

PROPERTY MANAGEMENT SERVICES AGREEMENT

This Property Management Services Agreement (this "**Agreement**") is entered into by and between the Eanes Independent School District, an independent school district in Travis County, Texas ("**EISD**") and WAQUA, LLC, a Texas limited liability company ("**WAQUA**") to be effective as of the Effective Date (as defined in Section 1.02 below). Each is a "Party," and both are collectively "Parties."

RECITALS

A. EISD owns a tract of land in Travis County, Texas, consisting of approximately 12.21 acres more particularly described as 4300 Westbank Dr., Austin, TX 78746, ABS 272 SUR 507 EANES A ACR 12.210

B. Within the above described tract, EISD plans to construct an Aquatics Facility ("**Facility**"), to be predominantly used for EISD athletics. The land in the immediate vicinity of, appurtenant to and beneath the Facility, including identified parking spaces, shall be considered the "**Property**."

C. When not in use by EISD, EISD is willing to make the Facility available to non-EISD users, while maintaining control and ownership of the Property and Facility.

D. EISD desires to engage an entity to manage and operate the Facility, and has conducted a publicly advertised a request for proposals process to seek interested entities.

E. In response to the published request for proposals, EISD received a response and proposal from WAQUA, and EISD has determined that WAQUA's proposal offers the overall best value to EISD.

NOW, THEREFORE, the Parties enter into this Agreement upon the terms and conditions herein set forth.

ARTICLE I DEFINITIONS

In addition to the terms set forth above and elsewhere in this Agreement, the following terms shall have the following meanings:

1.01 "**Agreement Year**" means (a) the period that commences with the Services Commencement Date and terminates on December 31st of the same calendar year and (b) thereafter, each successive twelve month period (but if this Agreement terminates on a day other than December 31, then the last Agreement Year will end on the date of termination of this Agreement).

1.02 “**Effective Date**” means the date of the last of the parties to execute this Agreement as shown on the signature pages to this Agreement.

1.03 “**Expiration Date**” shall be the last date of the Agreement Term, unless earlier terminated pursuant to this Agreement.

1.04 “**Facility**” mean as the context implies, an aquatics facility, to be named the Eanes ISD Aquatics Center, which shall include, without limitation, the features set forth in Exhibit A.

1.05 “**Force Majeure**” shall mean and refer to acts of God; strikes, lockouts, or other industrial disturbances; acts of public enemies, orders of any kind of the government of the United States, including, but not limited to, the State of Texas or any civil or military authority; insurrections; riots; epidemic; landslides; lightning, earthquakes; fires, hurricanes; storms, floods; washouts; droughts; arrests; restraint of government and people; civil disturbances; explosions; breakage or accidents to machinery, pipelines, or canals; hazardous substances; or other causes not reasonably within the control of the Parties.

1.06 “**Governmental Authorities**” means all federal, state, and local governmental agencies having jurisdiction over the Property.

1.07 “**Net Revenues**” means the gross revenues accrued by WAQUA for all uses of the Facility in a given Agreement Year, as defined in Section 1.01, plus interest earned on such amounts, less all expenses incurred by WAQUA in the same year for performance of the Services. Expenses for depreciation and amortization shall only be permitted for WAQUA’s personal property located at the Facility and necessary for performance of the Services.

1.08 “**Operating Budget**” means a detailed and itemized statement of all anticipated day to day maintenance and operations expenses, plus WAQUA’s overhead for each Agreement Year.

1.09 “**Schedule of Rates and Fees**” means the categories and amounts of rates and fees, presented to EISD for review for each Agreement Year, that WAQUA will charge to third parties for use of the Facility during available periods of non-EISD use as set forth in Article 8.

1.10 “**Services**” mean the property management services required to be performed by WAQUA under this Agreement, as specified in Article 4.

1.11 “**Services Commencement Date**” means the date in which the Facility is Substantially Complete.

1.12 “**Substantial Completion**” and “**Substantially Complete**” mean that all of the following have occurred: (i) EISD has completed or caused the construction of the Facility to be completed in accordance with the permitted plans and specifications , and (ii) EISD has obtained a certificate of occupancy for the Facility from the appropriate Governmental Authorities.

**ARTICLE 2
TITLE TO THE FACILITY AND PROPERTY**

2.01 The Parties acknowledge and agree that this Agreement does not convey, transfer or confer any ownership rights, property interests or title to any portion of the Facility, the Property, or any other Facility, fixtures or equipment therein or thereon. As government owned and financed property improvements, and given that this Agreement in no way creates a joint venture or partnership, WAQUA shall not be entitled to and agrees that it will not claim any capital depreciation or amortization deductions, investment tax credits or other tax benefits with respect to the Facility, or any EISD owned property, equipment or improvements contained therein. Further, WAQUA shall have no authority to sell, dispose of or divest EISD of any of its property, equipment or fixtures.

2.02 WAQUA will retain title to and ownership of any tangible personal property or removable equipment that it furnishes or brings to the Facility for purposes of performing the services under this Agreement.

**ARTICLE 3
AGREEMENT TERM**

3.01 **Term.**

(a) This Agreement shall be binding on the parties as of the Effective Date of the Agreement; however the Term of the Agreement (the "Agreement Term") shall commence on the Services Commencement Date and shall continue for (i) for a period of five (5) years, subject to the extension options provided herein, or (ii) until the effective date of a termination as provided for in this Agreement. Upon the expiration of the initial five (5) year term, if WAQUA is not in default of this Agreement, the term will automatically extend for one (1) subsequent five (5) year term. The parties may, upon mutual written agreement, extend the Agreement Term for three (3) additional and subsequent five (5) year terms, and such mutual agreement must occur no sooner than 180 days prior to the expiration of the then current Agreement Term.

(b) EISD shall have the right to terminate the Agreement for an Event of Default as described in Article 12.

(c) WAQUA shall have the right to terminate the Agreement for an Event of Default as described in Article 12.

(d) This multi-year Agreement shall not constitute a debt of EISD, and any payment obligations shall be made from the current funds of EISD. Accordingly, the Board of Trustees of EISD reserves the right to terminate this Agreement at the end of each fiscal year if the Board of Trustees determines that (i) the Property and Facility must be sold due to a declared or undeclared financial exigency of the District; (ii) there are insufficient funds in EISD's budget to continue the District's aquatics program and applicable tax laws at the time prohibit non-governmental use of the Facility in the absence of governmental

use, or (iii) if the Property or Facility is needed for an alternative public necessity of EISD and such alternate public necessity must be something substantially different than a aquatics facility or pool.

ARTICLE 4 SERVICES

4.01 WAQUA shall maintain and manage the Facility and provide all Services set forth in Article 5, and as required for use as a public school district competitive aquatics facility. Notwithstanding the above, in the event the legal requirements for a public school district competitive aquatics facility change during the term of this Agreement, and such changes require the addition of new or improved equipment, devices, etc., WAQUA will not be required to purchase the new and improved items. EISD will be solely responsible for the procurement of the items.

4.02 WAQUA shall manage the assessment and collection of rates and fees for non EISD use of the Facility.

4.03 WAQUA shall coordinate all scheduled uses of the Facility by non-EISD users during periods dedicated for non-EISD as set forth under Article 8.

4.04 No later than November 1st of each year, WAQUA shall prepare and present to EISD the annual Operating Budget and a Schedule of Rates and Fees for the Facility for the following Agreement Year.

4.05 WAQUA shall comply with all applicable ordinances and local, state and federal safety rules, as well as Eanes ISD Board Policy. WAQUA shall not permit use of the Facility in any manner that will constitute a nuisance, or for any purpose other than as expressly permitted in this Agreement. WAQUA shall have no authority to dispose of any EISD property without the express authority of the EISD Board of Trustees.

4.06 WAQUA shall take all actions to manage and maintain the safety and security of the Facility and its occupants.

4.07 WAQUA shall provide all staff and vendors necessary to carry out its obligations under this Agreement.

ARTICLE 5 CONSTRUCTION, MAINTENANCE AND OPERATIONS

5.01 **Construction.** EISD shall be solely responsible for design, permitting, and constructing the Facility in accordance with the requirements of Governmental Authorities, as well as causing any future capital improvements such as modifications, additions and renovations to the Facility. Capital expenses shall not include normal maintenance activities or repairs necessary to preserve and continue safe and effective operations of the Facility.

5.02 **Cost Sharing for Construction Upgrades.**

(a) Design plans and specifications for the Facility, and any subsequent modifications, additions or renovations to the Facility, shall be provided to WAQUA for its review. In the event either Party requests additional or upgraded design and/or construction features which result in additional design and/or construction costs to EISD, and both Parties agree to such modifications, the Parties shall negotiate to share in such additional costs proportionally. If the additional or upgraded design and/or construction features were requested by WAQUA, WAQUA shall reimburse no less than 50% of such additional costs. Any reimbursements owed to EISD by WAQUA due to any negotiated cost sharing agreements for such expenditures shall be paid by WAQUA by the end of the Agreement Year in which the construction modifications are completed.

(b) If EISD constructs the Facility with an upgraded Myrtha pool construction (or similar technology that eliminates the need for periodic replastering), WAQUA acknowledges that there will be operational cost avoidances in years 7, 14, and 21 of the Facility and this Agreement. Due to this benefit, if this Agreement is in effect in years 7, 14, and 21 of the Facility, WAQUA shall reimburse EISD an amount to be determined at the conclusion of years 7, 14, and 21, as follows: an amount equal to the average of WAQUA's profit amount for the previous seven (7) year period, using the time frame of June 1 – July 19 each year. In no event will WAQUA be required to pay more than \$325,000 in the aggregate, or more than 50% of the cost of the Myrtha pool construction (or similar technology), whichever is less.

5.03 **Commencement of Construction.** EISD anticipates commencing construction of the Facility by June 30, 2020. If EISD does not commence construction of Facility by December 31, 2020, WAQUA shall have the option to terminate this Agreement without penalty.

5.04 **Operations.** WAQUA shall be solely responsible for payment of all charges for any utilities incurred in connection with its use and maintenance of the Property and Facility, including but not limited to charges relating to electricity, gas, water, and trash collection. WAQUA shall be solely responsible for obtaining all utility accounts in WAQUA's name. Once the Facility is operational, all permits, licenses, inspections and certifications required to operate the Facility shall be obtained and maintained by WAQUA, at its sole cost and expense. Any and all taxes assessed by any taxing authority resulting from WAQUA uses permitted under Article 8 shall be the sole responsibility of WAQUA.

5.05 **Maintenance.** WAQUA shall, at WAQUA's sole cost and expense, operate, repair and maintain the Property and Facility in a visibly attractive, well-groomed, safe, good and working condition at all times during the Agreement Term, beginning on the Service Commencement Date. All maintenance and operations costs, shall be at WAQUA's sole cost and expense (except where reimbursement for extraordinary damage caused during use by EISD is required elsewhere in this Agreement). EISD shall have discretion to review qualifications of any service entity providing services to the facility prior to any agreement is to be made between WAQUA and service provider. Notwithstanding the above, all capital upgrades shall be at the sole cost and expense of EISD, except when subject to cost-sharing pursuant to Section 5.02. Maintenance costs shall include all services, repairs and replacements necessary to keep the

Facility, its equipment, components and features in good, proper and working order and to prevent their failure decline. Capital upgrades shall include the addition of any equipment, feature or component that did not previously exist in the Facility as originally designed or constructed, or the replacement of any pre-existing equipment, feature or component with something that exceeds the grade, quality or functionality of the pre-existing equipment, feature or component.

5.06 **Compliance with ADA.** WAQUA hereby agrees, warrants and represents that WAQUA will comply with the Americans With Disabilities Act (“ADA”) requirements applicable to public government-owned facilities. WAQUA will indemnify and hold harmless EISD and its officers, employees, and agents for, from and against any and all claims by third parties alleged against EISD for alleged violations of the ADA relating to WAQUA’s operations, programs, and/or failure to make accommodations.

5.07 **Maintenance and Operations Reserves.** During the first two years of this agreement, WAQUA shall be required to maintain, and shall provide proof thereof to EISD, a dedicated account for the payment of maintenance and operations expenses. WAQUA shall keep a minimum reserve balance of the greater of (i) two months of estimated maintenance and operating expenses, or (ii) \$75,000. EISD shall have the right to verify the reserve balance upon written request. Beginning the third year of this agreement, WAQUA shall keep a minimum reserve of \$50,000.

5.08 **Hazardous Materials.** WAQUA shall not bring onto any portion of the Property or the Facility, any asbestos, petroleum, or petroleum products, explosives, toxic materials, or substances defined as hazardous wastes, hazardous materials, or hazardous substances by any federal, state or local law or regulation ("*Hazardous Materials*"), except in limited quantities required for maintenance and operation of the Facility, which shall be stored and maintained in strict accordance with all applicable laws and safety regulations.

5.09 **WAQUA’s Protective Actions and Indemnity.** WAQUA shall defend, indemnify and hold EISD harmless from and against any claims, damages, penalties, liabilities, and costs (including reasonable attorney's fees and court costs) caused by or arising out of a violation of the foregoing prohibition. WAQUA shall clean up, remove, remediate and repair in accordance with the requirements of applicable law any soil or ground water contamination and any other damage caused by the presence or release of any Hazardous Material brought onto the Property or the Facility by WAQUA or its contractors, agents, or representatives. WAQUA shall immediately give EISD written notice of any suspected breach of the provisions of this section upon learning of the presence or release of Hazardous Materials, and upon receiving any notice from Governmental Authorities of Hazardous Materials pertaining to the Property and/or the Facility. The obligations of WAQUA under this section shall survive the expiration or termination of this Agreement for any reason.

5.10 **Criminal Background Checks.** WAQUA shall, prior to the commencement of any work by WAQUA’s employees or agents on the Property or in the facility, certify, on a form provided by EISD upon WAQUA’s request, that, for WAQUA, each employee of WAQUA, and each employee or independent contractor of WAQUA’s or such contractor’s subcontractors who (1) will have direct contact with students (substantial opportunity for verbal or physical interaction

with students that is not supervised by a certified educator or other professional District employee), and (2) will have continuing duties related to the Agreement or the Property, WAQUA has obtained, as required by Texas Education Code Section 22.0834 and Texas Administrative Code Sections 153.1101 and 153.1117:

- (a) national criminal history record information from a law enforcement or criminal justice agency for WAQUA and each employee of WAQUA hired before January 1, 2008;
- (b) national criminal history record information from the Texas Department of Public Safety for WAQUA and each employee of WAQUA hired on or after January 1, 2008; and
- (c) national criminal history record information from the Texas Department of Public Safety for each employee or independent contractor of each subcontractor of WAQUA during the Agreement Term.

Any employee or independent contractor of a contractor or subcontractor who will have direct contact with students must not have been convicted of an offense identified in Texas Education Code Section 22.085 (or any higher standard established by the District's Board of Trustees).

ARTICLE 6 COMPENSATION

6.01 **Revenue Sharing.** As consideration for the Services, the Parties agree to share the annual Net Revenues, as defined in Section 1.07, as follows: For each Agreement Year, the first \$200,000 of any Net Revenues shall be paid to WAQUA. For any Net Revenues in excess of \$200,000 in any Agreement Year, WAQUA shall retain 80% of such Net Revenues and WAQUA shall remit 20% of such Net Revenues to EISD. WAQUA shall pay EISD's share of the Net Revenues to EISD for each Agreement Year no later than March 31st of the following Agreement Year. Upon termination prior to December 31st of any Agreement Year, WAQUA shall pay EISD's share of Net Revenues to EISD no later than 90 days from the effective date of termination. Shortfalls of any party's anticipated Net Revenues shall not be carried forward to a subsequent Agreement Year.

6.02 **WAQUA's Financial Records.** By March 31st of each Agreement Year, WAQUA shall provide to EISD an annual financial report, which shall include an income statement showing all gross revenues all maintenance and operating expenses related to the Facility, a balance sheet, and a cash flow statement. Upon termination prior to December 31st of any Agreement Year, WAQUA shall provide such records to EISD no later than 90 days from the effective date of termination. EISD reserves the right to conduct or cause to be conducted an audit of WAQUA's financial records, at EISD's expense, anytime during the Agreement Term and for a period of three (3) years thereafter.

**ARTICLE 7
EISD PRIORITY USE**

7.01 WAQUA shall manage and maintain the Facility at all times as necessary for EISD's athletics programs including but not limited to, swimming, diving, water polo, career and technology training requiring use of the Facility.

(a) EISD has the absolute and priority right to the Facility during the following times:

i. Mondays through Fridays from August 1 through May 31 plus the last week of June of each Agreement Year, during the following hours: 7:00 a.m. – 9:00 a.m., 10:30 a.m. – 1:00 p.m., and 4:30 p.m. – 5:30 p.m. During these times, EISD reserves all of the Facility for exclusive use, unless notification is provided to WAQUA pursuant to subsection (iv) below.

ii. Annually, during each school year, EISD reserves the right to schedule up to five (5) events requiring use of the entire Facility to be hosted by EISD at the Facility, upon thirty (30) calendar days advance notice to WAQUA, but without the need for WAQUA's approval.

iii. EISD reserves the right to request additional use of all or part of the Facility, upon fourteen (14) calendar days advance notice to WAQUA, and subject to WAQUA's prior approval, such approval shall be at the sole discretion of WAQUA. For such requests, WAQUA shall inform EISD if the request can only be accommodated with non-EISD groups using the Facility at the same time, and EISD reserves the right to exercise and agree to non-exclusive use of the Facility only to the extent of such requests.

iv. In the event any scheduled usage time or event under subsections (i), (ii), or (iii) above is cancelled, or if EISD will not require exclusive use of the Facility under subsection (i), EISD shall endeavor to notify WAQUA of the availability of the Facility as soon as practicable.

v. Quarterly (prior to the start of each school year, October, prior to the start of the second semester, and March), EISD shall provide to WAQUA a calendar which lists EISD's intended usage for the upcoming quarter. The purpose of the calendar is to enable WAQUA to make the facility ready for EISD's usage. This Subsection in no way limits or modifies EISD's rights to use the facility in accordance with this Section.

(c) EISD's use of the Property and Facility under this Section shall be at no cost to EISD and is part of the valuable consideration exchanged between EISD and WAQUA.

(d) EISD shall, at its expense, repair all property that is destroyed or damaged (beyond normal wear and tear) during EISD's use of the Facility. Further, during EISD's use of the Facility, EISD agrees to keep the Facility in a clean and operable condition. If EISD fails

to commence repairs to damaged property within ten (10) business days following receipt of written notice and demand from WAQUA, then WAQUA may repair the damage created by EISD. In such event, EISD agrees, upon delivery of a list of expenses and repairs from WAQUA, along with adequate supporting documentation evidencing the cost and necessity of repairs, to reimburse WAQUA within ten (10) business days for reasonable expenses actually incurred by WAQUA in connection with repairs by WAQUA of damage caused by EISD.

ARTICLE 8 WAQUA RIGHT TO USE

8.01 **Permitted Uses by WAQUA.** WAQUA shall have the right to use the Property for the operation and management of an aquatic facility. WAQUA shall further be permitted to engage in revenue generating activities by scheduling and managing use by third party users. Such uses shall include, but not be limited to community and family memberships, swim lessons, camps, aquatics masters and fitness programs, rentals to swim teams, clubs or organizations, as well as uses commonly found at private and public aquatic centers. WAQUA will be authorized to use 25 identified parking spots on the Property during the school day, as well as use of the entire parking lot during non-school hours.

8.02 **Compliance with Laws.** WAQUA shall comply with all federal, state and local laws, ordinances, codes, rules, regulations or orders regarding all portions of the Property and WAQUA's use thereof, including, without limitation, all laws relating to health and the environment.

8.03 **Unauthorized Use.** WAQUA shall not occupy or use the Property in any manner that will constitute a nuisance or permit any portion of the Property to be occupied or used for any purpose other than as expressly permitted herein.

8.04 **Suspension of Use.** EISD shall have the right to close and/or prohibit use of the Facility due to events of Force Majeure, as defined in Section 1.05, if deemed, in EISD's sole discretion, to be necessary to protect public health and safety, for the duration of the Force Majeure event. Notwithstanding the above, in the event EISD is mandated to close, or determines it necessary to close, schools and/or athletic fields during a Force Majeure event, but a state or local governing authority allows the operation of an aquatics center during the same Force Majeure event, EISD and WAQUA will mutually determine whether the Facility can be safely and legally operated during the Force Majeure event.

**ARTICLE 9
INSURANCE AND INDEMNITY**

9.01 **Insurance.**

(a) **Property Insurance.**

(i) During construction, EISD shall maintain, or require its contractors to maintain, property insurance covering the Property an "all risk" builder's risk policy, including at least such perils as customarily insured for similar properties in Travis County, Texas, in an amount equal to the full replacement value of the Property and Facility. The policy shall contain an agreed value endorsement and a laws and ordinances endorsement ("***All Risk Property Insurance***"). Such insurance shall name only EISD or its contractors as the loss payees.

(ii) Following Substantial Completion of the Facility, EISD shall maintain property insurance covering the Property caused by perils now or hereafter embraced by or defined in a manuscript "all risk" policy (or any successor to such policy), including at least such perils as customarily insured for similar properties in Travis County, Texas, in an amount equal to the full replacement value of the Property and Facility. The policy shall contain an agreed value endorsement and a laws and ordinances endorsement ("***All Risk Property Insurance***"). Such insurance shall name EISD as the loss payee.

(b) **Liability Insurance.**

(i) **By WAQUA.** During the Agreement Term, WAQUA shall maintain a standard policy of commercial general liability insurance against injury or death to persons or damage to property arising out of occurrences on or about the Property ("***CGL Insurance***") in the minimum amount of \$1,000,000 per occurrence, \$5,000,000 annual aggregate. The CGL Insurance polic(ies) to be maintained by WAQUA shall (i) state that it is primary with regard to any other insurance carried by EISD (and any insurance carried by EISD shall be excess, secondary, and noncontributing), (ii) name EISD and such parties as EISD may reasonably designate as an additional insureds, and such endorsement shall be without exceptions for the acts or omissions of any additional insured (including negligence), (iii) be endorsed to provide cross-liability coverage, and (iv) shall not have a deductible or self-insured retention in excess of \$10,000. Any dispute shall be resolved by a third party insurance consultant that (x) has at least ten years of experience in Texas, (y) is unrelated to EISD or WAQUA, and (z) is mutually agreed upon by EISD and WAQUA. The cost of any such insurance consultant shall be split between the parties.

(ii) **By EISD.** During the Agreement Term, EISD shall maintain a standard policy of commercial general liability insurance against injury or death to persons or damage to property arising out of EISD's use of the Property during the

Agreement Term, with the same limits imposed upon WAQUA under this Agreement.

(c) **Maintenance and Operations Vendors.** WAQUA will cause all vendors performing maintenance and operations activities on the Property and at the Facility to obtain and maintain business auto liability and, if necessary, commercial umbrella liability insurance with limits reasonably acceptable to EISD, which policy shall be endorsed to include EISD and parties reasonably designated by EISD as additional insureds (without exceptions for acts or omissions of the additional insureds, including negligence). WAQUA will cause all such vendors to also obtain and maintain worker's compensation insurance in the statutory limits provided under Texas law applicable to government employees.

(d) **Insurance Carriers.** All of the insurance policies required hereunder shall be issued by corporate insurers licensed to do business in the state of Texas and rated Policyholder's Rating of "A" and a Financial Size Rating of "VIII" or better by A. M. Best Company.

(e) **Insurance Certificates.** WAQUA and its vendors shall provide or cause to be provided to the EISD certificates of insurance evidencing all insurance required to be carried hereunder (i) before the commencement of any construction, if applicable; (ii) at least fifteen days prior to the expiration or renewal of any such insurance policy; (iii) at any other time upon request from EISD. All such certificates of insurance shall be on an ACORD Form 27 (or any equivalent successor form); provided, however, with the prior review and approval of the other party, an ACORD Form 25-S (or any equivalent successor form) may be used for CGL Insurance provided the other party has been provided with a certified copy of all insurance policies, including all required endorsements, and provided (1) there is attached to the Certificate of Insurance a valid and binding Revised Cancellation Endorsement specifying the requirement of the carriers to give thirty (30) day advance notice of cancellation or material change in the policies and the words "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives" shall be deleted from the certificate form's cancellation provision and (2) the other party is authorized to contact the issuing insurance agency and the insurance carriers to confirm the existence of the coverages. Furthermore, if requested in writing by any party, EISD, WAQUA and General Contractor will provide to the requesting party a copy of any or all insurance policies or endorsements required by the Agreement.

(f) **Failure to Carry Insurance.** If WAQUA fails to keep or cause to be kept insurance required in this Agreement in full force and effect, EISD may notify WAQUA of this failure, and if WAQUA does not deliver to EISD certificates showing all such insurance to be in full force and effect within ten (10) days after this notice, EISD may, at its option (but shall have no obligation to do so), take out and/or pay the premiums on the insurance needed to fulfill WAQUA's obligations under the provisions of this Article. Upon demand from EISD, WAQUA shall reimburse EISD the full amount of any insurance

premiums paid by WAQUA pursuant to this section, plus interest on such amount at a rate of ten (10%) percent per annum.

9.02 **Indemnity and Immunity.**

(a) **By WAQUA.** From the Effective Date, WAQUA assumes liability for, and shall indemnify, protect, save and keep harmless EISD and its officers, trustees, agents, servants, successors and assigns ("*EISD*") from and against any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs and expenses, including reasonable legal expenses, of whatsoever kind and nature, imposed on, incurred by or asserted against EISD, in any way arising out of WAQUA's possession or control of any part of the Property or Facility. If EISD notifies WAQUA of any claim, demand, action, administrative or legal proceeding, investigation or allegation as to which the indemnity provided for in this Section applies, WAQUA shall assume on behalf of EISD and conduct with due diligence and in good faith the investigation and defense thereof and the response thereto; provided, that EISD shall have the right to be represented by advisory counsel of its own selection and at its own expense; and provided further, that if any such claim, demand, action, proceeding, investigation or allegation involves both WAQUA and EISD and EISD shall have been advised in writing by reputable counsel that there may be legal defenses available to it which are inconsistent with those available to WAQUA, then EISD shall have the right to request that WAQUA's insurance carrier provide separate counsel to participate in the investigation and defense of and response to such claim, demand, action, proceeding, investigation or allegation on its own behalf. If any claim, demand, action, proceeding, investigation or allegation arises as to which the indemnity provided for in this Section applies, and WAQUA fails to assume promptly (and in all event within a reasonable time after being notified of the claim, demand, action, proceeding, investigation or allegation) the defense of EISD, then EISD may contest (or settle, with the prior consent of WAQUA, which consent shall not be unreasonably withheld) the claim, demand, action, proceeding, investigation or allegation at WAQUA's expense using counsel selected by EISD; provided, that after any such failure by WAQUA which continues for sixty (60) days after written demand has been delivered to WAQUA to assume such defense, no such contest need be made or continued by EISD and settlement or full payment of any claim may be made by EISD without WAQUA's consent and without releasing WAQUA from any obligations to EISD under this Section if in the written opinion of reputable counsel to EISD, the settlement or payment in full is clearly advisable. In no event, however, will WAQUA be required to indemnify EISD for loss or liability arising from acts or events which occurred before WAQUA took possession or control of any portion of the Property, or after the Effective Date, to the extent of such loss or liability resulted from the willful misconduct or gross negligence of EISD. EISD shall promptly notify WAQUA of any event or condition which requires indemnity hereunder or any allegation of such event or condition. The provisions of this section, except as expressly limited hereby, shall survive the expiration or earlier termination of this Agreement.

(b) **EISD's Immunity.** Nothing in this Agreement shall be construed as or constitute a waiver of any of EISD's governmental immunities.

**ARTICLE 10
CASUALTY AND CONDEMNATION**

10.01 **Damage or Destruction.**

(a) **Notice of Damage or Destruction.** During the Agreement Term, WAQUA shall give EISD immediate written notice if any portion of the Property or Facility are substantially damaged or destroyed by fire, casualty, or other cause (a "*Casualty*"). Upon EISD's receipt of any notice under this subsection, in the event a Casualty renders the facility to be inoperable for greater than 180 days, EISD shall be entitled to terminate this Agreement by giving WAQUA written notice within thirty (30) days of such Casualty or waive such right of termination and notify WAQUA of a suspension of this Agreement for such period as necessary to repair or reconstruct the Facility.

(b) **EISD's Obligation to Repair.** In the event of a Casualty, whether partial or total, and if EISD does not terminate this Agreement pursuant to Section 10.01(a), EISD shall repair, restore, and rebuild the Facility to substantially the same or better condition as existed immediately prior to such Casualty. EISD retains all rights of subrogation against the insurance policies of WAQUA or its agents and vendors.

10.02 **Condemnation.** During the Agreement Term, EISD shall give WAQUA immediate written notice if an entity having condemnation authority institutes an eminent domain proceeding with regard to any portion of the Property. In such event, EISD shall be entitled to terminate this Agreement without penalty or additional compensation due to WAQUA. Nothing prohibits EISD from voluntarily conveying all or part of the Property to a public utility, agency, or authority under threat of a taking under the power of condemnation. Any such voluntary conveyance shall be treated as a condemnation within the meaning of this Section.

**ARTICLE 11
ASSIGNMENT**

11.01 **Assignment.** WAQUA shall have the right to assign this Agreement upon the consent of EISD, at EISD's sole discretion.

**ARTICLE 12
DEFAULTS AND REMEDIES**

12.01 **Default.** Each of the following events is an "*Event of Default*" under this Agreement;

(a) **Monetary Defaults.** Failure by either party to pay undisputed Compensation due to the other party, and such failure continues for a period of thirty (30) days after written notice thereof has been delivered to the defaulting party.

(b) **Non-Monetary Defaults.** Failure by either party to perform or observe any of the terms, covenants, conditions, agreements and provisions of this Agreement and such failure

continues for a period of thirty (30) days after notice has been delivered to the defaulting party; provided however, (i) that if any such failure cannot reasonably be cured within the 30-day period, then such failure shall not be an Event of Default so long as the defaulting party proceeds in good faith, continuously, and with due diligence to remedy and correct any such failure, provided that the defaulting party has commenced to cure such failure after the effective date of the notice and within the 30-day period.

(c) **Levy or Attachment.** The initiation of any proceeding whereupon the estate or interest of WAQUA in the Property, or any portion thereof, or in this Agreement is levied upon or attached if such proceeding is not vacated, discharged or bonded within thirty (30) days after the date of such levy or attachment.

(d) **Insolvency or Cessation of Operations.** If WAQUA, at any time ceases its business operations for a period of sixty (60) consecutive days, or becomes insolvent.

(e) **Bankruptcy, Receivership, Etc.** The entry of any decree or order for relief by a court having jurisdiction in respect of WAQUA an involuntary case under the federal bankruptcy laws, as now or hereafter constituted, or any other applicable federal or state bankruptcy, insolvency or other similar law, or the appointment of a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of WAQUA or for any substantial part of the assets of WAQUA, or the entry of any decree or order with respect to winding-up or liquidation of the affairs of WAQUA, if any such decree or order continues unstayed and in effect for a period of thirty (30) consecutive days.

(f) **Voluntary Proceedings.** The commencement by WAQUA of a voluntary case under the federal bankruptcy laws, as now or hereafter constituted, or any other applicable federal or state bankruptcy, insolvency or other similar law, or the consent by WAQUA to the appointment of or possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official) of WAQUA or for any substantial part of the assets of WAQUA, or any assignment made by WAQUA for the benefit of creditors. WAQUA shall provide EISD with ninety (90) days advance written notice of its intent to file a voluntary petition for bankruptcy, or its consent to the appointment of or possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official).

(g) **Criminal Conviction.** The conviction of WAQUA of any felony criminal offense or any criminal offense involving moral turpitude.

12.02 **Remedies.** Upon the occurrence and continuance of an Event of Default, the non defaulting party shall have the option to do and perform any one or more of the following in addition to, and not in limitation of, any other remedy or right permitted it by law or in equity or by this Agreement:

(a) **Performance by either Party.** Either party, with or without terminating this Agreement (to the extent that termination is expressly permitted hereby), may (but will not be obligated to) perform any obligation of the other party under this Agreement, and the non-breaching party and its agents may enter the Property for such purposes without

advance notice to to the other party, and the breaching party shall fully reimburse and compensate the non-breaching party on demand for all costs and expenses incurred by the non-breaching party in such performance, with interest for such amount accruing at a rate of ten (10%) percent per annum.

(b) **Judicial Relief.** Either party may file suit in a court of competent jurisdiction to seek the other party's specific performance of any action, injunctive relief to prevent its continued performance of any Event of Default, and/or for damages, along with all of its costs of litigation.

(c) **Termination of Agreement.** Either party may terminate the Agreement without cost or penalty, and the breaching party shall only be entitled to receive Compensation for Services performed up to the Event of Default, less any costs incurred by by the non-breaching party's self-performance of the breaching party's obligations.

12.03 **Payment by WAQUA.** WAQUA shall pay to EISD all costs and expenses incurred by EISD, including court costs and reasonable attorney's fees, in (a) causing the removal of WAQUA's presence from the Property, (b) removing, storing and selling (if applicable), WAQUA's or any other occupant's personal property, (c) repairing or restoring the Facility to the condition in which WAQUA is required to deliver the Facility at the end of the Agreement Term, (d) paying or performing the underlying obligation that gave rise to the subject default and that WAQUA failed to pay or perform and (e) enforcing any of EISD's rights arising as a consequence of the Event of Default.

12.04 **Other Remedies.** Any termination of this Agreement as provided in this Article shall not relieve defaulting party from the payment of any sum or sums that are due and payable to the non-defaulting party under the Agreement at the time of termination, or any claim for damages then or previously accruing against the defaulting party under this Agreement, and any such termination shall not prevent the non-defaulting party from enforcing the payment of any such sum or sums that are then due and payable or claim for damages by any remedy provided for by law, or from recovering damages from the defaulting party for any default under the Agreement provided the non-defaulting party shall not be entitled to recover damages based on rental accruing after the date of termination of this Agreement. All rights, options, and remedies of the non-defaulting party contained in this Agreement shall be construed and held to be cumulative, and no one of them shall be exclusive of the other, and the non-defaulting party shall have the right to pursue any one or all of such remedies or any other remedy or relief which may be provided by law or in equity, whether or not stated in this Agreement. No waiver by the non-defaulting party of a breach of any of the covenants, conditions, or restrictions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other covenant, condition, or restriction contained in this Agreement.

12.05 **Default.** The parties shall not be deemed in default in the performance of any obligation required to be performed by it hereunder unless and until it has failed to commence such performance promptly within thirty (30) days after written notice by the other party specifying such default; provided, however, if the nature of the default is such that more than thirty (30) days are required for its performance, the party shall not be deemed to be in default if it commences

such performance within said 30-day period and diligently pursues the same to completion. Unless and until party fails to so cure any default after such notice, the other party shall not have any remedy or cause of action by reason thereof.

ARTICLE 13 MISCELLANEOUS

13.01 **Right of Entry and Inspection.** EISD and its agents shall, at all times, have the right to enter the Property and the Facility, provided such entry does not, except in the case of an Event of Default, interfere with WAQUA's rights to use the Facility pursuant to Article 8.

13.02 **No Partnership or Joint Venture.** The relationship between EISD and WAQUA at all times shall be an independent contractor relationship and shall not be deemed a partnership or a joint venture.

13.03 **No Waiver.** No waiver by either party of any default or breach of any covenant, condition, or stipulation contained in this Agreement shall be treated as a waiver of any subsequent default or breach of the same or any other covenant, condition, or stipulation of this Agreement.

13.04 **Delivery of Payments and Notices.** All payments, notices, demands, or requests from one party to another may be personally delivered or sent by mail, certified or registered, postage prepaid, to the addresses stated in this section and shall be deemed to have been given at the time of personal delivery, if delivered personally, or on the second (2nd) business day after depositing same in the United State Mail in accordance with this Section 14.05. All payments, notices, demands, or requests from WAQUA to EISD shall be given or mailed to EISD, attention Chief Operations Officer, at 601 Camp Craft Road, Austin, Texas 78746, or at such other address as requested by EISD in writing. All payments, notices, demands, or requests from EISD to WAQUA shall be given or mailed to WAQUA, attention Jeff Buch, at 1200 Barton Creek Blvd, Unit 17, Austin, Texas 78735, or at such other address as requested by WAQUA in writing.

13.05 **Parties Bound.** This Agreement shall be binding upon and inure to the benefit of the parties to the Agreement and their respective heirs, executors, administrators, legal representatives, successors and assigns. No other intended beneficiaries are created under this Agreement.

13.06 **Severability.** In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, this invalidity, illegality, or unenforceability shall not affect any other provision of the Agreement, and this Agreement shall be construed as if the invalid, illegal, or unenforceable provision had never been contained in the Agreement.

13.07 **Prior Agreements Superseded.** This Agreement constitutes the sole and only agreement of the parties to the Agreement and supersedes any prior understandings or written or oral agreements between the Parties respecting the subject matter of the Agreement.

13.08 **Amendment.** No amendment, modification, or alteration of the terms of this Agreement shall be binding unless it is in writing, dated subsequent to the date of this Agreement, and duly executed by the parties to this Agreement.

13.09 **Rights and Remedies Cumulative.** The rights and remedies provided by this Agreement are cumulative, and the use of any one right or remedy by either party shall not preclude or waive its right to use any or all other remedies. The rights and remedies provided in this Agreement are given in addition to any other rights the parties may have by law, statute, ordinance, or otherwise.

13.10 **Survival.** All indemnity obligations of WAQUA under this Agreement shall survive any termination of this Agreement.

13.11 **Approvals by EISD.** As contemplated in this Agreement, for any action, condition or decision that requires EISD's approval or consent, it is understood that such approval or consent must be given in writing by the EISD Chief Operations Officer. Notwithstanding, any amendment to this Agreement shall require approval of a formal amendment by EISD's Board of Trustees.

*[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]
[SIGNATURES ON NEXT PAGE]*

This Agreement is executed to be effective as of the Effective Date.

EISD:

EANES INDEPENDENT SCHOOL DISTRICT, an independent school district in Travis County, Texas.

DocuSigned by:
By: Tom Leonard
Printed Name: Dr. Tom Leonard
Title: Superintendent
Date: 6/11/2020

WAQUA:

WAQUA, LLC

DocuSigned by:
By: Jeff Buch
Printed Name: Jeff Buch
Title: Manager
Date: 6/11/2020

EXHIBIT A

FACILITY FEATURES

- Proposed location on District property in close proximity to Westlake High School.
- Approximately 23,000 total square feet.
- 122'x75' 8-lane 25 meter stretch pool with moveable bulkhead. 15-lane cross course.
- Naturally ventilated main pool area. Operable garage doors on both sides.
- Coaches Office, which may be in a shared space with the WAQUA office.
- Administrative/management office for WAQUA, which may be in a shared space with the Coaches office.
- Public restrooms
- Storage at deck level.
- Pool Equipment room located in basement area below locker room areas.
- Moveable aluminum bleachers.
- Pool Equipment:
 - Pool equipment with high rate sand filters
 - Water chemistry monitoring controller
 - UV treatment system
 - Flow meters
 - Calcium hypochlorite chlorine feeder
 - Muriatic acid system for pH adjustment
 - Automatic fill system
 - Gas fired swimming pool heater