

SETTLEMENT AGREEMENT, GENERAL RELEASE AND  
COVENANT NOT TO SUE

THIS SETTLEMENT AGREEMENT, GENERAL RELEASE AND COVENANT NOT TO SUE (hereafter "Agreement") relating to claims against Mitchell Katz, Mivic Hirose, Colleen Riley and THE CITY AND COUNTY OF SAN FRANCISCO (hereafter "the City"), is made between Derek Kerr, M.D. (hereafter "Plaintiff") and the City.

WHEREAS, Plaintiff was employed by the City as a 2232 Senior Physician Specialist with the Department of Public Health; and

WHEREAS, Plaintiff claims that during and as a result of Plaintiff's employment with the City Plaintiff suffered damages on account of wrongful conduct by Mitchell Katz, Mivic Hirose, Colleen Riley and the City including, without limitation, deprivation of due process in violation of 42 U.S.C. Section 1983, retaliation for engaging in protected speech in violation of 42 U.S.C. Section 1983, and retaliation in violation of California Labor Code Section 1102.5, Health and Safety Code Section 1432 and Government Code Section 53298; and

WHEREAS, Plaintiff filed the following complaint in San Francisco Superior Court, which was then removed to the United States District Court for the Northern District of California: *Kerr v. City and County of San Francisco, et al.*, Case No. 10-05733 CW (the "Action"); and

WHEREAS, the parties now desire to avoid the expense, burden and delay of litigation, and without admitting or acknowledging any liability, to resolve all of Plaintiff's claims, as well as the Action, and any and all lawsuits and claims brought by Plaintiff against the City, fully and forever in consideration of the promises contained herein,

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. In exchange for the promises by Plaintiff in this Agreement and complete settlement of the Action, the City will pay the total amount of Seven Hundred and Fifty

Thousand Dollars and No Cents (\$750,000.00) (the "Settlement Amount") to be allocated and payable as follows:

(a) A check in the amount of Six Hundred and Fifty Thousand Dollars (\$650,000.00) will be made out to "Kochan & Stephenson." This amount will be considered and treated as general damages for personal injury, including allegations of emotional injury and attorneys' fees and costs. In the event the appropriate taxing authorities should finally determine, contrary to the intentions of the parties, that the City should have withheld additional amounts for tax purposes, Plaintiff agrees to indemnify the City for any and all tax liability for which Plaintiff would have been responsible which may result from such failure to withhold.

(b) A second check in the amount of One Hundred Thousand Dollars (\$100,000.00), less applicable taxes and withholdings, as severance made payable to "Derek Kerr" for disputed claims of lost wages. This payment shall be reported as W-2 wages.

(c) The Settlement Amount will be considered received by Plaintiff upon delivery of the two checks specified in paragraphs 1(a) and (b) to Kochan & Stephenson at 260 California Street, Suite 803, San Francisco, California 94111.

(d) Post a Notice/Statement on the Department of Public Health's website, making reference to the September 2, 2010 "Statement Concerning the Laguna Honda Gift Fund," and stating that to the extent this Statement suggested that Plaintiff and/or Dr. Rivero were detractors of the Department or Laguna Honda Hospital, or intentionally made false or inaccurate statements regarding the Gift Fund, these representations were incorrect. The Notice/Statement shall be in the same format as the September 2, 2010 Statement, except that Barbara Garcia shall be listed as the Director of Health. The Notice/Statement shall be posted within 10 business days of the final approval of this Agreement and shall remain posted for a minimum of 10 months.

(e) Laguna Honda Hospital ("LHH") will install a plaque as soon as practicable at LHH at a plainly visible location to be determined by LHH in either the S3/Hospice Unit

or the gazebo/garden area (once it is completed), recognizing Plaintiff's contributions to LHH generally, and LHH's Hospice and Palliative Care Program in particular.

(f) LHH will within 10 business days of the final approval of this Agreement provide Plaintiff with a letter signed by LHH Medical Director Colleen Riley, M.D. and LHH Chief of Staff Steven Thompson, M.D. stating that: (i) Plaintiff was respected by his colleagues at LHH for his skills and accomplishments as a hospice and palliative care physician and for his work in establishing and running the LHH Hospice and Palliative Care Program; and (b) when Plaintiff retired from City service in June 2010 his privileges as a member of the LHH medical staff expired by operation of the LHH Medical Staff by-laws and not for reasons related in any way to the quality of medical care he provided to LHH residents.

(g) Following the final approval of this Agreement, Mivic Hirose will, at the next scheduled meeting of the Health Commission and the next meeting of the LHH Senior Staff, announce both the installation or pending installation of the plaque (§ 1(e)) and the letter signed by Riley and Thompson (§ 1(f)), and read the contents of both to those in attendance. Plaintiff will be informed of the dates of the meetings in advance, so that he may attend the meetings, should he so choose; if Plaintiff chooses to attend the LHH Senior Staff meeting, he will be excused from the meetings after the reading of the plaque and letter.

(h) Remove any document(s) from Plaintiff's personnel file that suggest his separation of City employment was a lay-off, as opposed to a voluntary retirement.

(i) Provide one-hour of training to the LHH Executive Committee regarding whistleblowing and the First Amendment rights of City employees.

2. (a) In consideration of the foregoing promises and for other good and sufficient consideration Plaintiff, for Plaintiff, Plaintiff's heirs, executors, administrators, assigns and successors, fully and forever releases and discharges Mitchell Katz, Mivic Hirose, Colleen Riley and the City, its constituent departments (including the Department of Public Health and

Laguna Honda Hospital), commissions, agencies, boards, predecessors, successors, subsidiaries, related entities, and current and former officers, directors, trustees, agents, employees and assigns (collectively "Releasees") from any and all liabilities, claims, demands, contracts, debts, damages, acts or omissions, obligations and causes of action of every nature, kind and description, in law, equity, or otherwise, whether or not now known or unknown, which heretofore do or may exist, in any way arising out of, connected with or related in any way to Plaintiff's employment with the City, the Action, the negotiation or execution of this Agreement, up to and including the date that Plaintiff signs this Agreement (the "Signature Date"). The release in this paragraph includes but is not limited to release of any matter, cause or thing arising out of, relating to, or connected with the Action referred to above, and any and all lawsuits and claims, charges and grievances brought by Plaintiff against any Releasee not set forth herein, and all past, pending or contemplated EEOC, DFEH or other administrative charges relating to or arising from Plaintiff's employment with the City through the Signature Date.

(b) In reaching a settlement of the Action resulting in the execution of this Agreement, Plaintiff and City have considered and sought to protect the interests of the Centers for Medicare and Medicaid Services ("CMS"), the federal agency that runs Medicare. Plaintiff represents and warrants that Plaintiff is Medicare eligible pursuant to 42 U.S.C. 1395c or will be Medicare eligible within thirty months from the Signature Date. Plaintiff has asserted a need for future medical treatment arising out of or related to the Action. Plaintiff will place a portion of the Settlement Amount in a Medicare Set Aside ("MSA") account which Plaintiff represents and warrants will satisfy the requirements of the Medicare, Medicaid and SCHIP Extension Act of 2007 and which will be used to pay for future medical expenses arising out of or related to the Action. Plaintiff, in consultation with his health care provider, reasonably and in good-faith estimates that he will have future medical expenses arising out of or related to the Action in the amount of \$2,500 and will set aside such sum in a MSA promptly upon receipt of the Settlement Amount identified above in paragraph 1. Plaintiff and Plaintiff's counsel agree to defend,

indemnify and hold harmless the City against any and all claims arising out of or related to the MSA or the terms of this paragraph, including without limitation, any claims by CMS.

(c) The release contained in this Paragraph 2 is a complete and general release that will forever bar Plaintiff from pursuing any released claims or rights against any Releasee. Plaintiff covenants not to sue or otherwise institute any legal or administrative proceedings against any Releasee with respect to any matter arising out of, connected with or related in any way to Plaintiff's employment with the City or the subject matter of the Action including any matter related to the Laguna Honda Hospital Patient Gift Fund, Davis Ja & Associates, or Health Management Associates. Plaintiff understands and agrees that Plaintiff is waiving any rights Plaintiff may have had, now has, or in the future may have to pursue any and all remedies available to Plaintiff under any cause of action arising out of, connected with or in any way related to Plaintiff's employment with the City, and which arose at any time through the Signature Date. Such causes of action shall include without limitation claims of wrongful discharge, defamation, invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, breach of the covenant of good faith and fair dealing, retaliation in violation of California Labor Code Section 1102.5, California Health and Safety Code Section 1432 and California Government Code Section 53298, violation of any other provisions of the California Labor Code, the City's Charter, Administrative Code, ordinances, Civil Service Commission Rules and other City enactments, the Meyers-Milias-Brown Act, violation of any memoranda of understanding covering Plaintiff, and claims under Title VII of the 1964 Civil Rights Act, as amended, the Civil Rights Act of 1991, the California Fair Employment and Housing Act, the Americans with Disabilities Act, the Rehabilitation Act, the Family and Medical Leave Act, the California Family Rights Act, the California and United States Constitutions, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act, the Civil Rights Acts of 1866 and 1871 (42 U.S.C. Sections 1981 and 1983), any other laws and regulations relating to employment or to discrimination.

(d) Plaintiff understands and expressly agrees that the release contained in this Paragraph 2 extends to all claims of every nature and kind, known or unknown, suspected or unsuspected, past, present or future, and that any and all rights under Section 1542 of the California Civil Code or any analogous state law or federal law or regulation are hereby expressly waived. Said Section 1542 of the Civil Code of the State of California, reads as follows:

**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.**

3. In further consideration of the foregoing, Plaintiff hereby agrees, acknowledges and recognizes that this Agreement is a “no fault” settlement in light of disputed claims, and that nothing contained in this Release shall constitute or be treated as an admission of liability or wrongdoing by, Mitchell Katz, Mivic Hirose, Colleen Riley or the City, which liability or wrongdoing is expressly denied by all parties.

4. Plaintiff represents that either (a) there are no existing liens or partial liens in existence, including without limitation any attorney's fees, medical reimbursement, unemployment or disability compensation liens, which attach to the Action, the amounts specified in this Agreement, or to any recovery paid to Plaintiff in connection with the settlement of the Action or the Proceeding, nor is any person or entity entitled to establish a lien for any payment or payments they have made or will make to Plaintiff on behalf of Plaintiff as a consequence of any of the matters arising out of or connected with Plaintiff's employment with the City, the Action or the Proceeding, or (b) to the extent there are any such liens, Plaintiff will pay and retire all such liens out of the Settlement Amount. Plaintiff agrees to defend, indemnify and hold harmless Mitchell Katz, Mivic Hirose, Colleen Riley and City against any and all claims by any person or entity purporting to hold any lien, interest, or other claim, whether for medical care, unemployment and/or disability compensation, attorneys' fees, or otherwise,

involving Plaintiff and arising from or connected with Plaintiff's employment with the City, the Action or the Proceeding.

5. Plaintiff represents and warrants that Plaintiff has full power to make the releases and agreements contained herein. Plaintiff expressly represents and warrants that Plaintiff has not assigned, encumbered or in any manner transferred all or any portion of the claims covered by the releases and agreements contained herein. Plaintiff acknowledges and agrees that this warranty and representation is an essential and material term of this Agreement. Plaintiff agrees to indemnify the affected Releasee for any claims brought against any Releasee by purported assignees of Plaintiff, including costs of judgment and reasonable attorneys' fees.

6. Plaintiff agrees within three (3) court days of receiving a fully executed copy of this Agreement, and being notified that this Agreement has been approved by the San Francisco Board of Supervisors, and receipt of the settlement monies described in paragraph 1(a), above, Plaintiff will dismiss the Action in its entirety and with prejudice by filing a "Stipulation for Dismissal with Prejudice" pursuant to Federal Rule of Civil Procedure 41. Plaintiff agrees to serve an endorsed filed copy of the dismissal on the City's counsel. In addition, Plaintiff represents that there are no outstanding DFEH, EEOC or other administrative charges which are or may be pending relating to Plaintiff's employment with the City through the Signature Date. To the extent any such charges have been or are filed on Plaintiff's behalf, Plaintiff agrees to dismiss or withdraw any such charges, with prejudice. Plaintiff expressly acknowledges that the list of outstanding litigation may not be exhaustive, but Plaintiff nevertheless agrees to dismiss with prejudice all litigation, claims, grievances, and administrative charges of any nature, kind and description against any Releasee which arise out of any right or claim released in this Agreement, whether or not listed in this Agreement.

7. All parties shall bear their own attorneys' fees, legal expenses and costs.

8. Plaintiff acknowledges that this Agreement is contingent upon approval by the San Francisco Board of Supervisors, and that this Agreement will not become effective absent

such approval. The City Attorney's Office will make all reasonable efforts to submit this Agreement for approval by the Board of Supervisors at the earliest possible date.

9. Plaintiff further acknowledges that this Agreement is contingent upon the execution by Maria Rivero, M.D. of a general release of any and all claims, including an express waiver of any and all rights under Section 1542 of the California Civil Code, against the City, its constituent departments (including the Department of Public Health and Laguna Honda Hospital), commissions, agencies, boards, predecessors, successors, subsidiaries, related entities, and current and former officers, directors, trustees, agents, employees and assigns. The consideration for such a release is the inclusion of Maria Rivero, M.D. in the Notice/Statement described in paragraph 1(d) above and the release shall be commemorated in a separate agreement between Maria Rivero, M.D. and the City, to be drafted and approved by the City Attorney's Office.

10. The parties acknowledge that this Agreement constitutes the sole agreement in this matter, that it supercedes any prior oral or written agreements, and that it may be modified only by a writing signed by all parties to this Agreement, and approved by the San Francisco Board of Supervisors.

11. If any provision of this Agreement is found to be unenforceable, then the remaining provisions shall remain valid and enforceable.

12. The parties agree that the United States District Court for the Northern District of California will have jurisdiction to enforce this Agreement. All disputes arising out of this Agreement shall be resolved by the United States District Court for the Northern District of California.

13. Plaintiff acknowledges that Plaintiff has the right to consult with an attorney concerning this Agreement, including the releases contained herein.

14. Plaintiff acknowledges that Plaintiff has read and understands this Agreement and that Plaintiff agrees to its terms and signs this Agreement voluntarily and without coercion. Plaintiff further acknowledges that the release and waivers Plaintiff has made herein are



knowing, conscious and with full appreciation that Plaintiff is forever foreclosed from pursuing any of the rights or claims so released or waived.

15. This Agreement has been reviewed by the parties and their respective attorneys, and each have had full opportunity to negotiate the contents of this Agreement. The parties each waive any common law and statutory rule of construction that ambiguity should be construed against the drafter of this Agreement, and agree that the language in all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning.

16. In connection with the Age Discrimination in Employment Act (“ADEA”), Plaintiff acknowledges that the City has advised Plaintiff to consult with an attorney prior to signing this Agreement. As set forth in the ADEA, 29 U.S.C. Section 626(f)(1), Plaintiff hereby acknowledges the following: (1) that this Agreement is written in a manner calculated to be understood by Plaintiff and that Plaintiff in fact understands the Agreement; (2) that this Agreement specifically refers to and waives rights or claims arising under the ADEA; (3) that this Agreement applies only to claims arising up to and including the date that Plaintiff signs this Agreement; (4) that in exchange for this Agreement, Plaintiff received value beyond that to which Plaintiff is already entitled; (5) that the City has advised Plaintiff in writing to consult with an attorney before executing the Agreement; and (6) that Plaintiff has been provided with an adequate period of time to review this Agreement. Plaintiff further acknowledges that Plaintiff is entitled to consider this Agreement for twenty-one (21) days before signing and that Plaintiff has made a knowing and voluntary decision to sign this Agreement before expiration of the twenty-one (21) day period. Plaintiff may revoke this Agreement for a period of seven (7) days after executing the Agreement. Any such revocation must be communicated in writing to Jonathan Rolnick, Deputy City Attorney, 1390 Market Street, Fifth Floor, San Francisco, CA 94102 within the seven-day revocation period. This Agreement shall not become effective or enforceable until the revocation period has expired.


17. This Agreement may be executed in separate counterparts, each of which shall be deemed an original, and all of which shall constitute one single instrument. The parties agree

that their signatures on any facsimile or electronic transmission thereof shall be fully binding upon them in the same manner as if the parties had each signed the same original Agreement.

DATED: 11/6/2012

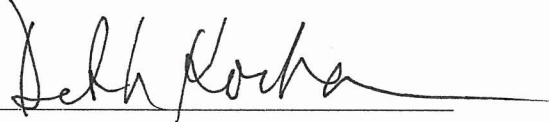
  
DEREK KERR  
Plaintiff

DATED: \_\_\_\_\_

  
BARBARA GARCIA  
Director of Health

APPROVED AS TO FORM AND SUBSTANCE:

LAW OFFICES OF KOCHAN & STEPHENSON

By: 


DATED: 11-6-2012

Attorneys for DEREK KERR

DENNIS J. HERRERA  
City Attorney

By:   
JONATHAN ROLNICK  
Deputy City Attorney

DATED: 11/14/12

By:   
ELIZABETH S. SALVESEON  
Chief Labor Attorney

DATED: 1-3-13

Attorneys for Defendants  
City and County of San Francisco, et al.