

## SETTLEMENT AGREEMENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE ("Agreement") is made by and between the City of O'Fallon, Missouri (the "City") and Kyle Kelley, together with his heirs, executors, administrators, successors, and assigns (collectively "Kelley"), and the "effective date" of this Agreement is the date on which the seven-day waiver period set out in Paragraph 8(g) has expired. The City and Kelley are collectively referred to herein as the "Parties."

WHEREAS, the following lawsuits are presenting pending by Kelley against the City and/or the City's current or former agents, officials or employees in the Circuit Court for St. Charles County, Missouri: *Jeffrey Gray and Kyle Kelly v. City of O'Fallon, Missouri, et al.*, Case No. 1811-CC00150, and *Jeffrey Gray and Kyle Kelly v. City of O'Fallon, Missouri*, Case. No. 2011-CC00764; (collectively "Lawsuits"); and

WHEREAS, there may be other EEOC/MCHR charges or claims asserted or unasserted, which Kelley has or may claim to have, against the City or the City's agents, officials or employees (collectively "Charges"); and

WHEREAS, the Parties mediated all of Kelley's Lawsuits and alleged claims with mediator Jerry Diekemper on December 28, 2020, and continued settlement discussions thereafter; and

WHEREAS, the City denies any and all allegations of wrongdoing against Kelley, including those set forth in the Lawsuits and the Charges; and

WHEREAS, Kelley and the City have voluntarily agreed to resolve all disputes between them, including all claims and causes of action that were, or could have been, asserted in connection with the Lawsuits and the Charges;

NOW, THEREFORE, in consideration of the mutual covenants in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

### TERMS

1. **No Admission Of Liability.** Nothing contained in this Agreement, or any statements or communications made by a party or its agent during the negotiations preceding this Agreement, shall be considered admissions of liability by or on behalf of any party.

2. **Consideration.** The promises, representations, and undertakings set forth in this Agreement shall constitute material and sufficient consideration for the Parties' respective agreements to enter into this Agreement and to be bound to its terms. Kelley expressly agrees and acknowledges that the monetary consideration set forth in Paragraph 3 of this Agreement constitutes separate material and sufficient consideration for his agreement to the terms set forth herein, including for his release of all claims against the Released Parties (as defined below), and his dismissal with prejudice of the Lawsuits and the Charges.

**3. Settlement Payment.** In consideration for the promises, representations, and undertakings set forth in this Agreement, including the release of all claims asserted in the Lawsuits and the Charges, Kelley will receive the following Settlement Payment:

The City shall pay Kyle Kelley a gross sum of Two Hundred Eighty Thousand Dollars and zero cents (\$280,000.00), as and for the settlement of all alleged claims, damages, costs and attorneys' fees incurred in connection with the above Lawsuits and Charges and any other alleged asserted and unasserted claims arising from Kyle Kelley's employment with the City. This Settlement Payment shall be paid as follows:

One check made payable to Kyle Kelley in the amount of Thirty-Two Thousand, Six Hundred and Eighty-Six Dollars and Thirty-Nine Cents (\$32,686.39), less standard payroll deductions, as and for any alleged claims for lost wages. An IRS Form W-2 shall be issued to Kyle Kelley in connection with the Settlement Payment.

One check made payable to Kyle Kelley in the amount of One Hundred Thirty Thousand, Seven Hundred and Forty-Five Dollars and Fifty-Four Cents (\$130,745.54), as and for any alleged claims for emotional distress. An IRS Form 1099 shall be issued to Kyle Kelley in connection with the Settlement Payment.

One check made payable to The Law Offices of John Lynch, LLC in the amount of One Hundred Sixteen Thousand, Five Hundred and Sixty-Eight Dollars and Seven Cents (\$116,568.07), as and for all attorneys' fees and costs. An IRS Form 1099 shall be issued to Kelley and his attorney in connection with the Settlement Payment.

The above consideration shall be delivered to Kelley's attorney no later than thirty (30) days following the effective date of this Agreement, and provided further the following has occurred to the satisfaction of counsel for the City: (1) counsel for the City has received a copy of this Agreement signed and dated by Kelley; (2) counsel for the City has received an executed IRS Form W-9 from Kelley and his attorney; and (3) Kelley has filed a notice of withdrawal with both the EEOC and the MCHR regarding any presently pending administrative charge of discrimination filed by Kelley.

Kelley acknowledges and agrees that neither he, nor any attorney or other person acting or purporting to act on his behalf, shall make any claim, complaint, petition, or other request for attorneys' fees, costs, or any other remuneration to be paid in connection with the Lawsuits or the Charges, this Agreement, or any other matter pending between the Parties. Kelley further agrees to indemnify and hold harmless each of the Released Parties for all expenses, including all costs and attorneys' fees, which might be incurred in connection with such a claim, complaint, petition, or request.

Kelley represents and affirms that he is not aware of any liens and/or pending legal claims applicable to all or any portion of the Settlement Payments. Kelley agrees to defend, indemnify, and hold harmless the Released Parties against any lien, claim, or action asserted against any portion of the Settlement Payments. Kelley also agrees that he will be solely responsible to satisfy any liens or pending legal claims asserted against him in connection with the Settlement Payments.



Kelley further acknowledges and agrees that the imposition, or attempted imposition, of any lien or legal claim against the Settlement Payment shall not impair or otherwise impact the validity or operability of this Agreement, nor shall it excuse anything less than Kelley's full compliance with every obligation imposed upon him in connection with this Agreement.

**4. Taxation.** Kelley agrees that the City and the Released Parties make no representation as to the taxability, or proper tax treatment, of the amounts paid pursuant to Paragraph 3 of this Agreement. If the Internal Revenue Service, the Missouri Department of Revenue, or any other taxing authority determines that any portion of the payment called for by Paragraph 3 is further taxable beyond the amounts withheld, Kelley acknowledges and agrees that he shall be solely responsible for the payment of all taxes, penalties, and interest that might be assessed against him. Kelley further agrees to release, indemnify, and hold harmless the Released Parties for any and all amounts assessed and any other tax liability imposed against Kelley. Kelley further agrees to reimburse the Released Parties for any fees, costs, expenses, and/or attorneys' fees incurred as a result of Kelley's failure to pay any taxes Kelley owes on this consideration.

**5. No Settlement Payment Without Signing Agreement.** Kelley acknowledges and agrees that he has no independent entitlement to the Settlement Payment set forth in Paragraph 3, and would not otherwise receive said payment, but for his willingness to sign this Agreement and his commitment to fulfill each of the obligations that it imposes upon him. Kelley's execution of this Agreement is a condition precedent to his receipt of any compensation or benefit outlined in the Agreement.

**6. Additional Consideration and Terms.** The Parties further agree to the following consideration and settlement terms:

(a) Upon the effective date of this Agreement, Kelley will submit a written document stating that he is withdrawing and no longer pursuing his pending Human Resources complaint. The City's Human Resources Department will then close its investigation and Kelley will be returned from paid administrative leave status and will be restored to his position. Kelley is not permitted at the Police Department or other City property and shall not engage in any police work.

(b) Upon the effective date of this Agreement, and as a condition of this settlement, Kelley shall immediately tender his voluntary and irrevocable notice of retirement from the City of O'Fallon and its Police Department, effective immediately after coming off of paid administrative leave as discussed in Paragraph 6(a) of this Agreement. Kelley will be issued a retirement card and retirement badge by the City within thirty (30) days of his effective retirement date.

(c) At the time of retirement, Kelley shall be eligible for retiree health insurance benefits consistent with the City's retiree benefits policy and plan. He shall receive payout of vacation time and sick time accrued as of the date when the Parties sign this Agreement. Kelley may receive the Police Department award ribbons/pins he qualifies for when they become available. Kelley is entitled to no other accrued leave, compensation or benefits.

(d) The Parties agree that the City shall box Kelley's personal property remaining in his office and locker and will have the same delivered to him within ten (10) days of the effective date of this Agreement.

## **7. General Release Of All Claims.**

(a) *General Release.* Kelley, on behalf of himself and his present, past, and future attorneys, insurers, representatives, agents, successors, and assigns, knowingly and voluntarily releases and forever discharges, individually and collectively, the City of O'Fallon, Missouri, along with, as applicable, any and all of the City's current and former councilmembers, officers, directors, insurers, agents, attorneys, and employees, including but not limited to Mike Snowden, John Griesenauer, Bill Hennessy, Timothy Clothier, Roy Joachimstaler, Philip Dupuis, Lenore Toser-Adaz, and Bonnie Therrien, both individually and in their official capacities (all of the foregoing persons and/or entities in this paragraph are referred to collectively as the "Released Parties") of and from any and all claims, demands, causes of action, damages, losses, and expenses, whether known and unknown, asserted or unasserted, which Kelley has or may claim to have, against any of the Released Parties as of the effective date of this Agreement, including, without limitation, Kelley's claims as set out in the Lawsuits and Charges, as well as any claim or alleged violation of, or liability for, any of the following:

(1) Any claim based on federal, state or local law, rule, regulation or ordinance, including, but not limited to, claims of discrimination or harassment based on race, national origin, religion, gender, age, disability, or some other protected category that might be alleged under such laws as Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, any claims under Sections 1981 through 1988 of Title 42 of the United States Code, the Employee Retirement Income Security Act of 1974 (except for any vested benefits under any tax qualified benefit plan), the Americans with Disabilities Act, the Worker Adjustment and Retraining Notification Act, the Fair Credit Reporting Act, the Family and Medical Leave Act, the Immigration Reform and Control Act, the Equal Pay Act, the Fair Labor Standards Act, the Families First Coronavirus Relief Act, the Genetic Information Nondiscrimination Act, the Missouri Human Rights Act, Mo. Rev. Stat. §213.010 et seq., as amended, the Missouri Equal Pay Law, Mo. Rev. Stat. §290.400 et seq., as amended, the Missouri Handicap Discrimination Law, Mo. Rev. Stat. §209.150 et seq., as amended, the Missouri State Wage, Payment, Work Hour, and Dismissal Laws contained at Mo. Rev. Stat. §§ 290.010-290.580, the Missouri Genetic Testing Information Bias Law, Mo. Rev. Stat. §735.1300 et. seq., as amended, the Missouri Smokers' Rights Law, Mo. Rev. Stat. §290.145, as amended, the Missouri AIDS Law, Mo. Rev. Stat. §191.665, as amended, the Missouri Jury Duty Law, Mo. Rev. Stat. §494.460, as amended, the Missouri Voting Leave Law, Mo. Rev. Stat. §115.637, as amended, the Missouri Emergency Response Leave Law, Mo. Rev. Stat. § 320.336, as amended, the Missouri Witness/Crime Victim Law, Mo. Rev. Stat. §595.220, as amended, the Missouri Military Leave/Re-Employment Rights Law, Mo. Rev. Stat. §40.490, as amended, the Missouri War on Terror Veterans Leave Law, Mo. Rev. Stat. § 288.042, as amended, the Missouri Service Letter Law, Mo. Rev. Stat. § 290.140 et. seq., as amended, the Missouri Statutory Provisions Regarding Employer Use of Employee Social Security Number, Mo. Rev. Stat. § 407.1355, as amended, the Missouri Statutory Provisions

Regarding Disclosure of Workers' Compensation Records, Mo. Rev. Stat. § 287.380, as amended, the Missouri Statutory Provisions Regarding Off Duty Use of Tobacco & Alcohol, Mo. Rev. Stat. § 290.145, as amended, the Missouri Statutory Provisions Regarding Employee Political Activities – Mo. Rev. Stat. § 115.637, as amended, the Missouri Statutory Provisions Regarding Drug & Alcohol Testing, Mo. Rev. Stat. § 290.145, as amended, Missouri Statutory Provisions Regarding Retaliation/Discrimination for Filing Worker's Compensation Claim, Mo. Rev. Stat. § 287.780, as amended, the Missouri Statutory Provisions Regarding Wage Claim Retaliation, Mo. Rev. Stat. § 290.525, as amended, the Missouri Statutory Provisions Regarding Whistleblower Protection, Mo. Rev. Stat. § 197.285, as amended and Mo. Rev. Stat. § 198.006, as amended, as well as any other federal, state or local law, common law, regulation, or ordinance;

(2) Any claim for breach of contract or promise, express or implied;

(3) Any claim for breach of any term or condition of an employee handbook or policy manual, including any claim for breach of any promise of specific treatment in specific situations;

(4) Any claim for unpaid wages, commissions, bonuses, or other remuneration for employment earned through the effective date of this Agreement;

(5) Any public policy, contract, tort, or common-law claim, including, without limitation, claims for wrongful discharge, breach of implied or express contract, harassment, unpaid wages, leave, intentional or negligent infliction of emotional distress, defamation, slander, or any negligence in the hiring, training, supervision, or retention of any employee; and

(6) Any claim or other basis for recovering costs, fees, or other expenses, including attorneys' fees incurred in such matters.

(b) *Claims Not Released.* Nothing in this Agreement shall be construed as a waiver or release on Kelley's part of any rights that he may have to: (a) receive benefits and/or the right to seek claims for compensation for work-related injuries under applicable workers' compensation, and/or unemployment compensation statutes; (b) pursue claims which, by law, cannot be waived by signing this Agreement; or (c) enforce this Agreement.

(c) *Collective/Class Action Waiver.* For any claim not subject to release, and to the fullest extent permitted by law, Kelley waives any right or ability to be a class or collective-action representative, or to otherwise participate in any putative or certified class, collective or multi-party action or proceeding based on such a claim to which any of the Released Parties, including the City, is a party.

**8. Specific Release of Any Age Discrimination Claims.** As part of the claims released above, by signing this Agreement, Kelley releases and waives all claims arising under the Age Discrimination in Employment Act of 1967 (ADEA) against the Released Parties. Kelley agrees and acknowledges as follows:

- (a) Kelley acknowledges that this waiver of rights or claims arising under the ADEA is in writing, written in a manner calculated to be understood, and is understood by Kelley.
- (b) Kelley expressly understands that this waiver refers to rights or claims arising under the ADEA;
- (c) Kelley expressly understands that by execution of this document, he does not waive any rights or claims under the ADEA that may arise after the date the waiver is executed;
- (d) Kelley acknowledges that the waiver of rights or claims arising under the ADEA is in exchange for the consideration payable to Kelley under this Agreement, which is substantially above and beyond that to which Kelley is otherwise entitled except for this Agreement;
- (e) Kelley acknowledges that the City expressly advises him to consult with an attorney of his choosing prior to executing this Agreement and that he has, in fact, done so;
- (f) Kelley has been advised by the City that he is given a period of twenty-one (21) days, which period started on January 20, 2021, within which to consider and execute this Agreement, and if Kelley does not execute and return this Agreement to the City within that period, all offers made and terms contained herein are revoked and considered null and void;
- (g) Kelley acknowledges that the City has advised him that he is entitled to revoke this waiver of rights or claims arising under the ADEA within seven (7) days after executing this Agreement and that said waiver will not and does not become effective or enforceable until the seven (7) day revocation period has expired;
- (h) Kelley understands and agrees that this waiver is not requested in connection with an exit incentive or other employment termination program;
- (i) Kelley acknowledges that the City shall have no liability to him for any sum or benefit to be paid under this Agreement until after the expiration of the seven (7) day revocation period referenced in subparagraph (g) above, notwithstanding any other provision of this Agreement to the contrary; and
- (j) If Kelley exercises the right to revoke, as referred to in subparagraph (g) above, this Agreement shall be null and void and of no force or effect and all rights and obligations of the Parties hereunder shall be cancelled and voided.

**9. No Future Application For Employment.** As a condition of this Agreement, Kelley agrees that he will not, now or at any time in the future, apply for or accept employment with the City or any department or division thereof, due to irreconcilable differences; and the City may decline to employ Kelley in the future without being subject to liability.



**10. Dismissal of Lawsuits and Charges.** Within two (2) business days following receipt of the Settlement Payments described in Paragraph 3, Kelley agrees to dismiss the Lawsuits and Charges with prejudice. Kelley and the City shall each bear their respective attorneys' fees and costs associated with the Lawsuits and Charges, and the above-described consideration is offered and accepted by Kelley in full, complete and final settlement, as fully described in this Agreement, of all claims or potential claims referenced in this Agreement. Each party relies on the finality of this Agreement as a material factor inducing that party's execution of this Agreement.

**11. Medicare Has No Interest In The Settlement Amount.** As a term of this Agreement, the Parties have fully considered Medicare's interests pursuant to the Medicare Secondary Payer rules, and, in doing so, Kelley has declared and hereby affirms that (a) he is either not eligible for benefits under Medicare or there is no lien or any related medical treatment that could be claimed on a lien by Medicare; (b) Medicare has no interest in any portion of the Settlement Payment; and (c) Kelley has not made a claim against any Released Party involving any illness, injury, incident, or accident in which medical expenses were, or are expected to be, incurred. Based on these representations, the Parties have determined that Medicare has no interest in the payments under this Agreement and no reporting is required to Medicare. However, if Medicare (or the agency representing Medicare's interests) later determines that it does have an interest in the payment to Kelley under this Agreement, Kelley agrees to indemnify, defend, and hold harmless for all expenses, including costs and attorneys' fees, that any Released Party might incur in connection with any proceeding related to Kelley's medical expenses; to reasonably cooperate with Released Parties concerning any information needed to satisfy the reporting requirements under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007, if applicable, and also any claim that Medicare may make and for which Kelley is required to indemnify Released Parties under this Paragraph; and to waive any and all future actions against Released Parties for any private cause of action for damages pursuant to 42 U.S.C. § 1395y(b)(3)(A).

**12. Confidentiality And Other Limitations On Communications.**

(a) Kelley acknowledges and agrees that the terms and conditions of this Agreement were made and entered into in strict confidence and must remain confidential to the maximum extent permitted by law. Kelley, on behalf of himself, and his present, past, and future attorneys, insurers, representatives, agents, successors, and assigns, promises, warrants, and represents that he shall not directly or indirectly disclose or offer to disclose, and has not directly or indirectly disclosed, privately or publicly, any of the terms or conditions of this Agreement or the negotiations leading to this Agreement, to any person or entity, including, without limitation, any member of the print, electronic, or other media, nor has he disclosed it on any form of social media, such as Facebook, Twitter, or any similar platform, with the exception of (i) a disclosure required by law or required to enforce or effectuate any obligations hereunder, including obtaining the dismissal of the Lawsuits and Charges; (ii) a disclosure to his attorneys and/or financial advisors, all of whom are to be advised by Kelley of the confidential nature of this Agreement, and must agree to the same; and (iii) his spouse, who whom is to be advised by Kelley of the confidential nature of this Agreement, and must agree to the same. Kelley further acknowledges and agrees that this confidentiality provision is an express and absolute condition of this Agreement, is

bargained-for consideration for this Agreement, and is not a mere recital. Kelley finally acknowledges and agrees that any violation of the terms and conditions of this confidentiality provision shall constitute a material breach of this Agreement.

(b) Notwithstanding the foregoing, either Party may publicly state that they have amicably resolved the litigation between them.

(c) If Kelley is requested to disclose any or all of the terms of this Agreement as a matter of law (such as pursuant to a subpoena), he shall promptly notify the City of such fact, in writing, so that it has the opportunity to contest that disclosure. If no objection is made within ten (10) business days of delivery of the notice, or if a court of competent jurisdiction, arbitrator, or government body orders such disclosure (irrespective of whether the notice has been effectuated or the ten (10) business days has run), then he may make such disclosure.

(d) Kelley acknowledges and agrees that, in the event a court of competent jurisdiction concludes that he has breached the confidentiality obligations contained in this Agreement, and in addition to any non-monetary relief that a court may award the City, he shall pay to the party or parties aggrieved by the breach any costs, including attorneys' fees, incurred in seeking enforcement for the breach of the confidentiality obligation contained in this Agreement.

**13. Return Of Property.** Kelley affirms that he has returned to the City all City property, files, memoranda, records, other documents, keys, and all other physical property that he received from the City.

**14. Governing Law And Interpretation.** This Agreement shall be governed and construed in accordance with the laws of the State of Missouri without regard to its conflict of laws provisions. In the event of a breach of this Agreement, any of the Parties may institute an action specifically to enforce any term or terms of this Agreement or seek any damages for breach. All suits, proceedings, and other actions relating to, arising out of, or in connection with this Agreement shall be submitted to the *in personam* jurisdiction of the courts of the State of Missouri. Should any provision of this Agreement other than the general release language be declared illegal or unenforceable by any court of competent jurisdiction, and if it cannot be modified to be enforceable, then such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect.

**15. Waiver And Amendment In Writing.** This Agreement may not be modified, altered or changed except upon express written consent of all parties in a writing signed by all parties, which writing shall make specific reference to this Confidential Settlement Agreement and General Release. Moreover, no waiver or modification is intended or shall be implied from any conduct during the life of the Agreement.

**16. Entire Agreement.** This Agreement sets forth the entire agreement between the Parties hereto, and it fully supersedes any prior agreements or understandings between the Parties. Furthermore, Kelley acknowledges that he has not relied on any representations, promises, or agreements of any kind made to him in connection with his decision to accept this Agreement, except for those set forth in this Agreement. The Parties are relying on their own judgment. The



Parties also specifically affirm that this Agreement clearly expresses their intent to waive fraudulent inducement claims and that they disclaim any reliance on representations about any of the specific matters in dispute.

**17. Joint Drafting And Advice Of Counsel.** In interpreting this Agreement, the Parties expressly agree that this Agreement was prepared by the Parties jointly and that no ambiguity shall be resolved against any Party on the basis that it was responsible or primarily responsible for having drafted this Agreement. The Parties further acknowledge that they have had the opportunity to review this Agreement with counsel of their choosing.

**18. Signatures.** This Agreement may be signed in counterparts, each of which shall be deemed an original, but all of which, taken together shall constitute the same instrument. A signature made on a faxed or electronically mailed copy of the Agreement or a signature transmitted by facsimile or electronic mail will have the same effect as the original signature.

**KYLE KELLEY, FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION AND WITH THE OPPORTUNITY TO CONSULT WITH COUNSEL OF HIS CHOOSING REGARDING THIS AGREEMENT, ENTERS INTO THIS CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS HE HAS OR MIGHT HAVE AGAINST THE CITY OF O'FALLON, MISSOURI AND ANY AND ALL RELEASED PARTIES.**

Agreed and accepted by Kyle Kelley:

Kyle Kelley  
Kyle Kelley

Date: 1/21/21

Agreed and accepted by the City of O'Fallon, Missouri:

By: [Signature]

Date: 1-28-21

Title: City Administrator

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