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[Fee exempt Pursuant to
Govt. Code § 6103]

13 Attorneys for Defendant / Cross-
14 Complainant San Francisco
15 Community College District

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF SAN FRANCISCO**

18 SAN FRANCISCO MUSEUM OF
19 MODERN ART,

20 Plaintiff,

21 v.

22 SAN FRANCISCO COMMUNITY
23 COLLEGE DISTRICT,

24 Defendant.

Case No. **CGC-23-609700**

**SAN FRANCISCO COMMUNITY
COLLEGE DISTRICT'S CROSS-
COMPLAINT FOR**

- 1. **BREACH OF CONTRACT**
- 2. **NEGLIGENCE**
- 3. **DECLARATORY RELIEF**

25 SAN FRANCISCO COMMUNITY
26 COLLEGE DISTRICT,

27 Cross-Complainant,

28 v.

SAN FRANCISCO MUSEUM OF
MODERN ART, and DOES 1 through 250,
inclusive,

Cross-Defendant

1 SAN FRANCISCO COMMUNITY COLLEGE DISTRICT (“College”) by and through its
2 undersigned counsel, hereby alleges as follows:

3 **THE PARTIES**

4 1. College is informed and believes, and based thereon alleges, that SAN FRANCISCO
5 MUSEUM OF MODERN ART (“SFMOMA”), is a California non-profit organization organized
6 under the laws of the state of California and with its principal place of business at 151 Third Street,
7 San Francisco, California 94103.

8 2. College is a California public community college district organized under the laws
9 of the State of California and with its principal place of business at 50 Frida Kahlo Way, San
10 Francisco, California 94112.

11 3. College is ignorant of the true names and capacities of additional cross-defendants
12 sued herein as DOES 1 through 250, inclusive, and College will amend this Cross-Complaint to
13 allege their true names and capacities when ascertained. College is informed and believes and
14 thereon alleges that each of the yet-undiscovered cross-defendants is responsible in some manner
15 for the occurrences herein alleged, and that the damages as herein alleged were proximately caused
16 by said defendant.

17 **FACTUAL ALLEGATIONS**

18 4. On or about September 13, 2019 College and the SFMOMA entered into that certain
19 Loan and Partnership Agreement (Agreement), attached hereto as Exhibit A.

20 5. The Agreement established a process by which College agreed to loan SFMOMA
21 artwork known as Diego Rivera’s Unión de la Expresión Artística del Norte y Sur de este Continente
22 (the “Artwork”).

23 6. The Agreement required SFMOMA to dedicate a total budget of \$3,975,000 to
24 complete the “Project,” defined as removing the Artwork from College’s original location,
25 transporting it and displaying it at SFMOMA’s location, and returning it to College (the “Project
26 Budget”). Specifically, Section 4(a) of the Agreement provides as follows:

27 (a) SFMOMA agrees to fund a total budget for the project not to exceed THREE
28 MILLION NINE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS
(\$3,975,000) “Maximum Authorized Payment Amount”) (See Exhibit A – Budget).

1 This represents SFMOMA’s estimate of the reasonable costs for the condition
2 reporting and de-installation at CCSF, any repair/restoration of the lobby area at
3 CCSF where the Artwork is currently displayed, packing, transport from CCSF to
4 SFMOMA, insurance, conservation, installation, exhibition presentation, **the final**
5 **de-installation at SFMOMA, condition reporting, packing at SFMOMA and**
6 **return transit to CCSF at its new CCSF PAEC, or to another location**
7 **designated by CCSF on the CCSF campus in San Francisco, or to a mutually**
8 **agreed upon storage location** (as provided above in Section 3 (Terms and
9 Conditions)) (the “Project”). **SFMOMA will be logistically and financially**
10 **responsible for the expenses incurred and activities undertaken, as called out**
11 **above.** (Emphasis added.)

7. Section 4(a) references Exhibit A of the Agreement, which required SFMOMA to
dedicate One Million Dollars (\$1,000,000) of the Budget to the removal of the Artwork (the “Return
Budget”) as follows:

Deinstallation at SFMOMA, condition reporting, packing, and transit to CCSF or
designated storage (\$1,000,000)

8. Section 4(b) of the Agreement also required CCSF to return the Artwork to College
by September 1, 2023 (the “Return Date”) as follows:

The Artwork shall be returned for reinstallation at CCSF no later than
September 1, 2023. Any revisions to this deadline are subject to the mutual
agreement of SFMOMA and CCSF. The Parties agree that SFMOMA is not
responsible for the costs or logistics related to the storage and reinstallation of the
Artwork following the presentation and deinstallation at SFMOMA and transit to
CCSF. Moreover, once SFMOMA reaches its Maximum Authorized Payment
Amount, SFMOMA shall not be responsible for any additional costs associated with
the Artwork or the Project. [Emphasis Added.]

9. Section 18 of the Agreement states that SFMOMA may cancel the Agreement if it is
unable to meet its obligations under the Project as follows:

In the event that SFMOMA is unable, for any reason, to conceive, research, or
present the Artwork as agreed upon, in consideration of the scenarios called out in
Section 4 of this agreement, or if it determines it cannot complete the Project within
the budget, SFMOMA reserves the right to terminate this Agreement for its
convenience.

10. Section 21 of the Agreement states that the terms of the Agreement can only be
revised through written agreement executed by the Parties as follows:

This Agreement may only be modified, assigned or transferred in writing, with
signatures from all parties.”

1 11. The Parties did not amend the Agreement through a written agreement as required
2 by Section 18 of the Agreement.

3 12. Collectively, the Agreement required SFMOMA to reserve One Million Dollars
4 (\$1,000,000) for the return of the Artwork to College by September 1, 2023, unless SFMOMA
5 cancelled the Agreement.

6 13. On April 23, 2023, the Parties met to discuss the status of the Artwork (the “April
7 Meeting”), during which SFMOMA informed College that it had expended the entire Project
8 Budget, including the Return Budget. However, SFMOMA did not cancel the Agreement during
9 the April Meeting.

10 14. After the April Meeting, SFMOMA’s legal counsel provided a summary of the
11 discussion, which included several misstatements regarding the discussions as well as the content
12 of the Agreement (the “April Memorandum”), attached hereto as Exhibit B.

13 15. On May 1, 2023, College sent a letter to SFMOMA clarifying the statements made
14 during the April Meeting (the “May Letter”), attached hereto as Exhibit C.

15 16. The May Letter confirmed that the Agreement required SFMOMA to incur the cost
16 to return the Artwork by the Return Date and that College never agreed to revise the Agreement.

17 17. The May Letter also noted that SFMOMA waited until after it had spent all of the
18 Project Budget (including the Return Budget) to inform College that it had no funds to meet its
19 obligations pursuant to the Agreement.

20 18. The May Letter also confirmed that the Agreement required SFMOMA to maintain
21 One Million Dollars (\$1,000,000) to return the Artwork and did not allow SFMOMA to spend funds
22 in a manner that would compromise its ability to complete the Project.

23 19. On June 5, 2023, College sent another letter to SFMOMA outlining its position (the
24 “June Letter”), attached hereto as Exhibit D.

25 20. The June Letter confirmed that College never agreed to revise the Agreement and
26 specifically did not agree to extend the Artwork Return Date or relieve SFMOMA of its obligations
27 to use the Return Budget to return the Artwork to College.

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1 this action. College's damage amount includes the costs resulting from the delay in the return of
2 the Artwork and any costs College has to incur to secure the return of the Artwork. College will
3 seek leave to amend this Complaint to specify such amounts when the same are ascertained, or
4 upon proof thereof upon the trial of this action.

5 **SECOND CAUSE OF ACTION**

6 **(Negligence Against SFMOMA)**

7 29. College re-alleges and incorporates by reference into its Second Cause of Action, for
8 negligence, each and every preceding allegation of this Complaint as if the same were fully set forth
9 herein.

10 30. At all times relevant to this action, SFMOMA had a duty to exercise due care to
11 College to ensure the Artwork would be returned in accordance with the Agreement by reserving
12 the Return Budget to ensure the Artwork would be properly returned to College by the Return Date.

13 31. College is informed and believes, and therefore alleges, SFMOMA negligently and/or
14 recklessly breached their duty of care to College by expending the Project Budget without ensuring
15 enough funds were available to properly return the Artwork by the Return Date as required by the
16 Agreement in violation of the standard of care set forth in the Agreement based on the particulars
17 described herein above.

18 32. As a proximate and foreseeable result of SFMOMA aforesaid conduct, College has
19 sustained, and will sustain, damages because it has not received the Artwork by the Return Date and
20 therefore, will have to incur costs to secure the Artwork at a later date, based on the particulars
21 alleged herein above. College's damages are of an amount which is not presently ascertainable and
22 will not be ascertainable until the conclusion of this action. College will seek leave to amend this
23 Complaint to specify such amounts when the same are ascertained, or upon proof thereof at trial.

24 **THIRD CAUSE OF ACTION**

25 **(Declaratory Relief)**

26 33. College re-alleges and incorporates by reference into its Cause of Action, for
27 declaratory relief, each and every preceding allegation of this Complaint as if the same were fully
28 set forth herein.

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4. On All Causes of Action: For interest at the maximum legal rate; for College's costs of suit; and for such further or additional relief as the Court deems just and proper upon the trial of this action.

Dated: November 15, 2023

ATKINSON, ANDELSON, LOYA, RUUD & ROMO


By: 
Stephen M. McLoughlin
Attorneys for Defendant / Cross-Complainant San Francisco Community College District

Exhibit A

SB
12/1/19

LOAN and PARTNERSHIP AGREEMENT

This Agreement (the "Agreement") is made as of **September 13, 2019** by and between the San Francisco Museum of Modern Art ("SFMOMA"), 151 Third Street, San Francisco, California 94103, and City College of San Francisco ("CCSF"), **50 Frida Kahlo Way, San Francisco, CA 94112**

SFMOMA and CCSF will partner around the conservation, deinstallation at CCSF and installation at SFMOMA, and transit of Diego Rivera's mural, Unión de la Expresión Artística del Norte y Sur de este Continente (The Marriage of the Artistic Expression of the North and of the South on this Continent), 1940, also known as "Pan American Unity" ("Artwork"). The Artwork is owned by and currently on view at CCSF and planned for presentation to the general public at SFMOMA in the Roberts Family Gallery starting in the fall of 2020 (final dates TBD).

1. BACKGROUND

To date, multiple investigations have taken place to better understand the condition of the Artwork, determine how the Artwork panels are installed in the CCSF theatre building, and develop a plan to deinstall at CCSF, transit to and install at SFMOMA and return to CCSF.

December 2017

CCSF and SFMOMA entered into a **Memorandum of Understanding** to lay out the initial terms of this partnership, dated December 6, 2017, a copy of which is attached to this Agreement as Exhibit D.

January 2018

Local stakeholders convened at CCSF to begin assessing the scope of and logistics surrounding the project. Later that month, SFMOMA staff traveled to Mexico City to become familiar with other Rivera murals, guided by curator Jay Oles and Sandra Zetina.

May 2018

SFMOMA contracted Atthowe Fine Arts Services ("Atthowe") and other experts including conservators, concrete specialists, and building engineers to begin exploratory work on the mural. Assessment of the mural's condition, installation and structural integrity began at this time pursuant to terms set out in the May 1, 2018 "Vendor Agreement (Evaluation and Assessment - Proposed Removal and Installation of Rivera Mural)." See Exhibit A (SFMOMA AND CCSF Agreement with Atthowe, dated May 1, 2018). A key goal of this preliminary assessment was to compare the mural's installation with historical architectural drawings to determine if the mural was installed as previously designed. The preliminary assessment found that the "as built" varied from the original designs in several respects, including the manner the piece was ultimately attached to the wall.

July 2018

SFMOMA contracted Atthowe to engage tests to confirm the methods used to set the Nelson studs into the wall behind the mural. A concrete specialist assessed the grout used to set the studs in place. A key goal of this work was to begin to understand which tools might be necessary to deinstall the mural, and subsequently what type of vibration might result. See Exhibit B (SFMOMA and CCSF Agreement with Atthowe, dated May 22, 2019).

November 2018

The SFMOMA project team met with Dan Hanford of Atelier (NYC), a fine art packing and handling specialist with significant experience working with Rivera's portable murals. The group visited Rivera's *Still Life and Blossoming Almond Trees* (1931) portable mural located in Stern Hall on the UC Berkeley campus for a preliminary discussion on the deinstall and transportation of the mural. The group later visited the Artwork at CCSF to discuss options for removing and protecting the panels, and to gain insight from Dan's experience.

December 2018

The SFMOMA project team met with Alejandro Ramírez Reivich, a mechanical design engineer from National Autonomous University of Mexico (UNAM), Mexico, and two of his engineer colleagues to view the mural and introduce key questions surrounding the project. Topics discussed included monitoring and controlling vibration during deinstallation and transportation.

January 2019

Diego Rivera Roundtable, organized by SFMOMA and held in Mexico City, brought together experts in the field from both U.S. and Mexico for a working discussion to continue informing and shaping the process and plan for detach and deinstall, stiffening, protection and dampening, loading and transportation, and re-installation.

May 2019

SFMOMA entered into a Vendor Agreement with Atthowe to further assess the steps to disconnect and remove the Artwork from its current site and with Site and Studio Conservation, LLC, to assess the current condition of the Artwork and to determine whether any conservation work should be done prior to the Artwork being deinstalled and moved to SFMOMA. See Exhibits B (SFMOMA-CCSF-Atthowe Agreement) and C (SFMOMA Agreement with Site and Studio Conservation, dated May 22, 2019).

Moving forward, SFMOMA will continue working with CCSF and experts as proposals are developed for this project.

2. DESCRIPTION OF ARTWORK; ADDITIONAL FACTS**A. TECHNICAL DESCRIPTION OF THE ARTWORK AS INSTALLED AT CCSF**

The Artwork consists of ten fresco panels comprised of a painted lime plaster layer over a concrete and metal wire lath substrate. Each panel is framed by an equal leg angle iron to which a reinforcing steel framework channel is attached. The overall mural measures 22 feet by 74 feet and weighs approximately 42,500 – 47,500 pounds. The mural is composed of two different sized panels – square panels on the top row of the mural and smaller rectangular panels (half height) which comprise the bottom row. The parties understand that more information about the artwork and installation may become available as the examination process continues.

In their current installation in the CCSF theater building, the mural panels are set into a structural concrete wall with metal rods, Nelson studs, which were welded to the steel framework of the Artwork. The panels were set in place with these rods aligning into precast holes in the concrete wall behind the mural. The studs were then grouted into place, sealing the wall and securing the studs within the holes. The acoustical ceiling of the theater was put in after the mural was installed, and as such the space between the top of the mural and the ceiling is extremely limited.

B. ADDITIONAL FACTS

Given its size, fragility, and the method by which the Artwork was installed, it will be difficult to move the Artwork safely.

The structure in which the Artwork is currently housed is not seismically safe and needs to be replaced. CCSF will be seeking voter approval of a bond measure to fund construction of a new performing arts center with space for safely exhibiting the Artwork.

The budget SFMOMA has developed for this Project reflects a commitment to preservation of this extraordinary work of art, but it has limitations that must be respected.

The Parties have and will continue to cooperate in SFMOMA's efforts to investigate how to safely remove the Artwork from its current location, a move that will be necessary in the future whether or not it can be done within the limits of SFMOMA's budget for the purpose of this Project.

The Parties understand and agree that deinstallation of the Artwork at CCSF will result in partial demolition to varying degrees of the current lobby area where the Artwork is installed. The parties understand and agree that the current lobby area where the artwork is installed in the building which is adjacent to, but separate from, the theater-shall be restored to a functional condition for lobby gathering purposes, consistent with its condition immediately prior to removal. Functionality shall be defined as being weathertight with any holes or openings required as part of the deinstallation, including any glass openings, to be closed and sealed. Finishes may vary from those of the original

building (e.g. stucco may be substituted for concrete) so long as the previous conditions are met. Where possible, SFMOMA would replace any broken or open glass doors or windows with replacement glass of similar condition and quality. SFMOMA is not responsible for correcting conditions that currently exist in the building (including accessibility issues and/or deteriorated building systems, or for any electrical changes or upgrades, or for making any further improvements or changes.

3. TERMS AND CONDITIONS OF LOAN TO EXHIBITION

In consideration of the financial investment made by SFMOMA, CCSF agrees to lend the Artwork to SFMOMA at no charge for a loan period beginning with the de-installation of the Artwork in spring 2020 at CCSF, and continuing until the close of the exhibition at SFMOMA, through deinstallation at SFMOMA, and through transport of the Artwork to CCSF under the terms of this agreement. For the purposes of this agreement, "transport of the Artwork to CCSF" includes transport to one of the following: a new CCSF Performing Arts Center (PAEC) or other location designated by CCSF on the CCSF campus in San Francisco, or to a mutually agreed upon storage location. SFMOMA is not responsible for re-installation at CCSF or for any movement between the above listed CCSF locations.

4. FINANCIALS

(a) SFMOMA agrees to fund a total budget for the project not-to-exceed THREE MILLION NINE HUNDRED SEVENTY FIVE THOUSAND DOLLARS (\$3,975,000) "Maximum Authorized Payment Amount" (See Exhibit A – Budget). This represents SFMOMA's estimate of the reasonable costs for the condition reporting and de-installation at CCSF, any repair/restoration of the lobby area at CCSF where the Artwork is currently displayed, packing, transport from CCSF to SFMOMA, insurance, conservation, installation, exhibition presentation, the final de-installation at SFMOMA, condition reporting, packing at SFMOMA and return transit to CCSF at its new CCSF PAEC, or to another location designated by CCSF on the CCSF campus in San Francisco, or to a mutually agreed upon storage location (as provided above in Section 3 (Terms and Conditions)) (the "Project"). SFMOMA will be logistically and financially responsible for the expenses incurred and activities undertaken as called out above.

(b) The Artwork shall be returned for reinstallation at CCSF no later than September 1, 2023. Any revisions to this deadline are subject to the mutual agreement of SFMOMA and CCSF. The Parties agree that SFMOMA is not responsible for the costs or logistics related to the storage, and reinstallation of the Artwork following the presentation and deinstallation at SFMOMA and transit to CCSF. Moreover, once SFMOMA reaches its Maximum Authorized Payment Amount, SFMOMA shall not be responsible for any additional costs associated with the Artwork or the Project. For the avoidance of doubt, SFMOMA shall not be responsible for any costs in excess of the Maximum Authorized Payment Amount, or otherwise related to the post September 1, 2023 storage, transit, and/or reinstallation of the Artwork at CCSF's designated location. Nor is SFMOMA responsible for the costs or logistics related to any move from CCSF's designated storage

to the PAEC in the event the Artwork cannot be returned directly to the PAEC at the end of SFMOMA's exhibition.

(c) If CCSF wishes to engage SFMOMA for oversight of the re-installation at CCSF or a designated CCSF location, this shall be subject to a separate written Agreement between the Parties.

All expenses, other than those SFMOMA has agreed to cover under this Agreement, are the responsibility of CCSF.

(d) In the event that the new Performing Arts Center at CCSF is not ready for the timely installation of the Artwork following September 1, 2023, due to construction, budgetary, or any other reasons outside of SFMOMA's control, CCSF must pay for all costs associated with the insurance, interim storage, relocation, and reinstallation of the Artwork after September 1, 2023.

(e) Given the learnings to date on the manner in which the Artwork was originally installed, the Parties agree that the deinstallation of the Artwork at CCSF will result in partial demolition to varying degrees of the current lobby area where the Artwork is installed. SFMOMA will only be responsible for repairs to this lobby area that result from the deinstallation of the Artwork in so far as they are required to meet the standards set forth in Section 2 and the repairs are included in the scope of the work of the contractor responsible for deinstalling the Artwork and part of the allocated budget for this Project. Such repairs shall be subject to a three party agreement among CCSF, the contractor, and SFMOMA, but shall not impose any additional costs on SFMOMA beyond the Maximum Authorized Payment Amount hereunder. SFMOMA and CCSF would approve any subcontractors used by the contractor. (The parties anticipate that the contractor will be Atthowe Fine Arts Services.)

(f) The final plan for deinstallation of the Artwork will be discussed in detail between SFMOMA, CCSF, and related contractors for clarity of impact on the current building. If CCSF determines in its reasonable discretion that the de-installation of the work at CCSF will result in the CCSF theatre lobby becoming unusable for lobby gathering purposes following the required repair and restoration of such area under this Agreement, and if no reasonable alternative is available, CCSF may terminate this agreement. If SFMOMA determines in its sole discretion that the de-installation, shipping/transit, re-installation, or display of the work at SFMOMA will pose an undue risk to the Artwork, facilities, or will exceed the budgeted costs, or if the Artwork or its loan cannot be insured within SFMOMA's allocated budget for this Project, or if SFMOMA is not able to safely remove or move the work from its current site to SFMOMA, SFMOMA may terminate this Agreement.

(g) If after work has begun to remove the Artwork at CCSF, SFMOMA determines that continued work will pose an undue risk to the Artwork, facilities, or will exceed the budgeted costs, SFMOMA may terminate this Agreement. Under this scenario,

SFMOMA will work with CCSF to find a mutually agreeable solution, within the constraints of SFMOMA's allocated budget, for reinstallation to the extent necessary for the security of the Artwork consistent with its prior installation. If, as a consequence of the work already done, the Artwork cannot be reinstalled, in consultation with CCSF SFMOMA will be responsible for packing the deinstalled components of the Artwork and sending them to storage in a mutually agreeable location subject to the provisions governing packing and shipping set forth in section 7. Any necessary storage related expenses for the deinstalled components of the Artwork to be covered by SFMOMA until September 1, 2023 and subject to the constraints of SFMOMA's allocated budget for this Project.

5. SCHEDULE

The final Artwork will be fully installed and available for public viewing at SFMOMA in October 2020 (date TBD), to coincide with SFMOMA's *Diego Rivera* exhibition in the Museum's fourth floor galleries. In order to allow for a timely installation that considers further research and assessment, and stabilization work, the following schedule will be put in place:

Spring - Summer 2019	Complete documentation to assess materials and condition
Summer- Fall 2019	Stabilization and treatment of Artwork
Winter 2019-20	Vibration study and design development for Artwork removal
Spring 2020	Protection and Deinstallation at CCSF
Spring - Summer 2020	Transport to SFMOMA and installation at SFMOMA
Fall 2020	Cleaning, and preparations for public opening at SFMOMA
Spring/Summer 2023	Deinstallation at SFMOMA, transit to and installation at CCSF (through September 1, 2023)

SFMOMA and CCSF to maintain communications on this schedule and given the unknowns and complexities of this project, including but not limited to funding, construction timelines, deinstallation/installation and transit challenges, conservation needs, etc. will make adjustments accordingly.

6. FUNDRAISING and CREDIT LINE

SFMOMA and CCSF agree to meet and discuss any potential joint fundraising opportunities, which shall be subject to mutual written agreement.

SFMOMA and CCSF agree to include the Organizational Credit line in all printed materials related to the Artwork and its presentation at SFMOMA, including but not limited to exhibition announcements, invitations, educational materials, website, press releases, and in any other promotional materials.

The Organizational credit line for the Artwork is as follows:

Unión de la Expresión Artística del Norte y Sur de este Continente, (The Marriage of the Artistic Expression of the North and of the South on this Continent), by Diego Rivera, in the collection of City College of San Francisco, is presented by the San Francisco Museum of Modern Art.

The use of translations in the title subject to SFMOMA's editorial guidelines. After first mention of the title, the Artwork may be referred to as *Pan American Unity*.

Once back on display at CCSF, CCSF shall credit SFMOMA with the following:

This artwork was conserved in 2020/2021 through the generosity of the San Francisco Museum of Modern Art and its sponsors... (donor listing TBD).

SFMOMA will seek project funding from individuals, foundations, and corporations. The credit line is subject to change as sponsorship information becomes available. In all cases, without exception, any funding secured will be acknowledged on a separate line below the Organizational credit line in accordance with SFMOMA's guidelines for recognition. Any subsequent changes or additions to the credit line shall become part of this agreement.

7. CONSERVATION, PACKING AND TRANSPORTATION, and ACCESS

As per section 2, SFMOMA will continue working with CCSF and contract art handlers and conservators on identifying and executing best practices for the conservation and protection of the mural in anticipation of the deinstallation at CCSF, transit to and installation and deinstallation at SFMOMA, and transit from SFMOMA to CCSF or storage as provided in this agreement. All plans for conservation and transit will be approved in advance by CCSF.

A point-of-origin condition report will be prepared by SFMOMA or an independent contract conservator. This report will be annotated following the Artwork's arrival at SFMOMA, prior to packing at deinstallation, and upon return to CCSF. This report will be the reference document used if a change or modification in the condition of the Artwork occurs during presentation or transport to CCSF.

SFMOMA will exercise due care in protecting the Artwork from damage, loss, and theft, including maintaining optimum standards of environmental and security controls consistent with the standards it has adopted and exercises for the preservation and safekeeping of its own property. If possible, and where SFMOMA determines that such measure is in the best interests of the Artwork, the Artwork shall be shipped back to CCSF encased in the framework constructed to install it at SFMOMA.

SFMOMA will work with CCSF and other contract vendors on the construction of packing and housing for the transit of the Artwork from CCSF to SFMOMA and back to CCSF. In consultation with CCSF, SFMOMA will arrange for the transport of the Artwork from CCSF to SFMOMA. In accordance with sections 4 and 5, SFMOMA shall arrange for the return transport to CCSF.

CCSF will provide all necessary access to the Artwork on its premises at CCSF and shall cooperate in the work to be performed pursuant to the Work Plans provided by Atthowe, SFMOMA, and outside parties and approved in advance by CCSF. SFMOMA will work with Atthowe, internal staff, and outside parties to develop these work plans for the development of the conservation, packing, transit, and installation plan and its execution. SFMOMA will work with CCSF to identify timeframes that will allow for this work to be completed to meet the schedule outlined in section 5 and the opening of the presentation at SFMOMA. CCSF via Steven Bruckman or his designee, shall provide any necessary access or parking permits to facilitate the services under this Agreement. If additional work is necessary to best serve the purposes of this Agreement, CCSF will have staff available to approve additional work by either SFMOMA or its contractors deemed appropriate and necessary by CCSF and authorized by SFMOMA.

Any plans, diagrams, and models generated by SFMOMA for the purposes of planning and execution shall remain the property of SFMOMA.

8. HANDLING AND CARE

SFMOMA will provide periodic on-site inspection of the Artwork during the exhibition period to ensure that the condition of the Artwork meets the standards set by SFMOMA and CCSF during installation and deinstallation. SFMOMA will maintain security coverage during public hours. SFMOMA will be responsible for the handling and care of the Artwork during the period of time covered by this Agreement, specifically during the timeframes in which SFMOMA is working on site with the Artwork. No agents or employees of SFMOMA shall be held personally responsible or liable for any damage to or destruction of the Artwork supplied by the CCSF during the exhibition period.

SFMOMA assumes the right, unless specifically denied by CCSF, to examine and document the Artwork by all modern scientific methods during the exhibition. It is understood that SFMOMA will not clean, restore, conserve, or otherwise alter the Artwork while on site at SFMOMA without consent of CCSF unless SFMOMA and CCSF have agreed to a maintenance schedule prior to the opening of the Exhibition at SFMOMA. Any emergency alterations during the exhibition will be recorded and forwarded to CCSF.

9. INSURANCE

Liability Insurance Requirements.

SFMOMA represents that it has and will comply with CCSF's General Liability, Workers Compensation, and Auto insurance requirements, which shall be provided to SFMOMA prior to execution of this Agreement and attached hereto, and SFMOMA shall provide a certificate evidencing its insurance.

Fine Arts Insurance.

SFMOMA will insure the Artwork at [REDACTED]. SFMOMA shall arrange for commercial insurance ("all risk" fine arts insurance with standard exclusions, including, but not limited to, loss or damage resulting from gradual and natural deterioration, wear and tear, inherent vice, etc.) from the condition checking and de-installation of the Artwork at CCSF, while in transit, during the installation and exhibition at SFMOMA, through the deinstallation, condition checking and packing at SFMOMA, and return transit to CCSF or an alternate storage facility. CCSF will insure the Artwork upon arrival on its premises or storage facility.

SFMOMA agrees to name Atthowe Fine Arts Services and Site and Conservation Services, LLC as an additional insured, and to name CCSF as an additional insured and as loss payee, under SFMOMA's fine arts insurance policy and will provide CCSF and Atthowe with a certificate of insurance evidencing such coverage.

It is understood by CCSF that all tangible objects are subject to gradual inherent deterioration for which SFMOMA is not responsible. Notwithstanding any other provision of this Agreement, CCSF agrees that in the event of loss or damage to the Artwork, CCSF's sole recovery against SFMOMA, its officers, agents, contractors (including Atthowe and contract conservators and specialists) and employees, shall be limited to the amount, if any, paid by the insurance required under this Agreement. CCSF hereby releases SFMOMA and such parties from any further liability from any and all claims arising out of such loss or damage. The policy covers the Artwork for the amount indicated above against "all risks" of physical loss or damage from external cause in keeping with the exclusions listed above while in transit and on location during the exhibition period.

SFMOMA agrees that any loss, damage, deterioration, or change in the condition of the Artwork will be reported to CCSF immediately upon SFMOMA's discovery of such change in condition.

Except for emergency procedures to arrest the possibility of further damage, SFMOMA will not make or permit the making of any repairs to the Artwork unless and until it receives written permission from CCSF.

10. COPYRIGHT, PHOTOGRAPHS, REPRODUCTIONS

SFMOMA will seek to secure the necessary copyright permissions for images to be reproduced by SFMOMA for promotional, social media, website, news/media, editorial, marketing, archival, scholarship, educational purposes and any other purposes in furtherance of the charitable and educational missions of SFMOMA and, where possible and where no additional fees are required, may also request the extension of such permissions to CCSF. Any fees related to these permissions for SFMOMA's uses will be the responsibility of SFMOMA. SFMOMA will be responsible for securing permission from the copyright holder when proposing to crop or bleed an image of the Artwork off the page, print in any single color other than black, or superimpose anything on the images of the Artwork. Notwithstanding the above, CCSF shall be solely responsible for its compliance with all applicable copyright laws and any applicable permissions or license agreements relating to the Artwork and shall indemnify, defend, and hold SFMOMA harmless for any CCSF violations of such laws or agreements in accordance with the Indemnification provisions of this Agreement.

Photography and filming of the Artwork on site by SFMOMA's and CCSF's professional staff is permitted for documentary or educational purposes, or publicity purposes (print, out of home, digital or broadcast, advertising, and social media authorized by SFMOMA and/or CCSF, subject to any required copyright licenses, but then only if supervised by SFMOMA or CCSF's professional staff on their respective premises. Any/all authorized photography is subject to the following restrictions:

- Lights may not be too close or intense
- Flashbulbs or flash equipment may never be used and SFMOMA shall post a notice, accordingly.

SFMOMA will use reasonable efforts to include the full biographical information about the Artwork, its complete ownership credit line, the photographer's credit line (if given), and the copyright notice when space and medium permit.

Reproductions of the Artwork will include the following information:

Diego Rivera, Unión de la Expresión Artística del Norte y Sur de este Continente (The Marriage of the Artistic Expression of the North and of the South on this Continent), 1940. Courtesy City College of San Francisco. ©Banco de Mexico Diego Rivera & Frida Kahlo Museums Trust, Mexico, D.F. / Artists Rights Society (ARS), New York. "Trust Copyright".

The use of translations in the title subject to SFMOMA's editorial guidelines. After first mention of the title, the Artwork may be referred to as *Pan American Unity*.

Visitors to the exhibition will be permitted to take photographs for personal, non-commercial uses.

11. PRESS, MARKETING, AND PUBLIC ANNOUNCEMENTS

The Parties will work collaboratively on media and marketing strategy. Once a direction is set in consultation with CCSF, SFMOMA shall have the right to advance the story of the project in all media channels without restriction from CCSF. SFMOMA shall have final authority over the use of its name, or logo usage by approval, or images of the interior(s) or exterior(s) of the Museum building. CCSF shall consult with SFMOMA on its use of SFMOMA's name or logos and shall coordinate with SFMOMA in advance on all press releases and media communications.

CCSF shall obtain SFMOMA's approval before issuing any press releases concerning or featuring images of the Artwork as part of a story that focuses on the project. In addition, where possible and where time permits, CCSF shall consult with SFMOMA before arranging or conducting any interviews with the press concerning or featuring the Artwork.

Marketing and social media campaigns will be developed in consultation of the Parties, and each SFMOMA and CCSF will have the right to direct specific executions without additional review, except as outlined in this Agreement.

When necessary, the Parties shall give the other five (5) working days to turn around approvals on press and marketing materials.

SFMOMA will conduct a photo shoot of the Artwork in situ at SFMOMA to create installation images for media, marketing, and advertising materials and social media.

SFMOMA will create and execute a press event to introduce the media to the installed Artwork at SFMOMA. CCSF will have a speaking opportunity, the ability to contribute to the guest list, and attend the event.

The Parties will share with each other copies of any printed materials relating to the installation including any press reports, installation photography, emails, internal magazine articles and any other materials that donors, visitors, and the public will have access to.

12. MEDIA AND PRODUCTION RIGHTS

Subject to the Trust copyright, SFMOMA shall have the authority to create images of the Artwork and the conservation and installation and deinstallation of the Artwork and to use such imagery in its sole discretion for educational, charitable (non-commercial), and archival purposes. For any commercial uses, SFMOMA shall obtain CCSF's prior approval, which shall not be unreasonably withheld.

13. TICKETING AND OPENING EVENTS

The Artwork will be on view in SFMOMA's Roberts Family Gallery, a free admission space for visitors.

SFMOMA will be responsible for the organization associated with opening events planned for SFMOMA and related to the Diego Rivera exhibition on view with the Artwork. SFMOMA will work with CCSF on finalizing the CCSF invitee list of selected staff, trustees, and sponsors to its opening reception and related events, with the number of CCSF guests for each event to be determined by SFMOMA, depending on event size.

14. PROGRAMS

SFMOMA will work with CCSF on the development of programs related to the Artwork, as appropriate and pending budget availability. As of the date of this agreement, a Roundtable on best practices in conservation and transport of Rivera murals was held in Mexico with CCSF representatives, and internships for CCSF students at SFMOMA have been established.

15. MERCHANDISE

SFMOMA may decide to create merchandise related to the Artwork and Exhibition and will work with CCSF on a supplemental merchandise agreement.

16. STAFF CONTACTS

The persons representing this project for each party for the purpose of receiving notices, rendering reports or giving approval required under this Agreement are (until notified by certified mail of a change):

For SFMOMA
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Helen and Charles Schwab Director
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nbenezra@sfmoma.org

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Co-Director of Exhibitions
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For CCSF
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Chancellor
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General Counsel
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Thomas Boegel
Senior Vice Chancellor, Academic and Institutional Affairs
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Staff contacts for questions and information:

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Registration, Exhibitions
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Elise S. Haas Senior Curator of Painting and Sculpture
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Sriba Kwadjovie Quintana
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AT CCSF

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William Maynez
Diego Rivera Mural Steward
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wmaynez@ccsf.edu

Judy Teichman
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415-309-6042
judyteichman@gmail.com

17. LIABILITY AND INDEMNIFICATION

Each party represents and warrants to the other that it has full power and right to enter into this Agreement and that there are no conflicting obligations relating to the rights granted herein.

With respect to losses other than loss or damage to the Artwork (such claims to be covered under the fine arts insurance policy and provisions provided and referenced herein and governed by the appropriate SFMOMA insurer's claims process and procedures), the parties agree as follows:

SFMOMA agrees to indemnify, defend and hold harmless CCSF, its trustees, officers, agents and employees from any and all claims, damages, losses, liabilities and expenses, including but not limited to reasonable attorneys' fees and cost of litigation (collectively "Claims") in connection with any accident, loss, injury (including death) or damage to persons or property (including intellectual property and/or any copyright infringement claims or claims for breach of license agreements relating to the Artwork) arising out of the acts, errors or omissions of SFMOMA, its trustees, officers, agents, and employees related to the performance of activities conducted pursuant to this Agreement, but only to the extent such Claims are attributable to the acts or omissions of SFMOMA, its trustees, officers, agents and employees; provided that CCSF: (a) promptly notifies SFMOMA in writing of the claim; (b) grants SFMOMA sole control of the defense and/or settlement of the claim; and (c) provides SFMOMA, at CCSF's expense, with all assistance, information and authority reasonably required for the defense and/or settlement of the claim, but in a manner consistent with CCSF's respective confidentiality obligations and preservation of attorney/client, work product, and other privileges. SFMOMA shall not without consent of CCSF (which consent shall not be unreasonably withheld), effect any settlement or discharge or consent to the entry of any judgment, unless such settlement or judgment includes as an unconditional term thereof the giving by the claimant or plaintiff to CCSF of a general release from all liability in respect of such liability and imposes no restrictions or obligations on CCSF.

CCSF agrees to indemnify, defend and hold harmless SFMOMA, its trustees, officers, agents, and employees from any and all Claims in connection with any accident, loss, injury (including death) or damage to persons or property (including any intellectual property and any copyright infringement claims or claims for breach of license agreements relating to the Artwork) arising out of the acts, errors or omissions of the CCSF, its trustees, officers, agents and employees related to the performance of activities conducted pursuant to this Agreement, but only to the extent such Claims are attributable to the acts or omissions of CCSF, its trustees, officers, agents, and employees; provided that SFMOMA: (a) promptly notifies CCSF in writing of the claim; (b) grants CCSF sole control of the defense and/or settlement of the claim; and (c) provides CCSF, at SFMOMA's expense, with all assistance, information and authority reasonably required for the defense and/or settlement of the claim, but in a manner

consistent with SFMOMA's respective confidentiality obligations and preservation of attorney/client, work product, and other privileges. CCSF shall not without consent of SFMOMA (which consent shall not be unreasonably withheld), effect any settlement or discharge or consent to the entry of any judgment, unless such settlement or judgment includes as an unconditional term thereof the giving by the claimant or plaintiff to SFMOMA of a general release from all liability in respect of such liability and imposes no restrictions or obligations on SFMOMA.

Except with respect to liabilities arising out of CCSF's and SFMOMA's indemnification obligation, (A) neither party shall be liable to the other party for any punitive, incidental, indirect, special, reliance, or consequential damages, including lost business, revenue, or anticipated profits, whether based on breach of contract, tort (including negligence), or otherwise, and whether or not the party was advised of the possibility of such loss or damages and (B) in no event will either party's liability and damages under this Agreement exceed the amount of the Joint Project Expenses. The parties agree that the limitations of liability set forth in this section will survive any termination or expiration of this Agreement and will apply even if any limited remedy specified in this Agreement is found to have failed of its essential purpose.

CCSF and SFMOMA each hereby waive subrogation and agree to hold the other party harmless against worker's compensation benefits, personal injury, bodily injury or property damage claims and related expenses arising from its own trustees, officers, agents, and employees in connection with activities conducted pursuant to this Agreement.

18. CANCELLATION

In the event that SFMOMA is unable, for any reason, to conceive, research, or present the Artwork as agreed upon, in consideration of the scenarios called out in Section 4 of this agreement, or if it determines it cannot complete the Project within the budget, SFMOMA reserves the right to terminate this Agreement for its convenience.

19. CONFIDENTIAL INFORMATION

CCSF acknowledges that during the course of this Agreement, CCSF may have access to and come into contact with Confidential Information of SFMOMA. Confidential Information shall include, without limitation, all information related to the Exhibition and the business of SFMOMA. During the term of this Agreement, CCSF shall not reproduce, use, duplicate, distribute, disclose or otherwise disseminate any Confidential Information or any physical embodiments thereof (for example, documents) except to the extent necessary to complete the project and as required by law. Upon request by SFMOMA and in any event upon termination of the Agreement for any reason, CCSF shall promptly deliver to SFMOMA all property belonging to SFMOMA including, without limitation, any Confidential Information then in its custody, control or possession. SFMOMA also agrees to reciprocate this courtesy with regard to any Confidential Information revealed to SFMOMA by CCSF.

20. SUCCESSORS AND ASSIGNS

This Agreement shall inure to the benefit of and be binding upon the successors of each of the parties. This Agreement may not be transferred or assigned by CCSF in any manner whatsoever without the prior written consent of SFMOMA.

21. CONCLUSION AND GOVERNING LAW

This Agreement represents the entire mutual understanding of the parties hereto, and supersedes and replaces all prior documents, correspondence, conversations and other written or oral understandings related to the Agreement. This Agreement may only be modified, assigned or transferred in writing, with signatures from all parties.

This Agreement shall be governed by and construed in accordance with the laws of the State of California. Any disputes arising out of this Agreement will be subject to the exclusive jurisdiction of the state and federal courts located in San Francisco County, California, and each party consents to personal jurisdiction thereof.

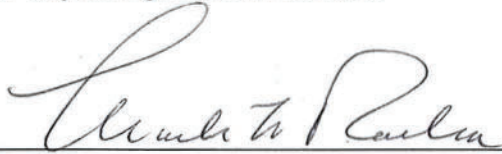
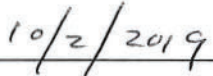
For The San Francisco Museum of Modern Art

Neal Benezra
Helen and Charles Schwab Director

Date

For City College of San Francisco

Dr. Mark Rocha
Chancellor

Date

Exhibit A: Budget

ESTIMATED PROJECT BUDGET

Deinstallation at CCSF, transit to SFMOMA, Installation at SFMOMA	\$ 1,750,000
Gallery preparation related expenses	\$ 275,000
Deinstallation at SFMOMA, condition reporting, packing, and transit to CCSF or designated storage	\$ 1,000,000
Insurance	\$ 300,000
Conservation related expenses	\$ 650,000
TOTAL	\$ 3,975,000

IN NO EVENT SHALL SFMOMA'S TOTAL BUDGET AND EXPENDITURES EXCEED \$3,975,000.

Exhibit B:

SFMOMA Agreement with CCSF and Atthowe, dated May 22, 2019

Exhibit C:

SFMOMA Agreement with CCSF and Site and Studio Conservation, LLP, dated May 22,
2019

Exhibit B

MEETING MINUTES – Virtual Meeting to Discuss Return of Rivera Mural

MEETING DATE: April 13, 2023, 1pm – 1:30pm

San Francisco Museum of Modern Art (SFMOMA), City College of San Francisco (CCSF), and Atthowe Fine Arts Services (Atthowe)

.....

The following individuals attended the virtual meeting on April 13, 2023, at 1pm.

FROM CCSF:

- David Martin, Chancellor
- John Al-Amin, Vice Chancellor - Finance and Administration
- Alberto Vazquez, Associate Vice Chancellor - Facilities, Construction & Planning

SFMOMA:

- Christopher Bedford, Director
- Adine Varah, General Counsel
- Tsugumi Maki, Chief Exhibitions and Collections Officer
- Rebecca Malkin Chocron, COO/CFO
- David Funk, Project Manager - Exhibitions
- Michelle Barger, Director of Conservation
- Clara Hatcher Baruth, Director of Communications

ATTHOWE FINE ART SERVICES:

- Bryan Cain, Chief Executive Officer

SUMMARY OF 4/13/23 MEETING

I. **Brief Introductions & Re-Cap of Where we Are (SFMOMA & CCSF)**

- **Important Collaboration.** All parties agreed that the collaboration on the Rivera mural has been very meaningful to the public and that the community feels invested in this work.
- **Transparency and Candor.** All parties agreed that communicating transparently, promptly, and directly with each other will be even more critical as we move forward with the safe and efficient return of the mural.
- **Communications and External Announcements.** We also agreed, consistent with the Loan and Partnership Agreement, that all parties plan to collaborate on future external announcements and press engagement regarding the return of the mural.
- **SFMOMA's efforts to help CCSF.** CCSF also acknowledged that SFMOMA:
 - **Accommodated CCSF's written requests for extension of the loan through early 2024.** Such requests date back to at least December 2021 (see 12/16/21 email from Leslie Simon to Neal Benezra with cc to Chancellor David Martin and Trustee John Rizzo).
 - **Initiated Early Communications in November 2022 to begin to plan for the Mural's return.** Anticipating the logistics involved in the return, SFMOMA initiated discussions late last year to confirm CCSF's return plan and discuss CCSF's financial responsibilities under the Loan and Partnership Agreement.

- **Helped CCSF Find a Suitable Alternative Return Location at Treasure Island.** After the meeting with SFMOMA’s Director, General Counsel, and Chief Exhibitions and Collections Officer, in November 2022 where Chancellor Martin and John Rizzo indicated that they did not have appropriate storage on campus and were concerned regarding delays to the Performing Arts Center project, SFMOMA proactively worked for several months with Treasure Island Representatives and City Officials at the Arts Commission and TIDA (Treasure Island Development Authority) and CCSF Chancellor Martin to explore an alternative Treasure Island solution.
- **Accommodated CCSF’s recent reversal/sudden 3/20/23 request to accelerate the return of the loan** (from January or March 2024 back to September 1, 2023) by being willing to take the steps necessary to help facilitate return by September 1, 2023.

II. Contractual Obligations--Review of Responsibility for Costs

- **SFMOMA’s Cost Cap Reached.** General Counsel Adine Varah reiterated that SFMOMA has financed all related costs to date and has already reached the mutually agreed-upon contractual cost cap of \$3,975,000 (Maximum Authorized Payment Amount).
- **CCSF’s Responsibility for Deinstallation and Return Costs Under the Agreement.** Referencing SFMOMA’s April 6, 2023 letter to Chancellor Martin, Ms. Varah noted that while SFMOMA will help with coordinating the return of the Mural, the remaining financial responsibilities now rest exclusively with CCSF under the express provisions of the 2019 Loan and Partnership Agreement.* (Text of provisions included below).
- **CCSF’s Interpretation.** Chancellor Martin noted that CCSF interprets the MOU (Memorandum of Understanding) [referring to the 2019 Loan and Partnership Agreement] differently and believes CCSF is not responsible for the costs associated with deinstallation. SFMOMA respectfully but firmly disputes that interpretation based on the text of the Agreement, which was specifically and carefully negotiated with their former counsel, Judy Teichman.
- **CCSF’s Original Counsel.** General Counsel Adine Varah urged CCSF to contact Judy Teichman, who negotiated the Loan and Partnership Agreement on CCSF’s behalf as well as the three-party Vendor Agreement with Atthowe, to resolve any remaining misunderstandings, and to help expedite an informed and efficient path forward. Ms. Varah noted that she and Judy Teichman negotiated the specific terms of the Agreement, including the mutually agreed cost cap provisions, and that SFMOMA made clear that the cost cap was a key condition for SFMOMA to enter into the agreement.
- **For the purposes of the call, the parties agreed to disagree on the topic of contractual responsibility for costs so that the parties could move forward with the pressing issue of timing for the return and logistics.**
- **Advance Payments Needed.** Bryan Cain of Atthowe also noted the importance of the payments in advance in order to start the work.

III. Timing for Return & Logistics

- **Cooperation on Return Date.** SFMOMA indicated that—while it was surprised by CCSF’s reversal of its repeated requests for a longer loan term into early 2024-- SFMOMA would be willing to take the steps necessary to facilitate the return of the Mural by September 1, 2023.

- **CCSF Does not Need Mural by September 1, 2023 – Separating Return Date from Financial Responsibility.** Chancellor Martin acknowledged that the September 1, 2023 return date demanded in the March 20, 2023 letter was an artificial deadline in that CCSF does not need the mural to be returned by that date. Instead, CCSF thought they needed to accept it by that date to avoid paying additional costs under the Loan and Partnership Agreement. SFMOMA respectfully but firmly disputes that interpretation based on the text of the Agreement.
- **Mural Safety and Cost Considerations Merit a Longer Timeline.** Given CCSF’s honest acknowledgement that the September 1, 2023 deadline is an artificial deadline, the parties—including Bryan Caine of Atthowe—agreed that it was in the best interests of the mural, and to minimize expenditures, to allow for additional time for the mural move.
- **Advance Funds Needed in Escrow to Pay Vendors—Including Atthowe and Site and Studio—to Start Work.** Tsugumi Maki and Bryan Cain outlined the logistics involved in the return of the mural, including vendors (i.e., Atthowe, Site and Studio/Kiernan Graves) who would need to be paid in advance. In response to CCSF’s Vice Chancellor John Al-Amin’s inquiry regarding the amount of funds needed to be paid in advance to commence the work, Bryan Cain of Atthowe indicated that he would calculate the initial payments needed for his Services. Tsugumi Maki and her team will work with Atthowe to identify the total costs for the various vendors and advance payments required.
- **SFMOMA’s Chief Exhibitions and Collections Officer, Tsugumi Maki, and Atthowe’s CEO, Bryan Cain, confirmed the parties would need at least 3-4 weeks to prepare the gallery for the de-installation and AT LEAST 8-10 weeks for de-installation (TOTAL estimated time 11-14 weeks),** assuming no other outside or unanticipated delays (including third party or other vendor delays, weather delays, City permit delays or other unanticipated issues).

In short, SFMOMA remains cautiously optimistic that we can bring this project to a successful and celebratory close. SFMOMA is open to finding a mutually agreeable path forward, but one that embraces the financial terms and realities of the agreement.

Also, in **light of the 3-4 weeks needed to prepare the gallery for the move, in addition to AT LEAST 8-10 weeks needed for de-installation (total 11-14 weeks)**, the parties will need to resolve all outstanding issues by **mid-May 2023** so that SFMOMA and Atthowe may make necessary arrangements to facilitate the move logistics, operations, and related communications.

IV. NEXT STEPS

The parties agreed to approach the following in **two simultaneous and parallel paths, as much as possible**, recognizing that without the proper funds in escrow, Atthowe (and other vendors) will not proceed with the deinstallation. To help the parties move forward, we will try to separate the return date from the financial issues just for the moment, with the understanding that both must be resolved as soon as possible.

APRIL – MAY 2023– LEGAL/CONTRACTUAL WORK.

- **ASAP – APRIL 2023 - CCSF Chancellor David Martin** will contact Judy Teichman (Former Outside Counsel) to work with Adine Varah to resolve remaining misunderstandings regarding financial obligations under the Loan and Partnership Agreement and

remaining misunderstandings about the linkage of timing to financial obligations.

- **[UPDATE SINCE APRIL 13, 2023 Meeting: Adine Varah** connected Chancellor Martin with Judy Teichman via email on April 13, 2023, shortly after the virtual meeting. Ms. Teichman wrote back to Chancellor Martin via email on April 14. Judy Teichman indicated that “[I]n negotiating the Rivera Mural Project Agreements, I served as an assistant to then City College Counsel Steven Bruckman so having malpractice insurance was not necessary. Going forward, if the Chancellor wishes, I would be happy to assist City College in any way I am able short of actually serving as counsel since I do not carry malpractice insurance.”]
- **ASAP – APRIL 2023 - CCSF Chancellor David Martin** shall also name a point person for Mural Return, consistent with the qualifications outlined in the amended three-party Vendor Agreement between CCSF, Atthowe, and SFMOMA.
- **ASAP – APRIL 2023/MAY 2023 - Amendment to Loan and Partnership Agreement – New Return Deadline for Mural.** Without changing the Agreement’s terms regarding CCSF’s responsibility for expenses beyond the mutually agreed cost cap, and pending resolution of the proper timeframe/date for return, SFMOMA’s General Counsel, Adine Varah, will draft a brief amendment with a mutually agreed return timeframe/date.
- **MAY 2023 (or JUNE 2023). Three-Party Agreement for Mural Return.** Pending resolution of the cost issue, and the budget, timing, and logistics noted herein (including 11-14 weeks for gallery prep and de-installation), the parties will begin to negotiate a three-party agreement (CCSF-SFMOMA-Atthowe) for return of the Mural.
- APRIL 2023/MAY 2023 SFMOMA, ATTHOWE and CCSF shall also identify additional vendors with whom CCSF—and/or SFMOMA--needs to contract.
- **SFMOMA’s General Counsel, Adine Varah** will take the lead, as before, in drafting such agreements.

APRIL – MAY 2023– BUDGET, TIMING AND LOGISTICS.

- **APRIL 2023 - SFMOMA’s Tsugumi Maki and David Funk** to work with Bryan Cain of Atthowe and CCSF to identify a mutually agreeable alternative **return date and timeline** for the process. **As noted above, the preparation and de-installation will take AT LEAST 11-14 weeks, assuming no delays.**
- **APRIL – MAY 2023 - SFMOMA’s Tsugumi Maki and David Funk** to work with Bryan Cain at Atthowe (and other appropriate vendors) to identify the **estimated costs**, including any advance payments needed, to facilitate the return of the Mural.
- **APRIL – MAY 2023 - CCSF’s Chancellor, John Al-Amin, Vice Chancellor (Finance and Administration) and Alberto Vazquez, Associate Vice Chancellor, Facilities, Construction & Planning, following consultation with their counsel/Judy Teichman as**

appropriate, shall issue any required advance payments (to Atthowe, Site and Studio/Kiernan Graves, etc.) and prepare to transfer required funds into escrow.

Please confirm receipt of this summary and let us know whether it is accurate and complete, or whether you have any comments or changes. If we do not hear otherwise from you, we will assume you agree with the summary and next steps.

We look forward to working with you to reach an efficient and mutually agreeable conclusion to this next and final phase of the project.

Thank you for your cooperation and prompt attention to this matter.

Best,

Adine Varah
General Counsel
SFMOMA

*As noted in SFMOMA's letter of April 6, 2023, referenced during the call, the 2019 Loan and Partnership Agreement makes the cost cap, the "Maximum Payment Amount," clear in three separate provisions. The provisions, in relevant part, are as follows **(in bold)**:

"4. FINANCIALS

- (a) SFMOMA agrees to fund a total budget for the project **not-to-exceed THREE MILLION NINE HUNDRED SEVENTY FIVE THOUSAND DOLLARS (\$3,975,000) "Maximum Authorized Payment Amount"** (See Exhibit A —Budget). ...
- (b) ... Moreover, once SFMOMA reaches its Maximum Authorized Payment Amount, SFMOMA shall not be responsible for any additional costs associated with the Artwork or the Project. **For the avoidance of doubt, SFMOMA shall not be responsible for any costs in excess of the Maximum Authorized Payment Amount, or otherwise related to the post September 1, 2023 storage, transit, and/or reinstallation of the Artwork at CCSF's designated location.**

Exhibit A (Budget), in turn also includes the following statement reiterating the cost cap:

"IN NO EVENT SHALL SFMOMA'S TOTAL BUDGET AND EXPENDITURES EXCEED \$3,975,000.

The Agreement not only sets a Maximum Authorized Payment Amount for SFMOMA, it also expressly states in Paragraph 4(c) that any excess costs above SFMOMA's cap are CCSF's responsibility:

"(c) All expenses, other than those SFMOMA has agreed to cover under this Agreement, are the responsibility of CCSF."

Exhibit C

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A PROFESSIONAL LAW CORPORATION

ATTORNEYS AT LAW

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OUR FILE NUMBER:

006241.00013
41049761.1

CSchwindt@aalrr.com

May 1, 2023

VIA EMAIL AND FIRST CLASS MAIL

Adine Varah
General Counsel
SFMOMA
151 Third Street
San Francisco, CA 94103
avarah@SFMOMA.org

Re: Rivera Mural Return to City College of San Francisco (CCSF)

Dear Ms. Varah:

We are in receipt of your Memorandum attached to your email dated April 17, 2023 (“Memorandum”) providing your summary of the virtual meeting that took place on April 13, 2023 and at which I was not present. The following provides our initial comments on the Memorandum with the hope that the parties can begin moving forward with the necessary steps in the best interest of the Mural in order for it to be returned to CCSF.

We appreciate and agree with the position stated in the Memorandum that the return date of the Mural and the financial responsibility associated with the return can be separated to the extent that both parties are in agreement. However, please note that CCSF disagrees with the accuracy of the following points in the Memorandum: 4th bullet point and sub-points under “I. Brief Introductions & Re-Cap of Where we Are (SFMOMA & CCSF).” The September 1, 2023 deadline was not an “artificial” deadline but, rather, a contractual deadline expressly stated in the Loan and Partnership Agreement (“Agreement”) that was never amended in the Agreement by the parties. Thus, if the parties agree to amend the deadline to return the Mural, we can move forward with the amendment process.

With respect to the financial responsibility, the Memorandum fails to reflect that the Agreement defines “Project” to include:

“...the final de-installation at SFMOMA, condition reporting, packing at SFMOMA and return transit to CCSF at its new CCSF PAEC, or to another location designated by CCSF on the CCSF campus in San Francisco, or to in mutually agreed upon storage location (as provided Section 3 (Terms and Conditions)) (the “Project”).”

Adine Varah
May 1, 2023
Page 2

The Agreement does not give SFMOMA the right to not complete the Project nor does it allow for SFMOMA to spend funds in a manner that would compromise its ability to complete the Project. Moreover, the Agreement is clear that returning the Mural is SFMOMA's responsibility and not CCSF's responsibility. Nothing in the Agreement provides for SFMOMA to shift its responsibility for the return of the Mural by the September 1, 2023 deadline to CCSF.

With respect to SFMOMA's expenditure of funds, there are many unanswered questions. It is unclear to CCSF why the funds were expended in a manner that resulted in SFMOMA exceeding its budget and not having funds available complete the Project. It is also unclear to CCSF why SFMOMA waited until after SFMOMA had expended all the funds to inform CCSF that it would not complete the Project. Accordingly, in an effort to move forward and resolve the financial responsibility issue we believe it is appropriate for the parties to review how the funds were expended and to confirm that the funds were properly used for the benefit of the Mural and in accordance with the terms of the Agreement. To that end, we request that records be provided documenting the expenditure of the funds for CCSF's review.

I look forward to working with you to resolve these issues and help our clients move forward cooperatively with the return of the Mural.

Very truly yours,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A handwritten signature in cursive script that reads "Constance J. Schwindt".

Constance J. Schwindt

CJS:mbq

cc: David Martin (dmartin@ccsf.edu)

Exhibit D

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

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OUR FILE NUMBER:

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CSchwindt@aalrr.com

June 5, 2023

VIA EMAIL AND FIRST CLASS MAIL

Stephanie Herrera
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, California 94105
Stephanie.Herrera@mto.com

Re: Rivera Mural Return to City College of San Francisco (CCSF)

Dear Ms. Herrera:

Thank you for your time on the phone last week as well as your correspondence dated May 16, 2023 (“May 16th Letter”). As we discussed, City College of San Francisco (“CCSF”) was hopeful that SFMOMA would be willing to discuss options for moving forward collaboratively with the Mural’s return. CCSF also hoped to avoid expending further time and attorney’s fees on letters addressing whether SFMOMA had completed its obligations under the Loan and Partnership Agreement Dated September 23, 2019 (“Agreement”). During our call, however, it was made clear that SFMOMA would like to have a written response to the May 16th Letter. During our call it was also made clear that SFMOMA had no intention of completing the final stage of the Project which is returning the Mural to CCSF by September 1, 2023. Accordingly, the purpose of this correspondence is to formally reply the May 16th letter. CCSF also hereby requests that SFMOMA confirm in writing whether it will complete the Project (as defined in the Agreement) or whether SFMOMA intends to exercise its right to terminate the Agreement pursuant to Paragraph 18.

Delegation of Authority

The arguments in the May 16th Letter rely heavily if not predominantly on an unfounded assertion that the parties mutually agreed to amend the Agreement to have a later return date for the Mural. As discussed in greater detail below, the Agreement was not amended and any discussions concerning a change to the Mural’s return date never materialized into an amendment to the Agreement. The Project, as defined, includes returning the Mural by September 1, 2023. CCSF continues to hope that SFMOMA will act in the best interest of the Mural in order for it to be returned to CCSF in accordance with the Agreement. The CCSF’s board of trustees (“Board”) did not agreed to amend the Agreement to have a later return date for

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the Mural. Nor did the Board ever ratify any such amendment to the Agreement. In the May 16th Letter, you allege that CCSF “repeatedly and publicly acknowledged the parties’ mutually agreed extension through January 2024”. However, none of the alleged acknowledgements suggests anything other than that discussion had taken place and cannot take the place of Board action to amend a contract. The only action that can amend the Agreement is approval by a majority of the Board. No statement by an individual Board Trustee or CCSF administrator, regardless of position, can take the place of Board approval.

In order for SFMOMA to establish a valid claim that the Agreement was amended to delay the return date of the mural, SFMOMA must first demonstrate that CCSF was duly authorized to enter into and bind the CCSF to an amendment to the terms and conditions of the Agreement. Even if there were a delegation of authority to approve contracts on behalf of the Board, the validity of such approval legally requires subsequent ratification by the Board. The Education Code contains the requirement to ratify. Education Code §17604 and Education Code §81655¹ establishes that the power to contract is invested solely in the governing board of a school or community college district. Although Education Code §§17604 and 81655 permit a board to delegate its power to its district superintendent or other persons, these statutes provide that:

... no contract made pursuant to such delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, said approval or ratification to be evidenced by a motion of said board duly passed and adopted.” (Emphasis added.)

It is well settled that a contract that is not approved or ratified by a school board does not comply with required formalities under Education Code §17604 (formerly Education Code §15961) and is unenforceable against the district. (*Santa Monica Unified School District of Los Angeles v. Persh, supra*, at 953.) Ratification is not an optional condition. Community colleges and school districts cannot ignore or waive irregularities in exercising their power to contract. As stated in *Santa Monica Unified School District of Los Angeles v. Persh* (1970) 5 Cal.App.3d 945, 952, [85 Cal.Rptr. 463, 467-8]²:

Under such circumstances the express contract attempted to be made is not invalid merely by reason of some irregularity or some invalidity in the exercise of a

¹ Education Code §81655 specifically addresses power to contract that is invested in the governing board of a community college district.

² In *Santa Monica Unified School District of Los Angeles v. Persh*, the board had passed two resolutions authorizing the eminent domain action as well as the offer to purchase. However, the contract for the sale of the condemned property to the district had not been ratified by the board before the board passed a resolution abandoning the eminent domain proceedings. Despite the fact that the defendant had already incurred over \$56,000 in debt purchasing other real estate to avoid income tax consequences as a result of the property sale to the district, the court determined that the contract for the purchase of the property by the school district was not valid because the contract had not been ratified by the board in accordance with the Education Code.

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general power to contract, but the contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all and can be exercised in no other manner so as to incur any liability on the part of the municipality. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application in such cases. (Emphasis added.)

Furthermore, in *El Camino Community College District v. Los Angeles County*, the court reasoned that a modification to an original contract, if it constitutes a “significant alteration of the rights of each party to the contract, and goes to the heart of the parties’ agreement” must also comply with Education Code §§17604 and 81655. (*El Camino Community College District v. Los Angeles County* (1985) 173 Cal.App.3d 606, 617 [216 Cal.Rptr. 236]³.) Failure to do so would render such a modification unenforceable. The court in *El Camino Community College District* considered that the expenditure of public monies constituted a material element of a contract and that public policy considerations come into play when public monies are at stake. (*El Camino Community College District v. Los Angeles County, supra*, 173 Cal.App.3d at 617.) Specifically, the court stated that there is a strong public policy interest in “forcing the major decisions of public school districts to be made in the open and subject to public scrutiny.” (*El Camino Community College District v. Los Angeles County, supra*, 173 Cal.App.3d at 617.)

Given the significance of a change in date to the Mural’s return and the financial implications that flow from, the change in return date goes straight to heart of the Agreement. In this case, no amendment to Agreement was ever brought to the Board for approval let alone approved or ratified by the Board as required. Moreover, any alleged amendment to Agreement violates Education Code §§17604 and 81655 and is not valid as to CCSF and the Mural return date remains September 1, 2023 absent a valid Board approved amendment to the Agreement.

The Doctrine of Estoppel

SFMOMA’s arguments that it relied on “acknowledgements” that the Mural’s return date had been delayed does not mean the statutorily required contracting requirements can be ignored or no longer apply. Education Code §§17604 and 81655 apply even if a private party may suffer undeniable hardship. (*Santa Monica Unified School District of Los Angeles v. Persh, supra*, at 953.) The court in *Santa Monica Unified School District of Los Angeles v. Persh* noted that persons dealing with a school district are chargeable with notice for the limitations on the school district’s power to contract and, although a party may suffer undeniable hardship, the doctrine of estoppel is not available because the principle does not apply to a municipal agency failing to comply with a statute that is measure of its power. (*Santa Monica Unified School District of Los Angeles v. Persh, supra*, at 953.) Moreover, the court in *Santa Monica Unified School District of*

³ The court found invalid the agreements signed by two vice presidents for the district because they were never properly ratified by the board of trustees.

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Los Angeles v. Persh makes it clear that no implied liability, on the part of a school district, can arise from benefits that the district may have received under a contract made in violation of the “prescribed statutory mode.” (*Santa Monica Unified School District of Los Angeles v. Persh*, *supra*, at 953-954.)

Project as Defined in Agreement

The Agreement defines “Project” to include the return of the Mural to CCSF:

“...the final de-installation at SFMOMA, condition reporting, packing at SFMOMA and return transit to CCSF at its new CCSF PAEC, or to another location designated by CCSF on the CCSF campus in San Francisco, or to in mutually agreed upon storage location (as provided Section 3 (Terms and Conditions)) (the “Project”).”

The Agreement does not allow SFMOMA to pick and choose what portions of the Project it will be financially responsible for. As discussed above, the Agreement was not amended so the Project continues to include the return of the Mural to CCSF by September 1, 2023.

While the May 16th Letter reiterates its prior arguments that SFMOMA’s financial obligations ended once the Maximum Authorized Payment Amount was reached, the May 16th Letter is silent as to how it intends to address its failure to complete the Project. Other than shifting the financial responsibility to CCSF, SFMOMA appears to have thrown up its hands and is walking away from the Project expecting that CCSF will shoulder a burden for which it did not contract.

Notably, Paragraph 18 of the Agreement allows for SFMOMA to determine that it cannot complete the Project financially and terminate the Agreement. However, we are heartened to note that the May 16th Letter affirmatively states that SFMOMA intends to complete the Project. Specifically:

“To be clear, SFMOMA has every intention of completing the Project...” (May 16th Letter, Page 2)

While CCSF is glad to see that SFMOMA is committed to completing the Project, completing the Project includes SFMOMA paying for the Mural’s return to CCSF by September 1, 2023. Accordingly, SFMOMA’s statement in the May 16th Letter appears to be at odds with SFMOMA’s actions that otherwise indicate a refusal by SFMOMA to pay for the Mural’s return to CCSF by September 1, 2023. A refusal to pay for the Mural’s return by September 1, 2023 means SFMOMA is refusing to complete the Project. SFMOMA cannot have it both ways. SFMOMA cannot both complete the Project and simultaneously refuse to pay for the Mural’s return by September 1, 2023.

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As explained above, there was no amendment to the Agreement to delay the return date and CCSF has had and continues to have a storage location⁴ available at the Diego Rivera Theatre at CCSF for the Mural to be stored. Accordingly, if SFMOMA is unable to complete the Project by paying for the Mural to be returned to CCSF, the Agreement provides for SFMOMA to terminate the Agreement if SFMOMA “determines it cannot complete the Project within the budget.” If SFMOMA plans to exercise its right to terminate the Agreement, please provide proper notification to CCSF. Otherwise, CCSF will continue to make itself available to work with SFMOMA for the return of the Mural by September 1, 2023.

Summary of Alternatives

CCSF desires to continue work with SFMOMA to provide for the return of the Mural by September 1, 2023 in accordance with the Agreement. As noted above, the Mural can be returned to the storage location identified herein so that SFMOMA can complete the Project on time if it chooses. Despite having no obligation to pay for the return of the mural, CCSF is even willing to explore scenarios whereby the parties amend the Agreement to provide for a cost sharing of the return of the Mural by September 1, 2023 or a later date if both parties agree.

However, if SFMOMA is unwilling to negotiate with CCSF to amend the Agreement to allow for the parties to share the cost of returning the Mural to CCSF, then the terms of the Agreement shall stand and CCSF will expect that SFMOMA either: (1) complete the Project by paying for the Mural’s return by September 1, 2023 to the CCSF storage location on its campus; or (2) notify CCSF that it is electing to terminate the Agreement under Paragraph 18 because it is unable to complete the Project. Absent a termination of the Agreement by SFMOMA, CCSF will continue to assume that SFMOMA intends to complete the Project, which includes SFMOMA’s financial responsibility to return the Mural by September 1, 2023. In the event that SFMOMA elects to terminate the Agreement, CCSF will need to take steps to address the unplanned financial burden the termination of the Agreement would place on CCSF.

Once SFMOMA notifies CCSF which direction it will go, the parties could consider moving forward jointly in a public statement that clarifies the next steps. If SFMOMA does not want to issue a joint statement, CCSF will provide its own.

Lastly, we understand from the May 16th letter that SFMOMA will be sharing information with CCSF so that we can better understand how the shortfall in budgeted funds occurred and placed SFMOMA in this unfortunate position that it exceeded its budget before completing the Project. We look forward to receiving this information.

⁴ CCSF storage location for the Mural is at the Diego Rivera Theatre located at 50 Frida Kahlo Way, San Francisco, CA, 94112. This storage location has been available throughout the duration of the Agreement and will be continue to be available through and beyond September 1, 2023.

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In closing, we reiterate CCSF's willingness to continue working with SFMOMA to complete the Project. I look forward to working with you to resolve these issues and help our clients move forward cooperatively with the return of the Mural.

Very truly yours,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A handwritten signature in cursive script that reads "Constance J. Schwindt". The signature is written in black ink and is positioned above the printed name.

Constance J. Schwindt

CJS:mbq

cc: David Martin (dmartin@ccsf.edu)

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PROOF OF SERVICE

(CODE CIV. PROC. § 1013A(3))

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive South, Suite 300, Cerritos, California 90703-9364.

On November 16, 2023, I served the following document(s) described as **SAN FRANCISCO COMMUNITY COLLEGE DISTRICT'S CROSS-COMPLAINT** on the interested parties in this action as follows:

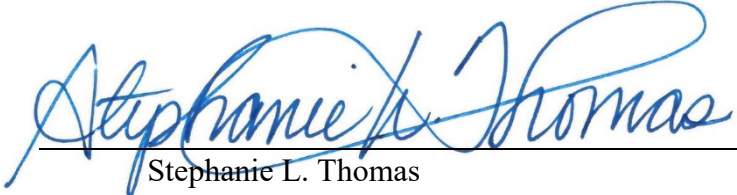
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Attorneys for Plaintiff
SAN FRANCISCO MUSEUM OF MODERN
ART

- BY EMAIL:** My electronic service address is SThomas@aalrr.com. Based on a written agreement of the parties pursuant to California Code of Civil Procedure § 1010.6 to accept service by electronic means, at , I sent such document(s) to the email address(es) listed above or on the attached Service List. Such document(s) was scanned and emailed to such recipient(s) and email confirmation(s) will be maintained with the original document in this office indicating the recipients' email address(es) and time of receipt pursuant to CCP § 1013(a).
- BY ELECTRONIC SERVICE VIA ONE LEGAL:** Complying with California Rule of Court 2.251 and Code of Civil Procedure § 1010.6, I caused a true and correct copy of the document(s) to be served through One Legal at www.onelegal.com addressed to the parties shown herein appearing on the above-entitled case. The service transmission was reported as complete and a copy of One Legal's Receipt/Confirmation Page will be maintained with the original document in this office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 16, 2023, at Cerritos, California.


Stephanie L. Thomas