

RESOLUTION NO. 2018-169

**RESOLUTION APPROVING THE SETTLEMENT OF LITIGATION
AND AUTHORIZING BUSINESS ADMINISTRATOR TO EXECUTE SETTLEMENT
DOCUMENTS IN CONNECTION WITH THE MATTER OF
10TH AVENUE FREEZE OUT, LLC v. BOROUGH OF BELMAR**

WHEREAS, on February 9, 2011, the Borough of Belmar (the “Borough”) entered into a lease agreement (the “2011 Lease”) with 10th Avenue Freeze Out, LLC, Hilary Colanduoni, and Trent Colanduoni (“Plaintiffs”) for a certain portion of the Borough’s former 10th Avenue Pavilion; and

WHEREAS, on March 6, 2015, Plaintiffs and the Borough executed a lease agreement (the “2015 Lease”) for a 1,000 square-foot section of the Borough’s 13th Avenue boardwalk; and

WHEREAS, on April 28, 2018, Plaintiffs and the Borough executed a lease agreement (the “2017 Lease”) for a portion of the new 10th Avenue Pavilion; and

WHEREAS, various disputes arose between Plaintiffs and the Borough as to the terms and conditions of the 2011 Lease, 2015, Lease, and 2017 Lease, particularly with respect to the Leases’ scope, termination, and the respective obligations of the parties; and

WHEREAS, Plaintiffs filed a Complaint against the Borough in the Superior Court of New Jersey, Law Division, Monmouth County alleging breaches of the Leases (the “Action”); and

WHEREAS, the Borough filed an Answer and Counterclaim in the Action, denying the allegations contained in Plaintiffs’ Complaint; and

WHEREAS, Plaintiffs and the Borough acknowledge and agree that the Action involves arguable and disputed questions of fact and law;

BE IT RESOLVED by the Mayor and Borough Council as follows:

- 1) The Settlement Agreement, which is attached hereto as Exhibit A, is hereby approved by the Mayor and Borough Council.
- 2) The Business Administrator is hereby authorized by the Mayor and Borough Council to execute and deliver to Plaintiffs the Settlement Agreement and accompanying First Addendum to Lease Agreement, and to take such measures as may be necessary to implement the terms and conditions thereof.

Mayor Magovern offered the above resolution and moved its adoption. Seconded by Councilman Walsifer and adopted by the following vote on roll call:

Council members:	AYES	NAYS	ABSTAIN	ABSENT
Mr. Walsifer	X			
Mr. McCracken	X			
Mrs. Nicolay	X			
Mr. Brennan	X			
Mayor Magovern	X			

Adopted: December 4, 2018

Settlement Agreement & Mutual General Releases

This Settlement Agreement and Mutual General Release ("Agreement") is made this _____ day of _____, 2018, between 10th Avenue Freeze Out, LLC; Hilary Colanduoni, and Trent Colanduoni (the "Plaintiffs") and the Borough of Belmar, the Borough Council of the Borough of Belmar, Matthew Doherty and Colleen Connolly (the "Defendants").

DEFINITIONS

A. 10th Avenue Freeze Out, LLC (hereinafter 10th Avenue) shall mean and include: 10th Avenue, including its predecessors, successors, assigns, parents, subsidiaries, divisions and also its present and former employees, partners, shareholders, members, officers, directors, agents, assigns, heirs, executors, administrators, and attorneys.

B. Borough of Belmar (the "Borough") shall mean and include: The Borough, its elected officials, officers, employees, directors, agents, assigns, and attorneys.

C. "Hilary Colanduoni" shall mean and include: Hilary Colanduoni and her agents, assigns, heirs, executors, administrators, and attorneys.

D. "Trent Colanduoni" shall mean and include: Trent Colanduoni and his agents, assigns, heirs, executors, administrators, and attorneys.

E. "Matthew Doherty" shall mean and include: Matthew Doherty and his agents, assigns, heirs, executors, administrators, and attorneys.

F. "Colleen Connolly" shall mean and include: Colleen Connolly and her agents, assigns, heirs, executors, administrators, and attorneys.

G. The "Litigation" shall mean and include for purposes of this Agreement: 10th Avenue Freeze Out, LLC, et al. v. the Borough of Belmar, et al. Docket No. Mon-L-3088-17, currently pending in the Superior Court of New Jersey, Law Division, Monmouth County.

H. The "Parties" shall mean and include for purposes of this Agreement: The Plaintiffs and the Defendants, both as before defined.

I. The "Lease" shall mean the "Lease Agreement in the Tenth Avenue Pavilion Concession Area South End" entered into April 28, 2017 between the Borough and 10th Avenue.

RECITALS

A. Plaintiffs filed the Litigation against Defendants on August 21, 2017.

B. Defendants filed an Answer on December 8, 2017 and, subsequently, an Amended Answer with Counterclaim on January 8, 2018.

C. The Parties, in view of the burden, expense, and uncertainties of litigation and deeming it to be in their respective best interests to resolve the claims and disputes among them, have agreed to settle amicably and resolve finally all claims among them, without admissions of wrongdoing or violations, including all claims and counterclaims that were alleged or that could have been alleged between or among them in the Litigation.

AGREEMENT

NOW, THEREFORE, BY REASON OF THE FOREGOING, FOR THE GOOD AND VALUABLE CONSIDERATION STATED HEREIN, THE PARTIES HEREBY AGREE TO SETTLEMENT OF THEIR DISPUTE UPON THE FOLLOWING TERMS:

1. Lease Amendment. The Parties agree, in consideration of this Agreement, that the Borough and 10th Avenue will execute, no later than

December 5, 2018 and be bound by, the Lease Amendment Agreement attached hereto as Exhibit A, which is an amendment to the Lease hereinbefore defined.

2. Deposit Refund. Currently, the Borough holds \$15,000 in deposit monies that relate to prior Lease Agreements between the Borough and 10th Avenue. Within 30 days of the effective date of this Agreement, the Borough will refund to 10th Avenue the \$15,000 afore mentioned.

3. Release by Plaintiffs. In consideration for the Lease Amendment, Deposit Refund and other consideration stated herein, Plaintiffs release, acquit and forever discharge Defendants, of and from any and all claims, demands, charges, debts, liens, causes of action, liability, damages, costs and expenses of any nature whatsoever, whether arising under state, federal or local law, common law, contract, tort, or in equity, which Plaintiffs ever had, or may have, whether such are known or unknown, discovered or undiscovered, anticipated or unanticipated, direct or indirect, contingent or fixed, occurring any time prior to the date of the execution of this Agreement. Such claims and causes of action include, but are not limited to, any claims

or causes of action asserted in the Litigation or that could have been asserted in the Litigation, by way of claim or counterclaim and include any claim for attorney's fees.

4. Release by Defendants. In consideration for the Release by Plaintiffs and other consideration stated herein, Defendants release, acquit and forever discharge Plaintiffs, of and from any and all claims, demands, charges, debts, liens, causes of action, liability, damages, costs and expenses of any nature whatsoever, whether arising under state, federal or local law, common law, contract, tort, or in equity, which Plaintiffs ever had, or may have, whether such are known or unknown, discovered or undiscovered, anticipated or unanticipated, direct or indirect, contingent or fixed, occurring any time prior to the date of the execution of this Agreement. Such claims and causes of action include, but are not limited to, any claims or causes of action asserted in the Litigation or that could have been asserted in the Litigation, by way of claim or counterclaim and include any claim for attorney's fees.

5. Bear Own Costs. The parties shall bear their own costs, expenses, and attorneys' fees and disbursements incurred in connection with the Litigation.

6. Execution Knowing and Voluntary. Each party acknowledges and represents that it, she or he (a) has fully and carefully read and considered this Agreement prior to its execution; (b) has been or has had the opportunity to be fully apprised by an attorney of the legal effect and meaning of this document and all terms and conditions hereof; (c) has had the opportunity to make whatever investigation or inquiry deemed necessary or appropriate in connection with the subject matter of this Agreement; (d) has been afforded the opportunity to negotiate as to any and all terms hereof; and (e) is executing this Agreement voluntarily, free from any undue influence, coercion, duress, or fraud.

7. No Drafting Party. Each party acknowledges and agrees that this Agreement shall not be deemed prepared or drafted by any one party. In the event of any dispute between the parties concerning this Agreement, the parties agree that any rule of construction to the effect that any ambiguity in

the language of the Agreement is to be resolved against the drafting party shall not apply.

8. Severability. In the event any one or more of the provisions of this Agreement is determined to be invalid, illegal, or unenforceable, such provision shall be fully severable, the Agreement shall be construed and enforced as if such provision had never comprised a part of the Agreement, and the remaining provisions of the Agreement shall remain in full force and effect.

9. Complete Agreement. This Agreement, including any attachments hereto, constitutes the complete and exclusive statement of agreement of each of the parties relative to the subject matter hereof, and supersedes all previous oral or written proposals, negotiations, representations, or understandings concerning the subject matter. This Agreement may not be modified except by a writing executed by authorized representatives of the parties to this Agreement; and each of the parties expressly disclaims any right to enforce or claim the effectiveness of any oral

modification to this Agreement based upon a course of dealing, waiver, reliance, estoppel, or other similar theory of law.

10. Counterparts. This Agreement may be executed in one or more counterparts, including electronically transmitted counterparts, all of which, when taken together, shall be deemed one and the same instrument. Each of the signatories to this Agreement represents that he or she is fully authorized to sign for and bind the party on whose behalf the signature is provided.

11. Stipulation of Dismissal. Upon completion of all conditions stated herein, the parties shall file a Stipulation of Dismissal With Prejudice in this matter dismissing all claims, cross-claims and counterclaims with prejudice and without costs and fees.

12. Enforcement of Terms. No Release in this Agreement will preclude or prevent the enforcement of the terms of this Agreement by any of its parties. Any party prevailing in an action to enforce the terms of this Agreement will be awarded reasonable attorneys' fees and costs in that enforcement.

13. Compromise of Disputed Claims. It is understood and agreed that any party, by executing this Agreement, is making any admission of wrongdoing or liability. Rather, it is understood and agreed that this Agreement constitutes a good faith settlement of disputed claims to provide an amicable conclusion to the litigation.

14. Governing Law. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey, without regard to conflicts of law.

15. Amendments. This Agreement may be amended or modified only in a writing executed by all of the parties.

ATTEST:

BOROUGH OF BELMAR

Borough Clerk

Colleen Connolly, Business Administrator

Dated:_____

BOROUGH COUNCIL OF BELMAR

Borough Clerk

Jennifer Nicolay, Council-President

Dated:_____

MATTHEW DOHERTY

Witness

Dated:_____

COLLEEN CONNOLLY

Witness

Dated:_____

10TH AVENUE FREEZEOUT, LLC

Witness

Hilary Colanduoni, Owner

Dated:_____

HILARY COLANDUONI

Witness

Dated:_____

TRENT COLANDUONI

Witness

Dated:_____

EXHIBIT A

FIRST ADDENDUM TO LEASE AGREEMENT DATED APRIL 28, 2017, BETWEEN THE BOROUGH OF BELMAR AND 10TH AVENUE FREEZE OUT, LLC

WHEREAS, on April 28, 2017, the Borough of Belmar ("Landlord") and 10th Avenue Freeze Out, LLC ("Tenant") (collectively the "Parties") entered into a Lease Agreement for the Tenth Avenue Pavilion Concession Area South End; and

WHEREAS, The Parties desire to clarify and modify certain terms and conditions contained in the Lease Agreement to more specifically define their respective rights and obligations and to avoid potential conflicts in the future;

NOW, THEREFORE, the Parties hereby covenant and agree as follows:

1) Paragraph 2 of the Parties' Lease Agreement is amended to indicate that: "The Property to be leased constitutes that portion of the south end of Tenth Avenue Pavilion at Tenth Avenue on the boardwalk in Belmar, New Jersey, comprising 800 square feet."

2) Paragraph 4 of the Parties' Lease Agreement is amended to provide that each payment due in each year from and including 2018 until and including 2022 (for rent years 2019 through 2023) shall be reduced by \$26,000 (the "Rent Reduction"), so that the payments for those years shall be as follows:

December 15, 2018	\$51,797.91	2019
December 15, 2019	\$54,131.84	2020
December 15, 2020	\$56,535.79	2021
December 15, 2021	\$59,011.86	2022
December 15, 2022	\$61,562.21	2023

The Following is also added to Paragraph 4: "If the Lease ends pursuant to any of the terms thereof or the premises are destroyed or rendered unusable to any extent, between the date of this First Addendum and the payments referenced above all being made, then the total amount of the Rent Reduction (i.e., \$130,000 minus \$26,000 times the remaining years in the Rent Reduction) will be immediately due to the Tenant from the Landlord.

Examples: If the Lease relationship ends after the December 15, 2018 payment but before the December 15, 2019 payment, \$104,000 would be due Tenant.

If the Lease relationship ends after the December 15, 2019 payment but before the December 15, 2020 payment, \$78,000 would be due Tenant.

If the Lease relationship ends after the December 15, 2020 payment but before the December 15, 2021 payment, \$52,000 would be due Tenant.

If the Lease relationship ends after the December 15, 2021 payment but before the December 15, 2022 payment, \$26,000 would be due Tenant.

If the Lease relationship ends after the December 15, 2022 payment but before the December 15, 2022 payment, \$0 would be due Tenant.

The remaining provisions of Paragraph 4 will not be affected.

3) Paragraph 8 of the Parties' Lease Agreement is amended to state as follows: "The Tenant agrees to use the Property only for the purpose of sale of food products, beverages, ice cream, frozen yogurt, frozen fruit products or other dessert products. The Tenant shall operate its business and be open for business, at minimum, from Memorial Day through Labor Day (the "Season") of each year according to the schedule of days and hours of operation that the Tenant sets. The Tenant may otherwise be open for business at the Property at its discretion, and Landlord shall not require the

Tenant to operate year-round. In the event the Tenant is delayed in opening by Memorial Day or must close during the Season due to future enactment of any law or issuance of any governmental order, rule or regulation, or by reason of delays due to strikes, lock-outs, acts of God, enemy action, civil commotion, fire or other cause beyond Tenant's reasonable control, then the Tenant shall be excused from being open during this period."

4) Tenant shall be permitted to set up an area near its business on Landlord's beachfront in accordance with the provisions of Belmar Borough Ordinances No. 40-7.32.2 that are applicable to "Outdoor Eating Areas", provided however, that the public may not be excluded from said area, regardless of whether or not such persons are patrons or customers of Tenant's business. Notwithstanding any provision in Ordinance to the contrary, picnic-style tables will be permitted in the area.

ATTEST:

BOROUGH OF BELMAR (Landlord)

Borough Clerk

Colleen Connolly, Business Administrator

Dated:_____

10TH AVENUE FREEZEOUT, LLC

Witness

Hilary Colanduoni, Owner

Dated:_____