

11-0022

Resolution No.

STOCKTON CITY COUNCIL

RESOLUTION AUTHORIZING AND DIRECTING THE CITY MANAGER TO EXECUTE A FACILITIES MANAGEMENT AGREEMENT BETWEEN THE CITY OF STOCKTON AND SMG FOR THE OPERATION AND MAINTENANCE OF THE STOCKTON ARENA, BOB HOPE THEATRE, OAK PARK ICE ARENA, AND THE STOCKTON BALLPARK; MAKING APPROPRIATE FINDINGS PURSUANT TO STOCKTON MUNICIPAL CODE SECTION 3.68.070; MAKING NECESSARY ALLOCATIONS AND APPROPRIATIONS; AND AUTHORIZING THE CITY MANAGER TO TAKE SUCH OTHER AND FURTHER ACTIONS THAT ARE APPROPRIATE TO CARRY OUT THE PURPOSE AND INTENT OF THIS RESOLUTION

On March 2, 2004, the City Council approved the Facilities Management Agreement with International Facilities Group (IFG) (the "IFG Agreement") to operate and maintain the Arena, Bob Hope Theatre, Oak Park Ice Arena, and the Stockton Ballpark (the "Facilities"); and

In 2007, the City Auditor issued a report about the operations at the Arena that identified several concerns, and while the City of Stockton (City) has attempted to mitigate these concerns, the conditions identified in the audit cannot be seriously addressed without significant changes to the contractual arrangements in place at the Arena; and

It is also expected that the operational losses at the Facilities will continue until a change in management is made; and

In April 2008, the City hired Convention Sports and Leisure (CSL) to assist the City in an effort to substantially reduce these losses and the accompanying burden on the City's general fund; and


CSL was directed to find a suitable replacement firm to operate the Facilities with reduced cost and improved activity, and CSL brought forward proposals from four organizations; and

City staff from the City Manager's Office and the City Attorney's Office as well as the CSL consultant team reviewed the proposals, brought firms back for a second presentation, and SMG was selected because of its excellent reputation in venue management, its presence in California, and its experience in turning around underperforming venues; and

City Atty

Review

Date


JAN 19 2011

SMG is an international company with positive relationships with promoters, ticketing companies, food and beverage concessionaires, and other industry professionals which serve to significantly improve the financial performance of the venues under its management; and

SMG manages arenas, stadiums, performing arts centers, and convention centers throughout the United States, Canada, United Kingdom, Germany, Norway, Puerto Rico, Dubai, and Mexico, and its services include event booking and management, cash management, maintenance, risk management, and security; and

Venues managed by SMG annually host more than 10,000 events and include more than 1.5 million seats. In California, SMG manages many venues including Long Beach Arena, Oakland Arena and Coliseum, Rabobank Arena (Bakersfield), Savemart Center (Fresno), Selland Arena (Fresno), and the Moscone Center (San Francisco); and

SMG's presence in California will be especially helpful in booking the Facilities by being able to route events and shows through the multiple venues managed by SMG, and SMG's extensive experience and relationships with industry professionals will lead to more activity in the Facilities; and

The City and SMG have come to an agreement regarding the management of the Facilities by SMG and the terms of that agreement are reflected in the Facilities Management Agreement attached hereto as Exhibit 1 (the "Facilities Management Agreement"); and

In the Facilities Management Agreement, SMG has agreed to provide a \$1,000,000 capital contribution as a commitment to the City to be used to pay a portion of the termination fee the City will pay to IFG in order to terminate the IFG Agreement, and SMG has also committed to pay up to \$25,000 in other transition costs; and

Staff has negotiated an agreement with IFG for the termination of the IFG Agreement (the "Management Termination Agreement"), and the City Council will consider its approval of the Management Termination Agreement at such time as it is considering the approval of the Facilities Management Agreement; and

The City Charter requires the publication of a notice to lease City property. A "Notice of Intention to Lease City Property" has been published at least ten days prior to City Council action; now, therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF STOCKTON, AS FOLLOWS:

1. Pursuant to the requirements of Stockton Municipal Code section 3.68.070, the City Council approves the following findings which support entering into the Facilities Management Agreement for the operation and maintenance of the Facilities:

- A. The City was under contract with IFG for the services contemplated in the Facilities Management Agreement, and the undertaking of a formal RFP process under that circumstance would have been inconsistent with the maintenance of an effective and cordial contractual relationship with IFG.
- B. The City did undertake a robust, fair, and thorough process for solicitation of proposals from several reputable firms capable of performing the services contemplated in the Facilities Management Agreement, and that process did provide reasonable and appropriate assurances that SMG will provide the City with the necessary expertise to run the Facilities in a professional and cost-effective manner in keeping with best practices in the venue management industry.
- C. SMG is imminently qualified to engage in the services contemplated in the Facilities Management Agreement: SMG is an international management firm that currently manages many venues in the United States and throughout the world, including the Long Beach Arena, Oakland Arena and Coliseum, Rabobank Arena (Bakersfield), Savemart Center (Fresno), Selland Arena (Fresno), and Moscone Center (San Francisco).
- D. SMG has further demonstrated to the City its strong intention to provide the City the professional management services that are needed to ensure the success of the Facilities by its agreement to capitalize \$1,000,000 of the City's expected costs pertaining to the termination of the IFG Agreement.

2. Based on the above findings, pursuant to Stockton Municipal Code section 3.68.070, the City Council hereby declares that an exception to the competitive bidding process is justified.

3. The Facilities Management Agreement between the City and SMG for the operation and maintenance of the Facilities, a copy of which is attached hereto as Exhibit 1 and incorporated herein by this reference, is approved.

4. The City Manager is authorized and directed to execute the Facilities Management Agreement; however, the City Manager may make minor changes and amendments thereto as necessary and appropriate to carry out the purpose and intent of this resolution, particularly the achievement of the objectives of the Management Termination Agreement for termination of the IFG Agreement.

5. The City Manager is hereby authorized and directed to negotiate and facilitate final details during the transition period pertaining to various matters, such as the final accounting and the creation, closure, and assignment of bank accounts.

6. The City Manager is authorized and directed to approve activities and expenditures in alignment with the orderly transition of management activities from IFG to SMG, as contemplated pursuant to the terms of the Facilities Management Agreement.

7. Notwithstanding any other provision of this Resolution, the City Manager may not execute the Facilities Management Agreement, and it shall not be effective, unless and until that Management Termination Agreement for termination of the IFG Agreement has been approved by the City Council and fully executed.

8. No more than \$118,100 in transition costs and expenditures associated with the termination of the IFG Agreement and transition to SMG are hereby approved and funds necessary therefore are hereby appropriated; and \$25,000 to fund said costs and expenditures will be provided by SMG and is hereby accepted.

9. The amount of \$309,000 in additional operating funds for SMG operations through June 30, 2011, is approved and appropriated.

10. The City Manager is hereby authorized to take whatever actions are appropriate to carry out the purpose and intent of this resolution.

PASSED, APPROVED AND ADOPTED JAN 25 2011.

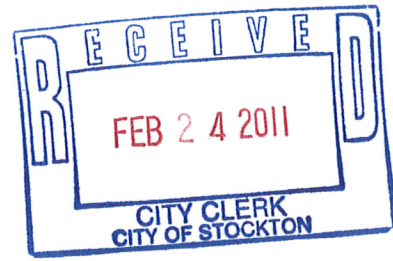

ANN JOHNSTON
Mayor of the City of Stockton

ATTEST:


KATHERINE GONG MEISSNER
City Clerk of the City of Stockton



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MANAGEMENT AGREEMENT
BETWEEN
CITY OF STOCKTON, CALIFORNIA
AND
SMG

MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT (this “**Agreement**”) is dated and effective as of the 25th day of February, 2011, by and between the CITY OF STOCKTON, CALIFORNIA, a municipal corporation organized and existing under the laws of the State of California (“**City**”), and SMG, a Pennsylvania general partnership (“**SMG**”).

BACKGROUND

The City is the owner of the Stockton Arena (the “**Arena**”), the Bob Hope Theatre (the “**Theatre**”), Oak Park Ice Arena (the “**Ice Center**”) and Banner Island Ballpark (the “**Ballpark**”), which together with the Arena, the Theatre and the Ice Center are individually and collectively, as the context requires, the “**Facility**” or the “**Facilities**”.

SMG is engaged, among other things, in the business of providing full service management services, including operations and marketing services for public assembly facilities.

The City desires to engage SMG, and SMG desires to accept such engagement, to promote, operate and manage the Facilities on behalf of the City, on the terms and conditions set forth herein. The City intends to work in mutual accord with SMG in order to ensure provision of high quality management services, thereby enhancing the use and enjoyment of the Facilities.

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises, covenants and agreements herein contained, the parties hereto, intending to be legally bound, hereby agree as follows:

1. Definitions.

In addition to the capitalized terms defined elsewhere in this Agreement, the following terms have the meanings referred to in this Section 1:

“**Advertising**” means all announcements, acknowledgements, banners, signs, panels, scoreboard panels, dasher boards, show bills, promotional materials, handouts and other printed materials and promotional product sampling, and audio or visual commercial messages displayed, announced or otherwise presented in the Facilities including, without limitation, video messages.

“**Affiliate**” means a person that directly or indirectly controls or is controlled by, or is under common control with, a specified person. For purposes of this definition, “control” means ownership of equity securities or other ownership interests that represent more than 50% of the voting power in the controlled person.

“**Agency**” means the Redevelopment Agency of the City of Stockton, a public body, corporate and politic, established and organized pursuant to the Community Redevelopment Law.

“**Agreement**” means this Management Agreement.

“Approved Budget” means the Budget submitted by SMG, accepted by the City and approved by City Council pursuant to Section 5 hereof, and any amendments thereto as provided in this Agreement.

“Arena” means the City owned approximately 10,000 seat multi-purpose arena at 248 Fremont Street in Stockton, CA.

“Arena Parcel” means the parcel within the Events Center designated as Parcel 4 on the parcel map for the Events Center property, upon which the Arena was constructed, which Parcel 4 was leased to Agency and Agency leased back Parcel 4 and improvements for purpose of bonds, which financed the construction of the Arena.

“Authorized Representative” means the person named by either party to be its authorized representative under this Agreement who shall be the liaison for such party with the other party on all matters relating to this Agreement. In the case of the City, such representative shall be named by written notice to SMG by the Office of the City Manager, and in the case of SMG, such representative shall generally be the General Manager appointed hereunder, but may also include SMG’s regional or senior personnel who oversee the Facilities for SMG.

“Ballpark” means the City-owned baseball park, accommodating approximately 5,000 spectators, which currently serves as the home of the Stockton Ports professional baseball team of the Class A California League.

“Ballpark Fund” means the fund maintained pursuant to Article 7 of the Ball Park License Agreement; which shall be a City Account, owned, controlled and maintained by the City.

“Ball Park License Agreement” means the license agreement regarding the use of the Ballpark between the City and the Ports.

“Base Fee” means the fixed management fee payable to SMG pursuant to Section 4.1 hereof.

“Benchmark” means Three Million Five Hundred Thousand Dollars and 00/100 (\$3,500,000) of Operating Revenues for only the Arena and Theatre, which was determined by using the average Operating Revenues for the Arena and Theatre for the 2008 and 2009 Fiscal Years, as shown in Exhibit “A” of this Agreement.

“Bonds” has the meaning provided in Section 2.5.

“Budget” means, for any one Fiscal Year of the Term, a draft operating budget, annual cash flow budget and Capital Expenditure forecast to be prepared by SMG under the provisions of Section 5 of this Agreement and submitted to the City for its acceptance and presentation to the City Council.

“Business Plan” means the annual business plan due March 1 of each year with meaning set forth in Section 2.6 (a), and as otherwise provided in this Agreement.

“Capital Equipment” and **“Capital Improvements”** means any and all furniture, fixtures, machinery or equipment, either additional or replacement, having a per item original cost of \$5,000 or more or any and all building additions, alterations, renovations, repairs or improvements that have an initial dollar cost of not less than \$5,000 per project, with an estimated useful life of more than one year.

“Capital Expenditure” means funds budgeted or expended on Capital Equipment or Capital Improvements.

“Catering” means the business of selling and delivering food and beverages directly to patrons of the Club Seats, Luxury Suites, meeting rooms, party areas, backstage areas and other spaces where special events are held at or in connection with the Arena.

“City” means the City of Stockton, CA.

“City Events” means up to ten (10) City Events which may be held annually in the Arena and up to ten (10) City Events which may be held annually in the Theatre.

“City Manager” means the City Manager of the City.

“Club Seats” means the 344 specialized seats and related lounge and comfort areas in the Arena.

“Concession(s)” means the business of selling food, beverages or Merchandise to patrons of any Facility at or in connection with Events.

“Concessionaire” means any person or entity operating a Concession in any Facility or providing Catering in any Facility. The same Concessionaire may operate more than one of these services.

“Concessions Agreement” means that certain Concessions Agreement by and between the City, as assignee of IFG-Stockton Management, L.P., Stockton Sportservice, L.L.C, and Sportservice Corporation.

“Event(s)” means all revenue or non-revenue producing sports, entertainment, cultural, religious, governmental, civic, and all other activities conducted at each Facility, excluding events conducted by Ports at the Ballpark pursuant to the Ball Park Agreement.

“Events Center” means the area bounded by North Harrison Street, West Fremont Street, North Commerce Street and the Stockton Channel, and which contains the Arena, the Ballpark, parking garage, surface parking lots, open space, marina, and related City-owned improvements.

“Facility Use Agreement” means the license agreement SMG shall prepare for City review and approval to be entered into by users of the Facilities, excluding tenant sport teams.

“Fiscal Year” means a one-year period beginning July 1 and ending June 30.

“General Manager” means chief operating employee of SMG for the Facilities.

“Hockey Lease Agreement” means that agreement between the City and the Hockey Team Owner relating to the use of the Arena for hockey games.

“Hockey Team Owner” means SC Hockey Franchise Corp., the owner of the East Coast Hockey League team that plays its home games at the Arena, currently known as the *Stockton Thunder*, or any approved successor, assign or any entity that acquires all or substantially all of the assets of such team.

“Ice Center” means the City owned Oak Park Ice Arena at 3545 Alvarado Ave., Stockton, CA.

“Incentive Fee” means collectively the Level 1 Incentive Fee and the Level 2 Incentive Fee.

“Laws” means all federal, state, local and municipal regulations, ordinances, statutes, rules, laws and constitutional provisions.

“Lease Agreement” means the agreement entered into between the Agency and the City, dated on or about April 1, 2004, pursuant to which the Agency leased to the City the Arena Parcel and the Arena in connection with the Bonds.

“Level 1 Incentive Fee” means the incentive fee that may be earned by SMG pursuant to Section 4.2(a) hereof.

“Level 2 Incentive Fee” means the incentive fee that may be earned by SMG pursuant to Section 4.2(b) hereof.

“Losses” means any and all losses, liabilities, claims, actions, causes of action or demands, damages and expenses (including reasonable attorneys’ fees).

“Luxury Suites” means the twenty-four (24) suites (with 12 seats per suite) within the Arena.

“Maintenance Capital Fund” means the fund established by the City for Capital Improvement and Capital Equipment expenditures for the Arena; which shall be a City account, owned, controlled and maintained by the City.

“Management Term” has the meaning set forth in Section 3.1 hereof.

“Material Contract” means any contract with a value in excess of \$20,000 annually (with the exception of Facility Use Agreements), any contract for pouring rights or naming rights, or any contract with an Affiliate of SMG

“Merchandise” means any and all novelties, souvenirs, recordings, merchandise, programs and like or similar items sold in connection with Events at any Facility.

“Net Operating Loss/Profit” means, with respect to a Fiscal Year, the excess, if any, of Operating Expenses for such Fiscal Year over Operating Revenues for such Fiscal Year in the case of a loss, and the excess, if any, of Operating Revenues for such Fiscal Year over Operating Expenses for such Fiscal Year in the case of a profit.

“Operating Expenses” means any and all expenses and expenditures of whatever kind or nature incurred by SMG, directly or indirectly, in promoting, operating, maintaining and managing the Facilities, including without limitation those expenses set forth on Exhibit “B” attached hereto, all as determined in accordance with generally accepted accounting principles, consistently applied; provided that Operating Expenses shall not include expenses or expenditures in connection with Capital Equipment and Capital Improvements purchases. In addition, solely in connection with calculating SMG’s Incentive Fee hereunder, Operating Expenses shall exclude the Base Fee, depreciation and amortization, interest, debt service, income taxes, and all emergency and extraordinary expenses.

“Operating Revenues” means any and all revenues of every kind or nature derived by SMG, directly or indirectly, from owning, operating, managing or promoting the Facilities, including without limitation those revenues set forth on Exhibit “B” attached hereto, all as determined in accordance with generally accepted accounting principles, consistently applied.

“Parking District” means Stockton Central Parking District (CFD 2001-01) and any successor thereof.

“Ports” means 7th Inning Stretch, LLC, a California limited liability company, doing business as the Stockton Ports, a professional baseball team that is a member of the California League, or any approved successor or assign.

“Pre-existing Agreements” means each contract, license, agreement, option, lease and commitment existing as of the date of this Agreement that grants any person any right (i) to license, use, occupy or rent all or any portion of the Facilities, or (ii) to provide services to be used in the management, operation, use, possession, occupation, maintenance, promotion or marketing of all or any portion of the Facilities, and that are only listed on Exhibit “C” hereto.

“Renewal Term” means the additional period for which this Agreement may be renewed in accordance with Section 3.1 (b) hereof.

“Security Plan” means the security plan to be updated by SMG, as a component of the Business Plan, by March 1 of each year and submitted to City for review and approval as provided in Section 2.6(m).

“Site Lease” means the agreement entered into between the Agency and the City, dated on or about April 1, 2004, pursuant to which the City leased to the Agency the Arena Parcel in connection with the Bonds.

“SMG Capital Contribution” means the sum of One Million Dollars and 00/100 (\$1,000,000) to be contributed by SMG to the City on the first business day following the commencement of the Management Term, and to be utilized, as provided in Section 5.6(a) hereof.

“**Term**” means the Management Term or Renewal Term, as applicable.

“**Theatre**” means the 2,000 seat, historic Bob Hope (Fox) Theatre located at 242 E. Main Street in Stockton, CA.

2. Engagement of SMG.

2.1 Exclusivity. Subject to the terms and conditions set forth in this Agreement, City hereby engages SMG, on an exclusive basis, to manage, operate, and promote the Facilities during the Term, and SMG hereby accepts such engagement. In such capacity, SMG shall have exclusive authority over the day-to-day operation of the Facilities and all activities therein. Without limiting the generality of the foregoing, the services to be provided by SMG shall include those described on Exhibit “D” attached hereto.

2.2 Standard of Care. SMG shall perform its obligations hereunder in conformity with the standard to which an operator of a comparable assortment of multi-purpose public entertainment Facilities would operate. Due to the City’s need to retire debt on the Arena, SMG shall direct Events that generate substantial revenue to the Arena rather than the other Facilities to the extent such an Event would be appropriate in the Arena. SMG is to operate the Facilities in keeping with the management goals set each year pursuant to the annual Approved Budget, with the overarching goal of having the Arena Operating Revenues equal or exceed its Operating Expenses; provided, however, the City hereby acknowledges that it is highly possible that the Arena will not achieve such goal and that SMG is not responsible for the Arena not attaining such goal in any Fiscal Year. City recognizes that Operating Revenues for the Arena are incapable of being estimated with reasonable certainty given that the entertainment industry as a whole fluctuates based upon general economic conditions, current trends in entertainment, available income of patrons, competitive facilities and a variety of rapidly changing factors beyond the control of SMG. SMG has made no, and disclaims any purported or actual, representation or warranty as to the results which can be expected from the ownership and operation of the Arena including, without limitation, the Operating Revenues or Operating Expenses or the accuracy of its projections and estimates thereof. City recognizes and accepts that all budgets and projections represent SMG’s estimate of the expected expenditures and revenues and that SMG is in no way responsible or liable if the actual expenditures and revenues are more or less than that projected; provided, however, nothing in this Section shall be construed to authorize SMG to expend funds other than in accordance with the provisions of this Agreement. SMG shall exercise its diligent, good faith efforts in managing and operating the Facilities according to these standards. In this connection, the parties agree that SMG, in establishing and implementing its booking policies, may schedule not only those Events that generate substantial direct revenue to each Facility, but also those Events that produce less direct revenue but, in SMG’s good faith judgment, generate either a significant economic, cultural, or other benefit to City or otherwise serve the public interest; provided that no use of the Facilities shall be permitted without a reasonable charge for such use, except for the City Events.

2.3 Duty and Liability. SMG owes to City a duty to perform its obligations under this Agreement and to conduct the management and operation of the Facilities at all times with integrity and good faith consistent with the well being of the greater Stockton community, in a manner which is consistent with industry practices and all applicable Laws. SMG shall use best

and most reasonable efforts to require that all persons using the Facilities or attending Events at the Facilities comply with all legal requirements of all governmental authorities having jurisdiction over the Facilities; provided, however, SMG shall not be liable for any such non-compliance so long as SMG has used its best and reasonable efforts as provided in this Section. To ensure compliance with this provision, SMG shall provide in a timely manner to the City, upon written request, documentation supporting the methodology used by SMG pertaining to the allocation of costs, expenses and revenue for any Event or for the operation and maintenance of any Facility.

SMG shall follow such policies and guidelines established by the City that are applicable to the operation and maintenance of the Facilities. However, to the extent that such a policy or guideline hereafter established or modified by the City significantly and adversely affects (i) the Benchmark or paid attendance; (ii) Operating Revenues; or (iii) Operating Expenses (such as increases in premiums for liability insurance or cost of utilities), or to the extent that other agreements affecting the Facilities are modified by the City subsequent to the effective date of this Agreement which adversely affect expenses or revenues of the Facilities, then City and SMG shall meet, confer and discuss possible options, including amendments to this Agreement, with respect to the impact of such items or circumstances.

2.4 Inspection of Facilities. The City Manager and the designated City representatives shall have the right to enter all portions of the Facilities to inspect same, to observe the performance by SMG of its obligations under this Agreement, to install, remove, adjust, repair, replace or otherwise handle any equipment, utility lines, or other matters in, on, or about the Facilities, or to do any act or thing which the City may be obligated or have the right to do under this Agreement. In connection with the exercise of such rights, the City will endeavor to provide (but is not obligated to provide) advance notice to SMG for security purposes and to minimize any interference with or disruption of SMG's work under this Agreement. This Section 2.4 is not intended to nor shall it be construed to limit any other rights of the City under this Agreement, nor shall it impose or be construed to impose upon the City any independent obligation to construct, maintain or make repairs, replacements, alterations, additions or improvements, or create any independent liability for any failure to do so.

2.5 Tax-Exempt Financing. SMG acknowledges that the City has financed the majority of the cost of construction of the Arena with tax-exempt bonds (the "**Bonds**"). Except for any actions that SMG is directed to take by the City, SMG hereby agrees that it will not knowingly take any actions that would (i) result in the Bonds becoming "private activity bonds" or (ii) would otherwise cause the interest on the Bonds to become subject to federal income taxes. In the event any term or condition in this Agreement shall cause the City or SMG to violate any underlying covenant or condition associated with the Bonds, the Site Lease or the Lease Agreement, the parties agree to amend this Agreement in a manner to avoid violating any underlying covenant or condition associated with the Bonds.

2.6 Operational Responsibilities. Subject to the limitations set forth in this Agreement and the Approved Budget, SMG shall perform the following services for each Facility during the Term:

(a) *Business Plan.* By March 1 of each year that this Agreement is in effect, SMG shall prepare and submit to City an annual Business Plan, which (among the several components provided for in this Agreement) shall set forth in detail SMG's strategy for managing, operating, maintaining, marketing and promoting each Facility for the upcoming Fiscal Year, specifically including, but not limited to, (i) the types and quantity of Events to be pursued and booked to each Facility; (ii) attendance goals; (iii) Operating Revenues goals; and (iv) Operating Expenses goals for each Facility. The overarching goal of the Business Plan is to define the manner in which SMG proposes to operate and maintain the Facilities such that to the maximum extent reasonably possible Operating Revenues equal or exceed Operating Expenses on an annual basis for the Arena, and the other Facilities. City and SMG shall mutually evaluate the Business Plan and come to agreement as to the final content thereof no later than May 1 of each year.

(b) *Marketing and Promotion.* SMG shall provide or cause to be provided marketing and promotional activities, which shall be undertaken in a manner consistent with optimizing the use of each Facility. SMG will pursue a promotional campaign for each Facility consistent with industry practices designed to showcase the Facilities within the sports and entertainment community. SMG shall be responsible for coordinating with City to ensure that appropriate Events are booked into each Facility. SMG shall submit a comprehensive marketing plan to the City each year as a component of the Business Plan. SMG shall also work cooperatively with the Ports for Ballpark Events pursuant to the Ball Park License Agreement.

(c) *Booking and Scheduling.* SMG shall be responsible for booking and scheduling of all Events held at each Facility, except for the times the Ports operate the Ballpark pursuant to the Ball Park License Agreement. However, City shall approve the general types of Events SMG intends to schedule. If an Event involves a financial risk to City, if more than ten (10) dates per year are involved or if the safety of the public is jeopardized, SMG shall contact City for approval prior to booking such Event. SMG shall attempt to optimize the use of each Facility. SMG shall use the provisions of Section 5.2(c) of the Ball Park License Agreement for the booking priorities at the Ballpark. SMG shall meet at least quarterly with the Ports and teams using the Arena to coordinate the schedules for the Ballpark and the Arena. SMG shall make available to the City's designated representative, on a read-only basis, online, real-time access to SMG's computerized Event scheduling calendar system for the Facilities (SMGBooking.com) which sets forth the scheduled and tentatively scheduled Events, and Event holds, for each Facility. It is understood and agreed that the information contained on said system is and must remain strictly confidential at all times and that disclosure thereof could adversely affect the operation and management of the Facilities, and that therefore City agrees to establish appropriate safeguards within the City in order to insure such confidentiality, including limiting access to certain individuals. It is understood and agreed that, in some instances, SMG may desire to book an Event in a Facility, which involves some risk, such as the payment of a guaranteed gate to an act or promoter. SMG shall offer the City the opportunity to act as a promoter or co-promoter of each such Event. In this regard, City and SMG shall agree upon a process by which such Event is submitted to the City along with an analysis of the risk involved. If the City is unwilling to permit SMG to assume such risk on behalf of the City, SMG or an Affiliate thereof

shall be entitled to act as a promoter or co-promoter of such event, assume such risk, and shall thereafter be entitled to profit from the Event as such promoter or co-promoter.

(d) *City Events.* SMG agrees to accommodate City Events below the established rental rate or license fee, or free of same, upon reasonable notice to SMG, provided, however, it is understood and agreed that any and all of SMG's out-of-pocket Operating Expenses incurred as a result of such City Event will be paid accordingly. City Event bookings shall be booked according to rates and policies established by SMG and in accordance with availability. It is understood and agreed that SMG may book certain Events which do not provide significant Operating Revenues for the Facilities but which have a significant economic, cultural or other benefit to the City or the community at large, or which otherwise serve the public interest, provided however that no use of the Facilities shall be permitted without a reasonable charge for such use with the exception of City Events.

(e) *Sale of Advertising & Other Rights/Luxury Suites/Club Seats.* SMG shall organize and conduct appropriate marketing efforts for the sale of Advertising, pouring or product rights, naming rights and other sponsorship or promotional opportunities at or in connection with the Facilities, and for the sale or licensing of Club Seats and Luxury Suites. SMG shall conduct such marketing and sales campaigns in the manner customary to the industry. Additionally, SMG shall organize and conduct any other sales and marketing campaigns that may result in sources of revenue for the Facilities.

(f) *Deposit of Revenues From Sales.* SMG shall deposit all revenues generated for any Facility by SMG from sales or licensing, and any other similar revenues, in the Operating Account, and all such revenues shall be considered Operating Revenues for the purposes of this Agreement.

(g) *Facility Use Agreements.* SMG shall be responsible for negotiating and entering into Facility Use Agreements with the users of each Facility. SMG shall be responsible for developing the form of Facility Use Agreement.

(h) *Location Maintenance.* SMG shall be responsible for all maintenance at each Facility, except as otherwise provided in the Ball Park License Agreement, including, without limitation, elevators, elements of the electrical and mechanical systems, all furniture, fixtures and equipment, plumbing systems, building exterior, drains, roof, sidewalks, entranceways, as well as custodial cleaning services, pest control and trash removal. The expense to SMG of providing the services under this Section shall be considered an Operating Expense. SMG shall be responsible for the clean-up of the Ball Park after each Event at the Ballpark not sponsored by the Ports, including, but not limited to the removal of all trash, cleanup and sanitization of all public restrooms, and returning the Ballpark to "broom clean" condition after each non-Ports Event. SMG shall follow the Clean-Up Plan for the Ballpark approved by the City pursuant to the Ball Park License Agreement. The City shall be responsible to ensure that the condition of the Ballpark, including the playing surface of the ball field, complies with facilities standards for professional baseball after each non-Ports Event, and prior to the commencement of any Ports' event.

(i) *Operational Services.* Except for Ports' events held at the Ballpark, SMG shall be responsible for all services required to present Events at each Facility, including but not limited to services involving the public and backstage areas, sound system, lighting system, stage rigging, dress areas, stage equipment, set up and tear down, and loading in and loading out. SMG will be responsible for providing all management staff, ticket sales personnel, front-of-house personnel, and other personnel (except as otherwise to be provided by the City) required for the operation of each Facility.

(j) *Ticket Sales.* SMG shall be responsible for all aspects of ticket sales, including the supervision of arrangements with computerized ticketing services, for each Facility, except for the Ballpark for any Ports' events and except for season ticket packages and/or group sales as set forth in the Hockey Lease Agreement. The manner of effectuating ticket sales is subject to the approval of City. These services shall include ordering, selling and accounting for tickets, reporting ticket revenues for a given Event for each user of each Facility, cash and credit card processing, and auditing and accounting for each Event in a manner acceptable to the City. SMG shall enforce the provisions of the Hockey Lease Agreement so as to receive accurate and complete reporting by the Hockey Team Owner to SMG and City of all season ticket packages sold and group ticket sales so that allocations of revenues may be accurately and timely determined pursuant to the Hockey Lease Agreement. SMG shall pay, within three (3) business days after the completion of the Event, to the Parking District, any revenue it may collect for parking as part of tickets sales or otherwise, to the extent owed thereto. SMG shall take reasonable precautions, consistent with industry standards, to protect the City if it appears from advance ticket sales within forty-eight (48) hours prior to the scheduled commencement of an Event that a user of a Facility will not be able to pay for the use of the Facility.

(k) *Facility Fee.* SMG shall collect from each ticket purchaser a minimum facility fee of Two and 00/100 Dollars (\$2.00), or any increased amount as determined below, for each ticket sold for Events at the Arena whether full price or discounted, and of One and 25/100 Dollars (\$1.25), or any increased amount as set forth in the Ports License Agreement, for each ticket sold for non-Ports Ballpark Events whether full price or discounted (the "**Minimum Facility Fee**"). The City and SMG shall meet once prior to March 1 every year under this Agreement, to confer on any increase to the amount of the Minimum Facility Fee. Any such increase shall reflect increased costs of operating, maintaining and making capital replacements and improvements to the applicable Facility. Any permanent increases to the Minimum Facility Fee shall be approved by the City Council along with the Approved Budget and shall become effective on the first day of the next Fiscal Year. SMG shall deposit the Minimum Facility Fees for each Arena Event into the Maintenance Capital Fund, and the Minimum Facility Fees for each non-Ports Ballpark Event into the Ballpark Fund, within three (3) business days after each Event. Notwithstanding the foregoing, SMG shall be entitled to collect an additional amount from each ticket purchaser, which shall be added to the Minimum Facility Fee, on an Event-by-Event basis, as it deems reasonably necessary for the purposes of booking events in the Facilities (the "**Full Facility Fee**"). Any amount collected as Full Facility Fees, including the Minimum Facility Fee, shall be considered Operating Revenues. Nothing contained herein shall prevent SMG at its discretion from collecting from each

ticket purchaser for Events at the Theatre a fee in the nature of a facility fee, and any revenues so collected shall be considered Operating Revenues.

(l) *Settlement.* SMG shall require all users of the Facilities to provide timely exchange of information regarding revenues and expenses at the end of each Event in accordance with industry practice. Within three (3) business days after each Event, SMG shall complete, or use best and diligent efforts to cause the users of each Facility to complete, the settlement of revenues and expenses for such Event, with a settlement statement in form and content consistent with standard industry practice for the settlement of Event revenues and expenses. Simultaneously with the delivery of said statement, SMG shall pay to the appropriate Event sponsor or promoter the appropriate shares, if any, of the revenues owed to such sponsor or promoter as set forth in the Facility Use Agreement with such sponsor or promoter and in the Hockey Lease Agreement. At the same time, SMG shall deposit into the Operating Fund for each Facility the City's share of the revenues due to the City from such Event.

(m) *Security.* SMG will arrange for security for Events at each Facility and for general facility security at each Facility when Events are not in progress. As a part of the process for approval of the Business Plan each year, representatives from SMG shall meet with representatives from City to update the security plan (the "**Security Plan**") for each Facility for Event and day-to-day security. SMG shall coordinate security for each Facility with the City in order to ensure that there are no gaps in security or unnecessary overlaps in allocation of resources. The Security Plan shall include both emergency and nonemergency procedures and protocols to be followed by SMG and SMG-contracted security, if any, in all aspects of the Security Plan so that all security personnel are fully familiar with the security protocols. SMG shall coordinate with Ports on the Security Plan for the Ballpark with the understanding that Ports is responsible for Ballpark security during Ports' events at the Ballpark pursuant to the Ball Park License Agreement.

(n) *Community Engagement:* SMG shall (i) establish a local promoter/talent forum network for local promoters and talent to help facilitate their potential access to the Facilities; (ii) establish a system of communication that encourages networking and collaborative efforts between and among the different segments of the greater Stockton community and downtown businesses including but not limited to hospitality, local chambers, entertainment, sports, food service and non-profit agencies; and (iii) create an open, clear, and responsive reporting system that enhances the operation of the Facilities. As a component of the Business Plan, SMG will develop and provide to the City an annual community engagement plan and a report on the success of these efforts. The community engagement plan will include measurable goals and objectives, will describe how SMG will meaningfully engage all segments of the community, and will examine the employment opportunities made available as a direct or indirect consequence of the operation of the Facilities.

(o) *Other Responsibilities.* In addition, SMG shall be responsible for the following services:

- (1) Subject to the Ballpark License Agreement and the Hockey Lease Agreement, manage and operate each Facility and contract for its use in a manner that will promote and further the purposes for which each Facility was constructed;
- (2) Perform, execute and enforce for the City and on the City's behalf the terms of the Ball Park License Agreement and the Hockey Lease Agreement; and any future sport team agreements;
- (3) Negotiate, execute, and perform all contracts, use agreements, licenses and other agreements (i) with persons who desire to schedule Events, performances, telecasts, broadcasts or other transmissions in, from or to each Facility or who desire otherwise to use each Facility or any part thereof or (ii) that otherwise pertain to the use, operation and occupancy of each Facility or any part thereof;
- (4) Coordinate and participate in, where necessary or applicable, all marketing, promotional and public relations activities for or at each Facility;
- (5) Subject to approval of City as otherwise provided in this Agreement, negotiate, execute and perform all contracts, use agreements, licenses and other agreements for the sale, promotion, marketing and use of all names, trademarks, trade names, logos and similar intangible property relating to each Facility;
- (6) Take adequate measures to protect the naming rights, pouring rights, and other commercial or product sponsorship rights, including any limitations on competition by other brands in the operation of the Facilities, as required by the applicable agreements;
- (7) Select and negotiate on behalf of the City any contracts for Concessions or Catering at each facility, for services not being provided by SMG, with City's written approval, subject to any limitations provided in the Ball Park License Agreement and the Hockey Lease Agreement;
- (8) Select, schedule, and coordinate the efforts of all parties involved in the operation of each Facility and establish and maintain consistent procedures for cost estimating and reporting, maintenance and payment of invoices, including preparation of budgets and reports as required under this Agreement;
- (9) Plan, coordinate, and administer operation of each Facility, and select, train and supervise each Facility's staff;
- (10) Subject to City prior written approval, retain legal counsel in connection with the discharge of its duties hereunder and cause such counsel to coordinate with City's legal department where necessary or appropriate;

- (11) Coordinate the work of all parties performing work in connection with the operation of each Facility;
- (12) Monitor actual and projected Operating Expenses and inform City if projected costs exceed the amounts set forth in the Approved Budget;
- (13) Make prompt payment as appropriate of the Operating Expenses from funds available for that purpose under this Agreement;
- (14) Market and sell or license the use of the Club Seats in the Arena including VIP parking;
- (15) Market and sell or license the use of the Luxury Suites in the Arena including VIP parking;
- (16) Devise and implement procedures including preventive maintenance procedures reasonably designed to keep each Facility in good order and condition, subject to ordinary wear and tear, and maintain each Facility in such order and condition;
- (17) Perform such other consulting, administrative or management services as reasonably requested by City and agreed in writing by SMG, as it relates to the Facilities;
- (18) Furnish all services necessary to accomplish the foregoing requirements of this Section.

2.7 Concessions and Catering/Utilities/Misc.

(a) *Contract Authority.* Except as provided in the Ball Park License Agreement, the Concessions Agreement and the Hockey Lease Agreement, SMG shall, at each Facility, as appropriate for each Facility, throughout the Term of this Agreement, select and contract with Concessionaires to conduct Concessions or Catering, provided however, nothing contained herein shall prevent SMG from directly conducting such Concessions or Catering as otherwise provided for herein.

Upon the expiration or early termination of the Concession Agreement for the Arena (which expiration date is on or about December 10, 2012), SMG may, at its option, assume responsibility for Concessions and Catering at the Arena for the balance of the Term. Such responsibility may be handled either directly by SMG or through a separate Concession and Catering agreement with one of its Affiliates. In consideration of the performance of such services, SMG or its affiliated Concessionaire will receive a fee equal to five percent (5%) of the gross food and beverage Concession and Catering revenues, less applicable taxes. The costs of SMG or its Affiliate in providing such food and beverage Concession and Catering services shall be an Operating Expense

(b) *Licenses and Permits.* SMG shall use best and diligent efforts to anticipate any upcoming changes in Concessionaires, work with appropriate regulatory

authorities to assure that a liquor license for service of liquor in any Facility will always be in place for Events, and expedite any application for renewal or new license during any change in Concessionaires.

(c) *Cleaning.* All trash resulting from cleaning shall be placed in containers supplied by City. SMG shall provide for removal of trash from each Facility. SMG must follow all applicable provisions of the Ball Park License Agreement for providing these services at the Ballpark.

(d) *Utilities.* City shall furnish SMG with electrical connections, at and in each Facility, to permit SMG to operate the electrical equipment customarily used in connection with the Facilities. The cost of supplying such electrical current used in connection with normal and customary operations shall be considered an Operating Expense. City shall furnish each Facility with heating and air conditioning equipment so that each Facility may be heated or cooled in a proper manner and shall furnish SMG at each Facility with an adequate potable hot and cold water supply and appropriate drainage and sewage facilities to permit activities in the normal and customary manner. The cost of supplying such heat, air conditioning, hot and cold water, drainage and sewage services used at each Facility in connection with its normal and customary operations shall be considered an Operating Expense.

(e) *Employees.* All service employees working in the public areas of each Facility shall wear uniforms.

2.8 Public Records Act. If any person requests the City to disclose any information with respect to any Facility or SMG under the Public Records Act, prior to making such a disclosure, City shall notify SMG of such request, in which case SMG shall (i) promptly and timely inform City if any of the requested materials may constitute confidential, proprietary or trade secret information of SMG which may be exempted from disclosure under the Public Records Act, and, in that event, and (ii) cooperate with City in preparing appropriate responses and/or filings to any such person with respect to such request, including any litigation involved therein, to prevent a disclosure of such information. SMG shall promptly refer all Public Records Act requests it receives directly to the City and shall not respond to any Public Records Act request except in cooperation with the City.

3. Management Term; Renewal Term; SMG's Rights and Powers.

3.1 Management Term.

(a) The Management Term of this Agreement shall commence on February 25, 2011 and end at midnight on February 24, 2016, unless earlier terminated pursuant to the provisions of this Agreement.

(b) The City may, in its discretion, extend the Term hereof for an additional five-year period commencing February 25, 2016 and ending February 24, 2021 by giving written notice to SMG at least ninety (90) days prior to the end of the Management Term.

(c) The City may, at its discretion, terminate this Agreement at the end of the third year of either the Management Term, or the Renewal Term, by providing written notice to SMG, at least ninety (90) days prior to the end of such third year, of its intent to so terminate.

3.2 SMG's Rights and Powers.

(a) *Grant of Authority.* City hereby grants to SMG, and SMG hereby accepts, the exclusive rights and obligations, in its own name, as an independent contractor and not as an agent of City, to provide those management services to City as are set forth in this Agreement in connection with SMG's management, operation and administration of each Facility and, in connection therewith, to perform or furnish or cause to be performed or furnished, subject to the provisions hereof, and subject to the availability of funds, all of such management services upon the terms and subject to the limitations of this Agreement. SMG and City acknowledge and agree that as relates to the Ballpark such grant of authority is limited to the City's authority in the Ballpark pursuant to the terms of the Ball Park License Agreement.

(b) *Property.* SMG shall have no authority to sell, remove from the Facilities, or otherwise dispose of, or to encumber or alienate any personal or real property owned, leased, or otherwise controlled or maintained by the City. SMG shall be obligated to provide City with an accurate annual inventory of all property located at each Facility.

(c) *Contracts.* Except as set out in this Agreement, SMG shall have no authority, without the prior written consent of City, to enter into: (i) any Material Contracts; (ii) any Catering or Concessions contract; or (iii) any contract for the provision of goods and/or services to any Facility that would extend beyond the Term, provided, however, that City agrees to cooperate with SMG in connection with the execution of such contracts that would extend beyond the Term of this Agreement by executing and delivering agreements with the providers of such goods and services whereby City agrees to honor and observe such contracts following termination of this Agreement. SMG shall have the right to enter into, execute, and deliver Facility Use Agreements that extend beyond or relate to dates falling after the expiration of the Term. All contracts entered into by SMG shall provide that the same are assignable to City (or any successor management company retained by the City) without the vendor's prior consent and, notwithstanding any contrary provision hereof, upon termination of this Agreement for any reason, the parties agree that City shall assume in writing, or shall cause any successor management company retained by it to assume in writing, any or all then outstanding contracts affecting each Facility, provided that SMG entered into such contract in accordance with this Agreement.

(d) *Employees.* All persons who are required to have an employer/employee relationship with the Facilities shall be SMG's employees, including any General Manager. All pay and benefits relating to such employees shall be considered Operating Expenses and paid from the Operating Account. All personnel matters shall be handled in accordance with SMG's personnel procedures set out in its personnel policy manual. During the Term and for one (1) year after the termination of this Agreement, except with

SMG's prior written consent, the City shall not solicit for employment or employ any person who has served as General Manager or any other of SMG's "senior personnel" during the Term. For purposes of this provision, "senior personnel" shall mean personnel of SMG who report or reported directly to the General Manager. In addition to any other remedies which SMG may have, specific performance in the form of injunctive relief shall be available for the enforcement of this provision.

(e) *Purchase of Supplies and Services.* SMG shall comply with all Laws involving the purchase of equipment, materials, supplies and inventories reasonably required by it in the management of each Facility, but shall endeavor to make all such purchases at the best price available as known to SMG, considering the quantities required and the quality desired, at the time available for the delivery and the sources of supply whenever possible as part of a volume purchase by SMG

(f) *Transactions with Affiliates; Booking of Events at Multiple SMG Venues.* SMG may acquire property or services from or otherwise transact business with its Affiliates for any of the goods to be purchased or services to be performed by it under this Agreement but only if the prices charged and services rendered are competitive with those obtainable from others rendering comparable services. To insure compliance in this respect, SMG agrees to obtain at least two (2) other competitive bids from suppliers other than SMG's Affiliates, whenever SMG considers transacting business with an Affiliate for providing goods or services under this Agreement. Notwithstanding the above, all such purchases must be within the amounts approved for such purchases in the applicable Approved Budget.

SMG has advised City that SMG performs facility services similar to those outlined herein for other public assembly facilities. In order to maximize utilization of each Facility, SMG may from time to time book the same Event at a number of the facilities it operates. If SMG desires to book Events at a Facility while at the same time booking said Events under the same contract for other facilities for which SMG is providing services, then before finalizing such contract, SMG shall obtain City's approval over the allocation of such contract's expenses to the Facility. Similarly, if SMG desires to acquire goods or services in bulk for any of the Facilities and one or more of the other facilities for which SMG performs services, SMG shall first obtain in writing City's approval over the allocation of the costs thereof to the Facilities. SMG shall not allocate or impose any costs or expenses related to its corporate offices or other facilities to each Facility that are not related to SMG's provisions of management services to each Facility.

(g) *Settlement of Claims and Suits.* SMG will be advised by City of, and City shall continually keep SMG apprised of, City's procedures and requirements in respect to settlement of third party claims filed with and lawsuits filed against City with respect to each Facility. SMG agrees to comply with such settlement procedures. SMG and City agree to cause their respective legal counsels to coordinate with one another in connection with the settlement of claims. All costs and expenses thereof, including the settlement thereof, are deemed an Operating Expense in accordance with the terms and provisions of this Agreement. Both parties agree that they will immediately notify the

other party in writing of any claim or lawsuit filed which relates to any Facility or the operation thereof in any way.

(h) *Cooperation.* SMG shall coordinate and participate in meetings with City representatives and related community meetings as may be necessary to perform the services contemplated herein.

4. SMG's Compensation.

4.1 Management and Capital Investment Fees. As base compensation to SMG for providing the services hereunder, the City shall pay SMG during the Term an annual fixed fee of Two Hundred Seventy Thousand Dollars (\$270,000) per Fiscal Year, which amount shall be adjusted upward on the first day of each Fiscal Year, commencing with the Fiscal Year beginning on July 1, 2012, by the percentage change in the Consumer Price Index -- All Urban Consumers (CPI-U) -- U.S. City Average -- All Items, as published by the Bureau of Labor Statistics of the U.S. Department of Labor for the twelve month period ending on May 31 immediately preceding such July 1 date (the "**Base Fee**"). Such Base Fee shall be payable in equal monthly installments due on or before the last day of each month during such Fiscal Year, and SMG shall be entitled to draw such amounts from the account described in Section 5.2. For any partial Fiscal Year during the Term, the Base Fee shall be prorated.

4.2 Incentive Fee.

(a) In addition to the fee described in Section 4.1 above, SMG shall be entitled to an annual incentive fee ("Level 1 Incentive Fee") with respect to each Fiscal Year hereunder during the Term, which fee is equal to twenty-five percent (25%) of the improvement of the financial performance of the Arena and the Theatre over the Benchmark. The Level 1 Incentive Fee amount earned by SMG in any given Fiscal Year shall not exceed 50% of the Base Fee for such year.

(b) Additionally, SMG shall be entitled to an additional annual incentive fee (the "Level 2 Incentive Fee") in an amount calculated as set forth below based upon the aggregate paid attendance for the Arena and the Theatre.

<u>paid attendance</u>	<u>Level 2 Incentive Fee</u>
Up to 300,000	0% of the Base Fee
300,001 - 310,000	10% of the Base Fee
310,001 - 320,000	20% of the Base Fee
320,001 - 330,000	30% of the Base Fee
330,331 - 350,000	40% of the Base Fee
Over 350,000	50% of the Base Fee

(c) Notwithstanding anything to the contrary contained herein, the Incentive Fee owed in any Fiscal Year shall not exceed the Base Fee for such year. With respect to calculation of SMG's Incentive Fee for any Fiscal Year hereunder that is not a full twelve (12) months, the Benchmark and the above stated paid attendance levels shall be prorated to reflect such short Fiscal Year.

(d) The Incentive Fee determined above pursuant to this Section 4.2 shall be payable to SMG within thirty (30) days after the City's receipt of an invoice from SMG setting forth the Operating Revenues and Operating Expenses, and the aggregate paid attendance for the Arena and the Theatre, for the previous Fiscal Year, and showing the calculation of the Incentive Fee payable with respect to such Fiscal Year. Upon the completion of the audit of the annual financial statement as provided in Section 6.1 hereof for any Fiscal Year, SMG shall recalculate the incentive fee payable for that Fiscal Year based upon such audited numbers. In the event that the amount of the incentive fee which was paid based on SMG's invoice differs from such recalculated amount, SMG shall promptly remit to the City any excess amount which was paid, or the City shall promptly pay the shortfall, as the case may be.

4.3 No Commissions on Club Seats, Luxury Suites, Advertising, Pouring Rights or Naming Rights. SMG shall receive no commissions on sales of Club Seats, Luxury Suites, Advertising, pouring rights, naming rights, or other sponsorships for the Facilities; however, the foregoing shall not preclude SMG from paying market rate commissions to any of its employees or third party contractors, who in either case solicited such sales.

5. Budgets; Bank Accounts.

5.1 Budgets; Funding.

(a) As a component of the annual Business Plan, SMG will prepare a Budget, which shall include an operating budget and annual cash flow budget for the next Fiscal Year to perform the services hereunder and meet the objectives under this Agreement. The Budget shall also set forth the anticipated Capital Expenditures to be made during the next Fiscal Year and a five (5) and ten (10) year Capital Expenditure forecast. Said Budget shall be reviewed and is subject to approval by the City in accordance with this Agreement. Within twenty (20) days of receipt thereof, the City shall respond to SMG indicating whether such Budget is accepted for presentation to the City Council, or the City will indicate the items in the Budget that preclude the City from accepting it. SMG shall, as required, amend the Budget and resubmit the same for acceptance by the City and such process shall continue until the City accepts the Budget. The accepted Budget will then be submitted for City Council approval along with the City's normal budget approval process, and only if approved by the City Council shall it be considered an Approved Budget. In the event a Budget has not been approved prior to the first day of the Fiscal Year to which it relates, the Approved Budget for the applicable month for the previous Fiscal Year shall control for each month in the fiscal period for which a Budget has not been approved.

(b) With respect to the Budget for the initial, full Fiscal Year hereunder ending on June 30, 2012, SMG shall submit to the City for its approval on or before March 1, 2010 a Budget that is based upon (i) SMG's pro forma budgets submitted to the City in connection with the selection process, adjusted accordingly for the changes in the operating circumstances that occurred subsequent to the selection process, and (ii) the actual Operating Revenues and Operating Expenses for the Facilities for July 1, 2010 through February 24, 2011 and projected Operating Revenues and Operating Expenses

for February 25, 2011 through June 30, 2011. A Budget for the period from February 25, 2011 through June 30, 2011 may be requested and approved by the City Manager.

(c) Approved Budgets may be amended by the parties pursuant to procedures mutually agreed upon.

(d) Without limiting the foregoing, the parties acknowledge that in connection with its operations hereunder, SMG will comply with the spending limitations contained in the Approved Budgets, including any amendments thereto approved as provided herein.

(i) If, however, extraordinary events occur which could not reasonably have been contemplated at the time the Approved Budget was prepared, SMG may submit an amended budget to the City for approval. Upon approval by the City Manager of such amended budget, such budget shall become an Approved Budget. In the event such amended budget is not approved, the Approved Budget shall govern the expenditures and operations of SMG hereunder.

(ii) Notwithstanding the foregoing, SMG shall have the right to act, with the consent of the City, in situations which SMG determines to be an emergency with respect to the safety, welfare and protection of the general public, including spending and committing funds held in the operating account(s) of the Facilities, even if such expenses are not budgeted; provided, however, SMG shall have no obligation under any circumstance to spend or commit funds other than funds then available in such accounts for any such purpose. Immediately following such action, SMG shall inform the City of the situation and the action(s) taken, and the City shall pay into such account(s) the amount of funds, if any, spent or committed by SMG pursuant to this Section 5.1(d)(ii) in excess of budgeted amounts.

5.2 Accounts, Receipts and Disbursements. SMG shall establish and maintain bank accounts, as appropriate, for the Facilities (the “**Operating Account(s)**”), utilizing SMG’s tax identification number, for the promotion, operation and management of each such Facility, with signature authority in such employees of SMG as SMG shall determine, subject to the reasonable approval of the City. SMG may establish such additional bank accounts as are necessary and convenient to the operation of each Facility with the City’s consent, including without limitation an account for the deposit of any ticket sale revenues which SMG receives with respect to an Event to be held at a Facility pending the completion of the Event. Such ticket sale monies are to be held for the protection of ticket purchasers, the City and SMG, and to provide a source of funds, as required for such payments to performers and promoters and for such payments of Operating Expenses in connection with the presentation of Events as may be required to be paid with respect to the Event. Following the satisfactory completion of the Event, SMG shall make a deposit into the appropriate Operating Account established above of the amount in such ticket sale account and shall pay from the Operating Account Event expenses and such other amounts that are due. All Operating Revenues collected by SMG shall be deposited into such accounts and Operating Expenses shall be paid by SMG from such accounts.

The Operating Accounts shall remain the property of City at all times. SMG shall have complete control and authority as to the Operating Accounts, subject only to the provisions of this Agreement. Monies in the Operating Accounts and any interest thereon shall be applied first to the payment of Base Fees accrued through the end of the prior month and thereafter to any other Operating Expenses for such Facility then accrued. The balance shall be retained in the Operating Accounts as reserve for payment of future Operating Expenses for such Facility. If, at the end of any Fiscal Year, there shall be a balance in the Operating Accounts in an amount in excess of the anticipated working capital and Operating Expenses for the first month of the ensuing year, SMG shall disburse such excess to City on or before the fifteenth (15) day of such month, subject to the provisions of this Agreement. The funding of all of the foregoing Operating Accounts shall be made by City to cover all projected Operating Expenses at the Facilities to the extent not covered by the Operating Revenues.

5.3 Capital Equipment; Capital Improvements. The obligation to pay for, and authority to perform, direct and supervise Capital Equipment and Capital Improvements purchases shall remain with City and will not be considered Operating Expenses. As a component of the Business Plan, SMG shall provide to the City its recommendations regarding Capital Equipment and Capital Improvements purchases to be accomplished during the year accompanied by an estimate of the cost of all such items and projects and a request that City budget funds therefore. City shall retain the discretion to determine whether and to what level to fund Capital Equipment and Capital Improvements purchases for the Facilities.

5.4 Limitation of SMG Liability. Notwithstanding any provision herein to the contrary and except for SMG's express indemnification undertakings in Section 8.1 and its obligation under Sections 5.6(a) and 5.6(e) hereof to provide, respectively, the SMG Capital Contribution and a portion of the transition expenses, SMG shall have no obligation to fund any cost, expense or liability with respect to the operation, management or promotion of the Facilities.

5.5 Non-Funding.

(a) The City shall have no obligation to provide funds for the payment of Operating Expenses incurred or committed for after the date SMG receives written notice (an "**Appropriation Deficiency Notice**") of the fact that insufficient funds or no funds have been appropriated for the Facilities.

(b) If the Appropriation Deficiency Notice is of insufficient funds, the City shall pay all Operating Expenses incurred or committed for after such date which are within the aggregate level of appropriated funds specified in the Appropriations Deficiency Notice. The City shall pay all Operating Expenses incurred or committed for prior to the date SMG receives the Appropriation Deficiency Notice. Any failure by the City to provide funds (beyond the aggregate level of appropriated funds) for the payment of Operating Expenses incurred or committed for after SMG receives an Appropriations Deficiency Notice shall not be a breach of or default under this Agreement by the City. Any failure by SMG to perform its obligations under this Agreement shall not be a breach of or default under this Agreement if such breach or default results from the City's

failure to appropriate sufficient funds for the management, operation and promotion of the Facilities.

(c) If the City appropriates funds at (or reduces appropriated funds to) a level that, in SMG's judgment, renders the management of the Facilities not feasible, SMG may, at its option, either (i) continue management of the Facilities at a reduced level consistent with anticipated Operating Revenues and available funding or (ii) terminate this Agreement pursuant to Section 10.1 (with the effect set forth in Section 10.2). Following such termination, SMG shall have the right to resume management of the Facility at such time as the City shall first restore appropriated funds to reasonable levels.

5.6 SMG Capital Contribution.

(a) SMG will contribute One Million and 00/100 Dollars (\$1,000,000.00) to be used by the City to fund a portion of the City's buy-out of the previous management company at the Facility and at the City's discretion to fund future reserves for the operation of the Facilities and to make Capital Improvements at the Facilities.

(b) Subject to Section 5.6(c) below, if this Agreement expires or is terminated at any time, the City shall reimburse SMG for the SMG Capital Contribution based upon the following schedule:

<u>Termination</u>	<u>Reimbursement</u>
After Year 1:	\$1,000,000
After Year 2:	\$1,000,000
After Year 3:	\$833,333
After Year 4:	\$666,667
After Year 5:	\$500,000
After Year 6:	\$400,000
After Year 7:	\$300,000
After Year 8:	\$200,000
After Year 9:	\$100,000
After Year 10:	\$0

(c) Notwithstanding the foregoing, if this Agreement is terminated by the City on account of an uncured material breach by SMG, the City shall reimburse SMG for the SMG Capital Contribution based upon the following schedule:

<u>Termination</u>	<u>Reimbursement</u>
After Year 1:	\$900,000
After Year 2:	\$800,000
After Year 3:	\$700,000
After Year 4:	\$600,000
After Year 5:	\$500,000
After Year 6:	\$400,000
After Year 7:	\$300,000
After Year 8:	\$200,000

After Year 9	\$100,000
After Year 10	\$0

(d) Any repayment of the SMG Capital Contribution under Section 5.6(b) or (c) shall be made by the City unconditionally and without set-off no later than thirty (30) days following the effective date of the expiration or termination of this Agreement.

(e) SMG will pay up to twenty-five thousand dollars (\$25,000) to offset a portion of the management transition expenses. The City and SMG will mutually agree upon a budget for such expenses related to such transition, and the balance of such expenses in excess of \$25,000 will be funded by the City.

6. Records, Audits, and Reports.

6.1 Records and Audits.

(a) SMG shall keep full and accurate accounting records on an accrual basis of accounting relating to its activities at the Facilities and shall provide to the City monthly financial statements in a format similar to that used in other SMG-managed facilities. SMG shall give the City's authorized representatives access to such books and records maintained at the Facilities during reasonable business hours and upon reasonable advance notice. SMG shall keep and preserve for at least three (3) years following each Fiscal Year all sales slips, rental agreements, purchase order, sales books, credit card invoices, bank books or duplicate deposit slips, and other evidence of Operating Revenues and Operating Expenses for such period.

(b) Additionally, SMG shall deliver to the City annual financial statements (i.e., a balance sheet, a statement of profit and loss and a statement of cash flows) within one hundred twenty (120) days after the close of each Fiscal Year for each Facility and cumulatively for the Facilities prepared in accordance with generally accepted accounting principles, accompanied by an independent auditor's report containing an opinion of an independent certified public accountant. The annual audit shall be performed by a reputable firm selected by SMG. The City will have the right to approve the auditor selected, which approval shall not unreasonably be withheld or delayed.

6.2 Monthly Reports. By the twenty-fifth (25th) day of each month during the Term, SMG shall provide to City a written monthly report in a form approved by City setting out each Facility's anticipated activities and financial condition for the upcoming month and reporting on the prior month's activities and finances for each Facility, by Facility.

7. SMG Employees.

7.1 During the Term, SMG shall, within the Approved Budget, select, train and employ at the Facilities such number of employee(s) as SMG deems necessary or appropriate to satisfy its responsibilities hereunder, and SMG shall have authority to hire, terminate and discipline any and all personnel working at the Facilities. SMG may, at its reasonable discretion, periodically adjust or revise the terms and conditions relating to such employment.

7.2 SMG shall assign to the Facilities a competent General Manager and prior to SMG's appointment of the General Manager, SMG shall obtain the approval of such individual from the City (which approval shall not be unreasonably withheld). If the City is unsatisfied with the performance of the General Manager, the City shall have the right to present SMG with written specific issues that must be remedied with respect to performance. SMG and the General Manager shall have sixty (60) days to remedy the specific issues to the City's satisfaction. If the City remains unsatisfied upon the expiration of sixty (60) days, the City may direct SMG to remove the General Manager within thirty (30) days of the date of written request of the City's Authorized Representative.

7.3 SMG employees at the Facilities shall not for any purpose be considered to be employees of City, and SMG shall be solely responsible for their supervision and daily direction and control and for setting, and paying as an Operating Expense, their compensation (including federal, state and local income tax withholding) and any employee benefits, and all costs related to their employment.

7.4 The parties acknowledge that in connection with the performance of its services hereunder, SMG may be required to employ individuals who are full time and/or casual or part-time employees covered by a collective bargaining agreement(s) and in connection with such employment, to make contributions to multiemployer plans (as that term is defined in Section 4001(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")), on behalf of or for the benefit of such employees during the term of this Agreement. Such contribution obligation may expose SMG to withdrawal liability for a share of any unfunded vested benefits under such plans. Accordingly, the City shall indemnify, defend and hold harmless SMG from and against any Losses in respect of any withdrawal liability for unfunded vested benefits that SMG may have under any such multiemployer plans in connection with the hiring and firing of such employees by SMG during the term of this Agreement or the termination of this Agreement. The obligation of the City under this Section 7.4 shall survive the termination of this Agreement. In addition, if requested by the City, SMG shall, during the time that it employs any such union employees, use its best efforts to obtain information from such multiemployer plans regarding the withdrawal liability status, if any, of such plans and the applicability of any statutory exemptions under ERISA with respect to withdrawal liability and shall advise the City of the status of any such information which it obtains from such plans.

8. Indemnification and Insurance.

8.1 Indemnification.

(a) SMG shall indemnify, defend and hold harmless the City and the Agency, and their respective council members, board members, officers, agents, employees and volunteers against any and all Losses whatsoever against them, or any of them, before administrative or judicial tribunals of any kind whatsoever, arising out of, connected with, or caused by SMG or SMG's employees, agents or independent contractors or companies in the performance of, or in any way arising from, the terms and provisions of this Agreement to the extent of SMG's negligence or willful misconduct; provided, however, that the foregoing indemnification shall not extend to Losses to the extent such Losses (i) arise from (A) any breach or default by the City of its obligations under

Section 8.1(b) below, or (B) if the law does not permit the City to provide its indemnification, defense and hold harmless obligations in favor of SMG under Section 8.1(b) below, then any of the items described in clauses (i) through (viii) of Section 8.1(b) below, (ii) are caused by or arise out of the services provided by the architects, engineers and other agents (other than SMG) retained by the City in connection with Capital Improvements or Capital Equipment purchases at the Facility, or (iii) relate to or arise from occupational related diseases of any employee of the City who provides any services at the Facilities. Notwithstanding the foregoing, to the extent that such occupational disease described in clause (iii) above is demonstrated to be directly related to the work of any such Agency or City employee at the Facilities, then the provisions of clause (iii) shall not apply to the extent thereof.

(b) To the extent permitted by law, the City shall indemnify, defend and hold harmless SMG, its partners, officers, agents and employees from and against any and all Losses arising from (i) any material default or breach by the City of its obligations specified herein, (ii) the fact that at any time prior to, as of, or after the commencement of the Term hereunder the Facilities have not been operated, or the Facilities and the premises are not or have not been, in compliance with all Laws, including, but not limited to, the ADA, (iii) the fact that prior to, as of, or after the commencement of the Term hereunder there is any condition on, above, beneath or arising from the premises occupied by the Facilities which might, under any Law, give rise to liability or which would or may require any "response," "removal" or "remedial action" (as such terms are defined under CERCLA), (iv) any structural defect or unsound operating condition with respect to the Facilities or the premises occupied by the Facilities prior to, as of or after the commencement of the Term hereunder, (v) any obligation or liability for physical damage or other Loss to any real property and personal property assets located at the Facilities or intended to be incorporated therein, whether such assets are insured by the City or whether the City decides not to insure for such damage and Losses (including without limitation damages or Losses falling within any insurance deductible), (vi) any non-compliance with any Pre-Existing Agreement on or prior to the commencement of the Term, or (vii) any act or omission carried out by SMG at or pursuant to the direction or instruction of the City, its agents (other than SMG) or employees; provided, however, that the foregoing indemnification under clauses (i), through (viii) above shall not extend to Losses to the extent such Losses arise from any default or breach by SMG of its obligations specified herein.

(c) The indemnity provisions hereunder are the exclusive remedies of the parties under this Agreement with respect to any disputes arising hereunder regarding each party's performance of this Agreement, and those provisions shall survive the expiration or termination of this Agreement. IN NO EVENT SHALL EITHER PARTY BE LIABLE OR RESPONSIBLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR SPECIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, LOST PROFITS), WHETHER BASED UPON BREACH OF CONTRACT OR WARRANTY, NEGLIGENCE, STRICT TORT LIABILITY OR OTHERWISE, AND EACH PARTY'S LIABILITY FOR DAMAGES OR LOSSES HEREUNDER SHALL BE STRICTLY LIMITED TO DIRECT DAMAGES THAT ARE ACTUALLY INCURRED BY THE OTHER PARTY.

8.2 Insurance. SMG shall secure and deliver to the City prior to the commencement of the Term hereunder and shall keep in force at all times during the Term, a commercial general liability insurance policy and automobile liability insurance policy and such other insurance policies as are described in Exhibit "E" hereto.

9. Assignment.

Neither this Agreement nor any of the rights or obligations hereunder may be assigned by either party thereto without the prior written consent of the other party hereto. For sake of clarity, the parties acknowledge that the foregoing does not preclude (i) the assignment by SMG of its rights to receive its Base Fees and Incentive Fees hereunder to its lender(s) as collateral security for SMG's obligations under any credit facilities provided to it by such lender(s), provided that such collateral assignment shall not in any event cover SMG's rights to manage, promote or operate the Facilities hereunder or (ii) the ability of SMG to subcontract certain services related to the operation of the Facility, as permitted under subparagraph (b) of Exhibit "D" and consistent with SMG's practices and the needs of the Facility.

10. Termination.

10.1 Termination Upon Default. Either party may terminate this Agreement upon a default by the other party hereunder. A party shall be in default hereunder if (i) such party fails to pay any sum payable hereunder within thirty (30) days after same is due and payable, or (ii) such party fails in any material respect to perform or comply with any of the other terms, covenants, agreements or conditions hereof and such failure continues for more than sixty (60) days after written notice thereof from the other party. In the event that a default (other than a default in the payment of money) is not reasonably susceptible to being cured within the sixty (60) day period, the defaulting party shall not be considered in default if it shall within such sixty (60) day period have commenced with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default.

10.2 Effect of Termination or Expiration.

(a) In the event this Agreement expires or is terminated, (i) all Operating Expenses incurred or committed for prior to the date of expiration or termination shall be paid using funds on deposit in the account(s) described in Sections 5.2 and to the extent such funds are not sufficient, the City shall pay all such Operating Expenses, (ii) the City shall promptly pay SMG all fees earned to the date of expiration or termination (the fees described in Sections 4.1 and 4.2 hereof (as applicable) being subject to proration, and (iii) the City shall assume, or cause any successor management company retained by it to assume, all outstanding contracts and agreements pertaining to the Facilities as provided in Section 3.2(c) hereof. Upon termination or expiration, all further obligations of the parties hereunder shall terminate except for the obligations that are expressly intended to survive the termination or expiration of this Agreement, including, without limitation, Sections 3.2(d), 7.4, 8.1, 10.2 and 10.3 hereof.

(b) Additionally, the City shall pay, or cause any successor management company to pay, to SMG unconditionally and without set-off the unamortized amount of

the SMG Capital Contribution existing as of such expiration or termination as provided in Section 5.6 hereof.

10.3 Surrender of Premises. Upon termination or expiration of this Agreement, SMG shall surrender and vacate the Facilities upon the effective date of such termination or expiration. The Facilities and all equipment and furnishings shall be returned to the City in good repair, reasonable wear and tear excepted, to the extent funds were made available therefore by the City. All reports, records, including financial records, and documents maintained by SMG at the Facilities relating to this Agreement other than materials containing SMG's proprietary information or property shall be immediately surrendered to the City by SMG upon termination or expiration.

11. Miscellaneous.

11.1 Representations and Warranties.

(a) The City represents and warrants to SMG the following: (i) all required approvals have been obtained, and the City has full legal right, power and authority to enter into and perform its obligations hereunder, (ii) this Agreement has been duly executed and delivered by the City and constitutes a valid and binding obligation of City, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar Laws affecting creditors' rights generally or by general equitable principles, and (iii) the execution and delivery of this Agreement will not violate or cause a breach (with or without notice or the passage of time) under any agreement to which the City is a party.

(b) SMG represents and warrants to the City the following: (i) all required approvals have been obtained, and SMG has full legal right, power and authority to enter into and perform its obligations hereunder, (ii) this Agreement has been duly executed and delivered by SMG and constitutes a valid and binding obligation of SMG, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar Laws affecting creditors' rights generally or by general equitable principles, and (iii) the execution and delivery of this Agreement will not violate or cause a breach (with or without notice or the passage of time) under any agreement to which the SMG is a party.

11.2 Certain Other Provisions.

(a) City Actions. Except as otherwise expressly provided in this Agreement, whenever this Agreement calls for or permits a City approval, consent, election, or waiver, the written approval, consent, election, or waiver of the City Manager or the City Manager's designee shall constitute the approval, consent, election, or waiver of the City, without further authorization required from the City Council; provided, however, that the City Manager may seek such authorization when the City Manager deems it appropriate. Except as otherwise provided in this Agreement, the City Council hereby authorizes the City Manager or the City Manager's designee to deliver such approvals, consents, and

elections as are required or permitted by this Agreement, and to waive requirements or conditions under this Agreement, on behalf of the City.

(b) Cooperation. The parties desire to cooperate with each other in the management and operation of the Facilities pursuant to the terms hereof. In keeping with this cooperative spirit and intent, any dispute arising hereunder will first be referred to the parties' respective agents or representatives prior to either party initiating a legal suit, who will endeavor in good faith to resolve any such disputes within the limits of their authority and within sixty (60) days after the commencement of such discussions. If and only if any dispute remains unresolved after such sixty day period, then either party may initiate litigation and/or terminate this Agreement.

(c) No Partnership or Joint Venture; No Tenancy. Nothing herein contained is intended or shall be construed in any way to create or establish the relationship of partners or a joint venture between the City and SMG. SMG shall not be considered a tenant of the Facilities, and shall gain no right to occupy the Facilities as a tenant or any other property right or interest in the Facilities by virtue of this Agreement.

(d) Entire Agreement; Amendments. This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings with respect thereto. No other agreements, representations, warranties or other matters, whether oral or written, will be deemed to bind the parties hereto with respect to the subject matter hereof. This Agreement shall not be altered, modified or amended in whole or in part, except in a writing executed by each of the parties hereto.

(e) Force Majeure. No party will be liable or responsible to the other party for any delay, damage, loss, failure, or inability to perform caused by "Force Majeure" if notice is provided to the other party within ten (10) days of date on which such party gains actual knowledge of the event of "Force Majeure" that such party is unable to perform. The term "Force Majeure" as used in this Agreement means the following: an act of God, strike, war, public rioting, lightning, fire, storm, flood, explosions, inability to obtain materials, supplies, epidemics, landslides, lightening storms, earthquakes, floods, storms, washouts, civil disturbances, explosions, acts of terrorism, breakage or accident to machinery or lines of equipment, temporary failure of equipment, freezing of equipment and any other cause whether of the kinds specifically enumerated above or otherwise which is not reasonably within the control of the party whose performance is to be excused and which by the exercise of due diligence could not be reasonably prevented or overcome.

(f) Binding Upon Successors and Assigns. This Agreement and the rights and obligations set forth herein shall inure to the benefit of, and be binding upon, the parties hereto and each of their respective successors and permitted assigns. The parties agree that there are no intended third-party beneficiaries of this Agreement.

(g) Notices. Any notice, consent or other communication given pursuant to this Agreement will be in writing and will be effective either (a) when delivered

personally to the party for whom intended, (b) on the second business day following mailing by an overnight courier service that is generally recognized as reliable, (c) on the fifth day following mailing by certified or registered mail, return receipt requested, postage prepaid, or (d) on the date transmitted by telecopy as shown on the telecopy confirmation therefore as long as such telecopy transmission is followed by mailing of such notice by certified or registered mail, return receipt requested, postage prepaid, in any case addressed to such party as set forth below or as a party may designate by written notice given to the other party in accordance herewith.

If to the City, to:

City of Stockton
425 N. El Dorado Street
Stockton, CA 95202
Attention: City Manager
Telecopy: (209) 937-8904

With a copy to:

Office of the City Attorney
425 N. El Dorado Street
Stockton, CA 95202
Telecopy: (209) 937-8898

If to SMG, to:

SMG
300 Conshohocken State Road, Suite 770
West Conshohocken, PA 19428
Attention: President
Telecopy: (610) 729-1590

With a copy to:

Stradley, Ronon, Stevens & Young
2600 One Commerce Square
Philadelphia, PA 19103
Attention: William R. Sasso, Esq. or Steven A. Scolari, Esq.
Telecopy: (215) 564-8120

(h) Governing Law; Venue. This Agreement will be governed by and construed in accordance with the internal Laws of the State of California, without giving effect to otherwise applicable principles of conflicts of law. Any lawsuit pertaining to any matter arising under, or growing out of, this Agreement shall be instituted in San Joaquin County, California.

(i) Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original copy of this Agreement, and all

of which, when taken together, shall be deemed to constitute but one and the same agreement.

(j) Severability. The invalidity or unenforceability of any particular provision, or part of any provision, of this Agreement shall not affect the other provisions or parts hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions or parts were omitted.

(k) Non-Waiver. A failure by either party to take any action with respect to any default or violation by the other of any of the terms, covenants, or conditions of this Agreement shall not in any respect limit, prejudice, diminish, or constitute a waiver of any rights of such party to act with respect to any prior, contemporaneous, or subsequent violation or default or with respect to any continuation or repetition of the original violation or default.

(l) Governmental Compliance. Nothing in this Agreement shall require SMG to undertake any compliance activity to meet requirements under any Law, nor shall SMG have any liability under this Agreement therefore, if such activity requires any Capital Improvements or Capital Equipment purchases, unless the City provides funds for such Capital Improvements and Capital Equipment purchases. Except for the foregoing and subject to available funding, SMG shall operate the Facilities in compliance with all applicable Laws.

(m) Nondiscrimination. In performing its obligations under this Agreement, SMG shall not in a manner that violates or is prohibited by federal or California law, refuse to hire or employ the person, or refuse to select the person for a training program leading to employment, or bar or discharge the person from employment or from a training program leading to employment, or discriminate against the person in compensation or in terms, conditions or privileges of employment.

(n) News Releases/Interviews. All news releases, media interviews, testimony at hearings and public comments by SMG involving financial information about the Facility must be specifically authorized by the City in writing. SMG shall not make any public written or oral statement that is critical or derogatory of the City or the teams playing in the Facility. The City shall not make any public written or oral statement that is derogatory of SMG.

(o) Condemnation. If the whole or any substantial part of any Facilities shall be taken by any paramount public authority under the power of eminent domain, then this Agreement shall be terminated as to such Facilities from the day when the possession of that part shall be taken for said public purpose. All damages awarded for this taking shall belong to and be the property of City, subject to the terms of the sale of the Bonds which partially funded the construction of the Arena and all agreements pertaining to that sale, including without limitation the Site Lease and the Lease Agreement. However, City shall not be entitled to any portion of the award made for loss of business installation or improvements belonging to SMG, if any.

(p) Possessory Interest Tax. SMG and the City agree that it is their understanding that this Agreement does not create a possessory interest subject to possessory interest or property taxes levied or assessed on such interest. SMG and the City agree and acknowledge that this Agreement may be adjudged to create a possessory interest in the Facilities subject to applicable possessory interest taxes or property taxes levied or assessed on such interest. Either party shall have the right to contest in good faith any such taxes or assessments. In the event it is determined by the appropriate body that such taxes are due, such taxes shall be paid from the operating account and the City shall hold SMG harmless therefrom, including any costs and attorney fees SMG may have incurred in contesting such tax. All such payments will be considered an Operating Expense.

(q) Confidentiality/Non-Disclosure by SMG. Subject to applicable public disclosure Laws, SMG shall not disclose to any person, directly or indirectly, either during the Term or at any time thereafter, any information other than that which is necessary pursuant to this Agreement. All documents prepared by SMG and submitted by it to the City and all confidential information of the City given to SMG pursuant to this Agreement are the exclusive property of the City, except for (i) those documents which are proprietary to SMG and (ii) the personnel files and information of SMG's employees which shall remain the property of SMG. Under no circumstances shall any such information or documents be removed from the City without the City's prior written consent.

(r) Rights and Remedies Cumulative. Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise or failure to exercise one or more of such rights or remedies by either party shall not preclude the exercise by it, at the same time or different times, of any right or remedy for the same default or any other default by the other party.

(s) Confidentiality/Non-Disclosure by City. In connection with the performance of SMG's services hereunder, the City acknowledges that SMG may provide the City and its employees, agents and subcontractors with Confidential Information. In addition, in connection with the performance of the services hereunder, SMG may provide to the City and its employees, agents and subcontractors with materials that are protected by copyright of SMG.

(i) The City agrees that it shall keep secret and confidential any and all Confidential Information already disclosed and/or to be disclosed to it by SMG, and the City shall not divulge any such information, in whole or in part, to any third party except as is expressly permitted below in this Section 11.2(s).

(ii) The City shall not use any such information, except for the express purpose of utilizing it in connection with the management of the Facilities. The City shall not directly or indirectly disclose or discuss any such information with any person, other than employees, agents and subcontractors of the City who are directly concerned with the management of the Facility, provided, however, that in the event of any such disclosure to its employees, agents and subcontractors,

the City (i) shall first inform SMG of its desire to make such disclosure, (ii) if requested by SMG, shall require such employees, agents or subcontractors to execute and deliver to SMG prior to any disclosure by the City to him/her/it, an agreement acknowledging a receipt of a copy of the provisions of this Section 11.2(s) and agreeing to be bound by such provisions to the same extent as the City, and (iii) in any event, shall advise in writing all such persons of the existence of the provisions of this Section 11.2(s) and of their responsibility to comply with such provisions.

(iii) "Confidential Information" means any and all proprietary information disclosed (orally, in writing, by inspection or otherwise) to the City by SMG pursuant to this Agreement and any information developed by the City and based upon the information disclosed to the City pursuant to this Agreement. The restrictions upon confidentiality and use of Confidential Information set forth in this Section 11.2(s) do not apply to information which the City can demonstrate was publicly available or lawfully in its possession at the time of its disclosure to the City by SMG.

(iv) With respect to any information or material which is protected by copyright of SMG, no part of such materials may be reproduced, stored in a data base and retrieval system or transmitted in any form or by any means - graphic, electronic, photocopying, recording, mechanical or otherwise - without the prior written permission of SMG.

(t) Exhibits. All exhibits to this Agreement are hereby incorporated herein and made a part hereof by this reference.

(u) Closure of Facilities. City reserves the right, for budgetary reasons, to temporarily or permanently close one or more of the Facilities. Should the City decide to close one or more of the Facilities, City and SMG shall negotiate in good faith changes to the Base Fee and the Incentive Fee, commensurate with the change in responsibilities.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties hereto as of the day and year first above written.

CITY OF STOCKTON

SMG

By: _____

BOB DEIS
CITY MANAGER

By: _____

Name: John F. Burns
Title: Chief Financial Officer

ATTEST:

fwk KATHERINE MEISSNER
CITY CLERK

By: _____



APPROVED AS TO FORM
AND CONTENT:

JOHN M. LUEBBERKE
CITY ATTORNEY

By: _____

EXHIBIT "A"**Benchmark calculation**

	2009			2010		
	Theater	Arena	Total	Theater	Arena	Total
Income						
Rental Income	\$143,245	\$628,198	\$771,443	\$84,123	\$608,772	\$692,895
Event Cost Reimbursement		69,841	69,841	(460)	101,109	100,649
Rent Credits	(30,090)	(198,562)	(228,652)	(12,650)	(62,392)	(75,042)
Concessions & Catering	18,126	402,250	420,376	8,786	353,587	362,373
Novelties Revenue	12,068	20,394	32,462	4,333	41,381	45,714
Premium Seating	-	354,099	354,099	-	482,888	482,888
Advertising and Sponsorship	184,391	311,616	496,007	150,043	374,320	524,363
Ticketing	175,375	382,825	558,200	105,624	526,612	632,236
Facility Fees	52,250	465,505	517,755	35,100	503,562	538,662
Other Revenue	56,309	448,174	504,483	38,977	163,269	202,246
Total Income	\$611,675	\$2,884,340	\$3,496,015	\$413,876	\$3,093,108	\$3,506,984

2-Year Avg.	\$3,501,500
BENCHMARK	\$3,500,000

EXHIBIT "B"

Operating Expenses and Operating Revenues

The Operating Expenses shall include without limitation the following:

1. payroll, SMG benefits (including any customary SMG employee bonus, subject to the Approved Budget) and related costs
2. food and beverage costs, once SMG takes over responsibility for the food and beverage operations pursuant to Paragraph (i) of Exhibit "D" hereto
3. purchase of operating supplies
4. advertising costs related to promotions of the Facility
5. cleaning expenses
6. data processing costs
7. insurance costs related to Facility operations
8. business-related dues, subscriptions, and membership costs
9. printing and stationary costs
10. postage and freight costs
11. equipment rental costs
12. repairs and maintenance costs
13. security expenses
14. cost of office supplies
15. utility and telephone charges
16. cost of employee uniforms
17. exterminator and trash removal costs
18. expenses and costs of any audit
19. possessory interest taxes and related expenses

The Operating Revenues shall include without limitation the following:

1. rental revenues
2. concession revenues (and as long as the Sportservice Corporation Concession Agreement is in effect, such revenues shall encompass the commission payments made by Sportservice Corporation to the Arena)
3. merchandise sales revenues
4. on-site Facility Advertising and sponsorship revenues
5. equipment rental fees
6. utility income
7. box office income
8. miscellaneous operating income
9. income generated from separate agreements with SMG Affiliates pertaining to the Facility
10. interest income
11. reimbursable event expenses
12. all facility fees

EXHIBIT "C"

Pre-Existing Agreements

The following is a list of the Pre-Existing Agreements:

Vendor

Ascentis
ABI
Barco
Great Computer Systems
Micros Filios
Paciolan
Postini
PSI/Protection One
Quality Sound
Simplex Grinnell
Sportservice
Stockton Blue
Translex

Sponsors

Jackson Rancheria (BHT)
Chase
Alpine Meats
Van Ruiten
Jackson Rancheria
Food 4 Less
DBI (formerly San Joaquin Bev)
B & B Heating and Air
Stockton Blue
Kinder's B-B-Q
Imperial Brands (Vodka)
Pepsi
Utility Telephone
La Tequilera, Inc (Tequila)
Trinity Urgent Care
Cal Water
St. Josephs
Bank of AG.
CHP
Dreyers
Kids Care
News 10
Les Schwab
Golden Bear

Suiteholders

Food For Less
Van Ruiten
Neumiller Beardslee
Arnaiz
Collins Electrical
California Welding
Zeiter Eye/Barketts
Golden Bear/ Kevin Dougherty/Vince
Loduca
Jackson Rancheria
BAC/Bank of Stockton
Diede Construction
Hayashi /UOP

Club Seat Agreements

All Club Seat Agreements that expire after
2/25/2011

Event License Agreements

All event license agreements that relate to
events occurring on or after 2/25/2011

EXHIBIT "D"**Services**

Without limiting the generality of Article 2 of this Agreement, SMG shall have, without any prior approval by City except as otherwise expressly noted in this Agreement and below, sole right and authority to:

(a) Administer on behalf of the City the Pre-Existing Agreements. In that connection, the City shall use best efforts to have the counterparty to each Pre-Existing Agreement name SMG as an additional insured under all insurance policies maintained by the counterparty thereunder to the extent that the City is already named as an additional insured thereunder;

(b) Provide or cause to be provided, through itself and/or one or more of its Affiliates and/or third party subcontractors, booking services, Catering and Concession services, maintenance services, and all other services in connection with the management, promotion and operation of the Facility;

(c) Negotiate, execute in SMG's own name, deliver and administer any and all licenses, occupancy agreements, rental agreements, booking commitments, advertising agreements, concession agreements, supplier agreements, service contracts (including, without limitation, contracts for cleaning, decorating and set-up, snow removal, general maintenance and maintenance and inspection of HVAC systems, elevators, stage equipment, fire control panel and other safety equipment, staffing and personnel needs, including guards and ushers, and other services which are necessary or appropriate) and all other contracts and agreements in connection with the maintenance, management, promotion and operation of the Facilities, provided that (i) if any such license, agreement, commitment or contract other than those involving the license, lease or rental of the Facilities in the ordinary course has a term that extends beyond the remaining Term, such license, agreement, commitment or contract must prior thereto be approved in writing by the City (which approval shall be at the City's sole discretion, not to be unreasonably withheld), and (ii) SMG and the City will have joint approval rights (which approval right shall be at each party's sole discretion, not to be unreasonably withheld) for all major revenue streams that can impact the profitability of any Facility, including ticketing, sponsorships, food and beverage, and tenant leases with terms of one year or greater. In connection with any licenses, agreements, commitments or contracts for the Facilities, SMG will use best efforts to include in such documents (i) the right of SMG to assign all of its rights and obligations under such licenses, agreements, commitments and contracts to the City or to any successor management company retained by the City upon the expiration or termination of this Agreement, and (ii) the right of the City to assign its rights and obligations under such documents to any successor management company retained by the City thereafter. Upon the expiration or termination of this Agreement, an assignment and assumption by and between SMG and the City or a successor management company retained by the City shall occur as provided in Section 10.2 hereof.

In addition, SMG may rent any Facility or any part thereof to itself in connection with any event in the promotion of which SMG is involved, so long as such rental is on prevailing rates and terms or such other rates and terms as the City approves. Further, SMG and the City will develop guidelines and parameters which define, describe and limit the amount of risk that may be undertaken in the promotion or presentation of any Event. In the event that SMG determines that it is in the best interest of the City to enter into a greater risk venture, it will not do so without the advice and consent of the City;

(d) Establish and adjust prices, rates and rate schedules for the aforesaid licenses, agreements and contracts and any other commitments relating to the Facilities to be negotiated by SMG in the course of its management, operation and promotion of the Facilities. In determining such prices and rate schedules, SMG shall evaluate comparable charges for similar goods and services at similar and/or competing facilities and shall consult with the City about any adjustments to the rate schedules at the Facilities to be made by SMG;

(e) To the extent that Operating Revenues or funds supplied by City are made available therefore, (i) maintain the Facilities in the condition received, reasonable wear and tear excepted, and (ii) rent, lease or purchase all equipment and maintenance supplies necessary or appropriate for the operation and maintenance of the Facilities; provided that City shall be responsible for undertaking all Capital Improvements and Capital Equipment purchases as provided in Section 5.3;

(f) Pay, when due, on behalf of City, all Operating Expenses from accounts established pursuant to Sections 5.2 of this Agreement;

(g) After consultation with the City's attorney or his/her designee, institute at the reasonable expense of the City, with counsel selected by SMG, such legal actions or proceedings as SMG shall deem necessary or appropriate in connection with the operation of the Facilities, including, without limitation, to collect charges, rents or other revenues due to the City or to cancel, terminate or sue for damages under, any license or agreement for the breach thereof or default thereunder;

(h) Engage in such marketing, public relations, and promotional activities as SMG similarly conducts at comparable facilities designed to develop the potential of the Facilities and the cultivation of broad community support; and

EXHIBIT "E"
INSURANCE REQUIREMENTS
SMG SERVICES

INSURANCE Throughout the Term of this Agreement, SMG shall pay as an Operating Expense and maintain in full force and effect with an insurance company(s) (Company) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A: VII" in Best Insurance Key Rating Guide, the following policies of insurance:

- A. COMMERCIAL GENERAL LIABILITY** insurance which shall include independent contractors, contractual liability, products and completed operations, contingent liquor liability (however, if SMG or one of its affiliates takes over responsibility for the food and beverage and catering services as provided herein, then SMG or such affiliate concessionaire shall maintain liquor liability coverage), personal and advertising injury, public liability and property damage, covering the premises, the operations hereunder, in the amount of One Million Dollars (\$1,000,000.00) per occurrence for bodily injury and One Million Dollars (\$1,000,000.00) per occurrence for property damage. The policy shall include medical liability for EMT's if any while working for SMG.
- B. UMBRELLA LIABILITY** insurance, with a limit of Five Million Dollars (\$5,000,000) in the aggregate.
- C. COMMERCIAL (BUSINESS) AUTOMOBILE LIABILITY** insurance, endorsed for "any auto" with combined single limits of liability of not less than \$1,000,000 each occurrence. (CA 0001)
- D. PROFESSIONAL ERRORS AND OMISSIONS**, Not less than \$1,000,000 per Claim./\$2,000,000 Aggregate. Certificate of Insurance only required.
- E. CRIME COVERAGE**, Not less than \$1,000,000 per occurrence.
- F. EMPLOYMENT PRACTICES LIABILITY** insurance, with coverage of at least One Million Dollars (\$1,000,000.00) for claims relating to the employment practices of SMG at the Facility pertaining to its employees.
- G. WORKERS' COMPENSATION** Insurance, as required under the California Labor Code, and Employers Liability Insurance with limits not less than \$1,000,000 per accident/injury/disease.

Deductibles and Self-Insured Retention

Any deductibles or self-insured retention must be declared to and approved by CITY.

Other Insurance Provisions

The Policy (s) shall also provide the following:

- a.) The Commercial General Liability, the Umbrella Liability and Automobile Liability insurance shall be written on ISO approved occurrence form (see item 1 and 2 above)

and endorsed to name: *City of Stockton, its Mayor, Council, officers, representatives, agents, employees and volunteers are additional insureds*. ISO form CG 20 37 10 01 edition shall be used as the Additional Insured Endorsement. This form must be used with either ISO form CG 20 10 10 01, or CG 20 33 10 01 (or earlier editions of these forms).

- b.) For any claims related to this project, SMG's insurance coverage shall be primary insurance as respects the City of Stockton, its Mayor, Council, officers, representative, agents, employees and volunteers. Any coverage maintained by the CITY shall be excess of SMG's insurance and shall not contribute with it. Policy shall waive right of recovery (waiver of subrogation) against the CITY.
- c.) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days' prior to written notice by certified mail, return receipt requested, has been given to the CITY. Further, the thirty (30) day notice shall be unrestricted, except for workers' compensation, which shall permit ten (10) days advance notice. The Insurer shall provide the CITY with notification of any cancellation, major change, modification or reduction in coverage.
- d.) Regardless of these contract minimum insurance requirements, SMG and its insurer shall agree to commit SMG's full policy limits and these minimum requirements shall not restrict SMG's liability or coverage limit obligations.
- e.) Coverage shall not extend to any indemnity coverage for the active negligence of the additional insured in any case where such an agreement to indemnify the additional insured would be invalid under Subdivision (b) of Section 2782 of the California Civil Code.
- f.) The Company shall furnish the City of Stockton with the Certificates and Endorsements for all required insurance, prior to the CITY's, execution of the Agreement and start of work.
- g.) Proper Address for Mailing Certificates, Endorsements and Notices shall be:
City of Stockton,
Attn: Risk Services
425 N. El Dorado
Stockton, CA 95202
- h.) Upon notification of receipt by the City of a Notice of Cancellation, major change, modification, or reduction in coverage, the Contractor shall immediately file with the City a certified copy of the required new or renewal policy and certificates for such policy.

Any variation from the above contract requirements shall only be considered by and be subject to approval by the City's Risk Services Manager (209) 937-8682. Our Fax is (209) 937-8833.

If at any time during the Term of this Agreement, SMG fails to maintain the required insurance in full force and effect, all work under this Agreement shall be discontinued immediately, and all payments due or that may become due to SMG shall be withheld until acceptable replacement coverage notice is received by the City. Any failure to maintain the required insurance shall be sufficient cause for the City to terminate this Agreement. In the event of insurance cancellation, the City reserves the right to purchase insurance or insure (or self-insure) for the above required coverages, at SMG's full expense.

If SMG should subcontract all or any portion of the work to be performed in this Agreement, SMG shall cover the Sub-consultant, or require each Sub-consultant to adhere to all subparagraphs of these Insurance Requirements section, unless the City Manager otherwise consents in writing.