

## MASTER SERVICES AGREEMENT

between City of Sherwood, Oregon  
and Health Fitness Corporation

This Master Services Agreement (this “**Agreement**”) is entered into as of the \_\_\_ day of October, 2017 (the “**Effective Date**”) by and between the City of Sherwood , an Oregon municipal corporation , with its principal place of business located at 22560 SW Pine Street, Sherwood, Oregon 97140 (hereinafter called “**Client**”) and Health Fitness Corporation, a Minnesota corporation, with its principal place of business located at 1700 West 82<sup>nd</sup> Street, Suite 200, Minneapolis, MN 55431 (hereinafter called “**HealthFitness**”). Each of Client and HealthFitness are referred to in this Agreement as a “**Party**” and collectively as the “**Parties**”.

WHEREAS, HealthFitness is in the business of providing integrated health and fitness management solutions; and

WHEREAS, Client desires that HealthFitness provide to Client, and HealthFitness is willing to provide to Client, the Services (as hereinafter defined) and related staff, equipment and resources, all as more fully described in Scopes of Work (as hereinafter defined) in connection with Client’s health and/or fitness solutions described in the Scopes of Work (collectively, the “**Program**”).

NOW THEREFORE, in consideration of the mutual covenants herein contained, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties hereto, intending to be legally bound, agree as follows:

**Section 1. References.** Except as otherwise specifically indicated, all references to Article, Section, and Subsection numbers refer to Articles, Sections, and Subsections of this Agreement, and all references to exhibits, schedules or appendices refer to the exhibits, schedules or appendices attached hereto. The words “herein,” “hereof,” “hereunder,” “hereinafter,” and words of similar import refer to this Agreement as a whole and not to any particular Article, Section, or Subsection hereof. Unless expressly stated to the contrary, reference to any Article includes all of the Sections contained therein, and reference to any Section includes the Subsections contained therein. The terms “include” and “including” shall be construed as if followed by the phrase “without being limited to.” The captions or section headings used herein are for convenience only, and are not a part of this Agreement. The same shall not be referred to in construing or interpreting this Agreement. Whenever the context of this Agreement requires, the masculine gender includes the feminine or neuter, and the singular number includes the plural.

**Section 2. Interpretation of Agreement.** In interpreting this Agreement, each Party expressly agrees that the Parties prepared this Agreement jointly, and no ambiguity shall be resolved against any Party on the basis that it was responsible or primarily responsible for having drafted this Agreement. In addition, each Party hereto expressly represents and warrants to any other Party hereto that (a) before executing this Agreement, said Party has fully informed itself of the terms, contents, conditions, and effects of this Agreement; (b) said Party has relied solely and completely upon its own judgment in executing this Agreement; (c) said Party has had the opportunity to seek and has obtained the advice of counsel before executing this Agreement; (d) said Party has acted voluntarily and of its own free will in executing this Agreement; (e) said Party is not acting under duress, whether economic or physical, in executing this Agreement; and (f) this Agreement is the result of arm’s-length negotiations conducted by and among the Parties and their counsel. The Parties are sophisticated and have been represented by attorneys throughout the negotiations of the provisions contained herein. All capitalized terms used herein shall have the

meanings ascribed to them herein or in the Scope of Work.

**Section 3. Services Provided.** HealthFitness agrees to provide to Client the services described in any Scope of Work as the obligation of HealthFitness (the “**Services**”). Those requirements or conditions for the Program not specifically designated as the obligation of HealthFitness in a Scope of Work shall belong to Client. Each Party shall designate one of its employees to be its “point of contact” under each Scope of Work, who shall act for that Party on all matters under the Scope of Work. Each Party shall notify the other in writing of any replacement of any such point of contact. Each of HealthFitness and Client shall be responsible for providing, at its respective cost and expense, the respective equipment, “Program Supplies” and “Expenditures” of such Party, as such responsibilities are outlined in any Scope of Work.

**Section 4. Scopes of Work.** All Scopes of Work will be substantially in the form of the Scope of Work attached hereto as Exhibit A and shall be executed by each Party. Upon execution of a Scope of Work, it shall become part of and subject to this Agreement.

**Section 5. Term.** The Term of this Agreement shall commence on the Effective Date with implementation Services provided until the Program Launch Date and then will continue in effect until the last day of the month that is sixty (60) months after the Program Launch Date (the “**Initial Term**”). Unless otherwise agreed by the Parties in writing, the Program Launch Date will be November 1, 2018. Unless otherwise terminated in accordance with this Agreement, immediately prior to the expiration of the Initial Term or any subsequent renewal Term, this Agreement and any Scope of Work shall automatically renew for additional consecutive two (2) year Terms. The Initial Term and the renewal terms are collectively referred to in this Agreement as the “**Term.**”

**Section 6. Termination.**

- (a) If any Party fails to cure a material breach of any provision of this Agreement or any applicable Scope of Work to the other Party’s reasonable satisfaction within sixty (60) days after written notice thereof, then, in addition to all other rights and remedies available to the non-breaching Party under this Agreement or applicable law, the non-breaching Party may terminate this Agreement and/or any applicable Scope of Work under which the breach occurred, upon written notice to the breaching Party.
- (b) In the event that either Party (i) becomes insolvent or makes a general assignment for the benefit of creditors, or a petition in bankruptcy shall be filed by or against such Party (and if involuntarily filed, the involuntary petition is not dismissed within sixty (60) days of filing), or any proceeding shall be instituted by or against the Party for any relief under any bankruptcy or insolvency laws or any laws relating to the relief of debtors, readjustment of indebtedness, reorganization, compositions or extensions or a receiver shall be appointed of the Party’s property or assets; (ii) takes definitive action to cause its dissolution or liquidation; (iii) ceases to do business as a going concern; or (iv) enters into an agreement for the arrangement, extension or readjustment of substantially all of its obligations, then either Party may terminate this Agreement and any Scope of Work by written notice designating the effective date of such termination
- (c) Beginning one hundred eighty (180) days before the end of the Initial Term, either Party may terminate this Agreement for convenience, without reason, cause or prejudice, upon not less than one hundred eighty (180) days prior written notice to the other Party.
- (d) Upon termination or expiration of this Agreement, whether at the end of the Term or at any other time for whatever reason, Client shall pay HealthFitness in full for all Services performed through the effective date of such termination or expiration, and the Parties shall continue to observe and perform such other obligations herein that survive termination or expiration of this Agreement. In addition, for the sake of clarity, in the event this Agreement is terminated pursuant to this Section 6, all Scopes of Work then in effect shall also terminate as of the effective date of such termination, unless otherwise

agreed by the Parties in writing.

### **Section 7. Fees; Billing.**

- (a) During any Term, Client shall pay HealthFitness all fees for the Services set forth in any Scope of Work, including, all management fees.
- (b) Except to the extent otherwise required by law, HealthFitness shall be responsible for all federal, state, and local taxes, government fees, charges, surcharges or similar exactions imposed on the Services and/or products that are the subject of the Agreement including but not limited to state and local sales and use taxes.
- (c) Client acknowledges that currently, and from time to time, there is uncertainty about regulatory classification and/or treatment of some of the Services HealthFitness provides and consequently, uncertainty about what fees, taxes and surcharges are due from HealthFitness and/or its customers. Client agrees that HealthFitness has the right to determine, in its sole discretion, what fees, taxes and surcharges are due and to collect, invoice and remit them to the relevant governmental authorities, provided, however, that HealthFitness will be solely liable for any liability resulting from such determinations
- (d) Unless otherwise stated, the rates and fees stated in each Scope of Work with a term longer than one (1) year shall be increased (unless such rates and fees are periodically adjusted to reflect HealthFitness' then-current commercial rates and fees), effective as of each anniversary of that Scope of Work's effective date, in an amount agreed to by the parties, but in any event by no more than 3% each year. Should Client request additional Services, sites or locations beyond the Services, sites or locations described in the applicable Scope of Work, the Parties shall execute a new Scope of Work or an amendment to an existing Scope of Work that describes the Services, sites or locations that Client seeks to add and the applicable rates and fees payable to HealthFitness before either Party shall have any obligation with respect to the requested additional Services, sites or locations.
- (e) HealthFitness shall provide Client, on a monthly basis, a detailed report of revenues and expenses for the immediately prior month, describing revenue and expenses on a line item basis, as well as net income or net loss for the month and year to date (based on a July 1 to June 30 fiscal year). HealthFitness shall reconcile with Client for quarterly Services and Program management fees and revenues at the beginning of each quarter for the Services provided or Management fees incurred or accruing and revenues received during the immediately preceding quarter. For purposes of this Agreement, quarters shall be defined as follows: First Quarter (July, August, and September); Second Quarter (October, November, and December); Third Quarter (January, February, and March); Fourth Quarter (April, May, and June). If there is a net amount owed to HealthFitness, Client shall pay HealthFitness within thirty (30) days of Client's receipt of invoices for Services, or Program management, the amount stated in such applicable invoice. Client shall remit payment to HealthFitness via electronic funds transfer to an account designated by HealthFitness in writing. HealthFitness may assess, and Client agrees to pay, a finance charge equal to 0.05% per day for amounts more than thirty (30) days past due.
- (f) Within thirty (30) days after each quarterly reconciliation, HealthFitness shall remit to Client all revenue in excess of expenses for the applicable three (3) month period.
- (g) **Budget Management.** The Parties agree that HealthFitness will be responsible for managing the Client's facility where Services will be performed in Sherwood, Oregon. HealthFitness will manage this facility in accordance with the Pro Forma budget that is attached to the Scope of Work, such that the revenue will, at a minimum, fully cover the operating expenses during each year of the Initial Term such that there will be a one-hundred percent (100%) recovery rate. Notwithstanding the foregoing, the Parties also agree to perform an annual review of expenses and revenues on each anniversary of the Program Launch Date, such that:

- If, after the first year, there is a budget deficit (i.e., the operating expenses are greater than the revenue for the applicable year), then the Client will be responsible for such deficits.
- If, after either the second, third, fourth or fifth years, there is a budget deficit, then HealthFitness will be responsible to the Client for such deficits; provided, however, HealthFitness' liability for such deficits shall not to exceed \$50,000.00 per year.
- If, after the first year, there is a budget surplus (i.e., the revenue is greater than the operating expenses for the applicable year), then Client will be entitled to the full amount of the budget surplus that exists at the end of the applicable year.
- If, after either the second, third, fourth or fifth years, there is a budget surplus (i.e. the revenue is greater than the operating expenses for the applicable year), then the Client will be entitled to the amount of the budget surplus that exists at the end of each applicable year; provided, however, that HealthFitness shall be entitled to, as an additional fee, a payment in the amount of twenty percent (20%) of the surplus that exists for the applicable year (each an "Annual Success Payment"). In no event shall any Annual Success Payment exceed \$50,000.00.
- If, after the first year, during any six-month period during the term of this Agreement, there is a budget deficit (i.e., the operating expenses are greater than the revenue for said period) in excess of \$50,000.00, Client shall so notify HealthFitness, and HealthFitness shall have six months to cure the budget deficit (i.e. bring the deficit to be less than or equal to \$50,000.00 for that six month period), failing which, Client may, in its sole discretion, terminate this Agreement, effective upon written notice to HealthFitness or upon such other date specified in such notice.

## **Section 8. General Representations and Warranties**

- (a) Client hereby represents and warrants to HealthFitness that:
- (i) Client is a corporation duly organized, validly existing and in good standing under the laws of the state of its formation and has the requisite corporate power and authority to own, lease or otherwise hold its properties and assets and to carry on its business as presently conducted;
  - (ii) Client has the requisite corporate power and authority to execute and to deliver this Agreement and to perform the transactions contemplated hereunder;
  - (iii) Client has procured and will maintain, at its sole cost and expense during the Term, all business licenses, permits and/or registrations required for the operation of the Client premises where Services will be performed by HealthFitness; and
  - (iv) The execution and delivery by Client of this Agreement and the performance by Client of the transactions contemplated hereunder have been duly authorized by all necessary corporate action on the part of Client and, assuming the due execution and delivery by HealthFitness, this Agreement constitutes a valid and binding agreement of Client, enforceable against Client in accordance with its terms, subject to applicable bankruptcy, reorganization, moratorium, and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity.
- (b) HealthFitness hereby represents and warrants to Client that:
- (i) HealthFitness is a corporation duly organized, validly existing and in good standing under the laws of the state of Minnesota and has the requisite corporate power and authority to own, lease or otherwise hold its properties and assets and to carry on its business as presently conducted;
  - (ii) HealthFitness has the requisite corporate power and authority to execute and to deliver this Agreement and to perform the transactions contemplated hereunder;
  - (iii) The execution and delivery by HealthFitness of this Agreement and the performance by HealthFitness of the transactions contemplated hereunder have been duly authorized by all

- necessary corporate action on the part of HealthFitness and, assuming the due execution and delivery by Client, this Agreement constitutes a valid and binding agreement of HealthFitness, enforceable against HealthFitness in accordance with its terms, subject to applicable bankruptcy, reorganization, moratorium, and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity.
- (iv) HealthFitness will perform the Services in accordance with its reasonable judgment and experience and in compliance with applicable standard industry practices, subject to direction given by Client, and consistent with the requirements of the any Scope of Work.
  - (v) EXCEPT FOR THE WARRANTIES SPECIFICALLY PROVIDED IN THIS AGREEMENT, THE SERVICES ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED. HEALTHFITNESS EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTY OR REPRESENTATION WITH RESPECT TO THE SERVICES, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE. CLIENT'S SOLE AND EXCLUSIVE REMEDY FOR HEALTHFITNESS' BREACH OF ANY WARRANTY SHALL BE HEALTHFITNESS' RE-PERFORMANCE OF THE WARRANTIED SERVICE.

#### **Section 9. Personnel; Subcontractors.**

- (a) HealthFitness may hire or retain such employees and subcontractors as it deems reasonably necessary or appropriate in connection with the Services provided under this Agreement.
- (b) HealthFitness will hire, train, promote, discharge and supervise the work of all HealthFitness employees and subcontractors in connection with the Services.
- (c) HealthFitness shall have sole responsibility for all compensation and benefits for all employees and subcontractors employed or retained by HealthFitness to provide Services.
- (d) With respect to all HealthFitness employees and subcontractors providing Services, HealthFitness has conducted or caused to be conducted a background investigation in accordance with applicable law that includes:
  - 10-panel drug screening;
  - Social security number trace ;
  - County criminal search;
  - Multi-jurisdiction index search
    - A premier database report that searches for occurrences of a person's name in one quick search across the country. It combs through more than *300 million* criminal records from county and state databases, Departments of Corrections records, national and international terrorism sources, banking and financial regulatory sanctions. Going a step further, we include a LIVE search of the National Sex Offender Public Registry—including all 50 states, the District of Columbia, Guam and Puerto Rico. This is not archived information, but a fresh search of the registry for the most accurate and current information available. In addition, knowing that results often yield partial or out-of-date information, we drill down to the county where the record occurred for accurate and verified results.
  - Confirmation of education (highest level earned)
  - Professional license/certification confirmation

For all residence and employment addresses for the past seven (7) years for any such employee or subcontractor and to the extent permitted by federal, state and/or local Law, conducted pre-assignment drug screening upon client request for any such employee to test for unlawful drug use (a "**Background Check**"). All hiring decisions and placement decisions for individuals assigned to provide Services for the Client based on information obtained in the Background Check will be made in accordance with federal, state and local Law.

**Section 10. Insurance.**

(a) HealthFitness currently has and agrees to maintain, at its sole expense, during the Term of this Agreement the following insurance coverage and shall provide proof of such insurance as Client may from time to time request:

<b>INSURANCE</b>	<b>LIMITS OF LIABILITY</b>
General Liability	\$1,000,000 Occurrence
	\$2,000,000 Aggregate
Professional Liability	\$5,000,000 Occurrence
	\$10,000,000 Aggregate
Auto Liability (Owned, Non-owned and Hired)	\$1,000,000 Occurrence
Worker’s Compensation	
Coverage A	Statutory
Coverage B	\$1,000,000 Each Accident
	\$1,000,000 Disease – Policy Limit
	\$1,000,000 Disease – Each Employee
Excess Liability	\$10,000,000 Occurrence
	\$10,000,000 Aggregate

(b) Such coverage shall be primary and non-contributory for those claims that are subject to HealthFitness’ indemnification obligation set forth in Section 16 below. Coverage shall include personal injury, bodily injury, including death, and broad form property damage, including loss of use of property, occurring in the course of or in any way related to HealthFitness’s operations. HealthFitness agrees to include Client, and its officers, agents, volunteers, and employees, as an additional insured on HealthFitness’ Comprehensive General Liability and Excess Liability Insurance Policy. HealthFitness shall provide Client, upon request, with a Certificate of Insurance evidencing the policy limits, with the additional insured language included as an endorsement.

(c) Notwithstanding the foregoing, HealthFitness, its subcontractors, if any, and all employers providing work, labor, or materials under this Agreement, who are subject employers under the Oregon Workers’ Compensation Law, shall comply with ORS 656.017, which requires them to provide workers compensation coverage that satisfies Oregon law for all their subject workers. Out-of-state employers must provide workers' compensation coverage for their workers that complies with ORS 656.126.

**Section 11. Intellectual Property; Proprietary Rights of the Parties.**

- (a) Each Party acknowledges that the other Party owns Intellectual Property as of the Effective Date of this Agreement, the possession of which shall not be challenged while this Agreement is in effect nor upon expiration or termination of this Agreement. Each Party agrees that, except as explicitly and specifically provided in this Agreement, it shall acquire no license, right, title or interest in or to the other Party’s Intellectual Property by virtue of this Agreement. For purposes of this Agreement, “**Intellectual Property**” means the collective reference to all rights, title, interest, and privileges in or relating to intellectual property, whether arising under United States, multinational or foreign laws or otherwise, including all creative or proprietary interests, data, tools, business processes, methods, symbols, copyrights, patents, trademarks, service marks, trade names, trade secrets, internet domain names and licenses, whether now or hereafter existing.
- (b) Client shall own and continue to own: (i) all Intellectual Property owned by Client prior to the date of this Agreement, and (ii) all Intellectual Property developed or purchased by Client independent of and apart from this Agreement (collectively, “**Client Intellectual Property**”), and nothing herein grants or transfers to HealthFitness any ownership interest in such Client Intellectual Property.

- (c) HealthFitness (including, for all purposes, HealthFitness' Affiliates, and third party licensors) shall own and continue to own all Intellectual Property owned by HealthFitness prior to the date of this Agreement, including (i) the "Owned Materials" specifically identified attach hereto as Exhibit B, (ii) all registrations worldwide for a family of trademarks incorporating the term *Live for Life*, used for a variety of health-related goods and services and (iii) all programming and operational manuals prepared by HealthFitness for delivery of Services and management of the Program and all systems and methods of delivery for the Services and management of the Program (collectively, "**HealthFitness Pre-Existing Intellectual Property**"), and nothing herein grants or transfers to Client any ownership interest in such HealthFitness Pre-Existing Intellectual Property, even if such Intellectual Property is embodied in any Services or deliverables provided to Client. For purposes of this Agreement, the term "**Affiliate**" shall mean any other entity directly or indirectly controlling, controlled by or under common control with entity. An entity shall be deemed to control another entity if the controlling entity owns fifty-one percent (51%) or more of any class of voting securities (or other ownership interests) of the controlled entity or possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of the controlled entity, whether through ownership of stock or other ownership interests, by contract or otherwise.

#### **Section 12. Ownership and Use of Collected Personal Information.**

- (a) Client shall own all data regarding individuals participating in the Program or receiving Services pursuant to this Agreement and maintained by HealthFitness ("**Personal Information**"). HealthFitness shall use commercially reasonable security procedures to collect, manage and maintain the confidentiality of all Personal Information and to ensure that Personal Information is only used to provide the Services or manage the Program. HealthFitness shall not be responsible for the negligent, willful or illegal acts of any third parties not retained or employed by HealthFitness with respect to the Personal Information. Notwithstanding anything to the contrary herein, HealthFitness may use for its own business purposes, such as improvement of its programs and services, aggregated data that does not identify the Client or any specific individual.
- (b) HealthFitness will provide Client with the reports identified in the Scope of Work in an aggregate, de-identified (non-individually identifiable) format, based on the Personal Information collected as part of the Services provided.

#### **Section 13. Personal Information – Transfer to Successor Vendor.**

- (a) Upon termination of this Agreement, and following the written direction of the Client, HealthFitness will provide all Personal Information data, other data related to the Services and other pertinent records related to the Services (but not any HealthFitness Intellectual Property or HealthFitness Confidential information) (collectively, "**Program Information**") to a third party designated by Client in writing (the "**Recipient**"). The transfer of Program Information shall be conducted in accordance with the provisions of this Section 13, HealthFitness' privacy policies and requirements then in effect and all applicable laws and regulations.
- (b) Client shall be responsible for the reasonable costs associated with copying, preparing, delivering and transferring Program Information and other data and records to Recipient.
- (c) Following termination or expiration of this Agreement for any reason, and notwithstanding the transfer of Program Information to the Recipient, HealthFitness shall retain a perpetual, royalty-free right to use and disclose in aggregate and de-identified (non-individually identifiable) formats for business, product and services improvement, research and analysis purposes, all Program Information collected or otherwise received by HealthFitness during the Term of this Agreement.
- (d) Client shall retain copies of all Program Information for a period of not less than six (6) years following expiration or termination of this Agreement and shall allow HealthFitness access to such information upon reasonable notice to the extent required to respond to any legal or governmental action or

proceeding. Client shall provide HealthFitness with no less than thirty (30) days' prior written notice of any planned destruction, transfer or disposal of such Program Information. Client shall require Recipient's cooperation as necessary to ensure HealthFitness' access to Program Information in accordance with this Section 13(c).

- (e) From and after HealthFitness' transfer of Program Information to a Recipient, the Parties hereby agree and acknowledge that HealthFitness shall have no liability with respect to any use of or disclosure of such Program Information by Recipient, its employees, agents, subcontractors or representatives.
- (f) The provisions of this Section 13 shall survive termination or expiration of this Agreement.

#### **Section 14. Independent Contractor Relationship.**

- (a) At all times during the term of this Agreement, HealthFitness shall be deemed to be an independent contractor of Client. The personnel or subcontractors hired or retained by HealthFitness to provide Services or manage the Program shall be solely employees, subcontractors or agents of HealthFitness, shall not under any circumstances be deemed to be employees, subcontractors or agents of Client, and shall not be entitled to participate in any employee benefit plans or employee programs of Client. Nothing contained within this Agreement shall be deemed or construed to create a partnership or joint venture, to create the relationship of employee/employer, principal/agent, or otherwise to create any liability whatsoever between HealthFitness and Client in any capacity other than as parties to this Agreement. Except as may be otherwise provided in a Scope of Work, in addition to contracts for the employment of personnel or subcontractors necessary to deliver the Services and manage the Program as specifically set forth in this Agreement or any Scope of Work, all other contracts or undertakings necessary for the delivery of the Services or management of the Program shall be in the name of and the obligation of HealthFitness, including contracts for repairs or maintenance services, utilities, supplies and merchandise.
- (b) HealthFitness acknowledges that it has no right to bind Client to any commitment or obligation and Client shall not incur any liability as the result of HealthFitness' actions or the actions of any employee or subcontractor of HealthFitness. HealthFitness' employees and subcontractors shall at all times disclose that they are employees of HealthFitness or independent contractors retained by HealthFitness, as applicable, and shall not represent to any third party that they are employees, agents, co-ventures, or representatives of Client.

**Section 15. Confidentiality.** Each Party acknowledges that it and its employees or other Representatives may, in the course of the Agreement, be exposed to or acquire Confidential Information of the other Party. Each Party agrees that it will cause its employees and other Representatives to comply with the terms and provisions of this Agreement applicable to such Party, including this Section 15. Each Party agrees to use reasonable measures, no less stringent than those measures used by such Party to protect its own Confidential Information (but not less than reasonable measures), to protect the Confidential Information of the other Party from disclosure to any third party. Each Party agrees to use Confidential Information received from the other Party pursuant to this Agreement solely in connection with the performance of such Party's obligations under this Agreement. Each Party acknowledges and agrees all Confidential Information of a Party is the property of that Party alone. No Party shall make or assert any claim to the Confidential Information of any other Party. Nothing in this Agreement shall be construed as granting any rights, title, interest, or privileges to the Party receiving Confidential Information of another Party, by license or otherwise, of any of the Disclosing Party's Confidential Information. Upon Termination of this Agreement for whatever reason (i) Client shall return to HealthFitness and cease use of all of HealthFitness' Confidential Information and (ii) HealthFitness shall return to Client and cease use of all of Client's Confidential Information. Notwithstanding the foregoing, the Parties acknowledge that Client and/or HealthFitness may be required by law, including but not limited to Oregon Public Records Law, to release certain Confidential Information to a third party, and the Parties agree that (1) releasing Confidential Information as required by law does not constitute a breach of this Agreement, and (2) prior to any such

release of Confidential Information, the party intending to disclose such information will provide written notice to the other party, and the other party may seek to prevent such disclosure by any legal means available to it. For purposes of this Agreement, “**Confidential Information**” means any and all non-public information (including all ideas, discoveries, concepts, know-how, trade secrets, techniques, designs, specifications, drawings, sketches, models, manuals, samples, tools, computer programs, technical information, and other confidential business, customer, member, client or personnel information or data) that is or reasonably could be regarded as confidential by, or proprietary to, the Party (the “**Disclosing Party**”) making the disclosure to the other Party or its Representatives (the “**Receiving Party**”), including information embedded in, contained in or related to other information disclosed by the Disclosing Party to the Receiving Party, whether or not marked as “confidential”, “private” or otherwise, whether disclosed orally or in printed, electronic or other form or manner, whether disclosed in original form, copies or reproductions and whether disclosed by such Disclosing Party or its Representatives. Confidential Information does not include information that (i) is or becomes generally available to the public other than as a result of a breach of this Agreement or any other agreement by the Receiving Party or its Representatives, (ii) was lawfully within the Receiving Party’s possession prior to being furnished by the Disclosing Party or its Representatives, (iii) is or becomes lawfully available to the Receiving Party from a source other than the Disclosing Party, without any breach or violation of any non-disclosure or confidentiality agreement by the party disclosing such information to the Receiving Party or (iv) is independently developed by the Receiving Party without use of any of the Disclosing Party’s Confidential Information. For purposes of this Agreement the term “**Representative**” shall mean a designated representative or agent (whether as independent contractor or a subcontractor) of either Party empowered and authorized by such Party and acting with or on behalf of such Party, including any Affiliate of such Party so empowered and authorized

#### **Section 16. Indemnification.**

- (a) HealthFitness shall indemnify and hold Client, its trustees, affiliates, officers, clients, agents, volunteers, and employees harmless of and from all manner of loss, liability, damage, claims, demands and actions of any nature whatsoever (including reasonable costs of litigation and attorneys’ fees) (each a “**Loss**” or collectively, “**Losses**”), which Client may hereafter incur, become responsible for, or pay out to a third party as a result of (i) the death or bodily injury to any person or destruction or damage to any property to the extent that such Loss was due to any negligent, reckless or willful act or omission by HealthFitness or its agents or employees, or (ii) any claim by a third party that any of the HealthFitness Intellectual Property (so long as it has not been modified and is used as permitted by this Agreement) infringes upon any intellectual property of a third party, subject to Section 16(b) or (iii) HealthFitness’ breach of Section 11 or Section 15 of this Agreement. Notwithstanding anything contained herein to the contrary, HealthFitness shall not have any obligation under this Section 16(a) for any portion of a Loss finally determined by a court of competent jurisdiction to arise from Clients negligence, recklessness or willful misconduct.
- (b) Notwithstanding the foregoing, HealthFitness shall not be required to indemnify Client for any infringement or alleged infringement of HealthFitness Intellectual Property to the extent that the alleged infringement or unlawful use: (i) is based on information, requirements or directives furnished by Client; (ii) is the result of a modification made by a party other than HealthFitness or its third party subcontractors; (iii) arises from use of the Services in a manner inconsistent with any Scope of Work, or use of the Services in a manner not otherwise contemplated by this Agreement; or (iv) arises out of Clients use of software licensed by Client from third parties.
- (c) Client shall indemnify and hold HealthFitness and it agents and employees harmless of and from all manner of Losses, which HealthFitness may hereafter incur, become responsible for, or pay out as a result of (i) the death or bodily injury to any person or destruction or damage to any property to the extent that such Loss was due to any negligent, reckless or willful act or omission by Client or its agents or employees, or (ii) the Client’s Program (excluding those Losses that are subject to the terms of

Section 16(a) above), or (iii) Client's breach of the terms of any Scope of Work and/or this Agreement, including but not limited to, Sections 11 or 15 hereof. Notwithstanding anything contained herein to the contrary, Client shall not have any obligation under this Section 16(c) for any portion of a Loss finally determined by a court of competent jurisdiction to arise from HealthFitness' negligence, recklessness or willful misconduct.

- (d) The indemnified Party shall promptly notify the indemnifying Party in writing of any Loss claim for which it intends to seek indemnification. The indemnifying party shall have the right to undertake, conduct and control, through counsel of its own choosing, the defense and settlement of any such Loss; provided that no such settlement may compromise any rights or interests of the indemnified Party without such Party's express written consent. The indemnified Party shall have the right to be represented by counsel of its own choosing, but, notwithstanding anything herein to the contrary, at its own expense. So long as the indemnifying Party is contesting any such Loss in good faith, the indemnified Party shall not pay or settle such Loss.

**Section 17. Remedies; Limitation of Liabilities.** Except to the extent expressly limited in this Agreement, each Party's remedies hereunder shall be cumulative and additional to any other or further remedies provided under this Agreement or by applicable law or equity, including the recovery of direct damages and the entry of injunctive relief.

- (a) A delay in notification of a breach or making a claim shall not constitute a waiver of a breach or remedy. No waiver of a breach of any provision of the Agreement by a Party shall constitute a waiver of any other or subsequent breach, or of the breached provision itself. No claim or right of a Party arising under, or related to, this Agreement may be discharged in whole or in part by a waiver or renunciation unless supported by additional consideration and in writing signed by the Party discharging such claim or right.
- (b) IN NO EVENT WILL EITHER PARTY'S LIABILITY UNDER THIS AGREEMENT OR IN CONNECTION WITH THE SERVICES PROVIDED HEREUNDER, REGARDLESS OF THE FORM OF ACTION, INCLUDE (I) ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES OR CLAIMS FOR LOSS OF BUSINESS OR PROFITS OR COST OF COVER, UNDER CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHER LEGAL THEORY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSS OR DAMAGE, OR (II) EXCEED \$5,000,000.00.
- (c) The exercise of any right of Termination or any remedies under this Section 17 shall not prejudice the right of either Party to recover any payment due at the time of such Termination and shall not prejudice any cause of action or claim of either Party accrued, or to be accrued, on account of any breach or default of this Agreement by the other Party.

**Section 18. Agreement not to Hire.** During the Term of this Agreement and for twelve (12) months thereafter, Client shall not, and shall not cause or knowingly permit any Client subcontractor or vendor to, directly or indirectly solicit or hire any employee or contractor of HealthFitness without HealthFitness' prior written consent; provided that such prior written consent shall not be required upon the payment of a Hiring Fee (as hereinafter defined) to HealthFitness. For purposes of this Agreement, the term "**Hiring Fee**" means twenty five percent (25%) of the annual base salary or fee paid to the applicable employee or subcontractor by HealthFitness in the previous twelve month period. Notwithstanding the foregoing, the Parties agree that this Section 18 shall not prevent (i) Client from advertising employment or consulting opportunities or otherwise soliciting such opportunities to the general public and/or from hiring or employing a HealthFitness employee who has voluntarily responded to such advertising or solicitations or (ii) hiring or employing a HealthFitness employee who has been terminated or ended employment with HealthFitness prior to the commencement of employment discussions with the third party.

**Section 19. Notices.**

Except as otherwise provided in this Agreement or in an applicable Scope of Work, any and all notices or other communications by either party intended for the other in respect to this Agreement or a Scope of Work shall be deemed to have been duly given if in writing and will be effective either (i) when delivered if delivered in person at the address set forth below or via facsimile or email (in each case, with confirmation of receipt received) as set forth below, or (ii) when received, if sent by an overnight courier delivery service, or sent registered or certified mail in the United States Mail; postage prepaid, return receipt requested, and addressed as set forth below. The addresses to which notices or other communications may be given by either Party may be changed by written notice given by such Party to the other pursuant to this Section.

If to HealthFitness:	If to Client:
Health Fitness Corporation 400 Field Drive Lake Forest, IL 60045 Attention: Contract Administration Associate Facsimile: 847.615.3872 Email: <a href="mailto:contracts@hfit.com">contracts@hfit.com</a> and <a href="mailto:lawcontracts@trustmarkins.com">lawcontracts@trustmarkins.com</a>	City of Sherwood 22560 SW Pine Street Sherwood, Oregon 97140 Attention: Kristen Switzer, Community Services Director Facsimile: (503) 625-5524 Email: <a href="mailto:switzerk@sherwoodoregon.gov">switzerk@sherwoodoregon.gov</a>

**Section 20. Conformity with Client Policies.** If HealthFitness comes upon Client’s premises to perform any Services, HealthFitness will comply with applicable Client security, safety, and standards of conduct policies and rules and will take all reasonable precautions to assure Consultant’s safety and the safety of others. Client shall provide HealthFitness with written copies of such applicable security, safety, and standards of conduct policies and rules prior to HealthFitness having any obligation or liability under this Section 20.

**Section 21. Successors and Assigns.** Client may not assign its rights and obligations under this Agreement without HealthFitness’ prior written consent. HealthFitness’ consent will not be unreasonably withheld or delayed. HealthFitness may freely assign its rights and obligations under this Agreement (i) upon the merger or consolidation of HealthFitness with another legal entity, (ii) upon the transfer of all or substantially all of the assets of HealthFitness to a third party or (iii) to an Affiliate of HealthFitness. Except as set forth in the immediately preceding sentence, HealthFitness may not, without the prior written consent of Client, assign its rights under this Agreement. Client’s consent will not be unreasonably withheld or delayed.

**Section 22. Governing Law; Jurisdiction; Venue.** This Agreement shall be construed and enforced under the laws of the State of Oregon, without giving consideration to any conflicts of law provisions. Each Party agrees that claims arising out of or related to this Agreement shall be brought exclusively in the courts of the State of Oregon sitting in Washington County, Oregon or the United States District Court for the District of Oregon and the appellate courts having jurisdiction over appeals from such courts. Each Party hereby irrevocably agrees that all claims in respect of any such suit, action or proceeding may be heard and determined in any such court and irrevocably waives any objection it may now or hereafter have as to the venue of any such suit, action or proceeding brought in such a court or that such a court is an inconvenient forum

**Section 23. Severability.** If any provision of this Agreement is held to be illegal, invalid, or unenforceable under any present or future law, and if the rights or obligations under this Agreement of Client on the one hand and HealthFitness on the other hand will not be materially and adversely affected thereby, (i) such provision will be fully severable; (ii) this Agreement will be construed and enforced as if such illegal,

invalid, or unenforceable provision had never comprised a part hereof; (iii) the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the illegal, invalid, or unenforceable provision or by its severance from this Agreement; and (iv) in lieu of such illegal, invalid, or unenforceable provision, there will be added automatically as a part of this Agreement a legal, valid, and enforceable provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible.

**Section 24. Not Exclusive.** Notwithstanding any other term or provision of this Agreement, HealthFitness shall not be precluded in any manner from providing services similar to the Services for third parties even where such services may produce similar results, nor from using and disclosing for any purpose any general ideas, concepts or techniques which may result from the performance of Services hereunder so long as the same do not include any of Client's Confidential Information.

**Section 25. Force Majeure.** Neither Client nor HealthFitness shall be liable for its failure to perform any obligation under this Agreement due to any cause beyond its reasonable control, including, but not limited to, strikes, riots, war, fire, acts of God, acts required in compliance with any law or government regulation.

**Section 26. Counterparts; Signature.** This Agreement and any Scope of Work may be signed in any number of counterparts all of which together shall constitute one and the same document. A signed copy of this Agreement or any Scope of Work transmitted via facsimile, email or other electronic means shall constitute an originally signed Agreement or Scope of Work, as applicable, and, when together with all other required signed copies of this same Agreement or Scope of Work, as applicable, shall constitute one and the same instrument.

**Section 27. Publicity.** Neither Party shall use the other Party's (or its respective Affiliates') trademarks, trade names or other Intellectual Property that could, in the other Party's sole judgment, identify a Party or its respective Affiliates or imply endorsement by the other Party, its respective Affiliates or any of their respective employees in any Publicity Matters without the prior written consent of the other Party or its respective Affiliates, as applicable. For purposes of this Agreement, "**Publicity Matters**" means any public statement, publicity, advertising, presentation, brochure, newsletter, book, electronic database or any other matter of whatever nature, form or manner involving a communication with a third party, whether written, electronic or oral. Notwithstanding the foregoing, HealthFitness may use Client's company name, logo or trademark in HealthFitness' promotion, marketing or advertising materials without obtaining Client's prior written consent so long as such use does not create the perception that Client endorses or otherwise sponsors HealthFitness.

**Section 28. Costs and Expenses.** In the event of any litigation between or among any of the Parties based upon or arising out of this Agreement, the substantially prevailing Party, as determined by a court of competent jurisdiction, shall be entitled to recover all of its reasonable costs and expenses (including attorneys' fees) from any non-prevailing Party. If a Party substantially prevails on some aspects of such litigation, but not others, the court shall apportion any costs and expenses, as it deems equitable.

**Section 29. Restricted Persons.** Client has not been placed on any list published and maintained by the Government of the United States of America of persons or entities with whom any U.S. person or entity is prohibited from conducting business, including without limitation the Denied Persons List maintained by the Bureau of Industry and Security and the Specially Designated Nationals and Blocked Persons List maintained by the Department of Treasury's Office of Foreign Assets Control.

**Section 30. Entire Agreement.** This Agreement, including all Exhibits, Scopes of Work and Addenda, sets forth the entire agreement of the Parties hereto and cannot be changed or modified except by an agreement in writing signed by each Party or its duly authorized agent. In the event of any conflict between the terms of this Agreement, any Exhibit, Scope of Work or Addenda, the terms of this Agreement shall control, unless the specific conflicting term in the Exhibit, Scope of Work or Addenda explicitly states that that particular term is intended to control over a specific conflicting term in the Agreement. This Agreement, including all Exhibits, Scopes of Work, and Addenda, supersedes all prior oral and written communications, agreements and understandings of the Parties, if any, with respect to the subject matter hereof.

**Section 31. HIPAA; Business Associate Agreement.** Except to the extent of a separate business associate agreement between the Parties, Confidential Information includes “Protected Health Information,” as that term is defined in 45 CFR Section 160.103 of the federal privacy regulations and such Confidential Information would be subject to the protections and requirements of the Health Insurance Portability and Accountability Act of 1996 (and the applicable regulations, rules and procedures thereunder, “HIPAA”). In the event that Client will provide, directly or through its subcontractors, Protected Health Information to HealthFitness as part of the Program, prior thereto the Parties will enter into a business associate agreement on such terms a mutually agreeable to the Parties.

**Section 32. Survival.** All terms, conditions, obligations, representations and warranties capable of surviving termination or expiration of this Agreement shall so survive, including, without limitation: Section 6, Section 11, Section 12, Section 13, Section 15, Section 16, Section 17, Section 18, Section 19, Section 27, Section 27, Section 30, Section 31 and Section 32.

### **Section 33. Access to Records; Audit**

(a) HealthFitness shall maintain, and the Client and its duly authorized representatives shall have access during normal business hours to, the books, documents, papers, and records of HealthFitness which are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts, and transcripts for a period of three years after payment. Copies of applicable records shall be made available upon reasonable request. Payment for cost of copies is reimbursable by the Client.

(b) The Client, either directly or through a designated representative, at the Client's expense except as provided in subsection (c) below, may conduct financial and performance audits of the billings and services specified in this Agreement at any time in the course of the Agreement and during the three (3) year period established by subsection (a) above. Audits will be conducted in accordance with generally accepted auditing standards as promulgated in Government Auditing Standards by the Comptroller General of the United States General Accounting Office.

(c) If an audit discloses that payments to HealthFitness were in excess of the amount to which HealthFitness was entitled, then HealthFitness shall repay the amount of the excess to the Client. If the payments to HealthFitness were in excess of the amount to which HealthFitness was entitled by five percent (5%) or more, then HealthFitness shall additionally repay to the Client the reasonable costs of the audit performed under subsection (b) above. If audit discloses that payments to HealthFitness resulted in underpayment, Client will pay balance due to HealthFitness.

### **Section 34. Miscellaneous Terms and Statutory Provisions.**

(a) Identification. HealthFitness shall furnish to the Client HealthFitness' employer identification number, as designated by the Internal Revenue Service, or, if the Internal Revenue Service has designated no employer identification number, HealthFitness' Social Security number.

(b) Duty to Inform. HealthFitness shall give prompt written notice to the Client if, at any time during the performance of this Agreement, HealthFitness becomes aware of actual or potential problems, faults, or defects in the project, any nonconformance with the Agreement, or with any federal, state, or local law, rule, or regulation, or has any objection to any decision or order made by the Client. Any delay or failure on the part of the Client to provide a written response to HealthFitness shall constitute neither agreement with nor acquiescence in HealthFitness' statement or claim, and shall not constitute a waiver of any of the Client's rights.

(c) Conflict of Interest. Except with the Client's prior written consent, HealthFitness shall not engage in any activity, or accept any employment, interest or contribution that would, or would reasonably appear, to compromise HealthFitness' professional judgment with respect to this Agreement, including, without limitation, concurrent employment on any project in direct competition with the subject of this Agreement.

(d) Statutory Provisions. As provided by ORS 279B.220, HealthFitness shall:

- (i) Make payment promptly, as due, to all persons supplying to HealthFitness labor or material for the performance of the work provided for in this Agreement.
- (ii) Pay all contributions or amounts due the Industrial Accident Fund from HealthFitness or any subcontractor incurred in the performance of this Agreement.
- (iii) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.
- (iv) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.
- (v) As provided by ORS 279B.230, HealthFitness shall promptly, as due, make payment to any person, copartnership, association, or corporation furnishing medical, surgical, and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of HealthFitness, of all sums that HealthFitness agrees to pay for the services and all moneys and sums that HealthFitness collected or deducted from the wages of employees under any law, contract, or agreement for the purpose of providing or paying for the services. It is a condition of this Agreement that all employers working under this Agreement are either subject employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126.
- (vi) As provided by ORS 279A.110, HealthFitness may not discriminate against a subcontractor in the awarding of a subcontract because the subcontractor is a minority, women, or an emerging small business enterprise certified under ORS 200.055 or a business enterprise that is owned or controlled by or that employs a disabled veteran, as defined in ORS 408.225. If HealthFitness violates this subsection, the Client may

regard the violation as a breach of contract that permits the Client to: (1) terminate this Agreement; or (2) exercise any remedies for breach of contract that are reserved in this Agreement.

(vii) As provided by ORS 279B.235, HealthFitness' employees shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime. HealthFitness must give notice in writing to employees who work on this Agreement, either at the time of hire or before commencement of work on this Agreement, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first set forth above.

*City of Sherwood, Oregon*

*Health Fitness Corporation*

By: \_\_\_\_\_

By: \_\_\_\_\_

Joseph Gall  
\_\_\_\_\_

\_\_\_\_\_

Title: City Manager  
\_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_