

## SETTLEMENT AGREEMENT AND AMENDMENT

This Settlement Agreement and Amendment ("Agreement"), dated as of the date of the last signature below (the "Effective Date"), is between and among TrackingPoint, Inc. (hereinafter "TP") and the Pflugerville Community Development Corporation (hereinafter "PCDC"). The "Parties" shall refer to all entities.

### RECITALS

WHEREAS, on or about May 13, 2013, TP executed an Economic Development Performance Agreement (hereinafter "EDPA") with PCDC (attached hereto as Exhibit A), wherein PCDC granted certain economic incentives to TP in exchange for TP's promise to create and retain primary jobs as provided for in such agreement and as provided for in Texas Local Government Code §505.155 to promote and develop new and expanded business enterprises that create and retain primary jobs;

WHEREAS, on or about June 13, 2013 TP executed a Commercial Sublease regarding the sublease of approximately 48,000 square feet of rentable area in Pecan 130 Business Park addressed as 3709 Helios Way, Building 1, Pflugerville, Texas for a 60 month term from PCDC (attached hereto as Exhibit B);

WHEREAS, prior to June 1, 2013, TP executed an addendum to the Commercial Sublease to complete finish out renovations to the leased property with a total cost of improvements of up to \$1,680,000 U.S. dollars (attached hereto as Exhibit C).

WHEREAS, due to market conditions, TP is unable to meet the performance obligations and other contractual obligations currently in place between the Parties;

WHEREAS, the Parties have negotiated and come to a compromise and resolution to TP's inability to meet the current performance obligations and other referenced contractual obligations by entering into this Agreement;

WHEREAS, the Parties desire to avoid the cost, expense, and uncertainty of possible litigation, and have elected to compromise and settle this dispute upon the terms and conditions stated herein and in accordance with the attachments hereto;

WHEREAS, the PCDC finds this Agreement is made for the benefit of the corporation as required by Section 501.156 of the Texas Local Government Code;

WHEREAS, the Parties have agreed that this Agreement shall serve as an amendment to the EDPA and to be effective, the City Council of the City of Pflugerville must approve this Agreement by Resolution to serve as an amendment to the EDPA, pursuant to Section 505.158(b) of the Texas Local Government Code.

### COVENANTS AND AGREEMENTS

For and in consideration of the promises set forth in this Agreement, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

*BAW*

1. **THE SETTLEMENT PAYMENTS.** TP shall make the following payments according to the terms, conditions and procedures set forth in this Agreement, and subject to City Council approval of this Agreement as set forth herein:
  - a. Immediately upon the execution of this Agreement, TP acknowledges that all furniture described on Exhibit D hereto and all equipment described on Exhibit E hereto shall be fully transferred and owned by PCDC, and represents that such items are free of any lien (possessory, purchase money or otherwise) and free of any obligation by PDCD; and,
  - b. Within 5 business days of the Effective Date of this Agreement, TP shall pay and PCDC shall receive a single cash payment of \$162,416.74; and,
  - c. Within 10 days of the execution date and on the first business day of the month of each month thereafter, TP shall pay and PCDC shall receive no later than 5 business days thereafter, a minimum of \$5,816.85 until TP has paid a total of \$209,406.85 in the aggregate to PCDC (the "Prior EDPA Penalty"), less any New Employee Performance Credits earned by TP as described in Section 2.c. of this Agreement below. In the event TP is no longer a PCDC sub-tenant either by surrendering the leased premises or through eviction, any balance of the Prior EDPA Penalty remaining is due immediately and in full and is to be received by PCDC within 5 business days of the occurrence of such event.
  - d. The payments referred to in subparagraphs (a) through (c) above shall be referred to as the "Settlement Payments."
2. **AMENDMENT OF THE EDPA.** The Parties hereby agree to amend the terms of the EDPA as follows (the "Amendment"), so long as all Settlement Payments required to be paid within 10 days of the execution date of this Agreement have been paid in full by TP and received by PCDC:
  - a. The Recitals of the EDPA are hereby amended to include the following definitions:
    - i. "The 'Prior EDPA Penalty' means the amount of \$209,406.85, representing the pro rata amount of rent reduction previously received by TP under this Agreement."; and
    - ii. "The 'Commercial Sublease Amendment' means that certain Commercial Sublease Amendment between the Parties dated on or about September \_\_, 2015, which amends and together with the Commercial Sublease attached hereto as Exhibit B are herein referred to as the 'Amended Commercial Sublease Agreement'."
  - b. Article I of the EDPA is hereby deleted in its entirety and replaced with the following:
    - i. "TP must maintain its Corporate Headquarters within the City Limits of Pflugerville, Texas until at least December 31, 2018. In the event corporate



growth results in the need for more space suitable for TP than is available within the City Limits of Pflugerville, then the Parties agree to negotiate a waiver of this requirement at that time.”

c. Article II of the EDPA is hereby deleted in its entirety and replaced with the following:

i. “As of September 30, 2016, and each year thereafter during the term of this Agreement, PCDC shall have the right to inspect TP personnel and payroll records to determine if TP has created new permanent full-time primary jobs during that preceding year. For each new permanent full-time primary job, TP shall be entitled to receive a New Employee Performance Credit (“Performance Credit”) in the amount below:

- A. New Jobs @ an annual gross salary of \$50,000-\$74,999 = \$2,500
- B. New Jobs @ an annual gross salary of \$75,000-\$99,999 = \$3,500
- C. New Jobs @ an annual gross salary of \$100,000 or greater = \$4,500

Any Performance Credit earned by TP shall first be applied toward the then remaining balance of the Prior EDPA Penalty owed to PCDC. After the balance of the Prior EDPA Penalty is paid in full, Performance Credits earned by TP shall be applied toward rents owed to PCDC under the Amended Commercial Sublease Agreement. This Performance Credit is not available for more than 100% of the aggregate rent owed under the Amended Commercial Sublease Agreement, and does not accrue for future years’ rent. Additionally, if TP is no longer a PCDC sub-tenant, without necessity of further an amendment to this Agreement approved by the Parties, this Article II terminates and is void as of the date TP ceases to be a PCDC subtenant; provided that, any and all Performance Credits earned by TP prior to such termination date are fully earned and, except as provided in Article III of this EDPA, are not subject to refund or return to PCDC.”

d. Article III of the EDPA is hereby deleted in its entirety and replaced with the following:

i. “Pursuant to Texas Local Government Code §501.158, the EDPA must contain terms under which repayment must be made if TP does not meet the performance requirements set forth in Article 1 above. Therefore, in the event that any of the items listed below as (A)-(D) occur, PCDC has no obligation to advance, disburse or pay any financial assistance to TP. Further, in the event any of the items listed below occur, TP shall reimburse PCDC any and all past advances, disbursements or any other financial assistance made to TP by PCDC, within 30 days of demand:

- A. TP admits in writing its inability to pay its debts as they become due, files a petition in bankruptcy (voluntarily or involuntarily) or any similar proceedings, or is adjudged bankrupt;

- B. TP fails to provide PCDC with sufficient documentation to support any incentive within 10 days of written demand by PCDC;
  - C. TP fails to perform any one or all of the obligations, terms or conditions required under this EDPA; or
  - D. TP fails to meet any time requirement under the EDPA.”
- e. This Amendment is effective for the purposes set forth herein and shall be limited precisely as written and shall not be deemed to be a consent to any amendment, modification or waiver of any other term or condition of the EDPA.
  - f. This Amendment shall be construed in connection with and as part of the EDPA and sets forth the entire agreement and understanding of the Parties relating to the subject matter hereof and merges all prior discussions between them. All terms, conditions, representations, warranties, covenants and agreements set forth in EDPA, except as herein amended, are hereby ratified and confirmed and shall remain in full force and effect.
3. THE SETTLEMENT AGREEMENTS. The Parties have agreed, in addition to the consideration recited above, to the following as additional consideration for this Agreement:
- a. TP and PCDC shall execute a Commercial Sublease Amendment in form and substance substantially equivalent to that attached hereto as Exhibit F, amending the existing Commercial Sublease regarding the premises located at 3813 Helios Way, Building B, Pflugerville, Texas 78660 (the Commercial Sublease together with the Commercial Sublease Amendment shall serve as the “Amended Commercial Sublease Agreement”).
  - b. Upon execution of the Commercial Sublease Amendment, all rentable space previously leased and occupied by TP under the Commercial Sublease that is not subject to the Amended Commercial Sublease Agreement, is hereby returned to PCDC’s full and unqualified control, and TP’s obligations under the Commercial Sublease pertaining to such returned rentable space are hereby terminated.
  - c. The Parties acknowledge that upon execution of the Commercial Sublease Amendment, the Amended Commercial Sublease Agreement will continue to be subject to the Master Sublease Agreement and the Landlord’s Consent to Sublease, and that the Construction Addendum to Commercial Sublease is hereby terminated.
4. RELEASES. Contingent upon the full and complete satisfaction of the independent consideration offered by TP and PCDC respectively, as provided for in this Settlement Agreement and the full satisfaction of the contractual agreements contained and attached hereto, the Parties grant the following releases:
- a. TP, on its own behalf and on behalf of its respective past or present agents, officers, partners, directors, owners, stockholders, employees, attorneys, predecessors,



subcontractors, successors, assigns, representatives, insurers, reinsurers, parent companies, subsidiaries, or affiliated entities, or any other person, party, or entity claiming by or through any of it, hereby release, acquit, and forever discharge the PCDC and each of its respective past or present agents, officers, partners, directors, owners, stockholders, employees, attorneys, predecessors, subcontractors, successors, assigns, representatives, insurers, reinsurers, parent companies, subsidiaries, or affiliated entities, or any other person, party, or entity claiming by or through it, from any and all claims, demands, rights, actions, and causes of action, of any kind or character, whether known or unknown, accrued or unaccrued, direct or derivative, liquidated or unliquidated, which TP may have had, or have now, for relief of any nature at law or in equity, including, *without limitation*, claims arising under or in connection with the agreements and tenancies recited above, which are incorporated herein as if recited verbatim, including claims that were alleged or that could have been alleged in State or Federal Court.

- b. PCDC, on its own behalf and on behalf of its respective past or present agents, officers, partners, directors, owners, stockholders, employees, attorneys, predecessors, subcontractors, successors, assigns, representatives, insurers, reinsurers, parent companies, subsidiaries, or affiliated entities, or any other person, party, or entity claiming by or through any of it, hereby release, acquit, and forever discharge TP and each of its respective past or present agents, officers, partners, directors, owners, stockholders, employees, attorneys, predecessors, subcontractors, successors, assigns, representatives, insurers, reinsurers, parent companies, subsidiaries, or affiliated entities, or any other person, party, or entity claiming by or through any of them, from any and all claims, demands, rights, actions, and causes of action, of any kind or character, whether known or unknown, accrued or unaccrued, direct or derivative, liquidated or unliquidated, which PCDC may have had, or have now, for relief of any nature at law or in equity, including, *without limitation*, claims arising under or in connection with the agreements and tenancies recited above, which are incorporated herein as if recited verbatim, including claims that were alleged or that could have been alleged in State or Federal Court.
- c. The Parties acknowledge that the above releases *shall not* extend to any future claim or dispute concerning the terms or enforcement of this Agreement or the attached agreements.

- 5. **NO ADMISSION OF LIABILITY.** The Parties agree and acknowledge that the payment of the Settlement Payments and full and timely performance of the consideration as provided in the attached agreements is to compromise and settle the disputed claims, and is in no way an admission of liability or wrongdoing, and shall not be construed or used as an admission or evidence of any kind of any liability or wrongdoing in any proceeding. The Parties enter into this Agreement to avoid the respectively shared risk, expense and harassment of continued, protracted litigation.
- 6. **NO FURTHER CLAIMS.** The Parties represent and warrant that (1) they have not filed or initiated any lawsuits, complaints or charges against one another that have not been described in this Agreement before the Effective Date of this Agreement and (2) they will

not bring any future complaint, suit, or administrative proceeding arising from any act or omission of any of the Parties' made prior to the Effective Date of this Agreement.

7. GENERAL PROVISIONS.

- a. This Agreement represents the final and entire agreement between the Parties relative to the subject matter hereof, and may not be contradicted by evidence of prior oral or written agreements between the Parties. There are no unwritten oral agreements between the Parties. Any modifications to this Agreement must be in writing and signed by both parties.
- b. The Parties agree that the Agreement shall be deemed to have been drafted collectively by the Parties. As such, the rule of contractual construction construing against the drafter any ambiguities found to be herein is of no consequence and of no force or effect.
- c. In entering this Agreement, the Parties represent that they have had the opportunity to fully review this Agreement, and that the terms of this Agreement are fully understood and voluntarily accepted by them. The Parties expressly represent and warrant and do hereby state and represent that no promise or agreement which is not herein expressed has been made to them in executing the release contained in this Agreement, and that they are not relying upon, and hereby disclaim any reliance on, any statement, representation, action or inaction of any of the parties being released hereby. Each of the Parties is solely relying upon its own judgment in entering into this Agreement. **The Parties agree that this disclaimer of reliance shall preclude any claims of fraudulent inducement or the like, and those claims are encompassed by the releases contained herein.** Unless expressly stated herein, the claims, suits, rights and/or interests which are the subject matter hereto are owned by the party asserting the same, have not been assigned, transferred or sold and are free of encumbrance.
- d. The Parties agree that this Agreement may be executed in multiple counterparts, no one of which need be executed by all the parties hereto. A copy or reproduction showing signatures, including any copies reproduced electronically by telex, fax, photocopy or otherwise, or any combination thereof, shall be deemed to be as valid as an executed copy or original.
- e. This Agreement shall be governed and interpreted pursuant to the laws of the State of Texas without regard to any conflict of laws principles.
- f. The Parties agree that the prevailing party in any subsequent lawsuit arising from any alleged breach of this Agreement, its attachments or enforcement of its terms shall be entitled to recover all reasonable attorneys' fees and costs incurred in connection therewith.

*[Signature page follows.]*

**AGREED TO AND ACKNOWLEDGED:**

TrackingPoint, Inc.

By: 

Name: Richard Wierzbicki, its Chief Financial Officer

Date: September 24, 2015

Pflugerville Community Development Corporation  
A Texas Economic Development Corporation

By: 

Name: Douglas Weiss, its President

Date: September 24, 2015

**Exhibit A**

**Economic Development Performance Agreement**



**Exhibit B**

**Commercial Sublease**

**Exhibit C**

**Construction Addendum to Commercial Sublease**

**Exhibit D**

Furniture Transferred to PCDC



**Exhibit E**

**Equipment Transferred to PCDC**

**Exhibit F**

**Commercial Sublease Amendment**