

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This SETTLEMENT AGREEMENT AND MUTUAL RELEASE (“Agreement”) is made and entered into, by and between the City of Escondido, a California municipal corporation (“City”), and TOUCHSTONE MF FUND I, LLC, a Delaware limited liability company (“Touchstone”), individually, a “Party” and collectively, “Parties.” The Parties hereby agree as follows:

RECITALS

A. On December 10, 2018, the Parties executed an Agreement of Purchase and Sale and Joint Escrow Instructions (“**2018 PSA**”) relating to City-owned real property located at 137 Valley Parkway, Escondido, CA 92025, and having assessor’s parcel number 229-421-26 (“**Property**”); and

B. On June 2, 2020, Touchstone filed a Complaint against City entitled *Touchstone MF Fund I, LLC v. City of Escondido, et al.*, in the Superior Court of the State of California, County of San Diego, Case No. 37-2020-00020856-CU-BC-NC, alleging Breach of Contract and Declaratory Relief in relation to the 2018 PSA. On July 22, 2020, City filed a Cross-Complaint against Touchstone alleging Breach of Contract and Declaratory Relief (collectively the “**Underlying Action**”); and

C. The Parties have a common interest in resolving their disputes and avoiding further litigation. Without admitting any wrongdoing or fault concerning these matters, the Parties wish to settle their disputes and believe that this Agreement is in their mutual best interests; and

D. The Parties intend to fully and completely settle and dispose of the Dispute and Underlying Action between them on the terms and conditions in this Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

DEFINITIONS

1. “**City**” refers to the City of Escondido, a California municipal corporation.
2. “**Touchstone**” refers to Touchstone MF Fund I, LLC, a Delaware limited liability company.
3. “**KB Escondido**” refers to KB Escondido, LLC, a California limited liability company, who intends to develop the Property.
4. “**PSA**” refers to an Agreement of Purchase and Sale and Joint Escrow Instructions between City and Touchstone executed on December 10, 2018.
5. “**Property**” refers to City-owned real property located at 137 Valley Parkway, Escondido, CA 92025, and having assessor’s parcel number 229-421-26.

6. “**Underlying Action**” refers to the entire matter titled *Touchstone MF Fund I, LLC v. City of Escondido, et al.*, in the Superior Court of the State of California, County of San Diego, Case No. 37-2020-00020856-CU-BC-NC, including the City’s Cross-Complaint.

7. “**Dispute**” refers to the Underlying Action, inclusive of all claims, cross-claims, counter-claims and defenses alleged therein, *and* all past and existing claims, demands, actions, suits, damages, debts, liabilities, obligations, costs and expenses, whether known or unknown, suspected or unsuspected, asserted or not asserted, of any kind or nature whatsoever relating to the PSA, the Property, or any prior agreements between the Parties.

8. “**First Amendment to Purchase and Sale Agreement**” refers to an executed agreement between the City and Touchstone that is in substance the same as the unexecuted version of the First Amendment to Purchase and Sale Agreement attached as Exhibit “1” hereto and incorporated herein by reference, with the only differences between Exhibit “1” and the executed version of the same being the dating and signatures necessary to execute the same.

A G R E E M E N T

1. Stay and Dismissal of Underlying Action.

1.1. The Parties agree to file a stipulation with the Court in the Underlying Action to stay the Underlying Action for 31 months from the date of execution of this Agreement.

1.2. At the earlier of (a) the conclusion of the stay in the Underlying Action granted by the Court following the efforts by the Parties described in Paragraph 1.5 below, or (b) the close of escrow pursuant to the PSA as amended by the First Amendment to Purchase and Sale Agreement, or (c) the termination of the PSA as amended by the First Amendment to Purchase and Sale Agreement, Touchstone shall file a dismissal with prejudice of its Complaint and City shall file a dismissal with prejudice of its Cross-Complaint. The Parties intend this provision to mean that in all circumstances the Underlying Action will be dismissed regardless of the outcome of any development application process undertaken by KB Escondido, or any other authorized assignee(s), and that Touchstone, including its successors, affiliates, principals, and managing partners, shall not participate in the development of the Property with KB Escondido or any other authorized assignee.

1.3. The Parties agree that the five-year rule under California Code of Civil Procedure section 583.310 is hereby waived and a waiver of the five-year rule shall be filed with the Court in the Underlying Action within 30 days of the Court granting the stay(s) described in this Paragraph.

1.4. The Parties mutually agree to release and waive any litigation costs and attorney’s fees recoverable against the other Party incurred in the Underlying Action.

1.5. The Parties shall submit the Stipulation and Order for the Court to consider in the Underlying Action as attached hereto as Exhibit “2.” If the Court does not grant the Parties a 31-

month stay in the Underlying Action, the Parties will jointly stipulate or otherwise move for an 18-month stay of the Underlying Action, unless the Court has, prior to the Parties doing so, communicated to the Parties verbally or in writing that it would not approve any such request for a stay of 18 months or longer. If the Court fails or refuses to grant any stay of the Underlying Action, the Parties agree to meet and confer on a resolution of the Underlying Action consistent with the intent of the Parties provided for herein.

2. This Agreement is contingent upon and is of no effect unless and until the First Amendment to Purchase and Sale Agreement is duly approved and executed.

While this Agreement is of no effect unless and until the First Amendment to Purchase and Sale Agreement is executed, the Parties agree that this Agreement will be signed by all Parties prior to any Party signing the First Amendment to Purchase and Sale Agreement.

3. Mutual Releases and Related Provisions.

3.1 City's Release. Excluding only the rights and obligations created by this Agreement and agreement identified in Paragraph 2 above, City, on behalf of itself, and to the fullest extent permitted by law fully and unconditionally releases, settles, and forever discharges Touchstone from all claims involved in or arising from or relating to the Dispute, which City now has or may have, or which City at any time in the future may have.

3.2. Touchstone's Release. Excluding only the rights and obligations created by this Agreement and agreements identified in Paragraph 2 above, Touchstone, on behalf of itself, and to the fullest extent permitted by law fully and unconditionally releases, settles, and forever discharges City from all claims involved in or arising from or relating to the Dispute, which Touchstone now has or may have, or which Touchstone at any time in the future may have.

3.3. Section 1542 Waiver. The Parties intend to release all claims arising from or relating to the Underlying Action that the releasing Parties may not know or suspect they have against the Parties being released under the releases in Paragraphs 3.1 and 3.2 herein. In connection with those releases, the Parties waive all rights under California Civil Code section 1542 ("Section 1542"), which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

Each Party is aware that it may discover claims or facts in addition to or different from those now known or believed to be true with respect to any matter. Nevertheless, each Party expressly states its intention to fully, finally, and forever settle all claims arising from or relating to the Dispute that do now exist, may exist, or previously have existed.

The Parties further expressly waive all rights and benefits conferred upon them by any provision of any other law similar to Section 1542 and expressly agree that the releases set forth above shall be given full force and effect, according to the express terms and provisions of this Agreement, as to unknown and unsuspected claims arising from or relating to the Dispute.

4. Essential Terms. The Parties acknowledge that the provisions of Section 3 are essential and material terms of the Agreement, and that without such provisions, the Parties would not have entered into this Agreement.

5. General Provisions.

5.1 Cooperation and Further Assurances. The Parties agree to cooperate in good faith in carrying out their mutual intentions in this Agreement, including, without limitation, executing all further and additional documents as shall be reasonable, convenient, necessary, or desirable to carry out the intent and provisions of this Agreement.

5.2 No Admission. It is understood and agreed that this settlement is the compromise of disputed claims, and that the terms and conditions recited hereinabove are not to be construed as an admission of liability, or of the merit or lack of merit of any of the disputed claims, on the part of the Parties hereby released, and that said Parties intend merely to avoid litigation. The Parties further agree that this Agreement, inclusive of its exhibits incorporated herein, and all evidence of discussions, negotiations, and unexecuted drafts relating to this Agreement shall not be admissible as evidence in the Underlying Action or any matters relating to the Dispute, regardless of whether or not the same are or are not covered by California Evidence Code § 1152.

5.3 Entire Agreement. This Agreement, which incorporates the First Amendment to Purchase and Sale Agreement contains all representations and the entire understanding among the Parties with respect to the subject matter of this Agreement.

5.4 Independent Counsel. Each Party hereby represents and warrants that it has been advised to consult with independent legal counsel of its own choosing and has had a reasonable opportunity to do so prior to executing this Agreement.

5.5 Joint Preparation. This Agreement and the provisions contained herein shall not be construed or interpreted for or against any Party hereto because said Party drafted or caused the Party's legal representative to draft any of its provisions. This Agreement shall be construed without reference to the identity of the Party or Parties preparing the same, it being expressly understood and agreed that the Parties hereto participated equally or had equal opportunity to participate in the drafting thereof.

5.6 Severability. If any term, covenant, condition, or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the State of California or the United States invalid, void or unenforceable, the remainder of the terms, covenants, conditions, or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

5.7 Choice of Law and Venue. This Agreement is executed and intended to be performed in the State of California and the laws of California shall govern its interpretation and effect. The Parties agree that all legal proceedings regarding this Agreement shall only be instituted in the courts of the State of California for San Diego County, North County Division.

5.8 Waiver. The failure of any Party to enforce any term, covenant, or condition of this Agreement on the date it is to be performed shall not be construed as a waiver of that Party's right to enforce such term, covenant, or condition, or any other term, covenant, or condition of this Agreement. A waiver of any Party's right to enforce any provision of this Agreement shall not be effective unless such a waiver is made expressly in writing. An express waiver of any one breach shall not be deemed a waiver of any other breach of the same or any other provision of this Agreement.

5.9 No Third-Party Beneficiaries. The Parties do not intend to create any third-party beneficiaries to this Agreement.

5.10 Counterparts. This Agreement may be executed in counterparts and each counterpart when executed shall have the efficacy of a signed original. Delivery of an executed signature page of this Agreement by electronic means, including an attachment to an email, shall be effective as delivery of an executed original.

5.11 Effective Date. The Effective Date of this Agreement shall be the last date on which each of the following events have occurred: (a) the Escondido City Council has approved the terms of this Agreement; (b) the Escondido City Attorney has approved this Agreement as to form; (c) a duly authorized representative of each Party has signed this Agreement; and (d) the First Amendment to Purchase and Sale Agreement has been approved by the Escondido City Council and has been executed.

5.12 Headings. The section headings herein are for the convenience of the Parties and are not intended to be used as an aid to interpretation of the terms of this Agreement.

5.13 Authority. Each of the signatories hereto warrants and represents that it is competent and authorized to enter into this Agreement on behalf of the Party for whom it purports to sign, except for any signatures indicating only approval of the Agreement as to form.

5.14 Introduction and Recitals. The introductory sections of this Agreement and the Recitals are hereby incorporated into the Agreement and made part thereof.

5.15 Attorney's Fees Arising out of Enforcement of Agreement. In the event any action or proceeding is brought to enforce this Agreement, the prevailing Party shall be entitled to the reasonable fees, out-of-pocket expenses, and costs of attorneys and experts against the non-prevailing Party, in addition to all other relief to which that Party may be entitled. Absent such action or proceeding, each Party shall bear its own attorney's fees and costs in connection with the Underlying Action.

5.16 Notices. Notices required under this Agreement shall be given to the Parties by first-class U.S. Mail and by electronic mail as follows:

City: City Attorney's Office
Attention: Michael R. McGuinness
201 N. Broadway
Escondido, CA 92025

Touchstone: TOUCHSTONE MF FUND I, LLC
c/o Touchstone Communities, LLC
Attention: Kerry Garza & Addison Garza
9915 Mira Mesa Blvd., Suite 140
San Diego, CA 92131

5.17 Binding on Successors and Assigns. The terms, covenants and conditions herein shall inure to the benefit of, and be binding upon and enforceable against, the successors and assigns of the Parties.

5.18 No Assignments. Each Party represents and warrants that it has not assigned, transferred, or granted, or purported to assign, transfer, or grant, voluntarily or involuntarily, or by operation of law, any of the claims, demands, or causes of action disposed of or agreed to be disposed of by this Agreement.

5.19 Relationship. Nothing in this Agreement shall be deemed or construed by the Parties or by any third person to create a relationship of principal and agent or fiduciary or partnership or a joint venture between the Parties or between a Party and any third party.

This Agreement is executed by the Parties or their duly authorized representatives:

CITY OF ESCONDIDO

Date: _____ By: _____
[Name, Title]

TOUCHSTONE MF FUND I, LLC

Date: _____ By: _____
[Name, Title]

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY
Michael R. McGuinness, City Attorney

By: _____

Exhibit 1 –First Amendment to Purchase and Sale Agreement
Exhibit 2 –Stipulation to Stay Litigation

Exhibit "1"

**FIRST AMENDMENT TO
PURCHASE AND SALE AGREEMENT**

This First Amendment to Purchase and Sale Agreement (this "Amendment") is made and entered into as of _____, 2023 ("Effective Date") by and between the City of Escondido, a California general law city ("Seller") and Touchstone MF Fund I, a California limited liability company, its successors and assigns] ("Buyer"), with reference to the following:

RECITALS

The following Recitals are for informational purposes only and in the event of any conflict between the Recitals and the Amendment, the provisions of the Amendment shall control:

- A. Seller and Buyer are parties to that certain Purchase and Sale Agreement and Joint Escrow Instructions, dated as of December 10, 2018 (the "Purchase Agreement"), relating to the sale and purchase of the Property as defined therein.
- B. Buyer and Seller wish to amend the Purchase Agreement pursuant to the terms of this Amendment.

TERMS

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency whereof is hereby acknowledged, and intending to be legally bound, the parties hereby agree as follows:

1. Incorporation of Recitals: Definitions. The foregoing Recitals are incorporated herein by reference. All capitalized terms, when used in this Amendment without separate definition, shall have the same respective meanings as contained in the Purchase Agreement.
2. Definitions. Section 1 of the Purchase Agreement is hereby amended as follows:
 - a. Section 1.6 is hereby deleted in its entirety and replaced as follows:

“**Closing Date.** Unless otherwise agreed to in writing by City and Buyer, or as otherwise set forth in this Agreement, the Closing Date shall be forty-five (45) days following issuance of a building permit for the Project or twenty-four (24) months after the Effective Date of this Amendment, whichever is earlier; provided, however, the Closing Date may be extended pursuant to Section 4.3 and shall be tolled pending the resolution of any third-party legal challenges to the Project or this Agreement, this Amendment or any subsequent amendment thereto. Buyer shall also have the right to accelerate the Closing Date by providing ten (10) days’ written notice to City, provided all obligations under this Agreement are met prior to closing.”
 - b. Section 1.10 is hereby deleted in its entirety and relaced as follows:

Exhibit "1"

“Entitlements. Entitlements shall mean the land use approvals required for Buyer’s intended development of the Property, which may or may not include: planned development, specific plan amendment, CEQA determination, and development agreement.”

c. Section 1.18 is hereby deleted in its entirety and replaced as follows:

“Project. Project means a residential or mixed use development with a minimum of 116 residential units on the Property and consistent with the City’s Downtown Specific Plan, as the Downtown Specific Plan exists as of the date the Project is approved.”

3. Purchase Price. Section 3 of the Purchase Agreement is hereby amended as follows:

a. Section 3.2 is hereby deleted in its entirety and relaced as follows:

“Purchase Price. City agrees to sell and Buyer agrees to buy the Property for the Purchase Price of ONE MILLION EIGHT HUNDERED AND SIXTEEN THOUSAND FOUR HUNDRED AND SEVENTY FIVE DOLLARS (1,815,475.00).”

4. Conditions to Close Escrow. Section 6.2(B) is hereby added as follows:

a. B. Buyer’s Indemnity under the Surplus Lands Act. In the event the CA Department of Housing and Community Development (“HCD”) finds this Agreement is subject to the Surplus Lands Act (“SLA”) and that this Agreement constitutes a violation thereof, City may terminate this Agreement unless Buyer agrees to indemnify City against any and all fines, fees, or other charges imposed by HCD as a result of any such violation

5. Buyer’s Obligations. Section 7 of the Purchase Agreement is hereby amended as follows:

a. Section 7.3 is hereby deleted in its entirety.

6. Entitlements. Section 12 is hereby amended as follows:

a. Section 12.1 is hereby deleted in its entirety and replaced as follows:

b. **“Entitlements.** Buyer and Seller hereby authorize KB Escondido LLC, or such other entity approved by the City Manager in writing, to use commercially reasonable efforts to process and obtain City’s approval of the Entitlements as soon as practicable. Nothing in this Agreement shall be construed to require City to approve such Entitlements. If, despite Buyer’s commercially reasonable efforts, Buyer has not closed escrow by the Closing Date (including any extensions pursuant to Section 4.3 or any tolling due to third-party legal challenges), then City shall have the right, at its option, to terminate this Agreement by delivery of written notice thereof to Buyer. Should this Agreement be terminated as a result of Buyer’s failure to close escrow, then,

Exhibit "1"

and following such written notice, Buyer and City shall each execute escrow cancellation instructions whereby Buyer and City terminate this Agreement and release one another, the Property, and Escrow Holder from any obligations under this Agreement with respect to the Property, except those indemnity and corrective obligations of Buyer relating to Buyer's inspection of the Property and any other agreements expressly intended to survive such termination. If either party terminates this Agreement as provided herein for any reason other than Buyer's default, all of Buyer's deposits shall be returned to Buyer."

7. Application(s). An application for the Entitlements shall be submitted to the City to permit the construction and operation of the Project within ninety (90) days from the Effective Date of this Amendment. Buyer shall be permitted multiple applications for the Entitlements prior to the Closing Date.
8. Assignor's Extension Deposit. Upon execution of this Amendment, the Escrow Holder shall immediately return to Touchstone the \$20,000 extension deposit that Touchstone previously deposited into escrow pursuant to Section 4.3 of the Purchase Agreement and Buyer shall be deemed to have not yet utilized any extensions under the Purchase Agreement.

9. Miscellaneous.

9.1. Effect and Ratification. Except as expressly amended or supplemented hereby, the Purchase Agreement shall remain in full force and effect without change and is hereby ratified and confirmed.

9.2. Governing Law. This Amendment shall be construed and enforced in accordance with the laws of the State of California.

9.3. Counterparts. This Amendment may be executed in multiple counterparts, each of which shall be deemed an original and all of which shall constitute one agreement.

9.4. Binding Agreement. This Amendment shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns.

9.5. Headings. The captions and headings herein are for convenience and reference only and in no way define or limit the scope or content of this Amendment or in any way affect its provisions.

9.6. Entire Agreement; Amendments. The Purchase Agreement, and the Exhibits and Schedules attached thereto, as amended and supplemented by this Amendment, set forth all of the promises, covenants, agreements, conditions and undertakings between and among the parties hereto with respect to the subject matter hereof, and supersede all prior and contemporaneous agreements and understandings, inducements and conditions, express or implied, oral or written, except as contained herein. No extension, alteration, modification or other

Exhibit "1"

amendment of or to the Purchase Agreement shall be valid or binding unless made in writing and signed by all parties hereto.

Exhibit "1"

IN WITNESS WHEREOF, the parties have executed this Amendment as of the Effective Date.

SELLER:

BUYER:

City of Escondido

Touchstone MF Fund I, LLC

By: _____

Name: _____

Title: _____

By: _____

Name: Kerry Garza

Title: President

By: _____

Name: _____

Title: City Clerk

Approved as to form:

Office of the City Attorney
City of Escondido,
a California general law city

By: _____
MICHAEL R. MCGUINNESS, City Attorney

Exhibit "2"

Plaintiff/Cross-Defendant TOUCHSTONE MF FUND I, LLC (“Touchstone”) and Defendant/Cross-Complainant CITY OF ESCONDIDO (“City,” and collectively with Touchstone, the “Parties”), by and through their respective attorneys of record, hereby stipulate as follows:

WHEREAS, on August 11, 2023, the Court stayed the litigation of the above-captioned action to allow the Parties to continue undertaking settlement discussions for a period of six months with a status conference scheduled for February 2, 2024.

WHEREAS, the Parties continued negotiations and have reached a settlement agreement of the above-captioned action (“Action”) which is conditioned on the occurrence of future actions between the Parties and a third-party. Those actions will require a significant and extended amount of time to complete.

WHEREAS, “[t]rial courts generally have the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency.” (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489.) Moreover, this Court may adopt “any suitable process or mode of proceeding . . . which may appear most comfortable to the spirit of [the California Code of Civil Procedure].” (Cal. Civ. Proc. Code § 187; *see also Bailey v. Fosca Oil Co., Ltd.* (1963) 216 Cal.App.2d 813, 817–18 (upholding stay to “insure the orderly administration of justice”). Should there be any concern regarding the five year rule under California Code of Civil Procedure § 583.310, the Parties have agreed to waive that rule if the stay requested here is granted.

NOW, THEREFORE, the Parties hereby stipulate to stay all proceedings in this Action for a period of 31 months. The Parties propose to take off calendar the status conference scheduled for February 2, 2024 at 9:00 a.m.

///
///
///
///
///

IT IS SO STIPULATED.

Dated: _____, 2023

JOSEPH OLIVA & ASSOCIATES, P.C.

By: _____
Joseph L. Oliva, Esq.
Matthew R. Toothacre, Esq.

Attorneys for Plaintiff / Cross-Defendant,
TOUCHSTONE MF FUND I, LLC

Dated: _____, 2023

OFFICE OF THE CITY ATTORNEY

Michael R. McGuinness, City Attorney
Keith Phillips, Assistant City Attorney

By: _____
Mark P. Bookholder
Deputy City Attorney

Attorneys for Defendant / Cross-
Complainant, CITY OF ESCONDIDO

IT IS SO ORDERED.

Dated: _____, 2023

Blaine K. Bowman, Judge of the Superior Court