



CITY HALL
10300 TORRE AVENUE
CUPERTINO, CA 95014-3255
WWW.CUPERTINO.ORG

PRESS RELEASE

FOR IMMEDIATE RELEASE

July 9, 2019

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City of Cupertino Agrees to Settlement with Former City Attorney Randolph Hom

CUPERTINO - The City of Cupertino and its former City Attorney Randolph Hom have reached a settlement of Hom's retaliation, discrimination, and breach of contract claims.

After a confidential mediation with Judge James Kleinberg, a retired judge of the Santa Clara County Superior Court, the parties reached agreement on a total settlement payment of \$205,000. The Cupertino City Council approved the settlement agreement at its public meeting on July 8, 2019.

"While the City denied liability for all claims, settling for \$205,000 compared to the millions Mr. Hom originally claimed makes good sense because it avoids the costs of a potentially lengthy lawsuit," said Heather Minner, who became City Attorney in February 2019.

"We need to move the City forward and this potential lawsuit was a distraction," Mayor Steven Scharf said. "Agreeing to this settlement and putting this matter behind us is in the best interest of the City."

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Attachment: Staff Report and Settlement Agreement



ADMINISTRATIVE SERVICES DEPARTMENT

CITY HALL
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TELEPHONE: (408) 777-3220 • FAX: (408) 777-3109
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CITY COUNCIL STAFF REPORT

Special Meeting: July 8, 2019

Subject

Settlement Agreement between the City of Cupertino and its former City Attorney, Randolph Hom.

Recommended Action

Approve and authorize the City Manager to execute a Settlement Agreement and Mutual General Release between the City of Cupertino and Randolph Hom.

Discussion

On October 22, 2018 and on February 8, 2019, former City Attorney Randolph Hom filed Government Tort Claims with the City, the first claiming he was fired in retaliation for whistleblowing, as well as discrimination and breach of contract claims, and seeking millions in compensation. In the second claim, he claimed that he was entitled to six months severance payment (equaling \$191,700), plus interest and attorney's fees, under his employment contract.

While the City disputed liability on all claims, after a confidential mediation with Judge James Kleinberg, a retired judge of the Santa Clara County Superior Court, the parties reached agreement on a total settlement payment of \$205,000. This amount will eliminate the potential expense of defending a lawsuit in court.

Sustainability Impact

No sustainability impact.

Fiscal Impact

Within ten (10) business days following the effective date of the agreement, the City will incur an expenditure of two-hundred five thousand (\$205,000) for the settlement payment.

Prepared by: Zach Korach, Finance Manager

Reviewed by: Kristina Alfaro, Director of Administrative Services

Approved for Submission by: Deborah Feng, City Manager

Attachments:

A – Settlement Agreement and Mutual General Release

SETTLEMENT AGREEMENT AND MUTUAL GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL GENERAL RELEASE (hereinafter, this "Agreement") is entered into by the City of Cupertino, State of California, a Municipal Corporation, by and through its City Council (hereinafter "the City"), and Randolph Hom (hereinafter "Hom").

RECITALS

A. From January 2016 to October 2018, Hom was employed by the City as its City Attorney.

B. On October 22, 2018 ("October Claim"), and on February 8, 2019 ("February Claim"), Hom filed Government Tort Claims with the City alleging retaliatory discharge for engaging in protected activity in violation of state and federal law, racial discrimination, intentional and negligent infliction of emotional distress, and breach of his Second Amended Employment Contract, based on, among other things, the failure to pay nine months severance as required by the contract for any termination.

C. The City expressly denies and disclaims any liability for any and all claims or damages asserted in both claims, and in no way admits the truth of the allegations in the claims. If Hom is entitled to the severance, nine months severance under Hom's contract totals \$191,700; with prejudgment interest, the amount would be nearly \$205,000.

D. In the interest of avoiding the expense, distraction, and inconvenience of litigation, the parties have agreed to settle. Each party agrees and understands that this Agreement constitutes a compromise settlement of disputed claims. The furnishing of the consideration for this Agreement shall not at any time for any purpose be deemed or construed by Hom or by anyone else as an admission of liability or responsibility by the City.

AGREEMENT

1. Employment Ending Date. Hom understands and agrees that his employment and any other relationship with the City terminated on October 12, 2018. Hom agrees that he will not seek re-employment with the City. Apart from the consideration for signing this Agreement provided in Paragraph 2 below, Hom affirms that he has been paid all outstanding salary, benefits, and other compensation (paid administrative leave, accrued leave) arising from his City employment.

2. Consideration. In consideration of the covenants undertaken and releases given herein by Hom, the City agrees, within ten (10) business days following (1) the Effective Date of this Agreement (as defined in Paragraph 15), and (2) delivery to the City of a fully executed and valid withdrawal of the October Claim and the February Claim, to pay the total amount of Two Hundred Five Thousand Dollars and Zero Cents (\$205,000.00) (the "Settlement Payment"), allocated as follows: (1) \$85,200 less standard payroll taxes and withholdings, in a check payable to Randolph Hom as compensation for lost wages; (2) \$64,797.31 in a check payable to Randolph Hom for emotional distress damages; and (3) \$55,002.69 to Cotchett, Pitre & McCarthy for attorney's fees and costs, made by wire transfer to the client trust account of Cotchett, Pitre & McCarthy [Wells Fargo Bank, 490 Broadway, Millbrae, California 94030; Routing Number: 121000248; Account Number: 3697751026]. Checks payable to Randolph Hom shall be mailed via certified mail to an address provided by Randolph Hom to the Director of Administrative Services and shall be deemed paid as of the date mailed.

3. Valid Consideration. The City and Hom agree that the consideration described in Paragraph 2 of this Agreement is not required by the City's policies or procedures or by any

contractual or noncontractual obligation (other than disputed obligations that are being settled herein), and is offered solely as consideration for this Agreement.

4. Return of Property. Hom confirms and agrees that he has returned to the City all property received from the City or any of its current or former employees or generated by Hom in the course of employment. Nothing in this provision shall limit the City's right to ask Hom for return of property in the future should the City or Hom later learn that Hom's electronic files still contain City property.

5. Mutual General Release.

a. By Hom. In consideration of the payments and other promises contained herein, Hom expressly waives any and all claims against the City and, to the maximum extent permitted by law, releases the City, all current and former members of the City Council, and all of the City's managers, agents, employees, and representatives ("Releasees") from any and all actual or potential actions, claims, causes of action, damages, and rights to attorneys' fees or costs, known or unknown, that he may have or claim to have based on any action or inaction by any Releasee, including but not limited to those asserted in the October Claim and February Claim. It is understood that this release includes, but is not limited to, any claims for retaliation, discrimination, wrongful discharge, as well as any claims for wages, bonuses, employment benefits (including claims under continuing employee benefit plans or claims under ERISA), or damages of any kind whatsoever, arising out of any common law torts, any contracts, express or implied, any covenant of good faith and fair dealing, express or implied, any theory of wrongful termination, any theory of negligence, any theory of retaliation, any theory of discrimination or harassment in any form, any legal restriction on Releasees' right to terminate employees, or any federal, state, or other governmental statute or ordinance, including, without limitation, Title VII of the Civil Rights Act of 1964 as amended, the Americans with Disabilities Act, the Family and Medical Leave Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the California Fair Employment and Housing Act, the California Family Rights Act, the California Labor Code, California Government Code § 910, et seq., or any other statutory or common law limitation or regulation of the employment relationship under state or federal law.

b. By the City. In consideration of the promises contained herein, the City expressly waives any and all claims against Hom and, to the maximum extent permitted by law, releases Hom, and all of his agents, employees, servants, representatives, heirs and assigns ("Hom Releasees") from any and all actual or potential actions, claims, causes of action, damages, and rights to attorneys' fees and costs, known or unknown, that the City may have or claim to have based on any action or inaction by any Hom Releasee through the date of the mediation in this matter, including by not limited to those asserted by the City in response to the October Claim and/or the February Claim. It is understood that this release includes, but is not limited to, any claims or damages of any kind whatsoever, arising out of any common law torts, any contract, express or implied, any cause of action or theory based on violation of the attorney-client privilege, attorney work-product doctrine or privilege, defamation, conversion, confidentiality, malpractice, right to privacy, negligence, discrimination or harassment, in any form, or any statutory or common law limitation under state or federal laws. For the avoidance of doubt, the City does not hereby release future claims it may have against Hom if Hom has violated or does violate any duty to the City, including without limitation the obligation of confidentiality owed by attorneys to former clients, either since the mediation in this matter or in the future.

c. It is the intention of Hom and the City in executing this Agreement that the same shall be effective as a waiver and bar to each and every claim, including any potential unknown or unsuspected claims. Hom and the City therefore expressly waive any and all rights and benefits conferred by the provisions of SECTION 1542 OF THE CALIFORNIA CIVIL CODE, which provides:

"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.”

The parties expressly waive any right, claim or cause of action that might arise as a result of information later learned by them.

6. No Admission of Wrongdoing. This Agreement shall not be construed as an admission by the City of any wrongful act, unlawful discrimination, or breach of contract, and the City specifically disclaims any liability to or unlawful discrimination against Hom.

7. Other Charges or Complaints. Hom represents that he has not filed any complaints, claims, charges, appeals, or actions against Releasees with any state, federal, or local agency or court, and that Hom will not do so at any time hereafter. Nothing in this Agreement is intended to waive claims (i) for unemployment or workers' compensation benefits, (ii) for vested rights under ERISA-covered employee benefit plans as applicable on the date Hom signs this Agreement, (iii) that may arise after Hom signs this Agreement, or (iv) which cannot be released by private agreement. In addition, nothing in this Agreement prevents Hom from filing a charge or complaint with or from participating in an investigation or proceeding conducted by the EEOC, National Labor Relations Board, or any other any federal, state or local agency charged with the enforcement of any laws, or from exercising rights under Section 7 of the NLRA to engage in joint activity with other employees, although by signing this release Hom is waiving rights to individual relief based on claims asserted in such a charge or complaint, or asserted by any third-party on his behalf, except where such a waiver of individual relief is prohibited.

8. Severability. The provisions of this Agreement are severable, and, if any part of it is found to be unlawful or unenforceable, the other provisions of this Agreement shall remain fully valid and enforceable to the maximum extent consistent with applicable law.

9. Applicable Law. This Agreement is entered into in Cupertino, California and shall be interpreted under the laws of the State of California without regard to California's conflicts of laws principles. Any disputes arising under this Agreement shall be brought in a court of competent jurisdiction within Santa Clara County, California.

10. Entire Agreement. This Agreement sets forth the entire understanding between the City and Hom and supersedes any prior agreements or understandings, express or implied, pertaining to the terms of Hom's employment with the City and the termination of the employment relationship. Hom acknowledges that in executing this Agreement, he does not rely on any representation or statement by any representative of the City concerning the subject matter of this Agreement, except as expressly set forth in the text of this Agreement.

11. Employment References. The City agrees to answer all potential employment inquiries regarding Hom by only verifying Hom's dates of employment and job title while working for the City. Hom agrees to direct all potential employment inquiries to the Director of Administrative Services at Phone (408) 777-3220, Fax (408) 777-3109.

12. No Assignment of Rights. Hom warrants and represents that he has not heretofore assigned or transferred to any person not a party to this Agreement any released matter or any part or portion thereof and each shall defend, indemnify and hold harmless any Releasee from and against any claim (including the payment of attorneys' fees and costs actually incurred whether or not litigation is commenced) based on or in connection with or arising out of any such assignment or transfer made, purported or claimed.

13. Consult with Counsel. In entering into this Agreement, the parties represent that they have relied upon the advice of their attorneys, who are attorneys of their own choice, and that the terms of this Agreement have been completely read and explained to them by their attorneys, and that those terms are fully understood and voluntarily accepted by them.

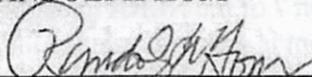
14. **Taxes.** Hom agrees that he shall be exclusively liable for the payment of all federal and state taxes (other than payroll taxes required to be paid by the employer) which may be due as the result of the consideration received from the settlement of disputed claims as set forth herein, and Hom hereby represents that he shall make payments on such taxes at the time and in the amount required of them. In addition, Hom hereby agrees fully to defend, indemnify and hold harmless The City from payment of taxes, interest and/or penalties that are required of the City by any government agency at any time as the result of payment of the consideration set forth herein.

15. **Opportunity to Consider and Revoke Agreement.** Hom acknowledges that he has been encouraged to seek legal counsel to review this Agreement, has been provided the opportunity to consider for twenty-one (21) days whether to enter this Agreement, and has knowingly and voluntarily chosen to enter the Agreement on this date. Hom may revoke this Agreement for a period of seven (7) days following the execution of this Agreement; this Agreement shall become effective following expiration of this seven (7) day period (the "Effective Date"). Hom acknowledges that he has carefully read and fully understands all aspects of this Agreement, that Hom has not relied upon any representations or statements not set forth herein, that he has been advised to consult with an attorney of his choice prior to executing the Agreement, that he has had the opportunity to consult with an attorney of his choice as to the subject matter and effect of this Agreement, and that he enters into this Agreement freely and without duress of any kind or nature.

CITY OF CUPERTINO

RANDOLPH HOM

By: _____



Randolph Hom

Title: _____

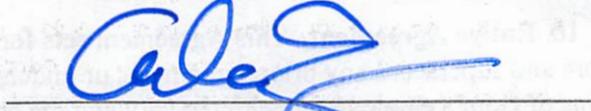
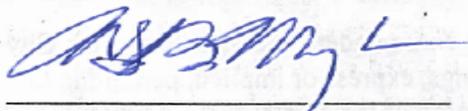
Dated: 6/21/2019

Dated: _____

Approved as to form and content:

FARELLA BRAUN & MARTEL LLP

COTCHETT, PITRE & MCCARTHY, LLP



Thomas Mayhew

Adam Zapala

Counsel for City of Cupertino

Counsel for Randolph Hom