

SETTLEMENT AGREEMENT

This Settlement Agreement ("**Agreement**") dated for reference purposes as of February 1, 2020 is made and entered into by and between the Pilara Family Foundation, a Nevada non-profit corporation ("**PFF**") and the City and County of San Francisco, acting through its San Francisco Port Commission ("**Port**").

RECITALS

The parties enter into this Agreement with reference to the following facts and allegations:

A. In June 2007, Port and PFF (the "**Parties**") entered into Port Lease No. L-14414 for a seven and one-half year term for that certain pier shed space located at the Pier 24 Annex in the City and County of San Francisco, State of California for the sole purpose of storage and curation of an art and photographic collection, visits by researchers by appointment only, and periodic visits by PFF's Board of Trustees (the "**Lease**") (Port Commission Resolution 07-68). The Lease commenced on December 1, 2007. The Lease: (i) provided six (6) months of free rent; (ii) prohibited public assembly, admission of the general public and special events without prior Port approval; and (iii) required PFF to perform the following Initial Tenant Improvements at PFF's sole cost and without rent credits: repairs to the substructure and superstructure, replacement of the roof, installation of a state-of-the-art fire suppression system, installation of a Heating, Ventilation, and Air Conditioning System, connection and installation of utilities, and abatement of existing hazardous materials on the exterior and interior of the building. PFF estimated the cost of the Initial Tenant Improvements to be at \$3.2 million. The Lease was amended by the First Amendment effective June 6, 2008 to remove the requirement to obtain earthquake insurance coverage and to allow a personal guaranty for the improvements.

B. During construction of the Initial Tenant Improvements, PFF encountered unforeseen conditions, including extensive dry rot and termite damage that the Parties agreed could not have been known prior to execution of the Lease. PFF estimated that the total project cost would be \$11 million of which approximately \$7.5 million would be for core and shell improvements including substructure repairs. Accordingly, the Parties executed a Second Amendment to the Lease, effective January 1, 2009, amending the Lease as follows: (i) increasing the monthly rent to reflect the fair market value of the premises; (ii) extending the term until November 30, 2017 (the "**Lease Expiration Date**") for a total ten year term; and (iii) providing rent credits for Certified Core Improvement Costs that would benefit the Port in an amount not to exceed \$3 million (Port Commission Resolution 08-74; Board of Supervisors Resolution 49-09). PFF completed the Initial Tenant Improvements in June of 2010 and represents that it expended a total of \$14 million on the Initial Tenant Improvements including \$9.2 million on the building core and shell.

C. Effective December 16, 2010, the Lease was amended by the Third Amendment to change the Permitted Uses and Prohibited Uses to: (i) allow for visits by the general public to view the photography collection by appointment at no charge; and (ii) to prohibit: public assembly, exceedance of the legal occupancy limit of 93 people at any time, the sale of tickets or products, and any retail uses.

D. The Lease expired on November 30, 2017 and continued on a holdover month-to-month basis ("**Holdover Period**"). At that time, a disagreement arose regarding the rent owed during the holdover period. PFF alleged that it was entitled to continue to apply the same monthly rent credit that it had applied prior to the Lease Expiration Date until a new lease or amendment could be negotiated and Port alleged that the maximum \$3 million rent credit was fully applied and that fair market rent was then due. Despite negotiations, the Parties were

unable to agree and, on December 13, 2019, Port sent PFF a thirty day notice to terminate the Lease, including an estimate of holdover rent in an amount equal to \$1,325,648.76 in alleged unpaid rent and late charges.

E. The Parties now wish to settle their dispute in a manner that allows PFF to continue offering access to its collection to interested members of the public and enter this Agreement with the intention of avoiding protracted disputes, uncertainties, and litigation with their attendant inconveniences and expenses. Nothing contained herein is to be construed or deemed an admission of liability, culpability, negligence, or wrongdoing on the part of the Parties hereto.

F. As described in further detail below, subject to approval by the Port Commission and Board of Supervisors, under this Agreement, (i) the Parties will terminate the Lease and enter into a new lease in the form attached hereto (“**New Lease**”) which allows the application of rent credits for the remaining unamortized core and shell investment for a term commensurate with the exhaustion of such credits and in exchange requires PFF to maximize public access to view its collection to the extent feasible taking into consideration legal occupancy limitations; and (ii) the Parties will release each other for matters related to the dispute.

G. All capitalized terms used herein but not otherwise defined shall have the meaning given to them in the Lease or the New Lease as the case may be.

AGREEMENT

1. RECITALS.

The foregoing recitals are true and correct and are incorporated herein by this reference as if fully set forth herein.

2. LEASE RECONCILIATION AND NEW LEASE.

(a) Port will allow a total rent credit of \$8.5 million for Certified Core Improvements Costs as that term is defined in the Lease. The Parties agree that \$3 million of the total rent credit was exhausted as of the Lease Expiration Date, leaving an additional \$5.5 million rent credit that can be applied (i) during the holdover period of the Lease and (ii) under the New Lease until exhausted. In order to implement this Agreement,

(i) The New Lease will commence upon the termination of the Lease (“**Lease Termination Date**”) which date will be the date immediately preceding the New Lease Commencement Date.

(ii) Until the Lease Termination Date, PFF will continue to pay monthly base rent of \$1.18 per square foot and will receive a monthly rent credit of \$1.136 per square foot, resulting in \$1,202.59 of rent payable to the Port each month, and the Parties agree that this amount is the applicable rate for the Holdover Period.

(iii) The remaining balance of the total \$8.5 million rent credit will be applied under the New Lease.

(iv) Under the New Lease, PFF will pay monthly base rent of \$3.40 per square foot with a monthly rent credit of \$3.19 per square foot resulting in \$5,735.31 rent payable to the Port each month.

(v) The term of the New Lease will expire on the date the \$5.5 million rent credit is exhausted.

(b) The Parties must execute the New Lease in the form attached hereto as *Exhibit A*. The only changes to the attached form of lease for the New Lease will be to fill in the Effective Date, the Commencement Date and the Expiration Date which will be calculated based on the remaining balance of the \$5.5 million rent credit as of the Commencement Date of the New

Lease and to add any new mandatory City requirements applicable as of the Commencement Date of the New Lease. The New Lease shall be effective on the date fully executed by both Parties and shall commence on the first day of the first calendar month following the effective date; and shall expire on the date on which the balance of the rent credit is exhausted. For illustrative purposes, an example calculation of the Expiration Date of the New Lease is attached.

(c) Except as explicitly provided herein with respect to rent credits for Certified Core Improvements Costs, (i) from and after the Lease Termination Date, neither Port nor PFF shall have any rights or obligations under the Lease, except for obligations arising prior to the Lease Termination Date and any rights or obligations which, by their express terms, survive the expiration or termination of the Lease; (ii) except as otherwise provided in Section 4(b) or Section 5 (Mutual Releases) hereof, this Agreement shall not release or discharge PFF from any liability, whether past, present or future, under the Lease (including but not limited to any indemnification, hold harmless or exculpation obligations) nor shall it be construed to waive any breach by PFF, or any of Port's rights thereunder, or to enlarge or increase Port's obligations thereunder; and (iii) Port expressly reserves the right to pursue and does not release PFF from any and all obligations under the Lease, except as otherwise provided and released in Section 4(b) or Section 5 (Mutual Releases).

3. PFF OBLIGATIONS.

(a) No later than March 4, 2020, PFF shall execute this Agreement. PFF agrees that Port has no obligation to present this Agreement to the Port Commission unless and until PFF fulfills this obligation.

(b) As a material consideration for this Agreement, as a condition of the New Lease and to remain entitled to the rent credit described in Section 2(a)(iii), (A) PFF shall continue to maintain the PFF photography collection on the Premises and allow and facilitate maximum public access to view the collection to the extent feasible taking into consideration legal occupancy limitations at no cost through an on-line reservation system similar to the system in place on the Effective Date of this Agreement; (B) in furtherance of the goal of maintaining and maximizing public access to the extent feasible taking into consideration legal occupancy limitations, PFF shall track and report on visits to the Premises as detailed in the New Lease; (C) at Port's request, PFF will meet and confer with Port regarding implementation of measures intended to increase the public's enjoyment of the Premises and the collection and/or provide other public benefits; and (D) PFF (as the tenant) must maintain its nonprofit status and must annually certify to such status in writing and from time to time at Port's request.

(c) No later than thirty (30) days after the Lease Commencement Date, PFF shall reimburse Port for its actual attorney's fees in the amount of \$20,000.

4. PORT OBLIGATIONS.

(a) Upon the necessary approval actions described in Section 9 of this Agreement, Port shall execute this Agreement, produce an execution version of the New Lease, and upon PFF's execution of the New Lease and delivery of the first month's rent and proof of insurance as required by the New Lease, execute the New Lease.

(b) Port agrees to waive all late charges, interest and holdover rent accruing after the Lease Expiration Date (estimated in the Port's termination letter to be \$1,325,648.76), and prior to PFF's execution of this Agreement.

5. MUTUAL RELEASES.

PFF, for itself and on behalf of its officers, employees, owners, successors, and assigns, if any, and on behalf of its agents and invitees, hereby agrees to fully and forever release and discharge the City and County of San Francisco, its elective and/or appointive boards, agents, employees, departments, commissioners, and officers, including without limitation the San

Francisco Port Commission ("**City Releasees**") from any and all claims, actions, causes of action, liabilities, damages, loss of business or profits, demands, attorneys' fees, expenses and costs (including without limitation court costs) of any kind or nature whatsoever, whether known or unknown, suspected or unsuspected, which have existed or may have existed, or which do exist, or which hereafter shall or may exist, and which arise out of or are in any way related to any of the transactions, occurrences, acts or omissions related to the Lease or the matters described in this Agreement. PFF agrees that this release includes without limitation, any claims for any cost for improvements made by PFF under the Lease in excess of \$8.5 million.

PFF waives any rights or benefits provided by Section 1542 of the Civil Code, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

PFF hereby waives application of Section 1542 of the Civil Code. PFF understands and acknowledges that, as a consequence of this waiver of Section 1542, even if PFF should eventually suffer additional or further loss, damages or injury arising out of or in any way related to any of the events which gave rise to this Agreement, or any of them, PFF will not be permitted to make any claims to recover for such loss, damages or injury. PFF acknowledges that it intends these consequences even as to claims that may exist as of the date of this Agreement but which PFF does not know exist, and which, if known, would materially affect PFF's decision to execute this Agreement, regardless of whether PFF's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

Port, for itself and on behalf of its and City's officers, employees, owners, successors, and assigns, if any, and on behalf of its agents and invitees, hereby agrees to fully and forever release and discharge PFF, its elective and/or appointive boards, agents, employees, ("**PFF Releasees**") from any and all claims, actions, causes of action, liabilities, damages, loss of business or profits, demands, attorneys' fees, expenses and costs (including without limitation court costs) of any kind or nature whatsoever, whether known or unknown, suspected or unsuspected, which have existed or may have existed, or which do exist, or which hereafter shall or may exist, and which arise out of or are in any way related to claims related to rent under the Lease.

Port waives any rights or benefits provided by Section 1542 of the Civil Code, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Port hereby waives application of Section 1542 of the Civil Code. Port understands and acknowledges that, as a consequence of this waiver of Section 1542, even if Port should eventually suffer additional or further loss, damages or injury arising out of or in any way related to any of the events which gave rise to this Agreement, or any of them, Port will not be permitted to make any claims to recover for such loss, damages or injury. Port acknowledges that it intends these consequences even as to claims that may exist as of the date of this Agreement but

which Port does not know exist, and which, if known, would materially affect Port's decision to execute this Agreement, regardless of whether Port's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

The terms of this Section 5 shall survive the expiration or earlier termination of this Agreement.

6. AUTHORITY.

Each of the persons executing this Agreement on behalf of PFF hereby covenants and warrants that PFF is a duly authorized and existing entity, that PFF has and is qualified to do business in California, that PFF has full right and authority to enter into this Agreement, and that each and all of the persons signing on behalf of PFF are authorized to do so.

7. RIGHTS ARE CUMULATIVE.

The liability of PFF and all rights, powers, and remedies of Port under this Agreement shall be cumulative and not alternative, and such rights, powers, and remedies given to Port by law or in equity.

8. MISCELLANEOUS.

(a) Each party acknowledges that, in executing this Agreement, it is acting on its own, independent judgment and advised by its legal counsel. Each party acknowledges having read this Agreement and each of its provisions and understands its meaning and effect. Each party acknowledges and warrants that its execution of this Agreement is free and voluntary.

(b) Each party acknowledges that this Agreement and its exhibits contain and constitutes the entire agreement between the Parties with respect to the matters discussed herein. The terms of this Agreement are contractual and not a mere recital. Each party acknowledges that the other party has made no representations, express or implied, to induce that party to enter into this Agreement, other than as expressly set forth herein.

(c) Any prior correspondence, memoranda, agreements, warranties, or representations, whether written or oral, relating to such subject matter are superseded in total by this Agreement. No prior drafts of this Agreement or changes from those drafts to the executed version of this Agreement shall be introduced as evidence in any litigation or other dispute resolution proceeding by any party or other person, and no court or other body should consider those drafts in interpreting this Agreement.

(d) No aspect of this Agreement is intended to be nor at any time shall be construed, deemed, or treated in any respect as an admission by either party of liability for any purpose. The Parties expressly understand that this Agreement does not constitute an admission of the truth or accuracy of any of allegations made in the course of the Parties' discussions. Nothing contained herein shall operate as a representation or warranty by Port of any nature whatsoever.

(e) This Agreement has been fully negotiated with the assistance of counsel and should not be construed more strictly against one party than another.

(f) If any of the provisions of this Agreement or the application thereof is held to be invalid, its invalidity shall not affect any other provision or application of this Agreement to the extent that such other provision or application can be given effect without the invalid provision or application, and to this end, the provisions of this Agreement are declared and understood to be severable.

(g) In the event of any inconsistencies between the terms of this Agreement and the Lease, or the New Lease, the terms of this Agreement shall prevail. Time is of the essence of this Agreement. This Agreement shall be governed by the laws of the State of California. Neither this Agreement nor any of the terms hereof may be amended or modified except by a written instrument signed by all the Parties hereto.

9. PORT COMMISSION AND BOARD OF SUPERVISORS APPROVAL.

This Agreement (including the New Lease) is subject to the approval of the San Francisco Port Commission. The New Lease is subject to the approval of the San Francisco Board of Supervisors. Each approval shall be in the sole discretion of the approval body.

Notwithstanding anything to the contrary contained in this Agreement, PFF acknowledges and agrees any obligations or liabilities of City under this Agreement are contingent upon a duly adopted Resolution of the Board of Supervisors approving the New Lease and the New Lease shall be null and void if City's Mayor and the Board of Supervisors do not approve the New Lease, in their respective sole discretion. Approval of this Agreement or the New Lease by any department, commission or agency of City shall not be deemed to imply that such Resolution will be enacted, nor will any such approval create any binding obligations on City.

10. EFFECTIVE DATE; EXPIRATION DATE.


(a) This Agreement shall be effective upon Port's execution following the effective date of a duly adopted a resolution of the Board of Supervisors approving the New Lease.

(b) If a Resolution of the Board of Supervisors approving the New Lease is not adopted by September 1, 2020, this Agreement will automatically expire and the Parties will have no further obligations under this Agreement.

[Signatures on Following Page]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date set forth below.

PILARA FAMILY FOUNDATION, A NEVADA NON-PROFIT CORPORATION

By: 
Name: ANDREW PILARA
Title: PRESIDENT
Date Signed: 4/4/20

By: _____
Name: _____
Title: _____
Date Signed: _____

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, operating by and through the
SAN FRANCISCO PORT COMMISSION

By: _____
Michael J. Martin
Deputy Director, Real Estate and Development
Date Signed: _____

Approved as to Form:
DENNIS J. HERRERA, City Attorney

By: _____
Rona H. Sandler
Deputy City Attorney

Port Commission Resolution No. _____

Agreement Prepared by: Michael Martin (initial)

EXAMPLE CALCULATION OF EXPIRATION DATE OF NEW LEASE

EXAMPLE 1: Assuming the new lease commences May 1, 2020

- a. Total rent credits available: \$5,500,000
- b. Rent Credits for Holdover Period:
 - i. November 2017 through December 2019: \$873,776.72 (per revised calculation sent by Port on 2/26/20)
 - ii. January 2020 through April 2020: \$124,101.20
 - 1. \$1.136/sf per month per Section 2(a)(ii) of Settlement Agreement
 - 2. $\$1.136 \times 27,311 \text{ sf} = \$31,025.30$
 - 3. $\$31,025.30 \times 4 \text{ months} = \$124,101.20$
 - iii. Total Rent Credits for November 2017 through April 2020: \$997,877.92
- c. Remaining Rent Credits after Holdover Period: \$4,502,122.08
- d. Term to amortize remaining rent credits: 51.7 months
 - i. Monthly rent credit as reflected on Lease page BLI-5: \$3.19/sf per month
 - ii. $\$3.19 \times 27,311 \text{ sf} = \$87,122.09$
 - iii. $\$4,490,781.20 \text{ divided by } \$87,122.09 = 51.7$
- e. Therefore, the expiration date of the New Lease would be August 22, 2024

EXAMPLE 2: Assuming the new lease commences July 1, 2020

- a. Total rent credits available: \$5,500,000
- b. Rent Credits for Holdover Period:
 - i. November 2017 through December 2019: \$873,776.72 (per outline of terms sent by Port on 12/2019)
 - ii. January 2020 through June 2020: \$186,151.80
 - 1. \$1.136/sf per month per Section 2(a)(ii) of Settlement Agreement
 - 2. $\$1.136 \times 27,311 \text{ sf} = \$31,025.30$
 - 3. $\$31,025.30 \times 6 \text{ months} = \$186,151.80$
 - iii. Total Rent Credits for November 2017 through June 2020: \$1,059,928.52
- c. Remaining Rent Credits after Holdover Period: \$4,440,071.48
- d. Term to amortize remaining rent credits: 51 months
 - i. Monthly rent credit as reflected on Lease page BLI-5: \$3.19/sf per month
 - ii. $\$3.19 \times 27,311 \text{ sf} = \$87,122.09$
 - iii. $\$4,428,730.59 \text{ divided by } \$87,122.09 = 50.8$
- e. Therefore, the expiration date of the New Lease term would be September 30, 2024

EXHIBIT A
FORM OF NEW LEASE

[Attachment on following page]