

MEMORANDUM OF UNDERSTANDING

WHEREAS, on or about June 1, 2012, the Workers' Compensation Board (Board) assumed the administration and final distribution of the assets and liabilities of the Mercantile Self-Insurance Trust ("MERC"); and

WHEREAS, upon the Board's assumption of the administration and final distribution of MERC's assets and liabilities, the Board commissioned a forensic accounting of MERC with the stated purpose of verifying MERC's accumulated deficit, as determined by SaxBST, LLP, and allocating the accumulated deficit among the former employer members of MERC (MERC Forensic Analysis); and

WHEREAS, after the Board's assumption of MERC's assets and liabilities, the Board purchased an assumption of liability policy (ALP) for MERC which transferred all remaining claims liability for MERC to an insurance carrier pursuant to Workers' Compensation Law (WCL) §50(3-a)(7)(a); and

WHEREAS, in order for the Board to pay for the ALP it purchased for MERC, bonds were issued by the New York State Dormitory Authority and the interest payments on those bonds require repayment by the Board; and

WHEREAS, the MERC Forensic Analysis has been completed and the Board has stated that it has provided to all former members of MERC a copy of the Deficit Reconstruction and 2016 Assessment (2016 Assessment), dated January 26, 2016 by mailing it to the MERC members, and a copy of the MERC Forensic Analysis has been made available on its website; and

WHEREAS, the Board has also stated that it has served all former members of MERC with invoices detailing their pro-rata share and joint and several liability for the 2016 Assessment; and

WHEREAS, "Attachment A" which is annexed hereto, identifies the former employer member(s) of MERC who hereby agree to participate in this Memorandum of Understanding (all former employer members who join this Memorandum of Understanding shall hereafter be collectively referred to as "Participating MERC Members"); and

WHEREAS, the Board acknowledges that the Participating MERC Members dispute their liability and/or the amounts assessed in connection with their respective membership in MERC as set forth in the 2016 Assessment; and

WHEREAS, the Participating MERC Members seek a thorough review of the MERC Forensic Analysis and the 2016 Assessment by expert actuaries, claims reviewers and forensic accountants to determine the accuracy of the amounts assessed; and

WHEREAS, the Participating MERC Members seek the production of necessary documentation to permit the review of the MERC Forensic Analysis and the 2016 Assessment contemplated by the "WHEREAS" clause above and wish to preserve their legal and equitable rights and avoid the time, effort and expense of litigation, including, but not limited to, Article 78 proceedings, other discovery proceedings and/or FOIL requests to obtain the same; and

WHEREAS, the Board is in need of a steady flow of funds from the former employer members of MERC, including the Participating MERC Members, to meet the obligations of MERC; and

WHEREAS, the Board wishes to avoid the time, effort and expense of litigation to compel the payment of the 2016 Assessment by the Participating MERC Members; and

WHEREAS, both the Board and the Participating MERC Members wish to preserve all of their legal rights with respect to the Board's assessment.

NOW THEREFORE, in consideration of this Memorandum of Understanding (hereinafter referred to as "Agreement") and for other good and valuable consideration, receipt of which is hereby acknowledged, the Participating MERC Members, and the Board hereby agree as follows:

1. Effective Date, Counterparts. This Agreement shall become effective upon its execution by the parties hereto, through their respective counsels. This Agreement may be executed in counterparts, each of which shall be an original, but all of which, taken together, shall constitute one Agreement binding on all parties.

2. Tolling of Limitations Periods. The time period during which this Agreement is in effect, commencing on the execution date by both parties, shall not be included, asserted, or relied upon in any way in computing the running of the time under any applicable statute of limitations, or by way of laches, in defense of any administrative and/or civil action brought by the Board or its agents against the Participating MERC Members or brought by Participating MERC members against the Board, including, but not limited to, actions arising under Article 78 of the CPLR. Nothing in this Agreement shall have the effect of reviving any claims which were barred by the passage of time or the statute of limitations as of the execution date hereof.

3. Standstill Commitment by the WCB. During the time that this Agreement is in effect, the Board and its agents will not commence an administrative and/or civil action against any individual Participating MERC Member to collect the 2016 Assessment or any subsequent assessment so long as that Participating MERC Member is in compliance with the obligations of Paragraph 10 herein. The failure of one or more Participating MERC Members to comply with the obligations of Paragraph 10 shall not trigger an administrative and/or civil action by the Board or its agents against Participating MERC Members who are in compliance with Paragraph 10.

4. Standstill Commitment by Participating MERC Members. During the time that this Agreement is in effect, the Participating MERC Members will not commence any civil action and/or proceeding pursuant to CPLR Article 78 against the Board to challenge the MERC Forensic Accounting, the amount of the 2016 Assessment or for any other reason and will not file FOIL or other information requests with the Board relative to the MERC Forensic Accounting and/or the amount of the 2016 Assessment. Nothing herein shall prevent, limit or restrict Participating MERC Member's right to access MERC information as set forth in this Agreement.

5. Reservation of Rights. Other than the commitments made herein, both the Board and the Participating MERC Member(s) reserve all other rights, defenses and claims, legal and equitable,

that may be asserted in administrative actions, civil actions and/or proceedings pursuant to CPLR Article 78, except as modified by Paragraphs 2, 3 and 4 above.

6. Terms of Agreement. This agreement shall expire on **October 15, 2016** unless either party terminates the agreement pursuant to Paragraph 8 below or renews the agreement pursuant to Paragraph 7 below. Monthly payments due hereunder in accordance with **Attachment A** hereto shall be made on the 15th day of each month for a period of **six (6) months** beginning on **May 15, 2016 through and including October 15, 2016.**

7. Extension of Agreement Term. The Participating MERC Member(s) and the Board may agree in writing to extend the term of this Agreement.

8. Termination of Agreement. Either the Participating MERC Member(s), acting jointly through counsel, or the Board may terminate this Agreement by giving ninety (90) days prior written notice of such termination to the other party hereto.

9. Notices. Any notice given pursuant to this Agreement shall be made by any delivery with proof of service, addressed to the other party as hereinafter set forth, or to such other address as a party may designate, and shall be deemed given upon mailing or hand delivery.

a. Any such notice given to the Board shall be addressed to:

Michael Papa
Deputy General Counsel
Workers' Compensation Board
328 State Street
Schenectady, New York 12305-2318

b. Any such notice given to the Participating MERC Members shall be addressed to:

Please Print Name of Signatory Above

_____ [title/position]

_____ [Name of Company]

_____ [Address]

c. Any such notice given to the Participating MERC Members shall have a copy sent to:

Name of Attorney (if applicable)

Either party may amend this notice provision by providing notice of change of address pursuant to the terms of this paragraph.

10. Monthly Payment of Portion of Assessment. Each and every one of the Participating MERC Members, shall, within thirty (30) days of the execution of this Agreement but in no event later than May 15, 2016, and monthly on the 15th day each and every month thereafter, so long as this Agreement is in effect, remit payments to the Board in an amount equal to **forty percent (40%)** of the 2016 Assessment charges against that Member, at the rate corresponding to the longest repayment plan available to such Participating MERC Members. All funds received pursuant to this paragraph shall be applied to reduce the principle of the amount claimed owed by the Board by each Participating MERC Member, as set forth in the MERC 2016 Assessment for each Participating MERC Member.

11. Interest and Penalties. All Participating MERC Members who begin and continue to make the monthly payments set forth in Paragraph 10 above, do not seek any recoupment of such payments except pursuant to Paragraph 14 and 15 of this Agreement, and comply with all other terms of this Agreement, shall not be assessed by the Board or its agents in any administrative and/or civil action(s): (i) any interest, collection fees and/or penalties associated with the State Finance Law or any other law or rule relative to the payments made pursuant to this Agreement; (ii) any interest for the period of this Agreement; (iii) collection fees and/or penalties on the amount of payments as of the termination date of this Agreement that would have been paid pursuant to this Agreement had the Participating MERC Members made payments at one hundred (100%) percent of the 2016 Assessment charges against the Participating MERC Members at the rate corresponding to the longest repayment plan available to such Participating MERC Members at a rate that exceeds eleven (11%) percent.

12. Most Favored Nation. To the extent the Board enters into any Agreement with other MERC Members or their representative counsel, which any Participating MERC Member deems to be more beneficial than that which is provided for herein, the Board shall agree to extend the same terms to the Participating MERC Members and shall provide Participating MERC Members copy of said agreement. For purposes of this paragraph, the Board's granting of the Hardship payment plan on an individual basis shall not be deemed to be a more beneficial Agreement.

13. Discovery. To the extent requested, the Board shall provide the expert or experts selected by the Participating MERC Members with access to all documentation reasonably required by a set of duly accredited and licensed actuaries and forensic accountants (Expert(s)) to review the MERC Forensic Accounting and 2016 Assessment, as well as any subsequent assessment, for accuracy as against all employer members of MERC as a whole and the Participating MERC Members in particular, subject to the restrictions on disclosure and confidentiality protections set forth below. The actuarial Expert selected shall be a fellow or associate of the casualty actuarial society, and the accounting Expert selected shall be a Certified Public Accountant. The review performed by the Experts shall consist of the production of the following documents and/or the providing of access to said documents at the following times and in the following manner:

A) *Documents regarding the MERC Forensic Analysis and the 2016 Assessment:* Not sooner than May 15, 2016, the Expert shall provide the Board with a proposed process to be used in connection with the granting of access to documents sufficient to review the MERC Forensic Accounting and 2016 Assessment (collectively Employer Material). Said process must include the execution of a confidentiality agreement, to be drafted by the Board and mutually-agreed upon by both parties, and a detailed recitation of the manner in which the Expert plans to protect from verbal or written disclosure to the Participating Members and the Public: i) any and all individually identifiable claimant information, including, but not limited to, payroll information, experience modification calculations, premium calculations, audited financial statements, tax returns, credit histories, Federal Employer Identification Numbers, Unemployment Insurance Identification Numbers, and names of individual employees contained within the Employer Material. To the extent that counsel to the Participating MERC Members will seek access to the Employer Material then counsel to the Participating MERC Members shall execute the same or similar confidentiality agreement executed by the Expert. The Board shall evaluate the reasonableness of such process and, within fifteen (15) days of its receipt, either approve, or disapprove, with good faith reasons therefor, such proposed process. In the event of a good faith disapproval, then the parties shall have an additional fifteen (15) days in which to arrive at a mutually-agreed upon process. Within fifteen (15) days after the approval of a mutually-agreed upon process, the Expert shall be granted access to the Employer Material pursuant to the agreed-upon process and at an agreed-upon time that will minimize disruption to the Board's consultants and cause no interruption in the provision of benefits to injured workers. Within thirty (30) days of the completion of a final report, such report shall be provided to the Board.

14. Third Party Proceeds. The Board has received, and continues to review, the 2016 Forensic Analysis for MERC. The Board believes there may be viable causes of action against third parties relative to their acts or omissions in connection with the administration of MERC. In the event damages are recouped by the Board, said funds shall be used to first to repay prior statutory assessments relative to MERC levied upon other self-insured employers; and second then to be distributed in accordance with Paragraph 15. MERC's deficit, if any, shall be reduced by the amount of damages recouped by the Board.

15. Repayment in the Event of a Fund Surplus. In the event that the application of paragraph 14, when combined with the payments of the Participating MERC Members pursuant to this Agreement and/or an agreement by the parties as to the ultimate amount of the MERC deficit, results in a surplus of funds over and above the MERC deficit, then the Board shall, within ninety (90) days, refund said surplus (in the appropriate proportion and not to the exclusion of non-Participating MERC Members) to the Participating MERC Members in the same proportion in which the total payments made pursuant to this Agreement were made individually by the Participating MERC Members. Any allocation of said surplus shall also consider prior payments by MERC Members, if any were so made.

16. Settlement Offer. At the conclusion of this Agreement, the Board will issue a “Settlement Offer” to all former employer members of MERC, including the Participating MERC Members. Such settlement offer will calculate the **Final Pro Rata Allocation (FPRA)** for each former member employer of MERC. The Board will then provide each former member employer an opportunity to pay or make arrangements to pay their respective FPRA amounts. Upon full payment of the FPRA by any former member employer, the Board will issue a full and complete release to that former employer member absolving them of any further liability for any obligations that arose out of the former employer member’s participation in MERC.,

17. No Third Party Beneficiary. This Agreement is not intended to create and does not create any rights in or benefits to any third party.

18. Use of Agreement. This Agreement may not be introduced into evidence, construed as an admission or otherwise mentioned in any action or other proceeding between the Board and/or its agents, the Participating MERC Members, or anyone else, except to enforce compliance with this Agreement, demonstrate compliance with the terms of this Agreement or to establish the Participating MERC Members’ agreed upon payment schedule during this Agreement’s term.

19. Governing Law. This Agreement shall be governed by the laws of the State of New York, without giving effect to rules of conflict of laws.

20. Authority to Sign Agreement. The signatory on behalf of the Participating MERC Member(s) warrants and represents that it is duly authorized to enter into this Agreement on behalf of the Participating MERC Member(s) set forth on **Attachment A**.

21. Bi-Lateral Negotiations. The parties acknowledge that this Agreement is the result of negotiations between the parties hereto. It is understood and agreed that both parties shall be deemed to have drafted this document in order to avoid any negative inference by any court as against the party preparing this Agreement.

22. Captions. All captions set forth herein are for ease of reference only and shall not affect the meaning of the paragraph.

23. Amendment. This Agreement may not be amended, modified, or changed except in writing with notice as set forth above. This Agreement supersedes and replaces any and all prior agreements and contracts.

24. Compliance. For purposes of this agreement, “compliance” shall mean full compliance, provided that neither the Board nor a Participating MERC Member shall be found not to be in compliance until that party has been given the opportunity to cure the defect during a period of ten (10) days from receipt of written notice to its counsel, in the manner set forth in Paragraph 9. In the event that a Participating MERC Member defaults on its payment obligation under Paragraph 10 of this Agreement and fails to cure such default in accordance with this Paragraph then the entire amount due and owing by the Participating MERC Member pursuant to this Agreement shall be accelerated and become immediately due. The Board shall have the option of taking whatever action it deems appropriate to collect such funds with such actions being in

addition to, and separate and apart from, any other remedy at law or in equity that the Board has or may have with respect to the entire amount owed by the Participating MERC Member in connection with its membership in MERC. In addition, in the event that: (i) a Participating MERC Member notifies the Board, prior to the due date of a monthly payment required under this Agreement, that financial circumstances have changed such that the Participating MERC Member can no longer meet its agreed upon financial obligation under this Agreement, (ii) such Participating MERC Member further provides a completed Hardship application and supporting documentation; and (iii) the Board approves such Hardship application, then such Participating MERC Member shall not be held in default under this Paragraph. Notwithstanding the foregoing, in the event of a default under this Agreement and when the Participating MERC Member does not qualify for a Hardship, the Board shall offer the opportunity to cure by allowing for catch-up payments by the Participating MERC Member for the balance due and owing that shall be spread equally over the remaining term of the Agreement.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed and intend to be legally bound hereby, as of _____, 2016.

Dated: _____

Dated: _____

On Behalf of Participating MERC Member

Attorney for the Board

By: _____

By: _____

Michael Papa, Esq.
Deputy General Counsel
Workers' Compensation Board
328 State Street
Schenectady, New York 12305-2318