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City of El Cajon



MEETING: 10/13/09

ITEM NO: 4.6

Agenda Report

DATE: October 8, 2009

TO: Mayor Lewis, Mayor Pro Tem Wells,
Councilmembers Hanson-Cox, Kendrick, and McClellan

FROM: City Manager

SUBJECT: Mutual Termination and Settlement Agreement between the City of El Cajon and Christian Community Theater


RECOMMENDATION: That the City Council approve the attached Mutual Termination and Settlement Agreement between the City of El Cajon and Christian Community Theater doing business as Art Beat Management.

BACKGROUND: Art Beat Management has been under contract with the City of El Cajon to manage the East County Performing Arts Center since January 2006. For a number of reasons, including the expense associated with running the theater; the poor economy and its negative impact on attendance; the need for major repairs and renovation of the theater and the lack of parking due to the construction projects adjacent to the theater, the City and Art Beat Management have decided to terminate the agreement for management services effective December 31, 2009.

Notices will be sent to theater contacts and a press release has been prepared should the City Council approve the settlement agreement. All bookings with signed contracts will be accommodated.

FISCAL IMPACT: There is no fiscal impact with this action; however, the City has committed to pay Art Beat Management \$160,000 for the expenses incurred this fiscal year.

PREPARED BY:


Kathi Henry
CITY MANAGER

MUTUAL TERMINATION AND SETTLEMENT AGREEMENT

This Mutual Termination and Settlement Agreement (hereafter "Termination Agreement") is made and entered into this ____ day of _____, 2009, by and between Christian Community Theater, a California corporation, dba Art Beat Management (hereinafter referred to as "CCT") and the City of El Cajon, a California municipal corporation (hereafter referred to as "City").

RECITALS

- A. City owns the East County Performing Arts Center ("ECPAC") in El Cajon, California.
- B. ECPAC is a performing arts facility, consisting of a theater building, which accommodates presentations of drama, music, and other performing and visual arts.
- C. CCT was formed to further and foster educational and cultural programs in the theater arts in San Diego County, California, and established Art Beat Management in order to manage the operation of ECPAC on behalf of City.
- D. City and CCT entered into that certain agreement dated December 22, 2005 (the "Agreement"), by which City and CCT established the terms and conditions for work necessary to manage ECPAC. The Agreement, in section 8(c), also recognized that CCT was entitled to use of ECPAC at anytime upon the payment of all applicable rates.
- E. At all times pertinent hereto, CCT, through Art Beat Management, operated ECPAC on behalf of City. CCT also used ECPAC for its own rehearsals and performances. On numerous occasions, the revenues from operations of ECPAC did not cover the expenses of management and operations by CCT.

F. Under the terms of the Agreement City agreed to provide an initial subsidy to CCT to manage and operate ECPAC, and further agreed to consider the approval of future subsidies in the adoption of its annual budget in subsequent fiscal years, in order to assist CCT in its operation of ECPAC.

G. On June 23, 2009, in accordance with the terms of the Agreement CCT requested a subsidy for the operation of ECPAC during fiscal year 2009-2010. The need for a subsidy for fiscal year 2009-2010 arose out of the general decline of the local economy, and difficulties in attracting performances to ECPAC.

H. The City Council for the City conditionally approved the request and directed its City Manager to return with a plan for the funding of the 2009-2010 subsidy. In the course of preparing the requested plan for funding the 2009-2010 subsidy the City Manager analyzed the rents paid to CCT through all uses of ECPAC, and discovered that the parties failed to interpret section 8(c) of the Agreement in the same manner allowing CCT to use ECPAC for its own productions at a rental rate different than those established for other users. As a result of the discovery of these inconsistent interpretations the parties determined that CCT's management plan under the Agreement required the optimal use of ECPAC, by CCT and third party contracts, and that without optimizing its use, CCT's need for financial assistance in order to manage and operate ECPAC, through City subsidies, far exceeded the City's ability to assist CCT. The parties agree that CCT could not continue to provide performances at ECPAC without the payment of rent at a reduced rent.

I. The parties have mutually determined that it is necessary and appropriate to terminate the Agreement effective December 31, 2009, while at the same time protecting performances under contract as of the date of this Termination Agreement, and that City will

thereafter be responsible for the management of ECPAC.

J. CCT and City have jointly agreed to resolve all outstanding claims, obligations, and disputes by way of this Termination Agreement to avoid the expense and uncertainty of litigation or other dispute resolution alternatives for the prior termination of the Agreement.

WHEREFORE, in consideration of the foregoing facts and mutual covenants and agreements herein contained, the parties agree as follows:

ARTICLE 1

TERMINATION OF MANAGEMENT AGREEMENT

1.1. Agreement Termination Date. The Agreement, and each and every term and condition thereof, shall terminate effective 12:00 a.m., San Diego time, January 1, 2010 (the "Termination Date"). All obligations of the parties surviving termination of the Agreement, as set forth therein and herein, shall remain obligations of the parties.

1.2. CCT Pre-termination Responsibilities. From the effective date of this Termination Agreement, through and including the Termination Date, CCT shall continue to operate and manage ECPAC under the terms and conditions of the Agreement. City agrees that "terms and conditions of the Agreement" include the use of ECPAC by CCT at those rental rates historically charged to CCT under the Agreement. CCT agrees that from the effective date of this Termination Agreement it shall not enter into any contracts with third parties for the rent or use of ECPAC, or necessary for the management or operation of ECPAC, including any vendor or supplier contracts, without City's prior written consent. CCT agrees to provide City with all of their files created for the operation of ECPAC, including those files containing user contracts and mailing lists of users and patrons.

1.3. Identification of Obligations. CCT has disclosed to City each and every

outstanding contract or other obligation (1) for the rent or use of ECPAC, (2) for the management or operation of ECPAC (including, without limitation, any employment agreements, consultant agreements, and other management agreements), and (3) with vendors or suppliers related to the operation of ECPAC, which obligations exist after the effective date of this Termination Agreement. All such disclosed contracts and obligations are identified in Exhibit A, attached hereto and incorporated herein by this reference. CCT hereby represents and warrants to City that to its knowledge, after reasonable investigation, that as of the Termination Date there exist no liabilities of, or claims against, CCT, in the operation of ECPAC, except for those liabilities or claims identified and listed on Exhibit A. CCT warrants that if, after the Termination Date (the "CCT Obligations"), it should discover any liabilities or claims not listed in Exhibit A it shall notify City, in writing not later than ten (10) days following such discovery, of the existence of the liability or claim, and further warrants that it shall be responsible for the CCT Obligations as hereinafter set forth.

1.4. CCT's Post-termination Obligations. Any contracts or obligations entered into by CCT other than as identified in Exhibit A, including any CCT Obligations, in any event which may be in force and effect after the Termination Date, shall be the sole responsibility of CCT, and CCT shall indemnify, defend, and hold City, and its elected and appointed officials, officers, and employees, harmless from any claims arising out of those contracts and obligations not identified in Exhibit A.

1.5. City's Pre-termination Obligations. City recognizes that the termination of the Agreement prior to the expiration of its initial term will cause CCT to incur obligations under employment agreements, vendor agreements, and other contracts and obligations, entered into by CCT in anticipation of operations of ECPAC through the end of Fiscal Year 2009-2010. The

City has determined that it is in the public interest to allow ECPAC to be managed and operated under the Agreement, and open and available for use, through the Termination Date, and that continued operation of ECPAC through the Termination Date requires a one-time subsidy to CCT in the amount of \$160,000.00 (the "2009 Subsidy"). City has examined all necessary records to support CCT's request for the 2009 Subsidy and finds that the 2009 Subsidy is necessary and appropriate, and is approved. City shall pay the 2009 Subsidy to CCT within ten (10) days of the effective date of this Termination Agreement.

1.6. City's Post-termination Obligations. From and after the Termination Date City shall be solely responsible for the management and operation of ECPAC. City agrees to be responsible for those obligations identified in Exhibit A. Any contracts or obligations incurred by City, which may be in force and effect after the Termination Date, and any obligations identified in Exhibit A (collectively, the "City Obligations"), shall be the sole responsibility of City, and City shall, to the extent permitted by law, indemnify, defend, and hold CCT, and its directors, shareholders, officers, and employees, harmless from any claims arising out of the City Obligations. Except as provided in this Termination Agreement, City shall assume no liabilities of CCT under this Termination Agreement or under the Agreement, and City does not intend nor shall it assume or become liable for any obligations, commitments, or liabilities of CCT, whether known or unknown, absolute, contingent, or otherwise, and whether or not related to the operations of ECPAC.

ARTICLE 2

REPRESENTATIONS AND WARRANTIES OF CCT

2.1. CCT's Representations and Warranties. CCT makes the following representations and warranties to City, each of which is true and correct as of the date of this

Agreement, and which will be true and correct as of the Termination Date:

(a) CCT is California not-for-profit corporation, duly organized, validly existing, and in good standing under the laws of the state of its organization and is qualified to transact business in the State of California.

(b) CCT has full legal power and authority to enter into and to perform this Termination Agreement; and this Termination Agreement constitutes the valid and binding obligation of CCT, enforceable in accordance with its terms.

(c) The execution and delivery of this Termination Agreement does not conflict with, violate, or constitute a default under the terms, conditions, or provisions of any agreement or instrument to which CCT is a party, or any law, judgment, or order of which CCT is aware, and will not result in the creation of any lien, security interest, or encumbrance on ECPAC.

(d) There are no actions, suits, proceedings, or claims now pending, or, to the best of CCT's knowledge, threatened against CCT, or ECPAC that would affect CCT's ability to fulfill its obligations under this Termination Agreement or that would impair the value of ECPAC.

ARTICLE 3

REPRESENTATIONS AND WARRANTIES OF CITY

3.1. City's Representations and Warranties. City makes the following representations and warranties to CCT, each of which is true and correct as of the date of this Termination Agreement and shall be true and correct as of the Termination Date:

(a) City is a California municipal corporation, duly organized, validly existing, and in good standing under the laws of the state of its organization and is qualified to transact business in the State of California.

(b) City has full legal power and authority to enter into and perform this Termination Agreement; and this Termination Agreement constitutes the valid and binding obligation of City, enforceable in accordance with its terms.

(c) The execution and delivery of this Termination Agreement does not conflict with, violate, or constitute a default under the terms, conditions, or provisions of any agreement or instrument to which City is a party, or any law, judgment, or order of which City is aware, and will not result in the creation of any lien, security interest, or encumbrance on ECPAC.

(d) There is no action, proceeding, or claim pending, or, to City's knowledge, threatened, against City that would affect City's ability to consummate the transactions contemplated by this Termination Agreement.

(e) No consent, approval, or authorization of or declaration, filing, or registration with any governmental or regulatory authority is required in connection with the execution, delivery, and performance by City of this Termination Agreement or the consummation of the transactions contemplated by this Termination Agreement.

ARTICLE 4

RELEASE

4.1. Release. In exchange for the 2009 Subsidy, the execution of this Termination Agreement, including each and every term and condition, including representations and

warranties, contained herein, and a full and general release by CCT of the City, and by the City of CCT, the parties shall fully and generally release each other under the terms set forth below.

4.2. No Admission of Liability. Execution of this Termination Agreement and/or payment of any sums do/does not constitute an admission of liability or any wrongdoing by either party. This Termination Agreement constitutes a compromise and settlement of claims that have been in and remain in dispute. The settlement is entered into upon recognition of the desire to avoid the expense and uncertainty of litigating disputes between the parties.

4.3 Attorneys' Fees and Costs. The parties to this action shall bear their own attorneys' costs and fees.

4.4. Release by City. Except for the rights to enforce all provisions of this Agreement, and except for the CCT Obligations, the City, its successors and assigns, its agents, employees and representatives do hereby release and forever discharge CCT, its directors, officers, and employees from any and all claims, debts, demands, liabilities, obligations, costs, expenses (including, but not limited to reasonable attorneys' fees), actions and causes of actions, damages, judgments, rights of every kind and nature, including claims for breach of the Agreement and failure to pay applicable rent, whether known or unknown, suspected or claimed, arising in law, equity or otherwise, or any fact, event, cause or matter which in whole or in part is the subject of the events described herein, or which is, or could have been stated, claimed, or alleged to be related to the events described herein.

4.5. Release by CCT. Except for the rights to enforce all provisions of this Termination Agreement, and further except for the City's Obligations, CCT, its successors and assigns, its agents and employees, and its representatives do hereby release and forever discharge the City, its elected and appointed officers, officials, and employees from any and all claims,

debts, demands, liabilities, obligations, costs, expenses (including, but not limited to reasonable attorneys' fees), actions and causes of actions, damages, judgments, rights of every kind and nature, including claims for breach of the Agreement and failure to provide annual subsidies, whether known or unknown, suspected or claimed, arising in law, equity or otherwise, or any fact, event, cause or matter which in whole or in part is the subject of the events described herein, or which is, or could have been stated, claimed, or alleged to be related to the events described herein.

4.6. Full Release. This Termination Agreement is intended to be a full settlement and compromise of all the claims relating to the matters described herein between the parties.

4.7. California Civil Code §1542. The parties hereby expressly acknowledge that there is a risk that subsequent to the execution of this Termination Agreement, they may incur a separate loss, damage or injury which is in some way caused by the transaction between the parties as of the execution date, which is unknown and unanticipated at the time this Termination Agreement is executed and do hereby assume the above-mentioned risk in its general, full, and final release of claims and shall apply to all unknown or unanticipated results of the transactions and occurrences by and between the parties as well as those known and anticipated, and the parties do hereby waive any and all rights under Section 1542 of the California Civil Code which section has been duly explained and read as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.”

ARTICLE 5

NON-DISPARAGEMENT

5.0. Both parties covenant that, from and after the effective date of this Termination Agreement, they shall not authorize the disclosure or dissemination of any false, libelous or slanderous statement on the part of the party, regarding the other party, with regard to the operations of ECPAC, termination of the Agreement, disputes between parties, or settlement thereof. The breach of this covenant shall not constitute a default of this Termination Agreement but shall entitle the party claiming a breach to seek such remedies as permitted by law.

ARTICLE 6

GENERAL PROVISIONS

6.1. **Sole Consideration.** The parties acknowledge that the consideration recited in this Termination Agreement is the sole and only consideration exchanged between the parties and that no representations, promises, or inducements have been made by either of the parties, other than as appears herein. This Termination Agreement constitutes the entire agreement between the parties; and it is expressly agreed and understood that this Termination Agreement may not be altered, amended, modified, or otherwise changed in any respect whatsoever, except by writing duly executed by the parties hereto.

6.2. **No Transfer or Assignment.** The parties represent and warrant that they have the full right and power to execute this Termination Agreement and that they have not heretofore assigned or transferred, or purported to have assigned or transferred, sold, conveyed, hypothecated, encumbered, or otherwise disposed of any rights or claims that they may have or had relating to the matters described herein, to any person, firm, or corporation whatsoever, any claim, debt, liability, demand, obligation, cost, attorneys' fees, expenses, action or cause of

action herein released. The parties agree to indemnify, hold harmless, and defend the parties, and each of them, of and from any and all claims, debts, liabilities, demands, obligations, costs, expenses, actions or causes of action, which are in any way based on, arise out of, or in any connection with any such transfer or assignment, including all attorneys' fees and costs incurred in connection therewith. This Termination Agreement shall be binding upon the undersigned parties and all their respective agents, employees, partners, successors, predecessors, assignors, assignees, transferors, transferees, heirs, executors, administrators, beneficiaries, grantors, insurers, attorneys, accountants, officers, directors, shareholders, and other representatives and all other persons or entities acting or purporting to act on their respective behalf.

6.3. Use of Independent Counsel. The undersigned parties hereby declare that they have received sufficient information, either through their own legal counsel or through other sources of their own selection, so as to be able to intelligently exercise their judgment in deciding whether to execute this Termination Agreement. The undersigned further state that they have read this Termination Agreement in its entirety prior to executing this document and that they have executed this Termination Agreement voluntarily, with knowledge of the terms, significance, and legal effect.

6.4. Assignment. The respective rights and obligations of the parties to this Termination Agreement may not be assigned by any party without the prior written consent of the other, which consent may not be unreasonably withheld or delayed.

6.5. Successors and Assigns. The terms and provisions of this Termination Agreement shall be binding on and inure to the benefit of the successors and assigns of the parties.

6.6. Entire Agreement. This Termination Agreement constitutes the entire agreement between the parties with respect to the subject matter of this Termination Agreement and supersedes all prior agreements, oral and written, between the parties hereto with respect to the subject matter of this Termination Agreement.

6.7. Modification and Waiver. This Termination Agreement may not be amended, modified, or supplemented except by written agreement signed by the party against which the enforcement of the amendment, modification, or supplement is sought. No waiver of any of the provisions of this Termination Agreement shall be deemed, or shall constitute, a waiver of any other provision. No waiver shall be binding unless executed in writing by the party making the waiver.

6.8. Attorneys' Fees. If any legal action or other proceeding is brought to enforce the provisions of this Termination Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in the action or proceeding, in addition to any other relief to which the prevailing party may be entitled.

6.9. Fees and Expenses. Except as otherwise specifically provided in this Termination Agreement, CCT and City shall pay their own fees and expenses in connection with the negotiation and consummation of the transactions contemplated by this Termination Agreement.

6.10. Notices. All notices, requests, demands, and other communications required by this Termination Agreement shall be in writing and shall be (a) delivered in person or by courier, (b) mailed by first-class, registered or certified mail, or (c) delivered by facsimile transmission, as follows, or to such other address as a party may designate to the other in writing:

(i) If to CCT: Christian Community Theater
1545 Pioneer Way
El Cajon CA 92020

(ii) If to City: City of El Cajon
200 Civic Center Way
El Cajon CA 92020
Attention: City Manager

With a Copy to: Morgan L. Foley
200 Civic Center Way
El Cajon CA 92020

If delivered personally or by courier, the date on which the notice, request, instruction, or document is delivered shall be the date on which the delivery is made, and if delivered by facsimile transmission or mail as aforesaid, the date on which the notice, request, instruction, or document is received shall be the date of delivery.

6.11. Headings. All section headings contained in this Termination Agreement are for convenience of reference only, do not form a part of this Termination Agreement, and shall not affect in any way the meaning or interpretation of this Termination Agreement.

6.12. Counterparts. This Termination Agreement may be executed in two (2) or more counterparts, all of which shall be considered one and the same agreement, and shall become effective when one counterpart has been signed by each party and delivered to the other party hereto.

6.13. Time of Essence. Time shall be of the essence with respect to the obligations of the parties to this Termination Agreement.

6.14. Governing Law. This Agreement shall be governed by and construed under the laws of the State of California.

6.15. Severability. In the event any provision of this Termination Agreement is deemed to be invalid, illegal, or unenforceable, all other provisions of this Termination Agreement that are not affected by the invalidity, illegality, or unenforceability shall remain in full force and effect

6.16. Faxed Signatures. Signatures by facsimile, when attached to this Termination Agreement, shall be fully effective and shall be a satisfactory substitute for original signatures.

6.17. Cooperation of the Parties. Each party shall take reasonable steps necessary to accomplish the duties and responsibilities as described in this Termination Agreement and shall reasonably cooperate in executing all documents, applications, and forms necessary to accomplish the terms of this Termination Agreement.

[Signatures on following page]

IN WITNESS WHEREOF, the parties have executed this Agreement the dates set forth below, but effective as of the date set forth above.

CCT:

Christian Community Theater, a California corporation

Dated: October ____, 2009

By: _____
Paul Russell, President

By: _____
Cathie D. Stanner, Secretary

City:

City of El Cajon, a municipal corporation

Dated: October ____, 2009

By: _____
Kathi J. Henry, City Manager

ATTEST:

By: _____
Kathie J. Rutledge, CMC
City Clerk

APPROVED AS TO FORM:

By: _____
Morgan L. Foley
City Attorney