



NEWMeyer & DILLION LLP  
ATTORNEYS AT LAW

**THE KEY NON-MONETARY  
SETTLEMENT TERMS  
IN THE RESOLUTION OF  
CONSTRUCTION DEFECT CASES**

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**West Coast Casualty's Construction Defect Seminar**

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### **Introduction and Parties**

- This Settlement Agreement and Release (hereinafter "Agreement") is made and entered into as of \_\_\_\_\_, 2003, among and between the following entities and individuals, both on their own behalf and on behalf of any and all Related Persons and Entities (as defined below):
  - Each of the Individual Homeowners of the 200 houses listed on Exhibit "1" attached hereto and incorporated herein by this reference (collectively "Homeowners");
  - Developer, Inc. ("Developer");
  - The following subcontractors (collectively "Subcontractors"):

### **Defined Terms**

- "Action" shall refer to the legal Action pending in the Superior Court for the State of California, County of Orange, entitled Joe Homeowner, et al. v. Developer, Case No. 999999, filed on or about April 1, 2002, including all cross-complaints filed therein and/or deemed filed therein pursuant to any Case Management Order filed and entered by the Court.
- "Claim" or "Claims" shall refer to any and all claims, demands, liabilities, losses, damages, errors, latent defects, patent defects, complaints, cross-complaints, causes of action, negligent acts, negligent omissions, liability without fault, misrepresentations, material omissions, fraud, deceit, breaches of contract, breaches of warranties, injunctive relief, unfair business practices, unlawful business practices, fraudulent business practices, economic damages, non-economic damages, compensation, property damage, loss of use, loss of services, personal injury, bodily injury, mental distress, emotional distress, attorney's fees, expert's fees, repair costs, investigative costs, future professional fees, consultative expenses, relocation costs, diminution in value claims, and any other actionable omissions, conduct or damage of every kind and nature whatsoever,

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- whether subrogated or non-subrogated, whether in tort, contract or extracontractual, at law or in equity, actual or contingent, foreseen or unforeseen, known or unknown, past, present or future.
- "Parties" shall refer to the Homeowners, Developer and the Subcontractors.
  - "Project" shall refer to the Buena Vista development project located in the City of Irvine, County of Orange, State of California, including, without limitation, Tracts 1234 and 5678.
  - "Property" shall refer to all real and personal property and all improvements to real property located within the lots owned by Plaintiffs in the Project, including, without limitation, those lots listed on Exhibit "1" to this Agreement.
  - "Related Persons and Entities" shall refer to any and all past, present and future parent companies, divisions, subsidiaries, affiliates, partnerships, limited liability partnerships, corporations, limited liability corporations, business entities, members, owners, stockholders, directors, officers, employees, insurers, lenders, mortgage holders, predecessors, predecessors-in-interest, successors, successors-in-interest, assigns, partners, joint venturers, legal representatives, agents, attorneys, heirs, administrators, trusts, trustees, beneficiaries, creditors, assigns, lessees, tenants, residents, legal owners and equitable owners that are related in any way to the Parties.
  - "Third Party Improvers" shall mean and refer to any and all of the subcontractors, materialmen, design professionals, engineers, suppliers and other persons and entities who were not named as Parties but who performed any Work on the Property or the Project.
  - "Work" shall refer to any work related in any way to the Property or the Project performed at any time, including, without limitation, improvement, design, specification, selection, installation, surveying, planning, supervision, inspection, testing, observation of construction, services, development, construction, repair, maintenance,

manufacture, marketing, sale, ownership, use, warranty work and customer service work.

**Payment, Signature and Tendering of Dismissals**

- The insurers of Defendant Parties shall pay on behalf of their respective insureds the following sums (the “Settlement Payments”) totaling \$\_\_\_\_\_.

Defendant Party	Total Settlement Amount	Insurer	Portion of Total Settlement Amount That Insurer Agrees to Pay
XYZ Subcontractor	\$100,000	Acme Insurance	\$50,000
		Brand X Insurance	\$50,000

- This Agreement contemplates that all of the Settlement Payments referenced above will be made by insurers for Developer and the Subcontractors. The insurers for Developer and the Subcontractors shall be responsible only for the portion of the total settlement that the insurer agrees to pay as set forth above and shall not be responsible for any other Settlement Payment. In the event that an insurer for any Defendant Party is unable to pay its portion of the Settlement Payments due to bankruptcy or receivership or conservatorship or any other reason, the parties and the Court shall work in good faith to persuade the other insurers for that Developer or Subcontractor and/or the insurers for any other Developer or Subcontractor and/or the Developer or Subcontractors themselves to make up the shortfall in the Settlement Payments. If the shortfall cannot be made up within a reasonable time, then Plaintiffs may elect to waive the shortfall and consummate the settlement. If the shortfall cannot be made up within a reasonable time, and Plaintiffs do not elect within a reasonable time to waive the shortfall and consummate the settlement, then the

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Homeowners or Developer (or the Subcontractor to which a shortfall applies) may elect to declare the settlement entirely null and void.

- This Agreement contemplates that all of the Settlement Payments will be made by insurers of the Developer and the Subcontractors. In the event that an insurer is unable to pay its portion of the Settlement Payments due to bankruptcy or receivership or conservatorship or any other reason, that Developer's or Subcontractor's other insurers will make up the shortfall.
- The Settlement Payments shall be made by checks made payable to "Plaintiffs' Counsel" (Tax Identification Number 000000000).
- Developer and Subcontractors and their insurers agreed to deliver all Settlement Payments to Plaintiffs' counsel at 123 Main Street, Suite 1, Irvine, CA on or before \_\_\_\_\_, 2003. Plaintiffs' counsel may deposit the Settlement Payments but agrees to hold the Settlement Payments in trust until it is authorized to disburse the funds as set forth below. Any interest earned on the Settlement Funds shall be payable to the Homeowners.
- All Parties agree to deliver to counsel for Developer a signed original counterpart of this Agreement on or before \_\_\_\_\_, 2003.
- Each of the Homeowners agree to sign and deliver to counsel for Developer a notarized original counterpart of a Memorandum of Settlement in the form attached hereto as Exhibit 1 and incorporated herein by this reference on or before \_\_\_\_\_.
- All Parties agree to deliver to counsel for Developer an unfiled, properly executed Request for Dismissal with Prejudice as to all Claims asserted by them in the Action on before \_\_\_\_\_. Counsel for Developer shall hold said Requests for Dismissal in trust until it is confirmed that all signatures have been provided, all Requests for Dismissal have been received and all Settlement Payments have been received.

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**Preconditions to Disbursement of Settlement Funds and Continuing  
Jurisdiction by the Court to Enforce Settlement**

- All Settlement Payments delivered to Plaintiffs' counsel shall be held in strict trust and shall not be disbursed until all of the following conditions have been satisfied:
  - All Parties have delivered to counsel for Developer signed original counterparts of this Agreement.
  - All Homeowners have delivered to counsel for Developer notarized signed original counterparts of the Memorandum of Settlement in the form attached hereto as Exhibit 2.
  - All Parties have delivered to counsel for Developer an unfiled, properly executed Request for Dismissal with Prejudice as to all Claims asserted by them in the Action.
  - The Court in this Action finds this Agreement was reached in good faith pursuant to California Code of Civil Procedure section 877.6 as to all Defendant Parties, and the time to file a petition for writ of mandate challenging that determination has expired. Developer shall initiate the application for this finding. This condition shall be deemed waived and/or unnecessary if a global resolution involving all parties is reached. If the Court does not find that this Agreement was reached in good faith pursuant to California Code of Civil Production section 877.6 as to Developer and Subcontractors, this Agreement shall be entirely null and void.
- Upon confirmation that all signatures have been provided, all Requests for Dismissal have been received and all Settlement Payments have been received, a good faith finding has been made by the Court and the time to challenge the good faith

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finding has expired, counsel for Developer shall file the Requests for Dismissal with the Court and provide copies of all signature pages on the Agreement and the Memorandum of Settlement to all Parties. Upon receipt of conformed copies of the Requests for Dismissal, counsel for Developer shall provide conformed copies to all parties.

- The Parties agree that the Court retains jurisdiction to enter judgment pursuant to Code of Civil Procedure §§ 664.6 and 664.7.
- The Parties agree that the Court may utilize an order to show cause procedure or any other proper procedure to enforce the terms of this Agreement. The order to show cause hearing may request a Party to show cause why a Settlement Payment has not been made, a Request for Dismissal has not been provided or the Agreement has not been properly signed. The order to show cause may also request a Party to show cause why sanctions should not be issued and/or a judgment should not be entered that is equivalent to obtaining a signed Agreement or filing a Request for Dismissal.

### **Release Provisions**

- Release by the Homeowners of Defendant Parties. The Homeowners, and each of them, on their own behalves and on behalf of their Related Persons and Entities, do hereby fully and finally settle, release, acquit and forever discharge, in the broadest possible manner, Developer, Subcontractors and Third Party Improvers, and each of them (and their respective Related Persons and Entities) as to any and all Claims related to or arising out of the Action, the Project or the Property.
- Releases Between Defendant Parties. Except as otherwise provided herein, Developer and Subcontractors, and each of them, for themselves and on behalf of their respective Related Persons and Entities, hereby release all Claims as between them to the same extent that they are each effectively released by the Homeowners.

- Limitations on the Release. Notwithstanding anything else in this Agreement, Developer and Subcontractors, and each of them, for themselves and their respective Related Persons and Entities, hereby expressly acknowledge and agree that nothing in this Agreement shall be construed to release, relinquish, acquit, discharge or waive: (a) any Claims by Developer or its insurers to seek recovery and/or contribution as to Developer's defense costs from any Subcontractor insurance carrier or insurance broker (or their Related Persons and Entities) which Developer contends owes a duty to defend Developer as an insured or additional insured; (b) any Claims that Developer or Subcontractors may have now or in the future against one another with respect to houses in the Project other than the Homeowners' properties listed on Exhibit 1; (c) any Claims that Developer or Subcontractors may have now or in the future with respect to projects other than the Project; (d) any Claims that Developer may have now or in the future against insurers of Subcontractors arising out of insurance policies issued to entities other than Subcontractors; and (e) any rights that Developer or Subcontractors may have now or in the future against one another with respect to defense or indemnity for Claims not released by this Agreement.
- Waiver of Civil Code Section 1542. The Parties acknowledge and understand that there is a risk that, subsequent to the execution of this Agreement, they may accrue, obtain, incur, suffer or sustain Claims which in some conceivable way arise out of, are caused by, are connected with, or relate to the Parties (and/or their Related Persons and Entities) and/or the Action or the Property, which are unknown and unanticipated at the time this Agreement is signed or which are not presently capable of being ascertained. The Parties further acknowledge that there is a risk that any Claims as are known or should be known with respect to the released matters may become more serious than they now expect or anticipate. Nevertheless, the Parties hereby expressly waive all rights they may have in such unknown and unexpected consequences or results as to the released matters. The Parties acknowledge that they have had the benefit of or opportunity to consult with counsel, understand the provision of

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California Civil Code section 1542, and expressly waive the provisions of Civil Code Section 1542, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which, if know by him, must have materially affected his settlement with the debtor."

The Parties hereby specifically waive any and all rights and benefits under said section as they relate to the matters released and acknowledge that this settlement would not be made without such a waiver.

**Code of Civil Procedure Sections 664.6 and 664.7**

- The Parties hereby acknowledge, agree and stipulate that each has the right to enforce any provision of this Agreement by filing any appropriate action, proceeding, or motion, including without limitation, a motion pursuant to California Code of Civil Procedure Section 664.6 or 664.7, in the appropriate law and motion department of the County where the Action is venued, or in the appropriate law and motion department where any subsequent action is venued. The Parties further acknowledge, agree and stipulate that the Court in the Action shall retain jurisdiction over the Parties to reopen the Action after it is dismissed in order to hear and rule on any motion brought pursuant to Code of Civil Procedure Section 664.6 or 664.7.

**Confidentiality, Non-Publicity and Non-Advertisement**

- The Parties and their counsel agree that the terms and conditions of this Agreement, including the amount of all settlement payments and the settlement negotiations that led to this Agreement, are to remain proprietary and confidential. The Parties and their counsel agree from the date of this Agreement forward not to disclose any of the terms of this Agreement to anyone without a court order. The Parties shall be entitled to injunctive relief to prevent any further or continuing breach of this confidentiality provision, in addition to any other available relief. In the event that the Homeowners are subpoenaed and are

asked about this Agreement, they are permitted to acknowledge the existence of an Agreement and to state that there is a confidentiality agreement which prevents them from discussing the facts or terms of settlement absent authorization by Developer. Homeowners may disclose these matters to subsequent purchasers of their homes per Civil Code section 1102, et seq. The Parties and their counsel shall make reasonable efforts to cause their Related Persons and Entities to maintain such confidentiality.

- The Homeowners and their attorneys agree to refrain from disclosing, advertising, or publicizing via newspapers, magazines, jury verdict publications, law firm marketing brochures, television, radio, newsletters, websites or the Internet any of the terms of this Agreement. Nothing in this paragraph will prohibit the explanation of settlement terms in papers filed with the Orange County Superior Court, including, but not limited to, motions for good faith settlement. However, the homeowners and their attorneys agree that any pleadings, declarations and other papers filed with the Court in this regard shall be filed under seal and treated as confidential materials and will not be otherwise provided or referenced in any way, shape or form to any person or entity, including, but not limited to, newspapers, magazines, jury verdict publications, law firm marketing brochures, television, radio, newsletters, websites or the Internet. Developer shall be entitled to injunctive relief to prevent any further or continuing breach of this confidentiality provision, in addition to any other available relief under California law.

### **Representations and Warranties**

- The Homeowners further make the following material representations with the understanding that the Developer and Subcontractors enter into this Agreement in reliance upon each of these representations and that, without these representations, Defendant Parties would not enter into this Agreement:
  - The Homeowners, for themselves and their Related Persons and Entities, covenant and agree never to commence, participate in and/or prosecute against Developer or Subcontractors or Third

Party Improvers (or any of their respective Related Persons and Entities) any legal action and/or other proceeding based in whole or in part upon the Claims released by this Agreement, and/or any legal action or other proceeding based in whole or in part upon any Claim arising out of or relating to any repairs and/or maintenance previously performed, not performed, and/or improperly performed and related to the Action. This Agreement may be pled as a full and complete defense to any action or other proceeding, as well as a basis for abatement of, or injunction against, such action or other proceeding, and as the basis for a cross-complaint for indemnity and damages, which damages shall include, without limitation, reasonable attorneys', paralegals' and experts' fees, costs and expenses incurred in defending any such action and prosecuting such cross-complaint.

- Homeowners intend that the terms and conditions of this Agreement, and the Agreement as a whole, shall be binding upon them and each of their Related Persons and Entities and are intended by the Parties to run with the land pursuant to applicable California law as to the Property and each part of it.
- Homeowners acknowledge and represent that they have had the benefit and advise of legal counsel in evaluating, finalizing and executing this Agreement, and that they have selected and retained their own attorneys, experts and consultants to inspect, analyze and advise them regarding the nature, extent and cause of the Claims, and appropriate redesign, repairs, remediation, corrective work and/or maintenance of or at the Property. Homeowners may have considered the opinions, representations, conclusions, recommendations and estimates expressed by Developer or Subcontractors and/or their consultants, experts and attorneys, but they have not been induced to enter into this Agreement by reliance upon them. Homeowners shall not assert any Claims against Developer or Subcontractors, or their respective Related Persons and Entities, or their respective experts or consultants, based upon any

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alleged misrepresentation, error, omission, opinion, conclusion or estimate related to the Action.

- The Homeowners listed in Exhibit 1 and who are signing this Agreement comprise all of the owners for the all of the houses in the Action and there are no other legal or equitable owners of these houses who must sign this Agreement.
- All of the terms and provisions of this Agreement have been explained to the Homeowners by their legal counsel, and said Homeowners have understood and accept all of said terms and provisions.
- The Homeowners acknowledge that they are solely and completely responsible for any and all redesign, repairs, remediation, corrective work and/or maintenance performed and/or not performed to their individual houses as identified in Exhibit 1. Developer and Subcontractors bear no responsibility whatsoever to determine how the settlement money shall be divided, distributed, or spent, or how to remedy any of the Claims.
- Each of the signatories hereto warrants and represents that he or she is competent and authorized to enter into this Agreement on behalf of the party for whom he or she purports to sign.
- Each of the signatories hereto warrants and represents that he/she/it has not sold, transferred, conveyed, assigned, hypothecated and/or subrogated any of the Claims, rights, or causes of action released herein.

### **Integration Clause**

- The Agreement, including all exhibits attached hereto, constitutes the entire understanding between and among the Parties with regard to the matters herein set forth. There are no representations, warranties, agreements, arrangements, understandings, oral or written, between or among the parties hereto relating to the subject matter of this

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Agreement which are not fully expressed herein. This Agreement shall be interpreted according to its own terms, as defined in this Agreement or otherwise according to their ordinary meaning, without any parol evidence. This is an integrated agreement.