

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:)	
	)	Chapter 11
BUILDING MATERIALS HOLDING)	
CORPORATION, <i>et al.</i>,¹	)	Case No. 09-12074 (KJC)
)	
Reorganized Debtors.	)	Jointly Administered
)	
	)	Hearing Date: March 24, 2010 at 10:00 a.m.
	)	Objection Deadline: March 17, 2010 at 4:00 p.m.

**MOTION OF PACIFIC BAY PROPERTIES FOR RELIEF FROM THE PLAN
INJUNCTION OR, IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC
STAY TO PERMIT CONTINUATION OF STATE COURT LITIGATION**

Pacific Bay Properties (the "**Claimant**"), by and through the undersigned counsel, move this Court for relief from the Plan Injunction, or, in the alternative, relief from the automatic stay, to permit continuation of state court litigation (the "**Motion**"). In support of this Motion, Claimant states as follows:

Jurisdiction and Venue

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.
2. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1409.
3. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(G).
4. The statutory predicates for the relief sought herein are 11 U.S.C. §§ 105(a), 362(d) and 524(e) and Rule 4001 of the Federal Rules of Bankruptcy Procedure.

Parties

¹ The Reorganized Debtors, along with the last four digits of each Reorganized Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Reorganized Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

5. Claimant is a California corporation with a principal place of business located at 4041 MacArthur Blvd., Suite 500, Irvine, California.

6. Building Materials Holding Corporation and its affiliates are the reorganized debtors in the above-referenced cases (collectively, the "**Debtors**").

Background

7. On June 16, 2009 (the "**Petition Date**"), each of the Debtors filed with the United States Bankruptcy Court for the District of Delaware (the "**Court**") voluntary petitions for relief under title 11 of the United States Code (the "**Bankruptcy Code**"). The Debtors' cases are being jointly administered pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure. On December 17, 2009, the Court entered an *Order Confirming Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications)* [Docket No. 1182] (the "**Confirmation Order**") confirming the Debtors' joint plan of reorganization (the "**Plan**"). On January 4, 2010 (the "**Effective Date**"), the Debtors' Plan became effective.

8. From the Petition Date until the Effective Date, the automatic stay imposed by 11 U.S.C. § 362 prevented persons or entities from bringing or continuing any actions against the Debtors on account of prepetition claims, and from and after the Effective Date the injunction imposed by the Plan and Confirmation Order (the "**Plan Injunction**") prevents persons or entities from bringing or continuing any actions against the Debtors on account of prepetition claims.

9. On or about June 9, 2009, Richard Ballard and various other homeowners (collectively, the "**Homeowners**") commenced litigation against Claimant relating to a certain housing development located in Chula Vista, California (the "**Project**"). Thereafter, on or about August 6, 2009, the Homeowners filed an Amended Complaint alleging numerous causes of action and seeking damages based upon strict products liability, breach

of express and implied warranties, breach of contract and negligence (the “**Amended Complaint**”). The matter is known as Case No. 37-2009-00091480-CU-CD-CTL in the San Diego Superior Court of the State of California. A true and correct copy of the Amended Complaint is attached as Exhibit “A.”

10. On or about November 23, 2009, without actual or constructive knowledge of Debtors’ bankruptcy, Claimant filed a Cross-Complaint for breach of contract, breach of written contract to indemnify, breach of written contract to obtain insurance, breach of written contract to defend, total implied indemnity, equitable indemnity/contribution, strict liability, breach of implied and express warranty, negligence and declaratory relief (the “**Action**”) against, inter alia, Debtors based upon the alleged construction defects caused by Debtors during Debtors’ performance of work and/or services and/or providing of materials which were incorporated into the development, construction and/or sale of the Project. A true and correct copy of the Action is attached as Exhibit “B.”

11. The Claimant is entitled to seek recovery of its damages with respect to the claims alleged in the Action from any and all applicable insurers (the “**Insurers**”) under any and all applicable insurance policies issued to the Debtor (the “**Policies**”).

12. The Claimant accordingly seeks relief from the Plan Injunction to allow the Claimant to proceed with the Action for recovery from any and all available insurance proceeds from the Policies.

13. Claimant does not seek to prosecute the Action in order to collect a judgment from any of the Debtors or their respective estates. If any action by the Claimant causes a claim against the Debtors on account of any deductible and/or self insured retention under the Policies, the Claimant shall not seek such portion of the payment from the Policies.

14. The Plan, Appendix A, paragraph 84 provides: “Insurance Policies and Agreements means all of the Debtors’ insurance policies and any agreements, documents, or

instruments relating thereto including, without limitation, all payment and collateral agreements.”

15. The Plan, Appendix A, paragraph 85 provides: “Insured Claim means a Claim covered by one or more of the Debtors’ Insurance Policies and Agreements, including, but not limited to, tort claims, property damage claims, personal injury claims, general liability claims, automobile liability claims and employer liability and workers’ compensation claims within or above the applicable deductible or self insured retention under the applicable policy.”

16. Section 7.17 of the Plan provides:

On the Effective Date, the applicable Debtors that are parties to such Insurance Policies and Agreements and the applicable Reorganized Debtors shall be deemed to have assumed in accordance with section 365 of the Bankruptcy Code all such Insurance Policies and Agreements, and the applicable Reorganized Debtors shall remain liable for all obligations under the Insurance Policies and Agreements, whether now existing or hereafter arising, and shall pay such obligations in the ordinary course of business. The applicable insurers shall be deemed to have consented to such assumption. Nothing in the Plan: (a) precludes or limits the rights of insurers to contest and/or litigate with any party, including, without limitation, the Debtors, the existence, primacy and/or scope of available coverage under any alleged applicable policy; (b) permits any holder of an Insured Claim to recover the same amounts from an insurer and any other party including, but not limited to, the Debtors (or after the Effective Date, the Reorganized Debtors); (c) alters an insurer’s rights and obligations under its Insurance Policies and Agreements or modifies the coverage provided thereunder; (d) alters the rights and obligations of the Debtors (or after the Effective Date, the Reorganized Debtors) or the insurers under the Insurance Policies and Agreements including, without limitation, any duty of the Debtors’ to defend, at their own expense, against claims asserted under the Insurance Policies and Agreements; (e) discharges, releases or relieves the Debtors or Reorganized Debtors, after the Effective Date, from any debt or other liability under the Insurance Policies and Agreements; or (f) limits, diminishes, or otherwise alters or impairs the Debtors’, Reorganized Debtors’ and/or an insurer’s defenses, claims, Causes of Action, or other rights under applicable non-bankruptcy law with respect to the Insurance Policies and Agreements.

17. The Plan Injunction in section 9.1.1 of the Plan provides:

[T]he Confirmation of the Plan shall, as of the Effective Date: (i) discharge the Debtors, the Reorganized Debtors or any of its or their Assets from all Claims, demands, liabilities, other debts and Interests that arose on or before

the Effective Date, including all debts of the kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (a) a Proof of Claim based on such debt is filed or deemed filed pursuant to section 501 of the Bankruptcy Code, (b) a Claim based on such debt is Allowed pursuant to section 502 of the Bankruptcy Code or (c) the Holder of a Claim based on such debt has accepted the Plan; and (ii) preclude all Persons from asserting against the Debtors, the Reorganized Debtors, or any of its or their Assets, any other or further Claims or Interests based upon any act or omission, transaction, or other activity of any kind or nature that occurred prior to the Effective Date, all pursuant to sections 524 and 1141 of the Bankruptcy Code.

Relief Requested

A. Relief from Plan Injunction

18. Claimant asserts that it does not seek to recover from any of the Debtors, and, instead, only seeks to recover from any available insurance funds. The applicable Debtors are merely nominal parties in the Action for the purpose of establishing liability to permit payment up to the limits of applicable insurance. “[A]fter discharge and upon expiration of the automatic stay, actions aimed at collecting such an obligation from a debtors’ liability insurer are permissible, even when they involve the debtor as a nominal defendant.”

Doughty v. Holt (In re Doughty), 195 B.R. 1, 4 (Bankr. D. Me. 1996); see also In re HNRC Dissolution Co., No. 02-14261, 2005 WL 3841865, at *3 (Bankr. E.D. Ky. filed July 29, 2005).

19. Regarding Claimant’s failure to file a claim in Debtors’ Chapter 11 case, courts have stated:

11 U.S.C. § 524(a) operates as an injunction against actions against a debtor subsequent to the discharge of a debt. The bankruptcy discharge and § 524 injunction serve to give the debtor a financial fresh start. As a general rule, a creditor must file a proof of claim during the bankruptcy proceedings to preserve its claim against the debtor. If a creditor fails to file such notice, the § 524 injunction will act to shield the debtor from the creditor.

The discharge and injunction, however, are expressly designed to protect only the debtor, and do not affect the liability of any other entity for the debt. Accordingly, courts are in near unanimous agreement that § 524(e) permits a creditor to bring, and proceed in, an action nominally directed against a

discharged debtor for the sole purpose of proving liability on its part as a prerequisite to recovering from its insurer. . . .

In short, even though [the creditor's] failure to file a proof of claim in [the debtor's] bankruptcy proceedings is a bar to continued prosecution of his claims against [the debtor], it does not affect his claims against non-debtors, such as general liability insurers. The fresh-start policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured.

In re Coho Resources, Inc., 345 F.3d 338, 342-43 (5th Cir. 2003).

20. It is well settled that a discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt. Section 524(e) specifies that the debt still exists and can be collected from any other entity that might be liable. See 11 U.S.C. § 524(e); see also First Fidelity Bank v. McAteer, 985 F.2d 114, 118 (3d Cir. 1993); Houston v. Edgeworth (In re Edgeworth), 993 F.2d 51 (5th Cir. 1993); Green v. Welsh, 956 F.2d 30, 35 (2nd Cir. 1992); In re Jet Fla. Sys., Inc., 883 F.2d 970, 973-77 (11th Cir. 1989); In re Beeney, 142 B.R. 360, 362-63 (B.A.P. 9th Cir. 1992) (pursuing an action post-discharge against a debtor solely in order to collect on an insurance policy is permissible).

21. While the Plan does not contain any provision akin to 11 U.S.C. § 524(e) which provides that “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of another entity for, such debt[.]” the Plan, in section 7.17, does provide that

Nothing in the Plan: . . . (c) alters an insurer's rights and obligations under its Insurance Policies and Agreements or modifies the coverage provided thereunder; (d) alters the rights and obligations of the Debtors (or after the Effective Date, the Reorganized Debtors) or the insurers under the Insurance Policies and Agreements including, without limitation, any duty of the Debtors' to defend, at their own expense, against claims asserted under the Insurance Policies and Agreements; (e) discharges, releases or relieves the Debtors or Reorganized Debtors, after the Effective Date, from any debt or other liability under the Insurance Policies and Agreements”

22. Both the language of the Plan, section 524(e) of the Code and the case law support the position of the Claimant. Accordingly, the Claimant is entitled to relief from the Plan Injunction to permit continuation of state court litigation up to the limits of applicable insurance coverage.

WHEREFORE, Claimant respectfully requests that this Court enter an Order, as follows:

- (i) modifying the Plan Injunction to permit Claimant to continue the Action up to the limits of applicable insurance coverage; and
- (ii) for such other relief as is just.

B. Alternatively, For Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1), (2)

23. Pursuant to the Plan, Confirmation Order and 11 U.S.C. § 362(c)(2), the automatic stay is no longer in effect.

24. In the event that the automatic stay under 11 U.S.C. § 362 remains relevant, Claimant is entitled to relief from the automatic stay to permit continuation of state court litigation up to the limits of applicable insurance coverage.

25. The Bankruptcy Court has broad discretion in granting relief of an automatic stay. See, e.g., 11 U.S.C. § 362, Revision Notes and Legislative Reports 1978 Acts. “The question of whether cause exists for relief from the automatic stay must be determined on a case by case basis in the bankruptcy court's discretion.” In re Jewett, 146 B.R. 250, 251 (B.A.P. 9th Cir. 1992) (citations omitted).

26. A party may seek relief from the stay when the party needs to obtain a judgment against the debtor in name only in order to recover from the debtors’ insurer. Int’l Bus. Machs. v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.), 938 F.2d 731 (7th Cir. 1991); see also Foust v. Munson S.S. Lines, 299 U.S. 77, 87, 57 S.Ct. 90, 95, 81 L. Ed. 49 (1936) (allowing wrongful death action against bankrupt defendant to proceed despite

stay; plaintiff “entitled to maintain an action against the insurer for the amount of his judgment but not exceeding the amount of insurer's liability to the debtor under the policy.”).

27. The absence in the estate or the debtor of a direct interest in the proceeds removes the proceeds from the estate and from the scope of the automatic stay. See McAteer, 985 F.2d at 118 (proceeds of credit life insurance policy were not property of estate of bankrupt debtor which owned policy, but were property of creditor beneficiary of policy); Pintlar Corp. v. Fidelity & Cas. Co. (In re Pintlar Corp.), 124 F.3d 1310 (9th Cir. 1997); Edgeworth, 993 F.2d 55-56 (proceeds of a physician’s liability policy not part of the estate because debtor had no right to receive and retain any proceeds when insurer paid on a claim); In re Louisiana World Exposition, 832 F.2d 1391, 1398-1400 (5th Cir. 1987) (proceeds of a directors and officers liability policies are not part of the bankruptcy estate even though the policies were purchased and owned by the debtor because the debtor received no direct coverage against liabilities to third parties).

28. The Fifth Circuit’s Edgeworth decision, a leading case on the subject, has held that typical liability insurance policies are not estate property, stating:

The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.

Examples of insurance policies whose proceeds are property of the estate include casualty, collision, life, and fire insurance policies in which the debtor is a beneficiary. Proceeds of such insurance policies, if made payable to the debtor rather than a third party such as a creditor, are property of the estate and may inure to all bankruptcy creditors. But under the typical liability policy, the debtor will not have a cognizable interest in the proceeds of the policy. Those proceeds will normally be payable only for the benefit of those harmed by the debtor under the terms of the insurance contract.

Edgeworth, 993 F.2d at 55-56; see also McAteer, 985 F.2d at 117 (recognizing a distinction between ownership of a life insurance policy and the proceeds thereof that resulted in the exclusion from the estate of the proceeds pursuant to section 541(d) of the Bankruptcy Code).

29. When the court is reasonably confident that the policy proceeds will be sufficient to satisfy all creditors with claims that may be paid under the policy, the court should grant relief from the stay to permit an action either against the debtor, if necessary, or directly against the insurer. 3 Collier on Bankruptcy ¶ 362.07[3][a] (2008). Since the policy proceeds will be available only to creditors with the type of claims covered by the policy, there will be no depletion of assets that would otherwise be available to satisfy general, unsecured claims and no reason to delay the creditor seeking to recover under the policy. See 3 Collier on Bankruptcy ¶ 362.07[3][a] (2008). In addition, the insurer will likely be responsible for the cost of defense so there should be no added expense for the estate. 3 Collier on Bankruptcy ¶ 362.07[3][a] (2008).

30. Bankruptcy Code § 362(d)(1) directs that the bankruptcy court “shall” lift the automatic stay for “cause.” 11 U.S.C. § 362(d)(1). The United States District Court for the District of Delaware considers three factors when determining the existence of “cause” for stay relief under § 362(d)(1): (1) the prejudice that would be suffered should the stay be lifted, (2) the balance of hardships facing the parties, and (3) the probable success on the merits if the stay is lifted. American Airlines, Inc. v. Continental Airlines, Inc. (In re Continental Airlines, Inc.), 152 B.R. 420, 424 (D. Del. 1993); see also In re Rexene Products Co., 141 B.R. 574 (Bankr. D. Del. 1992).

31. In the instant case, modification of the automatic stay is proper to the extent that Debtors’ have liability insurance. Such stay relief does no injustice to Debtors under the Bankruptcy Code. First, Debtors will not be prejudiced should the stay be lifted because Claimant is not seeking estate assets in the Action. The policy proceeds will be available

only to Claimant because Claimant is the only creditor with the type of claims covered by the policy. Thus, there will be no depletion of assets that would otherwise be available to satisfy general, unsecured claims and no reason to delay the creditor seeking to recover under the policy. In addition, Debtors' insurer will likely be responsible for the cost of defense so there should be no added expense for the estate.

32. Second, the potential hardship for Claimant is great. Absent stay relief, Claimant will be deprived of any recovery out of otherwise available insurance coverage.

33. Third, the probable success on the merits if the stay is lifted is not as significant a factor in this particular case in that bankruptcy estate assets are not at issue in the Action. Moreover, "[e]ven a slight probability of success on the merits may be sufficient to warrant stay relief in an appropriate case," Continental Airlines, Inc., 152 B.R. at 426, and "[t]he required showing is very slight," In re Rexene Prod. Co., 141 B.R. at 578. In any event, the attached Action demonstrates that Claimant has pled a claim upon which relief can be granted under several well-established theories of insurance coverage law. Consequently, pursuant to § 362(d)(1), this Court should lift the automatic stay imposed under §362(a) so that Claimant may proceed with the Action against the Debtors to the extent of available insurance coverage, if any.

34. In addition, Debtors do not have any equity in the insurance proceeds at issue and said insurance proceeds are not necessary for the an effective reorganization of the estate. As such, the stay should be lifted pursuant to § 362(d)(2) as well.

35. For these reasons, the automatic stay should be modified to permit the aggrieved non-debtor, Claimant, to pursue the Action so long as recovery is limited to available insurance coverage.

WHEREFORE, Claimant respectfully requests that this Court enter an Order, as follows:

(i) terminating the automatic stay pursuant to 11 U.S.C. § 362(d) to permit Claimant to continue the Action up to the limits of applicable insurance coverage; and

(ii) for such other relief as is just.

Respectfully submitted,

WHITE AND WILLIAMS LLP

BY: /s/ Marc S. Casarino
Marc S. Casarino (#3613)
824 N. Market Street, Suite 902
P.O. Box 709
Wilmington, DE 19899-0709
Phone: 302.467.4520
Attorneys for Pacific Bay Properties

Dated: February 4, 2010

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:)	
	)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,¹	)	Case No. 09-12074 (KJC)
Reorganized Debtors.	)	Jointly Administered
)	
	)	Hearing Date: March 24, 2010 at 10:00 a.m.
	)	Objection Deadline: March 17, 2010 at 4:00 p.m.

**NOTICE OF MOTION OF PACIFIC BAY PROPERTIES FOR RELIEF FROM
THE PLAN INJUNCTION OR, IN THE ALTERNATIVE, FOR RELIEF FROM THE
AUTOMATIC STAY TO PERMIT CONTINUATION OF STATE COURT LITIGATION**

TO: Counsel of the Debtors, the U.S. Trustee, and counsel for the Official Committee of Unsecured Creditors

PLEASE TAKE NOTICE that on February 3, 2010 Pacific Bay Properties (the "*Claimant*"), filed its Motion for Relief from the Plan Injunction or, in the Alternative, for Relief from the Automatic Stay to Permit Continuation of State Court Litigation (the "**Motion**").

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion will be held before the Honorable Kevin J. Carey in the United States Bankruptcy Court for the District of Delaware on March 24, 2010 at 10:00 a.m. (the "**Hearing**").

PLEASE TAKE FURTHER NOTICE that responses or objection to the Motion must be filed with the Court and served so as to be received by the undersigned counsel on or before March 17, 2010 at 4:00 p.m. (the "**Objection Deadline**").

Marc S. Casarino, Esquire
White and Williams LLP
824 North Market Street, Suite 902

¹ The Reorganized Debtors, along with the last four digits of each Reorganized Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Reorganized Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

P.O. Box 709
Wilmington, DE 19899
Phone: (302) 467-4520
Facsimile: (302) 467-4550
casarinom@whiteandwilliams.com

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE THE COURT
MAY GRANT THE RELIEF DEMANDED BY THE MOTION WITHOUT FURTHER
NOTICE OR HEARING.

WHITE AND WILLIAMS LLP

BY: /s/ Marc S. Casarino
Marc S. Casarino (#3613)
824 N. Market Street, Suite 902
P.O. Box 709
Wilmington, DE 19899-0709
Phone: 302.654.0424
Attorneys for Pacific Bay Properties

Dated: February 4, 2010

Exhibit A

TRANSACTION ID#
26392142

SUM-100

SUMMONS On First Amended
(CITACION JUDICIAL) Complaint

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

PACIFIC BAY PROPERTIES, A California Corporation; AND DOES
1- 1000, INCLUSIVE.

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

RICHARD BALLARD & DEBORAH BALLARD; THOMAS
BERNHARD & KATHLEEN BERNHARD; (See Attachment #1)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED
Clerk of the Superior Court

AUG 06 2009

By: L. SPENCE, Deputy

TRANSACTION ID#

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

(AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.)

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 o más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): Superior Court of California, San Diego
220 W. Broadway
San Diego, CA 92101

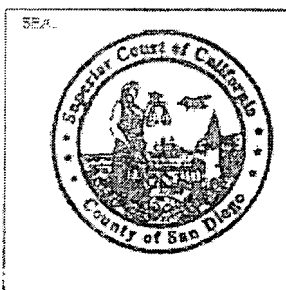
CASE NUMBER
(Número del Caso): 37-2009-00091480-CU-CD-CTL

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

DATE:
(Fecha) AUG 06 2009

Clerk, by
(Secretaria) LINDA SPENCE, Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): Pacific Bay Properties, a California Corporation
under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other (specify):

4. ☐ by personal delivery on (date):

Page 1 of 1

SHORT TITLE:

Ballard, et al. v. Pacific Bay Properties, et al.

CASE NUMBER:

37-2009-00091480-CU-CD-CTL

INSTRUCTIONS FOR USE

- This form may be used as an attachment to any summons if space does not permit the listing of all parties on the summons.
- If this attachment is used, insert the following statement in the plaintiff or defendant box on the summons: "Additional Parties Attachment form is attached."

List additional parties (Check only one box. Use a separate page for each type of party.):

☒ Plaintiff ☐ Defendant ☐ Cross-Complainant ☐ Cross-Defendant

Attachment #1

SIMON BIELAZ & ILIANA BIELAZ; ANDREW CALICA & LEAH CALICA; ALEXANDER CALIGUIRAN & MARIDI CALIGUIRAN; JOSE CASTRO & PENELOPE CASTRO; EDUARDO CECENA & DARLENE CECENA; JOHN CHACON & DONITA CHACON; BRETT COLTER; EDDIE FLORES & NATALIE FLORES; MARK FUNK & GRACE FUNK; LORI GARCIA; RICHARD HANSEN & HERMELINDA HANSEN; DANIEL HENNESSY & LEANNE HENNESSY; DAVID HERNANDEZ & MARIA HERNANDEZ; MICHAEL JANZEN & MICHELLE JANZEN; ROBERT JOHNSON & EDITH JOHNSON; MICHAEL LAI & ANDREW LAI; CHRIS LAPACIK & ROSEMARY LAPACIK; CHARLES LEWIS; ERNIE LUCERO & DIANA LUCERO; RODGER MOORE & LAURA MOORE; JULIE OVENSHERE; HAROLD POMEROY & SUZANNE POMEROY; DWIGHT QUINONEZ & CINTHIA QUINONEZ; MAHMOUD RAZZAGHII; ALBERTO REYES & MARTINA REYES; MANUEL SANCHEZ & ALEJANDRA SANCHEZ; STEVEN SCHEMMER; WILLIAM SCULLY & GRACE SCULLY; CARL STEPHENSON & LINDA STEPHENSON; WILLIAM STONE & YOUNG JA STONE; TIMOTHY STUBER & MARJORIE STUBER; CHRISTOPHER TAN; ERIC TARR & ANDREA TARR; RIMA THOMAS; ALLEN GOINES & MARICELA OCHOA; EDWARD LOPEZ & SCHERRY MESSIC; FERNANDO LEAL & KIMBERLY MARTINDALE; MARY LOU SOTO & ELVIRA TENA; AND ROBERT BLACKWELDER & YOLANDA GARCIA.

Page 1 of 1

Page 1 of 1

MILSTEIN, ADELMAN & KREGER, LLP

2800 Donald Douglas Loop North

Santa Monica, California 90405

Telephone: (310) 396-9600

Fax: (310) 396-9635

Lee Jackson, SBN 216970

Christina L. Kurtz, SBN 244875

Attorneys for Plaintiffs,
RICHARD BALLARD & DEBORAH BALLARD, ET AL.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

RICHARD BALLARD & DEBORAH	)	CASE NO.: 37-2009-00091480-CU-CD-CTL
BALLARD; THOMAS BERNHARD &)	
KATHLEEN BERNHARD; SIMON BIELAZ &)	
ILIANA BIELAZ; ANDREW CALICA & LEAH	)	FIRST AMENDED COMPLAINT FOR
CALICA; ALEXANDER CALIGUIRAN &	)	DAMAGES:
MARIDI CALIGUIRAN; JOSE CASTRO &)	
PENELOPE CASTRO; EDUARDO CECENA &	)	1. STRICT PRODUCTS LIABILITY
DARLENE CECENA; JOHN CHACON &	)	2. STRICT PRODUCTS LIABILITY
DONITA CHACON; BRETT COLTER; EDDIE	)	(COMPONENT PRODUCTS)
FLORES & NATALIE FLORES; MARK FUNK	)	3. BREACH OF IMPLIED WARRANTY
& GRACE FUNK; LORI GARCIA; RICHARD	)	(MERCHANTABILITY)
HANSEN & HERMELINDA HANSEN;	)	4. BREACH OF CONTRACT
DANIEL HENNESSY & LEANNE	)	5. NEGLIGENCE
HENNESSY; DAVID HERNANDEZ & MARIA	)	6. BREACH OF EXPRESS WARRANTY
HERNANDEZ; MICHAEL JANZEN &)	
MICHELLE JANZEN; ROBERT JOHNSON &)	
EDITH JOHNSON; MICHAEL LAI &)	
ANDREW LAI; CHRIS LAPACIK &)	
ROSEMARY LAPACIK; CHARLES LEWIS;)	
ERNIE LUCERO & DIANA LUCERO;)	
RODGER MOORE & LAURA MOORE;)	
JULIE OVENSHERE; HAROLD POMEROY &)	
SUZANNE POMEROY; DWIGHT QUINONEZ)	
& CINTHIA QUINONEZ; MAHMOUD)	
RAZZAGHI; ALBERTO REYES & MARTINA)	
REYES; MANUEL SANCHEZ & ALEJANDRA)	
SANCHEZ; STEVEN SCHEMMER; WILLIAM)	
SCULLY & GRACE SCULLY; CARL)	
STEPHENSON & LINDA STEPHENSON;)	
WILLIAM STONE & YOUNG JA STONE;)	

1 TIMOTHY STUBER & MARJORIE STUBER;)
2 CHRISTOPHER TAN; ERIC TARR &)
3 ANDREA TARR; RIMA THOMAS;)
4 ALLEN GOINES & MARICELA OCHOA;)
5 EDWARD LOPEZ & SCHERRY MESSIC;)
6 FERNANDO LEAL & KIMBERLY)
7 MARTINDALE; MARY LOU SOTO &)
8 ELVIRA TENA; AND ROBERT)
9 BLACKWELDER & YOLANDA GARCIA,)

10 Plaintiffs,)

11 vs.)

12 PACIFIC BAY PROPERTIES, A California)
13 Corporation; AND DOES 1- 1000, INCLUSIVE,)

14 Defendants.)
15)
16)
17)
18)

19 Plaintiffs allege:

- 20 1. Plaintiffs are individuals residing in the County of SAN DIEGO, State of California.
21 2. The subjects of this action are the land with single family dwellings and other
22 improvements thereon, owned by Plaintiffs respectively, (hereinafter collectively referred to as the
23 "PROPERTY") located in the County of SAN DIEGO, State of California, described as follows:
24

	OWNER NAME	PROPERTY ADDRESS	TRACT NUMBER	LOT
25	1 Richard Ballard & Deborah Ballard	543 Los Altos Dr Chula Vista, Ca 91914	Map 13742 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 9	15
26	2 Thomas Bernhard & Kathleen Bernhard	558 Los Altos Dr Chula Vista, Ca 91914	Map 13741 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 8	20
27	3 Simon Bielaz & Iliana Bielaz	612 El Portal Dr Chula Vista, Ca 91914	Map 13504 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 5	1
28	4 Andrew Calica & Leah Calica	2626 Santa Maria Ct Chula Vista, Ca 91914	Map 13503 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 4	6
	5 Alexander Caliguiran & Maridi Caliguiran	732 Valley View Dr Chula Vista, Ca 91914	Map 13698 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 10	9
	6 Jose Castro & Penelope Castro	2452 Mackenzie Creek Rd Chula Vista, Ca 91914	Map 13663 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 4	24
	7 Eduardo Cecena & Darlene Cecena	743 Stone Canyon Rd Chula Vista, Ca 91914	Map 13690 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 2	18
	8 John Chacon & Donita Chacon	612 Los Altos Dr Chula Vista, Ca 91914	Map 13739 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 6	14

1	9	Brett Colter	2522 Falcon Valley Dr Chula Vista, Ca 91914	Map 13654 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 7	4
2	10	Eddie Flores & Natalie Flores	759 San Rafael Pl Chula Vista, Ca 91914	Map 13664 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 5	1
3	11	Mark Funk & Grace Funk	751 Stone Canyon Rd Chula Vista, Ca 91914	Map 13693 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 5	2
4	12	Lori Garcia	801 Esperanza Pl Chula Vista, Ca 91914	Map 13694 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 6	1
5	13	Richard Hansen & Hermelinda Hansen	653 Rocking Horse Dr Chula Vista, Ca 91914	Map 13657 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 10	16
6	14	Daniel Hennessy & Leanne Hennessy	728 River Rock Rd Chula Vista, Ca 91914	Map 13691 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 3	27
7	15	David Hernandez & Maria Hernandez	739 Stone Canyon Rd Chula Vista, Ca 91914	Map 13690 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 2	17
8	16	Michael Janzen & Michelle Janzen	676 San Jose Ct Chula Vista, Ca 91914	Map 13654 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 7	11
9	17	Robert Johnson & Edith Johnson	2615 Santa Angela Ct Chula Vista, Ca 91914	Map 13743 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 10	9
10	18	Michael Lai & Andrew Lai	764 Whispering Trails Dr Chula Vista, Ca 91914	Map 13598 Tr: 98-01 Salt Creek Ranch Neighborhood 5A	40
11	19	Chris Lapacik & Rosemary Lapacik	562 Los Altos Dr Chula Vista, Ca 91914	Map 13741 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 8	19
12	20	Charles Lewis	785 Valley View Dr Chula Vista, Ca 91914	Map 13697 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 9	11
13	21	Ernie Lucero & Diana Lucero	2616 Santa Barbara Ct Chula Vista, Ca 91914	Map 13504 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 5	6
14	22	Rodger Moore & Laura Moore	770 Dry Creek Dr Chula Vista, Ca 91914	Map 13451 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 5	21
15	23	Julie Ovenshire	2420 Paso Robles Ct Chula Vista, Ca 91914	Map 13661 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 2	18
16	24	Harold Pomeroy & Suzanne Pomeroy	625 Los Altos Dr Chula Vista, Ca 91914	Map 13739 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 6	6
17	25	Dwight Quinonez & Cinthia Quinonez	646 Prairie Dr Chula Vista, Ca 91914	Map 13441 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 1	3
18	26	Mahmoud Razzaghi	865 Esperanza Pl Chula Vista, Ca 91914	Map 13694 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 6	17
19	27	Alberto Reyes & Martina Reyes	2482 Mackenzie Creek Rd Chula Vista, Ca 91914	Map 13663 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 4	29
20	28	Manuel Sanchez & Alejandra Sanchez	869 Esperanza Pl Chula Vista, Ca 91914	Map 13694 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 6	18
21	29	Steven Schemmer	637 El Portal Dr Chula Vista, Ca 91914	Map 13503 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 4	25
22	30	William Scully & Grace Scully	681 Santa Clara Ct Chula Vista, Ca 91914	Map 13500 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 1	3
23	31	Carl Stephenson & Linda Stephenson	668 San Jacinto Pl Chula Vista, Ca 91914	Map 13656 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 9	5
24	32	William Stone & Young Ja Stone	605 El Portal Dr Chula Vista, Ca 91914	Map 13504 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 5	19

33	Timothy Stuber & Marjorie Stuber	587 El Portal Dr Chula Vista, Ca 91914	Map 13743 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 10	14
34	Christopher Tan	2412 Mackenzie Creek Rd Chula Vista, Ca 91914	Map 13660 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 1	4
35	Eric Tarr & Andrea Tarr	602 Los Altos Dr Chula Vista, Ca 91914	Map 13739 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 6	16
36	Rima Thomas	777 River Rock Rd Chula Vista, Ca 91914	Map 13692 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 4	1
37	Allen Goines & Maricela Ochoa	637 Los Altos Dr Chula Vista, Ca 91914	Map 13739 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 6	9
38	Edward Lopez & Scherry Messic	770 Stone Canyon Rd Chula Vista, Ca 91914	Map 13693 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 5	16
39	Fernando Leal & Kimberly Martindale	729 Creekside Pl Chula Vista, Ca 91914	Map 13696 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 8	13
40	Mary Lou Soto & Elvira Tena	661 Rocking Horse Dr Chula Vista, Ca 91914	Map 13657 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 10	18
41	Robert Blackwelder & Yolanda Garcia	751 River Rock Rd Chula Vista, Ca 91914	Map 13691 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 3	9

3. Plaintiffs are informed and believe and based thereon allege that at all times herein mentioned and material hereto that PACIFIC BAY PROPERTIES, A California Corporation, was and is a corporation authorized to conduct business in California and engaged in business in the County of SAN DIEGO and were the developers and/or general contractors of the PROPERTY and the project(s) within which the PROPERTY is located.

4. The names and capacities, whether individual, corporate, associate or otherwise of certain developers, builders, general contractors, subcontractors and/or their alter egos sued herein as DOES 1 through 100 inclusive, are presently unknown, and Plaintiffs will amend the Complaint to insert the same when ascertained. Plaintiffs are informed and believe and based thereon allege that each of these Defendants was a resident of said County and State and/or have principal offices or were doing business in said County and State and were and are responsible in some way for the happenings and damages alleged in this complaint. Said Defendants, along with the Defendants named above, will hereinafter be referred to as the **"DEVELOPER DEFENDANTS."**

5. In order to build and construct said PROPERTY and project(s) the DEVELOPER DEFENDANTS hired, retained, employed, or contracted for the services of certain persons or entities to plan, design, and prepare drawings and specifications for the building of the PROPERTY

1 and project. The identities of said persons or entities, whether individual, corporate or otherwise,
2 sued herein as Does 101 through 200, are presently unknown to Plaintiffs who therefore sue such
3 persons by their fictitious names. Plaintiffs are informed and believe and thereon allege that said
4 persons or entities are wholly or in some part responsible for the occurrences set forth in the
5 complaint. These Defendants will hereinafter be referred to as the **"DESIGN DEFENDANTS."**

6 6. In order to build and construct said project the DEVELOPER DEFENDANTS hired,
7 retained, employed, or contracted with persons or entities to provide for labor and materials in the
8 construction of the PROPERTY and project(s). The identities of said persons or entities, whether
9 individual, corporate, or otherwise, sued herein as Does 201 through 400 are presently unknown to
10 Plaintiffs who therefore sue such persons by their fictitious names. Plaintiffs are informed and
11 believe and thereon allege that said persons or entities are wholly or in some part responsible for the
12 occurrences set forth in the Complaint in accordance with that party's individual scope of work that
13 is limited to work performed and criticized by Plaintiffs' experts. These Defendants will herein
14 after be referred to as the **"CONTRACTOR DEFENDANTS."**

15 7. Plaintiffs are informed and believe and based thereon allege that there were other
16 persons and entities involved in the planning, design, construction, maintenance, repairs, and sale of
17 the PROPERTY and project(s). The identities of said persons or entities, whether individual,
18 corporate, or otherwise, sued herein as Does 401-1000 are presently unknown to Plaintiffs who
19 therefore sue such persons by their fictitious names. Plaintiffs are informed and believe and thereon
20 allege that said persons or entities are wholly or in some part responsible for the occurrences set
21 forth in the complaint. Plaintiffs are informed and believe and based thereon allege that at all times
22 herein mentioned Defendants and each of them were the agents, servants, employees, assistants and
23 consultants of their co-Defendants and were as such acting within the course and scope of their
24 agency and authority of such agency and employment.

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FIRST CAUSE OF ACTION
STRICT PRODUCTS LIABILITY
(DEVELOPER DEFENDANTS)

8. Plaintiffs repeat and reallege paragraphs 1 through 7, inclusive, and incorporate the same as if set forth herein at length.

9. DEVELOPER DEFENDANTS and each of them, at all times herein mentioned were in the business of developing and mass producing and/or distributing homes in and, within the County where the PROPERTIES are located, and selling them to members of the public at large.

10. Within the last ten years, the DEVELOPER DEFENDANTS and each of them, developed and mass produced the PROPERTY and/or otherwise participated in the stream of commerce for sale of the PROPERTY and in the projects where the PROPERTY is located.

11. At all times herein mentioned and material hereto, DEVELOPER DEFENDANTS knew and intended that the PROPERTY would be purchased by members of the public at large, and used by them without further inspection for defects.

12. Plaintiffs purchased the PROPERTY from said DEVELOPER DEFENDANTS and moved into it with their families.

13. At the time of the purchase by Plaintiffs, the PROPERTY was defective and unfit for its intended purposes because Defendants did not construct the PROPERTY in a workmanlike manner as manifested by, but not limited to, numerous defects which have resulted in damage to the homes and their component parts. The defects include, without limitation and to various degrees on the plaintiffs' respective residences, the following:

Faulty soil compaction, faulty existing underlying soils and expansive soils resulting in soil movement and damage to the structures, concrete slabs, flatwork and foundation defects; plumbing defects; electrical defects; drainage defects; roof defects; HVAC defects; waterproofing defects; window and door defects; landscaping and irrigation defects; framing, siding and structural defects; ceramic tile, vinyl flooring and countertop defects; drywall defects; fence and retaining wall

defects; cabinet and wood trim defects; fireplace and chimney defects; tub and shower door defects; painting defects; sheet metal defects; and stucco defects

14. The above-specified claims involve predominantly common questions of law or fact, are typical of claims attributable to other residences in tracts Map 13742 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 9, Map 13741 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 8, Map 13504 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 5, Map 13503 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 4, Map 13698 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 10, Map 13663 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 4, Map 13690 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 2, Map 13739 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 6, Map 13664 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 5, Map 13693 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 5, Map 13694 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 6, Map 13657 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 10, Map 13691 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 3, Map 13690 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 2, Map 13654 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 7, Map 13743 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 10, Map 13598 Tr: 98-01 Salt Creek Ranch Neighborhood 5A, Map 13741 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 8, Map 13697 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 9, Map 13504 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 5, Map 13451 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 5, Map 13661 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 2, Map 13739 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 6, Map 13441 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 1, Map 13694 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 6, Map 13663 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 4, Map 13694 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 6, Map 13503 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 4, Map 13500 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 1, Map 13656 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 9, Map 13504 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 5, Map 13743 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 10, Map 13660 Tr: 92-02 Salt Creek Ranch Neighborhood 4B Unit 1, Map 13739 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 6, Map 13692 Tr: 92-02 Salt Creek Ranch Neighborhood 5 Unit 4, Map 13739 Tr: 92-02 Salt Creek Ranch Neighborhood 2 Unit 6, Map 13693 Tr: 92-02 Salt Creek Ranch

1 Neighborhood 5 Unit 5, Map 13696 Tr: 92-02 Salt Creek Ranch Neighborhood 6 Unit 8, Map 13657
2 Tr: 92-02 Salt Creek Ranch Neighborhood 3 Unit 10, Map 13691 Tr: 92-02 Salt Creek Ranch
3 Neighborhood 5 Unit 3 ("the project"), and adequately represent all other homeowners in the
4 project(s) in which the property is located.

5 15. The Plaintiffs gave and/or attempted to give DEVELOPER DEFENDANTS due and
6 timely notice of the defective quality of the above mentioned items.

7 16. The defects alleged herein above are defects that were not apparent by reasonable
8 inspection of the PROPERTY at the time of the purchase. The defects thereafter manifested.

9 17. Because of the defective conditions of the PROPERTY as herein above alleged,
10 Plaintiffs have been specifically damaged in the following ways, as well as others which will be
11 inserted with leave of court when ascertained:

12 A. Plaintiffs will be forced to incur expenses for the restoration and repairs of the
13 PROPERTY to cure the damage, defects and/or deficiencies. The exact amount of the damages is
14 presently unknown, except that the costs will exceed the sum of \$100,000 per home.

15 B. Plaintiffs have been damaged through the diminution in value of the PROPERTY.
16 Plaintiffs are unaware of the precise amount of such damage but will establish such amount at time
17 of trial.

18 C. Plaintiffs have been forced to retain expert consultants to analyze and determine the
19 method of repairing the aforementioned defects and damage. Plaintiffs are unaware of the precise
20 amount of such damage but will establish such amount at time of trial.

21 18. DEVELOPER DEFENDANTS, and each of them, as developers, mass producers,
22 builders and sellers and/or otherwise within the stream of commerce are strictly liable and
23 responsible to Plaintiffs for all damage suffered as a result of the above described damage, defects
24 and deficiencies in the PROPERTY.

25 ///

26 ///

27 ///

28 ///

1

2

3

4

6

10

14

13

14

2-

23

22

1 PRODUCT MANUFACTURER DEFENDANTS knew and intended that the PROPERTIES and
2 the SUBJECT COMPONENT PRODUCTS would be purchased by the PLAINTIFFS

3 27. PLAINTIFFS are lay people and lack the knowledge and understanding to inspect
4 the SUBJECT COMPONENT PRODUCTS and to understand whether said component products
5 have any defects. PLAINTIFFS lacked the ability to test the subject component products, to know
6 whether a defect did exist at the time they purchased their PROPERTIES and /or the SUBJECT
7 COMPONENT PRODUCTS.

8 28. At the time each of the SUBJECT COMPONENT PRODUCTS left COMPONENT
9 PRODUCT MANUFACTURER DEFENDANTS' custody, control or possession, each SUBJECT
10 COMPONENT PRODUCTS was defective and unfit for its intended purposes because the
11 SUBJECT COMPONENT PRODUCTS contained defects in their design, parts, materials used to
12 manufacture them, and how they were manufactured, which have resulted in foreseeable damage to
13 the PROPERTIES and the parts of the SUBJECT COMPONENT PRODUCTS that were the
14 defects and parts that were not the defects.

15 29. The defects in the SUBJECT COMPONENT PRODUCTS design, parts and
16 materials used to manufacture them, and how they were manufactured, existed at the time the
17 SUBJECT COMPONENT PRODUCTS left the possession and control of COMPONENT
18 PRODUCT MANUFACTURER DEFENDANTS and were and are common to each of the
19 respective SUBJECT COMPONENT PRODUCTS.

20 30. The defects in the SUBJECT COMPONENT PRODUCTS have caused water
21 intrusion and penetration into the wall systems, cavities and the interior of PLAINTIFFS'
22 PROPERTIES and are, and have caused the following resultant PROPERTY damage, including but
23 not limited to:

- 24 A) Damage to interior drywall of PLAINTIFFS' PROPERTY;
25 B) Damage to perimeter wall systems of PLAINTIFFS' PROPERTY; and
26 C) Damage to the wall systems, cavities and the interior of PLAINTIFFS'
27 PROPERTY.
28

1 This intrusion, penetration, and damage occurred in each named PLAINTIFFS'
2 PROPERTY.

3 31. PLAINTIFFS have also suffered the following damages in addition to all other
4 damage alleged in this Complaint as follows:

5 A) PLAINTIFFS will be forced to incur expenses for the restoration and repairs
6 of the PROPERTY to cure the damage, defects and/or deficiencies caused by the SUBJECT
7 COMPONENT PRODUCTS. PLAINTIFFS are unaware of the precise amount of such damage but
8 will establish such amount at time of trial; and

9 B) PLAINTIFFS have been damaged through the cost to repair or replace the
10 SUBJECT COMPONENT PRODUCTS. PLAINTIFFS are unaware of the precise amount of such
11 damage but will establish such amount at time of trial; and

12 C) Plaintiffs have been damaged through the diminution in value of the
13 PROPERTY caused by the SUBJECT COMPONENT PRODUCTS. Plaintiffs are unaware of the
14 precise amount of such damage but will establish such amount at time of trial; and

15 D) PLAINTIFFS have been forced to retain expert consultants to analyze and
16 determine the method of repairing the aforementioned defective SUBJECT COMPONENT
17 PRODUCTS. PLAINTIFFS are unaware of the precise amount of such damage but will establish
18 such amount at time of trial.

19 32. The defects alleged hereinabove are defects that were not apparent to PLAINTIFFS
20 by reasonable inspection of the PROPERTY and the SUBJECT COMPONENT PRODUCTS before
21 or at the time PLAINTIFFS individually purchased the SUBJECT COMPONENT PRODUCTS or
22 purchased their PROPERTY.

23 33. Because of the defective design and conditions of the SUBJECT COMPONENT
24 PRODUCTS, as herein alleged, PLAINTIFFS, and each of them, have the defective SUBJECT
25 COMPONENT PRODUCTS in their PROPERTY that need to be removed and replaced with non-
26 defective component products and have damage in and to their PROPERTY caused by the
27 SUBJECT COMPONENT PRODUCTS.

1 34. COMPONENT PRODUCT MANUFACTURER DEFENDANTS, and each of them,
2 as manufacturers, mass producers, distributors and sellers of the SUBJECT COMPONENT
3 PRODUCTS, and/or otherwise having placed their SUBJECT COMPONENT PRODUCTS within
4 the stream of commerce, are strictly liable and responsible to PLAINTIFFS for all damage(s)
5 suffered as a result of the above described defects and deficiencies in the SUBJECT COMPONENT
6 PRODUCTS.

7
8 **THIRD CAUSE OF ACTION**

9 **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**

10 (b) (DEVELOPER DEFENDANTS)

11 35. Plaintiffs incorporate by reference all previous paragraphs of this complaint as
12 though set forth in full herein.

13 36. At all times herein mentioned and material hereto DEVELOPER DEFENDANTS
14 were and now are the merchants and sellers of newly constructed housing, the type of merchandise
15 sold to Plaintiffs as herein above alleged and described.

16 37. DEVELOPER DEFENDANTS, and each of them, at the time and place of the sale of
17 the PROPERTY, impliedly warranted that it was properly constructed and of merchantable quality.

18 38. The PROPERTY was not properly constructed, and not of merchantable quality in
19 that it was defective as previously alleged herein above in paragraph 13.

20 39. Original Purchaser Plaintiffs discovered the defective quality of the PROPERTY.
21 Original purchaser Plaintiffs thereafter gave DEVELOPER DEFENDANTS, and each of them, due
22 and timely notice of the defective quality of the above mentioned items.

23 40. The defects described herein above caused by the breaches of warranty by
24 DEVELOPER DEFENDANTS, and each of them, were defects not apparent by reasonable
25 inspection of the PROPERTY at the time of purchase. The defects and damages were latent and
26 were not reasonably apparent to original purchaser Plaintiffs until on or about the time of
27 notification to the DEVELOPER DEFENDANTS.

28 41. Because of the foregoing breaches of implied warranties by DEVELOPER
DEFENDANTS, and each of them, original purchaser Plaintiffs have been specifically damaged as
herein above alleged in paragraph 17.

1 **FOURTH CAUSE OF ACTION**

2 **BREACH OF CONTRACT**

3 **(DEVELOPER DEFENDANTS)**

4 42. Plaintiffs incorporate by reference all previous paragraphs of this complaint as
5 though set forth in full herein.

6 43. On various dates, original purchaser Plaintiffs entered into written sales contracts
7 with DEVELOPER DEFENDANTS pursuant to which DEVELOPER DEFENDANTS, in exchange
8 for payment of certain sums, agreed to provide original purchaser Plaintiffs with quality residences
9 which were constructed in a workmanlike manner.

10 44. Original purchaser Plaintiffs have performed all conditions, covenants, and promises
11 required by the sales contracts in accordance with the terms and conditions of the contract.

12 45. Defendants have breached the sales contracts as set forth herein by failing to provide
13 residences constructed in a workmanlike manner as previously alleged herein above in paragraph
14 13, as a result of which original purchaser Plaintiffs have been specifically damaged as herein above
15 alleged in paragraph 17.

16 **FIFTH CAUSE OF ACTION**

17 **NEGLIGENCE**

18 **(ALL DEFENDANTS)**

19 46. Plaintiffs incorporate by reference all previous paragraphs of this complaint as
20 though set forth in full herein.

21 47. The aforementioned Defendants so carelessly and negligently planned, constructed,
22 modified, inspected, and/or performed work and services at the PROPERTY so as to proximately
23 cause defects and damages to the systems, buildings, and improvements as herein above alleged in
24 paragraph 13. With regard to those Defendants identified PREVIOUSLY herein as the
25 "CONTRACTOR DEFENDANTS", Plaintiffs' allegations are limited to that Contractor's scope
26 of work that is implicated by the opinions of Plaintiffs' experts.

27 ///

28

48. Because of the carelessness and negligence of each of the Defendants, and as a proximate result thereof, Plaintiffs have been damaged as previously alleged herein above in paragraph 17.

49. The defects and damages described herein above in paragraph 13 caused by the negligently and carelessly performed work of the Defendants, and each of them, were defects not apparent by reasonable inspection of the PROPERTY at the time of purchase.

SIXTH CAUSE OF ACTION

BREACH OF EXPRESS WARRANTY

(DEVELOPER DEFENDANTS)

50. Plaintiffs incorporate by reference all previous paragraphs of this complaint as though set forth in full herein.

51. Developer defendants expressly warranted through the Real Estate Purchase Contracts, and other documents that the subject properties were designed, constructed, developed, inspected, and manufactured, in accordance with all the applicable Federal, State and municipal law, ordinances, rules and regulations and that the subject properties were structurally sound, free of all material defects and designed and constructed for the intended purposes. Defendants further warranted that the homes and soils constructed thereon were in good working order and condition with no deficiencies therein.

52. Original purchaser Plaintiffs relied on defendants express representations.

53. Defendants breached said warranties in that the properties were not properly designed and constructed and were defective as set forth in paragraph 13.

54. Original Purchaser Plaintiffs discovered the defective quality of the above listed items involving the dwellings and pads. Original purchaser Plaintiffs thereafter gave DEVELOPER DEFENDANTS that they knew of, and each of them, due and timely notice of the defective quality of the above mentioned items. DEVELOPER DEFENDANTS failed and/or refused to rectify said items.

1 55. The damages described hereinabove caused by the breaches of warranty by
2 DEVELOPER DEFENDANTS, and each of them, were not apparent by reasonable inspection of
3 the property and project at the time of purchase. The defects and damages were latent and were not
4 reasonably apparent to original purchaser plaintiffs until on or about the time of notification to the
5 DEVELOPER DEFENDANTS.

6 56. As a result of the foregoing acts or omissions by defendants, plaintiffs have been
7 damaged as set forth in paragraph 17.

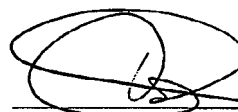
8
9
10 **WHEREFORE**, Plaintiffs pray for judgment against the Defendants, and each of them, as
11 follows:

12 **FIRST, SECOND, THIRD, FOURTH, FIFTH,**
13 **AND SIXTH, CAUSES OF ACTION:**

- 14 1. For costs of restoration and repairs to the PROPERTY in excess of
15 \$100,000 per home;
16 2. For costs of investigation;
17 3. For diminution of value of the PROPERTY according to proof at time of
18 trial;
19 4. For expert fees and costs of suit;
20 5. For loss of use of the property and relocation expenses;
21 6. For such other and further relief as the Court deems just and proper.

22
23 DATED: July 31, 2009

MILSTEIN, ADELMAN, & KREGER LLP

24
25 

26 By: Lee Jackson, Esq.
27 Christina L. Kurtz, Esq.
28 Attorneys for Plaintiffs,
 Richard Ballard & Deborah Ballard, et al.

Exhibit B

GRIMM, VRANJES, McCORMICK & GRAHAM LLP

Mark Vranjes, Esq. (SBN 106447)

Michael B. Martin, Esq. (147701)

550 West C Street, Suite 1100

Post Office Box 129012

San Diego, CA 92112-9012

TEL: (619) 231-8802

FAX: (619) 233-6039

Attorneys for Defendant/Cross-Complainant, PACIFIC BAY PROPERTIES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

RICHARD BALLARD & DEBORAH) CASE NO: 37-2009-00091480-CU-CD-CTL
BALLARD; THOMAS BERNHARD &)

KATHLEEN BERNHARD; SIMON) **CROSS-COMPLAINT FOR:**
BIELAZ & ILIANA BIELAZ; ANDREW)

CALICA & LEAH CALICA;) **1. Breach of Contract;**
ALEXANDER CALIGUIRAN & MARIDI) **2. Breach of Written Contract to**
CALIGUIRAN; JOSE CASTRO &) **Indemnify;**
PENELOPE CASTRO; EDUARDO) **3. Breach of Written Contract to Obtain**
CECENA & DARLENE CECENA; JOHN) **Insurance;**
CHACON & DONITA CHACON; BRETT) **4. Breach of Written Contract to Defend;**
COLTER; EDDIE FLORES & NATALIE) **5. Total Implied Indemnity;**
FLORES; MARK FUNK & GRACE) **6. Equitable Indemnity/Contribution;**
FUNK; LORI GARCIA; RICHARD) **7. Strict Liability;**
HANSEN & HERMELINDA HANSEN;) **8. Breach of Implied Warranty;**
DANIEL HENNESSY & LEANNE) **9. Breach of Express Warranty;**
HENNESSY; DAVID HERNANDEZ &) **10. Negligence;**
MARIA HERNANDEZ; MICHAEL) **11. Declaratory Relief;**
JANZEN & MICHELLE JANZEN;) **12. Declaratory Relief for Duty to**
ROBERT JOHNSON & EDITH) **Indemnify;**
JOHNSON; MICHAEL LAI & ANDREW) **13. Declaratory Relief for Duty to Obtain**
LAI; CHRIS LAPACIK & ROSEMARY) **Insurance; and**
LAPACIK; CHARLES LEWIS; ERNIE) **14. Declaratory Relief for Duty to Defend**
LUCERO & DIANA LUCERO; RODGER)

MOORE & LAURA MOORE; JULIE) Judge:
OVENSHERE; HAROLD POMEROY &) Dept.:
SUZANNE POMEROY; DWIGHT) Complaint Filed:
QUINONEZ & CINTHIA QUINONEZ;) Trial Date:
MAHMOUD RAZZAGHI; ALBERTO)
REYES & MARTINA SANCHEZ;)
STEVEN SCHEMMER; WILLIAM)
SCULLY & GRACE SCULLY; CARL)
STEPHENSON & LINDA)
STEPHENSON; WILLIAM STONE &)
YOUNG JA STONE;)

1 TIMOTHY STUBER & MARJORIE)
2 STUBER; CHRISTOPHER TAN; ERIC)
3 TARR & ANDREA TARR; RIMA)
4 THOMAS; ALLEN GOINES &)
5 MARICELA OCHOA; EDWARD LOPEZ)
6 & SCHERRY MESSIC; FERNANDO)
7 LEAL & KIMBERLY MARTINDALE;)
8 MARY LOU SOTO & ELVIRA TENA;)
9 AND ROBERT BLACKWELDER &)
10 YOLANDA GARCIA,)
11)
12 Plaintiffs,)
13)
14 v.)
15)
16 PACIFIC BAY PROPERTIES, A)
17 California Corporation; and DOES 1-1000,)
18 INCLUSIVE,)
19)
20 Defendants.)
21)
22)
23)
24)
25)
26)
27)
28)

PACIFIC BAY PROPERTIES, A)
California Corporation; and DOES 1-1000,)
INCLUSIVE,)
Cross-Complainant,)
v.)
RODRIGUEZ LANDSCAPE GRADING;)
PACIFIC WINDOW CORPORATION;)
KENNEDY MASONRY, INC.; JUST-)
STAR CONSTRUCTION, INC.; ROYAL)
CABINETS, INC.; WALKER WOOD)
PRODUCTS; THE JASPER)
COMPANIES; LJW TILE, INC., dba)
AMERICAN TILE.; CAL CUSTOM)
MANUFACTURING, LLC; MASCO)
CONTRACTOR SERVICES OF)
CALIFORNIA, INC., dba SCHMID)
INSULATION CONTRACTORS, INC.;)
SEAL ELECTRIC, INC.; R.E.M.)
CONCEPTS, INC., dba ABC WINDOW)
COMPANY; REGAL CULTURED)
MARBLE, INC.; INLAND PACIFIC)
MARBLE, INCORPORATED;)
SURECRAFT SUPPLY, INC.; C&M)
DOOR AND TRIM, INC.; KENWALL)
FIREPLACES, INC.; E.L. WEBSTER,)
INC., dba BATH CO SHOWER DOOR;)
BERNARD & HART, INC.; DOOSE)
LANDSCAPE INCORPORATED;)
PARAMOUNT R&R, INC.; VIKING)

1 PLUMBING, INC.; ALLIANCE)
 MECHANICAL HEATING AND AIR)
 2 CONDITIONING, INC.; NEW VISION)
 DRYWALL, INC., dba PERFORMANCE)
 3 PLUS DRYWALL; SAM COUTTS)
 PLASTERING, INC.; HEINTSCHEL)
 4 PLASTERING, INC.; SAN MARINO)
 PLASTERING, INC.; MASTER DESIGN)
 5 DRYWALL, INCORPORATED; R.A.)
 HUGHES ENTERPRISES, INC., dba)
 6 HUGHES HEATING & AIR)
 CONDITIONING; MACORD)
 7 CONSTRUCTION CORPORATION;)
 MAYER ROOFING, INC.; HONDO)
 8 CONSTRUCTION & DEVELOPMENT,)
 INC.; HNR FRAMING SYSTEMS, INC.;)
 9 GREG MINOR, INC., dba GREG MINOR)
 CONSTRUCTION, INC.; HACIENDA)
 10 ROOFING, INC.; SUN PLUMBING CO.,)
 INC.; E&D PAINTING, INC.; ED BOLEN)
 11 PAINTING CO., INC.; AMERICAN)
 DESIGN PAINTING AND DRYWALL,)
 12 INCORPORATED; FENCEWORKS,)
 INC., dba GOLDEN STATE FENCE CO.;)
 13 BAY SHEET METAL, INC.; MERLE)
 WILLIAMS & SONS CORP.; MUELLER)
 14 LEWIS CONCRETE, INC.; HONDO)
 ELECTRIC, INC.; TRIUMPH SHEET)
 15 METAL, INC.; HOMESTEAD SHEET)
 METAL; DARLAND PAINTING,)
 16 INCORPORATED; BENCHMARK)
 LANDSCAPE, INC.; SOUTHWEST T-)
 17 FOUR ENTERPRISES, INC., dba T-)
 FOUR TILE; JAMAR ELECTRIC, INC.;)
 18 C&H FRAMING; JUST-STAR)
 CONSTRUCTION, INC.; LAKEPOINT)
 19 WINDOW COMPANY, INC.; JELD-)
 WEN, INC., dba SUMMIT WINDOWS;)
 20 INTERIOR SPECIALISTS, INC.; and Roes)
 1-1000, inclusive,)
 21)
 Cross-Defendants.)
 22)

PRELIMINARY ALLEGATIONS

24 1. At all times herein mentioned, PACIFIC BAY PROPERTIES (hereinafter referred
 25 to as Cross-Complainant) was and is a California corporation, duly authorized to do business and
 26 is doing business in the County of San Diego, State of California.

27 ///

28 ///

2. Cross-Defendants, RODRIGUEZ LANDSCAPE GRADING; MASONRY, INC.; PACIFIC WINDOW CORPORATION; JUST-STAR CONSTRUCTION, INC.; ROYAL CABINETS, INC.; WALKER WOOD PRODUCTS; THE JASPER COMPANIES; LJW TILE, INC., dba AMERICAN TILE; CAL CUSTOM MANUFACTURING, LLC; MASCO CONTRACTOR SERVICES OF CALIFORNIA, INC., dba SCHMID INSULATION CONTRACTORS, INC.; SEAL ELECTRIC, INC.; R.E.M. CONCEPTS, INC., dba ABC WINDOW COMPANY; REGAL CULTURED MARBLE, INC.; INLAND PACIFIC MARBLE, INCORPORATED; SURECRAFT SUPPLY, INC.; C&M DOOR AND TRIM, INC.; KENWALL FIREPLACES, INC.; E.L. WEBSTER, INC., dba BATH CO SHOWER DOOR; BERNARD & HART, INC.; DOOSE LANDSCAPE INCORPORATED; PARAMOUNT R&R, INC.; VIKING PLUMBING, INC.; ALLIANCE MECHANICAL HEATING AND AIR CONDITIONING, INC.; NEW VISION DRYWALL, INC., dba PERFORMANCE PLUS DRYWALL.; SAM COUTTS PLASTERING, INC.; HEINTSCHEL PLASTERING, INC.; SAN MARINO PLASTERING, INC.; MASTER DESIGN DRYWALL, INCORPORATED; R.A. HUGHES ENTERPRISES, INC., dba HUGHES HEATING & AIR CONDITIONING; MACORD CONSTRUCTION CORPORATION; MAYER ROOFING, INC.; HONDO CONSTRUCTION & DEVELOPMENT, INC.; HNR FRAMING SYSTEMS, INC.; GREG MINOR, INC., dba GREG MINOR CONSTRUCTION, INC.; HACIENDA ROOFING, INC.; SUN PLUMBING CO., INC.; E&D PAINTING, INC.; ED BOLEN PAINTING CO., INC.; AMERICAN DESIGN PAINTING AND DRYWALL, INCORPORATED; FENCEWORKS, INC., dba GOLDEN STATE FENCE CO.; BAY SHEET METAL, INC.; MERLE WILLIAMS & SONS CORP.; MUELLER LEWIS CONCRETE, INC.; HONDO ELECTRIC, INC.; TRIUMPH SHEET METAL, INC.; HOMESTEAD SHEET METAL; DARLAND PAINTING, INCORPORATED; BENCHMARK LANDSCAPE, INC.; SOUTHWEST T-FOUR ENTERPRISES, INC., dba T-FOUR TILE.; JAMAR ELECTRIC, INC.; C&H FRAMING; JUST-STAR CONSTRUCTION, INC.; LAKEPOINT WINDOW COMPANY, INC; JELD-WEN, INC., dba SUMMIT WINDOWS; and INTERIOR SPECIALISTS, INC. are collectively sometimes referred to herein as "Cross-Defendants."

///

1 3. Cross-Complainant, PACIFIC BAY PROPERTIES, is sometimes referred to
2 herein as “Cross-Complainant.”

3 4. At all times herein mentioned, RODRIGUEZ LANDSCAPE GRADING was
4 a California business entity unknown duly authorized to do business and is doing business in the
5 County of San Diego, State of California.

6 5. At all times herein mentioned, PACIFIC WINDOW CORPORATION was and is a
7 California corporation duly authorized to do business and is doing business in the County of San
8 Diego, State of California.

9 6. At all times herein mentioned, KENNEDY MASONRY, INC. was and is a
10 California corporation duly authorized to do business and is doing business in the County of San
11 Diego, State of California.

12 7. At all times herein mentioned, JUST-STAR CONSTRUCTION, INC. was and is a
13 California corporation duly authorized to do business and is doing business in the County of San
14 Diego, State of California.

15 8. At all times herein mentioned, ROYAL CABINETS, INC was and is a California
16 corporation duly authorized to do business and is doing business in the County of San Diego, State
17 of California.

18 9. At all times herein mentioned, WALKER WOOD PRODUCTS was and is a
19 California corporation duly authorized to do business and is doing business in the County of San
20 Diego, State of California.

21 10. At all times herein mentioned, THE JASPER COMPANIES was and is a California
22 corporation duly authorized to do business and is doing business in the County of San Diego, State
23 of California.

24 11. At all times herein mentioned, LJW TILE, INC., dba AMERICAN TILE was and is
25 a California corporation duly authorized to do business and is doing business in the County of San
26 Diego, State of California.

27 ///

28 ///

1 12. At all times herein mentioned, CAL CUSTOM MANUFACTURING, LLC was a
2 California limited liability company duly authorized to do business and is doing business in the
3 County of San Diego, State of California.

4 13. At all times herein mentioned, MASCO CONTRACTOR SERVICES OF
5 CALIFORNIA, INC., dba SCHMID INSULATION CONTRACTORS, INC., was and is a
6 California corporation duly authorized to do business and is doing business in the County of San
7 Diego, State of California.

8 14. At all times herein mentioned, SEAL ELECTRIC, INC. was and is a California
9 corporation duly authorized to do business and is doing business in the County of San Diego, State
10 of California.

11 15. At all times herein mentioned, R.E.M. CONCEPTS, INC., dba ABC WINDOW
12 COMPANY was and is a California corporation duly authorized to do business and is doing business
13 in the County of San Diego, State of California.

14 16. At all times herein mentioned, REGAL CULTURED MARBLE, INC. was and is a
15 California corporation duly authorized to do business and is doing business in the County of San
16 Diego, State of California.

17 17. At all times herein mentioned, INLAND PACIFIC MARBLE, INCORPORATED
18 was a California corporation duly authorized to do business and is doing business in the County of
19 San Diego, State of California.

20 18. At all times herein mentioned, SURECRAFT SUPPLY, INC., was and is a California
21 corporation duly authorized to do business and is doing business in the County of San Diego, State
22 of California.

23 19. At all times herein mentioned, C&M DOOR AND TRIM, INC. was and is a
24 California corporation duly authorized to do business and is doing business in the County of San
25 Diego, State of California.

26 20. At all times herein mentioned, KENWALL FIREPLACES, INC. was and is a
27 California corporation duly authorized to do business and is doing business in the County of San
28 Diego, State of California.

1 21. At all times herein mentioned, E.L. WEBSTER, INC., dba BATH CO SHOWER
2 DOOR, was and is a California corporation duly authorized to do business and is doing business in
3 the County of San Diego, State of California.

4 22. At all times herein mentioned, BERNARD & HART, INC. was and is a California
5 corporation duly authorized to do business and is doing business in the County of San Diego, State
6 of California.

7 23. At all times herein mentioned, DOOSE LANDSCAPE INCORPORATED was and
8 is a California corporation duly authorized to do business and is doing business in the County of San
9 Diego, State of California.

10 24. At all times herein mentioned, PARAMOUNT R&R, INC. was a California
11 corporation duly authorized to do business and is doing business in the County of San Diego, State
12 of California.

13 25. At all times herein mentioned, VIKING PLUMBING, INC.. was and is a California
14 corporation duly authorized to do business and is doing business in the County of San Diego, State
15 of California.

16 26. At all times herein mentioned, ALLIANCE MECHANICAL HEATING AND AIR
17 CONDITIONING, INC. was and is a California corporation duly authorized to do business and is
18 doing business in the County of San Diego, State of California.

19 27. At all times herein mentioned, NEW VISION DRYWALL, INC., dba
20 PERFORMANCE PLUS DRYWALL was and is a California corporation duly authorized to do
21 business and is doing business in the County of San Diego, State of California.

22 28. At all times herein mentioned, SAMCOUTTS PLASTERING, INC. was a California
23 corporation duly authorized to do business and is doing business in the County of San Diego, State
24 of California.

25 29. At all times herein mentioned, HEINTSCHEL PLASTERING, INC. was a California
26 corporation duly authorized to do business and is doing business in the County of San Diego, State
27 of California.

28 ///

1 30. At all times herein mentioned, SAN MARINO PLASTERING, INC. was and is a
2 California corporation duly authorized to do business and is doing business in the County of San
3 Diego, State of California.

4 31. At all times herein mentioned, MASTER DESIGN DRYWALL, INCORPORATED
5 was and is a California corporation duly authorized to do business and is doing business in the
6 County of San Diego, State of California.

7 32. At all times herein mentioned, R.A. HUGHES ENTERPRISES, INC., dba HUGHES\
8 HEATING & AIR CONDITIONING was and is a California corporation duly authorized to do
9 business and is doing business in the County of San Diego, State of California.

10 33. At all times herein mentioned, MACORD CONSTRUCTION CORPORATION was
11 and is a California corporation duly authorized to do business and is doing business in the County
12 of San Diego, State of California.

13 34. At all times herein mentioned, MAYER ROOFING, INC. was and is a California
14 corporation duly authorized to do business and is doing business in the County of San Diego, State
15 of California.

16 35. At all times herein mentioned, HONDO CONSTRUCTION AND DEVELOPMENT,
17 INC. was and is a California corporation duly authorized to do business and is doing business in the
18 County of San Diego, State of California.

19 36. At all times herein mentioned, H.N.R. FRAMING SYSTEM, INC. was and is a
20 California corporation duly authorized to do business and is doing business in the County of San
21 Diego, State of California.

22 37. At all times herein mentioned, GREG MINOR, INC., dba GREG MINOR
23 CONSTRUCTION, INC., was a California corporation duly authorized to do business and is doing
24 business in the County of San Diego, State of California.

25 38. At all times herein mentioned, HACIENDA ROOFING, INC. was a California
26 corporation duly authorized to do business and is doing business in the County of San Diego, State
27 of California.

28 ///

1 39. At all times herein mentioned, SUN PLUMBING CO., INC. was a California
2 corporation duly authorized to do business and is doing business in the County of San Diego, State
3 of California.

4 40. At all times herein mentioned, E&D PAINTING, INC. was a California corporation
5 duly authorized to do business and is doing business in the County of San Diego, State of California.

6 41. At all times herein mentioned, ED BOLEN PAINTING CO., INC. was a California
7 corporation duly authorized to do business and is doing business in the County of San Diego, State
8 of California.

9 42. At all times herein mentioned, AMERICAN DESIGN PAINTING AND DRYWALL
10 INCORPORATED was a California corporation duly authorized to do business and is doing business
11 in the County of San Diego, State of California.

12 43. At all times herein mentioned, FENCEWORKS, INC. was and is a California
13 corporation duly authorized to do business and is doing business in the County of San Diego, State
14 of California.

15 44. At all times herein mentioned, BAY SHEET METAL, INC. was and is a California
16 corporation duly authorized to do business and is doing business in the County of San Diego, State
17 of California.

18 45. At all times herein mentioned, MERLE WILLIAMS & SONS CORP. was a
19 California corporation duly authorized to do business and is doing business in the County of San
20 Diego, State of California.

21 46. At all times herein mentioned, MUELLER LEWIS CONCRETE, INC. was and is a
22 California corporation duly authorized to do business and is doing business in the County of San
23 Diego, State of California.

24 47. At all times herein mentioned, HONDO ELECTRIC, INC. was and is a
25 California corporation duly authorized to do business and is doing business in the County of San
26 Diego, State of California.

27 ///

28 ///

1 48. At all times herein mentioned, TRIUMPH SHEET METAL, INC. was a California
2 corporation duly authorized to do business and is doing business in the County of San Diego, State
3 of California.

4 49. At all times herein mentioned, HOMESTEAD SHEET METAL was and is a
5 California corporation duly authorized to do business and is doing business in the County of San
6 Diego, State of California.

7 50. At all times herein mentioned, DARLAND PAINTING, INCORPORATED was
8 and is a California corporation duly authorized to do business and is doing business in the County
9 of San Diego, State of California.

10 51. At all times herein mentioned, BENCHMARK LANDSCAPE, INC. was
11 and is a California corporation duly authorized to do business and is doing business in the County
12 of San Diego, State of California.

13 52. At all times herein mentioned, SOUTHWEST T-FOUR ENTERPRISES, INC., dba
14 T-FOUR TILE was a California corporation duly authorized to do business and is doing business
15 in the County of San Diego, State of California.

16 53. At all times herein mentioned, JAMAR ELECTRIC, INC. was and is a California
17 corporation duly authorized to do business and is doing business in the County of San Diego, State
18 of California.

19 54. At all times herein mentioned, C&H FRAMING was a California general
20 partnership duly authorized to do business and is doing business in the County of San Diego, State
21 of California.

22 55. At all times herein mentioned, JUST-STAR CONSTRUCTION, INC was and is
23 California corporation authorized to do business and is doing business in the County of San Diego,
24 State of California.

25 56. At all times herein mentioned, LAKEPOINT WINDOW COMPANY, INC. was a
26 California corporation authorized to do business and is doing business in the County of San Diego,
27 State of California.
28

1 57. At all times herein mentioned, JELD-WEN, INC., dba SUMMIT WINDOWS was
2 a California corporation authorized to do business and is doing business in the County of San Diego,
3 State of California.

4 58. At all times herein mentioned, INTERIOR SPECIALISTS, INC. was
5 a California corporation authorized to do business and is doing business in the County of San Diego,
6 State of California.

7 59. Cross-Complainant does not know the true names and capacities of Cross-Defendants
8 sued as ROES 1 through 1000, inclusive, and will amend this Cross-Complaint to set forth their true
9 names and capacities when they have been ascertained. Cross-Complainant is informed and
10 believes, and thereon alleges, that each "Roe" cross-defendant was in some manner responsible for
11 Plaintiffs' or any other party's alleged damages, if any. The true names or capacities, whether
12 individual, corporate or associate, or otherwise, of cross-defendants ROES 1 through 1000 are in
13 some manner responsible for the events and happenings referred to herein and are liable to Cross
14 Complainant as hereinafter alleged for Plaintiffs' or any other party's complaints, in that they
15 designed, controlled, manufactured, constructed, supervised or otherwise participated in the building
16 of Plaintiffs' residences at the subject homes located in the City of San Diego, County of San Diego,
17 in nine separate projects (hereinafter referred to as "Homes").

18 60. Cross-Complainant is informed and believes, and thereon alleges, that at all relevant
19 times each of the Cross-Defendants was the principal, agent or employee of each of the other cross
20 defendants, and acted within the course and scope of that relationship.

21 61. Cross-Complainants are informed and believe and based upon such information and
22 belief, allege that at all relevant times hereto, they entered into standardized subcontracts with Cross-
23 Defendants and/or its affiliated companies of which it is a third party beneficiary, which included
24 the following obligations and conditions.

25 GENERAL CONTRACTOR-CONTRACTOR AGREEMENT

26 . . .

27 Statement of Work. General Contractor will be constructing the number of
28 dwelling units as referenced in line "C" above at the projects site referenced
in Lines "B" and "C" above located at the address shown on line "d" above

1 ("Project"). Contractor shall, at its expense, furnish all labor, materials,
2 equipment, tools, supplies, services, facilities, permits and competent
3 supervision and administration necessary for the complete and proper
4 performance of the work described in the Scope of Work and Specification
5 referred to in Section 2 below and generally described in line "M" as
6 referenced above (the "Work").

7 . . .

8 Contractor's Responsibility for the Work. Contractor accepts the relationship
9 of trust and confidence established with General Contractor hereunder and
10 covenants with General Contractor to furnish Contractor's best skill, efforts,
11 supervision and judgment in furthering the interest of General Contractor.
12 Contractor is solely responsible for supervising its own Work so that the
13 Work is performed in compliance with the Contract Documents; regardless
14 of General Contractor's right to approve and inspect the Work. Contractor
15 shall perform all Work that is reasonably

16 . . .

17 GENERAL CONDITIONS

18 Review Contract Documents and Project. Contractor represents and warrants
19 to General Contractor that, prior to the execution of the Contract Documents,
20 Contractor has thoroughly reviewed and is fully familiar with the Contract
21 Documents and all Laws, has investigated the Project and has, or prior to the
22 commencement of any Work will become fully acquainted with the
23 conditions existing at the Project. Contractor has observed no defects,
24 discrepancies or problems among the various Contract Documents or
25 between the Contract Documents and the Laws. Contractor shall
26 immediately seek direction from General Contractor. Contractor shall be
27 responsible for correcting any defects in the Work caused by not seeking or
28 following the General Contractor's directions. Before proceeding with the
Work, Contractor shall check and verify dimensions and sizes and the
accuracy and coordination of all lines, levels of measurements with Project
benchmarks, property lines, reference lines and dimensions. Contractor
agrees that, should any change in the Work be required by any government
agency with jurisdiction, such change shall be made by Contractor without
additional charge. No further variations from the specified lines, grades or
dimensions shall be made without the prior written consent of General
Contractor.

29 . . .

30 Employees and Supervision. During the progress of its Work, Contractor
31 shall furnish skilled labor and a qualified superintendent or a foreman to act
32 as a representative of Contractor at the Project site with the right and power
33 to bind Contractor. . . .

34 . . .

35 ///

62. In addition to the Cross-Defendants' obligations per the Agreement referenced above, each standardized contract contained general conditions which further confirmed and elaborated each Cross-Defendants' obligation to fully indemnify and defend Cross-Complainant, including its affiliated companies, as provided as follows.

Indemnity. To the fullest extent permitted by law, Contractor on behalf of itself, agents, employees, partners, officers and each Subcontractor, as such term is defined in the General Conditions (all of said parties are herein sometimes collectively referred to as the "Indemnitors"), **shall indemnify, protect, defend and hold General Contractor, the owner of the Project,** all parties designated by General Contractor as additional insureds in the Insurance Requirements, employees, partners, stockholders, officers, directors and anyone else acting for or on behalf of any of them (all of said parties are herein collectively referred to as "Indemnitees") harmless from and against all liabilities, debts, causes of action, damages, losses, claims, demands, actions and expenses of any nature whatsoever (including, but not limited to, attorneys' and expert witness fees and costs incurred at trial or on appeal), regardless of the theory of liability, including statutory, contractual, tort or strict liability (collectively, "claims and liabilities"), that may arise out of or with or are claimed to arise out of or in connection with: (i) the performance of the Work by the Indemnitors; (ii) any act or omission of the indemnitors, including, but not limited to, workers' claims, equal employment opportunity claims, unemployment claims, withholding claims and social security claims; (iii) the breach of any of the obligations of Indemnitors under the Contract Document;

. . .

(v) any and all liens, stop notices and charges of every type, nature, kind or description that may at any time be filed or claimed against an Indemnitee or the Project, or any portion thereof for Work which General Contractor has paid Contractor pursuant to the terms of the Contract Document as a consequence of the acts or omission of Indemnitors;

. . .

(viii) the failure of any Subcontractors to procure the policies of insurance required herein; provided, however, that Indemnitor shall not be obligated to indemnify an Indemnitee for any such claim or liability to the extent such claim or liability is the result of the sole negligence or willful misconduct of said Indemnitee.

Contractor hereby acknowledges and agrees that if any one or more claims or liabilities are asserted against the Indemnitees, giving rise to a duty to defend on the part of Indemnitors, General Contractor shall have the right to elect, in General Contractor's sole and absolute discretion, whether or not to contest any one or more of such claims or actions and Contractor shall be required to perform the obligations of Contractor set forth above regardless of whether General Contractor elects to contest such claims. If General Contractor elects to contest such claim, General Contractor shall have the right to select its own counsel and to control the Indemnitees' defense and Contractor shall bear the cost of employing such counsel and otherwise defending such claims. General Contractor shall have the right, at its option, upon notice to Contractor, to tender the Indemnitees' defense to Indemnitors and to approve such counsel as Contractor deems necessary to represent the

Indemnitees in connection with any claim or liability indemnified herein, and all fees and expenses of such counsel shall be the sole responsibility of Indemnitors. The Indemnitors' obligation to defend an Indemnatee shall not extend to any action, proceeding or arbitration that asserts or alleges only that the injury to the claimant resulted from the sole negligence or willful misconduct of the Indemnatee and from no other cause or if a final judgment is obtained establishing that such injury to the claimant resulted from the sole negligence or willful misconduct of an Indemnatee, in which latter event Indemnitors' sole obligation to defend such Indemnatee shall cease upon the date such judgment becomes final, and such Indemnatee shall thereupon reimburse the Indemnitors for their reasonable attorneys' fees and court costs in so defending such Indemnatee.

In the event more than one of the Indemnitors may be responsible for an accident or occurrence covered by this indemnification clause, then each of such Indemnitors shall be jointly and severally liable to the Indemnatee for indemnification and the ultimate responsibility among such Indemnitors for the claims and liabilities of any such indemnification shall be settled by separate proceedings and without jeopardy to any Indemnatee. The provisions of this Section shall survive the termination or expiration of this Agreement and shall not be affected in any way by the amount or type of insurance obtained by Indemnitees or Indemnitors. Contractor shall include this indemnification section in any and all contracts with Subcontractors.

. . .

GENERAL CONTRACTOR-CONTRACTOR AGREEMENT

. . .

In any action between the parties hereto seeking enforcement of any term or provision of the Contract Documents or in connection with the Project, the prevailing party in such action shall be entitled to recover from the other party its reasonable attorneys' fees and other reasonable expenses in connection with such action or proceeding (including expert witness fees and any such fees and expenses incurred on appeal) in addition to its recoverable court costs.

63. Cross-Complainants is informed and believes and on that basis alleges that Cross-Defendants and ROES 1 through 1000 were required to name Cross-Complainant and others, as additional insured under their policies of insurance and are to indemnify Cross-Complainant with respect to the claims made and costs incurred on behalf of Cross-Complainant, in defending against Plaintiffs' allegations as are more particularly described in the Complaint.

Insurance/Additional Insured

In addition and pursuant to your contractual agreement, you agreed to maintain general liability insurance naming my clients as additional insureds as follows:

1 Insurance. During the entire term of the Agreement Contractor shall
2 maintain in full force and effect the policies of insurance specified in the Insurance
3 Requirements.

4 . . .

5 INSURANCE REQUIREMENTS

6 1. COVERAGES. Prior to commencing any Work, Contractor shall, at
7 its sole cost and expense, fully comply with the terms and requirements of these
8 Insurance Requirements. Contractor and each Subcontractor shall maintain in full
9 force and effect during the entire period of construction, the following policies of
10 insurance written by insurance companies satisfactory to General Contractor.

11 . . .

12 (b) Commercial General Liability Insurance covering bodily
13 injury, property damage, personal injury and advertising injury written on a per-
14 occurrence and not a claims-made basis containing the following minimum limits:
15 (i) general aggregate limit of One Million Dollars (\$1,000,000.00); (ii) product-
16 completed operations aggregate limit of One million Dollars (\$1,000,000.00); (iii)
17 personal and advertising injury limit of One Million Dollars (\$1,000,000.00); and (iv)
18 each occurrence limit of One Million Dollars (\$1,000,000.00). Said policy shall
19 include the following coverages: (i) blanket contractual liability (specifically covering
20 the indemnification clause contained in the Contract Documents); (ii) all operations;
21 (iii) independent contractors; (iv) broad form property damage, including completed
22 operations; (v) severability of interest; (vi) cross liability; and (vii) property damage
23 liability arising out of the so-called "XCU" hazards (explosion, collapse and
24 underground hazards). The policy shall not have a deductible in excess of Five
25 Thousand Dollars (\$5,000.00).

26 . . .

27 2. General Provisions. All of the foregoing policies of insurance shall
28 be primary insurance and any insurance maintained by General Contractor, the owner
of the Project and the construction lender for the Project shall be excess and non-
contributing. Each insurer of Contractor and each Subcontractor shall waive all
rights of contribution and subrogation against General Contractor, the owner of the
Project and the construction lender for the Project and their respective insurers.

3. Additional Insured. Each of such policies of insurance shall name
General Contractor, the owner of the Project and each of their respective parent,
subsidiary and affiliated entities as additional insureds on an ISO Form CG 2010
(11/85 version) or substantially similar form and not an ISO Form CG 2009.

64. On or about June 9, 2009 Plaintiffs filed their initial Complaint. Thereafter, on
August 6, 2009, Plaintiffs filed an Amended Complaint ("operative complaint") for Strict Products
Liability, Strict Products Liability (Component Products), Breach of Implied Warranty
(Merchantability), Breach of Contract, Negligence, and Breach of Express Warranty against Cross-

1 Complainant. Cross-Complainant denies Plaintiffs' allegations and further denies that Plaintiffs are
2 entitled to any recovery whatsoever. The Plaintiffs' operative complaint is incorporated by reference
3 only for the purpose of illustrating its allegations, and not for the truth thereof.

4 65. Cross-Complainant denies that it was negligent or liable under any theory found in
5 Plaintiffs' operative Complaint or under any theory whatsoever, for the damages and/or injuries
6 allegedly suffered by Plaintiffs or any other party herein.

7 **FIRST CAUSE OF ACTION**

8 **(BREACH OF CONTRACT)**

9 66. Cross-Complainant re-alleges and incorporates by reference, paragraphs 1 through
10 65 of this Cross-Complaint as though fully set forth herein.

11 67. Cross-Defendants and ROES 1 through 1000 entered into standardized written
12 subcontracts with Cross-Complainant and/or its affiliated companies of which it is a third party
13 beneficiary, related to the development and construction of the relevant projects identified in
14 Plaintiffs' Complaint.

15 68. The subcontracts provided that every Cross-Defendant and ROES 1 through 1000
16 would fully indemnify and hold Cross-Complainant harmless from any and all liability or damages
17 incurred by Cross-Complainant arising from the actions, inactions, misfeasance and/or non-feasance
18 of the Cross-Defendants in connection with the construction of the relevant projects.

19 69. The subcontracts provided that every Cross-Defendant and ROES 1 through 1000
20 would fully defend at its own cost and expense and risk any and all suits, actions or other legal
21 proceedings of any character, whatsoever, that may be brought or instituted against Cross-
22 Complainant.

23 70. The subcontracts required that every Cross-Defendant and ROES 1 through 1000
24 would obtain and pay for insurance on behalf of Cross-Complainant in conjunction with their work
25 under the subcontract, including naming Cross-Complainant as "Additionally Insured" and obtaining
26 certificates of insurance evidencing same.

27 ///

28 ///

1 71. The subcontracts required that every Cross-Defendant and ROES 1 through 1000
2 perform its work in a “first class” manner, and in accordance with the plans, manufacturer’s
3 specifications, building codes and all applicable laws.

4 72. Pursuant to the subcontracts, Cross-Defendants and ROES 1 through 1000 engaged
5 in some or all of the designing, manufacturing, constructing, installing, supervising, and/or other acts
6 and omissions complained of in Plaintiffs’ Complaint. Cross-Complainant has at all times
7 performed and complied with all conditions and obligations required of them pursuant to the
8 subcontracts, and are entitled to enforce the subcontracts.

9 73. Cross-Complainant is informed and believes, and on that basis alleges, that Cross-
10 Defendants and ROES 1 through 1000 breached the aforementioned subcontracts in one or more of
11 the following ways:

- 12 (a) By refusing and failing to indemnify Cross-Complainant;
- 13 (b) By refusing to defend Cross-Complainant;
- 14 (c) By failing to obtain and maintain insurance meeting the requirements of the
15 subcontracts;
- 16 (d) By failing to perform their work in strict compliance with subcontract, the
17 plans, specifications and amenities, manufacturer’s recommendations,
18 requirements of the City of Chula Vista and other applicable local and state
19 ordinances, and the applicable building codes;
- 20 (e) By failing to maintain the skill, experience, skilled employees and other
21 workers, materials, equipment and/or tools necessary to perform the work as
22 required under the subcontract; and/or
- 23 (f) By unnecessarily deviating from the plans and/or specifications.

24 74. As a direct and proximate result of Cross-Defendants’ and ROES 1 through 1000’s
25 breach of the subcontracts, Cross-Complainant is informed and believes, and on that basis alleges,
26 that it has been damaged in a sum which is currently undetermined but to be proven at trial, but
27 which is directly related to defending against Plaintiffs’ Complaint, including incurring attorneys’

28 ///

1 fees, expert fees, litigation costs, and in the event of settlement or judgment indemnification costs
2 to Plaintiffs.

3 75. Cross-Complainant has retained the services of Grimm, Vranjes, McCormick &
4 Graham, LLP to defend them against the allegations of Plaintiffs' Complaint hereby incurring
5 ongoing costs and attorneys' fees in the defense of Plaintiffs' action and in the prosecution of this
6 Cross-Complaint. Cross-Complainant will provide proof to show the amount of the ongoing costs
7 and attorneys' fees at the time of trial.

8 **SECOND CAUSE OF ACTION**

9 **(BREACH OF WRITTEN CONTRACT TO INDEMNIFY)**

10 76. Cross-Complainant re-alleges and incorporates by reference paragraphs 1 through
11 75 of this Cross-Complaint as though fully set forth herein.

12 77. Cross-Defendants and ROES 1 through 1000 entered into written subcontracts with
13 Cross-Complainant its affiliated companies and/or agents. Each subcontract entered into provided
14 that Cross-Defendants and ROES 1 through 1000 would fully defend and indemnify and hold Cross-
15 Complainant harmless from any and all liability or damages incurred by Cross-Complainant arising
16 from the actions, inactions, misfeasance and/or nonfeasance of the Cross-Defendants and ROES 1
17 through 1000 related to their work under the subcontracts and related to the development of the
18 related projects.

19 78. Pursuant to the subcontracts, Cross-Defendants and ROES 1 through 1000 engaged
20 in some or all of the designing, manufacturing, constructing, installing, supervising and/or other acts
21 and omissions complained of in Plaintiffs' Complaint. Cross-Complainant has at all times hereto
22 performed and complied with all conditions and obligations required of them pursuant to the
23 subcontracts, and are entitled to enforce the subcontracts.

24 79. As a direct and proximate result of Cross-Defendants' and ROES 1 through 1000's
25 breach of their contractual duty to defend and indemnify, Cross-Complainant is informed and
26 believes, and on that basis alleges, that it has been damaged in a sum which is currently
27 undetermined but to be proven at trial, but which is directly related to defending against Plaintiffs'

28 ///

1 Complaint, including incurring attorneys' fees, expert fees, litigation costs, and in the event of
2 settlement or judgment indemnification costs to Plaintiffs.

3 80. Cross-Complainant has retained the services of Grimm, Vranjes, McCormick &
4 Graham, LLP to defend it against the Plaintiffs' Complaint hereby incurring ongoing costs and
5 attorneys' and expert fees in the defense of Plaintiffs' action and in the prosecution of this Cross-
6 Complaint. Cross-Complainant will provide proof to show the amount of the ongoing costs and
7 attorneys' fees at the time of trial.

8 **THIRD CAUSE OF ACTION**

9 **(BREACH OF WRITTEN CONTRACT TO OBTAIN INSURANCE)**

10 81. Cross-Complainant re-alleges and incorporates by reference paragraphs 1 through
11 80 of this Cross-Complaint as though fully set forth herein.

12 82. Cross-Defendants entered into written subcontracts with Cross-Complainant, its
13 affiliated companies and/or agents. Each subcontract entered into provided that Cross-Defendants
14 and ROES 1 through 1000 would obtain and pay for insurance for Cross-Complainant, including the
15 obligation to name Cross-Complainant as "Additional Insured" and to submit the necessary
16 certificates of insurance evidencing said insurance.

17 83. Pursuant to the subcontracts, Cross-Defendants and ROES 1 through 1000 engaged
18 in some or all of the designing, manufacturing, constructing, installing, supervising and/or other acts
19 and omissions complained of in Plaintiffs' Complaint. Cross-Complainant has at all times hereto
20 performed and complied with all conditions and obligations required of them pursuant to the
21 subcontracts, and are entitled to enforce the subcontracts.

22 84. Cross-Defendants and ROES 1 through 1000 have breached their subcontracts given
23 their failure to obtain the necessary insurance on behalf of Cross-Complainant, including failing to
24 name Cross-Complainant as "Additionally Insured."

25 85. As a direct and proximate result of Cross-Defendants' and ROES 1 through 1000's
26 breach of the subcontracts, specifically the failure to name Cross-Complainant as "Additionally
27 Insured," Cross-Complainant is entitled to damages from the Cross-Defendants and ROES 1 through
28 1000 for all litigation costs they must pay "out-of-pocket," including attorneys' fees, experts fees and

costs, incurred by Cross-Complainant as a result of defending against Plaintiffs' Complaint. In addition, to the extent that Cross-Complainant pays money to Plaintiffs, either by judgment or settlement, to resolve Plaintiffs' claims, then Cross-Complainant will seek as damages any settlement or judgment paid to Plaintiffs due to Cross-Defendants' and ROES 1 through 1000's failure to obtain the necessary insurance on behalf of Cross-Complainant.

FOURTH CAUSE OF ACTION

(BREACH OF WRITTEN CONTRACT TO DEFEND)

86. Cross-Complainant refers to and incorporates herein by this reference, paragraphs 1 through 85 of this Cross-Complaint as though fully set forth herein.

87. Cross-Defendants and ROES 1 through 1000 entered into written subcontracts with Cross-Complainant, its affiliated companies and/or agents. Each subcontract entered into provided that Cross-Defendants and ROES 1 through 1000 would fully defend at its own cost and expense and risk any and all suits, actions or other legal proceedings of any character, whatsoever, that may be brought or instituted against Cross-Complainant.

88. Pursuant to the subcontracts, Cross-Defendants and ROES 1 through 1000 engaged in some or all of the designing, manufacturing, constructing, installing, supervising and/or other acts and omissions complained of in Plaintiffs' Complaint. Cross-Complainant has at all times hereto performed and complied with all conditions and obligations required of them pursuant to the subcontracts, and are entitled to enforce the subcontracts.

89. As a direct and proximate result of Cross-Defendants' and ROES 1 through 1000's breach of their contractual duty to defend, Cross-Complainant is informed and believes, and on that basis allege, that they have been damaged in a sum which is currently undetermined but to be proven at trial, but which is directly related to defending against Plaintiffs' Complaint, including incurring attorneys' fees, expert fees, litigation costs, and in the event of settlement or judgment indemnification costs to Plaintiffs.

90. Cross-Complainant has retained the services of Grimm, Vranjes, McCormick & Graham, LLP to defend it against the Plaintiffs' Complaint hereby incurring ongoing costs and attorneys' and expert fees in the defense of Plaintiffs' action and in the prosecution of this Cross-

1 Complaint. Cross-Complainant will provide proof to show the amount of the ongoing costs and
2 attorneys' fees at the time of trial.

3 **FIFTH CAUSE OF ACTION**
4 **(TOTAL IMPLIED INDEMNITY)**

5 91. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1
6 through 90 of this Cross-Complaint as though set forth herein.

7 92. Cross-Complainant contends that if it is held liable, which liability is specifically
8 denied, then each Cross-Defendant and ROES 1 through 1000 is primarily and actively responsible
9 and negligent or otherwise responsible in causing or bringing about the alleged injuries to Plaintiffs
10 or any other party herein. Any liability of Cross-Complainant, which is specifically denied, will be
11 imputed on the basis of vicarious or secondary liability and not as a result of any active negligence,
12 breach of warranty, breach of contract or any other act on the part of Cross-Complainant.

13 93. By reason of the foregoing, if Plaintiffs or any other party herein recover against
14 Cross-Complainant, then Cross-Complainant is entitled to be indemnified from Cross-Defendants,
15 and ROES 1 through 1000 and each of them, for injuries and damages sustained by Cross-
16 Complainant, if any, for any sums paid by way of settlement, or, in the alternative, judgment
17 rendered against Cross-Complainant, including, but not limited to, reasonable attorneys' fees, costs
18 of suit and such further and other relief as the Court may deem as just and proper.

19 **SIXTH CAUSE OF ACTION**
20 **(EQUITABLE INDEMNITY/CONTRIBUTION)**

21 94. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1
22 through 93 of this Cross-Complaint as though fully set forth herein.

23 95. Cross-Complainant contends that if it is held liable to Plaintiffs or any other party
24 herein in any ascertainable percentage, or pay any settlement, then Cross-Complainant is entitled to
25 equitable indemnification, apportionment of liability and contribution among and from the Cross-
26 Defendants, and ROES 1 through 1000 and each of them, and Cross-Complainant seeks that said
27 Cross-Defendants and ROES 1 through 1000 be ordered to reimburse Cross-Complainant herein for
28 each of their proportionate responsibilities for any said injuries and/or damages paid by way of

1 judgment and/or settlement to Plaintiffs or any other party herein. Said indemnification/contribution
2 representing that portion of liability, settlement monies or judgment, paid in excess of the degree to
3 which Cross-Complainant's culpability, fault or responsibility, if any, contributed to the damages
4 as alleged in Cross-Complainant's Cross-Complaint, if any there were. Said relief to include, but
5 not limited to, reasonable attorneys' fees, costs of suit, and such other and further relief as the Court
6 may deem as just and proper.

7 **SEVENTH CAUSE OF ACTION**

8 **(STRICT LIABILITY)**

9 96. Cross-Complainants refer to and incorporate herein each and every allegation
10 contained in paragraphs 1 through 95 above.

11 97. Cross-Complainant is informed and believes and thereupon alleges that Cross-
12 Defendants, and ROES 1 through 1000 and each of them, at all times herein mentioned were in the
13 business of designing, manufacturing, constructing, assembling, distributing and/or supplying
14 building materials, within San Diego County, California, and selling them to members of the public
15 at large.

16 98. Within the last ten years, Cross-Defendants and ROES I through 1000 designed,
17 manufactured, constructed, assembled, distributed and/or supplied building materials and mass
18 produced building materials and/or component parts and/or otherwise participated in the stream of
19 commerce for sale of these building materials.

20 99. At all times herein mentioned and material hereto, Cross-Defendants and ROES 1
21 through 1000 knew and intended that the finished product would be purchased by members of the
22 public at large, and used by them without further inspection for defects.

23 100. Cross-Defendants and ROES I through 1000 manufactured, assembled, distributed
24 and/or supplied the building materials for installation in the homes that are the subject matter of the
25 operative Complaint.

26 101. Plaintiffs' operative Complaint alleges that at the time of completion of the homes,
27 the materials supplied to the project by Cross-Defendants and ROES 1 through 1000, were allegedly
28 defective and unfit for their intended purposes. The materials manufactured, assembled, distributed

1 and/or supplied by Cross-Defendants and ROES I through 1000 were allegedly not produced in a
2 workmanlike manner as manifested by, but not limited to, the following alleged defects, as set forth
3 in Plaintiffs' operative Complaint:

- 4 (A) Faulty soil compaction, faulty existing underlying soils and expansive soils
5 resulting in soil movement and damage to the structure and systems;
- 6 (B) Faulty design, construction, and installation of concrete slabs, flatwork and
7 foundation;
- 8 (C) Faulty design, construction and installation of the plumbing system;
- 9 (D) Faulty design, construction and installation of interior electrical systems and
10 lighting systems;
- 11 (E) Faulty design, construction and installation of the exterior electrical systems;
- 12 (F) Faulty design, construction and installation of grading and drainage systems;
- 13 (G) Faulty design, construction and installation of all exterior surfaces;
- 14 (H) Faulty design, construction and installation of roofs;
- 15 (I) Faulty design, construction installation of air conditioning, heating, and ventilation
16 systems;
- 17 (J) Faulty design, construction and installation of balconies and decks;
- 18 (K) Faulty design, construction and installation of doors, sliding doors and garage;
- 19 (L) Faulty design, construction and installation of windows;
- 20 (M) Faulty design, construction and installation of landscaping and irrigation system;
- 21 (N) Faulty design, construction and installation of framing, siding and structural
22 members;
- 23 (O) Faulty design, construction and installation of below-grade waterproofing;
- 24 (P) Faulty design, construction and installation of ceramic tile and vinyl flooring
25 and countertops;
- 26 (Q) Faulty design, construction and installation of drywall;
- 27 (R) Faulty design, construction and installation of fences, retaining walls and
28 decorative walls;

(S) Faulty design, construction and installation of cabinets and wood trim;
(T) Faulty design, construction and installation of fireplaces and chimneys;
(U) Faulty design, construction and installation of rain gutters and downspouts;
(V) Faulty design, construction and installation of tubs and shower doors;
(W) Faulty design, construction and installation of painting;
(X) Faulty design, construction and installation of sheet metal;
(Y) Faulty design, construction and installation of stucco;
(Z) faulty design, construction and installation of brick, stone and masonry
veneer; and
(AA) Faulty design, construction and installation of insulation.

102. As a direct result of the allegedly defective conditions of the project as so alleged by Plaintiffs in their operative Complaint, Cross-Complainant has been specifically damaged in that Cross-Complainant will be forced to incur expenses for the restoration and repairs of the project to cure the alleged defects and/or deficiencies as so set forth in Plaintiffs' operative Complaint. Further, Cross-Complainant has been forced to retain expert consultants to assist in determining the scope of the alleged damage and the potential method of repairing the alleged defects.

103. Cross-Defendants and ROES 1 through 1000, as material suppliers of mass produced building materials placed within the stream of commerce, are strictly liable and responsible to Cross-Complainant for all damage suffered as a result of the above described alleged defects and deficiencies in the project.

EIGHTH CAUSE OF ACTION
(BREACH OF IMPLIED WARRANTY)

104. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1 through 103 of this Cross-Complaint as though fully set forth herein.

105. Cross-Complainant is informed and believes and thereupon alleges that each of the Cross-Defendants and ROES 1 through 1000 impliedly warranted that the work performed and/or materials manufactured or supplied by each was designed and constructed in a reasonably

///

workmanlike manner and was of merchantable quality and safe and fit for their foreseeable or intended use.

106. Cross-Complainant relies on the skill and judgment of the Cross-Defendants, ROES 1 through 1000, and each of them, in installing their products and in performing their services in the construction and design of the project and said products and services were used in a reasonably foreseeable or intended manner.

107. Plaintiffs have alleged that Cross-Complainant is somehow liable for the damage, if any, that they have asserted. Cross-Complainant, by way of their Answer, have denied and continue to deny the allegations of their liability and have asserted the appropriate affirmative defenses. If, however, at the trial of this action, it should be determined that Cross-Complainant is in some manner responsible to Plaintiffs, then Cross-Complainant is informed and believes and upon such information and belief alleges that the proximate cause of Plaintiff's damage, if any, was the fact that the design and/or installation of the aforementioned homes and/or components thereof were not of merchantable quality or designed or constructed in a reasonably workmanlike manner, or safe and fit for its foreseeable or intended use, as warranted by each of the Cross-Defendants and ROES 1 through 1000.

108. Cross-Complainant intends this Cross-Complaint to constitute notice to the Cross-Defendants and ROES 1 through 1000, and each of them, of the breach of said implied warranty.

109. As a direct and proximate result of the breach of implied warranty by the Cross-Defendants and ROES 1 through 1000, and each of them, Cross-Complainant has incurred and continues to incur considerable expense in defense of this suit and may have to pay all or part of any recovery realized by Plaintiffs, and, therefore, have suffered damages which will be demonstrated at trial according to proof.

NINTH CAUSE OF ACTION

(BREACH OF EXPRESS WARRANTY)

110. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1 through 109 of this Cross-Complaint as though fully set forth herein.

///

1 111. Cross-Complainant is informed and believes and thereupon alleges that each of the
2 Cross-Defendants and ROES 1 through 1000 expressly warranted that the work performed and/or
3 materials manufactured or supplied by each was performed in a reasonably workmanlike manner and
4 was of reasonable quality and safe and fit for their foreseeable or intended use.

5 112. Cross-Complainant relies on the skill and judgment of each of the Cross-Defendants,
6 ROES 1 through 1000, and each of them, in installing their products and in performing their services
7 in the construction and design of the project and said products and services were used in a reasonably
8 foreseeable or intended manner.

9 113. Plaintiffs have alleged that Cross-Complainant is somehow liable for the damage, if
10 any, that they have asserted. Cross-Complainant, by way of its Answer, has denied and continues to
11 deny the allegations of its liability and has asserted the appropriate affirmative defenses. If, however,
12 at the trial of this action, it should be determined that Cross-Complainant is in some manner
13 responsible to Plaintiffs, then Cross-Complainant is informed and believes and upon such
14 information and belief alleges that the proximate cause of Plaintiffs' damage, if any, was the fact that
15 the design and/or installation of the aforementioned homes and/or components thereof was not of
16 merchantable quality or designed or constructed in a reasonably workmanlike manner, or safe and
17 fit for its foreseeable or intended use, as warranted by each of the Cross-Defendants and ROES 1
18 through 1000.

19 114. Cross-Complainant intends this Cross-Complaint to constitute notice to each of the\
20 Cross-Defendants and ROES 1 through 1000, and each of them, of the breach of said express
21 warranty.

22 115. As a direct and proximate result of the breach of express warranty by each of the
23 Cross-Defendants and ROES 1 through 1000, and each of them, Cross-Complainant has incurred
24 and continues to incur considerable expense in defense of this suit and may have to pay all or part
25 of any recovery realized by Plaintiffs, and, th

26 ///

27 ///

28 ///

1 **TENTH CAUSE OF ACTION**

2 **(NEGLIGENCE)**

3 116. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1
4 through 115 of this Cross-Complaint as though fully set forth herein.

5 117. Cross-Complainant is informed and believes and thereupon alleges that Cross-
6 Defendants, and ROES 1 through 1000 and each of them, owed a duty of care to Cross-Complainant
7 to perform work or manufacture and/or supply materials, in a reasonably workmanlike manner and
8 in a manner which does not fall below the standard of care in the industry.

9 118. Cross-Complainant is informed and believes and thereupon alleges that Cross-
10 Defendants, and ROES 1 through 1000 and each of them, breached said duty of care by performing
11 work or manufacturing and/or supplying materials which fell below the applicable standard of care
12 in the industry and/or by failing to perform work in a reasonably workmanlike manner.

13 119. As a direct and proximate result of Cross-Defendants' and ROES 1 through 1000
14 breach of said duty of care, Cross-Complainant has been damaged in a sum which is currently
15 unascertainable. Cross-Complainant will seek leave of Court to amend this Cross-Complaint when
16 such sums can be reasonably be ascertained.

17 120. Cross-Complainant is informed and believes and thereupon alleges that Cross-
18 Defendants, and ROES 1 through 1000 and each of them, negligently, carelessly and wrongfully
19 failed to use reasonable care in the design, development, manufacture, supervision, maintenance,
20 repair, supply of materials, installation, inspection and/or construction of the subject homes at issue
21 in Plaintiffs' operative Complaint.

22 121. Cross-Complainant is informed and believes and thereupon alleges that Cross-
23 Defendants, and each of them, including ROES 1 through 1000, negligently and carelessly failed to
24 exercise reasonable care and diligence to avoid loss and to minimize and mitigate damages which
25 could have been prevented by reasonable efforts on the part of said Cross-Defendants and ROES 1
26 through 1000, or by expenditures which should have been made in the exercise of due care.

27 ///

28 ///

1 122. Cross-Complainant is informed and believes and thereupon alleges that the failures
2 and damages alleged by Plaintiffs occurred because of the negligence of Cross-Defendants, and
3 ROES 1 through 1000 and each of them.

4 123. As a direct and proximate result of the negligence of Cross-Defendants, and each of
5 them, including ROES 1 through 1000, it is herein alleged that Cross-Complainant has incurred and
6 continues to incur costs and expenses including, but not limited to, litigation costs, attorneys' fees
7 and consultant' fees for inspection, repair, and mitigation of damages arising out of said alleged
8 negligent design, construction, repair and maintenance and to defend against Plaintiffs' allegations.

9 **ELEVENTH CAUSE OF ACTION**

10 **(DECLARATORY RELIEF)**

11 124. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1
12 through 123 of this Cross-Complaint as though fully set forth herein.

13 125. An actual controversy exists between Cross-Complainant and Cross-Defendants, and
14 ROES 1 through 1000 and each of them, whereby Cross-Complainant contends that it is entitled to
15 equitable indemnification and/or contribution for the payment of judgment, payment of settlement
16 or assessment of any liability from Cross-Defendants, and ROES 1 through 1000 and each of them,
17 in the total implied indemnification amount referenced in the second cause of action of this cross-
18 complaint or, alternatively, an amount proportionate to the percentage of fault or the responsibility
19 of Cross-Defendants, and ROES 1 through 1000 and each of them, which bears relationship to the
20 whole of the fault or responsibility of all parties or persons determined to be legally responsible for
21 the injuries and damages, if any there were, suffered by Plaintiffs, any other party herein, or Cross-
22 Complainant in the underlying action.

23 126. Cross-Complainant is informed and believes and thereupon alleges that Cross-
24 Defendants, and ROES 1 through 1000 and each of them, deny that they are in any way responsible
25 for the events as alleged in Plaintiffs' operative Complaint and that they will further deny that Cross-
26 Complainants are entitled to equitable indemnity and/or contribution.

27 127. Cross-Complainant further desires a declaration that it is entitled to total implied
28 indemnity, equitable indemnification and/or indemnity from Cross-Defendants, and ROES 1 through

1 1000 and each of them, wherein the Court, or trier of fact, may set forth a percentage or ratio of fault,
2 culpability or responsibility for the Plaintiffs' or any other party's damages, if any there are, among
3 all parties to the operative Complaint and Cross-Complaint.

4 **TWELFTH CAUSE OF ACTION**

5 **(DECLARATORY RELIEF FOR DUTY TO INDEMNIFY)**

6 128. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1
7 through 127 of this Cross-Complaint as though fully set forth herein.

8 129. A dispute and actual controversy has arisen and now exists between Cross-
9 Complainant and Cross-Defendants and ROES 1 through 1000 as to whether Cross-Defendants and
10 ROES 1 through 1000 must indemnify Cross-Complainant.

11 130. Cross-Complainant requests a judicial declaration of the parties' respective rights
12 and duties regarding Cross-Defendants' and ROES 1 through 1000s' obligations to indemnify Cross-
13 Complainant.

14 **THIRTEENTH CAUSE OF ACTION**

15 **(DECLARATORY RELIEF FOR DUTY TO OBTAIN INSURANCE)**

16 131. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1
17 through 130 of this Cross-Complaint as though fully set forth herein.

18 132. A dispute and actual controversy has arisen and now exists between Cross-
19 Complainant and Cross-Defendants and ROES 1 through 1000 as to whether these Cross-Defendants
20 and ROES 1 through 1000 had a duty to provide insurance for Cross-Complainant.

21 133. Cross-Complainant therefore requests a judicial declaration of the parties' respective
22 rights and duties regarding the provision of insurance.

23 **FOURTEENTH CAUSE OF ACTION**

24 **(DECLARATORY RELIEF FOR DUTY TO DEFEND)**

25 134. Cross-Complainant refers to and incorporates herein by this reference paragraphs 1
26 through 133 of this Cross-Complaint as though fully set forth herein.

27 ///

28 ///

1 135. A dispute and actual controversy has arisen and now exists between Cross-
2 Complainant and Cross-Defendants and ROES 1 through 1000 as to whether Cross-Defendants and
3 ROES 1 through 1000 must defend Cross-Complainant.

4 136. Cross-Complainant requests a judicial declaration of the parties' respective rights
5 and duties regarding Cross-Defendants' and ROES 1 through 1000s' obligations to defend Cross-
6 Complainant.

7 WHEREFORE, Cross-Complainant prays for judgment against Cross-Defendants, and ROES
8 1 through 1000 and each of them as follows:

9 1. For consequential damages according to proof at trial;

10 2. That this Court declare that Cross-Complainant is entitled to equitable
11 indemnification and/or contribution from Cross-Defendants, and ROES 1 through 1000 and each of
12 them, for that proportion of damages as their fault or responsibility, if any, bears to the total
13 amount of fault or legal responsibility of the parties herein or entities and/or individuals legally
14 responsible but not a party, in the amount of monies that said proportion will equal;

15 3. That this Court declare that Cross-Complainant is entitled to total implied indemnity
16 from Cross-Defendants, and ROES 1 through 1000 and each of them, for any and all damages
17 assessed against Cross-Complainant;

18 4. For judicial declaration of parties' rights and obligations under their respective
19 contracts regarding the duty to defend, indemnify and procure insurance;

20 5. For judicial declaration of parties' rights and obligations in the amount and degree
21 of fault; proportion of share owed; and any of Cross-Complainant's expenses and attorney's fees;
22 and

23 6. For such other and further relief as the Court may deem just and proper

24 Dated: November 23, 2009

GRIMM VRANJES
McCORMICK & GRAHAM, LLP

25
26 By: Mark Vranjes

MARK VRANJES
Attorney for Defendants/Cross-Complainant
PACIFIC BAY PROPERTIES

27
28 S:\Cases\300952\pld\x-c.wpd

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:)	
	)	Chapter 11
BUILDING MATERIALS HOLDING)	
CORPORATION, <i>et al.</i>,¹	)	Case No. 09-12074 (KJC)
)	
Reorganized Debtors.	)	Jointly Administered
)	
)	

**ORDER GRANTING MOTION OF PACIFIC BAY PROPERTIES FOR RELIEF FROM
THE PLAN INJUNCTION OR, IN THE ALTERNATIVE, FOR RELIEF FROM THE
AUTOMATIC STAY TO PERMIT CONTINUATION OF STATE COURT LITIGATION**

AND TO WIT, having duly considered Pacific Bay Properties' Motion for Relief From the Plan Injunction, or, in the Alternative, Relief From the Automatic Stay, To Permit Continuation of State Court Litigation (the "**Motion**") and all responses thereto;

IT IS ORDERED this ____ day of _____, 2010 that the Motion is GRANTED.

Hon. Kevin J. Carey
United States Bankruptcy Judge

¹ The Reorganized Debtors, along with the last four digits of each Reorganized Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Reorganized Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:)	
	)	Chapter 11
BUILDING MATERIALS HOLDING)	
CORPORATION, <i>et al.</i>,¹	)	Case No. 09-12074 (KJC)
)	
Reorganized Debtors.	)	Jointly Administered
)	
	)	Hearing Date: March 24, 2010 at 10:00 a.m.
	)	Objection Deadline: March 17, 2010 at 4:00 p.m.

CERTIFICATE OF SERVICE

I Marc S. Casarino, Esquire, hereby certify that on this 4th day of February, 2010, I caused a copy of the foregoing *Motion for Relief from the Plan Injunction or, in the Alternative, for Relief from the Automatic Stay to Permit Continuation of State Court Litigation* to be served via First Class Mail on parties listed on the attached service list and electronically via FRBP Rule 2002 and Local Rule 2001 available on ECF/PACER.

/s/ Marc S. Casarino
MARC S. CASARINO

¹ The Reorganized Debtors, along with the last four digits of each Reorganized Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Reorganized Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

Service List

Allison N. Cooper, Esquire
Marks Colia & Finch LLP
8620 Spectrum Center Blvd., Suite 900
San Diego, CA 92123

Donald J. Bowman, Jr., Esquire
Young Conaway Stargatt & Taylor
1000 West Street, 17th Floor
Wilmington, DE 19801

Scott K. Brown, Esquire
Lewis and Roca LLP
40 North Central Avenue, Suite 1900
Phoenix, AZ 85004

Vicki Lauren Shoemaker, Esquire
Marshall Dennehey Warner Coleman & Goggin
1220 N. Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899

Bradford J. Sandler, Esquire
Benesch Friedlander Coplan & Aronoff
222 Delaware Avenue, Suite 801
Wilmington, DE 19801

Brian K. Cuttone, Esquire
1233 W. Shaw Avenue, Suite 100
Fresno, CA 93711

Robert F. Poppiti, Jr., Esquire
Young Conaway Stargatt & Taylor
1000 West Street, 17th Floor
Wilmington, DE 19801

Sean Matthew Beach, Esquire
Young Conaway Stargatt & Taylor
1000 West Street, 17th Floor
Wilmington, DE 19801

United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19899

Christopher J. Giaimo, Esquire
Arent Fox, PLLC
1050 Connecticut Avenue, NW
Washington, DC 20036-5339