

<mark>City of El Cajon</mark> Agenda Report

MEETING: 12/12/17

ITEM NO: 4.1



TO: Mayor Wells, Mayor Pro Tem McClellan, Councilmembers Goble, Kalasho and Kendrick

FROM: Douglas Williford, City Manager

SUBJECT: MANAGEMENT AGREEMENT FOR THE EAST COUNTY PERFORMING ARTS CENTER WITH LIVE NATION WORLDWIDE, INC.

RECOMMENDATION: That the City Council adopt a resolution approving a Management Agreement for the East County Performing Arts Center with Live Nation Worldwide, Inc., and authorizing the City Manager to execute the agreement, and any amendments thereto and extensions thereof, with such changes as the City Manager shall accept with the approval of the City Attorney.

BACKGROUND:

On February 14, 2017, the City Council authorized the City Manager to engage in negotiations with Live Nation for the purposes of arriving at a mutually agreed upon Management Agreement for the East County Performing Arts Center (ECPAC). Since that time, staff has met with Live Nation representatives on multiple occasions to discuss both the details of an agreement, as well as the extent and estimated costs of physical improvements to the building that would be necessary in order for them to successfully manage the facility. These discussions have been extensive in nature and have involved numerous technical staff, as well as legal review, from both Live Nation and the City.

On September 26, 2017, staff presented to the City Council the major business points of the draft Management Agreement with Live Nation. With feedback provided from the City Council, staff has finalized the Management Agreement and is now ready for City Council consideration. During the September 26th Council meeting, questions were posed regarding the proposed agreement and construction costs. Staff has prepared an attached Question & Answer document in conjunction with this staff report that addresses issues raised at the meeting.

Basic Policy Issue in Pursuing an Agreement with Live Nation

Live Nation is the nation's and world's largest live entertainment producer with nearing 200 venues in seven countries, focused primarily in the United States and Europe. In Southern California, the company operates or books numerous venues, including Chula Vista's Mattress Firm Amphitheater, San Diego's House of Blues and three venues owned

by the City of Riverside, two of which have similarities to ECPAC. They also operate several venues in greater Los Angeles. Live Nation Entertainment, Inc., also owns Ticketmaster. There is no more professional or successful live entertainment group anywhere in the United States.

The history of ECPAC has been varied and certainly in its earlier history played host to many major acts. However, in the more recent years that the facility was open, it was primarily used as a local community event center, where local artists and organizations performed.

It must be recognized by both the City Council and the community that if the City enters into a Management Agreement with Live Nation, ECPAC will be marketed on a national level as a major, high quality, professionally managed entertainment event venue of the highest caliber. Among many obvious positive things that this will bring to the community, there are two other outcomes that will also result.

First, as was outlined in September, bringing the facility up to this level of professional excellence and quality will be more expensive than we originally estimated in 2014. The cost of improving the facility lies solely with the City. Second, it is likely that not all the local organizations who once utilized ECPAC will be able to afford to do so in the future. The agreement does provide provisions to assist non-profit and school events to a limited extent and the City Council may choose at a later date to further subsidize such events.

Significant Provisions of the Management Agreement

<u>Nature of the Agreement</u> – Under this agreement, Live Nation would not lease the building, but rather would manage ECPAC on behalf of the City. Live Nation and their employees would essentially be contract staff to the City with specific authorities and financial arrangements that would go along with operating and managing ECPAC, such as booking and promoting events, negotiating entertainment contracts, managing rentals, marketing the venue, managing staff, preparing budgets and sales forecasts, and obtaining and maintaining a liquor license.

<u>Term of the Agreement</u> – The agreement's duration would be an initial term of five years with two additional five-year terms, making the agreement potentially effective for fifteen years. Agreement extensions would be subject to the mutual satisfaction of the City and Live Nation. The term will begin at the point Live Nation begins marketing and booking operations, which will be approximately six months prior to the actual opening of ECPAC.

<u>Management Fee</u> – In exchange for Live Nation's services, the City would pay a management fee of \$375,000 per year through the initial five-year term of the agreement. Subsequent five-year terms would be subject to future negotiation.

<u>Premises Alterations</u> – the agreement indicates that the City is responsible to make certain improvements to ECPAC. Live Nation will provide the City with consulting services during the construction period for a \$50,000 fee. This service will be valuable to ensure Live Nation's successful operation of ECPAC.

<u>Revenue</u>, <u>Expenditures</u>, and <u>Incentive Bonus</u> – under the agreement, all operating revenues

generated from ECPAC (ticket sales, rental revenue, concessions, etc.) belong to the City. Also, all operating and capital expenditures related to ECPAC are the responsibility of the City. Each year, Live Nation and the City will agree upon a pro forma forecasting revenues and expenditures. If Live Nation is able to increase revenue above this pro forma, it would be entitled to an incentive bonus in which the additional revenue would be shared between the two parties. This provision creates a strong financial incentive for Live Nation to outperform the pro forma.

<u>Venue</u> – The agreement defines the space that can be programmed by Live Nation; it includes ECPAC and the outdoor space in front of ECPAC between it and City Hall. Live Nation will be able to market and utilize this large outdoor space as part of the ECPAC experience. It is intended that alcohol will be served both inside and outside the venue, under Live Nation's liquor license.

<u>Number and Types of Events</u> – The agreement specifies that Live Nation will schedule a wide variety of bookings that may include performing arts, cultural events, musical acts, film showing, comedy shows, etc. In the first year, Live Nation is expected to schedule fifty events and by the fifth year, a minimum of sixty-five events are expected to be scheduled. While Live Nation will have full authority to book events, the City has the right to prohibit events that may pose a demonstrable threat to public safety or health. Staff does not actually expect this to become an issue; however, this provision is intended to be used only in very unusual circumstances wherein the police may have information of potential problems associated with a particular act or event. Also, non-ticketed political rallies or events would be prohibited. While political speakers would be permitted, they must be ticketed events.

<u>Day Use Fees</u> – For the basic use of the facility, the City Council will be presented a "day fee" schedule for consideration. The schedule will be based on current industry standards in the San Diego region. The City had always adopted such a fee when the facility was previously open. In addition to the day fee, it is important to note that all equipment operations (i.e. soundboards, lighting, etc.) will be performed by Live Nation employees, regardless of who is using the facility. Outside technicians will not be permitted to use the equipment.

<u>Communication between City and Live Nation</u> – The agreement includes provisions that define communication between the parties. For example, each quarter, Live Nation is required to present critical financial records such as budgets, audits, and profit projections, as well as day-to-day operational issues and schedule of events. Also, upon request of the City, Live Nation is required to provide operational reports to help the City understand the management of ECPAC. These communications will allow staff to present periodic reports to the City Council regarding the business operations.

<u>Traffic Control</u> – Because the Civic Center area and adjacent parking structure were always intended to anticipate ECPAC usage (and for many years actually did), it is expected that existing traffic control infrastructure (i.e. stoplights, stop signs, existing driveways, left hand turn pockets, etc.) will be sufficient. A full ECPAC (1,145 seats) should produce no more automobiles than the courthouse, city hall and nearby uses produce every work weekday. The one possible time of conflict may be if early Friday evening event parking temporarily overlaps with Civic Center/courthouse parking. Live Nation and staff will monitor this and will provide additional traffic control, as necessary.

<u>Staffing</u> – Live Nation is responsible for hiring and managing all staff necessary to operate and manage the facility. All Live Nation staff costs are included as part of the City's operational expenditures as outlined above.

<u>Facility Maintenance Fee</u> – The agreement requires Live Nation to charge a \$2.00 Facility Maintenance Fee with each ticket. The proceeds from this fee would be deposited into a City capital improvement fund to pay for future improvements and upgrades to ECPAC. This strategy will be critical in ensuring the long term sustainability of the facility and that no major unforeseen unbudgeted capital expenditures will be required of the City moving forward.

<u>Use by City</u> – The agreement indicates that the City has at least twelve days each year in which ECPAC can be used without having to pay a day fee. The City may assign these days to whomever it chooses.

<u>Repair and Maintenance Obligations</u> – All normal repair and maintenance costs are the City's responsibility, unless the need for the repair was due to Live Nation's inappropriate use of the facility (i.e. damage caused by negligence during an event). The agreement would establish cost thresholds for who actually does the physical repairs and maintenance. The agreement would indicate that Live Nation will be responsible for general maintenance and repairs under \$10,000, while the City will be responsible to manage repairs greater than \$10,000.

<u>Naming Rights</u> – The agreement includes details on how naming rights for ECPAC could be secured and how the proceeds would be allocated. Regardless of whether formal naming rights are achieved or not, both Live Nation and City staff strongly believe that the facility should be renamed to reflect a more regional presence. This is something the City Council has discussed in recent years. No proposals have yet been made and this will be a future decision by the City Council, later into 2018. It is important to recognize, however, that Live Nation will be marketing ECPAC nationally as one of their San Diego venues, as they currently do with their 20,500 seat Mattress Firm Amphitheatre in Chula Vista.

<u>Termination Options</u> – The agreement includes various causes for termination ranging from default of the agreement, significant damage to the property caused by Live Nation, and failure to meet performance measurements. For each option, the agreement would contemplate cure provisions first.

Recommended Improvements and Estimated Costs

Live Nation and City staff have spent considerable time in determining necessary improvements to ECPAC and estimating the costs to complete the work. The September 26th staff report included a comprehensive list of repairs; a summary of repairs is attached as part of the Question & Answer document. Including architectural services, construction management, and all construction costs, staff anticipates the need to invest between \$5 and \$6 million in ECPAC. This figure will become more precise as the City has final plans prepared and secures construction bids. The primary sources of funding have already been set aside for ECPAC improvements. These funds include revenue from the sale from the City to the Redevelopment Agency (several years ago) of the former Police Department building, CDGB funds specifically for ADA improvements, and remaining Redevelopment Funds. The City has limited additional one-time only revenue that is held within the General Fund Reserves. Staff proposes using that to assist with the expected additional costs. On-going annual revenues, such as sales or property tax, would only be used if all other funds proved to be insufficient. Final funding and sources of funds will be subject to final City Council approval.

Process and Timeline

If the Management Agreement is approved by the City Council, the City will immediately secure the services of an architect to complete plans in preparation for procuring construction services. Staff anticipates that an agreement for architectural services will be presented for City Council consideration in January 2018. The City and Live Nation are both committed to accelerating the renovation and opening of ECPAC at the soonest possible time, however, it is important that a realistic timeframe is acknowledged. Depending on whether the City performs a traditional bid or an alternative procurement method, construction could begin as early as late Spring to early Summer 2018, with construction expected to take 7 to 9 months. Therefore, a realistic timeframe for the Grand Opening is Spring 2019. If it can be completed sooner, then we will.

Shortly after execution of the Management Agreement, the City will erect a "Coming Soon" sign along Main Street to inform the public of the major construction that will be occurring inside the ECPAC in preparation for its grand opening.

FISCAL IMPACT:

Estimated capital improvement costs are contained within the staff report. More detailed figures will be presented as the improvement project goes through the procurement process.

SUBMITTED BY:

1 **Douglas Williford CITY MANAGER**

QUESTIONS & ANSWERS September 26, 2017 City Council Meeting Management Agreement with Live Nation

Q: Does the Management Agreement with Live Nation require the City to assume liability for Live Nation's staff and the ECPAC facility?

A: The Management Agreement is similar to many agreements in which cities contract out services. Under the Live Nation Management Agreement, Live Nation will hire, manage and pay its staff. Through the agreement, the City assumes the cost of those staff members. However, under this scenario, the City has no long-term pension liability nor other indirect costs associated with employing the Live Nation staff.

Regarding general liability of ECPAC, the City is responsible to maintain ECPAC in a safe condition and to meet accessibility standards. The City will continue to have liability for the building as it has in the past. Live Nation will assume liability for damages that may occur during use of the facility.

Q: How do non-profit organizations access ECPAC and what do they pay?

A: Any user of ECPAC will pay a room rental fee and then additional charges depending on needs (sound engineering, spot light operators, etc.).

The City will have two different room rental rates—one rate for corporate events and one for nonprofit organizations. Staff will present the rate structure to the City Council at a later date. The draft rate schedule has non-profit rates lower than corporate rates by 40 to 50 percent.

The user of the facility will also pay a fee for use of Live Nation staff to manage an event. An event that involves showing a movie would be less expensive than a full concert because each have different staff demands. In order to ensure greater use of ECPAC, the following clause was negotiated and added to the Management Agreement:

Owner and Manager will meet and confer to discuss programming of certain community events (e.g., events supporting the development and enrichment of children, cultural events, events hosted by a local school district, etc.) at the Premises on open dates. For such mutually approved events, Manager will provide discounted labor and other reasonable consideration, in consultation and coordination with its 'Music Forward' division. Such events will count towards the number of Events to be booked by Manager each year.

It is also important to note that the City has use of ECPAC at no fee, except for any Live Nation staff costs required to manage the event.

In the September 26th staff report, staff suggested that at a later date, the City Council may wish to designate a line item in the budget that could be used to assist non-profit organizations to use the building. As that concept is considered, the City Council will want to define parameters for use of the subsidy. Also, staff will recommend that the subsidy only be used to assist organizations that can meet a certain seat occupancy (perhaps 800 to 900 seats) so that the City is not subsidizing empty seats.

Staff has relied on Riverside's experience to understand the impact on its non-profit organizations. Initially, there was effort made to educate the local non-profit organizations about the cost to use its facilities. Ultimately, Riverside helped non-profit organizations realize the value of using more appropriately sized facilities. Staff also contacted the cities of Escondido and Poway regarding

non-profit use of their respective facilities. Escondido's Center for the Arts offers a discount of nearly 50 percent (depending on the day of the week) to non-profits for use of the facility. Escondido has no price discount for front of house operations and some discounts for technical staff. Poway's hourly use rate is 25 percent less for non-profits and there is no discount for use of staff.

As an alternative to ECPAC, groups that do not need ECPAC's seating capacity can rely on the Greenfield Middle School auditorium. The Greenfield auditorium has a capacity for up to 450 spectators.

Q: What are some key lessons from the City of Riverside?

A: The City of Riverside's experience has been valuable as the City and Live Nation have negotiated the Management Agreement.

Early in the Riverside/Live Nation arrangement, Riverside's performing arts center budget was hindered by 1) certain contractual obligations that existed prior to the Live Nation agreement, (2) a requirement to host a certain number of Broadway-type shows each year, which often required financial subsidy, and 3) a requirement to keep a box office with two employees open during business hours.

Since then, Live Nation and Riverside have been able to stabilize the budget. Riverside and Live Nation recently renewed a second lease term. Earlier this year, the Riverside City Council received a report for the 2016/17 year. The following summarize some of the points made in that presentation:

- Live Nation exceeded number of events by 28 percent,
- Live Nation exceeded revenue projections by 82 percent,
- New events were added such as May 4th Star Wars Fest, UC Riverside School of Business Speaker Series, Adam West (Batman) Tribute, Food Truck Festival, etc., and
- Excluding the management fee of \$600,000 paid to Live Nation, the Riverside facilities are resulting in a profit of approximately \$400,000. Factoring in the management fee, Riverside subsidizes its facilities by approximately \$200,000. Prior to Live Nation managing the facilities, Riverside was experiencing about a \$1 million loss each year.

City of Riverside staff reported that Live Nation has been an excellent partner with public safety staff, has been sensitive to community needs, and has demonstrated that they are the experts in the field of event booking, promotion, and production.

Q: How will security be handled?

A: Live Nation has contractual responsibility to provide security at all scheduled events. The management agreement also allows the City to require that Live Nation develop a security and first aid plan thirty days prior to the event—those plans are subject to the approval of the City's Police and Fire Departments. In speaking to City of Riverside staff regarding the issue of security, staff learned that Riverside has not had the need to cancel an event. Live Nation's success in terms of providing security and medical aid at their events is attributed to its close relationship with local public safety agencies.

Q: What are the anticipated start-up costs?

A: Staff anticipates two significant start-up costs. First, as has been previously discussed, there is significant cost to renovate the facility at the level of excellence desired. This significant renovation will require completing architectural plans and constructing major upgrades to the facility. Several of the significant renovations and preliminary cost estimates include:

New HVAC System	\$1,200,000
General Building Upgrades*	\$1,200,000
New Production (lights, sound, screen, etc.)	\$930,000
Architect, Engineering, Studies	\$535,000
Signage & Graphics	\$450,000
Enlarge Concession Areas	\$170,000
Plumbing	\$150,000
Backup Generator	\$145,000
Fire Safety	\$125,000
Seating Upgrades & Cup Holders	\$125,000

*General Building Upgrades include ADA improvements, replacing hardware, new lighting fixtures, acoustical treatments, interior painting, dressing room/green room renovations, restroom renovations, and upgrade building systems.

Additional costs to those listed above will include construction management and contingencies, which result in an anticipated need to invest between \$5 and \$6 million in ECPAC. This figure will become more precise as the City has final plans prepared and secures construction bids.

The second cost associated with opening ECPAC is related to operational start-up costs that Live Nation will experience. Approximately six months prior to the first show, Live Nation will be working to book shows, establish ECPAC in the market, and promote upcoming events. This will result in expenditures without any offsetting revenue for at least six months. Even after this start-up period, it is anticipated that there will be a stabilization phase until ECPAC is re-established as a prominent venue in the San Diego market.

RESOLUTION NO. _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EL CAJON APPROVING A MANAGEMENT AGREEMENT FOR THE EAST COUNTY PERFORMING ARTS CENTER WITH LIVE NATION WORLDWIDE, INC.

WHEREAS, on February 14, 2017, the City Council authorized the City Manager to engage in negotiations with Live Nation Worldwide, Inc. ("Live Nation") for the purposes of arriving at a mutually agreed upon management agreement (the "Agreement") for the East County Performing Arts Center ("ECPAC"); and

WHEREAS, on September 26, 2017, staff presented the major business points of the Agreement with Live Nation to the City Council, and the Agreement has now been prepared consistent with such business points, and is ready for City Council consideration; and

WHEREAS, the City and Live Nation are both committed to accelerating the renovation and opening of ECPAC at the soonest possible time, with an expected reopening of ECPAC in the Spring of 2019; and

WHEREAS, the City Council believes it to be in the City's best interests to enter into the Agreement with Live Nation for its management of ECPAC, subject to certain conditions.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL CAJON AS FOLLOWS:

1. The above recitals are true and correct, and are the findings of the City Council.

2. The City Council hereby approves the execution of the proposed Management Agreement for the East County Performing Arts Center with Live Nation Worldwide, Inc., substantially in the form as presented to the City Council in this meeting, with such changes as may be approved by the City Manager.

3. The City Manager and City Clerk are hereby authorized and directed to execute said Agreement on behalf of the City of El Cajon.

4. The City Manager is hereby further authorized to execute, and the City Clerk is hereby authorized to attest the City Manager's signature, such amendments to the Agreement as may be necessary to approve any renewal terms of the Agreement as contemplated therein, and to make such other changes as may be necessary, in the determination of the City Manager, to implement the Agreement in the best interests of the City.

12/12/17 (Item No. 4.1) Approve Live Nation Mgmt Agmt for ECPAC 120717

MANAGEMENT AGREEMENT FOR THE EAST COUNTY PERFORMING ARTS CENTER

THIS MANAGEMENT AGREEMENT FOR THE EAST COUNTY PERFORMING ARTS CENTER ("Agreement") is made and entered into as of this _____ day of _____ ("Effective Date") by and between the CITY OF EL CAJON, a charter city and municipal corporation ("Owner"), and LIVE NATION WORLDWIDE, INC., a Delaware corporation ("Manager") with reference to the following terms, conditions and obligations.

ARTICLE I SCOPE

1.1 **Property**. Owner is the fee title owner to that certain real property located at 210 E. Main Street, El Cajon, California, commonly known as East County Performing Arts Center ("Premises"), along with designated exterior areas as shown in Exhibit "C." Owner, in consultation with Manager, will make substantial investment in the rehabilitation of this significant civic structure to contribute to the development of an entertainment hub for downtown El Cajon. At all times during the Term (as defined below) of this Agreement, the Premises shall remain the absolute property of the Owner. No legal title or leasehold interest in the Premises shall be deemed or construed to have been created or vested in Manager, by anything contained in this Agreement.

1.2 **Purpose**. The purpose of this Agreement is to provide for the management and operation of the Premises as a first-class live entertainment and special event venue consistent with the goals of the Owner, on the terms and as set forth in this Agreement. The Premises is owned by the Owner to create a positive economic impact, to stimulate growth for the region, and to provide for the cultural and intellectual enrichment of the community, and Manager recognizes these goals in programming for the Premises. Manager shall exercise its commercially reasonable efforts to optimize use of the Premises to meet these goals by (a) attracting national and international artists of the highest quality; (b) providing a diverse schedule; and (c) fostering the growth of community arts groups and in live music entertainment, but in all instances of (a) - (c), such programming will be consistent with the booking and events at other similar live entertainment venues owned or operated by Manager or its Affiliates (as defined below).

1.3 **Engagement**. Owner does hereby engage Manager as the sole and exclusive manager and operator of the Premises, to perform the services described in Exhibit "A" attached hereto and incorporated herein by reference ("Duties") and the terms, conditions and obligations contained elsewhere in this Agreement. Manager does hereby accept such engagement and agrees to perform the Duties, terms, conditions and obligations in accordance with the terms in this Agreement.

1.4 **Owner's Contract Administrator**. Owner hereby authorizes City Manager, or such person designated by the City Manager, as the Contract Administrator, as defined in Section 6.4 of this Agreement, to perform all tasks related to the execution of this Agreement, excluding those duties reserved for the Owner's legislative body as identified in this Agreement.

ARTICLE II TERM

2.1 <u>Term</u>. The term of this Agreement ("Initial Term") shall commence on ("Commencement Date") and continue for five (5) years thereafter, subject to the termination provisions contained in this Agreement.

Owner may terminate this Agreement during the Initial Term or any "Renewal Term" (as defined

below) based upon Manager's uncured, material default of the terms of this Agreement in accordance with the terms of Article 11 below.

2.2 <u>Renewal Term</u>. Following the Initial Term, so long as Manager is not in default under any material term, duty, condition or obligation of this Agreement following an opportunity to cure in accordance with the terms of this Agreement, this Agreement shall, at Manager's option with prior written notice to Owner for each Renewal Term, renew for two (2) additional terms of five (5) years each (each a "Renewal Term"). The Initial Term and Renewal Term may be referred to in this Agreement collectively as the "Term."

ARTICLE III

MANAGEMENT FEE; PREMISES ALTERATIONS; CONSULTING FEE; CORE SHELL WORK; FF&E ITEMS

3.1 <u>Management Fee</u>. As compensation and in consideration for the services rendered under this Agreement, Owner shall pay to Manager a fee of Three Hundred Seventy Five Thousand and 00/100 (\$375,000)) during the Initial Term ("Management Fee") and the Management Fee shall be renegotiated for each Renewal Term, which shall be approved by Owner's legislative body. Said Management Fee cannot in any event be decreased.

3.2 **Premises Alterations.** The parties acknowledge and agree that the Premises requires certain alterations and improvements, including those needed to bring the Premises into compliance with applicable laws, to allow for Manager to operate in a first-class manner, in accordance with the standards set forth in this Agreement. The parties agree to mutually agree upon a suitable scope of work for both "Core Shell Work" and "FF&E Items" (defined below) and a related construction schedule, with the understanding that Owner alone is responsible for the cost (including all cost overruns) associated with any improvements or alterations to the Premises. The parties further acknowledge and agree that Owner shall be solely responsible for obtaining all bids and facilitating any and all RFP processes, as required by applicable laws, to allow for the pricing and execution of all such work to the Premises.

3.3 Consulting Fee. In addition to the Management Fee, Owner shall pay to Manager a consulting fee in the amount of \$50,000 ("Consulting Fee") beginning on the Effective Date through the date that is fifteen months following the Effective Date ("Expected Completion Date"). In consideration for this payment, Manager shall confer and consult with Owner on the design, construction and other aspects related to Owner's renovation of the Premises, all to be completed at Owner's sole cost and expense but in accordance with Manager's recommendations and operating specifications (the "Venue Renovations"). The Venue Renovations (consisting of the "Core Shell Work" and "FF&E Items") shall include but not be limited to those required to bring the Venue to a first-class condition of 1,142 seated sellable capacity, in accordance with mutually approved plans and specifications and a budget, completion of which shall be considered a material inducement to Manager entering into this Agreement. If the Venue Renovations are completed prior to or upon the Expected Completion Date, Manager shall nonetheless retain the full Consulting Fee. If, however, the Venue Renovations are not completed for any reason after the Expected Completion Date, Owner shall pay to Manager a continued consulting fee in the amount of \$10,000 per month until such time as the Premises are suitable for occupancy as reasonably determined by Manager and Manager is reasonably able to undertake the booking and operating activities contemplated by this Agreement. Notwithstanding anything contained herein to the contrary, Owner shall allow Manager reasonable access to the Premises in advance of the Expected Completion Date to allow for employee training, orientation, pre-opening and other activities related to Manager's duties under this Agreement. Notwithstanding anything contained herein to the contrary, if Owner fails to complete the Venue Renovations in accordance with Manager's specifications by a reasonable "outside" date as reasonably agreed upon by the parties, Manager shall have the right to terminate this Agreement with prior written

notice by Manager and with no liability of any kind to Owner.

3.4 **Core Shell Work.** Notwithstanding anything contained herein to the contrary, Owner shall be solely responsible for the costs/expenses (including all overruns, contingencies, etc.) and contractual performance (with Owner appointing Manager as the Owner's Representative) of all Venue Renovations. For the avoidance of doubt, Owner shall be solely responsible for the cost and contractual performance (including any liability for defective work) and timely completion of Core Shell Work, to include but not be limited to:

(a) General scope: HVAC, plumbing, fire protection, roofing and electrical;

(b) Any structural/occupancy items to allow for issuance of a certificate of occupancy of 1,142 sellable capacity; and

(c) All work needed to bring the Premises into compliance with applicable laws.

3.5 **FF&E Items.** With Manager's input, Owner agrees to enter into contracts, appointing Manager as the Owner's Representative, for the performance of certain FF&E Items to consist of production, concessions, signage, low voltage interiors – painting, lighting, art, the cost, the scope, cost and schedule of which shall be approved in writing by Owner. Manager shall assist Owner in the sourcing and selection of suitable vendors and in developing the appropriate scope of work for the FF&E Items, subject to Owner's approval. For the avoidance of doubt, Owner shall be solely responsible for the cost and contractual performance (including any liability for defective work) and timely completion of the FF&E Items.

3.6 **Incentive Bonus Eligibility**. Manager shall be eligible for an incentive bonus in each fiscal year for every dollar the anticipated operating income ("AOI") set forth in the Proforma, as revised annually, attached hereto as Exhibit "B" and incorporated herein by reference ("Proforma") is increased up to and including breaking even. Manager and Owner agree to split the additional income 70/30, with Owner receiving 70 percent and Manager receiving 30 percent. For every dollar of AOI beyond breaking even, Manager and Owner agree to split 50/50.

3.7 <u>Annual</u>. For purposes of this Article III, "annual" shall correspond to the annual year, and for purposes of this Agreement, the fiscal year shall be the fiscal year from July 1st to June 30th each year.

3.8 **<u>Payment</u>**. Manager shall be paid the Management Fee monthly by the fifth (5th) of each month. The first payment shall be due within thirty (30) days from the Effective Date.

3.9 <u>Name of Facility</u>. Parties acknowledge that the name of the Premises shall be renamed to attain national name recognition which will complement Manager's marketing of the Premises. A new name shall be agreed upon by both Parties by written mutual consent.

ARTICLE IV EVENT

4.1 **Event**. An event ("Event") shall mean a show for which tickets are made available for sale to the general public or any other type of ticketed or non-ticketed programming, rental, promoted event, special event, etc., and which involves a scheduled beginning and ending time typically all within the same day (or for evening Events, typically commencing in the evening and concluding before 2:00 a.m. of the succeeding day) and shall include, without limitation, all live musical events, live entertainment events, movies, community and cultural events public and private rentals, special events and public and private functions.

4.2 Number of Events. For the first full year after the Commencement Date, Manager shall use commercially reasonable efforts to ensure that not less than fifty (50) Events for the first fiscal year shall be held at the Premises. The increase in the number of events for the remainder of the term is set forth in Exhibit "A." Notwithstanding anything contained in this Agreement to the contrary, all of Events will be pro-rated for any stub period/partial year. Manager acknowledges that the Premises are intended to be operated as a first-class live entertainment and special event venue. Owner shall review the schedule on a quarterly basis. Manager shall have discretion to make the Premises available for suitable Events. Manager shall seek Owner's prior written approval for any Events that have demonstrable and 'published' (e.g., in national or local news outlets and media) evidence of public safety, health and welfare concerns ("Pre-Approved Events"). Manager's designated representative (or such other person identified by Manager) will send, via e-mail, any proposed "Pre-Approved" Event to the person identified by Owner for approval ("Event Approval Request"). Within 24 hours of Manager sending the Event Approval Request, Owner will respond via e-mail with either "Approved" or "Disapproved." If "Disapproved," the parties will confer in good faith to attempt to resolve any issues. Owner's failure to respond to any Event Approval Request within 24 hours will be deemed "Approved." Once a particular Event is "Approved" by Owner, it will be considered "Approved" for future bookings. "Pre-Approved" Events that are "Disapproved" shall nonetheless count towards Manager's number of Events contemplated by this Agreement.

Notwithstanding anything contained in this Agreement to the contrary, the Plaza as depicted in Exhibit "C" attached hereto and incorporated herein by this reference (the "Plaza") shall be included within the Premises. Any programming booked by Manager in the Plaza, accordingly, shall count toward Manager's Event obligations, as set forth in this Agreement. Further, notwithstanding anything contained herein to the contrary, all references to approval or consent shall be deemed to mean approval or consent not to be unreasonably conditioned, withheld or delayed.

4.3 <u>Promoter</u>. Manager, or entities with whom Manager has an ownership interest or relationship, may act as a promoter of Events which are scheduled at the Premises; provided, however, that Manager at all times shall impose upon such persons the same terms and obligations which would be imposed upon disinterested third party promoters and shall not deviate at all from the applicable fee schedule without the prior written approval of Owner. Manager, its Affiliates or entities with whom Manager has an ownership interest or relationship also may act as promoters of Events which are scheduled at theaters or venues, other than the Premises anywhere, including in San Diego County, it being understood that this Agreement imposes no radius or other restriction upon Manager, its Affiliates, etc.

4.4 **Booking Policies**. Manager's booking and the Events booked for the Premises will be consistent with the booking and events at other similar live entertainment venues owned or operated by Manager or its Affiliates. "Affiliate" shall mean an entity that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a specified entity. For purposes of this definition, "control" means ownership of equity securities or other ownership interests which represent more than fifty-one percent (51%) of the voting power in the controlled entity. Manager covenants and agrees to book Events each calendar year that are balanced so as to ensure a reasonable blend of diverse programming and cultural experiences. Manager shall have no obligation, however, to book any type of category of Event or specific Events that are unprofitable, as reasonably determined by Manager. Notwithstanding anything to the contrary in this Agreement, Manager will deliver to Owner an Operating Manual for all Events including security, first aid and evacuation plans. If there are concerns based upon incidents arising at Events, Owner has the right to require Manager to provide a security and first aid plan for an Event, thirty (30) days prior to the scheduled Event, and subject to the approval of the City of El Cajon Police and Fire Departments from time to time.

4.5 <u>Presentation Schedule</u>. To the extent available, Manager will provide Owner with a preliminary outline of Events, which will be subject to change, at Manager's sole discretion. Manager will have control over all programming and details such as artist or group approval, performance schedule and length and other artistic and promotional matters, including but not limited to artist and performance selection, exhibition them and schedules, presentational and production specifics and artist content, consistent with conditions of this Agreement.

4.6 <u>Confidentiality</u>. Whenever Manager provides Owner with information which is exempt from public disclosure under the California Public Records Act, Government Code section 6250 et seq., Owner shall cooperate with Manager in a good faith effort to maintain the confidentiality of such documents, to the extent allowed by law and if otherwise not compelled by law to disclose such documents.

4.7 Licensing Beyond Term. Owner and Manager acknowledge that the booking of Events into the Premises requires a long lead time and that these Events are often contracted up to twelve (12) months prior to the dates of performance. The attraction and servicing of these Events requires a substantial effort on the part of the Manager. Manager and Owner agree that Manager's efforts to book Events beyond the end of Manager's Initial or Renewal Term is in the best interest of the Owner and Manager should be compensated for efforts made from which the Owner, after the term of this Agreement, will benefit. Manager shall use its best efforts to obtain fully executed Use Agreements to use the Premises on dates which fall beyond the date on which this Agreement terminates. Upon notification of non-renewal of this Agreement by either party, Manager will refer all post-term booking inquiries to the new management entity or to another representative designated by Owner. At the end of Manager's term, Manager shall submit to Owner copies of signed Use Agreements to rent the Premises for any bookings beyond the end of Manager's term.

4.8 <u>**Deposit</u>**. To confirm the rental of Premises for a specific date and time, Manager shall collect a deposit of an amount appropriate for the length and type of Event being held.</u>

4.9 <u>Marketing</u>. Manager shall use reasonable efforts, consistent with marketing practices in the industry, to disseminate information and bring the Premises to the attention of a broad base of potential users.

ARTICLE V USE OF THE PREMISES

5.1 <u>Use</u>. Manager shall, in a manner similar to operations by Manager and its Affiliates at other locations nationally, use reasonable efforts to schedule Events and to maximize the use and profitability of the Premises, which schedule shall be based on a policy and rental rate structure that supports theater use by non-profit and for profit entities. Manager shall enter into written Use Agreements with third parties (collectively, "Users" or individually a "User") for use of the Premises for Events in accordance with the User Fee Schedules, which sets forth only minimum rental rates. The User Fee Schedules will be proposed by Manager each January and approved by Owner's legislative body for the following fiscal year. Notwithstanding anything contained herein to the contrary, Owner shall have the right to determine Use Fee Schedules solely for non-profit Events. For all other Events, Manager has the right to determine all User Fee Schedules in its sole discretion.

In negotiating Use Agreements with third parties, Manager shall be permitted to deviate from the User Fee schedule without Owner's prior written consent if determined by Manager, using its reasonable business judgment, to be necessary or appropriate with respect to the specific situation.

5.2 <u>Use Agreements</u>. On Owner's behalf, Manager shall enter into written agreements with each party wanting to use the Premises ("Use Agreement"). Manager shall employ and pay for legal

services as an Operating Expense (defined below) as needed to draft and review Use Agreements or contracts pertaining to the use of the Premises. Via e-mail, Manager shall provide one original Use Agreement to all users and shall retain one original copy in the Manager's file available for inspection by Owner at any time.

5.3 **Operation of Premises**. Manager shall have the exclusive right to distribute tickets, operate a ticket office, and charge admission for Events at the Premises. Manager, or its concessionaire, shall also have the exclusive right to sell food and beverages as well as concessions, clothing, novelties, and publications and related items (collectively "Concessions") within the Premises as appropriate and in compliance with applicable laws. Notwithstanding anything in this Agreement to the contrary, Manager will have the right to serve liquor in the "performance hall" area and the Plaza as shown in Exhibit "C." Events that include amplified music or sustained amplified sound should typically be prohibited in the Plaza on the first, second, third and fourth Tuesdays of each month. Manager should coordinate with Owner to determine if a first through fourth Tuesday is available for an Event. Subject to Section 8.4(b) below, all revenue derived from the sale of Concessions at or around the Premises ("F&B Revenue") shall be considered Operating Revenue.

5.4 **Facility Fee**. Manager shall impose a Facility Maintenance Fee in an amount, consistent with industry standard, as mutually agreed by the parties ("Facility Fee") in order to underwrite the future maintenance of the Premises. Manager shall include the Facility Fee requirement in all Use Agreements and ticket sale agreements for the Premises and shall deposit one hundred percent (100%) of the Facility Fee proceeds to the Operating Account (as defined below) to be used to underwrite maintenance operations for the Premises. As of the date of this Agreement, the minimum Facility Fee is \$2.00, which is in accordance with industry standard. in accordance with industry standard

5.5 **Use of Premises Names or Logos**. Manager shall have the right to use throughout the Initial Term and any Renewal Term (and permit others to use in furtherance of Manager's obligations hereunder), for no charge, the name and all logos of the Premises, on Manager's stationery, in its advertising of the Premises, and whenever conducting business of the Premises; provided, that Manager shall take all prudent and appropriate measures to protect the intellectual property rights of Owner relating to such logos. All intellectual property rights in any Premises logos developed by Manager or Owner shall be and at all times remain the sole and exclusive property of the Owner. Manager agrees to execute any documentation requested by Owner from time to time to establish, protect or convey any such intellectual property rights. Owner is required to obtain a license from Manager to use any of Manager's intellectual property.

5.6 <u>Use by Owner</u>. Owner shall be entitled to twelve (12) occasions in each fiscal year during the Initial Term and any Renewal Terms, subject to the terms and conditions hereof, to make use of the Premises for hosting an Event ("Owner's Use"), provided however, that the booking for Owner's Use shall be subject to Manager's previously booked Events and provided, further, that Owner will provide Manager prior written notice requesting dates for Owner's Use, all in accordance with and governed by Manager's current challenge process. Contract Administrator or his designee shall be Owner's designated agent to coordinate with Manager's staff for Owner's Use of the Premises. Owner's Use events shall count toward the number of Events to be booked by Manager each year. The annual number of Owner's Use are "non-rolling," so that if not used in any given fiscal year, they do not accrue to the next or subsequent years.

Owner and Manager will meet and confer to discuss programming of certain community events (e.g., events supporting the development and enrichment of children, cultural events, events hosted by a local school district, etc.) at the Premises on open dates. For such mutually approved events, Manager will provide discounted labor and other reasonable consideration, in consultation and coordination with its 'Music Forward' division. Such events will count towards the number of Events to be booked by Manager each year.

Owner shall not pay any user or rental fee, for Owner's Use. Owner shall, however, after receipt of a written invoice, reimburse Manager for all actual labor costs incurred by Manager to facilitate the Owner's Use. Manager shall retain exclusive rights to the operation of all concessions and other operations at the Premises during Owner's Use, including, without limitation, food and beverage concessions and sales, including alcoholic beverages (but Owner shall have the right to prohibit the sale of alcoholic beverages for any Owner's Use). All proceeds of such sales and concession operations shall be the sole property of Owner. Manager will ensure that the pricing for any concessions shall not exceed the normal pricing therefor charged at standard Events at the Premises.

5.7 <u>Complimentary Tickets</u>. Owner shall be entitled to receive a maximum of three hundred (300) complimentary tickets each year with no more than ten (10) tickets available for any single Event at the Premises that is open to the general public and is presented or promoted by Manager ("Complimentary Tickets"), unless a greater number is agreed to by Manager. Owner may not engage in the sale or re-sale of the Complimentary Tickets nor may Owner offer any Complimentary Tickets to the intended user prior to the date the tickets have first become generally available to the public.

5.8 <u>Website</u>. Owner shall retain ownership of the Premises website domain but Manager shall have the obligation to maintain and upkeep its contents. Owner shall have the right to reject any obscene (as defined by applicable laws) content following good faith consultation and discussion with Manager to try and revise the content in a mutually acceptable way.

5.9 **Sponsorship Sales.** Manager has the right to obtain sponsorship (each a "Sponsorship") for any aspects of the use of the Venue during the Term, including but not limited to naming rights (e.g., NIT and NUT). All revenue derived from a Sponsorship ("Sponsorship Revenue") as a result of Manager's solicitation efforts shall be distributed to the parties as follows: first, a onetime commission in the amount of 20% shall be payable to Manager, then 40% to Manager, 60% to Owner, after activation and other costs related to the Sponsorship ("Activation Costs"). The one-time commission may be paid out in a lump sum payment or if the Sponsorship is on a payment plan, the commission may be distributed over the course of the payment plan. In all instances, the Owner has the right to approve any prospective Sponsorships in advance solely to ensure the content will be general public appropriate, such approval not to be unreasonably conditioned, withheld or delayed and, in all circumstances, a response will be provided to Manager in writing (including via e-mail) within ten (10) business days of Manager's submission to Manager for approval.

5.10 **Political Activities**. The Premises shall not be utilized by Manager for the purpose of working or campaigning for the nomination or election to any public office, whether partisan or nonpartisan. Notwithstanding the foregoing, Manager may rent all or a part of the Premises to persons or entities for ticketed political activities (e.g. the Premises may not be used for political rallies or demonstrations).

5.11 **Ownership of the Premises, Data, Equipment and Materials**. Owner will at all times retain ownership of the Premises, including but not limited to real estate, technical equipment, furniture, displays, fixtures and similar property, including improvements made during the Initial Term and each Renewal Term at the Premises, except for any items purchased/paid for by Manager, which items shall belong solely to Manager at the end of the Term, unless said items are attached to the Premises and the removal of the same will cause damage to the Premises, in which case the items will become the property of the Owner. Any data, equipment or materials furnished by the Owner to Manager or acquired by Manager as an Operating Expense shall remain the property of the Owner, and shall be returned to the Owner shall not have the right to use any third party software licensed by Manager for general use by Manager at the Premises and other Premises managed by Manager, the licensing fee for which is proportionately allocated and charged to the Premises as an Operating Expense (as defined below); such software may be retained

by Manager upon expiration or termination hereof. Furthermore, the Owner recognizes that any Operations Manual to be developed and used by Manager hereunder is proprietary to Manager, and shall belong to Manager at the end of the Term; Owner shall not use or maintain copies thereof upon the end of the Term.

Owner Access. Owner and Owner's agents shall have the right to access the Premises at 5.12 least one (1) time each quarterly period for the purpose of inspecting the same and to take all such action thereon as may be necessary or appropriate for any such purpose provided for under this Agreement (but nothing contained in this Agreement shall create or imply any duty on the part of Owner to make any such inspection or to do any such work). Owner will coordinate such access in advance with Manager so as to minimize interference with Manager's operations and Events. Owner, and its authorized agents, representatives, and employees, may enter the Premises at any time in case of emergency, and otherwise with at least twenty-four (24) hours prior notice reasonably coordinated with Manager to: (i) inspect the Premises; (ii) conduct tours of the Premises as an entertainment venue; (iii) determine whether Manager is complying with all its obligations hereunder; (iv) take possession due to any material breach of this Agreement following notice and a reasonable opportunity to cure in the manner provided herein; (v) perform any covenants of Manager which Manager fails to perform following notice and a reasonable opportunity to cure; (vi) to perform duties of Owner as set forth in this Agreement; and (vii) repair, alter or improve the Premises or any portion of the Premises, and may for such purposes erect, use and maintain scaffolding, pipes, conduits and other structures in and through the Premises where reasonably required by the nature of the work to be performed; provided, however, that all such work shall be done as promptly as reasonably possible and so as to cause as little interference with the operation of this Agreement.

5.13 **Liquor License**. Manager, with the assistance of Owner, must obtain and maintain a liquor license and must comply with all requirements of the liquor license and other applicable laws regulating the sale of alcoholic beverages. Manager must also limit sales of liquor on the Premises to only those times when an Event is being held at the Premises and to refrain from liquor sales at the Premises during all other times. Manager agrees that there shall be no liquor sold or served between the hours of 2:00 a.m. and 6:00 a.m.

ARTICLE VI PERSONNEL

6.1 **Employees**. Manager shall hire and supervise employees who are required to operate the Premises on a regular Event basis ("Employees"). These Employees shall not be deemed employees of Owner, and Manager shall be responsible for and shall make timely payment of all Employee costs. Manager shall provide Owner with evidence that proper workers' compensation insurance is maintained throughout the term hereof. All Employee costs (including but not limited to salary, bonus, benefits and commissions) are Operating Expenses funded by the Operating Account in accordance with the terms of this Agreement. Manager has the right to engage one or more third party concessionaires for the sale and service of food and beverages at the Premises. All costs associated with such concessions agreement shall be part of the Operating Expenses.

6.2 <u>Generally</u>. All Premises staff and other personnel shall be engaged or hired by Manager, and shall be employees, agents or independent contractors of Manager (or an Affiliate thereof), and not of Owner. Manager shall select, in its sole discretion but subject to Owner's right to approve the Operating Budget (as defined below), the number, function, qualifications, and compensation, including salary and benefits, of its Employees and shall control the terms and conditions of employment (including without limitation termination thereof) relating to such Employees. Manager agrees to use reasonable and prudent judgment in the selection and supervision of such personnel. Owner specifically agrees that Manager shall be entitled to pay its Employees, as an Operating Expense, bonuses and benefits in accordance with Manager's then current practices, which may be modified by Manager from time to time in its sole

discretion. A copy of Manager's current practices shall be provided to the Owner upon request for its review, but not retention. Owner agrees that any schedule of salaries and bonuses or other incentives could be a trade secret of Manager.

6.3 **Supervision**. Manager shall supervise, either directly or by delegating such obligation to a responsible, adult management employee (including an Assistant General Manager or AGM) of Manager, every performance that is held at the Premises.

6.4 <u>Contract Administrator</u>. Each party shall appoint a contract administrator who shall monitor such party's compliance with the terms of this Agreement. Manager's contract administrator shall be its General Manager at the Premises, unless Manager notifies Owner of a substitute contract administrator in writing. Owner's Contract Administrator shall be its City Manager or such person designed by the City Manager. Owner shall notify Manager of the name of its Contract Administrator within thirty (30) days of execution hereof.

6.5 <u>General Manager</u>. Personnel engaged by Manager will include an individual with managerial experience in similar theaters to serve as a full-time on-site General Manager or AGM of the Premises. The General Manager will have general supervisory responsibility for Manager and will be responsible for day-to-day operations of the Premises, supervision of employees, and management and coordination of all activities associated with events taking place at the Premises.

6.6 Manager's Other Activities; Management Entity. Manager may engage in the operation of theater and venues other than the Premises. However, the General Manager or AGM as described in Section 6.5, shall during the Term thereof remain the person principally responsible for managing the Premises, and shall devote such time to Manager's obligations hereunder as shall be necessary to operate the Premises in accordance with the terms of this Agreement.

ARTICLE VII MAINTENANCE AND INSPECTION

7.1 Repairs and Maintenance Manager Obligations.

a. All as Operating Expenses, Manager shall maintain and keep in good order, condition, and repair the structural integrity of the Premises and all improvements, fixtures, furniture, furnishings, and equipment situated on or used in connection for the Premises, compliant with all federal, state and local laws; provided, however, that Manager shall cause the performance of work for any single repair to the structural integrity of the Premises or any improvements, fixtures, furnishings, and equipment situated on or used in connection for the Premises, the cost of which is less than Ten Thousand Dollars (\$10,000.00). Manager shall first apply the proceeds of any damage deposit posted by a rental user, if applicable and available, towards the repair of any damage resulting from such rental user's use of the Premises before determining if the cost of any single repair exceeds the sum of Ten Thousand Dollars (\$10,000.00). Manager shall cause all repairs under Ten Thousand Dollars (\$10,000.00) to be made and treat said repair cost as an Operating Expense.

b. Owner shall maintain and perform landscape maintenance as necessary to maintain in first-class condition including watering/irrigation, fertilization, pruning, trimming, shaping, and replacement, as needed, of all trees, shrubs, grass, and other plants or plant materials, weeding of all plants, planters and other planted areas, staking for support of plants as necessary, and clearance, cleaning and proper disposal of all cuttings, weeds, leaves and other debris, and graffiti.

c. Owner, except as provided above in this subparagraph, shall be responsible to cause performance of work and to pay from the first dollar any cost of repair ("repair costs") that exceeds Ten Thousand Dollars (\$10,000.00) for repairs (structural or non-structural, interior or exterior), and

maintenance required to the Premises and all its fixtures, signs, displays, equipment, machinery, appliances, appurtenances, improvements, alterations, systems (including but not limited to the plumbing system, electrical system, wiring and conduits, heating and air conditioning systems). Notwithstanding the foregoing, Owner may elect to request Manager to cause performance of said work, but the cost of such work shall nonetheless be Owner's sole responsibility.

d. Items of multiples, including but not limited to seats and chairs, which in the ordinary course of business would be repaired, maintained, or replaced in multiple units shall not be considered a single repair item for the purpose of this subparagraph. Manager will have the option to have these multiple units repaired, maintained or replaced. The costs for such repairs, maintenance or replacement shall be deemed to be the total cost for all necessary multiple units.

e. Repairs and maintenance shall be made promptly, as and when necessary. All repairs and maintenance shall be in quality and class at least equal to the original work.

f. Manager shall notify Owner of repairs with costs in excess of Ten Thousand Dollars (\$10,000.00) and request Owner determine the next step regarding the repairs. Owner shall notify Manager in writing within fifteen (15) working days of receipt of Manager's notice to repair that it will either: (i) commence such repairs within thirty (30) days thereafter, (ii) commence forthwith the competitive bidding process as necessary for such repairs, or (iii) request Manager to commence such repairs subject to reimbursement from Owner within 30 days of receipt of invoices evidencing the cost of the work. If Owner requests Manager to commence such repairs subject to reimbursement by Owner, Manager shall commence such repairs. Any repairs made by Manager shall be at competitive market prices and costs.

g. Manager may proceed to make emergency repairs even where the costs exceed Ten Thousand Dollars (\$10,000.00), in which case Owner shall reimburse Manager for the full amount of the repair only if the cost exceeds Ten Thousand Dollars (\$10,000.00) within 30 days of receipt of invoices evidencing the cost of the work. Manager shall give written notice to Owner of the nature and cause of the repair and the cost or estimated cost within twenty-four (24) hours after determining such emergency exists. Throughout this Agreement, the term "emergency repair" shall mean a repair of a condition which, if not accomplished immediately, creates a dangerous or unsafe condition at the Premises or is needed to permit a scheduled Event at the Premises to take place.

h. To the extent permitted by law, the parties agree that the Ten Thousand Dollars (\$10,000.00) limitation on the cost of repairs mentioned in this subparagraph may be adjusted as of July 1st of any year during the Term of this Agreement by mutual agreement of the parties and written amendment to this Agreement. Any repairs that may be required by reason of Manager's negligence (reasonable wear and tear excluded) shall be the sole responsibility, regardless of dollar amount, of the Manager to repair.

i. On or before January 1st of each year during the Term of this Agreement, Manager will make recommendations to Owner for additions of fixtures, furniture, furnishings, and equipment and for capital improvement projects at the Premises for the following Fiscal Year. The term "capital improvement" shall mean improvements of a durable nature costing in excess of Ten Thousand Dollars (\$10,000.00).

j. Owner shall, at its sole cost and expense, make all repairs, improvements and alterations to the Premises that are in the best interest of the public, for life, safety, or required for compliance with all applicable laws, ordinances, rules, regulations, statutes and legal requirements of any governmental body, agency or authority having jurisdiction over the Premises (e.g. ADA; Applicable Laws). Owner shall not be obligated to make any other additions or capital improvements of a cosmetic/aesthetic nature unless Owner: (i) budgets and obligates funds for such improvements, and (ii) if

exceeds the City's purchasing ordinance (\$50,000 at the time of execution of this Agreement) such expenditure has been given approval through its City Council.

7.2 <u>Alterations</u>. Manager shall not make any alterations, improvements or additions in, on or about any of the Premises, without first obtaining Owner's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

a. All alterations, improvements or additions in, on or about the Premises, whether temporary or permanent in character, shall immediately become Owner's property and at the expiration of the Term of the Agreement and shall remain in the Premises without compensation to Manager, unless such alterations, improvements or additions were paid for by Manager, in which case, Manager shall be the owner of such items, unless such items become attached to the Premises and the removal of the same will cause damage to the Premises, in which case, the alterations, improvement or additions shall remain in the Premises.

b. By notice given to Manager no less than ninety (90) calendar days prior to the expiration of the Term of the Agreement, Owner may require that Manager remove any removable alterations, improvements, or additions in, on or about the Premises and purchased by Manager. In that event, Manager shall remove the alterations, improvements or additions at Manager's sole cost and expense and shall restore the Premises to the condition in which the Premises was before the alterations, improvements and additions were made, reasonable wear and tear excepted.

7.3 Mechanic's Liens.

a. Owner shall be responsible for contracting for all improvements and repairs to the Premises, and shall be responsible for hiring all contractors, including subcontractors of any tier, for such work. Owner shall, to the extent permitted by law and except as provided in paragraph (b), below, indemnify the Manager against and hold the Manager and its Affiliates, free, clear and harmless of and from any liens or claims arising out of any work performed, materials furnished or obligations incurred by the Owner.

b. In the event Manager shall cause repairs or improvements to be performed on the Premises by a contractor or subcontractor (e.g., with Owner's consent or in cases of emergency work or repairs), Owner shall reimburse Manager for the costs of such work.

c. Except as otherwise provided above, Manager shall indemnify the Owner against and hold the Owner and the Premises, free, clear and harmless of and from any liens or claims of liens arising out of any non-emergency work performed, materials furnished or obligations incurred by the Manager without Owner's consent, and Manager shall be responsible for the removal of any such liens and all costs to remove same. Failure to remove any such liens within sixty (60) calendar days of written request by Owner shall constitute a default of this Agreement. At its election, but without having any obligation to do so, Owner may pay such liens not timely removed by Manager and the any amount expended by Owner shall be collected as additional rent to be paid by Manager within fifteen (15) calendar days after delivery of a statement for the expense.

7.4 **Property**. Except for all items purchased by Manager, Manager agrees that all furniture, equipment, and other similar property of a personal nature shall be and remain the property of Owner. All fixtures, (i.e. items which are attached to, affixed or otherwise become part of the Premises identified in this Agreement and the removal of which will cause damage to the Premises) shall be property of the Owner.

7.5 **Improvements and Alterations**. Manager agrees to care for all alterations, additions and improvements made by Owner of the Premises and the cost of the same by Operating Expenses. Manager agrees not to alter any existing improvements, except in accordance with plans and specifications

previously submitted and approved in writing by Owner's designated representative and except as otherwise permitted in this Agreement. Where applicable, Owner shall provide Manager with instructions for use of equipment, and train Manager personnel with respect to the care of any equipment installed by Owner. Alterations for the accommodation of the ongoing operation of the Premises shall be the responsibility of Manager and shall be subject to the reasonable prior approval of Owner.

ARTICLE VIII ACCOUNTING/FINANCIAL

8.1 **Operating Budget**. Manager shall use commercially reasonable efforts to meet the yearly projections as set forth in the Proforma. Manager shall notify Owner prior to any changes in the Proforma for Owner's approval, which shall not be unreasonably withheld. Each year during the Term, the parties will work together to establish the Operating Expenses, Required Capital Improvements and projections ("Operating Budget"). Owner acknowledges and agrees that any performance projections are estimates only and not a guaranty of the financial performance of the Premises. Nothing contained in this Agreement shall be deemed to constitute a covenant, representation or warranty of any nature whatsoever, express or implied, by or on behalf of Manager, with respect to the amount of Operating Revenue which is or will be, or which is anticipated to be, generated from the Premises or any portion thereof, and Manager hereby expressly disclaims any such express or implied covenant, representation or warranty.

8.2 **Operating Account**. Manager shall maintain an account at a reputable financial institution from which all Event settlement expenses are paid ("Operating Account"). Monies transferred from the Operating Account will be evidenced by invoices and Event settlement forms. Notwithstanding anything contained in this Agreement to the contrary, Owner acknowledges and agrees that the Operating Account will <u>not</u> be a segregated account, but rather will be part of Manager's larger consolidated payroll/ticket sales/Ticketmaster accounts where inter-company activity and transfers occur. However, all accounting records for the Premises need to be separate.

8.3 <u>Maintenance of Financial Accounts</u>. Manager shall maintain all financial accounts at a federally-insured financial institution acceptable to Owner and, in so doing, shall use reasonable efforts to obtain an interest-bearing account that also has private insurance available to cover deposits in excess of \$100,000.00. Manager shall implement and adhere to such safeguards as are required by the applicable financial institution. All monies deposited in the Operating Account shall be disbursed from said account strictly as provided for in this Agreement. All expenses incurred in maintaining the Operating Account shall be paid from funds in the account as an Operating Expense.

8.4 <u>Allocation of Funds in and Disbursements from Operating Account</u>. Manager shall allocate and disburse funds from the Operating Account as outlined herein. Manager shall cause all Operating Expenses to be paid to the obligees thereof in a timely manner from the Net Operating Revenue (defined below) collected and deposited in the Operating Account. By the 15th of each month during the Term, Manager will submit to Owner a statement ("Monthly Report"), prepared on an annual basis and in form acceptable to Owner, setting forth the Operating Revenue (defined below), Operating Expenses and Net Operating Revenue

Expenses."

a. "Net Operating Revenues" means "Operating Revenues" less "Operating

b. "Operating Revenues" means revenues from the following amounts received by or credited to Manager: ticket sales, ticket service charges, ticket fees, the Facility Fee, merchandise/novelties, Premium Seat Sales ("PSS"), Food and Beverage ("F&B") Revenue and all other revenues from sales at the Premises.

c. "Operating Expenses" means all fixed, variable and show expenses and costs incurred by Manager, which will include but not be limited to, artist fees, co-promoter expense, production expenses (e.g., catering, stagehands, etc.), operation expenses (e.g., security, clean-up/janitorial, police, medical, ushers, etc.), parking costs, concessions, concessionaire fees, advertising expense, sound and light expense, event rent expense, insurance expense, ASCAP/BMI fees, credit card fees, Employee salary, bonus, benefits and commissions, rent, marketing, facility maintenance, utilities, legal fees, consulting fees, travel and entertainment, office supplies and postage, taxes (except as otherwise set forth in the Agreement), bank fees/bad debt, permits, pre-opening costs, house supplies, trash removal and all other costs associated with the operation of the Premises.

8.5 **Responsibility for Operating Expenses**. Upon the Commencement Date, Manager shall be responsible for funding of the Operating Expenses during the Initial Term and any Renewal Term. Operating Expenses shall be monthly, to the maximum extent feasible, offset by Operating Revenues and any remaining Operating Revenues shall be paid to Owner or rolled into the Operating Account at Owner's discretion. Any outstanding Operating Expenses shall be reconciled monthly with Owner reimbursing Manager for the same. By the 15th of each month during the Term, Manager will submit to Owner a report of Operating Revenues, Operating Expenses and Net Operating Revenues. By the 30th of each month during the Term, Owner will reimburse Manager for any Operating Expenses not covered by Operating Revenues. Furthermore, if at any point in time during the Term, Manager has advanced deposits or any other sums exceeding \$100,000 in the aggregate, Owner will reimburse Manager for same within fifteen (15) days of submission of such costs from Manager. Notwithstanding anything contained herein to the contrary, Manager shall have no liability (whether during or after the Term) for negative Net Operating Revenues.

8.6 **Records and Annual Audit**. It is recognized and acknowledged that the Premises is a growing and dynamic business and because of this, certain terms of this Agreement will need to change or be eliminated to more appropriately track or regulate ongoing activity. Manager shall provide to Owner, within twenty (20) days after the end of each calendar quarter, quarterly reports of accounts in accordance with generally accepted accounting principles and certified by Manager as true and correct, in the form acceptable to the Owner, and all records required to be kept by Manager shall be available to Owner upon request. All records must be made available no later than one hundred twenty (120) days after the end of each fiscal year. Manager shall, however, be responsible for and shall pay for any additional audit, accounting or legal costs incurred by either party due to additional investigation warranted because of fraud, theft or gross negligence on the part of the Manager. Within one hundred twenty (120) days after the end of each fiscal year, Manager shall provide a schedule of Net Operating Revenues for the preceding fiscal year, audited by a certified public accountant as being true and correct.

8.7 <u>Annual Budget</u>. Manager will submit to Owner a Proposed Annual Budget not less than one hundred twenty (120) days before the end of the current fiscal year for each year during the term hereof. The Proposed Annual Budget will cover the operations of the Premises for the period July 1st through June 30th of the following year. The Proposed Annual Budget will include estimates of revenues as Owner, but are not to be construed as any guaranty of performance or profitability. A Revised Proposed Annual Budget will be submitted by Manager to Owner on or before July 1st of each year and quarterly thereafter. The Revised Proposed Annual Budget as reviewed and recommended by the Owner will be used to update the Proposed Annual Budget and the Management Fee (which can only be subject to increase, not decrease) as set forth in Section 3.1. The Revised Proposed Annual Budget will be approved by City Council of the City of El Cajon as part of the City's annual budget request. Manager shall also prepare and present a revised forecast after each quarter.

ARTICLE IX INSURANCE

9.1 **General**. Manager shall assume all responsibility for damages to property and injuries to persons, including accidental death, which may arise out of or may be caused by Manager's performance of this Agreement, by its subcontractors or by anyone Manager directly or indirectly employed, and whether such damage or injury may accrue, or may be discovered, before or after termination of this Agreement.

9.2 <u>Commercial General Liability and Automobile Insurance</u>. Prior to Owner's execution of this Agreement, Manager shall obtain, and shall thereafter maintain during the term of this Agreement, commercial general liability insurance and automobile liability insurance as required to insure Manager against damages for personal injury, including accidental death, as well as from claims for property damage, which may arise from or which may concern operations by anyone directly or indirectly employed by, connected with, or acting for or on behalf of Manager.

Manager's commercial general liability insurance policy shall cover both bodily injury (including death) and property damage (including, but not limited to, operations liability, productscompleted operations liability, independent contractor's liability, personal injury liability, and contractual liability) in an amount not less than \$2,000,000 per occurrence and a general aggregate limit in the amount of not less than \$3,000,000.

Manager's automobile liability policy shall cover both bodily injury and property damage in an amount not less than \$1,000,000 per occurrence and an aggregate limit of not less than \$1,000,000. All of Manager's automobile and/or commercial general liability insurance policies shall cover all vehicles used in connection with Manager's performance of this Agreement, which vehicles shall include, but are not limited to, Manager owned vehicles, Manager leased vehicles, Manager's employee vehicles, non-Manager owned vehicles.

9.3 Workers' Compensation Insurance. By executing this Agreement, Manager certifies that Manager is aware of and will comply with section 3700 of the Labor Code of the State of California requiring every employer to be insured against liability for workers' compensation, or to undertake self-insurance before commencing any of the work. Manager shall carry the insurance or provide for self-insurance required by California law to protect said Manager from claims under the Workers' Compensation Act. Prior to Owner's execution of this Agreement, Manager shall file with Owner either (1) a certificate of insurance showing that such insurance is in effect, or that Manager is self-insured for such coverage, or (2) a certified statement that Manager has no employees, and acknowledging that if Manager does employ any person, the necessary certificate of insurance will immediately be filed with Owner. Any certificate filed with Owner shall provide that Owner will be given ten (10) days prior written notice before modification or cancellation thereof.

9.4 <u>**Crime Insurance**</u>. Manager shall purchase from a company acceptable to Owner, at Manager's expense, a crime insurance policy in an amount not less than One Million Dollars (\$1,000,000). The policy shall indemnify the Owner against any fraud or dishonest acts of the Manager, its agents or its employees, individually or in collusion with others. Manager shall maintain such insurance until Owner consents to its removal following a final audit of Manager's records at the end of the contract term.

9.5 <u>Liquor Liability Insurance</u>. Prior to Owner's execution of this Agreement, Manager shall obtain, and shall thereafter maintain during the term of this Agreement, liquor liability insurance in the minimum amount of \$1,000,000 to protect Owner from claims resulting from Manager's sale of alcohol.

9.6 <u>Errors and Omissions Insurance</u>. Prior to Owner's execution of this Agreement, Manager shall obtain, and shall thereafter maintain during the term of this Agreement, errors and omissions professional liability insurance in the minimum amount of \$1,000,000 to protect Owner from claims resulting from the Manager's activities. 9.7 **Umbrella or Excess Insurance**. Prior to Owner's execution of this Agreement, Manager shall obtain and maintain umbrella or excess insurance coverage in the minimum amount of Ten Million Dollars (\$10,000,000). Such excess coverage shall be at least as broad as any underlying coverage. Coverage shall be provided on a "pay on behalf" basis, with defense costs payable in addition to policy limits. There shall be no cross liability exclusion and no contractor's limitation endorsement. The policy shall have starting and ending dates concurrent with the underlying coverages. The Named Insured may determine the layering of primary and excess liability insurance provided that if such layering differs from that described here, the actual coverage program meets the minimum total required limits and complies with all other requirements listed in this Article. Manager shall maintain this coverage for a minimum of five (5) years after final completion and acceptance of the Work. The Umbrella or Excess policy shall contain a clause stating that it takes effect (drops down) in the event the primary limits are impaired or exhausted.

9.8 <u>Requirements</u>. Prior to Owner's execution of this Agreement, in connection with all insurance obligations Manager shall comply with the following requirements and shall continue to comply during the Initial Term and any Renewal Term of this Agreement:

a. Copies of insurance policies or original certificates and additional insured endorsements evidencing the coverage required by this Agreement, shall be filed with Owner and shall include the Owner and its elected and appointed officers, employees and agents, as additional insureds. Said policies shall be in the usual form of commercial general and automobile liability insurance policies, but shall include the following provisions:

It is agreed that the City of El Cajon, and its elected and appointed officers, employees and agents, are added as additional insureds under this policy, solely for work done by and on behalf of the named insured for the City of El Cajon.

b. If the policy is written on a claims made basis, the certificate should so specify and the policy must continue in force for two years after completion of the services. The retroactive date of coverage must also be listed.

c. The policy shall specify that the insurance provided by Manager will be considered primary and not contributory to any other insurance available to the Owner.

d. Insurance required hereunder shall be with companies duly licensed to transact business in the state of California, and maintaining during the policy term a "General Policyholders Rating" of at least A, and a financial class of VII or higher. Manager shall not do or permit to be done anything, which shall invalidate the insurance policies referred to in this Article. No such policy shall be cancelable or subject to modification except after thirty (30) days' prior written notice to Owner. Manager shall at least thirty (30) days prior to the expiration of such policies, furnish Owner with evidence of renewals or "insurance binders" evidencing renewal thereof, or Owner may order such insurance and charge the cost thereof to Manager, which amount shall be payable by Manager to Owner upon demand.

9.9 <u>Mutual Waiver of Subrogation</u>. The Parties hereto release each other and their respective authorized employees, agents and representatives, from any and all claims, demands, loss, expense or injury to any person, or to the Premise or to personal property, including, but not limited to, furnishings, fixtures or equipment located therein, caused by or resulting from perils, events or happenings which are the subject of insurance in force at the time of such loss. Each Party shall cause each insurance policy obtained by it to provide that the insurer waives all right of recovery by way of subrogation against either party in connection with any damage covered by any policy.

9.10 <u>Manager's Failure to Obtain, Pay for, or Maintain Insurance</u>. Manager shall deliver to Owner the required certificate(s) of insurance and endorsement(s) before Owner signs this Agreement.

Manager's failure to obtain, pay for, or maintain any required insurance shall constitute a material breach upon which Owner may immediately terminate or suspend this Agreement. In the event of any termination or suspension, Owner may use the services of another manager, without Owner incurring any liability to Manager. At its sole discretion, Owner may obtain or renew Manager's insurance, and Owner may pay all or part of the premiums. Upon demand, Manager shall pay Owner all monies paid to obtain or renew the insurance. Owner may offset the cost of the premium against any monies due Manager from Owner.

9.11 <u>**City's Insurance**</u>. Owner hereby represents that it has a self-insured retention amount of \$250,000 with excess coverage up to \$25,000,000 for general liability.

ARTICLE X POWERS AND DUTIES OF OWNER

10.1 **Improvements**. Subject to the provisions of the Agreement, Owner may make continuing repairs and improvements to the Premises, at Owner's discretion and cost; provided, however, that Owner shall coordinate, consult and cooperate with Manager in scheduling such improvements to minimize disruptions of scheduled Events.

10.2 **Insurance**. Owner shall insure the Premises against casualty losses, either through selfinsurance or a purchased insurance policy. Premiums for such insurance, if any, shall be paid by Owner. Owner will deliver to Manager a certificate of insurance evidencing Owner's insurance upon Manager's request.

ARTICLE XI DEFAULT AND TERMINATION

11.1 **Default of Manager**. In the event that Manager has failed to comply with any material term of this Agreement ("Default"), Owner shall notify Manager in writing of the nature of the Default and of the corrective action to be taken. If corrective action is not commenced within ten (10) business days after receipt of written notice or such reasonable time given the circumstances and completed within a reasonable time thereafter, then, if such default is not cured within thirty (30) days (or if the default is not susceptible to cure within said thirty day period, the Owner does not commence to cure the default within the thirty (30) day period), Owner may terminate this Agreement by written notice to Manager ("Notice of Termination"), which termination shall take effect one hundred eighty (180) days after delivery of the Notice of Termination, unless such default is cured in this time frame and Owner agrees to withdraw the Notice of Termination. [discuss]

11.2 **Default of Owner**. If a default by Owner in the performance of any of the covenants and agreements to be performed by Owner pursuant to this Agreement causes the cancellation of an Event or Events, Owner shall compensate Manager for the loss of estimated and incurred expenses suffered by reason of such default. Upon the occurrence of any other default by Owner in the performance of any of the covenants and agreements to be performed by Owner pursuant to this Agreement, Manager shall provide written notice of such default to Owner. If corrective action is not commenced within one hundred eighty (180) days after receipt of written notice or such reasonable time given the circumstances and completed within a reasonable time thereafter, then if such default is not curred within thirty (30) days (or if the default is not susceptible to cure within said thirty day period, Owner does not commence to cure the default within the thirty (30) day period) after said notice is mailed or delivered to Owner, Manager may immediately terminate this Agreement.

11.3 **Damage or Destruction**. In the event of the damage or destruction of the Premises to an extent which interferes with the regular and customary operation of the Premises, either Owner or Manager

may terminate this Agreement unless Owner, shall as promptly as practicable (subject to an event of force majeure) diligently undertakes to repair, restore, rebuild or replace such damage or destruction.

11.4 **Vacation of Premises**. Upon expiration or termination of this Agreement, Manager shall: (a) vacate the Premises, including offices and box offices, and shall not damage any part of the Premises during such vacation; (b) deliver to Owner all records, accounts, contracts and other information held or obtainable by Manager in connection with the use or operation of the Premises to the extent permitted by Applicable Laws and excluding any confidential/proprietary information of Manager; and (c) cooperate with Owner and any successor manager in accomplishing a transition of management that minimizes to the extent possible any disruption in the operation of the Premises.

11.5 <u>Abandonment by Manager</u>. Should Manager abandon this Agreement by complete cessation of operations of the Premises for reasons other than force majeure, Manager shall pay as damages to Owner, one million dollars (\$1,000,000) for the operating year and relinquish all money held in the Operating Account. Manager acknowledges that this payment is to allow Owner to continue to operate the Premises and pay for any and all scheduled Events so as not to cause greater losses and damages.

11.6 <u>Termination for Failure to Meet Performance Measurements</u>. In the event that Manager has failed to achieve at least eighty percent (80%) of the Proforma targets set forth in Exhibit "B" for any fiscal year, then the parties will meet and confer, no later than ten (10) business days upon Manager informing Owner of failure, to discuss appropriate corrective measures or reasonably required adjustments to the performance measures. Manager agrees to implement mutually agreed upon corrective measures in good faith and promptly following reaching agreement upon same with Owner. In the event the parties agree upon a reasonably feasible corrective plan to allow for Manager to "catch up" Events in the immediately subsequent year, then Manager shall not be deemed in default, nor will Owner declare an Event of Default.

11.7 **Consequence of Termination**. In the event of termination, Manager shall deliver to Owner copies of all reports, documents, and other work performed by Manager under this Agreement to the extent permitted by Applicable Laws and excluding any proprietary/confidential information of Manager, and, upon receipt thereof, Owner shall pay Manager for services performed and reimbursable expenses incurred pursuant to the provisions of this Agreement to the date of termination.

11.8 **Termination Procedures.** Upon termination of this Agreement, Owner, in addition to any other rights provided in this Agreement, may require Manager to deliver to Owner any property specifically produced or acquired for the performance of this Agreement to the extent permitted by Applicable Laws and excluding any proprietary/confidential information of Manager. After receipt of a Notice of Termination, Manager shall:

a. Consult with and follow the direction of Contract Administrator to determine when and the manner by which to stop work under the Agreement on the date and to the extent specified in the Notice of Termination;

b. Place only those orders or subcontracts for materials or services, as may be necessary to maintain the interests of the Owner;

c. Assign to Owner, in the manner, at the times, and to the extent reasonably directed by the Contract Administrator, all of the rights, title and interests of Manager under this Agreement;

d. Settle all outstanding liabilities and claims (other than ongoing contract obligations), with the approval or ratification of Owner to the extent Owner may reasonably require, which approval or ratification shall be final for all the purposes of this clause;

e. Transfer to Owner, and deliver in the manner, at the times, and to the extent

directed by Owner, title to any property which, if the Agreement had been completed, would have been required to be furnished to Owner; and

f. Take such action as may be necessary, or as Owner may reasonably direct, for the protection and preservation of the property related to this Agreement which is in the possession of Manager and in which Owner has or may acquire an interest.

ARTICLE XII

REPRESENTATIONS, WARRANTIES AND COVENANTS

12.1 <u>Manager Representations and Warranties</u>. Manager hereby represents warrants and covenants to Owner as follows:

(a) that it has the full legal right, power and authority to enter into this Agreement and to grant the rights and perform the obligations of Manager herein, and that no third party consent or approval is required to grant such rights or perform such obligations hereunder;

(b) that this Agreement has been duly executed and delivered by Manager and constitutes a valid and binding obligation of Manager, 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

(c) that Manager will comply with all Applicable Laws related to its management of the Premises.

12.2 <u>Owner Representations, Warranties and Covenants</u>. Owner represents warrants and covenants to Manager as follows:

(a) that it has the full legal right, power and authority to enter into this Agreement and to grant the rights and perform the obligations of Owner herein, and that no other third-party consent or approval is required to grant such rights or perform such obligations hereunder;

(b) that this Agreement has been duly executed and delivered by Owner and constitutes a valid and binding obligation of Owner, 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

(c) that the Premises is, as of the Effective Date, in compliance in all respects with all Applicable Laws (including but not limited to ADA and Environmental Laws) relating to the construction, use and operation of the Premises, and that (to the best of its knowledge after reasonable investigation) there exist no structural defects or unsound operating conditions at the Premises.

ARTICLE XIII TAXES

13.1 <u>Possessory Interest Tax</u>. It is the understanding of the Manager that no interest in the Premises property or structures is created by this Agreement. It is acknowledged and agreed that the sole purpose of this Agreement is for Manager to provide operation management services. Nevertheless, Manager recognizes and agrees that the assessor for the County of San Diego may determine that Manager's right to operate and manage the Premises as set forth in this Agreement creates a possessory interest subject to a possessory interest tax under section 107.6 of the State Revenue & Taxation Code. In the event that possessory interest taxes are assessed, Manager shall include the expense in the Proforma set forth in

Exhibit "B."

13.2 **Income Taxes**. Manager shall timely pay all state, federal and local income taxes arising from Manager's Management Fees under this Agreement. Manager is not responsible for, and Owner shall indemnify and hold Manager harmless from any tax liabilities arising from the Operating Revenues of the Premises and any other real/property taxes/assessments pertaining to the Premises.

13.3 **Business License**. Manager shall secure and maintain at all times, a business license to operate in the City of El Cajon, pursuant to Chapter 5.04.050 of the El Cajon Municipal Code. Manager shall also secure and maintain at all times, any other licenses or permits which may be required.

13.4 <u>**Tax – Hold Harmless**</u>. Manager and Owner agree to protect, defend, indemnify and hold each other, including the Premises, and any improvements now or hereafter in the Premises, free and harmless from any liability, loss, or damage resulting from any taxes, assessment, or other charges required by this Agreement to be paid by Manager or Owner, and from all interests, penalties, and other sums imposed thereon and from any proceedings to enforce collection of any such taxes, assessments, or other charges.

ARTICLE XIV MISCELLANEOUS PROVISIONS

14.1 <u>Assignment</u>. Owner may assign its interest in this Agreement to a governmental, nonprofit, or for-profit entity (the "Owner Assignee"), in its sole discretion. Manager shall not assign any right or interest in this Agreement, and shall not delegate any duty owned, without Owner's prior written consent. Any attempted assignment or delegation shall be void and totally ineffective for all persons, and shall constitute a material breach upon which Owner may immediately terminate or suspend this Agreement. Notwithstanding the foregoing, Manager, with written consent of the Owner, may assign all or a portion of its interest in this Agreement to another entity that is an Affiliate of Manager ("Manager Assignee"), but only if:

a. The assignment is to a Manager Assignee which has the capability to carry on the operation of the Premises in substantially the same manner as Manager.

b. The Manager Assignee agrees to assume all the rights and obligations assigned, and to keep and perform all the provisions and obligations of this Agreement.

c. Manager agrees to guarantee the performance of its obligations under this Agreement not assumed by the Manager Assignee, and to reaffirm this guarantee simultaneously with the assignment.

Subject to the foregoing, this Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective permitted successors and assigns.

Notwithstanding anything contained herein to the contrary, Manager shall have the right, after prior written notice to Owner, to enter into a transfer to any subsidiary corporation of Manager, Manager's parent corporation or to any other entity affiliated with Manager, or to any entity determined by Manager to be necessary or desirable in connection with obtaining liquor licenses for the Premises (including, without limitation, to an unaffiliated non-profit corporation), or to any entity resulting from a consolidation, reorganization or merger, or to a corporation acquiring all or substantially all of the assets of Manager ("Permitted Transfer"), provided that, with respect to an assignment of this Agreement, within fifteen (15) days after the effective date of any such assignment, the assignee executes and delivers to Owner an instrument reasonably acceptable to Owner containing an express assumption of all of Manager's obligations under this Agreement arising after the date of such assignment. Notwithstanding anything to

the contrary contained in this Agreement, Manager shall have the right to grant licenses, concessions, equipment operating/management agreements and rentals for the Premises without Owner's approval or consent, and all of the foregoing shall be deemed to not be an assignment or a violation of this Agreement, provided that the same shall not relieve Manager of its obligations under this Agreement.

14.2 **Notices.** All notices hereunder must be in writing and, unless otherwise provided herein, shall be deemed validly given on the date either personally delivered to the address indicated below; or on the third (3rd) business day following deposit, postage prepaid, using certified mail, return receipt requested, in any U.S. Postal mailbox or at any U.S. Post Office; or when sent via facsimile to a party at the facsimile number set forth below or to such other or further facsimile number provided in a notice sent under the terms of this paragraph, on the date of transmission of that facsimile. Should Owner or Manager have a change of address, the other party shall immediately be notified in writing of such change, provided, however, that each address for notice must include a street address and not merely a post office box. All notices, demands or requests from Manager to Owner shall be given to Owner addressed as follows:

Owner:	City of El Cajon 200 Civic Center Way El Cajon, CA 92020 Attention: City Manager
Manager:	Live Nation Worldwide, Inc. c/o House of Blues Entertainment 7060 Hollywood Boulevard Hollywood, California 90028 Attn: COO and SVP of Legal Affairs

14.3 <u>**Rights Cumulative**</u>. The rights and remedies hereby created are cumulative, and the use of one remedy shall not be taken to exclude or waive the right to use of another.

14.4 <u>Severability</u>. In the event that any provision of this Agreement shall be held invalid or unenforceable, no other provisions of this Agreement shall be affected by such holding, and all of the remaining provisions of this Agreement shall continue in full force and effect pursuant to the terms hereof.

14.5 <u>Governing Law</u>. This Agreement shall be governed by and construed under the laws of the State of California. Any action to interpret or enforce this Agreement shall be brought to the Superior Court of the State of California in San Diego County. Manager, hereby waives its right to remove any such actions as otherwise allowed by California Code of Civil Procedure section 394.

14.6 **Entire Agreement**. This Agreement is the entire agreement of the parties and replaces and supersedes any prior agreements or understandings between the parties.

14.7 <u>No Additional Rights</u>. By entering into this Agreement Manager shall obtain no additional rights or privileges in the future regarding the operation or use of the Premises and Owner shall not be deemed to have waived or abrogated any power or discretion it has regarding the operation or ownership of the Premises upon the expiration or termination of this Agreement.

14.8 **Force Majeure**. Neither party shall be considered in default in the performance of its obligations hereunder or any of them, if such obligations were prevented or delayed by any cause, existing or future beyond the reasonable control of such party which include but are not limited to acts of God, labor disputes or civil unrest. Any delays beyond the control of either party shall automatically extend the time schedule as set forth in this Agreement by the period of any such delay.

14.9 **Indemnification**. "Owner" for the purposes of this Section 14.10 shall mean and include Owner and Owner's elected and appointed officers, agents and employees. "Manager" for the purposes of

this Section 14.9 shall mean and include Manager and Manager's affiliates, directors, officers, agents and employees. To the fullest extent permitted by law and except to the extent caused by Owner's negligence or willful misconduct, Manager covenants with Owner that Owner shall not be liable for any damage or liability of any kind or for any injury to or death of persons or damage to property of Manager or any other person occurring from and after the date Owner delivers possession of the Premises to Manager from any cause whatsoever by reason of the use, occupancy and enjoyment of the Premises by Manager or any person holding under Manager. Subject to the provisions of this Section 14.9, Manager shall pay for, defend (with an attorney reasonably approved by Owner), indemnify, and save Owner harmless against and from any real or alleged damage or injury and from all claims, judgments, liabilities, costs and expenses, including reasonable attorney's fees and costs, arising out of or connected with Manager's use of the Premises and its facilities, and any breach of this Agreement by Manager provided, however, the foregoing indemnity shall not extend to the extent of Owner's negligence or willful misconduct. Subject to the provisions of this Section 14.9, Owner shall pay for, defend (with an attorney reasonably approved by Manager), indemnify, and save Manager harmless against and from any real or alleged damage or injury and from all claims, judgments, liabilities, costs and expenses, including reasonable attorneys' fees and costs, arising out of or connected with the Premises and its facilities, or any repairs, alterations or improvements which Owner may make or cause to be made to the Premises, any claims arising from matters or incidents occurring prior to the Commencement Date; , non-payment of any general contractor/sub for payment of the Core Shell Work and/or FF&E Items and any breach of this Agreement by Owner; provided, however, the foregoing indemnity shall not extend to the extent of Manager's negligence or willful misconduct. The obligations to indemnify set forth in this Section 14.9 shall include all reasonable attorneys' fees, litigation costs, investigation costs and court costs and all other costs, expenses and liabilities reasonably incurred by the indemnified party from the first notice that any claim or demand is to be made or may be made and upon determination of such obligation to indemnify. All indemnity obligations under this Section 14.9 shall survive the expiration or termination of this Agreement.

14.10 <u>Signs and Decor</u>. Any signs to be installed by Manager that become permanently affixed to the Premises shall be subject to the prior written approval of Owner and shall be installed by a sign contractor approved by Owner. Manager shall be responsible as an Operating Expense for payment of all sign costs including installation costs, permits and costs to repair the Premises resulting from the installation or removal of such sign. Any and all changes to the decor must be first submitted to Owner, in writing, for approval.

14.11 <u>Compliance with Laws</u>. Manager shall comply with all applicable laws, ordinances, orders, rules, regulations and other governmental requirements relating to the use, condition or occupancy of the Premises. The judgment of any court of competent jurisdiction, or the admission of Manager in a proceeding brought against it by any governmental entity, that Manager has violated any such governmental requirement shall be conclusive as between the Owner and the Manager and shall constitute grounds for declaration of default, material breach, forfeiture, and termination of this Agreement by Owner.

14.12 **Compliance with Environmental Laws**. Owner represents and warrants that, as of the Commencement Date, the Premises is in compliance with all Environmental Laws (as defined below) and shall indemnify Manager for any claims, liabilities, demands or losses related to matters arising prior to the Commencement Date and for any breach of this representation and warranty, all in accordance with the indemnification terms set forth in Section 14.9 above. Manager and the Premises shall remain in compliance with all applicable laws, ordinances, orders, rules and regulations regulating, relating to, or imposing liability of standards of conduct concerning any Hazardous Materials, or pertaining to occupational health or industrial hygiene, occupational or environmental conditions on, under, or about the Premises, as now or may at any later time be in effect, including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") [42 USC section 9601 et seq.]; the Resource Conservation and Recovery Act of 1976 ("RCRA") [42 USC section 6901 et seq.]; the Clean

Water Act, also known as the Federal Water Pollution Control Act ("FWPCA") [33 USC section 1251 et seq.]; the Toxic Substances Control Act ("TSCA") [15 USC section 2601 et seq.]; the Hazardous Materials Transportation Act ("HMTA") [49 USC section 1801 et seq.]; the Insecticide, Fungicide, Rodenticide Act [7 USC section 6901 et seq.] the Clean Air Act [42 USC section 7401 et seq.]; the Safe Drinking Water Act [42 USC section 300f et seq.]; the Solid Waste Disposal Act [42 USC section 6901 et seq.]; the Surface Mining Control and Reclamation Act [30 USC section 101 et seq.] the Emergency Planning and Community Right to Know Act [42 USC section 11001 et seq.]; the Occupational Safety and Health Act [29 USC section 655 and 657]; the California Underground Storage of Hazardous Substances Act [H & S C section 25288 et seq.]; the California Hazardous Substances Account Act [H & S C section 25300 et seq.]; the California Safe Drinking Water and Toxic Enforcement Act [H & S C section 24249.5 et seq.] the Porter-Cologne Water Quality Act [Water Code section 13000 et seq.] together with any amendments of or regulations promulgated under the statutes cited above and any other federal, state or local law, ordinance, order, rule or regulation now in effect or later enacted that pertains to occupational health or industrial hygiene, and only to the extent the occupational health or industrial hygiene laws, ordinances, or regulations relate to hazardous substances on, under or about the Premises, or the regulation or protection of the environment, including ambient air, soil, soil vapor, groundwater, surface water or land use ("Environmental Laws").

a. Manager shall immediately notify Owner in writing and provide copies upon receipt of all written complaints, claims, citations, demands, inquiries, reports or notices relating to the condition of the Premises or compliance with environmental Laws. Manager shall promptly cure and have dismissed with prejudice any of those actions and proceedings to the satisfaction of Owner. Manager shall keep the Premises free of any lien imposed pursuant to and Environmental Law.

b. The term "Hazardous Materials" shall include, without limitation, substances defined as "hazardous substances," "hazardous materials," "toxic substances," "hazardous wastes," "extremely hazardous wastes," or "restricted hazardous wastes," or stated to be known to cause cancer or reproductive toxicity, under any Environmental Law. Manager shall not permit to occur any release, generation, manufacture, storage, treatment, transportation or disposal of any Hazardous Materials. Manager shall promptly notify Owner in writing if Manager has or acquires notice or knowledge that any Hazardous Materials have been or are threatened to be released, discharged, disposed of, transported, or stored on, in, under or from the Premises; and if any Hazardous Materials are found on the Premises, Manager, at its sole cost and expense, shall immediately take such action as is necessary to detain the spread of and remove the Hazardous Material to the complete satisfaction of Owner and the appropriate governmental authorities.

c. Owner shall, at Owner's sole cost and expense, have the right at all reasonable times and from time to time to conduct environmental audits of the Premises, and Manager shall cooperate in the conduct of those audits.

d. If Manager fails to comply with the forgoing covenants pertaining to Hazardous Materials, Owner may cause the removal (or other cleanup acceptable to Owner) of any Hazardous Materials from the Premises. The costs of Hazardous Materials removal and any other cleanup (including transportation and storage costs), whether or not cleanup was ordered by a court, will be the financial liability of Manager, and those costs will become due and payable on demand by the Owner. Manager shall give Owner, its agents and employees access to the Premises to remove or otherwise cleanup any Hazardous materials. Owner, however, has no affirmative obligation to remove or otherwise cleanup any Hazardous Materials, and this Agreement shall not be construed as creating any such obligation.

e. Manager shall indemnify, defend (with counsel reasonably acceptable to Owner and at Manager's sole cost), and hold Owner and Owner's elected and appointed officials, officers, employees, agents, successors and assigns free and harmless from and against all losses, liabilities, obligations, penalties, claims, litigation, demands, defenses, costs, judgments, suits, proceedings, damages (including consequential damages), disbursements or expenses of any kind (including attorneys' and experts' fees and expenses and fees and expenses incurred in investigating, defending or prosecuting any litigation, claim or proceeding) that may at any time be imposed upon, incurred by, or asserted or awarded against Owner in connection or arising out of: (i) any Hazardous Material on, in, under or affecting all or any portion of the Premises, (ii) any violation or claim of violation of any Environmental Law by Manager; or (iii) the imposition of any lien for the recovery of costs for environmental cleanup or other response costs relating to the release or threatened release of Hazardous Materials on, in, under or affecting all or any portion of the Premises. Manager's indemnification shall survive the expiration and termination of this Agreement.

14.13 <u>Non-Discrimination</u>. Manager herein covenants by and for itself, its heirs, executors, administrators, and assigns, and all persons claiming under or through it, that this Agreement shall be performed and is subject to the requirement that there shall be no discrimination against or segregation of any person or group of persons, on account race, religious creed, color, national origin, ancestry, age, physical disability, mental disability, medical condition, including the medical condition of Acquired Immune Deficiency Syndrome (AIDS) or any condition related thereto, marital status, sex, genetic information, gender, gender identity, gender expression, or sexual orientation, in the, use, occupancy, tenure, or enjoyment of the Premises during the performance of this Agreement.

[Signatures on the following page.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

CITY OF EL CAJON

LIVE NATION WORLDWIDE, INC.

By: _____

By:

Douglas Williford, City Manager

Attested to:

By:

Angela Aguirre, City Clerk

Approved as to form:

By:

Morgan Foley, City Attorney

EXHIBIT "A" DUTIES

Manager's obligations, duties and responsibilities under this Agreement shall consist of the following:

1. Establish and adjust prices, rates and rate schedules for user, license, concessions,

occupancy, and advertising agreements, and booking commitments, subject to prior prices, fees and fee schedules. Manager may deviate from the established fee schedule when entering into any such agreements if determined by Manager, using its reasonable business judgment, to be necessary or appropriate with respect to the specific situation. The fee schedule shall be reviewed annually. Any requested changes to the fee schedule must be submitted to Owner in January for changes to occur in July.

2. Operate and maintain the Premises, including the equipment utilized in connection with its operation and any improvements made during the Term of this Agreement, in the condition received, normal wear and tear excepted.

3. Arrange for and otherwise book Events at the Premises in accordance with a booking schedule to be developed by Manager.

4. Pay all Operating Expenses incurred in connection with the operation, maintenance supervision and management of the Premises from the Operating Account or with funds otherwise made available by the Owner.

5. Secure all license and permits necessary for the operation and use of the Premises for the specific events to be held therein, and for the general occupancy of the Premises, including without limitation all necessary food and liquor license, music licenses, software licenses, and renewals thereof. The Owner shall cooperate in this process to the extent reasonably required. All costs associated with this process shall be Operating Expenses.

6. On an annual basis, cause a written inventory to be taken of all furniture, fixtures, office equipment, supplies, tools and vehicles at the Premises, and deliver a written report of the foregoing to Owner. Manager shall document all major damage to, or loss in, such inventory during the Term as soon as such damage or loss is discovered by Manager, and Manager shall promptly notify Owner of any such damage or loss.

7. Obtain and maintain a State of California liquor license and comply with all requirements of the liquor license and other applicable laws regulating the sale of alcoholic beverages. Manager agrees that there shall be no liquor sold or served between the hours of 2;00 a.m. and 6:00 a.m. Manager shall ensure any concessionaire hired by Manager to provide alcoholic beverage service at the Premises has obtained a liquor license and abides by the regulations set forth in this Agreement.

8. Provide all custodial services, as an Operating Expense, on a regular basis to ensure that the Premises are kept in a clean, neat and pristine condition. Manager shall be required to have the Premises cleaned before and after any Event.

9. Provide security at the Premises for all scheduled Events. Owner has the right to require Manager to provide a security and first aid plan for all Events, thirty (30) days prior to the scheduled Events, and subject to the approval of the City of El Cajon Police and Fire Departments.

10. Maintain and repair the Premises as an Operating Expense in conformance with the standards of maintenance and repair set forth in Article 7 of the Agreement.

11. During all Events, Manager shall maintain and operate food and beverage concessions and may maintain and operate merchandise concessions on the Premises either through contracting for such concessionaires or directly providing these concessions.

12. Routinely confer with Owner about all matters affecting the viability of the Premises. Owner and Manager shall meet quarterly to review the Quarterly Report, Event recaps, the Operating Account, to schedule programming of the Plaza area, and to discuss and exchange information as to the day-to-day operations of the Premises.

13. Comply with all laws, statutes, ordinances and rules of all applicable governmental authorities unless the Owner is contesting or has affirmed its intention to contest any such law, statute, ordinance, rule, regulation, order, or requirements pursuant thereto.

14. Pay or cause to be paid all sales tax and other taxes and fees attributable to operation of the Premises as an Operating Expense.

15. Maintain written plans, acceptable to Owner, for the emergency evacuation of the Premises. The Manager shall instruct all current staff members and thereafter all newly hired staff members each calendar quarter; provided, however, that such fire drills also ensure that at least one employee trained and qualified to monitor safety procedures and to report the status of such procedures to Owner on a biannual basis, and at such other times as Owner may reasonably request.

16. Operate a box office at the Premises as seen fit to meet needs of Manager. Manager shall have sole and exclusive control and supervision of the box offices and their personnel. All receipts from the sale of tickets purchased at the Premises box offices shall be under the absolute control, disposition and supervision of Manager, and Owner shall incur no liability for the same.

18. Take all reasonable measures to assure that any Managers, users, or licensees of the Theaters avoid any form of waste, damage, destruction of the Premises, or make any permanent alterations of the Premises, without the Owner's prior written consent. Such measures shall include use of written agreements, provision of insurance, and if necessary, on- site monitoring of performances and other uses of the Premises. In the event of any waste, damage or destruction, Manager shall give prompt notice to Owner of any material damage to the Premises within five (5) days of such damage occurring. Owner shall not itself commit or allow any waste or damage to the Premises or permit any public or private nuisance. Manager shall keep the Premises clean and clear of refuse and obstructions, and shall assure that either itself or all managers, users or licensees dispose of all garbage, trash, and rubbish and return the Premises to the condition prior to use, in a manner satisfactory to Owner.

19. Diligently perform all of its obligations under this Agreement, and to use the Premises solely for the purposes described in this Agreement.

20. Produce, present, or provide a wide variety of performing arts and visual presentations and special events, by agreement with promoters, performing artist, other performing arts organizations, commercial promoters, or event coordinators, rentals and all other live entertainment events similar to those booked by Manager and its affiliates at comparable venues on a national basis. Using commercially reasonable efforts, ensure the following number of Events:

50 Events
50 Events
55 Events
60 Events
65 Events

21. Cause such other acts and things to be done with respect to the Premises, as determined by Manager in its reasonable discretion to be necessary for the management and operation of the Premises.



EXHIBIT "B"

PROFORMA

to be available at a later date

EXHIBIT "C"

DEPICTION OF THE PLAZA AREA

