

OPERATOR AGREEMENT CITY OF FRESNO, CALIFORNIA

THIS AGREEMENT (Agreement) is made and entered into, effective _____, 2023, by and between the CITY OF FRESNO, a California municipal corporation (**City**), and 809 Olive Avenue LLC, a California Limited Liability Corporation (**Operator**).

RECITALS

A. City owns that certain real property at the intersection of Olive and Wishon in the City of Fresno (**Property**) improved with the Tower Theater building which contains an operating theater and lounge (**Theater**) and a number of business spaces.

B. City desires to obtain management services for the Theater to allow currently scheduled performances to continue as planned. The services provided by Operator shall include the Theater but shall not include the business spaces on the Property.

C. Operator is engaged in the business of furnishing services as the operations manager of Theatre, a performing arts venue, and hereby represents that it desires to and is professionally and legally capable of performing the services called for by this Agreement.

D. Operator acknowledges that this Agreement is subject to the requirements of Fresno Municipal Code Section 4-107.

E. This Agreement will be administered for City by its City Manager (**Administrator**) or designee.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and of the covenants, conditions, and premises hereinafter contained to be kept and performed by the respective parties, it is mutually agreed as follows:

1. **Scope of Services.** Operator shall perform to the satisfaction of City the services described in **Exhibit A**, including all work incidental to, or necessary to perform, such services even though not specifically described in **Exhibit A (Services)**. Nicholas Kennedy shall be the primary person performing the Services on behalf of Operator which shall not be modified without the written consent of City.
2. **Term of Agreement and Time for Performance.** This Agreement shall be effective 31 days from the date on which the City Council approves the agreement (**Effective Date**) and shall continue in full force and effect for three years, with two one-year extensions, subject to any earlier termination in accordance with this Agreement. The Services shall commence on the Effective Date and all such Services shall be completed monthly prior to expiration of this Agreement and in accordance with any performance schedule set forth in **Exhibit A**.
3. **Compensation.**

(a) Operator's sole compensation for satisfactory performance of all Services

shall be 12% of gross receipts payable monthly, estimated for the first year at \$13,290 on average per month, or \$159,480 for the first year. For subsequent years, the management fee is estimated at \$15,173 on average per month, or \$182,076 per year. Such fee shall exclude all operating expenses, including, but not limited to, expenses related to employees, promoters, sound systems, etc., reimbursed or paid by the City for operation of the Theater. The initial projected operating revenues/(expenses) is attached hereto as **Exhibit D**.

(b) Operator and City developed the projected operating revenues/(expenses) attached as **Exhibit D** which also reflects net event revenue at an average of five (5) events per month. Such amount, net of average event revenue is estimated at \$8,934.14 per month. The City agrees to deposit \$8,934.14 per month into the Operator's operating account by the first of every month during with time this agreement is in effect. The Operator shall report true-up accounting by the tenth (10th) of each month which shall include detailed supporting documentation, along with monthly reports for any and all services performed, and revenue and expenses incurred. Furthermore, Operator agrees to allow City to review and/or audit all documentation, reports, and statements provided in support of Operator's monthly reports. An annual reconciliation is expected to be performed jointly by the City and the Operator, within 60 days of each 12-month period.

(c) The parties acknowledge and agree that Operator shall have access to advanced ticket sales for future bookings as provided in **Exhibit E**, attached hereto, which is incorporated by reference herein.

(d) The parties may modify this Agreement to increase or decrease the scope of Services or provide for the rendition of Services not required by this Agreement, which modification shall be approved by City Council and may include an adjustment to Operator's compensation arrangement. Any change in the scope of Services must be made by written amendment to the Agreement signed by an authorized representative of the Operator and approved by City Council. Should Operator's scope of services be increased in the future, the Operator shall not be entitled to any additional compensation if Services are performed prior to a signed written amendment to this Agreement.

4. Termination, Remedies, and Force Majeure.

(a) This Agreement shall terminate without any liability of City to Operator thereafter upon the earlier of: (i) Operator's filing for protection under the federal bankruptcy laws, or any bankruptcy petition or petition for receiver commenced by a third party against Operator; (ii) thirty (30) calendar days' prior written notice with or without cause by Operator to City; or (iii) expiration of this Agreement.

(b) Immediately upon any termination or expiration of this Agreement, Operator shall (i) immediately stop all work hereunder; (ii) immediately cause any and all of its subcontractors to cease work; and (iii) return to City any and all unearned payments and all properties and materials in the possession of Operator that are owned by City. Subject to the terms of this Agreement, Operator shall be paid compensation for Services satisfactorily performed prior to the effective date of termination. Operator shall not be paid for any work or Services performed or

costs incurred which reasonably could have been avoided.

(c) In the event of termination due to failure of Operator to satisfactorily perform in accordance with the terms of this Agreement, City may withhold an amount that would otherwise be payable as an offset to, but not in excess of, City's damages caused by such failure. In no event shall any payment by City pursuant to this Agreement constitute a waiver by City of any breach of this Agreement which may then exist on the part of Operator, nor shall such payment impair or prejudice any remedy available to City with respect to the breach.

(d) Upon any breach of this Agreement by Operator, City may (i) exercise any right, remedy (in contract, law or equity), or privilege which may be available to it under applicable laws of the State of California or any other applicable law; (ii) proceed by appropriate court action to enforce the terms of the Agreement; and/or (iii) recover all direct, indirect, consequential, economic and incidental damages for the breach of the Agreement. If it is determined that City improperly terminated this Agreement for default, Operator may pursue damages against the City accordingly.

(e) Operator shall provide City with adequate written assurances of future performance, upon Administrator's request, in the event Operator fails to comply with any terms or conditions of this Agreement.

(f) Operator shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of Operator and without its fault or negligence, including, but not limited to, acts of God or the public enemy, acts of City in its contractual capacity, nonperformance by performers and/or promoters, fires, floods, epidemics, pandemics, quarantine restrictions, strikes, picketing, community unrest, unusually severe weather, and delays of common carriers. Operator shall notify Administrator in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, and shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to Administrator of the cessation of such occurrence.

5. Confidential Information and Ownership of Documents.

(a) Any reports, information, or other data prepared or assembled by Operator pursuant to this Agreement shall not be made available to any individual or organization by Operator without the prior written approval of the Administrator. During the term of this Agreement, and thereafter, Operator shall not, without the prior written consent of City, disclose to anyone any Confidential Information. The term Confidential Information for the purposes of this Agreement shall include all proprietary and confidential information of City, including, but not limited to, business plans, marketing plans, financial information, materials, compilations, documents, instruments, models, source or object codes and other information disclosed or submitted, orally, in writing, or by any other medium or media, except (i) where such information is now or becomes part of the public domain through no fault of Operator, (ii) information which is already in Operator's possession at the time of the disclosure, (iii) information which comes into Operator's possession

from a third party without breach of this Agreement, or (iv) information that is independently developed by Operator or a third party without recourse to or utilization of any portion of the Confidential Information imparted or transmitted hereunder. All Confidential Information shall be and remain confidential and proprietary in City.

(b) The parties acknowledge the Agreement permits Operator to engage artists to perform at The Tower Theater and any oral or written information exchanged between the Operator and artist in connection with the preparation and performance of their agreed terms is regarded as Confidential Information. The Operator and City shall maintain confidentiality of all such Confidential Information, and it shall not disclose any relevant Confidential Information to any third parties, except for the information that: (a) is or will be in the public domain (other than through the receiving Party's unauthorized disclosure); (b) is under the obligation to be disclosed pursuant to the applicable laws or regulations, or orders of the court or other government authorities; or (c) is required to be disclosed by any party to its legal counsel or financial advisors regarding the transaction contemplated hereunder, provided that such third parties will be bound by confidentiality obligations similar to those set forth here. In the event the City believes it may be legally required to disclose Confidential Information as provided under this Agreement, the City shall notify Operator of such potential disclosure in writing and Operator may, at its own expense object or otherwise oppose the disclosure of such Confidential Information.

(c) Any and all writings and documents prepared or provided by Operator pursuant to this Agreement are the property of City at the time of preparation and shall be turned over to City upon expiration or termination of the Agreement. Operator shall not permit the reproduction or use thereof by any other person except as otherwise expressly provided herein.

(d) If Operator should subcontract all or any portion of the Services, Operator shall cause each subcontractor to also comply with the requirements of this Section 5.

(e) This Section 5 shall survive expiration or termination of this Agreement.

6. Indemnification.

To the furthest extent allowed by law, OPERATOR shall indemnify, hold harmless and defend CITY and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by CITY, OPERATOR or any other person, and from any and all claims, demands and actions in law or equity (including reasonable attorney's fees, litigation expenses and cost to enforce this agreement), arising or alleged to have arisen directly or indirectly out of performance of this Agreement. OPERATOR'S obligations under the preceding sentence shall apply regardless of whether CITY or any of its officers, officials, employees, agents or volunteers are negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused solely by the gross

negligence, or caused by the willful misconduct, of CITY or any of its officers, officials, employees, agents or volunteers.

If OPERATOR should subcontract all or any portion of the work to be performed under this Agreement, OPERATOR shall require each subcontractor to indemnify, hold harmless and defend CITY and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the preceding paragraph.

This section shall survive termination or expiration of this Agreement.

7. Insurance.

Throughout the life of this Agreement, OPERATOR shall pay for and maintain in full force and effect all insurance as required in Exhibit B 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 designee at any time and in its sole discretion. The required 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, its officers, officials, employees, agents and volunteers as additional insureds, shall be the greater of the minimum limits specified therein or the full limit of any insurance proceeds to the named insured.

If at any time during the life of the Agreement or any extension, OPERATOR or any of its subcontractors fail to maintain any required insurance in full force and effect, all services and work under this Agreement shall be discontinued immediately, and all payments due or that become due to OPERATOR shall be withheld 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 pursuant to this section shall in any way relieve OPERATOR 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 OPERATOR shall not be deemed to release or diminish the liability of OPERATOR, 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 OPERATOR. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of OPERATOR, vendors, suppliers, invitees, contractors, sub-contractors, subcontractors, or anyone employed directly or indirectly by any of them.

8. Conflict of Interest and Non-Solicitation.

(a) Prior to City's execution of this Agreement, Operator shall complete a City of Fresno conflict of interest disclosure statement in the form as set forth in **Exhibit**

C. During the term of this Agreement, Operator shall have the obligation and duty to immediately notify City in writing of any change to the information provided by Operator in such statement.

(b) Operator shall comply, and require its subcontractors to comply, with all applicable (i) professional canons and requirements governing avoidance of impermissible client conflicts; and (ii) federal, state and local conflict of interest laws and regulations including, without limitation, California Government Code Section 1090 et. seq., the California Political Reform Act (California Government Code Section 87100 et. seq.) and the regulations of the Fair Political Practices Commission concerning disclosure and disqualification (2 California Code of Regulations Section 18700 et. seq.). At any time, upon written request of City, Operator shall provide a written opinion of its legal counsel and that of any subcontractor that, after a due diligent inquiry, Operator and the respective subcontractor(s) are in full compliance with all laws and regulations. Operator shall take, and require its subcontractors to take, reasonable steps to avoid any appearance of a conflict of interest. Upon discovery of any facts giving rise to the appearance of a conflict of interest, Operator shall immediately notify City of these facts in writing.

(c) In performing the work or Services to be provided hereunder, Operator shall not employ or retain the Services of any person while such person either is employed by City or is a member of any City council, commission, board, committee, or similar City body. This requirement may be waived in writing by the City Manager, if no actual or potential conflict is involved.

(d) Operator represents and warrants that it has not paid or agreed to pay any compensation, contingent or otherwise, direct or indirect, to solicit or procure this Agreement or any rights/benefits hereunder.

(e) Neither Operator, nor any of Operator's subcontractors performing any Services shall bid for, assist anyone in the preparation of a bid for, or perform any Services pursuant to, any other contract in connection with this Agreement unless fully disclosed to and approved by the City Manager, in advance and in writing. Operator and any of its subcontractors shall have no interest, direct or indirect, in any other contract with a third party in connection with this Agreement unless such interest is in accordance with all applicable law and fully disclosed to and approved by the City Manager, in advance and in writing. Notwithstanding any approval given by the City Manager under this provision, Operator shall remain responsible for complying with Section 9(b), above.

(f) If Operator should subcontract all or any portion of the Services, Operator shall include the provisions of this Section 9 in each subcontract and require its subcontractors to comply therewith.

(g) This Section 8 shall survive expiration or termination of this Agreement.

9. Recycling Program. In the event Operator maintains an office or operates a facility(ies), or is required herein to maintain or operate same, within the incorporated limits of the City of Fresno solely to fulfill its obligations under the terms

of this Agreement, Operator shall, at the City's expense:

(a) Immediately establish and maintain a viable and ongoing recycling program, approved by City's Solid Waste Management Division, for each office and facility. Literature describing City recycling programs is available from City's Solid Waste Management Division and by calling City of Fresno Recycling Hotline at (559) 621-1111.

(b) Immediately contact City's Solid Waste Management Division at (559) 621-1452 and schedule a free waste audit and cooperate with such Division in their conduct of the audit for each office and facility.

(c) Cooperate with and demonstrate to the satisfaction of City's Solid Waste Management Division the establishment of the recycling program in paragraph (a) above and the ongoing maintenance thereof.

10. General Terms.

(a) Except as otherwise provided by law, all notices expressly required of City within the body of this Agreement, and not otherwise specifically provided for, shall be effective only if signed by the Administrator or designee.

(b) Records of Operator's expenses pertaining to this Agreement shall be kept on a generally recognized accounting basis and shall be available to City or its authorized representatives upon request during regular business hours throughout the life of this Agreement and for a period of three years after final payment or, if longer, for any period required by law. In addition, all books, documents, papers, and records of Operator pertaining to the management of the Theatre shall be available for the purpose of making audits, examinations, excerpts, and transcriptions for the same period of time. If any litigation, claim, negotiations, audit or other action is commenced before the expiration of said time period, all records shall be retained and made available to City until such action is resolved, or until the end of said time period whichever shall later occur. If Operator should subcontract all or any portion of the Services, Operator shall cause each subcontractor to also comply with the requirements of this paragraph. This Section 10(b) shall survive expiration or termination of this Agreement.

(c) Prior to execution of this Agreement by City, Operator shall have provided evidence to City that Operator is licensed to perform the Services (or that no license is required). If Operator should subcontract all or any portion of the Services, Operator shall require each subcontractor to provide evidence to City that subcontractor is licensed to perform the Services (or that no license is required) before beginning work.

11. Nondiscrimination. To the extent required by controlling federal, state and local law, Operator shall not employ discriminatory practices in the provision of Services, employment of personnel, or in any other respect on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era. Subject to the foregoing and during the performance of this Agreement, Operator agrees as follows:

(a) Operator will comply with all applicable laws and regulations providing that no person shall, on the grounds of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity made possible by or resulting from this Agreement.

(b) Operator will not discriminate against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era. Operator shall ensure that applicants are employed, and the employees are treated during employment, without regard to their race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era. Such requirement shall apply to Operator's employment practices including, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Operator agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provision of this nondiscrimination clause.

(c) Operator will, in all solicitations or advertisements for employees placed by or on behalf of Operator in pursuit hereof, state that all qualified applicants will receive consideration for employment without regard to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era.

(d) Operator will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice advising such labor union or workers' representatives of Operator's commitment under this section and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(e) If Operator should subcontract all or any portion of the Services, Operator shall cause each subcontractor to also comply with the requirements of this Section 11.

12. Independent Contractor.

(a) In the furnishing of the Services, Operator is acting solely as an independent contractor. Neither Operator, nor any of its officers, agents, or employees shall be deemed an officer, agent, employee, joint venturer, partner, or associate of City for any purpose. City shall have no right to control or supervise or direct the manner or method by which Operator shall perform its work and functions. However, City shall retain the right to administer this Agreement so as to verify that Operator is performing its obligations in accordance with the terms

and conditions thereof.

(b) This Agreement does not evidence a partnership or joint venture between Operator and City. Operator shall have no authority to bind City absent City's express written consent. Except to the extent otherwise provided in this Agreement, Operator shall bear its own costs and expenses in pursuit thereof.

(c) Because of its status as an independent contractor, Operator and its officers, agents, and employees shall have absolutely no right to employment rights and benefits available to City employees. Operator shall be solely liable and responsible for all payroll and tax withholding and for providing to, or on behalf of, its employees all employee benefits including, without limitation, health, welfare and retirement benefits. In addition, together with its other obligations under this Agreement, Operator shall be solely responsible, indemnify, defend and save City harmless from all matters relating to employment and tax withholding for and payment of Operator's employees, including, without limitation, (i) compliance with Social Security and unemployment insurance withholding, payment of workers' compensation benefits, and all other laws and regulations governing matters of employee withholding, taxes and payment; and

(ii) any claim of right or interest in City employment benefits, entitlements, programs and/or funds offered employees of City whether arising by reason of any common law, de facto, leased, or co-employee rights or other theory. It is acknowledged that during the term of this Agreement, Operator may be providing services to others unrelated to City or to this Agreement.

13. Notices. Any notice required or intended to be given to either party under the terms of this Agreement shall be in writing and shall be deemed to be duly given if delivered personally, transmitted by facsimile followed by telephone confirmation of receipt, or sent by United States registered or certified mail, with postage prepaid, return receipt requested, addressed to the party to which notice is to be given at the party's address set forth on the signature page of this Agreement or at such other address as the parties may from time to time designate by written notice. Notices served by United States mail in the manner above described shall be deemed sufficiently served or given at the time of the mailing thereof.

14. Binding. Subject to Section 15, below, once this Agreement is signed by all parties, it shall be binding upon, and shall inure to the benefit of, all parties, and each parties' respective heirs, successors, assigns, transferees, agents, servants, employees and representatives.

15. Assignment.

(a) This Agreement is personal to Operator and there shall be no assignment by Operator of its rights or obligations under this Agreement without the prior written approval of the City Manager or designee. Any attempted assignment by Operator, its successors or assigns, shall be null and void unless approved in writing by the City Manager or designee. Furthermore, any change in the stock ownership of Operator or management of Operator shall be an assignment in violation of this Section.

(b) Operator hereby agrees not to assign the payment of any monies due Operator from City under the terms of this Agreement to any other individual(s), corporation(s) or entity(ies). City retains the right to pay any and all monies due Operator directly to Operator.

- 16. Compliance With Law.** In providing the Services, Operator shall at all times comply with all applicable laws of the United States, the State of California and City, and with all applicable regulations promulgated by federal, state, regional, or local administrative and regulatory agencies, now in force and as they may be enacted, issued, or amended during the term of this Agreement. Operator shall be solely responsible for determining whether payment of prevailing wage is required. Operator shall indemnify, hold harmless, and defend (with counsel acceptable to City) the City against any claim for damages, compensation, fines, penalties, or other amounts arising out of the failure or alleged failure of any person or entity (including Operator, its contractors and subcontractors) to pay prevailing wages as required by law or to comply with other applicable provisions of Labor Code Sections 1720 et seq. and the implementing regulations of the Department of Industrial Relations.
- 17. Waiver.** The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement. No provisions of this Agreement may be waived unless in writing and signed by all parties to this Agreement. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.
- 18. Governing Law and Venue.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California, excluding, however, any conflict of laws rule which would apply the law of another jurisdiction. 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.
- 19. Headings.** The section headings in this Agreement are for convenience and reference only and shall not be construed or held in any way to explain, modify or add to the interpretation or meaning of the provisions of this Agreement.
- 20. Severability.** The provisions of this Agreement are severable. The invalidity, or unenforceability of any one provision in this Agreement shall not affect the other provisions.
- 21. Interpretation.** The parties acknowledge that this Agreement in its final form is the result of the combined efforts of the parties and that, should any provision of this Agreement be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this Agreement in favor of or against either party, but rather by construing the terms in accordance with their generally accepted meaning.
- 22. Attorney's Fees.** If either party is required to commence any proceeding 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 and legal expenses.

- 23. Exhibits.** Each exhibit and attachment referenced in this Agreement is, by the reference, incorporated into and made a part of this Agreement.
- 24. Precedence of Documents.** In the event of any conflict between the body of this Agreement and any exhibit or attachment hereto, the terms and conditions of the body of this Agreement shall control and take precedence over the terms and conditions expressed within the exhibit or attachment. Furthermore, any terms or conditions contained within any exhibit or attachment hereto which purport to modify the allocation of risk between the parties, provided for within the body of this Agreement, shall be null and void.
- 25. Cumulative Remedies.** No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.
- 26. No Third Party Beneficiaries.** The rights, interests, duties and obligations defined within this Agreement are intended for the specific parties hereto as identified in the preamble of this Agreement. Notwithstanding anything stated to the contrary in this Agreement, it is not intended that any rights or interests in this Agreement benefit or flow to the interest of any third parties.
- 27. Extent of Agreement.** Each party acknowledges that they have read and fully understand the contents of this Agreement. This Agreement represents the entire and integrated agreement between the parties with respect to the subject matter hereof and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be modified only by written instrument duly authorized and executed by both City and Operator.
- 28. Authority to Sign.** The City Manager, or designee, is hereby authorized and directed to execute and implement this Agreement. The previous sentence is not intended to delegate any authority to the City Manager to administer the Agreement, any delegation of authority must be expressly included in the Agreement.
- 29. Counterpart Execution.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original but all of which shall be deemed but one and the same instrument, and a facsimile copy of such execution shall be deemed an original.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties have executed this Agreement at Fresno, California, the day and year first above written.

CITY:

CITY OF FRESNO,
a California municipal corporation

By: _____
Georgeanne A. White,
City Manager

APPROVED AS TO FORM:
ANDREW JANZ
City Attorney

By:  4-14-23
Brandon M. Collet Date
Supervising Deputy City Attorney

ATTEST:
TODD STERMER, CMC
City Clerk

By: _____
Deputy Date

Address:
City of Fresno
Attention: Georgeanne White, City Manager
2600 Fresno Street, Room 2064
Fresno, CA 93721
Phone: (559) 621-7770
E-mail: Georgeanne.white@fresno.gov

Fresno, CA 93721

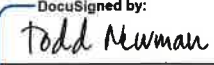
Attachments:

1. Exhibit A - Scope of Services
2. Exhibit B - Insurance Requirements
3. Exhibit C - Conflict of Interest Disclosure Form
4. Exhibit D - Initial Budget
5. Exhibit E - Prior Bookings

01160.0044/783624.1 ALL-B Operator Total Fee/ CAO 04-04-2023

OPERATOR:

809 Olive Avenue LLC

By: 
DocuSigned by:
0E4CEA126719474...
Todd Newman
Name: _____

Title: Todd Newman
(If corporation or LLC., Board Chair, Pres.
or Vice Pres.)

By: 
DocuSigned by:
47C3ADF8BDD54CD...
Eddy Burgos
Name: _____

Title: President
(If corporation or LLC., CFO, Treasurer,
Secretary or Assistant Secretary)

Address:
809 Olive Avenue LLC

Phone: _____
E-mail: _____

EXHIBIT A

SCOPE OF SERVICES

Operator Service Contract between City of Fresno (City) and Strummer's Numbskull Shows (Operator) Continued Management of Theater

Operator agrees to maintain the performances currently scheduled and traditionally held at Theater, and to cooperate with the City in good faith on community access rights to use and enjoy Theater. Any scheduling changes and new bookings shall require pre-approval in writing by the City. The City may also request scheduling changes be made. Operator shall use its best efforts to maximize the use of the Theater.

The form of the contract to be used with any performers shall be approved by City together with the rate to be charged. The processing of all monies shall be pursuant to the directions of the City.

Use of any related entities to perform services for the Theater shall be approved in writing by City in advance.

Nothing herein shall be construed to require that Operator act as the property manager for the Property and Operator shall have no duty or right to negotiate any leases for the Property.

Maintenance and Capital Improvement Responsibilities

The City shall be responsible for all general maintenance of the core and shell building components and utilities. Examples of these items include structural components, in-wall and underground utilities, electrical systems, building envelope, exterior doors, HVAC and similar.

The Operator shall be responsible for all other building maintenance not classified as a core and shell building component. Examples of these items include interior finishes, fixtures, lighting (including bulbs and ballasts), restrooms, janitorial, seats, staging, rigging, paint, flooring, kitchen equipment, minor plumbing repairs, cosmetic items, etc.

The Operator shall be responsible for all aspects of the operation of the Facility and shall be responsible for any and all operating expenses, routine building maintenance and repairs of the Facility (as indicated the the preceding paragraph). Operator shall contract and pay for all utilities and services to the Facility. Operator may hire subcontractors to perform all or any portion of these obligations in compliance with all applicable laws (including all applicable bonding and licensing requirements). Operator 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. Operator shall further comply with any and all provisions and conditions of any development entitlements issued by the City.

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 Operator 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 Operator for security purposes and to minimize any interference with or disruption of Operator'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.

Food and Beverage Policy

The Operator may provide food and beverage throughout the venue. However, other than the food and beverage provided by the Operator, no outside food and beverage may be brought into the venue without prior written authorization from the City. The Operator is solely responsible for adhering to all City, county and state health regulations and is responsible for obtaining all applicable permits and licenses accordingly. Furthermore, Operator is solely responsible for the compliance of local, state, and federal laws related to the distribution of food and beverages.

The Operator shall be responsible for maintaining the cleanliness of the facility to standards determined by the City. As a result of the Operator providing food and beverage, any additional expenses with maintaining and repairing the facility, including replacement of items to restore to original condition, shall be the sole cost of the Operator. The Operator shall clean the facility after each event.

The City reserves the right to suspend this policy at any time.

EXHIBIT B

INSURANCE REQUIREMENTS **Operator Service Agreement between City of** **Fresno (City) and Strummer's Numbskull Shows** **(Operator)** Management of Theater

MINIMUM SCOPE OF INSURANCE

Throughout the life of this Agreement, OPERATOR 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 designee at any time and in its sole discretion. The required 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, its officers, officials, employees, agents and volunteers as additional insureds, shall be the greater of the minimum limits specified therein or the full limit of any insurance proceeds to the named insured.

If at any time during the life of the Agreement or any extension, OPERATOR or any of its subcontractors fail to maintain any required insurance in full force and effect, all services and work under this Agreement shall be discontinued immediately, and all payments due or that become due to OPERATOR shall be withheld 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 pursuant to this section shall in any way relieve OPERATOR 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 OPERATOR shall not be deemed to release or diminish the liability of OPERATOR, 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 OPERATOR. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of OPERATOR, vendors, suppliers, invitees, contractors, sub-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 ISO Commercial General Liability Coverage Form CG 00 01, providing liability coverage arising out of your business operations. The Commercial General Liability policy 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 with limits of liability not less than those set forth under "Minimum Limits of Insurance."

2. The most current version of Commercial Auto Coverage Form CA 00 01, 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

OPERATOR, or any party the OPERATOR subcontracts with, shall maintain limits of liability of not less than those set forth below. However, insurance limits available to CITY and each of their 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) \$2,000,000 per occurrence for bodily injury and property damage;
- (ii) \$2,000,000 per occurrence for personal and advertising injury;
- (iii) \$2,000,000 aggregate for products and completed operations; and,
- (iv) \$4,000,000 general aggregate applying separately to the work performed under the Agreement.

2. **COMMERCIAL AUTOMOBILE LIABILITY :**

\$1,000,000 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. **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;

5. **PROPERTY:** Limits of insurance in an amount equal to the full (100%) replacement cost (without deduction for depreciation) of OPERATOR'S business property.

6. **COMMERCIAL CRIME** insurance which shall be at least as broad as the most current version of Insurance Service Office (ISO) Crime and Fidelity Form CR 00 20 with limits of liability of not less than \$500,000 per occurrence.

UMBRELLA OR EXCESS INSURANCE

In the event OPERATOR 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 and each of their officers, officials, employees, agents and volunteers.

DEDUCTIBLES AND SELF-INSURED RETENTIONS

OPERATOR shall be responsible for payment of any deductibles contained in any insurance policy(ies) required herein and OPERATOR 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 designee. At the option of the CITY'S Risk Manager or 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) OPERATOR shall provide a financial guarantee, satisfactory to CITY'S Risk Manager or designee, guaranteeing payment of losses and related investigations, claim administration and defense expenses. At no time shall 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. OPERATOR 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, OPERATOR 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, OPERATOR 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 and Automobile Liability insurance policies shall be written on an occurrence form.

The Commercial General, Liquor and Automobile Liability insurance policies shall be endorsed to name City, its officers, officials, agents, employees and volunteers as an additional insured. OPERATOR shall establish additional insured status for the City under the Commercial General Liability policy by use of ISO Forms or an executed manuscript insurance company endorsement providing additional insured status. The Commercial General endorsements must be as broad as that contained in ISO Forms: GC 20 10 11 85 or both CG 20 10 & CG 20 37.

The Commercial General, Liquor and Automobile Liability insurance shall contain, or be endorsed to contain, that the OPERATORS' insurance shall be primary to and require no contribution from the City. These coverages shall contain no special limitations on the scope of protection afforded to City, its officers, officials, employees, agents and volunteers. If OPERATOR 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 OPERATOR.

Should any of these policies provide that the defense costs are paid within the Limits of Liability, thereby reducing the available limits by 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 CITY, its officers, officials, agents, employees and volunteers.

The Commercial General and Automobile Liability insurance policies shall contain, or be endorsed to contain, a waiver of subrogation as to CITY, its officers, officials, agents, employees and volunteers.

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

PROVIDING OF DOCUMENTS - OPERATOR 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 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, OPERATOR 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 OPERATOR 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, OPERATOR 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 OPERATOR 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 OPERATOR shall not be deemed to release or diminish the liability of OPERATOR, 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 OPERATOR. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of OPERATOR, its principals, officers, agents, employees, persons under the supervision of OPERATOR, vendors, suppliers, invitees, consultants, sub-consultants, subcontractors, or anyone employed directly or indirectly by any of them.

SUBCONTRACTORS - If OPERATOR should subcontract all or any portion of the services to be performed under this Agreement, contract any work or allow events on premises, OPERATOR shall verify that all subcontractors or event holders maintain insurance meeting all the requirements stated herein and OPERATOR shall ensure that CITY, its officers, officials, employees, agents and volunteers are additional insureds. The certificates and endorsements shall be on file with OPERATOR.

EXHIBIT C
DISCLOSURE OF CONFLICT OF INTEREST
Operator Service Agreement
between City of Fresno (City)
and Strummer's Numbskull Shows (Operator)

Management of Theater

		YES*	NO
1	Are you currently in litigation with the City of Fresno or any of its agents?	☐	☒
2	Do you represent any firm, organization, or person who is in litigation with the City of Fresno?	☐	☒
3	Do you currently represent or perform work for any clients who do business with the City of Fresno?	☐	☒
4	Are you or any of your principals, managers, or professionals, owners or investors in a business which does business with the City of Fresno, or in a business which is in litigation with the City of Fresno?	☐	☒
5	Are you or any of your principals, managers, or professionals, related by blood or marriage to any City of Fresno employee who has any significant role in the subject matter of this service?	☐	☒
6	Do you or any of your subcontractors have, or expect to have, any interest, direct or indirect, in any other contract in connection with this Project?	☐	☒
* If the answer to any question is yes, please explain in full below.			

Explanation: _____

☐ Additional page(s) attached.

DocuSigned by:
Todd Newman
 Signature
 4/14/2023
 Date
 Todd Newman
 (Name)
 809 olive Avenue LLC
 (Company)
 809 E. olive Ave.
 (Address)
 Fresno, CA 93728
 (City, State Zip)

EXHIBIT D
ESTIMATED BUDGET

Description	Estimated Budget	
	Monthly	Annually
<u>INCOME</u>		
Theatre Events		
Average number of events/month:	5	
Average net proceeds per event:	\$ 9,900.00	
Total Net Event Income	\$ 49,500.00	\$ 594,000.00
TOTAL INCOME	\$ 49,500.00	\$ 594,000.00
<u>EXPENSES</u>		
<u>Payroll</u>		
Administration - Hospitality	\$ 4,250.00	\$ 51,000.00
Administration - General Manager	7,083.33	84,999.96
Administration - Talent Buyer	4,500.00	54,000.00
Payroll Taxes	1,237.70	14,852.40
<u>Events/Office</u>		
Accounting and Bookkeeping	2,000.00	24,000.00
Bank Charges, Credit Card Processing	3,402.38	40,828.56
Advertising	6,000.00	72,000.00
Bad Debts, Décor, Dues and Subscriptions	377.00	4,524.00
HVAC Small Repairs, Other Facility Repairs	1,150.00	13,800.00
Insurance - General Liability	5,000.00	60,000.00
Insurance - Medical	2,000.00	24,000.00
Insurance - Workers Comp	587.19	7,046.28
Legal	300.00	3,600.00
Maintenance/Janitorial	1,775.00	21,300.00
Supplies - Food, Linen, Office, Postage, Printing, Misc.	2,629.57	31,554.84
Payroll Processing and Permits/Fees, Licenses	541.97	6,503.64
Staff Relations, Sponsorship	250.00	3,000.00
Security	150.00	1,800.00
Travel and Entertainment	150.00	1,800.00
Auto	300.00	3,600.00
Uniforms	150.00	1,800.00
Utilities	3,525.00	42,300.00
TOTAL EXPENSES	\$ 47,359.14	\$ 568,309.68
NET OPERATING REVENUES/(EXPENSES)	\$ 2,140.86	\$ 25,690.32
<u>MANAGEMENT FEE</u>		
Average Management Fee per event:	\$ 2,215.00	
	\$ 11,075.00	\$ 132,900.00
TOTAL OUTGO NET (City)	\$ 8,934.14	\$ 107,209.68

EXHIBIT E

BOOKINGS PRIOR TO COUNCIL APPROVAL

Tower Theatre
Future Bookings
As of March 1, 2023

Month	Day	Show	Ticket Revenue	Deposit	Total Collected
March					
1	11	Ladaniva			
2	12	Mania – The ABBA Tribute			
3	23	Chingo Bling			
4	25	Linda Ronstadt Revue			
5	31	Stratos Dionysiou			
6	31	Fresno Classic Muscle Sports (Lounge)			
April					
1	1	Fresno Classic Muscle Sports (Theatre)			
2	7	K-Pop Nation			
3	8	Adam Carolla			
4	13	Elton Dan			
5	15	Wig Wam			
6	28	L.A. Guns			
7	29	Hearts on Fire (Tower District Fundraiser)			
May					
1	12	Daniel Weingarten (Lounge)			
2	13	Mark Goodwin Comedy Show			
3	20	Panos Kalidis			
4	29	Judy Collins			
June through December					
1	June-23	Yachtley Crew			
2	July-23	Jeanette Harris			
3	September-23	Felipe Esparza			
4	November-23	The Fab Four			
		Total Revenues Collected			

- I. Operator shall open a "reserve" account in which the City will deposit _____ amounting to the total advanced ticket sales and deposit revenues collected as reflected above at the effective date of this agreement.
- II. Operator will also open a new "operating" account in which the City will make monthly deposits as reflected in **Exhibit D** and described under **section 3(b)** of the agreement; the Operator and City shall jointly control the new operating account. Further, the Operator shall transfer the total collected for each future booking to the operating account in the month in which the event is scheduled. Further, within (30) days of the true-up accounting described in **section 3(b)** of this agreement one of two actions will take place: 1. the Operator shall set aside any excess/unused funds to offset future expenses (IE, the Operator understands that all net ticket revenues and other net revenues from the Theater operations will be reinvested into the Theatre in the future); or, 2. the City shall provide the Operator with an additional deposit in the amount of a monthly operational

deficit.

EXHIBIT F
BUILDING MAP OF MANAGEMENT SERVICES

