

RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement (“Agreement”) is made and entered into in Santa Clara County, California, on ~~February~~ _____, 2017, by and between, ANDREW DEFARIA (“DEFARIA”) and FREEDOM FROM RELIGION FOUNDATION, INC. (“FFRF”) (collectively, the “FFRF Parties”), on the one hand, and the CITY OF SANTA CLARA and CITY OF SANTA CLARA CITY COUNCILMEMBERS, MAYOR LISA GILLMOR, VICE MAYOR TERESA O’NEILL, PAT KOLSTAD, DEBI DAVIS, JERRY MARSALLI, DOMINIC CASERTA, AND KATHY WATANABE (collectively, the “CITY”), on the other hand (all collectively, the “PARTIES”).

RECITALS

WHEREAS, on April 28, 2016, the FFRF Parties filed a Verified Complaint for Equitable Relief and Damages against the CITY in the U.S. District Court for the Northern District of California (the “Complaint”);

WHEREAS, the Complaint alleges, among other things, that the Latin cross located in the public park at the intersection of Martin Avenue and De La Cruz Boulevard, commonly known as “Memorial Cross Park” (the “Park”), violates the Establishment Clause of the United States Constitution and the Establishment, No Preference, and No Aid Clauses of the California Constitution;

WHEREAS, the City denies and disputes the allegations and claims of the Complaint;

WHEREAS, the City has removed the cross from the Park;

WHEREAS, the City asserts (and the FFRF Parties deny) that it would have removed and relocated the cross without the necessity of the Complaint, and the FFRF Parties assert (and the City denies) that the Complaint was required to cause the removal and relocation of the cross;

WHEREAS, the PARTIES’ claims, denials, and disagreements shall be referred to as the “Dispute”;

WHEREAS, to resolve the Dispute and any and all claims arising out of the Complaint, the PARTIES now desire to compromise and settle their disputes as set forth herein, subject to the conditions stated herein;

WHEREAS, the FFRF Parties acknowledge that the Agreement itself is and shall be a public record subject to public review and inspection pursuant to California law; and

THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the mutual covenants contained herein, the PARTIES agree as follows:

ARTICLE I
REMOVAL OF THE CROSS AND PAYMENT

1.1 Removal of the Cross. The FFRF Parties acknowledge that the subject cross has been removed from the Park, and that no further action is required by the City.

1.2 Payment to the FFRF Parties. The FFRF Parties shall provide the CITY with an executed IRS Form W9 to facilitate tax reporting of any reportable amount. Within ten business days of the CITY's receipt of the W9, the CITY shall pay a sum of six thousand five hundred dollars (\$6,500.00) to the FFRF Parties, payable to the "Law Offices of David Kaloyanides Client Trust Account." The CITY shall not be obligated to make any payment until it has received a properly completed and signed W9 as provided herein. This amount shall be considered full, total, and complete settlement of all claims including, but not limited to, legal fees, costs, expenses, and damage claims arising from or related to the Complaint, Dispute, and this Agreement. The FFRF Parties expressly acknowledge and agree that any tax consequences arising from CITY's payment of any sums hereunder shall be the full responsibility of the FFRF Parties. The FFRF Parties further agree that they will indemnify and hold the CITY harmless from and against any claims, costs, and expense imposed by any taxing authority against the CITY for non-payment of taxes by reason of the payment described in this paragraph.

1.3 No Admission of Liability. The CITY's payment is not intended, and shall not be construed, to be an acknowledgment, admission, concession, or stipulation of liability or wrongdoing by the CITY but, rather, constitute a resolution and settlement of disputed issues without admission of any fault.

ARTICLE II
RELEASE AND DISMISSAL

2.1 Release of the CITY by FFRF. Except for claims arising directly as a result of breach of the terms, covenants, conditions, and representations of the CITY contained in this Agreement, and as a material inducement to the CITY to enter into this Agreement, FFRF does hereby irrevocably and unconditionally release, acquit and forever discharge the CITY, and each of them, and its officials, council members, members, directors, officers, agents, assigns, attorneys, insurers, representatives, and employees from any and all claims, actions, charges, complaints, causes of action, rights, demands, and damages, at law and equity, which FFRF has or could have, whether now or in the future known, against CITY, whether arising from or in connection with the Complaint, the Dispute or this Agreement, which arose on or before the effective date of this Agreement. FFRF acknowledges and agrees that it will not sue or initiate against the CITY any action or proceeding pertaining in any manner whatsoever to the claims released by FFRF in this release. FFRF agrees that it shall not seek, demand, or request in any manner any compensation or payment arising from or in connection with the Complaint, Dispute, and/or this Agreement other than and/or in addition to the payment under this Agreement. FFRF represents and warrants hereby that it has not made an assignment or any other transfer of any interest in the claims, causes of action, suits, debts, agreements or promises described herein. Nothing in this paragraph is intended to release any right or obligation of any party arising out of this Agreement.

2.2 Release of the CITY by DEFARIA. Except for claims arising directly as a result of breach of the terms, covenants, conditions, and representations of the CITY contained in this Agreement, and as a material inducement to the CITY to enter into this Agreement, DEFARIA does hereby irrevocably and unconditionally release, acquit and forever discharge the CITY, and each of them, and its officials, council members, members, directors, officers, agents, assigns, attorneys, insurers, representatives, and employees from any and all claims, actions, charges, complaints, causes of action, rights, demands, and damages, at law and equity, which DEFARIA has or could have, whether now or in the future known, against CITY, whether arising from or in connection with the Complaint, the Dispute or this Agreement, or in any other manner. DEFARIA acknowledges and agrees that he will not sue or initiate against the CITY any action or proceeding pertaining in any manner whatsoever to the claims released by DEFARIA in this release. DEFARIA agrees that he shall not seek, demand, or request in any manner any compensation or payment arising from or in connection with the Complaint, Dispute, and/or this Agreement other than and/or in addition to the payment under this Agreement. DEFARIA represents and warrants hereby that he has not made an assignment or any other transfer of any interest in the claims, causes of action, suits, debts, agreements or promises described herein. Nothing in this paragraph is intended to release any right or obligation of any party arising out of this Agreement.

2.3 Dismissal. The PARTIES shall file a Stipulation of Dismissal, with prejudice, dismissing the Complaint in its entirety no later than February 28, 2017.

ARTICLE III **MISCELLANEOUS PROVISIONS**

3.1 Recitals. The aforementioned Recitals are incorporated into this Agreement as if set forth fully herein.

3.2 Investigation. Each of the PARTIES has made such investigation of the facts pertaining to the Complaint, Dispute, and this Agreement as it deems necessary. The PARTIES hereto understand that if any fact with respect to any matter covered by this Agreement and/or the Dispute is found hereafter to be other than, or different from, the facts now believed by the PARTIES to be true, each party hereto expressly accepts and assumes the risk of such possible difference in facts and agree that this Agreement shall become and remain effective notwithstanding such different facts.

3.3 Release of Unknown or Unsuspected Claims. For the purpose of implementing full and complete releases to the extent stated herein, the PARTIES hereto expressly acknowledge that the releases provided in this Agreement are intended to include in their effect, without limitation, any and all claims, complaints, charges or suits within the scope of such releases, including those claims, complaints, charges or suits which they do not know or suspect to exist in their favor at the time of execution hereof, which if known or suspected, could materially affect the PARTIES' decision to execute this Agreement. This Agreement contemplates the extinguishment of any such claims, complaints, charges or suits within the

scope of the stated releases and therefore all rights under Section 1542 of the California Civil Code are hereby expressly waived. Section 1542 of the Civil Code provides:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

The PARTIES each represent that it has read and understood the provisions of California Civil Code Section 1542. Further, each acknowledges that it is represented by counsel and has been specifically advised by its counsel of the consequences of the above waiver, as well as with respect to this Agreement generally.

3.4 Integration Clause. This Agreement contains the entire agreement of the PARTIES with respect to the subject matter of this Agreement and supersedes any and all prior, written or oral, agreements among them concerning the subject matter of this Agreement. There are no representations, agreements, arrangements or understandings, oral or written, among the PARTIES, relating to the subject matter of this Agreement that are not fully expressed herein. This is a fully integrated document.

3.5 Other and Further Documents. The PARTIES, and each of them, shall take such actions and shall execute, deliver and file or record any such document as may be reasonable or necessary to effectuate the purposes and contents of this Agreement.

3.6 Consultation With Counsel. The PARTIES represent and warrant that they have presented their respective counsel with this Agreement, that their respective counsel has had the opportunity to review this Agreement and that they are executing this Agreement of their own free will after having received advice from their respective counsel regarding the execution of this Agreement.

3.7 Choice of Law, Jurisdiction and Venue. This Agreement shall be governed by and construed in accordance with California law. Any action or proceeding arising under this Agreement shall be brought exclusively in the U.S. District Court for the Northern District of California.

3.8 No Waiver. The failure of any party to insist upon compliance with any of the provisions of this Agreement or the waiver thereof, in any instance, shall not be construed as a general waiver or relinquishment by such party of any other provision of this Agreement.

3.9 Amendment. This Agreement may not be amended except by an instrument in writing, executed by the PARTIES, and each of them.

3.10 Agreement Obligates, Extends and Inures. The provisions of this Agreement shall be binding upon each of the PARTIES and others to the extent stated herein. The provisions of this Agreement shall be binding upon those who may succeed to, or assume, the

capacities of the PARTIES and such others subsequent to the execution and effective date of this Agreement.

3.11 No Reliance. Each of the PARTIES represents and warrants that, except for the representations and warranties specifically set forth in this Agreement, in executing this Agreement, it does not rely, and has not relied, on any representation or statement made by any other party to this Agreement, or any representation or statement made by any person acting or purporting to act on behalf of any other party to this Agreement.

3.12 No Assignment. Each of the PARTIES represents and warrants that it owns the claims released hereby; that no other person or entity has any interest in such claims; that it has not sold, assigned, conveyed or otherwise transferred any such claim, or any other claim or demand against any person released hereby; and, that it has the sole right to settle and release such claims. The undersigned represent and warrant that to the best of their information and belief, they have no knowledge of any claims held by one against the other that are not released hereby.

3.13 No Pending Action. The PARTIES represent and warrant that they have not filed any other claim, complaint, charge or suit against any other party or any other party's predecessors, subsidiaries, affiliates, members, directors, officers, shareholders, trustees, partners, successors, agents, assigns, joint venturers, attorneys, insurers, representatives, employees, heirs and executors, with any federal, state or other agency, court, board, office or other forum or entity, without limitation. Except for breaches of a party's representations, warranties or covenants under this Agreement, the PARTIES will not, at any time hereafter, file or pursue any claim, complaint, charge or suit based upon circumstances heretofore arising.

3.14 Multiple Counterparts. This Agreement may be executed in multiple counterparts that shall become effective to the same extent as the original only when every party has signed and delivered a signed counter-part. For purposes of the execution of this Agreement, signature pages transmitted by facsimile or electronic mail shall be given the same weight and effect as, and treated as, original signatures.

3.15 Authority. The undersigned natural persons executing this Agreement warrant and represent that they are duly authorized to do so and to bind the person or entity for which they sign.

3.16 Construction. Each party hereto has cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the same shall not be construed against any party on the ground that said party drafted this Agreement. This Agreement shall be deemed to have been executed and delivered within the State of California, and the rights and obligations of the PARTIES hereunder shall be construed and enforced in accordance with, and governed by, the laws of the State of California, in effect as of the date hereof.

3.17 No Admission of Liability. Nothing in this Agreement shall be construed as an acknowledgment, admission, concession, or stipulation of liability or wrongdoing by either party.

3.18 No Third Party Beneficiary. The terms and provisions of this Agreement shall be binding upon and inure to the benefit of the PARTIES, and their respective successors and assigns, and is made solely and specifically for their benefit. No other person shall have any rights, interest or claims hereunder or be entitled to any benefits under or on account of this Agreement as a third-party beneficiary or otherwise.

IN WITNESS WHEREOF the PARTIES hereto have executed this Agreement on the dates written below.

READ CAREFULLY BEFORE SIGNING:

FOR THE FFRF PARTIES:

Dated: February 28, 2017

ANDREW DEFARIA, an individual

By: 

ANDREW DEFARIA

Dated: February _____, 2017

FREEDOM FROM RELIGION FOUNDATION,
INC.

By: _____
[Name], [Title]

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3.18 No Third Party Beneficiary. The terms and provisions of this Agreement shall be binding upon and inure to the benefit of the PARTIES, and their respective successors and assigns, and is made solely and specifically for their benefit. No other person shall have any rights, interest or claims hereunder or be entitled to any benefits under or on account of this Agreement as a third-party beneficiary or otherwise.

IN WITNESS WHEREOF the PARTIES hereto have executed this Agreement on the dates written below.

READ CAREFULLY BEFORE SIGNING:

FOR THE FFRF PARTIES:

Dated: February _____, 2017

ANDREW DEFARIA, an individual

By: _____
ANDREW DEFARIA

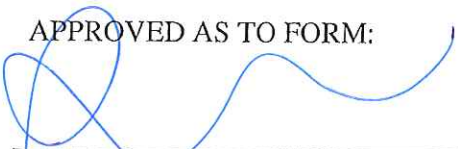
Dated: February 20, 2017

FREEDOM FROM RELIGION FOUNDATION,
INC.

By: Annex Anne Taylor, Co-President
[Name], [Title]

FOR THE CITY PARTIES:

APPROVED AS TO FORM:

for


BRIAN DOYLE
Interim City Attorney

Dated: 3.14.17



RAJEEV BATRA
Interim City Manager
1500 Warburton Avenue
Santa Clara, CA 95050
Telephone: (408) 615-2210
Fax: (408) 241-6771

ATTEST:

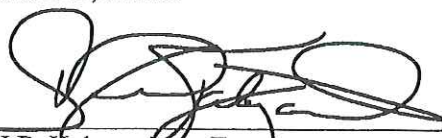
for


ROD DIRIDON, JR.
City Clerk

APPROVED AS TO FORM AND CONTENT:

Dated: March 2, 2017

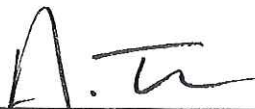
LAW OFFICES OF DAVID J.P.
KALOYANIDES, APLC

By: 

David J.P. Kaloyanides, Esq.
Attorneys for FREEDOM FROM RELIGION
FOUNDATION, INC. and ANDREW
DEFARIA

~~Dated: February~~ ^{MARCH} 6, 2017

CITY OF SANTA CLARA

By: 

Albert Tojg, Esq.
Attorneys for CITY OF SANTA CLARA