

**NONEXCLUSIVE LICENSE AGREEMENT AND
PROFESSIONAL SERVICES AGREEMENT
BY AND BETWEEN
CITY OF DESERT HOT SPRINGS
AND**

THIS NONEXCLUSIVE LICENSE AGREEMENT AND PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into effective on the 15th day of May, 2018, by and between the City of Desert Hot Springs ("City"), a California municipal corporation ("City"), and USA Management, a Limited Liability Corporation, hereinafter referred to as "Consultant" or "Licensee." City and Consultant are sometimes referred to collectively as "parties" and individually as "party."

RECITALS

WHEREAS, the City owns the improvements that comprise the Furbee Pool ("Pool"), located at located at 11750 Cholla Drive, Desert Hot Springs, California, 92240, and seeks to have Consultant operate a swimming program at the Pool; and

WHEREAS, Licensee desires to provide aquatic and swim programs for the community that include the following: swim lessons for adults, children and infants; water exercise for teams, adults and seniors; Junior Lifeguard Corp.; lifeguard training, recreational swim for children, adults and families, and pool and water safety lessons programs at the Pool during the Summer of 2018 and other aquatic programs approved by the City ("Permitted Use" or "Scope of Services"); and

WHEREAS, Licensee desires to use the Pool for the Permitted Use, from May 15, 2018 through and including September 15, 2018 ("License Period"); and

WHEREAS, the City intends to allow Licensee to use the Pool for the aforementioned Permitted Use for the License Period; and

WHEREAS, the City desires to utilize the services of Consultant, as an independent contractor, to perform the Scope of Services; and

WHEREAS, the performance of this Agreement by the parties will not result in any gift of public funds because the community which the City serves will derive a substantial public benefit, rendering the obligations set out in this Agreement being for a public purpose; and

WHEREAS, the parties enter into this Agreement pursuant to that certain Request for Proposals for Furbee Aquatic Center program management, dated April 2, 2018, incorporated herein by this reference; and

WHEREAS, Consultant represents that it is fully qualified to perform such services by virtue of its experience and the training, education and expertise of its principals and employees.

Now therefore, in consideration of the covenants, conditions and promises contained herein, the parties agree as follows:

AGREEMENT

Section 1. RECITALS

The Recitals set forth above are hereby incorporated into this Agreement by this reference, as though fully set forth herein.

Section 2. GRANT OF NONEXCLUSIVE LICENSE AND TERM

a. The City hereby grants to Licensee a nonexclusive right, privilege, and permission to enter onto and use the Pool for the Permitted Use for the duration of the License Period, in accordance with this Agreement ("License"). The License Period may be extended one (1) additional year at the sole discretion of the City Manager.

b. This License shall only apply to City-owned property. Consultant understands and agrees that Consultant shall request and obtain written permission for use of property owned by persons or entities other than the City which Consultant desires to use in performance of the services.

Section 3. COMPENSATION PAID TO CONSULTANT AND FEES CHARGED BY CONSULTANT

a. The City agrees to pay Consultant for and in consideration of the faithful performance of the services set forth in the Scope of Services, and Consultant agrees to accept from the City, as and for compensation for the faithful performance of said services and duties, an amount not to exceed a total compensation of Sixty-Eight Thousand One Hundred Eighty Dollars and Zero Cents **(\$68,180.00)** for services performed during the License Period. Consultant shall submit invoices to the City, attention, Lynne Paul, on a monthly basis describing the work performed. Consultant's bills shall include a brief description of the services performed, the date the services were performed, the number of hours spent and by whom, and a description of any reimbursable expenditures. The City shall pay Consultant no later than thirty (30) days after approval of the invoice by City staff provided that the services reflected in the invoice were performed to the reasonable satisfaction of the City in accordance with the terms of this Agreement, that the number of hours of service set forth in the invoice reflect the amount of time ordinarily expended for such service by members of the profession currently practicing in the same locality under similar conditions, and that all expenses, rates and other information set forth in the invoice are consistent with the terms and conditions of this Agreement. Along with

the invoices, Consultant shall also provide a detailed breakdown of the fees charged to program participants, to the reasonable satisfaction of the City.

b. Licensee may charge program participants fees for any Scope of Services based on the recreational swim services provided for children, adults and families ("Nexus Study Fees"). However, Licensee shall not charge such Nexus Study Fees above the fees allowable in the City's adopted Fee Schedule for community, recreational swimming, a copy of which is attached hereto and incorporated herein by this reference as Exhibit "A."

c. Licensee may charge program participants fees for any Scope of Services based on activities other than recreational swim services provided for children, adults and families, and the City shall impose no restrictions on Licensee for the amount of fees that Licensee may charge for such services.

Section 4. SCOPE OF SERVICES

Consultant shall provide to the City those Scope of Services at the time, place, and in the manner specified therein, in a manner satisfactory to the City and consistent with that level of care and skill ordinarily exercised by members of the profession currently practicing in the same locality under similar conditions. In the event any conflict exists between this Agreement minus the Scope of Services, on the one hand, and the Scope of Services, on the other hand, the former shall supersede.

Section 5. OBLIGATIONS

A. CITY OBLIGATIONS

The City shall perform the following.

- a. Prior to commencement of the License Period, ensure that the latch/locking mechanism to the office door is in good working order.
- b. Prior to commencement of the License Period, ensure that the chair lift is in good working order.
- c. During the License Period, provide adequate paper products for the men's and women's locker room.
- d. The City shall, at its sole and absolute discretion, keep the temperature of the Pool.
- e. Ensure that the non-skid tape strips in front of the men's and women's restrooms are in good working order during the term of the agreement.
- f. Provide facilities and maintain in a good, usable and safe condition, including pool, restrooms, showers and perimeter fencing.
- g. Provide and pay for all utility and pool maintenance costs, including chemicals.

B. CONSULTANT OBLIGATIONS

The Consultant shall perform the following.

1. During the License Period, Consultant shall maintain the Pool in good working order, except as otherwise provided by contract between the City and other vendors.
2. Should the City purchase any items whatsoever to better operate the Pool including, but not limited to, chemical test kits, floor mats, wall clocks, guard chair umbrellas, upon the expiration of the License Period, all of these items shall remain the City's property.
3. During the License Period, maintain at the utmost professional level a bulletin board on the wall entrance to the Pool. Should the City purchase and install said bulletin board, upon the expiration of the License Period, the bulletin board shall remain the City's property.
4. Provide certification of all lifeguards.
5. Provide to the City on a monthly basis documentation stating:
 - a. Number of users by day, by month
 - i. Track the users by senior, children or adult; and whether they are low income; and whether fees are waived.
6. Provide to the City documentation providing the following:
 - a. How many part time jobs were created for the License Term, as a result of this Agreement
 - b. How many full -time jobs were created for the License Term, as a result of this Agreement
 - c. Community outreach used for the program
 - d. Number of Consultant's employees or independent contractors were life guard certified
 - e. List of positions and salary and benefits, as a result of this Agreement
 - f. Job training and education classes offered to the employees or independent contractors, as a result of this Agreement
 - g. Type of swim programs offered and how many each month were in each program
 - h. Any uplifting program or project stories
7. Consultant shall in no way contact the City's Pool contractor (One Stop Pool Pros, Inc.) who provides routine maintenance service on the Pool.

Section 6. SUPERVISION

- a. No fewer than two (2) certified lifeguards shall be on duty at all times when the Pool is used by the Licensee, or in an amount as required by law.
- b. Consultant shall provide the City background checks of all employees, lifeguards and other personnel providing services, prior to commencement of the License Period, to the reasonable satisfaction of the City.

Section 7. MAXIMUM POOL OCCUPANCY

Each time Licensee shall use the Pool in accordance with the schedule, Licensee shall ensure that a maximum occupancy of the Pool, as required by law, is observed at all times.

Section 8. COMPLETION DATE

Consultant shall complete the services described in the Scope of Services during the term of this Agreement, which shall run concurrently with the License Period.

Section 9. DEPOSIT PAYMENT TO CITY

Concurrent with execution of this Agreement by Licensee, Licensee shall pay to City a Zero Dollars and Zero Cent (\$0.00) deposit ("Deposit"). City may deduct and retain amounts from the Deposit, including without limitation any fees for cleaning the facility, cost for repairing any damage, and any other monetary liability of Licensee. The Deposit shall be retained by the City until City determines the amount of any monies owed to City by Licensee.

Section 10. EXTRA WORK

At any time during the term of this Agreement, the City may request that Consultant perform Extra Work. As used herein, "Extra Work" means any work which is determined by the City to be necessary for the proper completion of the services, but which the parties did not reasonably anticipate would be necessary at the execution of this Agreement. Consultant shall not perform Extra Work without written authorization from the City.

Section 11. OWNERSHIP OF DOCUMENTS

All plans, studies, documents and other writings, including drafts, prepared by and for Consultant, its officers, employees and agents and subcontractors in the course of implementing this Agreement, except working notes and internal documents, shall become the property of the City upon payment to Consultant for such work, and the City shall have the sole right to use such materials in its discretion without further compensation to Consultant or to any other party. Consultant shall, at its expense, provide such reports, plans, studies, documents and other writings in pdf format to the City upon written request, or such other electronic format as reasonably requested by City.

Section 12. INSURANCE

a. Licensee shall procure and maintain at its own expense, during the term of this Agreement, general liability insurance of not less than One Million Dollars (\$1,000,000) combined single limit per occurrence, and Two Million Dollars (\$2,000,000) in the aggregate, insuring its interests against claims for personal and bodily injury, death and property damage occurring as a result of the use of the Pool under this Agreement by Licensee, its officers, employees, servants, volunteers, agents, independent

contractors, and Swim Team (collectively, "Licensee Parties").

b. Licensee shall procure and maintain at its own expense, during the term of this Agreement, workers' compensation insurance, providing coverage as required by the California State Workers' Compensation Law.

c. Licensee shall maintain Worker's Compensation Insurance and Employer's Liability Insurance for its employees in accordance with the laws of the State of California. In addition, Licensee shall require each subcontractor to similarly maintain Worker's Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the State of California for all of the subcontractor's employees. If any class of employees employed by Licensee pursuant to this Agreement is not protected by the California State Worker's Compensation Law, Licensee shall provide adequate insurance for the protection of such employees to the satisfaction of the City. This provision shall not apply if Licensee has no employees performing work under this Agreement. Licensee agrees to waive its statutory immunity under any worker's compensation or similar statute, as respecting the City, and to require any and all subcontractors and any other person or entity involved in the services to do the same.

d. Licensee shall maintain commercial automobile liability insurance covering bodily injury, personal injury and property damage for all activities of the Licensee arising out of or in connection with the work to be performed under this Agreement, including coverage for owned, hired and non-owned vehicles, in an amount of not less than one million dollars (\$1,000,000) combined single limit for each occurrence, and two million dollars (\$2,000,000) in the aggregate. As an alternative, Licensee shall be permitted to obtain a non-owned automobile endorsement to its comprehensive general liability insurance providing the same protection and coverage as though Licensee were to provide separate commercial vehicle liability insurance as set forth in this paragraph. The coverage required in this paragraph shall provide at least as much coverage as that provided by ISO form CA 00 01 or any updated form thereof.

e. Licensee agrees to require that all parties with whom Licensee enters into contracts or whom Licensee hires or retains pursuant to or in any way related to the performance of this Agreement, provide the insurance coverage required herein, at minimum, and name as additional insureds the City of Desert Hot Springs, and the parties to this Agreement. Licensee agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this Section.

f. In the event this Agreement is terminated for any reason prior to the completion of all obligations and requirements of this Agreement, Licensee agrees to maintain all coverages required herein until the City provides written authorization to terminate the coverages following the City's review and determination that all liability posed under this Agreement as to the party providing insurance has been eliminated.

g. Licensee agrees and acknowledges that if it fails to obtain all of the insurance required in this Agreement in accordance with the requirements herein, or to obtain and ensure that the coverage required herein is maintained by any subcontractors or others involved in any way with the Permitted Use, Licensee shall be responsible for any losses, claims, suits, damages, defense obligations, or liability of any kind or nature attributable to the City and Desert Hot Springs Health and Wellness Foundation or the City and Desert Hot Springs Health and Wellness Foundation's officers, employees, servants, volunteers, agents and independent contractors.

Section 13. WAIVER OF SUBROGATION RIGHTS

Licensee shall require the carriers of all required insurance policies to waive all rights of subrogation against the City and Desert Hot Springs Health and Wellness Foundation and their officers, volunteers, employees, contractors and subcontractors.

Section 14. ADDITIONAL NAMED INSURED

Except for worker's compensation, errors and omissions, professional liability or directors and officers coverage the protection offered by all policies shall bear an endorsement whereby it is provided that the City and Desert Hot Springs Health and Wellness Foundation's officers, employees, servants, volunteers and agents and independent contractors are named as additional insureds.

Section 15. PROOF OF INSURANCE COVERAGE; CERTIFICATES

Prior to executing the Agreement, Licensee shall secure from a good and responsible company or companies authorized to do insurance business in the State of California the policies of insurance required by this Agreement and furnish to the City certificates of said insurance with original endorsements to the City as evidence of the insurance coverage required herein, on or before the commencement of the term of this Agreement.

Section 16. COMPLIANCE WITH LAWS

Licensee shall comply with all local, state and federal laws, rules, regulations, policies, and procedures applicable to use of the Pool, including, but not limited to, obtaining a business license from the City and compliance with any and all labor laws. In the event Licensee hires or otherwise uses a sub-contractor, Licensee shall ensure all such sub-contractors comply with the terms of this Agreement and shall be liable for any sub-contractors failure.

Section 17. HOLD HARMLESS; INDEMNIFICATION

a. Licensee shall defend, indemnify and hold harmless the City and the Desert Hot Springs Health and Wellness Foundation, their officers, officials, agents, employees and volunteers from and against any and all claims, demands, actions, losses,

damage, injuries, and liability, direct or indirect (including any and all costs, expenses and attorneys' fees in connection therewith), arising out of Licensee's performance under this Agreement, including without limitation, any such claims related to the use of the Pool by any of the Licensee Parties, except to the extent any such claim may arise out of the gross negligence, recklessness or willful misconduct of the City and the Desert Hot Springs Health and Wellness Foundation, their officers, agents, employees or volunteers.

b. The City does not, and shall not; waive any rights that it may have against Licensee under this section because of the acceptance by the City, or the deposit with the City, of any insurance policy or certificate required pursuant to this Agreement. The hold harmless, indemnification and duty to defend provisions of this section shall apply regardless of whether or not said insurance policies are determined to be applicable to the claim, demand, action, damage, liability, loss, cost or expense described herein.

c. Notwithstanding the provisions of subsections a. and b. of this section, Licensee shall not be responsible for damages or be in default or deemed to be in default by reason of delay caused by strikes, lockouts, accidents, or acts of God, or the failure of the City to furnish timely information or to approve or disapprove Licensee's work promptly, or by reason of delay or faulty performance by the City, construction contractors, or governmental agencies, or by reason of any other delays beyond Licensee's control, or for which Licensee is without fault.

Section 18. WAIVER OF RIGHTS

a. Licensee agrees to waive all rights it may have against the City and the Desert Hot Springs Health and Wellness Foundation, and its officers, agents, employees and independent contractors to pursue any actions, suits, proceedings, claims, demands, losses, judgments and costs and expenses of every type and description, including settlement costs, legal costs and attorneys' fees, resulting from or arising out of, or otherwise in connection with any injury or damage sustained by any Licensee Parties that may arise from this Agreement.

b. Licensee expressly waives any and all rights and benefits conferred upon Licensee by the provisions of section 1542 of the California Civil Code which reads as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

This waiver shall be effective as a bar to any and all actions, fees, damages, losses, claims, liabilities and demands of whatsoever character, nature and kind that are known or unknown, or suspected or unsuspected. Licensee further represents and warrants that Licensee understands this waiver and that if it does not understand this

waiver, Licensee shall seek the advice of a qualified attorney before executing this Agreement.

Initials

Section 19. **PROFESSIONAL ABILITY OF CONSULTANT;
WARRANTY; FAMILIARITY WITH WORK; PERMITS AND
LICENSES**

a. Consultant warrants that all services will be performed in a competent, professional and satisfactory manner in accordance with the standards prevalent in the industry for such services.

b. By executing this Agreement, Consultant warrants that:

- (1) it has thoroughly investigated and considered the work to be performed;
- (2) it has investigated the issues, regarding the scope of services to be provided;
- (3) it has carefully considered how the work should be performed; and
- (4) it fully understands the facilities, difficulties and restrictions attending performance of the work under this Agreement.

c. Should Consultant discover any latent or unknown conditions materially differing from those inherent in the work or as represented by the City, it shall immediately inform the City of such fact and shall not proceed except at Consultant's risk until written instructions are received from the City Manager or appropriate City representative.

d. Consultant represents that it and all of its subcontractors, if any, have obtained and will maintain at all times during the term of this Agreement all professional and/or business licenses, certifications and/or permits necessary for performing the services described in this Agreement, including a City business license.

Section 20. **NOTICES**

a. Any notice to be provided pursuant to this Agreement shall be in writing, and all such notices shall be delivered by personal service or by deposit in the United States mail, certified or registered, return receipt requested, with postage prepaid, and addressed to the parties as follows:

To the City:

City of Desert Hot Springs
Attn: Charles Maynard

65-950 Pierson Blvd.
Desert Hot Springs, California 92240

b. To Licensee: Notices, payments and other documents shall be deemed delivered upon receipt by personal service or as of the second (2nd) day after deposit in the United States mail.

Section 21. ATTORNEY'S FEES AND LITIGATION EXPENSES

In the event any action, suit or proceeding is brought for the enforcement of, or the declaration of any right or obligation pursuant to this Agreement or as a result of any alleged breach of any provision of this Agreement, the prevailing party in such suit or proceeding shall be entitled to recover its costs and expenses, including reasonable attorney's fees, from the losing party, and any judgment or decree rendered in such a proceeding shall include an award thereof.

Section 22. TERMINATION

a. This Agreement may be terminated or suspended without cause by either party at any time provided that the respective party provides the other party at least thirty (30) calendar days written notice of such termination or suspension. Upon termination, Consultant shall be entitled to compensation for services performed up to the effective date of termination, provided that Consultant shall have satisfied all its obligations under this Agreement through and including the effective date of termination, and is not otherwise in breach of this Agreement.

b. This Agreement may be terminated by the City in the City's sole and absolute discretion immediately upon written notice to Licensee if the City determines Licensee to be in violation of the terms of this Agreement or any of the rules or regulations that govern the Pool.

**Section 23. REPRESENTATIONS AND ACKNOWLEDGMENTS
REGARDING STATUS OF LICENSEE AS INDEPENDENT
CONTRACTOR**

a. Licensee represents and acknowledges the following:

(1) The City and the Desert Hot Springs Health and Wellness Foundation are not required to provide any training or legal counsel to Licensee or its employees in order for Licensee to perform the services described in this Agreement.

(2) Nothing in this Agreement shall be interpreted to imply that the City or Desert Hot Springs Health and Wellness Foundation must maintain any contractual relationship with Licensee on a continuing basis after termination of this Agreement.

(3) Neither the City nor the Desert Hot Springs Health and Wellness Foundation will be requested or demanded to assume any liability for the direct payment of any salary, wage or other such compensation to any person employed by Licensee to perform the services described in this Agreement.

(4) Licensee shall not at any time or in any manner represent that it or any of its officers, employees, or agents are "employees" of the City or Desert Hot Springs Health and Wellness Foundation.

b. The City represents and acknowledges the following:

(1) The City will not hire, supervise or pay any assistants working for Licensee pursuant to this Agreement.

(2) Nothing in this Agreement shall be interpreted to imply that Licensee must maintain any contractual relationship with the City or Desert Hot Springs Health and Wellness Foundation on a continuing basis after termination of this Agreement.

(3) Licensee is not required to devote full time to the business operations of the City or Desert Hot Springs Health and Wellness Foundation in order to perform the services set forth in this Agreement.

(4) Nothing in this Agreement shall be interpreted to preclude Licensee from working for other persons or firms, provided that such work does not create a conflict of interest.

(5) Licensee is not required to perform the Permitted Use set forth in this Agreement in any particular order or sequence.

Section 24. NOT AGENT

a. Nothing contained in this Agreement shall be deemed, construed or represented by the Licensee or City or by any third person to create the relationship of principal and agent.

b. Licensee shall have no authority, express or implied, to act on behalf of the City or Desert Hot Springs Health and Wellness Foundation in any capacity whatsoever as an agent, nor shall Licensee have any authority, express or implied, to bind the City or Desert Hot Springs Health and Wellness Foundation to any obligation whatsoever.

Section 25. EQUAL OPPORTUNITY EMPLOYMENT

Licensee represents that it is an equal opportunity employer and shall not discriminate against any subcontractor, employee, or applicant ("person") for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. Unless

otherwise permitted under the law, Licensee shall not refuse to hire or employ any such person or refuse to select any such person for a training program leading to employment, or bar or discharge any such person from employment or from a training program leading to employment, or otherwise discriminate against any such person in compensation or in terms, conditions, or privileges of employment.

Section 26. CONFLICTS OF INTEREST

a. Consultant (including principals, associates and professional employees) covenants and represents that it does not have any investment or interest in real property and shall not acquire any interest, direct or indirect, in the area covered by this Agreement or any other source or income, interest in real property or investment which would be affected in any manner or degree by the performance of Consultant's services hereunder. Consultant further covenants and represents that in the performance of its duties hereunder no person having any such interest shall perform any services under this Agreement.

b. Consultant is not a designated employee within the meaning of the Political Reform Act because Consultant:

(1) Does not make or participate in:

- (i) the making or any governmental decisions regarding approval of a rate, rule, or regulation, the adoption or enforcement of laws;
- (ii) the issuance, denial, suspension or revocation of permits, licenses, applications, certificates, approvals, orders, or similar authorization or entitlement;
- (iii) authorizing the City to enter into, modify, or renew a contract;
- (iv) granting the City approval to a contract that requires City approval and to which the City is a party, or to the specifications for such a contract;
- (v) granting the City approval to a plan, design, report, study, or similar item; or
- (vi) adopting, or granting City approval of, policies, standards, or guidelines for the City or for any subdivision thereof.

(2) Does not serve in a staff capacity with the City and in that capacity participate in making a governmental decision or otherwise perform the same or substantially all the same duties for the City that would otherwise be performed by an

individual holding a position specified in the City's Conflict of Interest Code under Government Code Section 87302.

Section 27. DEFAULT

a. Failure or delay by any party to this Agreement to perform any material term or provision of this Agreement shall constitute a default under this Agreement; provided however, that if the party who is otherwise claimed to be in default by the other party commences to cure, correct or remedy the alleged default within fifteen (15) calendar days after receipt of written notice specifying such default and shall diligently complete such cure, correction or remedy, such party shall not be deemed to be in default hereunder.

b. The party which may claim that a default has occurred shall give written notice of default to the party in default, specifying the alleged default. Delay in giving such notice shall not constitute a waiver of any default nor shall it change the time of default; provided, however, the injured party shall have no right to exercise any remedy for a default hereunder without delivering the written default notice, as specified herein.

c. Any failure or delay by a party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any rights or remedies associated with a default.

d. In the event that a default of any party to this Agreement may remain uncured for more than fifteen (15) calendar days following written notice, as provided above, a "material breach" shall be deemed to have occurred. In the event of a material breach, the injured party shall be entitled to seek any appropriate remedy or damages as otherwise set forth herein and by initiating legal proceedings.

Section 28. REMEDIES

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the parties are cumulative and the exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

Section 29. LICENSING AND PERMIT REQUIREMENTS

Licensee represents that it has obtained and will maintain at all times during the term of this Agreement all professional and/or business licenses, certifications and/or permits necessary for the Permitted Use described in this Agreement, including a City business license.

Section 30. **TIME OF THE ESSENCE**

Time is of the essence in the performance of this Agreement.

Section 31. **COUNTERPARTS**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original.

Section 32. **CONFIDENTIALITY**

Licensee shall not use the City or Desert Hot Springs Health and Wellness Foundation's insignia or photographs relating to the Licensee's Permitted Use, or any publicity pertaining to the Licensee's Permitted Use under this Agreement in any magazine, trade paper, newspaper, television or radio production or other similar medium without the prior written consent of the City.

Section 33. **MODIFICATIONS AND AMENDMENTS**

This Agreement may be modified or amended only by a written instrument signed by both parties.

Section 34. **BACKGROUND CHECKS AND FINGERPRINTING**

At any time during the term of this Agreement, the City reserves the right to make an independent investigation into the background of Licensee's personnel who perform work required related in any way to the Permitted Uses, including but not limited to their references, character, address history, past employment, education, social security number validation, and criminal or police records, for the purpose of confirming that such personnel are lawfully employed, qualified to provide the subject service or pose a risk to the safety of persons or property in and around the vicinity of the Pool. If the City makes a reasonable determination that any of Licensee's prospective or then current personnel is deemed objectionable, then the City may notify Licensee of the same. Licensee shall not use that personnel to perform work related to the Permitted Use, and if necessary, shall replace him or her with another suitable worker.

Licensee hereby acknowledges and consents that Licensee or any of its employees, volunteers, contractors, or the like will be required, at City's sole discretion, to be livescanned (fingerprinted) by the City of Desert Hot Springs Police Department, at Consultant's expense, prior to or during the term of this Agreement.

Section 35. **CONSULTANT'S BOOKS AND RECORDS**

a. Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services, or expenditures and disbursements charged to the City for a

minimum period of three years, or for any longer period required by law, from the date of final payment to Consultant pursuant to this Agreement.

b. Consultant shall maintain all documents and records which demonstrate performance under this Agreement for a minimum of three years, or for any longer period required by law, from the date of termination or completion of this Agreement.

c. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit, at any time during regular business hours, upon written request by the City Manager, City Attorney, City Auditor or a designated representative of these officers. Copies of such documents shall be provided to the City for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Consultant's address indicated for receipt of notices in this Agreement.

d. Where the City has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of Consultant's business, the City may, by written request of any of the above-named officers, require that custody of the records be given to the City and that the records and documents be maintained at City Hall. Access to such records and documents shall be granted to any party authorized by Consultant, Consultant's representatives, or Consultant's successor-in-interest.

Section 36. ENTIRE AGREEMENT

a. This Agreement supersedes any and all other agreements, either oral or written, between the City and Licensee with respect to the subject matter of this Agreement.

b. This Agreement contains all of the covenants and agreements between the parties with respect to the subject matter of this Agreement, and each party to this Agreement acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except those covenants and agreements embodied in this Agreement.

c. No agreement, statement, or promise not contained in this Agreement shall be valid or binding.

Section 37. AMBIGUITIES

This Agreement is in all respects intended by each party hereto to be deemed and construed to have been jointly prepared by the parties and the parties hereby expressly agree that any uncertainty or ambiguity existing herein shall not be interpreted against either of them. Except as expressly limited by this paragraph, all of the applicable rules of interpretation of contract shall govern the interpretation of any uncertainty or ambiguity of this Agreement.

Section 38. **NON-LIABILITY OF OFFICERS AND EMPLOYEES**

No officer or employee of the City or Desert Hot Springs Health and Wellness Foundation shall be personally liable to Licensee, or any successor in interest, in the event of any default or breach by the City or Desert Hot Springs Health and Wellness Foundation or for any amount which may become due to Licensee or to its successor, or for any breach of any obligation of the terms of this Agreement.

Section 39. **WAIVER**

a. No waiver shall be binding, unless executed in writing by the party making the waiver.

b. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any such waiver constitute a continuing or subsequent waiver of the same provision.

c. Failure of either party to enforce any provision of this Agreement shall not constitute a waiver of the right to compel enforcement of the remaining provisions of this Agreement.

Section 40. **ASSIGNMENT AND SUBCONTRACTING**

The experience, knowledge, capability and reputation of Licensee, its principals and employees were a substantial inducement for the City to enter into this Agreement. Assignments of any or all rights, duties or obligations of the Licensee under this Agreement will be permitted only with the written consent of the City. Licensee shall notify the City in writing of any change in ownership of Licensee at least thirty (30) days prior to said change. Without limiting the foregoing obligations, in the event Licensee desires to assign this Agreement, or any portion of it, Licensee shall notify the City in writing at least thirty (30) days prior to such assignment.

Section 41. **CAPTIONS AND HEADINGS**

The captions and headings contained in this Agreement are provided for identification purposes only and shall not be interpreted to limit or define the content of the provisions described under the respective caption or heading.

Section 42. **SUCCESSORS, HEIRS AND ASSIGNS**

Except as otherwise expressly provided herein, this Agreement shall be binding upon the successors, endorsees, assigns, heirs, and personal representatives of each of the parties to this Agreement and, likewise, shall inure to the benefit of the successors, endorsees, assigns, heirs, and personal representatives of each of the parties.

Section 43. **SEVERABILITY**

If any one or more of the sentences, clauses, paragraphs or sections contained herein is declared invalid, void or unenforceable by a court of competent jurisdiction, the same shall be deemed severable from the remainder of this Agreement and shall not affect, impair or invalidate any of the remaining sentences, clauses, paragraphs or sections contained herein.

Section 44. **GOVERNING LAW**

The validity of this Agreement and any of its terms or provisions, as well as the rights and duties of the parties under this Agreement, shall be construed pursuant to and in accordance with California law.

Section 45. **CUMULATIVE REMEDIES**

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the parties are cumulative and the exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

Section 46. **VENUE**

All proceedings involving disputes over the terms, provisions, covenants or conditions contained in this Agreement and all proceedings involving any enforcement action related to this Agreement shall be initiated and conducted in the applicable court or forum in Riverside County, California.

Section 47. **EFFECTIVENESS OF AGREEMENT**

This Agreement shall not be binding upon the City, until signed by the authorized representative(s) of Licensee, and approved as to form by the City Attorney, and executed by the Mayor or his or her designee.

Section 48. **NO THIRD PARTY BENEFICIARIES**

The parties do not intend the benefits of this Agreement to inure to any third party, other than the City, nor shall any provision of this Agreement be so construed.

Section 49. **LABOR LAWS**

a. All work performed within the State of California pursuant to this Agreement by Licensee, Licensee's employees and independent contractors, or contractor's subcontractors and its subcontractors' employees and independent contractors shall be performed by individuals lawfully permitted to perform such work or services in the State

of California and/or the United States of America pursuant to all applicable State and/or Federal labor laws, rules and regulations including, but not limited to, any State or Federal law, rule or regulation prohibiting the employment of undocumented workers or any other person not lawfully permitted to perform said work or services in the State of California or the United States of America.

b. Documentation must be promptly submitted to the City at any time, at the request of the City, for the purpose of determining whether or not the Permitted Use is in compliance with this section.

Section 50. **REPRESENTATIONS OF PARTIES AND
PERSONS EXECUTING AGREEMENT**

a. Each of the parties to this Agreement hereby represents that all necessary and appropriate actions of their governing bodies have been taken to make this Agreement a binding obligation of each of the parties hereto.

b. The persons executing this Agreement warrant that they are duly authorized to execute this Agreement on behalf of and bind the parties each purports to represent.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the City and Licensee have executed this Agreement as of the date first written above.

“Licensee”

USA Management, LLC

Troy Avery, President

“City”

City of Desert Hot Springs

Scott Matas, Mayor

ATTEST:

Jerryl Soriano, City Clerk

APPROVED AS TO FORM:

Jennifer Mizrahi, City Attorney

