

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement (the "Agreement") is entered into and made effective on this 23rd day of August, 2018, by and between the City of Mesa, Arizona, an Arizona municipal corporation ("Mesa"), and Philip Mitchell Brailsford, Jr. ("Brailsford"), (collectively, the "Parties").

RECITALS

A. Brailsford was hired as a police officer with Mesa's Police Department on July 1, 2013.

B. On January 18, 2016, Brailsford was involved in an officer involved shooting (the "Incident") arising out of his employment as a Mesa police officer.

C. On or around February 25, 2016, an internal investigation of the Incident was initiated in IA2016-046 wherein Brailsford was alleged to have violated Mesa Police Department's Policies. Specifically, 1) DPM 1.4.5.43, Discourtesy, using disrespectful vulgar or obscene language, 2) DPM 1.4.5.50, Willful disobedience of Department rules or orders, 3) DPM 1.4.5.53, Failure to obey City Management Policies or Personnel Rules, 4) DPM 1.4.5.73, Conduct Unbecoming Officer/Employee, and 5) DPM 1.4.5.74, Unsatisfactory Performance.

D. On or around March 14, 2016, an internal investigation of the Incident was initiated in IA2016-017 wherein Brailsford was alleged to have violated Mesa Police Department's Policies. Specifically, 1) DPM 1.4.5.53, Failure to obey City Management Policies or Personnel Rules, 2) DPM 1.4.5.73, Conduct Unbecoming Officer/Employee, and 3) DPM 1.4.5.76, Arrested for any offense.

E. On or around March 15, 2016, Brailsford was served with a Notice of Intent to Discipline/Pre-Deprivation Hearing wherein the Mesa Police Department recommended Brailsford's dismissal from employment.

F. On or around March 17, 2016, after a Pre-Deprivation Hearing before Mesa Police Chief John Meza, Chief Meza sustained the allegations in IA-2016-017 and IA2016-046 and ordered that Brailsford be dismissed from employment with the Mesa Police Department.

G. On or around March 21, 2016, Brailsford was served with a Notice of Dismissal terminating his employment from the Mesa Police Department as of March 21, 2016.

H. On or around March 22, 2016, Brailsford filed an appeal with the Mesa Personnel Appeals Board to appeal his dismissal of employment from the Mesa Police Department.

I. As a result of the Incident, Brailsford is a defendant in *Laney Sweet, et al., v. City of Mesa, et al.*, U.S. District Court for the District of Arizona, Case No. 2:17-cv-00152-PHX-GMS (the "Sweet Lawsuit"), *Grady Shaver, et al., v. City of Mesa, et al.*, U.S. District Court

for the District of Arizona, Case No. 2:17-00715-PHX-GMS (the “*Shaver* Lawsuit”), and *Portillo v. Brailsford, et al.*, U.S. District Court for the District of Arizona, Case No. 2:18-cv-00178-SRB (the “*Portillo* Lawsuit”) (collectively, the “Lawsuits”), which all arise out of events that occurred on January 18, 2016.

J. Prior to January 18, 2016, Mesa purchased certain liability insurance, including law enforcement liability coverage that is part of the Travelers Indemnity Company Policy No. ZLP-81M45183-15-PA as modified by the Self-Insured Retentions endorsement issued 12/14/15 (the “Travelers Primary Policy”), whose policy period includes January 18, 2016.

K. Mesa has a \$3,000,000 self-insured retention under the Law Enforcement Liability Coverage part of the Travelers Primary Policy.

L. Mesa has retained Daniel O’Connor and Justin Holm of O’Connor & Campbell to defend Brailsford in the Lawsuits, and is currently paying the costs of Brailsford’s defense in the Lawsuits subject to a reservation of rights.

M. The Travelers Indemnity Company has issued reservations of rights as to whether the Law Enforcement Liability Coverage part of the Travelers Primary Policy would apply to any amounts that Brailsford may become legally obligated to pay as damages in the Lawsuits.

N. Brailsford and Mesa, to avoid the risks, costs, and uncertainty of any present or potential future claims, administrative proceedings or litigation, mutually desire to fully and finally settle all differences between them arising out of Brailsford’s dismissal from employment, define all obligations between them related to the defense and indemnity related to the Lawsuits, and settle and agree as to all other matters agreed to herein.

NOW THEREFORE, for valuable consideration, the receipt of which is hereby acknowledged, including the mutual covenants and conditions contained herein, Brailsford and Mesa hereby agree as follows:

1. Waiver and Release of Brailsford’s Employment Claims and Rights. Brailsford hereby releases and discharges Mesa and its agents, officers, directors, elected and appointed officials, and affiliated entities and successors in interest from and against all present or future claims, rights, charges, damages, and actions of every kind, known or unknown, accrued or unaccrued, arising out of or related to Brailsford’s employment with Mesa and the discipline and/or proposed discipline referenced in the above Recitals, and further arising out of or related to Brailsford’s employment with Mesa and his dismissal therefrom, including but not limited to any claim, right, charge, damage, or action arising under any federal, state, or local discrimination statute, including but not limited to, Title VII of the Civil Rights Act of 1964, the Reconstruction Era Civil Rights Act, the Equal Pay Act, the Americans with Disabilities Act, the Family Medical Leave Act, the Fair Labor Standards Act, the Arizona Civil Rights Act, the Arizona Employment Protection Act, or under any other provision or theory of law or contract, including but not limited to breach of contract, breach of the covenant of good faith and fair dealing, and wrongful termination, including his appeal currently pending before the Mesa Personnel Appeals Board.

2. Brailsford's Rehiring. Brailsford and Mesa acknowledge and agree that pursuant to this Agreement and in recognition of Brailsford's waiver of all his employment claims and rights:

(a) Within five (5) business days after Brailsford signs and delivers this Agreement to Mesa, Mesa will rehire Brailsford to his former position as a Mesa Police Officer for the sole and limited purpose of allowing Brailsford to file an application for Accidental Disability-Medical Retirement (the "Application") with the Public Safety Personnel Retirement System (PSPRS) Local Board ("Local Board");

(b) Within five (5) business days after being rehired by Mesa, Brailsford will file his Application with the Local Board;

(c) Mesa will place Brailsford in an unbudgeted position until the Local Board renders its decision on Brailsford's Application;

(d) Brailsford acknowledges and agrees that his rehiring does not confer upon him any right to be assigned any duties, to perform any work, or to receive any compensation or other employee benefits as a Mesa Police Officer while his Application is pending with the Local Board;

(e) The City will reimburse Brailsford for reasonable medical expenses arising out of his treatment for Post-Traumatic Stress Disorder ("PTSD") subject to the funding limitation of the Stress Injury Fund. Reimbursable medical expenses consist of expenses incurred by Brailsford from the first date of his medical treatment for PTSD and all past, current, and future medical expenses incurred up to the date of determination by the Local Board. Medical expenses incurred after the date of determination by the Local Board will not be eligible for reimbursement. Brailsford must submit PTSD medical treatment receipts to John Pombier, Assistant City Manager, within 30 days after the date of determination by the Local Board to be eligible for reimbursement.

3. Payments to Brailsford. Brailsford acknowledges and agrees that he is not entitled to receive, and expressly waives any right to any additional payment or receipt of, any additional employee benefits, monies, consideration or other compensation from Mesa for entering into this Agreement. Brailsford further acknowledges and agrees that, as of the date of this Agreement, he has received from Mesa all accrued employee benefits, wages, and other compensation due and owing to him, except for the consideration specifically identified in paragraph 2 above, and upon execution of this Agreement, that no further benefits, wages or other compensation from Mesa are due and owing to him arising out of or related to any claims alleged by him arising out of his employment with Mesa.

4. Application and Local Board Action. Brailsford acknowledges and agrees that filing (or failing to timely file) an Application with the Local Board will result in the following consequences:

(a) Brailsford filing his Application with the Local Board will be an

affirmative admission that he is permanently unable to perform the essential functions of his position as a Mesa Police Officer;

(b) If the Local Board denies Brailsford's Application, Brailsford's City of Mesa employment will be terminated, and he will have no rights to grieve or appeal the termination of his employment to Mesa's Personnel Appeals Board or any state or federal court. This provision does not affect Brailsford's right to appeal any decision of the Local Board to any state or federal court.

(c) If the Local Board denies Brailsford's Application or if Brailsford fails to timely file his Application as described in paragraph 2(a), all provisions of this Agreement will remain in full force and effect.

(d) In the event Brailsford fails to timely file his Application as described in paragraph 2(a), Brailsford's rehiring will be rescinded and he will forfeit his ability to file any further Applications with the Local Board.

5. The Lawsuits.

(a) Mesa agrees to pay the reasonable "defense expenses" (as defined by the Travelers Primary Policy) for Brailsford's defense in the Lawsuits. Provided, however, that Mesa's obligation to pay Brailsford's defense expenses is subject to the following terms, conditions, and limitations:

(i) Mesa's obligation to pay defense expenses will terminate once Mesa has made payments totaling \$3 million in the payment of (x) defense expenses for the defense of Brailsford, Mesa, and the other officer defendants (including such payments that Mesa has made before entering into this Agreement), (y) amounts, if any, that Mesa, Brailsford, and/or the other officer defendants become legally obligated to pay in the Lawsuits, and/or (z) amounts, if any, to settle any of the Lawsuits against Mesa, Brailsford, and/or the other officer defendants. This \$3 million limit may be satisfied by the payment of expenses described in (x) in the preceding sentence or by a combination of payments of expenses described in (x) and amounts described in (y) and/or (z) in the preceding sentence.

(ii) Brailsford cooperates with attorneys Daniel O'Connor, Justin Holm and O'Connor & Campbell, P.C. in the defense of the Lawsuits. Such cooperation will include, but is not limited to, appearing for depositions, testifying in judicial proceedings, and any other reasonable participation necessary for the defense of the Lawsuits.

(iii) To the extent that payments for Brailsford's defense expenses are made by or on behalf of the Travelers Indemnity Company or another insurance company, Mesa shall not be obligated to pay such amounts.

(b) Mesa agrees to pay those amounts, if any, that Brailsford becomes legally obligated to pay in the Lawsuits, but only (i) if the Law Enforcement Liability Coverage part of the Travelers Primary Policy applies (or, in the absence of Mesa's self-insured retention, would apply) to the injury because of which Brailsford becomes legally obligated to pay such amounts in the Lawsuits, and (ii) if and to the extent that, immediately prior to Mesa paying any such amount (or part of such amount) that Brailsford becomes legally obligated to pay, Mesa has not paid a total of \$3 million in the payment of (x) defense expenses for the defense of Mesa, of Brailsford, and of the other officer defendants (including such payments that Mesa has made before entering into this Agreement), (y) amounts that Mesa, Brailsford, and/or the other officer defendants become (or are then) legally obligated to pay in the Lawsuits, and/or (z) amounts to settle any of the Lawsuits against Mesa, Brailsford and/or the other officer defendants. This \$3 million limit may be satisfied by the payment of expenses described in (ii)(x) in the preceding sentence or by a combination of payments of expenses described in (ii)(x) and amounts described in (ii)(y) and/or (ii)(z) in the preceding sentence. Provided, however, that Mesa's obligation to pay any amount that Brailsford becomes legally obligated to pay in the Lawsuits is subject to the following additional terms, conditions, and limitations:

(i) The most that Mesa will pay of those amounts that Brailsford becomes legally obligated to pay is \$3 million less the sum of the amounts paid by Mesa in the payment of (x) defense expenses for the defense of Mesa, Brailsford, and other officer defendants in the Lawsuits (including such payments that Mesa has made before entering into this Agreement), (y) amounts that Mesa, Brailsford, and/or other officer defendants become legally obligated to pay in the Lawsuits, and (z) amounts to settle any of the Lawsuits against Mesa, Brailsford, and/or the other officer defendants.

(ii) Mesa's obligation to pay those amounts that Brailsford becomes legally obligated to pay does not apply to any amount that Brailsford voluntarily agrees to pay.

(iii) Brailsford shall cooperate with attorney Daniel O'Connor, Justin Holm and the O'Connor & Campbell, P.C. firm in defending the Lawsuits. Such cooperation will include, but is not limited to, appearing for depositions, testifying in judicial proceedings, and any other reasonable participation necessary for the defense of the Lawsuits.

(iv) To the extent that payments of amounts that Brailsford becomes legally obligated to pay are made by or on behalf of the Travelers Indemnity Company or another insurance company, Mesa shall not be obligated to pay such amounts.

(c) Except for the obligations undertaken by Mesa in paragraph 5(a)-(b) of this Agreement, and in consideration for the promises made and obligations undertaken by Mesa in this Agreement, including, without limitation, those contained in paragraphs 2 and 5(a)-(b), Brailsford hereby fully releases and discharges the City from any obligation and claim directly or indirectly based on, arising out of, or in any way related to any obligation of Mesa to (i) pay

for his defense in the Lawsuits, and/or (ii) indemnify him against, or otherwise pay or discharge, all or any part of his liability, if any, in the Lawsuits.

(d) Nothing in this Agreement is intended to impair any right or obligation that Brailsford or Mesa has or may have in the future under the Travelers Primary Policy or any excess insurance policy with respect to the Lawsuits.

6. Indemnification. Brailsford agrees to defend, hold harmless and indemnify Mesa and its agents, officers, directors, elected and appointed officials, employees and affiliated entities or successors in interest (collectively, the "City") from and against any and all claims, losses, costs, damages or expenses, including without limitation, reasonable attorneys' fees and costs, arising out of Brailsford's breach of this Agreement. Brailsford further agrees that if he is married at the time of executing this Agreement, he will indemnify the City from any claims, liabilities, losses, damages, causes of action or any other costs or expenses claimed by his spouse based on any claims, charges, damages, rights, events or actions released in this Agreement.

7. Denial of Liability. By entering into this Agreement neither party admits, and each party affirmatively denies, committing any actionable wrong, including, but not limited to, any tort, breach of contract, breach of the covenant of good faith and fair dealing, or violation of any federal or state law, Mesa policy, personnel rule, or any civil rights statute.

8. Reformation/Severability. Should any provision(s) of this Agreement be declared or determined by any court to be illegal or invalid, the Parties shall have the opportunity to modify, to the extent possible, the provision(s) in such manner as to render the provision(s) valid, legal and enforceable and to retain the intent of the Parties. If such modification is not possible, the validity, legality and enforceability of the remaining provision(s) shall not be affected thereby and said illegal or invalid provision(s) shall be deemed severed from this Agreement.

9. Binding Effect. This Agreement shall be binding upon Brailsford, and upon his heirs, representatives, executors, administrators, successors, and assigns, and shall inure to the benefit of Mesa, and each of them and to their heirs, representatives, executors, administrators, successors, and assigns.

10. Legal Representation. Brailsford and Mesa acknowledge and agree that each has been, or has had the opportunity to be, represented by an attorney in connection with the preparation, execution and delivery of this Agreement. Brailsford understands and acknowledges that he is responsible for seeking any legal and financial advice to determine the consequences, if any, to him as a result of entering into this Agreement.

11. Attorneys' Fees. In the event legal proceedings are brought or an attorney is retained by any party to the Agreement to enforce the terms of this Agreement, or for the interpretation of any provision herein in dispute, the prevailing party shall be entitled to recover, in addition to any other remedy, reimbursement for reasonable attorneys' fees, court costs, costs of investigation, including but not limited to, expert fees and costs, and other related expenses incurred in connection therewith. "Legal Proceedings" shall include, but are not

limited to, all administrative proceedings, appeals from a lower court judgment, as well as proceedings in state, federal, or bankruptcy court.

12. Governing Law. Except where preempted by the laws of the United States, this Agreement shall be deemed to be made under, governed by, and construed in accordance with the laws of the State of Arizona. Proceedings to enforce any provision of this Agreement or to obtain any remedy with respect hereto shall be brought in the Superior Court of Maricopa County, Arizona or in the Phoenix Division of the United States District Court for the District of Arizona and for this purpose each party hereby expressly and irrevocably consents to the jurisdiction of either court.

13. Waiver. No waiver of any of the terms or conditions of this Agreement, and no waiver of default or failure of compliance, shall be effective unless in writing, and no waiver furnished in writing shall be deemed a waiver of any other term or provision or any future condition. Failure of any party to exercise any right, remedy, or option arising out of a breach of this Agreement shall not be deemed a waiver of any right, remedy, or option with respect to the continuance of any such breach, or any subsequent or different breach.

14. Captions. Captions and paragraph headings used herein are for convenience only, and do not define, limit, amplify, alter, or otherwise affect any provision or meaning hereof, and shall not be deemed relevant in construing this Agreement.

15. Interpretations. To the extent permitted by the context in which used, (i) words in the singular number shall include the plural, words in the masculine gender shall include the feminine and neuter, and vice versa, and (ii) references to “persons” or “parties” in this Agreement shall be deemed to refer to natural persons, corporations, limited liability companies, general and limited partnerships, trusts, and all other entities. No listing of specific instances, items, or matters in any way limits the scope or generality of any portion of the text in this instrument where found, and any use of the word “include(s)” means “include(s), without limitation,” and the word “including” means “including, but not limited to.” This Agreement is the result of negotiation between the parties and is to be interpreted as a whole, in accordance with its fair meaning and in the manner, which will most closely achieve the intention of the parties as expressed herein, without application of any rule or presumption requiring construction against the party with primary drafting responsibility.

16. Amendments. No provision of this Agreement may be amended, modified, waived, rescinded, deleted, or supplemented except by a written document executed by the party against whom enforcement of such amendment, modification, waiver, rescission, deletion, supplementation, or termination is sought.

17. Mesa Policy. This Agreement does not establish, and shall not be construed to be, official Mesa policy with respect to the resolution of the issues in dispute herein.

18. Acknowledgement. Brailsford acknowledges, understands and agrees in deciding to sign this Agreement:

(a) That he has consulted with, or had the opportunity to consult with, an

attorney before signing this Agreement;

(b) That he has thoroughly and carefully discussed all aspects of his rights and obligations under this Agreement with his attorney and any other legal or non-legal representative to the extent he wished to do so;

(c) That he has had a reasonable and sufficient amount of time to carefully read, understand and consider all of the terms and provisions of this Agreement and to decide whether to enter into this Agreement;

(d) That he and/or his attorney have participated in drafting this Agreement to the extent they wished to do so;

(e) That he has relied upon his own judgment and that of any persons of his own choosing who have provided advice or counsel to him regarding this Agreement;

(f) That he did not rely on and has not relied upon any representation or statement made by Mesa, or by any of Mesa's employees, officers, directors, or attorneys, other than those representations and/or statements expressly set forth herein, with regard to the subject matter, basis or effect of this Agreement, or for any other purpose;

(g) That this Agreement is written in a manner that is understandable to Brailsford and that he has read, understood, and agreed to all the provisions set forth in this Agreement.

19. Voluntary Waiver. Brailsford understands and agrees that by entering into this Agreement, he is voluntarily waiving his rights to challenge or contest any disciplinary action in any internal, administrative or litigated context. Brailsford further warrants that he has not instituted any action against Mesa or any of its agents, representatives or employees, arising out of or related to his employment, the recommended disciplinary action, his dismissal or any actions or statements by Mesa, its agents, representatives or employees made prior to the effective date of this Agreement relating to his employment, the recommended disciplinary action, or his dismissal from employment.

20. Employment Reference. Mesa agrees that Brailsford may refer potential employers requesting job reference inquiries to Mesa's Human Resources Division ("HR"). HR shall provide only a neutral reference and disclose the dates of Brailsford's employment with Mesa, the positions held by Brailsford while employed by Mesa, and Brailsford's annual salary at the end of his employment with Mesa. HR will not provide any information about Brailsford's eligibility for re-hire. Brailsford understand and agrees, except for the limited circumstances described in this Agreement, that he is not eligible for future employment with Mesa.

21. Subsequently Discovered Facts. Mesa and Brailsford acknowledge that each party may hereafter discover facts different from or in addition to those that party now knows of or believes to be true with respect to the matters released herein or set forth herein, and each



John Pombier
Assistant City Manager

Approved as to Form:



Alfred J. Smith
Deputy City Attorney