

SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS (“AGREEMENT”) is made and entered into by and between the CITY OF SANTA CLARA, its past or present council members, officers, directors, employees, agents, predecessors, attorneys, divisions, affiliates, representatives, successors in interest and assigns and all persons acting by, through, under, or in concert with any of them (collectively “the City”), PATRICK NIKOLAI (“Nikolai”), TODD CUMMINS (“Cummins”) (collectively “Defendants”), on the one hand, and JACOB MALAE (hereinafter “Malae”), on the other. The City, Nikolai, Cummins, and Malae may be referred to collectively as the “Parties” with respect to the following:

RECITALS

WHEREAS, Malae is a former Police Sergeant at the City;

WHEREAS, Malae filed a lawsuit against Defendants on or about March 1, 2021, in the United States District Court for the Norther District of California, Case No. 5:21-cv-1453;

WHEREAS, Malae has amended his complaint on two occasions, and the operative version is a Second Amended Complaint (“SAC”) filed on August 17, 2021;

WHEREAS, the SAC alleges causes of action against Defendants for: (1) Deprivation of Civil Rights Under 42 U.S.C. Section 1983; (2) Unlawful Discrimination Based on Race under the Fair Employment & Housing Act (“FEHA”); and (3) FEHA Retaliation;

WHEREAS, among other claims, Malae alleges he was denied promotional opportunities to Lieutenant based on race and in retaliation for protected conduct;

WHEREAS, Defendants deny any liability whatsoever and maintain that all of the circumstances at issue in the SAC were based on non-discriminatory and non-retaliatory reasons, and that all actions toward Malae have always been legitimate and lawful; however, as a result of defending themselves against the allegations in the SAC, Defendants will be forced to incur avoidable attorneys’ fees and costs that will greatly exceed the money paid pursuant to this AGREEMENT; therefore, Defendants wishes to avoid incurring additional litigation expenses;

WHEREAS, the Parties wish to finally settle and compromise all disputes and controversies existing between them, whether known or unknown;

NOW THEREFORE, in consideration of the mutual covenants and promises contained in this AGREEMENT and other good and valuable consideration, receipt of which is hereby acknowledged by the execution of this AGREEMENT, and to avoid unnecessary fees and costs, it is agreed by and between the Parties as follows:

1. No Precedent. This AGREEMENT is in no way intended, and shall in no way be construed, to restrict rights guaranteed to Defendants under local, state or federal law, rule, policy or agreement or to establish a precedent in this or any other matter, now or in the future.

2. No Admission of Liability. This AGREEMENT shall not be construed as an admission by Defendants of any unlawful or wrongful acts or other liability whatsoever. Defendants specifically disclaim any liability to, or wrongful acts against, Malae.

3. Settlement Amount. In consideration for Malae entering into this AGREEMENT and the conditions set forth herein, including Malae's waiver and release of claims against Defendants, the City agrees to pay Malae the total sum of ONE-HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS and NO CENTS (\$125,000.00) (the "Settlement Payment"). The City will cause to be delivered to Malae's attorney, the Law Office of Philip J. Kaplan ("Kaplan"), two settlement checks, as described below, on or before the 30th day, but no sooner than seven (7) full days, after the Effective Date and after counsel for the City, Morin Jacob, receives the following: (a) this AGREEMENT executed by Malae; (2) IRS Form W9s from Kaplan and Malae; and provided also that Malae otherwise fulfills his obligations under this AGREEMENT. The Settlement Payment represents full, final, and complete settlement of all of Malae's claims as specified in this AGREEMENT.

- a. The first settlement check, for which the City will issue a Form 1099 as required by law, shall be made payable to "JACOB MALAE." The amount shall be for ONE-HUNDRED THOUSAND DOLLARS AND NO CENTS (\$100,000.00). It is understood and agreed that the total amount of this settlement check shall not be subject to any withholdings or deductions. This check represents a compromised payment for the harms alleged by Malae in the SAC, including any alleged physical and emotional injuries.
- b. The second settlement check, for which the City will issue a Form 1099 as required by law, shall be made payable to the Law Office of Philip J. Kaplan Client Trust Account for TWENTY-FIVE THOUSAND DOLLARS AND NO CENTS (\$25,000.00). The check represents a settlement by the Parties of Malae's alleged attorneys' fees and costs allegedly incurred in connection with the Complaint.
- c. The Settlement Payment represents full and complete settlement of all of Malae's claims as specified in this AGREEMENT. The Settlement Payment represents a settlement by the Parties of Malae's purported damages, including attorneys' fees and costs, allegedly incurred in connection with the SAC. Malae agrees the Settlement Payment shall constitute the entire consideration provided to him under this AGREEMENT, and he will not seek, nor is he in any way entitled to,

any further compensation for any claimed damages, costs, or attorneys' fees in connection with the matters encompassed in this AGREEMENT.

- d. Malae acknowledges and agrees that the City has made no representations about the tax consequences of any amounts received by him under this AGREEMENT. Malae agrees to pay federal, state, or local taxes, if any, required by law to be paid with respect to this settlement exclusive of the employer's share of payroll taxes. Malae further agrees to indemnify and hold the City harmless from any claims, demands, deficiencies, levies, assessments, executions, judgments, or recoveries by any governmental entity against the City for any amounts claimed due from Malae related to the monies paid on account of this AGREEMENT and for any costs, interest, expenses, fines, penalties, attorneys' fees, or damages incurred or sustained by the City by reason of Malae's failure to pay such taxes.

4. Malae's Dismissal of the SAC. Immediately after the Effective Date, Malae shall promptly sign and file a request for dismissal of the SAC with prejudice, as to all claims, causes of action, and parties, each side to bear its own costs and fees.

5. Mutual Release of All Claims and Potential Claims. As consideration for the payments and agreements that make up this Agreement, the Parties hereby irrevocably and unconditionally waive, release and forever discharge each other from any and all claims they may have against one another. Such claims include, but are not limited to:

- a. Any and all charges, complaints, lawsuits, claims, liabilities, claims for relief, claims for punitive damages, obligations, promises, agreements, contracts, interests, controversies, injuries, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, liens, judgments, indebtedness, and expenses (including attorney's fees and costs actually incurred), of any nature whatsoever, whether in law or in equity, known or unknown, suspected or unsuspected, actual or potential, which the Parties now have, own, or hold, or claim to have, own, or hold against each other, at common law or under any statute, rule, regulation, order or law, whether federal, state, or local, or on any grounds whatsoever, with respect to any act, omission, event, matter, claim, damage, loss, or injury arising out of the employment of and/or the separation from such employment between Malae and the City, including but not limited to its past or present council members, directors, governing body, employees, agents, predecessors, attorneys, divisions, departments, representatives, insurers, successors in interest and assigns, and all persons acting by, through, under or in concert with any of them, and/or with respect to any other claim, matter, or event arising prior to the Effective Date of this Agreement by the Parties, including, but not limited to, the following:

- i. The California Fair Employment and Housing Act (California Government Code §12940 et seq.), the California Family Rights Act

(California Government Code §12945.2, 19702.3 et seq.), California Government Code §11135, the Unruh and George Civil Rights Acts (California Civil Code §51 et seq.), the California Labor Code, including, but not limited to, Labor Code section 1194 and any related Wage Orders or similar directives/authorities issued by any state authority having enforcement powers, the Fair Labor Standards Act and any related regulations, interpretive bulletins or similar directives/authorities issued by any Federal authority having enforcement powers;

- ii. The Constitution of the United States, the Constitution of the State of California, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.), the Equal Pay Act (29 U.S.C. §206(d)), the Rehabilitation Act of 1973 (29 U.S.C. §793 et seq.), the Family and Medical Leave Act (29 U.S.C. §2901 et seq.), the Employee Retirement Income Security Act of 1974, also known as "ERISA" (29 U.S.C. §1001 et seq.), and/or Sections 1981, 1983, 1985, 1986 or 1988 of Title 42 of the United States Code (42 U.S.C. 1981 et seq.), the Americans with Disabilities Act (42 U.S.C. §12101 et seq.);
- iii. Claims of Retaliation (California Labor Code §1102.5 et seq.), Claims of "Whistle-blowing," claims for breach of any type of contract, including written, oral or implied contracts, breach of any covenant, promise, or representation pertaining to Malae's employment, whether express or implied, claims for negligent hiring, retention, supervision, investigation, wrongful termination, discrimination of any type, interference with economic relations, failure to pay wages and/or benefits of any kind, fraud and/or misrepresentation of any kind, negligent or intentional infliction of emotional distress, slander, assault, battery, and/or any other claims arising under any other state or federal provision, act, ordinance, Constitution, law, common law, or arising under any contract or agreement, against the City.

b. This Agreement does not limit Malae's ability to bring an administrative charge with an administrative agency, but Malae expressly waives and releases any right to recover any type of personal relief from the City, including monetary damages or reinstatement, in any administrative action or proceeding, whether state or federal, and whether brought by Malae or on Malae's behalf by an administrative agency, related in any way to the matters released herein. Furthermore, nothing in this Agreement prohibits Malae from reporting possible violations of law or regulation to any government agency or entity, including but not limited to the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, the Department of Labor

and/or the Department of Justice, or making other disclosures that are protected under the whistleblower provisions of law. Malae does not need prior authorization of the City to make any such reports or disclosures and is not required to notify the City that he has made such reports or disclosures.

6. Release of Unknown Claims. For the purpose of implementing a full and complete release and discharge in favor of Defendants, Malae expressly acknowledges that this AGREEMENT is intended to include in its effect, without limitation, all claims which Malae does not know of or expect to exist in his favor at the time of the execution hereof, and Malae agrees that this AGREEMENT contemplates the extinguishment of any such claim or claims occurring prior to the date of execution of this AGREEMENT.

In addition, The Parties each hereby waive any and all rights that they may have pursuant to California Civil Code section 1542, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

a. The Parties hereby expressly waive the provisions of California Civil Code section 1542 and further expressly waive any right to invoke said provisions now or at any time in the future.

b. The Parties recognize and acknowledge that factors which have induced each of them to enter into this Agreement may turn out to be incorrect or to be different from what they had previously anticipated, and they hereby expressly assume any and all of the risks thereof and further expressly assumes the risks of waiving the rights provided by California Civil Code section 1542.

7. Each Party to Bear Own Fees and Costs. Each Party shall bear their own costs, expenses and attorneys' fees incurred in connection with the administrative and/or legal proceedings resulting in this AGREEMENT, or in connection with any other claims made or investigated by either Party against the other in any forum (civil, criminal, administrative or quasi-administrative), and each Party hereto expressly waives any claim for recovery of any such costs, expenses or attorneys' fees from the other Party. Attorneys for the Parties to this AGREEMENT do likewise expressly waive any claim for recovery of costs, expenses and/or attorney's fees from the party(ies), their counsel and/or from any source whatsoever.

8. Age Discrimination Waiver. Malae specifically acknowledges that, pursuant to Title 29 of the Code of the Laws of the United States of America, Chapter 14, entitled “AGE DISCRIMINATION IN EMPLOYMENT” (hereinafter “ADEA”), (1) it shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age; (2) to limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee in order to comply with said Chapter. The Older Workers Benefit Protection Act (hereinafter “OWBPA”), codified at 29 U.S.C. sections 626 et seq., further augments the ADEA and prohibits the waiver of any right or claim under the ADEA or OWBPA. Malae further acknowledges he has been advised and understands, pursuant to the provisions of the ADEA and OWBPA, that:

- a. This AGREEMENT is written in a manner understood by Malae.
- b. By entering into this AGREEMENT, Malae will receive consideration he would not receive if he were not to enter into this AGREEMENT.
- c. Malae is aware of his rights under the ADEA, and of the legal significance of his waiver of any possible claims he may have under the ADEA or similar age discrimination laws.
- d. Malae is entitled to a reasonable time of at least twenty-one (21) days to review and consider this AGREEMENT, and the waiver and release of any rights he may have under the ADEA or similar age discrimination laws, but he may, in his discretion, sign or reject this AGREEMENT any time before the twenty-one (21) day period.
- e. The waivers and releases set forth in this AGREEMENT shall not apply to any rights or claims that may arise after the effective date of this AGREEMENT.
- f. If Malae signs this AGREEMENT, he shall have seven (7) non-waivable calendar days following the date he executes this Agreement to revoke it. If Malae chooses to revoke this AGREEMENT, his counsel must provide written notice of his revocation to counsel for the City, Jesse Maddox, of Liebert Cassidy Whitmore, prior to the expiration of the seven-day period.
- g. This AGREEMENT shall not be effective or enforceable and the consideration herein shall not be provided to Malae until after the AGREEMENT is executed by him and after expiration of the seven-day revocation period set forth in the preceding subparagraph (the “Effective Date”).

9. No Prior Assignments. Each Party represents that neither has assigned nor transferred, nor purported to assign or transfer, to any person or entity, any claim or any portion thereof or interest therein against each other.

10. Covenant to Effectuate Agreement. Malae agrees to execute and deliver all instruments and documents necessary to fulfill and effect the provisions of this AGREEMENT.

11. No Other Terms. This AGREEMENT contains all of the terms and conditions agreed upon by the Parties hereto regarding the subject matter of this AGREEMENT. Any prior agreements, promises, negotiations, or representations, either oral or written, relating to the subject matter of this AGREEMENT, not expressly set forth herein, are of no force or effect.

12. Waiver of Terms of Agreement. No waiver by any Party of any breach of any term or provision of this AGREEMENT shall be construed to be, nor be, a waiver of any preceding, concurrent or succeeding breach of the same, or any other term or provision hereof. No waiver shall be binding unless in writing and signed by the Party to be charged or bound.

13. Interpretation. The language in this AGREEMENT shall be construed as a whole according to its fair meaning and not strictly for or against any of the Parties. The Parties also agree and understand that should any provision of this AGREEMENT be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms and provisions shall not be affected thereby and said illegal or invalid part, terms or provisions shall be deemed not to be part of this AGREEMENT. The Parties further agree that this AGREEMENT was negotiated and executed in the State of California and shall be interpreted under the procedural and substantive laws of California as existing as of the date of execution, without regard to principles of conflict of laws.

14. Consultation with Representative/Counsel. The Parties represent and agree that they have carefully read and fully understand all of the provisions of this AGREEMENT, and that they are voluntarily, without any duress or undue influence on the part of or on behalf of any Party, entering into this AGREEMENT. The Parties affirm that, prior to execution of this AGREEMENT, they have consulted with a representative or counsel of their choice concerning the terms and conditions set forth herein, and that the Parties agree to the terms and conditions.

15. Execution of Agreement. This AGREEMENT may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A photocopy or facsimile transmission of the AGREEMENT, including signatures, shall be deemed to constitute sufficient evidence of the AGREEMENT having been executed.

16. Signatures Required. This AGREEMENT requires the signature of Malae and Defendants to be effective.

17. Enforcement. The Parties agree that any and all disputes regarding this AGREEMENT shall be brought in the United States District Court for the Northern District of

California. In any action brought to enforce any provision of this AGREEMENT, each side shall bear his/its own costs and attorneys' fees.

18. Severability. In the event that any one or more provisions of this AGREEMENT shall be declared to be illegal, invalid, unenforceable, and/or void by a court of competent jurisdiction, such provision or portion of this AGREEMENT shall be deemed to be severed and deleted from this AGREEMENT but this AGREEMENT shall in all other respects remain unmodified and continue in force and effect.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE INCLUDES A RELEASE BY THE PARTIES OF ALL KNOWN OR UNKNOWN CLAIMS. THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS AGREEMENT, UNDERSTAND IT, AND ARE VOLUNTARILY ENTERING INTO THIS AGREEMENT.

IN WITNESS WHEREOF, the Parties hereto have executed this AGREEMENT.

JACOB MALAE

Dated: November 10TH, 2022



JACOB MALAE

CITY OF SANTA CLARA

Dated: ~~November~~ Dec. 5, 2022
RR



RAJEEV BATRA
CITY MANAGER

PATRICK NIKOLAI

Dated: ~~November~~ December 2, 2022



PATRICK NIKOLAI


TODD CUMMINS

TC
DECEMBER
Dated: November 1, 2022

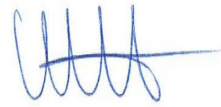

TODD CUMMINS

APPROVED AS TO FORM:

Dated: November 10, 2022

By: 
Philip J. Kaplan
LAW OFFICES OF PHILIP J. KAPLAN
Attorneys for Plaintiff JACOB MALAE

Dated: November 10, 2022

By: 
Morin I. Jacob
LIEBERT CASSIDY WHITMORE
Attorneys for Defendants CITY OF SANTA
CLARA, PATRICK NIKOLAI, and TODD
CUMMINS

Dated: November _____, 2022

By: _____
Sujata Reuter
CITY ATTORNEY

TODD CUMMINS

Dated: November _____, 2022

TODD CUMMINS

APPROVED AS TO FORM:

Dated: November _____, 2022

By:

Philip J. Kaplan
LAW OFFICES OF PHILIP J. KAPLAN
Attorneys for Plaintiff JACOB MALAE

Dated: November _____, 2022

By:

Morin I. Jacob
LIEBERT CASSIDY WHITMORE
Attorneys for Defendants CITY OF SANTA
CLARA, PATRICK NIKOLAI, and TODD
CUMMINS

Dated: November 14, 2022

By:



Sujata Reuter
CITY ATTORNEY'S OFFICE