

RESOLUTION NO. R-2019-111

A RESOLUTION AUTHORIZING THE MAYOR TO SIGN A SETTLEMENT AGREEMENT AND RELEASE BETWEEN THE CITY OF WHEATON AND MORNINGSIDE WHEATON, LLC

WHEREAS, on October 3, 2019, the Second District Appellate Court entered an Order granting Wheaton's motion for summary judgment and denying Morningside's motion for summary judgment in the case entitled, *City of Wheaton v. Morningside Wheaton, LLC*, 2017 MR 0077 (the "Litigation"); and

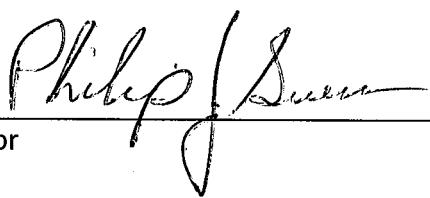
WHEREAS, the parties have elected to settle and compromise any claims, counterclaims and defenses they may have or may have had against each other based on or arising out of the disputes at issue in contract or the Litigation; and

WHEREAS, a true and accurate copy of the Reciprocal Settlement Agreement and Release is attached hereto and incorporated herein as EXHIBIT 1.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and the City Council of the City of Wheaton, DuPage County, Illinois, that:

- 1) The Mayor is hereby authorized to sign the Reciprocal Settlement Agreement and Release between the City of Wheaton and Morningside, Wheaton, LLC (EXHIBIT 1).
- 2) City staff and the City attorney are hereby authorized to undertake any and all acts necessary to complete effectuation of the terms of the agreement and release.

ADOPTED this 16th day of December 2019.



Mayor

Attested by:



City Clerk

Roll Call Vote:

Ayes: Councilman Rutledge
Councilman Zaruba

Councilman Barbier
Councilwoman Bray-Parker
Councilwoman Fitch
Mayor Suess
Councilwoman Robbins

Motion Carried Unanimously

RECIPROCAL SETTLEMENT AGREEMENT AND RELEASE

THIS RECIPROCAL SETTLEMENT AGREEMENT AND RELEASE (this "Agreement") is entered into as of this ____ day of November 2019 (the "Effective Date"), by and between MORNINGSIDE, WHEATON, LLC an Illinois corporation ("Morningside") and the CITY OF WHEATON ("Wheaton"). Morningside and Wheaton are collectively referred to herein as the "Parties".

RECITALS

WHEREAS, Wheaton filed a declaratory judgment action against Morningside in the Circuit Court for the Eighteenth Judicial Circuit of Illinois, styled as *City of Wheaton v. Morningside Wheaton, LLC, 2017 MR 0077* (the "Litigation");

WHEREAS, Morningside filed counter-claims against Wheaton for, *inter alia*, breach of contract;

WHEREAS, on or about October 3, 2019, the Court entered an order granting Wheaton's Motion for Summary Judgment and denying Morningside's Motion for Summary Judgment;

WHEREAS, on or about October 31, 2019, Morningside filed a Notice of Appeal in the Litigation (the "Appeal");

WHEREAS, the Parties desire to settle and compromise any claims, counter-claims and defenses they have or may have against the other, that are based upon or arising out of the disputes at issue in the contract or the Litigation.

NOW, THEREFORE, in consideration of the mutual covenants, promises and agreements set forth below, the Parties agree as follows:

AGREEMENT

1. **Incorporation of Recitals.** The Parties hereby incorporate the Recitals set forth above as Paragraph 1 of this Agreement as representing the intent of the Parties and as substantive provisions of this release.
2. **Mutual Release.** To the fullest extent of the law and without qualification or condition the Parties hereby mutually and reciprocally fully, completely, finally, and forever release and discharge the other party, including but not limited to elected and appointed officials, employees, agents, attorneys, consultants, officers, directors, spouses, heirs and assigns of the other, from any and all claims, demands, liens, actions, suits, causes of action, obligations, controversies, debts, costs, attorneys' fees, expenses, damages, judgments, orders and liabilities of whatever kind or nature in law, equity or otherwise, whether now known or unknown, suspected or unsuspected, and whether or not concealed or hidden, which exist, have existed, or may exist, based in any way, directly or indirectly, upon or otherwise relating to or arising from, regarding, or otherwise in any way pertaining to any and all events, activities, omissions, matters, actions, failures to act, injuries, circumstances, or facts of any and all types occurring or existing prior to the date hereof with respect to any and all claims as it relates to the above-referenced Litigation, except for claims related to the enforcement of this Agreement's terms and obligations due hereunder. It is the Parties' intent by approval and execution of this Agreement that, other than enforcement of this Agreement, any and all disputes, disagreements, issues, questions that did or could form a basis for claims or litigations between or amongst them are fully and unequivocally resolved.

3. **Dismissal of Lawsuit.** Wheaton shall cause the Litigation to be dismissed, with prejudice, with the Court retaining jurisdiction to enforce the terms of this Agreement.
4. **Dismissal of Appeal.** Morningside shall cause the Appeal, and any claimed affirmative defenses and counterclaim, to be dismissed with prejudice, with the Court retaining jurisdiction to enforce the terms of this Agreement.
5. **Attorney's Fees.** The Parties agree that each shall be responsible for payment of their own attorney's fees and court costs incurred as a result of the Litigation and in preparation for Appeal.
6. **Event of Default.** A Party shall be in default under this Agreement and shall be deemed to be in breach of same (an "Event of Default") if (a) it fails to keep or perform any other obligation, covenant or agreement contained in this Agreement; or (b) any representation or warranty made or deemed made by a Party in this Agreement shall be or shall become untrue or inaccurate in any respect.
7. **Representations and Warranties Relating to Wheaton.** Wheaton represents and warrants as follows:
 - a. **Organization.** Wheaton is a duly organized Illinois municipal corporation. Wheaton possesses full and adequate power and authority to carry on and conduct its business as it is currently being conducted.
 - b. **Authorization.** Wheaton has the full right, power and authority to execute and deliver this Agreement and to perform and satisfy its obligations under this Agreement. The execution and delivery of this Agreement by Wheaton has been duly and fully authorized and approved by all necessary and appropriate action. This Agreement has been duly executed and delivered by Wheaton.
 - c. **Binding Obligation.** This Agreement constitutes the legal, valid and binding obligations of Wheaton, and is enforceable against Wheaton in accordance with its terms.
 - d. **Approval and Ratification by City Council.** Wheaton represents and warrants that this Agreement is approved in form by the City Council of the City of Wheaton, and Wheaton shall provide Morningside with evidence of same and such approval is ratified as set forth in Exhibit A.
8. **Representations and Warranties Relating to Morningside.** Morningside represents and warrants that it has the full right, power and authority to execute and deliver this Agreement and to perform and satisfy its obligations and duties under this Agreement. The execution, delivery and performance of this Agreement by Morningside has been duly and fully authorized and approved by all necessary and appropriate action. This Agreement has been duly executed and delivered by Morningside.
9. **Enforcement Costs.** In any dispute related to or arising out of this Agreement, or upon the Event of Default, the prevailing/non-defaulting party shall be entitled to reimbursement of its reasonable attorneys' fees and costs by the non-prevailing/non-defaulting party.
10. **Choice of Law.** The interpretation and enforcement of this Agreement shall be governed by the internal law of the State of Illinois, without regard to its choice-of-law rules.
11. **Venue.** The Parties agree that any dispute arising out of or related to this Agreement shall be brought solely and exclusively in DuPage County, Illinois.

12. **Entire Agreement.** This Agreement contains the complete and entire agreement between the Parties. This Agreement supersedes all prior correspondence, communications, negotiations and/or agreements, which are merged herein. There are no additional or prior promises, representations, terms or provisions other than those contained herein. Furthermore, the Parties agree that this Agreement may be modified only by a written instrument signed by all parties and that no party will assert any claim against any other based on any alleged agreement affecting or relating to the terms of this Agreement not in writing and signed by all.
13. **No Oral Modifications or Waivers.** No term or provision of this Agreement may be waived or modified unless such waiver or modification is in writing and signed by a duly authorized representative of the party against whom such waiver or modification is sought to be enforced.
14. **Agreement Binding Upon Successors.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.
15. **Severability.** If any clause, term or provision of this Agreement, or the application thereof to any individual, entity or circumstance, shall to any extent be deemed by a court of competent jurisdiction to be invalid or unenforceable, then the remainder of this Agreement and the application of such clause, term or provision to individuals, entities or circumstances other than those in respect of which it is invalid and unenforceable, shall not be affected thereby, and shall be valid and be enforced to the fullest extent permitted by law.
16. **Drafting and Ambiguity:** This Agreement is deemed to have been drafted jointly by the parties and any uncertainty or ambiguity shall not be construed for or against any Party as an attribution of drafting to any Party.
17. **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of which shall constitute but one and the same instruments. For purposes of this Agreement, facsimile and email scanned signatures shall be considered the same as original signatures and shall be treated as valid and binding upon the Parties hereto.

[Signature Page Follows]

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

CITY OF WHEATON

By: Philip J. Sween
Its: Mayor

Dated: 12/18/19

MORNINGSIDE WHEATON, LLC

By: Daniel M. Gentry
Its: MANAGER

Dated: 12/2/19