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STATE OF WASHINGTON

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No. 69500-2-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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Ballard Leary Phase II, LP.; BRCP/CPI Phase II, LLC; Continental Pacific Investments Real Estate Fund 1, LP; Continental Pacific Investments Real Estate Fund 1, LP; Continental Properties, Inc.; Claudio Guincher and Jane Doe Guincher; and Don Bowzer and Jane Doe Bowzer, Appellants,

v.

Canal Station North Condominium Association, Respondent.

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**NOTICE OF ERRATA:**

APPELLANTS' OPENING BRIEF

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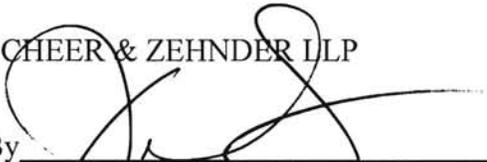
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In Appellants' Opening Appellate Brief filed on April 18, 2013, the Brief inadvertently included a Cover Page with the incorrect case number. Accordingly, Appellants respectfully request that the attached Cover Sheet replace the Cover Sheet on the previously filed Appellants' Opening Brief.

DATED this 19<sup>th</sup> day of April 2013.

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**PROOF/CERTIFICATE OF SERVICE:**

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I, Jennifer Griffiths, legal assistant to John E. Zehnder, Jr. and Jennifer M. Smitrovich, counsel for Appellants, hereby certify that on April 19, 2013 copies of the following was served via legal messenger to Respondent's counsel and Division I of the Washington Court of Appeals (original and one (1) working copy) at the addresses identified further below:

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DATED this 19<sup>th</sup> day of April, 2013 at Seattle, Washington.

  
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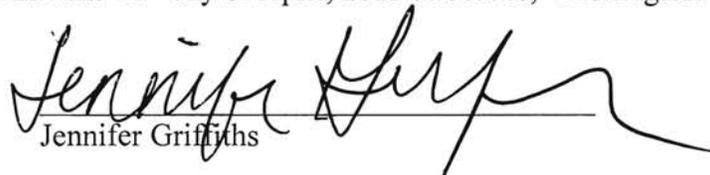
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DATED this 18<sup>th</sup> day of April, 2013 at Seattle, Washington.

  
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## I. IDENTITY OF PARTIES

Appellants Ballard Leary Phase II, LP; BRCP/CPI Phase II, LLC; Continental Pacific Investments Real Estate Fund 1 LP; CPI Fund 1, LP; Continental Properties LLC; Claudio Guincher, Jane Doe Guincher; Don Bowzer; and Jane Doe Bowzer (collectively “Appellants” and/or “Ballard Leary”) are all defendants before the trial court, and the moving parties here.

## II. DECISION OF THE TRIAL COURT AND COURT OF APPEALS

### A. Trial Court Decision

Appellants seek review of the Order striking (in its entirety) Ballard Leary’s demand for WCA arbitration, entered by the King County Superior Court on August 21, 2012, as well as the Order denying Defendants’ motion for reconsideration of the Order striking the WCA arbitration demand, entered by the King County Superior Court on September 28, 2012. *Clerk’s Papers (“CP”) at 851-853; 975-977.*

### B. Court of Appeals Decision

Appellants moved this Court for discretionary review. On February 1, 2013 this Court ruled that Appellants may appeal the denial of arbitration as a matter of right under RAP 2.2 and that, moreover, Appellants had also met the discretionary review standard.

## III. INTRODUCTION

The Superior Court erred by striking (in its entirety) Ballard Leary’s demand for Washington Condominium Act (“WCA”) arbitration.

In doing so, the trial court's Order is in direct conflict with: (a) controlling Washington Supreme Court law; (b) the judicial/legal admissions of the plaintiff HOA; and (c) the clear and unambiguous language of RCW 64.55.100. Specifically, the trial court erred when it found:

- (1) Ballard Leary waived their right to arbitration by filing a motion under CR 12(b)(6);
- (2) Defendants "CPI Fund 1, LP; Continental Properties LLC; Claudio Guincher, and Don Bowzer" are not "declarants" and, as such, have no right to arbitration; and
- (3) the so-called manufacturer defendants are not subject to arbitration.

The trial court's misapplication of the arbitration provisions in the Condominium Act and its refusal to apply controlling precedent have forced the Appellants to defend claims in Superior Court – in what will be protracted and costly litigation – that should have been subject to mandatory arbitration under the Condominium Act. The trial court's entire Order is in error for at least the following reasons:

*First*, the Washington Supreme Court (en banc) affirmed a Division One decision and held that **even the filing of a motion for summary judgment does not result in a waiver** (thus, of course, neither could a 12(b)(6) motion). *Townsend v. Quadrant Corp.*, 173 Wash. 2d 451, 463, 268 P.3d 917, 923 (2012), affirming *Townsend v. Quadrant Corp.*, 153 Wash. App. 870, 224 P.3d 818 (Div 1 2009). As such, under these circumstances the right to arbitration under the WCA is absolute. If

demanded, “the parties **shall** participate in a private arbitration hearing.” RCW 64.55.100.

*Second*, **the HOA has admitted** that Defendants CPI Fund 1, Continental Properties LLC, Claudio Guincher, and Don Bowzer (collectively, the “CPI Defendants”) **are WCA declarants** and, as such, have the right under the WCA to receive arbitration.<sup>1</sup> A party is bound by the words in their own pleadings, and black letter law requires that their words must be treated as “judicial admissions.” *Schott Motorcycle Supply, Inc. v. American Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir.1992)(“[A] party's assertion of fact in a pleading is a judicial admission by which it is normally bound throughout the course of the proceeding.”).

*Third*, the HOA also admits the CPI Defendants are declarants by seeking to enforce the WCA against them.<sup>2</sup> The WCA can only be enforced against a declarant (or dealer). *See, RCW 64.34.445, 64.34.450, 64.34.405*. Critically, when a plaintiff seeks to claim the benefits of the WCA by imposing a claim against a defendant, that plaintiff is equitably estopped from denying the defendant its WCA right to arbitrate.

*Fourth*, once again, the HOA has admitted that the so-called manufacturer defendants **are actually “supplie[rs]”** of the product at

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<sup>1</sup> As outlined below, the trial court overlooked these admissions – i.e. allegations – in plaintiff’s Complaint stating that the CPI Defendants are, in fact, declarants. The trial court’s Order is in error where it states that the CPI Defendants “are not alleged” to be declarants. *CP 851 – 853*.

<sup>2</sup> The plaintiff’s First Amended Complaint mistakenly names certain of the “declarant” defendants. For example, Continental Properties is an incorporated entity, not an “LLC.” *See, e.g. Declaration of Claudio Guincher, CP 911 – 915*.

issue in the complaint. Having admitted that they are suppliers, the WCA arbitration provision clearly provides that they are subject to arbitration. *RCW 64.55.150*.

By denying the right to arbitration under RCW 64.55, the trial court also denied the other benefits of the statute. That is, **if there is an arbitration under the WCA, the risk of paying prevailing party attorney fees and costs may shift from the Appellants to the Respondent**. As explained next, taking away the arbitration right from Appellants dramatically affects Appellants' rights in this case, because without arbitration that shift of risk to Respondent cannot happen.

Under the originally constituted Washington Condominium Act ("WCA"), if a plaintiff condominium association prevailed at trial, they were entitled to recover their attorney fees. *RCW 64.34.455*. There was no right of arbitration. However, that dynamic changed with the enactment of Chapter 64.55 RCW, which established the right to demand arbitration.<sup>3</sup> But while the legislature made that arbitration right subject to *de novo* trial court review, that *de novo* right was not unfettered. Quite to the contrary.

To put "teeth" into the WCA arbitration, and to thereby make sure that WCA arbitrations would have the effect of ending litigation, the legislature decided to create significant risk, and incentive, for the plaintiff. That is, if a plaintiff *de novo*'ed the arbitration result, and then failed to better their position at trial, they would have to pay ***the***

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<sup>3</sup> In an effort to reduce litigation, the legislature incorporated the absolute right to demand arbitration within 90 days after service of the complaint. *RCW 64.55.100*.

*defendant's* attorney fees and costs. *RCW 64.55.100(5)*. This has had a devastating effect on a plaintiff's desire to even take a matter to arbitration (i.e. they settle prior to the hearing), let alone reject an arbitration ruling. Now the WCA puts plaintiff at risk of paying substantial monies to the defense – but only if there is an arbitration. Thus, Respondent fights to avoid the arbitration and the intent to prevent protracted litigation.

As set forth herein, the Appellants' singular action of filing a motion on the pleadings – without conducting any other discovery, depositions, or expert investigations – is not (under any interpretation of the law and the statute) an act of waiver. The action of filing the motion was simply to narrow the issues to be presented at arbitration *and* at any subsequent *de novo*'ed trial. As set forth below, all actions and inactions of Ballard Leary were meant to serve the purpose of arbitration, including the timing of filing the CR 12(b)(6) motion to be heard before the expiration of the 90 days to compel WCA arbitration. The contrary findings of the trial court are in error and the trial court's Order (in its entirety) must be reversed.

#### **IV. ASSIGNMENT OF ERROR**

A. Whether the trial erred by ruling that Appellants waived their right to statutorily guaranteed arbitration under *RCW 64.55.100* through the sole act of filing a CR 12(b)(6) motion on the pleadings?

B. Whether the trial court erred by ruling that all claims alleged against all Appellants are not subject to arbitration under Chapter 64.55 *RCW*?

C. Whether the trial court erred by ruling that claims against manufacturer defendants (whom the plaintiff HOA alleged to be “suppliers”) are not subject to statutory arbitration under RCW 64.55.100 and 64.55.150?

## V. STATEMENT OF THE CASE

This is a construction defect case, which arises out of the construction of the Canal Station North Condominium located at 5450 Leary Avenue, Seattle, King County, Washington. Ballard Leary Phase II is the statutory declarant for the project.

### A. Plaintiff’s Complaint

The plaintiff HOA filed its first Complaint on April 27, 2012. The plaintiff then filed its First Amended Complaint on May 25, 2012.<sup>4</sup> The plaintiff HOA’s Amended Complaint alleges the following seven causes of action against the Ballard Leary Defendants: (1) breach of implied warranty of quality under the Washington Condominium Act; (2) breach of the implied warranty of habitability; (3) breach of express warranty and contract; (4) negligent misrepresentations or omissions; (5) breach of fiduciary duty; (6) violation of the Consumer Protection Act; and (7) disgorgement of fraudulent transfers.<sup>5</sup>

The plaintiff HOA’s Amended Complaint names the following entities and alleges that they are affiliates and partners of the declarant,

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<sup>4</sup> CP 36 – 67.

<sup>5</sup> *Id.*

Ballard Leary Phase II LP: BRCP/CPI Phase II LLC, Continental Pacific Investments Real Estate Fund 1 LP, CPI Fund 1 LLC, and Continental Properties LLC.<sup>6</sup> The plaintiff HOA refers to the foregoing entities collectively as “Continental.” The plaintiff HOA also named Claudio Guincher and Don Bowzer in their individual capacities, as they are alleged to be the previous declarant-appointed board members. The HOA has brought multiple causes of action alleging that the declarant defendants were either the declarant or “alter-egos” of the declarant and “responsible for all tort, contract, and warranty liabilities alleged....against the declarant.”<sup>7</sup> These claims seek (in part) recovery of damages to common elements and limited common elements as provided by the WCA. At least six of the HOA’s seven claims alleged against the declarant simultaneously seek the same recovery of damages from the declarant and the declarant’s “alter egos” or “affiliates.”<sup>8</sup>

The plaintiff HOA’s Complaint also alleges causes of action against Uponor, Inc., Dahl Brothers Canada, Ltd., Brass-Craft Manufacturing Company and Masco Corp. related to product liability for supplying alleged defective yellow brass plumbing fixtures. Uponor, Dahl, Brass-Craft and Masco are collectively referred to as the “manufacturer defendants.” The HOA alleges that each of these

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<sup>6</sup> *Id.* Plaintiff’s original complaint named Continental Properties, Inc. The entity was changed to an LLC in the Amended Complaint.

<sup>7</sup> *CP 36 – 67 at* ¶ 2.14.

<sup>8</sup> *CP 36 - 67.*

defendants “supplied” defective plumbing components that were used at the project.

**B. Ballard Leary’s Motion on the Pleadings**

On July 6, 2012, Ballard Leary filed a CR 12(b)(6) motion to dismiss the plaintiff HOA’s claims for (a) Consumer Protection Act violations, and (b) negligent misrepresentation, due to lack of standing.<sup>9</sup> The motion did not argue the substantive merits of the claims and did not present any defense to the claims, other than the plaintiff HOA did not have standing under RCW 64.34.304 and case law regarding representational standing of an Association.

As part of the 12(b)(6) motion, Ballard Leary also requested that the trial court dismiss, without prejudice, the HOA’s secondary claims for improper winding up and fraudulent transfers. In the alternative, Ballard Leary requested that the trial court bifurcate the secondary claims so as to have a decision on the merits first, before any finding of the secondary claims could be made.

The trial court heard oral argument on Ballard Leary’s CR 12(b)(6) motion on August 3, 2012. The trial court ruled that the motion was denied in its entirety, except that the plaintiff HOA must cure the deficiencies in its First Amended Complaint related to the negligent misrepresentation claim.<sup>10</sup>

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<sup>9</sup> CP 439 – 452.

<sup>10</sup> CP 713 – 715.

**C. Ballard Leary's Arbitration Demand**

On August 7, 2012, just four days after the CR 12(b)(6) motion was denied, Ballard Leary filed a demand for arbitration pursuant to RCW 64.55.100.<sup>11</sup> Ballard Leary did not conduct any discovery, take any depositions, or file any motions, other than the singular CR 12(b)(6) motion referenced above, before filing its arbitration demand. Ballard Leary did not engage construction defect experts to conduct a site inspection and did not partake in any expert discovery related to this lawsuit. Ballard Leary did not even file an Answer before demanding arbitration under RCW 64.55.100.

On August 8, 2012, Ballard Leary filed a second notice related to the arbitration, affirming that all parties (including the manufacturing defendants) were subject to arbitration.<sup>12</sup>

**1. Plaintiff HOA's Motion to Strike Arbitration Demand**

The plaintiff HOA moved to strike the arbitration demand arguing waiver and that certain defendants were not entitled to demand arbitration. Ballard Leary opposed the plaintiff HOA's motion to strike the arbitration demand.<sup>13</sup>

**2. Trial Court's Order Striking Arbitration Demand**

On August 21, 2012, the trial court issued its Order (without oral argument) striking Ballard Leary's arbitration demand in its entirety (as to

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<sup>11</sup> CP 716 - 718.

<sup>12</sup> CP 719 - 721.

<sup>13</sup> CP 722 - 734; 821 - 831.

all defendants).<sup>14</sup> The trial court’s order striking the arbitration demand provides that: (a) Ballard Leary waived their right to statutory arbitration under RCW 64.55.100 due to the sole act of filing a CR 12(b)(6) motion prior to demanding arbitration; (b) only the claims against the statutory declarant, “Ballard Leary Phase II,” are subject to arbitration under the WCA; and (c) the claims against the manufacturer defendants are not subject to WCA arbitration.<sup>15</sup>

In striking Ballard Leary’s arbitration demand, the trial court – again, without allowing argument on its form – essentially “rubber-stamped” the Order proposed by the plaintiff HOA. As set forth below, the trial court’s findings which conclude with a finding of waiver are in error, undermine the express terms of the statute, and otherwise are not supported by the record.

### **3. Trial Court’s Order Denying Motion for Reconsideration**

Ballard Leary filed a motion for reconsideration of the trial court’s order denying RCW 64.55 arbitration<sup>16</sup>; the trial court denied the motion for reconsideration without requesting oral argument on September 28, 2012.<sup>17</sup> It is from this Order and the trial court’s Order striking arbitration that Ballard Leary appeals.<sup>18</sup>

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<sup>14</sup> *CP 851 – 853.*

<sup>15</sup> *Id.*

<sup>16</sup> *CP 856 - 859*

<sup>17</sup> *CP 975 - 977*

<sup>18</sup> *CP 851-853; CP 975 - 977*

## VI. ARGUMENT

### A. Questions of Arbitrability are Reviewed De Novo

Questions of arbitrability are reviewed *de novo*. *Stein v. Geonerco, Inc.*, 105 Wash. App. 41, 44, 17 P.3d 1266, 1268 (2001); *Mlendez v. Palm Harbor Homes*, 111 Wn. App. 446, 453, 45 P.3d 594 (2002). Arbitrability in this case must be determined under RCW 64.55.100. Washington law favors arbitration as a means of resolving disputes. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 891-92, 16 P.3d 617 (2000); *Adler v. Fred Lind Manor*, 153 Wash. 2d 331, 341 n.4, 103 P.3d 773, 779, n.2 (2004).

### B. Washington Courts Favor Arbitration

Washington has a strong public policy that favors alternative dispute resolution. *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wash. App. 400, 403 -04, 200 P.3d 254 (2009). “Washington courts apply a strong presumption in favor of arbitration.” *Id.* at 405 (citing *Peninsula School Dist. No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 924 P.2d 13 (1996)). Any doubts should be resolved in favor of arbitrability, and “all questions upon which the parties disagree are presumed to be within the arbitration provision unless negated expressly or by clear implication.” *Id.* (emphasis added). Indeed, “Courts must indulge every presumption in favor of arbitration....” *Id.* (citing *Xuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 25, 103 S.Ct. 927 (1983))). That presumption applies “whether the problem at hand is the construction of the contract language itself *or an allegation of*

*waiver, delay, or a like defense to arbitrability.” Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wash. App. 82, 87, 246 P.3d 205 (2010)

The party “seeking to prove waiver has a heavy burden of proof.” *J.L. Steele v. Lundgren*, 85 Wn.App. 845, 852, 935 P.2d 671 (1997). Consistent with Washington's presumption in favor of alternative dispute resolution, waiver of an arbitration clause does not occur unless there is “conduct inconsistent with any other intention but to forego a known right.” *Verbeek*, 159 Wn.App. at 87. Washington has specifically “declined to follow the federal approach and support(s) the public policy favoring arbitration by adhering to the requirement that waiver cannot be found absent *conduct inconsistent with any other intention but to forego a known right.*” *Lake Washington School. Dist. NO. 414 v. Mobile Modules Northwest, Inc.*, 28 Wn.App. 59, 62, 621 P.2d 791 (1981) (emphasis added).

**1. RCW 64.55.100 Grants Mandatory Right to Arbitration**

RCW 64.55.100 provides that parties to a WCA dispute automatically are granted a right to submit their claims to arbitration, as follows:

(1) If the declarant, an association, or a party unit owner demands an arbitration by filing such demand with the court not less than thirty and not more than ninety days after filing or service of the complaint, whichever is later, **the parties shall participate in a private arbitration hearing.** The declarant, the association, and the party unit owner do not have the right to compel arbitration without giving timely notice in compliance with this subsection. Unless otherwise agreed by the parties,

the arbitration hearing shall commence no more than fourteen months from the later of the filing or service of the complaint.

*Id.* (emphasis added). Pursuant to this statute, a party need only timely demand arbitration (within ninety days of after filing or service of the complaint) to submit the case to mandatory arbitration.<sup>19</sup> Here, there is no dispute that Ballard Leary timely submitted their demand for arbitration (less than ninety days from service of the Complaint).

As discussed next, there is no condition to the right to mandatory arbitration (other than the timely filing of the arbitration demand), and based on the language of RCW 64.55.100, as well as this court's interpretation of waiver of the right to arbitration, the trial court erred by finding that Ballard Leary waived the right to WCA arbitration.

## **2. Ballard Leary Did Not (and Cannot) Impliedly Waive Statutorily Guaranteed Right to Arbitration**

There is no reported decision in Washington deciding whether waiver of the statutorily guaranteed right to arbitration under RCW 64.55.100 can occur by implication. However, considering the long history of decisions declining to find that any given action acted as a waiver of the right to arbitration, coupled with the mandatory words of the statute compelling arbitration, the trial court erred by finding that Ballard Leary waived the right to WCA arbitration.

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<sup>19</sup> RCW 64.34.100(2) also provides: "...any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter."

The case of *Townsend v. Quadrant Corp.*, 153 Wash. App. 870, 875-78, 224 P.3d 818, 822-23 (2009) *aff'd*, 173 Wash. 2d 451, 268 P.3d 917 (2012) is compelling and controlling. In *Townsend*, the Washington Supreme Court upheld the Division 1 Court of Appeals ruling that the filing of a summary judgment motion may not act to waive a right to arbitration so long as the moving party “promptly” thereafter seeks arbitration – which is exactly what the defendants did here.

In *Townsend*, Respondents (the Homeowners) purchased houses designed, built, and sold by The Quadrant Corporation, Weyerhaeuser Real Estate Company (WRECO), and Weyerhaeuser Company. After purchasing and living in their homes, the Homeowners discovered construction defects. The Homeowners sued the defendants for fraud, outrage, violation of the CPA, negligence, negligent misrepresentation, rescission, breach of warranty, and a declaration of the unenforceability of the arbitration clause contained in the PSA. *Id.*

The PSAs for all four homeowners contained an arbitration provision. Weyerhaeuser and WRECO moved for summary judgment seeking dismissal of all the claims on the merits with prejudice. The court denied Weyerhaeuser and WRECO's summary judgment motion. *Id.* Weyerhaeuser and WRECO promptly moved to compel arbitration of the case. The trial court denied the appellants' motions to compel arbitration, finding that the motion for summary judgment acted as a waiver of arbitration. *Id.* **Both the Division 1 Court of Appeals and the Supreme Court reversed this decision.**

First, the Court of Appeals, Division 1, ruled that the filing of the dispositive motion **did not** waive the right to compel contractual arbitration at a later date:

WRECO and Weyerhaeuser moved for summary judgment...alleging they were not properly parties to the lawsuit, as the Homeowners had not pleaded facts that implicated their liability. The court denied both the motion and...the motion for reconsideration. The basis for the summary judgment was not the merits of the issues, but whether WRECO and Weyerhaeuser were proper parties....We hold that a party may challenge before the court whether they are properly parties to an arbitration agreement, or whether a basis exists to revoke the arbitration agreement, without waiving the substantive right to invoke the arbitration clause if they lose these challenges.

*Townsend v. Quadrant Corp.*, 153 Wash. App. 870, 888-89, 224 P.3d 818, 829 (2009) *aff'd on other grounds*, 173 Wash. 2d 451, 268 P.3d 917 (2012). While the Court of Appeals focused on the nature of the motion filed, the Supreme Court focused almost entirely on the fact that, after the summary judgment motion was denied, WRECO and Weyerhaeuser “promptly” sought arbitration (exactly what we have here). The Supreme Court’s held:

The facts before us are quite different because unlike the teachers in *Naches Valley* [the case relied upon by the Homeowners] who prevailed on summary judgment and therefore waived their right to arbitrate, **WRECO and Weyerhaeuser moved to compel arbitration after the trial court denied their motion for summary judgment.**

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Here, WRECO and Weyerhaeuser moved to compel arbitration **promptly after the superior court denied their motion for summary judgment** based on their assertions that they had no connection to the lawsuit. In our view, this conduct did not evince intent to waive arbitration.

*Townsend v. Quadrant Corp.*, 173 Wash. 2d 451, 462-463, 268 P.3d 917, 923 (2012) (internal citations omitted) (emphasis added).

Precisely as was the case in *Townsend*, Ballard Leary “promptly” demanded arbitration within four days of the trial court’s decision on the 12(b)(6) motion. Moreover, while not addressed by the Supreme Court, it should be noted that consistent with the opinion from Division One, Ballard Leary’s motion on the pleadings here was a procedural motion that did not go to the merits of the issues; it was a 12(b)(6) motion solely on the pleadings and without submitting any evidence – which makes it all the more clear that the motion could never be deemed to relate to the merits. In fact, Ballard Leary’s motion asked the Court to: (a) dismiss two causes of action for lack of standing [i.e. challenging whether the plaintiff was a proper party to bring such claims] and (b) dismiss claims against “alter-ego” defendants as premature [again, challenging whether “alter ego” defendants are proper parties at the inception of litigation].<sup>20</sup> Just as was the case in *Townsend*, the 12(b)(6) motion was directed to determining who was a proper party to bring, or be subject to, certain

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<sup>20</sup> Consistent with the foregoing, Ballard Leary’s motion in the alternative to bifurcate out the alter-ego claims was directed at making sure the proper claims against the proper parties would be addressed first.

claims. Just as was the case in *Townsend*, the trial court denied Ballard Leary's motion and the defendants promptly compelled arbitration.

The Supreme Court has made it clear that a party need only "take some action to enforce" their right to arbitration "within a reasonable time." *Townsend*, 173 Wash. 2d at 463 (2012). Here, Ballard Leary demanded arbitration **four** days after the trial court's decision on the 12(b)(6) motion (which was within the 90 day requirement of RCW 64.55.100). Four days unquestionably is "within a reasonable time." The only action taken by the defendants prior to submitting its arbitration demand was the filing of a CR 12(b)(6) motion and that, as a matter of Supreme Court law, cannot be a waiver.

**3. A Long History of Case Law, Establishing a Strong Presumption against Waiver, Prevents a Finding of Waiver Here.**

Of course, the foregoing is consistent with the strong policy favoring arbitration and, in fact, a strong presumption *against* waiver of a right to arbitrate. See, e.g., *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788 (8th Cir. 1998); *Prudential Securities Inc. v. Marshall*, 909 S.W.2d 896 (Tex. 1995); *Mutual Assur., Inc. v. Wilson*, 716 So. 2d 1160 (Ala. 1998); *Brennan v. King*, 139 F.3d 258, 125 Ed. Law Rep. 303, 73 Empl. Prac. Dec. (CCH) ¶45465 (1st Cir. 1998); *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71 (2d Cir. 1997) (close questions on whether arbitration waiver has occurred are resolved in favor of arbitration); *Steel Warehouse Co., Inc. v.*

*Abalone Shipping Ltd. of Nicosai*, 141 F.3d 234, 1998 A.M.C. 2054 (5th Cir. 1998).

In deciding whether **contractual** arbitration clauses are waived, the majority of courts find the conduct evidencing waiver must be unequivocal, and in close cases, the strong presumption against waiver should govern. *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008), cert. denied, 129 S. Ct. 952, 173 L. Ed. 2d 116 (2009). The party asserting waiver bears the burden of proof. Because waiver of the right to compel arbitration will not be lightly inferred, the party seeking to prove waiver has a heavy burden. *Britton v. Co-op Banking Group*, 916 F.2d 1405, Fed. Sec. L. Rep. (CCH) ¶95613 (9th Cir. 1990); *Hill v. Ricoh Americas Corp.*, 634 F. Supp. 2d 1247 (D. Kan. 2009); *Application of ABN Intern. Capital Markets Corp.*, 812 F. Supp. 418 (S.D. N.Y. 1993), order aff'd, 996 F.2d 1478 (2d Cir. 1993); *Virginia College, LLC v. Moore*, 974 So. 2d 269, 230 Ed. Law Rep. 101 (Miss. Ct. App. 2008); *Bridas Sociedad Anonima Petrolera Industrial Y Commercial v. International Standard Elec. Corp.*, 128 Misc. 2d 669, 490 N.Y.S.2d 711 (Sup 1985). The Supreme Court in *Townsend* establishes that the Respondent's heavy burden here has not been met.

**C. Specific Errors of Trial Court's Findings**

**1. Trial Court's Errant Findings Regarding Waiver**

The trial court's Order concludes that Ballard Leary waived its right to arbitration, in part, because "[Ballard Leary's] CR 12(b)(6) motion sought to narrow specific liability issues for trial while expressly leaving

others for determination by the trier of fact.” *CP 851 – 853*. The trial court also based its finding of waiver on the allegation that the CR 12(b)(6) motion “sought to stage the litigation in an alternative motion for bifurcating the trial of liability and damages from the trial of alter ego and Uniform Fraudulent Transfers Act claims.” *Id.* In so ruling, the trial court misunderstood Ballard Leary’s CR 12(b)(6) motion and misapplied Chapter 64.55 RCW. These two specific findings are in error for several reasons: *First*, Ballard Leary did, in fact, file the CR 12(b)(6) motion to “narrow the issues” to be decided. However, the intent of the motion was to limit the number of claims that were to be presented **at arbitration**. *Second*, as set forth herein, RCW 64.55 grants a party the right to *de novo* the arbitration result to the superior court. To gauge the full extent of potential exposure and liability on a *de novo* trial, Ballard Leary filed a motion to dismiss certain claims due to lack of standing. Ballard Leary is entitled to determine what the litigation landscape would look like after an arbitration. With this information, Ballard Leary – as well as Respondent – could make an informed decision on whether to *de novo* an arbitration ruling. This information would make it **more likely** that an arbitration ruling would be accepted and not *de novo*’ed.

*Third*, Ballard Leary requested that the trial court dismiss outright the secondary claims related to alleged fraudulent transfers and improper winding up. In so doing, once again Ballard Leary was seeking to narrow the issues to be presented **at arbitration**. Again, if the claims were dismissed, they would be dismissed as to any future *de novo* trial.

Ballard Leary's motion sought, in the alternative (and only if the secondary claims were not dismissed outright) to bifurcate the secondary claims. There is nothing in the law that prohibits a party from seeking alternative relief. In fact, this is a common practice amongst civil litigants. The trial court erred when it ruled that the defendants' motion sought to "stage litigation" by alternatively bifurcating the trial of liability and damages. The secondary claims at issue (regarding winding up and fraudulent transfers) are only actionable if and when the plaintiff HOA prevails on its liability claim. Often times, plaintiffs file such claims as a means to discover assets and financial records that are otherwise not discoverable if those claims are not brought by a plaintiff. Ballard Leary sought to dismiss these claims as unrelated to the liability issues or, in the alternative, to segregate the claims to first allow arbitration on the liability issues. There was no intent to "stage" litigation by filing this motion.

In the end, Ballard Leary's foregoing conduct is consistent with the intent to arbitrate.

## **2. Trial Court's Errant Findings of Fact**

The trial court's order also concludes that: "defendants made no effort to invoke or preserve the arbitration forum." This is in error because the only act required by Ballard Leary to invoke arbitration under Chapter 64.55 RCW was to file an arbitration demand within ninety (90) days of service of the plaintiff's Complaint. It is undisputed that Ballard Leary met the all statutory prerequisites to invoking and preserving its right to arbitration by demanding it within 90 days of service of the

pleadings. The trial court's Order assumes (incorrectly) that Ballard Leary needed to take some action **in addition** to what is required by the statute to preserve its right to arbitration. This is false and flies in the face of the clear and unambiguous terms of RCW 64.55.100. By adopting this finding, the trial court is adding a duty/requirement that does not exist.

Ballard Leary fully complied with the statute to preserve its right to arbitration by (a) setting the briefing schedule on their CR 12(b)(6) motion to be decided before expiration of the ninety (90) days in the statute to demand arbitration; and (b) filing/serving their arbitration demand before expiration of the ninety day period. No additional action "to preserve" the statutory right to arbitration is required nor could any such action be read into the statute.

Further, the act of requesting the alternate relief of bifurcating the secondary claims is entirely consistent with the holding of *Townsend v. Quadrant*, 153 Wash. App. 870, 875-78, 224 P.3d 818, 822-23 (2009) *aff'd*, 173 Wash. 2d 451, 268 P.3d 917 (2012) (upholding the Division 1 Court of Appeals ruling that the filing of a summary judgment motion may not act to waive a right to arbitration so long as the moving party "promptly" thereafter seeks arbitration). If the filing of a motion for summary judgment is not an act of waiver, then surely requesting that secondary claims be bifurcated cannot be an act of waiver.<sup>21</sup>

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<sup>21</sup> The trial court's Order also bases its finding of waiver on Ballard Leary's use of the phrase "jury confusion" in its briefing on the CR 12(b)(6) motion. However, the use of the phrase "jury confusion" (made in a reply brief) related to the request to dismiss without prejudice the secondary claims for fraudulent transfers/alter ego liability. The use of such a phrase is a term of art and does not connote an absolute intent to litigate

### 3. Trial Court Overlooked All Actions *Not* taken by Ballard Leary

As set forth above, the only action taken by Ballard Leary before demanding arbitration was filing the CR 12(b)(6) motion. The filing and service of the arbitration demand, in and of itself, is sufficient to compel arbitration and RCW 64.55 does not include any other condition precedent or prerequisite to moving the dispute to the arbitration forum. There is no requirement that the parties remain quiet or “sit on their hands” prior to filing the arbitration demand. Had the legislature intended otherwise, the statute would reflect that. Notwithstanding, the trial court’s Order completely ignores all of the actions **not taken** by Ballard Leary before the arbitration demand was filed – which inaction screams out “we intend to arbitrate.” That is, Ballard Leary did not do any of the following before filing its CR 12(b)(6) motion: (1) request any discovery of any other party; (2) answer any discovery; (3) request any depositions; (4) conduct any expert site investigations; or (5) file any dispositive motions. Indeed, Ballard Leary did not even file an Answer to the Complaint! While there is no duty for Ballard Leary to evidence an intent to arbitrate before filing

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(Respondent’s bald assertions aside). Ballard Leary’s use of “jury confusion” was simply meant to show the trial court that the failure to dismiss non-liability claims would be confusing to any trier of fact (jury or arbitrator). There was no emphasis on the use of the word “jury” – the use of the phrase “trier of fact” also was made in the underlying trial court motion. Nonetheless, the arguments that were advanced for dismissal of the secondary claims (without prejudice) were not evidence of an intent to litigate in trial court; they were made for the sole purpose of cleaning up the pleadings prior to the time that Ballard Leary demanded WCA arbitration.

its demand, Ballard Leary actually impliedly expressed an intent to arbitrate.

**D. RCW 64.55, And Its Legislative History, Mandates That the Defendants Be Granted Their Right To Arbitrate**

As set forth above, while there is a strong presumption against waiver of a contractual arbitration right, the case is even more compelling when dealing with an absolute “shall” right provided RCW 64.55.100. RCW 64.55.100 clearly bestows an unequivocal right to arbitration. The only condition placed upon the right to arbitration under the statute is that the demand be “timely” filed, which is what happened here.

Words in statute are given their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wash. 2d 699, 985 P.2d 262 (1999). The word “shall” means: “used in laws, regulations, or directives to express what is mandatory.”<sup>22</sup> Thus, the legislature intended that it be mandatory that WCA claims be arbitrated if a party filed an arbitration demand within ninety days of service of the Complaint. As there is no contrary intent in the statute, plain meaning applies, and so no waiver can be found.

The Analysis of House Bill 1848 from the Washington State House of Representatives provides as follows regarding the intent of arbitration of Condominium Act Disputes:

Once a lawsuit has been filed alleging a breach of a warranty under the WCA, several alternative dispute resolution provisions will apply. **The**

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<sup>22</sup> <http://www.merriam-webster.com/dictionary/shall>

**dispute will be referred to arbitration if within  
90 days after a lawsuit is filed any party  
demands arbitration.**

There is no indication in any of the legislative history underlying the enactment of H.B. 1848 – RCW 64.55 *et. seq.* – that any action taken by a party within ninety days of filing of the lawsuit could waive the right to arbitrate. The House Bill analysis states unconditionally that a dispute “will” be referred to arbitration if demanded within ninety days after a lawsuit is filed. The language of the statute is unambiguous. To the extent that any ambiguity exists and this Court looks to the legislative history, that too is clear. That is, there can be no waiver here.

**E. All Declarant-Related Defendants Should Be Compelled to Arbitration Because They Are Alleged, And Plaintiff Has Admitted, they are Declarants**

The trial court’s order also is in error because it states that “CPI Fund 1, LP; Continental Properties LLC; Claudio Guincher, Jane Doe Guincher; Don Bowzer and Jane Doe Bowzer *are not alleged* or shown to be declarants.”<sup>23</sup> However, the Plaintiff HOA **does** allege that these defendants are declarants.<sup>24</sup> In fact, that is precisely the point. Because the Plaintiff alleges, and therefore admits, these defendants are declarants – and even asserts they have WCA claims against them as declarants – it is inconceivable that they somehow have no declarant’s right to arbitration.<sup>25</sup>

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<sup>23</sup> CP 851 – 853.

<sup>24</sup> CP 38 - 39 at ¶¶ 2.14, 2.15, 2.16

<sup>25</sup> Ballard Leary does not admit any allegation in Plaintiff’s Complaints. Here, Ballard Leary merely point out the common sense rule that Plaintiff cannot have it both ways by denying what it admits/alleges when it suits them.

The plaintiff's First Amended Complaint actually admits that all of the Ballard Leary defendants are "declarants" – either through affiliation and/or through "alter-ego" status.<sup>26</sup> Further, Messers. Guincher and Bowzer and named by the plaintiff in the First Amended Complaint as "agents of the Declarant."<sup>27</sup> Thus, these defendants actually are alleged by the Plaintiff HOA to be the declarant and/or the declarant's "affiliate", "alter-ego" and/or "agent." Not only has Plaintiff admitted the Ballard Leary defendants are declarants, but – as discussed next – they are equitably estopped from denying it now.

**F. Because Plaintiff Has Sought To Enforce the WCA Against Declarant-Related Defendants, Plaintiff is Equitably Estopped From Denying them their Right to Arbitration Under the WCA.**

There can be no question that Plaintiff has alleged, and thereby admits, that the defendants are entitled to arbitration as WCA declarants. The plaintiff HOA has sought to enforce the WCA against all defendants – alleging breach of the WCA implied and express warranties.<sup>28</sup> The WCA only can be enforced against a declarant. This, therefore, mandates the application of equitable estoppel. In that vein, as the Supreme Court has held, **"equitable estoppel precludes a party from claiming the benefits of contract while simultaneously attempting to avoid the burdens that the contract imposes."** *Townsend*, 173 Wash. 2d at 461 (2012); *see also*,

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<sup>26</sup> *CP* 39 – 42 at ¶¶ 2.8, 2.11, 2.13, 2.15.

<sup>27</sup> *Id.* at ¶ 2.15

<sup>28</sup> *CP* 41, 43

*Bignold v. King County*, 65 Wash.2d 817, 399 P.2d 611 (1965); *Moore v. Dark*, 52 Wash.2d 555, 327 P.2d 429 (1958); *Nelson v. Bailey*, 54 Wash.2d 161, 338 P.2d 757 (1959); *Code v. London*, 27 Wash.2d 279, 178 P.2d 293 (1947); *Shafer v. State*, 83 Wash. 2d 618, 623, 521 P.2d 736, 739 (1974). Of course, application of this equitable principle to a *statutory arbitration right* is even more compelling.

This principle mandates that, here, the Plaintiff HOA may not seek to use the WCA as a “sword” against the defendants but, at the same time, deny them the “shield” of the arbitration right provided in the WCA. Because the Plaintiff HOA has sought to impose the WCA against all defendants, all defendants have the right to assert their right to arbitration under the WCA.

**G. Impact of Trial Court’s Ruling on Arbitrability of only Some Claims**

RCW 64.55.100 states that, upon proper demand by the declarant, the parties shall participate in arbitration. RCW 64.55.005(2) provides that: “RCW 64.55.010 and 64.55.100 through 64.55.160 and 64.34.415 **apply to any action** that alleges breach of an implied or express warranty under chapter 64.34 RCW or that seeks relief that could be awarded for such breach, **regardless of the legal theory pled.**” The trial court erred when it ruled that only claims against the statutory named declarant (Ballard Leary Phase II) are subject to arbitration.<sup>29</sup> Simply because RCW

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<sup>29</sup> CP 851 – 853.

64.55.100 restricts the right to demand arbitration to certain entities, does not indicate that participation in the arbitration is limited to causes of action regarding only those entities. *See, e.g. Peninsula School Dist. No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 924 P.2d 13 (1996)) (any doubts should be resolved in favor of arbitrability). Further, the trial court’s ruling that only the statutory declarant is subject to WCA arbitration is in derogation with RCW 64.55.0054(2), which provides that “any action” related to breach of implied or express warranties is subject to arbitration, “regardless of the legal theory pled.”

In fact, Chapter 64.55 RCW actually does the opposite and expands the language regarding who will be compelled to participate in arbitration to “the parties,” which means all the parties to a lawsuit, including “any subcontractor or supplier” despite the fact those parties have no right to demand arbitration.<sup>30</sup> The intent of the legislature in using this broad all-inclusive language should be compelling in favor of arbitration here. Critically, there is not a single reported decision in Washington that instructs this court that all claims and all parties may not be put into arbitration. The court should honor the strong preference for arbitration expressed in the WCA and order all claims and parties to arbitration.

Common sense should be applied. That is, it makes no sense that WCA arbitration right is so limited that it could be erased by the HOA

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<sup>30</sup> *See* RCW 64.55.150.

simply adding certain claims and/or certain parties to defeat the right, even though all the damages sought are duplicative of what the WCA provides. The WCA right to arbitration clearly extends to any party against whom WCA damages are sought.<sup>31</sup>

Finally, it is not reasonable to believe that only specific causes of action or certain defendants would be subject to the statutory right of arbitration within the WCA, while the remaining causes of action would be stayed or litigated while arbitration is pending. Not only would this be incredibly inefficient, it could lead to multiple duplicative recoveries for the HOA for the same alleged defects. Moreover, under the trial court's Order, such a scenario would occur in any WCA lawsuit that included non-declarant parties (which they all do). Again, the trial court's order on the application of the arbitration statute would, if it stands, render it effectively useless.

**H. The Remaining Defendants – Masco, Dahl Brothers and Uponor – are “Suppliers” and are Subject to Mandatory Arbitration**

The plaintiff HOA's claims against the manufacturer defendants should be submitted to arbitration as well. Because those claims impact the common elements and limited common elements and are entangled with the HOA's allegations of liability against Ballard Leary under the WCA, separate and distinct dispute resolution makes little sense.

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<sup>31</sup> RCW 64.55.005(2)

The trial court's Order states that: "other manufacturer defendants likewise do not fall within the statutory reference to 'parties.'"<sup>32</sup> The trial court's Order completely ignores RCW 64.55.150, which provides that subcontractors and suppliers are subject to arbitration:

Upon the demand of a party to an arbitration demanded under RCW 64.55.100, **any subcontractor or supplier** against whom such party has a legal claim and whose work or performance on the building in question becomes an issue in the arbitration may be joined in and become a party to the arbitration.

The plaintiff HOA specifically alleges that the "manufacturer defendants" are **suppliers** of alleged defective plumbing products (yellow brass PEX fittings and PEX piping). Indeed, Plaintiff's First Amended Complaint provides that each manufacturer defendant: "manufactured, distributed, and **supplied** defective component parts." Thus, the trial court's order (again) is in derogation of the Plaintiff's Complaint.

When evaluating the scope of *contractual* arbitration provisions, courts, as a general rule, find that a contractual dispute is arbitrable unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute. *Stein v. Geonerco, Inc.*, 105 Wash. App. 41, 45-46, 17 P.3d 1266, 1269 (2001)(citing *Kamaya Co. v. American Property Consultants, Ltd.*, 91 Wash.App. 703, 713-14, 959 P.2d 1140 (1998), *rev. denied*, 137 Wash.2d 1012, 978 P.2d 1099 (1999)). Applying the same standard here, the claims against the

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<sup>32</sup> *CP 851 – 853.*

manufacturer defendants are arbitrable because the trial court cannot interpret RCW 64.55 *et. seq.* to exclude claims against product manufacturers, as the plaintiff HOA alleges these defendants to be.

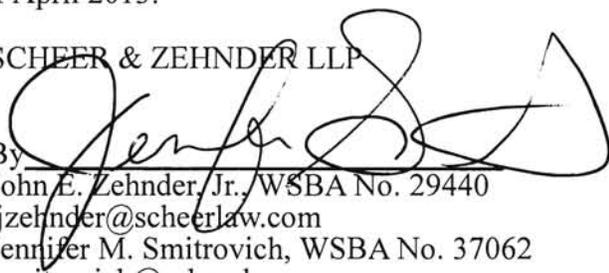
Further, it is logical to include the claims against the product manufacturers in arbitration with the claims against the other defendants because the plaintiff HOA is claiming that the Ballard Leary defendants are liable under the WCA for the same alleged defective products as claimed against the manufacturer defendants. Allowing the claims against the manufacturer defendants to proceed in the litigation forum while simultaneously having the other claims proceed to arbitration would be inefficient. If the trial court's Order stands, the plaintiff HOA could obtain duplicative recoveries and/or there could be inconsistent rulings as to the same alleged defective product.

## VII. CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court decision and hold that all parties and all claims must be submitted to arbitration under RCW 64.55.100 pursuant to Ballard Leary's arbitration demand.

DATED this 18<sup>th</sup> day of April 2013.

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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Ballard Leary Phase II, LP.; BRCP/CPI Phase II, LLC; Continental Pacific Investments Real Estate Fund 1, LP; Continental Pacific Investments Real Estate Fund 1, LP; Continental Properties, Inc.; Claudio Guincher and Jane Doe Guincher; and Don Bowzer and Jane Doe Bowzer, Appellants,

v.

Canal Station North Condominium Association, Respondent.

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**PROOF/CERTIFICATE OF SERVICE:**

APPELLANTS' OPENING BRIEF

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STATE OF WASHINGTON  
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I, Jennifer Griffiths, legal assistant to John E. Zehnder, Jr. and Jennifer M. Smitrovich, counsel for Appellants, hereby certify that on April 18, 2013 copies of the following was served via legal messenger to Respondent's counsel and Division I of the Washington Court of Appeals (original and one (1) working copy) at the addresses identified further below:

1. Appellants' Opening Brief.

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DATED this 18<sup>th</sup> day of April, 2013 at Seattle, Washington.

  
Jennifer Griffiths

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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Ballard Leary Phase II, LP.; BRCP/CPI Phase II, LLC; Continental Pacific Investments Real Estate Fund 1, LP; Continental Pacific Investments Real Estate Fund 1, LP; Continental Properties, Inc.; Claudio Guincher and Jane Doe Guincher; and Don Bowzer and Jane Doe Bowzer, Appellants,

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**PROOF/CERTIFICATE OF SERVICE:**

APPELLANTS' OPENING BRIEF

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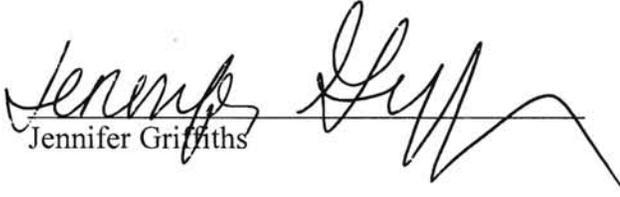
I, Jennifer Griffiths, legal assistant to John E. Zehnder, Jr. and Jennifer M. Smitrovich, counsel for Appellants, hereby certify that on April 19, 2013 copies of the following was served via legal messenger to Respondent's counsel and Division I of the Washington Court of Appeals (original and one (1) working copy) at the addresses identified further below:

1. Appellants' Opening Brief.

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