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ATTORNEYS FOR

Plaintiff THE BELMONT
HOMEOWNERS ASSOCIATION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

THE BELMONT HOMEOWNERS ASSOCIATION,)

Plaintiff,)

vs.)

SYLVAN I. POSNER and LOIS B.
POSNER, et al.,)

Defendants.)

AND RELATED CROSS-ACTIONS.)

NO. 283762

MEMORANDUM OF POINTS AND
AUTHORITIES IN RESPONSE
TO DEFENDANTS' MOTION

Date: October 25, 1985

Time: 9:00 a.m.

Dept: Seven

Est. Time: 30 minutes

INTRODUCTION

This is a motion brought by defendants requesting the Court to enforce their version of a proposed written settlement agreement. In response to this motion, plaintiffs are requesting that the Court deny defendants' request and instead enforce plaintiff's proposed Compromise Settlement and Mutual Release. Although there are a number of slight differences between the two proposed written agreements, it seems that the primary issue is whether the settlement agreement should include the release and settlement of the validity of a particular Association rule relating to a "move-in, move-out fee".

1 The "move-in, move-out fee" issue was initially introduced
2 into this action by way of a cross-complaint filed by the
3 defendants in response to plaintiff's complaint in the Superior
4 Court. Approximately one week prior to the trial date where a
5 settlement was ultimately placed on the record, defendants
6 unilaterally purported to dismiss those portions of their
7 cross-complaint relating to the "move-in, move-out fee" issue.
8 Prior to the settlement being placed upon the record, the
9 defendants then paid their delinquent move-in, move-out fee.
10 Defendants now contend that, in light of these actions, the
11 move-in, move-out fee was not an issue at the time of the
12 settlement, and thus they have preserved their right to raise
13 it as an issue in the future. On the other hand, plaintiff
14 contends that the move-in, move-out fee was an issue from the
15 filing of the cross-complaint to the time of settlement, and
16 that that issue was intended to be included in the settlement
17 and to be covered by the language of the general release and
18 the Civil Code §1542 waiver.

19 Unfortunately, to understand the current dispute it is
20 necessary that the facts leading up to this hearing be set
21 forth in some detail.

22 FACTS

23 Sometime in 1983, Mr. and Mrs. Posner, the owners of two
24 units at the Belmont Condominium Project, placed both of their
25 units on the market. After a number of months without success
26 in the marketing of their units, the Posners complained to the
27 Homeowners Association that the reason for their lack of
28 success was primarily related to the fact that the Association,

1 by it's adopted rules, prohibited real estate lock boxes being
2 attached to doors entering into the common area.

3 The members of the Board of Directors considered the
4 Posners' complaint. However, they were well aware that a
5 number of units at The Belmont had been successfully marketed
6 with the same rule in effect, and thus concluded that the
7 Posners' conclusion was erroneous. When the Board declined to
8 modify the rule, the Posners initiated two actions in Small
9 Claims Court contending that they were entitled to a recovery
10 of interest and Association dues paid over the marketing
11 period, on the grounds that the rule had prohibited their
12 ability to market their units.

13 In response to these actions, the Association filed the
14 present action in Superior Court seeking declaratory relief to
15 the effect that the Association's rule relating to the
16 prohibition of real estate lock boxes on common area doors was
17 valid. Mr. and Mrs. Posner filed an answer to the complaint
18 and a cross-complaint which named the Association, and the
19 individual Board members as defendants. In the
20 cross-complaint, the Posners sought a declaration not only as
21 to the validity of the lock box rule, but also as to the
22 validity of a rule referred to as the "move-in, move-out fee."
23 This later rule relates to the requirement that whenever a unit
24 is moved into, the owner is required to pay a one time move-in,
25 move-out fee in the amount of \$225.00. The purpose of this
26 rule is to defray a number of expenses which the Association
27 has historically incurred as a result of such activity. At the
28 time the cross-complaint was filed, the Posners were in fact

1 delinquent for one such move-in, move-out fee.

2 Following a number of depositions, plaintiff filed an
3 At-Issue Memorandum and the case was set for a court trial on
4 May 15, 1985. A number of settlement conferences were held
5 prior to the trial date with little success. Although the
6 Board of Directors had indicated a willingness to consider some
7 modifications to the lock box rule, including the installation
8 of a special telephone to permit entry of real estate agents
9 during hours when the front desk was closed, Mr. and Mrs.
10 Posner refused to settle.

11 Approximately one week prior to the trial date, William
12 Klein, the attorney for Mr. and Mrs. Posner, unilaterally
13 dismissed the cross-complaint as to all of the individual
14 defendants and further purported to dismiss certain portions of
15 the cross-complaint relating to the "move-in, move-out fee".

16 On May 15, 1985, the matter came on regularly for trial in
17 the Department of the Presiding Judge. Prior to the matter
18 being assigned, further settlement discussions were held
19 between the parties. Ultimately, certain language was agreed
20 upon regarding the rule relating to the lock boxes. The
21 insurance carrier, which had come in to defend the Association
22 on the cross-complaint, also agreed to pay to Mr. and Mrs.
23 Posner the sum of \$3,000.00. Plaintiff's counsel specifically
24 told Mr. Klein that any settlement would have to include a
25 settlement of the issue of the move-in, move-out fee and that
26 from the \$3,000.00 to be paid to the Posners, they would be
27 required to pay immediately their delinquent \$225.00 move-in,
28 move-out fee. Mr. Klein discussed this matter with his clients

1 and indicated that Mr. and Mrs. Posner were willing to pay the
2 move-in, move-out fee before placing the settlement on the
3 record. Mr. Klein further indicated that because the move-in,
4 move-out fee was an emotional one with his clients, he
5 preferred not to refer to it specifically in the settlement
6 agreement. Plaintiff's counsel informed Mr. Klein that it
7 would not be necessary to refer specifically to the move-in,
8 move-out fee on the record if his clients were willing to agree
9 to a waiver of the provisions of Civil Code §1542 and give a
10 general release to the Association. Mr. Klein discussed this
11 with his clients and agreed to this alternative.

12 Contrary to Mr. Klein's declaration, both counsel agreed
13 that the matter would be placed upon the record. Plaintiff's
14 counsel did suggest that it would promote harmony within the
15 Condominium Project if the terms of the settlement agreement
16 were kept confidential among the parties. Mr. Klein agreed.
17 His clients then gave to the Association a check in the amount
18 of \$225.00 in payment of their delinquent move-in, move-out
19 fee. All parties then proceeded to the chambers of Judge
20 Bollhoffer where the settlement was placed on the record. The
21 specific wording placed upon the record is contained in a
22 transcript in the Court's file. Plaintiff's counsel agreed to
23 prepare a written agreement to reflect the understanding of the
24 parties.

25 Approximately two to three days after the settlement was
26 placed upon the record, plaintiff's counsel was notified by his
27 client that, contrary to the understanding and spirit of the
28 settlement agreement, Mr. and Mrs. Posner, only a few days

1 following the settlement, requested of the Association that
2 they be provided a complete list of all members of the
3 Association who had ever paid the move-in, move-out fee. On
4 May 23, 1985, plaintiff's counsel sent to Mr. Klein a proposed
5 Compromise Settlement and Mutual Release. In that letter,
6 plaintiff's counsel specifically noted that the request of the
7 Posners was in direct violation of the general release which
8 they had placed upon the record on May 15, 1985.

9 After waiting for two weeks without response to the
10 proposed Agreement from Mr. Klein, plaintiff's counsel again
11 wrote to Mr. Klein with a request that he respond to the
12 proposed Settlement Agreement. Thereafter, plaintiff's counsel
13 and Mr. Klein spoke by telephone regarding the Agreement. In
14 that telephone conversation, Mr. Klein indicated he had some
15 minor changes which related primarily to the preamble of the
16 Agreement. At no time during that conversation did Mr. Klein
17 ever object to any provision in the Agreement which
18 specifically indicated that the move-in, move-out fee issue had
19 been resolved. The telephone conversation concluded with an
20 understanding that Mr. Klein would put in writing his specific
21 objections to the proposed written Agreement and send them to
22 plaintiff's counsel so that the matter could be resolved.

23 Contrary to their agreement on the telephone, Mr. Klein
24 then filed a motion in Superior Court seeking to have the Court
25 order the transcription of the settlement agreement placed upon
26 the record in Court's chambers. Attached to that motion was a
27 declaration which contained a number of "factual inaccuracies".
28 In response to that motion, plaintiff's counsel contacted Mr.

1 Klein and informed him that he had absolutely no objection to
2 the agreement being transcribed, that the motion was
3 unnecessary, that the declaration filed by Mr. Klein was
4 "factually inaccurate" and that plaintiff's counsel intended to
5 file a declaration in response to the motion, if for no other
6 purpose than to set the record straight. Thereafter,
7 plaintiff's counsel did file a declaration setting forth the
8 facts as he knew them. Mr. Klein requested that his motion be
9 taken off calendar and that the proposed Agreement which he had
10 filed with the motion be placed in the confidential portion of
11 the Court's file.

12 After the motion was taken off calendar, Mr. Klein did
13 send to plaintiff's counsel his proposed revisions to the
14 written Agreement. It should be noted that nowhere in Mr.
15 Klein's letter was there any indication that he wished to
16 remove from the proposed written Agreement any reference to the
17 fact that the move-in, move-out fee issue had been resolved.
18 Following receipt of Mr. Klein's letter, plaintiff's counsel
19 received the transcript of the settlement conference. With
20 both Mr. Klein's letter and the transcript, plaintiff's counsel
21 contacted Mr. Klein by telephone and discussed each of the
22 issues raised by Mr. Klein. At the conclusion of that
23 telephone conversation, it was the understanding of plaintiff's
24 counsel that an agreement had been reached as to all of the
25 issues raised by Mr. Klein. Plaintiff's counsel then
26 incorporated each of the agreed provisions into the originally
27 proposed Compromise Settlement and Mutual Release. That
28 document along with a cover letter was then sent to Mr. Klein

1 for his clients' signatures on August 6, 1985.

2 Although plaintiff's counsel and Mr. Klein had agreed on
3 every issue raised in the telephone conversation, Mr. Klein, on
4 August 21, 1985, wrote to plaintiff's counsel, indicating that
5 all previous discussions notwithstanding, his clients were only
6 prepared to sign an agreement in the form which he included
7 with his letter of August 21, 1985. Although this agreement
8 differed in a number of minor respects with the original
9 proposed Agreement by plaintiff's counsel, it did differ in one
10 major respect, which is now the issue before the Court.

11 In Mr. Klein's agreement of August 21, 1985, he now
12 expressly states that the settlement "does not extend to
13 release claims and disputes relating to rules regarding 'non-
14 refundable move-in, move-out fee' fees and charges." This
15 agreement of August 21, 1985, represents the first time
16 throughout the entire negotiations of this lawsuit, including
17 those following the statements on the record on May 15, 1985,
18 in which Mr. Klein indicates that his clients do not intend to
19 settle the move-in, move-out fee issue. This total reversal of
20 positions is a clear indication that Mr. Klein and his clients
21 seek to modify the understanding of the parties entered into on
22 May 15, 1985, so that they may continue to generate more
23 litigation and division within the Association.

24 DISCUSSION OF THE LAW

25 Until recently, there was a dispute among various
26 decisions of the Courts of Appeals in this State as to the
27 appropriate procedure for enforcing a settlement which had been
28 judicially supervised and placed on the record. However, in

1 1981, effective January 1, 1982, the Legislature laid this
2 issue to rest with the enactment of Code of Civil Procedure
3 §664.6, which reads as follows:

4 "If parties depending litigation stipulate, in
5 writing or orally before the Court, for
6 settlement of the case, or part thereof, the
Court, upon motion, may enter judgment pursuant
to the terms of the settlement."

7 By this enactment, the Legislature has approved a procedure for
8 the enforcement of settlements even where there is a contention
9 of disputed facts. (Corkland v. Boscoe (1984) 156 C.A.3d 898,
10 994.) The procedures to be followed in ruling on such a motion
11 are outlined in Corkland as follows:

12 "In acting upon a §664.6 motion, the trial
13 court must determine whether the parties
14 entered into a valid and binding settlement of
15 all or part of the case. In making this
16 determination trial judges, in the sound
exercise of their discretion, may receive oral
testimony or may determine the motion upon
declarations alone. (Citations)" (Corkland v.
Boscoe, supra, 156 C.A.3d at p. 994.)

17 In the present action, each of the parties offers to the
18 Court a proposed Compromise Settlement and Mutual Release.
19 Although there are some minor differences between the
20 Agreements, they are basically the same except for the issue
21 of the "move-in, move-out fee." Defendants contend that
22 because they "dismissed that issue from the lawsuit prior to
23 the settlement" and because there is no specific reference
24 to the move-in, move-out fee in the settlement agreement
25 placed on the record, that issue was not resolved at the
26 settlement conference. On the other hand, plaintiff contends
27 that defendants attempted dismissal of certain language within
28 the First Cause of Action was ineffective and that the

1 inclusion of the general release and the waiver of Civil Code
2 §1542, coupled with the discussions leading up to that release
3 and waiver, have resulted in a settlement of all issues in the
4 litigation, including the issue of the move-in, move-out fee.

5 Civil Code §1542 provides as follows:

6 "A general release does not extend to claims
7 which the creditor does not know or suspect to
8 exist in his favor at the time of executing the
9 release, which if known by him must have
materially effected his settlement with the
debtor."

10 This §1542 waiver along with other language in plaintiff's
11 proposed Settlement Agreement were included pursuant to the
12 statement on the record that there would be a "general release"
13 and a "1542 waiver". (Rptr. Trans.-3) The purpose of the
14 general release was to settle all existing, known claims, and
15 the purpose of the "1542 waiver" was to settle any existing,
16 but unknown claims. That this was intended is reflected in the
17 Court's statement on the record which reads "and you understand
18 this will be a full settlement of all your claims and lawsuits
19 against Belmont Homeowners Association?" (Rptr. Trans.-5)

20 The move-in, move-out fee was clearly an issue in the
21 lawsuit. It had been specifically pleaded in the First Cause
22 of Action of the cross-complaint filed by the Posners. It is
23 submitted that the filing of a request for dismissal of certain
24 language within a cause of action is of no legal significance.
25 No authority exists for such a procedure. However, even if Mr.
26 Klein removed the issue from the lawsuit, it was still an issue
27 known to Mr. and Mrs. Posner.

28 Mr. Klein in his memorandum of points and authorities

1 argues that the move-in, move-out fee was removed as an issue
2 because his clients conceded prior to the settlement that they
3 owed the \$225.00 fee to plaintiff. However, it was not just
4 the delinquency of the fee that was in dispute in the lawsuit.
5 It was, in fact, the validity of the rule itself, and this
6 issue was directly raised by the cross-complaint filed by Mr.
7 Klein on behalf of his clients. To follow Mr. Klein's
8 "reasoning", the validity of the rule was not an issue before
9 the settlement because his clients had acknowledged it's
10 validity by paying the move-in, move-out fee. However, he now
11 files a motion and seeks an agreement which specifically
12 indicates that his clients are not waiving their right to file
13 a new lawsuit contesting the validity of the move-in, move-out
14 fee. If it was not an issue before the settlement, then it
15 should not be permitted to be an issue after the settlement.

16 Clearly, it was not the intent of the Board of Directors
17 of the Homeowners Association to settle this lawsuit with the
18 intent of leaving certain issues raised by the Posners
19 unresolved. To do so would leave the Association vulnerable to
20 a second lawsuit by Mr. and Mrs. Posner, who have a history of
21 fermenting discontent within the Association. The
22 acknowledgement by Mr. and Mrs. Posner on page 5 of the
23 Reporter's Transcript to the effect that they clearly
24 understood that this was a "full settlement of all claims and
25 lawsuits against the Belmont Homeowners Association" reflects
26 the understanding of the parties at the time the settlement was
27 entered into and should be enforced by this Court. To do
28 otherwise, will almost certainly mean that these parties will

1 be back in this Court to dispute, once again, the move-in,
2 move-out fee.

3 Finally, certain comments must be made with reference to
4 Mr. Klein's request for sanctions in this motion. The record
5 will reflect that eight days after this matter was placed on
6 the record, plaintiff's counsel prepared and sent to Mr. Klein
7 a six-page proposed Compromise Settlement and Mutual Release.
8 Thereafter, plaintiff's counsel waited for more than two weeks
9 without any response from Mr. Klein or his clients to the
10 proposed Agreement. Only after plaintiff's counsel wrote a
11 letter to Mr. Klein did he respond with a telephone call.
12 Following that telephone call, and totally contrary to what had
13 been discussed, Mr. Klein filed a motion which required
14 plaintiff's counsel to file an extensive declaration in
15 response thereto. Thereafter, plaintiff's counsel in good
16 faith attempted to resolve all of the issues by telephone
17 discussions with Mr. Klein after receiving a copy of the
18 transcript of the settlement agreement. Then, as admitted in
19 Mr. Klein's letter of August 21, 1985, Mr. Klein totally
20 disregarded what had been agreed to on the telephone with
21 plaintiff's counsel and submitted an agreement removing the
22 move-in, move-out fee from the settlement. It is ludicrous
23 that Mr. Klein has asked for sanctions upon the basis of this
24 record.

25 The Belmont Homeowners Association immediately following
26 the settlement agreement on May 15, 1985, amended their rules
27 regarding the real estate lock boxes to conform with the terms
28 of the settlement agreement. Clearly, that is an act of good

1 faith. The Posners' have not received payment of the \$3,000.00
2 because they have refused to sign an Agreement which accurately
3 reflects the letter and spirit of the settlement entered into.
4 They have delayed the process through inaction and attempts to
5 change the actual agreement. It is submitted that plaintiff be
6 awarded sanctions in the amount of \$1,070.00 on the basis of
7 the actions of defendants and their counsel which have clearly
8 been directed at delaying settlement of this case.
9

10 Dated: October 18, 1985

Respectfully submitted,

11 BERGERON AND GARVIC
12

13 By



JOHN D. GARVIC

Attorney for Plaintiffs
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ATTORNEYS FOR Plaintiff THE BELMONT
 HOMEOWNERS ASSOCIATION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE BELMONT HOMEOWNERS ASSOCIATION,))	NO. 283762
)	
Plaintiff,)	DECLARATION OF JOHN D.
)	GARVIC
vs.)	
)	
SYLVAN I. POSNER AND LOIS B.)	
POSNER, et al.,)	
)	Date: October 25, 1985
Defendants.)	Time: 9:00 a.m.
)	Dept: Seven
)	Est. Time: 30 minutes
)	
<u>AND RELATED CROSS-ACTIONS.</u>)	

I, JOHN D. GARVIC, declare that:

1. I am an attorney at law licensed to practice in the State of California, and the attorney of record for the plaintiff, THE BELMONT HOMEOWNERS ASSOCIATION, in the above-entitled action.

2. This action originally began when defendants, Mr. and Mrs. Posner, initiated two Small Claims Court actions in the San Mateo County Municipal Court for damages, wherein they alleged that the Association's rule prohibiting lock boxes on the common area entrances was invalid. In response to these

1 Small Claims Court actions, the Association initiated the
2 present action in Superior Court, requesting that the Court
3 declare the rule relating to the lock boxes valid. In response
4 to this Superior Court action, Mr. and Mrs. Posner filed a
5 cross-complaint and, among other things, sought a declaration
6 that the rule relating to the lock boxes, as well as other
7 rules, was invalid. One of the other rules specifically
8 singled out by Mr. and Mrs. Posner was that relating to the
9 required payment of \$225.00 to the Association each time a unit
10 was occupied, frequently referred to as the "move-in, move-out
11 fee".

12 3. Numerous attempts to settle this matter prior to
13 trial met without success, with the result that the trial was
14 scheduled for May 15, 1985.

15 4. On May 7, 1985, approximately one week before the
16 scheduled trial, Mr. and Mrs. Posner unilaterally filed a
17 Request for Dismissal without prejudice as to certain aspects
18 of their cross-complaint including all references to the
19 "move-in, move-out fee" in the First Cause of Action and the
20 entire Second Cause of Action of the cross-complaint.

21 5. On the date set for trial, May 15, 1985, the Court
22 conducted additional settlement conferences. During settlement
23 negotiations with the attorney for Mr. and Mrs. Posner, William
24 Klein, certain language modifications to the rules relating to
25 lock boxes, for sale signs and access to the units by real
26 estate brokers were discussed and agreed upon. It was also
27 agreed that the Association's insurance carrier would pay to
28 the Posners the sum of \$3,000 to facilitate the settlement. I

1 indicated to Mr. Klein that the Association fully expected Mr.
2 and Mrs. Posner to pay from that \$3,000 the \$225.00 move-in fee
3 that was still owing by them. I also indicated to Mr. Klein
4 that the settlement would have to include an acknowledgment by
5 Mr. and Mrs. Posner of their obligation to pay and the validity
6 of the move-in, move-out fee. Mr. Klein indicated that this
7 aspect of the litigation was a very emotional one for Mr. and
8 Mrs. Posner and that he did not want a specific reference to
9 the move-in, move-out fee in the settlement on the record. I
10 informed Mr. Klein that unless the issue regarding the move-in,
11 move-out fee was settled, the lawsuit could not be settled. I
12 then suggested that in lieu of specific mention of the move-in,
13 move-out fee, we would instead include a General Release and
14 Civil Code §1542 waiver, with the understanding that that
15 release and waiver would effect all of the issues raised by the
16 litigation, including those issues raised in the
17 cross-complaint and subsequently dismissed. Mr. Klein agreed
18 and, before entering Judge's chambers to place the settlement
19 statement on the record, his clients paid to the Association,
20 by check, the \$225.00 for their move-in, move-out fee.

21 (Exhibit "A".)

22 6. In the Court's chambers, the basics of the settlement
23 were recited on the record before the Honorable Alan J.
24 Bollhoffer, Judge of the Superior Court. Before the agreement
25 was placed on the record, I mentioned to the Court that present
26 in chambers were all of the current Board members plus a
27 previous Board member, Robert Kilpatrick. Following the
28 recital of the terms of the settlement agreement on the record,

1 it was further agreed by all of the parties that all of the
2 terms of the settlement would remain confidential except as was
3 necessary for the Association to conduct it's business or upon
4 further order of the Court. I agreed to prepare a written
5 Settlement Agreement.

6 7. Although it was the expressed intent of all of the
7 parties at the time of the settlement to resolve all existing
8 disputes between them, shortly after May 15, 1985, I was
9 informed that Mr. and Mrs. Posner had once again requested of
10 the Association various documentation relating to the
11 assessment and collection of the move-in, move-out fee. This
12 request followed the settlement agreement placed on the record
13 in Court's chambers, and was a clear indication that Mr. and
14 Mrs. Posner intended to continue to dispute the move-in,
15 move-out fee and to ferment discontent within the Association,
16 in spite of their General Release and Waiver.

17 8. Approximately one week after the settlement, I
18 prepared a proposed Compromise Settlement and Mutual Release
19 consisting of seven pages and reflecting all aspects of the
20 settlement reached in the Court's chambers. In that Agreement,
21 it was specifically indicated that all of the issues, including
22 those raised by the various portions of the cross-complaint
23 which had been dismissed prior to settlement, would be settled
24 by the Agreement of the parties. On May 23, 1985, I forwarded
25 a copy of the proposed Compromise Settlement and Mutual Release
26 along with a cover letter explaining certain aspects of the
27 document to William Klein. (Exhibit "B")

28 9. When I heard nothing from Mr. Klein for more than two

1 weeks, I wrote to him on June 10, 1985, and requested that he
2 respond to my documents. (Exhibit "C")

3 10. Following my letter of June 10, 1985, I had one
4 telephone conversation with Mr. Klein. In that conversation,
5 he indicated that his primary objections related to the
6 preamble of the Compromise Settlement and Mutual Release
7 document. I told Mr. Klein that the preamble, in my
8 experience, was quite standard, but that I would be more than
9 willing to discuss any specific objections he might have to it.
10 I suggested to Mr. Klein that he meet with his clients and
11 prepare a list of all objections in writing and forward it to
12 me at his earliest convenience so that we could resolve any
13 disputed areas and conclude the settlement. Mr. Klein agreed
14 to do this.

15 11. Thereafter, I heard nothing further from Mr. Klein
16 until late June, 1985, when I received from Mr. Klein a motion
17 for an order to open sealed records, which motion had attached
18 to it the proposed Compromise Settlement and Mutual Release
19 which I had prepared. The declaration of Mr. Klein in support
20 of the motion contained a number of "erroneous statements".

21 12. Thereafter, I contacted Mr. Klein by telephone and
22 informed him that I had no objection to the preparation of a
23 transcript of the settlement placed on the record and that I
24 felt that it was totally unnecessary to file such a motion,
25 particularly in light of the fact that it was my understanding
26 that he would be corresponding with me in writing as to his
27 clients' objections to my proposed Agreement. I further
28 informed Mr. Klein that I felt that by attaching the proposed

1 Agreement to the noticed motion, he had acted in total
2 disregard of the stipulated confidentiality between the
3 parties.

4 13. Mr. Klein then indicated that he would take the
5 motion off calendar and proceed to order a copy of the
6 transcript. He also wrote a letter to the Court requesting
7 that the Court place the motion with the proposed Settlement
8 Agreement in the sealed portion of the file.

9 14. In July, 1985, I received a copy of the transcript.
10 In the meantime, Mr. Klein had provided me with some written
11 objections to the original language in my proposed Agreement.
12 (Exhibit "D")

13 15. On July 17, 1985, I replied to these objections.
14 (Exhibit "E")

15 16. Following receipt of the transcript of the Settlement
16 Agreement, I contacted Mr. Klein by telephone on August 6,
17 1985, to discuss what modifications could be made to the
18 proposed Agreement which would be acceptable to all parties.
19 At that time, it was my understanding that all of the issues
20 were resolved, and I prepared a letter to Mr. Klein
21 memorializing our telephone conversation which included a
22 revised copy of the Compromise Settlement and Mutual Release.
23 (Exhibit "F")

24 17. From the date that the settlement was placed on the
25 record through my discussions with Mr. Klein of August 6, 1985,
26 Mr. Klein never once objected to the language in the proposed
27 Settlement Agreement and Mutual Release relating to the fact
28 that all of the issues, including those related to the move-in,

1 move-out fee were being settled by this Agreement.

2 18. On August 21, 1985, I received from Mr. Klein a
3 letter, together with a completely revised Compromise
4 Settlement and Mutual Release. The letter indicated that all
5 previous conversations notwithstanding, his clients were
6 prepared to sign only the Agreement which he had enclosed.
7 (Exhibit "G") The Agreement enclosed included a specific
8 reservation of the move-in, move-out fee issue, indicating that
9 the Posners had no intent of releasing this issue.

10 19. Upon receipt of Mr. Klein's letter of August 21,
11 1985, I contacted him by telephone and inquired as to why all
12 of the agreements previously discussed had been disregarded in
13 this new proposed Agreement. Mr. Klein indicated that he
14 realized that the proposed Agreement accompanying his letter of
15 August 21, 1985, was very different from that which had been
16 discussed earlier. He further stated that this was all that
17 his clients were willing to sign and that he fully anticipated
18 that this matter would have to be resolved by a motion to the
19 Court.

20 20. Throughout all of the Settlement Conferences and
21 discussions prior to May 15, 1985, the move-in, move-out fee,
22 as well as all of the other issues raised by the various
23 complaints and cross-complaints in the litigation were always
24 discussed. On May 15, 1985, when the Settlement Agreement was
25 placed on the record, it was my understanding, and I believe
26 the understanding of my clients, Mr. Klein, and Mr. and Mrs.
27 Posner that the Settlement was meant to resolve and settle all
28 disputed issues between the parties so that some semblance of

1 harmony might return to The Belmont Condominium Project.

2 21. Since the settlement, no reference has been made to
3 the proposed language in the original proposed Compromise
4 Agreement and Mutual Release, which included the move-in,
5 move-out fee issue, until Mr. Klein's letter of August 21,
6 1985.

7 22. With this motion, I am attaching in a sealed envelope
8 a copy of Exhibits A, B, C, D, E, F and G. Also enclosed is
9 the revised proposed Compromise Settlement and Mutual Release
10 to which Mr. Klein agreed, but later reneged on. (Exhibit "H")
11 It is requested that these documents be kept confidential by
12 the Court.

13 I declare under penalty of perjury of the laws of the
14 State of California that the foregoing is true and correct and
15 that this declaration was executed on October 18, 1985, at San
16 Mateo, California.

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20 JOHN D. GARVIC
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