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 City of Stockton
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9 UNITED STATES BANKRUPTCY COURT
 10 EASTERN DISTRICT OF CALIFORNIA
 11 SACRAMENTO DIVISION
 12

13 In re:
 14 CITY OF STOCKTON, CALIFORNIA,
 15 Debtor.

Case No. 2012-32118
 D.C. No. OHS-14
 Chapter 9

**DECLARATION OF MARC A.
 LEVINSON IN SUPPORT OF CITY'S
 MOTION TO COMPEL PRODUCTION
 OF DOCUMENTS BY SEVENTH
 INNING STRETCH, LLC PURSUANT
 TO RULE 2004 SUBPOENA**

Date: October 28, 2013
 Time: 10:00 a.m.
 Dept: Courtroom 35
 Judge: Hon. Christopher M. Klein

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1 I, Marc Levinson, hereby declare as follows:

2 1. I am an attorney licensed to practice law in California and admitted to practice
3 before the United States District Court for the Eastern District of California. I am a partner with
4 the firm of Orrick, Herrington & Sutcliffe LLP, counsel for the City of Stockton, California (the
5 “City”), in this chapter 9 case. I am the lead bankruptcy lawyer for the City. I make this
6 declaration in support of the City’s Motion To Compel Production Of Documents By Seventh
7 Inning Stretch, LLC Pursuant To Rule 2004 Subpoena (“Motion”). I have personal knowledge of
8 the matters stated herein and if called as a witness, I could and would testify as follows.

9 2. I spoke to Philip Rhodes (“Rhodes”), counsel for Seventh Inning Stretch, LLC
10 (“SIS”), by phone on September 17, 2013, four days after the City served SIS with its Subpoena
11 For Rule 2004 Examination (“Subpoena”), a true and correct copy of which is attached hereto as
12 Exhibit 1. During that call, I explained that the City needed the information requested by the
13 Subpoena in order to accurately evaluate the best treatment of SIS under a plan of adjustment, to
14 evaluate whether to assume or reject the relevant license agreement, and to avoid continuing a
15 sizeable subsidy to an entity that might already be making a substantial profit. I also suggested
16 that the City and SIS try to arrange a meeting to discuss a potential resolution.

17 3. On October 8, 2013, my office received a set of Objections To Subpoena For Rule
18 2004 Examination (“Objections”) via email from Rhodes. To the best of my recollection, this
19 was the first communication I received from counsel subsequent to our September 17 phone call.
20 On October 11, 2013, I left Rhodes a voicemail advising him that the Objections were untimely,
21 and that SIS was therefore not excused from complying with the Subpoena and producing
22 documents by October 14. I also asked whether SIS intended to produce the requested documents
23 on October 14, and requested that he contact me.

24 4. On the afternoon of October 14, I left a second voicemail for Rhodes, stating that
25 the City had not received any documents from SIS and informing him the City would be required
26 to file a motion to compel if SIS was not going to comply with the Subpoena. I again asked him
27 to contact me to discuss a potential resolution.

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1 5. Shortly after leaving the second voicemail, I emailed Rhodes, restating the City's
2 position that the Objections were late and that SIS was therefore required to produce the
3 requested documents that day (October 14). I also repeated that while the City would prefer not
4 to do so, it would be forced to pursue a motion to compel if the documents were not produced.

5 6. On October 15, one day after SIS's production was due, Rhodes responded via
6 email to my email of October 14, asking for additional clarification regarding the City's
7 document request, and suggesting that the City review a bankruptcy court decision from the
8 Western District of Pennsylvania.¹ The email gave no indication that SIS was prepared to comply
9 with the Subpoena.

10 7. As I was unavailable on October 15, I asked Patrick Bocash, an attorney in my
11 office, to contact Rhodes.

12 8. On October 17, I received another email from Rhodes. It plainly stated that SIS
13 would not be producing "any records under the subpoena."

14 9. Given that the Motion has been rendered necessary by undue delay by SIS, an
15 award of costs would be appropriate. In addition to several months of informal requests, SIS had
16 30 days to fulfill its obligations under the Subpoena. Instead, SIS served untimely Objections on
17 the City, and then failed to respond to the City's communications until the time for production
18 had passed. As of the date of the Motion, SIS has still not complied with the Subpoena, despite
19 the City's repeated insistence that SIS is required to produce the documents.

20 10. As a result of the delays described above, and in light of SIS's refusal to comply
21 with the Subpoena, the City has been forced to bring the Motion. This has caused the City to
22 incur costs that would otherwise have been unnecessary. These costs include attorneys fees for
23 the drafting, service, and argument of the Motion and related pleadings, as well as costs related to
24 involving the City Attorney's Office and other City personnel in the preparation of and review of
25 such pleadings. While the City has not calculated the exact amount of these costs, they are likely
26 in excess of \$5,000. For the sake of expediency, the City is therefore limiting its request for
27 costs, should it prevail on the Motion, to \$5,000.

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¹ *In re Continental Forge*, 73 B.R. 1005 (Bankr. W.D. Pa.).

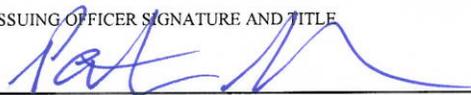
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Executed this 18th day of October 2013, at Sacramento, California. I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

/s/ Marc Levinson
Marc Levinson

Exhibit 1

B254 (Form 254 – Subpoena for Rule 2004 Examination) (12/07)

UNITED STATES BANKRUPTCY COURT - EASTERN DISTRICT OF CALIFORNIA	
In re <i>[Debtor Name(s)]</i> : City of Stockton, California	SUBPOENA FOR RULE 2004 EXAMINATION
	Case No. * 2012-32118
	Chapter 9
TO: Pat Filippone <i>Name</i> c/o 7th Inning Stretch LLC <i>Address</i> 404 W. Fremont St. Stockton, CA 95203	
<input type="checkbox"/> YOU ARE COMMANDED to appear and testify at an examination under Rule 2004, Federal Rules of Bankruptcy Procedure, at the place, date, and time specified below. A copy of the court order authorizing the examination is attached.	
PLACE OF TESTIMONY	DATE AND TIME
<input checked="" type="checkbox"/> YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): See Attachment 1 to this Subpoena.	
PLACE Orrick, Herrington & Sutcliffe LLP 400 Capitol Mall, Suite 3000 Sacramento, California 95814-4497	DATE AND TIME October 14, 2013, 10:00 a.m.
ISSUING OFFICER SIGNATURE AND TITLE  Attorney for Debtor, City of Stockton	DATE September 13, 2013
ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER Patrick B. Bocash, Orrick, Herrington & Sutcliffe LLP, 400 Capitol Mall, Ste. 3000, Sacramento, CA 95814 (916) 447-9200	

* If the bankruptcy case is pending in a district other than the district in which the subpoena is issued, state the district under the case number.

PROOF OF SERVICE

SERVED	DATE	PLACE
SERVED ON (PRINT NAME)	MANNER OF SERVICE	
SERVED BY (PRINT NAME)	TITLE	

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ DATE _____ SIGNATURE OF SERVER _____

ADDRESS OF SERVER _____

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2007, made applicable in cases under the Bankruptcy Code by Rule 9016, Federal Rules of Bankruptcy Procedure:

(c) Protecting a Person Subject to a Subpoena.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) **Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) **When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) **When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information;
- (ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party; or
- (iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) **Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

ATTACHMENT 1

DEFINITIONS

As used in these requests:

“The Agreement” means the 2005 long-term licensing agreement between the City of Stockton and 7th Inning Stretch, LLC for the use of the 5,200 seat Class A baseball stadium that the City of Stockton constructed in 2004 and that hosts Ports games and other events.

“The Ports” means the minor league baseball team known as the Stockton Ports.

“The Stadium” means the 5,200 seat Class A baseball park that the City of Stockton constructed in 2004 and that hosts Ports games and other events.

“You” and “Your” mean 7th Inning Stretch, LLC and, where appropriate in the context, 7th Inning Stretch, LLC’s past and present employees, agents, counsel, representatives, consultants, financial advisors, investigators, and all persons acting or purporting to act on 7th Inning Stretch, LLC’s behalf.

INSTRUCTIONS

These requests require that You produce all documents specified herein which are in Your actual or constructive possession, custody, or control.

“All” shall be understood to include and encompass “any.” As used herein, the singular shall also be taken to include the plural, and vice versa. Whenever the conjunctive is used, it shall also be taken to include the disjunctive, and vice versa, to bring within the scope of these requests all documents or things which might otherwise be construed to be outside their scope. Additionally, the present tense shall also include the past tense.

The terms “referring to,” “relating to,” “regarding,” and “concerning” as used herein are to be broadly construed and shall mean, without limitation, comprising, constituting, reflecting, regarding, containing quantitative data relating to, pertaining to, commenting upon, indicating, showing, describing, evidencing, discussing, mentioning, embodying, or computing.

You are requested to produce not only those documents in Your possession, custody or control, but also those documents reasonably available to You. These requests extend to any documents in the possession, custody, or control of Your present or former agents, contractors, accountants, financial advisors, consultants, experts, investigators, or attorneys, or persons or entities acting at the direction or on behalf of, or as a witness for, You.

If You object to part or all of any request, specify the part together with the reasons for the objection. Produce all documents called for by that part of the request to which You do not object.

If You assert a claim of privilege with respect to part or all of any such document on the grounds of attorney-client privilege, the attorney work product doctrine, or any other basis, describe the document with sufficient particularity to make it susceptible to identification by separately stating the following with respect to any such document:

- a) the type of document;
- b) the name and position of the writer, sender, or initiator of each copy of the document;
- c) the name and position of the recipient, addressee, or party to whom any copy of the document was sent;

- d) the date of each copy of the document, if any, or an estimate of its date;
- e) a statement of the basis for the claim of privilege (including, where work product immunity is asserted, identification of the proceeding for which the document was prepared); and
- f) a general description of the subject matter of the document sufficient for the Court to rule on the applicability and appropriateness of the claimed privilege.

Notwithstanding the assertion of any objection, any purportedly privileged document containing non-privileged material must be disclosed, with the purportedly privileged portion excised. Identify all excised material from a document with sufficient particularity to make it susceptible to identification.

These requests are continuing in nature. If, after making Your initial production, You obtain or become aware of any additional document(s) responsive to these requests and not previously produced, You are requested to produce such additional documents.

REQUEST FOR PRODUCTION NO. 1:

All Detailed Internal Operating Revenue/Expense Statements for the Ports for the past 5 years (2008-2012).

REQUEST FOR PRODUCTION NO. 2:

All Detailed Internal Operating Revenue/Expense Statements regarding Your use of the Stadium under the Agreement for the past 5 years (2008-2012).

REQUEST FOR PRODUCTION NO. 3:

All Audited Financial Statements for the Ports for the past 5 years (2008-2012).

REQUEST FOR PRODUCTION NO. 4:

All Audited Financial Statements regarding Your use of the Stadium under the Agreement for the past 5 years (2008-2012).

REQUEST FOR PRODUCTION NO. 5:

All League Standard Financial Reports for the Ports for the past 5 years (2008-2012).

REQUEST FOR PRODUCTION NO. 6:

All Detailed Current Year Budgets and Projections for the Ports.

REQUEST FOR PRODUCTION NO. 7:

All Detailed Current Year Budgets and Projections regarding Your use of the Stadium under the Agreement.

REQUEST FOR PRODUCTION NO. 8:

All historical event information for Your events held at the Stadium, including the total number of home games played, the total and average paid attendance, the total and average turnstile attendance, and average ticket prices.