FIRST AMENDMENT TO CUSTODIAL AGREEMENT

THIS FIRST AMENDMENT TO CUSTODIAL AGREEMENT is entered into this _____ day of _____, 2015 ("Amendment") by and between the City of Flagstaff, Arizona, a political subdivision of the state of Arizona ("City") and Western Alliance Bank, an Arizona chartered bank whose principal address is One E. Washington Street, Suite 1400, Phoenix, Arizona 85004 ("Bank").

RECITALS

A. City has authority to invest idle funds pursuant to A.R.S. § 35-321 et seq. and the City of Flagstaff, Arizona Investment Policy, dated October 1, 2012 as may be amended from time to time ("Investment Policy");

B. City issued a Solicitation No. 2015-19 for Community Banking Services seeking proposals from banks with a local presence for purchase of Certificates of Deposit of up to $5 million in City funds consistent with the City Investment Policy in an effort to encourage new consumer and small business loan generation to help spur local economic activity;

C. Bank submitted a proposal to use Promontary Interfinancial Network, LLC's Certificate of Deposit Account Registry Service ("CDARS") to enable the City to purchase Certificates of Deposit from institutions insured by the Federal Deposit Insurance Corporation ("FDIC"), which insured institutions will pay agreed upon interest until the maturity date;

D. City and Bank are entering into a CDARS Deposit Placement Agreement ("CDARS Agreement") and Custodial Agreement related to the proposed City investments;

E. Bank has advised it is unable to modify the CDARS Agreement per direction of Promontory Interfinancial Network, LLC;

WHEARS, City and Bank desire to amend the Custodial Agreement as set forth below.

AMENDMENTS

NOW THEREFORE, the Custodial Agreement is hereby amended as follows (except for paragraph 1, all other paragraphs are additions):

1. **MODIFICATIONS OF LANGUAGE.** The following non-numbered paragraphs are amended as follows (additions are shown as capitalized text, deletions are shown as stricken):

   ~~You shall have no liability to the undersigned for any action taken or omitted by you hereunder in good faith.~~

   The undersigned [CITY] agrees to indemnify you [BANK] and your nominees against, and to hold you and them harmless from, all expenses (including counsel fees), liabilities

and claims arising out of the CITY'S SOLE NEGLIGENCE. The undersigned [CITY] agrees to pay any service charges [AGREED UPON IN WRITING BY THE PARTIES] on this custodial account.

1. **NOTICES.** Any notice under this Agreement will be sent to the following persons:

If to Bank: Western Alliance Bank
One East Washington Street, Suite 1400
Phoenix, Arizona 85004
Attention: Kate Maynard
Telephone: (602) 952-5442
Email: kmaynard@alliancebankofarizona.com

If to City: Attention: Andy Wagemaker, City Finance Director
City of Flagstaff
211 W. Aspen Avenue
Flagstaff, Arizona 86001
Telephone: (928) 213-2253
Email: awagemaker@flagstaffaz.gov

2. **FDIC INSURANCE/COLLATERALIZATION.** To ensure City funds will be fully insured by the FDIC at all times (in particular prior to investment in a Certificate of Deposit or after a Certificate of Deposit matures), Bank will hold City funds on behalf of City no longer than one (1) business day, and Bank will take such measures so that City funds will be fully collateralized pursuant to A.R.S. §§ 35-1205 and 35-323.

3. **MAXIMUM INVESTMENT IN SINGLE INSURED INSTITUTION.** The maximum investment of City funds in a single insured institution shall not exceed $250,000 including the total of the principal and all accrued interest at any time.

4. **MONTHLY STATEMENTS.** Bank or its agent/subcontractor will provide City with monthly statements regarding current investment of City funds, with sufficient detail so City may easily see status of current investments (sample monthly statement is attached hereto as Exhibit A) .

5. **INVESTMENT ROLLOVERS.** Bank will consult with City at least ten (10) days prior to maturity date of any investment. Bank will not rollover any investment without City's express written direction. City will direct any rollover or new investment at least seven (7) days in advance of the maturity date.

6. **LOCAL LENDING PLAN.** In its proposal to City, Bank has provided: (a) a descriptive plan of how the City's deposited funds will be used locally for new customer and small business loan generation to help spur local economic activity; (b) a description of its institution's local community lending programs in Flagstaff and surrounding Coconino County as it relates to consumer loan/banking services and

residential/small business loans; (c) a description of its corporate social responsibility efforts in Flagstaff and surrounding Coconino County (i.e. volunteerism hours, philanthropic causes); and (d) its Community Reinvestment Act rating. The City will require an annual update to the City Council. This will include but is not limited to presentation that will show council a summary of the City investments and related earnings as well as the local community benefits from the deposits provided through this program.

7. **LOCAL LENDING.** Bank shall make good faith efforts to generate small business loans and economic activity within Coconino County and Arizona to the extent enabled through this investment of City funds via the CDARS network.

8. **CDARS AGREEMENT.** This Custodial Agreement shall not be construed to amend the CDARS Agreement,. Likewise, the CDARS Agreement shall not be construed to amend the Custodial Agreement or this First Amendment.

9. **COMPLIANCE WITH LAW.** Bank shall perform this Agreement in compliance with law.

10. **DISPUTES.** Each party shall have all rights and remedies available at law or in equity related to any breach or dispute related to this Agreement.

11. **SOLVENCY.** Bank agrees that, if, during the term of any contract it has with the City, it becomes involved as a debtor in a bankruptcy proceeding, or becomes involved in a reorganization, dissolution or liquidation proceeding, or if a trustee or receiver is appointed over all or a substantial portion of the property of Bank under federal bankruptcy law or any state insolvency law, Bank shall immediately provide the City with a written notice to that effect, and shall provide the City with any relevant information it requests to determine whether Bank will meet its obligations to the City.

12. **STANDARD TERMS AND CONDITIONS.** The following City Standard Terms and Conditions (City numbering) shall apply to this agreement. Any reference to "Contractor" shall mean Bank.

* * *

24. OFAC: No City payments may be made to any person in violation of Office of Foreign Assets Control regulations, 31 C.F.R. Part 501.

* * *

32. RECORDS: The City shall have the right to inspect and audit all Contractor books and records related to the Contract for up to five (5) years after completion of the Contract.

33. **RIGHT TO INSPECT BUSINESS:** The City shall have the right to inspect the place of business of the Contractor or its subcontractor during regular business hours at reasonable times, to the extent necessary to confirm Contract performance.

34. **PUBLIC RECORDS:** This Contract and any related materials are a matter of public record and subject to disclosure pursuant to Arizona Public Records Law, A.R.S. § 39-121 et seq. If Contractor has clearly marked its proprietary information as "confidential", the City will endeavor to notify Contractor prior to release of such information.

35. **GENERAL INDEMNIFICATION:** Contractor shall indemnify, defend and hold harmless the City, its council, boards and commissions, officers, employees from all losses, claims, suits, payments and judgments, demands, expenses, attorney's fees or actions of any kind resulting from personal injury to any person, including employees, subcontractors or agents of Contractor or damages to any property arising or alleged to have arisen out of the negligent performance of the Contract, except any such injury or damages arising out of the sole negligence of the City, its officers, agents or employees. This indemnification provision shall survive termination or expiration of the Contract. This indemnification clause shall not apply, if a different indemnification clause is included in the City's Specific Terms and Conditions.

36. **INSURANCE:** Contractor shall maintain all insurance coverage required by the City, including FIDUCIARY COVERAGE OF $5 MILLION.

37. **INTELLECTUAL PROPERTY INDEMNIFICATION:** Contractor shall indemnify and hold harmless the City against any liability, including costs and expenses, for infringement of any patent, trademark or copyright or other proprietary rights of any third parties arising out of contract performance or use by the City of materials furnished or work performed under this Contract. Contractor shall promptly assume full responsibility for the defense of any suit or proceeding which is, has been, or may be brought against the City and its agents for alleged infringement, or alleged unfair competition resulting from similarity in design, trademark or appearance of goods, and indemnify the City against any and all expenses, losses, royalties, profits and damages, attorneys fees and costs resulting from such proceedings or settlement thereof. This indemnification shall survive termination or expiration of the Contract.

* * *

48. **IMMIGRATION LAWS:** Pursuant to A.R.S. § 41-4401, Contractor hereby warrants to the City that the Contractor and each of its subcontractors will comply with, and are contractually obligated to comply with, all State and Federal Immigration laws and regulations that relate to its employees and A.R.S. § 23-214(A) (hereinafter "Contractor Immigration Warranty"). A breach

of the Contractor Immigration Warranty shall constitute a material breach of this Contract and shall subject the Contractor to penalties up to and including termination of this Contract at the sole discretion of the City. The City retains the legal right to inspect the papers of any Contractor or subcontractor employee who works on this Contract to ensure compliance with the Contractor Immigration Warranty. Contractor agrees to assist the City in regard to any such inspections. The City may, at its sole discretion, conduct random verification of the employment records of the Contractor and any subcontractors to ensure compliance with Contractor's Immigration Warranty. Contractor agrees to assist the City in regard to any random verification performed. Neither Contractor nor any subcontractor shall be deemed to have materially breached the Contractor Immigration Warranty if Contractor or subcontractor if Contractor or subcontractor establishes that it has complied with the employment verification provisions prescribed by sections 274A and 274B of the Federal Immigration and Nationality Act and the E-verify requirements prescribed by A.R.S. § 23-214(A).

49. **CANCELLATION FOR GRATUITIES:** The City may cancel this Contract at any time, without penalty or further liability to Contractor, if City determines that Contractor has given or offered to give any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant ("Gratuities") in connection with award or performance of the Contract.

50. **CANCELLATION FOR CONFLICT OF INTEREST (A.R.S. § 38-511):** The City may cancel this Contract within three (3) years after its execution, without penalty or further liability to Contractor.

51. **NOTICES:** All notices given pursuant to this contract shall be delivered at the addresses as specified in the contract, or updated by notice to the other party. Notices may be: (a) personally delivered, with receipt effective upon personal delivery; (b) sent via certified mail, postage prepaid, with receipt deemed effective four (4) days after being sent; (c) or sent by overnight courier, with receipt deemed effective two (2) days after being sent notice may be sent by email as a secondary form of notice.

52. **THIRD PARTY BENEFICIARIES:** this Contract is intended for the exclusive benefit of the parties. Nothing herein is intended to create any rights or responsibilities to third parties.

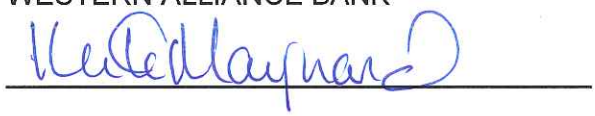
53. **GOVERNING LAW:** This Contract shall be construed in accordance with the laws of Arizona.

54. **FORUM:** In the event of litigation relating to this Contract, any action at law or in equity shall be filed in Coconino County, Arizona.

55. **ATTORNEYS FEES:** If any action at law or in equity is necessary to enforce the terms of this Contract, the prevailing party shall be entitled to recover its reasonable attorneys fees, costs, professional fees and expenses.

13. All other terms and conditions of the Agreement shall remain in full force and effect.

WESTERN ALLIANCE BANK



Print name: Kate Maynard

Title: Vice President

CITY OF FLAGSTAFF

_____

Print name:_____

Title:_____

Attest:

_____
City Clerk

Approved as to form:

_____
City Attorney's Office

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ATTACHMENT: EXHIBIT A – SAMPLE MONTHLY STATEMENT

Western Alliance Bank
One E Washington St.
Ste 1400
Phoenix, AZ 85004

Date 01/30/15
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City of Flagstaff
[redacted]

Subject: CDARS® Customer Statement

Legal Account Title: [redacted] City of Flagstaff

Below is a summary of your certificate(s) of deposit, which we are holding for you as your custodian. These certificate(s) of deposit have been issued through CDARS by one or more FDIC-insured depository institutions. Should you have any questions, please contact us at **1-888-857-4067.**

Summary of Accounts Reflecting Placements Through CDARS

Account ID	Effective Date	Maturity Date	Interest Rate	Opening Balance	Ending Balance
[redacted]	11/06/14	05/07/15	0.30954%	$1,296,284.69	$1,296,625.52
TOTAL				**$1,296,284.69**	**$1,296,625.52**

CDARS® is a registered service mark of Promontory Interfinancial Network, LLC.

CONTAINS CONFIDENTIAL INFORMATION

ACCOUNT OVERVIEW

Account ID: [redacted]
Product Name: 26-WEEK NON-PERSONAL CD
Interest Rate: 0.30954%
Account Balance: $1,296,625.52
The Annual Percentage Yield Earned is 0.31%.

Effective Date: 11/06/14
Maturity Date: 05/07/15
YTD Interest Paid: $340.83
Int Earned Since Last Stmt: $340.83

CD Issued by Amarillo National Bank

YTD Interest Paid:	$64.71	***01/01/15***	***OPENING BALANCE***	***$246,116.86***
Int Earned Since Last Stmt:	$64.71	01/30/15	Interest Payment	64.71
		01/30/15	***ENDING BALANCE***	***$246,181.57***

CD Issued by East West Bank

YTD Interest Paid:	$64.71	***01/01/15***	***OPENING BALANCE***	***$246,116.86***
Int Earned Since Last Stmt:	$64.71	01/30/15	Interest Payment	64.71
		01/30/15	***ENDING BALANCE***	***$246,181.57***

CD Issued by Flagstar Bank, FSB

YTD Interest Paid:	$64.71	***01/01/15***	***OPENING BALANCE***	***$246,116.86***
Int Earned Since Last Stmt:	$64.71	01/30/15	Interest Payment	64.71
		01/30/15	***ENDING BALANCE***	***$246,181.57***

CD Issued by Happy State Bank

YTD Interest Paid:	$64.71	***01/01/15***	***OPENING BALANCE***	***$246,116.86***
Int Earned Since Last Stmt:	$64.71	01/30/15	Interest Payment	64.71
		01/30/15	***ENDING BALANCE***	***$246,181.57***

CD Issued by NewBridge Bank

YTD Interest Paid:	$17.28	***01/01/15***	***OPENING BALANCE***	***$65,700.39***
Int Earned Since Last Stmt:	$17.28	01/30/15	Interest Payment	17.28
		01/30/15	***ENDING BALANCE***	***$65,717.67***

CD Issued by Santander Bank, N.A.

YTD Interest Paid:	$64.71	***01/01/15***	***OPENING BALANCE***	***$246,116.86***
Int Earned Since Last Stmt:	$64.71	01/30/15	Interest Payment	64.71
		01/30/15	***ENDING BALANCE***	***$246,181.57***

Thank you for your business.

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CONTAINS CONFIDENTIAL INFORMATION