LAW OFFICES OF KEVIN D. FREDERICK
Kevin D. Frederick (CSB #83431)
Paul K Lee (CSB #192812)
702 Marshall Street, Suite 620
Redwood City, California 94063-1890
Telephone (650) 365-9800
Facsimile: (650) 365-9808

FILED SAN MATEO COUNTY

DEC 0 2 2008

Clerk of the Superior Court

CIV 478893

DEFOTY CLERK

Attorneys for Plaintiff:

MANDALAY HEIGHTS AT TERRABAY HOMEOWNERS ASSOCIATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN MATEO UNLIMITED JURISDICTION

MANDALAY HEIGHTS AT TERRABAY HOMEOWNERS ASSOCIATION,

Plaintiff,

VS

WESTERN PACIFIC HOUSING, INC., D. R. HORTON; and DOES 1-100, inclusive,

Defendants.

Case No:

COMPLAINT FOR

COMI LAINT FOR

1 STRICT PRODUCTS LIABILITY 2. BREACH OF IMPLIED WARRANTY (FITNESS)

3 BREACH OF IMPLIED WARRANTY (MERCHANTABILITY)

4. NEGLIGENCE

5. NEGLIGENCE PER SE

GENERAL ALLEGATIONS

Plaintiff, MANDALAY HEIGHTS AT TERRABAY HOMEOWNERS ASSOCIATION (hereinafter "Plaintiff" or "Association"), is a non-profit mutual benefit corporation organized and existing under and by virtue of the laws of the State of California, established to maintain, repair, and manage 135 single family residential homes located in South San Francisco, California, (hereinafter "Subject Property"). As set forth in California Civil Code §1368.3 and Code of Civil Procedure §382, Plaintiff is entitled to and authorized to maintain and commence litigation for damages to common areas, damage to the separate interests which the Association is obligated to maintain or repair, for damage to the separate interests which arise out of, or is integrally related to, damage to the common areas or separate interests that the Association is obligated to maintain or repair, and damage to separate interests as a representative of its members.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

22

23

24

25

26

27

28

2 Plaintiff is informed and believes and thereon alleges that defendants WESTERN PACIFIC
HOUSING, INC. and D. R. HORTON are California corporations business in South San Francisco.
WESTERN PACIFIC HOUSING, INC and D. R. HORTON, at all times herein referred, are and were
nass producers/developers and general contractors of mass-produced real estate properties WESTERN
ACIFIC HOUSING, INC. and D. R. HORTON then sold such properties to the general public.

- 3. Defendants DOES 1-100, inclusive, whether individual, corporate, partnership, an association or otherwise, are fictitious names of Defendants whose true names and capacities are unknown to Plaintiff. Plaintiff will seek to amend this Complaint to insert the true names and capacities of said fictitiously named Defendants when the same have been ascertained
- 4 Plaintiff is informed and believes, and on the basis of such information and belief alleges, that at all times herein mentioned each of the fictitiously named Defendants and each named defendant, whether acting for itself or an agent, corporation, partnership, association, or otherwise, is in some way hable or responsible to Plaintiff, on the facts herein alleged, and legally caused injuries and damages as hereinafter alleged.
- 5. Plaintiff is informed and believes, and on the basis of such information and belief alleges that the defendant, including DOES 1-100, and each of them, were acting as agents, servants, employees, or principal of each other, and were acting within the full course and scope of their employment or agency, or directed the actions of the other Defendants, with full knowledge and consent, either express or implied, of each of the other named Defendants, and are jointly and severally liable to Plaintiff.
 - 6 Plaintiff has complied with the requirements of Civil Code §§895 et seq and 1375 et seq

FIRST CAUSE OF ACTION STRICT PRODUCTS LIABILITY

- Plaintiff incorporates by reference all previous paragraphs of this complaint as though set forth in full herein
- 8. 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 Subject Property is located, and selling them to members of the public at large.

- 9. Within the last ten years, the Defendants, and each of them, developed and mass produced the Subject Property and/or otherwise participated in the stream of commerce for sale of the Subject Property and in the units where the Subject Property is located
- At all times herein mentioned and material hereto, Defendants knew and intended that the Subject Property would be purchased by members of the public at large, and used by them without further inspection for defects.
- 11. Plaintiff's members purchased units at the Subject Property from said Defendants and moved into it with their families.
- At the time of the purchase by Plaintiff's members, the Subject Property was defective and unfit for its intended purposes because the Defendants did not construct the Subject 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, the following:
 - (a) Excessively cracked stucco;
 - (b) Efflorescence on the stucco;
 - (c) Missing drip screeds from soffits;
 - (d) Mis-flashed windows,
 - (e) Failed IGU;
 - (f) On roofs riser strips missing or incomplete;
 - (g) Roof valleys are not supported;
 - (h) Unfastened tiles and cracked tiles;
 - (1) Other defects that will be proven at time of trial
- 13. Within the last 3 years Plaintiff became aware of the defects and deficiencies The Plaintiff thereafter gave and/or attempted to give the Defendants due and timely notice of the defective quality of the above mentioned items.
- 14. The defects alleged herein above are defects that were not apparent by reasonable inspection of the Subject Property at the time of the purchase. The defects thereafter manifested.

- Because of the defective conditions of the Subject Property as herein above alleged,
 Plaintiff has been specifically damaged in the following ways, as well as others which will be inserted with leave of court when ascertained:
- a. Plaintiff will be forced to incur expenses for the restoration and repairs of the Subject Property to cure the damage, defects and/or deficiencies. The exact amount of the damages is presently unknown.
- b. Plaintiff has been damaged through the diminution in value of the Subject

 Property Plaintiff is unaware of the precise amount of such damage but will establish such amount at time of trial.
- c. Plaintiff has been forced to retain expert consultants to analyze and determine the method of repairing the aforementioned defects and damage. Plaintiff is unaware of the precise amount of such damage but will establish such amount at time of trial.
- 16. Defendants, and each of them, as developers, mass producers, builders and sellers and/or otherwise within the stream of commerce are strictly liable and responsible to Plaintiff for all damage suffered as a result of the above described damage, defects and deficiencies in the Subject Property

SECOND CAUSE OF ACTION

BREACH OF IMPLIED WARRANTY OF FITNESS FOR INTENDED USE

- 17. Plaintiff incorporates by reference all previous paragraphs of this complaint as though set forth in full herein.
- 18. At all times herein mentioned and material hereto the Defendants were and now are the merchants and sellers of newly constructed housing, the type of merchandise sold to Plaintiff and its members as herein above alleged and described.
- 19. Defendants, and each of them, at the time and place of the sale of the Subject Property, impliedly warranted that it was properly constructed and fit for use as homes.
- The Subject Property was not properly constructed, and not fit for its intended use, and is defective as previously alleged herein above

- 21. After Plaintiff and its members discovered the defective quality of the Subject Property, Plaintiff gave Defendants, and each of them, due and timely notice of the defective quality of the above mentioned items.
- 22. The defects described herein above caused by the breaches of warranty by Defendants, and each of them, were defects not apparent by reasonable inspection of the Subject Property at the time of purchase. The defects and damages were latent and were not reasonably apparent until on or about the time of notification to the Defendants.
- 23. Because of the foregoing breaches of implied warranties by Defendants, and each of them, Plaintiff has been specifically damaged as herein above in an about to be determined at trial.

THIRD CAUSE OF ACTION

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

- 24. Plaintiffs incorporate by reference all previous paragraphs of this complaint as though set forth in full herein.
- 25. At all times herein mentioned and material hereto Defendants were and now are the merchants and sellers of newly constructed housing, the type of merchandise sold to Plaintiff and its members as herein above alleged and described.
- 26. Defendants, and each of them, at the time and place of the sale of the Subject Property, impliedly warranted that it was properly constructed and of merchantable quality
- 27. The Subject Property was not properly constructed, and not of merchantable quality in that it is defective as previously alleged herein above.
- 28. After Plaintiff discovered the defective quality of the Subject Property, Plaintiff gave Defendants, and each of them, due and timely notice of the defective quality of the above mentioned items
- 29. The defects described herein above caused by the breaches of warranty by Defendants, and each of them, were defects not apparent by reasonable inspection of the Subject Property at the time of purchase. The defects and damages were latent and were not reasonably apparent to Plaintiff and its members until on or about the time of notification to the Defendants.

30. Because of the foregoing breaches of implied warranties by the Defendants, and each of them, Plaintiffs have been specifically damaged as herein above in an about to be determined at trial

FOURTH CAUSE OF ACTION

NEGLIGENCE

- 31. Plaintiff incorporates by reference all previous paragraphs of this complaint as though set forth in full herein.
- 32. The aforementioned Defendants so carelessly and negligently planned, constructed, modified, inspected, and/or performed work and services at the Subject Property so as to proximately cause defects and damages to the systems, buildings, and improvements as herein above.
- 33. Because of the carelessness and negligence of each of the Defendants, and as a legal result thereof, Plaintiff has damaged as previously alleged herein above described.
 - Within the last 3 years Plaintiff discovered the defective quality of the Subject Property.
- 35. The defects and damages described herein above caused by the negligently and carelessly performed work of the Defendants, and each of them, were defects not apparent by reasonable inspection of the Subject Property at the time of purchase.

FIFTH CAUSE OF ACTION

NEGLIGENCE PER SE

- 36. Plaintiff incorporates by reference all previous paragraphs of this complaint as though set forth in full herein.
- Various provisions of the then-applicable building codes and <u>Civil Code</u> §895 et seq. placed on the Defendants non-delegable duties to construct, plan, design and/or inspect the Subject Property in accordance with the requirements of said building codes. The Defendants failed to comply with <u>Civil Code</u> §895 et seq. and breached their duty by negligently constructing, planning, designing and/or inspecting the Subject Property.
- 38. As a legal result of said building code violations, Plaintiff has suffered injuries of the types that the building codes specifically were designed to prevent, e.g., physical damage to their homes and the appurtenances thereto, as more fully set forth above.

39. As a legal result of the building code violations in the Subject Property which were caused by the Defendants as hereinabove alleged, Plaintiff has been damaged as previously alleged above in an about to be determined at trial

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them, as follows.

- 1. For compensatory damages according to proof;
- 2. For interest thereon at the maximum legal rate;
- 3. For prejudgment interest on all sums awarded at the maximum legal rate,
- 4. For costs of suit incurred herein;
- 5. For professional, consultant and technical fees according to proof;
- 6. For loss of use in an amount according to proof,
- 7. For damages to personal property according to proof;
- 8 For attorney's fees;
- 9. For such other and further relief as the Court deems just and proper.

DATED: December 2, 2008

PAUL K. LEE

Attorney for Plaintiff