

CITY OF EL PASO, TEXAS
REQUEST FOR COUNCIL ACTION (RCA)

DEPARTMENT: Financial and Administrative Services
AGENDA DATE: August 25, 2009
CONTACT PERSON/PHONE: Carmen Arrieta-Candelaria, Chief Financial Officer, 541-4293
DISTRICT(S) AFFECTED: All

SUBJECT:

Discussion and action on a Resolution that the City Manager be authorized to execute a Bill of Sale and Equipment Purchase Agreement between the City and the Greater El Paso Chamber of Commerce Foundation ("**Foundation**") to transfer the rights, title and interest in certain equipment commonly known as the "Star on the Mountain" and that the City Manager be authorized to enter into an Operation and Maintenance Agreement with the Foundation to operate and maintain the Star from August 1, 2009 through April 30, 2010, in an amount not to exceed \$50,000 on an annual basis.

BACKGROUND / DISCUSSION:

On March 31, 2009, the City Council unanimously approved that the City Manager proceed to work with the Foundation to deed the Star to the City such that the Foundation would maintain the lease for the site for a period not to exceed twelve months and the City would assume the costs of the operation and maintenance of the star.

The Bill of Sale and Equipment Purchase Agreement would transfer all rights, title and interest in the Equipment as defined in the agreement. The Equipment includes all lights, poles, electrical panels, software and hardware associated with the operation of the Star. In addition, the Chamber will donate to the City all its legal rights in it "Star on the Mountain" Program ("**Program**") including but not limited to its copyrights for the Star, the Star Pin and a commemorative and donation program which assists with the costs of lighting the Star for an evening.

The Operation and Maintenance Agreement will supervise and oversee the lighting and maintenance of the Star and shall operate the Program. The period of this Agreement is from August 1, 2009 through April 30, 2010. The cost of this shall not exceed \$50,000 on an annual basis.

PRIOR COUNCIL ACTION:

March 31, 2009 as noted in the Background/Discussion.

AMOUNT AND SOURCE OF FUNDING:

\$10 for the transfer of the Star; \$50,000 for the annual O&M; source of funding is General Funds (\$25,000 will come from the El Paso Electric Company)

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: Carmen Arrieta-Candelaria

(Example: if RCA is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____

DATE: _____

RESOLUTION

WHEREAS, the Greater El Paso Chamber of Commerce Foundation (the Chamber) is the owner of the Star on the Mountain (the "Star"), which is located on the south side of the Franklin Mountains, and the equipment of the Star, including the lights, poles, and electrical panels; and

WHEREAS, the Star is currently located on property which is leased by the Chamber; and

WHEREAS, the Chamber desires to transfer the equipment constituting the Star and the City desires to accept from the Chamber, the equipment, free and clear of all liens, claims, encumbrances, restrictions, and other rights of third parties; and

WHEREAS, the Chamber is willing to donate to the City all its legal rights in its "Star on the Mountain" program (the "Program"), including but not limited to its rights, title and interest in the Star Logo and a commemorative and donation program which assists with the costs of lighting the Star for an evening; and

WHEREAS, the City has determined that it would be of benefit to the public to continue the Program; and

WHEREAS, the Chamber is willing and able to provide management and operation services with respect to the Program and with respect to the Star,

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign:

1. An Equipment Purchase Agreement between the GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION and the CITY OF EL PASO;
2. A Bill of Sale from GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION to the CITY OF EL PASO for all of the Chamber's rights, title and interest in and to the equipment, which shall be contemporaneously construed with the Equipment Purchase Agreement Equipment; and
3. An Operation and Maintenance Agreement between the CITY OF EL PASO and GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION for the operation and maintenance of the Star.

ADOPTED this _____ day of _____, 2009.

THE CITY OF EL PASO

John F. Cook, Mayor

ATTEST:

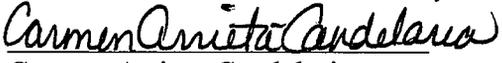
Richarda D. Momsen, City Clerk

APPROVED AS TO FORM:



Theresa Cullen
Deputy City Attorney

APPROVED AS TO CONTENT:



Carmen Arrieta-Candelaria
Chief Financial Officer

BILL OF SALE

STATE OF TEXAS)
)
COUNTY OF EL PASO) KNOW ALL MEN BY THESE PRESENTS

WHEREAS, the **GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION**, a Texas non-profit organization (the "Chamber"), for and in consideration of the sum of **Ten and No/100 Dollars (\$10.00)** cash in hand paid by the **CITY OF EL PASO**, a Texas non-profit organization (the "City"), the receipt and sufficiency of which are hereby acknowledged by the Chamber, has **BARGAINED, SOLD, AND DELIVERED**, and by these presents does **BARGAIN, SELL and DELIVER**, unto the City, all of the Chamber's rights, title and interest in and to the equipment more particularly described on Exhibit "A" attached hereto and made a part hereof (the "Equipment") and all of the Chamber's rights, title and interest in the Star Logo depicted on Exhibit "B" attached hereto (hereinafter the "Star Logo"). The Chamber specifically reserves ownership of the Chamber's logo depicted on Exhibit "C" attached hereto that includes the Star Logo (hereinafter the "Chamber Logo"). By accepting this Bill of Sale the City understands and agrees that the Chamber's Logo is separate and distinct from the Star Logo and that inclusion of the Star Logo within the Chamber Logo shall not constitute infringement in any way of the City's rights in the Star Logo.

NOW, THEREFORE, for and in consideration of the sum of Ten and No/100 Dollars (\$10.00) in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Chamber, the Chamber hereby agrees as follows:

1. Sale and Conveyance. The Chamber hereby sells, transfers, and conveys the Equipment and the Star Logo unto the City, its successors and assigns. The Equipment is sold in place and the Chamber surrenders possession of the Equipment to the City at its present location at the most Southern reach of the Franklin Mountains.

2. Disclaimer of Warranties. **THE CITY ACKNOWLEDGES THAT, EXCEPT FOR THE WARRANTIES STATED IN THE EQUIPMENT PURCHASE AGREEMENT BETWEEN THE PARTIES OF EVEN DATE HEREWITH, THE CHAMBER MAKES NO REPRESENTATION OR WARRANTY, EXPRESS, IMPLIED OR AT COMMON LAW, BY STATUTE OR OTHERWISE, RELATING TO ANY ITEM OF EQUIPMENT OR THE STAR LOGO. WITH RESPECT TO EACH ITEM OF EQUIPMENT, CHAMBER DISCLAIMS AND NEGATES, AND THE CITY HEREBY WAIVES, ANY WARRANTY OF MERCHANTABILITY AND FITNESS FOR ANY PURPOSE. IT IS THE INTENTION OF THE PARTIES THAT EACH ITEM OF EQUIPMENT BE SOLD ON AN "AS IS", WITH ALL FAULTS, BASIS.**

3. Governing Law. This Bill of Sale shall be construed and enforced in accordance with and governed by the laws of the State of Texas.

4. Binding Effect. This Bill of Sale shall be binding upon and inure to the benefit of the

parties hereto and their respective successors and assigns.

5. Incorporation of Equipment Purchase Agreement. This Bill of Sale shall be contemporaneously construed with that certain Equipment Purchase Agreement dated _____, 2009, the provisions of which remain in full force and effect.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Chamber has caused this instrument to be executed as of this 17 day of August, 2009.

THE GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION

By: [Signature]
Name: RICHARD E. DAYOUS
Title: PRESIDENT AND CEO

THE CITY OF EL PASO

By: _____
Name: Joyce A. Wilson
Title: City Manager

APPROVED AS TO FORM:

[Signature]
Theresa Cullen
Deputy City Attorney

APPROVED AS TO CONTENT:

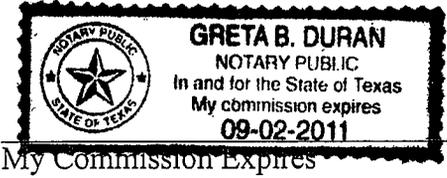
[Signature]
Carmen Arrieta-Candelaria
Chief Financial Officer

STATE OF TEXAS)
)
COUNTY OF EL PASO)

Before me, a notary public in and for said county, personally appeared Richard E. Dayous known to me to be the person who, as President + CEO of the Greater El Paso Chamber of Commerce Foundation, a Texas non-profit organization, the corporation which executed the foregoing instrument, signed the same, and acknowledged to me that he/she did so sign said instrument in the name and upon behalf of said corporation as such officer; that the same is his free act and deed as such officer and the free and official act and deed of said corporation; that he was duly authorized thereunto by its board of directors.

In testimony whereof, I have hereunto subscribed my name on this 17 day of August, 2009.

[Signature]
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS



STATE OF TEXAS)
)
COUNTY OF EL PASO)

Before me, a notary public in and for said county, personally appeared _____ known to me to be the person who, as _____ of The CITY OF EL PASO, a Texas municipality.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission Expires

EXHIBIT "A"

STAR ON THE MOUNTAIN EQUIPMENT

Electrical

Material Used For Load Center

<u>Quantity</u>	<u>Description</u>
1	ARC -10 Automated Remote Control System
2	200 amp load center
30	50amp breakers
2	Start/Stop switches for energizing and de-energizing of star
2	Universal hubs
2	EMT connectors
8	2" EMT straps
	EMT conduit

Material Used From Streamers

Bulb Sockets with enclosures
Bulbs
Copper stranded wire comprising the Star

Structural

Material Used For Construction Of Star

10	Steel galvanized poles
1	30' Wood pole
	Support anchors
	1/4" Guy pre-forms
	3/8 Thimbles
	1/4" Cable clamps
	1/4" Galvanized stranded guy wire located at the site of the Star

Miscellaneous

1	Metal storage box for bulb and socket replacements
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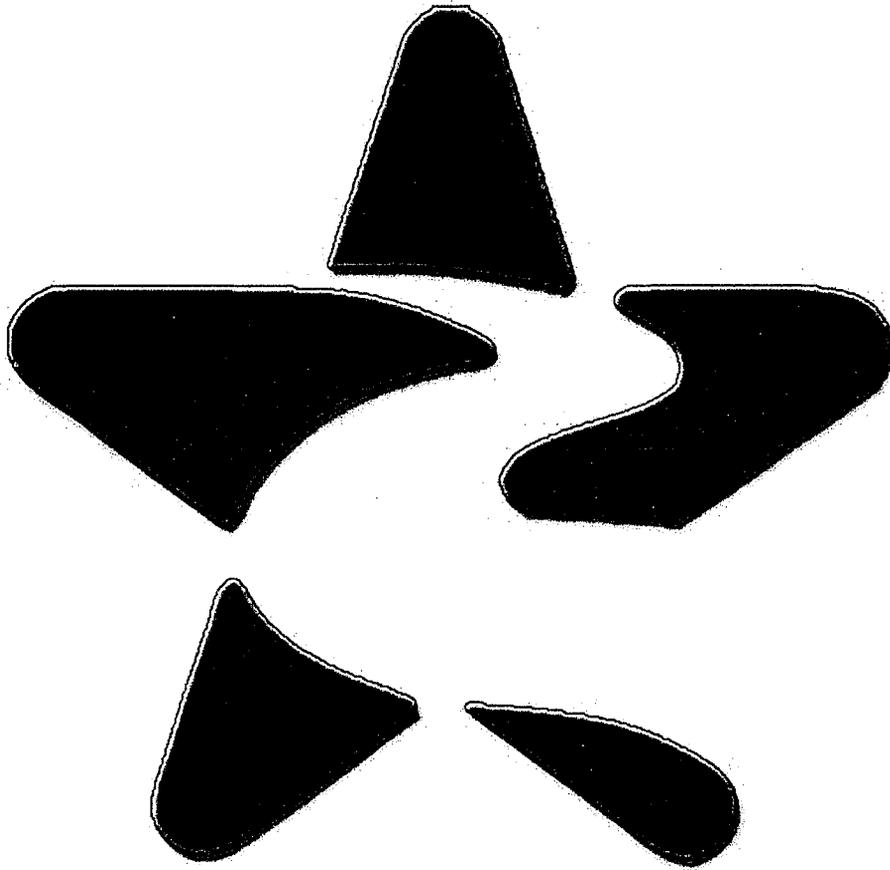


Exhibit "B"



Exhibit "C"

STATE OF TEXAS)
)
COUNTY OF EL PASO)

**OPERATION AND
MAINTENANCE AGREEMENT**

This Operation and Maintenance Agreement ("Agreement") is made by and between the **CITY OF EL PASO** ("City") and **THE GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION**, a Texas non-profit organization ("Chamber") as of the ____ day of _____, 2009.

WHEREAS, the City has acquired the Star on the Mountain (the "Star"), which is located on the south side of the Franklin Mountains in El Paso, Texas on property leased by the Chamber from 88 Investments, Inc. (the "Landlord") pursuant to a lease agreement effective May 1, 2009, (the "Lease Agreement"); and

WHEREAS, the City has determined that it would be of benefit to the public to continue the Program; and

WHEREAS, the Chamber is willing and able to provide management and operation services with respect to the Program and with respect to the maintenance of the Star on a temporary basis pursuant to the terms stated below.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the parties hereto agree as follows:

1. *Services.* The Chamber shall supervise and oversee the lighting and maintenance of the Star and shall operate the Program, including but not limited to soliciting contributions and donations for the Program and providing publicity for the participants in the Program. The management and operation of the Program shall be performed by employees of the Chamber. The Chamber shall be responsible for the hiring and training of appropriate staff, and for ensuring that the Program is adequately staffed during all Chamber business hours of operation.

The Chamber shall provide publicity and acknowledgements for individuals and entities participating in the Program in a similar manner that the Chamber has prior to the date hereof. All Program information materials must have the prior approval of the City Manager.

During the term of this Agreement, the City will reserve up to ten (10) nights it can light the Star in honor or in commemoration of City events, which will be determined by the City Manager, at no cost to the City except for the Reimbursable Expenses defined below.

The Chamber will provide the City with a monthly report of its services, including an accounting of contributions and donations.

The Chamber will continue to maintain the Lease Agreement during the term of this Agreement.

2. *Consideration.* In consideration of the services to be performed by the Chamber, the City agrees to acknowledge the Chamber's participation with the Program by naming the Chamber as a supporter of the Program in all Program publications. In addition, the City agrees to reimburse the Chamber for its costs for utilities to light the Star, liability insurance, and maintenance costs associated with the lighting of the Star (the "Reimbursable Expenses") on a monthly basis, provided that the total cost for the Reimbursable Expenses required for the operation of the Program for one (1) calendar year shall not exceed \$50,000.00.

The Chamber shall submit to the City itemized monthly statements showing any invoices for Reimbursable Expenses. Such statements shall be due and payable within thirty (30) days after receipt and approval by the City.

3. *Term.* The term of this Agreement shall commence on the 1st day of August, 2009, and expire on the 30th day of April, 2010, unless sooner terminated pursuant to the terms of this Agreement.

4. *INDEMNITY AND LIABILITY INSURANCE.* TO THE EXTENT COVERED BY INSURANCE REQUIRED TO BE MAINTAINED HEREUNDER, THE CHAMBER AGREES TO INDEMNIFY AND HOLD THE CITY HARMLESS AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS, AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY'S FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY, OR INDIRECTLY TO THE OPERATION, CONDUCT OR MANAGEMENT OF THE CHAMBER'S ACTIVITIES RELATED TO THE PROGRAM, ITS USE OF ANY CITY REAL OR PERSONAL PROPERTY, OR FROM ANY BREACH ON THE PART OF THE CHAMBER OF ANY TERMS OF THIS AGREEMENT, OR FROM ANY ACT OR NEGLIGENCE OF THE CHAMBER, ITS AGENTS, CONTRACTORS, EMPLOYEES, SUBTENANTS, CONCESSIONAIRES, OR LICENSEES IN, ABOUT OR IN CONNECTION WITH ANY CITY REAL OR PERSONAL PROPERTY. IN CASE OF ANY ACTION OR PROCEEDING BROUGHT AGAINST THE CITY BY REASON OF ANY SUCH CLAIM, THE CHAMBER, UPON NOTICE FROM THE CITY, AGREES TO DEFEND THE ACTION OR PROCEEDING BY COUNSEL REASONABLY ACCEPTABLE TO THE CITY. NOTWITHSTANDING THE FOREGOING, IN NO EVENT SHALL THE CHAMBER BE LIABLE TO THE CITY PURSUANT TO THIS PROVISION FOR ANY AMOUNT IN EXCESS OF THE POLICY LIMITS OF ANY INSURANCE REQUIRED TO BE MAINTAINED HEREUNDER.

5. *Insurance.* The Chamber shall procure and maintain at its expense during the Term of this Agreement public liability insurance in an amount not less than Two Hundred Fifty Thousand Dollars (\$250,000.00) for bodily injury to one (1) person for each occurrence, Five Hundred Thousand Dollars (\$500,000.00) for bodily injuries to more than one (1) person arising out of each occurrence, and One Hundred Thousand Dollars (\$100,000.00) for property damage arising out of each occurrence, or in amounts equal to the maximum liability for damages for municipalities for

claims arising under governmental functions, provided for under the Texas Tort Claims Act, whichever is greater.

The Chamber shall maintain said insurance with a solvent insurance company authorized to do business in the State of Texas. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without thirty (30) days prior written notice to the City.

Certificates of insurance shall be delivered to the City's Capital Assets Manager at least ten (10) days prior to the effective date of this Agreement and shall name the City, its officers, agents, servants and employees as additional insureds.

6. *Cancellation.* This Agreement shall be subject to termination by the City in the event the Chamber shall default in the performance of any of the covenants, conditions or agreements required herein to be kept and performed by the Chamber and such default continues for a period of thirty (30) days after receipt of written notice from the City to cure such default, unless during such thirty (30) day period the Chamber shall commence and diligently perform such action as may be reasonably necessary to cure such default.

This Agreement may be terminated by the Chamber in the event: (i) the City shall default in the performance of any of the covenants, conditions or agreements required herein to be kept and performed by the City and such default continues for a period of thirty (30) days after receipt of written notice from the Chamber to cure such default, unless during such thirty (30) day period the City shall commence and diligently perform such action as may be reasonably necessary to cure such default; (ii) the Lease Agreement is terminated by the Landlord; (iii) the City assumes the operation of the Star; or (iv) the City discontinues the Program.

In the event that the City discontinues the Program for any reason or assumes the responsibility for the operation of the Star, the City may terminate this Agreement upon thirty (30) days' written notice to the Chamber. Upon receipt of notice of termination from the City, the Chamber shall serve notice to the Landlord of its termination of the Lease and, to the extent possible, terminate all other activities, services and agreements that give rise to a Reimbursable Expense. Notwithstanding the termination of this Agreement by the City, the City shall be responsible for Reimbursable Expenses incurred by the Chamber that the Chamber could not avoid by exercise of reasonable diligence.

Failure of the City to declare this Agreement canceled upon the default of the Chamber shall not operate to bar or destroy the right of the City to cancel this Agreement by reason of any subsequent violation of the terms herein.

Upon termination of the agreement for any reason or if the City assumes the responsibility for the operation of the Star, the Chamber will provide the City with a full accounting of activities and pending commitments, if any, related to the operation of the Program, and the Chamber shall forward to the City a financial statement and any contributions or donations it has solicited for the Program.

Upon the termination of this agreement for any reason the Chamber shall be released from all responsibility for the operation of the Program.

7. *Right of Entry and Inspection.* The City's authorized representative shall have the right to enter upon the Chamber's offices and inspect the Chamber's business records related to the Program during the Chamber's business hours with ten (10) days written notice.

8. *General Provisions.*

A. *Successors and Assigns.* This Agreement, or any interest therein, is not assignable without the prior written consent of the City Council and the Chamber. All provisions of this Agreement shall extend to, bind and inure to the benefit not only of the City and the Chamber, but also their legal representatives, successors and assigns.

B. *Notices.* All notices provided for herein shall be sufficient if sent by certified or registered mail, return receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

City:	City of El Paso City Manager 2 Civic Center Plaza El Paso, Texas 79901	copy to:	City of El Paso Financial Services 2 Civic Center Plaza El Paso, Texas 79901
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Chamber:	The Greater El Paso Chamber of Commerce Attention: Richard Dayoub 10 Civic Center Plaza El Paso Texas 79901
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or to such other addresses as the parties may designate to each other in writing from time to time.

C. *Law Governing.* The laws of the State of Texas shall govern the validity, performance, interpretation, and enforcement of this Agreement. Venue shall be in the courts of El Paso County, Texas.

D. *Entire Agreement.* This document contains all of the agreements between the parties and may not be modified, except by an agreement in writing signed by both parties.

E. *Severability.* In the event any covenant, condition, or provision herein contained is held to be invalid by any court of competent jurisdiction, the invalidity of any such covenant, condition, or provision shall in no way affect the remainder of this Agreement, provided that the invalidity of such covenant, condition, or provision does not materially prejudice either the City or the Chamber in the respective rights and obligations contained in the valid covenants, conditions, or provision of this Agreement.

F. *Authorization to Enter Agreement.* The individual signing this Agreement on behalf of the Chamber acknowledges that he or she is authorized to do so and said individual further

warrants that he or she is authorized to commit and bind the Chamber to the terms and conditions of this Agreement.

G. *Paragraph Headings.* The paragraph headings contained herein are for convenience in reference and are not intended to specifically define or limit the scope of any provision of this Agreement.

H. *Survival of Certain Provisions.* All provisions of this Agreement, which expressly or impliedly contemplate or require performance after the cessation, expiration, cancellation, or termination of this Agreement hereunder, shall survive such cessation, expiration or termination of this Agreement.

IN WITNESS WHEREOF, the parties have hereunto agreed on the date first noted above.

THE CITY OF EL PASO

Joyce A. Wilson, City Manager

APPROVED AS TO FORM:



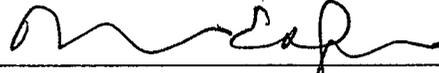
Theresa Cullen
Deputy City Attorney

APPROVED AS TO CONTENT:



Carmen Arrieta-Candelaria
Chief Financial Officer

**THE GREATER EL PASO CHAMBER OF
COMMERCE FOUNDATION**

By: 

Name: RICHARD E. DAYOUB

Title: PRESIDENT AND CEO

EQUIPMENT PURCHASE AGREEMENT

This Equipment Purchase Agreement ("Agreement") is made this _____ day of _____, 2009 by and between the GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION ("Chamber"), a Texas non-profit organization, and the CITY OF EL PASO ("City"), a Texas municipality.

RECITALS

- A. The Chamber is the owner of the Star on the Mountain (the "Star"), which is located on the south side of the Franklin Mountains, and the equipment of the Star, including the lights, poles, and electrical panels, is more particularly described on Exhibit "A" (collectively, the "Equipment").
- B. The Star is currently located on property owned by George Salom, Jr. (the "Property"). The Chamber leases this Property from 88 Investments, Inc. (the "Landlord") under the terms of a Lease Agreement effective May 1, 2009 (the "Lease Agreement").
- C. The Chamber desires to transfer the Equipment constituting the Star and the City desires to accept from the Chamber, the Equipment, free and clear of all liens, claims, encumbrances, restrictions, and other rights of third parties, on the terms described below.
- D. The Chamber is willing to donate to the City all its legal rights in its "Star on the Mountain" program, including but not limited to its rights, title and interest for the Star Logo as depicted in the Bill of Sale in the form attached as Exhibit "B" (the "Bill of Sale"), the Star Pin, and a commemorative and donation program which assists with the costs of lighting the Star for an evening (the "Program"). The Parties understand and agree that the Chamber is not transferring the Chamber's rights in any of the Chamber's Logos that include the Star Logo.

NOW THEREFORE in consideration of the premises and the mutual covenants and agreements set forth in this Agreement, the parties hereby agree as follows:

1. *Sale of Equipment and Transfer of Program.* On the terms and subject to the conditions of this Agreement, the Chamber agrees to (i) sell to the City, and the City agrees to purchase from the Chamber, the Equipment free and clear of all liens, claims, encumbrances, restrictions, and other rights of third parties and (ii) donate to the City all its legal rights in its "Star on the Mountain" program. At the Closing (as defined below) the Chamber will execute and deliver to the City the Bill of Sale to consummate this transaction and transfer the ownership of the Equipment and the Program.
2. *Closing.* The Closing will take place at ____:____.m. El Paso time, on _____, 2009 (subject to extension as provided in this Agreement), at the offices of the El Paso City Attorney's Office, 2 Civic Center Plaza, 9th Floor, El Paso, Texas 79901 (the "Closing"); provided that if all conditions specified herein have not been fulfilled (or waived by the party entitled to waive the unfulfilled condition), the Closing will be rescheduled for a time mutually agreed to by the parties.
3. *Conditions to Closing.* The performance of the obligations of the Chamber under this

Agreement is subject to the fulfillment, at or prior to the Closing, of the following conditions:

- a. The Chamber having entered into a Lease Agreement for a period not to exceed twelve (12) months with the 88 Investments, Inc.;
- b. The Chamber shall deliver to the City an executed original of the Bill of Sale;
- c. The Chamber and the City shall enter into the Operating and Maintenance Agreement in the form attached hereto as Exhibit "C".

4. *The Chamber's Warranties.*

- a. The Chamber represents and warrants to the City that:
 - (i) the Chamber has good and marketable title to the Equipment and the Equipment is being sold free and clear of all liens, claims, encumbrances, restrictions, or rights of third parties;
 - (ii) the Chamber has no knowledge of the any material defects and unsafe conditions in the Equipment and it is in good working condition, reasonable wear and tear excepted;
 - (iii) the Chamber has the corporate power and authority to execute, deliver and perform the transactions contemplated by this Agreement; and
 - (iv) the Chamber's execution, delivery and performance of this Agreement has been duly authorized and does not violate any provision of the Chamber's corporate charter or bylaws or violate, conflict with, result in the breach or termination of, constitute a default under, or result in the creation of, any lien, charge or encumbrance upon any of its properties or assets under an agreement to which the Chamber is a party.
- b. The City's sole and exclusive remedy for a breach of the representation and warranty contained in Section 4.a.(ii) above shall be to rescind this agreement and return the Equipment to the Chamber within forty-five (45) days after the transfer of the Equipment to the City (the "Rescission Period"). After the expiration of the Rescission Period, the Foundation shall have no further obligation under Section 4.a.(ii) of this Agreement. Regardless of the foregoing, the Chamber shall have no obligation to replace any light bulb constituting an item of Equipment and the failure of any light bulb within the Rescission Period or the delivery of the Equipment with faulty light bulbs shall not constitute a breach of warranty under Section 4.a.(ii).
- c. The City's sole and exclusive remedy for a breach of the representation and warranty contained in Section 4.a.(i) above shall be to rescind this agreement and return the Equipment to the Chamber within forty-five (45) days after the City receives notice of any liens, claims, encumbrances, restrictions, or rights of third parties upon or to the Equipment.
- d. The representations and warranties set forth in 4.a.(i), (iii) and (iv) will survive until

the earlier of the expiration of the applicable statute of limitations under Texas law or the forty-five (45) day rescission period expressly stated in paragraphs 4.b. and 4.c. above.

- e. The City shall be entitled to exercise this rescission remedy provided in paragraphs 4.b. and 4.c. above only if the Equipment is returned free from liens, claims or encumbrances that result from acts of omissions of the City.

5. *Disclaimer of Warranties.* **THE CITY ACKNOWLEDGES THAT, EXCEPT FOR THE WARRANTIES STATED IN SECTION 4 ABOVE, THE CHAMBER MAKES NO REPRESENTATION OR WARRANTY, EXPRESS, IMPLIED OR AT COMMON LAW, BY STATUTE OR OTHERWISE, RELATING TO ANY ITEM OF EQUIPMENT. WITH RESPECT TO EACH ITEM OF EQUIPMENT, THE CHAMBER DISCLAIMS AND NEGATES, AND THE CITY HEREBY WAIVES, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PURPOSE, EXCEPT AS PROVIDED IN SECTION 4 ABOVE, IT IS THE INTENTION OF THE PARTIES THAT EACH ITEM OF EQUIPMENT BE SOLD ON AN "AS IS", WITH ALL FAULTS, BASIS.**

6. *Removal of Equipment.* If the Chamber terminates the Lease prior to the expiration of its term without the City's consent, or before a mutually agreed termination of the Operation and Maintenance Agreement, the Chamber shall be responsible for removal of the Star at its expense. If the Chamber desires to terminate the Lease prior to the expiration of its term, the Chamber shall provide thirty (30) days written notice to the City of its intent to terminate the Lease. Upon receipt of such notice, the City will have the option to (i) assume the Lease, (ii) enter into a new lease agreement with 88 Investments, Inc. or (iii) if the Chamber terminates the Lease for any reason other than the City's breach of the Operation and Maintenance Agreement, request that the Chamber remove the equipment and deliver it to the City to a location in El Paso designated by the City. In the event that (i) the City assumes the Lease, (ii) the City enters into a new lease with 88 Investments, Inc., (iii) the Lease's twelve month term expires, (iv) the City and the Chamber mutually agree to the termination of the lease and/or the Operation and Maintenance Agreement, or (v) the City terminates the Operation and Maintenance Agreement for any reason other than a breach by the Chamber, the Chamber will be relieved of its obligation to remove the Equipment and the City shall be responsible for removing the Equipment if requested by 88 Investments, Inc.

7. *Miscellaneous.*

- a. *Delivery of Notices.* All notices under this Agreement must be in writing and are effective upon delivery if delivered by (i) hand, (ii) nationally recognized overnight courier, (iii) certified or registered United States Mail postage prepaid or (iv) facsimile, provided that service by facsimile after 5:00 p.m. local time of the recipient shall be deemed delivered on the following business day, as follows:

- (1) If notice is to the Chamber:

The Greater El Paso Chamber
of Commerce Chamber
Attention: President
#10 Civic Center Plaza

El Paso, Texas 79901
Facsimile (915) 577-9916;

(2) If notice is to the City:

The City of El Paso
Attention: City Manager
2 Civic Center Plaza
El Paso, Texas 79901
Facsimile (915) 541-4866

Copy to:
The City of El Paso
Attention: Financial Services
2 Civic Center Plaza
El Paso, Texas 79901

Each party may change its address for purposes of notice under this Agreement by notice complying with the above provisions.

- b. *Continuation of Agreement.* This Agreement is binding upon and inures to the benefit of the parties and their respective successors and assigns.
- c. *Integration.* This Agreement prevails over prior communications between the parties or their representatives concerning these matters. This Agreement and the attached "Bill of Sale" are integrated and contain the entire agreement between the parties and no representations, warranties or promises have been made or relied on by any party other than those set forth in this Agreement and in the Bill of Sale. This Agreement was drafted by counsel for the parties, and there shall not be a presumption of construction against any party based upon the Identity of the author of this Agreement or any portion hereof.
- d. *Attachments.* The exhibits attached to this Agreement are incorporated into and made a part of this Agreement for all purposes. The term "this Agreement" means the body of the Agreement together with such exhibits. The expression "herein," "hereof," "hereunder" and other words of similar import refer to this Agreement and such exhibits as a whole and not to any particular part or subdivision of this Agreement.
- e. *Amendment.* This Agreement may not be amended or modified except by a written instrument executed by a duly authorized representative of each party.
- f. *Additional Assurances.* From time to time subsequent to the date of this Agreement without further consideration and subject to the other terms of this Agreement, each party shall promptly execute and deliver such other instruments as the other party may reasonably request to fully accomplish the transaction contemplated by this Agreement.

- g. *Cumulative Remedies.* The rights and remedies conferred by this Agreement are cumulative and the exercise of such rights or remedies shall be without prejudice to the enforcement of any other right or remedy authorized by this Agreement, common law, statute or equity. No waiver of any breach or default shall be deemed or construed to constitute a waiver of any other violation or other breach of any of the terms, provisions, and covenants contained in this Agreement, and forbearance to enforce one or more of the remedies provided on an event of default shall not be deemed or construed to constitute a waiver of such default or of any other remedy provided for in this Agreement.
- h. *Applicable Law.* This Agreement shall be governed by and construed pursuant to the laws of the State of Texas without reference to its conflict of law provisions. Any action or proceeding based upon this Agreement or arising out of its performance shall be instituted in a federal or state court of competent jurisdiction in the County of El Paso, Texas and in no other.
- i. *Partial Invalidity,* if any term or provision of this Agreement is determined to be invalid, void or unenforceable, the remaining terms and provisions of this Agreement shall, to the extent reasonable, equitable and practicable, continue in full force and effect.
- j. *Construction.* All reference herein in the singular shall be construed to include the plural where applicable, and the masculine to include the feminine and neuter genders. The headings contained in this Agreement are designed to facilitate prompt reference to subject matter and shall be disregarded when resolving any dispute concerning the meaning or interpretation of any language contained in the Agreement. The verb "to include," in all of its forms, tenses, and variations, is always used in the nonexclusive tense.
- k. *Multiple Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which collectively constitute one and the same Agreement.
- l. *Expenses.* The parties to this Agreement shall bear their respective expenses incurred in connection with the preparation, execution and performance of this Agreement and the transaction contemplated by this Agreement, including all fees and expenses of representatives, agents, counsel and accountants.

The parties hereto have caused this Agreement to be signed by their proper officers or duly-authorized representatives on the day and year first written above.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Chamber has caused this instrument to be executed as of this 17 day of August, 2009.

THE GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION

By: [Signature]
Name: RICHARD E. DAYOUS
Title: PRESIDENT AND CEO

THE CITY OF EL PASO

By: _____
Name: Joyce A. Wilson
Title: City Manager

APPROVED AS TO FORM:

[Signature]
Theresa Cullen
Deputy City Attorney

APPROVED AS TO CONTENT:

[Signature]
Carmen Arrieta-Candelaria
Chief Financial Officer

STATE OF TEXAS)
)
COUNTY OF EL PASO)

Before me, a notary public in and for said county, personally appeared Richard E. Dayous known to me to be the person who, as President + CEO of the Greater El Paso Chamber of Commerce Foundation, a Texas non-profit organization, the corporation which executed the foregoing instrument, signed the same, and acknowledged to me that he/she did so sign said instrument in the name and upon behalf of said corporation as such officer; that the same is his free act and deed as such officer and the free and official act and deed of said corporation; that he was duly authorized thereunto by its board of directors.

In testimony whereof, I have hereunto subscribed my name on this 17 day of August, 2009.

[Signature]
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

