

## **SETTLEMENT AGREEMENT**

This Settlement Agreement (“Settlement Agreement”) dated as of December 28, 2017 (the “Effective Date”) is made and entered into by and among the BOARD OF EDUCATION OF PLEASANTDALE SCHOOL DISTRICT 107 (the “Board” or “PSD”) and GILBANE BUILDING COMPANY, a Rhode Island corporation (“Gilbane”) (collectively, the “Parties”).

### **WITNESSETH**

**WHEREAS**, in 2007, Gilbane and the Board entered into a contract for Gilbane to serve as the Construction Manager for certain additions and renovations at Pleasantdale Middle School in Illinois (the “Gilbane Contract” or “Project”); and

**WHEREAS**, Gilbane entered into a separate contract with Kiefer Specialty Flooring, Inc. (“Kiefer”) for Kiefer to, among other things, install a new gymnasium floor at Pleasantdale Middle School as part of the Project (the “Kiefer Contract”); and

**WHEREAS**, the Board has discovered a blistering and de-bonding defect in the gymnasium floor allegedly arising, at least in part, out of the work of Kiefer on the Project, and the Board has asserted a pre-lawsuit claim and demand against Gilbane pursuant to the Gilbane Contract (the “Issue”); and

**WHEREAS**, Gilbane contends that the liability, if any, for this alleged latent defect is derivative of Kiefer’s liability; and

**WHEREAS**, The cause of the alleged defect is not definitively known; and

**WHEREAS**, After reasonable investigation, and efforts to solicit Kiefer’s input and assistance in resolving the defect, Kiefer has failed, despite demand, to remediate the defect, replace the work, or contribute meaningful financial consideration toward the replacement or remediation of the present conditions; and

**WHEREAS**, This Settlement Agreement has been agreed to solely for the purpose of compromising disputed claims, and any payment or provision made pursuant to the Settlement Agreement is not to be construed as an admission of responsibility, wrongdoing, unlawful conduct, or liability whatsoever on the part of Gilbane, which expressly denies any responsibility, wrongdoing, unlawful conduct, or liability whatsoever.

**NOW THEREFORE**, for good and valuable consideration and mutual promises as described fully in this Settlement Agreement, the legality and sufficiency of which is hereby acknowledged by the Parties, it is hereby agreed between the Parties as follows:

#### **I. REPRESENTATIONS AND WARRANTIES**

- a. All Parties to this Settlement Agreement represent and warrant that it is validly authorized and empowered to settle the claims, actions and remedies that are the subject of this Settlement Agreement and execute this Settlement Agreement under

the applicable laws of the State of Illinois. All Parties to this Settlement Agreement further represent and warrant that no assignment of any right, demand, cause of action or other claim covered by this Settlement Agreement has been made to any individual, firm, corporation, or any other entity whatsoever, except for Gilbane's assignment to PSD of Gilbane's claims, rights, and causes of actions against Kiefer as set forth in Section IV.b of this Settlement Agreement and as more fully set forth in the executed *Assignment of Claims Agreement*, which is attached to this Settlement Agreement as Exhibit 1.

- b. All Parties to this Settlement Agreement represent and warrant that they understand and agree that the consideration set forth herein is the entire and only consideration for this Settlement Agreement, and it is intended that this Settlement Agreement be complete and not be subject to any claim of mistake of law or fact, that the Settlement Agreement expresses a full and complete settlement of liability claimed and denied between the Parties to this Settlement Agreement. However, while the Settlement Agreement is intended to be full, final, and complete as to the Parties to the Settlement Agreement, for the avoidance of doubt, this document is not intended to limit in any way Gilbane's assigned rights against Kiefer, or PSD's right to pursue claims of liability, indemnification, or otherwise, against Kiefer or any other third party related to the Issue or the Project.
- c. All Parties to this Settlement Agreement represent and warrant that they have read this instrument and understand the terms and contents hereof.
- d. All Parties to this Settlement Agreement represent and warrant that they had the opportunity to seek the advice and representation of counsel of their own selection with regard to these matters, and have done so. The Parties to this Settlement Agreement further acknowledge that they have read and understand the Settlement Agreement and legal effect thereof.
- e. All Parties to this Settlement Agreement represent and warrant that they have not relied upon any representation or statement made by any other party with respect to the facts of this ~~lawsuit~~Settlement Agreement.
- f. With the exception of ordinary course change orders executed by and among Gilbane, Kiefer, and the Project architect during the course of the Project, Gilbane warrants that its only agreement or contract, whether verbal or written, with Kiefer related in any way to the Project, Issue, or this Settlement Agreement is the Kiefer Agreement, #43137-000, made as of February 22, 2007, inclusive of the related contract documents referenced and incorporated therein, which is attached to this Settlement Agreement as Exhibit 2 (the "Kiefer Agreement"). By way of specific example only, Gilbane expressly warrants that Kiefer has not agreed to pay to Gilbane any portion of the Settlement Sum under this Settlement Agreement and Gilbane agrees that it will not seek indemnification or contribution of any portion of this Settlement Sum from Kiefer, as any such right or claim has been assigned to the Board. Gilbane further warrants that the Kiefer Agreement attached as Exhibit 2 is a true and accurate official copy of the Kiefer Agreement.

## II. CONSIDERATION AND TERMS

- a. Gilbane agrees to directly pay the sum of \$20,000 (the “Settlement Sum”) to the Board within seven (7) days after execution of this Settlement Agreement by the Parties.
- b. Gilbane further agrees to assign to PSD all rights, claims, and causes of action which Gilbane has, or may come to have, against Kiefer arising out of or related in any material way to Kiefer’s work on the Project including but not limited to any indemnification rights Gilbane has against Kiefer with respect to the Settlement Sum paid pursuant to this Settlement Agreement. To memorialize this assignment of claims, Gilbane agrees to execute the *Assignment of Claims Agreement*, which is Exhibit 1 to this Settlement Agreement, and shall be fully incorporated as part of this Settlement Agreement. This Settlement Agreement shall not be binding or effective unless and until this Settlement Agreement and the *Assignment of Claims Agreement* has been fully executed by the Parties.
- c. PSD, for and in consideration of receipt of the executed Assignment of Claims Agreement and Settlement Sum hereby releases and forever discharges Gilbane, its predecessor, successor, parent, subsidiary, affiliate, and member corporations and companies, and all of their past, present, and future owners, partners, officers, directors, stockholders, shareholders, insurers, coinsurers, reinsurers, representatives, servants, employees, subsidiaries, affiliates and partners—except for Kiefer and any of its related affiliates, partners, agents, employees, and predecessor, successor, parent, subsidiary, and member corporations and companies, and their past, present, and future owners, partners, officers, directors, stockholders, shareholders, insurers, coinsurers, reinsurers, representatives, servants, employees, subsidiaries, affiliates and partners (the “Kiefer Exclusion to the Release”)—from all claims and demands, actions and causes of action, attorney fees and costs, which have arisen or which may arise from the gymnasium floor blistering and de\_bonding Issue identified at the Project. This release specifically includes any alleged defect ~~or future failure of any adjacent or physically proximate systems~~ which are or come to be alleged to have caused or contributed to the Issue.
- d. Gilbane mutually agrees to release the Board, its individual Board members, employees and agents from all claims and demands, actions and causes of action, attorney fees and costs, which have arisen or which may arise from the gymnasium floor blistering and de\_bonding defect Issue identified at the Project.
- e. The Parties agree to complete any ordinary course paperwork, and execute any documentation, required to give effect to this Settlement Agreement. Specifically, and by way of example, Gilbane agrees to complete, and return, the attached *Assignment of Claims Agreement*, and to provide complete and full copies of its files related to the Project, the Issue, and the work of Kiefer.

- f. This constitutes the entire agreement between the Parties with respect to the resolution of the Parties' claims and denials related to the Issue, and the Parties agree, that except as set forth herein, that no representations, warranties, or promises have been made or relied upon by any party hereto.
- g. No provision of this Settlement Agreement may be waived, modified, or amended except by written agreement by the Parties.
- h. The failure of a party to insist upon strict adherence to any obligation of this Settlement Agreement shall not be considered a waiver or deprive the party of the right thereafter to insist upon strict adherence to that term or any other term of the Settlement Agreement. No waiver by the Parties of any failure to keep or perform any covenant or condition hereof shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or condition.
- i. If any provision of the Settlement Agreement is held to be invalid, void, or unenforceable, the remainder of the provisions will remain in full force and effect and will in no way be affected, impaired or invalidated. The Parties to this Settlement Agreement agree that to the extent that any provision of the Settlement Agreement could be more narrowly drawn so as not to be invalid, void, or unenforceable, then it shall be so narrowly drawn without invalidating the remaining provisions of this Settlement Agreement.
- j. This Settlement Agreement shall be construed in all respects in accordance with and governed by the laws and decision of the State of Illinois without regard to its choice of law provisions. Each of the Parties consents to exclusive jurisdiction in the the State of Illinois and the exclusive venue in the Circuit Courts of Illinois or the U.S. District Court, Northern District of Illinois, eastern Division, as permitted by applicable law. Each of the Parties waives any and all rights to contest jurisdiction and venue.
- k. This Settlement Agreement may be signed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute the same instrument. A signature made on a faxed or electronically mailed copy of the Settlement Agreement or a signature transmitted by facsimile or electronic mail will have the same effect as an original signature.
- l. The foregoing promises and commitments by PSD are expressly conditioned upon the receipt of payment, including the receipt of any check or wire transfer, and on that check or transfer clearing so that the funds comprising the Settlement Sum are actually received and possessed by PSD and/or its bank or other financial representative.

**III. SIGNATURES**

**GILBANE BUILDING COMPANY**

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

Date: \_\_\_\_\_

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

Subscribed and sworn to me this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

Notary Public, State of \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

**THE BOARD OF EDUCATION OF PLEASANTDALE SCHOOL DISTRICT 107**

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

Date: \_\_\_\_\_

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

Subscribed and sworn to me this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

Notary Public, State of \_\_\_\_\_

My Commission Expires: \_\_\_\_\_