



**CITY OF BOULDER
CITY COUNCIL AGENDA ITEM**

MEETING DATE: June 21, 2022

AGENDA TITLE

Consideration of a motion authorizing the city manager to enter into an agreement to settle claims brought by Seth G. Franco against the city.

PRESENTERS

Nuria Rivera-Vandermyde, City Manager
Teresa Tate, City Attorney
Luis Toro, Senior Assistant City Attorney
Kara Skinner, Interim Chief Financial Officer

EXECUTIVE SUMMARY

The city manager and city attorney recommend approval of the settlement.

STAFF RECOMMENDATION

Suggested Motion Language:

Staff requests council consideration of this matter and action in the form of the following motion:

Motion to authorize the city manager to enter into an agreement in the amount of \$2 million to settle claims brought by Seth G. Franco against the city.

COMMUNITY SUSTAINABILITY ASSESSMENTS AND IMPACTS

- Economic – N/A
- Environmental – N/A
- Social – The resolution of disputes is generally of social benefit and the resolution of this dispute will free up city attorney time to work on other projects.

OTHER IMPACTS

- Fiscal – Payment for the proposed settlement will be made from the city’s General Fund.
- Staff time – The City Attorney’s Office together with outside council represent the city in this matter.

BOARD AND COMMISSION FEEDBACK

None.

PUBLIC FEEDBACK

None.

BACKGROUND

This Settlement resolves claims brought by Sage B. Franco as Personal Representative of the Estate of Seth Franco, (“Mr. Franco”) against the City of Boulder (“Boulder”), in the action titled Sage B. Franco, Personal Representative of the Estate of Seth Garrett Franco v. City of Boulder, United States District Court for the District of Colorado Case No. Civil Action No. 1:19-cv-02634-MEH. Two claims for relief are presented: (1) Fourth and Fourteenth Amendments; unconstitutional, warrantless arrest against all Defendants; and (2) Fourth and Fourteenth Amendments; unconstitutional, warrantless arrest against Defendants Garretson, Coon, and the city.

The Court ruled on a summary judgment motion on March 8, 2021, granting the motion for summary judgment with respect to the Defendant officers but denying the motion with respect to the city, on a single claim alleging that the arrest and detention were the result of constitutionally inadequate training by the city on the subject of arrests of persons for probation violations.

A five-day jury trial commenced on October 18, 2021. Final judgment was entered on October 27, 2021, on behalf of Plaintiff and against the city for damages in the amount of \$3.41 million.

The city filed a renewed motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, alter or amend judgment pursuant to Fed. R. Civ. P. 59(e), in the alternative for a new trial pursuant to Fed. R. Civ. P. 59(a), or for remittitur on November 24, 2021. On

February 16, 2022, the Court found that the evidence and the law permitted the jury to find the city liable on the Monell claim but found the damages amount to be excessive to the extent that a remittitur was appropriate. Plaintiff accepted the Court's remittitur order that reduced the damages award from \$3.41 million to \$2.1 million in lieu of a new trial on damages. On February 23, 2022, the parties filed a stipulation requesting the Court enter an order assessing the City \$602,701.00 as inclusive of Plaintiff's attorneys' fees as the prevailing party and assess the city post-judgment interest on same.

On March 11, 2022, the city filed a notice of appeal of merits judgment and a notice of appeal of attorneys' fee judgment. Plaintiff filed a notice of cross-appeal from final judgment on March 25, 2022. The appeals and cross-appeal will be briefed together. The city's principal brief is due on June 30, 2022.

The parties attended a mediation conference on June 9, 2022, facilitated by the United States Tenth Circuit Court of Appeals and reached the terms outlined in the Settlement Agreement.

ANALYSIS

It is not possible to predict the outcome of an appeal. Given the projected costs of litigation and the current outstanding judgment and interest, the city attorney believes that it is unlikely that the city will be in a significantly better economic position by litigating the case as compared to approving the proposed settlement agreement.

The city manager supports the proposed settlement.

Council has the option of approving or rejecting the proposed settlement. If council rejects the settlement, the litigation will continue.

ATTACHMENT

Attachment A – Draft Proposed Release and Settlement Agreement

RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement (the “Agreement”) is entered into as of June __, 2022, by and between SAGE B. FRANCO as Personal Representative of the Estate of Seth Franco, (“Mr. Franco”) and THE CITY OF BOULDER (“Boulder”), and is intended to fully and finally settle and resolve all of the claims that were or could have been asserted in *Sage B. Franco, Personal Representative of the Estate of Seth Garrett Franco v. City of Boulder*, United States District Court for the District of Colorado Case No. Civil Action No. 1:19-cv-02634-MEH (the “Action”). Mr. Franco and Boulder may each be referred to herein as a “Party” and, collectively, as “Parties”.

RECITALS

A. The Action resulted in a judgment in favor of Mr. Franco and against the City. Both the City and Mr. Franco filed appeals of the judgment with the United States Tenth Circuit Court of Appeals. The City’s appeal challenged the judgment in favor of Mr. Franco. Mr. Franco’s appeal challenged the dismissal of his claims against certain Boulder police officers and the district court’s denial of his motion to amend his complaint to, among other things, add an additional Boulder police officer as a party defendant.

B. The Parties desire to enter into this Agreement to fully settle and discharge any and all claims which have been asserted or could have been asserted in the Action, and cause the dismissal with prejudice of all pending appeals, upon the terms and conditions set forth herein.

AGREEMENT

In consideration of the recitals, agreements, promises, and warranties set forth herein, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **PAYMENT.** Within ___ days after approval of this Agreement by Boulder City Council (the “Settlement Date”), a settlement payment shall be made on behalf of the City to Mr. Franco for the sum of Two Million Dollars (\$2,000,000) made payable to the COLTAF Account of Caplan & Earnest LLC in full satisfaction of the judgment entered in the Action.

2. **DISMISSAL OF LEGAL ACTION.** Upon Mr. Franco’s receipt of the Settlement Sum, the Parties shall enter into a stipulation for dismissal with prejudice of the appeals filed by each Party in the Tenth Circuit Court of Appeals, with each party to bear his or its own attorneys’ fees and costs associated with the appeals. Mr. Franco further agrees to file a Notice of Satisfaction of Judgment in the Action.

3. **RELEASE AND DISCHARGE.** Except for the specific obligations arising out of this Agreement, for and in consideration of the mutual promises, covenants, releases, and payments set forth herein, each Party, for himself or itself, and for all other persons claiming by, through or under him or it, hereby completely and forever releases and discharges the other Party and all other persons claiming by, through or under the other Party, as well as the other Party’s heirs, successors, assigns and agents, from all claims, demands, actions, losses, causes of action, damages, costs, and

expenses of any kind (collectively, the “Claims”) that were or could have been asserted in the Action. Mr. Franco specifically releases and discharges any claims the Estate of Seth Garrett Franco may have against any Boulder police officers, past or present, arising out of or related to the transactions and events that were the subject of the complaint in the Action.

4. PRIOR RESTITUTION JUDGMENT IN BOULDER DISTRICT COURT CASE 16CR1703. With respect to the restitution judgment entered in Boulder District Court Case 16CR 1703, the Parties agreed that: a) Boulder will not oppose a motion on behalf of Mr. Franco to vacate the restitution judgment in that case; and b) if the restitution judgment is not vacated, Boulder will make no attempt to collect on that judgment, including the use of, *inter alia*, any writs of garnishment, attachment, or execution.

5. WARRANTY OF CAPACITY TO EXECUTE AGREEMENT. The Parties each represent and warrant that they have read this Agreement and know and understand its contents fully. The Parties each further represent and warrant that they have voluntarily executed this Agreement after having consulted with counsel of their choosing, and without being pressured or influenced by any representation of any person acting on behalf of the other Party. Mr. Franco further represents and warrants that he is the personal representative of the estate of Seth Franco and has full authority to resolve the estate’s claims against Boulder and Boulder police officers arising out of or related to the transactions and events that were the subject of the complaint in the Action.

6. ENTIRE AGREEMENT AND SUCCESSORS IN INTEREST. This Agreement contains the entire agreement between the Parties, and the terms of this Agreement are contractual and not a mere recital. This Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, devisees, agents, employees, officers, directors, trustees, conservators, guardians, beneficiaries, heirs, successors, and assigns of each of the Parties.

7. MODIFICATION. This Agreement may not be modified except by a mutually executed amendment, dated and executed by authorized representatives of each of the Parties. No oral statement or writing that does not meet the requirements of this paragraph will constitute a modification or waiver of any provision of this Agreement.

8. WAIVER. No breach of any provision of this Agreement shall be deemed waived unless it is waived in writing. Waiver of any one breach shall not be deemed a waiver of any other breach of the same or any other provision of this Agreement.

9. NO ADMISSION OF LIABILITY. It is understood and agreed that this Agreement represents a compromise of disputed claims and shall not to be construed as an admission of liability by or against any of the Parties, each of whom expressly denies any such liability.

10. NO ASSIGNMENT OF CLAIMS. The Parties represent and warrant they have neither pledged, encumbered, transferred, granted, assigned nor made any assignment, subrogation or other right of substitution to any person of their rights against any Party with respect to the matters contained herein (or subject matter of this Agreement), and that they are not aware of any person or entity who may pursue, who may be entitled to pursue, or who intends to pursue, any

claims derivative of, or in any way relating to, the subject matter of this Agreement.

11. MISTAKE. The Parties expressly assume all risk that this Agreement was the result of any mistake of any kind, waving all claims or defenses based upon the doctrine of mistake. This Agreement shall act as an accord and satisfaction with respect to the Parties and all claims designated herein.

12. HEADINGS. The headings of the various paragraphs contained herein are for convenience of reference only and shall not affect the meaning or construction of any of the provisions of this Agreement.

13. SEVERABILITY. If any provision of this Agreement shall be determined to be invalid or void, for any reason, the remaining provisions shall nonetheless remain in full force and effect.

14. CONSTRUCTION. This Agreement shall be construed and interpreted in accordance with the laws of the State of Colorado. Further, the language of this Agreement shall be construed as a whole, according to its intent, and not strictly for or against any party hereto, regardless of who drafted or was primarily responsible for drafting any of the language in this Agreement. Should any court find any provision of this Agreement to be ambiguous, then such provision shall be determined in accordance with the Parties' express intention that this Agreement be construed in the broadest possible manner, in accordance with the Parties' express intention that all disputes between them in regard to the Action be forever resolved.

15. COUNTERPARTS. This Agreement may be executed in any number of counterparts, each of which, when so executed, shall be deemed to be an original and all of which, taken together, shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

SIGNATURES FOLLOW

SAGE B. FRANCO

By: _____
Sage B. Franco, Personal Representative of the Estate of Seth Franco

Date: _____

CITY OF BOULDER, a Colorado home rule city

By: _____
City Manager

Date: _____

ATTEST: _____
City Clerk

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DRAFT