

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

**In the Matter of the Settlement
For the Reimbursement of Administrative
Costs for Inactive Hazardous Waste Disposal
Site, Under Article 27, Title 13 of the
Environmental Conservation Law
of the State of New York for**

**ORDER ON CONSENT
AND
ADMINISTRATIVE
SETTLEMENT**

INDEX NO. R7-20231129-77

SITE NO. 704029

Hereinafter referred to as "Site"

By:

**AMERICAN FITNESS, INC.,
BAHAMA MAMA, LLC, and
BRIAN ANDRULEWICH,**

Hereinafter referred to individually and
collectively as "Settling Respondent"

1. A. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of the Environmental Conservation Law of the State of New York ("ECL") and the New York State Finance Law ("SFL") and such laws provide the Department authority to enter into this Order on Consent and Administrative Settlement (the "Order").

B. The Department is responsible for carrying out the policy of the State of New York to conserve, improve and protect its natural resources and environment and control water, land, and air pollution consistent with the authority granted to the Department and the Commissioner by Article 1, Title 3 of the ECL.

C. The Department also asserts that it has the authority, *inter alia*, to provide for the prevention and abatement of all water, land, and air pollution. See, e.g., ECL 3-0301.1.i.

D. This Order is issued pursuant to the Department's authority under, *inter alia*, ECL Article 27, Title 13, ECL Article 71, Title 27, and ECL 3-0301 and Section 97-b of the SFL, and resolves Settling Respondent's liability to the State under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA") 42 U.S.C. § 9601 *et seq.*, to the extent set forth herein. Accordingly, to the extent set forth in Subparagraph XIII.E, pursuant to CERCLA §

113(t)(3)(B), 42 U.S.C. § 9613(t)(3)(B), Respondent may seek contribution from persons who are not parties to this Order.

E. 6 NYCRR 375-2.1(l)(ii) authorizes the Department to expend money of the hazardous waste remedial fund provided for at SFL section 97-b to pay for the cleanup or restoration to its original state of any area where contaminants were disposed of or possessed unlawfully contrary to ECL 27-0914. 6 NYCRR 375-2.1(l)(iii) authorizes the Department to expend moneys of the hazardous waste remedial fund as provided for in SFL section 97-b to pay for site identification, classification, and investigation activities including, but not limited to testing, analyses, and record searches and the Department's related administrative activities.

2. AMERICAN FITNESS, INC. ("Settling Respondent") is a domestic business corporation with its principal executive office located at 1808 Vestal Parkway East, Vestal, New York 13850, and a person as defined in ECL 1-0303 and 6 NYCRR 375-2.1(ag).

3. BAHAMA MAMA, LLC ("Settling Respondent") is a limited liability company with its principal executive office located at 1808 Vestal Parkway East, Vestal, New York 13850 and a person as defined in ECL 1-0303 and 6 NYCRR 375-2.1(ag). Bahama Mama, LLC is the owner, having taken title on June 26, 2013 of that certain property located at 1808 Vestal Parkway East, Vestal, New York 13850, Broome County and more specifically identified as Tax Map No. 158.13-3-2.1 (hereinafter, the "Site"). Exhibit "A" is a map of the Site showing its general location.

4. BRIAN ADRULEWICH ("Settling Respondent") is a person as defined in ECL 1-0303 and 6 NYCRR 375-2.1(ag) and is the Chief Executive Officer of American Fitness, Inc. and the sole member Bahama Mama, LLC.

5. Settling Respondents maintains that neither they, nor their members, officers, or directors have any relationship to other persons that have liability for the Site, other than the purchase of the Site by Bahama Mama, LLC.

6. Settling Respondents operate a fitness center located at 1808 Vestal Parkway East, Vestal New York, which is an Inactive Hazardous Waste Disposal Site as defined at ECL 1-0303 and 6 NYCRR 375-1.2(y).

7. The Site is currently listed in the *Registry of Inactive Hazardous Waste Disposal Sites in New York State* as "Hidden Valley Electronics, Inc." Site No. 704029, with a Class "4" classification, pursuant to ECL 27-1305, indicating that the site is "properly closed - requires continued management." Pursuant to the legal authorities stated herein, the Department has, and anticipates the need to spend additional monies of the hazardous waste remedial fund for the implementation of a Remedial Program,¹ including

¹ As the term is defined in 6 NYCRR §375-1.2(ap).

the operation and maintenance of the site management requirements found in the Site Management Plan and any amendments to such plan identified on or in proximity to the Site. These expenditures are authorized by and in conformance with relevant and applicable state and federal law.

8. The Department alleges for purposes of this Order only that Settling Respondents are liable for the reimbursement of the Department's administrative response costs (including any legally accrued interest) for the investigation and remediation of hazardous wastes and/or substances existing on the Site in accordance with applicable state and federal law.

9. Settling Respondents, in entering into this Order, do not admit any liability or fault with respect to any matter arising out of or relating to the Site.

10. The goals of this Order are for (i) Settling Respondents to pay to the Department a sum of Ten Thousand Dollars (\$10,000.00) to settle past and future costs as delineated in Par II; (ii) the Department to release and covenant not to sue the Settling Respondents for the investigation and remediation of the Site and for the reimbursement of Site related response costs upon the execution of this Order as delineated in Par VII; and (iii) the Department to provide Settling Respondents with contribution protection provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and/or any other applicable federal or state law for matters addressed by this Order.

11. Settling Respondents consent to the Department's issuance of this Order without an admission or finding of liability of any kind. The parties recognize that the implementation of this Order is mutually acceptable, fair, reasonable, and in the public interest.

12. Solely with regard to the matters set forth herein, the Settling Respondents hereby waive any right to a hearing as may be provided by law, consent to the issuance and entry of this Order, and agree to be bound by its terms. Settling Respondent consents to and agree not to contest the authority or jurisdiction of the Department to issue or enforce this Order and agree not to contest the validity of this Order or its terms.

NOW, having considered this matter and being duly advised, **IT IS ORDERED THAT:**

I. Site Specific Definitions

Unless otherwise expressly provided herein, terms used in this Order which are defined in ECL Article 27 or in regulations promulgated thereunder shall have the meaning assigned to them under said statute or regulations, or amendments thereto. The following terms shall have the following meaning:

A. The Site: The real property designated by the Department as New York State Inactive Hazardous Waste Site Number 704029, approximately 2.639 acres

in size, known as the "Hidden Valley Electronics Inactive Hazardous Waste Site" located at 1808 Vestal Parkway East, Town of Vestal, Broome County and more specifically identified as Tax Map Section 158.13, Block 3, Lot 2.1. Exhibit "A" is a map of the Site showing its general location.

B. Covered Contamination: Any release, as that term is defined in 6 NYCRR § 375-1.2(am), on or under the Site or that has or is emanating from the Site of hazardous waste, as that term is defined in 6 NYCRR § 375-1.2(w) which occurred prior to the effective date of Consent Decree #1:11-CV-1077 between State of New York/NYSDEC and CG Properties, LLC, Allen J. Green, and Hidden Valley Electronics, Inc.

II. Settlement Payment

A. Settling Respondent shall pay to the Department a sum of TEN THOUSAND DOLLARS (\$10,000.00) to settle past and future costs as delineated in Par VII immediately upon closing of the sale of the Site.

B. Settling Respondent shall not interfere with the requirements of the Environmental Easement including implementation of the Site management Plan and any and all engineering controls as they are described in the Site Management Plan.

III. Appropriate Care/Cooperation

Settling Respondents shall exercise appropriate care² at the Site with respect to the Covered Contamination and shall comply with all applicable local, State, and federal laws and regulations. Settling Respondents shall cooperate fully with the Department in the implementation of any additional response³ actions needed to address Covered Contamination at the Site and shall not interfere with such response actions. Settling Respondents shall affirmatively ensure that any development activities on the Site during Settling Respondents' control or ownership of the Site are in compliance with the environmental easement, all applicable local, State, and federal laws and regulations, including but not limited to 6 NYCRR §§ 375-1.1(d) and 375-2.11(a).

IV. Certification

By entering into this Order, Settling Respondents certify that they have not caused or contributed to the release or threatened release of a hazardous waste from or onto the Site, nor generated, transported, or disposed of, arranged for, or caused the generation, transportation, or disposal of hazardous waste from or onto the Site.

² As the term is defined in 42 U.S.C. § 9601(40)(D).

³ As that term is defined in 42 U.S.C. § 9601(25).

V. Environmental Easement

A. An Environmental Easement ("EE") for the Site was recorded on December 19, 2012, which runs with the land in favor of the State, and which complies with the requirements of ECL Article 71, Title 36, and 6 NYCRR § 375-1.8(h)(2) for the Site.

B. The EE for the Site limits the use and development of the property to commercial use as defined in 6 NYCRR § 375-1.8(g)(2)(iii) or to industrial use as defined in 6 NYCRR § 375-1.8(g)(2)(iv); requires compliance with the Department-approved Site Management Plan ("SMP"); restricts the use of groundwater as a source of potable or process water, without necessary water quality treatment as determined by New York State Department of Health or Broome County Department of Health and without the Department's written approval; requires any disturbance of the soil be performed in accordance with the SMP; requires evaluation of the potential for vapor intrusion for any building and the development and implementation of a plan to monitor or mitigate identified vapor intrusion impacts; and requires the property owner to complete and submit to the Department a periodic certification of the institutional and engineering controls.

VI. Access

A. Settling Respondents hereby consent, upon reasonable notice under the circumstances presented, to grant entry upon the Site by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to the hazardous wastes/substances on the Site; by any agent, consultant, contractor, or other person so authorized by the Commissioner for assuring compliance with the Site Management Plan.

B. Settling Respondents shall ensure during its ownership that lessees, and sublessees of the Site provide the same access.

VII. Release and Covenant Not to Sue

A. The Department hereby releases and covenants not to sue, and shall forbear from bringing any action, proceeding, or suit pursuant to the Environmental Conservation Law, or the State Finance Law, and from referring to the Attorney General any claim for recovery of costs incurred by the Department, against the Settling Respondents for the further investigation and remediation of the Site, including but not limited to an action pursuant to Section 9607(a) of CERCLA, 42 U.S.C. § 9607(a), based upon the release or threatened release of Covered Contamination, provided that: (a) Settling Respondents pay the sum of \$10,000.00 to the Department; (b) Settling Respondents continue to exercise appropriate care and cooperation as required in Paragraph III; and (c) Settling Respondent continues to allow access as required by Paragraph VI.

B. Nonetheless, the Department hereby reserves all of their respective rights concerning, and such release and covenant not to sue shall not extend to any further investigation or remedial action the Department deems necessary:

- due to off-Site migration of petroleum;⁴
- due to environmental conditions or information related to the Site which was unknown at the time this Order was issued and which indicate that this Order cannot be implemented with sufficient protection of human health and the environment;
- due to Settling Respondents' failure to implement the Order to the Department's satisfaction; or due to fraud committed by Settling Respondent in entering into or implementing the Order.

Additionally, the Department hereby reserves all of their respective rights and defenses under applicable law respecting any Departmental assertion of remedial liability against Settling Respondents, and any such release and covenant not to sue shall not extend to any Settling Respondents who cause/caused or allow/allowed a release or a threat of release at the Site of any hazardous waste (as that term is defined at 6 NYCRR § 375-1.2(w)) or petroleum (as that term is defined in Navigation Law § 172(15)), other than Covered Contamination; nor to any Settling Respondent who is otherwise responsible under law for the remediation of the Covered Contamination independent of any obligation that party may have respecting same resulting solely from the execution of this Order on Consent and Administrative Settlement.

Notwithstanding the above, however, with respect to any claim or cause of action asserted by the Department, the one seeking the benefit of this release and covenant not to sue shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to the Covered Contamination.

Notwithstanding any other provision in this release, covenant not to sue, and forbearance,

- if with respect to the Site there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this order shall be construed or deemed to preclude the State of New York from recovering such claim.
- except as provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights (including, but not limited to, the right to recover natural resources damages) with respect to any party, including Respondent.
- nothing contained in this Order shall prejudice any rights of the Department to

⁴ As that term is defined in Navigation Law § 172(15).

take any investigatory or remedial action it deems necessary if Settling Respondent fails to comply with the Order or if contamination other than Covered Contamination is encountered at the Site.

- nothing contained in this Order shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.
- nothing contained in this Order shall be construed to affect the Department's right to terminate the Order and this "Release and Covenant Not to Sue" under the terms of the Order at any time during its implementation if Settling Respondent fails to comply substantially with the Order's terms and conditions.

This release and covenant not to sue shall be null and void, *ab initio*, in the event of fraud relating to the execution or implementation of this Order or in the event of the Settling Respondents' failure to materially comply with any provision of this Order.

Nothing herein shall be construed as barring, diminishing, adjudicating, or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action or demands whatsoever that: (i) Settling Respondents may have against anyone other than the Department, including but not limited to rights of contribution under § 113(f)(B)(3) of CERCLA, 42 U.S.C. § 9613(f)(B)(3); and (ii) the Department may have against anyone other than the Settling Respondents and its directors, officers, employees, agents, and servants that were not responsible under law for the development and implementation of a Remedial Program at the Site prior to the effective date of this Order, and their respective secured creditors.

C. The benefits of the Release and Covenant Not to Sue set forth in Subparagraph VII.A. shall survive termination of this Order pursuant to Subparagraph XII.A.

VIII. Indemnification

Settling Respondents shall indemnify and hold the Department, the State of New York and its representatives and employees harmless as provided by 6 NYCRR § 375-2.5(a)(3)(i).

IX. Transfer of Ownership Interest

- A. If the Settling Respondents propose to convey the whole or any part of its ownership interest in the Site, or become aware of such conveyance, the Settling Respondents shall, not fewer than forty-five (45) days before the date of conveyance, or within forty-five (45) days after becoming aware of such conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed or actual date of the conveyance, and shall

notify the transferee in writing, with a copy to the Department, of the applicability of this Order. However, such obligation shall not extend to a conveyance by means of a corporate reorganization or merger or the granting of any rights under any mortgage, deed, trust, assignment, judgment, lien, pledge, security agreement, lease, or any other right accruing to a person not affiliated with the Settling Respondents to secure the repayment of money or the performance of a duty or obligation.

- B. In the event of an assignment or transfer of the Site or an assignment or transfer of an interest in the Site, the assignee or transferee must consent in writing to be bound by the terms of this Order, and upon delivery to the Department of a validly executed Consent of Additional Signatory, the transferor's obligations hereunder shall terminate.

X. Reservation of Rights

A. The release and covenant not to sue set forth in Subparagraph VII.A does not pertain to any matters other than those expressly specified in Subparagraph VII.A. The Department reserves and this Order is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, (a) claims based on a failure by Settling Respondent to meet a requirement of this Order, including but not limited to Paragraph II (Monitoring and Maintenance in lieu of Settlement Payment), Paragraph VI (Access), Paragraph III (Appropriate Care/Cooperation), and Paragraph V (Environmental Easement).

B. Except as provided in the release and covenant not to sue in Subparagraph VII.A after its issuance and except as otherwise provided in this Settlement Agreement, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights or authorities, including, but not limited to, the right to recover natural resource damages, the right to take any investigatory or remedial action deemed necessary, and the right to exercise summary abatement powers with respect to any person, including Settling Respondents.

C. Except as otherwise provided in this Order, Settling Respondents specifically reserve all rights and defenses under applicable law respecting any Departmental assertion of remedial liability and/or natural resource damages against Settling Respondents, and further reserve all rights respecting the enforcement of this Order, including the rights to notice, to be heard, to appeal, and to any other due process. The existence of this Order or Settling Respondents' compliance with it shall not be construed as an admission of any liability, fault, wrongdoing, or breach of standard of care by Settling Respondents, and shall not give rise to any presumption of law or finding of fact, or create any rights, or grant any cause of action which shall inure to the benefit of any third party. Further, Settling Respondents reserve such rights as it

may have to seek and obtain contribution, indemnification, and/or any other form of recovery from its insurers and from other potentially responsible parties or their insurers for past or future response and/or cleanup costs or such other costs or damages arising from the contamination at the Site as may be provided by law, including but not limited to rights of contribution under section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

XI. Communications

All written communications required by this Order shall be transmitted by United States Postal Service, by private courier service, or hand delivered as follows:

Communications from the Settling Respondent shall be sent to:

Robert Strange, P.E.
 Division of Environmental Remediation
 New York State Department of Environmental Conservation 625
 Broadway, 12th Floor
 Albany, New York 12233-7017 robert.strang@dec.ny.gov

Margaret A. Sheen, Esq. Office of General Counsel
 New York State Department of Environmental Conservation
 5786 Widewaters Parkway
 Syracuse, New York 13214-1867
Margaret.sheen@dec.ny.gov
 Correspondence only.

Communications from the Department to the Settling Respondent shall be sent to:

XII. Termination

Should the release and covenant not to sue set forth in Subparagraph VII.A herein become null and void, *ab initio*, in the event of fraud in the execution or implementation of this Order, or in the event of Settling Respondents' failure to materially comply with any provision of this Order then neither this Order nor its termination shall affect any liability of Settling Respondent for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined in CERCLA.

XIII. Miscellaneous

A. The Settling Respondents' corporate successor shall be bound by this Order and the terms of this Order shall inure to the benefit of the Settling Respondents and the Corporate Successors. Any change in ownership or corporate status of any Respondent including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Respondents' responsibilities under this Order.

B. The paragraph headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any provisions of this Order.

C. 1 The terms of this Order shall constitute the complete and entire agreement between the Department and the Settling Respondents concerning the actions required by this Order. No term, condition, understanding or agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department shall be construed as relieving Settling Respondent of their obligation to obtain such formal approvals as required by this Order.

2. i. Except as set forth herein, if the Settling Respondents desire that any provision of this Order be changed, they shall make timely written application to the Commissioner with copies to the parties listed in Paragraph XI herein. The Commissioner or the Commissioner's designee shall timely respond.

ii. Changes to a time frame set forth in this Order shall be accomplished by a written request to the Department's project attorney and project manager, which request shall be timely responded to in writing.

D. 1. If there are multiple parties signing this Order, the terms "Settling Respondent" and "Respondent" shall be read in the plural where required to give meaning to this Order. Further, the obligations of Settling Respondents under this Order are joint and several and the insolvency of or failure by any Settling Respondents to implement any obligations, as required under this Order, shall not affect the obligations of the remaining Settling Respondent(s) to carry out the obligations under this Order.

2. If Settling Respondent is a partnership, the obligations of all general partners, including limited partners who act as general partners, to finance and perform obligations under this Order and pay amounts owed to the Department under this Order are joint and several. In the event of the insolvency of or the failure of any of the general partners to implement the requirements of this Order, the remaining general partners shall complete all such requirements.

E. To the extent authorized under Section 113 of CERCLA (42 U.S.C. § 9613), New York General Obligations Law § 15-108, and any other applicable law, Settling Respondents shall be deemed to have resolved their liability, if any, to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2), for "matters addressed" pursuant to and in accordance with this Order. "Matters addressed" in this Order shall mean all response actions taken by Settling Respondents to implement this Order for the Site, including but not limited to payments required under this Order, and all response costs incurred or to be incurred by any person or party in connection with the work performed under this Order, which costs have been paid by the Settling Respondents, including reimbursement or any other payment of State Costs pursuant to this Order. Furthermore, to the extent authorized under CERCLA Section 113(f)(3)(B), by

entering into this administrative settlement of liability, if any, for some or all of the removal and/or response action and/or for some or all of the costs of such action, Settling Respondents are entitled to seek contribution from any person except those who are entitled to contribution protection under CERCLA Section 113(f)(2). Settling Respondents shall include the named individuals and partnerships, their officers, directors, agents, employees, corporate successors, all of whom are entitled to the full extent of protection from contribution claims or actions as provided by CERCLA Section 113(f)(2) including but not limited to rights of contribution under section 113(f)(3)(B) of CERCLA, 42 U.S.C. 9613(f)(3)(B).

F. All activities undertaken by the Settling Respondents pursuant to this Order shall be performed in accordance with the requirements of all applicable Federal and State laws, regulations and guidance documents.

G. Unless otherwise expressly provided herein, terms used in this Order which are defined in ECL Article 27, Title 13 or in regulations promulgated under such statutes shall have the meaning assigned to them under such statutes or regulations.

H. The Settling Respondents' obligations under this Order represent payment for or reimbursement of removal or response costs and shall not be deemed to constitute any type of fine or penalty.

I. This Order shall be filed in the Office of the Broome County Clerk at the expense of the Settling Respondents within five (5) days of receipt of an original signed document. Proof of recording shall be provided to the Department within thirty (30) days of the actual filing.

J. This Order may be executed for the convenience of the parties thereto, individually or in combination, in one or more counterparts, each of which for all purposes shall be deemed to have the status of an executed original and all of which shall together constitute one and the same.

K. The effective date of this order is the date on which the Commissioner or the Commissioner's designee signs this Order.

DATED: February 21, 2024

BASIL SEGGOS
Commissioner of
Environmental Conservation

By: *Andrew Guglielmi*
Andrew O. Guglielmi, Director
Division of Environmental Remediation

CONSENT BY SETTLING
RESPONDENTS

Settling Respondents hereby consent to the issuing and entering of this Order on Consent and Administrative Settlement, waive Respondents' right to a hearing herein as provided by law, and agree to be bound by this Order on Consent and Administrative Settlement.

AMERICAN FITNESS, INC.,

By: Brian Andrulewicz

Title: Pres

Date: 2/13/24

STATE OF NEW YORK)
) ss:
COUNTY OF Broomie)

On this 13th day of February 2024, before me personally came to me known, Brian Andrulewicz, who being by me duly sworn, did depose and say that (s)he resides in Endicott, NY that (s)he is the President of the companies described in, and who executed the foregoing instrument, and acknowledged that (s)he signed his/her name thereto undersigned in the ** _____ by order of the board of directors of said company.

Karen M. Currier
Notary Public

KAREN M CURRIER
Notary Public, State of New York,
No. 01CU6353038
Residing in Tioga County
My Commission Expires Jan. 17, 2025

Exhibit "A"

Site Map

