

**FIRST AMENDMENT TO THE NON-PROFESSIONAL SERVICES AGREEMENT WITH SMG, a  
Pennsylvania general partnership**

This First Amendment to the Agreement for Non-Professional Services entered into \_\_\_\_\_ 2018, between, **SMG, a Pennsylvania general partnership** hereinafter called "SMG", and the CITY OF STOCKTON, hereinafter called "CITY " also referred to as "party" or "parties" respectively.

RECITALS

The CITY and SMG wish to amend the AGREEMENT to add services relating to the Stockton Downtown Marina.

The CITY and SMG wish to amend the AGREEMENT to modify the term length, incentive bonus structure, and compensation to the City.

**NOW THEREFORE**, in consideration of the foregoing and of the mutual promises, covenants, and agreements herein contained, the parties agree to the following amendments:

**Background Section, Paragraph 1 is amended as follows:**

The City is the owner of the Stockton Arena (the "Arena"), the Bob Hope Theater (the "Theater"), Oak Park Ice Arena (the "Ice Center"), the Banner Island Ballpark (the "Ballpark"), and the Stockton Downtown Marina and Morelli Boat Launch (the "Marina"); which together are individually and collectively, as the context requires, the "Facility" or the "Facilities."

**Section 1- "Definitions" is amended to include the following definitions:**

**"Benchmark" means negative Two Million Five Hundred Fifty Thousand Dollars and 00/100 (\$-2,550,000) of Combined Net Operating Performance for the Arena, Theater, Ice Center, and Marina. The Annual Base Fee Shall be included in the Net Operating Performance as an expense for purposes of the Incentive Fee Calculation. Calculation attached as amended, Exhibit A.**

**"Marina"** means the property of the Stockton Downtown Marina located at 455 W Weber Ave, Stockton CA, and the surrounding guest docks located on both the north and south shores, and the Morelli Boat Launch Facilities and parking lot. (Exhibit G)

**Section 2.6(o) –"Other Responsibilities" amends subsection 18 and adds subsections 19-25 as follows:**

*(o) Other Responsibilities*

- 18) Daily operation of the marina office, boat slips, guest docks and Morelli Boat Launch facility;

- 19) Daily monitoring and cleaning of on-site restrooms and showers, docks, electrical boat pedestals, septic pump-out and card -key access systems;
- 20) Customer Service of the boating patrons including marina access, pump out services, policy standards and adherence, and patron billings and collection;
- 21) Fee collection of monthly patrons, daily/overnight guests and boat launch clients;
- 22) Maintenance of Marina equipment and facilities, including lighting, electrical supply and outlets, fire prevention /alarms, sails, docks, locks and access equipment/software, wifi, pumps, a barge, and small tools;
- 23) Security of the Marina property, including docks, slips, guest docks, and Morelli Boat launch facility;
- 24) Legal and environmental response to and vacating process of any and all derelict or abandoned boats, including but not limited to those that fail to pay appropriate moorage and those that are unauthorized in Marina facilities; Operator to use operating budget for such occurrences. For purposes of calculating Operator's incentive eligibility, the City shall not consider any expenses paid in connection with such occurrences in excess of twenty thousand dollars (\$20,000);
- 25) Accounting/reconciliation/auditing of operating budget, specifically, but not limited to all revenues, collections, and expenses; and
- 26) Furnish all services necessary to accomplish the foregoing requirements of this section.

**Section 3.1 "Management Term" is amended as follows:**

- (a) The Management Term of this agreement shall continue as currently stated, having began on February 25, 2011 and shall now end at mid-night on June 30, 2026, 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 July 1, 2026 and ending June 30, 2031 by giving written notice to SMG at least ninety (90) days prior to the end of the Management Term.

**Section 4.1 " Management and Capital Investment Fees" is amended as follows:**

As base compensation to SMG for providing the services hereunder, The City shall pay SMG during the Term an annual fixed fee of Three Hundred Fifty-Five Thousand Dollars (\$355,000) per fiscal year (\$50,000 for the Marina and \$305,000 for the remaining event venues), commencing with the Fiscal Year that begins on July 1, 2018 which amount shall be adjusted upward on the first day of each fiscal year, commencing with the Fiscal Year beginning on July 1, 2019, by the percentage change in the Consumer Price Index – All Urban Consumers (CPI-U) – US City Average – All items, as published by the Bureau

of Labor Statistics of the US 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, except for the month(s) following the execution of this amendment and July 1, 2018. During the time between the execution of this amendment and July 1, 2018; SMG shall be paid a management fee and any incentive fee, if appropriate, based on the original agreement. There will be no additional management fee added for the operation of the Marina during this time as the City will continue to be responsible for all revenues and expenses through the end of the current fiscal year, ending June 30, 2018. SMG shall invoice the City for any approved expenses incurred during the transition period, including Marina coverage staffing costs. SMG and the City will work together to transition the operation prior to July 1, 2018; with the expectation that the transition shall be completed by July 1, 2018. SMG shall assume responsibility for all Marina accounting and operational responsibilities, on July 1, 2018.

**Section 4.2 "Incentive Fee" is amended as follows:**

- (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, beginning July 1, 2018, which fee is equal to twenty-five percent (25%) of the improvement to the Operating Net Financial Performance of the Arena, Theater, Ice Center and the Marina from the Benchmark. The Benchmark shall be set at negative Two Million Five Hundred Fifty Thousand Dollars and 00/100 (\$-2,550,000) of Operating Net Performance from the Arena, Theater, Ice Center and Marina, (including the Base Fee as an expense), (Exhibit A). If a naming rights agreement is reached and implemented for any of the Facilities included in "Facilities" as defined in the Background, the Net Revenues generated from those rights shall be included for the purposes of calculating the Annual Level I Incentive Fee.
- (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 Theater and the improvement of the Marina's combined Guest Dock Operating Revenue Benchmark (MGDB). If only one of the two benchmarks is achieved, then no Level 2 Incentive Fee Shall be due. The MGDB shall be set at Fifty Thousand Dollars and 00/100 (\$50,000) of Operating Revenues from the Marina Guest Docks (North and South Shores), which was determined by using the average Marina Guest Dock Operating Revenues for 2015 – 2017 Fiscal Years. In the event that Paid Attendance and Marina Guest Dock are

achieved at varying Incentive levels, the lesser of the two shall prevail in terms of the percentage of Base fee that shall be paid. Example: If there are 315,000 in paid attendance and the Marina revenues are exceeded by 30%, SMG shall be entitled to a Level 2 Incentive Fee of 20%; the lesser of the two category thresholds.

| Arena and Theater Paid Attendance | Marina Guest Dock Operating Revenues | Level 2 Incentive Fee |
|-----------------------------------|--------------------------------------|-----------------------|
| Up to 300,000                     |                                      |                       |
| 301,000 – 310,000                 | 10% increase over Benchmark          | 10% of Base Fee       |
| 310,001 – 320,000                 | 20% increase over Benchmark          | 20% of Base Fee       |
| 320,001 – 330,000                 | 30% increase over Benchmark          | 30% of Base Fee       |
| 330,001 – 340,000                 | 40% increase over Benchmark          | 40% of Base Fee       |
| 340,001 or Above                  | 50% increase over Benchmark          | 50% of Base Fee       |

Parties agree to discuss Benchmarks in the event current AHL tenant's lease is not renewed, material adverse amendments arise out of an extended lease, or an additional tenant lease is entered.

- (c) Notwithstanding anything to the contrary contained herein, the Incentive Fee owed in any Fiscal Years shall not exceed seventy five percent (75%) of the Base Fee for such year. With respect to calculation of SMG's Incentive Fee for a Fiscal Year hereunder that is not a full twelve (12) months, The Benchmark, MGDB, and the above stated attendance levels shall be prorated to reflect such short Fiscal Year.

**Section 5.6 "SMG Capital Contribution" is amended to add Subsections f through l as follows:**

- (f) SMG will contribute an additional One Million Dollars (\$1,000,000) to be used at the City's discretion within the "Facilities" as defined in the Background of this Agreement. The contribution will be disbursed as follows:

Five hundred thousand dollars (\$500,000) will be disbursed to the City no later than sixty (60) days following the execution of the First Amendment to Agreement C-11-093.

A Second five hundred thousand dollars (\$500,000) will be disbursed to the City within sixty (60) days of the execution of the City's option to extend the term by an additional five years, to June 30, 2031.

- (g) The initial contribution of five hundred Thousand Dollars (\$500,000) as defined in Section 5.6 (f) will be amortized annually between the time of execution of Amendment 1 to this agreement and will be completed by June 30, 2026. Under no circumstance shall any amortization remain beyond June 30, 2026 from the initial disbursement received in 2018.
- (h) If the term is extended per Section 3.1, the second contribution of five hundred Thousand Dollars (\$500,000) as defined in Section 5.6 (f) will be amortized annually between the month of payment and will be completed by June 30, 2031.
- (i) Should the City terminate this Agreement prior to the end of the prescribed term, City shall pay SMG the unamortized balance to the nearest month following the month that the termination occurs. Said unamortized balance will be payable to SMG within ninety (90) days of the termination.

Section 8.2 is revised to include EXHIBIT E and F. Exhibit E shall refer to the Event Venues and Exhibit F shall pertain to the Marina Facility.

**EXHIBIT F     "Insurance Requirements for the Marina Facilities" is attached and incorporated herein.**

**EXHIBIT G     "Map of Marina Facilities" is attached and incorporated herein.**

Except as provided herein, all remaining terms, conditions and provisions of the Agreement are unchanged and unaffected by this Amendment and shall continue in full force and effect as set forth in the Original Agreement.

A copy of the Amendment shall be attached to the original Agreement dated February 24, 2011 for ease of reference.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date first above written by their respective officers duly authorized to do so.

CITY OF STOCKTON

SMG

A Pennsylvania General Partnership

BY \_\_\_\_\_  
KURT O. WILSON  
CITY MANAGER

BY \_\_\_\_\_  
Mr. John Burns  
Executive Vice President and CFO

ATTEST:

BY \_\_\_\_\_  
BRET HUNTER  
CLERK OF THE CITY OF STOCKTON

APPROVED AS TO FORM:

BY \_\_\_\_\_  
JOHN LUEBBERKE  
CITY ATTORNEY

## EXHIBIT 1

## EXHIBIT A

| 4 Year Financials for Level I Incentive  |         |                               |                |                |                |                |                |                |
|--|---------|-------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|
|  |         |                               | Actual         | Actual         | Projected      | Proposed       |                |                |
|  |         |                               | FY2015/16      | FY2016/17      | FY2017/18      | FY2018/19      | 3yr Ave        | 4 Yr Ave       |
| <b>Venues</b>  |         |                               |                |                |                |                |                |                |
|  | Revenue |                               |                |                |                |                |                |                |
|  |         | Arena                         | \$ 1,159,241   | \$ 1,380,618   | \$ 1,505,243   | \$ 1,847,354   | \$ 1,348,367   | \$ 1,473,114   |
|  |         | Theater                       | \$ 295,143     | \$ 317,532     | \$ 514,322     | \$ 644,520     | \$ 375,666     | \$ 442,879     |
|  |         | Ice Rink                      | \$ 387,521     | \$ 390,442     | \$ 421,189     | \$ 481,060     | \$ 399,717     | \$ 420,053     |
|  |         | Sub Total                     | \$ 1,841,905   | \$ 2,088,592   | \$ 2,440,754   | \$ 2,972,934   | \$ 2,123,750   | \$ 2,336,046   |
|  | Expense |                               |                |                |                |                |                |                |
|  |         | Arena                         | \$ 3,096,484   | \$ 3,312,057   | \$ 3,541,020   | \$ 3,625,816   | \$ 3,316,520   | \$ 3,393,844   |
|  |         | Theater                       | \$ 562,249     | \$ 567,665     | \$ 626,124     | \$ 886,245     | \$ 585,346     | \$ 660,571     |
|  |         | Ice Rink                      | \$ 662,764     | \$ 657,689     | \$ 687,439     | \$ 740,076     | \$ 669,297     | \$ 686,992     |
|  |         | Sub Total                     | \$ 4,321,497   | \$ 4,537,411   | \$ 4,854,583   | \$ 5,252,137   | \$ 4,571,164   | \$ 4,741,407   |
|  | Net     |                               | \$ (2,479,592) | \$ (2,448,819) | \$ (2,413,829) | \$ (2,279,203) | \$ (2,447,413) | \$ (2,405,361) |
| <b>Marina</b>  |         |                               |                |                |                |                |                |                |
|  | Revenue |                               |                |                |                |                |                |                |
|  |         | Marina                        |                | \$ 215,295     | \$ 190,500     | \$ 304,061     | \$ 236,619     |                |
|  |         | Sub Total                     | \$ -           | \$ 215,295     | \$ 190,500     | \$ 304,061     | \$ 236,619     |                |
|  | Expense |                               |                |                |                |                |                |                |
|  |         | Marina                        |                | \$ 452,133     | \$ 404,373     | \$ 589,752     | \$ 482,086     |                |
|  |         | Sub Total                     | \$ -           | \$ 452,133     | \$ 404,373     | \$ 589,752     | \$ 482,086     |                |
|  | Net     |                               | \$ -           | \$ (236,838)   | \$ (213,873)   | \$ (285,691)   | \$ (245,467)   |                |
| <b>Combined (Venues + Marina)</b>  |         |                               |                |                |                |                |                |                |
|  | Revenue |                               |                |                |                |                |                |                |
|  |         | Venues                        | \$ 1,841,905   | \$ 2,088,592   | \$ 2,440,754   | \$ 2,972,934   | \$ 2,123,750   | \$ 2,336,046   |
|  |         | Marina                        | \$ -           | \$ 215,295     | \$ 190,500     | \$ 304,061     |                | \$ 236,619     |
|  |         | SubTotal                      | \$ 1,841,905   | \$ 2,303,887   | \$ 2,631,254   | \$ 3,276,995   | \$ 2,123,750   | \$ 2,572,665   |
|  | Expense |                               |                |                |                |                |                |                |
|  |         | Venues                        | \$ 4,321,497   | \$ 4,537,411   | \$ 4,854,583   | \$ 5,252,137   | \$ 4,571,164   | \$ 4,741,407   |
|  |         | Marina                        | \$ -           | \$ 452,133     | \$ 404,373     | \$ 589,752     |                | \$ 482,086     |
|  |         | SubTotal                      | \$ 4,321,497   | \$ 4,989,544   | \$ 5,258,956   | \$ 5,841,889   | \$ 4,571,164   | \$ 5,223,493   |
|  | Net     |                               | \$ (2,479,592) | \$ (2,685,657) | \$ (2,627,702) | \$ (2,564,894) | \$ (2,447,413) | \$ (2,650,828) |
| * For purposes of the Ave. calculation, FY15/16 was not included in the Marina's average as it was highly skewed due to the Sherman boat docking fees that year (\$40k+).  |         |                               |                |                |                |                |                |                |
| Rounded to nearest \$1,000   |         |                               |                |                |                |                |                |                |
|  |         | Venues 4- year Ave            |                | \$ (2,405,000) |                |                |                |                |
|  |         | Marina 3- year Ave.           |                | \$ (245,000)   |                |                |                |                |
|  |         | Sub Total                     |                | \$ (2,650,000) |                |                |                |                |
|  |         | **City's first \$100K Benefit |                | \$ 100,000     |                |                |                |                |
|  |         | Level I Benchmark             |                | \$ (2,550,000) |                |                |                |                |
| ** The City shall receive the first \$100K of improvement in it's entirety, therefore the calualtion has been reduced by \$100,000 prior to setting the Benchmark. The intent is that the City receive some improvement in subsidy (\$100,000), prior to SMG's eligibility for incentives. |         |                               |                |                |                |                |                |                |

## MINIMUM SCOPE AND LIMIT OF INSURANCE

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office Form CG 00 01 covering CGL on an “occurrence” basis, including products and completed operations, property damage, bodily injury and personal & advertising injury with limits no less than **\$5,000,000** per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. **Protection and Indemnity Liability** insurance, endorsed for “any auto” with combined single limits of liability of not less than **\$5,000,000** each occurrence. (CA 0001)
3. **Workers’ Compensation:** as required by the State of California, with Statutory Limits, and Employer’s Liability Insurance with limit of no less than \$1,000,000 per accident for bodily injury or disease.
4. For work done upon navigable waters (including any adjoining pier, wharf, dry dock, etc.); then insurance shall be as required under the United States Longshore and Harbors (USL&H) Workers' Compensation Act and Jones Act for the Maritime as needed.

### Other Insurance Provisions

The insurance policies are to contain, or be endorsed to contain, the following provisions:

- **Additional Insured Status**

The *City of Stockton, its Mayor, Council, officers, representatives, agents, employees and volunteers* are to be covered as additional insureds on the CGL and AL policy with respect to liability arising out of work or operations performed by or on behalf of the Marina operator including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Marina operator’s insurance (**at least as broad as** ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10 and CG 20 37 if a later edition is used).

- **Primary Coverage**

For any claims related to this contract, the Marina operator’s insurance coverage shall be endorsed as **primary** insurance as respects the *City of Stockton, its Mayor, Council, officers, representatives, agents, employees and volunteers*. Any insurance or self-insurance maintained by the *City of Stockton, its Mayor, Council, officers, representatives, agents, employees and volunteers* shall be excess of the Marina operator’s insurance and shall not contribute with it. The City of Stockton does not accept endorsements limiting the Marina operator’s insurance coverage to the sole negligence of the Named Insured.



- ***Notice of Cancellation***

Each insurance policy required above shall provide that coverage shall not be canceled, except with notice to the City of Stockton.

- ***Waiver of Subrogation***

Marina operator hereby grants to the City of Stockton a waiver of any right to subrogation which any insurer of said Marina operator may acquire against the City of Stockton by virtue of the payment of any loss under such insurance. Marina operator agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the City of Stockton has received a waiver of subrogation endorsement from the insurer.

- ***Deductibles and Self-Insured Retentions***

Any deductibles or self-insured retentions must be declared to and approved by the City of Stockton Risk Services. The City of Stockton may require the Marina operator to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

- ***Acceptability of Insurers***

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII if admitted to do business in the State of California; If not admitted to do business in the State of California, insurance is to be placed with insurers with a current A.M. Best's rating of no less than A+:X.

- ***Claims Made Policies***

If any of the required policies provide claims-made coverage:

- The Retroactive Date must be shown, and must be before the date of the contract or the beginning of contract work.
- If Claims Made policy form is used, a three (3) year discovery and reporting tail period of coverage is required after completion of work.

- ***Verification of Coverage***

SMG shall furnish the City of Stockton with original certificates and amendatory endorsements required by this clause. All certificates and endorsements are to be received and approved by the City of Stockton Risk Services before work commences. Failure to obtain the required documents prior to the work beginning shall not waive the Marina operator's obligation to provide them. The City of Stockton reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time, for any reason or no reason.

SMG shall provide the City of Stockton with a copy of its Declarations Page and Endorsement Page for each of the required policies.

- ***Special Risks or Circumstances***

The City of Stockton reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other circumstances.

- ***Certificate holder address***

Proper address for mailing certificates, endorsements and notices shall be:

City of Stockton  
Attention: Risk Services  
400 E Main Street, 3<sup>rd</sup> Floor  
Stockton, CA 95202  
City of Stockton Risk Services Phone: 209-937-5037  
City of Stockton Risk Services Fax: 209-937-8558

- ***Maintenance of Insurance***

If at any time during the life of the Contract or any extension, the Marina operator fails to maintain the required insurance in full force and effect, all work under the Contract shall be discontinued immediately. Any failure to maintain the required insurance shall be sufficient cause for the CITY to terminate this Contract.

- ***Subcontractors***

If the Marina operator should subcontract all or any portion of the work to be performed in this contract, the Marina operator shall cover the sub-contractor, and/or require each sub-contractor to adhere to all subparagraphs of these Insurance Requirements section. Similarly, any cancellation, lapse, reduction or change of sub-contractor's insurance shall have the same impact as described above.

Map of Marina Facilities as noted in picture below:

