

## INDEMNITY AND DEFENSE AGREEMENT

This Indemnity and Defense Agreement (“Agreement”) is entered into by and between the Federated City Employees’ Retirement System, by and through its Board of Administration (“FCERS”) and the San José Police and Fire Department Retirement Plan, by and through its Board of Administration (“SJP&F”) on the one hand; and the City of San José (the “City”), on the other hand. FCERS and SJP&F are sometimes collectively referred to herein as the “Plans.” FCERS, SJP&F and the City are sometimes referred to herein individually as “Party” and collectively as the “Parties.” This Agreement shall become final and binding once it has been executed by all Parties (“Effective Date”).

### RECITALS

A. FCERS and SJP&F are public employees retirement plans established by City under Sections 1500 et seq. of the City Charter and Chapters 3.28 and 3.36 of the City Municipal Code for the benefit of certain of the City’s employees and their beneficiaries. The Plans are governed by their respective Boards of Administration (“Boards”). FCERS and SJP&F are tax-deferred, governmental defined benefit plans qualified under Section 401(a) of the Internal Revenue Code (“Code”), 26 U. S. C. § 401(a).

B. The City of San José is a charter city duly formed and operating under the provisions of Art. XI sec. 3 of the California Constitution, located in the County of Santa Clara, State of California.

C. In addition to retirement benefits, the City, through the Plans, has provided its employees and their beneficiaries certain other post-employment benefits, including retiree medical, dental and vision care (“OPEB”), through the vehicles of Code-authorized Section 401(h) accounts in the Plans and Code-authorized Section 115 Employer Health Care Trusts (“Trusts”) administered by the Boards. The funding sources for these benefits have been City and employee contributions and investment earnings on those contributions over time.

D. The City and its representative bargaining units have entered into an Alternative Pension Reform Settlement Frameworks (“Frameworks”) whereby, among other things, active City employees could elect to have their retiree OPEB funded through personal accounts in a new voluntary employee beneficiary association (“VEBA”). The VEBA is to be funded initially by contributions from the Section 115 Health Care Trusts through transfers made by the Boards, as trustees of the Trusts. The transfers are to be in amounts equivalent to the contributions the electing employees made during their service under the existing OPEB structure.

E. Pursuant to the Frameworks, qualified City employees were and will be provided an election period in which to exercise their election to participate in the VEBA and to cease their participation in the existing OPEB structure. In order to make an effective election, qualified employees were and will be required to sign and agree to the terms of an Election Form, a true copy of which is attached hereto.

F. The Election Form provides, in part, that the electing employee release and waive any and all claims against City arising out of the election. The Election Forms are not signed or consented to by the spouses of the electing employees. The Election Form does not extend its release and waiver terms to the Plans.

G. In connection with determining the propriety of authorizing the transfer of funds out of the Section 115 Health Care Trusts to the VEBA, the Boards have requested that the City enter into this Indemnity and Defense Agreement, and the City has agreed to do so.

NOW, THEREFORE, in consideration of the foregoing recitals and the promises, mutual covenants and warranties set forth herein, and for other good and valuable consideration, the receipt of which are hereby acknowledged, the Parties agree as follows:

### **AGREEMENT**

1. The above Recitals are true and correct and are incorporated by reference herein.
2. The City hereby agrees to indemnify and hold the Plans, their respective Boards, and their respective officers, trustees, agents, attorneys and representatives (collectively, “Indemnitees”) harmless from any and all claims, damages, charges, fees and costs, including but not limited to attorneys’ fees, asserted against any of them by any of the electing members, their spouses, representatives and/or beneficiaries, arising out of or in any manner relating to the VEBA, their elections to opt into the VEBA, and the administration of the Section 401(h) accounts in the Plans and Section 115 Health Care Trusts as administered by the Boards (collectively, “Claims.”) Indemnification and defense shall be without limitation and shall extend to all Claims presently asserted or that may be asserted in the future against Indemnitees. The City has the sole right to choose counsel to provide a defense of Indemnitees, including the City Attorney’s Office, and Indemnitees waive any conflicts that may result from a joint defense of the City and Indemnitees, either individually or collectively, because of this indemnity obligation. The City is not obligated to pay the cost of defense or to indemnify Indemnitees for the cost of attorneys or representation in the event of a claim or suit under this provision, except for counsel chosen by the City. Further, the City agrees not to file any cross-claim, demand or other claim for relief against Indemnitees in relation to any Claim that may be asserted against the City.
3. Except as expressly set forth herein all rights and obligations among the Parties shall be governed by applicable law, including the City of San José City Charter, the City of San José Municipal Code, the California Constitution and all other applicable federal or state laws.
4. Each of the Parties represents that the person executing this Agreement on its behalf has the authority necessary to execute this Agreement, and that no other consents or approvals of anyone are required or necessary for this Agreement to be binding once fully executed.
5. This Agreement is binding upon and shall inure to the benefit of the Parties, their respective officers, trustees, agents, attorneys, representatives, assigns and successors-in-interest.

6. This Agreement shall in all respects be interpreted, enforced and governed by and under the laws of the State of California. Any action relating to the terms of this Agreement must be filed in the Superior Court of California, County of Santa Clara.

7. This Agreement may not be modified except by a written instrument signed by all of the Parties.

8. The Parties agree to execute such other documents and take such other action as may be reasonably necessary to finalize and perform this Agreement.

9. The Parties may execute duplicate originals of this Agreement or any other documents they are required to sign or furnish pursuant to this Agreement.

Dated: \_\_\_\_\_ FEDERATED CITY EMPLOYEES' RETIREMENT SYSTEM

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: \_\_\_\_\_ SAN JOSÉ POLICE AND FIRE DEPARTMENT  
RETIREMENT PLAN

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: \_\_\_\_\_ CITY OF SAN JOSÉ

By: \_\_\_\_\_

Its: \_\_\_\_\_