

consent or approval under, any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award currently in effect having applicability to Developer or its Affiliates, (d) result in a breach of, or constitute a default or require any consent (unless such consent has been obtained) under, any indenture or agreement, lease or instrument to which Developer or any of its Affiliates is a party or its properties may be bound or affected, (e) cause Developer or any of its Affiliates to be in violation of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award, or in default under any such indenture, agreement, lease or instrument, or (f) result in or require the creation or imposition of a Lien, upon or with respect to any of the properties or interests now owned or hereafter acquired by Developer or any of its Affiliates.

Section 7.03 Legally Enforceable Agreement. This Agreement constitutes a legal, valid and binding obligation of Developer enforceable against Developer in accordance with its terms, except to the extent that such enforcement may be limited by applicable bankruptcy, insolvency and other similar laws affecting creditors' rights generally.

Section 7.04 Taxes. Developer has filed all tax (federal, state and local) returns required to be filed as of the date of this Agreement and has paid all taxes, assessments and governmental charges and levies shown thereon to be due as of the date of this Agreement, including interest and penalties, if any. Developer has no knowledge of any claims for taxes due and unpaid which might become a Lien upon any of its assets.

Section 7.05 Documents Submitted to ESDC. To Developer's knowledge, all information submitted to ESDC in connection with the Funding is complete and correct in all material respects and fairly presents the condition, operations and prospects of Developer as of the date hereof. To Developer's knowledge, Developer has not misstated, omitted or withheld any material fact in connection with its application for the Funding upon which ESDC may have relied in its decision to contribute the Funding to Developer. Each invoice, bill of sale, receipt, check or other document or instrument, heretofore or hereafter submitted to ESDC by Developer in connection with the Funding, upon submission was or shall be complete and genuine and accurately reflect the transaction to which it relates.

## ARTICLE VIII

### INDEMNIFICATION

Section 8.01 Obligation to Preserve ESDC against Liability. Except for its own gross negligence or intentionally wrongful acts, ESDC does not have (and shall not have at any time) any responsibility whatsoever for any of the following activities: (i) the construction of the Infrastructure, or (ii) the operations of the Developer or its Affiliates at the Project Site, thereabove and thereabout. At all times, Developer shall assume sole responsibility for each and every one of the foregoing activities so as to avoid injury to any Person and/or property damage. Developer and its Affiliates shall not perform any act, or do anything, or permit that any act be performed or thing done at the Project Site, or any portion thereof, or in connection with any of the activities listed above at any time that subjects or may subject ESDC to any liability for injury to any Person or damage to property for any reason whatsoever, including, without limitation, by reason of any violation of any Requirement.

Section 8.02 Obligation to Indemnify. To the extent permitted under applicable law, Developer shall defend, indemnify and save ESDC and its officials, members, directors, officers, employees, agents and servants (collectively, the “**Indemnitees**”) harmless from and against any and all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses, including, without limitation, reasonable attorneys’ fees and court costs and disbursements, that may be imposed upon, or incurred by, or asserted against, any of the Indemnitees by reason of any of the following, except to the extent that such liabilities, fines, damages, penalties, claims, costs, charges or expenses are caused by the gross negligence or intentional misconduct of such Indemnitee:

(a) Acts or Failure to Act of Developer. Any act or failure to act on the part of Developer or any of its respective partners, joint venturers, officers, shareholders, directors, agents, contractors, servants, employees, licensees or invitees, where such action is otherwise required, appropriate or customary for a party in Developer’s position;

(b) Construction Work. Any act done in, on, or about the Project Site or any part thereof by or on behalf of Developer or its Affiliates;

(c) Accidents, Injury to Person or Property. Any accident, injury (including death at any time resulting therefrom) or damage to any Person or property occurring in, on, or about the Project Site, or any part thereof, or in any sidewalk, comprising a part thereof or immediately adjacent thereto;

(d) Default of Developer. Any failure on the part of Developer to keep, observe and perform any of the terms, covenants, agreements, provisions, conditions or limitations contained in this Agreement; and

(e) Hazardous Substances. Any claim arising out of or in any way related to Hazardous Substances at or affecting the Project Site or the soil, water, vegetation, buildings, personal property, persons, animals or otherwise and any personal injury (including wrongful death) or property damage arising out of or related to any Hazardous Substances.

Section 8.03 Contractual Liability. The obligations of Developer under this Article VIII shall not be affected in any way by the absence of insurance coverage, or by the failure or refusal of any insurance carrier to perform an obligation on its part to be performed under insurance policies affecting the Project Site.

Section 8.04 Defense of Claim, Etc. If any claim, action or proceeding is made or brought against any of the Indemnitees in connection with any event referred to in Section 8.02 hereof, then upon demand of ESDC, Developer shall either resist, defend or satisfy such claim, action or proceeding in such Indemnitee’s name, by the attorneys for, or approved by, Developer’s insurance carrier (if such claim, action or proceeding is covered by insurance), or by such other attorneys as ESDC shall reasonably approve. The foregoing notwithstanding, any such Indemnitee may engage its own attorneys to defend such Indemnitee, or to assist such Indemnitee in such Indemnitee’s defense of such claim, action or proceeding, as the case may be, at such Indemnitee’s sole cost and expense.

Section 8.05 Notification and Payment. Promptly, upon having actual knowledge thereof, an Indemnitee shall notify Developer of any cost, liability or expense incurred by, asserted against, or imposed on, such Indemnitee, as to which cost, liability or expense Developer has agreed to indemnify such Indemnitee pursuant to this Article VIII. Developer agrees to pay such Indemnitee all amounts due under this Article VIII within sixty (60) Business Days after ESDC's request therefor, if Developer is obligated to make such payment pursuant to the terms of this Agreement, and any non-payment thereof by Developer shall constitute a Default for which ESDC may declare an Event of Default.

Section 8.06 Survival. The provisions of this Article VIII shall survive the expiration or earlier termination of this Agreement.

## ARTICLE IX

### LIMITATION ON LIABILITY; RELEASE

#### Section 9.01 ESDC Not Liable.

(a) To the extent permissible under applicable law, neither ESDC nor any member, director, officer, employee, agent or servant of ESDC shall be liable to Developer or to any other Person for any injury or damage happening on, in or about the Project Site or its appurtenances, nor for any injury or damage to the Project Site, or to any property belonging to Developer or to any other Person, that may be caused by fire, by breakage, or by any other casualty or by the use, misuse or abuse of any portion of the Project Site, or that may arise from any other cause whatsoever, except for any such injury or damage resulting from the negligence or intentional misconduct of ESDC or such elected officials, members, directors, officers, employees, agents or servants.

(b) To the extent permissible under applicable law, neither ESDC nor any member, director, officer, employee, agent or servant of ESDC shall be liable to Developer or to any other Person in connection with any matters contemplated by this Agreement, except for ESDC's potential liability for the failure to make disbursements of the Funding to the extent required hereby. In the event that there shall be a final determination by a court of competent jurisdiction that ESDC has failed to make a required disbursement of Funding, the only remedy available to Developer and/or to any other Person claiming that it has suffered damages because of ESDC's failure to make such disbursement, shall be to obtain the requisite disbursement from ESDC. In no event shall ESDC be liable to Developer and/or to any other such Person for any other damages, including, without limitation, consequential damages, due to any such failure.

(c) Neither ESDC nor any member, director, officer, employee, agent or servant of ESDC shall be liable to Developer or to any other Person if City Funding is deemed forfeited pursuant to the City Funding Agreement.

Section 9.02 No Personal Liability. No official, member, director, officer, employee, agent or servant of ESDC shall be liable (personally or otherwise) to Developer or any other Person under or by reason of this Agreement or any of the matters contemplated by this Agreement. No shareholder, director, partner, member, officer, employee, agent or servant of

Developer or its Affiliates shall be liable (personally or otherwise) to ESDC or any other Person under or by reason of this Agreement or any of the matters contemplated by this Agreement. Nothing contained in this Section 9.02 shall limit the liability of the Guarantor under the Guaranty pursuant to the terms thereof.

Section 9.03 Release. To the extent permissible under applicable law, Developer hereby releases and discharges, ESDC and its members, directors, officers, employees, agents and servants and each constituent thereof, from any and all causes of actions, suits, claims, costs, expenses, liabilities, damages, sums of money, accountings, duties, obligations, agreements and demands of any nature whatsoever, expressed or implied, in law or in equity, relating to, or arising in connection with any of the matters contemplated by this Agreement (other than a claim to the Funding required to be made pursuant to this Agreement).

Section 9.04 Survival. The provision of this Article shall survive the expiration or earlier termination of this Agreement.

## ARTICLE X

### CONFLICT OF INTERESTS

Section 10.01 No Prohibited Interests. Developer hereby agrees that no member, officer, director, official, agent or employee of ESDC or the City, EDC, or their designees, consultants or agents, no member of the governing body of the City or EDC and no public official of the City who exercises or exercised any functions or responsibilities with respect to the subject matter of this Agreement during his tenure, if known to Developer or its Affiliates, shall have any interest, direct or indirect, in any contract or subcontract, or the proceeds thereof, for work to be performed in connection with the Project or in any activity or benefit arising out of or in connection with the performance of the Project. Upon receiving notice or knowledge of any of the circumstances specified in the preceding sentence, Developer shall deliver notice to ESDC of the circumstances and immediately shall use its best efforts to cause the Persons affected to terminate their interest in the prohibited contract or property. Developer and its Affiliates shall require their respective contractors and subcontractors to make appropriate representations in writing that they, their employees and principals do not have any conflict of interest prohibited under this Section, and to covenant to cause the prohibited persons to terminate their interest in the relevant contract or property upon demand by Developer or the applicable Affiliate.

Section 10.02 No Illegal Payments. Developer hereby represents and warrants that it has not been asked to pay, and has neither offered to pay, nor paid, any illegal consideration, whether monetary or otherwise, in connection with the procurement of the Funding or the execution and delivery by ESDC of this Agreement.

## ARTICLE XI

### BOOKS AND RECORDS; INSPECTIONS AND AUDITS

Section 11.01 Maintenance of Books and Records. Developer shall keep separate, complete and accurate records and books of account regarding the Funding including amounts received and spent on Eligible Project Costs, and other amounts spent in connection with the construction of the Infrastructure and the Total Project Costs as well as other matters contemplated by this Agreement. Such books of account shall be prepared in accordance with generally accepted accounting principles consistently applied, and such records shall include, but not be limited to, bank statements, bills, invoices and receipts, and other documents and instruments that record all information, circumstances, and expenditures related to Developer's or its Affiliates, as applicable, rights, if any, and Obligations under this Agreement, including, without limitation, information relating to the construction of the Infrastructure. Developer shall maintain such records, books of account and documents at Developer's principal place of business (with copies thereof in New York City) for six (6) years after the expiration of the Term or earlier termination of this Agreement.

Section 11.02 Inspections and Audits. At any time and from time to time, upon reasonable prior notice, Developer shall permit EDC, ESDC and their respective officers, employees, servants, consultants and agents to: (a) examine and make copies and abstracts from the records, books of account and documents required to be maintained in connection with this Agreement, and (b) visit the properties of Developer and to discuss the affairs, finances, and accounts of Developer with any of its officers and directors.

Section 11.03 Survival. The Provision of this Article XI shall survive the expiration of the Term or earlier termination of this Agreement.

## ARTICLE XII

### INDEPENDENT CONTRACTOR

Section 12.01 Independent Contractor. Developer and its Affiliates shall perform their respective Obligations hereunder in the capacity of an independent contractor and not as an officer, employee, servant or agent of either the City or ESDC. Developer and its Affiliates are not employees of the City or ESDC, and accordingly neither Developer, its Affiliates, nor any of their respective directors, officers, employees, servants or agents will hold themselves out as, nor claim to be, directors, officers or employees of the City or ESDC, or of any department, agency, or unit of either the City or ESDC, and no such Person shall make any claim, demand, or application to or for, any right or privilege applicable to a member, director, officer, or employee, of the City or ESDC, including, but not limited to, workers' compensation coverage, unemployment insurance benefits, social security coverage or employee retirement membership or credit. Neither Developer nor its Affiliates shall permit any of its directors, officers, employees, servants or agents to act in contravention of this Section.

Section 12.02 No Liability. Developer shall assume sole responsibility for the work and personal conduct of all Persons employed or engaged by Developer, its Affiliates or other Persons in connection with the construction of the Infrastructure and the performance of its Obligations under this Agreement as well as for their direction and compensation. Nothing in this Agreement shall impose any liability or duty upon the City or ESDC to any Person employed or engaged by Developer or its Affiliates as coordinator, consultant, or contractor or in any other capacity, or as employee, servant or agent of Developer or its Affiliates, or shall make the City and/or ESDC liable to any Person for the acts, omissions, liabilities, obligations, taxes and benefits of whatever nature, including but not limited to unemployment insurance and old age taxes, incurred or payable by Developer or its Affiliates, or any of their respective coordinators, consultants, contractors, employees, servants or agents.

### ARTICLE XIII

#### TERMINATION; EVENTS OF DEFAULT AND CERTAIN REMEDIES

Section 13.01 Events of Default. Each of the following shall constitute an event of default ("**Event of Default**"):

(a) Developer or its Affiliates, if applicable, shall fail to perform or observe any of the terms, covenants or conditions on its part to be performed or observed pursuant to this Agreement and such failure continues for thirty (30) days after written notice to Developer specifying such Default (unless such failure requires work to be performed, acts to be done, or conditions to be removed which cannot, by their nature, reasonably be performed, done or removed within such thirty (30) day period, in which case no Event of Default shall be deemed to exist as long as Developer or its Affiliates, shall commence the requisite performance or observance within such thirty (30) day period and shall diligently and continuously prosecute the same to completion within a reasonable period).

(b) Any representation or warranty made by Developer in this Agreement, or in any certificate, document, opinion, financial or other statement furnished by Developer or any Affiliate of Developer relating to this Agreement or the construction of the Infrastructure shall be false, incomplete or misleading in any material respect when made; *provided* that if the defect and damage, if any, resulting from such defect can be, and are in fact, cured within thirty (30) days after written notice to Developer specifying such Default, the same shall not be an Event of Default.

(c) To the extent permitted by law, if Developer or Guarantor shall admit, in writing, that it is unable to pay its debts as such become due.

(d) To the extent permitted by law, if Developer or Guarantor shall make an assignment for the benefit of creditors.

(e) To the extent permitted by law, if Developer or Guarantor shall file a voluntary petition under the present or any future Federal Bankruptcy Act or any other present or future Federal, state or other bankruptcy or insolvency statute or law or if such petition shall be filed against Developer or Guarantor and an order for relief shall be entered, or if Developer or

Guarantor shall file a petition or an answer seeking, consenting to or acquiescing in, any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future Federal Bankruptcy Act or any other present or future federal, state or other bankruptcy or insolvency statute or law, or shall seek, or consent to, or acquiesce in, or suffer the appointment of, any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of Developer or Guarantor, or of all or any substantial part of its properties, or of the Project Site or any interest of Developer or Guarantor therein, or if Developer or Guarantor shall take any action in furtherance of any action described in Sections 13.01(c) or 13.01(d) hereof or this Section 13.01(e).

(f) To the extent permitted by law, if within sixty (60) days after the commencement of a proceeding against Developer or Guarantor seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future Federal Bankruptcy Code or any other present or future applicable federal, state or other bankruptcy or insolvency statute or law, such proceeding shall not be dismissed, or if, within one hundred twenty (120) days after the appointment, without the consent or acquiescence of Developer or Guarantor, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of Developer or Guarantor, or of all or any substantial part of its properties, or of the Project Site or any interest of Developer or Guarantor therein, such appointment shall not be vacated or stayed on appeal or otherwise, or if, within one hundred twenty (120) days after the expiration of any such stay, such appointment shall not be vacated.

(g) Developer's or its Affiliates' failure to remit payment to ESDC of any amounts due under the Cost Agreement within twenty (20) days after ESDC's written demand therefor.

Section 13.02 Certain Remedies. Upon the occurrence of an Event of Default, ESDC may exercise any right, power or remedy permitted to it by law, in equity, or under this Agreement, including, without limitation, terminating this Agreement by giving written notice to Developer, in which event (i) ESDC shall not be required to make any further State Funding Payments and City Funding Payments, (ii) Developer shall be obligated to pay to ESDC, within five (5) business days of such termination, the Required Amount and (iii) ESDC shall assign to EDC ESDC's interest in the Purchase Agreement, subject to the provision of Section 28 thereof.

Section 13.03 Abandonment. If prior to the Effective Date, Developer abandons the Project, (i) ESDC shall not be required to make any further State Funding Payments and City Funding Payments, (ii) Developer shall be obligated to pay to ESDC, within five (5) business days of such abandonment, the Required Amount and (iii) ESDC shall assign the Purchase Agreement to EDC; provided that if Developer fails to pay the Required Amount within such five (5) business day period, and an Institutional Lender pays the Required Amount within five (5) business days thereafter, such Institutional Lender shall be deemed a permitted assignee of Developer's rights under the Purchase Agreement. In the event the Project Documentation is not finalized in a form acceptable to Developer and ESDC by December 19, 2009, the Project shall be deemed abandoned by Developer and (w) ESDC shall not be required to make any further State Funding Payments and City Funding Payments, (x) Developer shall be obligated to pay to ESDC, within five (5) business days of such abandonment, the Required Amount, and (y) ESDC shall assign to EDC ESDC's interest in the Purchase Agreement, subject to the provision of Section 28 thereof. Upon request