fails in any material respect to perform or comply with any of the other terms, covenants, agreements or conditions hereof and such failure continues for more than sixty (60) days after written notice thereof from the other party. In the event that a default (other than a default in the payment of money) is not reasonably susceptible to being cured within the sixty (60) day period, the defaulting party shall not be considered in default if it shall within such sixty (60) day period have commenced with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default.

#### **11.2 Termination for Failure to Meet the Budget.**

The City shall also have the right to terminate this Agreement by giving ASM ninety (90) days written notice, if the actual Net Operating Loss/Profit for any Fiscal Year hereunder, as set forth in the annual financial statements described in Section 6.1, is greater than (or less than, as the case may be) the Net Operating Loss/Profit set forth in the Approved Budget for such year (the "Termination Shortfall") for two (2) consecutive years. ASM shall not be considered to be in breach of this Agreement solely by reason of the existence of a Termination Shortfall.

#### **11.3 Effect of Termination or Expiration.**

(a) In the event this Agreement expires or is terminated, (i) all Operating Expenses incurred or committed for prior to the date of expiration or termination, which have either been approved by the Council or are unanticipated expenses approved by the City Manager in light of termination, shall be paid using funds on deposit in the account(s) described in Sections 5.2 and to the extent such funds are not sufficient, the City shall pay the balance of such expenses; and (ii) City shall promptly pay ASM all fees earned to the date of expiration or termination subject to rights of set off in the event of a breach of this Agreement by ASM (the fees described in Section 4 (as applicable) being subject to proration).

(b) Upon termination or expiration, without any further action on the part of ASM or the City, the City shall, or shall cause another management company retained by it to, accept the assignment of ASM's rights, and assume and perform all of ASM's obligations, arising after the date of expiration or termination of this Agreement, under any licenses, occupancy agreements, rental agreements, booking commitments, advertising agreements, concession agreements, and any other contracts relating to the Facility which have been executed by ASM hereunder, except (A) to the extent that any such license, agreement, commitment or contract was executed by ASM in violation of any of the restrictions applicable to ASM's right to execute such

licenses, agreements, commitments or contracts contained in this Agreement; and (B) for any such license, agreement, commitment or contract to which the consent of the other party thereto is required for such assignment and assumption unless such consent is obtained (in the case of any such consent, ASM will use commercially reasonable efforts to obtain such consent and the City will cooperate in any reasonable manner with ASM to obtain such consent), and all further obligations of the parties hereunder shall terminate except for the obligations that are expressly intended to survive the termination or expiration of this Agreement, including, without limitation, Sections 5.4, 8.3, 11.2, 11.3 and 11.4.

#### **11.4 Surrender of Premises.**

Upon termination or expiration of this Agreement, ASM shall surrender and vacate the Facility upon the effective date of such termination or expiration. The Facility and all equipment and furnishings shall be returned to City in good repair, reasonable wear and tear excepted, to the extent funds were made available therefor by City. All reports, records, including financial records, and documents maintained by ASM at the Facility relating to this Agreement other than materials containing ASM's proprietary information or property shall be immediately surrendered to City by ASM upon termination or expiration.

### **12. Miscellaneous.**

#### **12.1 Certain Representations and Warranties.**

(a) City represents and warrants to ASM the following: (i) all required approvals have been obtained, and City has full legal right, power and authority to enter into and perform its obligations hereunder; (ii) this Agreement has been duly executed and delivered by City and constitutes a valid and binding obligation of City, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar all federal, state, local and municipal regulations, ordinances, statutes, rules, laws and constitutional provisions affecting creditors' rights generally or by general equitable principles; and (iii) the execution and delivery of this Agreement will not violate or cause a breach (with or without notice or the passage of time) under any agreement to which City is a party, including, without limitation, the City Agreement.

#### **12.2 Certain Other Provisions.**

(a) **Use by the City.** City use of the Facility shall (i) be booked in advance upon reasonable notice to ASM; (ii) not in conflict with dates previously booked by ASM for events; and (iii) not consist of Normally Touring Attractions (other than for occasional fund-raising events coordinated in advance with ASM). The City shall provide ASM credit as Operating Revenue the published rental rate for any City use of the

Facility. ASM, however, shall invoice, and the City shall promptly pay, ASM for direct out-of-pocket expenses incurred in connection with the City's use of the Facility. Such direct out-of-pocket expenses shall include, but not be limited to, employee time, utilities, clean-up, food and beverage service, and linens. Upon request of City through the Contract Administrator, ASM shall provide to City a list of available dates for City use of the Facility. To the extent that ASM has an opportunity to book a revenue producing event on a date which is otherwise reserved for use by City, ASM may propose alternative dates and other incentives for City to consider in rescheduling its event, and City shall use reasonable commercial efforts to attempt to reschedule such event; provided, that City shall not be obligated to reschedule its event. The City may from time- to-time direct ASM to book events at the Facility for organizations or entities unaffiliated with the City. The City shall provide ASM with reasonable notice of such events and make, or cause to be made, immediate payment for all expenses, including, but not limited to, rental charges and out of pocket expenses, incurred in connection with such use.

(b) **Non-Competition.** ASM agrees that it shall not, directly or indirectly, participate in or encourage development of, own, manage or provide consulting, or other management, marketing or promotion services, whether as a principal, partner, joint venture, member, consultant, agent, independent contractor, or stockholder of any company or business with respect to the following in the County of Fresno:

- i. **Indian Tribal Property:** Tribal gaming centers and future facilities within Kings, Madera, and Fresno Counties.
- ii. Any comparable municipally-owned arena, theatre, convention, or meeting facility, convention center facility or other facility with exhibition, meeting and banquet space.

(c) **Cooperation/Mediation/Litigation.** The parties desire to cooperate with each other in the management and operation of the Facility pursuant to the terms hereof. In keeping with this cooperative spirit and intent, any dispute arising hereunder will first be referred to the parties' respective agents or representatives prior to either party initiating a legal suit, which will endeavor in good faith to resolve any such disputes within the limits of their authority and within forty-five (45) days after the commencement of such discussions. If any dispute between the parties has not been resolved pursuant to such a good faith resolution, the parties will endeavor to settle the dispute by nonbinding mediation under the then current CPR International Institute for Conflict Prevention and Resolution ("CPR") model procedure for mediation of business disputes or, if such model procedure no longer exists, some other mutually agreeable procedure. The parties agree that any mediation proceeding (as well as any discussion pursuant to paragraph (a) above) will constitute settlement negotiations for purposes of the

federal and state rules of evidence and will be treated as non-discoverable, confidential and privileged communication by the parties and the mediator. No stenographic, visual or audio record will be made of any mediation proceedings or such discussions. All conduct, statements, promises, offers and opinions made in the course of the mediation or such discussion by any party, its agents, employees, representatives or other invitees and by the mediator will not be discoverable nor admissible for any purposes in any litigation or other proceeding involving the parties and will not be disclosed to any third party. Participation in such nonbinding mediation shall in no way waive a party's right to pursue any and all available judicial remedies.

(d) **Independent Contractor.** In the furnishing of the services provided for herein, ASM is acting as an independent contractor. Neither ASM, nor any of its officers, associates, agents or employees shall be deemed an employee, partner, joint venture or agent of City for any purpose. However, City shall retain the right to verify that ASM is performing its respective obligations in accordance with the terms hereof.

(e) **Entire Agreement; Amendments.** This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings with respect thereto. No other agreements, representations, warranties or other matters, whether oral or written, will be deemed to bind the parties hereto with respect to the subject matter hereof. This Agreement shall not be altered, modified or amended in whole or in part, except in a writing executed by each of the parties hereto.

(f) **Force Majeure.** No party will be liable or responsible to the other party for any delay, damage, loss, failure, or inability to perform caused by "Force Majeure" if notice is provided to the other party within ten (10) days of date on which such party gains actual knowledge of the event of "Force Majeure" that such party is unable to perform. The term "Force Majeure" as used in this Agreement means the following: an act of God, strike, war, public rioting, lightning, fire, storm, flood, explosions, inability to obtain materials, supplies, epidemics, landslides, lightning storms, earthquakes, floods, storms, washouts, civil disturbances, explosions, acts of terrorism, breakage or accident to machinery or lines of equipment, temporary failure of equipment, freezing of equipment and any other cause whether of the kinds specifically enumerated above or otherwise which is not reasonably within the control of the party whose performance is to be excused and which by the exercise of due diligence could not be reasonably prevented or overcome.

(g) **Binding Upon Successors and Assigns.** This Agreement and the rights and obligations set forth herein shall inure to the benefit of, and be binding upon, the parties hereto and each of their

respective successors and permitted assigns.

(h) **Notices.** Any notice, consent or other communication given pursuant to this Agreement will be in writing and will be effective either on the date transmitted electronically as shown on the electronic confirmation therefor as long as such electronic transmission is followed by mailing of such notice by certified or registered mail, return receipt requested, postage prepaid, in any case addressed to such party as set forth below or as a party may designate by written notice given to the other party in accordance herewith.

To City: City of Fresno  
Attention: Wilma Quan, City Manager  
2600 Fresno Street, Room 2064  
Fresno, California 93721  
Email: CityManager@fresno.gov

To ASM: ASM Global  
800 West Olympic Boulevard, 3rd Floor,  
Los Angeles, CA 90015, USA  
Attn: President  
bnewman@asmglobal.com

With a copy to:  
ASM Global  
300 Conshohocken State Rd. Suite 450  
West Conshohocken, Pennsylvania 19428  
Attn: Counsel  
bhanson@asmglobal.com

(i) **Governing Law; Counterparts.** This Agreement will be governed by and construed in accordance with the internal laws of the State of California, without giving effect to otherwise applicable principles of conflicts of law. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall be Fresno County, California. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original copy of this Agreement, and all of which, when taken together, shall be deemed to constitute but one and the same agreement.

(j) **Severability.** The invalidity or unenforceability of any particular provision, or part of any provision, of this Agreement shall not affect the other provisions or parts hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions or parts were omitted.

(k) **Non-Waiver.** A failure by either party to take any action



with respect to any default or violation by the other of any of the terms, covenants, or conditions of this Agreement shall not in any respect limit, prejudice, diminish, or constitute a waiver of any rights of such party to act with respect to any prior, contemporaneous, or subsequent violation or default or with respect to any continuation or repetition of the original violation or default.

(l) **Attorney's Fees.** If either party is required to commence any proceeding, arbitration or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees, costs and legal expenses.

(m) **Governmental Compliance.** In providing the services required under this Agreement, ASM shall at all times comply with all applicable all federal, state, local and municipal regulations, ordinances, statutes, rules, laws and constitutional provisions now in force and as they may be enacted, issued, or amended during the term of this Agreement. However, ASM shall have no liability under this Agreement therefor, if such activity requires any Capital Improvements or Capital Equipment purchases, unless City provides funds for such Capital Improvements and Capital Equipment purchases. ASM will promptly provide notice to the City if ASM becomes aware of any condition such non-compliance that requires Capital Improvements or Capital Equipment purchases to remedy the same; provided, however, as soon as practicable after the date hereof (but no later than six months after the date hereof) and on such other basis thereafter as the parties may mutually agree, ASM and the City will cooperate in, and mutually agreed upon, the planning and implementation of an inspection of the Facility for any such non-compliance issues to be performed by a qualified third party(ies) and/or qualified City employees or subcontractors (including without limitation a Phase I environmental analysis of the Facility), the costs of which inspection shall be provided for in the applicable Approved Budget.

(n) **Bond Counsel Approval.** The terms of this Agreement shall be subject to the City's bond counsel approval to ensure tax law and bond covenant compliance. Upon advice from City's counsel, the parties agree to cooperate to revise the Agreement to make the terms contained herein comply with tax law and bond covenants.

(o) **Tax Position.** ASM is not entitled to and will not take any tax position inconsistent with being a service provider to the City for the Facility.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties hereto as of the day and year first above written.

City of Fresno,  
A California municipal corporation

By:  
Wilma Quan  
City Manager

ASM Global Fresno, LLC

By:

Name: Mark D. Rozells

Title: Exec. VP & CFO

APPROVED AS TO FORM:  
DOUGLAS T. SLOAN  
City Attorney

By:  11.21.19  
Raj Singh Badhesha Date  
Senior Deputy City Attorney

REVIEWED BY:

  
Bruce Hanson  
General Counsel

ATTEST:  
YVONNE SPENCE, MMC CRM  
City Clerk

By: \_\_\_\_\_ Date \_\_\_\_\_  
Deputy

## Exhibit "A"

### INSURANCE REQUIREMENTS

(a) Throughout the life of this Agreement, ASM shall pay for and maintain in full force and effect all insurance as required herein with an insurance company(ies) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated no less than "A-VII" in the Best's Insurance Rating Guide, or (ii) as may be authorized in writing by CITY'S Risk Manager or his/her designee at any time and in his/her sole discretion. The City of Fresno and each of its officers, officials, employees, agents and volunteers (hereinafter referred to collectively as "CITY") requires policies of insurance as stated herein shall maintain limits of liability of not less than those amounts stated therein. However, the insurance limits available to CITY, shall be the greater of the minimum limits specified therein or the full limit of any insurance proceeds to the named insured.

(b) Any failure to maintain the required insurance shall be sufficient cause for CITY to terminate this Agreement. No action taken by CITY pursuant to this section shall in any way relieve ASM of its responsibilities under this Agreement. The phrase "fail to maintain any required insurance" shall include, without limitation, notification received by CITY that an insurer has commenced proceedings, or has had proceedings commenced against it, indicating that the insurer is insolvent.

(c) The fact that insurance is obtained by ASM shall not be deemed to release or diminish the liability of ASM, including, without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify CITY shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by ASM. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of ASM, vendors, suppliers, invitees, contractors, subcontractors, or anyone employed directly or indirectly by any of them.

Coverage shall be at least as broad as:

1. The most current version of Insurance Services Office (ISO) Commercial General Liability Coverage Form CG 00 01, or equivalent, providing liability coverage arising out of your business operations. The Commercial General Liability policy shall be written on an occurrence form and shall provide coverage for "bodily injury," "property damage" and "personal and advertising injury" with coverage for premises and operations (including the use of owned and non-owned equipment), products and completed operations, and contractual liability (including, without limitation, indemnity obligations under the Agreement) with limits of liability not less than those set forth under "Minimum Limits of Insurance."

2. The most current version of ISO \*Commercial Auto Coverage Form CA 00 01, or equivalent, providing liability coverage arising out of the ownership, maintenance or use of automobiles in the course of your business operations. The Automobile Policy shall be written on an occurrence form and shall provide coverage for all owned, hired, and non-owned automobiles or other licensed vehicles (Code 1- Any Auto).
3. Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.

### **MINIMUM LIMITS OF INSURANCE**

ASM, or any party the ASM subcontracts with, shall maintain limits of liability of not less than those set forth below. However, insurance limits available to The City of Fresno and each of its officers, officials, employees, agents and volunteers as additional insureds, shall be the greater of the minimum limits specified herein or the full limit of any insurance proceeds available to the named insured:

1. **COMMERCIAL GENERAL LIABILITY :**
  - (i) \$5,000,000 per occurrence for bodily injury and property damage;
  - (ii) \$5,000,000 per occurrence for personal and advertising injury;
  - (iii) \$300,000 damage to premises rented to you
  - (iv) \$5,000,000 aggregate for products and completed operations; and,
  - (iv) \$6,000,000 general aggregate applying separately
2. **COMMERCIAL AUTOMOBILE LIABILITY :**  
 \$2,000,000 per accident for bodily injury and property damage.
3. **WORKERS' COMPENSATION INSURANCE** as required by the State of California with statutory limits and **EMPLOYER'S LIABILITY** with limits of liability not less than:
  - (i) \$1,000,000 each accident for bodily injury;
  - (ii) \$1,000,000 disease each employee; and,
  - (iii) \$1,000,000 disease policy limit.
4. **PROPERTY:** Limits of insurance in an amount equal to the full (100%) replacement cost (without deduction for depreciation) of ASM'S business property.

5. **LIQUOR LIABILITY INSURANCE** for alcoholic beverages that are to be sold, served or furnished, Liquor Liability coverage is required with limits of liability of not less than:

- (i) \$1,000,000 per occurrence;
- (ii) \$2,000,000 aggregate for bodily injury and property damage;

**COMMERCIAL CRIME INSURANCE which shall be at least as broad as the most** current version of the Insurance Services Office (ISO) Crime and Fidelity Form CR 00 20 with limits of insurance of not less than \$500,000.00

### **UMBRELLA OR EXCESS INSURANCE**

In the event ASM purchases an Umbrella or Excess insurance policy(ies) to meet the "Minimum Limits of Insurance," this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies). In addition, such Umbrella or Excess insurance policy(ies) shall also apply on a primary and non-contributory basis for the benefit of the City of Fresno and each of its officers, officials, employees, agents and volunteers.

### **DEDUCTIBLES AND SELF-INSURED RETENTIONS**

ASM shall be responsible for payment of any deductibles contained in any insurance policy(ies) required herein and ASM shall also be responsible for payment of any self-insured retentions. Any deductibles or self-insured retentions must be declared on the Certificate of Insurance, and approved by, the CITY'S Risk Manager or his/her designee. At the option of the CITY'S Risk Manager or his/her designee, either:

- (i) The insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officers, officials, employees, agents and volunteers; or
- (ii) ASM shall provide a financial guarantee, satisfactory to CITY'S Risk Manager or his/her designee, guaranteeing payment of losses and related investigations, claim administration and defense expenses. At no time shall the CITY be responsible for the payment of any deductibles or self-insured retentions.

### **OTHER INSURANCE PROVISIONS/ENDORSEMENTS**

*All policies of insurance* required herein shall be endorsed to provide that the coverage shall not be cancelled, non-renewed, reduced in coverage or in limits except after thirty (30) calendar days written notice has been given to CITY, except ten (10) days for

nonpayment of premium. ASM is also responsible for providing written notice to the CITY under the same terms and conditions. Upon issuance by the insurer, broker, or agent of a notice of cancellation, non-renewal, or reduction in coverage or in limits, ASM shall furnish CITY with a new certificate and applicable endorsements for such policy(ies). In the event any policy is due to expire during the work to be performed for CITY, ASM shall provide a new certificate, and applicable endorsements, evidencing renewal of such policy not less than fifteen (15) calendar days prior to the expiration date of the expiring policy.

The Commercial General, Liquor Liability and Automobile Liability policies of insurance shall be endorsed to name The City of Fresno and each of its officers, officials, employees, agents and volunteers as additional insureds.

ASM shall establish additional insured status for the CITY and for all ongoing and completed operations by use of ISO Form CG 20 10 11 85 or both CG 20 10 10 01 and CG 20 37 10 01 or by an executed manuscript insurance company endorsement providing additional insured status as broad as that contained in ISO Form CG 20 10 11 85.

The Commercial General, Liquor Liability and Automobile Liability policies of insurance shall be endorsed so ASM's insurance shall be primary and no contribution shall be required of CITY. The coverage shall contain no special limitations on the scope of protection afforded to The City of Fresno and each of its officers, officials, employees, agents and volunteers. If ASM maintains higher limits of liability than the minimums shown above, City requires and shall be entitled to coverage for the higher limits of liability maintained by ASM.

Should any of the required policies provide that the defense costs are paid within the Limits of Liability, thereby reducing the available limits by any defense costs, then the requirement for the Limits of Liability of these policies will be twice the above stated limits.

The Workers' Compensation insurance policy shall contain, or be endorsed to contain, a waiver of subrogation as to The City of Fresno and each of its officers, officials, employees, agents and volunteers.

The Commercial Crime policy must be endorsed to name the City as a Loss Payee.

**PROVIDING OF DOCUMENTS** - ASM shall furnish CITY with all certificate(s) and applicable endorsements effecting coverage required herein **All certificates and applicable endorsements are to be received and approved by the CITY'S Risk Manager or his/her designee prior to CITY'S execution of the Agreement and before work commences.** All non-ISO endorsements amending policy coverage shall be executed by a licensed and authorized agent or broker. Upon request of CITY, ASM shall immediately furnish CITY with a complete copy of any insurance policy required under

this Agreement, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive expiration or termination of this Agreement. All subcontractors working under the direction of ASM shall also be required to provide all documents noted herein.

**MAINTENANCE OF COVERAGE** - If at any time during the life of the Agreement or any extension, ASM or any of its subcontractors fail to maintain any required insurance in full force and effect, all work under this Agreement shall be discontinued immediately until notice is received by CITY that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to CITY. Any failure to maintain the required insurance shall be sufficient cause for CITY to terminate this Agreement. No action taken by CITY hereunder shall in any way relieve ASM of its responsibilities under this Agreement. The phrase “fail to maintain any required insurance” shall include, without limitation, notification received by CITY that an insurer has commenced proceedings, or has had proceedings commenced against it, indicating that the insurer is insolvent.

The fact that insurance is obtained by ASM shall not be deemed to release or diminish the liability of ASM, including, without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify CITY shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by ASM. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of ASM, its principals, officers, agents, employees, persons under the supervision of ASM, vendors, suppliers, invitees, consultants, sub-consultants, subcontractors, or anyone employed directly or indirectly by any of them.

**SUBCONTRACTORS** - If ASM subcontracts any or all of the services to be performed under this Agreement, ASM shall require, at the discretion of the CITY Risk Manager or designee, subcontractor(s) to enter into a separate Side Agreement with the City to provide required indemnification and insurance protection. Any required Side Agreement(s) and associated insurance documents for the subcontractors must be reviewed and preapproved by CITY Risk Manager or designee. If no Side Agreement is required, ASM will be solely responsible for ensuring that its subcontractors maintain insurance coverage at levels no less than those required by applicable law and is customary in the relevant industry.