

FACILITY MANAGEMENT AGREEMENT

by and between

THE CITY OF MUSKOGEE, OKLAHOMA

and

SPORTS FACILITIES MANAGEMENT, LLC

Dated: _____

FACILITY MANAGEMENT AGREEMENT

THIS FACILITY MANAGEMENT AGREEMENT (“**Agreement**”) is made and entered into this ____ day of February, 2014 (“**Effective Date**”), by and between **THE CITY OF MUSKOGEE, OKLAHOMA** (“**Owner**”) and **SPORTS FACILITIES MANAGEMENT, LLC**, a Florida limited liability company (“**Manager**”).

RECITALS:

WHEREAS, Owner owns the land, infrastructure, buildings, parking, lighting, sports playing surfaces, sports equipment and all other hard assets associated with the athletic complex and aquatic center as the same exist now or may exist in the future including improvements related thereto, exclusive of the River Country Water Park, located on a one hundred acre tract of land near 34th Street and Arline, in the corporate limits of the City, as the same exist now or may exist in the future, known as the Love-Hatbox Sports Complex or any other name that may be identified in the future (collectively, the “**Facility**”);

WHEREAS, Manager has expertise in providing management services for athletic complex facilities throughout the United States; and

WHEREAS, Owner and Manager desire for Manager to operate and manage the Facility subject to the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the promises and covenants herein contained and other good and valuable consideration, the receipt of which is hereby acknowledged, Owner and Manager agree as follows:

ARTICLE I DEFINITIONS

1.1 **Definitions.** For purposes of this Agreement, the following terms have the meanings referred to in this Section:

Affiliate: A person or company that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a specified person or company.

Agreement: The “Agreement” shall mean this Management Agreement, together with all exhibits attached hereto (each of which are incorporated herein as an integral part of this Agreement), as amended, supplemented or restated from time to time.

Annual Business Plan: The term “Annual Business Plan” shall have the meaning ascribed to such term in **Exhibit “A”** to this Agreement.

Approved Policies: The term “Approved Policies” shall have the meaning ascribed to such term in Section 3.2 of this Agreement.

Base Management Fee: The term “Base Management Fee” shall have the meaning ascribed to such term in **Exhibit “B”** to this Agreement.

Booking Incentive Fee: The term “Booking Incentive Fee” shall have the meaning ascribed to such term in **Exhibit “B”** to this Agreement.

Capital Expenditures: All expenditures for building additions, alterations, repairs or improvements and for purchases of additional or replacement furniture, machinery, or equipment, where the cost of such expenditure is greater than \$5,000 and the depreciable life of the applicable item is, according to generally accepted accounting principles, in excess of five (5) years.

Commercial Rights: Naming rights, pouring rights, advertising, sponsorships, the branding of food and beverage products for resale and memorial gifts at or with respect to the Facility.

Effective Date: “Effective Date” shall have the meaning ascribed to such term in the preamble of this Agreement.

Existing Contracts: Service Contracts, Revenue Generating Contracts, and other agreements relating to the day-to-day operation of the Facility existing as of the Effective Date.

Facility: The “Facility” shall have the meaning ascribed to such term in the Recitals to this Agreement.

FF&E: Furniture, fixtures and equipment to be procured for use at the Facility.

General Manager: The employee of Manager acting as the full-time on-site general manager of the Facility.

Intellectual Property: The term “Intellectual Property” shall have the meaning ascribed to such term in Section 9.17 of this Agreement.

Laws: Means all applicable laws, statutes, rules, regulations and ordinances.

Manager: The term “Manager” shall have the meaning ascribed to such term in the Recitals to this Agreement.

Operating Account: A separate interest-bearing account in the name of the Manager at a licensed bank in the State of Oklahoma, to be designated by the Owner, where Revenue is deposited and from which Operating Expenses are paid, where the Owner is the beneficiary.

Operating Budget: A line item budget for the Facility that includes a projection of Revenues and Operating Expenses, presented on a monthly and annual basis.

Operating Expenses: All expenses incurred by Manager in connection with its operation, promotion, maintenance and management of the Facility, including but not limited to the following: (i) employee payroll, bonuses and benefits (including payments to any national benefit system), relocation costs, termination costs (including severance costs and payments in lieu of termination), and related costs, (ii) cost of operating supplies, including general office supplies, (iii) advertising, marketing, group sales, and public relations costs, (iv) cleaning expenses, (v) data processing costs, (vi) dues, subscriptions and membership costs, (vii) printing and stationary costs, (viii) postage and freight costs, (ix) equipment rental costs, (x) minor repairs, maintenance, and equipment servicing, not including expenses relating to performing capital improvements or repairs, (xi) security expenses, (xii) telephone and communication charges, (xiii) travel and entertainment expenses of Manager employees, (xiv) cost of employee uniforms and identification, (xv) exterminator and trash removal costs, if applicable (xvi) computer, software, hardware and training costs, (xvii) parking expenses, (xviii) utility expenses, (xix) office expenses, (xx) audit and accounting fees, (xxi) legal fees, (xxii) all bond and insurance costs, including but not limited to personal property, liability, and worker’s compensation insurance, (xxiii) commissions and all other fees payable to third parties (*e.g.* commissions relating to food, beverage and merchandise concessions services and commercial rights sales), (xxiv) cost of complying with any Laws, (xxv) costs incurred by Manager to settle or defend any claims asserted against Manager arising out of its operations at the Facility on behalf of Owner; (xxvi) loss, costs, damage, liability and any other obligations arising under or incurred under Service Contracts and other agreements relating to Facility operations, and (xxvii) Taxes. The term “Operating Expenses” does not include debt service on the Facility, Capital Expenditures or the management fees (all of which shall be the responsibility of the Owner).

Operating Year: The Operating Year shall be the same as the Owner’s Fiscal Year beginning on July 1 and ending on June 30, provided that the first Operating Year shall be a shortened year commencing on the Effective Date and ending on June 30 of such fiscal

year, and the last Operating Year shall be a shortened year, ending upon the expiration of this Agreement.

Operations Manual: The document to be developed by Manager which shall contain terms regarding the management and operation of the Facility, including detailed policies and procedures to be implemented in operating the Facility, as agreed upon by both the Owner and the Manager.

Owner: The term "Owner" shall have the meaning ascribed to such term in the Recitals to this Agreement.

Recruitment Fee: The term "Recruitment Fee" shall have the meaning ascribed to such term in Section 5.3 of this Agreement.

Revenue: All revenues generated by Manager's operation of the Facility, including but not limited to event ticket proceeds income, rental and license fee income, merchandise income, gross food and beverage income, gross income from any sale of Commercial Rights, gross service income, equipment rental fees, box office income, and miscellaneous operating income, but shall not include event ticket proceeds held by Manager in trust for a third party and paid to such third party, and sponsorship fees that are subject to a commission to the Manager under this Agreement.

Revenue Generating Contracts: Vendor, concessions and merchandising agreements, user/rental agreements, booking commitments, licenses, and all other contracts or agreements generating revenue for the Facility and entered into in the ordinary course of operating the Facility.

Service Contracts: Agreements for services to be provided in connection with the operation of the Facility, including without limitation agreements for consulting services, ticketing, web development and maintenance, computer support services, FF&E purchasing services, engineering services, electricity, steam, gas, fuel, general maintenance, HVAC maintenance, telephone, staffing personnel including guards, ushers and ticket-takers, extermination, elevators, stage equipment, fire control panel and other safety equipment, snow removal and other services which are deemed by Manager to be either necessary or useful in operating the Facility.

Taxes: Any and all governmental assessments, franchise fees, excises, license and permit fees, levies, charges and taxes, of every kind and nature whatsoever, which at any time during the Term may be assessed, levied, or imposed on, or become due and payable out of or in respect of, (i) activities conducted on behalf of the Owner at the Facility, including without limitation the sale of concessions, the sale of tickets, and the performance

of events (such as any applicable sales and/or admissions taxes, use taxes, excise taxes, occupancy taxes, employment taxes, and withholding taxes), or (ii) any payments received from any holders of a leasehold interest or license in or to the Facility, from any guests, or from any others using or occupying all or any part of the Facility.

Term: The term “Term” shall have the meaning ascribed to such term in Section 2.2 of this Agreement.

Termination Date: The term “Termination Date” shall have the meaning ascribed to such term in Section 2.3 of this Agreement.

Termination Fee: The term “Termination Fee” shall have the meaning ascribed to such term in Section 2.3 of this Agreement.

ARTICLE II APPOINTMENT; TERM; TERMINATION

2.1 **Appointment.** Owner hereby retains, engages and appoints Manager as Owner’s agent to act as the sole and exclusive manager and operator of the Facility and to perform the Management Services (as further set forth on **Exhibit “A”** attached hereto) during the Term, as more fully described herein, and Manager hereby accepts said appointment upon and subject to the terms hereof.

2.2 **Term.** This Agreement shall commence on the Effective Date of this Agreement and shall continue in full force and effect until the fifth (5th) anniversary of the Effective Date (“**Term**”) unless earlier terminated pursuant to this Agreement.

2.3 **Termination.** Owner or Manager shall have the ability to terminate this Agreement at any time by providing the other party with written notice on or before the date such terminating party wishes to terminate this Agreement (“**Termination Date**”). Upon termination by the Owner for any reason except “cause” due to Manager’s breach of any material provision herein, without cure following written notice from Owner detailing such breach of this Agreement, Owner shall pay to Manager a termination fee (“**Termination Fee**”) on the Termination Date that is equal to (a) the greater of: (i) one half (1/2) of the trailing twelve (12) months’ fees due to Manager hereunder or (ii) six (6) times the average monthly payment due to Manager during the Term; plus (b) any bonus or incentive payments that the Manager has earned through the Termination Date; plus (c) up to six (6) months’ salary for all full-time employees that been employed pursuant to the terms of this Agreement; plus (d) any severance payments and/or relocation expenses which are incurred by Manager related to the Manager’s terminating or relocating full-time employees that have been assigned to the Facility. In the Event that Owner terminates this

Agreement, Owner shall have the right to request that Manager vacate the property and cease all management activities related to the Facility, in which case Owner shall pay Manager the Termination Fee as set forth above. Notwithstanding anything contained herein to the contrary, in the event that Owner provides Manager with one hundred eighty (180) days' notice of termination, Manager and Owner hereby acknowledge and agree that the Termination Fee shall be waived.

2.4. **Effect of Termination.** Upon termination or expiration of this Agreement for any reason, (i) Manager shall vacate the property and promptly discontinue the performance of all services rendered hereunder related to the Facility; (ii) Owner shall promptly pay Manager all fees due Manager up to the date of termination or expiration (subject to proration if the Term ends other than at the end of the Operating Year); (iii) Manager shall make available to Owner all data, electronic files, documents, procedures, reports, estimates, summaries, and other such information and materials with respect to the Facility as may have been accumulated by Manager in performing its obligations hereunder, whether completed or in process; and (iv) without any further action on part of Manager or Owner, Owner shall, or shall cause a successor manager to, assume all obligations arising after the date of such termination or expiration, under any Service Contracts, Revenue Generating Contracts, booking commitments and any other agreements entered into by Manager in furtherance of its duties hereunder. Notwithstanding the foregoing, Manager is under no duty to provide certain proprietary confidential materials or intellectual property to Owner, including but not limited to national benchmarking formulas, key performance indicators reports, employee manuals, employee training materials, employee performance evaluations, financial forecasting formulas, Manager's internal databases or contact lists, Manager's Operations Manuals, and/or other intellectual property developed by and maintained by the Manager. Any obligations of the parties that are specifically intended to survive expiration or termination of this Agreement shall survive expiration or termination hereof.

ARTICLE III OWNERSHIP; MANAGEMENT SERVICES

3.1 **Ownership of Facility, Data, Equipment and Materials.** Owner shall at all times retain ownership of the Facility, including but not limited to real estate, technical equipment, furniture, displays, fixtures and similar property, including improvements made during the Term, at the Facility. Any data, equipment or materials furnished by 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 when no longer needed by Manager to perform under this Agreement. Notwithstanding the above, Owner shall not have the right to use any third party software licensed by Manager for general use by Manager at the Facility and other facilities managed by Manager, the licensing fee for which

is proportionately allocated and charged to the Facility as an Operating Expense, such software may be retained by Manager upon expiration or termination hereof. Furthermore, the Owner recognizes that the Operations Manual to be developed and used by Manager hereunder is proprietary to Manager, and shall belong solely to Manager at the end of the Term and the Owner shall not use or maintain copies of the Operations Manual upon the end of the Term for any reason whatsoever.

3.2 **Management of the Facility.**

(a) **General.** Owner hereby delegates to Manager, subject to the terms and conditions set forth in this Agreement, the discretion and authority to determine and implement in the exercise of its expertise in managing and operating indoor and outdoor athletic and recreation complexes, certain programs and other rules and regulations affecting the Facility or the operation thereof.

(b) **Owner's Rights.** Manager acknowledges and agrees that in accordance with the annual review and approval of the Annual Business Plan, Owner shall have the right to approve operating policies and procedures, standards of operation, service and maintenance, pricing and other general policies, general rules and regulations affecting the Facility and the operation and maintenance thereof (collectively, the "**Policies**"). All Policies approved by Owner are hereinafter referred to as "**Approved Policies.**" In conjunction with the administration of the Approved Policies, Manager shall have the right to cause its employees to perform any act on behalf of Owner deemed by Manager to be necessary or desirable for the marketing, operation and maintenance of the Facility, provided in no event shall Manager break any Laws or act grossly negligent or willfully or wantonly with respect to the discharge of its duties under this Agreement.

3.3 **Use of the Property.**

(a) **General.** Owner hereby grants to Manager the exclusive right and license to use the Facility for the Term, and Manager accepts such right of use, for the purpose of performing the Management Services, including without limitation, the operation and maintenance of all physical and mechanical facilities necessary for, and related to, the operation, maintenance and management of the Facility, including without limitation, athletic space, food service, meeting areas and such other uses as shall be compatible for the operation of a state of the art athletic facility. Owner shall provide Manager with a sufficient amount of suitable office space in the Facility (exact office space to be mutually agreed upon by the parties) and with such office equipment as is reasonably necessary to enable Manager to perform its obligations under this Agreement. In addition, Owner shall make available to Manager, at no additional cost, parking spaces adjacent to the Facility for all of Manager's full-time employees and for the Facility's event staff.

(b) Relationship. The parties agree that in no event is the relationship established herein one of landlord and tenant, or licensor and licensee, and Manager has no right to operate the Facility other than for the purposes set forth in this Agreement.

3.4 Limitations on Manager's Duties. Manager's obligations hereunder are contingent upon and subject to Owner making available, in a timely manner, the funds budgeted for and/or reasonably required by Manager to carry out such obligations during the Term. In the event Manager cannot perform any of its obligations hereunder as a result of Owner's failure to timely provide such funds, Manager shall not be deemed to have breached or be in default of any term hereof.

ARTICLE IV COMPENSATION; FINANCIAL REQUIREMENTS

4.1 Compensation Payments. Owner shall pay to Manager, as compensation for the Management Services rendered hereunder, those payments set forth on **Exhibit "B"** attached hereto.

4.2 Operating Account. Except as otherwise agreed to by the parties in writing, all Revenue derived from operation of the Facility shall be deposited by Manager into the Operating Account as soon as practicable upon receipt (but not less often than once each business day). The specific procedures (and authorized individuals) for making deposits to and withdrawals from such account shall be set forth in the Operations Manual, but the parties specifically agree that Manager shall have authority to sign checks and make withdrawals from such account, subject to the limitations contained in this Agreement, without needing to obtain the co-signature of an employee, agent or representative of the Owner. However, any amounts deposited which exceed the Operating Budget shall be transferred to the Owner at least monthly.

4.3 Source of Funding. Manager shall pay all items of expense for the operation, maintenance, supervision and management of the Facility from the funds in the Operating Account, which Manager may access periodically for this purpose. The Operating Account shall be funded with amounts generated by operation of the Facility or otherwise made available by Owner in accordance with the Operating Budget. To ensure sufficient funds are available in the Operating Account, Owner will deposit into the Operating Account, within two (2) business days of the Effective Date, the budgeted or otherwise approved expenses for the month beginning on the Effective Date. Owner shall thereafter, on or before the first (1st) day of each succeeding month following the Effective Date, deposit (or allow to remain) in the Operating Account the budgeted or otherwise approved expenses for each successive month. Manager shall have no liability to Owner or any third party in

the event Manager is unable to perform its obligations hereunder, or under any third party contract entered into pursuant to the terms hereof, due to the fact that sufficient funds are not made available to Manager to pay such expenses in a timely manner.

4.4 **Advancement of Funds.** Under no circumstances shall Manager be required to pay for or advance any of its own funds to pay for any Operating Expenses. Notwithstanding the foregoing, in the event that Manager agrees to advance its own funds to pay any Operating Expenses, Owner shall promptly reimburse Manager for the full amount of such advanced funds, plus interest at a rate to be mutually agreed upon.

ARTICLE V PERSONNEL

5.1 **Generally.** Existing full time Facility staff under the employ of the Owner at the time of the execution of this agreement shall remain employees of the Owner, subject to Owner's supervision.¹ All additional Facility staff and other personnel, including those hired on a part-time and seasonal basis, shall be engaged or hired by Manager, and shall be employees, agents or independent contractors of Manager, and not of Owner. Manager shall select, in its sole discretion, 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; provided, however, Owner shall have the right to disapprove the hiring of any employee for good reason as determined in the sole discretion of the Owner, with notice of the same provided to Manager. Manager agrees to use its reasonable and prudent judgment in the selection and supervision of such personnel. Owner specifically agrees that Manager shall be entitled to pay its employees, agents or independent contractors, as an Operating Expense, bonuses and benefits in accordance with Manager's then current employee manual, which may be modified by Manager from time to time in its sole discretion. During the Term, Owner shall have no right to supervise or direct such employees, agents or independent contractors.

5.2 **General Manager.** Personnel engaged by Manager will include in an individual who will serve as Manager's senior employee and representative of the Facility, with the duties of full-time General Manager of the Facility. Hiring of the General Manager by Manager shall require the prior approval of the Owner, which approval shall not be unreasonably withheld or delayed; provided, however, in the event of a vacancy in the General Manager position, Manager may, upon notice to the Owner, temporarily fill such position with an interim General Manager for up to one hundred eighty (180) days without

¹ The following positions with corresponding employee identification numbers shall remain in the Owner's employ: Parks and Recreation Maintenance Leader I - ID 7510110184; Parks and Recreation Maintenance Worker II - ID 7520120006; Parks and Recreation Maintenance Worker II – ID 7520130021.

the necessity of obtaining Owner's approval. The General Manager will have general supervisory responsibility for Manager and will be responsible for day-to-day operations of the Facility, supervision of employees, and management and coordination of all activities associated with events taking place at the Facility.

5.3 **Post-Termination Employment.** In the event of termination, or in any case where Owner expresses an interest in hiring Manager's employee(s), Manager shall reserve the right to agree or deny such a request. In the event that Manager elects to permit Owner to hire Manager's employee(s), Owner shall provide Manager with a one-time fee ("**Recruitment Fee**") equal to six (6) months' gross salary and benefits for each such employee; provided, however, where Owner has waived the Termination Fee following one hundred eighty (180) days' notice pursuant to Section 2.3, the Recruitment Fee for any employee shall be equal to four (4) months' gross salary and benefits.

ARTICLE VI RESPONSIBILITIES OF PARTIES

6.1 **General Responsibilities of Manager.** Manager is hereby charged with the sole and exclusive Management Services of the Facility and shall provide Owner with the services customarily provided for in such instances. It is expressly understood and agreed that so long as this Agreement is in force and effect, Owner shall not interfere with the day-to-day operations of the Facility and shall at no time give or communicate orders or instructions to employees or personnel employed about the Facility.

6.2 **Specific Responsibilities of Manager and Owner.**

(a) **Contract Administrator.** 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 Facility, unless Manager notifies the Owner of a substitute contract administrator in writing. Owner shall notify Manager of the name of its contract administrator within thirty (30) days of execution hereof. Any and all references in this Agreement requiring Manager or Owner participation or approval shall mean the participation or approval of such party's contract administrator, unless otherwise provided herein.

(b) **Collection of Monies.** Manager shall be responsible for the collection of all rental and other charges due from user groups, tenants, and all other revenues relating to the Facility. Owner authorizes Manager to request, demand, collect, receive, and receipt for all such rent, Facility use charges, other charges, and revenues, for the collection thereof and for the dispossession of tenants, guests and other persons from the Facility. Owner shall not require Manager to incur any expenses in this effort. Manager may not

incur any expenses fulfilling its duties hereunder without the prior express written consent of Owner. Should Manager incur expenses that have been previously approved by Owner in writing, Owner shall reimburse the expenses of such proceedings, and such expenses may include the engaging of counsel or collection services for any such matter. All monies collected by Manager shall be forthwith deposited in the general Facility bank account designated by Owner.

(c) Books and Records. Manager shall maintain adequate and separate books and records in connection with its management and operation of the Facility. Such books and records shall be kept in accordance with generally accepted accounting principles. Owner shall have the right and privilege of examining said books and records upon reasonable advance notice and during business hours. Manager shall render to Owner, on or before the 20th day of each month, on an accrual basis, a detailed profit and loss statement conforming to Manager's chart of accounts, for the preceding month. Said profit and loss statement shall include both current month and year-to-date figures for the following: actual revenues and expenses, budget revenues and expenses (approved annual Budget, variances between the actual and budget numbers. Manager shall submit, on or before the twentieth (20th) day of each month, a full balance sheet and cash reconciliation statement, as of the last day of the preceding month.

(d) Furnishings, Equipment, Etc. Owner shall furnish, equip and install at the Facility all such furniture, fixtures, equipment and operating supplies so as to make the Facility operational or shall request Manager to do same at Owner's expense.

(e) Inventory. Owner shall provide Manager with an inventory of personal property, materials and equipment at the commencement of the Term. At Owner's expense, Manager shall maintain a current inventory of all personal property, materials and equipment used in connection with the Facility.

(f) Insurance. Owner and Manager shall be responsible for obtaining and administering insurance in connection with the Facility as follows:

(i) General Liability - Owner. Owner shall maintain at its sole expense a general liability policy which insures Owner, with a combined single limit of \$1,000,000 per occurrence and a general annual aggregate limit of \$2,000,000. All such insurance shall be on an occurrence basis.

(ii) General Liability - Manager. Manager shall procure and maintain, at its own expense, a general liability policy (including contractual and Errors and Omissions liability insurance) which insures Manager as the named insured and where the Owner is listed as an additional insured, with a combined single limit of \$1,000,000 per

occurrence and a general annual aggregate limit of \$3,000,000. All such insurance shall be on an occurrence basis.

(iii) Workers Compensation. Manager shall procure and maintain all workers compensation insurance required under applicable Oklahoma state law. This cost will be reimbursed to the Manager out of the Operating Account as part of Reimbursed Expenses in Exhibit B.

(iv) Property Insurance. Owner shall procure and maintain fire and extended coverage casualty insurance, and (if appropriate) flood insurance, regarding the Facility in amounts and with companies acceptable to Owner in its sole discretion.

(v) Certificates of Insurance. Owner and Manager shall upon execution of this Agreement furnish to the other party certificates of all of the foregoing insurance as well as certificates of renewal no later than thirty (30) days prior to the expiration of each policy. No cancellation or non-renewal may take effect without thirty (30) days' prior written notice by registered mail to Owner.

(g) Taxes and Assessments. Owner shall be responsible for, and promptly pay, all real estate and personal property taxes, improvement assessments, where required, and other like charges related to the Facility and the property on which the Facility is located.

(h) Compliance with Legal Requirements. Owner and Manager shall take such actions as may be necessary to comply with any and all laws, orders, or requirements affecting Owner or the Facility by any federal, state, county or municipal agency, or authorities having jurisdiction thereover.

(i) Use and Maintenance of Property. Manager agrees not to knowingly permit the use of the Facility for any purpose which might void any policy of insurance relating to the Facility, or which might render any loss thereunder uncollectible, or which would be in violation of any government restriction. Owner, at Owner's sole expense, hereby covenants and agrees to keep the Facility in good condition and repair. Manager agrees to make regular inspections of the Facility and notify Owner of necessary repairs and maintenance. Any expenses previously approved by the Owner in writing and incurred by Manager in keeping the Facility in good condition and repair shall be immediately reimbursed by Owner.

(j) Fees and Costs. Manager shall not incur expenses, costs, fees, compensation, and other remuneration of any persons engaged by Manager from outside of its organization with the prior consent of Owner.

(k) Observance of Agreements. Throughout the Term, the Owner agrees to pay, keep, observe and perform all payments, terms, covenants, conditions and obligations under any leases, bonds, debentures, loans and other financing and security agreements to which the Owner is bound in connection with its ownership of the Facility.

ARTICLE VII FACILITY CONTRACTS; TRANSACTIONS WITH AFFILIATES

7.1 Existing Contracts. Owner shall have provided to Manager, on or before the Effective Date, full and complete copies of all Existing Contracts related to the Facility. Manager shall administer and use reasonable commercial efforts to assure compliance with such Existing Contracts to the extent provided such Existing Contracts are provided to Manager, but shall assume no liability thereunder and shall be held harmless by the Owner for any actions taken on behalf of the Owner in furtherance of such Existing Contracts.

7.2 Execution of Contracts. Manager shall have the right to enter into Service Contracts, Revenue Generating Contracts and other contracts related to the operation of the Facility, as agent on behalf of the Owner. Any such contracts shall contain standard indemnification and insurance obligations on the part of each vendor, licensee or service provider, as is customary for the type of services or obligations being provided or performed by such parties. Manager shall obtain the prior approval of the Owner (which approval shall not be unreasonably withheld or delayed) before entering into any such contract with a term that expires after the Term of this Agreement, unless such contract, by its express terms, can be terminated by the Owner or a successor manager within ninety (90) days of the Owner or successor manager's decision to so terminate.

7.3 Transactions with Affiliates. In connection with its obligations hereunder relating to the purchase of goods or procurement of services for the Facility (including without limitation food and beverage services, ticketing services and Commercial Rights sales), Manager may purchase or procure such goods or services, or otherwise transact business with, an Affiliate of Manager, provided that the prices charged and services rendered by such Affiliate are competitive with those obtainable from any unrelated parties providing such goods or rendering comparable services. Manager shall, at the request of the Owner, provide reasonable evidence establishing the competitive nature of such prices and goods and/or services, including, if appropriate, competitive bids from other persons seeking to deliver such goods or render such services at the Facility.

ARTICLE VIII

COVENANTS AND REPRESENTATIONS

8.1 **Owner's Covenants and Representations.** Owner makes the following covenants and representations to Manager, which covenants and representations shall, unless otherwise stated herein, survive the execution and delivery of this Agreement:

(a) **Owner's Status.** Owner is a municipality organized pursuant to the laws of the State of Oklahoma, and authorized to transact business in the State of Oklahoma, with full power and authority to enter into this Agreement.

(b) **Authorization.** The making, execution, delivery, and performance of this Agreement by Owner has been duly authorized and approved by requisite action, and 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 and applicable Laws.

(c) **Effect of Agreement.** To Owner's best knowledge, without duty of inquiry, neither the execution and delivery of this Agreement by Owner nor Owner's performance of any obligation hereunder: (i) will constitute a violation of any law, ruling, regulation, or order to which Owner is subject; or (ii) shall constitute a default of any term or provision or shall cause an acceleration of the performance required under any other agreement or document (A) to which Owner is a party or is otherwise bound, or (B) to which the Facility or any part thereof is subject.

(d) **Ownership Rights.** Owner shall obtain and retain the property interests in the Facility necessary to enable Manager to perform its duties pursuant to this Agreement peaceably and quietly. Owner represents and warrants that Manager's performance of the services required by this Agreement shall not violate the property rights or interests of any other Person.

(e) **Documentation.** If necessary to carry out the intent of this Agreement, Owner agrees to execute and provide to Manager, on or after the Effective Date, any and all other instruments, documents, conveyances, assignments, and agreements which Manager may reasonably request in connection with the operation of the Facility.

8.2 **Manager's Covenants and Representations.** Manager makes the following covenants and representations to Owner, which covenants and representations shall, unless otherwise stated herein, survive the execution and delivery of this Agreement:

(a) **Corporate Status.** Manager is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of Florida and authorized to transact business throughout the United States, including within the State of

Oklahoma with full corporate power to enter into this Agreement and execute all documents required hereunder.

(b) Authorization. The making, execution, delivery, and performance of this Agreement by Manager has been duly authorized and approved by all requisite action of the board of directors of Manager, and 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 and applicable Laws.

(c) Effect of Agreement. To Manager's best knowledge, without duty of inquiry, neither the execution and delivery of this Agreement by Manager nor Manager's performance of any obligation hereunder (i) will constitute a violation of any law, ruling, regulation, or order to which Manager is subject; or (ii) shall constitute a default of any term or provision or shall cause an acceleration of the performance required under any other agreement or document to which Manager is a party or is otherwise bound.

(d) Documentation. If necessary to carry out the intent of this Agreement, Manager agrees to execute and provide to Owner, on or after the Effective Date, any and all other instruments, documents, conveyances, assignments, and agreements which Owner may reasonably request in connection with the operation of the Facility.

ARTICLE IX GENERAL PROVISIONS

9.1 Relationship. Manager and Owner shall not be construed as joint venturers or general partners of each other, and neither shall have the power to bind or obligate the other party except as set forth in this Agreement. Manager understands and agrees that the relationship to Owner is that of independent contractor, and that it will not represent to anyone that its relationship to Owner is other than that of independent contractor. Nothing herein shall deprive or otherwise affect the right of either party to own, invest in, manage or operate property, or to conduct business activities, which are competitive with the business of the Facility. Manager covenants and agrees that even though it may have a management responsibility for other similar properties, which from time-to-time may be competitive with the Facility, Manager shall always represent the Facility fairly and deal with Owner on an equitable basis.

9.2 Representations. Owner represents and warrants: (i) that Owner has full power and authority to enter this Agreement; (ii) that to the best of Owner's knowledge, the property on which the Facility is located is zoned for the intended use; (iii) that all permits for the operation of the Facility have or will be secured and are or will be current; (iv) that the Facility and its operation do not violate any applicable statutes, laws, ordinances, rules,

regulations, orders, or the like (including, but not limited to, those pertaining to hazardous or toxic substances); and (v) that no unsafe condition exists.

9.3 **Assignment.** This Agreement shall not be assigned by either party without the express written consent of the non-assigning party. Any such assignment made without proper consent shall be deemed void.

9.4 **Benefits and Obligations.** The covenants and agreements herein contained shall inure to the benefit of, and be binding upon the parties hereto and their respective heirs, executors, successors, and assigns.

9.5 **Fees for Legal Advice.** Subject to the prior written approval of the Owner, which approval shall not be unreasonably withheld, Owner shall pay reasonable expenses incurred by Manager in obtaining legal advice regarding compliance with any law affecting the Facility or any activities related to it.

9.6 **Building Compliance.** Manager does not assume and is given no responsibility for compliance of the Facility or any equipment therein with the requirements of any building codes or with any statute, ordinance, law, or regulation of any governmental body or of any public authority or official thereof having jurisdiction, except to notify Owner promptly, or forward to Owner promptly, any complaints, warnings, notices, or summonses received by Manager relating to such matters. Owner represents that to the best of Owner's knowledge, the Facility and all such equipment contained therein comply with all such requirements.

9.7 **Notices.** All notices provided for in this Agreement shall be in writing and served by registered or certified mail, return receipt requested, postage prepaid, at the following addresses until such time as written notice of a change of address is given to the other party:

If to Owner: Howard W. Brown, Jr.
City Manager
P.O. Box 1927
Muskogee, OK 74402
hbrown@muskogeeonline.org

with a copy to: Roy D. Tucker
City Attorney
P. O. Box 1927
Muskogee, OK 74402
rtucker@muskogeeonline.org

If to Manager: Sports Facilities Management, LLC

Attention: Jason Clement and Dev Pathik
600 Cleveland Street, Suite 910
Clearwater, FL 33755
Email: jason@sportfacilitymanagement.com and
dev@sportfacilitymanagement.com

with a copy to: Bryan J. Stanley, P.A.
Attention: David R. Phillips
209 Turner Street
Clearwater, Florida 33756
Email: david@bryanjstanley.com

9.8 **Interest on Unpaid Sums.** Any sums due Manager under any provision of this Agreement, and not paid by Owner within thirty (30) days after such sums have become due, shall bear interest at the rate of one percent (1%) per month.

9.9 **Owner Responsible for Payments.** Upon termination of or withdrawal from this Agreement, Owner shall assume the obligations of any contract or outstanding bill executed by Manager under this Agreement for and on behalf of Owner and responsibility for payment of all unpaid bills, provided that such obligation has been approved by Owner as set forth herein.

9.10 **Headings.** All headings and subheadings employed within this Agreement and in the accompanying schedules and exhibits are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement.

9.11 **Force Majeure.** Any delays in the performance of any obligation of Manager under this Agreement shall be excused to the extent that such delays are caused by wars, national emergencies, natural disasters, strikes, labor disputes, utility failures, governmental regulations, riots, adverse weather, and other similar causes not within the control of Manager and any time periods required for performance shall be extended accordingly.

9.12 **Entire Agreement.** This Agreement, including any specified attachments, constitutes the entire agreement between Owner and Manager with respect to the management and operation of the Facility and supersedes and replaces any and all previous management agreements entered into or/and negotiated between Owner and Manager relating to the Facility covered by this Agreement. No change to this Agreement shall be valid unless made by supplemental written agreement executed and approved by Owner and Manager. Except as otherwise provided herein, any and all amendments, additions, or deletions to this Agreement shall be null and void unless approved by Owner

and Manager in writing. Each party to this Agreement hereby acknowledges and agrees that the other party has made no warranties, representations, covenants, or agreements, express or implied, to such party, other than those expressly set forth herein, and that each party, in entering into and executing this Agreement, has relied upon no warranties, representations, covenants, or agreements, express or implied, to such party, other than those expressly set forth herein.

9.13 **Rights Cumulative; No Waiver.** No right or remedy herein conferred upon or reserved to either of the parties to this Agreement is intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given under this Agreement or now or hereafter legally existing upon the occurrence of an event of default under this Agreement. The failure of either party to this Agreement to insist at any time upon the strict observance or performance of any of the provisions of this Agreement, or to exercise any right or remedy or be construed as a waiver or relinquishment of such right or remedy with respect to subsequent defaults. Every right and remedy given by this Agreement to the parties may be exercised from “time to time” and as often as may be deemed expedient by those parties.

9.14 **Applicable Law.** The execution, interpretation, and performance of this Agreement shall in all respects be controlled and governed by the laws of the State of Oklahoma. Any civil action or legal proceeding arising out of or relating to this Agreement shall be brought in the courts of record of the State of Oklahoma in Muskogee County or the United States District Court, Eastern District of Oklahoma. Each party consents to the sole and proper jurisdiction of such court in any such civil action or legal proceeding and waives any objection to the laying of venue of any such civil action or legal proceeding in such court.

9.15 **Acknowledgement.** The parties hereto acknowledge that they have been provided with a copy of this Agreement for review prior to signing it, that they have been given the opportunity to review it prior to signing it, that they has been given the opportunity to have this Agreement reviewed by their attorney prior to signing it, and that they understand the purposes and effect of this Agreement.

9.16 **Severability.** If any provision or provisions of this Agreement shall be held to be invalid or unenforceable, such invalidity or unenforceability shall not affect any other provisions of this Agreement, and this Agreement shall be construed and enforced as if such provision or provisions had not been included.

8.17 **Intellectual Property.** Owner acknowledges that Manager has certain intellectual property, trade secrets and proprietary business techniques (“**Intellectual Property**”) that it will use on behalf of the Owner to meet its obligations under this

Agreement. Owner acknowledges that it obtains no ownership rights whatsoever in the Intellectual Property and, upon termination of this Agreement, Manager shall retain all rights to the Intellectual Property and remove such Intellectual Property from the Facility and its operations. For purposes of this Agreement, the term Intellectual Property shall include, without limitation, analytical tools and documented procedures for forecasting, performance tracking, operational and marketing systems that are unique to Manager's approach, staff training programs, program curriculum and agendas, rights to certain discounts or programs that Manager has negotiated for Manager-operated facilities, and other intellectual property which Manager has previously introduced to the Facility and of which Manager is an author.

[SIGNATURE PAGE FOLLOWS]

DRAFT

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above written.

WITNESSES:

OWNER

THE CITY OF MUSKOGEE,
OKLAHOMA

Print Name: _____

By: _____

Print Name: _____

Print Name: _____
Print Title: _____

Attest

Pamela S. Bates, City Clerk

Approved as to form and legality this _____, day of September, 2014.

Roy D. Tucker, City Attorney

[REMAINDER OF PAGE INTENTIONALLY BLANK]

WITNESSES:

Print Name: _____

Print Name: _____

MANAGER

**SPORTS FACILITIES MANAGEMENT,
LLC, a Florida limited liability company**

By: _____

Print Name: _____

Print Title: _____

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DRAFT

EXHIBIT "A"

MANAGEMENT SERVICES

During the Term, Manager will provide services related to a broad range of management, booking, marketing, business development, planning, design, vendor negotiation, branding, marketing, operations set-up, bookkeeping and software systems set-up, employee & volunteer recruitment, policy and procedures and other aspects required at the Facility (collectively, the "**Management Services**"). The Management Services address the Manager's responsibility for all aspects of oversight for the staffing, marketing, maintenance, event management, sponsorship and advertising sales, and day-to-day operations of the Facility. These services include, without limitation, the following:

1. On-Site Facilities Management;
2. Corporate Oversight and National Relationships;
3. National Peer-to-Peer Network;
4. Tournament, event, league, and other program development/management;
5. Staff Development; and
6. Appropriate and City Council-approved on-site Management Staff

EXHIBIT "B"

MANAGER COMPENSATION

During the Term of this Agreement, Manager shall receive compensation from the Owner according to the following:

1. Base Management Fee;
2. Deferred Management Incentive Fee;
3. Sponsorship and Advertising Incentive;
4. Employee Compensation; and
5. Reimbursed Expenses

1. Base Management Fee. During the Term, Owner shall pay to Manager equal monthly installments ("Base Management Fee"). Each successive installment shall become due and payable on the first (1st) day of each successive month. The Base Management Fee shall be a fixed monthly fee which shall decline each year as further set forth in Table B2.

Table B2

Term Year	Year 1	Year 2	Year 3	Year 4	Year 5	Beyond Year 5
Monthly Base Management Fee	\$12,000.00	\$12,000.00	\$11,000.00	\$11,000.00	\$10,000.00	\$10,000.00

Note: This includes management for Love-Hatbox sports complex and the aquatic center.

2. Management Incentive Fee. In order to encourage the Manager to grow revenues at the Facility, an incentive program will provide additional compensation over the Base Management Fee, as further set forth in the Pro Forma ("**Management Incentive Fee**"). During each Operating Year, Owner shall pay to Manager a Management Incentive Fee equal to five percent (5%) of the total gross revenues for revenues which exceed \$250,000 of the Love Hatbox Sports Complex and five percent (5%) of the total gross revenues for revenues which exceed current (2014) gross revenue of the aquatics center. The Management Incentive Fee will be payable in monthly installments on the first (1st) day of

each month, beginning with the month following the month in which Facility revenues exceed the amounts described in the annual forecast from the budget. The payments to Manager shall not begin until the total revenues exceed the amounts described in the annual forecast from the budget. Any Management Incentive Fee payments shall be determined on accrual-based accounting so that the Manager is paid following the month in which an event takes place, not during the month when a deposit or initial payment is made.

By way of example, assuming the Pro Forma accounts for a baseline revenue target of \$500,000.00, Management Incentive Payments hereunder would be paid in the manner set forth in Table B3.

Table B3

Month	Revenue	Bonus Paid
July	\$25,000.00	\$0.00
August	\$25,000.00	\$0.00
September	\$50,000.00	\$0.00
October	\$100,000.00	\$0.00
November	\$100,000.00	\$0.00
December	\$200,000.00	\$0.00
January	\$150,000.00	\$7,500.00
February	\$150,000.00	\$7,500.00
March	\$200,000.00	\$8,000.00
April	\$200,000.00	\$8,000.00
May	\$200,000.00	\$8,000.00
June	\$200,000.00	\$8,000.00
Total		\$47,000.00

Any such Management Incentive Fee calculations shall be made by Manager within sixty (60) days of the ending of any Operating Year and paid to Manager within fifteen (15) days of delivery of same to Owner.

3. **Sponsorship and Advertising Compensation.** Due to the role that Manager will play in organizing the programs, negotiating agreements and pricing, and providing confidence to sponsors and advertisers, Manager will receive: (i) twenty percent (20%) of the gross revenue for sponsorship and advertising, if Manager is solely responsible for procuring such opportunity or (ii) ten percent (10%) of the gross revenue for sponsorship

and advertising, if a relationship with such sponsor or advertiser results from a collaborative effort between Manager and Owner. Notwithstanding the foregoing, the parties hereby acknowledge and agree that the municipalities which are parties to this Agreement are subject certain limitations imposed on them by IRS regulations whereby not more than a certain percent (10% for example) of bond proceeds may be used for private use and not more than a specified percent (10% for example) of bond debt service cannot be payable from private sources. Consequently, any such payments to Manager for sponsorship and advertising opportunities remain contingent upon review and approval by Owner's bond counsel.

Manager will also be paid five percent (5%) of the total cost savings for sponsored equipment, scoreboards, fencing, or other budgeted items that are donated to the project as a sponsorship effort by the vendor or supplier. This will apply only if the item has been budgeted for in the construction and start-up costs and where the Owner has approved such budgeted items and where negotiations with a vendor result in a direct cost savings in trade for a sponsorship or promotion of the vendor at the facility site.

The Owner must approve all sponsorship and advertising agreements including those provided by suppliers and vendors. In the event that the Owner does not approve the Sponsorship or Advertising arrangement, the Manager will not proceed with the agreement and the Manager will not receive a commission or compensation for the arrangement. Payments will be made to Manager within thirty (30) days of the time when a sponsor/advertiser makes payment. For budgeted items, payment will be made to the Manager by the Owner out of the construction and start-up account within thirty (30) days of the delivery or installation of the Owner-approved sponsored item.

4. **Payroll Compensation.** During the Term, Owner shall pay to Manager in equal monthly installments in accordance with the Operating Budget, the Employment Costs for all employees at the Facility (collectively, the "**Payroll Compensation**"). Manager will compensate all of its employees on a monthly basis and therefore each Payroll Compensation payment will become due and payable on the first (1st) day of each successive month. For purposes of this Agreement, the term "**Employment Costs**" shall mean the total salary and compensation for the Management Employees plus any fringe benefits including health insurance, etc., as well as any annual bonus to be paid.

5. **Reimbursed Expenses.** Manager shall be reimbursed for travel expenses preapproved by the City which directly relates to the Management Services, which shall not exceed \$12,000.00 during any Operating Year of the Term. All travel reimbursement will be based on receipts to be furnished by Manager to the Owner. Travel expenses may include

but are not limited to airfare, rental cars, parking fees, lodging and meals. All fees and reimbursements shall be paid to Manager within thirty (30) calendar days of invoicing.

EXHIBIT C

PRO FORMA

See attached sheets.