

Board of Trustees of the University of Oregon

**Resolution: Authorization of Settlement Agreement and
Associated Capital Expenditures (Global Scholars Hall)**

Whereas, the University of Oregon (University) has reached a legal settlement agreement (Agreement) attached hereto as Exhibit A regarding construction or design defects and repairs for the Global Scholars Hall (GSH);

Whereas, the Agreement includes a cash payment to the University of \$6,917,443, plus professional engineering services necessary to complete repairs necessary to remediate deflection in the concrete floor slabs and other issues related to the deflection;

Whereas approximately \$5.5 million of the paid \$6,917,443 will be for the repair, with the remainder being paid to cover other associated costs;

Whereas, the University wishes to engage appropriate and responsible vendors to complete these repairs at the soonest possible time to meet requirements set forth in the Agreement and other uses for which the GSH has been previously scheduled; and,

Whereas, Board approval is required for the execution of instruments and capital projects which exceed \$5,000,000.

Now, therefore, the Board of Trustees of the University of Oregon hereby accepts the Agreement attached hereto as Exhibit A and approves repairs to Global Scholars Hall pursuant to the Agreement. The Board further authorizes the President or his designee(s) to take any and all action necessary to execute said repairs, including use of special procurement and contracting processes as he or his designee(s) so deem necessary.

VOTE: Voice Vote Recorded – Ayes carried (no dissention)

DATE: December 2, 2016

Recorded by the University Secretary: 

EXHIBIT A

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (“Agreement”) is made effective as of the date it is fully executed (“Effective Date”), by and among the University of Oregon (“UO”), Hoffman Construction Company of Oregon (“Hoffman”), Zimmer Gunsul Frasca Architects LLP (“ZGF”), Catena Consulting Engineers, Inc. (“Catena”), and Pence/Kelly Concrete LLC (“Pence”). Hoffman, ZGF and Catena are referred to collectively as “Defendants.” UO, Hoffman, ZGF, Catena and Pence are referred to herein in the singular as “Party” and/or collectively as the “Parties”.

RECITALS

WHEREAS, on or about June 5, 2009, UO contracted with ZGF pursuant to the Architect Agreement for the East Campus Residence Hall Project to design a 185,000 square foot, mixed-use student living facility on the Eugene, Oregon campus of the University of Oregon (the “Project”). ZGF, in turn, contracted with Catena to perform the structural engineering required for the Project.

WHEREAS, Hoffman provided pre-construction phase and construction phase services for the Project and, on or about February 24, 2010, Hoffman executed a contract confirming its duties and obligations as CM/GC for the Project. Pence was the concrete subcontractor for the Project.

WHEREAS, the Project was originally identified as the East Campus Residence Hall and later named the Global Scholars Hall.

WHEREAS, noticeable cracking and micro-cracking and unexpectedly large deflection of the concrete floor slabs has been observed at the Project, which raised structural concerns.

WHEREAS, the Parties engaged in an investigation and preliminary negotiations of a resolution of the disputes related to the cracking, micro-cracking and unexpectedly large deflections of the concrete floor slabs at the Project, including the resulting effects.

WHEREAS, the Parties initial efforts to resolve their disputes failed and UO filed a lawsuit against Defendants in Marion County Circuit Court entitled: *University of Oregon v. Hoffman Construction Company abn Hoffman Corporation, Zimmer Gunsul Frasca Architects LLP, and Catena Consulting Engineers, Inc.*, case number 15CV05974, (“Litigation”).

WHEREAS, the Hoffman Entities filed a third-party complaint against some of the subcontractors that worked on the Project and a cross-claim against ZGF, Catena and Knife River Corporation-Northwest (“Knife River”) and a counterclaim against UO in this Litigation. ZGF also filed a cross-claim against the Hoffman Entities in the Litigation and a counterclaim against UO.

WHEREAS, Hoffman also determined that, to the extent any of the Litigation claims arise out of construction, Pence and/or Pence's subcontractors are responsible. In return, Pence demands arbitration to resolve any such disputes pursuant to section XVII(d) of the Hoffman/Pence contract. Hoffman asserts that Pence is bound to the Owner and the demand for arbitration shall be considered as a requirement to Owner. As such, Pence's subcontractors are bound to such dispute resolution agreed upon and memorialized in this Agreement pursuant to Pence's subcontracts and purchase orders and all implicated parties will resolve all issues arising from the Litigation in the same forum.

WHEREAS, the Parties engaged in mediation of the disputes between them in the Litigation. After an extensive mediation process, the Parties negotiated a settlement whose final terms are reflected herein. This Agreement supersedes any and all prior settlement agreements, negotiations or understandings between the Parties relating to the Project.

WHEREAS, a scope of repair ("Repair Plan") was developed to address the deflection, cracking and other conditions which UO has complained about in the Project.

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, receipt of which is hereby acknowledged, it is hereby agreed by and between the Parties as follows:

AGREEMENT

1. The Parties acknowledge that full, valid and binding consideration exists for the execution of this Agreement.
2. The recitals set forth above are representations that are intended by the Parties to be contractual in nature and not mere recitations.
3. In consideration of the terms stated herein, and as sole monetary consideration for this Agreement, Defendants shall pay UO a cash sum in the amount of \$6,917,443 (the "Settlement Payment") by no later than April 15, 2017.
4. At no cost to UO, Catena alone shall be responsible for providing the structural engineering services necessary for UO to accomplish the Repair Plan ("Catena Design Services"). The Catena Design Services shall include the services necessary for UO to obtain all permits relating to the Repair Plan and any special inspections required for the Repair Plan in time for a repair commencement date in the summer of 2017. Catena shall execute a written contract with UO, memorializing Catena's agreement to provide the Catena Design Services at no cost to UO, and confirming Catena's professional liability insurance of \$2 million for the Catena Design Services. Catena's scope of services is limited to structural engineering. All other services required for the Repair Plan are outside of Catena's scope of work.

5. Upon UO's receipt of the Settlement Amount, UO will release to Hoffman all securities and cash in US Bank Retainage Escrow account #1615****0, which were held in escrow in lieu of retainage.

6. Except for UO's release of the retainage amount remaining for the Project, UO shall owe no monetary amounts of any nature related to the Project or this Litigation.

7. Upon execution of this Agreement, the UO and Defendants shall enter into a stipulated judgment of dismissal with prejudice, without award of costs or attorneys' fees, of all claims by and between UO on the one side and the Defendants on the other side that were or could have been brought against each other side. ZGF, Catena, the Hoffman Entities and Pence shall file a stipulated motion to transfer the claims by and between them to binding arbitration as provided herein.

8. Upon the respective reciprocal releases from UO becoming effective as provided in Paragraph 9, the Hoffman Entities, ZGF, Catena and Pence for themselves, their successors and assigns, shall be deemed to have fully and finally released, dismissed and discharged all known and unknown claims, demands, suits or actions of any kind arising out of the Litigation and/or related to the Project including those which were or could have been brought by them in the Litigation and/or related to the Project against UO (and its affiliated companies or entities, board members, employees, officers, members, and consultants), thereby releasing UO of any and all liabilities, claims or potential claims, known or unknown, contingent or non-contingent, ripe or unripe, associated with or arising out of the Project and/or the Litigation. Defendants and Pence agree that no fault shall be allocated to UO during the ongoing dispute resolution proceedings agreed upon by Defendants and their subcontractors and discussed in paragraph 9 below.

9. Notwithstanding paragraph 8 above, Defendants and Pence reserve the claims they each may have against each other and against any third parties, including without limitation, those claims that Defendants and Pence have against each other and between themselves to allocate responsibility for the Settlement Payment, as well as all claims Hoffman and Pence have against each other and all subcontractors and/material suppliers that worked on and/or supplied materials for the Project (collectively, "Preserved Claims"). Defendants and Pence intend to continue to litigate the Preserved Claims through a binding arbitration process. Under any circumstance, Defendants and Pence shall not make UO a party to any legal proceedings involving the Preserved Claims and Defendants and Pence shall treat UO as a non-party to any legal proceedings involving the Preserved Claims. However, at its own expense, UO shall cooperate with requests made by Defendants and Pence in making UO's employees, and others it controls, available for depositions and hearing testimony arising from the proceedings related to the Preserved Claims, that are not unreasonably burdensome to UO.

10. UO for itself, its successors and assigns, fully and finally releases and discharges all known and unknown claims, demands, suits or actions of any kind against Defendants and Pence (and their affiliate companies or entities, employees, partners, principals, officers, shareholders, members, subcontractors, sub consultants, suppliers and insurers) arising out of the

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Litigation and/or related to the Project including those which were or could have been brought by UO in the Litigation and/or related to the Project, thereby releasing Defendants and Pence (and their affiliate companies or entities, employees, partners, principals, officers, shareholders, members, subcontractors, sub consultants, suppliers and insurers) of any and all liabilities, claims or potential claims, known or unknown, contingent or non-contingent, ripe or unripe, associated with or arising out of the Project and/or the Litigation. This expressly includes a release and waiver of all claims against Hoffman, Catena, Pence and ZGF, their affiliate companies or entities, employees, officers, partners, shareholders, members, subcontractors, material suppliers (and those subcontractors' subcontractors and material suppliers), consultants and insurers, in any way relating to or resulting from any repairs associated with the deflection, as well as claims that arise or relate to UO's failure to perform repairs associated with the deflection. ZGF, Pence and the Hoffman Entities shall have no responsibility, obligations or liabilities of any kind arising out of or related to the repair of the Project, including specifically the implementation or efficacy of the Repair Plan. UO's releases as set forth above as to Hoffman, Pence and ZGF is effective upon the performance of the payment provisions set forth in paragraph 3. UO's release as set forth above as to Catena is effective upon the payment provisions set forth in paragraph 3 and Catena's performance of the obligations set forth in paragraph 4.

11. Notwithstanding the release in Paragraph 10, UO also reserves its rights related to the Parties and subjects enumerated as follows:

- a. All rights, claims, demands, suits or actions of any kind, arising out of or related to latent defects related to or arising out of the Project that are not related in any way to the issues of slab deflection and its effects or conditions alleged by UO in the Litigation. UO represents and warrants that it is currently unaware of any claims in the nature of those reserved by this provision;
- b. As to Hoffman and Hoffman's subcontractors alone, all warranties, including manufacturer warranties of any kind, related to or arising out of the Project that are not related to the slab deflection issue that were or could have been alleged by UO in the Litigation; and,
- c. As to Catena alone, the Catena Design Services referenced in Paragraph 4.
- d. Nothing in this Agreement shall be construed to waive any existing manufacturing warranties to which UO is entitled that are not related to the slab deflection issue.

As to the rights by UO enumerated in items 11(a) — (d), the Defendants and Pence reserve all their respective rights and claims, including without limitation any defenses.

12. Nothing herein related to the issues in the Litigation shall be construed as an admission of fault by any Party, as any such fault is expressly denied. Moreover, UO agrees not

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to prejudice or limit the Defendants' or Pence's ability to compete for and be awarded future work on UO projects on account of the Litigation or claims raised therein.

13. If UO sells or transfers the Building to a new owner, UO agrees to indemnify, defend and hold harmless the Hoffman Entities, ZGF, Catena and Pence (and their affiliate companies or entities, employees, partners, principals, officers, shareholders, members, subcontractors, sub consultants, suppliers and insurers) from all claims, demands, suit or actions of any nature or claim arising out of or related to the Project which may be brought by any new owner or transferees, including without limitation any subsequent purchasers. Furthermore, UO agrees to modify its third party lease agreements for the Building to require lessees of the Building (other than students) to waive any possible claim of any nature or kind related to the Project against the Hoffman Entities, ZGF, Catena and Pence (and their affiliate companies or entities, employees, partners, principals, officers, shareholders, members, subcontractors, sub consultants, suppliers and insurers).

14. This Agreement is intended as a final expression of the Parties' agreements concerning the subject matter herein. There are no other agreements between the Parties regarding the subject matter herein and this Agreement supersedes any negotiations, prior agreements, or purported other agreements relating to the settlement of the Litigation. This integration clause does not apply to or in any way affect the binding arbitration agreement between and among Hoffman, Pence, Catena and ZGF.

15. This Agreement cannot be modified, amended, or altered in any way except by a written agreement executed by each Party to this Agreement.

16. This Agreement was negotiated and approved by the Parties. Any rule that would otherwise require an ambiguity in the Agreement to be construed against the drafting Party is hereby expressly waived by the Parties.

17. The Agreement shall be governed by and construed in accordance with the substantive law of the State of Oregon, without regard to any conflicts of law or choice of law principles.

18. Excluding the allocation of the Settlement Payment between the Defendants and Pence, any dispute or claim arising out of or related to this Agreement shall be determined by binding arbitration with Michael J. Scott designated as the sole arbitrator.

19. In the event any Party commences legal proceedings against any other Party to this Agreement to enforce the terms hereof, or to declare rights hereunder, or as a result of a breach of any term, covenant or condition of this Agreement, the prevailing party in any such proceeding shall be entitled to recover from the losing party its litigation costs, including attorney and expert fees, at trial, on appeal, on review or in arbitration.

20. Should any provision of this Agreement at any time conflict with any law, or be deemed unenforceable, then such provision shall continue in effect only to the extent that it

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remains valid. In the event any provision of this Agreement becomes legally unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.

21. The Parties represent and warrant that they have the authority necessary to execute this Agreement. The Parties represent and warrant that each has not previously assigned any substantive right (e.g. right or claims) at issue under the Agreement. No other consents or approvals of any third parties are required or necessary for this Agreement to be so binding. Upon execution by the Parties, this Agreement shall be deemed fully binding and enforceable in accordance with its terms.

22. The Agreement may be executed in any number of duplicate originals, photocopies, telecopies or PDF files, each of which counterparts shall be deemed an original, and all of which (once each Party has executed at least one such duplicate original, photocopy, telecopy or PDF version) will constitute one and the same document.

UNIVERSITY OF OREGON

By: _____

Its: _____

Date: _____

Approved as to form:

Janet Knauss Larsen, OSB No. 950279
Lane Powell PC
Attorneys for University of Oregon

**HOFFMAN CORPORATION
HOFFMAN CONSTRUCTION COMPANY
HOFFMAN CONSTRUCTION COMPANY OF OREGON**

By: _____

Its: _____

Date: _____

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Approved as to form:

Elizabeth E. Lampson, OSB No. 975185
Davis Rothwell Earle & Xochihua
Attorneys for Hoffman Entities

ZIMMER GUNSUL FRASCA ARCHITECTS LLP

By: _____

Its: _____

Date: _____

Approved as to form:

Guy A. Randles, OSB No. 773100
Stoel Rives LLP
Attorneys for Zimmer Gunsul Frasca Architects LLP

CATENA CONSULTING ENGINEERS, INC.

By: _____

Its: _____

Date: _____

Approved as to form:

Terence J. Scanlan, OSB No. 042185
Skellenger Bender, P.S.
Attorneys for Catena Consulting Engineers, Inc.

PENCE/KELLY CONCRETE, LLC

By: _____

Its: _____

Date: _____

Approved as to form:

Rachel Nies, OSB No. 085360
Lorber Greenfield & Polito, LLP
Attorneys for Pence/Kelly Concrete, LLC