

## SETTLEMENT AGREEMENT AND RELEASE

FRIENDS FOR FULLERTON'S FUTURE, JOSHUA FERGUSON AND DAVID CURLEE, their agents, representatives, employees, attorneys, predecessors, successors and assignees (hereinafter referred to collectively as "Defendants") on the one hand, and the CITY OF FULLERTON, its principals, elected officials, agents, representatives, attorneys, predecessors, successors, assignees, insurance companies, insurance adjusters, insurance agents and brokers (hereinafter collectively referred to as "City," or "Plaintiff") on the other hand, enter into the following Settlement Agreement and Release ("Agreement"). Hereinafter the parties to this action are collectively referred to as "THE PARTIES."

### A. RECITALS

1. There is now pending in Orange County Superior Court an action entitled CITY OF FULLERTON v. FRIENDS FOR FULLERTON'S FUTURE, et al., bearing Orange County Superior Court Case No. 30-2019-01107063-CU-NP-CJC, which is currently on appeal in the California Court of Appeal, District Four, Division 3, case number G058996 (hereinafter referred to as "The FFFF Litigation").

2. The subject of The FFFF Litigation is the City seeking return of confidential documents obtained from the City's file sharing account, and related injunctive relief. Defendants deny the material allegations of the Complaint and that there is any liability to Plaintiff and allege that the lawsuit constituted a Strategic Lawsuit Against Public Participation (SLAPP), in that it was retaliatory for publication of various articles about the City and violated Defendants' constitutional rights. The City denies these allegations. The City obtained a Preliminary Injunction against Defendants prohibiting the use, publication or transfer of the

Documents (as hereafter defined) and the trial court denied Defendants' special motion to strike finding that the lawsuit arose from protected activity, but the City had met its initial burden by making prima facie evidentiary showing that Defendants knowingly accessed the City's shared file account and took files from the account "without permission," which the trial court found would be sufficient to violate California Penal Code section 502.

The trial court's rulings on both issues are currently on appeal. The court of appeal issued an immediate stay of the trial court's injunction which prohibited Defendants from "(j) Selling, publishing, distributing, disclosing or otherwise using any of the [Documents] without the City's permission, or a valid court order; and (k) Conspiring with third parties to sell, publish, distribute, disclose or otherwise use any of the [Documents] without the City's permission, or a valid court order." However, the court of appeal has not yet considered the merits of the appeal or made any final rulings.

3. The City has a duty to provide prompt responses to Public Records Act (PRA) requests and is afforded by statute very little time to do so. In addition, SB 1421 requires release of a number of records pertaining to police officer conduct, while simultaneously requiring the City to engage in very specific review and redaction of such records to protect victims and witnesses.

4. In an effort to reduce the time and expense of responding to PRA requests, city staff began using a file sharing program in order to respond to various PRA requests. Staff charged with locating and producing public records in response to PRA requests were placing folders and files on the shared drive and created a shortcut link to the shared file account [CityofFullerton.com/outbox](http://CityofFullerton.com/outbox).

5. In the process of gathering and reviewing documents in response to PRA requests, city staff began placing large volumes of records in the file sharing account for attorney review and redaction, believing these files and folders placed therein were secure and that access was restricted to city staff and the City Attorney's office. However, due to errors by former employees of the City in configuring the account, the files and folders were in fact accessible and able to be downloaded by the public.

6. Once downloaded, some of the files placed on the shared drive required passwords to open, but due to lax password controls, Defendants, and possibly others, would have been able to open (unzip) many of the files without bypassing access controls because the same passwords may have been re-used for multiple files and/or were disclosed in public records.

7. The City acted on its belief that access controls were in place and filed The FFFF Litigation, and maintains that its primary goal was to retrieve confidential documents for the protection of city employees, residents and those doing business with the City. Defendants maintain that any information or documents published by Defendants were of public concern and did not contain confidential information, such as home addresses, social security numbers, or medical information.

8. Based on the City's additional investigation and through discussions with Mr. Ferguson and Mr. Curlee, the City now understands that documents were not stolen or illegally taken from the shared file account as the City previously believed and asserted. Rather, the documents were made inadvertently available by the City in response to PRA requests.

9. The City wishes to acknowledge its misunderstanding of the situation and THE PARTIES wish to resolve the litigation and any claims that may be related thereto.

10. In response, and because Defendants have published all information the City made inadvertently available that they deemed newsworthy, Defendants have also agreed to return copies of the remaining Documents and delete any other copies, as set out in Paragraph 3, below.

11. Therefore, THE PARTIES wish to settle all differences among themselves arising out of or in any way concerning, connected with or pertaining to the facts, circumstances, events, Documents and purported causes of action, which have been alleged, or which could have been alleged in The FFFF Litigation.

**B. SETTLEMENT AGREEMENT AND RELEASE**

NOW, THEREFORE, in consideration of the above and the promises and agreements herein contained, THE PARTIES agree as follows:

**1. DEFINITIONS**

For purposes of this Agreement, "Documents" shall mean any documents (including any and all copies (physical, electronic or virtual), backups, excerpts, portions, files, folders, metadata, derivatives, and other information) that Defendants have in their possession, custody, and/or control that were obtained from any of the following folders or portions thereof in or from [CityofFullerton.com/outbox](http://CityofFullerton.com/outbox):

- [ACUSA\\_PRR.zip](#)
- [CE\\_PRR\\_KC.zip](#)
- [council\\_20180430.zip](#)
- [PRR\\_AIR20180604.zip](#)
- [HL\\_PRR.zip](#)
- [Tiger\\_Signal\\_PRR](#)

- PRR\_JF\_20181002.zip
- JF\_PRR20181012.zip
- JF\_PRR\_2.zip
- PPR\_Cox.zip
- PRRS01082019.zip
- PRRS01092019\_all.zip
- PRRS01092019.zip
- PRRS01152019\_JF.zip
- pr1919 - Josh Ferguson.zip
- PRRS02042019\_VD\_2.zip
- PRRS02042019\_VD.zip
- PRR\_19-134\_data@thehourlystruggle.com.zip
- PR19-171VD\_1\_2.zip
- PR19-188VD.zip

**2. DISMISSAL**

Within five (5) business days following full execution and approval of this Agreement by THE PARTIES, the City will file a request for dismissal with prejudice of The FFFF Litigation.

**3. DEFENDANTS' OBLIGATIONS**

Within ten (10) business days of the date the City provides notice of entry of dismissal with prejudice of The FFFF Litigation, as provided in Paragraph 2, Defendants agree to do all of the following:

- A. To provide the City Attorney with copies of all of the Documents that are in their possession, custody, and/or control, in any and all formats in which Defendants may have them.
- B. To use CCleaner (or similar software) to delete the Documents from any physical storage within their possession, custody, and/or control, in a manner which permanently renders the files inaccessible, unreadable and unrecoverable.
- C. To delete the Documents from any cloud or virtual storage within their possession, custody, and/or control, in a manner which permanently renders the files inaccessible, unreadable and unrecoverable.

- D. The agreement to destroy copies of the Documents, as set out in Paragraph 3, subsections B and C, shall not apply any records or portion thereof that were previously published by any of the Defendants. The City also agrees to retain and maintain the Documents returned by Defendants, as described in Paragraph 3, subsection A, in the form in which they were returned, for a period of three years from the date this agreement is executed. Should Defendants face any legal challenge relating to its accessing or publishing records or information contained in the Documents, the City agrees to make the Documents returned by Defendants available to Defendants for use in any legal challenge, subject to reasonable protective orders, or for *in camera* review.
- E. Pending dismissal of The FFFF Litigation and completion of the above actions described in Paragraph 3, subsection A, Defendants agree that they will not delete, alter, destroy, remove, copy, download, provide access to, transmit, or permit copying of the Documents.
- F. The removal and clearing of documents under Paragraph 3, subsections A through C shall be conducted in the presence of and under the supervision of the Mediator, Daniel Garrie of JAMS.
- G. Counsel for Defendants shall notify the City Attorney in writing when Defendants have complied with the obligations in Paragraph 3, subsections A through C.

4. **ACKNOWLEDGMENT BY CITY**

Within ten (10) business days of counsel's notification to the City Attorney, as referenced in Paragraph 3.G., the City will place the following statement on official city letterhead, and

shall (1) provide a certified copy to Defendants and (2) place said statement on a conspicuous location on the homepage of the City's website, where it shall remain for a period of at least six (6) months:

We have dismissed the lawsuit the City filed against Joshua Ferguson, David Curlee, and Friends for Fullerton's Future.

Initially, City staff were placing folders and files on CityofFullerton.com/outbox, a shortcut to a shared file account, believing they were secure with restricted access. However, due to errors by former employees of the City in configuring the account and lax password controls, some of the files and folders were in fact accessible and able to be downloaded and/or accessed without circumventing access controls.

Based on the City's additional investigation and through discussions with Mr. Ferguson and Mr. Curlee, the City now agrees that documents were not stolen or taken illegally from the shared file account as the City previously believed and asserted. The City retracts any and all assertions that Friends for Fullerton's Future, Mr. Ferguson and/or Mr. Curlee acted illegally in accessing the documents.

The City has worked to protect the confidentiality of non-public documents while assuring robust public access to public records. While our attempts to secure these documents after their unintentional release was well-meaning, it had consequences for Mr. Curlee and Mr. Ferguson that we did not intend. The City regrets this misunderstanding.

## **5. PAYMENT**

THE PARTIES desire to resolve all aspects of The FFFF Litigation and to release each other from all liability known or unknown in connection with it. THE PARTIES agree that the settlement in this Agreement is made in good faith. THE PARTIES understand and agree that this Agreement is intended to provide complete resolution of any claims each may have against any other Party hereto, and full satisfaction of any and all claims that Plaintiff or Defendants have, had, or may have had, whether asserted or not, in connection with or relating to The FFFF Litigation, including but not limited to claims for attorneys' fees and costs associated with The

FFFF Litigation, except as otherwise provided herein. Therefore, the City agrees to make the following payments:

- A. **Claimed Damages:** As consideration for satisfaction of Defendants' promises set forth in Paragraph 3 here, within ten (10) business days following full execution and approval of this Agreement by THE PARTIES, the City shall issue two warrants, one made payable to Joshua Ferguson in the amount of Sixty Thousand (\$60,000.00), and one made payable to David Curlee in the amount of Sixty Thousand (\$60,000.00), and will deliver them to Kelly Aviles, Defendants' counsel herein, to be disbursed upon notice as provided for in Paragraph 3, above.
- B. **Attorneys' Fees and Costs:** Within ten (10) business days following full execution and approval of this Agreement by THE PARTIES, the City shall issue a warrant in the amount of Two Hundred Thirty Thousand (\$230,000) to the "Law Offices of Kelly Aviles" in full satisfaction of any independent claim for recovery of attorneys' fees and costs incurred in the FFFF litigation, to be negotiated only upon notice as provided for in Paragraph 3, above.

6. **EXCLUSIONS**

- A. There is pending in Orange County Superior Court a related action entitled JOSHUA FERGUSON v. CITY OF FULLERTON, bearing Orange County Superior Court Case No. 30-2019-01103679-CU-NP-CJC (hereinafter referred to as "The PRA Litigation"). Nothing in this Agreement is intended to affect The PRA Litigation. Nor is this Agreement intended to affect or impair claims of any person not a party to this Agreement.



- B. Nothing in this Agreement is intended to waive any rights Defendants may possess under California's Shield Law (Cal. Const., Art. I, § 2; Cal. Evid. Code § 1070) and the First Amendment-based Reporter's Privilege, nor shall anything in this Agreement be construed to limit those rights in any effort to enforce the terms of this Agreement.
- C. Nothing herein shall be deemed to release any claims or causes of action that any current or former employee of the City may have against Defendants or any of them relating solely to publication of any document or information by Defendants, whether before or after the execution of this Agreement.

7. **WAIVER OF CLAIMS**

**In consideration for the full and timely performance of all of the terms and conditions of this Agreement in the manner prescribed herein, including but not limited to all releases, dismissal, waivers, covenants, warranties and representations, and except as otherwise provided herein, each of THE PARTIES for themselves and their affiliated entities and/or their agents, personal representatives, successors or predecessors in interest, suppliers of product, insurance companies, insurance adjusters, insurance agents, brokers and assigns hereby fully and forever release, acquit and discharge each other, and all of their respective agents, personal representatives, successors or predecessors in interest, insurance companies, insurance adjusters, insurance agents, brokers, suppliers of product and assigns from any and all claims, damages, costs, attorney's fees, demands, rights, causes of action, or liabilities which any of them ever had, or now have, or may in the future have against any other party to this Agreement that arise from or are, directly or**

**indirectly, related to or are connected with The FFFF Litigation and any amendments thereto and all other pleadings on file in The FFFF Litigation, and any other matters, causes of action, or things whatsoever that were, have been, or could in any way have been or could have been alleged in The FFFF Litigation, including, without limitation, any claim, loss, damage or injury whatever, based on contract or tort, statute or common law, which THE PARTIES ever had, or now have, or may in the future have against any other party to this Agreement that arise from or are, directly or indirectly, related to or are connected with The FFFF Litigation, and any other matters, causes of action, or things whatsoever that were, have been, or could in any way have been alleged in The FFFF Litigation.** THE PARTIES understand and agree that this Agreement is intended to provide complete resolution of any claims each may have against any other Party hereto, and full satisfaction of any and all claims that Plaintiff or Defendants have, had, or may have had, whether asserted or not, in connection with or relating to The FFFF Litigation, including but not limited to claims for attorneys' fees and costs associated with The FFFF Litigation, costs associated with investigation or recovery of any Documents, costs associated with returning to the City and deleting any Documents as provided for herein, costs of notifying third parties of potential access to confidential documents, costs of credit report or identity theft monitoring, claims of damages for loss of income, earning capacity, medical costs, emotional distress, reputational damage, out of pocket costs, damage to or loss of use of computers or computer systems, or any other claimed incidental, consequential or related costs to the subject matter of the FFFF Litigation, except as otherwise provided herein.

**8. COVENANTS**

Each of THE PARTIES, with respect to matters released under this Settlement Agreement and Release, and as consideration for this Settlement Agreement and Release, hereby covenants and promises that no claim shall be made and no litigation or proceeding shall be commenced against any other party released or against any past or present employees, agents (whether ostensible or actual), officers, directors, shareholders, insurance carriers, attorneys, successors, predecessors, assigns, or servants, based upon or arising out of the actions, events, documents or purported causes of action alleged in any Complaint or any amendments thereto, or any other matters or causes of action or things that were, or have been, or could in any way have been, alleged in The FFFF Litigation by THE PARTIES. The only rights or matters released herein pertain to The FFFF Litigation between THE PARTIES.

**9. EACH PARTY IS RESPONSIBLE FOR ALL COSTS, FEES, LIENS, AND EXPENSES**

Except for the payment to Defendants' counsel as set forth in Paragraph 5, B., THE PARTIES specifically acknowledge that they are each responsible for all of their own costs, fees, liens and expenses, incurred as a result The FFFF Litigation.

**10. WAIVER OF SECTION 1542**

This Agreement is intended as a full settlement and compromise of each and every claim, known or unknown, of every kind which THE PARTIES now have, or will in the future have against each other arising out of, or accrued as a result of, the facts alleged in The FFFF Litigation and the filing and prosecution of The FFFF Litigation. THE PARTIES with respect to Plaintiff's claims against Defendants, and/or any claims which Defendants may have or could

have raised against Plaintiff as a result of The FFFF Litigation, hereby waive any and all rights which Plaintiff or Defendants may have under the provisions of Section 1542 of the Civil Code of the State of California, and agree that THE PARTIES' counsel has explained that Section to them, and that they know that Section to read:

"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."

**11. FACTS MAY TURN OUT DIFFERENT THAN BELIEVED**

It is understood by THE PARTIES that the facts with respect to which the releases are hereby given may turn out to be other than, or different from, the facts now believed by THE PARTIES to be true, and each of THE PARTIES, therefore, expressly assumes the risk of the facts turning out to be different than they believe them to be, and each of THE PARTIES agree that the foregoing release shall in all respects be effective and not subject to termination or rescission because of any such mistaken belief.

**12. NO ADMISSIONS**

In making this Agreement, no party to this Agreement is admitting the sufficiency of any claims, allegations, assertions, contentions or positions of any other party, or the sufficiency of any defenses to any such claims, allegations, assertions, contentions or positions. This Agreement is not intended to be an admission of liability, which is expressly denied, on the part of each of THE PARTIES, but is made solely for the purpose of compromise and settlement.

**13. NO AGREEMENT TO DEFEND AND INDEMNIFY**

In addition to the full and complete release and discharge by Plaintiff and Defendants as set forth herein, THE PARTIES further agree and covenant that he/it has not assigned any of the rights, causes of action, or any claims asserted in The FFFF Litigation, or which could be or could have been asserted therein or with respect thereto, and agree to defend and indemnify the other on any claim, demand, or cause of action asserted by any other person or entity not a party to this Agreement based on any actual or purported assignment from a Party hereto. Except as expressly provided herein, THE PARTIES have no obligation to defend or indemnify any other Party for that Party's own actions.

**14. OPTION TO MEDIATE**

THE PARTIES acknowledge Defendants may obtain documents in the future from third parties which were or may have been part of the Documents that are at issue in The FFFF Litigation. If Defendants publish, release or disseminate documents the City believes (a) are confidential or privileged and (b) were improperly retained in violation of this Agreement, the City may request Defendant(s) submit to mediation with Daniel Garrie of JAMS, or other agreed upon mediator with similar qualifications, prior to initiation of litigation over any dispute about matters covered by this Agreement. If Defendants receive documents that they intend to publish, release, or disseminate, which they have reason to believe may have also been in the Documents, Defendant(s) or their counsel may notify the City Attorney, who may request that THE PARTIES go to mediation, in accordance with the terms of this Paragraph. The City shall bear all costs related to any mediation under this Paragraph, except where the mediator determines that the documents at issue were not independently obtained by Defendant(s) after execution of

this Settlement Agreement, in which case Defendants shall bear all costs related to mediation under this Paragraph. In addition, if the mediator verifies to the City's counsel that the document in question was more likely than not obtained after the date of this Agreement, instead of as a result of the retention of Documents in violation of this Agreement, the City shall pay all reasonable attorneys' fees and costs incurred by counsel for Defendant(s) in mediation. Nothing herein shall be construed to relieve either party or be deemed to constitute a waiver by either party of their respective rights and obligations under Government Code Section 810, *et seq.*

**15. COURT JURISDICTION OVER AGREEMENT**

THE PARTIES to this Agreement agree that this Court shall have continuing jurisdiction pursuant to Code of Civil Procedure section 664.6 for a period of sixty days following the full execution and approval of this Agreement by THE PARTIES to enforce the terms and conditions of this Agreement.

**16. MISCELLANEOUS PROVISIONS**

THE PARTIES in consideration of the above-described settlement and as an inducement therefore, represent, covenant and agree as follows:

- A. that the signatory for each of THE PARTIES is competent to sign on behalf of and is fully authorized by the party on whose behalf the signatory has executed this instrument;
- B. that the consideration herein above recited is contractual and not mere recital;
- C. that no inducements other than those stated in this Agreement have been made to THE PARTIES on behalf of any of the other of THE PARTIES released hereby and that in deciding to release these claims and to execute this instrument, THE PARTIES have relied solely and only

upon their own judgment and the advice given to them by their attorney, whom THE PARTIES have selected;

D. that this instrument contains the entire, complete and final agreement between THE PARTIES, and no other agreements, written or oral, express or implied, exist between THE PARTIES concerning the subject matter of this instrument which are not incorporated herein;

E. that the compromise and settlement which forms the basis of this Agreement has been reached after thorough negotiation and bargaining and represents a final, mutually agreeable compromise;

F. this Agreement may be signed in counterparts and shall be considered as if signed in one document.

G. THE PARTIES acknowledge that they have had an adequate opportunity to review each and every provision in this Agreement and to submit the same to counsel and other consultants for review and comment and that THE PARTIES jointly drafted this Agreement. No provision of this Agreement or any Assignment shall be construed more strictly against one party than any other party by reason that one or the other party proposed, drafted or modified such provision or any other existing or proposed provision.

**17. ATTORNEYS' FEES AND COSTS**

THE PARTIES shall bear and pay their own attorneys' fees and costs in connection with any action or other proceeding for the enforcement of any term or provision of this Agreement, except for any claim arising from an applicable fee shifting statute, such as Code of Civil Procedure § 425.16, et seq., or as sanctions imposed by the court.

**Approved as to form and content:**

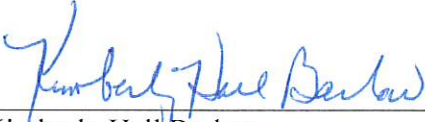
LAW OFFICES OF KELLY AVILES

Dated: \_\_\_\_\_

\_\_\_\_\_  
Kelly Aviles  
Attorneys for Defendants,  
FRIENDS FOR FULLERTON'S FUTURE  
JOSHUA FERGUSON AND DAVID CURLEE

JONES & MAYER

Dated: 5/12/21 \_\_\_\_\_

  
\_\_\_\_\_  
Kimberly Hall Barlow  
Attorneys for Plaintiff  
CITY OF FULLERTON



**18. CALIFORNIA LAW**

This Agreement shall be construed in accordance with, and shall be governed by, the procedural and substantive law of the State of California.

**19. CAPTIONS**

The captions of this Agreement have been inserted solely for reference purposes and shall not be given any effect in the construction or interpretation of this Agreement.

Dated: 5/12/21

  
\_\_\_\_\_  
CITY OF FULLERTON

BY: STEVE DANLEY

ITS: ACTING CITY MANAGER

Dated: \_\_\_\_\_

\_\_\_\_\_  
FRIENDS FOR FULLERTON'S FUTURE

BY: \_\_\_\_\_

ITS: \_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
JOSHUA FERGUSON

Dated: \_\_\_\_\_

\_\_\_\_\_  
DAVID CURLEE