

# UNOFFICIAL COPY



**THIS INSTRUMENT  
PREPARED BY AND WHEN  
RECORDED, RETURN TO:**

Christopher T. Nixon, Esq.  
Winstead Sechrest & Minick P.C.  
5400 Renaissance Tower  
1201 Elm Street  
Dallas, Texas 75270

Doc#: 0633134064 Fee: \$114.50  
Eugene "Gene" Moore  
Cook County Recorder of Deeds  
Date: 11/27/2006 01:50 PM Pg: 1 of 46

Doc#: 0633134012 Fee: \$54.00  
Eugene "Gene" Moore RHSP Fee: \$10.00  
Cook County Recorder of Deeds  
Date: 11/27/2006 09:22 AM Pg: 1 of 16

Permanent Tax Identification Number: 08-16-100-034, 08-16-100-035, and 08-16-100-036  
Street Address: 1701 Golf Road, Rolling Meadows, Illinois

## ASSIGNMENT AND SUBORDINATION OF MANAGEMENT AGREEMENT

THIS ASSIGNMENT AND SUBORDINATION OF MANAGEMENT AGREEMENT (this "Assignment"), is made as of November 21, 2006, by **CONTINENTAL TOWERS ASSOCIATES III, LLC**, a Delaware limited liability company, and **CONTINENTAL TOWERS, L.L.C.**, a Delaware limited liability company, jointly and severally as tenants in common (collectively, "Borrower" or "TICS" or individually, a "TIC"), and **LIFESTART, INC.**, an Illinois corporation ("Agent"), and **CWCAPITAL LLC**, a Massachusetts limited liability company (including its successors, transferees and assigns, "Lender").

### RECITALS:

A. This Assignment is being executed in connection with Lender's making a mortgage loan to Borrower in the original principal amount of **ONE HUNDRED FIFTEEN MILLION AND NO/100 DOLLARS (\$115,000,000.00)** (the "Loan").

B. The Loan is evidenced by a Promissory Note (the "Note"), dated of even date herewith, made by Borrower and is secured by, among other things, a Mortgage, Security Agreement and Fixture Financing Statement (the "Mortgage"), dated of even date herewith, granting a first lien on certain real property described on Exhibit A attached hereto and incorporated herein by reference (the "Property") (the Note, the Mortgage and the other documents executed and/or delivered in connection with the Loan are collectively referred to as the "Loan Documents").

C. Pursuant to a certain Management Agreement, dated January 1, 2006, between Borrower and Agent (the "Management Agreement") (a true and correct copy of which Management Agreement is attached hereto as Exhibit B), Borrower employed Agent exclusively to manage and operate health and athletic facilities at the Property.

255474  
9/11/06

46

PK

# UNOFFICIAL COPY

D. Lender requires as a condition to the making of the Loan that Borrower assign the Management Agreement as set forth below and Borrower and Agent agree to the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the above and the mutual promises contained in this Assignment, the receipt and sufficiency of which are acknowledged, the parties hereto agree as follows:

1. **Assignment of Management Agreement.** As additional security for the Loan, Borrower hereby conditionally transfers, sets over and assigns to Lender all of Borrower's right, title and interest in and to the Management Agreement, said transfer and assignment to automatically become a present, unconditional assignment, at Lender's option, in the event of a default by Borrower under the Loan Documents and the failure of Borrower to cure such default within any applicable grace period.
2. **Termination.** At such time as the Loan is paid in full and the Mortgage is released of record, this Assignment and all of Lender's right, title and interest hereunder with respect to the Management Agreement shall terminate.
3. **Borrower's Covenants.** Borrower hereby covenants with Lender that during the term of this Assignment: (a) Borrower shall not transfer the responsibility for the management of the health and athletic facilities at the Property from Agent to any other person or entity without the prior written consent of Lender, which consent shall not be unreasonably withheld, conditioned or delayed; (b) Borrower shall not terminate or amend any of the terms or provisions of the Management Agreement without the prior written consent of Lender, which consent shall not be unreasonably withheld, conditioned or delayed; and (c) Borrower shall, in the manner provided for in this Assignment, give notice to Lender of any notice or information that Borrower receives which indicates that the Agent is terminating the Management Agreement or that the Agent is otherwise discontinuing its management of the Property.
4. **Agent's Representations.** Agent warrants and represents to Lender as of the date hereof that (a) Agent has agreed to act as manager of the health and athletic facilities at the Property pursuant to the Management Agreement, (b) the entire agreement between Agent and Borrower for the management of the Property is evidenced by the Management Agreement, (c) the Management Agreement constitutes the valid and binding agreement of Agent, enforceable in accordance with its terms, and Agent has full authority under all state and local laws and regulations, to perform all of its obligations under the Management Agreement and (d) Borrower is not in default in the performance of any of its obligations under the Management Agreement and all payments and fees required to be paid by Borrower to Agent thereunder have been paid to the date hereof.
5. **Agreement by Borrower and Agent.** Borrower and Agent hereby agree that upon (i) the occurrence of or during the continuance of an Event of Default as defined in the Mortgage, (ii) the gross negligence, malfeasance, or willful misconduct of Manager with respect to the management of the Property, or (iii) the default by Manager under the Management Agreement beyond any applicable cure period thereunder, at the option of Lender exercised by written notice to Borrower and Agent: (a) all rents, security deposits, issues, proceeds and

# UNOFFICIAL COPY

profits of the Property collected by Agent, after payment of all costs and expenses of operating the Property (including, without limitation, operating expenses, real estate taxes, insurance premiums, repairs and maintenance and the fees and commissions payable under the Management Agreement), shall be applied in accordance with Lender's written directions to Agent; (b) Lender may exercise its rights under this Assignment and may immediately terminate the Management Agreement and require Agent to transfer its responsibility for the management of the Property to a management company selected by Lender in Lender's sole and absolute discretion; and (c) Agent shall, if requested by Lender, continue performance, on behalf of Lender of all of Agent's obligations under the terms of the Management Agreement with respect to the Property, provided Lender sends to Agent the notice set forth in Paragraph 12 hereof and performs or causes to be performed the obligations of Borrower to Agent under the Management Agreement accruing or arising from and after, and with respect to the period commencing upon, the effective date of such notice.

6. **Subordination of Management Agreement and Fees.** Borrower and Agent hereby agree that the Management Agreement and any and all liens, rights (including the right to receive management fees) and interests (whether choate or inchoate) owed, claimed or held by Agent in and to the Property and the rent and revenue generated therefrom, are and shall be in all respects subordinate and inferior to the liens and security interests created or to be created for the benefit of Lender, its successors and assigns, and securing the repayment of the Note including, without limitation, those created under the Mortgage covering, among other things, the Property, and filed or to be filed of record in the public records maintained for the recording of mortgages in the jurisdiction where the Property is located, and all renewals, extensions, increases, supplements, amendments, modifications and replacements thereof.

7. **Consent and Agreement by Agent.** Agent hereby acknowledges and consents to this Assignment and agrees that Agent will act in conformity with the provisions of this Assignment and Lender's rights hereunder or otherwise related to the Management Agreement. In the event that the responsibility for the management of the health and athletic facilities at the Property is transferred from Agent in accordance with the provisions hereof, Agent shall, and hereby agrees to, fully cooperate in transferring its responsibility to a new management company and effectuate such transfer no later than thirty (30) days from the date the Management Agreement is terminated. Further, Agent hereby agrees (a) not to contest or impede the exercise by Lender of any right it has under or in connection with this Assignment; and (b) that it shall, in the manner provided for in this Assignment, give at least thirty (30) days prior written notice to Lender of its intention to terminate the Management Agreement or otherwise discontinue its management of the Property.

8. **Lender's Agreement.** So long as Borrower is not in default (beyond any applicable grace period) under any of the Loan Documents, Lender agrees to permit any sums due to Borrower under the Management Agreement to be paid directly to Borrower.

9. **No Joint Venture.** Lender has no obligation to Agent with respect to the Mortgage or Loan Documents and Agent shall not be a third party beneficiary with respect to any of Lender's obligations to Borrower set forth in the Loan Documents. The relationship of Lender to Borrower, is one of a creditor to a debtor, and Lender is not a joint venturer or partner of Borrower.

# UNOFFICIAL COPY

10. **Lender's Reliance on Representations.** Agent has executed this Agreement in order to induce Lender to accept the Mortgage and the Loan Documents and with full knowledge that Lender shall rely upon the representations, warranties and agreements herein contained, and that but for this Assignment and the representations, warranties and agreements herein contained, Lender would not take such actions.

11. **Notice.** All notices given hereunder shall be in writing and shall be either hand delivered or mailed, by registered U.S. mail, Return Receipt Requested, first class postage prepaid, to the parties at their respective addresses below or at such other address for any party as such party may designate by notice to the other parties hereto:

To Borrower: Continental Towers Associates III, LLC  
 c/o Prime Group Realty Trust  
 77 West Wacker Drive, Suite 3900  
 Chicago, Illinois 60601  
 Attention: James Hoffman

Continental Towers, L.L.C.  
 c/o Prime Group Realty Trust  
 77 West Wacker Drive, Suite 3900  
 Chicago, Illinois 60601  
 Attention: Jeffrey Patterson

To Lender: CWCapital LLC  
 One Charles River Place  
 63 Kendrick Street  
 Needham, Massachusetts 02494  
 Attention: Legal Division  
 Re: Continental Towers  
 Telecopier: (781) 707-9397

with a copy to: CWCapital LLC  
 One Charles River Place  
 63 Kendrick Street  
 Needham, Massachusetts 02494  
 Attention: Loan Administration  
 Re: Continental Towers  
 Telecopier: (781) 707-9397

or any other servicer of the Loan

To Agent: LifeStart, Inc.  
 c/o LifeStart Wellness Network  
 117 N. Jefferson, Suite 203  
 Chicago, Illinois 60661  
 Attention: Mike Flanagan  
 Telecopier: (312) 627-1317

# UNOFFICIAL COPY

12. **Binding Nature of Assignment.** This Assignment shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

13. **Counterparts.** This Assignment may be executed in any number of counterparts all of which taken together shall constitute one and the same instrument.

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

IN WITNESS WHEREOF, the undersigned have executed this Assignment on the date and year first written above.

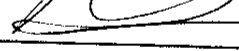
**BORROWER:**

**CONTINENTAL TOWERS ASSOCIATES III, LLC**, a Delaware limited liability company

By: **CONTINENTAL TOWERS ASSOCIATES II, LLC**, a Delaware limited liability company, its sole member

By: **CTA GENERAL PARTNER, LLC**, a Delaware limited liability company, its sole member

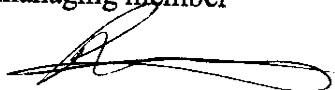
By: **CTA MEMBER, INC.**, a Delaware corporation, its managing member

By:   
Name: Yochanan Danziger,  
by Paul G. Del Vecchio,  
Attorney-In-Fact  
Title: President

**CONTINENTAL TOWERS, L.L.C.**, a Delaware limited liability company

By: **CTA GENERAL PARTNER, LLC**, a Delaware limited liability company, its sole member

By: **CTA MEMBER, INC.**, a Delaware corporation, its managing member

By:   
Name: Yochanan Danziger,  
by Paul G. Del Vecchio,  
Attorney-In-Fact  
Title: President

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

STATE OF ILLINOIS

§  
§  
§

COUNTY OF COOK

This instrument was ACKNOWLEDGED before me on November 17, 2006, by PAUL G. DEL VECCHIO, Attorney-In-Fact for YOCHANAN DANZIGER, the President of CTA MEMBER, INC., a Delaware corporation, as managing member of CTA GENERAL PARTNER, LLC, a Delaware limited liability company, as the sole member of CONTINENTAL TOWERS ASSOCIATES II, LLC, a Delaware limited liability company, as the sole member of CONTINENTAL TOWERS ASSOCIATES III, LLC, a Delaware limited liability company, on behalf of said limited liability company.

[SEAL]

My Commission Expires:

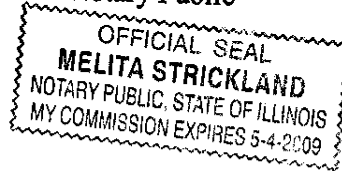
5-4-09

*Melita Strickland*

Notary Public, State of Illinois

MELITA STRICKLAND

Printed Name of Notary Public



STATE OF ILLINOIS

§  
§  
§

COUNTY OF COOK

This instrument was ACKNOWLEDGED before me on November 17, 2006 by PAUL G. DEL VECCHIO, Attorney-In-Fact for YOCHANAN DANZIGER, the President of CTA MEMBER, INC., a Delaware corporation, as managing member of CTA GENERAL PARTNER, LLC, a Delaware limited liability company, as sole member of CONTINENTAL TOWERS, L.L.C., a Delaware limited liability company, on behalf of said limited liability company.

[SEAL]

My Commission Expires:

5-4-09

*Melita Strickland*

Notary Public, State of Illinois

MELITA STRICKLAND


Printed Name of Notary Public



# UNOFFICIAL COPY

Witness the execution hereof as of the date first above written.

**CWCAPITAL LLC,**  
a Massachusetts limited liability company

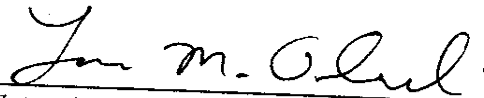
By:   
Name: Scott Spelfogel  
Title: Senior Vice President

COMMONWEALTH OF MASSACHUSETTS §  
  §  
COUNTY OF NORFOLK   §

This instrument was ACKNOWLEDGED before me on November 15, 2006 by Scott Spelfogel, as SVP of CWCAPITAL LLC, a Massachusetts limited liability company, on behalf of said limited liability company.

[SEAL]

My Commission Expires:  
March 15, 2013

  
Notary Public, Commonwealth of Massachusetts  
Laura M. Orlandi  
Printed Name of Notary Public


**LAURA M. ORLANDI**  
Notary Public  
My Commission Expires  
**March 15, 2013**



# UNOFFICIAL COPY

**AGENT:**

**LIFESTART, INC.,**  
an Illinois corporation

By: 

Name: MIKE FLANAGAN

Title: PRESIDENT

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

STATE OF ILLINOIS

§  
§  
§

COUNTY OF Cook

This instrument was ACKNOWLEDGED before me on November 16, 2006 by Mike Flanagan, as President of LIFESTART, INC., an Illinois corporation, on behalf of said corporation.

[SEAL]

Amy S. Hall  
Notary Public

My Commission Expires:

5/4/10

Amy S. Hall  
Printed Name of Notary Public



Attachment

Exhibit A      Legal Description  
Exhibit B      Management Agreement

# UNOFFICIAL COPY

## EXHIBIT A

### Legal Description

#### Parcel 1:

Lots 1 and 2 in CASATI-HEISE SUBDIVISION, being a subdivision of part of the Northeast 1/4 of Section 17 and part of the Northwest 1/4 of Section 16, both in Township 41 North, Range 11 East of the Third Principal Meridian in Cook County, Illinois according to the plat thereof recorded December 27, 1988 as Document Number 88592766, (excepting therefrom that part of Lot 1 dedicated for roadway purposes according to plat recorded December 2, 2002 as Document Number 0021325095), in Cook County, Illinois.

#### Parcel 2:

Easements appurtenant to and for the benefit of Parcels 1 and 4, as created and granted and set forth in easement agreement dated as of September 23, 1977 and recorded October 10, 1978 as Document Number 24662689 and as amended by Amendment to Easement Agreement dated as of May 15, 1980 and recorded June 10, 1980 and recorded as Document Number 25482426 upon, over, and under portions of Lots 1 to 6, inclusive, in Heise's Subdivision, a subdivision of part of the Northwest 1/4 of Section 16, Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois, according to the plat thereof recorded December 23, 1977 as Document 24119807 and also over, upon and under portions of that part of the Northeast 1/4 of Section 17, Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois described as follows:

Commencing at the Northeast Corner of the Northeast 1/4 of Section 17; thence Southerly along the east line of said Northeast 1/4 of Section 17, a distance of 80.0 feet to the southerly right-of-way of Golf Road (State Route 58), as dedicated and recorded September 24, 1929 as Document Numbers 10488005 and 10488006; thence South 89 Degrees, 08 Minutes West along said southerly right-of-way of Golf Road (State Route 58), 691.05 feet for a Point of Beginning; Thence South 0 Degrees, 52 Minutes East, 265.0 feet; thence South 89 Degrees, 08 Minutes West parallel with said southerly right-of-way of Golf Road (State Route 58) 196.11 feet; thence North 0 Degrees, 27 Minutes, 20 Seconds East parallel with the west line of Schwake's Subdivision recorded August 11, 1970 as Document 21235091, now vacated, 265.07 feet to said southerly right-of-way of Golf Road (State Route 58); thence North 89 Degrees, 08 Minutes East, along said southerly right-of-way of Golf Road (State Route 58), 190.0 feet to the Point of Beginning, all in Cook County, Illinois, for the operation, maintenance, repair, replacement, relocation and removal of a water supply line, sewer and other utilities, in Cook County, Illinois.

#### Parcel 3:

Easements appurtenant to and for the benefit of Parcels 1 and 4, as created and granted and set forth in Reciprocal Easement and Common Wall Agreement dated as of September 23, 1977 and recorded October 10, 1978 as Document Number 24662688 and as amended by Agreement thereto dated as of November 21, 1979 and recorded December 17, 1979 as Document Number 25284791 upon and under portions that part of the Northeast 1/4 of Section 17, Township 41

# UNOFFICIAL COPY

North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois described as follows:

Commencing at the Northeast Corner of the Northeast 1/4 of Section 17; thence Southerly along the east line of said Northeast 1/4 of Section 17, a distance of 80.0 feet to the southerly right-of-way of Golf Road (State Route 58), as dedicated and recorded September 24, 1929 as Document Numbers 10488005 and 10488006; thence South 89 Degrees, 08 Minutes West along said southerly right-of-way of Golf Road (State Route 58), 691.05 feet for a Point of Beginning; Thence South 0 Degrees, 52 Minutes East, 265.0 feet; thence South 89 Degrees, 08 Minutes West parallel with said southerly right-of-way of Golf Road (State Route 58) 196.11 feet; thence North 0 Degrees, 27 Minutes, 20 Seconds East parallel with the west line of Schwake's Subdivision recorded August 11, 1970 as Document 21235091, now vacated, 265.07 feet to said southerly right-of-way of Golf Road (State Route 58); thence North 89 Degrees, 08 Minutes East, along said southerly right-of-way of Golf Road (State Route 58), 190.0 feet to the Point of Beginning, all in Cook County, Illinois, for the operation, maintenance, repair, replacement, relocation and removal of a water supply line, sewer and other utilities, in Cook County, Illinois.

Parcel 4:

Lot 3 in CASATI-HEISE SUBDIVISION, being a subdivision of part of the Northeast 1/4 of Section 17 and part of the Northwest 1/4 of Section 16, both in Township 41 North, Range 11 East of the Third Principal Meridian in Cook County, Illinois according to the plat thereof recorded December 27, 1988 as Document Number 88592766, in Cook County, Illinois.

Street Address: 1701 Golf Road

Permanent Tax Identification Numbers: 08-16-100-034, 08-16-100-035, and 08-16-100-036.

# UNOFFICIAL COPY

## EXHIBIT B

### MANAGEMENT AGREEMENT

Property of Cook County Clerk's Office

Dallas\_1\4532518\2  
43412-20 11/15/2006

EXHIBIT B, Management Agreement - Cover Page  
43412-20/Continental Towers

# UNOFFICIAL COPY

## ASSIGNMENT OF MANAGEMENT AGREEMENT

THIS ASSIGNMENT OF MANAGEMENT AGREEMENT (this "Assignment") is made and entered into as of the 21<sup>st</sup> day of November, 2006, by and between **CONTINENTAL TOWERS ASSOCIATES - I, L.P.**, an Illinois limited partnership (hereinafter called "Assignor") and **CONTINENTAL TOWERS ASSOCIATES III, LLC**, a Delaware limited liability company (hereinafter called "Assignee").

### RECITALS:

A. Assignor and Continental Towers, L.L.C., tenants in common, are collectively the "Owner" pursuant to that certain Management Agreement dated January 1, 2006 among Owner and Life Start, Inc. as Operator, (the "Management Agreement") pursuant to which Operator manages and operates a portion of the property commonly known as Continental Towers and located at 1701 Golf Road, Rolling Meadows, Illinois.

B. Assignor desires to assign to Assignee all of Assignor's right, title and interest in, to and under the Management Agreement, and Assignee desires to accept such assignment and observe all of the terms, covenants, agreements and conditions contained in the Management Agreement on Assignor's part to be kept, performed and observed and which shall accrue from and after the date of this Assignment, subject to the terms, covenants and conditions contained in the Management Agreement

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Assignor and Assignee agree as follows:

1. Assignor hereby assigns to Assignee all right, title and interest of Assignor in, to and under the Management Agreement, subject to the terms, covenants and conditions of the Management Agreement. Assignee hereby accepts such assignment and assumes and agrees to keep, perform and observe all of the terms, covenants, agreements and conditions contained in the Management Agreement, on Assignor's part to be kept, performed and observed and which shall accrue from and after the date of this Assignment, subject to the terms, covenants and conditions contained in the Management Agreement.

2. Assignor agrees to defend, indemnify and hold harmless Assignee from and against any and all claims, demands, actions, losses, costs, damages, or expenses (including, without limitation, reasonable attorneys' fees and court costs) sustained by Assignee arising from or related to defaults in Assignor's performance of its obligations under the Management Agreement which accrued prior to the date hereof. Assignee agrees to defend, indemnify and hold harmless Assignor from and against any and all claims, demands, actions, losses, costs, damages or expenses (including, without limitation, reasonable attorneys' fees and court costs) sustained by Assignor arising from or related to defaults in Assignee's performance of its obligations under the Management Agreement which accrue from and after the date hereof.

# UNOFFICIAL COPY

3. This Assignment shall be governed by and construed in accordance with the laws of the State of Illinois.

4. This Assignment shall be binding upon and inure to the benefit of Assignor and Assignee and their respective successors and assigns.

5. This Assignment may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[Signature page follows.]

# UNOFFICIAL COPY

IN WITNESS WHEREOF, Assignor and Assignee have executed this Assignment as of the day and year first above written.

**Assignor:**

CONTINENTAL TOWERS ASSOCIATES - I,  
L.P., an Illinois limited partnership

By: CTA General Partner, LLC, its general partner

By: CTA Member, Inc., its managing member

By: 

Name: *Jochanan Danziger, by Paul H. Veech,*

Its: *President Attorney in Fact*

**Assignee:**

CONTINENTAL TOWERS ASSOCIATES III,  
LLC, a Delaware limited liability company

By: Continental Towers Associates II, LLC, its sole member

By: CTA General Partner, LLC, its managing member

By: CTA Member, Inc., its managing member

By: 

Name: *Jochanan Danziger, by Paul H. Veech,*

Its: *President Attorney in Fact*



# UNOFFICIAL COPY

## MANAGEMENT AGREEMENT

This Management Agreement ("Agreement") is dated January 1, 2006 ("Execution Date"), and is effective as of such date ("Effective Date") between LifeStart, Inc., an Illinois corporation ("Operator") and Continental Towers, L.L.C., a Delaware limited liability company, and Continental Associates I, L.P., an Illinois limited partnership, as Tenants in Common (collectively, "Owner").

## RECITALS

A. Owner owns the office building located in Chicago, Illinois and known as Continental Towers, 1701 West Golf Road, Rolling Meadows, Illinois ("Property").

B. Operator is experienced in designing, decorating, furnishing, equipping, promoting, managing and operating health and athletic facilities.

C. Owner desires to hire Operator, and Operator desires to be hired by Owner, to manage and operate a portion of the Property more particularly identified on the diagram attached hereto as Exhibit A (the "Center"), which exhibit is made a part hereof, all on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing Recitals (which are hereby incorporated by reference), the agreements hereafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

## ARTICLE I

### TERM

The initial term of this Agreement (the "Initial Term") shall be for two years commencing on the Effective Date and terminating on December 31, 2007, unless extended or terminated earlier as set forth herein.

## ARTICLE II

### IMPROVEMENTS AND EQUIPMENT

Owner may, from time to time during the Term hereof, in its sole discretion and at its sole cost and expense (a) construct improvements and purchase furnishings and equipment, and (b) engage architects, engineers, decorators and other specialists and consultants as may be necessary to make any such improvements and purchases as Owner elects to make during the Term hereof. Owner shall take into consideration Operator's expertise and recommendations in initiating such improvements and/or purchases so long as they are intended to benefit or preserve the goal of the Operating Plan.

# UNOFFICIAL COPY

## ARTICLE III

### OPERATION OF THE CENTER

3.1 Services. Owner hereby engages Operator to promote the Center and manage the operation of the Center on behalf of Owner. Operator shall manage and operate the Center (a) in a first class, business-like and efficient manner, and (b) in compliance with the Operating Plan (collectively, the "Operating Standard"). Operator shall have the obligation and authority to perform for Owner in accordance with the applicable Operating Standard and subject to the Operating Budget and Capital Budget and the terms of this Agreement, the following duties and services.

- (a) Maintain and operate the Center in accordance with the Operating Plan;
- (b) Implement a marketing program and sales of memberships;
- (c) Establish and implement fitness and wellness programs and services;
- (d) Bill members and collect revenue;
- (e) Hire, train, supervise and replace (as necessary) a sufficient number of persons who shall be employees of Operator (and not Owner) to perform Operator's services hereunder;
- (f) Provide for the operation, care and maintenance of the Center (including without limitation purchasing necessary supplies);
- (g) Audit all bills received for services, work and supplies ordered and expenses incurred in connection with the repair, maintenance and operation of the Center, and pay such bills in accordance with the Operating Budget and Capital Budget;
- (h) Comply with all applicable laws and regulations including without limitation those relating to worker's compensation, social security, unemployment insurance, hours of labor, wages, working conditions, ERISA, COBRA, employment discrimination, sexual harassment and other employer-employee-related matters ("Employer-Employee Related Matters") in connection with the operations of the Center, including the preparation and filing in the name and taxpayer identification number of Operator of all returns and reports with respect thereto required by any federal, state or local authority (other than income and property tax returns of Owner) and pay or make required deposits for such taxes on a timely basis;
- (i) Conduct appropriate background checks on employees and independent contractors at the Center hired or engaged by Operator in accordance with industry custom, furnish neatly uniformed and qualified employees during

# UNOFFICIAL COPY

- the Center's hours of operation, and cause such employees to maintain the Center in a clean and orderly manner according to the Operating Standard;
- (j) Obtain, or cause any employees and independent contractors (such as masseurs and masseuses) to obtain any required licenses applicable to the Center and renewals thereof;
  - (k) Operate and keep the Center open to club members during the established hours of operation of 6:00 A.M. to 8:00 P.M. weekdays except Holidays and 7:00 A.M. to 1:00 P.M. on Saturdays of the Center or such other hours as are mutually agreed to by the parties; and
  - (l) If required by Owner in writing, contract for utility service, rubbish removal, and security services.
  - (m) Perform those technical duties and services set forth on Exhibit B, attached hereto and made a part hereof ("Technical Services").
  - (n) Make available to members of the Center towel and laundry service, locker room rentals, personal training services, massage services, and health and wellness screening, unless and to the extent otherwise notified by Owner in writing.
  - (o) Comply with all manufacturer's guidelines regarding the installation, maintenance, and operation of equipment at the Center.
  - (p) Obtain insurance coverage as provided in this Agreement.
  - (q) Provide to Owner the reports required pursuant to this Agreement.

3.2 Scope of Management Powers. In performing its duties hereunder, Operator shall have control and decision-making authority in the day-to-day operation, direction, management and supervision of the Center subject to the Operating Plan and the other terms of this Agreement. In connection with its performance of its services hereunder, Operator shall have the following rights subject to the Operating Plan and the other terms of this Agreement: (a) establishing payment policies (including entering into agreements with credit card organizations), terms of admittance, membership initiation and monthly fees, athletic programs and services; (b) entering into membership agreements, as agent for the account of Owner, in the form attached hereto as Exhibit C (provided Owner hereby acknowledges that membership agreements entered into prior to the Execution Date may be in different form and that Operator is not in violation of this Agreement as a result of having entered into such membership agreements in different form); (c) conducting all phases of promotion and publicity relating to the Center or in such other form as approved by Owner in writing; and (d) engaging in such other actions as Operator reasonably deems necessary or desirable to effectuate the purposes of this Agreement.

In exercising the above powers, subject to the limitations on Operator's authority set forth in this Agreement, Operator may enter into, as agent for Owner, such concession agreements and other contracts, agreements and undertakings on behalf of Owner as Owner shall from time to

# UNOFFICIAL COPY

time reasonably consider appropriate, and Owner shall, execute any or all of the same at Operator's reasonable request, provided, however, that such contracts are in accordance with the Operating Plan, the Operating Budget and Capital Budget and such contracts shall further be subject to Owner's approval which shall not be unreasonably withheld or delayed. Owner agrees to recognize the terms and conditions of all membership agreements entered into by Operator during the Term which are in accordance with the terms of this Agreement, regardless of whether or not this Agreement has expired or has been terminated by either party hereto prior to the expiration of the term of such agreements.

Notwithstanding anything contained herein to the contrary, Owner shall have the right to approve the following: (i) the granting of free memberships or reciprocal rights for members in other Operator clubs to use the Center (but Operator agrees that Owner may withhold consent to granting free memberships and such reciprocal rights in Owner's sole and absolute discretion); and (ii) the selection or relocation of the on-site manager of the Center (but Owner's approval shall not be unreasonably withheld or delayed as to such selection).

3.3 Purchasing Services. In the performance of its duties hereunder and subject to the limitations provided for in the Operating Budget and Capital Budget, Operator may purchase, as agent for Owner, goods, supplies and services from or through Operator or any of Operator's Affiliates so long as Operator has fully disclosed the applicable purchase terms and the relationship between Operator and such affiliate prior to such purchase in the applicable Operating Budget. If requested by Owner, Operator shall purchase such goods, supplies, and services through providers specified by Owner.

3.4 Relationship of Agency. In the performance of its duties hereunder, Operator shall act solely as agent and representative of Owner. Nothing herein shall constitute or be construed to be or create a partnership or joint venture between Owner and Operator or be construed to create a lease or sublease by Operator of all or part of the Center.

## ARTICLE IV

### COMPENSATION

4.1 Fees. Owner shall pay to Operator the following fees for services rendered under this Agreement (collectively, "Fees");

- (a) A fee (the "Management Fee") equal to \$3,500 per month payable by the 15th day of each applicable month; such fee to be increased on an annual basis by 3% and to be prorated for any partial month during the Term; and
- (b) An incentive fee ("Incentive Fee") at a rate of fifty percent (50%) of the Net Operating Income for the Center up to \$18,000 per annum, and thereafter at a rate of twenty-five percent (25%) of the Net Operating Income for the Center. The term "Net Operating Income" shall mean Total Revenue less the Operating Expenses. To the extent that the Operating Expenses exceeds the Total Revenue, Operator shall not be entitled to an Incentive Fee hereunder.

# UNOFFICIAL COPY

4.2 Total Revenue, Payment of Operating Expenditures and Capital Expenditures. The term "Total Revenue" as used in this Agreement shall mean the total revenue generated by the operation of the Center, as determined on a (cash/accrual) basis in accordance with generally accepted accounting principles ("GAAP") consistently applied and shall include all income and revenue and proceeds of every kind (whether in cash or credit) received from the operation of the Center. From time to time, Operator shall pay or reimburse itself for Operating Expenses and Capital Expenses out of the Operating Account. In no event shall Operator withdraw funds from or write any check against the Operating Account or make any payment from its own funds earlier than is reasonably necessary for payment of any such Operating Expense or Capital Expense (and in no event earlier than 15 days prior to when such Operating Expense or Capital Expense comes due). No amount may be withdrawn by Operator from the Operating Account except for payment of an Operating Expense or Capital Expense in accordance with this Section 4.2.

If the existing balance in the Operating Account is insufficient, to satisfy any such Operating Expense or Capital Expense or to maintain such reserve, Operator shall notify Owner thereof as soon as reasonably practical and Owner shall be obligated to deposit additional sums in such account necessary to eliminate such deficit within thirty (30) days of Operator's demand therefor. All funds received by Operator shall be deposited in the Operating Account.

## ARTICLE V

### OWNER'S EXPENSES

5.1 Expenses. Owner shall be solely responsible for all Operating Expenses and Capital Expenses. To the extent the funds necessary therefor are not generated by the operation of the Center, they shall be supplied by Owner to Operator in the manner provided in Section 4.2 hereof. Operator shall not incur expenses in excess of the Operating Expenses and the Capital Expenses.

As used herein, "Operating Expenses" shall mean all expenses (other than Capital Expenses) incurred in the operation of the Center provided and to the extent (a) actually paid, and (b)(i) set forth in the Operating Budget (or otherwise allowed as an Emergency Expense or Permitted Variance), or (ii) otherwise approved or designated by Owner in writing. Subject to the foregoing, Operating Expenses shall include: payroll, benefits, associated employment taxes for the employees working at the Center (provided that if such employees work at the Center and work for Operator or its Affiliate(s) elsewhere, Owner shall only be responsible for a reasonable allocation of such employees' payroll, benefits, and associated employment taxes); regional employee support expenses; general administrative expenses, advertising and promotional expenses; facility expenses, such as towels, toiletries and pool supplies; the costs of equipment repairs and maintenance; direct costs associated with tennis lessons, massage services, personal training services and merchandise sales; costs of insurance required to be procured by Operator pursuant to Article XII below; the Management Fees; costs of non-capital repairs or maintenance associated with the Center, including fixtures. As used herein, "Capital Expenses" shall mean other expenses deemed to be capital expenses incurred in the Operation of the Center and in accordance with generally accepted accounting principles, provided and to the extent (a) actually

# UNOFFICIAL COPY

paid, and (b)(i) set forth in the Capital Budget (or otherwise allowed as a Permitted Variance), or (ii) otherwise designated or approved by Owner in writing.

5.2 Operator Not Obligated. Operator shall in no event be required to advance any of its own funds for the operation of the Center, nor to incur any liability in connection with any Operating Expense and Capital Expense.

## ARTICLE VI

### WORKING CAPITAL AND BANK ACCOUNTS

6.1 Operating Account. All funds made available to Operator by Owner for, or generated by, the operation of the Center shall be deposited in an account in the name of the Owner at JPMorgan Chase Bank, N.A. or such other bank selected by Owner and reasonably approved by Operator (the "Operating Account"). On opening the Operating Account, Owner hereby grants to Operator full authorization (and shall take all steps required to effectuate such authorization) to make withdrawals and effect certain other transactions authorized by Owner with respect to the Operating Account in accordance with the terms of this Agreement, subject to Owner's right to countersign for withdrawals or transfers in excess of \$5,000 (provided, however, Owner shall not be obligated to countersign for withdrawals or transfers in excess of \$5,000 to the extent such withdrawal or transfer is made in connection with the payroll for the benefit of the Operator's employees which payroll expenses are part of the Operating Budget). All such withdrawals and payments from the Operating Account shall be made by check only and shall be effected exclusively by the individual person(s) designated or approved from time to time for such purposes by Owner. Such funds shall not be commingled with any other funds of Operator or Owner. Upon termination of this Agreement, Operator shall no longer have the right to withdraw any amount from the Operating Account, and Owner shall be exclusively entitled to all amounts remaining in such Operating Account (but which entitlement shall in no way relieve Owner of its obligation to pay Operating Expenses and Fees due hereunder). The last sentence of this Section 6.1 shall survive the termination of this Agreement.

## ARTICLE VII

### BUDGETS AND PLANS

7.1 Operating Budget, Capital Budget and Operating Plan. Attached hereto as Exhibit D, and made a part hereof is (i) an operating budget for Calendar Year 2006 ("Initial Operating Budget"), (ii) a capital budget for Calendar Year 2006 ("Initial Capital Budget"), and (iii) an operating plan, including a detailed explanation of the basic operating objectives, operating procedures, and systems (including accounting systems); marketing and sales programs; membership and initiation fees; fitness and wellness programs and services; training, compensation, and employment plans; alterations, additions and improvements to the Center (and fixtures and equipment at the Center); and other material services, procedures and plans anticipated to be implemented and/or maintained for Calendar Year 2006, ("Initial Operating Plan"). At least 120 days prior to the beginning of each subsequent Calendar Year during the Term, Operator shall submit to Owner for its review and approval a proposed new operating budget, capital budget, and operating plan for such Calendar Year, each of which

# UNOFFICIAL COPY

shall be in the form required pursuant to the terms of this Section 7.1 and shall be in the form substantially similar to the form of the Initial Operating Budget, Initial Capital Budget, and Initial Operating Plan, as applicable, subject to modifications to form and content reasonably requested by Owner. Upon Owner's approval in writing of the proposed operating budget, capital budget, or operating plan, each such budget or plan shall be effective for the applicable Calendar Year. If Owner disapproves any such budget or plan, Owner shall provide Operator written notice of such disapproval no later than 15 days prior to January 1 of the applicable Calendar year and Owner and Operator shall endeavor in good faith to resolve their differences and come to agreement with respect to such budgets and plan prior to January 1 of the applicable Calendar Year. If they are unable to resolve their differences by that time with respect to either budget or the operating plan, then, as applicable, (i) the prior year's approved operating budget, plus 5% for each line item ("Provisional Operating Budget") shall apply and be in effect until Owner approves in writing a new operating budget, at which time such new operating budget shall apply and be in effect for the applicable Calendar Year, (ii) Operator shall incur no Capital Expense with respect to the Center and (iii) the prior year's operating plan ("Provisional Operating Plan") shall apply and be in effect until Owner approves in writing a new operating plan, at which time such new operating plan shall apply and be in effect for the applicable Calendar Year. As used herein, the term "Operating Budget" shall mean (a) for 2006 the Initial Operating Budget (as the same may be revised from time to time in accordance with this Section 7.1 below), and (b) for each subsequent Calendar Year, the approved operating budget for that year (as the same may be revised in accordance with this Section 7.1 below) or, until one is so approved, the Provisional Operating Budget. As used herein, the term "Capital Budget" shall mean (a) for Calendar Year 2006, the Initial Capital Budget (as the same may be revised in accordance with this Section 7.1 below) or (b) for each subsequent Calendar Year, the capital budget approved by Owner for that year (as the same may be revised in accordance with this Section 7.1 below) and, until one is so approved, Operator shall incur no Capital Expense with respect to the Center. As used herein, the term "Operating Plan" shall mean (a) for Calendar Year 2006, the Initial Operating Plan (as the same may be revised in accordance with this Section 7.1 below), and (b) for each subsequent Calendar Year, the Operating Plan approved by Owner for that year (as the same may be revised in accordance with this Section 7.1 below), or until one is so approved, the Provisional Operating Plan. Unless otherwise agreed by Owner in writing, Operator shall operate the Center in accordance with the Operating Plan and consistent with the Operating Budget and the Capital Budget. Notwithstanding the foregoing, Operator shall be permitted to deviate from the Operating Budget and the Capital Budget and make expenditures not contemplated therein (i) for emergency repairs to the Center and other actions which in Operator's reasonable opinion are not reasonably foreseeable at the time the applicable budget became effective and are required to avoid imminent and material damage to property or injury or death to person (provided Operator shall notify Owner within two (2) hours of such emergency and follow Owner's directions with respect to such additional expense and emergency repairs) ("Emergency Expense"); and/or (ii) which, in addition to all other expenditures in any Capital Budget or Operating Budget line item, do not exceed the amount of such line item by the greater of \$1,000 or 5%, and which, in addition to the total of all other Capital Budget or Operating Budget expenditures, as the case may be, do not exceed the applicable budget by 5% ("Permitted Variances").

In addition, in the event the Operating Budget or Capital Budget needs to be amended during any Calendar Year for unanticipated expenses or shortfalls in revenue (but in no event

# UNOFFICIAL COPY

due to Operator's failure to perform its duties hereunder), Operator shall notify Owner promptly after learning thereof and deliver to Owner for review and approval a revised operating budget and/or capital budget proposal. Only upon Owner's approval in writing of such revised operating budget and/or capital budget proposal (which may be withheld in its sole discretion) shall it be in effect and be deemed the "Operating Budget" or "Capital Budget."

## ARTICLE VIII

### BOOKS, RECORDS AND STATEMENTS

8.1 Operator to Keep Books. Operator shall prepare adequate records reflecting the results of operation of the Center on an accrual basis, all in accordance with GAAP with such exceptions as may be required by the provisions of this Agreement. Books of account and other records (including without limitation the Property Documents), or appropriate copies thereof relating to or reflecting the operation of the Center shall be kept at the Center and shall be available to Owner and its representatives at all reasonable times for examination, audit and inspection. Upon termination or expiration of this Agreement, but subject to Section 11.1 below, all of such books and records shall be turned over to Owner upon Owner's request, but Operator shall have access to such books and records at all reasonable times for inspection, audit, examination and copying to the extent such books and records relate to the periods in which Operator assisted Owner in the development, operation and management of the Center or relate to the calculation of amounts to be paid to Operator hereunder.

8.2 Center Reports. Operator shall provide to Owner the management and financial reports (the "Center Reports") listed in Exhibit E at such times as described on Exhibit E and certified as true and complete by an executive officer of Operator. Periodically, Operator shall furnish or cause to be furnished to Owner (or its designee) such other reports and statements as may be reasonably requested by Owner (or its designee) from time to time.

8.3 Audits. Operator shall cooperate with all audits of books and records by Owner (or its designee) and by any independent accountants that Owner may engage as follows:

- (a) Owner (or its designee) shall have the right and privilege of examining or auditing, or both, such books, records, and reports (including without limitation the reports described on Exhibit E and the Property Documents) at any and all reasonable times upon reasonable notice to Operator provided, however, each such party shall also have the right, from time to time, to conduct a spot examination or audit of such books, records, and reports without the necessity of furnishing Operator with prior advance notice and Operator shall cooperate with such party in connection therewith. Operator shall fully cooperate in any audit. If in the reasonable judgment of Owner, as the case may be, an audit discloses material weaknesses in internal controls, errors in record keeping, or other shortcomings in Operator's maintenance of the books, records, and reports of the Center, Operator shall immediately correct the same and shall promptly inform Owner in writing of the action taken to do so. Any error in the reporting of income and/or expenses of the Center or Fees payable



# UNOFFICIAL COPY

by Owner revealed by such audit shall be corrected promptly (and in no event later than thirty (30) days after written notice from either party to the other party) by payment of money, modification of records, or as otherwise appropriate. Each audit shall be an expense of the party requesting or performing such audit unless such audit reveals errors in the reporting of total Revenue, Operating Expenses, or Capital Expenses of the Center of more than the greater of 5% or \$5,000, in which case Operator shall bear all of Owner's reasonable out-of-pocket costs of such audit.

- (b) Operator shall reasonably cooperate with Owner (or its designee) and any independent accountant that may be engaged by Owner in connection with any audit and the examination, audit and preparation of the independently certified financial statements and income tax statements of Owner and/or the Center. Within thirty (30) days after the end of each Calendar Year, Operator shall provide Owner and any the independent accountant that may be engaged by Owner with all requested information relating to the Center to enable the independent accountant to conduct an audit of the Center or Owner and to prepare financial statements. Such books and records may also be examined at all reasonable times by any other supervisory or regulatory authority having jurisdiction over the Owner or the Center. The terms of this Section 8.3 shall survive the termination of this Agreement.

8.4 Contracts and Other Documents. Operator shall maintain at the Center an original (or a copy, if no original is available) of all contracts, membership agreements, equipment leases, maintenance agreements, construction documents, and material correspondence in Operator's possession relating to the management, maintenance, operation, or use of the Center ("Property Documents"). Subject to Section 11.1 below, duplicate originals (or a copy, if no duplicate original of a document is available) of all such documents shall be forwarded to Owner by Operator forthwith after execution thereof.

8.5 Final Accounting. Within thirty (30) days following termination of this Agreement, Operator shall be responsible for preparing a final accounting. Such final accounting shall set forth all current income, all current expenses, an estimate of all other expenses contracted for or incurred in connection with the Center but not yet paid, and the current balances (after all outstanding checks) of the Operating Account. The final accounting shall also include all other items relating to the books, records, and reports of the Center reasonably requested by Owner which are within Operator's knowledge or control. Such final accounting shall be modified within 90 days after termination of this Agreement to reflect any and all collections on accounts during the 60 day period following termination.

## ARTICLE IX

### ALTERATIONS, ADDITIONS AND IMPROVEMENTS; PROPERTY MAINTENANCE

# UNOFFICIAL COPY

9.1 Alterations, Additions and Improvements. No alterations, additions or improvements to the Center shall be made by or on behalf of Operator without Owner's prior written consent.

9.2 Maintenance. Subject to the Operating Budget and the Capital Budget, Operator shall maintain the Center and make repairs to the Center as may be necessary to keep the Center in good operating condition and in conformity with the Operating Plan and all applicable laws, orders, ordinances, rules and regulations.

## ARTICLE X

### ADVERTISING

10.1 Center Advertising/Publication. Operator shall arrange and contract for all advertising which Operator may reasonably deem appropriate for the operation of the Center, subject to the Operating Budget and the Operating Plan. Notwithstanding the foregoing, all advertising, publicity, promotion and marketing of the Center in any form (including without limitation, for such purposes, the use of the name of the Owner or its Affiliates (except as provided in the following sentence), use of the name or image of the Property or Center, or communications with tenants or subtenants of the Property) shall be subject to Owner's prior approval thereof, which may be withheld in Owner's sole and absolute discretion. Operator and its Affiliates, however, may disclose Owner's name, the name of the Center, the name of the Property and the fact that Operator provides management services for Owner, provided such disclosure is made in a non-public forum and is solely for the purpose of attracting fitness center owners or operators as potential clients of Operator or its Affiliates or companies or individuals as potential members (other than tenants or subtenants at the Property).

10.2 Exclusivity. The Center shall be the exclusive fitness center at the building where the Center is located, except for any fitness center exclusively operated by a tenant of the building solely for the use of such tenant and its employees, or except as otherwise agreed by the parties.

## ARTICLE XI

### USE OF NAMES; CONFIDENTIALITY

11.1 Intellectual Property.

- (a) Notwithstanding anything to the contrary contained herein, Operator's Intellectual Property (defined herein) shall be and shall remain the sole property of, and shall inure solely to the benefit of, Operator or its Affiliates, as the case may be, during and after the Term, and shall not be used by Owner or Owner's Affiliates, or any of their employees, officers, directors, trustees, agents, or representatives without Operator's prior consent, except: (i) to the extent required by law, regulation, court order or similar governmental mandate, (ii) in connection with the operation, publicity, or marketing of the Center during the Term, and (iii) for

# UNOFFICIAL COPY

communications among Owner and its Affiliates, any of such parties accountants and lawyers, and all of their employees, officers, directors, trustees, agents, or representatives. As used herein, the term "Operator's Intellectual Property" shall mean the names "LifeStart", "Athletic Clubs of America", and "HPHRA"; any proprietary service marks, trademarks, trade names, copyrights, patents, logos, emblems, insignias, slogans, or distinguishing characteristics of Operator or its Affiliates; and any operating manuals, computer software, or operating systems or materials (to the extent not generally available to the public) which are owned, controlled, or developed by Operator or its Affiliates and which are specifically identified as Operator's Intellectual Property by Operator or its Affiliates. The term "Operator's Intellectual Property" shall specifically exclude the proprietary service marks, trademarks, trade names, copyrights, patents, logos, emblems, insignias, slogans or distinguishing characteristics of Owner or Owner's Affiliates and other items which are specifically identified as Owner's Intellectual Property by Owner or Owner's Affiliates (the "Owner's Intellectual Property"). Notwithstanding anything else, contained herein, in no event shall Owner be restricted from disclosing the name of the Center, even if such name includes reference to "LifeStart", "Athletic Clubs of America", HPHRA, or other of Operator's Intellectual Property, provided that after the Term, the name of the Center shall be changed, if necessary, to exclude reference to "LifeStart", "Athletic Clubs of America", HPHRA, or other of Operator's Intellectual Property.

## 11.2 Nondisclosure of Terms and Information.

- (a) Owner agrees that none of Owner, Owner's Affiliates, or any of their officers or directors shall disclose the terms or conditions of this Agreement or disclose the Operator's Confidential Information (defined herein) without Operator's prior written consent. Notwithstanding the foregoing, none of the foregoing parties shall be restricted pursuant to this Section 11.2(a) from disclosing any information (i) to the extent required by law, regulation, court order or similar governmental mandate, (ii) to Owner, Owner's Affiliates or any of their employees, officers, directors, trustees, agents, or representatives to extent reasonably necessary, or (iii) which is or becomes generally available to the public other than in connection with a breach of the confidentiality requirements herein. As used herein, the term "Operator's Confidential Information" shall mean Operator's employee handbooks, employee training manuals, employee files, published price policies for the Center, details of contracts which do not exclusively benefit the Owner/Operator Centers, formats of business plans for the Center to the extent same are expressly identified in writing by Operator as Operator's Confidential Information
- (b) Operator agrees that neither Operator nor its Affiliates, or any of their officers, directors, shall disclose the terms or conditions of this Agreement

# UNOFFICIAL COPY

or disclose the Owner's Confidential Information (defined herein) without Owner's prior written consent. Notwithstanding the foregoing, none of the foregoing parties shall be restricted pursuant to this Section 11.2(b) from disclosing any information (i) to the extent required by law, regulation, court order or similar governmental mandate, (ii) to Operator, Operator's Affiliates, or any of their employees, officers, directors, agents, or representatives, to the extent reasonably necessary or (iii) which is or becomes generally available to the public other than in connection with a breach of the confidentiality requirements herein. As used herein, the term "Owner's Confidential Information" shall mean, the names or identity of any of Owner's tenants or subtenants, or Center members (unless and to the extent Operator obtains the applicable party's prior consent to disclose such information); any financial information of the Center, including without limitation the terms of any budget, operating plan, financial statement, economic terms of any membership agreement, final accounting; and/or other information which is expressly identified in writing by Owner as Owner's Confidential Information.

11.3 Injunctive Relief. Owner and Operator agree that damages may be an inadequate remedy for breach of this Article and that each of Owner and Operator shall have the right to specific performance of this Article and to injunctive relief to prevent any breach or continued breach by the other party. In any action seeking to enforce this Article, the losing party shall bear all of the prevailing party's reasonable costs and attorneys' fees in connection therewith. The provisions of this Article XI shall survive any termination of this Agreement.

## ARTICLE XII

### INSURANCE

#### 12.1 Insurance.

- (a) Operator shall purchase and maintain insurance during the entire Term of this agreement, at Operator's sole cost and expense (excluding costs for commercial general liability, workers compensation and employers liability insurance) for the benefit of Operator and Owner and any other parties specified by Owner, as their interests may appear, with terms, coverages, limits and in companies satisfactory to Owner, which companies shall be licensed to do business in the state where the Center is located with an AM Best Rating of A- X and with coverages as Owner may from time to time reasonably request, but initially Operator shall maintain the following coverages in the following amounts:
  - (i) Commercial General Liability Insurance on a primary and non-contributory basis and not excess or secondary to any other insurance as may be available to additional insureds, with broad form commercial liability policy, including contractual liability insurance, host liquor liability, bodily injury liability and including

# UNOFFICIAL COPY

sexual harassment coverage, insuring Operator and naming Owner (and its constituent members generally) and Owner's partners, affiliates, lenders, directors, officers, agents, employees, successors and assigns and any other parties designated by Owner from time to time ("Owner's Indemnities") as additional insureds, covering, without limitation, any liability for bodily injury, including death, personal injury and property damage arising out of Operator's operations, acts (including, without limitation criminal acts), omissions, assumed liabilities for use and management of the Center, for limits of liability not less than:

Bodily Injury Liability	\$1,000,000 per occurrence \$2,000,000 annual aggregate
Personal Injury Liability	\$1,000,000 per occurrence \$2,000,000 annual aggregate
Property Damage Liability	\$1,000,000 per occurrence \$2,000,000 annual aggregate
Fire Damage Liability	\$50,000 each occurrence
Medical Expense Liability	\$5,000 any one person

The cost of this insurance shall be included as an Operating Expense of the Center.

- (ii) Statutory Worker's Compensation Insurance covering all employees, agents and contractors of Operator with respect to the Center. Coverage shall include a waiver of subrogation in favor of Owner and Owner's Indemnities. The cost of this insurance shall be included as an Operating Expense of the Center.
- (iii) Employers liability insurance covering all employees, agents and contractors of Operator with respect to the Center, in amounts not less than \$1,000,000 for each accident and \$1,000,000 for diseases of each employee, agent and contractor. Coverage shall include a waiver of subrogation in favor of Owner and Owner's Indemnities. The cost of this insurance shall be included as an Operating Expense of the Center.
- (iv) Commercial Automobile Insurance covering all owned, non-owned and hired automobiles with limits of liability of not less than \$1,000,000 for bodily injury to any one person, and \$1,000,000 for property damage for each accident and naming Owner and Owner's Indemnities as additional insureds on a primary and non-contributory basis.

# UNOFFICIAL COPY

- (v) Umbrella or Excess Liability coverage in amounts not less than \$5,000,000 per occurrence and in the annual aggregate, excess of insurance specified in sections (i), (ii), (iii) and (iv) above.
- (vi) Professional Liability Errors and Omissions Insurance for errors, acts, and omissions of exercise physiologists and managers of fitness programs, in an amount not less than \$2,000,000 per claim and in the annual aggregate.
- (vii) Employment Practices Liability insurance in an amount not less than \$1,000,000 per occurrence and in the annual aggregate.
- (viii) Crime coverage including employee dishonesty, forgery, theft of money and securities, with minimum limit of \$1,000,000 per occurrence and in the annual aggregate.
- (ix) Operator shall maintain all risk physical damage insurance covering their equipment, supplies, tool, other personal property or any other insurance as Owner may from time to time require, from insurance companies licensed to do business in the State in which the Center is located.

Operator shall concurrently with Operator's execution of this Agreement and from time to time thereafter, furnish to Owner certificates of insurance evidencing such coverages and with renewal certificates no less than thirty (30) days prior to the expiration of such policies, which certificates of insurance shall state that such insurance coverage may not be adversely amended, changed or canceled without at least thirty (30) days' prior written notice to Owner and Operator. Owner shall have the right to reasonably increase the amount and to expand the scope of insurance to be maintained by Operator under this Agreement from time to time during the Term of this Agreement if in Owner's reasonable judgment of the coverages to be carried by Operator are outdated or insufficient.

- (b) Avoid Action Increasing Rates. Operator shall comply with all applicable Laws (including, without limitation, all applicable fire codes and rules and regulations of Owner's fire insurance underwriters) and all orders and decrees of court and all requirements of other governmental authorities, and shall not, directly or indirectly, make any use of the Center which may thereby be prohibited or be dangerous to person or property or which may jeopardize any insurance coverage or may increase the cost of insurance or require additional insurance coverage. If by reason of the failure of Operator to comply with the provisions of this section, any insurance coverage is jeopardized or insurance premiums are increased, Owner shall have the option either to terminate this Agreement or to require Operator to make payment of the increased insurance premium immediately upon Owner's demand.

# UNOFFICIAL COPY

- (c) Failure to Insure. If Operator fails to maintain any insurance which Operator is required to maintain pursuant to this section, Operator shall be liable to Owner for any loss or costs resulting from such failure to maintain such insurance, and (ii) Owner shall have the right (but not the obligation) to obtain such insurance, and (iii) all costs of such insurance shall be payable to Owner by Operator immediately upon Owner's demand. Operator may not self-insure against any risks required herein to be covered by insurance.
- (d) Representation. Owner makes no representation that the limits of liability specified to be carried by Operator under this section are adequate to protect Operator. In the event Operator believes that any such insurance coverage called for under this Agreement is insufficient, Operator shall provide, at its own expense, such additional insurance as Operator deems adequate.
- (e) Additional Requirements. Operator shall require each of its contractors and trades people, and their relevant subcontractors, to carry insurance in amounts and standards specified in Section 12.1(a) (i), (ii), (iii), (iv) and (v), and contractors, subcontractors, and trades people shall carry all risk physical damage insurance covering their equipment, supplies, tools, other personal property or any other insurance as Owner may from time to time require, from insurance companies licensed to do business in the State in which the Center is located. Should Operator contract with third party instructors, then Operator shall require each of its third party instructors to carry insurance in amounts and standards specified in Section 12.1(a) (i), (ii) and (iii).
- (f) Notices. Operator shall immediately furnish Owner with a copy of any written notice received, or a written summary of an oral notice received, from any governmental or quasi-governmental authority, insurance company, inspection bureau or any other third party as it relates to the Center, the Building or Owner. Operator shall promptly notify Owner of any occurrence or situation which may give rise to a claim under the general liability or property liability policies referenced above.
- (g) Property Insurance. Owner shall provide all risk property insurance on the Center and the equipment therein. Such insurance shall not extend to the personal property of Operator or its employees. Operator shall notify Owner immediately of any damage to the Center or any of the equipment located therein, regardless of whether or not such damage may or not be insured. Operator shall cooperate with Owner's insurer in the investigation of any claim of property damage. Operator shall comply with all safety requirements of Owner's insurer(s).

# UNOFFICIAL COPY

12.2 Insurance Programs. Operator may include insurance coverage set forth in Section 12.1 hereof under such program as Operator may maintain for one or more athletic and health facilities operated or managed by it or any of Operator's Affiliates.

12.3 Compliance with Rules. The parties agree to comply with all material rules, orders, regulations and requirements duly imposed by insurers in connection with the occupancy or operation of the Center and in the reasonable control of such party. If either party shall fail to so comply, the other party may, but shall be under no obligation to, comply with, fulfill and perform the same at the expense of the other party after providing the other party written notice and reasonable opportunity to comply.

## ARTICLE XIII

### DESTRUCTION OR EMINENT DOMAIN OF CENTER

13.1 Rebuilding. In the event that the Center or any portion thereof is damaged or destroyed or taken at any time during the Term, Owner shall have the right, but not the obligation, to at its own cost and expense (subject to Section 16.1 and Section 16.3 below) cause the Center to be repaired, rebuilt, or replaced, unless Owner has notified Operator that the Center will not be rebuilt.

13.2 Failure to Rebuild. In the event that the Center is destroyed or damaged or taken pursuant to exercise of any power of eminent domain to an extent which materially interferes with its operation for purposes as a health and wellness facility and Owner fails, within 90 days following the event, to either give the notice set forth in Section 13.1 hereof or to commence with diligence to repair, rebuild or replace the Center, Operator shall have the right, without limiting any other rights which it may have hereunder, to terminate this Agreement by providing Owner with five days' prior written notice.

13.3 Termination. In the event of any such termination as described in this Article 13, this Agreement shall be terminated and Owner shall pay Operator all outstanding amounts owed to Operator hereunder and accruing prior to termination in accordance with the terms set forth herein, but no other penalty or fee.

## ARTICLE XIV

[INTENTIONALLY OMITTED]

## ARTICLE XV

### TERMINATION

15.1 Right to Terminate.

- (a) Either party may terminate this Agreement prior to the expiration of the Term and without fee or penalty as set forth in Article XIII above, or as follows:



# UNOFFICIAL COPY

- (i) If the other party breaches any material term of this Agreement and fails to cure such breach within ten (10) days after written notice in the event of a breach involving fraud, willful misconduct, gross negligence, or which threatens the health or safety of the users of the Center or the physical condition of the Center, or thirty (30) days after notice of such breach in reasonable detail from the non-breaching party.
  - (ii) If an order, judgment or decree is entered by any court of competent jurisdiction adjudicating either party a bankrupt or insolvent or approving a petition seeking reorganization or appointing a receiver, trustee or liquidator of all or a substantial part of such party's assets, and such order, judgment or decree continues unstayed and in effect for a period of thirty (30) days.
  - (ii) If a receiver for all or any substantial portion of the property of either party is involuntarily appointed and such appointment is not terminated within thirty (30) days.
- (b) Either party may terminate this Agreement prior to the expiration of the Term as follows:
- (i) Upon thirty (30) days written notice to the other party, if Owner (or its successors and assigns) transfers all or substantially all of its interest in the Property either directly or indirectly.
  - (ii) As set forth in Section 13.2 above.
- (c) Owner may terminate this Agreement prior to the expiration of the Term as follows:
- (i) notwithstanding any of the foregoing notice periods set forth in Section 15.1(b) above, if Owner determines in its reasonable discretion that Operator's performance under this Agreement materially suffers at any time after receipt of Owner's notice of termination, Owner shall be entitled to accelerate such termination and make such termination effective 10 days after an additional written notice to Operator, unless Operator cures such insufficient performance to Owner's reasonable satisfaction within said ten (10) day period.
  - (ii) at any time during the Term at Owner's sole discretion, which termination shall be effective thirty (30) days after written notice to Operator. In no event shall Owner be liable to Operator for any fee or penalty in connection with the exercise by Owner of its rights pursuant to this Section 15.1(c)(ii).

**15.2 Outstanding Obligations and Rights.** Upon termination, Operator shall diligently endeavor and use all reasonable efforts as directed by Owner at Owner's expense to effect an

# UNOFFICIAL COPY

orderly transition of the management and operation of the Center to Owner or a designee of Owner and to reasonably cooperate with Owner or any such designee, which shall include without limitation: (a) Operator will promptly deliver all books and records (including without limitation the Property Documents) to Owner subject to the terms of Section 11.1 above, (b) Operator shall have no further right to act on behalf of Owner, (c) Operator shall perform the final accounting (and modification thereto) as set forth in Section 8.5 and the Annual Statement for the final Calendar Year (and modification thereto) as set forth in Exhibit E, and (d) Operator shall perform all reporting and accounting functions hereunder for the period from the date of the last report or accounting to the date of termination. In any event, upon termination, Operator shall assign its rights in all membership agreements at the Center to Owner or Owner's designee as of the effective date of termination. The rights and obligations in this Section 15.2 shall survive termination of the Agreement. Any rights or obligations of either party accruing under this Agreement prior to termination or expressly surviving termination shall survive termination of this Agreement.

## ARTICLE XVI

### INDEMNIFICATION

16.1 Operator's Responsibilities. Except to the extent Owner is reimbursed under any insurance policy covered by such risks, Operator shall be liable to Owner Related Parties for, and shall indemnify, defend and hold harmless Owner Related Parties from, any and all claims, demands, causes of action, debts, liabilities, judgments, damages, and expenses, including reasonable attorneys' fees and expenses in connection with the enforcement of this indemnity (collectively, "Losses") which are incurred by any Owner Related Party arising out of and/or resulting from (i) any default by Operator under this Agreement, and/or (ii) any misappropriation of funds, fraudulent act or omission, willful misconduct, or negligent act or omission of any Operator Related Party, (iii) injuries to persons or property occurring at the Center, and/or (iv) any claim by any employee of Operator or of Operator's Affiliate related to such employee's employment thereby, including without limitation any Employer-Employee Related Matter. "Owner Related Parties" shall mean Owner and Owner's direct or indirect members, partners, shareholders, principals, or agents, and any officer, trustee, director, employee, or agent of any of the foregoing.

16.2 Owner's Responsibilities. Except to the extent Operator is reimbursed under any insurance policy covering such risk, Owner shall be liable to the Operator Related Parties for, and shall indemnify, defend and hold harmless the Operator Related Parties from, any and all Losses which are incurred by or made against any Operator Related Party arising out of and/or resulting from (i) any default by Owner under this Agreement, or (ii) the operation of the Center prior to or subsequent to the Term, provided however, that such indemnification shall not apply to any Loss resulting from the negligence, gross negligence, or willful misconduct of the Operator Related Parties, or from acts or omissions of the Operator Related Parties which are in violation of this Agreement. "Operator Related Parties" shall mean Operator and Operator's Affiliates, and any officer, director, shareholder, principal, employee or agent of Operator or its Affiliates. Notwithstanding any other provisions of this Agreement to the contrary, the indemnity obligations under this Article XVI shall survive the expiration and/or termination of this Agreement and shall bind each such indemnitor.

# UNOFFICIAL COPY

16.3 No Waiver. The parties hereby agree that neither the express indemnities or any other provision contained in this agreement shall be interpreted as a waiver or limitation of the right of either party to seek recovery against the other for Losses attributable to the negligence of

16.4 Indemnification Procedure. A party seeking defense or indemnity against suit, legal action, claim, or other matter under Article XVI (the "Indemnified Party") shall notify the other party (the "Indemnifying Party") within the sooner of: (i) ten (10) business days of being served with any suit or legal action, or (ii) reasonably promptly after the discovery of any claim or other matter upon which the party seeking to be defended intends to base a claim for defense or indemnity under this Article (such notice, an "Indemnity Notice"). Failure to so notify the Indemnifying Party within the foregoing time frames shall bar the Indemnified Party from obtaining such indemnification only to the extent such delay by the Indemnified Party in so notifying the Indemnifying Party prejudices the Indemnifying Party. The Indemnifying Party shall notify the Indemnified Party of its acceptance or rejection of defense and indemnity obligations hereunder (including specific explanation of any rejection) on or before the sooner of (i) five (5) business days prior to the date on which any response to the subject suit or legal action, if any, is required, or (ii) ten (10) business days following the effective date of the Indemnity Notice. The Indemnified Party may take steps and incur expenses reasonably necessary to protect its interests, and such expenses (including without limitation reasonable attorneys fees and defense costs) incurred prior to or in the absence of the Indemnifying Party's acceptance of defense and indemnity obligations in accordance with the foregoing ("Indemnity Acceptance") shall be reimbursed by the Indemnifying Party following Indemnity Acceptance or a determination that such obligations applied at the time such steps and expenses occurred. The Indemnifying Party will have the right to engage counsel at its expense and, in the event of and following Indemnity Acceptance, the sole right (at the Indemnifying Party's expense) to control the defense of, and/or to settle or otherwise dispose of, the matter on such terms as the Indemnifying Party in its judgment deems appropriate. In any event, the Indemnified Party shall have the right to participate in the defense of such action, claim or proceeding under this Section 16.4 and the cost of same shall be paid by the Indemnifying Party. Each party shall reasonably cooperate with and assist the other party in the defense of any claim for which indemnification is or will be sought under this Section 16.4.

## ARTICLE XVII

### EMPLOYEES

17.1 Termination of Employees; Cooperation. By the commencement of the Initial Term, Owner shall have terminated all of the employees of the Center.

17.2 Center Employees. Subject to Section 3.2(ii) above, Operator shall have the exclusive right to hire and terminate the employees for the Center during the Term on such terms and conditions as Operator determines in its sole discretion and, notwithstanding Section 3.2(ii) above, any such employees hired by Operator or its Affiliate shall be Operator's or its Affiliate's (as the case may be) employees during the Term.

# UNOFFICIAL COPY

## ARTICLE XVIII

### MISCELLANEOUS

18.1 Notices. All notices, requests, instructions or other communications required or permitted to be given hereunder shall be in writing and hand delivered, sent by facsimile (with hard copy promptly to follow) or sent by nationally-recognized overnight or next day delivery service or mailed by certified or registered mail, return receipt requested, postage prepaid, addressed as set forth below; receipt shall be deemed to occur on the earlier of the date of actual receipt or receipt by the sender of confirmation that the delivery or transmission was completed or that the addressee has refused to accept such delivery or has changed its address without giving notice of such change as set forth herein.

(a) if to Operator, to:

LifeStar, Inc.  
c/o LifeStar Wellness Network  
117 N Jefferson  
Suite 203  
Chicago, IL 60661  
Attention: Mike Flanagan  
Fax No.: (312) 627-1311

(b) if to Owner as follows:

c/o Prime Group Realty Trust  
1701 West Golf Road  
3-106  
Rolling Meadows, Illinois 60008  
Attention: Property Manager  
Fax No.: (847) 640-7915

(c) with a copy to:

Prime Group Realty Trust  
77 West Wacker  
Chicago, Illinois 60601  
Attn: James Hoffman, Esq.  
Fax No.: (312) 917-1310

or such other address or persons as the parties may from time to time designate in writing in the manner provided in this Section.

18.2 Further Assurances. Owner and Operator shall execute and deliver all other supplemental agreements and other instruments and take any other action reasonably requested by the other party to effectuate the purposes hereof.

# UNOFFICIAL COPY

18.3 Headings. The article, section, subsection and paragraph headings and titles of this Agreement are for convenience only and are not intended to affect the meaning of any of the provisions hereof.

18.4 Waiver. The waiver of any of the terms and conditions of this Agreement on any occasion or occasions shall not be deemed a waiver of such terms and conditions on any other occasion.

18.5 Affiliates. The term "Affiliate" means any person or entity directly or indirectly controlling, controlled by or under common control with the person or entity in question.

18.6 Inspection. Owner shall have the right to inspect the Center during reasonable business hours, provided that such inspection shall not interfere with the efficient operation of the Center.

18.7 Partial Invalidity. In the event that any one or more of the phrases, sentences, clauses or paragraphs contained in this Agreement shall be declared invalid by the final order, decree or judgment of any court of competent jurisdiction, this Agreement shall be construed as if such phrases, sentences, clauses or paragraphs had not been inserted; provided that if such invalidity shall utterly destroy the basis of this Agreement between the parties and the intent thereof, then each of Operator and Owner shall have the right to terminate this Agreement exercisable by providing the other party with five days' prior written notice.

18.8 Time Commitment. Operator, its principals and its staff shall devote such time to the Center as necessary, in Operator's reasonable discretion, to enable Operator to perform its duties hereunder in accordance with the Operating Standard; neither the principals of Operator nor Operator's staff shall be required to devote their entire time to the business of the Center.

18.9 Consent. The consent or approval of Operator hereunder shall only be given by Mike Flanagan or any other individual designated by him; any consent or approval by any other individual on behalf of Operator shall be null and void. The consent or approval of Owner shall only be given by Randel S. Waites or Cathi Carlson or any other individuals designated in writing by Owner; any consent or approval by any other individual on behalf of Owner shall be null and void.

18.10 Entire Agreement. This Agreement together with all Exhibits constitutes the entire agreement between the parties relating to the subject matter hereof and supersedes all prior agreements and understandings, oral or written. This Agreement may not be amended, modified or terminated nor may any of the terms hereof be waived, except by an instrument in writing signed by the parties hereto.

18.11 Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Illinois, without giving effect to choice of law principles. Chicago, Illinois shall be the exclusive venue for any action filed by Owner or Operator pursuant to this Agreement.

18.12 Construction. This Agreement shall be construed fairly as to all parties and not in favor of or against any party, regardless of which party had this Agreement prepared.

# UNOFFICIAL COPY

18.13 Attorneys' Fees. In the event of any controversy, claim or dispute between the parties arising from or related to this Agreement or the breach hereof, the prevailing party shall be entitled to recover from the losing party its reasonable attorneys' fees and expenses.

18.14 Expenses. Each party shall bear all expenses incurred by it in connection with the preparation, negotiation and execution of this Agreement.

18.15 Assignment; Successors and Assigns. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective successors and permitted assigns. Neither party shall directly or indirectly assign, delegate, pledge, or encumber this Agreement or any of the rights or obligations created hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed; provided, however, (a) that Owner shall have the unrestricted right to assign this Agreement to any of Owner's Affiliates, and (b) that Operator shall have the unrestricted right to assign this Agreement to any of Operator's Affiliates. Any such permitted assignee shall assume all obligations accruing under this Agreement from and after the assignment (or at the assignor's and assignee's option, from and after the date of this Agreement), and to the extent such assignee assumes the assignor's obligations hereunder, such assignor shall be released from liability or obligation under this Agreement. The term "Owner" and "Operator" shall refer to Owner, Operator, and/or their permitted successors and assigns, as applicable.

18.16 No Third Party Beneficiaries. Except as expressly contemplated herein, this Agreement shall be binding upon and inure solely to the benefit of each party hereto and nothing in this Agreement is intended to, or shall, confer upon any other person or entity any rights or remedies of any nature whatsoever under or by reason of this Agreement.

18.17 Contract for Services. This Agreement constitutes an agreement for services to be provided by Operator and shall not be deemed to be a licensed lease or agreement for use as occupancy of the Center.

18.18 Reciprocal Club Agreements. Operator shall enter into reciprocal club agreements on behalf of Owner, if and only to the extent approved by Owner.

18.19 Time is of the Essence. Owner and Operator agree that time is of the essence of this Agreement.

18.20 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed a duplicate original.

18.21 Estoppel Certificates. From time to time during the term of this Agreement, upon not less than ten (10) days prior written request by Owner or by any party providing financing to Owner or Operator, Operator agrees to execute and deliver to the requesting party a statement in writing certifying (i) that this Agreement is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect, as modified, identifying the modifications), (ii) the dates to which any amounts owing to Operator have been paid, (iii) whether any defaults under the terms of this Agreement is known by, or any notice of default has been served upon Operator, and (iv) with respect to such other matters as reasonably requested.

# UNOFFICIAL COPY

IN WITNESS WHEREOF the parties have executed this Agreement as of the day and year first above written.

### OPERATOR

LifeStart, Inc.

By: *Mic F...*

Its: PRESIDENT

Property of Cook County Clerk's Office

### OWNER

CONTINENTAL TOWERS ASSOCIATES-I, L.P.,  
an Illinois limited partnership, Co-Owner

By: CTA GENERAL PARTNER, LLC, a Delaware limited liability company, its general partner

By: CTA MEMBER, INC., a Delaware corporation, its Managing Member

By: *Russell S. Warkes*

Name: RUSSELL S. WARKES

Its: ATTORNEY IN FACT

CONTINENTAL TOWERS, L.L.C.,  
a Delaware limited liability company, Co-Owner

By: CTA GENERAL PARTNER, LLC, a Delaware limited liability company, its sole member

By: CTA MEMBER, INC., a Delaware corporation, its Managing Member

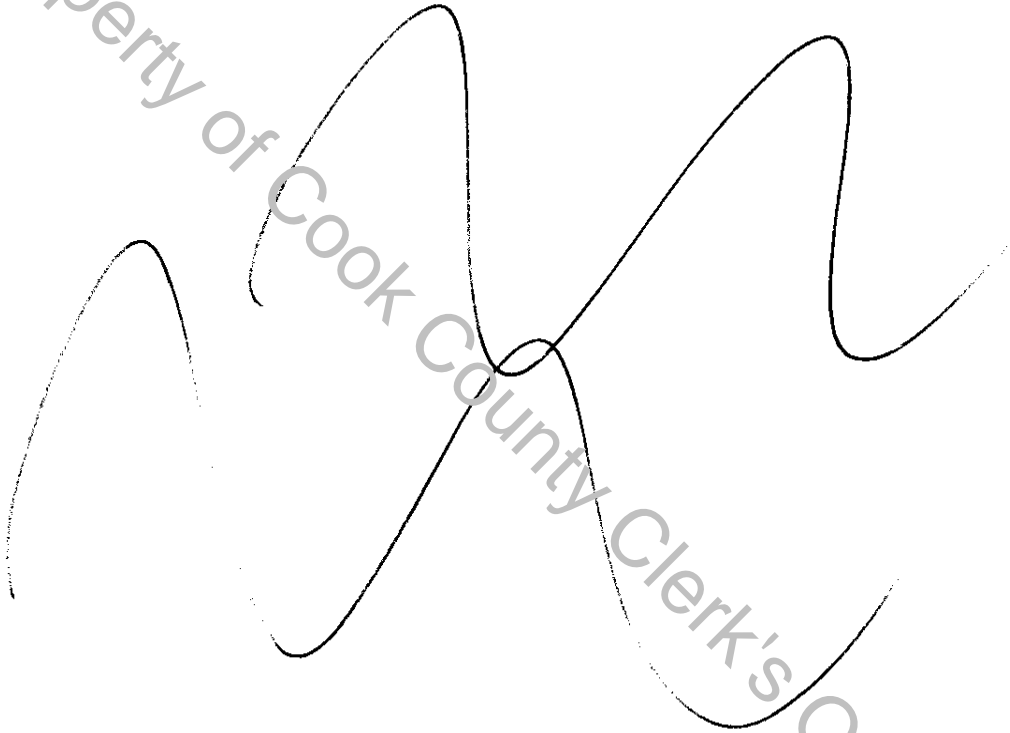
By: *Russell S. Warkes*  
Name: RUSSELL S. WARKES  
Its: ATTORNEY IN FACT

# UNOFFICIAL COPY

EXHIBIT A

DEPICTION OF CENTER

Property of Cook County Clerk's Office



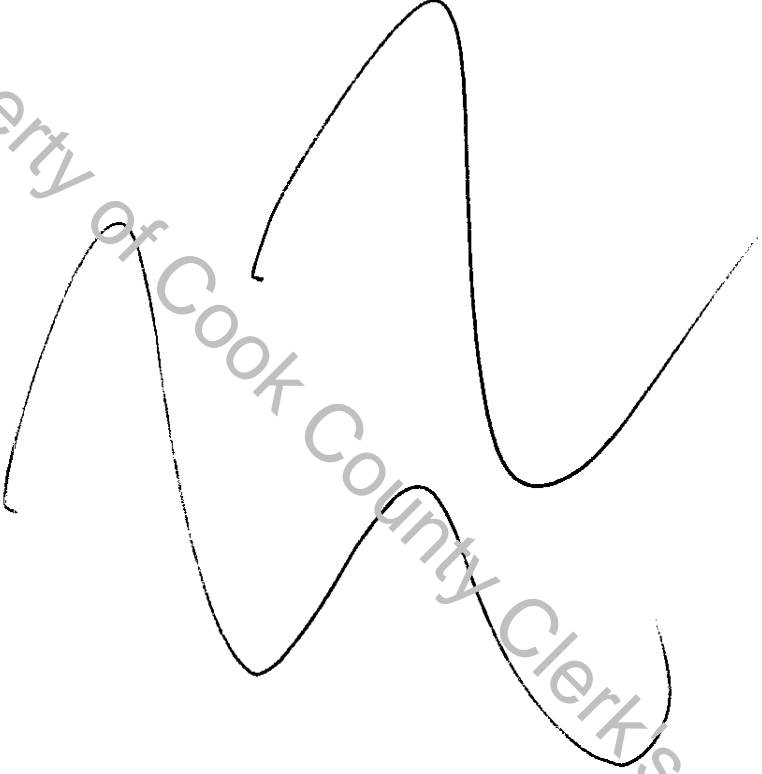


# UNOFFICIAL COPY

## EXHIBIT D

### INITIAL OPERATING BUDGET / INITIAL CAPITAL BUDGET

Property of Cook County Clerk's Office



# UNOFFICIAL COPY

## EXHIBIT E

### REPORTING PROCEDURE

1. Monthly Statements. Operator shall prepare and provide to Owner, not later than fifteen (15) days after the end of each calendar month, a statement with respect to such previous month in the form attached hereto as Schedule B-1 which sets forth the Center's profits and losses, Total Revenue, Operating Expenses, and Net Income with respect to such previous month prepared on an accrual basis. In addition, Operator shall provide a bank reconciliation report (along with copies of checks written and/or cancelled) and a copy of the bank statement for such account.

2. Quarterly Statements. On or before thirty (30) days after the end of each calendar quarter, Operator shall prepare and provide to Owner a statement for such previous quarter, in form reasonably approved by Owner, which includes: a delinquency report, a bank reconciliation report (along with copies of checks written and/or cancelled), a budget reforecast (subject to Section 7.1 of the Agreement regarding Owner's right to approve budget changes), updates to the Operating Plan, and an updated membership listing (including a listing of which members terminated their membership at the Center, and to the extent available, why they terminated) (collectively, "Operating Information").

3. Annual Statements. On or before thirty (30) days after the end of each Calendar Year, Operator shall prepare and provide to Owner a financial statement with respect to such period for the Center setting forth a balance sheet, a statement of income and expenses, a statement of cash flows, a statement of Total Revenue, Operating Expenses, Net Income, and Incentive Fees, and the Operating Information all in a format reasonably approved by Owner, and such other information respecting the Center as is reasonably considered necessary by Owner for its income tax return. For the final Calendar Year of the Term, such annual statement shall be modified within 90 days after termination of this Agreement to reflect any and all collections on accounts during the 60 day period following termination.

4. Other Statements. Operator shall also deliver to Owner such other statements and reports as are reasonably required by Owner from time to time.

# UNOFFICIAL COPY

## POWER OF ATTORNEY

### KNOWN ALL MEN BY THESE PRESENTS:

The undersigned, Yochanan Danziger, is the President of CTA Member, Inc. ("CTA Inc."). CTA Inc. is the Managing Member of CTA General Partner, LLC ("CTA Partner") and CTA Partner is the general partner of Continental Towers-I, L.P. ("CTA-I"). CTA-I is the beneficial owner of that certain property commonly known as Continental Towers and located at 1701 Golf Road in Rolling Meadows, Illinois (the "Property").

In connection with the foregoing, the undersigned, Yochanan Danziger, BY THESE PRESENTS DOES HEREBY make, constitute and appoint each of Randel Whites, in his capacity as a Senior Vice President of Prime Group Realty Trust, Paul G. Del Vecchio, in his capacity as a Senior Vice President of Prime Group Realty Trust and James F. Hoffman, in his capacity as an Executive Vice President of Prime Group Realty Trust, as true and lawful attorney-in-fact and agent, for him and in his name, place and stead, to prepare, execute, and deliver any and all documents that said attorney-in-fact determines to be necessary or appropriate to cause, effect or accomplish the following:


The execution on behalf of CTA Inc., in its capacity as the managing member of CTA Partner, in its capacity as the general partner of CTA-I, of any and all leases, amendments to leases, work-orders, contracts, agreements, service agreements, loan agreements, mortgages, promissory notes, guarantees, subordination non-disturbance and attornment agreements, assignment agreements, assumption agreements, purchase orders and any and all other documents, agreements, returns and reports whatsoever in connection with the ownership, operation, leasing, development and financing of the Property, with the power to bind CTA Inc., CTA Partner and CTA-I, subject to the restriction that no power is granted to intentionally purport to bind me personally, as

# UNOFFICIAL COPY

opposed to the foregoing entities.

giving and granting unto each said attorney-in-fact and agent, full power and authority to do and perform each and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as the undersigned might or could do in person, with full power of substitution and revocation, hereby ratifying and confirming all that said attorney-in-fact and agent may lawfully do or cause to be done by virtue hereof, including any and all actions taken by such attorney-in-fact and agent prior to the date hereof. A copy of this Power of Attorney delivered by facsimile transmission or email transmission shall be as effective as the original. This Power of Attorney may be revoked upon the actual receipt of each of the foregoing persons of a written revocation notice from the undersigned.

IN WITNESS WHEREOF, the undersigned has executed this Power of Attorney in Ocean County, New Jersey as of the 1~~st~~ day of August, 2005.  
Sep

  
Yochanan Danziger

# UNOFFICIAL COPY

STATE OF NS )  
 ) SS.  
COUNTY OF Ocean )

Sara Boxer, a Notary Public in and for, and residing in the said county, in the state aforesaid, DO HEREBY CERTIFY, that Yochanan Danziger, personally known to me to the same person whose name is subscribed to the foregoing instrument appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given in my hand and notary seal this 1 day of Sept, 2008.

Sara Boxer  
Notary Public

SARA BOXER  
NOTARY PUBLIC OF NEW JERSEY  
MY COMMISSION EXPIRES FEB. 14, 2008