

## SETTLEMENT AGREEMENT AND GENERAL RELEASE

KNOW ALL PERSONS BY THESE PRESENTS:

That the Plaintiffs and Defendant (as defined below), in consideration of the promises contained herein, the sufficiency and receipt of which they acknowledge, hereby enter into this SETTLEMENT AGREEMENT AND GENERAL RELEASE (“Agreement”), effective as of July 20, 2020 (“Effective Date”).

### DEFINITIONS

“Plaintiffs” means, jointly and severally, and together with all of their respective heirs, estate, agents, legal representatives, successors, past and present agents, attorneys, and assigns, Smokebrush Foundation Inc., a Colorado non-profit corporation, Katherine Tudor, an Individual, and Donald Herbert Goede, III, an Individual, who were named as party-plaintiffs to the Civil Action (defined below).

“Defendant” means the City of Colorado Springs, a home rule city and a Colorado municipal corporation duly incorporated under Article XX, § 6 of the Colorado Constitution and the Colorado Springs City Charter, together with all its past and present agents, officers, elected officials, employees, attorneys and insurers, and all their predecessors, successors, and assigns.

“Trestle Property” means all buildings, structures, improvements, condominium units and all other real property subject to and created pursuant to the Condominium Declaration recorded in the real property records of El Paso County, Colorado on March 31, 2004 at Reception No. 204050910 and the Condominium Plat recorded in the real property records of El Paso County, Colorado on June 14, 2005 at Reception No. 205088130, and now known as 219 W. Colorado Avenue, Colorado Springs, Colorado, 80903.

“Cimino Property” means all buildings, structures, improvements and all other real property comprising Lot 4, Confluence Park South, City of Colorado Springs, County of El Paso, State of Colorado Recorded Under Reception No. 203096556, and now known as 25 Cimino Drive, Colorado Springs, Colorado, 80903.

“Civil Action” means, collectively, *Smokebrush Foundation et al. v. City of Colorado Springs et al.*, El Paso County District Court Case no. 2013CV1469, which was appealed to the Colorado Court of Appeals, Case no. 2014 CA 228, and to the Colorado Supreme Court, Case no. 15 SC 627.

“Unit Holders” means all persons who hold any interest in and to the Trestle Property, including, without limitation, all condominium unit owners and The Trestle Office Condominium Owners Association, Inc., a Colorado non-profit corporation.

“Party” and “Parties” refers to Plaintiffs and Defendant, either individually or collectively.

## RECITALS

A. Plaintiffs filed the Civil Action against Defendant and others complaining of migration of contaminants present on the Cimino Property onto the Trestle Property by virtue of historic subsurface contamination and above-ground demolition activities occurring in and around 2012 (collectively, the “Environmental Claims”).

B. Plaintiffs now intend to settle forever against Defendant any and all claims arising in connection with the Environmental Claims and Civil Action.

## AGREEMENT

NOW, THEREFORE, in consideration of the terms, covenants and conditions contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which Plaintiffs hereby acknowledge, Plaintiffs agree as follows:

1. **Dismissal, Other Consideration.** The Parties consider the following as material terms of this Agreement.

- (a) The Parties will stipulate to the dismissal of Plaintiffs’ claims against Defendant in the Civil Action with prejudice, parties to bear their own costs, with such stipulation to be signed by the Parties and/or their attorneys and submitted to the Court.
- (b) The Defendant, or its successor in interest to the Cimino Property (the “25 Property Owner”), will pursue a voluntary clean-up plan (“VCUP”) for remediation of the contaminants which were the subject of this lawsuit (the “Contaminants”) from the Cimino Property. The 25 Property Owner will consider in good faith having its VCUP application take into consideration the remediation of any such Contaminants that may have emanated from the Cimino Property and migrated onto Trestle Property, all pursuant to a VCUP plan reasonable acceptable to the 25 Property Owner, all with the goal of obtaining a “no further action” determination from the Colorado Department of Public Health and Environment (“CDPHE”), for the unrestricted use of the Cimino Property.
- (c) The 25 Property Owner will make its VCUP application to the CDPHE for remediation of the Contaminants on the Cimino Property with the goal of generally meeting CDPHE’s commercial property standards for the Cimino Property, and in connection therewith, will consider in good faith incorporating into such VCUP application remediation of any Contaminants that may have emanated from the Cimino Property and migrated onto the Trestle Property (the “Migrating Contaminants”), all subject to, among other things: (i) the 25 Property Owner determination of the extent of the Migrating Contaminants and confirmation that the scope and costs associated with remediating any such Migrating Contaminants does not exceed the 25

Property Owner's expectations and general budget for completion of the VCUP remediation, and (ii) the 25 Property Owner having received all requisite consents from the 219 Property owner, authorizing the 25 Property Owner to enter upon and access the Trestle Property for purposes of completing any such agreed upon remediation of such Migrating Contaminants, all in the 25 Property Owner's sole and absolute discretion. The 25 Property Owner will provide a draft of the VCUP application to the Plaintiffs for their review and input; provided, however, that the Defendant and Plaintiffs each confirm and agree that Plaintiffs will not have the right to approve the VCUP prior to 25 Property Owner's submission, both Defendant and Plaintiffs recognizing that the scope of the VCUP application requires expertise outside both the Defendant's and the Plaintiffs' own capacities.

- (d) Following submission, the 25 Property Owner will use commercially reasonable efforts to obtain CDPHE's approval of the VCUP application within one (1) year of the Plaintiffs' signing of the Release as noted above, all subject to CDPHE's timing and approval process which cannot be guaranteed or controlled. The Defendant's intent is to have the VCUP application submitted as soon as reasonably possible pursuant to the terms of this Agreement.
- (e) If the CDPHE approves 25 Property Owner's VCUP application as submitted, then 25 Property Owner will use commercially reasonable efforts to bring commercial development to the Cimino Property as soon as reasonably possible so that implementation of the VCUP can proceed and the Contaminants can be remediated as described in the approved VCUP concurrently with the commercial development. Any CDPHE additions or supplements to the VCUP application shall be subject to 25 Property Owner's review and approval in 25 Property Owner's sole and absolute discretion; provided, however, that 25 Property Owner agrees to cooperate in good faith with CDPHE toward reaching agreement upon a mutually acceptable VCUP.
- (f) If the CDPHE fails to approve of 25 Property Owner's VCUP application as submitted, or if CDPHE otherwise supplements or requires additional remediation work as a condition to approval of 25 Property Owner's VCUP application to an extent which is unacceptable to 25 Property Owner, then 25 Property Owner will use commercially reasonable efforts to investigate and explore other reasonable alternatives, including, without limitation, the submission of a second VCUP application acceptable to 25 Property Owner, and until such time as either (i) the CDPHE approves such second VCUP application acceptable to 25 Property Owner, or (ii) 25 Property Owner finds other acceptable and reasonable alternatives, 25 Property Owner will promptly clean and seal coat the existing asphalt pavement covering the surface of the Cimino Property with the intent of generally encapsulating the Contaminants in place until such time as the same can be remediated pursuant to an

approved VCUP application or other possible alternative acceptable to 25 Property Owner.

- (g) The fully executed Agreement is intended to and shall be binding on all who have an ownership interest in the Trestle Property, is a precondition to settlement funding, and is intended to be recorded with the El Paso County Clerk and Recorder to travel with the land of the Trestle Property. The Plaintiffs represent that they have authority will use their best efforts to bind all who have an ownership interest in the Trestle Property and any improvements thereon. This Agreement will be supplemented by and include a separate and concurrent release of Defendant's successor in interest to the 25 Cimino Drive property (the "Successor"), which separate and concurrent release will include a release from all persons having an interest in all or any portion of the real property comprising the Trestle Property, including all owners of each of the condominium units within the Trestle building. As a condition to and in consideration for such separate and concurrent release, the Successor will be required to agree to abide by the terms of the settlement and assume the obligations described above with respect to the VCUP Application and the remediation of the 25 Cimino Drive property as and when described above.
- (h) The Plaintiffs will provide all reasonably necessary access easements and agreements for the Trestle Property, and will reasonably cooperate with remediation contractors who are designated to perform the Remediation, and will not unreasonably interfere with the completion of the Remediation work.
- (i) Plaintiffs will secure the release of Defendant from any claim or claims which have been or could have been asserted by all Unit Holders against Defendant related to the Environmental Claims and/or the Civil Action in the form agreed to in **Exhibit A**.

2. **Settlement Payment.** Defendant shall cause to be paid to Plaintiffs the sum of FIVE HUNDRED THOUSAND DOLLARS AND NO/100 CENTS (\$500,000.00) (the "Settlement Payment"). Such sum shall be made payable to Plaintiffs' counsel's COLTAF fund with 14 days of execution of this Agreement and Defendant's receipt of the Unit Holder releases contemplated above, to be distributed by and among Plaintiffs and their counsel as per their agreement.

3. **Covenant Not to Sue.** Plaintiffs agree not to file or cause to be filed, at any time after the date of execution of this Agreement, any charge, action, complaint, lawsuit or other legal, equitable or administrative proceeding, with any federal, state, local, public or private agency or authority against Defendant relating to any assertion of claim, right, title or interest, made or which could have been made as arising out of the Environmental Claims which were the subject of the Civil Action, and to immediately dismiss with prejudice any such charge, action, complaint, lawsuit or other legal, equitable or administrative proceeding filed on or prior to the date of execution of this Agreement.

4. **Representations and Warranties.** Plaintiffs warrant and represent as follows:

(a) **Organization.** Plaintiffs have all requisite power and authority to enter into this Agreement and to perform their obligations hereunder.

(b) **Authority; Warranty of Authority.** This Agreement has been duly executed and delivered by Plaintiffs and constitutes a legal, valid and binding obligation of Plaintiffs, enforceable against them in accordance with its terms. Plaintiffs warrant that the trustees, officers, and/or corporate agents executing this Agreement have full and unconditional authority to legally bind those entities to the terms of this Agreement.

(c) **No Other Actions Pending.** Plaintiffs hereby expressly warrant and represent that they have not filed, at any time prior to the date of execution of this Agreement, any charge, action, complaint, lawsuit or other legal, equitable or administrative proceeding, with any federal, state, local, public or private agency or authority against Defendant relating to any assertion of claim, right, title or interest, made or which could have been made arising out of or relating to the Environmental Claims and Civil Action.

(d) **Investigation of Facts.** Plaintiffs represents and warrants that they have made such investigation of the facts pertaining to this Agreement and all matters pertaining thereto as he deemed necessary.

(e) **Unknown Facts.** This Agreement pertains to all claims, actions, causes of action, liabilities, demands, rights, damages, costs, expenses and controversies of every nature and kind whatsoever, known or unknown, suspected or unsuspected. Plaintiffs acknowledge that they may hereafter discover facts different from, or in addition to, those which they now know or believe to be true with respect to these matters, and Plaintiffs agree that this Agreement shall remain effective in all respects notwithstanding such different or additional facts or the discovery thereof.

(f) **Knowledge and Review of Settlement Agreement.** Plaintiffs warrant and represent that this Agreement is executed voluntarily with full knowledge of the consequences and implications of their obligations contained herein. Plaintiffs expressly state that they are fully informed as to the nature, extent and character of their claimed damages to the extent possible, and that Plaintiffs have been advised of their right to consult additional professionals, including accountants and lawyers, at Plaintiffs' own expense, regarding any and all known and unknown damages.

(g) **Representation by Counsel.** The Parties warrant and represent that they have been represented by counsel of their choice throughout the negotiations which preceded the execution of this Agreement, and in connection with the preparation and execution of this Agreement, and that they have carefully and thoroughly reviewed this Agreement, in its entirety, with their counsel, and that such counsel has approved it as to form.

(h) **Complete Agreement.** This Agreement shall constitute the entire agreement with respect to the subject matter hereof and there are no agreements, representations or warranties of any kind, except as expressly set forth in this Agreement. Plaintiffs acknowledge that in executing this Agreement that they have relied solely on their own judgment, belief and knowledge, and except for representations expressly set forth herein, they have not been influenced by any other representation or statement of Defendant.

(i) **Survival.** All representations, warranties, covenants and agreements made in this Agreement shall survive the execution hereof and any investigation made by or on behalf of the other parties prior to or after such date.

(j) **Binding Effect.** Except as may specifically be provided in this Agreement to the contrary, the terms and conditions contained in this Agreement shall inure to the benefit of, and be binding upon Plaintiffs' heirs, estates, legal representatives, successors, past and present agents, officers, directors, shareholders, employees, employers, partners, attorneys, insurers, and assigns. Except as otherwise expressly provided herein, this Agreement is not assignable without the prior written consent of the Defendant, and no payment to be made hereunder shall be subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or other charge.

(k) **Warranty of Non-Assignment.** Plaintiffs warrant and represent that Plaintiffs have not assigned or transferred, nor purported to assign or transfer, to any person or any entity any claims, debts, liabilities, demands, obligations, damages, losses, causes of action, costs, expenses, and attorneys' fees subject to this Agreement.

(l) **No Admission of Liability.** Nothing in this Agreement, including the fact that it was entered into, shall constitute or be construed as an admission on behalf of Defendant as to the validity of any of the claims, defenses or allegations made in the Civil Action, nor shall it be admissible in any court, administrative agency or tribunal for any party, with the exception of a proceeding to enforce or interpret the terms of this Agreement. Plaintiffs understand that this Agreement is in full accord and satisfaction of disputed claims, and that it is not to be construed in any way as an admission that Defendant is liable, or that Plaintiffs have in fact incurred damages. Rather, Plaintiffs understand that Defendant expressly denies any liability whatsoever, and Defendant has consented to the settlement signified by this Agreement only to buy their peace of mind, and to avoid the time and expense of further dispute between Defendant and Plaintiffs.

(m) **Amendment.** No modification or amendment of this Agreement shall be valid unless in writing and signed by Defendant.

(n) **Severability.** In the event that any portion of this Agreement is held to be unenforceable, the unenforceable portion of the Agreement will be deleted and the rest of the Agreement will remain in full force and effect.

(o) **Governing Law.** This Agreement shall be construed and interpreted in accordance with and governed by the laws of the State of Colorado.

(p) **Venue.** Plaintiffs hereby expressly agrees that any action to interpret, construe, or enforce this Agreement shall be brought in the District Court in and for El Paso County, Colorado, and Plaintiffs hereby expressly waive any objections or defenses to such action based upon improper venue or lack of personal or subject matter jurisdiction.

(q) **Headings Descriptive.** The headings of the several sections of this Agreement are intended for convenience only and shall not in any way affect the meaning or construction of any of this Agreement.

(r) **No Party Deemed the Drafter.** This Agreement is the result of negotiations between Plaintiffs and Defendant. This Agreement therefore shall not be construed against any particular party because of the involvement of that party or its counsel in its preparation.

(s) **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall be considered one and the same Agreement as of the Effective Date.

5. **Releases.** Plaintiffs hereby fully release, remise, acquit, and forever discharge Defendant and/or its past and present agents, officers, elected officials, employees, attorneys and insurers, and all their predecessors, successors, and assigns, and all of their allied, affiliated, parent and associated companies and their respective shareholders, officers, directors, agents, employees, legal representatives, successors and assigns, its insurers, its attorneys, and all of Defendant's respective properties, interests and assets of any and every kind and character whatsoever and wheresoever situated, from any and all liability, claims, demands, actions, causes of action, damages, obligations, losses and expenses of whatsoever kind or nature arising out of any acts, omissions, transactions, transfers, happenings, violations, promises, contracts, agreements, facts or situations which occurred or existed at any time before the execution of this Agreement in any manner arising out of or related to the Environmental Claims which were the subject of the Civil Action, whether or not now known or suspected or claimed, whether in law or in equity or otherwise, and whether accrued or hereafter maturing, including without limitation, any and all claims, demands, actions, causes of action, damages, obligations, losses and expenses concerning the Environmental Claims and/or the Civil Action, with the exception only of the rights and obligations imposed upon or accruing to Plaintiffs pursuant to this Agreement.

Plaintiffs further expressly understand and agree that by signing this Agreement they and all of their respective past and present heirs, estate, agents, legal representatives, successors, past and present agents, officers, directors, shareholders, employees, employers, partners, attorneys, and insurers, and assigns will be forever bound by the Agreement's terms, and that no rescission, modification or release from its terms will be made for any mistake.

6. **Notices.** All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered by hand or mailed within the continental United States by first-class certified mail, return receipt requested, postage prepaid, addressed as follows:

Plaintiffs  
Smokebrush (Marmalade at Smokebrush)  
219 W. Colorado Ave., Ste. 210  
Colorado Springs, CO 80903

With a copy to:  
*(which shall not constitute notice)*

Randall M. Weiner, Esq.  
LAW OFFICES OF RANDALL M. WEINER, P.C.  
3100 Arapahoe Avenue, Suite 202  
Boulder, CO 80303

**and**

Erik Lamphere, Esq.  
Division Chief - Litigation  
City of Colorado Springs  
30 S. Nevada Ave., Suite 501  
Colorado Springs CO 80903

With a copy to:  
*(which shall not constitute notice)*

Robert J. Zavaglia, Jr., Esq.  
TREECE ALFREY MUSAT P.C.  
633 17th Street, Suite 2200  
Denver, CO 80202

7. **Actions for Breach.** Defendant or Plaintiffs shall have a right to bring an action to enforce any of the Agreement's terms or provisions. In any such action, the court **shall** award reasonable attorneys' fees and costs to the prevailing party.



I have carefully read this Agreement, I understand its contents, and I have signed it of our own free and voluntary act after having it explained to me by my own attorney.

IN WITNESS WHEREOF, I have executed and delivered this Agreement as of the Effective Date.

FOR SOMKEBRUSH FOUNDATION

Katherine Johnston Tudor  
By: Katherine Johnston Tudor  
Title: President, Smokebrush Foundation

STATE OF COLORADO )  
 ) ss.  
COUNTY OF El Paso )

Subscribed and sworn to before me by Katherine Johnston Tudor this 18<sup>th</sup> day of July, 2020. President, Smokebrush Foundation

KIMBERLY J MCGUIRE  
Notary Public  
State of Colorado  
Notary ID # 20184008996  
My Commission Expires 02-26-2022

Kimberly McGuire  
Notary Public  
My commission expires:

[SEAL]

I have carefully read this Agreement, I understand its contents, and I have signed it of our own free and voluntary act after having it explained to me by my own attorney.

IN WITNESS WHEREOF, I have executed and delivered this Agreement as of the Effective Date.

KATHERINE TUDOR

Katherine Tudor

STATE OF COLORADO )  
 ) ss.  
COUNTY OF El Paso )

Subscribed and sworn to before me by Katherine Tudor this 18<sup>th</sup> day of July, 2020.

KIMBERLY J MCGUIRE  
Notary Public  
State of Colorado  
Notary ID # 20184008996  
My Commission Expires 02-26-2022

Kimberly McGuire  
Notary Public  
My commission expires:

[SEAL]





Release

In consideration of the receipt of \$100,000 by the Trestle Office Condominium Owners Association, Inc. (the "Condo Association") and other good and valuable consideration, I, \_\_\_\_\_, a unit owner in the Trestle Building, located at the Trestle Building, 219 W. Colorado Avenue, Colorado Springs, Colorado, hereby release the City of Colorado Springs, and any successor owner in the property located at 25 Cimino Drive, Colorado Springs, Colorado, for any claims that were or could have been brought in the lawsuit, *Smokebrush Foundation, et al. v. City of Colorado Springs, et al*, Case No. 2013 CV1469 (Dist. Ct., El Paso County, Colorado), including disputes concerning future non-monetary consideration required to resolve that suit. This release shall be effective upon receipt of the funds referenced above.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**EXHIBIT  
A**