

Board of Trustees Agenda Item

Board Meeting Date: October 1, 2012

Title of Item: Renewal of Contract with Domus Aurea, Inc.

Background and Analysis:

The Board of Trustees approved a contract In August, 2008 with Domus Aurea, Inc. for the management and operation of the Flint Center. The current contract allows for one year extensions through 2013. The present agreement expires June 30, 2012 and this recommendation will extend that agreement by one year to June 30, 2013.

Recommendation: Vice Chancellor of Business Services Kevin McElroy recommends extension of agreement with Domus Aurea, Inc. through June 30, 2013

Submitted by:	Kevin McElroy, Vice Chancellor, ext. 6201
Additional contact names:	
Is backup provided?	Yes

**Second Amendment to Agreement between
Foothill-De Anza Community College
And
Domus Aurea, Inc.**

In response to the RFQ issued by the District on April 1, 2008, the Board of Trustees signed an Agreement with Domus Aurea, Inc. for a 3 year period from August 1, 2008 to June 30, 2011.

This Second Amendment to the original Agreement dated August 1, 2008, is retroactive to the 1st day of July 2012 through June 30, 2013 between Foothill-De Anza Community College District ("District") and Domus Aurea, Inc. ("Contractor").

THEREFORE, BE IT RESOLVED THAT, District and Contractor agree to the following amendments to the Agreement: that the term of the Agreement shall be extended for one year beyond the first one year amendment, to June 30, 2013; and that District may, at its sole discretion, require Contractor to transfer specified duties from its current President to its Assistant General Manager, for such period of time as the District determines.

Foothill-De Anza Community College District

Kevin McElroy, Vice Chancellor, Business Services

Date

Domus Aurea, Inc.

Paula Davis, President

Date

**AGREEMENT BETWEEN FOOTHILL-DE ANZA COMMUNITY COLLEGE
DISTRICT
AND
DOMUS AUREA, INC.**

This is an Agreement (Agreement) between Foothill-De Anza Community College District, a California community college district ("District") and Domus Aurea, Inc., a California corporation ("Contractor"), dated August 1, 2008 ("Commencement Date").

RECITALS

WHEREAS, District owns and operates the Flint Center for Performing Arts, located on the De Anza College Campus, 21250 Stevens Creek Boulevard, Cupertino, California 95014 ("Flint Center"); and

WHEREAS, District desires to engage the professional services of a firm that has expert knowledge of and specializes in day-to-day operations and booking of a first-class multi-use theatre; and

WHEREAS, Contractor has offered to perform certain services at Flint Center, and Contractor has the requisite personnel, expertise and experience, to perform the services set forth herein in accordance with District's objectives; and

WHEREAS, District and Contractor desire that Contractor be contractually engaged to manage and operate Flint Center and the parties desire to enter into this Agreement.

AGREEMENT

District and Contractor agree as follows:

1. **Term.** The term of this Agreement shall commence as of the Commencement Date and continue until June 30, 2011, unless otherwise terminated as provided in this Agreement. This contract may be extended, on an annual basis, through 2013 by mutual agreement of the parties.
2. **Operating Obligations of Contractor.** Contractor shall provide necessary personnel and management services to operate Flint Center within the budget for Flint Center approved by District's Board of Trustees as provided to Contractor, and within the management directives of District's Vice Chancellor, Business Services or Controller as provided to Contractor. Contractor agrees to consult with District in the preparation of the budget for Flint Center. Under direction of District, the services to be provided by contractor include:

- a. Providing on a reimbursable cost basis qualified employees of Contractor and independent contractors retained by Contractor, hired and paid directly by Contractor to operate Flint Center. No such persons or firms shall be employees or independent contractors of District. These personnel may include a general manager, assistant general manager, house manager, receptionist, accountant, marketing director, technical director, technical theater staff, box office staff, custodial maintenance personnel, and other such personnel as are needed to operate Flint Center;
- b. Booking a diverse range of entertainment events consistent with District's programming guidelines, including District's continuing commitment to local community arts groups and District's own use of Flint Center, and negotiating, arranging and preparing proposed contracts between users of Flint Center, for District's review, approval and execution; provided, however, District retains the right to prohibit any performance or to withhold approval of any proposed contract if in District's view such performance is not within District's programming guidelines or such contact is not in District's best business interest.
- c. Consulting, advising, and making recommendations with regard to other service and purchase agreements between District and vendors or contractors, as necessary to operate Flint Center;
- d. Upon District's request, submitting to District's Vice Chancellor, Business Services or Controller, for approval at their discretion, all such full-time employees and independent contractors, and the proposed compensation or other consideration to be paid to such persons or firms;
- e. Conforming to District policies and procedures, especially as they relate to authorization of cash and fund transfers and capitalization policy thresholds;
- f. Closing Contractor's monthly accounting cycle 5 to 10 days after the approved District close date. At fiscal year end, Contractor shall close at least one week prior to District's year-end close date;
- g. Submitting financial performance reports and narratives to District for annual and quarterly budget reporting according to established District budget deadlines;
- h. Prior to July 1, 2009, acquire a new accounting system; funded as a Special Project expense that supports the entertainment environment. The system shall be fully integrated and provide comprehensive and detailed reporting capabilities;

- i. Providing access to Flint Center's accounting system and all necessary files for purposes of review and audit;
- j. Analyzing the fund balance quarterly and identifying the appropriate amount to be maintained on Flint Center's books, subject to District approval. Any excess fund balance shall be transferred to District's Fund 16 annually;
- k. Providing monthly projected reports/schedules of future shows within the fiscal year, including financial projections. Quarterly budget reports shall be reported consistent with District's other Enterprise Funds (e.g. Campus Center – breakdown of expenses by major categories, G&A/Salaries/Benefits, etc.)
- l. The contractor shall coordinate major event logistics that have impact on parking, traffic flow, or security, with the District Chief of Police and the Vice President of Administration, or designee, at De Anza College.
- m. Performing such other services in furtherance of the foregoing as are mutually agreeable to District and Contractor.

3. **Operating Obligations of District.** District shall be obligated as follows:

- a. Fund the operations of Flint Center as provided for in the budget for Flint Center referred to in Section 2;
- b. Maintain and operate the Flint Center building envelope (roof, windows, doors, walls and structure) mechanical, electrical, plumbing infrastructure, HVAC, exterior painting and fire alarm;
- c. Maintain surrounding grounds, patio areas and site lighting;
- d. Provide District accountant to prepare Flint Center's monthly bank reconciliations;
- e. Provide District accountant to review all Flint Center disbursements and journal entries in amounts equal to or greater than \$5,000;
- f. Whenever requested by Contractor to approve an item contemplated by this Agreement, including without limitation the items set forth in Section 2, District shall act in a timely fashion and not unreasonably delay or withhold approval of such item.
- g. District shall maintain the levels and coverage of commercial general liability and property insurance it has in effect as to Flint Center as of the

Commencement Date, and shall notify Contractor of any changes in such levels or coverage's which materially decrease District's insurance coverage as to Flint Center.

4. **Compensation of Contractor.** District shall compensate Contractor for Contractor's services under this Agreement as follows:

- a. **Base Fee.** The Base Fee for Contractor's services shall be \$72,000.00 per year paid in monthly installments of \$6,000.00, pro-rated for any partial year. Payment shall be made on the first business day of each month. Base fee shall be adjusted each July 1st at a percentage equal to the percentage increase for the previous twelve months of the Consumer Price Index Urban for the San Francisco Bay Area. The increase shall be no less than three percent (3%) or more than five percent (5%).
- b. **Percentage of Net Operating Income.**
 - i. For each fiscal year ending June 30, District shall pay Contractor twenty five percent (25%) of Net Operating Income between \$50,000.00 and \$100,000.00, thirty five percent (35%) of Net Operating Income between \$100,000.00 and \$150,000.00, and fifty percent (50%) of Net Operating Income in excess of \$150,000.00.
 - ii. For purposes of this Agreement, the term Net Operating Income shall be defined as: Flint Center operational revenues less Flint Center operational expenses.
 - a) Operational revenues consist of facility and equipment rental fees, concessions, merchandise sales, executive suite receipts, box office income, promotion/production reimbursements, interest and other customary receipts. Preservation Fees and associated interest income are not included in operational revenues.
 - b) For purposes of this Agreement, the term Preservation Fees shall be defined as those revenues collected by contractor, from the promoter, on a per-ticket basis, and isolated in the budget for the sole purpose of facility upgrades and improvements
 - c) Operational expenses consist of employee, District, and independent contractor services (including employee payroll and benefits), professional services (including accounting and legal), management fees, utilities, advertising, insurance, telephone, postage, travel, office equipment, cleaning, and other costs to support ongoing operations at Flint Center. Capital improvements funded from Preservation Fees,

such as major facility modifications, equipment purchases, additions and/or repairs to Flint Center with an aggregate cost in excess of \$150,000, will be capitalized and depreciated. Depreciation on these capitalized assets will not be included in operational expenses. Improvements funded from Preservation Fees with aggregate costs less than \$150,000 will not be included in operational expenses.

- d) For purposes of this Agreement, the term Special Project shall be defined as any major project that is not funded by Preservation Fees and will not be included in operational expenses. All Special Project expenses will be approved, in advance, by District.
 - c. **District/Contractor Promotions and Co-Promotions.** For all events which are not four-wall facility rentals (e.g., producing, promoting or co-promoting), Contractor hereby grants to District a right of first refusal to participate in such events. The distribution of net proceeds (income or loss) from such events which are jointly entered into between Contractor and District shall be thirty percent (30%) to Contractor and seventy percent (70%) to District, settled the next business day following completion of the event or series. The net proceeds from such events will not be included in the calculation of Net Operating Income under Section 4b.
 - d. **Contractor Promotions and Co-Promotions.** Contractor may elect to promote events that District elects not to promote, or elect to co-promote such events with another promoter. In such instances, Contractor shall be obligated to pay District all customary, established user rates and charges of Flint Center (acknowledging that these are adjusted from time to time) on an arm's-length basis. Contractor shall bear all financial risk and be entitled to all net proceeds from such promotional and co-promotional activities.
 - e. **Expenses.** District shall be responsible for all expenses of Flint Center's operation which are not included in the base fee of the Contractor which have been approved by the District's Controller or Vice Chancellor, Business Services in accordance with the Flint Center budget referred to in Section 2.
5. **Termination.**
- For convenience: Should either party elect not to extend this agreement beyond the initial three year term, one (1) year advance written notice will be given.
 - For cause: This Agreement may be terminated on fifteen (15) days' written notice from one party to the other, in the event a party breaches its obligations under this Agreement and is unable to cure such breach within said fifteen (15) day period or provide satisfactory evidence that

such breach is not curable within such period but will be cured within an additional thirty (30) days thereafter. Upon any termination of this Agreement, the parties shall settle their respective accounts. Any such termination will not terminate or affect, in of itself, any other contracts between District and Contractor (e.g., co-promotion or rental agreements) existing at the time of such termination. Such contracts are and shall be completely independent of this Agreement.

6. **Relationship of Parties.** District and Contractor are independent contractors as to one another. Neither party is the other's agent, partner, employee or co-venturer with respect to matters of employment, employee benefits or withholding taxes, liability for injuries to others (whether or not covered by workers' compensation), or contractual or other relationships with third parties. Neither party is or shall be vicariously liable for any injuries to or claims from third persons, relating to actions of the other's employees or agents, or otherwise.
7. **Insurance.** Prior to the Commencement Date, Contractor shall accomplish each of the following:
 - a. Through one or more policies of insurance, copies of which shall be provided to District, Contractor shall demonstrate that it is insured under a policy of comprehensive general liability insurance that fully covers contractor for all liability risks associated with the services to be provided hereunder, including general liability, personal injury, and products liability, with at least One Million Dollars (\$1,000,000.00) per occurrence coverage. Such policy shall be provided to District and contain an endorsement naming District, its trustees, officers employees and agents as "additional insureds" under such policy, such that such parties will be insured with respect to any liability claims arising out of Contractor's performance or alleged misperformance of its services hereunder.
 - b. Contractor shall acquire and have in effect workers' compensation and employers' liability insurance providing full statutory coverage. In signing this Agreement, Contractor makes the following certification required by Section 1861 of the California Labor Code:

I am aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract.

Contractor shall acquire and have in effect comprehensive automobile liability insurance in the amount of \$1,000,000 combined single limit coverage covering all owned, hired or non-owned vehicles, including the loading or unloading thereof. Such policy shall be provided to District and contain an endorsement naming District, its trustees, officers, employees, and agents as "additional insured's" to that policy.

- c. Contractor shall acquire and have in effect fidelity bond and employee dishonesty insurance coverage in an amount not less than \$250,000.
- d. Contractor shall maintain all such insurance described in Section 7 in full force and effect and not cause or allow any of said policies to lapse or be terminated, without providing at least thirty (30) days prior written notice to District without providing replacement coverage.
- e. Whenever Contractor requests or requires a performing group, contractor or other person to insure Contractor as an additional insured, District shall also be named as an additional insured and the same coverage shall apply to District.

8. **Indemnification.**

- a. Contractor shall defend, indemnify and hold harmless District, its trustees, officers, employees and agents, from and against any actions, liabilities, claims, damages and expenses, including reasonable attorneys' fees and costs (collectively, "Losses"), which Losses are based on, relate to, or arise out of the acts or omissions of Contractor or Contractor's performance of obligations under this Agreement. Contractor's obligations hereunder shall include the obligation to defend, at its own expense, any action or claim against District which is within the reasonable scope of this indemnity obligation, and such obligation shall be triggered by third party's notification to District of such action or claim, provided written notice thereof is given by District to Contractor.
- b. District shall defend, indemnify, and hold harmless Contractor, its directors, officers, employees and agents from and against any Losses, which Losses are based on, relate to, or arise out of the acts or omissions of District or District's performance of obligations under this Agreement. District's obligations hereunder shall include the obligation to defend, at its own expense, any action or claim against Contractor which is within the reasonable scope of this indemnity obligation and such obligation shall be triggered by third party notification to Contractor of any such action or claim, provided written notice thereof is given by Contractor to District.

- c. In the event that an action or claim is made which alleges the liability of both Contractor and District which triggers the indemnity obligations of both parties, the respective defense and indemnity obligations shall be resolved through the provisions of Section 13 herein. The parties expressly acknowledge and agree that litigation with a third party is not a prerequisite to recovery under this Section 8.
9. **Compliance with Anti-Discrimination Laws.** Contractor shall comply with all applicable federal, state and local laws, regulations and policies as to anti-discrimination, affirmative action, wage and hour standards, child labor, privacy, confidentiality of personnel related information, and similar matters.
10. **Communication.** District and Contractor acknowledge and agree that it is important for the parties to communicate, and they shall frequently and freely communicate with each other as to all aspects of Flint Center's operations, their satisfaction or dissatisfaction with each other's performance under this Agreement, and related matters.
11. **Assignment.** This Agreement or its obligations shall not be assigned to any third person or entity without the written consent of the other party.
12. **Notices.** Any notice or other communication given to a party pursuant to this Agreement shall be in writing and delivered to such party's address as set forth below, which may be updated pursuant to this section. Notices may be delivered by telecopy, express courier, or by certified mail – return receipt requested, postage prepaid. Notices shall be deemed to have been given: (a) if delivered by telecopy or express courier, one (1) business day after the date of delivery; or (b) if transmitted by certified mail, on the earlier of (i) the third (3rd) business day after the date of such mailing, or (ii) the date of receipt.

If to District:	Foothill-De Anza Community College District Attn: Vice Chancellor, Business Services or Controller 12345 El Monte Road Los Altos Hills, California 94022 Fax: 650-941-1638
If to Contractor:	Domus Aurea, Inc. 6971 Port Rowan San Jose, California 95119 Fax: 408-864-8918

13. **Governing Law: Arbitration.** This Agreement shall be governed by and construed in accordance with California law as applied to contracts entirely executed and performed within said state. Any controversy or claim arising out of

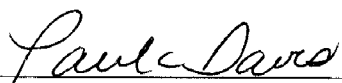
this Agreement shall first attempt to be settled by the parties by good faith discussions and amicable resolution. In the event the parties are unable to resolve the controversy or claim, it shall be finally determined by binding arbitration by the American Arbitration Association under the Commercial Arbitration Rules or such other arbitration panel as is mutually acceptable to the parties. The arbitrator(s) shall be appointed in accordance with the Commercial Arbitration Rules. Such arbitration shall be the sole remedy available to the parties in the event of such controversy or claim. The arbitration shall take place in Palo Alto, California. The arbitrator in his discretion shall be entitled to award the prevailing party (if any) in the arbitration all fees, costs and expenses of counsel in such arbitration, the parties shall bear the arbitrator's fees and costs equally and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. If no such award of fees, costs and expenses of counsel in such arbitration is made, the parties to the arbitration shall bear their own respective fees, costs and expenses and share the arbitrator's fees and costs equally.

14. **Partial Invalidity.** If any provision of this Agreement is held by a court or other tribunal to be prohibited, invalid, void or unenforceable, such provision shall be ineffective only to the extent of such prohibition and shall not affect the validity of the remaining provisions hereof.
15. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersede any and all other agreements, whether oral or written, between the parties with respect to such subject matter.
16. **Amendment; Waiver.** This Agreement may not be amended and no provision of this Agreement or breach hereof may be waived except by an instrument in writing signed by the party against whom enforcement thereof is sought and only to the extent described in such instrument.
17. **Section Headings.** The section headings used herein are for convenience and ready reference only and shall not be used in the interpretation of this Agreement.
18. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.
19. **Assignment.** This contract may only be assigned my mutual agreement of the parties.

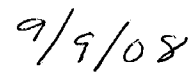
IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below to be effective as of execution by both parties.

CONTRACTOR

Domus Aurea, Inc.



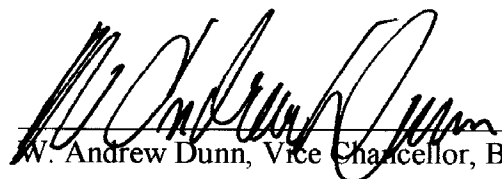
Paula Davis, President



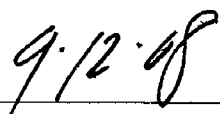
Date

DISTRICT

Foothill-De Anza Community College District



W. Andrew Dunn, Vice Chancellor, Business Services



Date