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OAKLAND

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CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6<sup>TH</sup> FLOOR • OAKLAND, CA 94612

Office of the City Attorney  
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City Attorney

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June 15, 2010

**HONORABLE CITY COUNCIL**  
Oakland, California

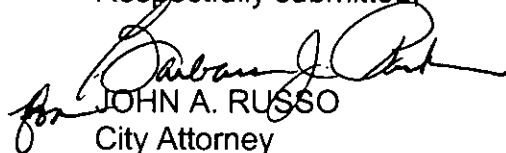
**Subject: RESOLUTION APPROVING SETTLEMENT OF RMC PACIFIC MATERIALS, INC. successor in interest to LONE STAR CALIFORNIA, INC. V. CITY OF OAKLAND (ALAMEDA SUPERIOR COURT CASE NO. RG09489761), BY OBLIGATING CITY TO PAY PLAINTIFF \$107,250, WHICH CONSTITUTES REIMBURSEMENT OF THREE-FOURTHS OF REAL PROPERTY TRANSFER TAXES PAID BY PLAINTIFF, IN EXCHANGE FOR DISMISSAL OF LAWSUIT CHALLENGING IMPOSITION OF TRANSFER TAXES IN THE AMOUNT OF \$143,340.07 (FINANCE AND MANAGEMENT AGENCY; REAL PROPERTY TRANSFER TAXES)**

Dear President Brunner and Members of the City Council:

Pursuant to section 401 of the Charter, and the direction of the Council at its May 18, 2010, closed session, the City Attorney has prepared and requests your approval of a resolution authorizing settlement of the above-entitled lawsuit by the entry of a settlement agreement obligating the City to pay Plaintiff \$107,250, which constitutes reimbursement of three-fourths of the real property transfer taxes paid by Plaintiff, in exchange for dismissal of the lawsuit challenging the imposition of transfer taxes in the amount of \$143,340.07.

Attached hereto are the proposed Resolution and Settlement Agreement.

Respectfully submitted,

  
JOHN A. RUSSO  
City Attorney

Attorney Assigned:  
Kevin D. Siegel

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Approved as to Form and Legality

  
Oakland City Attorney's Office

## OAKLAND CITY COUNCIL

Resolution No. \_\_\_\_\_ C.M.S.

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**RESOLUTION APPROVING SETTLEMENT OF RMC PACIFIC MATERIALS, INC. successor in interest to LONE STAR CALIFORNIA, INC. V. CITY OF OAKLAND (ALAMEDA SUPERIOR COURT CASE NO. RG09489761), BY OBLIGATING CITY TO PAY PLAINTIFF \$107,250, WHICH CONSTITUTES REIMBURSEMENT OF THREE-FOURTHS OF REAL PROPERTY TRANSFER TAXES PAID BY PLAINTIFF, IN EXCHANGE FOR DISMISSAL OF LAWSUIT CHALLENGING IMPOSITION OF TRANSFER TAXES IN THE AMOUNT OF \$143,340.07 (FINANCE AND MANAGEMENT AGENCY; REAL PROPERTY TRANSFER TAXES)**

**WHEREAS**, on or about August 18, 2009, the Finance and Management Agency issued a final administrative decision ("Administrative Decision") that Lone Star California, Inc., predecessor in interest of RMC Pacific Materials, Inc. ("Plaintiff") owed real property transfer taxes pursuant to Oakland Municipal Code Chapter 4.20, in the amount of \$143,340.07 (the "Transfer Taxes"), for the acquisition in 2005 of the corporate entity which owned real property in the City of Oakland, commonly known as 333 23<sup>rd</sup> Avenue; and

**WHEREAS**, Plaintiff paid the Transfer Taxes under protest and, on or about December 17, 2009, filed a Petition for Writ of Administrative Mandate and Complaint for Declaratory Relief, in Alameda Superior Court (Case No. RG09489761, the "Lawsuit") seeking to reverse the Administrative Decision and to obtain a refund of the Transfer Taxes, including on the ground that Oakland Municipal Code Chapter 4.20 (the "Real Property Transfer Tax Ordinance") did not expressly authorize the taxation of the type of acquisition at issue; and

**WHEREAS**, on May 18, 2010, the City Council considered whether to approve a settlement of this case in which the City would pay Plaintiff \$107,250, which constitutes reimbursement of three-fourths of the Transfer Taxes paid under protest by Plaintiff, in exchange for dismissal of the Lawsuit (such that the City would retain \$36,090); and

**WHEREAS**, consistently with the direction provided by the City Council in closed session, the City Attorney's Office and counsel for Plaintiff have prepared a Settlement Agreement to resolve the Lawsuit, the form of which is attached hereto; now therefore be it resolved

**RESOLVED:** The City Administrator, or his designee, is authorized to enter the Settlement Agreement, in substantially the same form as attached hereto, subject to final approval by the City Attorney.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - DE LA FUENTE, KERNIGHAN, NADEL, QUAN, BROOKS, REID,  
KAPLAN, AND PRESIDENT BRUNNER

NOES -  
ABSENT -  
ABSTENTION -

ATTEST:

---

LATONDA SIMMONS  
City Clerk and Clerk of the Council of  
the City of Oakland, California

**SETTLEMENT AGREEMENT  
AND RELEASE OF ALL CLAIMS**

1. **Date:** The date of this Settlement Agreement and Release of All Claims (“Agreement”) is the date on which it is last signed (“Effective Date”).

2. **Lawsuit:** This Agreement pertains to the lawsuit currently pending in the Superior Court of California for the County of Alameda, entitled RMC PACIFIC MATERIALS, INC., successor in interest to LONE STAR CALIFORNIA, INC. v. CITY OF OAKLAND, bearing Case No. RG09489761 (hereafter, “the Lawsuit”). The Lawsuit is set forth with greater particularity in the pleadings on file with the Court, which are incorporated herein by reference, but in no way limit the scope of this Agreement.

3. **Parties in Interest** (collectively, the “Parties”):

- **RMC PACIFIC:** “RMC PACIFIC” as used in this Agreement means RMC Pacific Materials, Inc. and all of its respective corporations, affiliates, subsidiaries, related companies, parents, shareholders, distributors, owners, agents, predecessors (including but not limited to Lone Star California, Inc.); successors, assigns, servants, employees, representatives, general and limited partners, officers, directors, attorneys, insurers, and any others acting on its behalf.
- **CITY:** “CITY” as used in this Agreement means the City of Oakland, a charter city and municipal corporation.

4. **Occurrence:** This Agreement includes, but is not limited to, all claims, demands, and causes of action brought by RMC PACIFIC for equitable relief and damages of any kind, nature or character allegedly resulting from or related to the allegations, facts and events giving rise to the Lawsuit, or that could have been asserted in the Lawsuit.

5. **Full and Complete Mutual Release of Claims:** RMC PACIFIC fully, finally, and forever releases, acquits and discharges the CITY from any and all claims, demands, and causes of action of every nature and type that RMC PACIFIC has had, may have now, or in the future may have against the CITY, whether known or unknown, including, but not limited to 1) all claims, causes of action, and demands asserted or that could have been asserted in the Lawsuit, and 2) all claims, demands, damages, and causes of action in any manner otherwise related to the events, occurrences, or allegations set forth in the pleadings filed in the Lawsuit, which RMC PACIFIC now has or under any circumstances could or might have arising out of, resulting from, or in any manner pertaining to any and all known and unknown past, present, and future losses, injuries, expenses, attorney's fees, costs or other consideration.

The CITY fully, finally, and forever releases, acquits and discharges RMC PACIFIC from any and all claims, demands, and causes of action of every nature and type that the CITY has had, may have now, or in the future may have against RMC PACIFIC, whether known or unknown, including, but not limited to 1) all claims, causes of action, assessments, or demands related to any and all transfers of property interests in real property commonly known as 333 23<sup>rd</sup> Avenue (APN 019-0072-014, 019-0072-010, 019-0072-011, 019-0072-015), Oakland, CA and 2400 Peralta St. (APN 005-0441-001), Oakland, CA taking place at any time prior to the \_\_\_\_\_, and 2) all claims, demands, damages, and causes of action in any manner otherwise related to the events, occurrences, or allegations set forth in the pleadings filed in the Lawsuit, which the CITY now has or under any circumstances could or might have arising out of, resulting from, or in any manner pertaining to any and all known and unknown past, present, and future losses, injuries, expenses, attorney's fees, costs or other consideration.

6. **General Release:** The Parties hereby acknowledge and agree that the release set forth in this Agreement is a general release. The Parties expressly waive and assume the risk of any and all claims for damages which exist as of this date or which, although unknown to them, may arise in the future even though the knowledge of such claim might materially affect their decision to enter into this Agreement.

7. **Waiver of Civil Code Section 1542:** This Agreement shall cover and include any future injuries, or damages of any type or kind, not now known to the Parties but which may later develop or be discovered, including the effects or consequences thereof. The Parties acknowledge that they have each been advised by legal counsel regarding, and are familiar with, California Civil Code section 1542, which provides as follows:

**“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, being aware of this code section, expressly waive any rights which they may have under this code section, as well as any rights which they may have under any other statutes or common law principles of similar effect.

8. **Payment:** In consideration for this Agreement, the CITY agrees to pay RMC PACIFIC the sum of \$107,250.00 within fourteen calendar days of the Effective Date of this Agreement. RMC PACIFIC acknowledges by its signature below that this is reasonable and sufficient consideration for its dismissal of the Lawsuit with prejudice, and the CITY acknowledges that the dismissal of the Lawsuit with prejudice is sufficient and reasonable consideration for its payment of \$107,250.00. Each of the Parties shall bear its own costs, expenses, and attorneys' fees incurred in connection with the Lawsuit.

9. **Dismissal of Lawsuit with Prejudice:** RMC and its counsel agree to provide counsel for the CITY with a signed Notice of Dismissal with prejudice of the Lawsuit, with all parties bearing their own costs, expenses and attorneys' fees, within seven (7) calendar days of the later-occurring of the following two events: the CITY's provision of the final executed copy of this Agreement bearing an original signature, and the City's payment to RMC PACIFIC of the sum set out in paragraph 8 of this Agreement, such sum being made payable to \_\_\_\_\_ . The City's payment is to be sent to RMC PACIFIC's counsel indicated below.

10. **No Admission of Liability; Disputed Claims:** It is understood and agreed by the Parties that this Agreement is a compromise of RMC PACIFIC's claims and is not to be construed under any circumstances as an admission of liability on the part of the CITY, or as to the nature and extent of any damages or injuries allegedly sustained by RMC PACIFIC. It is further understood and agreed by RMC PACIFIC that the CITY denies all liability and intends merely to settle all claims against it arising from, or relating to, the alleged claims set forth in the Lawsuit, and to avoid the time and expense of further litigation.

11. **Section 664.6 of the Code of Civil Procedure:** This Agreement shall be subject to section 664.6 of the California Code of Civil Procedure. In the event any Party fails to satisfy the terms of this Agreement, the Court may enter judgment pursuant to the terms of this Agreement in accordance with the provisions of section 664.6 of the California Code of Civil Procedure.

12. **Non-Assignment:** Each party to this Agreement hereby represents and warrants that each such party has not heretofore assigned or transferred, or purported to assign or transfer, to any person whomsoever any of the claims, demands, grievances, liabilities, debts, accounts,

obligations, costs, expenses, liens, actions or causes of action released by this Agreement. Each party to this Agreement further agrees to indemnify and hold harmless any other party from and against the assertion by any third party of any such claims, demands, grievances, liabilities, debts, accounts, obligations, costs, expenses, liens, actions or causes of action, including reasonable attorneys' fees and costs incurred, arising out of or in connection with any such assignment or transfer by such party.

13. **Successors and Assigns:** This Agreement shall be binding upon and shall inure to the benefit of the Parties to this Agreement, and all of their respective corporations, affiliates, subsidiaries, related companies, parents, shareholders, distributors, owners, agents, predecessors, successors, assigns, servants, employees, representatives, general and limited partners, officers, directors, attorneys, insurers, beneficiaries, spouses, heirs, predecessors, successors, representatives, and assigns, and any others acting on their behalf.

14. **Enforcement:** All remedies at law or in equity shall be available for the enforcement of this Agreement. The Parties hereby acknowledge and agree that the prevailing party in any action or proceeding to enforce the terms of this Agreement or any of its terms, shall be awarded reasonable attorney's fees and costs. Venue for any such action or proceeding must be in the Superior Court of California for the County of Alameda.

15. **Captions:** The captions used in this Agreement are meant to be an aid in interpreting it. To the extent they conflict with any substantive provisions of the Agreement, they are to be disregarded.

16. **Applicable Law:** This Agreement shall be construed pursuant to the laws of the State of California in effect on the date of this Agreement.



17. **The Parties Voluntarily Entered Into The Agreement:** The Parties further warrant and represent that they have entered into this Agreement of their own free will and accord, and in accordance with their own judgment. The Parties acknowledge they were advised of their right to obtain legal counsel to advise and represent them in connection with the matters set forth herein, and in fact have been advised and represented by counsel in the negotiation, preparation, and execution of this Agreement.

18. **Jointly Drafted:** This Agreement has been jointly negotiated and drafted. The language of this Agreement shall be construed as a whole according to its fair meaning, and not strictly for or against any of the Parties. This Agreement shall be liberally construed to accomplish this purpose.

19. **Complete Agreement:** The Parties represent that no promises, inducements, or agreements not expressed in this Agreement have been made or offered and that this Agreement is not executed in reliance upon any statement, act, or representation except as specifically set out in this Agreement. It is understood and agreed that this Agreement contains the entire agreement between the Parties with respect to the resolution of the Lawsuit and that the terms and provisions of this Agreement are contractual and not mere recitals.

20. **Authority Of Signatories:** Each person executing this Agreement does hereby represent and warrant to the other signatories that he or she has the authority necessary to execute this Agreement; and that no other consents or approvals of anyone are required or necessary for this Agreement to be binding.

21. **Severability**: Should any term of this Agreement be deemed unlawful, that provision shall be severed and the remaining terms shall continue to be valid and fully enforceable.

22. **Further Action**: The Parties agree to execute such other documents and take such other action as may be reasonably necessary to finalize and perform this Agreement.

23. **Execution in Counterparts**: This Agreement may be executed in any number of copies by the Parties to this Agreement on separate counterparts and will become effective upon signature by all parties upon one or more of such counterparts.

**BEFORE SIGNING BELOW, THE UNDERSIGNED DECLARE THEY ARE LEGALLY COMPETENT TO EXECUTE THIS AGREEMENT, HAVE READ AND FULLY UNDERSTAND IT, AND VOLUNTARILY EXECUTE IT WITH FULL KNOWLEDGE OF ITS CONTENTS AND MEANING FOR THE PURPOSE OF OBTAINING THE ABOVE-STATED CONSIDERATION.**

**APPROVED AND AGREED:**

CITY OF OAKLAND

Date: June \_\_\_\_, 2010

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

**APPROVED AS TO FORM:**

\_\_\_\_\_  
KEVIN D. SIEGEL, Deputy City Attorney  
Attorney for City of Oakland  
Date: June \_\_\_\_, 2010

///

RMC PACIFIC MATERIALS, INC.

Date: June \_\_\_\_, 2010

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

**APPROVED AS TO FORM:**

**GREENBERG TRAURIG, LLP**

\_\_\_\_\_  
MARC B. KOENIGSBERG  
Attorney for RMC PACIFIC Materials, Inc.  
Date: June \_\_\_\_, 2010

*DEL 86,321,980v2 6-3-10*