

## **SETTLEMENT AND RELEASE AGREEMENT**

This Settlement and Release Agreement (hereinafter referred to as the "Settlement Agreement") is made and entered into by and between the following parties:

1. Plaintiff State Farm General Insurance Company (hereinafter, "State Farm");
2. Plaintiff USAA Casualty Insurance Company (hereinafter, "USAA");
3. Plaintiff Mary Deborah Johns;
4. Plaintiff Kurtis F. Barnes;
5. Defendant, cross-complainant, and cross-defendant Moss Equipment Rental and Mark Moss (collectively, "Moss"); and
6. Defendant, cross-complainant, and cross-defendant City of Redlands (hereinafter, "Redlands").
7. Defendant and cross-defendant Pacific Crest Communities ("Pacific Crest")

"Parties" means and refers to all of the above entities collectively. State Farm, USAA, Mary Deborah Johns and Kurtis F. Barnes will collectively be referred to as the "Plaintiffs", and Moss and Redlands will collectively be referred to as the "Contributing Defendants".

The Settlement Agreement is made effective on the day the last party signs the Settlement Agreement, pursuant to the following facts:

### **A. RECITALS**

1. This action arises out of claims for damage arising out of a ruptured water main owned and operated by defendant Redlands. The water main in question is located near the corner of a residential construction site bordered by Sand Canyon Road and 16<sup>th</sup> Street in Yucaipa, California (hereinafter "Subject Project"). At the time of the rupture, Moss was serving as the rough grader for the Subject Project pursuant to a series of subcontracts it entered into with general contractor Pacific Crest. On May 20, 2005, during the course of rough grading operations, a blade protruding from one of Moss' construction scrapers punctured the buried water main, causing a large amount of water to run down a hillside into a several homes, depositing mud and debris at the homes (the "Accident").

2. USAA is an insurance carrier that issued at least one homeowner insurance policy (the "USAA policy") to homeowner Donald Barnes with respect to a home and property located at 32117 Tennessee Street in Yucaipa, California (the "Barnes home"). USAA contends that it paid at least \$43,653.08 to Donald Barnes for damages to the Barnes home arising out of the

Accident. USAA subsequently filed a lawsuit against Moss and the Redlands for recovery of these amounts, entitled USAA v. City of Redlands, San Bernardino Superior Court Case Number SCVSS131589 (the "USAA Action").

3. State Farm is an insurance carrier that issued at least one homeowner insurance policy ("the State Farm policy") to each of the following homeowners: (a) Robyn Wright ("Wright") with respect to a home and property located at 32141 Tennessee Street in Yucaipa, California (the "Wright home"), and (b) William and Candice Miller (collectively, "Miller") with respect to a home and property located at 32131 Tennessee Street in Yucaipa, California (the "Miller home"). State Farm contends that it paid a total of at least \$133,720.11 to Wright and Miller in reimbursement for damage to the Wright home and the Miller home arising out of the Accident. State Farm subsequently filed a lawsuit against Redlands, Moss and Pacific Crest for recovery of these amounts, entitled State Farm v. City of Redlands, et al., San Bernardino Superior Court Case Number SCVSS136200 (the "State Farm Action").

4. Mary Deborah Johns and Kurtis F. Barnes are tenants who were residing in the Barnes home on the date of the water main rupture. They assert damages totaling \$17,828.94 arising out of the Accident. Mary Deborah Johns and Kurtis F. Barnes subsequently filed a lawsuit against Redlands, Moss and Pacific Crest for recovery of these amounts, entitled Johns, et al. v. City of Redlands, et al., San Bernardino Superior Court Case Number SCISS132367 (the "Johns Action").

5. Various Parties filed cross-complaints among themselves, including a cross-complaint by Moss against Redlands for reimbursement its costs incurred related to the post-Accident clean up of the conditions at or near the Subject Project

6. The USAA Action, State Farm Action, and the Johns Action were subsequently consolidated. For purposes of the consolidation, the USAA Action was deemed the lead action (the "Consolidated USAA Action").

7. The Parties each recognize that further litigation or appeals among themselves requires substantial time, effort and expenses unless the various disputes and claims among them are settled and terminated at this time.

8. As set forth in this agreement, the Parties desire to resolve all claims, disputes, differences, complaints and cross-complaints relating to the USAA Action, State Farm Action, the Johns Action, and/or the Consolidated USAA Action, which exist or may exist which have arisen among them relating to this matter, and wish to reduce to writing the terms of their agreement and release.

## **B. AFFIRMATIVE COVENANTS**

NOW THEREFORE, in consideration of the foregoing recitals, all of which are

incorporated by reference, and the following provisions and covenants, the Parties hereto agree to the following terms and conditions:

1. The Contributing Defendants will pay a total of \$33,000.00 to USAA in full and complete settlement of all issues relating to the Accident, the USAA Action, and/or the Consolidated USAA Action. This amount will be paid by Redlands and Moss in equal shares of \$16,500 each. The settlement checks shall be made out to "The Law Offices of Jeffrey E. Karpel for United Services Automobile Association", Tax I.D. Number 95-2650751.

2. The Contributing Defendants will pay a total of \$100,000.00 to State Farm in full and complete settlement of all issues relating to the Accident, the State Farm Action, and/or the Consolidated USAA Action. This amount will be paid by Redlands and Moss in equal shares of \$50,000 each. The settlement checks shall be made out to "The Law Offices of Scott R. Kamrath in Trust for State Farm", Tax I.D. Number 95-4739354.

3. The Contributing Defendants will pay a total of \$5,500 to Mary Deborah Johns in full and complete settlement of all issues relating to the Accident, the Johns Action, and/or the Consolidated USAA Action. This amount will be paid by Redlands and Moss in equal shares of \$2,750 each. The settlement checks shall be made out to "Mary Deborah Johns and Corona, Johnson & Hoddick, LLP, her attorneys of record", Tax I.D. Number 33-0876824.

4. The Contributing Defendants will pay a total of \$5,500 to Kurtis F. Barnes in full and complete settlement of all issues relating to the Accident, the Johns Action, and/or the Consolidated USAA Action. This amount will be paid by Redlands and Moss in equal shares of \$2,750 each. The settlement checks shall be made out to "Kurtis F. Barnes and Corona, Johnson & Hoddick, LLP, his attorneys of record", Tax I.D. Number 33-0876824.

5. Cross-Defendant Redlands will pay to Moss a total of \$20,000 in full and complete settlement of all issues relating to the Cross-Complaint of Moss against Redlands.

6. As its contribution to the settlement, Pacific Crest will waive all claims for indemnity, costs and/or attorneys fees with respect the other Parties.

7. The parties shall execute releases as to each other. These releases are more fully set forth in section (C) below.

8. Settlement checks will be due with 30 days of the full execution of this agreement. All settlement proceeds shall be held in trust until the respective Plaintiffs' counsel files a request for dismissal with prejudice as to all parties in this Action. The referenced dismissal will be filed within 15 days following receipt of the settlement checks.

9. All Parties to this Settlement Agreement further agree to provide executed Requests for Dismissal *with prejudice* of their respective claims filed in the Action as to all

Parties within fourteen (15) days following the complete execution of this Settlement Agreement.

**C. RELEASES OF CLAIMS**

1. In exchange for the consideration set forth in Section (B) above, Plaintiffs, on behalf of themselves and their past, present and future assigns, heirs, successors-in-interest, affiliates, partners, attorneys and accountants, hereby releases, relinquishes, waives, discharges, absolves and acquits each of the Defendants, and all past, present and future predecessors, successors, heirs, assigns, officers, directors, shareholders, agents, employees, subcontractors, parent and subsidiary organizations, affiliates, partners, attorneys, accountants, indemnitors and insurers of each of the Defendants, from any and all past, present or future rights, claims, demands, obligations, or causes of action for compensatory or punitive damages, equitable relief, costs, losses, expenses, and compensation of every kind and nature whatsoever, whether known or unknown, whether past, present or future, whether based in contract, tort, statute or other legal or equitable theory of recovery, which each Plaintiff has, had, or which may later accrue to or be acquired by each Plaintiff against any of the Defendants arising from or related to the performance of the incident and events set forth in paragraphs (A)(1) through (A)(5), or related in any way to claims arising from the Accident or which are, could, might or may have been asserted in the USAA Action, State Farm Action, the Johns Action, and/or the Consolidated USAA Action.

2. Each of the Defendants, on behalf of themselves and each of their respective past, present and future assigns, heirs, successors-in-interest, affiliates, partners, attorneys and accountants, hereby release, relinquish, waive, discharge, absolve and acquit plaintiffs and each other, and all of each plaintiff's and each other's past, present and future predecessors, successors, heirs, assigns, officers, directors, shareholders, agents, employees, subcontractors, insureds, parent and subsidiary organizations, affiliates, partners, attorneys, accountants, indemnitors and insurers (except as described elsewhere in this Agreement), from any and all past, present or future rights, claims demands, obligations, or causes of action for indemnification, contribution, reimbursement, equitable relief, costs, losses, expenses, and compensation of every kind and nature whatsoever, whether known or unknown, whether past, present or future, whether based in contract, tort, statute or other legal or equitable theory of recovery, which each other has, had, or which may later accrue to or be acquired by each other for the amounts paid pursuant to this Agreement, or any amounts sought by plaintiffs in this Action.

3. Moss, on behalf of itself and its respective past, present and future assigns, heirs, successors-in-interest, affiliates, partners, attorneys and accountants, hereby release, relinquish, waive, discharge, absolve and acquit Redlands, and Redlands' past, present and future predecessors, successors, heirs, assigns, officers, directors, shareholders, agents, employees, subcontractors, insureds, parent and subsidiary organizations, affiliates, partners, attorneys, accountants, indemnitors and insurers (except as described elsewhere in this Agreement), from any and all past, present or future rights, claims demands, obligations, or causes of action for

indemnification, contribution, reimbursement, equitable relief, costs, losses, expenses, and compensation of every kind and nature whatsoever, whether known or unknown, whether past, present or future, whether based in contract, tort, statute or other legal or equitable theory of recovery, which Moss has, had, or which may later accrue to or be acquired by Moss for reimbursement of costs incurred by Moss in the post-Accident clean up of the conditions at or near the Subject Project.

4. Waiver of Civil Code Section 1542 The Parties intend and agree that the foregoing release shall be effective as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of whatsoever character, nature and kind, known or unknown, suspected or unsuspected, relating to the Project and/or Action in furtherance of which intention the Parties each independently and expressly waive any and all rights and benefits conferred upon them by the provisions of section 1542 of the California Civil Code, which reads as follows:

GENERAL RELEASE - CLAIMS EXTINGUISHED

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Parties hereby acknowledge that the foregoing waiver of the provisions of section 1542 of the California Civil Code was separately bargained for. The Parties expressly agree that the release provisions shall be given full force and effect in accordance with each and all of their express terms and provisions, including those terms and provisions relating to unknown or unsuspected claims, demands and causes of action, if any, to the same extent as those terms and provisions relating to any other claims, demands and causes of action specified above. The Parties to this Settlement Agreement each assume the risk of the subsequent discovery or understanding of any matter, fact or law, which, if now known or understood, would in any respect have affected this Settlement Agreement.

**D. REPRESENTATIONS AND WARRANTIES**

Each of the Parties to this Settlement Agreement represent and warrant to, and agree with, each other as follows:

1. Except as expressly stated in this Settlement Agreement, none of the Parties have made any statement or representation to any other party regarding any fact which is relied upon by any other party entering into this Settlement Agreement. No party to this Settlement Agreement relies upon any statement, or representation or promise of any other party, not

contained in this Settlement Agreement, in executing this Settlement Agreement or in making the settlement.

2. This Settlement Agreement is the result of a compromise of disputed claims and shall never at any time for any purpose be considered as an admission of liability or responsibility on the part of the Parties herein released, who continue to deny such liability and to disclaim such responsibility. This Settlement Agreement is made solely to avoid the additional expenses of litigation and risks attendant thereto.

3. The Parties represent and warrant, to each other, that each party is the sole and lawful owner of all right, title and interest in and to every claim which it purports to release and that each party will not and has not committed or permitted or agreed to any sale, encumbrance, hypothecation or transfer, whether by operation of law or otherwise, of any claim, right or cause of action to be released, discharged or assigned, or which otherwise would have been affected pursuant to the provisions of this Settlement Agreement. A division, if any, of the above-mentioned sums between the Parties receiving said sums and anyone else shall in no way affect the validity of this Settlement Agreement.

4. All Parties to this Settlement Agreement have thoroughly investigated the facts related to the Action. The Parties warrant that they freely entered into this Settlement Agreement and are not entering into the Settlement Agreement because of any duress or fear and are fully authorized to enter into the terms and conditions set forth herein, to execute the Settlement Agreement, and to legally bind the Parties. The Parties hereto further warrant that they have read this Settlement Agreement, have consulted with their attorneys and understand and agree to the provisions herein.

#### **E. ADDITIONAL PROVISIONS**

1. **Own Costs and Attorney's Fees.** The Parties to this Settlement Agreement shall bear their own costs and attorney's fees relating to the USAA Action, State Farm Action, the Johns Action, and/or the Consolidated USAA Action..

2. **Drafting Agreement.** The Parties to this Settlement Agreement shall be deemed to have cooperated in the negotiation and drafting of this Settlement Agreement, such that no ambiguity in this Settlement Agreement may be construed against any Party.

3. **Court Retains Jurisdiction.** The Parties agree and stipulate that the court shall retain jurisdiction over this case and all Parties to this case for the purpose of enforcing the terms of this Settlement Agreement.

4. **Successors, Assigns, and Beneficiaries.** This Settlement Agreement shall be binding upon and inure to the benefit of the Parties, and their respective employees, agents, attorneys, successors, devisees, executors, administrators, assigns, and insurance carriers.

5. **Whole Agreement.** This Settlement Agreement constitutes the entire agreement between the Parties and it is expressly understood and agreed that this Settlement Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever except by a writing duly executed and authorized by each of the Parties hereto. The Parties hereby agree and acknowledge that they will not claim at any time or place that this Settlement Agreement has been orally altered or modified or otherwise changed by oral communication of any kind or character.

6. **Applicable Law.** This Settlement Agreement shall be deemed to have been executed and delivered within the State of California, and the rights and obligations of the Parties shall be governed by and construed and enforced in accordance with the laws of the State of California.

7. **Authority.** Each person and entity executing this Settlement Agreement on behalf of any other person or entity does hereby personally represent and warrant to the other Parties that he, she or it has the authority to execute this Settlement Agreement on behalf of, and fully bind, such purported principal.

8. **Anti-Waiver.** The failure of any party to enforce any of its rights arising by reason of any breach of covenant on the part of the other party will not constitute a waiver of such breach. No custom or practice which may arise between the Parties in the course of administering this Settlement Agreement will be construed to waive any party's right to (i) insist upon the performance by the other party of any covenant in this Settlement Agreement or (ii) exercise any rights given it on the account of any breach of such covenant. A waiver of a particular breach will not be deemed to be a waiver of the same or any other subsequent breach.

9. **Independent Advice of Counsel.** The Parties to this Settlement Agreement represent and declare that in executing this Settlement Agreement they rely solely upon their own judgment, belief and knowledge, and the advice and recommendations of their own independently selected counsel, concerning the nature, extent and duration of their rights and claims hereunder and regarding all matters which relate in any way to the subject matter hereof, and that, except as provided herein, they have not been influenced to any extent whatsoever in executing this Settlement Agreement by any representations, statements or omissions pertaining to any of the foregoing matters by any party or by any persons representing any party to this Settlement Agreement.

10. **Survival.** All representations and agreements set forth in this Settlement Agreement shall be deemed continuing and shall survive the effective date of this Settlement Agreement.

11. **Further Assurances.** The Parties agree to execute such other documents and to take such other actions as may reasonably be necessary to further the purpose of this Settlement Agreement, including without limitation the complete and full dismissal with prejudice of all

litigation between the Parties, with the Parties bearing their own costs and attorney's fees.

12. **Headings.** The descriptive headings of the several articles and paragraphs contained in this Settlement Agreement are inserted for convenience only and shall not control or affect the meaning of construction of any of the provisions hereof.

13. **Counterparts and Facsimile.** This Settlement Agreement may be executed in counterparts which, when taken together, shall constitute one original Settlement Agreement.

14. **Attorneys Fees.** If any party to this Agreement incurs costs or attorney fees to enforce any of the provisions of this agreement, the prevailing party in any legal action including any lawsuit or arbitration, shall be entitled to recover all costs and reasonable attorneys fees.

The Settlement Agreement may be signed by facsimile and such facsimile signature shall constitute an original.

DATED: 9-4-07

State Farm General Insurance Company

By: Kathy Giff

Title: Claim Representative

DATED: \_\_\_\_\_

USAA Casualty Insurance Company

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

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Mary Deborah Johns

DATED: \_\_\_\_\_

Kurtis F. Barnes



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DATED: \_\_\_\_\_

State Farm General Insurance Company

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

Title: \_\_\_\_\_

DATED: 8/14/07

USAA Casualty Insurance Company

By: [Signature]

Title: LITIGATION MANAGER

DATED: \_\_\_\_\_

Mary Deborah Johns

DATED: \_\_\_\_\_

Kurtis F. Barnes

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Rx Date/Time

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DATED: \_\_\_\_\_

State Farm General Insurance Company

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

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

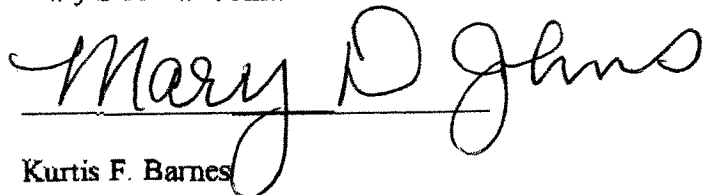
USAA Casualty Insurance Company

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

Title: \_\_\_\_\_

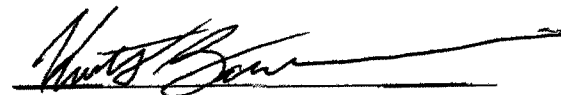
DATED: 8-10-07

Mary Deborah Johns



DATED: 8-10-07

Kurtis F. Barnes



DATED: 9-17-07

Moss Equipment Rental

By: [Signature]

Title: [Signature]

DATED: \_\_\_\_\_

City of Redlands

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

Title: \_\_\_\_\_

DATED: 9/20/07

Pacific Crest Communities

By: [Signature]

Title: Vice president

DATED: \_\_\_\_\_

Moss Equipment Rental

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

Title: \_\_\_\_\_

DATED: October 2, 2007

City of Redlands

ATTEST:

By:

Jon Harrison  
Jon Harrison

Lorrie Poyzer  
Lorrie Poyzer

Title: Mayor

City Clerk

DATED: \_\_\_\_\_

Pacific Crest Communities

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

Title: \_\_\_\_\_