

PREVIEW COPY

CITY OF MODESTO Retirement Incentive Program

SEPARATION AGREEMENT AND RELEASE OF ALL CLAIMS

This Separation Agreement and Release of All Claims (hereinafter referred to as the “Agreement”) is made and entered into by and between the undersigned “Employee,” his/her heirs, representatives, attorneys, successors and assigns, and anyone claiming through Employee and the City of Modesto, a municipal corporation, and its City Council members, officers, agents, employees, administrators, representatives, executors, successors, assigns, and/or other individuals or entities related thereto (hereinafter referred to collectively as “the City”).

RECITALS

WHEREAS,

1. The City has a projected budget shortfall for the remainder of fiscal year 2010-11 and for fiscal year 2011-12 as a result of the economic downturn.
2. In order to address the budget shortfall, the City is offering eligible employees who have been employed by the City for at least five (5) full years of continuous service in a regular position the option of electing to participate in the Retirement Incentive Program described herein.
3. Employee has timely notified the City, in writing by submitting the Letter of Separation/Retirement, attached hereto as Exhibit A, of his/her desire to participate in the City’s Retirement Incentive Program and has been accepted for participation by the City Manager.
4. By opting to participate in the Retirement Incentive Program, Employee agrees to all the terms set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth below and for other valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

1. **Effective Date.** This Agreement shall become effective and irrevocable by either party upon the expiration of seven (7) calendar days after this document is signed by both parties, in accordance with the revocation period set forth in paragraph 6(e) below (“Effective Date”).

2. **Terms of Retirement Incentive Program.**

- a. In consideration for voluntarily retiring from the City between June 30, 2010 and July 30, 2010 (last day on payroll to be no later than July 30, 2010), Employee shall receive compensation based on full years of service with the City as of the Employee's retirement effective date. The retirement incentive amount shall be calculated based on the employee's base salary and years of continuous service, with one week's base pay per completed year of service, up to a maximum of \$30,000. Based on this calculation, employee shall receive an incentive of \$_____.
- b. The City Manager is authorized to extend Employee's retirement date, after consulting with the Employee, under the Retirement Incentive Program to meet the needs and objectives of the City. No appeal of the City Manager's decision shall be permitted.
- c. Employee acknowledges that Employee is voluntarily retiring and, therefore, ineligible for unemployment compensation through the California Employment Development Department.
- d. Employees shall receive all benefits to which the Employee is normally entitled upon retirement from employment with the City.

3. **Employee Representations Regarding Claims.** Employee represents there are no actions at law or administrative proceedings currently pending which concern allegations based on Employee's hiring, retention, or compensation by the City, or the termination of Employee's employment, or based on any act or failure to act by the City affecting, involving, or relating to Employee and his/her employment with the City.

4. **No Admission of Liability.** This Agreement and compliance with this Agreement shall not be construed as an admission of any liability by either Employee or the City of any unlawful or wrongful acts by either party, individually or collectively. The parties disclaim liability as to or for any and all wrongful acts against each other.

5. **Waiver and Release.** In exchange for the valuable consideration and compromises set forth in this Agreement, Employee, on behalf of himself/herself and his/her representatives, family members, heirs, administrators, executives, successors, assigns and anyone claiming through Employee, hereby releases and forever discharges the City, its City Council members, officers, directors, agents, and employees (whether former or current), volunteers, successors, assigns, insurers, attorneys, consultants, affiliates, and/or related organizations or entities (all hereafter referred to singularly and collectively as "the parties hereby released"), from any and all actions, claims, judgments, obligations, damages, and liabilities of whatsoever kind and character with Employee may now have or has ever had arising in any way from or during Employee's employment with the City, including but not limited to:

- a. Any and all claims for wages, salary, paid leave, and/or benefits;
- b. Any grievance or other administrative remedy deriving from City policy;
- c. Any and all claims for wrongful or constructive discharge and/or reinstatement;
- d. Any and all claims relating to any contracts, express or implied, or breach of the covenant of good faith and fair dealing;
- e. Any and all tort claims of any nature, including but not limited to, fraud, deceit, misrepresentation, negligent misrepresentation, defamation, invasion of privacy, negligent or intentional infliction of emotional distress;
- f. Any and all claims of discrimination, harassment, retaliation or failure to accommodate under federal, state or municipal statute or ordinance, including but not limited to, race, national origin, age, gender, mental or physical disability, medical condition, sexual orientation, marital status, religion, or otherwise, and including any claims under the United States Constitution, California Constitution, California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 1981, 42 U.S.C. section 1983, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Older Workers' Benefit Protection Act, the Equal Pay Act, the Family Medical Leave Act, the California Family Rights Act, the Fair Labor Standards Act, the California Labor Code, and any other laws and regulations relating to employment; and
- g. Any and all claims for attorney's fees or costs.

Employee hereby further agrees that this Agreement shall operate as a complete bar against any and all litigation, charges, grievances now pending or contemplated by Employee or which might at any time be filed including but without limiting the foregoing, and any and all matters arising out of or in any manner whatsoever connected with Employee's employment with and separation of employment from the City up to the date of Employee's separation from the City.

Employee's Initials: _____

- 6. **Older Workers Benefit Protection Act.** For an Employee 40 years or older and in accordance with the Older Workers Benefit Protection Act, covered Employee acknowledges having been advised by this writing of the following:
 - a. Employee acknowledges having been advised to consult an attorney of his/her choosing before executing this Agreement.

- b. Employee acknowledges that the compensation provided in this Agreement constitutes independent consideration for the said waiver and is in addition to any other payment to which Employee is entitled.
- c. Employee acknowledges that this Agreement is written in a manner designed to be understood by Employee and that Employee has read the Agreement carefully and understands its terms.
- d. Employee acknowledges that he/she has up to forty five (45) calendar days from the date of receipt of this Agreement to consider whether to accept it, although Employee may accept it at any time within those 45 calendar days. If Employee accepts and signs the Agreement before the end of the 45 day period, Employee acknowledges doing so voluntarily and waives any further period for consideration.
- e. Employee has the right to revoke this Agreement within seven (7) calendar days after signing the Agreement. This Agreement shall not become effective or enforceable until the seven (7) day revocation period has expired. In the event that Employee revokes pursuant to this section, the entire Agreement shall be void and ineffective.

Employee's Initials (40 years or older): _____

- 7. **Specific Waiver of Section 1542 of the California Civil Code.** Employee acknowledges that he/she has read, and hereby waives the application of Section 1542 of the Civil Code, which provides:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH DEBTOR.”

Employee understands and acknowledges that the significance and consequence of this waiver of Section 1542 of the Civil Code is that, even if he/she should eventually suffer or discover damages arising out of Employee's employment with the City, Employee will not be permitted to make any claim for those damages. Furthermore, Employee acknowledges that he/she intends these consequences even as to claims that may exist as of the date of this release but which Employee does not know exist, and which, if known, would materially affect Employee's decision to execute this release, regardless of whether Employee's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

Employee's Initials: _____

8. **Protected Rights.** Employee and City agree that nothing in this Agreement is intended to or shall be construed to affect, limit or otherwise interfere with any non-waivable right of Employee under any Federal, state or local law, including but not limited to, the right to enforce this Agreement and recover for any breach of it, rights under California Labor Code Sections 2802 and 2804, the right to file a charge or participate in an investigation or proceeding conducted by the Equal Employment Opportunity Commission (“EEOC”) or to exercise any other right that cannot be waived under applicable law. Employee is releasing, however, his/her right to any monetary recovery or other relief should the EEOC or any other agency pursues claims on his/her behalf. Further, should the EEOC or any other agency obtain monetary recovery or other relief on Employee’s behalf, Employee assigns to City all rights to such monetary recovery or other relief.

Employee’s Initials: _____

9. **Return of Property.** Unless otherwise authorized by the City, on the last day of employment with the City, Employee shall return all City property in Employee’s possession or control, including without limitation any laptop computers, keys, proximity badge, credit cards, cellular telephones, files and documents (and all copies thereof).
10. **No Precedent.** The parties specifically acknowledge and agree that this Agreement is a compromise which shall not operate, nor be considered, as evidence of a practice or past practice of the City or a precedent in the future.
11. **Construction of the Agreement.** The parties agree that in any construction to be made of this Agreement, the same shall not be construed against any party on the basis that the party was the drafter.
12. **Acknowledgement of Voluntary Execution.** Employee has carefully read the Agreement and understands the contents. Employee has been afforded the opportunity to consult with his/her own counsel regarding this Agreement. Employee freely, knowingly, and voluntarily enters into this Agreement without any duress or undue influence on the part of any person released by this Agreement, or by any third party. Employee warrants and represents that he/she has the mental and emotional capacity to understand the provisions of this Agreement and its effects upon his/her legal rights.

Employee’s Initials: _____

13. **Partial Invalidity.** In the event that any of the covenants, duties, or restrictions of this Agreement are found to be illegal, invalid or unenforceable, such provision, if possible, shall be construed so as to render the provision legal, valid and enforceable. In the event such provision cannot be amended or construed to be legal, valid and enforceable, such provision shall be deemed deleted and the remainder of this Agreement shall remain in full force and effect.

14. **Entire Agreement.** This Agreement sets forth the entire agreement between the parties and supersedes any and all prior agreements or understandings, written or oral, between the parties pertaining to the subject matter hereof. No other promises or agreements shall be binding upon the parties with respect to the subject matter of this Agreement unless contained herein or separately agreed to in writing by the parties. This Agreement may not be modified except by a writing signed by Employee and the City Manager.
15. **Applicable Law.** This Agreement shall be governed by the laws of the State of California, and shall in all respects, be interpreted and enforced under the laws of the State of California. Litigation arising out of or connected with this Agreement shall be instituted and maintained in the courts of Stanislaus County in the State of California, and the parties consent to jurisdiction over their person and over the subject matter of any such litigation in such court, and consent to service of process issued by such court.
16. **No Assignment.** Employee warrants that he/she has not assigned, transferred, nor purported to assign or transfer, any claim(s) Employee may have against the City, and he/she will not assign or transfer, nor purport to assign or transfer, any claim(s) he/she may have against the City. The City warrants that it has not assigned, transferred nor purported to assign or transfer any claim(s) it may have against Employee and that it will not assign nor purport to assign or transfer hereafter any claim(s) it may have against Employee.
17. **Waiver.** Waiver by either party of any default, breach or condition precedent shall not be construed as a waiver of any other default, breach or condition precedent or any other right hereunder.
18. **Section Headings.** The section headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.
19. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall, for all purposes, be deemed an original and all such counterparts, taken together, shall constitute one and the same instrument.
20. **Attorney's Fees and Costs.** Each party shall bear all attorney's fees and costs arising from and/or in any way related to the actions of its own counsel with regard to the negotiation and creation of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year written below.

By: _____
Employee

By: _____
Greg Nyhoff
City Manager

Date: _____

Date: _____

APPROVED AS TO FORM:

By: _____
Susana Alcala Wood
City Attorney