

## GOLF COURSE OPERATING AGREEMENT

This Golf Course Operating Agreement (the "Agreement") is executed on the date set forth on the signature page hereof and is effective as of November 1, 2011 (the "Effective Date") by and between the City of Overland Park, Kansas, a municipal corporation, hereinafter referred to as the "City," and MGMCO, Inc. an S-Corporation, hereinafter referred to as the "Operator."

### RECITALS

WHEREAS, the City owns two municipal golf courses (each a "Golf Course" and collectively, the "Golf Courses") known as the Sykes/Lady Golf Course, located at 12501 Quivira Road, which includes a nine hole addition known as Westlinks, 12700 127<sup>th</sup> Street, and St. Andrews Golf Club, 11099 W. 135<sup>th</sup> Street, in Overland Park, Kansas; and

WHEREAS, the Operator has intimate knowledge of the management of the Golf Courses and there is substantial goodwill associated with the City's Golf Courses which, if exploited by the Operator in contravention of this Agreement, would cause substantial irreparable injury to the City and would adversely affect the City in its ownership and oversight of the Golf Courses; and

WHEREAS, the City wishes to engage Operator to manage and operate the Golf Course facilities as more fully defined and described herein (each such Golf Course managed and operated by the Operator is also referred to herein as a "Facility" and collectively as the "Facilities"), excluding certain maintenance responsibilities which the City has retained as provided herein; and

WHEREAS, the City shall engage Operator to manage and operate the Facilities for a period of two (2) years and two months commencing on the Effective Date, and Operator agrees to accept such engagement, pursuant to the terms herein;

NOW THEREFORE, for and in consideration of the foregoing, the mutual covenants and promises hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of all is hereby recognized, the parties agree as follows:

### SECTION 1

#### DEFINITIONS

For the purposes of this Agreement and the various covenants, conditions, terms and provision which follow, the definitions and identifications set forth below are considered to be correct and true and are agreed upon by the parties.

***Alcoholic Beverages:*** Any alcoholic liquor, beer, cereal malt beverage, non-alcoholic malt beverage, spirits, or wine as those terms are defined in Overland Park Municipal Code Section 11.48.100, regardless of where within the Facilities they are provided or to whom they are provided.

**Capital Expenditures:** All expenditures for building additions, alterations, or improvements and for purchases of additional or replacement furniture, machinery, or equipment, the depreciable life of which, according to generally accepted accounting principles, is in excess of one (1) year and any other item of expense that, according to generally accepted accounting principles, is not properly deducted as a current expense on the books of the Operator, but rather should be capitalized.

**Catering Services:** The preparation and sale of all food and beverages, including Alcoholic Beverages, at the Facilities, including banquet services and hors d'oeuvres and all food and beverages (including Alcoholic Beverages) served at events where the obligation to make payment for the entire function rests with one individual, company, or entity. Catering Services shall not include outside catering as described in Section 2.2.35(a).

**Concession Services:** The preparation and sale of all food and beverages, including Alcoholic Beverages served or sold from permanent or portable snack bars, concession stands or roving vendors to individual customers at the Facilities. These items include, but are not limited to, sodas, hot dogs, hamburgers, hot and cold sandwiches, popcorn, candy bars, potato chips and pretzels, and all beverages, including Alcoholic Beverages to the extent permitted hereby.

**Contract Administrator:** The City Manager or his/her designee.

**Director of Food and Beverage:** The individual hired by the Operator, or at the election of the City by the City, to be responsible for the day-to-day management and supervision of the Food Services operation.

**Executive Chef:** The individual hired by the Operator to be responsible for operation and supervision of food production facilities and food production personnel.

**Facilities:** A collective term for St. Andrews Golf Course, located at 11099 W. 135th Street and Sykes/Lady Golf Course located at 12501 Quivira Road which includes the nine hole extension known as Westlinks located at 12700 West 127th Street (each of which is referred to individually as a "Golf Course" and collectively as the "Golf Courses"), including, for each Facility, the Improvements and the FF&E (as defined below) including entrances, ground, sidewalks, and parking areas surrounding the Improvements and adjacent thereto. The Facilities include meeting rooms, common areas, lobby areas, offices, storage and utility facilities, and other spaces. The Facilities also include the Golf Courses greens, tees, aprons, traps and hazards, fairways, roughs and driving ranges, provided that the Operator has no maintenance responsibilities with respect thereto. Diagrams of each Facility are attached hereto as Exhibits A-1, A-2 and A-3, which diagrams also delineate the portions of the Facility for which the Operator has maintenance responsibilities.

**Facilities Lock Box Account:** The bank account by that name established as the depository of the daily Facilities revenues pursuant to Section 13 of this Agreement. The Facilities Lock Box Account shall be in the name of the City.

**Facilities Operating Account(s):** The bank account by that name established to hold the funds to cover the operation of the Facilities pursuant to Section 13 of this Agreement.

**FF&E:** All fixtures, furnishings, furniture and equipment required for the operation of the Facilities.

**Food Services:** The Operator's operation, service and sale of Catering Services and Concession Services at the Facilities.

**General Manager:** Curtis M. Nelson, the sole owner and stockholder of the Operator, shall provide his direct services and serve as the General Manager of the operations and shall maintain his Master Professional designation as a current member of the PGA of America.

**Golf Course Directive:** The directive provided by the City relating to Golf Course operations, as may be revised from time to time.

**Improvements:** As to each Facility, the clubhouse and all other buildings, structures and improvements now located or hereafter constructed on the land encompassing the Golf Course (the "Site") and all fixtures and equipment attached to, forming a part of and necessary or desirable for the operation of such clubhouse and other buildings, structures or improvements (including, without limitation, heating, lighting, plumbing, sanitary system, air-conditioning, refrigeration, kitchen, elevators and similar items) and such (i) restaurants, bars and banquet, meeting and other public areas, (ii) commercial space, including concessions and shops, (iii) garage and parking space, (iv) storage and service areas, (v) permanently affixed signage and (vi) other facilities and appurtenances, all as presently exist on the Site or are hereafter added thereon during the Operating Term.

**Master Professional:** A PGA member who meets the requirements for designation, has been designated, and maintains designation, as a Master Professional in such person's career path under the PGA Master Professional program, by making a significant effort to improve himself/herself as a golf professional and maintain the highest degree of excellence for himself/herself and his/her operations in accordance with such requirements.

**Operating Budget:** The line item budget for each Facility with projected sources of income and applications of expense that is annually submitted by the Operator and approved by the City as established in Section 12 of this Agreement.

**Operating Expenses:** Those expenses incurred by the Operator in managing, operating, staffing, promoting, marketing and maintaining the Facilities, as more fully defined in Section 14.13.

**Operating Term:** The period commencing on the Effective Date of this Agreement and expiring at 11:59 p.m. on December 31, 2013.

**Operating Year:** The twelve (12) month period of time during which the Facilities are operated, commencing on January 1st and ending on December 31st, and each twelve month period of time thereafter, provided that the first Operating Year shall commence on November 1, 2011 and end December 31, 2011.

**PGA:** The Professional Golfers Association of America.

**Revenues:** All income collected by Operator from the operation of the Facilities, as more fully described in Section 14 of this Agreement.

**Senior Executive Personnel:** The individuals employed from time to time as the General Manager, the Director of Golf at each Facility, the Head Professional at each Facility, the Director of Food and Beverage, the Director of Outside Services, the Director of Sales, the Director of Marketing, the Director of Instruction and the Executive Chef (or serving such functions, regardless of the specific titles given to such individuals).

## SECTION 2

### SCOPE OF SERVICES

2.1. City hereby engages Operator as an independent contractor to perform the services hereinafter described, provided that in operating the Facilities, entering into contracts (where applicable), accepting reservations for use of the Facilities and conducting financial transactions for the Facilities, to the extent such actions are taken in accordance with the authority expressly delegated to Operator under this Agreement, Operator acts on behalf of and as agent for the City (but subject to the limitations on Operator's authority as set out in this Agreement), with the fiduciary duties required by law of a party acting in such capacity.

2.2. Operator agrees to perform and furnish management services, systems and materials needed to operate, supervise, promote, manage and maintain the Facilities, in at least the same or better condition than presently existing, in the most efficient manner consistent with the operations of other similar facilities. It is the intent of the parties that the Operator will be delegated authority by the City over the day-to-day operation of the Facilities, and all activities therein, but subject to existing contracts and subject to policies, procedures, budgets and guidelines established by the City. The Operator's authority shall be subject to contract and City policies and procedures, which, from time to time, hereafter may be established or modified by the City.

The Operator's obligations shall include, but not be limited to, the performance of the following obligations, subject to controls and restrictions as stated elsewhere in the Agreement and in the Operations Manual to be developed by the Operator and the City prior to April 1, 2012, and as the same may hereafter be amended (the "Operations Manual"). The Operations Manual may hereafter be amended pursuant to such procedures as are set forth therein for such amendment, subject in all respects to the approval of the Contract Administrator. Upon its approval by the Contract Administrator, the Operations Manual, and any amendment thereto, shall be deemed to be a part of this Agreement and is incorporated herein by reference.

2.2.1 Manage the Facilities in accordance with the Operations Manual and the terms of this Agreement, including, but not limited to purchasing, payroll, fire prevention, security, routine repairs, preventative maintenance, janitorial services, promotions, energy conservation and general user services. Means and methods of management will effectively accommodate the needs of the mobility impaired and handicapped patrons.

2.2.2 Develop and implement a sales and marketing program for the Facilities, including advertising, sales and marketing of the Facilities and advertising, sales and marketing for the catering, concessions and other food service elements. All advertising and promotional material requires the prior approval of the City before it is printed, published, or broadcast. The Operator shall not use its corporate name or logo on any Facility sales brochures, menus or uniforms, business cards, letterhead or other materials. The marketing program shall include a website dedicated to the Facilities and shall be maintained by the Operator.

2.2.3 Administer, assure compliance with, negotiate and execute in the City's name service contracts, vendor agreements, user/rental agreements, booking commitments, licenses, and all other documents required in the ordinary course of business in operating the Facilities.

2.2.4 Obtain prior approval from the City before entering into service contracts. Documentation shall be submitted in a timely manner to the Contract Administrator evidencing the competitive nature of the goods or services obtained. Any additional benefit provided to the Operator, such as rebates or other incentives, shall be disclosed to the City prior to purchasing any good or service and shall be subject to City approval.

2.2.5 Develop and implement efficient maintenance programs including, but not limited to, custodial and interior maintenance of the buildings. The General Manager shall submit an annual plan to the Contract Administrator by December 1 of each year for review. It is understood and agreed that the City shall retain responsibility for maintenance of the Golf Courses greens, tees, aprons, traps and hazards, fairways, roughs and driving ranges, and for such maintenance of the clubhouses and other Improvements as the Contract Administrator shall direct.

2.2.6 Keep the Facilities in a clean, sanitary, safe, and orderly condition.

2.2.7 Develop and implement efficient management programs for the operation, scheduling of and use of the Facilities and the provision of services to the public including the presence of Operator's personnel, golf course superintendent(s) and golf professional(s). The General Manager shall submit an annual plan to Contract Administrator by December 1 of each year for review.

2.2.8 Hire, supervise, direct and schedule all employees needed and required for the efficient operation, maintenance, management and promotion of the Facilities, as further provided in Section 16.

2.2.9 Ensure all employees and/or contract labor are legally permitted to work in the United States.

2.2.10 Require that all users of the Facilities execute rental/user agreements in accordance with the requirements of Section 18 herein.

2.2.11 Cause such acts and things to be done in and about the Facilities as shall be necessary to their operation, control, supervision and maintenance, all in compliance with

all statutes, ordinances, laws, rules, regulations and requirements under Federal, State, City and other local authority.

2.2.12 Operate and maintain the Facilities, including the equipment and security and any improvements made during the term of this Agreement, in a manner consistent with other similar facilities. At the conclusion of the term of this Agreement, the City shall retain ownership of the Facilities, including all equipment and any improvements made during the term of the Agreement. All losses in inventory of the City-owned equipment shall be documented by the Operator as soon as such losses are discovered by the Operator and the City shall be promptly notified.

2.2.13 Maintain the Facilities in as good condition and repair as received at the beginning of the Term, excepting usual wear and tear. At all times equipment maintenance shall meet or exceed manufacturer's recommendations. The Operator shall provide the Contract Administrator an annual preventative maintenance schedule for the Facilities. In addition, the Operator shall provide the Contract Administrator a report within seven days of the last day of each quarter of all Facilities maintenance that was performed during the preceding quarter and all Facilities maintenance scheduled for the following quarter. This report shall include a list of breakdowns of all major pieces of installed and portable equipment for that quarter. The Operator shall provide the City with access to the Facilities for routine maintenance inspections.

2.2.14 Recommend prices, rates and rate schedules for user fees and occupancy agreements to be negotiated by the Operator in the course of its management of the Facilities, subject to the Golf Course Directive. Any rates established for the use of the Facilities shall be comparable to rates charged for similar facilities. All fees shall be subject to the approval of the Contract Administrator.

2.2.15 Schedule events at the Facilities in accordance with the Golf Course Directive.

2.2.16 Maintain the City's golf car rental fleet and make the fleet ready for rental.

(a) Operator shall not rent any motorized golf cart to any person not holding a validly issued vehicle operator's license.

(b) Operator will maintain said golf carts in a safe, operable condition.

(c) Operator shall store the golf carts in a storage area designated by the Contract Administrator for storing the same and shall maintain at all times the storage area in a clean and orderly condition.

(d) Contract Administrator, or designee, shall be the final authority in determining the condition of the Golf Courses for operating motorized golf carts.

(e) Upon rental of a motorized golf cart, Operator will not permit more than two persons to occupy the cart. Operator shall provide each renter and occupant of a golf cart with a list of the rules and regulations established for the

operation of the golf carts upon the Golf Course, and the Operator shall be responsible for the enforcement of the rules and regulations.

(f) Operator shall develop liability release forms used to relieve the City and Operator from liability of operating golf carts, subject to City approval, and require all users to sign release forms prior to renting the carts.

2.2.17 Provide a Director of Golf and a Head Golf Professional at each Golf Course (subject to the provisions of Section 16.4) and make professional services available to patrons of the Facilities at all reasonable times, including golf instruction and such services as are ordinarily rendered and provided by golf professionals employed by a municipal or private golf course and shall specifically include the duty to provide coaching and teaching services to patrons.

2.2.18 Complete a weekly report of all activities as directed by the Contract Administrator. The format of the weekly report shall be subject to the approval of the Contract Administrator and may be modified from time to time at the request of the Contract Administrator.

2.2.19 Operate and manage sale of pro shop merchandise at the Facilities to include but not limited to clothing, golf equipment and accessories.

(a) The City shall have the exclusive right to provide, or have provided the official logo for use in marketing, promoting and advertising the Facilities. No other logo will be permitted for use without the expressed written consent of the City. This provision does not apply to brand name logos or insignia placed on merchandise by manufacturers.

2.2.20 Operate the driving ranges for instruction and public use.

2.2.21 Maintain detailed, accurate and complete financial and other records of all its activities under this Agreement in accordance with generally accepted accounting principles. The City shall have access to such records. In furtherance of its services to be provided, pursuant to this subparagraph and elsewhere in this Agreement, the Operator may use its own proprietary computer software that, in such event, shall remain the sole property of the Operator.

2.2.22 Include in gross revenues for the Facilities all revenues that are generated from the operation of Facilities within the term of this Agreement.

2.2.23 Submit a written report to the Contract Administrator at least monthly, or as otherwise voluntarily agreed to between the parties, no later than the close of the following month concerning its activities in the operation, management and supervision of the Facilities. Such report shall, among other things, set forth for each Facility bookings, number of rounds, average rate, receipts from all sources, expenditures and such other and further information as the City may require or request. It is anticipated that during the first year of the agreement reporting will be bi-monthly. The information contained in the

report shall be subject to the approval of the Contract Administrator and may be modified from time to time by the Contract Administrator.

2.2.24 Prepare a proposed annual operating budget in accordance with the City's approved format and submit it to the City in accordance with an established City schedule.

2.2.25 Comply with the spending limitations imposed upon such budget, including any amendment(s) thereto as authorized. However, if extraordinary events occur which could not reasonably be contemplated at the time the budget was prepared, the Operator may submit an amendment to the budget to the City for review and approval or denial.

2.2.26 Pay all operating and related expenses for the Facilities from the City accounts established under this Agreement.

2.2.27 With prior approval from the Contract Administrator and the City Attorney, institute for the City at the reasonable expense of the City, any and all legal actions or proceedings to collect charges, rentals or other income generated by and due to the City, or to cancel or terminate any license, use or concession agreement for the breach thereof or default thereunder by any licensee, user or advertiser. With prior approval from the Contract Administrator, legal expenses for actions approved under the terms of this paragraph shall be included as an operating expense of the Facilities.

2.2.28 Deposit in the Lock Box Account or such other interest-bearing account in a local qualified public depository as the City shall direct, any revenues which it receives from the operation of the Facilities, as more fully provided in Section 13.1, and in the Operations Manual.

2.2.29 Require the local qualified public depository utilized by the Operator to submit to the City on a monthly basis copies of all bank statements concerning all trust accounts established pursuant to this Agreement.

2.2.30 Establish and have an ongoing relationship with various boards and committees and departments of the City and the Overland Park Convention & Visitors Bureau and Overland Park Chamber of Commerce and any other organization as designated by the City.

2.2.31 Assist the City in the development of, and comply with, the Golf Course Directive.

2.2.32 Provide an annual update of the Operator's short-term marketing plan for the promotion of the Facilities events, which shall contain but not be limited to the following elements, and such additional elements which the Contract Administrator may direct in writing from time to time:

- (1) Market research;
- (2) Market position;



- (3) Market conditions;
- (4) Marketing objectives;
- (5) Marketing strategies;
- (6) Booking priorities;
- (7) Event mix;
- (8) Targeted events, meetings, banquets, and tournaments;
- (9) Event/tournament management and marketing as well as corporate sponsorships;
- (10) Internal and external support staff;
- (11) Deployment of sales staff;
- (12) Advertising opportunities at local and regional level;
- (13) Profitability;
- (14) SWOT analysis;
- (15) Competition;
- (16) Desired market position;
- (17) Overall strategy;
- (18) Specific and measurable goals;
- (19) Sales and marketing tools and tactics; and
- (20) Summary.

2.2.33 Conduct staff planning, retention, and training.

2.2.34 Manage risk management and Facilities insurance needs.

2.2.35 Operate the Food Services, including the service and sale of Alcoholic Beverages, at all areas of the Facilities at which food and/or beverage services is permitted by City (which areas shall be designated by the City from time to time and are herein called the "Service Areas") in accordance with the terms and provisions set forth herein, except as provided below. The City shall control advertising and sponsorship rights and food selections. The City shall retain the right to designate specific areas of the Facilities at which food and beverages may not be served, it being understood that neither the City nor any third party shall be permitted to serve food and beverages in such areas.

(a) Notwithstanding the provisions of this Section 2.2.35, the exclusive rights granted to the Operator hereunder shall not be construed so as to prevent or prohibit the City from engaging in or contracting for, outside catering services privileges for Facilities sponsored events, special events or events at the discretion of the City, not to exceed six (6) per year. Any revenues from such outside catering services as provided in this Section shall not be included in Revenues.

(b) It is understood and agreed that the Operator will be called upon from time to time by the City to arrange for the delivery of specialized food service requirements at the Facilities such as preferred Kosher catering and authentic Kansas City BBQ, in accordance with a special operation plan as provided in the Operations Manual.

(c) It is understood and agreed that special event customers at the Facilities will be permitted to have wedding cakes, anniversary cakes and other special event cakes and desserts prepared by third parties.

(d) The City permits the Operator and/or such entity on behalf of the Operator that is a Kansas drinking establishment licensee, the right to occupy the Facilities for the purposes of the sale and service of Alcoholic Beverages and the Operator agrees to such occupancy for said purpose. The permission contained in this subsection does not constitute regulatory approval, and the applicable licensee will be required to comply with all legal requirements for the sale and service of Alcoholic Beverages.

(e) It is further understood that any outside caterers to third parties providing food and non-alcoholic beverage services wishing to use the Food Service premises at the Facilities shall be required to (a) pay City a reasonable fee for use of the Food Service premises; (b) furnish such insurance coverage as may reasonably be requested by City or Operator; (c) agree in writing to indemnify and hold Operator and the City harmless from and against any injury or damage to persons or property arising from or related to their use of the Food Service premises, which indemnity shall cover all loss, damage, liability, claims, judgments, settlements, and expenses (including attorneys' fees); and (d) pay to Operator a deposit to cover the cost of cleaning the Food Service premises, which deposit shall be returned to the caterer or third party provided the Food Service premises are returned to Operator in the condition they were in prior to the caterer or third party's use of the Food Service premises.

(f) On such date as shall be set forth in the Operations Manual, the Operator shall conduct an annual food and beverage equipment inventory, documenting any damaged and/or missing equipment. The Operator shall identify any equipment that has met the end of its useful life and request written approval from the Contract Administrator to dispose of such equipment.

(g) Smallwares Replacement - On January 1 the Operator is responsible for replacing damaged, lost, and missing service ware as required to maintain the original inventory levels. Actual replacement expenses of up to one-half percent (0.5%) of Revenues of the Food Services operations are considered an Operating Expense and the Operator will be solely responsible for replacements over one-half percent (0.5%) of such Revenues as a non-Operating Expense.

### **SECTION 3**

#### **PRODUCTS AND PRICES**

3.1. Operator shall order, stock, prepare, and pay for all food and beverage products and related supplies from the Operating Account. Operator warrants and represents that all consumables shall be first quality, wholesome and pure, and all products on hand shall be stored and handled with due care for sanitation, in full compliance with City and State of Kansas regulations, including the Kansas Food Code, K.A.R. 28-36-101 et seq. and all other applicable requirements. Operator shall follow approved procurement procedures, which shall be set forth in the Operations Manual.

3.2. During all events where cash sales are made, the Operator shall post signs and provide menus advertising the prices of items offered for sale. Both of such menus and prices shall be subject to the prior approval of the City.

3.3. The Operator shall notify City of all proposed price increases during the Operating Term. Price increases will require approval of the City.

3.4. The types of functions at which Alcoholic Beverages are sold shall be subject to regulations established by the City. The Operator shall have the responsibility to decide whether service of Alcoholic Beverages to an individual is permitted under applicable law.

### **SECTION 4**

#### **TERM OF THE AGREEMENT**

4.1. Unless sooner terminated pursuant to the provisions of Sections 5, 6, 24 or 25, the initial term of this Agreement shall be the Operating Term defined in Section 1 of this Agreement or as otherwise extended by the City under Section 4.2.

4.2. The City shall have the right to extend the Operating Term for one additional one-year period commencing at the end of the Operating Term and ending one year from the end of the Operating Term.

4.3. Upon termination of this Agreement, whether at the conclusion of the final Operating Term of this Agreement or upon the effective date of a termination notice terminating this Agreement pursuant to Section 5, Section 6, Section 25 or other applicable provision of this Agreement, the Operator shall (unless a termination notice, if any, directs otherwise); (i) promptly discontinue all services and (ii) deliver or otherwise make available to the City all

data, documents, procedures, reports, estimates, summaries, and other such information and materials as may have been accumulated by the Operator in performing its obligations, whether completed or in process unless said information is considered proprietary for the Operator. The Operator shall advise the City of the general nature of all information it considers proprietary and shall provide the City with an explanation of why it reasonably considers the information to be proprietary. The City has the right to challenge the Operator's designation of information as proprietary. Upon termination of this Agreement, the City shall, or shall cause the successor Facilities' manager to, honor reservations confirmed for the Facilities in the ordinary course of business with reservation dates after the effective date of a termination notice for which agreements are in place, provided that the Facilities remains in operation on such reservation date(s). Also, upon termination of this Agreement, the City shall, or shall cause the successor Facilities manager to, assume the responsibility of the Operator hereunder to administer and perform under all contracts, leases, licenses, maintenance and service contracts and other agreements which have been entered into on behalf of the City pursuant to this Agreement and which are in effect with respect to the Facilities as of the date of termination of this Agreement, subject in all respects to the City's determination in its sole discretion to terminate any such agreement.

## **SECTION 5**

### **TERMINATION FOR CONVENIENCE**

5.1. The City may without reason or without cause terminate this Agreement at any time for the convenience of the City. The City shall notify the Operator in writing at least ninety (90) days prior to the termination date if it decides to terminate the Agreement pursuant to this Section 5.1.

5.2. In the event termination pursuant to Section 5.1 above is effected by the City, the Operator will be paid for work performed, if any, to date of termination.

## **SECTION 6**

### **TERMINATION FOR DEFAULT**

6.1. The City shall have the right to terminate this Agreement if the Operator fails to perform or comply with any of the terms, covenants, agreements or conditions hereof and such failure continues for more than thirty (30) days after written notice thereof from the City. The City shall have the right to terminate this Agreement immediately upon an event of default specified in Section 6.4. The City shall also have the right to terminate this Agreement in the event of the death or disability of the General Manager, upon such notice as the City deems appropriate under the circumstances.

6.2. In the event termination pursuant to Section 6.1 above is effected by the City, the Operator will be paid for work performed to the date of termination, plus any expenses incurred to date of termination, less the cost to the City of making good any deficiencies, and correcting all work improperly performed.

6.3. In the event of termination pursuant to Section 6.1 above, the City may, in its discretion, assume the work and see that the same is completed by agreement with another party, including subcontractors of the Operator, or otherwise, all without liability to the Operator.

6.4. In addition to the events of default set forth in Section 6.1, the following shall constitute events of default upon the occurrence of which the City may immediately terminate this Agreement:

6.4.1 The occurrence of any act or omission on the part of the Operator that deprives it of the rights, powers, licenses, permits, and authorizations necessary for the lawful and proper conduct and operation of the services and activities authorized;

6.4.2 The filing by or against the Operator of any petitions in bankruptcy;

6.4.3 The abandonment or discontinuance by the Operator, without written consent of the City, of any or all of the operations and services permitted or required;

6.4.4 Any statement, representation or warranty made by Operator in or pursuant to this Agreement or its negotiation, execution, delivery or performance shall prove to have been false, incorrect, misleading, or breached in any material respect on the date when made; and

6.4.5 The commission of any criminal or fraudulent act by the Operator.

6.5. The exercise by the City or Operator of remedies and rights provided herein shall in no way affect any other right or remedy available to the City or Operator.

## SECTION 7

### COMPENSATION

7.1. Total Compensation. As total compensation to pay for its services, the City shall pay to Operator a fee composed of a Fixed Fee and an Incentive Fee.

7.2. Fixed Fee. The City shall pay the Operator an annual Fixed Fee of \$24,000 (\$4,000 for the Operating Year commencing November 1, 2011), which shall be \$2,000 per month during the Operating Years, and respective extensions, if any. The Fixed Fee will be payable monthly as an operating expense, and the Operator shall be entitled to pay itself such amount from the Facilities Operating Account.

7.3. Incentive Fee. In any Operating Year, starting with the Operating Year commencing January 1, 2012, in which the Revenue Benchmark, as defined below, has been achieved, the Operator will be entitled to an Incentive Fee based on the achievement of certain qualitative targets, as described below. The Revenue Benchmark and Incentive Fee will be calculated as follows:

7.3.1 *Revenue Benchmark.* The Revenue Benchmark will be \$4,800,000 in Revenues from the Facilities for the Operating Year.

7.3.2 *Incentive Fee.* The Incentive Fee will be based on qualitative factors, measured on the Operator’s performance with respect to the following qualitative criteria during the Operating Year.

(a) Revenues from the Facilities for the Operating Year (up to 70.0% of total Incentive Fee). The Revenues factor will be measured by the extent to which the Operator has met and exceeded the Revenues Benchmark, as follows:

<u>Revenues (In Millions)</u>	<u>Percentage of Fee Available for Revenues</u>	<u>Amount of Fee Available for Revenues</u>
\$4.8M to \$5.0M	10.0%	\$2,400
Over \$5.0M to \$5.2M	20.0%	\$4,800
Over \$5.2M to \$5.4M	30.0%	\$7,200
Over \$5.4M to \$5.6M	40.0%	\$9,600
Over \$5.6M to \$5.8M	55.0%	\$13,200
Over \$5.8M	70.0%	\$16,800

(b) Level of Customer Service (up to 20.0% of total Incentive Fee): The service factor will be measured by formal customer survey scores and percentage of repeat business, augmented by testimonials and anecdotal evidence that can be documented, all as more fully set forth in the Operations Manual.

(c) Level of Facilities Maintenance (up to 10.0% of total Incentive Fee): The maintenance factor will be measured by adherence to service schedules, written quarterly preventative maintenance reports and other regular reports to the Contract Administrator regarding scheduled maintenance and repairs, and cleanliness of facilities.

7.3.3 The Incentive Fee, if any, will be payable as a single payment for services performed by the Operator during the Operating Year after measurement by the City of the Operator’s performance with respect to the above qualitative criteria. The City will conduct such measurement at the end of the Operating Year following the availability of the annual financial statements pursuant to the procedures set forth in the Operations Manual, and will pay the Operator the Incentive Fee for such Operating Year, if any, within two (2) months of the end of the Operating Year.

7.4. Operating Expenses. In the event that Operating Expenses in an Operating Year exceed the amount budgeted for such operating expenses in the Operating Budget, the City reserves the right to reopen discussions with Operator on the method for calculating the Incentive Fee for any subsequent Operating Year, in which case the parties shall in good faith discuss possible changes to such Incentive Fee calculation for subsequent Operating Years.

7.5. Fee Limitation. In no event shall the total Incentive Fee paid for services performed in any Operating Year exceed 100% of the total Fixed Fee, \$24,000, paid for services performed during such Operating Year.

7.6. Additional Benefits to Senior Executive Personnel.

7.6.1 *Determination of Senior Executive Personnel Additional Benefit Pool.* The Senior Executive Personnel Additional Benefit Pool shall accrue in an Operating Year and shall be payable in the following Operating Year. The Operator shall be paid an amount not to exceed \$48,000 for the Operating Year beginning on January 1, 2012, and an amount not to exceed \$49,920 for the Operating Year beginning on January 1, 2013, as the then applicable Senior Executive Personnel Additional Benefit Pool.

7.6.2 *Schedule of Additional Benefits.* As part of the annual budgeting process, the Operator shall deliver to the City a Schedule of Additional Benefits (as defined below) it proposes to pay to the Senior Executive Personnel, it being understood that each such schedule shall set forth the names of each of the Senior Executive Personnel and the amount of the Additional Benefits compensation budgeted for each Senior Executive Personnel, and the method for calculating the Additional Benefit (the "Schedule of Additional Benefits"). The amount of the Schedule of Additional Benefits shall be computed on a basis comparable to the compensation generally paid to similarly situated employees at other comparable facilities based upon the performance of such other comparable facilities. If the Schedule of Additional Benefits varies from the amount of the Senior Executive Personnel Additional Benefit Pool for such Operating Year by more than 5%, the City and the Operator shall meet to discuss such variance and may mutually agree to amend the amount of the Senior Executive Personnel Additional Benefit Pool set forth in Section 7.6.1 above; provided however, that neither party shall be obligated to agree to any such amendment.

For purposes of this Agreement, the term Additional Benefits shall mean "Annual compensation paid to Senior Executive Personnel that is based upon the performance of the Facilities, based upon a predefined formula (and excluding, for avoidance of doubt, (1) base salary, (2) participation in employee benefit plans and programs (including any equity-based plans (to the extent based on equity in the Operator generally and not the Facilities specifically)), and (3) relocation and severance payments)."

7.6.3 *Increases to Senior Executive Personnel Additional Benefit Pool.* In the event that approved Additional Benefits of Senior Executive Personnel during an Operating Year exceeds the Senior Executive Personnel Additional Benefit Pool for such Operating Year, then the Senior Executive Personnel Additional Benefit Pool for such Operating Year shall be increased by the amount by which the Additional Benefits exceeds the Senior Executive Personnel Additional Benefit Pool for such Operating Year, but in no event will such increase to the Senior Executive Personnel Additional Benefit Pool (a) exceed an amount which combined with the total Incentive Fee paid in such Operating Year exceeds 100% of the Fixed Fee plus the Senior Executive Personnel Additional Benefit Pool for such Operating Year; and (b) be based upon the profitability of the Facilities. Compensation to Senior Executive Personnel shall be payable solely from the Senior Executive Personnel Additional Benefit Pool and to the extent the Senior Executive Personnel Additional Benefit Pool is insufficient, such insufficiency shall be paid by the Operator.

7.6.4 *Payment of Senior Executive Personnel Additional Benefit Pool.* An amount equal to one-twelfth of the Senior Executive Personnel Additional Benefit Pool for an Operating Year shall be payable directly to the Operator from the Facilities Operating Account each month. To the extent the amount of the Senior Executive Personnel Additional Benefit Pool is increased in accordance with Section 7.6.2 or 7.6.3 above, the amount of such withdrawal shall be increased so that the total amount of the Senior Executive Personnel Additional Benefit Pool for such Operating Year shall be paid to the Operator during such Operating Year.

## **SECTION 8**

### **OWNERSHIP**

The City will retain ownership of the Facilities, including but not limited to real estate, golf equipment, technical and office equipment and facilities, furniture, displays, fixtures and similar property. Ownership of assets purchased with revenues or any other City funds is and shall remain the property of the City. The City shall own all data and other electronic files generated by Operator through the use of either the City's or Operator's data process programs and software in operating the Facilities. Property rights will not accrue to Operator.

Neither Operator nor General Manager may take or use, for its or his own purposes, customer or exhibitor lists or similar materials developed for or by the City for the use of the Facilities unless written consent is granted by the City. Notwithstanding any other term or condition of this Agreement, the provisions of this Section shall survive the termination of this Agreement.

## **SECTION 9**

### **USE BY THE CITY**

The City shall have the right to use the Facilities or any part thereof based on the booking priority schedule established by the City without the payment of any rental or use fee, except that direct out-of-pocket expenses incurred in connection with such uses and not included in the approved budget for the Facilities shall be paid by the City. City uses of the Facilities shall not compete with, nor conflict with, paying events booked by the Operator, on behalf of the City and shall be booked in advance upon reasonable notice. Upon request of the City, the Operator shall provide a list of available dates for the City use based on booking priority schedules.

## **SECTION 10**

### **CASH BASIS LAW**

The City shall only be obligated, and shall not be in breach of this Agreement for failure, to appropriate funds in an amount equal to 100% of the accrued revenue of the current fiscal year plus any balance carried forward and cash reserves, all from the operating revenues of the Facilities.



## **SECTION 11**

### **EXPENDABLE SUPPLIES**

The Operator will be responsible for purchasing all expendable supplies for the operation of the Facilities. The Operator will exercise prudent judgment in the purchase of said supplies within budget provided to the Operator.

## **SECTION 12**

### **OPERATING BUDGET**

12.1. The Operator agrees that it will each year in accordance with the City's schedule prepare and present a line item budget for each Facility and for the combined Facilities, each of which budget will follow and comply with the existing City budget process or such other procedures which the City may require. Each budget shall include, at a minimum, a projected income and expense statement and statement of projected sources and applications of funds, and the separate Facility budgets shall include an allocation of shared income and expenses between the Facilities. Additionally, each budget shall include but not be limited to the following detailed projections, presented on a monthly and annual basis:

- (1) Gross revenues;
- (2) Rounds played;
- (3) Operating expenses;
- (4) Incomes;
- (5) Administrative and general expenses;
- (6) Marketing, advertising, and promotion expenses; and
- (7) Repairs and maintenance (excluding City-performed maintenance).

The Operator shall ensure that its representatives are present at all necessary meetings of the budget approval process related to the Facilities.

12.2. The annual operating budget for the Facilities shall receive the prior approval of the City.

12.3. The Operator shall have an approved budget effective January 1st of each fiscal year commencing January 1, 2012. The Operator shall have an approved budget effective November 1 for the first Operating Year commencing November 1, 2011. The Operator shall not exceed, commit or contract to expend any sums in excess of those amounts allowed in the approved budget, and as the budget may be amended, without the approval of the Contract Administrator.

## **SECTION 13**

### **PROCEDURE FOR HANDLING INCOME**

13.1. Revenues derived from operation of the Facilities, such as greens fees, rental fees, advertising, etc., will be deposited into the Facilities Lockbox Account as soon as practicable upon receipt (but not less often than once each business day, and in any event within one (1) business day of receipt). The funds in the City's Facilities Lockbox Account may be swept by the City on each business day or at such other time as may be provided in the Operations Manual. In the event any event is cancelled and refunds are due to the patrons, the City shall promptly pay such amounts back to the Operator so that the Operator can make the refunds to the patrons.

13.2. The Facilities Operating Account will be maintained in a separate bank account controlled by the Operator. The Operator shall use funds in the Facilities Operating Account to cover the operation of the Facilities. The City will transfer to and/or retain in the Facilities Operating Account at least once each quarter upon written request by the Operator, or at such other time as may be provided in the Operations Manual, the budgeted operating costs for the quarter, which may be accessed periodically by the Operator for the purpose of paying operating expenses. Such costs shall include all amounts due to the organizer of an event (such as entry fees previously deposited into the Facilities Lock Box Account), or any other third party, upon settlement of the event.

13.3. The City's Facilities Operating Account and any other account established hereunder or pursuant to the Operations Manual for Facilities operations, will be in the City's name and have two authorized City signatories, however the Operator shall have access to such accounts and shall designate up to four (4) Operator employees to be authorized signatories on the accounts.

13.4. It is the intent of this Agreement that cash control for Facilities operations shall be accomplished through a combination of rigid accounting procedures and internal audit tests and an annual audit by an independent public accounting firm selected by the City. Payrolls shall be processed through a separate bank account in the name of the Operator, reconciled monthly and tested via internal audit procedures. Each event shall be accounted for using an event accounting system, recorded in the financial statements as provided in the Operations Manual, and reimbursable expenses for each event shall be coded for accurate accumulation to ensure all applicable costs shall be paid by the users of the Facilities. Advance deposits covering rentals and estimated costs shall be required as provided in the Operations Manual to minimize collection programs. Credit references shall be checked on any new or questionable clients.

## **SECTION 14**

### **FISCAL RESPONSIBILITY**

14.1. The Operator agrees to keep and maintain, at its office in the applicable Facility, separate and independent records, in accordance with generally accepted accounting principles, devoted exclusively to its Facilities management operations in the City of Overland Park,

Kansas. Said books, ledgers, journals, accounts, and records shall contain all entries reflecting the business operations of the Operator under this Agreement. All of the foregoing records shall be open for examination and audit by the Contract Administrator or City designated and authorized agents or personnel during the Operator's ordinary business hours.

14.2. The Operator agrees to render, within fifteen (15) days after the end of each month, financial reports for each Facility and for the combined Facilities including a balance sheet, aging report on accounts receivable, and statement of revenues and expenditures (budget to actual) for the current month and year to date in accordance with generally accepted accounting principles. In addition, the Operator will immediately upon request by the City provide information on the Facilities Operating Account and the Facilities Lockbox Account.

14.3. The Operator agrees to meet with the Contract Administrator to answer questions relating to the operation of the Facilities and the financial reports. In addition, Operator agrees within sixty (60) days following the end of each fiscal year to provide or cause to be provided to the City a certified audit report on the accounts and records as kept by the Operator for the Facilities. This certified audit report will be paid from appropriate funds set aside in the operating budget. The Operator shall utilize an external auditor approved by the City to conduct this audit of the accounts and records of the Facilities in accordance with generally accepted auditing standards. A letter from said accounting firm expressing its opinion as to the effectiveness of internal controls and a management letter will accompany the audit report. At the option of the City and at its expense, additional audits may be performed.

14.4. The Operator agrees to use forms, accounting methods, internal controls and procedures for its reports that are acceptable to the City.

14.5. The City may request additional financial or statistical reports with respect to the Facilities, and the Operator shall promptly provide same. It is agreed that such requests by the City will be reasonable with respect to timing and frequency. Any and all costs for such reports shall be included as an operating expense.

14.6. The City will make immediately available to the Operator for the operation, maintenance, supervision, and management of the Facilities, all funds necessary to pay all budgeted items of expense, subject to Section 10. To the extent the Operator is unable to perform under this Agreement due to the fact that required budgeted funds are not made available by the City, the Operator will not be considered in breach of this Agreement nor shall such failure to perform for lack of funds be considered an event of default.

14.7. The Operator shall conduct regular inventories of all expendable supplies in accordance with the Operations Manual. The Operator will also work with the Contract Administrator to conduct an annual inventory of equipment, fixed assets and controlled assets of the Facilities in accordance with procedures outlined in the Operations Manual.

14.8. Any data, equipment or materials furnished by the City to the Operator and any such data, equipment or materials that may be acquired for the City by the Operator to be used at the Facilities shall remain the property of the City, and when no longer needed for the performance of this Agreement, shall be returned to the City.

14.9. The City shall provide those goods and services customarily supplied or provided from the City. The costs of these services will be considered operating expenses as identified in Section 14.13. Such services shall not include those that are deemed to be the responsibility of the Operator as stated in this Agreement.

14.10. The parties agree that in the event the Operator requests a capital improvement, the City will give reasonable consideration to such request(s) in formulating its budget in light of competing financial considerations in accordance with Section 15.

14.11. All Operator employees shall be sufficiently bonded under the corporate crime policy as an Operating Expense to protect the Operator's and the City's interests. Such policy shall be in an amount as set forth in Exhibit B and shall name the City as loss payee as its interest may appear.

14.12. Revenues for the Facilities shall be defined to include, but are not limited to:

- (1) Rental income;
- (2) Greens fees;
- (3) Merchandise income;
- (4) Food and beverage sales income;
- (5) Advertising sales income;
- (6) Equipment rental fees;
- (7) Miscellaneous operating income; and
- (8) Sponsorship income.

Revenues do not include applicable excise, sales, occupancy and use taxes, or similar government taxes, duties, levies or charges collected directly from patrons or guests, or as a part of the sales price of any goods, services, or displays, such as gross receipts, admission, cabaret, or similar or equivalent taxes, nor any gratuities collected (or to be collected) for the benefit of and paid to any of the Operator's personnel. Further, Revenues do not include moneys collected (or to be collected) for the benefit of and paid to third parties such as event promoters.

14.13. Operating expenses will be paid from Facilities Operating Account based on the City approved budget, and shall include, but are not limited to:

- (1) Payroll, the employer's share of payroll taxes, benefits, bonus (for non-Senior Executive Personnel), and related costs;
- (2) Operating supplies;
- (3) Advertising;

- (4) Cleaning;
- (5) Data processing;
- (6) Dues, subscriptions and membership;
- (7) The Fixed Fee and the Incentive Fee to be paid under this Agreement;
- (8) Printing and stationary costs;
- (9) Postage and freight costs;
- (10) Equipment and rental costs;
- (11) Minor repairs and maintenance, not inclusive of expenses relating to performing capital improvements, as further defined in Section 15;
- (12) Security expenses;
- (13) Cost of office supplies;
- (14) Telephone charges;
- (15) Travel and entertainment expenses;
- (16) Cost of employee uniforms;
- (17) Exterminator and trash removal costs;
- (18) Parking expenses;
- (19) Utility expenses;
- (20) Audit; and
- (21) Insurance costs.

Operating expenses do not include Additional Benefits (as defined in Section 7.6) paid to Senior Executive Personnel (but do include bonuses paid to non-Senior Executive Personnel).

14.14. All travel and professional expenses of the Operator's employees shall be paid when included in the approved annual budget of the Facilities. Such expenses shall be prorated if the Operator's employees conduct business on behalf of the Operator or other facilities. All non-budgeted travel and professional expenses shall be paid only with the prior written approval of the City.

14.15. Operating expenses incurred by the Operator for which the Operator submits invoices to the City for reimbursement shall be forwarded to the Contract Administrator for

payment. All such payments shall be operating expenses in accordance with the approved budget.

## **SECTION 15**

### **CAPITAL IMPROVEMENTS AND MAINTENANCE**

15.1. The City will retain the responsibility for capital improvements to the Facilities; however, the City is under no obligation to make such improvements. The City shall, at its sole discretion, determine Capital Expenditures for repairs, improvements and maintenance. The Operator agrees to annually provide to the Contract Administrator, in accordance with the Operator's requirements, a schedule of items that can be reasonably anticipated as necessary capital expenditures. The purpose of such a schedule is to allow the Contract Administrator to consider for inclusion such projects in its budget for the ensuing year and to prepare and update a long-range (five year) capital expenditure budget. The Operator's failure to list particular items or projects shall not be deemed a waiver of City's responsibility to make such capital improvements.

15.2. Operator, as an Operating Expense, in accordance with the approved budget shall be responsible for all routine maintenance, preventive maintenance, minor repairs, and equipment servicing including but not limited to cleaning and provision of normal day-to-day maintenance and repair, as necessary, to floor, walls, equipment, fire protection system, improvements and fixtures, provided by the City for Operator's use. As provided in Section 2.2.5, it is understood and agreed that the City shall retain responsibility for maintenance of the Golf Courses greens, tees, aprons, traps and hazards, fairways, roughs and driving ranges, and for such maintenance of the clubhouses and other Improvements as the Contract Administrator shall direct.

15.2.1 Operator is responsible for all sanitation and maintenance of the Food Services, including maintenance of all equipment used in the Food Services operation in accordance with scheduled maintenance standards of such equipment.

15.3. City shall supply all electricity, gas, local telephone, long distance telephone and data lines, water, and other utilities used by the Operator. Operator shall deposit into trash receptacles on the premises designated by the City, all waste, garbage and refuse which shall accumulate in the concession stands, kitchen and commissaries and shall keep the Facilities allotted to it in good, clean and sanitary condition. Trash removal from the Facility is the responsibility of the City.

15.4. Operator will comply with and observe all federal, state and local laws, ordinances and regulations as to sanitation and the purity of food and beverages or otherwise relating to the Food Services operation.

15.5. The cost of all repairs and maintenance shall be paid by the Operator from that line of the operating budget allocated for repairs. In the event repairs exceed the above stated amount, such repairs must be pre-approved by the City as an amendment to the approved budget. Additionally, the Operator shall be responsible for ensuring that all repairs, replacements, and

maintenance shall be of a quality and class at least equal to the original work. Any replacement of an item contained on the inventory schedule to be prepared prior to Facilities opening or any new item added to the inventory shall be deemed the property of the City.

15.6. If any repairs are of an emergency nature, the Operator shall make such repairs in accordance with the following provisions:

The City shall reimburse the Operator for the full amount of the emergency repair. An emergency repair is defined herein as the repair of a condition which, if not performed immediately, creates an imminent danger to persons or property and/or an unsafe condition at the Facilities threatening persons or property and was not the result of lack of preventative maintenance or improper operation. The cost of any emergency repairs shall be reimbursed to the Operator from the capital or operating budgets.

## **SECTION 16**

### **PERSONNEL**

16.1. All personnel employed at the Facilities shall be employees of the Operator and not of the City. The Operator shall select the number, function, qualifications, and compensation, including salary and benefits, of its employees and shall control the terms and conditions of employment relating to such employees. The City may request the removal of any of the Operator's employees and approval of said request will not be unreasonably withheld. The Operator's current benefit program, which may be amended at the Operator's sole discretion, is attached as Exhibit C. The Operator shall notify the Contract Administrator of relevant changes. Facilities personnel may include, but not limited to assistant golf professionals, a food and beverage manager, outside services manager, golf shop manager, assistant golf shop manager, supervisor of instructions, and such other persons as may be required.

16.2. The Operator's General Manager shall be responsible for the total operation by the Operator of the Facilities.

16.3. During each annual budget process during the term of the Agreement, the Operator will present, for approval by the City, a management organizational chart detailing each position and the salary and benefits to be paid. The City has the right to approve staffing levels sufficient to provide a first-class golf operation and Food Services operation at the Facility. The Operator will employ a highly skilled professional for each approved position. Full time management expense that has not received prior approval will not be an Operating Expense. The Operator shall select the number, function, qualifications, and compensation, including salary and benefits, of its employees and shall control the terms and conditions of employment relating to such employees, subject to the provisions of this Section 16. All full time year round employees shall be subject to approval of the Contract Administrator and shall be employed by the Operator on a full time basis. The City may request the removal of any of the Operator's employees and approval of said request will not be unreasonably withheld.

16.4. Operator's golf professional managerial employees shall include but not be limited to, two golf professionals with a PGA "A-4" Director of Golf classification (one for each Facility), two golf professionals with a PGA "A-1" Head Golf Professional classification (one for each Facility) and a golf professional with a PGA "A-14" Director of Instruction classification who will provide services to both Facilities, experienced in the management and operation of golf course facilities. City has the right to modify this requirement, including but not limited to having a single golf professional with the applicable classification provide services to both Facilities.

16.4.1 The Operator will submit to the City the names of qualified candidates for the position of Director of Golf for each Facility. The Operator will be responsible for hiring the Directors of Golf upon the approval of the Contract Administrator.

16.5. The Operator shall employ, train and supervise personnel with appropriate qualifications and experience in sufficient numbers to provide all services appropriate for the Food Services operation. Food Service employees shall receive alcohol training pursuant to State of Kansas standards. The Operator and its employees shall obey the rules and regulations established by City, but such employees shall be exclusively the employees of Operator and not of the City.

16.5.1 The Operator shall employ a highly skilled professional full-time, on-site Food Services management staff possessing the necessary experience and expertise to provide the overall management of a first-class Food Services operation.

16.5.2 The Operator will submit to the City the names of qualified candidates for the positions of Director of Food and Beverage and Executive Chef. The Operator will be responsible for hiring the Director of Food and Beverage and Executive Chef upon the approval of the Contract Administrator.

## **SECTION 17**

### **AGREEMENT MONITORING AND GENERAL MANAGER**

17.1. The City shall monitor the Operator's compliance with the term of this Agreement through the Contract Administrator. The Operator also agrees to name a specific individual to monitor the Agreement.

17.2. The City's Contract Administrator shall be the City Manager or his/her designee and shall have such authority as set forth in this Agreement. Any and all references in this Agreement requiring City participation shall mean the Contract Administrator. The City's Contract Administrator:

17.2.1 Shall be the liaison between the Operator and the City on all matters relating to this Agreement.

17.2.2 Shall be responsible for ensuring that any information supplied by the Operator is properly distributed to the appropriate City Departments.



17.2.3 Shall be responsible for the monitoring and assessment of the quality of services provided by the Operator and contract compliance by the Operator.

17.3. Curtis M. Nelson shall serve as the General Manager of the Facilities. The General Manager:

17.3.1 Shall be the day-to-day liaison between the City and the Operator on all matters relating to this Agreement.

17.3.2 Shall be responsible for the day-to-day management and supervision of the Facilities.

17.3.3 Shall be responsible for providing supervision and direction to Operator's employees at the Facilities.

17.4. Complaints received by the City regarding the conduct or manner of operation of the Facilities by the General Manager shall be addressed by the Operator.

## **SECTION 18**

### **USER FEES/RENTAL AGREEMENTS**

The Operator's General Manager shall have the authority to execute user/rental agreements for the use of the Facilities in substantially the form approved by the Contract Administrator as the standard Facilities License Agreement. Such agreements shall include indemnification and insurance requirements. Any occupancy agreement not in substantially the form of the standard agreement shall require the prior approval of the Contract Administrator. The Operator shall recommend user fees and charges for the Facilities to the Contract Administrator for approval. Such rates shall be comparable with rates charged for similar facilities.

## **SECTION 19**

### **PERMITS AND LICENSES**

The Operator shall apply for, obtain and maintain all licenses and permits necessary for performance of its obligations hereunder, as an Operating Expense. The Operator shall be required to obtain and hold all pertinent permits and licenses as an Operating Expense for the sale of all Alcoholic Beverages. The said Alcoholic Beverage permits and licenses must be limited to the applicable Facility and the Operator's interest in same must terminate simultaneously with the expiration or termination of the Agreement. The privilege to sell Alcoholic Beverages shall be subject to the provisions of the Alcoholic Beverage laws of the City and the State of Kansas. The City shall have the sole right to determine at which events Alcoholic Beverages may be sold.

## **SECTION 20**

### **CITY AND GOLF COURSE NAMES AND LOGOS**

The Operator shall have the right to use, for the term of this Agreement, the City's and each Facility's name and logo on stationery, in advertising and whenever conducting business for the Facilities. The design, format, font and overall appearance of said stationery and the purposes to its usages are subject to the prior approval of the City.

## **SECTION 21**

### **INDEMNIFICATION AND INSURANCE**

21.1. The Operator shall indemnify, hold harmless and defend the City, its agents, servants, and employees from and against any claim, demand or cause of action of whatsoever kind or nature arising out of error, omission or negligent act of Operator, its agents, servants or employees in the performance of services under this Agreement.

21.2. The Operator further agrees to indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatever kind or nature arising out of any conduct or misconduct of the Operator not included in Section 21.1 above and for which the City, its agents, servants or employees are alleged to be liable.

21.3. The execution of this Agreement by the Operator shall obligate the Operator to comply with the foregoing indemnification provisions. Notwithstanding any other term or condition of this Agreement, the indemnification provisions set forth herein shall survive the termination of this Agreement.

21.4. The Operator agrees to obtain insurance coverage in the manner and amounts as set forth in Exhibit B that is attached hereto.

21.4.1 The Operator agrees to maintain such referenced insurance during the life of this Agreement. No modification or change from these specifications shall be made without the City's approval.

21.4.2 All insurance policies shall be rated no less than A VIII, in the most recent "Best" insurance guide and shall be licensed in the state of Kansas or as otherwise agreed by the parties, and shall be in such form and contain such provisions as are generally considered standard for the type of insurance involved to the extent not otherwise required by this Agreement.

21.4.3 The commercial general liability policy, automobile liability insurance policy and umbrella or excess liability policy shall name City as an additional insured. The workers compensation policy shall contain a waiver of all rights of subrogation against City.

21.4.4 Each insurance policy shall include a requirement that the insurer provide at least thirty (30) days' written notice of cancellation or material change in the terms and provisions of the applicable policy.

21.4.5 If Operator subcontracts any of the services provided for under this Agreement, Operator shall either:

(a) Cover all subcontractors under its policies of insurance; or

(b) Require each subcontractor not so covered to secure insurance that will protect against applicable hazards or risks of loss as and in the minimum amounts designated herein.

Whichever option is chosen, Operator shall indemnify and hold harmless City as to any and all damages, claims or losses, including attorney's fees, arising out of the negligence or other actionable fault of its subcontractors.

## **SECTION 22**

### **COMPLIANCE WITH EQUAL OPPORTUNITY LAWS, REGULATIONS AND RULES AND OTHER LAWS**

22.1. Operator shall observe the provisions of the Kansas Act Against Discrimination, K.S.A. 44-1001 et seq., as amended, and shall not discriminate against any person in the performance of work under the present Agreement because of race, religion, color, sex, disability, national origin, ancestry, or age;

22.2. In all solicitations or advertisements for employees, Operator shall include the phrase, "equal opportunity employer," or a similar phrase to be approved by the Kansas Human Rights Commission (Commission);

22.3. If Operator fails to comply with the manner in which Operator reports to the Commission in accordance with the provision of K.S.A. 44-1031 and amendments thereto, Operator shall be deemed to have breached the present Agreement and it may be canceled, terminated or suspended, in whole or in part, by the City;

22.4. If Operator is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the Commission which has become final, Operator shall be deemed to have breached the present Agreement and it may be canceled, terminated or suspended, in whole or in part, by the City; and

22.5. Operator shall include the provisions of paragraphs 21.1 through 21.4 above in every subcontract so that such provisions will be binding upon such subcontractor.

22.6. Operator further agrees that the Operator shall abide by the Kansas Age Discrimination In Employment Act (K.S.A. 44-1111 et seq.) and the applicable provision in the Americans With Disabilities Act (42 U.S.C. 1201 et seq.) as well as all federal, state, and local

laws, ordinances and regulations applicable to this project and to furnish any certification required by any federal, state or local governmental agency in connection therewith.

## **SECTION 23**

### **PROHIBITION AGAINST CONTINGENT FEES**

23.1. Operator warrants that it has not employed or retained any company or person, other than a bona fide employee working for Operator, to solicit or secure this Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gifts, or any other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the City may terminate this Agreement without liability or may, in its discretion, deduct from the Agreement Price or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

23.2. Operator warrants that it will not accept any fee, commission, percentage, gift, or other consideration from any third party for the performance of any work under the Agreement.

## **SECTION 24**

### **FORCE MAJEURE**

Except as otherwise provided herein, neither party shall be obligated to perform, and neither party shall be deemed to be in default of its performance, if prevented by: (a) fire not caused by negligence of the party claiming the inability to perform, earthquake, hurricane, wind, flood, act of God, riot, or civil commotion occurring at the Facilities, or; (b) any law, ordinance, rule, regulation, or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, war, or governmental law and regulation; or (c) labor dispute which results in a strike or work stoppage affecting the Facilities or services described in this Agreement other than those occurring as a result of an act or omission of the party claiming the inability to perform.

## **SECTION 25**

### **CLOSING OF GOLF COURSE**

In the event that the City decides to close a Golf Course and to keep the other Golf Course open, this Agreement may be amended upon the agreement of both parties to reflect the changes in the responsibilities of the Operator for the operation of a single Golf Course. The Operator and the City agree to negotiate in good faith to determine if agreement can be reached on such an amendment, however, neither party is obligated to agree to amend this Agreement in such event. If agreement on an amendment cannot be reached within ninety (90) days of the City's notice to the Operator that the City will close a Golf Course (or such later date as the City directs), this Agreement will be terminated. This Agreement will also be terminated if the City decides to close both Golf Courses, upon ninety (90) days notice to the Operator.

## SECTION 26

### NON-COMPETITION; NON-SOLICITATION; NON-DISPARAGEMENT

26.1. Non-Competition. The City is entering into this Agreement with the Operator upon the expectation that the responsibilities of the Operator and the General Manager hereunder are full-time responsibilities, and that the responsibilities of the Operator's Senior Executive Personnel will be full-time responsibilities. The Operator covenants and agrees that during the Operating Term, none of the Operator, the General Manager or any business in which the Operator or the General Manager has an ownership interest, will enter a contract to provide services to, accept employment with, or otherwise perform services for or on behalf of (directly or indirectly, including but not limited to through the General Manager's spouse), any golf course other than the Golf Courses. The Operator further covenants and agrees to instruct and direct each of its Senior Executive Personnel that while such person is employed by the Operator at the Facilities during the Operating Term, the employee cannot enter a contract to provide services to, accept employment with, or otherwise perform services for or on behalf of (directly or indirectly), any golf course other than the Golf Courses.

26.2. Non-Solicitation. The Operator understands and acknowledges that the City's Code of Ethics provides that former employees are prohibited from selling or attempting to sell supplies, services, or construction to the City for one year following the date of the employee's termination of employment, as more fully set forth in the City's Employee Handbook. Operator acknowledges and agrees such policy is enforceable and necessary to protect the City's interests in maintaining its workforce and in preventing abuses or favoritism in connection with the provisions of City services contracted through third parties. The Operator covenants and agrees that during the Operating Term the Operator will not, directly or indirectly, hire, recruit, solicit, take away or attempt to hire, recruit, solicit or take away any person who is, at the time of such solicitation, an employee of the City who performs services for the Golf Courses, either on the Operator's behalf or in the service or on behalf of any other person or entity.

26.3. Non-Disparagement. Operator and General Manager shall not, and Operator shall instruct its employees not to, during the Restricted Period (as defined in Section 27), make (in private or in public) any statement or remark (orally or in writing) that impugns or disparages the City or any of its officials or employees or the character, reputation, integrity or services of any of them.

26.4. Survival. Notwithstanding any other term or condition of this Agreement, the provisions of this Section shall survive the termination of this Agreement.

## SECTION 27

### CONFIDENTIAL INFORMATION

Upon the request of the City and, in any event, upon termination of this Agreement, whether at the end of the Operating Term or pursuant to the termination provisions of this Agreement, the Operator shall return to the City and leave at its disposal all originals and copies,

in whatever form, of materials involving any Confidential Information, as defined below, and the Operator shall retain no copies.

For purposes of this Agreement, “Confidential Information” shall mean any data or information of or relating to the Facilities and not generally known by the public or available from other public sources. To the extent consistent with the foregoing definition, Confidential Information includes but is not limited to marketing plans and strategies, customer, advertiser or sponsor lists and data bases, rate information, sales data and projections, and the business plans and internal financial statements and projections of the Facilities.

The Operator covenants and agrees that during the herein-defined Restricted Period, the Operator shall not use, disclose or permit any person or entity to obtain any Confidential Information (whether or not such Confidential Information is in written or tangible form). For purposes of this Agreement, the “Restricted Period” means the period commencing with the effective date of this Agreement and continuing for a period of two (2) years after the termination of this Agreement.

Notwithstanding any other term or condition of this Agreement, the provisions of this Section shall survive the termination of this Agreement.

## **SECTION 28**

### **ASSIGNMENT**

The City is entering into this Agreement in recognition of and in reliance on the expertise, reliability, and competence of the Operator and its management in matters pertinent thereto. The qualifications and identity of Curtis M. Nelson, the General Manager, and the sole owner and stockholder of the Operator, are of particular concern to the City. It is in part because of the General Manager’s qualifications and identity that the City has entered into this Agreement with the Operator. The performance of the obligations imposed upon the Operator under the Agreement will not be assignable by it to any other party unless the City, within its sole discretion, consents to said assignment in writing. Furthermore, the performance of the obligations imposed upon Curtis M. Nelson as General Manager under the Agreement will not be assignable by the General Manager to any other party unless the City, within its sole discretion, consents to said assignment in writing. Any purported assignment in contravention of this Section shall be void. In the event of an assignment by Operator to an affiliate, parent or subsidiary which is an entity which is substantially owned or controlled by Operator or General Manager or which retains substantially similar management and directors, and in each case where the General Manager remains as General Manager of the Facilities, and where such assignment is intended to accomplish an internal corporate purpose of Operator or General Manager as opposed to materially and substantially altering the method of delivery of services to City, the City will not unreasonably withhold its consent for such assignment.

**SECTION 29**

**NOTICES**

All notices required or permitted to be given pursuant to this Agreement shall be in writing and delivered personally or sent by registered or certified mail, return receipt requested, or by generally recognized, prepaid, overnight air courier services. All such notices to either party shall be deemed to have been provided when delivered, if delivered personally to individuals or entities addressed below. The designation of the individuals to be so notified and the addresses of such persons or entities for the purpose of notice may be changed from time to time by written notice to the other party which shall be deemed effective ten (10) days after such notice of change is furnished to the other party.

For City of Overland Park, Kansas:  
8500 Santa Fe Drive  
Overland Park, Kansas 66212

For Operator:  
MGMCO, Inc  
c/o Curtis Nelson  
13409 W. 128<sup>th</sup> St.  
Overland Park, Kansas 66213

**SECTION 30**

**SEVERABILITY**

If a court of competent jurisdiction or an arbitrator determines that any term of this Agreement is invalid or unenforceable to any extent under applicable law, the remainder of this Agreement (and the application of this Agreement to other circumstances) shall not be affected thereby, and each remaining term shall be valid and enforceable to the fullest extent permitted by law. The parties hereto do hereby expressly authorize any court of competent jurisdiction to enforce any such provision or portion thereof or to modify any such provision or portion thereof in order that any such provision or portion thereof shall be enforced by such court to the fullest extent permitted by applicable law.

**SECTION 31**

**ALL PRIOR AGREEMENTS SUPERSEDED**

Other than the City's Request for Qualifications, which is incorporated herein by reference, this document incorporates and includes all prior negotiations, correspondence, conversations, agreements, or understanding applicable to the matter contained herein; and the parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly, the parties agree that no deviation from the terms hereof shall be predicated upon any prior representations or agreements whether oral or written. In case of conflict, this Agreement shall take preference over the Request for Qualifications.

**SECTION 32**

**APPLICABLE LAW**

The Agreement is entered into under and pursuant to, and is to be construed and enforceable in accordance with, the laws of the State of Kansas.

**SECTION 33**

**INDEPENDENT CONTRACTOR**

Operator is an independent contractor and as such is not an employee of the City. Operator is responsible for any and all federal, state and local taxes.

**SECTION 34**

**AMENDMENTS TO AGREEMENT**

No alteration or variation of terms shall be valid unless made in writing and signed by both parties, and no oral understanding or agreement not incorporated therein shall be binding on any of the parties.

**SECTION 35**

**WAIVERS, MODIFICATIONS, REMEDIES**

No failure or delay by a Party to insist on the strict performance of any term of this Agreement, or to exercise any right or remedy consequent on a breach thereof, shall constitute a waiver of any breach or any subsequent breach of such term. Neither this Agreement nor any of its terms may be changed or modified, waived, or terminated (unless as otherwise provided hereunder) except by an instrument in writing signed by the Party against whom the enforcement of the change, waiver, or termination is sought. No waiver of any breach shall affect or alter this Agreement, but each and every term of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof. The remedies provided in this Agreement are cumulative and not exclusive of the remedies provided by law or in equity.

[Remainder of page intentionally left blank]



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in triplicate this \_\_\_\_\_ day of October, 2011.

CITY OF OVERLAND PARK

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Carl Gerlach, Mayor

\_\_\_\_\_  
City Attorney

\_\_\_\_\_  
Kathryn P. Peters  
Kutak Rock LLP

MGMCO, INC.

By: \_\_\_\_\_  
Curtis M. Nelson, President

ACCEPTANCE:

The General Manager hereby accepts the responsibilities assigned to the General Manager under this Agreement.

\_\_\_\_\_  
Curtis M. Nelson, General Manager

CORPORATE ACKNOWLEDGMENT

STATE OF KANSAS                    )  
  ) ss.  
COUNTY OF JOHNSON            )

BE IT REMEMBERED, that on this \_\_\_ day of October, 2011, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came Curtis M. Nelson, President of MGMCO, Inc. a corporation duly organized, incorporated and existing under and by virtue of the laws of Kansas, who is personally known to me to be such officer and who is personally known to me to be the same person who executed as such officer the within instrument on behalf of said corporation, and such person duly acknowledged the execution of the same to be the act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal the day and year last above written.

My Appointment Expires:

\_\_\_\_\_  
Notary Public

**GOLF COURSE OPERATING AGREEMENT**

**EXHIBIT A-1**

**SITE MAP OF ST. ANDREWS GOLF COURSE FACILITY**

**GOLF COURSE OPERATING AGREEMENT**

**EXHIBIT A-2**

**SITE MAP OF SYKES/LADY GOLF COURSE FACILITY**

**GOLF COURSE OPERATING AGREEMENT**

**EXHIBIT A-3**

**SITE MAP OF WESTLINKS EXTENSION TO  
SYKES/LADY GOLF COURSE FACILITY**

# **GOLF COURSE OPERATING AGREEMENT**

## **EXHIBIT B**

### **INSURANCE**

At all times during this Agreement, Operator shall:

(a) maintain commercial general liability insurance, including products and completed operations, bodily injury and property damage liability, liquor liability, contractual liability, independent contractor's liability and personal and advertising injury liability against claims occurring on, in, or about the Facilities, or otherwise arising under this Agreement;

(b) maintain umbrella or excess liability insurance;

(c) maintain commercial automobile liability insurance, including coverage for the operation of owned, leased, hired and non-owned vehicles;

(d) maintain appropriate workers compensation and employer's liability insurance as shall be required by and be in conformance with the laws of the State of Kansas; and

(e) maintain professional liability including employment practices liability.

The following are a summary of the minimum liability insurance requirements as of the Effective Date:

#### **Commercial General Liability**

\$1,000,000 per occurrence  
\$1,000,000 personal and advertising injury  
\$2,000,000 general aggregate  
\$2,000,000 products-completed operations aggregate

#### **Automobile Liability**

\$1,000,000 per accident (BI and PD combined single limit)  
\$1,000,000 uninsured/underinsured motorist

#### **Umbrella or Excess Liability**

\$5,000,000 per occurrence and aggregate

## **Workers Compensation**

Workers Compensation: Statutory

Employer's Liability:

\$100,000 each accident-bodily injury by accident

\$500,000 policy limit-bodily injury by disease

\$100,000 each employee-bodily injury by disease

## **Employment Practices Liability (Claims Made)**

\$1,000,000 each claim/aggregate

Policy is to include:

- Entity Coverage
- Employment Practices Liability

## **Crime**

Type: Employee Dishonesty Bond

Limit: \$500,000 per loss

- City as a Joint Loss Payable

**GOLF COURSE OPERATING AGREEMENT**  
**EXHIBIT C**  
**OPERATOR'S CURRENT BENEFIT PROGRAM**