

## GOLF COURSE FACILITY MANAGEMENT AGREEMENT

This Agreement (“Agreement”) is made this 1st day of November 2018, between Touchstone Golf, LLC (“TOUCHSTONE”), a Delaware limited liability company and the City of Chula Vista, a municipal corporation in the county of San Diego, California (“CITY”). TOUCHSTONE and CITY may be referred to herein individually as a “Party” and collectively as the “Parties”.

A. CITY holds title to a parcel of real property (“Property”) including an (18) hole golf course and facility and other amenities known as the Chula Vista Golf Course.

B. CITY is in need of a professional manager of the complete operation of the Golf Course Facility, including, but not limited to, accounting and administration of all receipts and disbursements, marketing and sales, supervision of all employees and maintenance of the golf course, clubhouse, related facilities and equipment.

C. CITY desires that TOUCHSTONE provide the management and other services which are necessary for the operations of the Golf Course Facility in a professional manner with budgets and operations structured to attempt to accomplish CITY’s financial needs.

D. TOUCHSTONE has agreed to provide such services on the terms and conditions herein contained.

### **I. BASIC TERMS**

#### **A. Basic Terms**

1. **Term:** The “Term” of this Agreement shall commence on November 1, 2018 (the “Commencement Date”) and end on October 31, 2023 (“Completion Date”), unless terminated earlier as provided herein.

2. **Extension.** Unless TOUCHSTONE or CITY provides the other Party with thirty (30) days written notice of its intent for the Agreement to expire prior to the Completion Date, the Term of this Agreement shall be extended beyond the Completion Date on a month-to-month basis on the same terms and conditions as provided herein. If the Term is extended as provided above, either Party may thereafter terminate the Agreement for any or no reason by providing the other Party with thirty (30) days prior written notice of the effective date of the termination. The foregoing does not limit either Party’s right to terminate the Agreement as otherwise provided in this Agreement.

3. **Full Management:** The term “Full Management” shall mean the performance of all activities and services required to operate and maintain the Golf Course Facility, including but not limited to those identified in Section III of this Agreement.

4. **Base Management Fee:** The monthly fee for Full Management shall be seven thousand five hundred dollars (\$7,500) per month (\$90,000 per annum) (the “Base Management Fee”). The Base Management Fee includes all costs and expenses associated with regional and executive oversight by TOUCHSTONE, plus central accounting functions above the course level, excluding tax accounting.

5. Incentive Management Fee: In its management roll, TOUCHSTONE shall be eligible to earn an incentive fee (the “Incentive Management Fee”), in addition to the Base Management Fee as provided for above. The Incentive Management Fee shall be based on the increase in annual Net Operating Income (“NOI”) of the Golf Course Facility; as such figure is calculated pursuant to Exhibit B. The Incentive Management Fee for the first year of the Term, from November 1, 2018 through October 31, 2019, shall equal fifteen percent (15%) of the increase in NOI over two hundred thousand dollars (\$200,000). For subsequent years (November 1 through October 31) of the Term, the Incentive Management Fee will be calculated based on the highest NOI achieved in any prior year of the Term or two hundred thousand (\$200,000), whichever is greater. In the event of a termination for convenience that does not occur as of the twelve (12) month anniversary date of the Commencement Date, the incentive to be paid shall be calculated based on the increase in NOI for the partial year period compared to the higher of the NOI for the same partial year period or the prorated share of the two hundred thousand dollars (\$200,000). In the event of a termination for cause, no Incentive Management Fee shall be due.

6. Golf Course Facility Description: The term “Golf Course Facility” shall mean the eighteen (18) hole golf course facility and other amenities known as the Chula Vista Golf Course, including a clubhouse, restaurant, golf shop, practice facility, maintenance and storage facilities, and all improvements and business operations thereof or in connection therewith.

7. Golf Carts. CITY will reimburse TOUCHSTONE the full monthly lease payment amount during the Term, including any applicable sales and property taxes (“Cart Lease Costs”) for any cart fleet lease (“Lease”) that is obtained through use of TOUCHSTONE’s credit. CITY will also reimburse TOUCHSTONE for any required deposits related to such Lease. CITY hereby guarantees in the event of CITY’s termination of TOUCHSTONE for convenience under this Agreement, or TOUCHSTONE’s termination of CITY for cause under this Agreement, prior to the end of the Lease, that CITY will (i) assume the Lease and the duty to return the carts and (ii) make all efforts reasonably possible to obtain the release of TOUCHSTONE from any and all obligations associated with the Lease. CITY accepts responsibility for costs related to the cost of insurance, maintenance, and return of the golf carts at the end of any Lease, regardless of whether this Agreement has been terminated or extended.

8. Liquor License: During the Contract Period, TOUCHSTONE agrees to hold the liquor license in its name. TOUCHSTONE agrees that it will transfer the liquor license to CITY’S assignee at the time of the expiration or termination of this Agreement for no additional consideration other than reimbursement of any costs incurred by TOUCHSTONE. TOUCHSTONE shall retain all Net Profits from the sale of alcoholic beverages at the Golf Course Facility; provided, however, that the Base Management Fee shall be reduced each month by the amount equal to the Net Profits retained by TOUCHSTONE for such month. As used herein, the term “Net Profits” shall mean the gross receipts attributable to the sale of alcoholic beverages at the Golf Course Facility less (i) employee salaries, other compensation and benefits, (ii) payments under equipment leases, (iii) costs incurred to purchase alcoholic beverages for service or sale, and (iv) any applicable state and federal taxes, but specifically excluding TOUCHSTONE’s income taxes in respect of Net Profits retained by TOUCHSTONE pursuant hereto.

9. Intentionally omitted.

10. Addresses for Notices: All notices, demands, and requests to be sent to any Party shall be deemed to have been properly given or served if personally served or deposited in the United States mail, addressed to such party, postage prepaid, registered or certified, with return receipt requested, at the addresses identified below:

IF TO TOUCHSTONE:

Mr. Stephen T. Harker  
President and CEO  
Touchstone Golf, LLC  
1052 Overlook Road  
Berkeley, California 94708  
[sharker@touchstonegolf.com](mailto:sharker@touchstonegolf.com)  
Fax: (510) 315-0136

and,

Mr. Douglas J. Harker  
Executive Vice President  
Touchstone Golf, LLC  
11612 Bee Caves Road, Suite 150  
Austin, Texas 78738

IF TO CITY:

Mr. Richard Rayls  
Real Property Manager  
City of Chula Vista  
276 Fourth Avenue  
Chula Vista, CA 91910

and,

Attention: City Attorney  
City of Chula Vista  
276 Fourth Avenue  
Chula Vista, CA 91910

## **II. REPRESENTATIONS AND RESPONSIBILITIES**

Each party agrees to cooperate with the other and its officers, employees, agents and contractors in connection with this Agreement.

## **III. POWERS AND RESPONSIBILITIES OF TOUCHSTONE**

A. CITY hereby appoints TOUCHSTONE to manage the Golf Course Facility and TOUCHSTONE hereby accepts such appointment on the terms and conditions herein contained in this Agreement. Without limiting the generality of the foregoing, TOUCHSTONE shall provide to CITY all management services more particularly set out in this Section III.

B. TOUCHSTONE will operate the Golf Course Facility in a good, workmanlike and professional manner by:

1. Providing day-to-day management and oversight of operations of the 18 hole daily fee golf facility to ensure a quality experience for guests and residents.

2. Arranging for the employment of competent management that are trained in the necessary facets of golf course facility management, with sufficient experience in the golf course facility industry to oversee management of the Golf Course Facility.
3. Arranging for the employment of a competent staff and deploying such staff and other resources to insure proper care of the buildings, grounds, and Golf Course Facility.
4. Managing all hiring, training and termination of all Golf Course Facility management and personnel, including administering all labor relations. It is understood that TOUCHSTONE shall maintain the current Golf Course Facility Manager. Any new general manager to be hired shall be subject to the approval of CITY, not to be unreasonably withheld or delayed. Personnel of the Golf Course facility will become employees of TOUCHSTONE.
5. Overseeing the accounting process including planning and budgeting; daily and monthly sales reporting, producing monthly financial statements; processing all expenses for payment; reviewing monthly cash flow statements; bank account reconciliations, and procession payroll.
6. Preparing and maintaining accurately in all material respects the books, accounts, and records of the operations of the Golf Course Facility and all transactions related to the Golf Course Facility.
7. Overseeing the planning and implementation of all marketing programs, including developing and execution of membership sales, tournament/catering event sales, social media, email marketing, community outreach (included in marketing calendar), promoting the food and beverage operation, implementing pricing and revenue management techniques, and placing appropriate media/advertising.
8. Arranging for the purchase of such supplies and equipment as is reasonably necessary in order to operate the Golf Course Facility.
9. Maintaining the Golf Course Facilities in a condition consistent with the standards and quality levels defined in the calendar budget and business plan.
10. Coordinating with CITY to cause the Golf Course Facility to operate in compliance with applicable laws and regulations including without limitation, where applicable, TOUCHSTONE paying local prevailing wage rates in accordance with Sections 1770, and 1773, and 1782, as amended, of the California Labor Code for public works construction contracts and public works contracts for alteration, demolition, repair, and/or maintenance work.
11. Overseeing all other matters reasonably necessary for the efficient performance of the operations in connection with the Golf Course Facility.
12. Carrying out duties in a proper and business-like manner and in compliance with all applicable local, state and federal laws, regulations and ordinances.
13. To the extent that TOUCHSTONE has existing business relationships, such as those with suppliers and contractors, the use of which will benefit the CITY and the operation of the Golf Course Facilities, TOUCHSTONE shall make use of those relationships for the purchase supplies and equipment, as needed, to operate the Golf Course Facility.

14. TOUCHSTONE has an existing foundation or relationship with a foundation, the Touchstone Golf Foundation (the "Foundation"), which organizes a group of volunteers at the golf course to support non-profit causes and raise donations for them. The volunteers also support the golf course by educating the golfers on pace of play and acting as greeters. TOUCHSTONE shall make use of the Foundation to enhance guest service, community outreach, and promote the Golf Course Facility.

C. Subject to any provisions to the contrary herein contained, TOUCHSTONE may subcontract the whole or any part of the performance of its obligations and duties herein described to any wholly-owned subsidiary of TOUCHSTONE, or to any other person, firm, or CITY approved by CITY. The subcontracting of the whole or any part of its obligations and duties as aforesaid shall not relieve TOUCHSTONE from liability for the performance of such obligations and duties before or after such contracting.

D. For the term of this Agreement, TOUCHSTONE will carry reasonable amounts, as determined by the CITY's Risk Manager, of general liability insuring all Golf Course Facility assets and operations, and completed operations including Fire Legal Liability Sublimit of not less than \$100,000. TOUCHSTONE will also provide other insurance coverage as it or City deems necessary and normal for the operation of the Golf Course Facility, including but not limited to worker's compensation and automobile liability. Liquor liability insurance/DRAM shop insurance will only be required if TOUCHSTONE operates the food and beverage operation. To the extent available, all of the foregoing insurance policies shall name the City of Chula Vista and all of its officers, officials, employees, and agents as an additional insureds. The cost of all insurance called for in this paragraph III D shall be the sole responsibility of CITY and premiums paid by TOUCHSTONE shall be paid or reimbursed from the Operating Account(s) of the Golf Course, as defined below. Specific insurance coverage and limits are described in EXHIBIT C – TOUCHSTONE GOLF LLC INSURANCE COVERAGE.

E. Unless otherwise directed by CITY, all contracts and agreements that relate specifically to the Golf Course Facility shall be entered into by and in the name of CITY. No contract or agreement shall be entered into without CITY approval, unless in accordance with the budget and terminable on 30-days' notice. TOUCHSTONE shall provide CITY copies of all such contracts and agreements that are binding upon or obligate CITY within ten (10) business days of their execution.

F. TOUCHSTONE shall approve and pay all operating expenses of the Golf Course Facility promptly, unless the amounts thereof are in dispute. In addition, TOUCHSTONE will calculate any moneys or fees due TOUCHSTONE in accordance with this Agreement. TOUCHSTONE is authorized to pay its fees and expenses owing under this Agreement from the bank account utilized to pay operating expenses for the Golf Course Facility. No director or officer of TOUCHSTONE shall have any interest in any concession at the Golf Course Facility or in any contract for the Golf Course Facility without approval by the CITY or his designee. CITY shall designate bank account(s) necessary to fulfill the payment of expenses ("Operating Account(s)") and shall authorize TOUCHSTONE and Golf Course Facility employees, as necessary, to make deposits and authorize disbursements from the Operating Account(s), which authorization shall be presumed for individuals named on bank resolutions and/or signature cards.

G. TOUCHSTONE does not give any general or specific guarantee as to the profitability of the Golf Course Facility, the attendance thereat or the revenues therefrom.

H. Upon expiration of the term of this Agreement, or upon the prior termination of this Agreement, and in any year prior to such expiration or termination, TOUCHSTONE agrees and covenants to cooperate fully with CITY or CITY's designated successor manager in the smooth and businesslike transfer of the operations of Golf Course Facility including but not limited to the transfer of accounts, contracts, policies, licenses, permits, equipment and improvements in connection with the Golf Course Facility to CITY or CITY's designees, excepting proprietary information or processes, including proprietary software, to which TOUCHSTONE has the sole or exclusive ownership rights ("Proprietary Property"). TOUCHSTONE shall clearly identify any Proprietary Property with designations such as "Confidential" or "Proprietary". Furthermore, TOUCHSTONE agrees and covenants to execute all documents required or convenient to accomplish any such transfer in a timely, effective and efficient manner. On the expiration or on the termination of this Agreement for any reason, all Golf Course Facility property and interests therein, including cash, accounts, books, records, contracts; policies; licenses, permits and improvements in the Golf Course Facility property, except Proprietary Property and property as to which the parties have agreed shall be the property of TOUCHSTONE, will be promptly turned over to CITY and be the property of CITY. TOUCHSTONE shall execute and deliver to CITY all documents necessary to legally effectuate each of the transactions. Unless otherwise agreed in writing by the parties hereto, TOUCHSTONE shall remove its personnel and personal property from the Golf Course Facility upon such expiration or termination. Upon such expiration or termination, TOUCHSTONE shall surrender to CITY all cash and other assets of the Golf Course Facility. A transitional fee of fifteen thousand dollars (\$15,000) will be paid to cover the transition, wind down, and final accounting.

I. TOUCHSTONE shall not make, or suffer to be made, any alterations of the Golf Course Facility or any part thereof if the cost of such alteration in the aggregate would be in excess of \$10,000 unless already included within the then approved budget for the Golf Course Facility without the prior written consent of CITY. TOUCHSTONE shall keep the Golf Course Facility premises and CITY's property in which such premises are situated free from any liens arising out of any work performed or material furnished to the property. In the event such liens are placed, TOUCHSTONE shall immediately inform the CITY of the lien(s) and remove such liens as soon as reasonably possible.

J. TOUCHSTONE shall not discriminate against any employee or applicant for employment because of race, color, creed, sex, age, national origin or non-disqualifying handicap. TOUCHSTONE shall not discriminate because of race, religion, color, ancestry, sex, national origin or non-disqualifying handicap against any person by refusing to furnish such person any service or privilege offered to or enjoyed by the general public, nor shall TOUCHSTONE or its employees publicize the Golf Course Facility in any manner that would directly or inferentially reflect on the acceptability of the patronage of any person because of race, religion, color, ancestry, sex, national origin or non-disqualifying handicap, nor shall the Golf Course Facility be so used.

#### **IV. MANAGEMENT COMPENSATION**

Payments for services under this Agreement shall be made as follows:

1. The Base Management Fee set forth in Section I shall be due and paid to TOUCHSTONE, upon issuance of the income statement for the month.

2. The Incentive Management Fee, if earned, shall be due and payable within thirty (30) days of the City's approval of the final financial statement for the prior twelve (12) month period.

## **V. PLANNING AND BUDGETS**

No later than June 20<sup>th</sup> of each year, TOUCHSTONE and CITY shall have prepared and received CITY's approval of the annual budget (which shall include a line item budget by month of all revenue, costs of goods, operating expenses, payroll costs, management expenses, and other expenditures necessary for Full Management of the Golf Course Facility), marketing calendar, capital improvement plan, facility improvement plan, and equipment plan (collectively, the "Annual Budget"). Until such time that the Annual Budget is complete and approved by CITY, TOUCHSTONE shall use its best commercially reasonable efforts to operate the Golf Course Facility under the existing budget framework provided by TOUCHSTONE to CITY or in a manner consistent with the current market position of the Golf Course Facility.

## **VI. RECORDS, ACCOUNTS AND REPORTS**

A. TOUCHSTONE shall use the current accounting systems maintained by the Golf Course Facility or provided by CITY, as directed by the CITY's Director of Finance, to track and maintain its expenditures and revenues.

B. TOUCHSTONE shall accurately in all material respects prepare and maintain the books, accounts, and records of the operations of the Golf Course Facility and all transactions related to the Golf Course Facility.

C. TOUCHSTONE shall prepare monthly financial statements including a balance sheet, statement of operations and other financial data reasonably requested by CITY no later than twenty five (25) calendar days following the end of each month. TOUCHSTONE is not responsible for the preparation of the annual tax return of the Golf Course Facility.

D. CITY shall have the right, upon request, to examine all books and records and to, at CITY's expense, request an audit.

E. TOUCHSTONE shall maintain all books and records until termination or expiration of this Agreement, at which time they shall be transferred to the CITY or CITY's assignee in accordance with the terms of this Agreement.

## **VII. PAYMENT AND REIMBURSEMENT OF EXPENSES**

A. TOUCHSTONE shall be entitled to reimbursement from the CITY for those reasonable costs and expenses of maintaining, operating, and supervising the operation of the Golf Course Facility, provided they are in accordance with the contracts and consistent with the approved budget or within permitted variances provided for elsewhere in this Agreement, to include, but not limited to the following:

1. The salaries, fringe benefits, workers compensation insurance and expenses of employees;
2. All costs and expenses of any advertising or business promotion;

3. Costs of goods sold, including inventory and supplies necessary to conduct the business of the Golf Course Facility;
4. All expenditures for capital expenditures, repairs and maintenance, equipment and supplies;
5. Premiums for insurance maintained;
6. All expenses of regulatory compliance, permits, etc., it being specifically agreed that legal fees incurred in connection with regulatory compliance for such liquor licenses, food service, etc. are approved, reasonable and necessary legal fees of attorney's retained by CITY or otherwise approved by CITY in advance, directly related to the operation and protection of the Golf Course Facility and CITY's and TOUCHSTONE's liability;
7. Cost and expenses of utilities;
8. General and administrative and accounting costs, including forms and checks;
9. Preapproved consulting fees for certain expertise (e.g. agronomy) needed to address specific needs of the Golf Course Facility; and
10. Accounting fees (e.g. banking fees, electronic bill pay system fees, etc.), Incentive Management Fees and reimbursable expenses (e.g. travel for non-course based support team) of TOUCHSTONE as set forth herein.

B. CITY is responsible for providing sufficient funds to cover the operating expenses for the Golf Course Facility. TOUCHSTONE, acting as authorized independent contractor for CITY, will deposit all revenues of the Golf Course Facility into an Operating Account(s) or accounts for the Golf Course Facility and TOUCHSTONE will have authority to draw upon the funds in the Operating Account(s) to cover operating expenses. In the event that funds in the Operating Account(s) are not sufficient to cover operating expenses, TOUCHSTONE shall advise CITY of the shortfall or potential shortfall and CITY shall deposit additional funds into the appropriate account in a timely manner in order to ensure that sufficient funds are available to meet the operational requirements of the Golf Course Facility. Touchstone will have no obligation to contribute funds to the Operating Account(s) of the Golf Course Facility.

C. TOUCHSTONE may cause the Golf Course Facility to incur any expense (i) that is included in the approved Annual Operating Budget; (ii) that is needed to remedy any emergency situation that, in TOUCHSTONE's professional judgment, is potentially hazardous, unsafe or damaging to the Golf Course Facility or to persons reasonably expected to be present at the Golf Course Facility (e.g., employees, patrons, authorized visitors) ("Emergency Expenditure"), as more particularly set forth hereinabove; or (iii) as otherwise expressly approved by CITY. TOUCHSTONE shall not incur any expense that is not consistent with the Annual Budget without the consent of the CITY, except in the case of an emergency (as elsewhere provided in this Agreement) or as otherwise provided in this Agreement. TOUCHSTONE shall not enter into any contract, even if otherwise authorized hereunder, which binds or purports to bind CITY or the Golf Course Facility without the prior written approval of CITY if the term of such contract exceeds the Term unless such contract is terminable on 30 days' notice. Excepting only Emergency Expenditures or expenditures included in the approved budget, TOUCHSTONE shall not incur any single expense, even if otherwise authorized hereunder, which is chargeable to



CITY or to the Golf Course Facility if the amount equals or exceeds ten thousand dollars (\$10,000).

D. TOUCHSTONE may reallocate up to twenty five percent (25%) of any amount budgeted with respect to any one line item in the Annual Budget to another line item budgeted therein, provided that the aggregate expenditures in the Annual Budget are unaffected. Unbudgeted minor expenditures unforeseen at the time of preparation of the Annual Budget, and reasonably deemed necessary by TOUCHSTONE, may be made without Owner's authorization except that unbudgeted expenditures aggregating more than Ten Thousand Dollars (\$10,000) in any month, or more than Fifty Thousand Dollars (\$50,000) in any year, may not be made without CITY's written approval.

## VIII. TERMINATION

A. Notwithstanding the provisions of Section I, this Agreement may be terminated prior to the end of the Term as follows:

1. Mutual Consent: At any time by mutual agreement between TOUCHSTONE and CITY.
2. For Convenience: CITY may suspend or terminate this Agreement, at any time and for any or no reason, with or without cause, by giving specific written notice to TOUCHSTONE of such termination or suspension at least one hundred and eighty (180) days prior to the effective date thereof.
3. For Cause: Following a material breach of the terms and conditions of this Agreement, not amounting to gross negligence, the non-breaching party may terminate this Agreement following a written notice of breach and failure to cure as follows:

Notice: The non-breaching party shall provide the other with a written notice of the breach (the "Notice to Cure"). The Notice to Cure shall include sufficient detail to inform of the nature of the alleged breach and shall indicate a date not less than fifteen (15) days from the date on the Notice to Cure by which the alleged breach shall be cured.

Opportunity to Cure: The party accused of breach shall have an opportunity to cure the alleged breach within the timeframe provided in the Notice to Cure. In the event that a cure cannot be reasonably accomplished within the timeframe identified in the Notice to Cure, the party accused of breach shall provide the other party with an explanation of why the cure cannot be accomplished within the timeframe provided, indicate a date by which the cure can be completed, and diligently pursue the cure to completion.

4. In the event of gross negligence in the operation of the Golf Course Facility by TOUCHSTONE, immediately upon receipt of written notice. Notice may be delivered personally, by e-mail, or by registered mail, or equivalent mail delivery service which provides for a signature of receipt.

## **IX. MUTUAL INDEMNITY**

### **A. Indemnification by CITY of TOUCHSTONE**

CITY shall defend, indemnify, protect, and hold harmless the TOUCHSTONE, its officers, employees, agents, and affiliated entities, from and against any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury, in law or equity, to property or persons, including wrongful death, in any manner arising out of or incident to any negligence or willful misconduct of CITY, its officials, officers, employees, and agents arising out of or in connection with this Agreement. This indemnity provision does not include any claims, damages, liability, costs and expenses (including without limitations, attorneys fees) arising from the sole negligence, active negligence, or willful misconduct of TOUCHSTONE, its officers, employees, agents or affiliated entities.

### **B. Indemnification by TOUCHSTONE of CITY**

TOUCHSTONE shall defend, indemnify, protect, and hold harmless the CITY, its elected and appointed officers, agents and employees, from and against any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury, in law or equity, to property, including takings claims, or persons, including wrongful death, in any manner arising out of or incident to any alleged acts, omissions, negligence, or willful misconduct of TOUCHSTONE, its officers, employees, agents, or affiliated entities, arising out of or in connection with this Agreement. This indemnity provision does not include any claims, damages, liability, costs and expenses (including without limitations, attorneys fees) arising from the sole negligence, active negligence, or willful misconduct of CITY, its officers, employees, agents or affiliated entities.

C. **Enforcement Costs.** To the extent that a party hereto is entitled to be indemnified (“Indemnitee”) by the other (“Indemnitor”) according to the provisions above, the Indemnitor agrees to pay any and all costs Indemnitee incurs enforcing such provisions.

D. **Survival.** An Indemnitor’s obligations under Section IX shall survive the expiration and termination of this Agreement.

## **X. REPRESENTATIONS AND WARRANTIES**

A. CITY represents and warrants to TOUCHSTONE as follows:

1. CITY is duly organized and validly existing under the laws of the state of its creation and is qualified to do business and is in good standing in the state in which the Golf Course Facility is located, with full power and authority to enter into and execute this Agreement and to consummate the transactions contemplated hereby. CITY has received all requisite partner or corporate approvals necessary for the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby and this Agreement constitutes the legal, valid and binding obligation of CITY, enforceable against CITY in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting debtors’ and creditors’ rights generally and general equitable provisions.

2. To the best of the CITY'S knowledge, except as listed in Exhibit A, CITY has not received written notice from any governmental authority that the existing use, maintenance and operation of the Golf Course Facility or any portion thereof violates any law in any material respect. CITY has not received any written notice from any mortgagee, insurance company, fire marshal or building inspector requiring or requesting the performance of any work or alterations to the Improvements which has not been performed.

3. Except as set forth in Exhibit A, there are no actions, suits, or proceedings pending or, to the best of CITY'S knowledge, threatened in any court or before or by any governmental authority against or affecting CITY or the Golf Course Facility, except as disclosed in Exhibit A attached hereto and made a part hereof.

4. There are no pending eminent domain or condemnation proceedings against the Golf Course Facility or any part thereof and to the best of CITY's knowledge, no such proceedings are presently threatened or contemplated by any authority with the power of eminent domain.

5. The CITY is not aware of any contracts or other obligations outstanding for the sale, exchange or transfer of the Golf Course Facility or any portion thereof.

B. TOUCHSTONE represents and warrants to CITY as follows:

1. TOUCHSTONE is duly organized and validly existing under the laws of the state of its creation as a Delaware limited partnership, and is qualified to do business and is in good standing in the state in which the Golf Course Facility is located, with full power and authority to enter into and execute this Agreement and to consummate the transactions contemplated hereby. TOUCHSTONE has received all requisite partner or corporate approvals necessary for the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby and this Agreement constitutes the legal, valid and binding obligation of TOUCHSTONE, enforceable against TOUCHSTONE in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting debtors' and creditors' rights generally and general equitable provisions.

## **XI. CONFIDENTIALITY**

A. TOUCHSTONE acknowledges and agrees that CITY is subject to the California Public Records Act and numerous other laws and regulations regarding transparency and public disclosure of information (collectively, "Public Disclosure Laws"). Nothing contained in this Agreement is intended to create an obligation of CITY that is or would be in conflict with any Public Disclosure Laws. Except as required by Public Disclosure Laws or a court of competent jurisdiction, each party at all times hereafter shall attempt to preserve the secrecy and confidentiality of all the other party's confidential information (as defined hereafter) as it relates to the operation of other party's golf facilities, shall not attempt to use or in any way appropriate the same for its own use or benefit and shall not knowingly disclose or knowingly permit to be disclosed to any person (other than employees of CITY and TOUCHSTONE) confidential information without the prior written consent of the applicable party, except as required by law. Such consent shall not be unreasonably withheld. "Confidential information" means all information and data related to TOUCHSTONE, used by TOUCHSTONE in connection with TOUCHSTONE's obligations hereunder and related to other tennis or Golf Course Facilities of

TOUCHSTONE, which information and data relates to TOUCHSTONE trade secrets, ideas, know-how, improvements, inventions, technologies or internal business facts (including financial and operating information), except such information or data which is generally available to the public without CITY's fault or is acquired in good faith by CITY from a third party who CITY has no reason to believe acquired the same in other than good faith and who is not under any obligation to TOUCHSTONE in respect thereof.

B. TOUCHSTONE is permitted to identify its relationship with the Golf Course Facility in its advertising and marketing literature and website, including a photograph of the Golf Course Facility acceptable to CITY, with a generic reference stating that the Golf Course Facility, is a client (or upon expiration of the Contract Period, was a client) of TOUCHSTONE.

## **XII. FORCE MAJEURE**

A. For the purposes of this Section XII, "force majeure" shall mean an act of God, strike, lockout or other industrial disturbance, act of a public enemy, war blockade, public riot, lightning, fire, storm, earthquake, flood, explosion, governmental restraint, and any other cause, whether of the kind specifically enumerated above or otherwise, which shall not reasonably be within the control of the party claiming suspension.

B. If TOUCHSTONE or CITY is unable, wholly or in part, by reason of force majeure (as herein defined) to carry out an obligation under this Agreement, such obligation shall be suspended so far as it is affected by such force majeure during the continuance thereof. The party unable to perform shall give the other party prompt notice of such force majeure with reasonably full particulars thereof and, insofar as is known, the probable extent to which it will be unable to perform or be delayed in performing such obligation. The party unable to perform shall use all possible diligence to remove such force majeure as quickly as possible.

C. The requirement that any "force majeure" shall be removed with all possible diligence shall not require the settlement by the party unable to perform due to strikes, lockouts or other labor disputes or the meeting of any claims of or demands by any supplier or government entity contrary to the wishes of TOUCHSTONE or CITY or which may be harmful to CITY or to TOUCHSTONE.

## **XIII. NO WAIVER**

No failure of either the CITY or the TOUCHSTONE to insist upon the strict performance by the other of any covenant, term or condition of this Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Agreement, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.

## **XIV. AMENDMENTS**

This Agreement and the Exhibits and references incorporated into this Agreement fully express all understandings of the Parties concerning the matters covered in this Agreement. No change,

alteration, or modification of the terms or conditions of this Agreement, and no verbal understanding of the Parties, their officers, agents, or employees shall be valid unless made in the form of a written change agreed to in writing by both Parties or an amendment to this Agreement agreed to by both Parties. All prior negotiations and agreements are merged into this Agreement.

#### **XV. SEVERABILITY**

A. If it is held by a court of competent jurisdiction that:

1. any part of this Agreement is void, voidable, illegal or unenforceable; or
2. this Agreement would be void, voidable, illegal or unenforceable unless any part of this Agreement were severed from this Agreement;

then that part shall be severable from and shall not affect the continued operation of the rest of this Agreement.

B. The provisions of Section XV (A) shall not apply if the part of the Agreement affected is a substantive part in which event the parties shall in good faith renegotiate the provisions of the part so affected.

#### **XVI. ASSIGNMENT**

A. This Agreement shall be binding on all parties hereto and their respective successors and assigns.

B. A party shall not assign its rights and shall not be (except as provided herein) released from its obligations in, to, or under, this Agreement.

#### **XVII. COUNTERPARTS**

This Agreement may be executed in any number of counterparts, each of which, when so executed, shall be deemed to be an original and such counterparts shall together constitute an agreement.

#### **XVIII. NOTICES**

Any notice, document or other item to be given delivered, furnished or received under this Agreement shall be deemed given, delivered, furnished or received when given in writing and personally delivered to an officer of the applicable party, or, after same is deposited with the United States Postal Service, postage prepared, registered or certified first class mail, return receipt requested, addressed to such applicable part at the address or addresses as such party may from time to time designate by written notice to the other, at the time of delivery shown on such return receipt with the initial addresses being as set forth in the Basic Terms.

#### **XIX. MISCELLANEOUS**

A. All recitals herein are incorporated into this Agreement and are made a part hereof.

- B. Time is of the essence of each covenant and condition set forth in this Agreement.
- C. The relationship between CITY and TOUCHSTONE is that of independent contractors, and except as herein expressly provided, neither party is granted any right or authority to assume or create any obligation or responsibility, express or implied, on behalf of or in the name of the other or to bind the other in any manner or thing whatsoever.
- D. The remedies provided herein for breach of this Agreement are not exclusive; and, in event of breach, the parties hereto have all the remedies provided by law.
- E. This Agreement is not intended and does not create any rights or interest in persons not a party hereto.
- F. Where the consent or approval of a party is required or necessary under this Agreement, the consent or approval shall be writing and not be unreasonably withheld.
- G. Exhibits. Each of the following Exhibits is attached hereto and incorporated herein by this reference:
- Exhibit A: Known Litigation and Other Matters  
Exhibit B: Sample Incentive Management Fee Calculation  
Exhibit C: Touchstone Golf LLC Insurance Coverage
- H. The Parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this Agreement, and the decision of whether or not to seek advice of counsel with respect to this Agreement is a decision that is the sole responsibility of each Party. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Agreement.
- I. If an apparent conflict or inconsistency exists between the main body of this Agreement and the Exhibits, the main body of this Agreement shall control. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code and this Agreement, the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this Agreement, the Exhibits, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement shall control. Each Party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Agreement.
- J. The parties shall cooperate with each other in good faith, and assist each other in the performance of the provisions of this Contract.
- K. Further Assurances. CITY and TOUCHSTONE each agree to execute and deliver such additional documents as may be required to effectuate the purposes of this Agreement.
- L. The singular includes the plural and words importing one gender include the other gender
- M. The headings in this Agreement are for convenience only and shall not affect its interpretation.

## **XX. APPLICABLE LAW**

This Agreement is subject to the law of the state in which the Golf Course Facility is located and the parties submit to the jurisdiction of the courts of that State.

IN WITNESS WHEREOF, the parties have indicated their approval to the terms and conditions herein by the signatures below, and the Agreement shall be deemed executed on the date first hereinbefore written.

**TOUCHSTONE GOLF, LLC,**  
a Delaware limited liability company

By: 

Name: Stephen T. Harker

Title: Chief Executive Officer

**CITY OF CHULA VISTA**  
a Municipal Corporation

By: \_\_\_\_\_

Name:

Title: \_\_\_\_\_

**GOLF COURSE FACILITY MANAGEMENT AGREEMENT**

**LIST OF EXHIBITS**

**Exhibit A: Known Litigation and Other Matters**

**Exhibit B: Sample Incentive Management Fee Calculation**

**Exhibit C: Touchstone Golf LLC Insurance Coverage**



**EXHIBIT A**

**Known Litigation and Other Matters**

None

**EXHIBIT B**

**Sample Incentive Management Fee Calculation**

**Incentive Calculation (Year 1 of Term)**

Net Operating Income	12 Months	375,000
Net Operating Income	<b>Minimum</b>	200,000
<b>Improvement</b>		<b>\$ 175,000</b>
Incentive Percentage	<b>15%</b>	
<b>Incentive to Touchstone Golf</b>		<b>\$ 26,250</b>

*Note: Not actual numbers, for example sake only.*

Net Operating Income = Revenue minus Cost of Goods Sold, Payroll, Operating Expenses and management fees paid to Touchstone Golf. Does not include startup costs, capital improvements or capital equipment.

**Incentive Calculation (Remaining years of Term)**

Net Operating Income	12 Months	400,000
Net Operating Income	<b>Minimum (or highest prior annual year NOI)</b>	375,000
<b>Improvement</b>		<b>\$ 25,000</b>
Incentive Percentage	<b>15%</b>	
<b>Incentive to Touchstone Golf</b>		<b>\$ 3,750</b>

*Note: Not actual numbers, for example sake only.*

## EXHIBIT C

### Touchstone Golf LLC Insurance Coverage

For the Term of this Agreement, TOUCHSTONE GOLF LLC shall carry the following insurance, containing the limits and conditions described below:

TOUCHSTONE will maintain commercial general liability insurance on standard ISO form CG 00 01, or equivalent, with limits not less than \$1M per occurrence and \$2M annual aggregate, and including Fire Legal Liability with sub limit of not less than \$100,000.

TOUCHSTONE will maintain commercial auto liability insurance, including hired and non-owned auto liability, with limits not less than \$1M combined single limit of liability applicable to "any auto".

Should TOUCHSTONE be required to hold liquor license or otherwise become legally liable for liquor service, TOUCHSTONE will maintain liquor liability insurance with limits not less than \$1M per occurrence.\*

The general liability, auto liability and liquor liability policies maintained by TOUCHSTONE shall name CITY as an additional insured and shall respond on a primary and non-contributory basis to claims of legal liability for which TOUCHSTONE is responsible.

TOUCHSTONE will maintain a worker's compensation policy for TOUCHSTONE employees in accordance with statutory requirements in the state where TOUCHSTONE is doing business or hires employees. TOUCHSTONE workers compensation policy shall contain employer's liability limits of \$1M each accident, \$1M each disease each employee and \$1M each disease – policy limit.

TOUCHSTONE shall carry an umbrella policy with limits of \$5M per occurrence and \$5M annual aggregate, which follows form on the underlying general liability, auto liability, liquor liability, and employer's liability policies.

TOUCHSTONE general liability policy, auto liability policy, liquor liability policy and worker's compensation policy shall contain a waiver of subrogation in favor of CITY.

TOUCHSTONE shall give 30 days' notice of cancellation to CITY in the event that a required policy will cancel during the term of this agreement.

The CITY will provide property insurance covering buildings, personal property, carts, equipment and electronic data processing equipment.

Insurance for flood and earthquake are excluded from standard TOUCHSTONE insurance requirements.

*\* Liquor liability insurance/DRAM shop insurance will only be required if TOUCHSTONE operates the food and beverage operation. If food and beverage is operated by a third party concessionaire, the concessionaire will provide this insurance and name TOUCHSTONE as additionally insured.*