

1 **AGREEMENT REGARDING ESCROW AGREEMENTS**
2 **FOR SECURITY DEPOSITS IN LIEU OF RETENTION**

3 THIS AGREEMENT is made and entered into this 16th day of October, 2014, by
4 and between the FRESNO COUNTY ZOO AUTHORITY, a political subdivision of the State of
5 California, hereinafter referred to as "AUTHORITY," and the FRESNO'S CHAFFEE ZOO
6 CORPORATION, a California nonprofit public benefit corporation, hereinafter referred to as
7 "ZOOCORP." The Agreement is effective upon execution by both parties.

8 **WITNESSETH:**

9 WHEREAS, the adoption of Measure Z in 2004 has allowed ZOOCORP to construct new
10 exhibits and to modernize other exhibits at the Fresno Chaffee Zoo;

11 WHEREAS, for previous projects constructed by ZOOCORP and funded by the
12 AUTHORITY, such as Sea Lion Cove, ZOOCORP has submitted periodic requests for
13 reimbursement to the AUTHORITY during the course of construction of the project;
14

15 WHEREAS, upon receipt of each invoice, the AUTHORITY reviews the invoice, and if
16 appropriate, authorizes payment of the amount requested, less 5 percent of the requested
17 amount, which has been held by the AUTHORITY as a retention until the completion of the
18 project;

19 WHEREAS, upon completion of previous projects, ZOOCORP has issued a final invoice
20 to the AUTHORITY with a request for payment of the final invoice and any retention;

21 WHEREAS, if the AUTHORITY is satisfied that the final invoice is in order and the
22 project has been completed satisfactorily, it has paid the amount specified in the final invoice
23 plus the accumulated retentions withheld during the construction of the project;
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25 WHEREAS, ZOOCORP is currently constructing a project called "African Adventure", a
26 multi-acre exhibit with African animals including elephants, giraffes, zebra, rhinoceros, lions,
27 cheetahs, vultures and meerkats, all in a natural setting; the Mahali or lodge with a café and
28 rest area; a children's play area; a giraffe feeding station; a botanical garden; and sculptures;

1 WHEREAS, it is common on certain construction projects for the owner, such as
2 ZOOCORP, and the construction manager, to enter into an agreement providing for any
3 retention to be deposited into an interest bearing escrow account under the ownership and
4 control of the owner;

5 WHEREAS, at the conclusion of the construction project, the owner certifies that project
6 has been completed satisfactorily; and,

7 WHEREAS, escrow agreements are specifically authorized under the Public Contract
8 Code and ZOOCORP determined that Public Contract Code required that it enter into an
9 escrow agreement with the construction manager for the African Adventure project;

10 WHEREAS, ZOOCORP entered into an "Escrow Agreement for Security Deposit in Lieu
11 of Retention" with Harris Construction, the Construction Manager (the "Harris Escrow
12 Agreement"), a copy of which is attached hereto as Exhibit "A" and incorporated by this
13 reference as though fully set forth herein;

14 WHEREAS, ZOOCORP has requested that the AUTHORITY permit amounts that have
15 been and would otherwise be retained by the AUTHORITY during the construction of the
16 African Adventure project to be deposited by ZOOCORP to the escrow account owned and
17 controlled by ZOOCORP;

18 WHEREAS, the AUTHORITY is willing to disburse funds to the ZOOCORP under the
19 terms and conditions set forth below.

20 NOW, THEREFORE, in consideration of the promises, performances and considerations
21 set forth in this Agreement, the parties agree as follows:

22 1. **Retention Defined.** For purposes of this Agreement, "Retention" means funds retained
23 by the AUTHORITY from the amounts paid to ZOOCORP for invoices received on or before
24 July 15, 2014 related to work performed in constructing the African Adventure project.

25 2. **Escrow Account Defined.** For purposes of this Agreement, "Escrow Account" means
26 that certain account established at United Security Bank, whose address is 2151 West Shaw
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1 Avenue, Fresno, California 93711, pursuant to the Harris Escrow Agreement”.

2 3. **Release of Retention.** Within fourteen (14) days of the date this Agreement is
3 executed by both parties hereto, the AUTHORITY shall disburse the Retention to the
4 ZOOCORP. Not later than two (2) business days from its receipt of the Retention, ZOOCORP
5 shall deposit the Retention in the Escrow Account. Within one (1) business day of deposit of
6 funds in the Escrow Account, ZOOCORP shall send proof of deposit of the funds to the
7 AUTHORITY.

8 4. **Procedures For Payment of Future Invoices By The AUTHORITY.** Invoices from the
9 ZOOCORP related to the construction of the African Adventure project that are received
10 by the AUTHORITY subsequent to the date referenced in Paragraph 1 above (“Future
11 Invoices”) shall be:

12 a. Received, reviewed, and paid in accordance with the terms of the “Agreement
13 Regarding Procedures For Distribution Of Tax Revenue To The Chaffee Zoo” entered into by
14 the AUTHORITY and ZOOCORP on December 21, 2005 and the “Procedures for Approving
15 and Administering Measure Z Funds”, most recently revised and approved by the Board of
16 Directors of the AUTHORITY on March 28, 2012.

17 5. **ZOOCORP’S Deposit of Funds Received From AUTHORITY.** Not later than two (2)
18 business days from its receipt of funds from the AUTHORITY for reimbursement of Future
19 Invoices related to the African Adventure project, ZOOCORP shall deposit 5 percent of those
20 funds in the Escrow Account. Within 1 business day of deposit of funds in the Escrow Account,
21 ZOOCORP shall send proof of deposit of the funds to the AUTHORITY.
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23 6. **Certification to the AUTHORITY.** Prior to releasing any funds
24 from the Escrow Account, ZOOCORP will certify in writing to the Board of Directors of the
25 AUTHORITY that all conditions of the escrow agreement have been met, that the construction
26 project is final, and complete in accordance with the construction contract, and that the release
27 of funds in the Escrow Account is appropriate. Such written certification shall include
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1 certification from the project architect that the project has been completed in all respects in
2 accordance with the plans and specifications. ZOOCORP shall not release funds from the
3 Escrow Account without the prior written consent of the Board of Directors of the AUTHORITY.

4 7. **AUTHORITY Consent to Distribution of Escrow Funds.** Upon receipt of certification
5 from ZOOCORP that the project is final and complete in accordance with the construction
6 contract, the Board of Directors of the AUTHORITY will not unreasonably withhold its consent
7 to the release of the funds held in escrow. If it withholds consent, Board of Directors of the
8 AUTHORITY will set forth in writing its objections, stating those items that are not final and
9 complete according to the construction contract.

10 8. **TERMINATION**

11 a. Non-Receipt of Funds - The terms of this Agreement, and the funding to be
12 provided thereunder, are contingent on the receipt of funds by the AUTHORITY. Should the
13 funds received be insufficient to allow the AUTHORITY to transfer funding to the ZOOCORP
14 under this Agreement, this Agreement may be modified or terminated at any time by giving the
15 ZOOCORP thirty (30) days advance written notice.

16 b. Breach of Contract - The AUTHORITY may immediately suspend or terminate this
17 Agreement in whole or in part, where in the determination of the AUTHORITY there is:

- 18 i. An illegal or improper use of funds;
- 19 ii. A failure to comply with any term of this Agreement;
- 20 iii. A substantially incorrect or incomplete report submitted to the
21 AUTHORITY.

22 In no event shall any payment by the AUTHORITY constitute a waiver by the
23 AUTHORITY of any breach of this Agreement or any default which may then exist on the part of
24 the ZOOCORP. Neither shall such payment impair or prejudice any remedy available to the
25 AUTHORITY with respect to the breach or default. The AUTHORITY shall have the right to
26 demand of the ZOOCORP the repayment to the AUTHORITY of any funds disbursed to the
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1 ZOOCORP under this Agreement, which in the judgment of the AUTHORITY were not
2 expended in accordance with the terms of this Agreement. The ZOOCORP shall promptly
3 refund any such funds upon demand.

4 **9. INDEPENDENT CONTRACTOR**

5 In performance of the work, duties and obligations assumed by the ZOOCORP under
6 this Agreement, it is mutually understood and agreed that the ZOOCORP, including any and all
7 of the ZOOCORP's officers, agents, and employees will at all times be acting and performing as
8 an independent contractor, and shall act in an independent capacity and not as an officer,
9 agent, servant, employee, joint venturer, partner, or associate of the AUTHORITY.
10 Furthermore, the AUTHORITY shall have no right to control or supervise or direct the manner
11 or method by which the ZOOCORP shall perform its work and function. However, the
12 AUTHORITY shall retain the right to administer this Agreement so as to verify that the
13 ZOOCORP is performing its obligations in accordance with the terms and conditions thereof.
14 The ZOOCORP and the AUTHORITY shall comply with all applicable provisions of law and the
15 rules and regulations, if any, of governmental authorities having jurisdiction over matters the
16 subject thereof. Because of its status as an independent contractor, the ZOOCORP shall have
17 absolutely no right to employment rights and benefits available to AUTHORITY employees. The
18 ZOOCORP shall be solely liable and responsible for providing to, or on behalf of, its employees
19 all legally-required employee benefits. In addition, the ZOOCORP shall be solely responsible
20 and save the AUTHORITY harmless from all matters relating to payment of the ZOOCORP's
21 employees, including compliance with Social Security withholding and all other regulations
22 governing such matters. It is acknowledged that during the term of this Agreement, the
23 ZOOCORP may receive funds from others unrelated to the AUTHORITY or to this Agreement.

26 **10. HOLD HARMLESS**

27 The ZOOCORP agrees to indemnify, save, hold harmless, and at the AUTHORITY's
28 request, defend the AUTHORITY, its officers, agents, and employees from any and all costs

1 and expenses, damages, liabilities, claims, and losses occurring or resulting to the
2 AUTHORITY in connection with the performance, or failure to perform, by the ZOOCORP, its
3 officers, agents, or employees under this Agreement, and from any and all costs and expenses,
4 damages, liabilities, claims, and losses occurring or resulting to any person, firm, or corporation
5 who may be injured or damaged by the performance, or failure to perform, of the ZOOCORP,
6 its officers, agents, or employees under this Agreement.

7 The AUTHORITY agrees to indemnify, save, hold harmless, and at the ZOOCORP's
8 request, defend the ZOOCORP, its officers, agents, and employees from any and all costs and
9 expenses, damages, liabilities, claims, and losses occurring or resulting to the ZOOCORP in
10 connection with the performance, or failure to perform, by the AUTHORITY, its officers, agents,
11 or employees under this Agreement, and from any and all costs and expenses, damages,
12 liabilities, claims, and losses occurring or resulting to any person, firm, or corporation who may
13 be injured or damaged by the performance, or failure to perform, of the AUTHORITY, its
14 officers, agents, or employees under this Agreement.

16 **11.INSURANCE**

17 Without limiting the AUTHORITY'S right to obtain indemnification from the ZOOCORP or
18 any third parties, the ZOOCORP, at its sole expense, shall maintain in full force and effect
19 throughout the term of this Agreement:

20 a. Fiduciary/Errors and Omissions coverage for the Board of Directors, in the
21 minimum amount of Three Million Dollars (\$3,000,000). This may be accomplished through
22 either insurance or bonding, or a combination thereof.

23 b. Commercial General Liability Insurance with limits of not less than One Million
24 Dollars (\$1,000,000) per occurrence and an annual aggregate of Two Million Dollars
25 (\$2,000,000). This policy shall be issued on a per occurrence basis. The AUTHORITY may
26 require specific coverages including completed operations, products liability, contractual liability,
27 Explosion-Collapse-Underground, fire legal liability or any other liability insurance deemed
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1 necessary because of the nature of this contract.

2 c. Comprehensive Automobile Liability Insurance with limits for bodily injury of not
3 less than Two Hundred Fifty Thousand Dollars (\$250,000) per person, Five Hundred Thousand
4 Dollars (\$500,000) per accident and for property damages of not less than Fifty Thousand
5 Dollars (\$50,000), or such coverage with a combined single limit of Five Hundred Thousand
6 Dollars (\$500,000). Coverage shall include owned and non-owned vehicles used in connection
7 with this Agreement.

8 d. Property Insurance coverage for all assets owned by the ZOOCORP, including
9 vehicles, sufficient to ensure replacement of any/all lost or damaged property assets. The
10 AUTHORITY acknowledges that the underlying real property and some improvements to real
11 property at the zoo will remain the property of the City of Fresno, and that the City will remain
12 responsible for insuring, or self-insuring, those portions of the Zoo.

13 e. A policy of Workers' Compensation insurance as may be required by the
14 California Labor Code.

15 Such insurance policies, except the Workers' Compensation policy, shall name the
16 AUTHORITY, its officers, agents, and employees, individually and collectively, as additional
17 insureds, but only insofar as the operations under this contract are concerned. Such coverage
18 for additional insureds shall apply as primary insurance and any other insurance, or self-
19 insurance, maintained by the AUTHORITY, its officers, agents, and employees, shall be excess
20 only and not contributing with insurance provided under the ZOOCORP's policies herein. This
21 insurance shall not be cancelled or changed without a minimum of thirty (30) days advance,
22 written notice given to the AUTHORITY.
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24 The ZOOCORP shall provide certificates of insurance on the foregoing policies to the
25 AUTHORITY, stating that such insurance coverages have been obtained and are in full force;
26 that the AUTHORITY, its officers, agents, and employees will not be responsible for any
27 premiums on the policies; that such insurance names the AUTHORITY, its officers, agents, and
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1 employees, individually and collectively, as additional insureds (except Workers' Compensation
2 insurance), but only insofar as the operations under this contract are concerned; that such
3 coverage for additional insureds shall apply as primary insurance and any other insurance, or
4 self-insurance, maintained by the AUTHORITY, its officers, agents, and employees, shall be
5 excess only and not contributing with insurance provided under the ZOOCORP's policies
6 herein; and that this insurance shall not be cancelled or changed without a minimum of thirty
7 (30) days advance, written notice given to the AUTHORITY. In the event the ZOOCORP fails
8 to keep in effect insurance coverage as herein provided, the AUTHORITY may, in addition to
9 other remedies it may have, suspend or terminate this Agreement upon the occurrence of such
10 event.

11 **12. AUDITS AND INSPECTIONS**

12 The ZOOCORP shall, upon request by the AUTHORITY, permit the AUTHORITY to
13 audit and inspect all of its records and data with respect to the matters covered by this
14 Agreement. The ZOOCORP shall at all times during business hours, and as often as the
15 AUTHORITY may deem necessary, make available to the AUTHORITY for examination all of
16 such records and data necessary to ensure the ZOOCORP's compliance with the terms of this
17 Agreement.
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19 The AUTHORITY may also require the ZOOCORP to provide independently audited
20 statements or other reports on an annual or other basis at the ZOOCORP's expense. If this
21 Agreement exceeds ten thousand dollars (\$10,000), the ZOOCORP shall be subject to the
22 examination and audit of the State Auditor for a period of three (3) years after final payment
23 under the contract (Gov. Code, § 8546.7).
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1 **13. NOTICES**

2 The persons and their addresses having authority to give and receive notices under this
3 Agreement shall be the following:

4 **AUTHORITY**

5 FRESNO COUNTY ZOO
6 AUTHORITY
7 c/o Zoo Authority Coordinator
8 Department of Public Works and
9 Planning
County of Fresno
2220 Tulare Street, Sixth Floor
Fresno, California 93721

ZOOCORP

FRESNO'S CHAFFEE ZOO CORPORATION
c/o Chief Executive Officer
Chaffee Zoological Gardens
894 W. Belmont
Fresno, California 93728

10 Any and all notices between the AUTHORITY and the ZOOCORP provided for or
11 permitted under this Agreement or by law shall be in writing and shall be deemed duly served
12 when personally delivered to one of the parties, or in lieu of such personal service, when
13 deposited in the United States Mail, postage prepaid, addressed to such party.
14

15 **14. GOVERNING LAW**

16 The rights and obligations of the parties and all interpretation and performance of this
17 Agreement shall be governed in all respects by the laws of the State of California.

18 **15. CONSTRUCTION.**

19 Should any paragraph, clause or provision of this Agreement be
20 construed to be against public policy or determined by a court of competent jurisdiction to be
21 void, invalid or unenforceable, such construction and decision shall affect only those
22 paragraphs, clauses or provisions so construed or interpreted, and shall in no way affect the
23 remaining paragraphs, clauses or provisions of this Agreement, which shall remain in force.
24

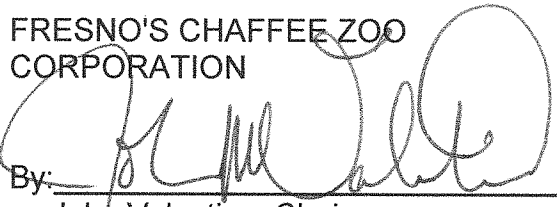
25 **16. ENTIRE AGREEMENT**

26 This Agreement constitutes the entire agreement between the ZOOCORP and the
27 AUTHORITY with respect to the subject matter hereof and supersedes all previous
28 negotiations, proposals, commitments, writings, advertisements, publications, and


1 understanding of any nature whatsoever unless expressly included in this Agreement. No parol
2 or other evidence outside this Agreement may be offered to explain, construed, contradict, or
3 clarify the terms of this Agreement. Counsel for both parties have reviewed, or have had the
4 opportunity to review, this Agreement, and, accordingly, any rules of construction to the effect
5 that ambiguities are to be resolved against the drafting party shall not be employed in the
6 interpretation of this Agreement.

7 IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and
8 year hereinabove written.

9 FRESNO'S CHAFFEE ZOO
10 CORPORATION

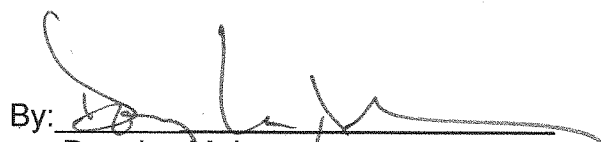
11 By: 
12 John Valentino, Chair

FRESNO COUNTY ZOO AUTHORITY

13 By: 
14 Peter Herzog, Chair

15 By: 
16 Brian Goldman, Chief Financial Officer

17
18
19 APPROVED AS TO LEGAL FORM

20
21
22 By: 
23 Douglas M. Larsen,
24 Zoo Corporation Legal Counsel

APPROVED AS TO LEGAL FORM

Daniel C. Cederborg, County Counsel

25 By: _____
26 Arthur G. Wille, Senior Deputy
27 County Counsel
28

APPROVED AS TO ACCOUNTING FORM

Vicki Crow, Auditor-Controller/Treasurer-
Tax Collector

By: 

FOR ACCOUNTING USE ONLY:

Org No.:

Account No.:

Requisition No.:

COPY

ESCROW AGREEMENT FOR SECURITY DEPOSIT IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between the FRESNO CHAFFEE ZOO CORPORATION (hereinafter called "Owner"), whose address is 894 W. Belmont, Fresno, California, HARRIS CONSTRUCTION CO., INC. (hereinafter called "Construction Manager"), whose address is 5286 E. Home Avenue, Fresno, California 93727 and UNITED SECURITY BANK, a state or federally chartered bank in California, (hereinafter called "Escrow Agent") whose address is 2151 W. Shaw Avenue, Fresno, California 93711.

For the consideration hereinafter set forth, the OWNER, CONSTRUCTION MANAGER (CM), and ESCROW AGENT agree as follows:

1. Pursuant to existing Agreement between the OWNER & CM, CM has the option to deposit securities with Escrow Agent as a substitute for retention earnings, required to be withheld by OWNER pursuant to the Agreement entered into between the OWNER and CM for, FRESNO CHAFFEE ZOO AFRICA EXHIBIT, in the amount of \$ 44,263,000.00 dated NOVEMBER 26, 2013 (hereinafter referred to as the "Contract"). Alternatively, on written request of the CM, the owner shall make payments of the retention earnings directly to the escrow agent. When CM deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 days of the deposit. The market value of the securities at the time of the substitution, as valued by the Owner, shall be at least equal to the cumulative total cash amount then required to be withheld as retention under the terms of the contract between Owner and CM. If the Owner determines that the securities are not adequate it will notify CM and Escrow Agent, and CM shall deposit additional security as further determined by the Owner. Securities shall be held in the name of the Owner, and shall designate the CM as the beneficial owner.
2. Securities eligible for invest include bank or savings and loan certificates of deposit, interest-bearing demand deposit accounts, and standby letters of credit. Deposit of any other type of security may be permitted only by mutual agreement of the CM and the Owner, evidenced by any amendment to this agreement executed by all of the parties hereto.

3. Upon the deposit of adequate securities, Owner shall make progress payments to the CM for such funds which otherwise would be withheld from progress payments pursuant to the Contract provisions.
4. When the Owner, at CM's written request, makes payment of retentions earned directly to the Escrow Agent, the Escrow Agent shall hold them for the benefit of the CM until such time as the escrow created under this contract is terminated. The CM may direct the investment of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the Owner pays the Escrow Agent directly.
5. CM shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the Owner. The Owner, CM and Escrow Agent shall determine these expenses and payment terms.
6. The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest, shall be for the sole account of CM and shall be subject to withdrawal by CM at any time and from time to time, without notice to the Owner.
7. CM shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by CM.
8. The Owner shall have the right to draw upon the securities or any amount paid directly to Escrow Agent in the event of default by the CM. Upon seven (7) days written notice to the Escrow Agent from the Owner of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash, including any amounts paid directly to Escrow Agent, as instructed by the Owner. Escrow Agent shall not be concerned with the validity of any notice of default given by Owner pursuant to this paragraph, and shall promptly comply with Owner's instructions to pay over said escrowed assets. Escrow Agent further agrees not to interplead the escrowed assets in response to conflicting demands and hereby waives any present or future right of interpleader.

9. Upon receipt of written notification from the Owner certifying that the Contract is final and complete and that the CM has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to CM all securities, and or monies, and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all monies and securities on deposit and payment of fees and charges.
10. Escrow Agent shall rely on the written notifications from Owner and CM pursuant to Sections (6), (7) (8) and (9) of this Agreement and Owner and CM shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.
11. The venue of any litigation concerning the rights and obligations of the parties to this Agreement shall be the County of Fresno and each party hereto expressly waives the removal provisions of Code of Civil Procedure Section 394.
12. The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of CM in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of OWNER:

On behalf of CONSTRUCTION MANAGER

FRESNO CHAFFEE ZOO CORPORATION

Executive Director

(Title)

Scott BARROW

(Name)

Scott Barrow

(Signature)

PRESIDENT

(Title)

DAVID P PARKES

(Name)

David P. Parkes

(Signature)

On behalf of ESCROW AGENT:

Vice President

(Title)

Paul Thaxter

(Name)

Paul Thaxter

(Signature)

At the time the Escrow Account is opened, the Owner and CM shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESSES WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.