

CITY CLERK ORIGINAL

C-6132-4
09/12/2011

FOURTH AMENDMENT TO EXHIBIT "A" OF MARKETING AGREEMENT

This Fourth Amendment to Exhibit "A" of Marketing Agreement ("Fourth Amendment") between the City of Glendale, an Arizona municipal corporation ("Client") and Off Madison Ave. Inc., an Arizona corporation ("Agency") is entered and effective as of the 12 day of September, 2011.

- A. The parties entered into a Marketing Agreement ("Agreement") on August 1, 2007 (Glendale Contract No. C-6132) which provided for marketing services with annual renewals based upon revisions to Exhibit A outlining the scope of work for any renewal period; and
- B. On July 1, 2008 (Glendale Contract No. C-6132-1), the parties renewed the Agreement by a First Amendment to Exhibit A; and
- C. On September 1, 2009 (Glendale Contract No. C-6132-2), the parties renewed the Agreement by a Second Amendment to Exhibit A; and
- D. On August 10, 2010 (Glendale Contract No. C-6132-3), the parties renewed the Agreement by a Third Amendment to Exhibit A; and
- E. The parties now desire to renew the Agreement by a Fourth Amendment as attached and outlined below.

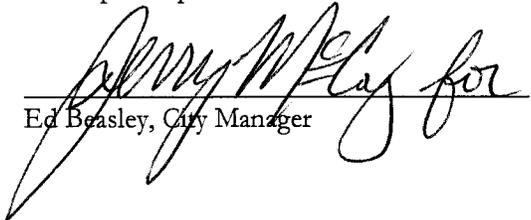
AGREEMENT

It is agreed that the Agreement under Glendale Contract No. C-6132 is renewed and amended as follows:

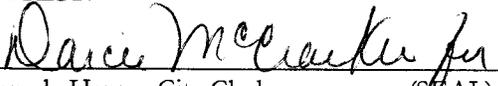
1. **Affirmation.** All of the original Agreement's terms and conditions are affirmed and incorporated herein as Exhibit A except as expressly set out below.
2. **Amendment.** Exhibit A is replaced in its entirety by the Fourth Amendment as attached.
3. **Addition.** The parties further agree to incorporate the attached Exhibit C pertaining to certain legal requirements of governmental entities into the original Agreement.

IN WITNESS WHEREOF, the parties enter into this Fourth Amendment to Exhibit "A" of Marketing Agreement effective as of the date first written above.

CITY OF GLENDALE, an Arizona
municipal corporation


Ed Beasley, City Manager

ATTEST:


Pamela Hanna, City Clerk (SEAL)

APPROVED AS TO FORM:


Craig Tindall, City Attorney

OFF MADISON AVE, INC., an Arizona corporation


David Anderson, President



Exhibit A
Scope of Work – Letter of Agreement

September 12, 2011

Mr. David Anderson
President
Off Madison Ave
5555 East Van Buren, Suite 215
Phoenix, AZ 85008

Dear Mr. Anderson:

Thank you for continuing to serve as the media buyer for the city's "Glendale's Got Game" advertising campaign this year. This Letter of Agreement outlines the scope of work based on the details we've already discussed and will be attached to our existing contract C-6132 (Exhibit B). Exhibit C is also attached which is now a statutory requirement for all city contracts.

Summary of the activities, timeframe and budget for the initial work:

- Glendale's Got Game Advertising Campaign
 - Focus on Fiesta Bowl, Spring Training and other sports-related activities
- December 1, 2011 – March 31, 2012
- Media Retainer - \$1,500 a month (billed at the end of each month)

Activities:

Integrated Media Campaign Development & Management:

Off Madison Ave's scope of work on "Glendale's Got Game" advertising campaign will include the following: evaluation of paid advertising opportunities and development and execution of a media plan. Media plan responsibilities include negotiating advertising contracts, preparing material specifications and deadline summaries, processing media vendor invoices, reporting and billing.

The "Glendale's Got Game" campaign focuses on sports events and activities surrounding the Coyotes, Cardinals, Fiesta Bowl and Spring Training. Media proposals geared towards the "Glendale's Got Game" campaign will only be considered. A proof of value summary will be included with Off Madison Ave's recommendations.

In addition to creating "Glendale's Got Game" media plan, Off Madison Ave will manage the campaign and monitor the performance metrics and expenditures. As a supplement, Off Madison Ave will produce regular monthly reports that will track results of the campaigns progress. Off Madison Ave staff has access to state-of-the-art report tracking software and research data including Scarborough, Qualitap, Aribton, Nielson, PrintPlus and Tru-Effect. Off Madison Ave will provide a year-end summary report to client that summarizes the effectiveness of the media plan, i.e., scope, reach, frequency, etc.

Off Madison Ave will offer "net rate" media with no commissions. The media fees will be based on the time required to place and manage the campaign and use of report tracking software and research data access. Glendale has allocated up to \$35,000 for Off Madison Ave to use for ad placements during the "Glendale's Got Game" campaign and a total project media retainer of \$6,000 (not to exceed \$1,500 a month). Proposed budgets are based on an hourly rate of \$125 per hour for all services performed by the agency.

Billing Policy

Off Madison Ave will invoice the city of Glendale after services have been completed at the end of each month and all invoices are due and payable by date on invoice. If invoices reach the 45 day past due mark, the city will receive notice from the agency in writing that the invoices are past due. Should invoices reach the 60 day past due mark, the city understands that the agency reserves the right to stop services until all invoices are paid in full.

Out-of-Pocket Expenses

The city understands that Off Madison Ave does not charge for items needed during the regular course of business including: photocopying, faxes, local, mobile and local distance phone calls, etc. However, the city does understand that incremental out-of-pocket expenses will be billed separately, which would include vendor expenses such as press release distribution fees; monthly press clipping service fees, production costs, stock photography fees, printing and mass mailing distribution fees, for example. Hard costs except for shipping, postage, meals, tax and local mileage are billed at net plus an amount that yields 15 percent. All out-of-pocket expenses must be pre-approved by the city of Glendale prior to them being incurred.

See Preceding Signature Pages

**CITY CLERK
ORIGINAL**

C-6132
08/01/07

MARKETING AGREEMENT

DATE: August 1, 2007

PARTIES: City of Glendale, an Arizona municipal corporation, located at 5800 West Glendale Drive, Suite 150, Glendale, AZ 85301. ("Client");

and

Off Madison Ave, Inc., an Arizona Corporation, including its division Mighty Interactive, currently located at 80 E. Rio Salado Parkway, Suite 711, Tempe, Arizona ("Agency").

RECITALS:

A. Client desires to engage Agency to prepare, develop and implement certain public relations, advertising and marketing programs for Client. Agency desires to prepare, develop and implement such programs for Client.

B. Client and Agency (singularly "party" or collectively "parties") desire to enter into this Marketing Agreement upon the terms and conditions set forth herein.

AGREEMENTS:

1. **Agency Appointment and Services to be Performed.** Client hereby engages and retains Agency to perform certain services, projects or programs. The services, projects or programs to be performed by Agency may include but are not limited to developing and implementing (a) on-going public/community relations activities; (b) comprehensive strategic marketing programs, services, and/or other projects; (c) advertising and creative activities and/or services; (d) an Internet marketing campaign (e) media placements; and (f) other tasks as directed by Client (collectively "services" or "projects"). The specific projects performed by Agency shall be described in Exhibit A, including the estimate for the fees for such projects, submitted to Client.

2. **Status of Agency.** Agency, while performing the services and projects under this Agreement, is at all times acting as an independent contractor. No work, act, commission, or omission by Agency pursuant to the terms and conditions of this Agreement shall be construed to make or render Agency an employee of Client.

3. **Fees; Fee Estimates.** Client shall pay Agency for all time that Agency's employees render and/or spend on Client related services or projects at the then employees' rates or fees charged (collectively "fee" or "fees"), and as outlined in Agency's invoices to Client and in Agency's separate reports of total fees spent to Client. Fees may include any fees to estimate future services or projects. Any estimate of fees is merely an approximation of fees for a defined project or projects, and any estimate may be exceeded with notice by Agency to Client. Notwithstanding the above, fees during the initial term of the contract shall not exceed the

amounts listed in Exhibit A. Fees for each succeeding agreement year shall be as agreed to and established by Client by correspondence and deemed to be incorporated and became part of this Agreement.

3.1 **Retainer.** Where requested by Agency, Client shall remit payment to Agency for a monthly "Retainer" which constitutes a monetary deposit to be applied against Agency's invoices to Client or against Agency's separate reports of total fees spent to Client. The Retainer is not an estimate of the fees to be charged in any specific month, and, except as provided in Section 5, Agency reserves the right to apply the Retainer to any unpaid invoice or to the amount accrued as reflected in the separate reports of total fees spent. The amount of the monthly Retainer shall be defined in a separate written document. The Retainer is billed to Client on or about the first of the month for which the Retainer is due, and the payment for the Retainer is due no later than the end of that month. The parties may examine and adjust the amount of the Retainer on a quarterly basis, and such adjustment, if any, shall be documented in writing.

3.2 **Expenses Incurred by Agency.** In addition to fees, Client shall be liable to and pay Agency for all net costs and expenses, including media, that are approved in writing, via e-mail, facsimile, letter, or other documentation, by Client and incurred in connection with Client related projects. As used in this Marketing Agreement, "net" is equal to the actual out-of-pocket cost and expenses incurred by Agency; net cost(s) do not include Agency fees. Notwithstanding the above, net costs shall be included in the amounts listed in Exhibit A, or in any succeeding exhibit.

3.3 **Written Approval.** If approval in writing is required by the terms of this Agreement, any and all forms of written documentation shall constitute written and signed approval, including but not limited to facsimile, e-mail, and letter correspondence.

4. **Media.** Agency will endeavor and act in a commercially reasonable manner to secure media placements. Agency does not, however, guarantee media placements in regard to public/media relations and media planning/buying, due to the nature of the media industry.

4.1 **Media Placements/Expenses.** Prior to securing any media placements on Client's behalf, Agency will provide a written cost estimate, for Client's written approval, describing anticipated Agency fees and costs to plan and place the media. If Client cancels any previously approved media, Client will be liable for all reasonable and unavoidable costs including but not limited to "short rates" and non-cancelable requests for time, space, or other media.

5. **Billing and Payment.** Agency will invoice Client for services provided, for the Retainer, for amounts or fees in excess of the Retainer and/or for all costs and expenses. Agency's invoices are due and payable upon receipt. Interest will be charged from the date of the invoice at the rate of 18 percent per annum on all invoices not paid within 45 days of the invoice. If Client disputes any Agency invoice, Client shall notify Agency in writing of such

dispute within 30 days of the date of the invoice. Notwithstanding the existence of any dispute deriving from an invoice, Client shall remit payment for all amounts not in dispute in a timely fashion, whether owed pursuant to the disputed invoice or any other invoice. If Client fails to timely remit payment for those amounts not in dispute, Client shall be deemed to have waived any and all claims and/or disputes deriving from the disputed invoice.

6. **Creative Works and Intellectual Property.** Upon full payment for creative services, Client owns all intellectual property rights in any creative or protectable work developed by Agency on Client's behalf during the term of this Marketing Agreement. To the extent applicable, Agency agrees that all materials created for Client are considered "work made for hire" as defined in the United States Copyright Act.

6.1 **Format.** Agency will endeavor to create and prepare its work or projects in a form or format that may be submitted for trademark and/or copyright protection with the United States Patent & Trademark Office ("USPTO") and/or the Register of Copyrights ("Register") respectively. Upon written request by Client, Agency shall submit and/or file any work completed by Agency to the USPTO and/or Register for trademark and/or copyright protection at Client's expense. Upon written request by Client, Agency shall execute any and all reasonably requested documents, such as an assignment of rights, to protect Client's ownership interest in any intellectual property created by Agency on behalf of Client.

6.2 **Infringement Warranty.** Agency warrants and represents that, to its actual and present knowledge without duty of inquiry or investigation, any material created for Client by Agency pursuant to this Agreement does not infringe upon any federally registered trademark or service mark of third parties (the "Infringement Warranty"). If Agency defends any claim related to an Infringement Warranty, then Agency shall have the right to determine Client's continued execution, use, implementation, or suspension of the project or any part thereof.

7. **Confidentiality.** Agency shall treat as private and confidential certain information, which is not otherwise publicly available, relating to Client's pricing, customers, trade secrets, and proprietary information. Agency will not release any such information to any person, firm or institution without the express written permission of Client, unless under Court order, or as may be necessary in Rules of Procedure. Notwithstanding the foregoing, Agency may use and disseminate any creative works developed by Agency for Client to promote Agency, including disclosure of the parties' relationship to others, work performed, and projects developed and/or implemented.

8. **Term of Agreement.** This Marketing Agreement shall be effective as dated above and shall continue in force for a period of one year (the "Initial Term"). At the end of the Initial Term and any Renewal Term (as defined herein), this Agreement shall automatically continue and extend for successive one-year periods (the "Renewal Term(s)"), upon the same terms and conditions set forth. Any changes in terms and conditions shall be in writing and signed by the parties hereto.

9. **Early Termination.** Either party may terminate this Agreement prior to the end of the Initial Term or any Renewal Term for any reason by giving written notice to terminate to the other party at least 60 days prior to the effective date of termination (the "Effective Termination Date"). Notwithstanding the foregoing provision, in the event that Client fails to pay any invoice or Retainer when due, Agency may terminate this Agreement, and such termination may be immediate or may be subject to the Effective Termination Date, to be determined by Agency at its discretion.

9.1 **Payment if Notice of Termination.** In the event that either party submits a notice to terminate this Agreement as referenced in Section 9, Client shall pay and shall be obligated to pay and liable to Agency for all fees, costs, expenses, Retainers, third party costs and other costs, incurred by Agency from the execution of this Agreement through the Effective Termination Date, in performance of Agency's obligations hereunder. Third-party costs include but are not limited to expenses incurred by Agency pursuant to Section 3.2; media expenses pursuant to Section 4.1; and any other out-of-pocket cost incurred by Agency on behalf of Client. Nothing in this provision shall be construed as an election of remedies, and Client shall be liable for all damages as provided by law, except as excluded in Section 11.1.

10. **Rights and Duties Upon Notice of Termination.** Upon submission of the written notice of termination as referenced in Section 9, no work in progress or project shall be completed by Agency unless (i) such work or project can be completed before the Effective Termination Date, (ii) Client requests the completion of such work or project in writing, and (iii) if demanded by Agency, Client provides security and/or advance payment deemed adequate by Agency in Agency's sole discretion for execution of such work or project.

10.1 **Delivery of Materials.** Agency shall deliver to Client all materials related to the work performed by Agency only if all outstanding invoices, expenses and other costs are paid in full to Agency. If Client directs Agency to transport and/or store such materials, Client agrees to pay in advance the reasonable costs and fees for transportation and/or storage, including any preparation costs and fees for transportation and/or storage.

11. **Indemnity.** Client hereby indemnifies and holds Agency harmless for any loss, costs (including all reasonable attorneys' fees) or damage suffered by Agency due to any material or information furnished by Client; materials and/or projects developed by Agency and/or used by Agency in any advertising or public relations and approved the Client; other material or projects developed for and approved by Client; or any claims made against Agency by a present or former employee of Client due to or related to Agency's investigation or interviewing of such employee, and the results thereof, for the project. The obligations of this section shall survive the termination of this Agreement.

11.1 **Limitation of Liability.** Except as provided for in Section 11, each party reserves its right to pursue direct or general contract damages caused by a party failing to perform its duties under this agreement. Neither party shall be liable to the other party for lost profits, punitive, incidental, special or consequential

damages (collectively "special damages") suffered as a result of, or in any way connected to, this agreement, including without limitation such special damages arising from a breach of contract or negligence, even if the breaching party has been specifically advised concerning the possibility that special damages may result. In no event shall either party's damages exceed the fees realized by and paid to Agency. The obligations of this section shall survive the termination of this Agreement.

12. **Non-Solicitation of Agency Employees.** Client and Agency mutually agrees that during the term of this Agreement for a 12 month period following any termination of this Agreement, neither Client nor Agency will, directly or indirectly, on its own behalf or on behalf of its affiliates or others solicit, employ, manage, divert or hire away, or attempt to solicit, divert or hire away any person who is (or was, at any time during the term of the Agreement or such 12 month period following) employed, contracted, or consulting with the Agency or employed by the Client. The obligations of this Section shall survive the termination of this Agreement.

12. **General Provisions.** The obligations of this Section 13 and its sub-sections shall survive the termination of this Agreement.

(a) **Complete Agreement.** This Agreement constitutes the complete agreement between the parties and supersedes all prior contracts, agreements and understandings between the parties. This Agreement may not be modified, changed or altered by any promise or statement unless in writing, signed by the parties, or as provided in Section 3.3.

(b) **Severability; Governing Law; Mediation.** Each of the provisions of this Agreement shall be enforceable independently of any other provision of this agreement and independent of any other claim or cause of action. This Agreement shall be governed by and constructed under the laws of the State of Arizona, and any and all actions relating to this Agreement shall be brought in the Arizona Superior Court, Maricopa County. Prior to bringing any lawsuit against Agency, the parties hereby agree to mediate any dispute relating to this Agreement, which such claims include but are not limited to breach of contract, negligence and/or fraud. All mediation costs will be born equally by the parties, and an agreement, if any, signed by the parties pursuant to the mediation conference shall be binding.

(c) **Waiver of Breach.** The failure of either party at any time to require the performance of the other of any provision herein shall in no way affect the respective rights of either party to enforce the same, nor shall the waiver by either party of any breach of any provisions hereunder be construed to be a waiver of any succeeding breach or as a waiver or modification of the provisions of this Agreement.

(d) **Notices.** Subject to the written approval as provided for in Section 4.2, all other notices and communications shall be in writing and shall be either delivered personally, telefaxed by confirmed facsimile, mailed by certified mail postage prepaid, or sent by express overnight courier, with confirmation of delivery. Such notices and communications shall be deemed to be given on the date of personal delivery, confirmed facsimile transmission, actual delivery of certified mail, or actual confirmed delivery by an express overnight courier. Unless

otherwise specified in a notice sent or delivered in accordance with the terms hereof, notices and other communications in writing shall be given to the parties hereto at their respective addresses set forth at the beginning of this Agreement, or, in the case of a facsimile transmission, to the parties at their respective regular facsimile telephone number.

(e) **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

(f) **Attorneys' Fees.** In the event litigation, arbitration, or any other judicial or quasi-judicial relief is brought to enforce the terms of this Agreement, the non-prevailing party shall be liable to the prevailing party for all of its attorneys' fees and costs.

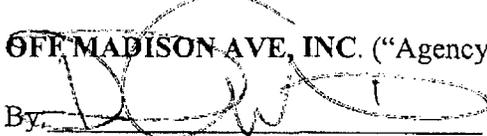
(g) **Construction.** All parties participated in drafting this Agreement, and this Agreement shall not be construed against the drafting party of any particular provision.

(h) **Authority.** Each person executing this Agreement on behalf of a party hereto warrants and represents to the other party that he or she has the authority to bind his or her company to this Agreement and all of its terms and provisions.

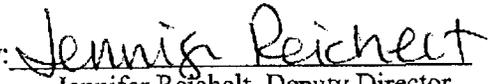
(i) **Understanding of Agreement.** Each party has read this Agreement and understands the contents thereof. Each party hereby affirms that it agrees with each provision herein.

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

OFF MADISON AVE, INC. ("Agency")

By: 
David Anderson, President

CITY OF GLENDALE ("Client")

By: 
Jennifer Reichelt, Deputy Director
Marketing/Communications

Approved as to form:



Craig Tindall
City Attorney

ATTEST

City Clerk

Exhibit C

ADDENDUM

Off Madison Avenue (OMA) further agrees as follows:

I. Immigration Law Compliance. OMA warrants under A.R.S. § 41-4401, that it has registered with and will continue to participate in the E-Verify program established by the United States Department of Homeland Security and Social Security Administration or any successor program; that it warrants compliance with all federal immigration laws and understands that any breach of this warranty subjects OMA to penalties, including termination of this Agreement; and finally, understands that Client has the right to inspect the papers of the OMA or any of its employees participating in this Agreement to ensure compliance with this paragraph.

II. Prohibitions. OMA certifies under A.R.S. §§ 35-391 *et seq.*, and 35-393 *et seq.*, that it does not have, and during the term of this Agreement will not have, "scrutinized" business operations, as defined in the preceding statutory sections, in the countries of Sudan or Iran.

III. Conflicts. This Agreement is subject to cancellation for conflicts of interest under the provisions of A.R.S. § 38-511.

IV. Governing Law. Notwithstanding any other provision within the Agreement, OMA agrees that Arizona Law will apply to all matters related to this Agreement.

NOTHING FOLLOWS