

THE UNIFORM CONSTRUCTION ARBITRATION AGREEMENT

WHEREAS, the parties desire to conduct in private by arbitration the resolution of any disputes regarding the Project [define] arising or continuing post-occupancy, or, in the event of a material default and resulting cessation of the work on the Project, any disputes caused by such material default, and have therefore consented to the terms and provisions set forth herein;

WHEREAS, the parties desire to have a single retired judge, or single arbitrator, experienced in construction law resolve in a final and binding manner all of their disputes regarding the Project in the arbitration forum of their choosing;

WHEREAS, the parties are informed of and recognize that arbitration remains a less expensive and more confidential method of resolving their disputes than found in state or federal court;

WHEREAS, the parties are also informed and acknowledge that the ability to completely, finally, and efficiently resolve any disputes arising from the Project will be significantly impaired if the litigation of such disputes in arbitration does not include a party or parties that are alleged to be and may be liable to one or more parties involved in such litigation;

WHEREAS, the parties have adopted this addendum or amendment to their agreement compelling arbitration of all disputes (this "Arbitration Agreement") in full recognition and understanding of (i) the enforcement and other provisions found herein requiring the universal assent to and application of this Arbitration Agreement to all parties contracting to supply services, labor, or material to the Project and, if such universal assent is not achieved, and (ii) the consequences for the party responsible for not achieving such universal assent;

WHEREAS, the parties recognize that this Arbitration Agreement is being appended to or added as an amendment to a variety of different forms of contracts (e.g., with engineers, general and sub-contractors, architects, material suppliers, and the like) regarding all aspects of the Project and, therefore, agree that if there is any conflict between this Arbitration Agreement and any provision of the agreement to which this Arbitration Agreement is appended by addendum or amendment, then the terms and provisions of this Arbitration Agreement will control; and

WHEREAS, this Arbitration Agreement elects arbitration over an action in state or federal court not because of the absence of a jury but because of the access to a more private and efficient forum for the resolution of disputes.

In light of the foregoing, and expressly incorporating the foregoing "WHEREAS" provisions into the agreement of the parties, the parties hereto agree as follows:

1. All issues of arbitrability and all disputes regarding the Project (including all statutory claims and remedies of any kind) shall be submitted by the complaining party or parties via arbitration demand(s), counter-demand(s), and/or cross-demand(s) to [JAMS, AAA, etc.], including, by way of example only, all claims for foreclosure of liens and other equitable relief, understanding that

the actual order of foreclosure and similar injunction or similar order for equitable relief cannot be issued by the arbitrator but all the findings necessary and predicate to entry of such an order can be and will be made by the arbitrator.

- a. If separate actions involving these or other parties to this or other Project-related contracts are initially commenced in arbitration or commenced in state or federal court and ordered to arbitration, then the arbitrations shall be consolidated for all purposes and the [JAMS, AAA, etc.] office nearest to the Project [or nearest to the Owner, Architect, General Contractor, etc.] shall administer and conduct the arbitration, and pursuant to its rules shall, absent consent of all parties to such arbitration, select the single arbitrator. Each party to this Agreement waives any rights it may have under Cal. Civ. Proc. Code Section 1281.91(b), or similar provision of another state's law, to disqualify an arbitrator so selected for anything other than good cause shown to a court of that state. If such a motion to disqualify a selected arbitrator alleging good cause shown is brought and does not succeed in disqualifying the selected arbitrator, then the moving party or parties shall be jointly and severally liable for the reasonable attorney's fees and costs of any one or more opposing party or parties upon motion made at any time thereafter to the selected arbitrator requesting such fees and costs. There shall be no award of fees or costs to any party that prevails on a motion to disqualify an arbitrator unless opposition thereto was brought and maintained without any reasonable basis in law or fact.
- b. The rules of [JAMS, AAA, etc.] most applicable to construction-related disputes, as determined by the selected arbitrator, shall govern the resolution of such disputes in that arbitral forum, provided, however, that if such rules are in conflict with the terms and provisions of this Arbitration Agreement, then the terms and provisions of this Arbitration Agreement will control; provided further, however, that, in order to expedite the full, final, and consensual selection of the single arbitrator, any party joined in the arbitration shall have ten (10) [or twenty, thirty, forty, etc.] business days to join any and all other parties to the arbitration that are or are alleged to be liable to that party, and thus in order to allow for full joinder of all parties selection of an arbitrator pursuant to such rules shall not commence until forty (40) [or sixty, eighty, etc.] days after the arbitration is first filed and served.
- c. The decision of the single arbitrator shall be issued within thirty (30) business days of the latter of (i) the last day evidence is presented; (ii) the day closing arguments are completed; or (iii) the day final briefs are submitted. Such decision shall be final and binding, and shall be in the form of a written statement of decision with findings of fact and conclusions of law. The decision of the arbitrator may be enforced by any party thereto in a court of competent jurisdiction.
- d. If any party or parties attempt(s) to challenge or overturn in court the arbitrator's decision on any ground other than bias or corruption of the arbitrator, and does not prevail on such ground(s), and notwithstanding whether there is an attorney's fees clause in the contract to which this Arbitration Agreement is appended or attached, then such party or parties shall pay the reasonable attorney's fees and costs of the

prevailing party or parties incurred in opposing that challenge, multiplied by two, with one half payable to the prevailing party and one half payable to the recognized charitable organization of the prevailing party's choice.

2. Each of the parties to this Arbitration Agreement is responsible to the other party or parties hereto, and to all other parties signing their corresponding Arbitration Agreement related to this Project, to have each party with whom or which they contract for services, labor, or materials used in the design or construction of the Project enter into an identical form of this Arbitration Agreement. Any failure by a party hereto (the "Responsible Party") to enter into this Arbitration Agreement with each and every other entity or person with whom or which it contracts for such services, labor, or materials (a "Missing Party") shall result in (a) the Responsible Party assuming the obligations of the Missing Party's insurer under the applicable insurance policy or policies of the Missing Party and subject to the same conditions, terms, and provisions of such policy or policies excluding any rights of subrogation thereunder, and (b) the Responsible Party waiving any rights of indemnity or contribution, or rights arising in contract or tort, against the Missing Party, and (c) the Responsible Party waiving any claim it may have for recovery of monies due under the contract to which this Arbitration Agreement is appended or added as an amendment against the party or parties that joined such Responsible Party in the arbitration.

3. The parties recognize that the Project is being designed and constructed by persons and entities with their respective operations and headquarters in many different geographic locations, and that the Project may have component parts to be incorporated into the Project created in other geographic locations as well. In particular, by way of example only, [project-specific facts]. Accordingly, and notwithstanding any venue, choice-of-law, or conflict-of-law provision contained in any contract to which this Arbitration Agreement is appended or attached, and also notwithstanding whether any party brings or must respond to any action commenced in state or federal court or any other adjudicatory or dispute-resolution forum to enforce or attempt to block or preclude enforcement of this Arbitration Agreement, the parties agree that the Federal Arbitration Act ("FAA") shall govern and control the interpretation, application, and enforcement of this Arbitration Agreement, and that any and all state laws, rules or statutes shall not govern and control the interpretation, application, and enforcement of this Arbitration Agreement; provided, however, the parties hereto expressly waive the application of and agree they will not invoke the statutory requirement in Section 4 of the FAA that a jury decide the enforceability of this Arbitration Agreement.

4. The parties hereto agree that whichever party shall first commence an arbitration filed pursuant to this Arbitration Agreement shall advance the fees necessary to commence the arbitration in the arbitral forum mandated in paragraph 1 above, subject to later allocation of such fees by the arbitrator once the arbitration is commenced or at the time of settlement or award, or upon motion of the party advancing such fees, as the arbitrator may elect. Any party refusing or failing to pay its share of such fees as and when allocated by the arbitrator shall waive the right to be heard, to present evidence, to cross-examine witnesses, and to assert counterclaims and cross-claims in the arbitration; moreover, as determined by the arbitrator, such failure to pay fees may alone serve as a basis of entry of default and/or adverse final award against the party failing to pay.

5. The parties signing below each acknowledge that the person executing this Arbitration Agreement on its behalf is authorized to so enter into this Arbitration Agreement, and also acknowledge that the signature of its attorney alone is not sufficient to bind it to this Arbitration Agreement.

6. This Arbitration Agreement does not require mediation prior to or concurrent with arbitration.

7. In the event that any provision of this Arbitration Agreement is determined to be unenforceable, the remaining provisions or portions of this Arbitration Agreement shall nevertheless remain in full force and effect.

8. This Arbitration Agreement is the result of arms-length negotiations and each party has cooperated in its drafting and preparation. As a result, in determining the intent or meaning of any provision of this Arbitration Agreement, such provision shall not be construed, in whole or in part, on the basis that any party was its drafter.

9. Each party to this Arbitration Agreement has also had the opportunity to seek the advice of its own counsel with respect to its meaning, consequences, and advisability of becoming bound by it, and has sought and received such advice, to the text it has deemed, in its independent judgment, to be reasonable. Each party executes this Arbitration Agreement and agrees to be bound by all of its terms and provisions, including but not limited to those set forth in paragraph 2, above, regarding the consequences to any party from a failure to ensure the universal consent to this Arbitration Agreement.

10. Each party to this Arbitration Agreement understands and acknowledges that by agreeing to arbitration, among other things, it is giving up (i) the right to a jury trial, (ii) the type of broad discovery customarily allowed to parties in civil court proceedings, and (iii) virtually any right to appeal the award of the arbitrator.

11. Each party to this Arbitration Agreement hereby submits and voluntarily consents to the personal jurisdiction of [the selected local office JAMS, AAA, etc.] and to the federal and state courts of the state in which such arbitral forum is located. Moreover, each party further submits and voluntarily consents to such arbitration organization local office as the appropriate venue for all matters governed by this Arbitration Agreement, as well as all disputes relating to or arising out of its application or interpretation, and hereby waives any and all objections, including but not limited to those relating to venue and personal jurisdiction, the authority of such arbitration organization, and the federal and state courts of the state in which such arbitral forum is located.

12. At the earliest reasonable time in the course of any arbitration commenced hereunder, the arbitrator shall issue a "Case Management Order" ("CMO"). The CMO shall contain, among other things, the following provisions:

- Initial disclosures shall be made within twenty (20) business days of a party's first appearance or within twenty (20) business days of the issuance of the CMO, whichever comes later. Initial disclosures shall include, at a minimum, identification of witnesses, the party's initial, non-binding disclosure of damages/defects/claims and initial computation of damages, a contractor's statement of work, a detailed statement of

insurance and production of insurance policies that may apply, and production of all project-related, non-privileged documents.

- There shall be no pleading motions or dispositive motions (e.g., motions for summary or partial adjudication) and no motions *in limine*.
- No separate discovery referee shall be appointed, with all discovery disputes to be decided by the arbitrator.
- No interrogatories and no requests for admission shall be allowed [in the alternative, set forth a list of form of business and insurance interrogatories, identification of PMQ/PMQ interrogatories, and/or scope of work interrogatories required to be answered within twenty (20) business days of service]. Discovery is via initial and supplemental CMO-required disclosures, document production, and depositions only. All documents shall be produced in electronic form in their native format, and only hard copies shall be produced bates-stamped and in PDF text-readable (OCR) format. Deposition time shall be limited in a manner consistent with the state code of civil procedure or the Federal Rules of Civil Procedure. The number of percipient witness depositions shall be set by the arbitrator after the initial disclosures and at the first or second status conference.
- There shall be no limit on third-party discovery subpoenas (records or testimony or both) except as may be shown on good cause demonstrated to the arbitrator.
- “Visual Inspections” shall be liberally allowed and, to prevent such an inspection, the party to be “inspected” must seek a protective order from the arbitrator. “Destructive Testing” will be allowed in a coordinated fashion, after a minimum of a fourteen (14) business-day notice by a requesting party of the type, location, licensed contractor to conduct such work, and insurance available to cover such work, with the requesting party responsible for complete restoration [subject to pursuing other participating parties for contribution].
- All service of all documents shall be electronic using an on-line service or via email, as the parties may agree or the arbitrator may order.
- The parties shall agree to or, in the absence of complete agreement, the arbitrator shall order, the usual deadlines and dates for the arbitration, expert witness disclosure, discovery cut-off, and the like.
- Other ideas for inclusion to govern the arbitration:
 - *Impose strict time limits on testimony, and hold parties to it. Couple that with consideration of direct testimony via declaration.*
 - *Use offers of proof on facts not in dispute. Force parties to really meet and confer, and perhaps even conduct a pre-arbitration hearing to resolve disputes on what comes in via this method.*
 - *Relax the rules of evidence for experts. Allow testimony in narrative fashion, allow reports to come into evidence, and even allow expert back-and-forth open dialogue as testimony.*
 - *Limit costs. Use deposition in lieu of live testimony, do not use a court reporter, use joint experts, make offers of proof in lieu of direct examination, and make effective use of stipulations.*

13. [Residential Construction] – The parties hereto acknowledge and intend that this Arbitration Agreement will be included in CC&Rs, Purchase and Sale Agreements, and other governing documents regarding the Common Interest Development created as part of the Project, and that the HOA/HOAs created thereby, and the purchasers of such residences/units, shall be entitled to

enforce this Arbitration Agreement and, conversely, shall be subject to enforcement against them of this Arbitration Agreement. [Owner accepts and acknowledges its duty to comply with all applicable laws governing the form of obtaining the consent of the HOA/HOAs and purchasers.]

14. Each and every signature below and on every version of this Arbitration Agreement used on the Project, regardless of date, and regardless of what contract or contracts this Arbitration Agreement may be appended to in the course of the Project, is intended to evidence and constitute a single, uniform Arbitration Agreement for the Project, and all such Arbitration Agreements shall be construed and enforced consistent with that principle.

[Signatures and Dates]

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