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No. 65833-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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LEDCOR INDUSTRIES (USA) INC.,  
a Washington corporation

Appellant,

v.

S.Q.I., INC., a Washington corporation; BORDAK BROTHERS, INC., an  
Oregon corporation; *et. al.*,

Respondents.

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BRIEF OF RESPONDENT BORDAK BROTHERS, INC.

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COURT OF APPEALS  
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**A. INTRODUCTION.**

Defendant/Respondent Bordak Brothers, Inc. (“Bordak”) brought a motion for summary judgment asserting, among other things, that the time limit for bringing an indemnity claim expired prior to the time it was sued by Ledcor. As Ledcor correctly notes, the trial court engaged in a thorough review of the facts and circumstances surrounding the indemnity claim prior to granting the motion, taking additional briefing and ruling 10 months later. Contrary to Ledcor’s assertions, the trial court’s decision was not based simply on the issuance of a certificate of occupancy. Instead, it was based on a number of facts and circumstances – the issuance of the certificate of occupancy (together with the requirements for issuance of the certificate), the fact that Ledcor’s retained expert, Morrison-Hershfield determined, in 2002, that the Project was complete, the fact that the Admiral Way Condominiums were “ready for occupancy” and inhabited on a date certain and the fact that the architect that was purportedly to determine the date of substantial completion has not, to this day, made such a determination. From these facts and circumstances the trial court determined that the indemnity claim was not timely pursued and dismissed that claim. For the reasons stated below, the trial court’s decision should be affirmed.

**B. STATEMENT OF THE CASE.**

**(1) FACTUAL BACKGROUND.**

This action arises out of the construction of Admiral Way Condominiums, a single building condominium complex located in West Seattle (the "Project").<sup>1</sup> Leducor was the general contractor on the Project, and it subcontracted with Bordak to provide stucco exterior finishing at the Project, excluding flashings and weather protection, in accordance with the Project drawings and specifications.<sup>2</sup> Bordak's original work on the Admiral Way Condominiums was completed on "approximately May 17, 2002, with additional repairs performed through approximately June 2002."<sup>3</sup> Bordak provided Leducor with the Sonowall warranty for the stucco product on July 18, 2002, which notably indicated that the work was complete as of April 25, 2002.<sup>4</sup>

After the Project was completed in 2002, construction defects began to manifest themselves.<sup>5</sup> Consequently, in 2003 Bordak returned to the Admiral project to perform additional work on the project.<sup>6</sup>

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<sup>1</sup> CP \_\_\_ (Sub No. 1, Summons and Complaint for Damages, page 5). (Bordak Brothers, Inc. filed a Supplemental Designation of Clerk's Papers on July 29, 2011, so as to designate the Summons and Complaint for Damages. These materials have not yet been transmitted to this Court and CPs are not currently available. Thus, references to these materials are by documents title and, when available, page number.)

<sup>2</sup> *Id.* and CP 52.

<sup>3</sup> CP 719 (answer to Interrogatory No. 5). Leducor later supplemented its discovery response (*See* CP 523).

<sup>4</sup> CP 1312.

<sup>5</sup> CP 109-140.

<sup>6</sup> CP 755, CP 757 and CP 759-761.

The following charts summarize the dates of the original work and additional repairs, along with the dates Ledcor made payments, up to and including the final reconciliation of amounts owed to Bordak:

<b>Date</b>	<b>Document</b>	<b>Charge</b>
1/4/2002	Original Contract between Ledcor and Bordak	\$45,000.00
1/21/2002	Change Order	\$882.00
10/3/2002	Change Order	\$7,800.00
4/3/2003	Change Order	\$15,676.00
4/3/2003	Change Order	\$2,148.00
		<b>Total: \$71,506.00</b>

<b>Date of Payment</b>	<b>Amount Paid by Ledcor</b>	<b>Balance Outstanding</b>
2/21/2002	\$8,100	\$63,406.00
3/21/2002	\$28,905.66	\$34,500.34
4/22/2002	\$3,144.91	\$31,355.43
8/21/2002	\$1,143.23	\$30,212.20
5/25/2003	Change Order Credit [\$24,659.45]	\$5,552.75
6/5/2003	\$3,916.37	\$1,636.38
7/2/2004	\$1,636.38	\$0

The only evidence before the court is that the additional work was completed in April of 2003. Indeed, comparison of documentation submitted shows that Bordak submitted documentation of additional work, and sought compensation for the additional work already performed on October 3, 2002, January 28, 2003, April 3, 2003 and May 1, 2003.<sup>7</sup> A comparison of the documents and the invoices, demonstrates that the work

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<sup>7</sup> CP 1303- 1304; and CP 1313-1318.

was last performed in 2003 and Leducor simply failed to make final payment until July of 2004.

On July 12, 2007, the Admiral Condominium Owners' Association ("COA")<sup>8</sup> filed a lawsuit for construction defects against the developer/declarant of the Admiral Way Condominiums, Admiral Way, LLC ("Admiral"), who in turn filed a third party claim against Leducor.<sup>9</sup> Leducor defended against the COA's claim but did not file suit against the subcontractor defendants, including Bordak, until August 29, 2008.<sup>10</sup>

During the pendency of the COA litigation against Leducor, Leducor filed a motion for summary judgment. The basis asserted by Leducor was that Admiral's indemnity claims were barred because they were not brought within six years of substantial completion. In making this argument, Leducor specifically asserted that the Admiral Way condominiums were "substantially complete" by March of 2003.<sup>11</sup> While the motion was pending, Leducor was successful in reaching settlement with Admiral for all claims against Leducor.<sup>12</sup>

## **(2) THE CONTRACT DOCUMENTS.**

The contract for construction of the Admiral Way Condominiums, the "Prime Contract" was entered into between Leducor and Admiral. Included

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<sup>8</sup> Notably, the underlying complaint was brought by the Admiral Way **owner's** association – not the retail tenants of the complex. CP 615-630.

<sup>9</sup> CP 5-91.

<sup>10</sup> See *Summons and Complaint for Damages*.

<sup>11</sup> CP 792 - 800.

<sup>12</sup> CP 696-713 at 705, 1124-25.

among the various terms of the contract was a definition of “substantial completion” – that “stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contact Documents so that the Owner can **occupy or utilize the Work for its intended purpose.**”<sup>13</sup> Another provision of the contract provided that the Architect (Carl Pirscher of CDA Architects) was to issue a “Certificate of Substantial Completion” and could dispute “substantial completion” only if the work was “not sufficiently complete” so that the Owner **could not** utilize the premises for its intended use.<sup>14</sup> Notably, the Certificate of Substantial Completion has **never** been issued by Mr. Pirscher. Instead, in 2004 Leducor and Admiral simply declared between themselves that the Project was substantially complete.<sup>15</sup>

### **(3) FACTUAL EVIDENCE DEMONSTRATING SUBSTANTIAL COMPLETION.**

There was ample factual evidence submitted to the trial court from which the trial court correctly relied upon to determine that “substantial completion” of the Admiral Way condominiums occurred more than six (6) years prior to Leducor filing suit against the subcontractors.

First, in October of 2002, after Bordak finished its work on the Project and, in fact, after the entire building was substantially complete, a

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<sup>13</sup> CP 245 (emphasis added).

<sup>14</sup> *Id.* (¶ 9.3.3)

<sup>15</sup> CP 526-529. Ironically, Leducor and Admiral set this date in resolving yet another dispute between these two parties relating to the Project.

water issue arose on the central Courtyard. Leducor retained an engineering firm, Morrison Hershfield, to conduct an assessment of the **as-built** construction of the building and make recommendations regarding revisions to the already-constructed building.<sup>16</sup> In early 2003, Morrison Hershfield provided Leducor with that assessment - the Admiral Way Mixed Use Project Building Envelope Assessment, dated January 6, 2003. Within the Assessment, Morrison Hershfield provided a summary of its involvement in the Project, again noting that this assessment was not provided until *after* the building was constructed and put its intended purpose:

#### 1.1 Background Information

The Admiral Way Project is a **recently completed** four-story building of non-combustible construction located near the intersection of Admiral Way and California in West Seattle. . .

During the construction phase, Morrison Hershfield (MH) was retained by the Owners to provide recommendations to CDA Architects with respect to the balcony to wall interface detail. We understand that some of our recommendations with respect to this detail were implemented while others were not.

In October 2002, MH was retained by Leducor to provide them with recommendations on the detailing of the sill at the suite entrance doors off of the central courtyard. We understand that the remedial measures we recommended have since been implemented by Leducor.

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<sup>16</sup> CP 93-102 and CP 103-107.

At this time, we understand that there remain a number of outstanding issues with respect to the construction of the envelope assembly for which the Owners and Leducor are seeking resolution while providing a durable system of protection against water infiltration.<sup>17</sup>

The Building Envelope Assessment also states that Morrison Hershfield would review the *as-built* condition of the building envelope and the plans and specifications for the Project, confirming that, at the time that Morrison Hershfield made any assessment, the building envelope, which necessarily includes the stucco, was completed.<sup>18</sup>

The Building Envelope Assessment contains a long and specific summary of Morrison Hershfield's concerns regarding the design and construction of the building envelope. In particular, Morrison Hershfield opined that **although the stucco system was constructed as provided in the plans and specifications**, it was defectively designed and would eventually fail:

Stucco Clad Wall Assemblies

...

**Although the stucco wall assemblies have been built in accordance with the project documents**, there are a number of discontinuities in the exterior seal and the secondary barrier. Nonetheless, even if these were rectified, given the exposure of the building we would expect that this wall assembly would suffer from significant

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<sup>17</sup> CP 111.

<sup>18</sup> CP 112.

moisture ingress leading [to] [sic] deterioration of the steel stud within the next decade. We believe no amount of maintenance can prevent such a failure from eventually occurring. [Emphasis added.]<sup>19</sup>

Morrison Hershfield's predictions came true as Bordak, as well as other subcontractors were called back to the Project long after having finished their original work, to perform remedial work.<sup>20</sup> When Bordak was called back to discuss its completed work at the Project, Morrison-Hershfield explained to Bordak that the issues with the stucco siding were related to the design, and not installation.<sup>21</sup> Second, in addition to the Morrison-Hershfield report, there was other evidence submitted to the trial court that demonstrated that the Admiral Way condominiums were, indeed, "substantially complete," as the evidence demonstrated that the condominiums could be utilized for their intended use, *e.g.*, condominiums to be lived in. Indeed, Marc Gartin, the principle of Admiral Way specifically testified that in March of 2003 he was marketing the Admiral Way condominiums and that he, as the owner, did not want to start marketing the units until "everything was done."<sup>22</sup> Mr. Gartin further testified that it was his understanding that the condominium project was "for the most part" complete by March of 2003 and that the

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<sup>19</sup> CP 129.

<sup>20</sup> CP 755, CP 757 and CP 759-761.

<sup>21</sup> CP \_\_\_ (Sub No. 239, Declaration of Anthony Arnautov in Support of Bordak Brothers, Inc.'s Opposition to Ledcor Industries (USA), Inc.'s Motion for Partial Summary Judgment Against Bordak Brothers, Inc. Regarding (1) Indemnity; (2) Insurance; and (3) Duty to Defend, at ¶¶ 3-4.)

<sup>22</sup> CP 1330 - 1331.

units which were sold in or about March of 2003 were not advance sales, but instead, were “turnkey” sales.<sup>23</sup>

Third, Leducor itself previously believed, asserted and argued, that the Admiral Way condominiums were complete in 2003. Indeed, when defending against Admiral’s action, Leducor asserted that there was ample “factual” evidence indicating that the Admiral Condominiums were “substantially complete.”<sup>24</sup> The facts that Leducor itself found so important were the fact that the Certificate of Occupancy was issued and by March of 2003 units were sold and “homeowners proceeded to move into (and to inhabit) their new homes.”<sup>25</sup>

Fourth, the City of Seattle agreed that the Project was “substantially complete,” as the City issued a Certificate of Occupancy on March 14, 2003.<sup>26</sup> And, contrary to Leducor’s implications that the issuance of the Certificate of Occupancy by the City is simply a ministerial task,<sup>27</sup> the issuance of such a certificate requires that a building meet certain substantive requirements. Indeed, as explained in a CAM (“Client Assistance Memo”)<sup>28</sup> published by the City, a Certificate of

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<sup>23</sup> CP 1331.

<sup>24</sup> CP 794.

<sup>25</sup> CP 795 & 798.

<sup>26</sup> CP 1325.

<sup>27</sup> Indeed, as indicated reviewing the arguments Leducor made when defending against Admiral, Leducor itself heavily relied on the issuance of the Certificate of Occupancy as evidence of substantial completion. CP 798.

<sup>28</sup> CP 1063-1065.

Occupancy is an indication that the “project complies with the regulations for **occupancy** required by the Seattle Building Code (Section 109).”<sup>29</sup>

The Requirements of Section 109, in pertinent part, are:

**109.1 Occupancy.** No new building or structure shall be used or occupied . . . until the building official has issued a Certificate of Occupancy. . . .

...

**109.3 Certificate Issued.** After satisfactory completion of inspection, when it is found that the building or structure . . . complies with the provisions of this code, the Fire Code and other pertinent laws and ordinances of the City, the building official shall issue a Certificate of Occupancy which shall contain the following information:

...

4. A statement that the described portion of the building complies with the requirements of this code for group and division of occupancy and the activity for which the proposed occupancy is classified;

...

...

**109.4 Temporary Certificate.** A Temporary Certificate of Occupancy may be issued by the building official for the use of a portion, or portions, of a building structure prior to the completion of the entire building or structure provided all devices and safeguards for fire protection and life safety,

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<sup>29</sup> *Id.* at 1064.

as required by this code, the Fire Code, and other pertinent laws and ordinances of the city, are maintained in a safe and usable condition.

...

**109.6 Revocation.** The building official may, in writing, suspend or revoke a Certificate of Occupancy issued under the provisions of this code whenever the certificate is issued in error, or on the basis of incorrect information supplied, or when it is determined that the building or structure or portion thereof is in violation of any pertinent laws or ordinances of the City or any of the provisions of this code.<sup>30</sup>

In addition to the Building Code itself, the City of Seattle's own publication (CAM 120),<sup>31</sup> explains the requirements for issuance of a Certificate of Occupancy, as follows:

All land use conditions in a Master Use Permit (e.g., easements, design review conditions, installation of pedestrian walkways) must be completed per plan.

All alarms, pressurization, sprinkler systems, emergency power plants, and other safety systems must be approved by the Seattle Fire Marshall's office. Prior to the building inspector's approval of the final inspection, the Seattle Fire Department must approve a final inspection. To request a fire department inspection, contact the Fire Marshall's Office at (206) 386-1450.

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<sup>30</sup> CP 1067.

<sup>31</sup> CP 1063-1065.

All mechanical systems commissioning and completion requirements must be approved by DPD inspectors.

All work authorized by specialty permits- such as electrical, plumbing, elevator, mechanical, boiler, and street use- must be inspected and finalized. This includes Seattle Public Utilities conditions such as water supply provisions and back flow prevention, and public contract work and street vacations approved by Seattle Department of Transportation (SDOT).

All work by special inspection agencies including soils, excavation, fireproofing, concrete, and steel, must be completed and on file at DPD, including final letters from involved agencies.

All required signage must be installed (exit, maximum occupancy, maximum storage load, address, etc.)

All required post-permit submittals must be on file with DPD and all fees paid.<sup>32</sup>

It was based upon all these facts and circumstances, that the trial court determined that the Admiral Way Condominiums were substantially complete more than six (6) years prior to the time Ledcor brought the action against Bordak.<sup>33</sup> In these circumstances, to assert that the trial

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<sup>32</sup> CP 1067.

<sup>33</sup> Similar to Bordak's motion and other subcontractors' joinder in same, Admiral Way, LLC's ("Admiral") joined in Ledcor Industries (USA), Inc.'s brief. If summary judgment was proper against Ledcor, it was also proper against Admiral. Thus, Bordak incorporates by reference the arguments continued in this appeal as a respondent's brief against Admiral to further judicial economy. Arguments made as to Ledcor should be read to include Admiral in those same arguments.

court based its ruling solely on the issuance of the Certificate of Occupancy is unsupported.

**(4) FACTS PROVIDED BY LEDCOR ITSELF DEMONSTRATE SUBSTANTIAL COMPLETION MORE THAN SIX YEARS PRIOR TO SUIT.**

Ledcor spends a great deal of time distancing itself from the fact that it previously espoused that substantial completion occurred in March of 2003. However, the very “facts” Ledcor now asserts are the opposite of the “facts” it previously asserted, on which it relied, and from which Ledcor benefited during settlement discussions with Admiral Way.

First, Ledcor now asserts that **only** the architect can determine substantial completion. However, the architect has **never** issued a Certificate of Occupancy and Ledcor has previously asserted that the architect’s refusal to issue the Certificate of Occupancy was completely irrelevant in making the ultimate determination. Indeed, Ledcor specifically asserted and, thereby admitted:

CDA’s refusal to issue such a certificate [of occupancy] simply has no bearing on whether the Admiral was substantially complete. The issuance of a Certificate of Substantial Completion is simply **one** means of formally documenting that a condominium is fit for its intended use. Another means of formally documenting that a condominium is fit for its intended use is obtaining a certificate of occupancy. Perhaps the best means of establishing that a condominium is fit for its intended use is actually putting it to that use by selling units. The Admiral was substantially

complete on March 14, 2003. CDA's refusal to issue the Certificate of Substantial Completion contemplated by the LLC/Ledcor contract is simply irrelevant.<sup>34</sup>

Second, Ledcor's current assertion that the "punch list" items which were being performed after March of 2003 were of such severity that they rendered the Project not "substantially complete." Again, the facts that Ledcor itself previously submitted belie such contention. Indeed, Ledcor submitted the declaration of an expert, Mark Uchimura, who specifically opined that the "punch list" work performed at the Admiral condominiums was "work of a type that is often performed subsequent to substantial completion of a project."<sup>35</sup> The fact that Ledcor now ignores its own expert and relies upon the architect of record is very telling. Apparently Ledcor is a chameleon that gets to changes the "facts" relied upon so long as they benefit Ledcor.

**C. STATEMENT OF THE ISSUES.**

1. Whether the trial court correctly determined based on the pertinent facts and circumstances that substantial completion of a construction project occurred more than six (6) years prior to the commencement of this action and was, therefore, time-barred. **Yes.**

2. Whether the trial court correctly determined that defendant Bordak's last work on the project was more than six years prior to

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<sup>34</sup> CP 799.

<sup>35</sup> CP 806.

bringing the underlying action and, therefore, dismissal as to Bordak was proper in any event. **Yes.**

**D. ARGUMENT.**

**(1) STANDARD OF REVIEW.**

The parties agree on the standard of review: An appellate court conducts a *de novo* review of an order granting a motion for summary judgment. *Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 78 P.3d 1274 (2003). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All evidence must be viewed in the light most favorable to the non-moving party. But where plaintiff's own factual allegations permit only one reasonable conclusion, the facts are not disputed and summary judgment is appropriate. *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Generally, if a dispute of fact exists, summary judgment is improper, "[h]owever, where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted." *Id.* at 65-66 (citing CR 56(c); *LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027, *cert. denied*, 493 U.S. 814, 110 S. Ct. 61, 107 L.Ed. 2d 29 (1989)).

**(2) LEDCOR SHOULD BE ESTOPPED FROM ALTERING ITS PREVIOUS POSITION ON WHEN "SUBSTANTIAL COMPLETION" OCCURRED.**

As indicated herein, Leducor previously argued that the facts supported its position that the Admiral Way condominiums were

“substantially complete” by March of 2003. Now, when it benefits Ledcor to take the opposite position it does just that – it attempts to refute its prior statement of the facts in order to support this lawsuit. Ledcor should not be permitted to do so.

#### Judicial estoppel

precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action. “The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time.” *Seattle-First Nat’l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982).

*Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832, 833 (2001).

The only requirement for application of judicial estoppel is that the party must have asserted a prior inconsistent position which either “benefited the party or was adopted by the court.” *Id.* at 904. Although judicial estoppel was raised in the trial court, and the trial court declined to find Ledcor’s claim barred on this basis, the record in this appeal establishes that judicial estoppel applies to bar Ledcor’s position. This Court may therefore affirm the trial court’s grant of summary judgment on this basis. *See Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 90, 246 P.3d 205 (2010) (stating that on appeal the Court “may affirm the trial court’s ultimate decision on any grounds

established by the pleadings and supported by the record”) (citing *Otis Housing Ass’n v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009)).

Here, there is no question that Leducor is asserting a position which is inapposite to the position it previously asserted. Thus, the only issue as to whether judicial estoppel should apply is whether Leducor obtained a benefit from having done so. What is clear is that Leducor asserted its position as to the date of substantial completion – a position which it clearly would not have asserted had it not been in Leducor’s best interest to do so – and while that assertion was “pending” Leducor pushed for Admiral to settle **before** the court ruled on the pending motion. The circumstantial evidence of a settlement occurring while the motion for summary judgment was pending evidences that Leducor benefited from taking the position it advanced – that it was able to achieve a settlement agreement with its adverse party based, at least in part, on the overwhelming chance that the court would adopt its position as to date of substantial completion at oral argument on the motion for summary judgment. In this circumstance Leducor should be barred from now arguing that the date of substantial completion was anything other than March of 2003 because it no longer supports Leducor’s position in this subsequent lawsuit.

**(3) THE TRIAL COURT’S DETERMINATION THAT THE INDEMNITY CLAIM IS TIME BARRED SHOULD BE UPHELD.**

Claims for indemnity arising out of a construction project must be brought, if at all, within six years of “substantial completion” of the project. See RCW 4.16.310 which provides, in pertinent part, as follows:

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later.....

In the same statute the Legislature defined “substantial completion” as

the state of completion reached when an improvement upon real property **may be used or occupied for its intended use**. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred.

Here, the factual evidence is that the Admiral condominiums not only **could** be utilized for their intended purposes, they **were** being utilized for their intended purpose by March of 2003. Leducor’s indemnity claim is barred.

- a. Leducor may not assert for the first time on appeal a new argument that Bordak agreed to toll the statute of repose.**

**Leducor argues for the first time on appeal** that the parties contractually agreed to toll the statute of repose and that, as “sophisticated parties,” the alleged contractual agreement is permissible. Leducor’s argument should be rejected.

First, Leducor never raised the issue of whether the parties contractually agreed to toll the statute of limitations and, more importantly, never raised the issue of whether any such tolling agreement would be permissible under the law. In general, the failure to raise an issue before the trial court

precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5. Indeed, an issue raised for the first time on appeal can be considered only if it is “arguably related” to issues raised in the trial court. *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 751 P.2d 329 (1988).

Here, despite the multitude of briefing that accompanied the underlying motion, at no time did Ledcor ever assert that the parties had contractually agreed to “toll” the statute of limitations and/or repose. Moreover, Ledcor never addressed, argued, or even mentioned the legal requirements for when an agreement to toll a statute of limitations and/or repose will be upheld under Washington law. Instead, Ledcor argued, and continues to argue, that the trial court erred because there was a question of fact as to the date of “substantial completion.” Ledcor’s attempt to bring a new issue into this appeal should be rejected.

Moreover even assuming *arguendo* that Ledcor’s argument is properly before this Court, Ledcor’s argument is flawed. There is no tolling agreement in place as between Ledcor and Bordak. Instead, there is simply a clause in a contract that says the certificate of occupancy shall be issued by the architect. In support of its new argument, Ledcor cites Washington case law which establishes that parties to a contract may agree to a **shorter** limitations period within which to bring claims under the contract, than would otherwise apply under the statute of limitations and/or statute of repose. See Appellant’s Brief at 20. Both *Southcenter View Condominium Owners’ Association v. Condominium Builders Inc.*,

47 Wn. App. 767, 769, 736 P.2d 1075 (1986) and *Yakima Asphalt Paving Co. v. Washington Department of Transportation*, 45 Wn. App. 663, 664, 726 P.2d 1021 (1986), addressed contract provisions limiting the time during which claims under the contracts could be brought. These cases did not involve an agreement by the parties to toll the statute of limitations or repose, nor did they address the requirements for a valid tolling agreement under Washington law.

**b. Ledcor’s “freedom of contract” argument is misplaced.**

Ledcor argues that Washington law recognizes a broad principle of freedom of contract, under which parties are free to enter into and enforce contracts that do not contravene public policy. Appellant’s Brief at 18. In support of this argument, Ledcor cites two cases, neither of which deal with a tolling agreement, or an agreement to waive a statutory defense. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 173-74, 94 P.3d 945 (2004) (determining certified question of whether Washington law would recognize and enforce an agreement...to negotiate a future contract”); *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994) (reaffirming the distinction between tort and contract damages, and limiting the measure of damages due to delay of performance of a construction contract to “remedies provided by contract”). This argument simply does not address the more detailed analysis required to determine whether a waiver of defense or tolling agreement is enforceable under Washington law. If the Court entertains Ledcor’s newly-raised argument, the proper inquiry is whether

the clause relied upon by Ledcor constitutes an enforceable tolling agreement, not simply whether two parties should be free to contract. In this case, under the analysis set forth below, Ledcor cannot show that the clause it relies upon has the effect of tolling the statute of limitations and/or repose.

**c. Ledcor and Bordak did not enter into an enforceable tolling agreement and Ledcor's indemnity claim is time barred.**

Under Washington law, in order to be valid an agreement to waive the defense of expiration of the statute of limitations or to toll the running of the statute of limitations must be made by "distinct agreement by the party sued." *Marshall-Wells Hardware Co. v. Title Guaranty & Surety Co.*, 89 Wn. 404, 411, 154 P. 801 (1916). In addition, "[a]n agreement to waive the statute of limitation must be supported by consideration and be for a definite time." *Taplett v. Khela*, 60 Wn. App. 751, 759, 807 P.2d 885 (1991) (citing *J.A. Campbell Co. v. Holsum Baking Co.*, 15 Wn.2d 239, 255, 130 P.2d 333 (1942)).

Although Ledcor failed to cite the above Washington cases, it does cite case law from other jurisdictions. The first case cited by Ledcor, *McRaith v. BDO Seidman*, 909 N.E. 2d 310, 322-23, 327 (Ill. App. Ct. 2009), established that, under Illinois law, an agreement to toll the statute of repose was enforceable because the duration of the tolling period was definite, and the party waiving the defense had "knowingly and voluntarily entered into each of the ...agreements [and were] fully aware

of the consequences of **expressly forfeiting** all time-related defenses.” (emphasis added). Similarly, in *First Interstate Bank of Denver v. Central Bank & Trust Co. of Denver*, 937 P.2d 855, 862 (Colo. App. Ct. 1996), the Colorado Court of Appeals found that the statute of repose at issue in that case could be waived “by stipulation or **express agreement.**” (emphasis added).

Here, Ledcor asserts, without any support whatsoever, that because the contract says the architect would be the “sole judge” of the date of substantial completion, and the agreement did not limit this authority to any specific purpose, the contract necessarily acts as an agreement to toll the statute of limitations and statute of repose. However, that is not what is required under Washington law. Bordak, the party entitled to raise a defense under the statute of repose, did not consent to an “express agreement” to waive the limitations period on claims brought under the contract. Ledcor admits in its opening brief that the clause “neither necessarily extends nor shortens the statute of limitations or the statute of repose.”<sup>36</sup> Such a clause simply cannot constitute the type of “express agreement” required under Washington law, and may not be relied upon by Ledcor as an agreement to toll the operation of the statute of repose.

In addition, the parties did not establish a definite time for which any waiver or tolling would apply. Indeed, the provision relied upon by Ledcor was completely indefinite in nature, which is clearly evidenced by

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<sup>36</sup> Brief of Appellant at page 24.

the fact that the architect never issued a Certificate of Occupancy. Instead, Ledcor and Admiral Way simply declared that the architect's approval was no longer necessary, and agreed among themselves that the Project was substantially complete.<sup>37</sup>

Ledcor also relies on *McRaith*, 909 N.E. 2d at 320, 327, to argue that tolling agreements made between two **sophisticated parties** are enforceable as long as the waiver is reasonable and definite. Even if "sophistication" was a necessary consideration under Washington law, Ledcor's argument is still unsound. Ledcor attempts to demonstrate the "sophistication" element by referring to the respective levels of sophistication of Ledcor and Admiral. Whether Ledcor and Admiral are sufficiently "sophisticated" is not the issue. The two parties at issue here are Ledcor, an admitted sophisticated entity, and Bordak, a small essentially family-run business which has employed between 7 to 10 people in 1999 to roughly 45 people in 2009.<sup>38</sup> Moreover, Ledcor failed to provide any evidence that Bordak was a "sophisticated entity."

Ledcor cannot show that Bordak entered into an express agreement to toll the limitations period for a definite time. The clause Ledcor cites to is insufficient to constitute an express agreement to toll the statute of repose, or to waive the defense of the expiration of the statute of repose. If the

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<sup>37</sup> Brief of Appellant at page 20.

<sup>38</sup> CP \_\_\_\_\_. (Sub No. 237, Bordak Brothers, Inc.'s Opposition to Ledcor Industries (USA) Inc.'s Motion for Partial Summary Judgment Against Bordak Brothers, Inc. Regarding: (1) Indemnity; (2) Insurance; and (3) Duty to Defend and in Opposition to Admiral Way's Joinder.)

Court entertains Leducor's new argument on appeal, the Court should find that Leducor's argument fails as a matter of law, and that the trial court correctly concluded that Leducor's indemnity claim is time barred.

**(4) THE TRIAL COURT CORRECTLY DETERMINED THAT REASONABLE MINDS COULD NOT DIFFER AS TO THE DATE OF SUBSTANTIAL COMPLETION, AND PROPERLY GRANTED SUMMARY JUDGMENT.**

The trial court considered the evidence presented by Leducor, Bordak and SQI regarding the date of substantial completion of the Admiral Way Condominiums, and properly concluded that the evidence established that the Project was substantially complete more than six years prior to Leducor's claim for indemnity.<sup>39</sup> Leducor now contends that the trial court erred in determining a disputed issue of fact, but on appeal Leducor has again failed to put forth evidence sufficient to lead "reasonable minds" to conclude anything other than substantial completion, as defined in the statute and the contract, occurred on or before the date the City of Seattle issued the Certificate of Occupancy. The trial court properly considered the evidence on record before it, and properly determined that only one reasonable conclusion could be drawn therefrom. The court's grant of summary judgment was therefore proper.

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<sup>39</sup> CP 1550-1552.

**a. The trial court correctly determined the Project was complete as of the date the City of Seattle issued the Certificate of Occupancy.**

Washington's Statute of Repose, RCW 4.16.310, provides that causes of actions or claims arising from construction of improvements upon real property must be commenced within "six years after substantial completion of construction" or six years after the "termination of services" which is later. "Substantial completion" is defined as:

the state of completion reached when an improvement upon real property **may** be used or occupied for its intended use

(emphasis added). The terms of the contract between Ledcor and Admiral tracked the language of the statute and defined substantial completion as the time when "the Owner can occupy or utilize the Work for its intended purpose."<sup>40</sup> Thus, under both the contract and the statute, completion of the entire Project was not required before it could be "substantially complete."

On appeal, Ledcor argues that a project can only be "substantially complete" if the entire project has been completed. Ledcor cites *Smith v Showalter*, 47 Wn. App. 245, 251, 734 P.2d 928 (1987), in support of this position, but the case presented in *Smith* related to claims of defective construction of a single-family dwelling, **not** a multi-unit mixed-use building, such as the Project at issue here. *See Id.* at 246. Indeed, several courts have held that, when dealing with residential projects, the ability to utilize a dwelling is a significant factor in determining whether the statute

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<sup>40</sup> CP 245.

of repose has commenced. *See, e.g., Moore v. F. Douglas Bidly Const., Inc.*, 587 S.E.2d 479 (N.C. App. 2003) (plaintiffs' claim was barred by statute of repose because certificate of occupancy and move-in date were more than six years prior to date plaintiffs commenced action); *see also Nolan v. Paramount Homes, Inc.*, 518 S.E.2d 789 (N.C. App. 2000) (a dwelling is substantially complete when it can be used for its intended purposes as demonstrated by issuance of certificate of compliance); *Bryant v. Don Galloway Homes, Inc.*, 556 S.E.2d 597 (N.C. App. 2001) (same).

Ledcor next argues that, even if the Project was substantially complete when the City issued its certificate of occupancy, the statute of repose did not begin to run until **after** Bordak performed its repair work at the Project. This contention is not supported. First, to allow the statute of repose to toll or start running anew each time a punch list item or repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of the statute of repose. No Washington court has addressed whether "repairs" or "punch list" work performed after the date of substantial completion resets the statute of repose. However, other jurisdictions have done so. Indeed, in *Bryant v. Don Galloway Homes, Inc.*, 556 S.E.2d 597, the court addressed the question of whether a "repair qualified as a last act or omission" for purposes of North Carolina's statute of repose. In determining that it did not, the court specifically held:

“To allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose. . . .”

The repose period began to run in November 1991 when defendant completed construction of the house and received a certificate of compliance.

*Id.* at 601 (citing and quoting *Monson v Paramount Homes, Inc.*, 515 S.E.2d 445, 450 (N.C. App. 1999)). Here, Bordak completed its original work on the project in June of 2002, the project was substantially complete in March 2003, and the repair and/or additional work Bordak performed was completed in April of 2003. Even if Leducor’s argument that repair work can toll the statute of repose is persuasive, Leducor’s claims against Bordak would still be untimely because Leducor filed suit more than six years after Bordak’s final work on the Project.

Finally, Leducor argues that determining the date of substantial completion is a question of fact, and the trial court erred in making such a determination. Leducor cites to, and relies heavily on the California case of *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.*, 177 Cal. App. 4th 272, 286-87 (2009), in support of its position. However, what Leducor fails to highlight in its discussion is that *North American* was a case dealing with a claim between two insurance carriers and involved issues of allocation of a loss based on each respective carrier’s time on the risk. The issue of “substantial completion” arose because it was necessary for the carriers to determine what work constituted “completed

operations.”<sup>41</sup> In determining that question, the court noted that substantial completion was a “question of fact to which the substantial evidence standard applies.” *Id.* at 286. The court also specifically noted that the factual determination was to be made “under the conditions and circumstances of each case,” and the court found that the date of issuance of the notice of completion for the project was the critical “circumstance.” *Id.* at 286-87. Thus, the decision by the *Claremont* court is inapposite to the issues before the Court.

**b. Leducor’s evidence before the trial court did not lead to a disputed issue of fact because the evidence as a whole gave rise to only one reasonable conclusion.**

Leducor argues on appeal that the trial court erred in determining the date of substantial completion because Leducor’s evidence created an issue of fact as to the date of substantial completion. Summary judgment is improper if the record reflects a disputed issue of material fact, unless “reasonable minds could reach but one conclusion from the admissible facts in evidence.” *Hiatt v. Walker Chevrolet*, 120 Wn.2d at 65-66 (citations omitted). Here, the evidence presented to the trial court, and reiterated on appeal, supports only one reasonable conclusion as to the date of substantial completion. The trial court properly considered the record, and correctly concluded that as a matter of law Leducor’s indemnity claim was time-barred.

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<sup>41</sup> “Completed operations” was a defined term in the insurance policy.

The evidence on record before the trial court prior to the court's decision on summary judgment showed that the City of Seattle had issued a Certificate of Occupancy on March 14, 2003.<sup>42</sup> Pursuant to requirements published by the City of Seattle, the circumstances and requirements for issuance of a Certificate of Occupancy include a finding that the "project complies with the regulations for occupancy required by the Seattle Building Code (Section 109)."

In addition to the City's determination, the court also considered evidence that, after the City's Certificate of Occupancy was issued, several units at the Project were placed on the market for sale, that "homeowners proceeded to move into (and to inhabit) their new homes."<sup>43</sup> In addition, the court had before it excerpts from the June 24, 2009 deposition of Mr. Marc Gartin, the principal of Admiral, who specifically testified that he did not want to start marketing the units until "everything was done," and that it was his understanding that except for "some lingering issues" the Project was "for the most part" complete by March of 2003.<sup>44</sup> Mr. Gartin further testified that the units which were sold on or about March of 2003 were not advance sales, but instead were "turnkey" sales. *Id.* The court was also aware that, during the course of litigation with Admiral, Leducor

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<sup>42</sup> CP 1052.

<sup>43</sup> CP 1041.

<sup>44</sup> *Id.*

itself had previously argued that the Project was substantially complete as of March of 2003.<sup>45</sup>

Moreover, Leducor's own expert, Morrison-Hershfield, said the Project was complete and it was the design defects causing the water intrusion. Indeed, Morrison-Hershfield specifically told Bordak this fact.

In support of its contention that the Project was not substantially complete in March of 2003, Leducor relied heavily on the refusal of the architect to certify that the Project was substantially complete.<sup>46</sup> Leducor maintained that the architect's determination was controlling, but this position is undermined by the fact that the architect on whom Leducor relied **never** determined that the Project was substantially complete, and eventually Leducor and Admiral simply declared between themselves that the Project was completed.

Leducor also asserts that the fact that it did not make final payment until July of 2004 demonstrate that Bordak's work was not complete until that date. The fact that Leducor did not make final payment until July of 2004 is a fact of no consequence – it is the date of final work on a project – not final payment – which is critical to the determination of whether the statute of repose will commence. Washington law specifically provides that “substantial completion” occurs at that point when the condominiums are fit for occupancy. *1519-1525 Lakeview Blvd. Condominiums Ass'n v. Apartment Sales Corporation*, 101 Wn. App. 923, 6 P.3d 74 (2000). The

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<sup>45</sup> *Id.*

<sup>46</sup> CP 673-673 and CP 1083.

fact that “punch list” and/or “repair” work must be undertaken after “substantial completion” does not alter this reality. *Id.* at 933 (substantial completion occurs even though “punch list” items remained when those punch list items did not render the project “not fit for occupancy”).

In summary, contrary to Ledcor's assertion, the trial court did not rely solely on the issuance of the Certificate of Occupancy. Instead, it considered all the evidence before it. That evidence was:

- That the City of Seattle determined the Project fit for occupancy and, thus, issued a Certificate of Occupancy;
- Ledcor admitted, through its own expert, Morrison-Hershfield, that the Project was complete;
- That Admiral representatives placed units at the Project on the market as “turnkey” units;
- That, as even Ledcor previously asserted, after the Certificate of Occupancy was issued "homeowners proceeded to move into (and to inhabit) their new homes;" and
- Ledcor itself had at one point in litigation asserted that the Project was complete as of March 2003.

It was from these facts contrasted with the opinion of the Project’s architect (which was eventually found to be superfluous by Ledcor and Admiral), that the trial court properly determined that reasonable minds could not differ as to the date of substantial completion. Thus, the trial court properly concluded that of substantial completion occurred in March

of 2003, and Leducor's claim for indemnity was therefore time-barred under the statute of repose.

**c. The trial court properly analyzed the issues before it.**

When the trial court granted Bordak's Motion to Reconsider, it specifically concurred with the reasoning contained in co-defendant SQI's Supplemental Reply.<sup>47</sup> In its appellate brief, Leducor takes great pains to distinguish the authority cited by SQI (the identical authority cited by Bordak throughout briefing below), *Lakeview Blvd. Condominiums Association, Supra*. Leducor contends that the trial court's reliance on *Lakeview* was misplaced because in *Lakeview*, the only evidence presented regarding the date of substantial completion was the certificate of occupancy, and the date on which the condominiums were first marketed, and that evidence was undisputed.<sup>48</sup> Leducor's argument is misplaced.

The plaintiffs in *Lakeview* brought suit against the developers of a four-unit condominium complex after condominiums purchased by the plaintiffs were severely damaged in a mudslide. The units at issue were designed and constructed between 1988 and 1990, the units were placed on the market for sale in June of 1990, and the City of Seattle issued its certificate of occupancy for the units in August of 1990. *Lakeview*, 101 Wn. App. at 927. Mudslides damaged the units in January of 1997, and plaintiffs brought suit in February of 1997. *Id.* at 928. The plaintiffs argued that substantial completion of the units could not have occurred

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<sup>47</sup> CP 1550-1552 at 1552.

<sup>48</sup> Brief of Appellant at page 34.

before sale, thus making their claims timely filed under RCW 4.16.300. In response, the court stated, “Nothing in the statute indicates, however, that its protections depend on sale of the improvement . . . . Instead, the statute defines ‘substantial completion’ as ‘the state of completion reached when an improvement upon real property *may be used or occupied for its intended use.*” *Id.* at 931 (emphasis original). The court went on to state that the language of the statute “plainly means that actual use or occupancy is not required for construction to be substantially complete.” *Id.* The court found that the trial court properly considered both the City’s certificate of occupancy, **and** the fact that the units had been put on the market for sale, in determining that the project was substantially complete more than six years prior to the plaintiffs’ lawsuit. *Id.* at 932.

Ledcor argues that the trial court relied on *Lakeview* in error because the project in *Lakeview* was smaller than Ledcor’s Project, and unlike the evidence presented in *Lakeview*, the evidence as to substantial completion of the Project here is contested. However, despite the respective size of the projects, the legal reasoning in *Lakeview* applies with equal force in our case. The evidence on record before the trial court showed that the City of Seattle issued a Certificate of Occupancy, the developer of the Project had placed units on the market for sale and considered those units “turnkey” and ready for occupancy and, according to Ledcor, people began to inhabit their new condominiums. The fact that additional repair work was done at the Project is not determinative as to the date of substantial completion. The court in *Lakeview* addressed just such a

concern, stating “the record does not indicate that any work yet unfinished rendered the project not substantially complete, *i.e.*, not fit for occupancy. The fact that additional work was done later...does not alter the fact that ... the project was substantially complete.” *Id.* at 932.

The trial court properly considered the date on which the Project had been put to its “intended use,” and the court concurred with SQI’s position that, under the statutory definition, the Project was substantially complete at the time the certificate of occupancy was issued and individual units were marketed and sold. Contrary to Ledcor’s argument on appeal, the trial court did not only consider the certificate of occupancy, or rely solely on this event to establish substantial completion as a matter of law. The trial court properly examined the evidence before it, and properly concluded that as a matter of law, the Project was substantially complete on the date it could be put to its intended purpose, that is it was fit for habitation and was placed on the market by Admiral.

**(5) BORDAK REQUESTS AN AWARD OF FEES ON APPEAL**

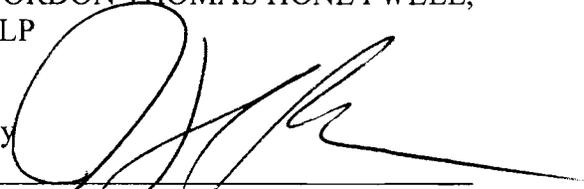
In the event this Court affirms the trial court's grant of summary judgment, Bordak is entitled to recover prevailing party attorneys' fees and costs under section 7.4 of the subcontract between Bordak and Ledcor. Pursuant to Appellate Rule 18.1(a), (b), Bordak hereby includes a request for an award of fees on appeal.

**E. CONCLUSION**

Based upon the foregoing, Bordak respectfully requests the Court affirm the Court's decision granting Bordak's Motion for Summary Judgment on Indemnity.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of August, 2011.

GORDON THOMAS HONEYWELL,  
LLP

By 

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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LEDCOR INDUSTRIES (USA) INC.,  
a Washington corporation,

Petitioner,

v.

S.Q.I., INC., a Washington corporation; BORDAK BROTHERS, INC., an  
Oregon corporation, et al.,

Respondents.

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CERTIFICATE OF SERVICE

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GORDON THOMAS HONEYWELL LLP  
Joanne Thomas Blackburn, WSBA No. 21541  
Michelle A. Menely, WSBA No. 28353  
Attorneys for Respondent Bordak Brothers, Inc.

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STATE OF WASHINGTON  
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TO: Clerk of the Court

AND TO: All Parties and Counsel of Record.

The undersigned declares as follows:

I am over the age of 18, not a party to this action, and competent to be a witness herein.

On the 1<sup>st</sup> day of August, 2011, I caused to be filed a true and correct copy of the Brief of Respondent Bordak Brothers and this Certificate of Service and delivered a copy to the following counsel of record as indicated:

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<p><b><u>Counsel for Exterior Metals:</u></b>  Fallon &amp; McKinley  Gregory Jones  1111 3<sup>rd</sup> Avenue, Suite 2400  Seattle WA 98101</p>	<p><input type="checkbox"/> U. S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> FedEx  <input checked="" type="checkbox"/> Email  <input type="checkbox"/> Legal Messenger</p>
<p><b><u>Counsel for Roestel's Mechanical:</u></b>  Office of Sharon Bitcon  Christopher D. Anderson  200 W. Mercer, Suite 111  Seattle WA 98119</p>	<p><input type="checkbox"/> U. S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> FedEx  <input checked="" type="checkbox"/> Email  <input type="checkbox"/> Legal Messenger</p>
<p><b><u>Co-Counsel for Roestel's Mechanical:</u></b>  Forsberg &amp; Umlauf  John Hayes/Martin Pujolar  901 5<sup>th</sup> Avenue, Suite 1400  Seattle WA 98164</p>	<p><input type="checkbox"/> U. S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> FedEx  <input checked="" type="checkbox"/> Email  <input type="checkbox"/> Legal Messenger</p>

<p><b><u>Counsel for United Systems, Inc.:</u></b>          Todd &amp; Wakefield          Stephen Todd/Joshua Joerres          1501 4<sup>th</sup> Avenue, Suite 1700          Seattle WA 98101</p>	<p><input type="checkbox"/> U. S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> FedEx  <input checked="" type="checkbox"/> Email  <input type="checkbox"/> Legal Messenger</p>
<p><b><u>Counsel for Starline Windows, Inc.:</u></b>          Salmi &amp; Gillaspy          Betsy A. Gillaspy          821 Kirkland Avenue, Suite 200          Kirkland WA 98033</p>	<p><input type="checkbox"/> U. S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> FedEx  <input checked="" type="checkbox"/> Email  <input type="checkbox"/> Legal Messenger</p>
<p><b><u>Counsel for Coatings Unltd., Inc.:</u></b>          Skellenger Bender          Kara R. Masters          1301 5<sup>th</sup> Avenue, Suite 3401          Seattle WA 98101</p>	<p><input type="checkbox"/> U. S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> FedEx  <input checked="" type="checkbox"/> Email  <input type="checkbox"/> Legal Messenger</p>
<p><b><u>Counsel for Admiral Way:</u></b>          Hecker Wakefield &amp; Feilberg          Stephen Wakefield          321 1<sup>st</sup> Avenue West          Seattle WA 98119</p>	<p><input type="checkbox"/> U. S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> FedEx  <input checked="" type="checkbox"/> Email  <input type="checkbox"/> Legal Messenger</p>
<p><b><u>Counsel for Starline Windows:</u></b>          Law Office of William J. O'Brien          William J. O'Brien          999 3<sup>rd</sup> Avenue, Suite 805          Seattle WA 98104</p>	<p><input type="checkbox"/> U. S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> FedEx  <input checked="" type="checkbox"/> Email  <input type="checkbox"/> Legal Messenger</p>

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Dated this 15 day of August, 2011.

GORDON THOMAS HONEYWELL LLP

*Carol Kinnaird*

Carol Kinnaird, Legal Assistant