

# NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

## Division of Environmental Remediation

625 Broadway, 12th Floor, Albany, New York 12233-7011

P: (518) 402-9706 | F: (518) 402-9020

[www.dec.ny.gov](http://www.dec.ny.gov)

250 East Main Street, LLC  
Peter O'Hara  
80 Orville Drive  
Bohemia, NY 11716

NOV 01 2017

**RE: Site Name: 250 East Main Street**  
**Site No.: C152245**  
**Location of Site: 250 East Main Street, Suffolk County,**  
**Bay Shore, NY 11706**

Dear Mr. O'Hara,

To complete your file, attached is a fully executed copy of the Brownfield Cleanup Agreement for the 250 East Main Street Site.

If you have any further questions relating to this matter, please contact the project attorney for this site, Caryn Bower, Esq., NYS Department of Environmental Conservation, Office of General Counsel, 625 Broadway, 14<sup>th</sup> Floor Albany, NY 12233-1500, or by email at [caryn.bower@dec.ny.gov](mailto:caryn.bower@dec.ny.gov).

Sincerely,



Michael J. Ryan, P.E.  
Assistant Director  
Division of Environmental Remediation

Enclosure

ec: J. Reza, Project Manager

cc: C. Bower, Esq.  
A. Guglielmi, Esq. /M. Mastroianni



Department of  
Environmental  
Conservation

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
BROWNFIELD CLEANUP PROGRAM  
ECL §27-1401 *et seq.*

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In the Matter of a Remedial Program for

**BROWNFIELD SITE  
CLEANUP AGREEMENT  
Index No. C152245-07-17**

**250 East Main Street**

DEC Site No.: C152245

Located at: 250 East Main Street  
Suffolk County  
Bay Shore, NY 11706

Hereinafter referred to as "Site"

by:

250 East Main Street, LLC  
80 Orville Drive, Bohemia, NY 11716

Hereinafter referred to as "Applicant"

-----  
**WHEREAS**, the Department of Environmental Conservation ("Department") is authorized to administer the Brownfield Cleanup Program ("BCP") set forth in Article 27, Title 14 of the Environmental Conservation Law ("ECL"); and

**WHEREAS**, the Applicant submitted an application received by the Department on March 13, 2017; and

**WHEREAS**, the Department has determined that the Site and Applicant are eligible to participate in the BCP.

**NOW, THEREFORE**, IN CONSIDERATION OF AND IN EXCHANGE FOR THE MUTUAL COVENANTS AND PROMISES, THE PARTIES AGREE TO THE FOLLOWING:

**I. Applicant Status**

The Applicant, 250 East Main Street, LLC, is participating in the BCP as a Participant as defined in ECL 27-1405(1)(a).

In addition to the responsibility to pay ongoing State Costs, as a Participant, the Applicant is responsible for payment of past State Costs incurred prior to the effective date of this Agreement. Those past costs, if any, have not yet been compiled, but they will be included in the Department's first itemized invoice(s) as set forth in Paragraph V of Appendix A.

Invoices shall be sent to one address. Unless otherwise noted, they will be sent to the first Applicant listed under IV.2 "Communications" who has consented to the issuance and entry of this Agreement.

**II. Tangible Property Tax Credit Status**

The Department has determined that the Site has previously been remediated pursuant to Article 12 of the Navigation Law. Therefore, in accordance with ECL § 27-1407(1-a), the Site is not eligible for tangible property tax credits.

### III. Real Property

The Site subject to this Brownfield Cleanup Agreement (the "BCA" or "Agreement") consists of approximately 0.900 acres, a Map of which is attached as Exhibit "A", and is described as follows:

Tax Map/Parcel No.: 394-1-69  
Street Number: 250 East Main Street, Bayshore  
Owner: 250 East Main Street, LLC

### IV. Communications

A. All written communications required by this Agreement shall be transmitted by United States Postal Service, by private courier service, by hand delivery, or by electronic mail.

1. Communication from Applicant shall be sent to:

Jahan Reza  
New York State Department of Environmental Conservation  
Division of Environmental Remediation  
SUNY at Stony Brook  
50 Circle Road  
Stony Brook, NY 11790-3409  
[jahan.reza@dec.ny.gov](mailto:jahan.reza@dec.ny.gov)

Note: one hard copy (unbound) of work plans and reports is required, as well as one electronic copy.

Krista Anders (electronic copy only)  
New York State Department of Health  
Bureau of Environmental Exposure Investigation  
Empire State Plaza  
Corning Tower Room 1787  
Albany, NY 12237  
[krista.anders@health.ny.gov](mailto:krista.anders@health.ny.gov)

Caryn Bower, Esq. (correspondence only)  
New York State Department of Environmental Conservation  
Office of General Counsel  
625 Broadway, 14<sup>th</sup> Floor  
Albany, NY 12233-1500  
[caryn.bower@dec.ny.gov](mailto:caryn.bower@dec.ny.gov)

2. Communication from the Department to Applicant shall be sent to:

250 East Main Street, LLC  
Attn: Peter O'Hara  
80 Orville Drive  
Bohemia, NY 11716  
[cke165@aol.com](mailto:cke165@aol.com)

B. The Department and Applicant reserve the right to designate additional or different addressees for communication on written notice to the other. Additionally, the Department reserves the right to request that the Applicant provide more than one paper copy of any work plan or report.

C. Each party shall notify the other within ninety (90) days after any change in the addresses listed in this paragraph or in Paragraph III.

V. Miscellaneous

A. Applicant acknowledges that it has read, understands, and agrees to abide by all the terms set forth in Appendix A - "Standard Clauses for All New York State Brownfield Site Cleanup Agreements" which is attached to and hereby made a part of this Agreement as if set forth fully herein.


B. In the event of a conflict between the terms of this BCA (including any and all attachments thereto and amendments thereof) and the terms of Appendix A, the terms of this BCA shall control.

C. The effective date of this Agreement is the date it is signed by the Commissioner or the Commissioner's designee.

DATED: 1.11.12

THIS BROWNFIELD CLEANUP AGREEMENT IS  
HEREBY APPROVED, Acting by and Through the  
Department of Environmental Conservation as Designee  
of the Commissioner,

By:



Michael J. Ryan, P.E., Assistant Director  
Division of Environmental Remediation

CONSENT BY APPLICANT

Applicant hereby consents to the issuing and entering of this Agreement, waives Applicant's right to a hearing herein as provided by law, and agrees to be bound by this Agreement.

250 East Main Street, LLC

By: Peter O'Hara

Title: MANAGING MEMBER

Date: 10/16/17

STATE OF NEW YORK )  
 ) ss:  
COUNTY OF )

On the 16<sup>th</sup> day of October in the year 2017, before me, the undersigned, personally appeared Peter O'Hara, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Jane L. Slavonik  
Signature and Office of individual  
taking acknowledgment

JANE L SLAVONIK  
Notary Public, State of New York  
No. 01SL6234364  
Qualified in Suffolk County  
Commission Expires January 18, 2019

B. The Department and Applicant reserve the right to designate additional or different addressees for communication on written notice to the other. Additionally, the Department reserves the right to request that the Applicant provide more than one paper copy of any work plan or report.

C. Each party shall notify the other within ninety (90) days after any change in the addresses listed in this paragraph or in Paragraph III.

V. Miscellaneous

A. Applicant acknowledges that it has read, understands, and agrees to abide by all the terms set forth in Appendix A - "Standard Clauses for All New York State Brownfield Site Cleanup Agreements" which is attached to and hereby made a part of this Agreement as if set forth fully herein.

B. In the event of a conflict between the terms of this BCA (including any and all attachments thereto and amendments thereof) and the terms of Appendix A, the terms of this BCA shall control.

C. The effective date of this Agreement is the date it is signed by the Commissioner or the Commissioner's designee.

DATED:

THIS BROWNFIELD CLEANUP AGREEMENT IS  
HEREBY APPROVED, Acting by and Through the  
Department of Environmental Conservation as Designee  
of the Commissioner,

By:

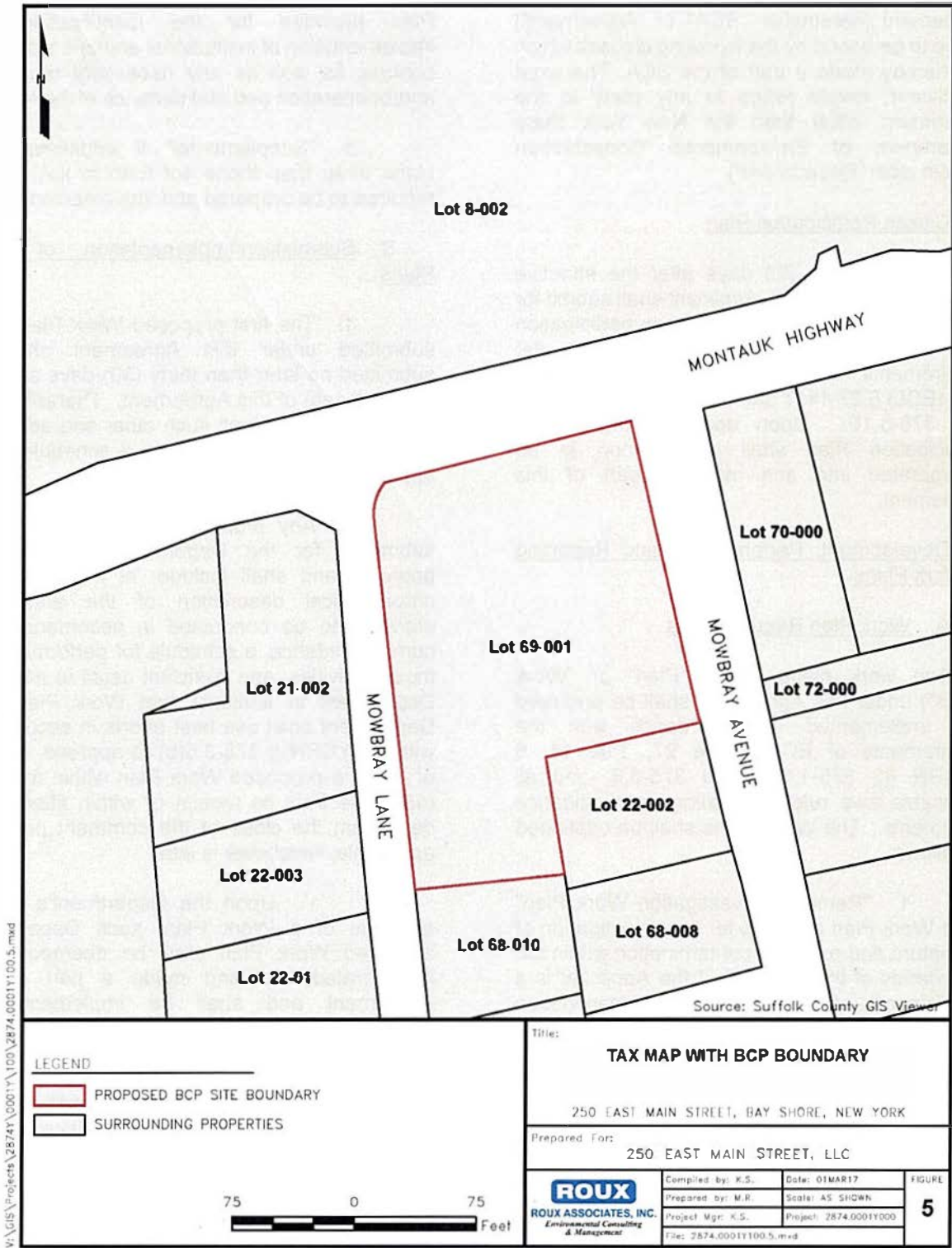
\_\_\_\_\_  
Robert W. Schick, P.E., Director  
Division of Environmental Remediation

RECEIVED  
JAN 11 2004  
DIVISION OF ENVIRONMENTAL REMEDIATION  
STATE OF NEW YORK  
1000



EXHIBIT A

SITE MAP



## APPENDIX A

### STANDARD CLAUSES FOR ALL NEW YORK STATE BROWNFIELD SITE CLEANUP AGREEMENTS

The parties to the Brownfield Site Cleanup Agreement (hereinafter "BCA" or "Agreement") agree to be bound by the following clauses which are hereby made a part of the BCA. The word "Applicant" herein refers to any party to the Agreement, other than the New York State Department of Environmental Conservation (herein after "Department").

#### I. Citizen Participation Plan

Within twenty (20) days after the effective date of this Agreement, Applicant shall submit for review and approval a written citizen participation plan prepared in accordance with the requirements of Environmental Conservation Law (ECL) § 27-1417 and 6 NYCRR §§ 375-1.10 and 375-3.10. Upon approval, the Citizen Participation Plan shall be deemed to be incorporated into and made a part of this Agreement.

#### II. Development, Performance, and Reporting of Work Plans

##### A. Work Plan Requirements

The work plans ("Work Plan" or "Work Plans") under this Agreement shall be prepared and implemented in accordance with the requirements of ECL Article 27, Title 14, 6 NYCRR §§ 375-1.6(a) and 375-3.6, and all applicable laws, rules, regulations, and guidance documents. The Work Plans shall be captioned as follows:

1. "Remedial Investigation Work Plan" if the Work Plan provides for the investigation of the nature and extent of contamination within the boundaries of the Site and, if the Applicant is a "Participant", the extent of contamination emanating from such Site. If the Applicant is a "Volunteer" it shall perform a qualitative exposure assessment of the contamination emanating from the site in accordance with ECL § 27-1415(2)(b) and Department guidance;

2. "Remedial Work Plan" if the Work Plan provides for the development and implementation of a Remedial Program for contamination within the boundaries of the Site and, if the Applicant is a "Participant", the contamination that has emanated from such Site;

3. "IRM Work Plan" if the Work Plan provides for an interim remedial measure; or

4. "Site Management Plan" if the Work Plan provides for the identification and implementation of institutional and/or engineering controls as well as any necessary monitoring and/or operation and maintenance of the remedy.

5. "Supplemental" if additional work plans other than those set forth in II.A.1-4 are required to be prepared and implemented.

##### B. Submission/Implementation of Work Plans

1. The first proposed Work Plan to be submitted under this Agreement shall be submitted no later than thirty (30) days after the effective date of this Agreement. Thereafter, the Applicant shall submit such other and additional work plans as determined in a schedule to be approved by the Department.

2. Any proposed Work Plan shall be submitted for the Department's review and approval and shall include, at a minimum, a chronological description of the anticipated activities to be conducted in accordance with current guidance, a schedule for performance of those activities, and sufficient detail to allow the Department to evaluate that Work Plan. The Department shall use best efforts in accordance with 6 NYCRR § 375-3.6(b) to approve, modify, or reject a proposed Work Plan within forty-five (45) days from its receipt or within fifteen (15) days from the close of the comment period, if applicable, whichever is later.

i. Upon the Department's written approval of a Work Plan, such Department-approved Work Plan shall be deemed to be incorporated into and made a part of this Agreement and shall be implemented in accordance with the schedule contained therein.

ii. If the Department requires modification of a Work Plan, the reason for such modification shall be provided in writing and the provisions of 6 NYCRR § 375-1.6(d)(3) shall apply.

iii. If the Department disapproves a Work Plan, the reason for such disapproval shall be provided in writing and the provisions of 6 NYCRR § 375-1.6(d)(4) shall apply.

3. A Site Management Plan, if necessary, shall be submitted in accordance with the schedule set forth in the IRM Work Plan or Remedial Work Plan.



### C. Submission of Final Reports

1. In accordance with the schedule contained in an approved Work Plan, Applicant shall submit a Final Report for an Investigation Work Plan prepared in accordance with ECL § 27-1411(1) and 6 NYCRR § 375-1.6. If such Final Report concludes that no remediation is necessary, and the Site does not meet the requirements for Track 1, Applicant shall submit an Alternatives Analysis prepared in accordance with ECL § 27-1413 and 6 NYCRR § 375-3.8(f) that supports such determination.

2. In accordance with the schedule contained in an approved Work Plan, Applicant shall submit a Final Engineering Report certifying that remediation of the Site has been performed in accordance with the requirements of ECL §§ 27-1419(1) and (2) and 6 NYCRR § 375-1.6. The Department shall review such Report, the submittals made pursuant to this Agreement, and any other relevant information regarding the Site and make a determination as to whether the goals of the remedial program have been or will be achieved in accordance with established timeframes; if so, a written Certificate of Completion will be issued in accordance with ECL § 27-1419, 6 NYCRR §§ 375-1.9 and 375-3.9.

3. Within sixty (60) days of the Department's approval of a Final Report, Applicant shall submit such additional Work Plans as it proposes to implement. In addition, Applicant shall include with every report submitted to the Department a schedule for the submission of any subsequent work plan required to meet the requirements of ECL Article 27 Title 14. Failure to submit any additional Work Plans within such period shall, unless other Work Plans are under review by the Department or being implemented by Applicant, result in the termination of this Agreement pursuant to Paragraph XII.

### D. Review of Submittals other than Work Plans

1. The Department shall timely notify Applicant in writing of its approval or disapproval of each submittal other than a Work Plan in accordance with 6 NYCRR § 375-1.6. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

2. If the Department disapproves a submittal covered by this Subparagraph, it shall specify the reason for its disapproval and may request Applicant to modify or expand the submittal. Within fifteen (15) days after receiving written notice that Applicant's submittal has been disapproved, Applicant shall elect in writing to either (i) modify or expand it within thirty (30) days of receipt of the written notice of disapproval; (ii) complete any other Department-approved Work Plan(s); (iii) invoke dispute resolution pursuant to Paragraph XIII; or (iv) terminate this Agreement pursuant to Paragraph XII. If Applicant submits a revised submittal and it is disapproved, the Department and Applicant may pursue whatever remedies may be available under this Agreement or under law.

### E. Department's Determination of Need for Remediation

The Department shall determine upon its approval of each Final Report dealing with the investigation of the Site whether remediation, or additional remediation as the case may be, is needed for protection of public health and the environment.

1. If the Department makes a preliminary determination that remediation, or additional remediation, is not needed for protection of public health and the environment, the Department shall notify the public of such determination and seek public comment in accordance with ECL § 27-1417(3)(f). The Department shall provide timely notification to the Applicant of its final determination following the close of the public comment period.

2. If the Department determines that additional remediation is not needed and such determination is based upon use restrictions, Applicant shall cause to be recorded an Environmental Easement in accordance with 6 NYCRR § 375-1.8(h).

3. If the Department determines that remediation, or additional remediation, is needed, Applicant may elect to submit for review and approval a proposed Remedial Work Plan (or modify an existing Work Plan for the Site) for a remedy selected upon due consideration of the factors set forth in ECL § 27-1415(3) and 6 NYCRR § 375-1.8(f). A proposed Remedial Work Plan addressing the Site's remediation will be noticed for public comment in accordance with

ECL § 27-1417(3)(f) and the Citizen Participation Plan developed pursuant to this Agreement. If the Department determines following the close of the public comment period that modifications to the proposed Remedial Work Plan are needed, Applicant agrees to negotiate appropriate modifications to such Work Plan. If Applicant elects not to develop a Work Plan under this Subparagraph then this Agreement shall terminate in accordance with Paragraph XII. If the Applicant elects to develop a Work Plan, then it will be reviewed in accordance with Paragraph II.D above.

#### F. Institutional/Engineering Control Certification

In the event that the remedy for the Site, if any, or any Work Plan for the Site, requires institutional or engineering controls, Applicant shall submit a written certification in accordance with 6 NYCRR §§ 375-1.8(h)(3) and 375-3.8(h)(2).

#### III. Enforcement

Except as provided in Paragraph V, this Agreement shall be enforceable as a contractual agreement under the laws of the State of New York. Applicant shall not suffer any penalty except as provided in Paragraph V, or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement as a result of a Force Majeure Event as described at 6 NYCRR § 375-1.5(b)(4) provided Applicant complies with the requirements set forth therein.

#### IV. Entry upon Site

A. Applicant hereby agrees to provide access to the Site and to all relevant information regarding activities at the Site in accordance with the provisions of ECL § 27-1431. Applicant agrees to provide the Department upon request with proof of access if it is not the owner of the site.

B. The Department shall have the right to periodically inspect the Site to ensure that the use of the property complies with the terms and conditions of this Agreement. The Department will generally conduct such inspections during business hours, but retains the right to inspect at any time.

C. Failure to provide access as provided for under this Paragraph may result in termination of this Agreement pursuant to Paragraph XII.

#### V. Payment of State Costs (Applicable only to Applicants with Participant Status)

A. Within forty-five (45) days after receipt of an itemized invoice from the Department, Applicant shall pay to the Department a sum of money which shall represent reimbursement for State Costs as provided by 6 NYCRR § 375-1.5(b)(3)(i).

B. Costs shall be documented as provided by 6 NYCRR § 375-1.5(b)(3)(ii). The Department shall not be required to provide any other documentation of costs, provided however, that the Department's records shall be available consistent with, and in accordance with, Article 6 of the Public Officers Law.

C. Each such payment shall be made payable to the "Commissioner of NYSDEC" and shall be sent to:

Director, Bureau of Program Management  
Division of Environmental Remediation  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-7012

D. Each party shall provide written notification to the other within ninety (90) days of any change in the foregoing addresses.

E. If Applicant objects to any invoiced costs under this Agreement, the provisions of 6 NYCRR §§ 375-1.5(b)(3)(v) and (vi) shall apply. Objections shall be sent to the Department as provided under subparagraph V.C above.

F. In the event of non-payment of any invoice within the 45 days provided herein, the Department may seek enforcement of this provision pursuant to Paragraph III or the Department may commence an enforcement action for non-compliance with ECL § 27-1409(2) and ECL § 71-4003.

#### VI. Liability Limitation

Subsequent to the issuance of a Certificate of Completion pursuant to this Agreement, Applicant shall be entitled to the Liability

Limitation set forth at ECL § 27-1421, subject to the terms and conditions stated therein and to the provisions of 6 NYCRR §§ 375-1.9 and 375-3.9.

#### VII. Reservation of Rights

A. Except as provided in Subparagraph VII.B, Applicant reserves all rights and defenses under applicable law to contest, defend against, dispute, or disprove any action, proceeding, allegation, assertion, determination, or order of the Department, including any assertion of remedial liability by the Department against Applicant, and further reserves all rights including the rights to notice, to be heard, to appeal, and to any other due process respecting any action or proceeding by the Department, including the enforcement of this Agreement. The existence of this Agreement or Applicant's compliance with it shall not be construed as an admission of any liability, fault, wrongdoing, or violation of law by Applicant, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

B. Notwithstanding the foregoing, Applicant hereby waives any right it may have to make a claim pursuant to Article 12 of the Navigation Law with respect to the Site and releases the State and the New York Environmental Protection and Spill Compensation Fund from any and all legal or equitable claims, suits, causes of action, or demands whatsoever with respect to the Site that Applicant may have as a result of Applicant's entering into or fulfilling the terms of this Agreement.

#### VIII. Indemnification

Applicant shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless from any claim, suit, action, and cost of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Agreement by Applicant prior to the Termination Date except for those claims, suits, actions, and costs arising from the State's gross negligence or willful or intentional misconduct by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Agreement. In the event that the Applicant is a Participant, this provision shall also include the Trustee of the State's Natural Resources. The Department shall provide Applicant with written

notice no less than thirty (30) days prior to commencing a lawsuit seeking indemnification pursuant to this Paragraph.

#### IX. Change of Use

Applicant shall notify the Department at least sixty (60) days in advance of any change of use, as defined in ECL § 27-1425, which is proposed for the Site, in accordance with the provisions of 6 NYCRR § 375-1.11(d). In the event the Department determines that the proposed change of use is prohibited, the Department shall notify Applicant of such determination within forty-five (45) days of receipt of such notice.

#### X. Environmental Easement

A. Within thirty (30) days after the Department's approval of a Remedial Work Plan which relies upon one or more institutional and/or engineering controls, or within sixty (60) days after the Department's determination pursuant to Subparagraph II.E.2 that additional remediation is not needed based upon use restrictions, Applicant shall submit to the Department for approval an Environmental Easement to run with the land in favor of the State which complies with the requirements of ECL Article 71, Title 36 and 6 NYCRR § 375-1.8(h)(2). Applicant shall cause such instrument to be recorded with the recording officer for the county in which the Site is located within thirty (30) days after the Department's approval of such instrument. Applicant shall provide the Department with a copy of such instrument certified by the recording officer to be a true and faithful copy within thirty (30) days of such recording (or such longer period of time as may be required to obtain a certified copy provided Applicant advises the Department of the status of its efforts to obtain same within such thirty (30) day period), which shall be deemed to be incorporated into this Agreement.

B. Applicant or the owner of the Site may petition the Department to modify or extinguish the Environmental Easement filed pursuant to this Agreement at such time as it can certify that the Site is protective of public health and the environment without reliance upon the restrictions set forth in such instrument. Such certification shall be made by a Professional Engineer or Qualified Environmental Professional as defined at 6 NYCRR § 375-1.2(ak) approved by the Department. The Department will not unreasonably withhold its consent.

#### XI. Progress Reports

Applicant shall submit a written progress report of its actions under this Agreement to the parties identified in Subparagraph III.A.1 of the Agreement by the 10th day of each month commencing with the month subsequent to the approval of the first Work Plan and ending with the Termination Date, unless a different frequency is set forth in a Work Plan. Such reports shall, at a minimum, include: all actions relative to the Site during the previous reporting period and those anticipated for the next reporting period; all approved activity modifications (changes of work scope and/or schedule); all results of sampling and tests and all other data received or generated by or on behalf of Applicant in connection with this Site, whether under this Agreement or otherwise, in the previous reporting period, including quality assurance/quality control information; information regarding percentage of completion; unresolved delays encountered or anticipated that may affect the future schedule and efforts made to mitigate such delays; and information regarding activities undertaken in support of the Citizen Participation Plan during the previous reporting period and those anticipated for the next reporting period.

#### XII. Termination of Agreement

Applicant or the Department may terminate this Agreement consistent with the provisions of 6 NYCRR §§ 375-3.5(b), (c), and (d) by providing written notification to the parties listed in Paragraph IV of the Agreement.

#### XIII. Dispute Resolution

A. In the event disputes arise under this Agreement, Applicant may, within fifteen (15) days after Applicant knew or should have known of the facts which are the basis of the dispute, initiate dispute resolution in accordance with the provisions of 6 NYCRR § 375-1.5(b)(2).

B. All cost incurred by the Department associated with dispute resolution are State costs subject to reimbursement pursuant to Paragraph V of Appendix A of this Agreement, if applicable.

C. Notwithstanding any other rights otherwise authorized in law or equity, any disputes pursuant to this Agreement shall be limited to Departmental decisions on remedial

activities. In no event shall such dispute authorize a challenge to the applicable statute or regulation.

#### XIV. Miscellaneous

A. If the information provided and any certifications made by Applicant are not materially accurate and complete, this Agreement, except with respect to Applicant's obligations pursuant to Paragraphs V, if applicable, and VII.B, and VIII, shall be null and void ab initio fifteen (15) days after the Department's notification of such inaccuracy or incompleteness or fifteen (15) days after issuance of a final decision resolving a dispute pursuant to Paragraph XIII, whichever is later, unless Applicant submits information within that fifteen (15) day time period indicating that the information provided and the certifications made were materially accurate and complete. In the event this Agreement is rendered null and void, any Certificate of Completion and/or Liability Limitation that may have been issued or may have arisen under this Agreement shall also be null and void ab initio, and the Department shall reserve all rights that it may have under law.

B. By entering into this Agreement, Applicant agrees to comply with and be bound by the provisions of 6 NYCRR §§ 375-1, 375-3 and 375-6; the provisions of such subparts that are referenced herein are referenced for clarity and convenience only and the failure of this Agreement to specifically reference any particular regulatory provision is not intended to imply that such provision is not applicable to activities performed under this Agreement.

C. The Department may exempt Applicant from the requirement to obtain any state or local permit or other authorization for any activity conducted pursuant to this Agreement in accordance with 6 NYCRR §§ 375-1.12(b), (c), and (d).

D. 1. Applicant shall use "best efforts" to obtain all Site access, permits, easements, approvals, institutional controls, and/or authorizations necessary to perform Applicant's obligations under this Agreement, including all Department-approved Work Plans and the schedules contained therein. If, despite Applicant's best efforts, any access, permits, easements, approvals, institutional controls, or authorizations cannot be obtained, Applicant shall promptly notify the Department and include a summary of the steps taken. The Department



may, as it deems appropriate and within its authority, assist Applicant in obtaining same.

2. If an interest in property is needed to implement an institutional control required by a Work Plan and such interest cannot be obtained, the Department may require Applicant to modify the Work Plan pursuant to 6 NYCRR § 375-1.6(d)(3) to reflect changes necessitated by Applicant's inability to obtain such interest.

E. The paragraph headings set forth in this Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any provisions of this Agreement.

F. 1. The terms of this Agreement shall constitute the complete and entire agreement between the Department and Applicant concerning the implementation of the activities required by this Agreement. No term, condition, understanding, or agreement purporting to modify or vary any term of this Agreement shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department shall be construed as relieving Applicant of its obligation to obtain such formal approvals as may be required by this Agreement. In the event of a conflict between the terms of this Agreement and any Work Plan submitted pursuant to this Agreement, the terms of this Agreement shall control over the terms of the Work Plan(s). Applicant consents to and agrees not to contest the authority and jurisdiction of the Department to enter into or enforce this Agreement.

2. i. Except as set forth herein, if Applicant desires that any provision of this Agreement be changed, Applicant shall make timely written application to the Commissioner with copies to the parties in Subparagraph IV.A.1 of the Agreement.

ii. If Applicant seeks to modify an approved Work Plan, a written request shall be made to the Department's project manager, with copies to the parties listed in Subparagraph IV.A.1 of the Agreement.

iii. Requests for a change to a time frame set forth in this Agreement shall be made in writing to the Department's project attorney and project manager; such requests shall not be

unreasonably denied and a written response to such requests shall be sent to Applicant promptly.

G. 1. If there are multiple parties signing this Agreement, the term "Applicant" shall be read in the plural, the obligations of each such party under this Agreement are joint and several, and the insolvency of or failure by any Applicant to implement any obligations under this Agreement shall not affect the obligations of the remaining Applicant(s) under this Agreement.

2. If Applicant is a partnership, the obligations of all general partners (including limited partners who act as general partners) under this Agreement are joint and several and the insolvency or failure of any general partner to implement any obligations under this Agreement shall not affect the obligations of the remaining partner(s) under this Agreement.

3. Notwithstanding the foregoing Subparagraphs XIV.G.1 and 2, if multiple parties sign this Agreement as Applicants but not all of the signing parties elect to implement a Work Plan, all Applicants are jointly and severally liable for each and every obligation under this Agreement through the completion of activities in such Work Plan that all such parties consented to; thereafter, only those Applicants electing to perform additional work shall be jointly and severally liable under this Agreement for the obligations and activities under such additional Work Plan(s). The parties electing not to implement the additional Work Plan(s) shall have no obligations under this Agreement relative to the activities set forth in such Work Plan(s). Further, only those Applicants electing to implement such additional Work Plan(s) shall be eligible to receive the Liability Limitation referenced in Paragraph VI.

4. Any change to parties pursuant to this Agreement, including successors and assigns through acquisition of title, is subject to approval by the Department, after submittal of an application acceptable to the Department.

H. Applicant shall be entitled to receive contribution protection and/or to seek contribution to the extent authorized by ECL § 27-1421(6) and 6 NYCRR § 375-1.5(b)(5).

I. Applicant shall not be considered an operator of the Site solely by virtue of having executed and/or implemented this Agreement.



J. Applicant and Applicant's agents, grantees, lessees, sublessees, successors, and assigns shall be bound by this Agreement. Any change in ownership of Applicant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Applicant's responsibilities under this Agreement.

K. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in ECL Article 27 or in regulations promulgated thereunder shall have the meaning assigned to them under said statute or regulations.

L. Applicant's obligations under this Agreement shall not be deemed to constitute any type of fine or penalty.

M. In accordance with 6 NYCRR § 375-1.6(a)(4), the Department shall be notified at least 7 days in advance of, and be allowed to attend,

any field activities to be conducted under a Department approved work plan, as well as any pre-bid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting; provided, however that the Department may be excluded from portions of meetings where privileged matters are discussed.

N. In accordance with 6 NYCRR § 375-1.11(a), all work plans; reports, including all attachments and appendices, and certifications, submitted by a remedial party shall be submitted in print, as well as in an electronic format acceptable to the Department.

O. This Agreement may be executed for the convenience of the parties hereto, individually or in combination, in one or more counterparts, each of which shall be deemed to have the status of an executed original and all of which shall together constitute one and the same.

**OPERATING AGREEMENT**  
**OF**  
**250 EAST MAIN STREET, LCC**

This Operating Agreement (the "Agreement") is entered into as of this 20th day of December, 2012, by and among PETER O'HARA ("PETER"), with an address at 250 East Main Street, Bay Shore, New York 11726, and NANCY CATALDO, ("NANCY") with an address at 175 Peninsula Drive, Babylon, New York 11702. PETER and NANCY are separately and collectively referred to as Member and Members respectively.

**WITNESSETH:**

WHEREAS, the Members have formed a limited liability company (the "Company") under the New York Limited Liability Company Law (the "Act") and upon the terms and conditions of this Agreement; and

WHEREAS, the Members wish to set forth their agreement as to how the business and affairs of the Company shall be managed and their rights and obligations with respect to the Company;

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, the parties hereby agree as follows:

**ARTICLE I**

**Formation and Business of the Company**

1.1 *Formation.* The Company was organized on December 20, 2012, in accordance with and pursuant to the Act.

1.2 *Name.* The name of the Company is 250 EAST MAIN STREET, LCC. The Company may do business under that name and, as permitted by applicable law, under any other name determined from time to time by the Members.

1.3 *Purpose of the Company.* The purpose of the Company shall be to acquire title and hold the real property situated at 240 and 250 East Main Street, Bay Shore, New York 11726. Nevertheless the Company may do any lawful business purpose and shall have all the powers set forth in Sec. 202(a)-202(b) of the New York Limited Liability Company Law. (The "Act").

1.4 *Principal Office.* The Company's initial principal place of business within the State of New York shall be located at 80 Orville Dr., Suite 18, Bohemia, New York 11716 or such other place determined from time to time by the General Manager. The Company may have such other business offices within or without the State of New York as determined from time to time by the General Manager.

1.5 *Term.* The term of the Company shall commence on the date hereof and continue for perpetual duration unless the Company is sooner dissolved in accordance with the Act.

1.6 *Members.* The names, addresses, and Percentage Interests of the Members are set forth on Schedule A attached hereto, as amended from time to time.

## ARTICLE II

### Definitions

The following terms, as used in this Agreement, shall have the following meanings (unless otherwise expressly provided herein):

- 2.1 "Act" shall have the meaning set forth in paragraph 1.3 of this Agreement.
- 2.2 "Affiliate" of a Person shall mean any relative of such Person, or any Person that controls, is controlled by or is under common control with, such Person, or an officer, director, partner or trustee (or relative of any thereof) of such Person. For purposes of this definition, (a) "control" shall mean the right or ability to elect the majority of the directors of a corporation or otherwise direct the management of a Person, and (b) "Relative" shall mean any other individual to whom the individual in question is related by blood, marriage or adoption.
- 2.3 "Agreement" shall mean this Operating Agreement, as originally executed and as amended from time to time in accordance herewith and with the Act.
- 2.4 *Intentionally Deleted*
- 2.5 "Articles of Organization" shall mean the Articles of Organization of the Company, as filed with the New York Secretary of State, as amended from time to time in accordance herewith and with the Act.
- 2.6 "Assignee" shall mean the holder of an Economic Interest, if any, who is not a Member.
- 2.7 "Bankruptcy" of a Member shall mean (a) the entry of an order for relief with respect to that Member in a proceeding under the bankruptcy or insolvency laws of any applicable jurisdiction, or (b) the Member's initiation, whether by filing a petition, beginning a proceeding or in answer to a proceeding commenced by another Person, of any action for liquidation, dissolution, receivership or other similar relief, or the Member's application for, or consent to the appointment of, a trustee, receiver or custodian for its assets. For purposes of this definition, a Member's consent shall be deemed to have been given if an order appointing a trustee, receiver or custodian is entered by a court of competent jurisdiction and is not dismissed within ninety (90) days after its entry.
- 2.8 "Capital Account" of an Interest Holder, as of any date, shall mean the account maintained for such Interest Holder pursuant to Section 3.2, as adjusted through such date.
- 2.9 "Capital Contribution" of, or attributed to, an Interest Holder shall mean the total contributions to the capital of the Company, whether in cash, property (net of liabilities) or services, made, performed or to be performed by, or attributed to, such Interest Holder, valued on the date of contribution as set forth in the Company's books and records.
- 2.10 "Capital Transaction" shall mean any transaction not in the ordinary course of the Company's business, in respect of which the Company receives cash or other consideration (but not Capital Contributions), including, without limitation, proceeds from sales or exchanges not in the ordinary course, financings and refinancings, condemnations or insurance policies.
- 2.11 "Cash Available for Distribution" as of any date, shall mean (except as otherwise determined by the General Manager), the excess of (a) all revenues received by the Company from its operations and investments less (b) total current operating expenses and reasonable reserves for future such expenses, including payments of indebtedness of the Company, capital improvements and contingencies, as determined from time to time by the General Manager. Cash available for

Distribution shall not be reduced by non-cash charges, including, without limitation, depreciation and amortization, and shall not include proceeds from Capital Transactions.

2.12 "*Code*" shall mean the Internal Revenue Code of 1986, as amended, in effect as of the date hereof and as amended from time to time hereafter.

2.13 "*Company*" shall have the meaning set forth in the preamble to this Agreement.

2.14 "*Company Minimum Gain*" shall mean the amount determined under Treas. Reg. Sections 1.704-2(i)(3) and 1.704-2(d), and shall be computed separately for each Interest Holder in a manner consistent with Code Section 704(b) and the Treasury Regulations thereunder or similar regulations.

2.15 "*Company Nonrecourse Deductions*" shall mean the deductions of the Company determined under Treas. Reg. Section 1.704-2© or similar regulation.

2.16 "*Economic Interest*" shall mean the right to share in the allocation of one or more of the Company's allocable items, including, without limitation, Net Profits and Net Losses, and/or in distributions of the Company's assets, in each case pursuant to this Agreement or the Act, but shall not include any Management Interest.

2.17 *Intentionally Deleted*

2.18 "*Fiscal Year*" shall mean the Company's accounting, tax and fiscal year, which shall be the calendar year.

2.19 "*General Manager*" means the person designated as such pursuant to Article V.

2.20 "*Initial Capital Contribution*" of a member shall mean its initial contribution to the capital of the Company pursuant to this Agreement.

2.21 "*Interest*" shall mean any of an Economic Interest, Management Interest and/or Membership Interest.

2.22 "*Interest Holder*" shall mean a Member or Assignee, as applicable.

2.23 "*Majority in Interest*" shall mean the Members holding more than fifty percent (50%) of the aggregate Percentage Interests held by all Members.

2.24 "*Management Interest*" of a Member shall mean his or its right to participate in the management of the business and affairs of the Company, including the right to vote on, consent to, or otherwise participate in, any decision or action of or by the Member hereunder or under the Act.

2.25 "*Managing Member*" shall be Peter O'Hara and in the event of his death or disability Nancy Cataldo.

2.26 "*Member*" shall mean each Person who (a) executes a counterpart of this Agreement as Member as of the date hereof or (b) is admitted as a Member after the date hereof in accordance herewith.

2.27 "*Membership Interest*" shall mean a Member's entire interest in the Company, including his or its Economic Interest (to the extent not Transferred) and Management Interest.

2.28 "*Member Nonrecourse Debt*" shall mean nonrecourse debt of the Company under Treas. Reg. Section 1.704-2(b)(4) or similar regulation.

2.29 "*Member Nonrecourse Deductions*" shall mean the losses, deductions and expenditures attributable to Member Nonrecourse Debt under Treas. Reg. Section 1.704-2(i)(2) or similar regulation.



2.30 "*Negative Capital Account*" shall mean a Capital Account with a balance less than zero and, where the context requires, the negative balance thereof, in each case as of the end of a Fiscal Year, after giving effect to the following:

(a) a credit for any amount required to be restored under Treas. Reg. Section 1.704-1(b)(2)(ii) or similar regulation, as well as any amounts in addition thereto pursuant to Treas. Reg. Section 1.704-2(g)(1) and (i)(5) or similar regulation, after taking into account any changes during such Fiscal Year in Company Minimum Gain and Member Nonrecourse Debt Minimum Gain; and

(b) a debit of the items described in Treas. Reg. Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6) or similar regulation.

2.31 "*Net Profits*" and "*Net Losses*" shall mean, for each Fiscal Year (or other period for which they are determined), the income and gain, and the losses, deductions and credits of the Company, respectively, in the aggregate or separately stated, as appropriate, determined in accordance with generally accepted accounting principles, consistently applied.

2.32 *Intentionally Deleted.*

2.33. "*Percentage Interest*" of an Interest Holder shall mean his or its percentage share of the Net Profits, Net Losses, other regularly allocable items and distributions of the Company, as set forth on Schedule A attached hereto, as amended from time to time.

2.34 "*Person*" shall mean any individual, partnership, limited liability company, corporation, joint venture, trust, association or any other entity, domestic or foreign, and its respective heirs, executors, administrators, legal representatives, successors and assigns where the context of this Agreement so permits.

2.35 "*Premises*" shall mean the real property situate at 240 and 250 East Main Street, Bay Shore, New York, as more completely described in and by the Purchase Agreement.

2.36 "*Prime Rate*" shall mean the prime rate as published on the applicable date in the *Wall Street Journal*.

2.37 "*Purchase Agreement*" shall mean the certain agreement between \_\_\_\_\_, as Seller and \_\_\_\_\_, as Purchaser providing for the sale of the Premises.

2.38 "*Regulatory Allocations*" shall have the meaning set forth in Section 4.6.

2.39 "*Total Disability*" shall mean a mental or physical condition that in the reasonable opinion of Peter O'Hara's personal physician determines that Peter O'Hara is unable or incompetent to carry out the material duties and responsibilities of the General Manager under this Agreement.

2.40 "*Transfer*" shall mean any sale, assignment, transfer, gift, exchange, bequest or other disposition of an Interest, in any manner, voluntary or involuntary, by operation of law or otherwise, (but shall not include a pledge, hypothecation or other contingent transfer of rights unless or until such contingency occurs).

2.41 "*Transferor*" shall mean any Member or Interest Holder which Transfers or proposes to Transfer an Interest.

2.42 "*Treasury Regulations*" or "*Treas. Reg.*" shall mean regulations promulgated under the Code in effect as of the date hereof or hereafter amended or adopted.



2.43 "Unreturned Capital Contribution" of a Member shall mean the amount, determined from time to time, equal to the excess of such Member's aggregate Capital Contribution over the cumulative aggregate amount distributed to such Member under Article IV hereof.

2.44 "Withdrawal Event" with respect to any Member shall mean his or its (a) withdrawal from the Company pursuant to the terms of the Agreement; or (b) any other event that terminates a Member's membership in the Company or otherwise causes the dissolution of the Company under the Act.

2.45 "Withdrawal Right Event" shall mean any event which triggers the right of a member to "withdraw".

### ARTICLE III

#### Capital Contributions, Capital Accounts and Funding Obligations

3.1 *Capital Contributions:* The parties hereto acknowledge that required capital contributions have been paid to date. Additional contributions to capital shall be made by the members as required.

3.2 *Purchase of the Premises.* Upon execution hereof the Company shall assume all the obligations of Topolito Inc., a corporation wholly owned by Nancy Cataldo, to purchase the premises at 240 and 250 East Main Street, Bay Shore, New York, from 240 & 250 Holding Co., LLC, as Seller and Topolito, Inc., as Purchaser, the rights pursuant to said agreement have been duly assigned to the Company contemporaneously with the execution hereof.

3.3 *Capital Account.* Separate capital accounts for income and equity shall be established by the Company as follows:

(a) *Income Capital Account.* Except as required by the Code, capital accounts for each partner for income shall be established as follows:

1. Net Profits - 80% to Peter - 20% to Nancy
2. Net Losses - 80% to Peter - 20% to Nancy

(b) *Equity Capital Accounts.* Except as required by the Code, capital accounts for each partner shall be established for the equity ownership of the property as follows:

1. Peter - 80%
2. Nancy - 20%

For purposes of this section, all Capital Accounts are intended to be maintained hereunder in accordance with Code Section 704(b) and the Treasury Regulations thereunder.

© Notwithstanding anything contained herein to the contrary, the manner in which Capital Accounts are maintained shall be modified, if necessary, in the opinion of the General Manager, to comply with applicable law, provided that no such change shall materially alter the economic agreement between or among the Interest Holders.

(d) Except as otherwise required by the Act, and notwithstanding anything contained herein to the contrary, each Interest Holder shall have proportionate liability to restore all or any portion of its Income or Equity Negative Capital Account.

(e) In no event shall any Interest Holder be paid interest on the balance of its Income or Equity Capital Account.

3.4 *Adjustments to Capital Accounts.*

(a) The Members may, in their discretion, adjust the Income Capital Accounts to reflect a revaluation of the Company's assets upon the occurrence of any of the following events:

(i) an Equity Capital Contribution by a new or existing Member as consideration for the issuance of an Interest;

(ii) the distribution of cash or other property by the Company to a retiring or continuing Member as consideration for the repurchase or redemption of an Equity Interest; or

(iii) events described in Treas. Reg. Section 1.704-1(b)(2)(iv)(f).

(b) Any adjustment pursuant to Section 3.3(a) shall be based on the fair market value of Company property on the date of adjustment, and shall reflect the manner in which the unrealized income, gain, loss or deduction inherent in the property, not previously reflected in Equity Capital Accounts, would be allocated among the Interest Holders if there were a taxable disposition of the property for fair market value on that date.

© If there is any basis adjustment pursuant to an election under Code Section 754, the Capital Accounts shall be adjusted to the extent required by Treas. Reg. Section 1.704-1(b)(2)(iv)(m).

3.5 *Return of Capital Contributions.* Except as otherwise provided in this Agreement, no Member shall have any right to demand or receive (a) any cash or property of the Company in return of its Capital Contribution or in respect of its membership Interest until the dissolution of the Company or (b) any distribution from the Company in any form other than cash.

3.6 *Transfer of Interest.* If an interest is Transferred as permitted by this Agreement, the transferee shall succeed to the Capital Account of the Transferor to the extent the Capital Account relates to the Transferred Interest in accordance with Treas. Reg. Section 1.704-1(b)(2)(iv)(1).

3.7 *Additional Cash Contributions.* In no event shall DRP be obligated to make any cash contribution other than that described in Paragraph 3.1. CHP agrees to make all such additional capital contributions as required pursuant to section 3.2.

## ARTICLE IV

### Distributions and Allocations

4.1 *Distributions.* Cash Available for Distribution shall be distributed to each Interest Holder in Accordance with its Percentage Interest of its equity capital account at such time as the Members may from time to time determine.

4.2 *Limitation on Distributions.* No distribution shall be declared and paid unless, after giving effect thereto, the cash assets of the Company exceed the Company's current liabilities.

4.3 *Allocations of Net Profits and Net Losses.* Except as otherwise required by the Code or as provided in this Agreement, the Net Profits and Net Losses for each Fiscal Year shall be determined by the independent accountants for the Company, on a cash basis and otherwise in accordance with generally accepted accounting practices and shall be allocated during the initial five year period among the Members as follows:

Profits:	20% to Nancy	80% to Peter
Losses:	20% to Nancy	80% to Peter

4.4 *Allocation of Gain or Loss on Liquidation.* Net gain or loss realized by the Company upon the sale of all or substantially all of its assets, i.e. the Premises, or otherwise in connection with the dissolution and liquidation of the Company shall be allocated to the Members (after allocating to them (a) all other Net Profits or Net Losses for the then current Fiscal Year in accordance with Section 4.3 and (b) any items allocable under Section 4.5 (including items in connection with such sale) in such amounts that, to the extent possible, the respective balances of their Capital Accounts shall equal the amounts to be distributed to them under Sections 4.1 and 9.2. In the event such balances do not equal the amounts to be distributed as provided in Section 4.1 and 9.2, then, notwithstanding anything contained herein to the contrary, any shortfall or excess shall be allocated to the Members in proportion to their Percentage Interests as set forth below.

Nancy	20%
Peter	80%

Anything to the contrary notwithstanding, distributions shall be made after taking into account all allocations of Net Profits or Net Losses pursuant to Section 4.3.

4.5 *Minimum Gain.*

(a) *Nonrecourse Deductions.* Company Nonrecourse Deductions shall be allocated to the Capital Accounts as set forth in Section 4.3. Member Nonrecourse Deductions shall be allocated to the Member that bears the economic risk of loss with respect to the debt to which such Member Nonrecourse Deduction is attributable.

(b) *Distributions of Nonrecourse Financing Proceeds.* If the Company makes a distribution to the Members that is allocable to the proceeds of any nonrecourse liability of the Company, or of any other entity in which the Company has an interest, such distribution shall be allocable to an increase in Company Minimum Gain as provided in Treas. Reg. Sections 1.704-2(h) and (i)(6).

© *Company Minimum Gain.* Each Member's share of Company Minimum Gain shall be determined as provided in Treas. Reg. Sections 1.704-2(g) and (i)(5).

(d) *Minimum Gain Chargeback.* If there is a net decrease in Company Minimum Gain for a Fiscal Year, items of Company income and gain shall be allocated to the Capital Accounts as provided in Treas. Reg. Section 1.704-2(f). Notwithstanding the foregoing, to the extent such net decrease is attributable to a member Nonrecourse Debt, then any Member with a share of the minimum gain attributable to such debt shall be allocated items of income and gain as provided in Treas. Reg. Section 1.704-2(i)(4).

4.6 *Regulatory Allocation.* The allocations set forth in Section 4.5 (the "Regulatory Allocations") are intended to comply with certain requirements of Treas. Reg. Sections 1.704-1(b) and 1.704-2. The Regulatory Allocations might not be consistent with the manner in which the Members intend to divide Company distributions. Accordingly, the General Manager is hereby authorized to allocate other items of income, gain, loss, and deduction among the members so as, to the extent possible, to prevent the Regulatory Allocations from causing the manner in which Company distributions will be divided between the members pursuant to this Agreement to be different from the division intended by the Members. In general, the Members anticipate that this will be accomplished by specially allocating other items of Company income, gain, loss and deduction among the Members so that, to the extent possible, the net amount of the Regulatory



Allocations and other such items to each Member shall be equal to the net amount that would have been allocated to each such Member if the Regulatory Allocations had not been required.

4.7 *Allocation of Nonrecourse Liabilities.* For purposes of Treas. Reg. Section 1.752-(a), the Members' interests in Net Profits shall be their respective Percentage Interests.

4.8 *Distribution in Kind.* All distributions of Company property in kind shall be valued at their fair market value as of the date of distribution, and the amount of any gain or loss that would be realized by the Company if it were to sell such property at fair market value shall be allocated to the Members in accordance with Section 4.3.

4.9 *Tax Returns and Other Elections.* The General Manager shall cause the preparation and timely execution and filing of all tax returns required to be filed by the Company pursuant to the Code and all applicable laws of each jurisdiction in which the Company does business. Copies of all such returns, or summaries thereof, shall be furnished to the Members within a reasonable time after the end of each Fiscal Year and at least 10 days prior to the filing thereof. All elections permitted to be made by the Company under Federal or state laws shall be made by the General Manager in his or its sole discretion.

4.10 *Mid-Year Transfers.* If an Interest is Transferred during the Fiscal Year as permitted by this Agreement, unless otherwise agreed by the parties:

(a) all Net Profits and Net Losses allocable to such Interest shall be allocated between the Transferor and the Transferee in the ratio of the number of days in the year before and after the effective date of the Transfer, without reference to the dates during the year on which income was earned, losses were incurred or distributions were made, and distributions shall be made to the Interest Holders as determined on the date such distribution is declared; and

(b) tax credits, if any, shall be allocated among the Interest Holders as determined at the time the property with respect to which the credit is claimed is placed in service.

## ARTICLE V

### Management: Rights, Powers, and Duties

#### 5.1 *Management*

5.1.1 Except as otherwise expressly provided herein, operational management of the Company shall be subject to the control and determination of the Members.

5.1.2 PETER O'HARA shall be the General Manager. (With respect to the management of the Company, PETER O'HARA is referred to throughout this agreement as the "General Manager". The General Manager shall retain control over accounting, financial and budgetary matters. If for any reason Peter O'Hara shall be unable to serve as General Manager, the General Manager shall be Nancy Cataldo.

5.1.3 Notwithstanding the authority of General Manager designated under 5.1.2, each of the Members shall have the full power to manage and supervise the day-to-day operations of the Company and upon direction from the Managing Member either Member or the company's Counsel and Assistant Secretary, David Roth, shall have the power to execute, for and on behalf of the Company, any and all documents and instruments which may be necessary to carry on the business of the Company, including, without limitation, any and all deeds, contracts, leases,

mortgages, deeds of trust, promissory notes, security agreements, and financing statements pertaining to the Company's assets or obligations; and no person dealing with the Company's Members or its Counsel need inquire into the validity or propriety of any document or instrument executed in the name of the Company by such person, or as to the authority of such person upon executing the same.

**5.1.4 *Intentionally Omitted***

**5.2 *Voting by Members***

5.2.1 The affirmative vote of the Members constituting 100% of the membership then held by Members is required for a sale of all or part of the premises or for the granting of a mortgage or other security interest in and to the Premises.

**5.3 *Duties of Parties.***

5.3.1 The Members shall do such acts as are reasonably required to complete the acquisition of the Premises pursuant to the Purchase Agreement with \_\_\_\_\_, and for completing the development and improvements to the Premises pursuant to the Building Permit to be issued by the Town of Islip and for performing all the obligations regarding maintenance of the Premises.

**ARTICLE VI**

**Withdrawal of Members**

6.1 *Right to Withdraw.* No Member shall be permitted to withdraw except upon consent and pursuant to agreement with the remaining member or members.

**ARTICLE VII**

**Death, Disability and Bankruptcy**

7.1 Absent a further agreement between the members the member's interest shall be transferred on death to the member's heirs by Will or intestacy.

7.2 In the event of partial or total disability the member shall retain his interest without limitation except that in the case of incapacity the members rights for hereunder may be exercised by or through a guardian, an attorney in fact as the case may be.

**ARTICLE VIII**

**Dissolution and Termination**

8.1 *Events Causing Dissolution and Winding-up.* The Company shall be dissolved and wound up upon the first to occur of the following events:

8.2 the written consent of the General Manager and a unanimous vote of the Members;

8.3 the sale or other disposition of all or substantially all of the business or assets of the Company;

8.4 the entry of a decree of judicial dissolution under Section 702 of the Act as to the Company;

8.5 *Winding up of the Company.*

(a) If the Company is to be dissolved in accordance with Section 9.1, then the General Manager shall wind up the affairs of the Company, including by selling or otherwise liquidating the Company assets in a *bona fide* sale or sales to third Persons at such prices and upon such terms as they may determine. If the General Manager determines that an immediate sale would be financially inadvisable, it may defer sale of the Company assets for a reasonable time.



(b) The proceeds of any liquidation of the Company shall be distributed in the following order of priority (to the extent that such order of priority is consistent with the laws of the State of New York):

(i) first, to the payment of the debts and liabilities of the Company and the expenses of dissolution and liquidation excluding therefrom debts and/or liabilities to any Member;

(ii) then, to the establishment of any reserves which the General Manager shall deem reasonably necessary for payment of such other debts and liabilities of the Company (contingent or otherwise), excluding therefrom debts or liabilities to any Member as are specified by the General Manager, such reserves to be held in escrow by a bank or trust Company selected by the General Manager, and to be disbursed as directed by the Managing Member in payment of any of the specified debts and liabilities or, at the expiration of such period as the Managing Member may deem advisable, to be distributed in the manner hereinafter provided; and

© If the Company is liquidated under Treas. Reg. Section 1.704-1(b)(2)(ii)(G), the liquidating distribution shall be made by the later of (i) the end of the fiscal Year in which liquidation occurs, or (ii) ninety (90) days after the date of liquidation.

(d) The Company shall terminate when all assets of the Company have been sold and/or distributed and all affairs of the Company have been wound up.

8.6 *Articles of Dissolution.* Within ninety (90) days following the dissolution and the commencement of winding up of the Company, or at any other time when there are no Members, Articles of Dissolution shall be prepared, executed and filed in accordance with the Act.

8.7 Any dissolution and winding up shall be subject to the Right of Withdrawal granted to DRP.

## **ARTICLE IX**

### **Indemnification**

9.1 *Indemnification.* The Company shall indemnify, defend and hold the General Manager harmless from and against, and may, upon the approval of the Members, indemnify, defend and hold the Company's and the Managing Member's respective Affiliates, agents, employees, consultants and other independent contractors (collectively, "Indemnitees") harmless from and against, all Losses arising from any demands, claims or lawsuits against any of the Indemnitees in connection with or resulting from his or its acts or omissions in his capacity as General Manager, or as such an Affiliate, agent, employee, consultant or other independent contractor of the Company or the General Manager, or in connection with, arising from, relating to, business or activities undertaken on behalf of the Company, including, without limitation, any demands, claims or lawsuits initiated by a Member, unless such acts or omissions are found by a court of competent jurisdiction upon entry of a final judgment to be in bad faith, or to constitute fraud, willful misconduct or a knowing violation of law or to have violated such lesser standard of conduct as under applicable law affirmatively prevents indemnification hereunder. The termination of any action, suit or proceeding by judgment, order, settlement, plea of *nolo contendere* or its equivalent or conviction shall not, of itself, create a presumption that an Indemnitee shall not be entitled to indemnification hereunder or that the Indemnitee did not act in good faith and in a manner which it reasonably believed to be in or not opposed to the best interests of the Company.

9.2 *Advancement of Expenses.* The General Manager shall be entitled to receive, upon application therefor, advances from the Company to cover the costs of defending any pending, threatened or completed claim, action, suit or proceeding against it for Losses in connection with which it would be entitled to indemnification under this Article X, provided, that such advances shall be repaid to the Company (with interest thereon at an annual rate equal to the Prime Rate) if the Indemnatee receiving such advance is found by a court of competent jurisdiction upon entry of a final judgment to have violated any of the standards set forth in Section 10.1 which preclude indemnification hereunder.

9.3 *Rights Not Exclusive; Survival.* The rights of an Indemnatee set forth in this Article X shall not be exclusive of any other rights to which it may be entitled, whether by separate agreement or otherwise, nor shall such rights limit or affect any other such rights. All rights of an Indemnatee under this Article X shall survive the dissolution of the Company and any Withdrawal Event with respect to such Indemnatee, and shall inure to the benefit of his or its heirs, personal representatives, successors and assigns.

9.4 *Source of Payment.* Notwithstanding anything contained herein to the contrary, any amount to which an Indemnatee may be entitled under this Article X shall be paid only out of the assets of the Company and any insurance proceeds available to the Company for such purposes. No Member shall be personally liable for any amount payable pursuant to this Article X, or to make any Capital Contribution, return any distribution made to it by the Company, or restore any Negative capital Account balance to enable the Company to make any such payment.

## **ARTICLE X**

### **Books, Records, Accounting, and Tax Elections**

10.1 *Bank Accounts.* All funds of the Company shall be deposited in a bank account or accounts opened in the Company's name. The General Manager shall determine the institution or institutions at which the accounts will be opened and maintained and the types of accounts.

#### **10.2 Books and Records.**

10.2.1 The General Manager shall keep or cause to be kept complete and accurate books and records of the Company and supporting documentation of the transactions with respect to the Company's business. The records shall include, but not be limited to:

10.2.1.1 a current alphabetized list of the names and address of all of the members, as well as the contribution and the share of profits and losses of each member or information from which such share can be readily derived;

10.2.1.2 if the firm is managed by a manager or managers, a current alphabetized list of the names and addresses of the managers;

10.2.1.3 a copy of the Articles of Organization and all amendments thereto or restatements thereof, together with executed copies of any powers of attorney pursuant to which any certificate or amendment has been executed;

10.2.1.4 a copy of the operating agreement and any amendments thereto and any amended and restated operating agreement; any asset purchase agreement from any company conducting business similar to the Company; any non compete agreement, any Employment Agreement involving a Member;

10.2.1.5 a copy of the limited liability company's federal, state, and local income tax or information returns and reports, if any, for the three most recent fiscal years.

10.2.2 The books and records shall be maintained in accordance with sound accounting practices and shall be available at the Company's principal office for examination by any Member or the Member's duly authorized representative at any and all reasonable times during normal business hours.

10.2.3 Each Member shall reimburse the Company for all costs and expenses incurred by the Company in connection with the Member's inspection and copying of the Company's books and records.

10.3 *Annual Accounting Period.* The annual accounting period of the Company shall be its calendar year. The Company's taxable year shall be selected by the General Manager, subject to the requirements and limitations of the Code.

10.4 *Reports.* Within seventy-five (75) days after the end of each taxable year of the Company, the General Manager shall cause to be sent to each Person who was a Member at any time during the taxable year then ended: (i) an annual compilation report, prepared by a CPA designated by the General Manager in accordance with standards issued by the American Institute of Certified Public Accountants; and (ii) a report summarizing the fees and other remuneration paid by the Company to any Member, the General Manager, or any Affiliate in respect of the taxable year. In addition, within seventy-five (75) days after the end of each taxable year of the Company, the General Manager shall cause to be sent to each Person who was an Interest Holder at any time during the taxable year then ended, that tax information concerning the Company which is necessary for preparing the Interest Holder's income tax returns for that year. At the request of any member, and at the Member's expense, the General Manager shall cause an audit of the Company's books and records to be prepared by independent accountants for the period requested by the Member.

10.5 *Tax Matters Member.* The General Manager shall be the Company's tax matters Member ("Tax Matters Member"). The Tax Matters Member shall have all powers and responsibilities provided in Code Section 6221, *et seq.* The Tax Matters Member shall keep all Members informed of all notices from government taxing authorities which may come to the attention of the Tax Matters Member. The Company shall pay and be responsible for all reasonable third party costs and expenses incurred by the Tax Matters Member in performing those duties. A Member shall be responsible for any costs incurred by the Member with respect to any tax audit or tax-related administrative or judicial proceeding against any Member, even though it relates to the Company. The Tax Matters Member shall not compromise any dispute with the Internal Revenue Service without the approval of the Managing Member.

10.6 *Tax Elections.* The General Manager upon the consent of the Company's regularly retained accounting firm, shall have the authority to make all Company elections permitted under the Code, including, without limitation, elections of methods of depreciation and elections under Code Section 754.

10.7 *Title to Company Property.*

10.7.1 Except as provided in Section 8.7.2, all real and personal property acquired by the Company shall be acquired and held by the Company in its name.

## ARTICLE XI



### **Miscellaneous Provisions**

11.1 *Notices.* Except as otherwise set forth herein, any notice, demand or communication required or permitted to be given under this Agreement shall be (a) in writing, (b) delivered by hand, and by FedEx Service and by Certified Mail, return receipt requested, postage prepaid, addressed to a party at its mailing address set forth on Exhibit A attached hereto, and © deemed to have been given on the date delivered by hand or sent by facsimile, one business day after deposit with such courier service, and five (5) business days after being deposited in the mail.

11.2 *Application of New York Law.* This Agreement, and the application or interpretation hereof, shall be governed by and in accordance with the laws of the State of New York applicable to agreements made and fully to be performed therein.

#### **11.3 Amendments.**

(a) Except as otherwise required by this Agreement or the Act, this Agreement may be amended by the affirmative vote of the majority interest of the Members.

(b) Notwithstanding anything to the contrary contained in Section 11.4(a), the General Manager may modify the provisions of this Agreement without the consent of the Members upon advice of counsel to the Company the modification is necessary to cause: (i) the Company to be or to continue to be classified as a partnership for Federal income tax purposes or (ii) the allocations under Article IV to have substantial economic effect or to be in accordance with the Members' interests under Section 704 of the Code and the Treasury Regulations thereunder. No modification hereunder may alter the limited liability of the Members or have a material effect on amounts distributable to any Member pursuant to this Agreement.

(c) Notwithstanding anything to the contrary contained in this Section 11.4, any amendment to this Agreement that would adversely affect (i) the Federal income tax treatment to be afforded a Member, (ii) the liabilities of a Member, or (iii) the consent and approval rights reserved by the Members, or which would otherwise change the method of calculating allocations or distributions under Article IV, shall require the consent of each Member affected.

11.4 *Amendment by Agreement of Merger.* Notwithstanding anything to the contrary contained in this Agreement, in accordance with Section 1104(e) of the Act, an agreement of merger or consolidation approved by the Members as required by this Agreement may effect: (a) amendments to this Agreement contained in the agreement of merger or consolidation or necessitate thereby or (b) the adoption of a new operating agreement for the Company if it is the surviving or resulting entity, in each case without further action by the Members.

11.5 *Execution of Additional Instruments.* Each Member hereby agrees to execute such other and further documents and instruments, including, without limitation, statements of their Interests and powers of attorney, as necessary to comply with applicable law or otherwise as reasonably requested by the General Manager.

11.6 *Construction.* Whenever the singular number is used in this Agreement and when required by the context, the same shall include the plural and *vice versa*, and the neuter gender shall include the feminine and masculine genders and *vice versa*.

11.7 *Headings.* The headings in this Agreement are for convenience only and are in no way intended to describe, interpret, define, or limit the scope, extent or intent of this Agreement or any of its provisions.

11.8 *Waivers; Rights and Remedies Cumulative.* The failure of any party to pursue any remedy for breach, or to insist upon the strict performance, of any covenant or condition contained in this Agreement shall not constitute a waiver of any such right with respect to any subsequent breach. Except as otherwise expressly set forth herein, rights and remedies under this Agreement are cumulative, and the pursuit of any one right or remedy by any party shall not preclude, or constitute a waiver of, the right to pursue any or all other remedies. All rights and remedies provided under this Agreement are in addition to any other rights the parties may have by law, in equity or otherwise.

11.9 *Severability.* If any provision, or portion thereof, of this Agreement, or its application to any Person or circumstance, shall be invalid, illegal or unenforceable to any extent, the remainder of this Agreement, such provision and their application shall not be affected thereby, but shall be interpreted without such unenforceable provision or portion thereof so as to give effect, insofar as is possible, to the original intent of the parties, and shall otherwise be enforceable to the fullest extent permitted by law.

11.10 *Successors and Assigns.* All of the covenants, terms, provisions and agreements contained in this Agreement shall be binding upon, and inure to the benefit of, the parties hereto and, to the extent permitted by this Agreement, their respective heirs, legal representatives, successors and assigns.

11.11 *Counterparts.* This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

11.12 *Investment Representations.* Each Interest Holder hereby represents and warrants to the Company and each other Interest Holder as follows:

(a) Such Interest Holder acknowledges that:

(i) the Interest owned by it has not been registered under the Securities Act of 1933, 15 U.S.C. § 15b et seq., the New York State Securities Act or any other state securities laws (collectively, the "Securities Acts") because the Company is issuing (or an Interest Holder has Transferred) such Interest in reliance upon exemptions from the registration requirements contained in the Securities Acts for issuances not involving a public offering;

(ii) the Company (or the Transferor) has relied upon the fact that the Interest is to be held by such Interest Holder for investment purposes only, and not with a view to any resale or distribution thereof; and

(iii) the Company is under no obligation to register or qualify the Interest or to assist any Interest Holder in complying with any exemption from registration under the Securities Acts if such Interest Holders wishes to dispose of the Interest.

(b) Each Interest Holder is acquiring the Interest for his or its own account, for investment purposes only, and not with a view to the resale or distribution thereof, unless there are effective registrations or other qualifications relating thereto under applicable Securities Acts, or unless the Interest Holder delivers to the Company an opinion of counsel required under Section 7.3(d).

(c) Nothing contained herein is intended to be construed as an admission that any Interest is a "security" for purposes of any of the Securities Acts or other applicable law.

11.13 *No Right to Petition for Dissolution.* The Members agree that irreparable harm would be done to the business and goodwill of the Company if any Member were to bring an action in



Court under the Act for the judicial dissolution of the Company. Accordingly, each Member in his capacity as such, hereby irrevocably waives any such right to petition for dissolution of the Company under the Act, and all similar rights under other applicable law, except to the extent such relief may be sought by the Company itself as authorized by the Members in accordance with this Agreement.

11.14 *No Third Party Beneficiaries.* The covenants, obligations and rights set forth in this Agreement are not intended to benefit any creditor of the Company or of any Interest Holder, or any other third Person, except as permitted by applicable law after the obligation to make an additional Capital Contribution has been fixed, or in connection with certain wrongful distributions, no such creditor or other third Person shall, under any circumstances, have any right to compel any actions or payments by the General Manager and/or the Members or shall, by reason of any provision contained herein, be entitled to make any claim in respect of any debt, liability, obligation or otherwise against the Company or any Interest Holder.

11.15 *Entire Agreement.* This Agreement, and the Articles of Organization, embody the entire understanding and agreement between the Members concerning the subject matter hereof and supersede any and all prior negotiations, understandings or agreements with respect thereto. To the extent the Act addresses a matter not otherwise addressed by this Agreement, it is the intention of the Members that the provisions of the Act shall apply, but no such application shall otherwise affect any provision of this Agreement.

**IN WITNESS WHEREOF**, the undersigned have executed this Operating Agreement as of the date first above written.

Members' signatures

250 EAST MAIN STREET, LCC

Jane L. Slavonik  
Witness

By: Peter O'Hara 12/20/12  
PETER O'HARA Date

Jane L. Slavonik  
Witness

Nancy Cataldo 12/20/12  
NANCY CATALDO Date

**AMENDMENT TO  
OPERATING AGREEMENT**

**OF**

**250 EAST MAIN STREET, LCC**

This Agreement to Amend the Operating Agreement (the "Agreement") is entered into effective the 7<sup>th</sup> day of March, 2017, by and among PETER O'HARA ("Peter"), with an address at 250 East Main Street, Bay Shore, New York 11726 and NANCY CATALDO ("Nancy") with an address at 175 Peninsula Drive, Babylon, New York 11702. Peter and Nancy are separately and collectively referred to as Member and Members respectively.

**WITNESSETH:**

WHEREAS, the Members have formed a limited liability company (the "Company") under the New York Limited Liability Company Law (the "Act") and upon the terms and conditions of this Agreement; and

WHEREAS, the Members previously entered into an operating agreement as of December 20, 2012, and

WHEREAS, Nancy wishes to withdraw from the Company, and

WHEREAS, Peter has agreed to acquire Nancy's membership and Nancy has agreed to transfer her membership to Peter, hereinafter the "Transfer", and

WHEREAS, the Members wish to set forth their agreement as to the Transfer and their rights and obligations with respect to the Company.

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, the parties hereby agree as follows:

1. Peter shall purchase all of the interest in the Company owned by Nancy for the sum of One Million Two Hundred Thousand Dollars (\$1,200,000.00). Payment shall be made within 60 days on a best efforts basis, as explained below in Paragraph 2, by bank check to Nancy Cataldo.
2. Peter anticipates liquidating the business interest in another entity on or before June 7, 2017 from which Peter will make payment to Nancy. In the event Peter does not make payment by June 7, 2017, this will constitute a note in the sum of \$1,200,000.00 with the simple interest at 5% per annum accruing from June 8, 2017, due and payable no later than December 31, 2017.
3. Nancy and Peter represent and warrant each to the other:
  - a. They are the sole members of the Company.
  - b. Nancy has the right to sell/transfer all of her interest in the Company to Peter and that there are no other owners of their interests.


c. Nancy's interest in the Company is hereby assigned/transferred/conveyed to Peter free and clear of all liens or encumbrances and no assignment of any economic or other interest of Nancy's membership interest in the Company exists.


d. Neither party has previously executed any unfilled contracts, agreements, and obligations, on the Company or incurred any liability that is not reflected and/or evidenced on the books and records of the Company.

4. Upon execution of this agreement, Nancy shall resign as a member of the Company and surrender her membership interest leaving Peter as the sole member of the Company.

5. All representations and warranties of the Parties shall survive the transfer. Each of the parties agrees to indemnify and hold the other harmless, including reasonable attorney's fees for the cost of defense of any claims asserted against the Company or against the other by reason of the breach of any representation made herein.

Dated: March 20, 2017

  
\_\_\_\_\_  
NANCY CATALDO

  
\_\_\_\_\_  
PETER O'HARA