

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY
HURRICANE EMERGENCY SALES TAX EXEMPTION PROGRAM (HESTEP)
AGENCY AND LEASE AGREEMENT

This **AGENCY AND LEASE AGREEMENT** (the "Agreement"), made and entered into April 2, 2013, by and between **NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY** (the "Agency"), 110 William Street, New York, New York 10038 and **MILL BASIN HEALTH & RACQUET CLUB, INC.** (the "Lessee"), an entity or person listed as the Applicant or Operating Company and having the address set forth in the Hurricane Emergency Sales Tax Exemption (HESTEP) Application attached hereto as Exhibit A.

WITNESSETH:

WHEREAS, pursuant to a resolution adopted by the Agency on November 13, 2012, in order to assist businesses adversely affected by Hurricane Sandy, the Agency will provide sales tax exemption benefits to the Lessee to assist with the repair, rehabilitation and replacement of facilities and equipment of the Lessee damaged by such hurricane;

NOW, THEREFORE, in consideration of the premises and the respective representations and agreements hereinafter contained, the parties hereto agree as follows:

1. **Definitions.** The following terms shall have the respective meanings in this Agreement:

Applicant means the Applicant that is described in the Project Application. The Applicant is the same person or entity as the Lessee.

City shall mean The City of New York, New York.

Commencement Date shall mean the date of this Agreement first set forth above, on which date this Agreement was executed and delivered.

Completion Date shall mean the date of completion of the Project.

Event of Default shall have the meaning specified in Section 8(a).

Expiration Date shall mean the first anniversary of the Commencement Date.

Facility Personalty shall mean those items of machinery, equipment, other items of personalty and building materials to be acquired by the Lessee on behalf of the Agency pursuant to the Sales Tax Letter as part of the Project for installation and use by the Lessee at the Facility Realty.

Facility Realty shall mean, collectively, the Land and the Improvements.

Form ST-340 shall mean NYSDTF Form ST-340 "Annual Report of Sales and Use Tax Exemptions Claimed by Project Operator of Industrial Development Agency/Authority" or such additional or substitute form as is adopted by NYSDTF to report Sales Tax Savings.

Form ST-60 shall mean NYSDTF Form ST-60 “IDA Appointment of Project Operator or Agent” or such additional or substitute form as is adopted by NYSDTF to report the Agency’s appointment of project operators or agents.

Hazardous Materials shall include any flammable explosives, radioactive materials, hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. Sections 9601, et seq.), the Hazardous Materials Transportation Act, as amended (49 U.S.C. Sections 5101, et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. Sections 6901, et seq.), and in the regulations adopted and publications promulgated pursuant thereto, or any other federal, state or local environmental law, ordinance, rule, or regulation.

Improvements shall mean the real property improvements located on the Land.

Indemnified Parties shall have the meaning set forth in Section 7(a).

Land shall mean that certain lot, piece or parcel of land identified in the “Project Location Detail” section of the Project Application.

Legal Requirements shall mean the Constitutions of the United States and the State and all laws, statutes, codes, acts, ordinances, resolutions, orders, judgments, decrees, injunctions, rules, regulations, permits, licenses, authorizations, certificates of occupancy, directions and requirements.

Lessee shall mean the entity or person so identified in the preamble to this Agreement.

Maximum Sales Tax Savings Amount shall mean the maximum dollar amount of Sales Tax Savings that the Lessee is permitted to receive under the Sales Tax Letter and this Agreement, which shall equal **\$80,000**.

NYSDTF shall mean the State Department of Taxation and Finance.

Project shall mean the acquisition and/or leasing of the Facility Personalty and related installation, repair and service contracts to the extent authorized by the Sales Tax Letter required to complete the reconstruction, renovation, repair, equipping and/or furnishing of facilities located at the Facility Realty as described in the Project Application.

Project Application shall mean the application submitted to the Agency by or on behalf of the Lessee, for approval by the Agency of the Project, a copy of which application is attached as Exhibit A.

Project Completion Certificate shall mean a certificate of a duly authorized representative of the Lessee in substantially the form set forth in Exhibit B – “Form of Project Completion Certificate.”

Project Documents shall mean this Agreement, the Project Application and the Sales Tax Letter.

Sales Taxes shall mean City and State sales and/or compensating use taxes imposed pursuant to Sections 1105, 1107, 1109 and 1110 of the New York State Tax Law, as each of the same may be amended from time to time (including any successor provisions to such statutory sections).

Sales Tax Letter shall mean the Letter of Authorization for Sales Tax Exemption, substantially in the form set forth in Exhibit C– “Form of Letter of Authorization for Sales Tax Exemption” and to be delivered pursuant to Section 5 on the Commencement Date.

Sales Tax Registry shall mean the Sales Tax Registry in the form set forth in Exhibit D.

Sales Tax Savings shall mean all exemptions from Sales Taxes realized by or for the benefit of the Lessee pursuant to this Agreement and/or the Sales Tax Letter.

State shall mean the State of New York.

Termination Date shall mean the earliest of (i) the Expiration Date, (ii) the Completion Date, (iii) the termination of this Agreement, (iv) the receipt by the Lessee of the Maximum Sales Tax Savings Amount or (v) notice from the Agency to the Lessee of the termination of the Sales Tax Letter.

2. REPRESENTATIONS AND WARRANTIES

The Lessee makes the following representations and warranties:

(a) The Lessee is an individual or an entity of the type, and duly organized under the laws of the state set forth in the preamble to this Agreement, is validly existing and in good standing under the laws of its state of organization, is duly qualified to do business and in good standing under the laws of the State, has the requisite power and authority to own its property and assets, to carry on its business as now being conducted by it and to execute, deliver and perform this Agreement and each other Project Document to which it, he or she is or shall be a party.

(b) The Project Documents (x) have been duly authorized by all necessary action on the part of the Lessee, (y) have been duly executed and delivered by the Lessee, and (z) constitute the legal, valid and binding obligations of the Lessee, enforceable against the Lessee in accordance with their respective terms.

(c) The Lessee is in compliance, and will continue to comply, with all applicable Legal Requirements relating to the Project.

(d) The Lessee has not used Hazardous Materials on, from, or affecting the Facility Realty in any manner that violates any applicable Legal Requirements governing the use, storage, treatment, transportation, manufacture, refinement, handling, production or disposal of Hazardous Materials, and to the best of the Lessee’s knowledge, no prior owner or occupant of the Facility Realty has used Hazardous Materials on, from, or affecting the Facility Realty in any manner that violates any applicable Legal Requirements.

(e) The information submitted by the Lessee in and accompanying its Project

Application was true, correct and complete as of the date submitted to the Agency and no event has occurred or failed to occur since such date of submission which would cause any of such information to include any untrue statement of a material fact or omit to state any material fact required to be stated therein to make such statements not misleading as of the date of this Agreement.

3. THE PROJECT

(a) **Appointment as Agent.**

The Agency hereby appoints the Lessee its true and lawful agent, and the Lessee hereby accepts such agency for purposes of undertaking the Project, with the same powers and with the same validity and effect as the Agency could do if acting in its own behalf, including: effecting the Project; making, executing, acknowledging and delivering any contracts, orders, receipts, writings and instructions with any other persons or entities (subject in each case to the requirements of this Agreement), and in general doing all things which may be requisite or proper, all for the purposes of undertaking the Project, and the Lessee agrees to pay, all fees, costs and expenses incurred with respect to the Project from its own funds or borrowed funds made available therefor by the Lessee.

(b) **Manner of Project Completion.**

The Lessee shall (i) commence acquisition, renovation, repair and installation of Facility Personalty at the Facility Realty (such commencement shall include applying for any necessary permits required to proceed with the Project) within six (6) months of the date that the Applicant signed the Project Application submitted to the Agency; (ii) notify the Agency if it has not commenced the Project work within such time frame, and (iii) complete the Project in accordance with all Legal Requirements by the Expiration Date, in a first class workmanlike manner, free of defects in materials and workmanship.

(c) **Maintenance.**

During the term of this Agreement, the Lessee shall be solely responsible for (i) the maintenance and condition of the Facility Realty and Facility Personalty and (ii) making or causing to be made all replacements, renewals and repairs thereto (whether ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen) necessary to ensure that the Facility Personalty and the operations of the Lessee at the Facility Realty shall not be materially impaired or diminished in any way.

The Agency shall be under no obligation to replace, service, test, adjust, erect, maintain or effect replacements, renewals or repairs of the Facility Personalty or Facility Realty, or any part thereof, to effect the replacement of any inadequate, obsolete, worn out or unsuitable parts of the Facility Personalty or Facility Realty, or to furnish any utilities or services for the Facility Personalty or Facility Realty, and the Lessee hereby assumes full responsibility therefor.

4. LEASE OF FACILITY PERSONALTY AND RENTAL PROVISIONS

(a) **Lease of the Facility Personalty.**

The Agency hereby leases the Facility Personalty to the Lessee, and the Lessee hereby

leases the Facility Personalty from the Agency, for and during the term herein and subject to the terms and conditions herein set forth.

(b) **Transfer of Facility Personalty to Lessee.**

All of the Agency's right, title and interest in Facility Personalty shall be automatically conveyed to the Lessee immediately, without the need for execution of further documentation, upon the earlier of: (i) with respect to any specific item of Facility Personalty, the permanent installation of such item of Facility Personalty as a real property improvement to the Facility Realty and (ii) the Termination Date.

All of the Agency's right, title and interest in the service, maintenance or installation contracts entered into by the Lessee as agent for the Agency in connection with the Project shall be automatically conveyed to the Lessee immediately, without the need for execution of further documentation, upon the earlier of: (i) with respect any such service, maintenance or installation contract that relates to a specific item of Facility Personalty, the permanent installation of such item of Facility Personalty as a real property improvement to the Facility Realty and (ii) the Termination Date.

To the extent that the Agency does not have an interest in any Facility Personalty or related installation, maintenance and service contracts hereunder, this Agreement shall continue in full force and effect as a contractual agency agreement between the Agency and the Lessee until the Termination Date.

On the Termination Date, all of the estate, right, title and interest herein granted or vested in the Lessee shall cease and terminate, and all of the Agency's right, title and interest in the Facility Personalty and related installation, maintenance and service contracts shall be conveyed to the Lessee, without the need for execution of further documentation, immediately upon such termination.

The provisions of this Section 4(b) shall survive the termination or expiration of this Agreement.

(c) **Duration of Term.** The term of this Agreement shall commence on the Commencement Date and shall expire at 11:58 p.m. (New York City time) on the Termination Date.

(d) **Rental and Payment Provisions.**

The Lessee shall pay rent to the Agency, without demand or notice, on the Commencement Date in the amount of \$1.00 (receipt of which is acknowledged by the Agency), which shall constitute the entire amount of rent payable hereunder.

Throughout the term of this Agreement, the Lessee shall pay to the Agency any additional amounts required to be paid by the Lessee to or for the account of the Agency hereunder.

In the event the Lessee should fail to make or cause to be made any payment of rent or any additional amounts required to be paid by the Lessee to or for the account of the Agency hereunder, pursuant to this Section 4(d), the amount not so paid shall continue as an

obligation of the Lessee until the amount not so paid has been paid in full, together with interest thereon from the date due at the applicable interest rate stated in this Agreement where so provided, or if not so provided, at twelve percent (12%) per annum, compounded daily.

(e) **No Warranty of Condition or Suitability.** THE AGENCY HAS MADE AND MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE MERCHANTABILITY, CONDITION, FITNESS, DESIGN, OPERATION OR WORKMANSHIP OF ANY PART OF THE FACILITY PERSONALTY, ITS FITNESS FOR ANY PARTICULAR PURPOSE OR THE QUALITY OR CAPACITY OF THE MATERIALS IN THE FACILITY PERSONALTY. THE AGENCY SHALL NOT BE LIABLE IN ANY MANNER WHATSOEVER TO THE LESSEE OR ANY OTHER PERSON FOR ANY LOSS, DAMAGE OR EXPENSE OF ANY KIND OR NATURE CAUSED, DIRECTLY OR INDIRECTLY, BY THE PROPERTY OF THE FACILITY PERSONALTY OR THE USE THEREOF OR THE FAILURE OF OPERATION THEREOF, OR THE REPAIR, SERVICE OR MAINTENANCE THEREOF.

5. SALES TAX EXEMPTION REQUIREMENTS

(a) **Scope of Sales Tax Exemption.** On the Commencement Date, the Agency shall make the Sales Tax Letter available to the Lessee in substantially the form of Exhibit C – “Form of Letter of Authorization for Sales Tax Exemption”. Subject to the terms of this Agreement, it is intended that the aggregate scope of the exemption from Sales Taxes pursuant to this Agreement and the Sales Tax Letter shall be limited in both duration and amount as follows:

- (i) The Sales Tax Letter shall be dated the Commencement Date and shall be effective for a term commencing on its date and expiring in accordance with its terms.
- (ii) The authorizations set forth in the Sales Tax Letter shall automatically be suspended upon notice to the Lessee that the Lessee shall be in default under this Agreement until such default is cured to the satisfaction of the Agency.
- (iii) The exemption from Sales Tax to be provided pursuant to the Sales Tax Letter shall be subject to all of the terms, conditions and provisions of the Sales Tax Letter and this Agreement.
- (iv) Any exemption from Sales Taxes resulting from or occasioned by the Agency’s involvement with the Project shall be limited to the items described on Annex A to the Sales Tax Letter.
- (v) The Sales Tax Letter shall not be used to benefit any person or entity, including any tenant or subtenant located at the Facility Realty, other than the Lessee and its Principals (as such term is defined in the Project Application), without the prior written consent of the Agency.
- (vi) **The Sales Tax Savings realized pursuant to the Sales Tax Letter shall not exceed the Maximum Sales Tax Savings Amount.**

(b) **Sales Tax Exemption Procedures.** The Lessee shall include language which is

substantially in the form of paragraph 5 of the Sales Tax Letter (through an attached rider or otherwise) in and as part of each contract, agreement, invoice, bill or purchase order entered into by the Lessee as agent for the Agency in connection with the Project. The Agency makes no representation to the Lessee or any third party that any Sales Tax Savings is available under the Sales Tax Letter.

(c) **Repayment for Misuse of Sales Tax Letter.** In the event that the Lessee shall utilize the Sales Tax exemption authorization provided pursuant to the Sales Tax Letter in violation thereof or this Agreement, the Lessee shall promptly deliver notice of same to the Agency, and the Lessee shall, upon demand by the Agency, pay to or at the direction of the Agency a return of Sales Tax exemptions in an amount equal to all such unauthorized Sales Tax exemptions together with interest at the rate of twelve percent (12%) per annum compounded daily from the date and with respect to the dollar amount for which each such unauthorized Sales Tax exemption was availed of by the Lessee (less any amount of interest and penalties paid to the State). The Lessee acknowledges and agrees that the use of the Sales Tax Letter to obtain Sales Tax Savings in excess of the Maximum Sales Tax Savings Amount is a violation of this Agreement and the Sales Tax Letter.

(d) **Inspection and Audit of Records.** Upon request by the Agency with reasonable notice to the Lessee, the Lessee shall make available at reasonable times to the Agency all such books, records, contracts, agreements, invoices, bills or purchase orders of the Lessee, and require all appropriate officers and employees of the Lessee to respond to reasonable inquiries by the Agency, as shall be necessary (i) to indicate in reasonable detail those costs for which the Lessee shall have utilized the Sales Tax Letter and the dates and amounts so utilized, and (ii) to permit the Agency to determine amounts owed, if any, by the Lessee under this Section 5.

(e) **Form ST-60 Filing Requirement.** If the Lessee needs to provide copies of the Sales Tax Letter to contractors to complete the Project, the Agency must file a completed Form ST-60 within thirty (30) days of the appointment of such person or entity as an agent of the Agency. The Lessee shall observe and comply with the terms and conditions of the Sales Tax Letter including, without limitation, Annex B to the Sales Tax Letter.

(f) **Form ST-340 Filing Requirement.** If and for so long as the same shall be required by law, the Lessee shall annually (currently, by each February 28 with respect to the prior calendar year) file a Form ST-340 with NYSDTF, in a manner and consistent with such regulations as is or may be prescribed by the Commissioner of NYSDTF, of the value of all Sales Tax Savings claimed by the Lessee or agents of the Lessee in connection with the Project, including contractors or subcontractors of such agents. Should the Lessee fail to comply with the foregoing requirement, the Lessee shall immediately cease to be the agent for the Agency in connection with the Project without any further action of the Agency and shall immediately and without demand return to the Agency the Sales Tax Letter for termination.

(g) **Sales Tax Registry Filing Requirement.** No later than August 1, 2013, the Lessee shall file with the Agency a completed Sales Tax Registry which accounts for all Sales Tax Savings realized by the Lessee during the period from the Commencement Date to June 30, 2013), unless the Termination Date occurred prior to June 30, 2013. Within ten (10) days after the Termination Date, the Lessee shall file with the Agency a completed Sales Tax Registry which accounts for all Sales Tax Savings realized by the Lessee during (a) the period from July 1, 2013 to the Termination Date, or (b) if the Termination Date occurred before July 1, 2013, the

period from the Commencement Date to the Termination Date.

6. INSURANCE.

(a) **Required Insurance.** Throughout the term of this Agreement, the Lessee shall obtain and maintain for itself as a primary insured the following insurance:

- (i) Commercial General Liability (“CGL”) with \$1,000,000 minimum per occurrence and \$2,000,000 minimum in the aggregate, per-location aggregate, and on a per occurrence basis. This policy shall contain coverage for contractual liability, premises operations, and products and completed operations.
- (ii) Workers’ Compensation, disability and employer liability insurance satisfying State statutory limits. Coverage for employer liability shall be in respect of any work or operations in, on or about the Facility Realty.

(b) **Required Policy Attributes.** The Lessee shall cause the CGL Policy to:

- (i) name the Agency as an additional insured on a primary and non-contributory basis as more particularly required in Section 6(a);
- (ii) be written on ISO Form CG-0001, or on such other equivalent form as same may be reasonably acceptable to the Agency but only if the substitute form being proposed as equivalent is provided to the Agency sixty (60) days prior to the intended effective date;
- (iii) not limit (whether by exception, exclusion, endorsement, script or other modification) any of the following coverage attributes: (x) contractual liability coverage insuring the contractual obligations of the insureds; (y) the right of the insureds to name additional insureds including the Agency; (z) the applicability of CGL coverage to the Agency as an additional insured in respect of liability arising out of any of the following claims: (A) claims against the Agency by employees of an insured, or (B) claims against the Agency by any contractor, architect or engineer or by the employees of any of the foregoing, or (C) claims against the Agency arising out of any work performed by a contractor, architect or engineer;
- (iv) provide primary insurance and the issuing insurer shall not have a right of contribution from any other insurance policy insuring the Agency;
- (v) to include a waiver by the insurer, as against any person or entity insured under such Policy including any additional insured, the following: (x) any right of subrogation, (y) any right to set-off or counterclaim against liability incurred by a primary insured or any additional insured, and (z) any other deduction, whether by attachment or otherwise, in respect of any liability incurred by any primary insured or additional insured; and
- (vi) the Agency shall not be liable for any insurance premium, commission or assessment under or in connection with the CGL policy.

(c) **Required Insurer Attributes.** The CGL policy must be issued by an insurer satisfying the following requirements:

- (i) the insurer must have a minimum AM Best rating of A minus; and
- (ii) the insurer must be an authorized insurer in accordance with Section 107(a) of the New York State Insurance Law.

(d) **Required Evidence of Compliance.** The Lessee shall deliver or cause to be delivered, throughout the term of this Agreement, upon the Agency's request, evidence of all policies required hereunder as set forth in this Section 6.

(e) **CGL Policy.** The Lessee shall deliver to the Agency an Acord Certificate for the CGL policy required by Section 6(a). Such Acord Certificate shall name the Agency as an additional insured in the following manner:

New York City Industrial Development Agency is an additional insured on a primary and non-contributory basis. The CGL policy is written on ISO Form CG-0001 without modification to the contractual liability or waiver-of-subrogation provisions therein.

(f) **Required Notices.** The Lessee shall immediately give the Agency notice of each occurrence that is reasonably probable to give rise to a claim under the insurance required to be maintained by Section 6(a). The Lessee shall in writing immediately notify the Agency of the cancellation of any Policy.

THE AGENCY DOES NOT REPRESENT THAT THE INSURANCE REQUIRED IN SECTION 6(a), WHETHER AS TO SCOPE OR COVERAGE OR LIMIT, IS ADEQUATE OR SUFFICIENT TO PROTECT THE INSUREDS AND THEIR OPERATIONS AGAINST CLAIMS AND LIABILITY.

7. COVENANTS OF LESSEE.

(a) **Indemnity.**

The Lessee shall at all times indemnify, defend, protect and hold the Agency, and any director, member, officer, employee, servant, agent (excluding for this purpose the Lessee, which is not obligated hereby to indemnify its own employees or affiliated individuals or entities) thereof and persons under the Agency's control or supervision (collectively, the "**Indemnified Parties**" and each an "**Indemnified Party**") harmless of, from and against any and all claims (whether in tort, contract or otherwise), taxes (of any kind and by whomsoever imposed), demands, penalties, fines, liabilities, lawsuits, actions, proceedings, settlements, costs and expenses, including attorney and consultant fees, investigation and laboratory fees, court costs, and litigation expenses (collectively, "**Claims**") of any kind for losses, damage, injury and liability (collectively, "**Liability**") of every kind and nature and however caused (except, with respect to any Indemnified Party, Liability arising from the gross negligence or willful misconduct of such Indemnified Party), arising during the period commencing on the Commencement Date, and continuing throughout the term of this Agreement, arising upon, about, or in any way connected with the Facility Realty, the Facility Personalty, the Project, the use of the Sales Tax Letter or any of the transactions with respect thereto.

The Lessee releases each Indemnified Party from, and agrees that no Indemnified Party shall be liable to the Lessee for any Claim or Liability arising from or incurred as a result of action taken or not taken by such Indemnified Party with respect to any of the matters set forth in this Section 7(a) including any Claim or Liability arising from or incurred as a result of the negligence or willful misconduct of such Indemnified Party, or at the direction of the Lessee with respect to any of such matters above referred to.

An Indemnified Party shall promptly notify the Lessee in writing of any claim or action brought against such Indemnified Party in which indemnity may be sought against the Lessee pursuant to this Section 7(a); such notice shall be given in sufficient time to allow the Lessee to defend or participate in such claim or action, but the failure to give such notice in sufficient time shall not constitute a defense hereunder nor in any way impair the obligations of the Lessee under this Section 7(a).

Anything to the contrary in this Agreement notwithstanding, the covenants of the Lessee contained in this Section 7(a) shall be in addition to any and all other obligations and liabilities that the Lessee may have to any Indemnified Party in any other agreement or at common law, and shall remain in full force and effect after the termination of this Agreement until the later of (i) the expiration of the period stated in the applicable statute of limitations during which a claim or cause of action may be brought and (ii) payment in full or the satisfaction of such claim or cause of action and of all expenses and charges incurred by the Indemnified Party relating to the enforcement of the provisions herein specified.

(b) **Employment Matters.**

Except as is otherwise provided by collective bargaining contracts or agreements, new employment opportunities created as a result of the Project shall be listed with the New York State Department of Labor Community Services Division, and with the administrative entity of the service delivery area created by the Workforce Investment Act of 1998 (29 U.S.C. §2801) in which the Facility Realty is located. Except as is otherwise provided by collective bargaining contracts or agreements, the Lessee agrees, where practicable, to consider first, persons eligible to participate in the Workforce Investment Act of 1998 (29 U.S.C. §2801) programs who shall be referred by administrative entities of service delivery areas created pursuant to such Act or by the Community Services Division of the New York State Department of Labor for such new employment opportunities.

Upon the request of the Agency, the Lessee shall cooperate with the Agency in the development of programs for the employment and/or training of members of minority groups in connection with performing work at the Facility Realty.

Nothing in this Section shall be construed to require the Lessee to violate any existing collective bargaining agreement with respect to hiring new employees.

(c) **Non-Discrimination.**

The Lessee shall not discriminate against any employee or applicant for employment because of race, color, creed, age, sex or national origin. The Lessee shall use its best efforts to ensure that employees and applicants for employment with any subtenant of the Facility Realty are treated without regard to their race, color, creed, age, sex or national origin.

As used herein, the term “treated” shall mean and include the following: recruited, whether by advertising or other means; compensated, whether in the form of rates of pay or other forms of compensation; selected for training, including apprenticeship; promoted; upgraded; downgraded; demoted; transferred; laid off; and terminated. The Lessee shall, in all solicitations or advertisements for employees placed by or on behalf of the Lessee state that all qualified applicants will be considered for employment without regard to race, color, creed or national origin, age or sex. The Lessee shall furnish to the Agency all information required by the Agency pursuant to this Section and will cooperate with the Agency for the purposes of investigation to ascertain compliance with this Section.

(d) **No Assignment.**

The Lessee shall not at any time mortgage, pledge, assign or transfer this Agreement.

(e) **Automatically Deliverable Documents.**

- (i) The Lessee shall immediately notify the Agency of the occurrence of any Event of Default, or any event that with notice and/or lapse of time would constitute an Event of Default under this Agreement. Any notice required to be given pursuant to this subsection shall be signed by a duly authorized representative of the Lessee and set forth a description of the default and the steps, if any, being taken to cure said default. If no steps have been taken, the Lessee shall state this fact on the notice.
- (ii) The Lessee shall deliver all insurance-related documents required by Section 6.
- (iii) Prior to the appointment of an agent in connection with the use of the Sales Tax Letter as provided in Section 5(e), the Lessee shall submit Form ST-60 electronically to the Agency as provided therein.
- (iv) By February 28th of each year (for each year in which the filing of Form ST-340 is required by law), the Lessee shall furnish a copy of the executed Form ST-340 to the Agency at the time of filing of such form with NYSDF.
- (v) No later than August 1, 2013, the Lessee shall file with the Agency a completed Sales Tax Registry which accounts for all Sales Tax Savings realized by the Lessee during the period from the Commencement Date to June 30, 2013).
- (vi) Within 10 days after the Termination Date, the Lessee shall (x) file with the Agency a completed Sales Tax Registry which accounts for all Sales Tax Savings realized by the Lessee during the period from July 1, 2013 to the Termination Date; and (y) deliver and surrender to the Agency the original of the Sales Tax Letter and all copies thereof for cancellation.
- (vii) Within ten (10) days after the Completion Date, the Lessee shall deliver to the Agency evidence of completion of the Project by delivering to the

Agency the Project Completion Certificate, together with all attachments required thereunder.

The obligations set forth in this Section 7(e) shall survive the termination or expiration of this Agreement.

(f) **Requested Documents.** Upon request of the Agency, the Lessee shall deliver or cause to be delivered to the Agency within ten (10) days of the date so requested:

- (i) a certificate of the Lessee that the insurance the Lessee maintains complies with the provisions of Section 6, that such insurance has been in full force and effect at all times during the term of this Agreement, and that duplicate copies of all policies or certificates thereof have been filed with the Agency and are in full force and effect and the evidence required by Section 6;
- (ii) copies of any (a) bills, invoices or other evidences of cost as shall have been incurred in connection with the Project, and (b) permits, authorizations and licenses from appropriate authorities relative to the occupancy, operation and use of the Facility Realty and Facility Personalty;
- (iii) upon twenty (20) days prior request by the Agency, a certificate of the Lessee either stating that to the knowledge of the Lessee after due inquiry there is no default under or breach of any of the terms hereof that, with the passage of time or the giving of notice or both, would constitute an Event of Default hereunder, exists or specifying each such default or breach of which the Lessee has knowledge;
- (iv) employment information requested by the Agency pursuant to Section 7(b); and
- (v) information regarding non-discrimination requested by the Agency pursuant to Section 7(c) .

(g) **Taxes, Assessments and Charges.** The Lessee shall pay when the same shall become due all taxes and assessments, general and specific, if any, levied and assessed upon or against the Facility Realty, this Agreement, any ownership estate or interest of the Lessee in the Facility Realty during the term of this Agreement, and all water and sewer charges, special district charges, assessments and other governmental charges and impositions whatsoever, foreseen or unforeseen, ordinary or extraordinary, under any present or future law, and charges for public or private utilities or other charges incurred in the occupancy, use, operation, maintenance or upkeep of the Facility Realty. The Lessee acknowledges and agrees that the Facility Realty is not exempt from such impositions due to the Agency's ownership of, or interest in, the Facility Personalty.

(h) **Compliance with Legal Requirements.** Throughout the term of this Agreement and at its sole cost and expense, the Lessee shall promptly observe and comply with all applicable Legal Requirements applicable to the Project, the Facility Personalty and the Facility

Realty.

(i) **Restrictions on Dissolution and Merger.** The Lessee covenants and agrees that at all times during the term of this Agreement, it will (i) maintain its existence as the type of entity set forth in the preamble of this Agreement, (ii) continue to be subject to service of process in the State, (iii) continue to be organized under the laws of, or qualified to do business in, the State, and (iv) not merge, consolidate, acquire, liquidate, wind-up, dissolve, transfer or otherwise dispose of to another entity or person all or substantially all of its property, business or assets remaining after the Commencement Date

(j) **Further Assurances.** The Lessee will do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered such further acts, instruments, conveyances, transfers and assurances, at the sole cost and expense of the Lessee, as the Agency deems reasonably necessary or advisable for the implementation, effectuation, correction or confirmation of this Agreement and any rights of the Agency hereunder and under any other Project Document.

8. REMEDIES AND EVENTS OF DEFAULT

(a) **Events of Default.** Failure of the Lessee to observe and perform any covenant or agreement on its part to be performed under this Agreement or the Sales Tax Letter, and continuance of such failure for a period of ten (10) days after receipt by the Lessee of written notice specifying the nature of such default from the Agency shall constitute an “**Event of Default**” hereunder.

(b) **Remedies on Default.** Whenever any Event of Default referred to in Section 8(a) shall have occurred and be continuing, the Agency may take any one or more of the following remedial steps:

- (i) The Agency may terminate this Agreement (with the effect that the term of this Agreement shall be deemed to have expired on such date of termination as if such date were the original Expiration Date of this Agreement) in which case this Agreement and all of the estate, right, title and interest herein granted or vested in the Lessee shall cease and terminate, and all of the Agency’s right, title and interest in the Facility Personalty and related installation, maintenance and service contracts shall be conveyed to the Lessee, without the need for execution of further documentation, immediately upon such termination;
- (ii) The Agency may bring an action for damages, injunction or specific performance;
- (iii) The Agency may take whatever action at law or in equity as may appear necessary or desirable to enforce performance or observance of any obligations, agreements or covenants of the Lessee under this Agreement; or
- (iv) The Agency may suspend or terminate the Sales Tax Letter or require the Lessee to surrender the Sales Tax Letter to the Agency for cancellation.

No action taken pursuant to this Section 8(b) (including termination of this Agreement pursuant to this Section 8(b) or by operation of law or otherwise) shall, except as expressly provided herein, relieve the Lessee from the Lessee's obligations hereunder.

(c) **Remedies Cumulative.** The rights and remedies of the Agency under this Agreement shall be cumulative and shall not exclude any other rights and remedies of the Agency allowed by law with respect to any default under this Agreement or the Sales Tax Letter.

(d) **No Additional Waiver Implied by One Waiver.** In the event any covenant or agreement contained in this Agreement should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

(e) **Effect on Discontinuance of Proceedings.** In case any proceeding taken by the Agency under this Agreement or under any other Project Document on account of any Event of Default hereunder or thereunder shall have been discontinued or abandoned for any reason or shall have been determined adversely to the Agency, then, and in every such case, the Agency shall be restored to its former position and rights hereunder and thereunder, and all rights, remedies, powers and duties of the Agency shall continue as in effect prior to the commencement of such proceedings.

(f) **Agreement to Pay Fees and Expenses of Attorneys and Other Consultants.** In the event the Lessee should default under any of the provisions of this Agreement or the Sales Tax Letter and the Agency should employ outside attorneys or other consultants or incur other out of pocket expenses for the enforcement of performance or observance of any obligation or agreement on the part of the Lessee herein contained or contained in any other Project Document, the Lessee agrees that it will on demand therefor pay to the Agency the reasonable fees and disbursements of such attorneys or other consultants and such other expenses so incurred.

9. MISCELLANEOUS

(a) **Amendments.** This Agreement may only be amended by a written instrument executed and delivered by the parties hereto.

(b) **Service of Process.** The Lessee represents that it is subject to service of process in the State and covenants that it will remain so subject until all obligations, covenants and agreements of the Lessee under this Agreement shall be satisfied and met. If for any reason the Lessee should cease to be so subject to service of process in the State, the Lessee hereby irrevocably consents to the service of all process, pleadings, notices or other papers in any judicial proceeding or action by designating and appointing the first person listed as a Principal of the Applicant in the Project Application, at the address of the Applicant listed in the Project Application as its agent upon whom may be served all process, pleadings, notices or other papers which may be served upon the Lessee as a result of any of its obligations under this Agreement. If such appointed agent shall cease to act or otherwise cease to be subject to service of process in the State, the Lessee hereby irrevocably designates and appoints the Secretary of State of the State of New York as its agent upon whom may be served all process, pleadings, notices or other papers which may be served upon the Lessee as a result of any of its obligations under this Agreement; provided, however, that the service of such process, pleadings, notices or other

papers shall not constitute a condition to the Lessee's obligations hereunder.

For such time as any of the obligations, covenants and agreements of the Lessee under this Agreement remain unsatisfied, the Lessee's agent(s) designated in this Section 9(b) shall accept and acknowledge on the Lessee's behalf each service of process in any such suit, action or proceeding brought in any such court. The Lessee agrees and consents that each such service of process upon such agents and written notice of such service to the Lessee in the manner set forth in this Section 9(b) shall be taken and held to be valid personal service upon the Lessee whether or not the Lessee shall then be doing, or at any time shall have done, business within the State and that each such service of process shall be of the same force and validity as if service were made upon the Lessee according to the laws governing the validity and requirements of such service in the State, and waives all claim of error by reason of any such service.

Such agents shall not have any power or authority to enter into any appearance or to file any pleadings in connection with any suit, action or other legal proceedings against the Lessee or to conduct the defense of any such suit, action or any other legal proceeding except as expressly authorized by the Lessee.

(c) **Notices.** All notices, certificates or other communications hereunder shall be sufficient if sent (i) by registered or certified United States mail, return receipt requested and postage prepaid, (ii) by a nationally recognized overnight delivery service for overnight delivery, charges prepaid or (iii) by hand delivery, addressed, as follows:

if to the Agency, to

New York City Industrial Development Agency
110 William Street
New York, New York 10038
Attention: General Counsel (with a copy to the
Executive Director of the Agency at the
same address)

and

if to the Lessee, to the address provided by the Applicant in the Project Application.

The Agency and the Lessee may, by like notice, designate any further or different addresses to which subsequent notices, certificates or other communications shall be sent. Any notice, certificate or other communication hereunder shall, except as may expressly be provided herein, be deemed to have been delivered or given (i) three (3) Business Days following posting if transmitted by mail, (ii) one (1) Business Day following sending if transmitted for overnight delivery by a nationally recognized overnight delivery service, or (iii) upon delivery if given by hand delivery, with refusal by the intended recipient party to accept delivery of a notice given as prescribed above to constitute delivery hereunder.

(d) **Consent to Jurisdiction.** The Lessee irrevocably and unconditionally (i) agrees that any suit, action or other legal proceeding arising out of this Agreement or any other Project Document, the Facility Personalty, the Facility Realty, the Project, the relationship between the

Agency and the Lessee, the Lessee's ownership, interest, use or occupancy of the Facility Personalty and the Facility Realty and/or any claim for injury or damages may be brought in the courts of record of the State in New York County or the United States District Court for the Southern District of New York; (ii) consents to the jurisdiction of each such court in any such suit, action or proceeding; (iii) waives any objection which it may have to the venue of any such suit, action or proceeding in such courts; and (iv) waives and relinquishes any rights it might otherwise have (w) to move to dismiss on grounds of forum non conveniens, (x) to remove to any federal court other than the United States District Court for the Southern District of New York, and (y) to move for a change of venue to a New York State Court outside New York County. If the Lessee commences any action against the Agency in a court other than the courts of record of the State in New York County or the United States District Court for the Southern District of New York, the Lessee shall, upon request from the Agency, either consent to a transfer of the action or proceeding to a court of record of the State in New York County or the United States District Court for the Southern District of New York, or, if the court where the action or proceeding is initially brought will not or cannot transfer the action, the Lessee shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of record of the State in New York County or the United States District Court for the Southern District of New York.

(e) **Prior Agreements Superseded.** This Agreement shall completely and fully supersede all other prior understandings or agreements, both written and oral, between the Agency and the Lessee relating to the repair, reconstruction, equipping and furnishing of the Facility Realty other than any other Project Document and any agreements between the Agency and Lessee or its affiliates executed and delivered prior to October 29, 2012.

(f) **Severability.** If any one or more of the provisions of this Agreement shall be ruled illegal or invalid by any court of competent jurisdiction, the illegality or invalidity of such provision(s) shall not affect any of the remaining provisions hereof, but this Agreement shall be construed and enforced as of such illegal or invalid provision had not been contained herein.

(g) **Effective Date; Counterparts.** This Agreement was delivered on the Commencement Date. This Agreement shall become effective upon its delivery on the Commencement Date. It may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

(h) **Binding Effect.** This Agreement shall inure to the benefit of the Agency, the Lessee and the Indemnified Parties, and shall be binding upon the Agency and the Lessee and their respective successors and assigns.

(i) **Third Party Beneficiaries.** It is the intention of the parties hereto that nothing contained herein is intended to be for, or to inure to, the benefit of any Person other than the parties hereto and the Indemnified Parties.

(j) **Law Governing.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of New York, without regard or giving effect to the principles of conflicts of laws thereof.

(k) **Waiver of Trial by Jury.** The Lessee does hereby expressly waive all rights to a trial by jury on any cause of action directly or indirectly involving the terms, covenants or


conditions of this Agreement or any matters whatsoever arising out of or in any way connected with this Agreement, the Lessee's obligations hereunder, the Facility Personalty, the Facility Realty, the Project, the relationship between the Agency and the Lessee, the Lessee's ownership, use or occupancy of the Facility Personalty or the Facility Realty and/or any claim for injury or damages. The provision of this Agreement relating to waiver of a jury trial shall survive the termination or expiration of this Agreement.

(l) **Construction.** In this Agreement, unless the context otherwise requires: The terms "hereby," "hereof," "hereto," "herein," "hereunder" and any similar terms refer to this Agreement. Words importing the singular number shall mean and include the plural number and vice versa. Words importing persons shall include firms, associations, partnerships (including limited partnerships and limited liability partnerships), trusts, corporations, limited liability companies and other legal entities, including public bodies, as well as natural persons. Any headings preceding the texts of the several Sections of this Agreement shall be solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect. Unless the content indicates otherwise, references to designated "Exhibits", "Sections", "Subsections" and other subdivisions are to the designated Exhibits, Sections, Subsections and other subdivisions of or to this Agreement. The words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation". The word "will" shall be construed to have the same meaning and effect as the word "shall". Any definition of or reference to any agreement, instrument or other document herein shall be construed to refer to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth therein).


(m) **Recourse Under This Agreement.** All covenants, stipulations, promises, agreements and obligations of the Agency contained in this Agreement or the Sales Tax Letter shall be deemed to be the covenants, stipulations, promises, agreements and obligations of the Agency, and not of any member, director, officer, employee or agent of the Agency or any natural person executing this Agreement or the Sales Tax Letter on behalf of the Agency in such person's individual capacity, and no recourse shall be had for any reason whatsoever hereunder against any member, director, officer, employee or agent of the Agency or any natural person executing this Agreement or the Sales Tax Letter on behalf of the Agency. In addition, in the performance of the agreements of the Agency herein contained, the obligations of the Agency shall neither subject the Agency to any pecuniary or other liability nor create a debt of the State or the City.

IN WITNESS WHEREOF, by signing below each of the Agency and the Lessee has caused this Agreement to be executed by a duly authorized representative as of the year and day first above written.

**NEW YORK CITY INDUSTRIAL
DEVELOPMENT AGENCY**

By: 
Name: _____
Title: _____

**MILL BASIN HEALTH & RACQUET CLUB,
INC.**

By: 
Name: William Charles Kruse
Title: President