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No. 56265-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION, a Washington Non-Profit
Corporation,

Respondent

vs.

SATOMI, LLC, a Washington Limited Liability Company,

Appellant.

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REPLY BRIEF OF APPELLANT SATOMI, LLC

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Respondent Association has narrowed the disputed issues by choosing not to respond on two points. First, the Association did not respond to Appellant Satomi's analysis establishing that regardless of the applicability of the FAA, the Washington Condominium Act's anti-arbitration statute does not cover the Association's implied warranty of habitability and Consumer Protection Act claims. Opening Brief of Appellant Satomi, LLC ("App. Br.") at 9-10, 26 n.14. Thus, regardless of whether the WCA's anti-arbitration statute is preempted here by the FAA, the lawsuit must nonetheless be stayed to permit arbitration of the warranty of habitability and CPA claims. Second, the Association did not respond to Satomi's explication of the evidence presented to the Superior Court (and not disputed by the Association in the Superior Court proceedings) that all 85 (not just 84) of the homeowners signed the Warranty Addendum. App. Br. at 2-4 & n.2, 27-30, 32-33 & n.20.

A. The FAA Applies Here.

1. Transactions Evidenced by the Contract Containing the Arbitration Agreement Affect Interstate Commerce Within the Meaning of the FAA.

As explained in Satomi's opening brief, the FAA applies to any arbitration agreement in a contract that evidences a transaction affecting

interstate commerce.¹ App. Br. at 10-11; *see* 9 U.S.C. §2 (FAA applies to an arbitration agreement in “a contract evidencing a transaction involving commerce”). Here, the Arbitration Agreement is part of the Purchase and Sale Agreements under which the Association’s members purchased their condominium units.² Thus, as discussed in Satomi’s opening brief, the dispositive issue is whether the sales of the Satomi Condominiums to the unit purchasers (the “Condo Sales Transactions”) are transactions affecting interstate commerce. They are.

The seminal Supreme Court cases interpreting the scope of the FAA, as well as the progeny of those seminal cases, establish that the Condo Sales Transactions affect interstate commerce because those transactions involved the sales of condominium units made up of materials that traveled in interstate commerce. As explained in Satomi’s opening brief, the Supreme Court concluded in *Allied-Bruce Terminix Cos., Inc. v. Dobson* that a contract between an exterminator and homeowner, for the extermination of termites, affected interstate commerce, and so the FAA applied, because the exterminator’s termite-treating and house-repairing materials came from outside the state. 513 U.S. 265, 282, 115 S. Ct. 834,

¹ The Association acknowledges this is the proper test under the FAA. Brief of Respondent Satomi Owners Association (“Resp. Br.”) at 6 (“for the FAA to apply, the contract containing the arbitration clause must evidence a transaction affecting interstate commerce”).

² Each Warranty Addendum, which contains the Arbitration Agreement, provides that it is an addendum to the “Condominium Purchase and Sale Agreement” between Satomi and the Satomi Condominium unit purchasers. *See, e.g.*, CP 167.

130 L. Ed. 2d 753 (1995). The Association's position is simply inconsistent with *Allied-Bruce*.³

Following *Allied-Bruce*, courts have consistently recognized the broad application of the FAA to sales contracts in which the items sold are made up of materials that traveled in interstate commerce, and the Courts have therefore held that the FAA preempts germane state law. For example, *Basura v. U.S. Home Corp.* held that purchase and sale agreements for homes manufactured with out-of-state materials evidenced transactions involving interstate commerce and, therefore, the FAA preempted a state law allowing lawsuits for design and construction defects. 120 Cal. Rptr. 2d 328, 334 (Cal. Ct. App. 2002). In that case, 60 homeowners sued a builder, alleging design and construction defects. *Id.* at 330. The purchase and sale contracts between the builder and the purchasers contained an arbitration clause. The builder moved to compel arbitration under the clause. *Id.* In opposition, the plaintiffs contended

³ The Association attempts to avoid the determinative effect of *Allied-Bruce* by pointing out that the parties in that case did not dispute the effect on interstate commerce. Resp. Br. at 16. But the Association ignores that, after noting that fact, the *Allied-Bruce* Court went on to state that interstate commerce was indeed affected because the materials used by the exterminator traveled in interstate commerce:

The parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama.

513 U.S. at 282; see also *Basura v. U.S. Home Corp.*, 120 Cal. Rptr. 2d 328, 334 (Cal. Ct. App. 2002) (quoting the above language in recognizing that the *Allied-Bruce* Court "readily concluded that the 'transaction in this case, in fact, involved interstate commerce'").

that (i) an applicable state law permitted a purchaser of real property to pursue a construction defect case in court even if the purchase and sale agreement contained an arbitration clause, and (ii) the FAA did not preempt the state law because the subject purchase and sale agreements did not evidence transactions affecting interstate commerce. *Id.*

Relying on *Allied-Bruce*, the *Basura* Court held that the transactions affected interstate commerce because the construction of the homes involved building materials and equipment from out-of-state:

In the instant case, the indicia of interstate commerce are far greater than in *Allied-Bruce Terminix*. The papers below included declarations by two Home executives, which stated the construction of the subject development project in Palmdale involved the receipt and use of building materials and equipment . . . which were manufactured and/or produced in states outside California . . . and which were shipped to the job site in Palmdale. . . .

These uncontroverted facts in the record compel the conclusion that the instant agreements between [the builder] and plaintiffs involved interstate commerce. Therefore, the agreements are governed by the FAA.

120 Cal. Rptr. 2d at 334. Other courts applying *Allied-Bruce* come to the same result.⁴

⁴ See, e.g., *Elizabeth Homes, L.L.C. v. Gantt*, 882 So. 2d 313, 316-17 (Ala. 2003) (citing *Allied-Bruce* and holding that FAA required enforcement of arbitration clause in contract between Alabama residents for construction of house in Alabama); *Wise v. Tidal Constr. Co.*, 583 S.E.2d 466, 469 (Ga. Ct. App. 2003) (citing *Allied-Bruce* and noting, in applying FAA to an arbitration clause in a limited warranty issued to home purchasers as part of home sales contract, that “[h]ome construction generally involves interstate commerce, because most building materials pass in interstate commerce.”); *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 720 (Tex. App. 1997) (citing *Allied-Bruce* and holding that the purchase of mobile home manufactured and delivered in Texas affected

As in *Allied-Bruce*, *Basura*, and the other FAA cases cited above (as well as the cases cited in Satomi's opening brief), Satomi presented uncontroverted evidence that the Condo Sales Transactions affect interstate commerce. Satomi presented the Superior Court with uncontroverted evidence that more than 70% of all materials used in the construction of the Satomi Condominiums were manufactured outside Washington and shipped through interstate commerce.⁵ CP 135-37.

The Association does not dispute this evidence. Instead, the Association argues that Satomi's "arguments prove that the condominium construction industry in Washington is a *business* that affects interstate commerce under federal civil rights legislation; but that is not the proper analysis." Resp. Br. at 9 (emphasis in original). In fact, the Association's

interstate commerce, and thus FAA applied to the purchase contract, where mobile home included components purchased or manufactured in other states and countries and Florida manufacturer operated facilities in other states and was bonded by New York insurance company); *Mr. Mudd, Inc. v. Petra Tech, Inc.*, 892 S.W.2d 389, 392 (Mo. Ct. App. 1995) (citing *Allied-Bruce* and noting that in FAA context the "relationship to commerce need not be substantial" and that where "materials are transported over state lines, interstate commerce is involved"); see also *Lost Creek Mun. Util. Dist. v. Travis Indus. Painter, Inc.*, 827 S.W.2d 103, 105 (Tex. App. 1992) (holding that a contract to paint the interior of a water reservoir in Texas affected interstate commerce, and thus FAA applied, where paint and epoxy used for project were manufactured out-of-state and surety on contractor's performance bond was headquartered out-of-state); see also *BWI Cos. v. Beck*, 910 S.W.2d 620, 622-23 (Tex. App. 1995) (arbitration agreement between employer and employee related to interstate commerce, even though employee only worked and made deliveries in Texas, because employer had facilities in Texas and other states).

⁵ The fact that 70% of all materials used in constructing the Satomi Condominiums were manufactured outside the State and shipped through interstate commerce inherently encompasses a broad range of interstate activity. For example, along with the actual manufacture and transportation of such materials are interstate communications and negotiations by telephone, mail, and/or e-mail for orders of such materials, interstate billing and payment, and any applicable interstate taxes.

FAA analysis is flawed. The analysis that the Association deems “improper” is the identical analysis used by the U.S. Supreme Court in *Allied-Bruce* and used by the state and federal courts that decided *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 123 Wn. App. 355, 98 P.3d 66 (2004), *Basura*, and the numerous other cases cited in Satomi’s opening brief and cited above in n.4. Simplified, the proper analysis is that regardless of the “local” aspect of two residents of the same state entering into a contract for the sale of an item in that state, the contract nonetheless evidences a transaction affecting interstate commerce ***if the item sold is made up of components that traveled in interstate commerce.*** And indisputably, the Satomi condominiums were constructed of materials that moved in interstate commerce.

Tellingly, other than *Marina Cove Condo. Owners Ass’n v. Isabella Estates*, 109 Wn. App. 230, 244, 34 P.3d 870 (2001),⁶ the Association does not cite any case discussing *Allied-Bruce*. The Association must avoid post-*Allied-Bruce* authorities because, as the

⁶ Satomi reminds the Court that the defendant in *Marina Cove* failed to present evidence establishing that out-of-state materials were used in the construction. Further, as explained below, the *Marina Cove* decision rests entirely on a Texas intermediate court decision, even though the Texas Supreme Court had, two years *prior* to *Marina Cove*, granted mandamus, found the FAA applied because of interstate commerce, and ordered the parties to arbitrate, finding that the lower court had abused its discretion in permitting the lawsuit to go forward. In short, even at the time it was decided, *Marina Cove* was built on a false foundation. This Court should overrule *Marina Cove*.

citations at n.4 above indicate, *Allied-Bruce* and its progeny plainly establish that Association's WCA claim must be arbitrated.

The crux of the Association's argument that the Condo Sales Transactions do not affect interstate commerce is the Association's contention that one of the bodies of case law cited in Satomi's opening brief consists of civil rights cases that supposedly apply a different standard than the FAA. *See, e.g.*, Resp. Br. at 6. Even if the Association were correct that the civil rights cases apply a different standard, that would not change the dispositive impact of *Allied-Bruce* and its progeny: the FAA applies to contracts for the sale of goods manufactured with out-of-state materials, even though the parties and the sold item reside in the same state.

In any event, the Association's distinction between the FAA's standard and the standard supposedly applied by the civil rights cases, is a false dichotomy. Just as the *business* carried on by Ollie's Barbeque in *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964), affected interstate commerce in that it involved the service at a restaurant of food partially comprised of out-of-state products, the Condo Sales *Transactions* here affect interstate commerce in that they involve the sale of condominium units constructed largely of out-of-state materials. Indeed, the Supreme Court has recently recognized the applicability of

Katzenbach to FAA analysis. As discussed in Satomi's opening brief, in *Citizens Bank v. Alafabco, Inc.*, the Supreme Court held that a loan made in Alabama by Alabama residents was within the jurisdiction of the Commerce Clause, rendering the FAA applicable, because:

[the loan] was secured by all of Alafabco's business assets, including its inventory of goods assembled from out-of-state parts and raw materials. If the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce, *Katzenbach v. McClung*, 379 U.S. 294, 304-305, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964), it necessarily reaches substantial commercial loan transactions secured by such goods.

539 U.S. 52, 57, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003).

2. *Marina Cove* Does Not Govern, Was Decided on Mistaken Grounds, and Should be Overruled.

The Association relies heavily on *Marina Cove* because it cannot cite any other authority that seems to apply the FAA favorably. This case is not *Marina Cove*. As discussed in Satomi's opening brief, the effects on interstate commerce shown here far exceed those presented in *Marina Cove*. App. Br. at 22. Specifically, the party seeking arbitration in *Marina Cove* made no showing that *any* of the materials used in constructing the condominiums traveled in interstate commerce. The Association attempts to avoid this critical distinguishing feature by making the unsupported assumptions that "[t]here is no doubt that . . . the Kenmore condominium in *Marina Cove* was also built with materials that

were shipped in interstate commerce” and “the declarant’s failure to raise this argument in *Marina Cove* is more likely the result of its inevitable acknowledgement that the information is irrelevant.” Resp. Br. at 21-22. In fact, the Association’s assumptions are completely unfounded, given that no such evidence was presented in *Marina Cove*.⁷

If this Court believes *Marina Cove* governs despite the party in Satomi’s position not having made the argument on which Satomi relies, then Satomi asks this Court to revisit *Marina Cove*, for it applies the wrong standard. (Indeed, the only authority on which *Marina Cove* relies had been effectively reversed two years *prior* to *Marina Cove*, as is explained below.) Construing *U.S. v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the *Marina Cove* Court analyzed whether the transactions had “a *substantial* effect on interstate commerce,” ultimately holding that the transactions’ “negligible contact with other states does not constitute a *substantial* effect on interstate commerce.” 109 Wn. App. at 243-44 (emphasis added). However, after *Marina Cove*, the U.S. Supreme Court, as well as other courts, made clear that *Lopez* and the “substantial effect on interstate commerce” test is inapplicable in the

⁷ The application of the FAA was only a secondary issue to the parties in that case; the *Marina Cove* appellants expended a mere four pages of their brief arguing that the FAA applied, and those appellants failed to argue that components of the construction traveled in interstate commerce. CP 1338-41.

context of the FAA; rather, for the FAA to apply, a transaction need only have some effect — not a substantial effect — on interstate commerce.

The *Marina Cove* Court adopted the reasoning of a single “post-*Lopez*” case from an intermediate Texas court (*L&L Kempwood Assocs., L.P. v. Omega Builders, Inc.*, 972 S.W.2d 819 (Tex. App. 1998)), which used *Lopez* in FAA analysis, to support its conclusion that there was not a **substantial effect** on interstate commerce. 109 Wn. App. at 243-44. This interpretation of *Lopez* as requiring a “substantial effect” test for the application of the FAA is a misinterpretation, as shown by the U.S. Supreme Court’s later criticism of *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759, 763 (Ala. 2000), which, like *Marina Cove*, also adopted *L&L Kempwood*’s reasoning.

Sisters of the Visitation involved a contract to repair cracks in the plaster of a monastery’s chapel. In the course of performing the work, paintings on the surface of the ceiling and wall were damaged. 775 So. 2d at 760. The monastery demanded arbitration. The mason objected on the grounds that the work did not involve interstate commerce and the arbitration provision was unenforceable under Alabama law. *Id.* The Alabama Supreme Court agreed with the mason and adopted the reasoning of *L&L Kempwood.*, *Sisters of the Visitation*, 775 So.2d at 763. Thus, *Sisters of the Visitation* followed the same reasoning as *Marina Cove*.

In 2003, after *Marina Cove* (2001) and *Sisters of the Visitation* (2000), the Supreme Court held that *Lopez* should *not* be used in FAA analysis and held that, for the FAA to apply, the transaction at issue need not have a “substantial effect” on interstate commerce. *Citizens Bank*, 539 U.S. at 56. Admonishing the *Sisters of the Visitation* Court for applying *Lopez* in its FAA analysis, the U.S. Supreme Court held:

The decision below . . . adheres to an improperly cramped view of Congress’ Commerce Clause Power. That view, first announced by the Supreme Court of Alabama in *Sisters of the Visitation* . . ., appears to rest on a ***misreading*** of our decision in *United States v. Lopez*. *Lopez* ***did not restrict the reach of the FAA or implicitly overrule Allied-Bruce Terminix Cos. – indeed, we did not discuss that case in Lopez.*** Nor did *Lopez* purport to announce a new rule governing Congress’ Commerce Clause power over concededly economic activity such as the debt-restructuring agreements before us now. To be sure, “the power to regulate commerce, though broad indeed, has limits,” but nothing in our decision in *Lopez* suggests that those limits are breached by applying the FAA to disputes arising out of the commercial loan transactions in this case.

539 U.S. at 58 (emphasis added; citations omitted).⁸

Post-*Citizens Bank*, courts nationwide have declined to use *Lopez* in FAA analysis. See *Elizabeth Homes*, 882 So.2d at 316-17 (2003) (holding that “in light of [*Citizens Bank*], we no longer apply the ‘substantial impact on interstate commerce’ test adopted in *Sisters of the Visitation*” and applying FAA to contract between Alabama residents even

⁸ In finding that *Sisters of the Visitation* misread *Lopez*, the *Citizens Bank* Court rejected the reasoning of *L&L Kempwood* and *Marina Cove*, since *Sisters of the Visitation* (like *Marina Cove*) adopted *L&L Kempwood*’s reasoning.

though the construction work was to be performed in Alabama); *Basura*, 120 Cal. Rptr. 2d at 334 n.8 (declining to use *Lopez* in FAA analysis and instead relying on *Allied-Bruce*); *Palm Harbor*, 944 S.W.2d at 719 (declining to use *Lopez* in FAA analysis and stating that “*Lopez* is not on point and does not factor into our decision”).

As is clear from *Citizens Bank*, the *Marina Cove* Court erred in using *Lopez*’s “substantial effect” test in the FAA setting. To reach its result, the *Marina Cove* Court relied solely on the 1998 decision by a Texas intermediate court in *L&L Kempwood*. 109 Wn. App. at 243-44. What is not explained in *Marina Cove* is why it relied on that intermediate Texas court decision, given the fact that in 1999 — two years prior to *Marina Cove* — the Texas Supreme Court granted mandamus and effectively reversed the Texas intermediate court. *In re L&L Kempwood Assocs., L.P.*, 9 S.W.3d 125 (1999).⁹ The Texas Supreme Court applied the FAA because it found the contract involved interstate commerce. The Court is explicit that the law in Texas as of the time of *Marina Cove* is 180 degrees from the law the *Marina Cove* Court applied in relying on the Texas intermediate court’s decision that had already been rejected by the Texas Supreme Court:

⁹ Given the Association’s complete reliance on *Marina Cove*, it is also surprising that the Association does not alert this Court to the fact that *Marina Cove* was decided on the basis of a case that had already been effectively reversed prior to *Marina Cove*.

Kempwood argues that *Lopez* did not restrict *Allied-Bruce*. We agree. ... *Lopez* ... did not cite *Allied-Bruce* ... or suggest in any way that it had changed its view of Congress's commerce power over economic activities. *Lopez* did not restrict the scope of the [FAA] as construed in *Allied-Bruce*. The other courts to consider this issue of which we are aware have reached the same conclusion.

In re L&L Kempwood, 9 S.W.3d at 127.

Unlike the *Marina Cove* Court, this Court has the benefit of *Citizens Bank's* analysis. Plainly, *Marina Cove* states an incorrect standard (relying on a Texas case that had been reversed before *Marina Cove* relied on it). This Court should correct that error.

Satomi presented the Superior Court with uncontroverted evidence that more than 70% of all materials used in the construction of the Satomi Condominiums were manufactured outside the state and shipped through interstate commerce. CP 135-37. As discussed in the cases cited in Satomi's opening brief and cited above (including numerous FAA cases), this fact establishes that the Condo Sales Transactions affect interstate commerce. Thus, the FAA applies to the Arbitration Clause.

B. The Association is Bound by the Arbitration Agreement in the Warranty Addendum.

As described in Satomi's opening brief, and in addition to the other reasons discussed in that brief, the Association is bound by the Arbitration Agreement because of three basic facts: (1) the Association is suing on behalf of the Satomi Condominium unit owners; (2) those unit owners

agreed to arbitrate the claims the Association is bringing on their behalf; and (3) the law requires that when a party sues on behalf of another, the suing party is bound by the same restrictions that apply to the person on whose behalf the claim is brought, including agreements to arbitrate.

The fact that the Association is suing on behalf of the homeowners is self-evident. The Association would not have anything on which to sue if the *homeowners'* units limited common areas and common areas were free from alleged defects.¹⁰ Every claim asserted belongs to the homeowners.¹¹ The Association is acting merely as the homeowners' agent in bringing this lawsuit.

The applicable law is established and clear: Where a party (such as an agent) sues for another (the homeowners), the representative party faces the same limitations as the persons on whose behalf the claims are presented. For example, an agent cannot bring a claim released by the principal. Nor can an estate bring a claim for a deceased if the statute of limitation expired in the deceased's lifetime. Similarly, a homeowners' association is bound by the limitations contracted for by the homeowners. This is not controversial, cutting-edge law. This is a fundamental

¹⁰ In Satomi's opening brief, the homeowners' ownership of every square inch of the Satomi Condominiums was explained. App. Br. at 35-36. The Association does not contest that important fact.

¹¹ The one exception is the Association's claim for plans and drawings. The Association owns that claim because the Association owns those items.

principle — so fundamental that it is rarely raised in contemporary reported decisions.

1. The Association is Suing on Behalf of the Satomi Condominium Unit Owners.

As discussed at length in Satomi's opening brief, the Association has brought claims not on behalf of itself, but on behalf of the individual condominium owners. *See* App. Br. at 35-38. The express and implied warranties of the WCA, upon which the Association is suing, run to the Satomi Condominium unit purchasers and not to the Association. *See* RCW 64.34.443(1); RCW 64.34.445(6). The Association cannot sue on its own behalf to enforce warranties that run to the unit purchasers only and not to the Association. *See* App. Br. at 35-36. Similarly, Washington's implied warranty of habitability, upon which the Association is also suing, runs from the builder-vendor of a new residence to the first *purchaser* only and is inherent in the sales transaction itself.¹² Thus, as the Association itself was not the purchaser of the Satomi Condominiums, the warranty runs not to the Association, but to the purchasers of the condominium units, the unit owners. In any litigation seeking to enforce the implied warranty of habitability, the Association cannot bring suit on its own behalf, but must bring suit on behalf of the

¹² *Stuart v. Coldwell Banker Commercial Group*, 109 Wn.2d 406, 416, 745 P.2d 1284 (1987) ("The doctrine of implied warranty of habitability imposes liability upon builder-vendors in favor of original purchasers of residential property.").

purchasers, the persons who actually hold the warranty. *See* App. Br. at 36-37. Finally, private rights of action under the CPA belong only to the individuals allegedly deceived in the consumer transaction.¹³ Since the unit owners, not the Association, purchased the condominium units that allegedly suffer from construction defects and resulting property damage, the CPA claims in this lawsuit belong to those unit owners, not the Association. *See* App. Br. at 37-38. Thus, the Association has brought the CPA claims on the unit owner's behalf.

The Association does not try to refute this analysis. Rather, the Association merely points out that by statute it has the authority to sue on its own behalf. Resp. Br. at 27. RCW 64.34.304(1)(d) indeed grants the Association the power to sue on its own behalf, as Satomi's quotation of that statute in its opening brief reveals. App. Br. at 35 n.22. But that does not mean the Association has done so here.¹⁴

Under the power granted to the Association by RCW 64.34.304(1)(d), the Association is free to bring any of its *own* claims on its own behalf. For instance, along with granting the Association the power to sue on behalf of itself (in addition to the power

¹³ *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792-93, 719 P.2d 531 (1986) ("Only a person 'injured in his business or property by a violation of RCW 19.86.020 . . .' may bring a private action.").

¹⁴ The exception is the one claim it has brought on its own behalf for violation of the duty to provide plans and specifications. App. Br. at 4 n.5.

to sue on behalf of its members), RCW 64.34.304 grants the Association a litany of other powers, including the power to make contracts or incur liabilities and acquire personal property. RCW 64.34.304(1)(e), (h). Thus, if the Association contracted for the purchase of office equipment, and the equipment supplier breached that contract, the Association would be free to sue the supplier on the Association's own behalf, under RCW 64.34.304(1)(d).

However, the power granted to the Association by RCW 64.34.304 to sue on behalf of itself (in addition to the power to sue on behalf of its members) does not magically transform claims that belong to the unit owners into claims that the Association can bring on its own behalf.¹⁵ Merely citing to the language in RCW 64.34.304 that bestows on the Association the power to sue on behalf of itself does not refute the fact pointed out by *Satomi*, and supported by legal authority, that the Association's claims for breach of express and implied warranties under the WCA and under the implied warranty of habitability and for violation

¹⁵ See 18 William B. Stoebuck & John W. Weaver, *Washington Practice Series, Real Estate: Transactions* § 12.5 (2d ed. 2005) ("The association may institute, defend, or intervene in litigation or administrative proceedings that affect the condominium, in its own name or on behalf of two or more unit owners. In this connection, the Washington Supreme Court held in *Stuart v. Coldwell Banker Commercial Group, Inc.*, that when an association represents unit owners in a lawsuit, it remains their action, with the association only a nominal party. Of course the association may sue and be sued in its own name in connection with its own functions and activities.") (citing RCW 64.34.304(1)(d)).

of the CPA are claims that belong to the unit owners, not the Association, which claims the Association has brought here on their behalf.

2. The Satomi Condominium Unit Owners Agreed to Arbitrate the Claims the Association is Bringing on Their Behalf.

Satomi has presented clear evidence that the unit owners agreed to the Arbitration Agreement. *See* CP 119-20, 163-1176, 1383-84; App. Br. at 27-31. The Association has presented no evidence to the contrary.¹⁶

The Association argues that any subsequent purchasers of the condominium units are not parties to the Warranty Addendum containing the Arbitration Agreement. Resp. Br. at 24-25. But the Association presented no evidence that there has been a re-sale of any unit. Instead, the Association supports its argument only with a mischaracterization of Ms. Nordstrom's Declaration, arguing that "the Declaration of Judy Nordstrom makes clear that *only* the 85 original purchasers were required to sign; thus, Declarant admits that subsequent purchasers were not parties to the agreement." Resp. Br. at 24-25 n.11 (emphasis in original).

Ms. Nordstrom's declaration makes no such statement. CP 1383-84. The

¹⁶ As noted at the beginning of this brief, the Association does not contest Satomi's evidence that all 85 homeowners signed the Arbitration Agreement. Yet the Association nonetheless asserts that Satomi "has not provided proof that the 85th original purchaser signed" the Arbitration Agreement. Resp. Br. at 3. To be clear, the record shows that Satomi in fact presented uncontroverted evidence that the 85th purchaser signed. *See* Second Declaration of Judy Nordstrom in Support of Motion to Compel Arbitration (CP 1383-84) ("I am confident that the 85th homeowner also signed the Warranty Addendum Agreement, since it was a requirement for all purchasers I believe the 85th Warranty Addendum Agreement has merely been misplaced.").

Association overlooked the fact that the express terms of the Warranty Addendum require the original unit purchasers to bind subsequent purchasers to the terms of the Warranty Addendum (*see, e.g.*, CP 171), as described in Satomi's opening brief (App. Br. at 31).

Even if the Association had proved that some of the current unit owners are re-sale purchasers and that the re-sale purchasers did not agree to be bound by the Warranty Addendum (despite the Warranty Addendum's specific requirement that re-sellers require their buyers to agree to be bound by the Warranty Addendum), the Association is asserting two of its claims solely on behalf of original purchasers. As stated in Section B.1. above, Washington's implied warranty of habitability runs only to the *first* purchaser of a new residence, and private rights of action under the CPA belong only to the individuals allegedly deceived in the consumer transaction, which transactions were between Satomi and the original purchasers of the Satomi Condominium units. Thus, the Association has clearly brought this action on behalf of unit owners who agreed to the Arbitration Agreement, and, thus, is required to arbitrate those claims, as discussed further below.

3. **The Law Requires that When a Party Sues on Behalf of Others, the Party Bringing the Lawsuit is Bound by the Same Restrictions that Apply to Those on Whose Behalf the Claim is Brought.**

The unit owners cannot avoid their agreement to arbitrate the claims alleged in this action simply by causing the Association to bring those claims on their behalf. The law is clear that a party bringing claims on behalf of others is bound by any restrictions that would apply if the persons on whose behalf the claims are brought were asserting the claim directly. The applicable law is sensible, long-standing and uncontroversial. To coin a phrase, it truly is black letter law.

For example, in *Javitch v. First Union Securities, Inc.*, a receiver of two businesses sued the brokers who had invested the businesses' money, claiming a panoply of causes of action including negligence, negligent supervision, breach of fiduciary duty, fraud, conspiracy, RICO Act violations, aiding and abetting securities laws violations, conversion, and for money had and received. 315 F. 3d 619, 621-22 (6th Cir. 2003). The brokers moved to compel arbitration under customer agreements to which the businesses were parties and which included broad provisions for mandatory arbitration of disputes. *Id.* at 623. Although the receiver was not a party to the customer agreements containing the arbitration clauses, the *Javitch* Court nonetheless held that the receiver was bound to the

arbitration agreements to the same extent as the businesses, because the receiver was bringing claims on behalf of the businesses. *Id.* at 627.¹⁷

As discussed in Satomi's opening brief, the Washington Supreme Court adhered to this principle in *Coldwell Banker*. See App. Br. at 39-41. In that case, board members of a condominium association filed a lawsuit in their representative capacities on behalf of condominium unit owners. *Coldwell Banker*, 109 Wn.2d at 410. The Supreme Court held that a statute of limitations precluded the association from bringing suit because the statute of limitations began to run when the *homeowners*, not the *association*, had notice of the defects, since "[t]he rights being asserted, and the claims being made, belong[ed] to the individual homeowners." *Id.*

¹⁷ See also, e.g., *Wilkerson ex rel. Estate of Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 288-89 (M.D.N.C. 2005) (requiring administrator of deceased patient's estate to arbitrate negligence claims against health care provider, even though administrator had not signed arbitration agreement between patient and provider, because "the estate's potential for recovery is legally derivative of [patient's] own ability to recover. Because [patient's] ability was limited in form to arbitration by her execution of the agreement with [provider], her estate is equally bound by the arbitration agreement."); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 655 (Ala. 2004) (holding that, in a wrongful death action, personal representatives of nursing home residents' estates were bound by the arbitration provisions contained in nursing home admission contracts to which the residents were parties, even though personal representatives were not parties to the arbitration agreement, because Representatives brought action on behalf of residents); *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 421-22 (Ind. App. 2004) (personal representative of patient's estate was bound by arbitration clause in nursing home facility's admission agreement, and thus, was compelled to arbitrate wrongful death and survival action claims against nursing home, regardless of whether personal representative was privy to agreement, because representative was not entitled to pursue claims on behalf of estate that patient would not have been able to bring); *SouthTrust Bank v. Ford*, 835 So. 2d 990, 993-94 (Ala. 2002) (holding that administrator of estate asserting tort claims on behalf of the estate "stands in [decedent's] shoes" and is bound to arbitrate claims as signatory decedent would have been had he asserted claim himself).

at 413-14. In its brief, the Association does not even mention *Coldwell Banker*.

Instead, the Association addresses the irrelevant issue of whether the Association itself is a party to the Warranty Addendum containing the Arbitration Agreement and claims that because the Association is a “separate legal entity” it cannot be limited by agreements made by its 85 constituent members. Resp. Br. at 24.¹⁸ The Association relies on *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 988 P.2d 12 (1999). *Powell* does *not* stand for the proposition that a representative party is free from an arbitration agreement binding the party on whose behalf the lawsuit is filed. In *Powell*, an injured seaman proceeded directly against the insurer of a dissolved corporation. Plainly, the arbitration clause in the insurer-corporation contract could not bind the seaman who was entitled to

¹⁸ The Association also attacks Satomi for citing a non-Washington unpublished opinion, *In re Managed Care Litig.*, 2003 WL 22410373 (S.D. Fla. Sept. 15, 2003), for the proposition that, in suing on behalf of its members, the Association is bound by the same restrictions as its members. Contrary to the Association’s assertion, this Court (Div. I) has never ruled on citing non-Washington unpublished opinions. RAP 10.4 governs citing *Washington* unpublished opinions. Satomi exercised good faith in citing an out-of-state unpublished opinion because there is relatively little case law, in Washington or elsewhere around the country, addressing individuals attempting to avoid their arbitration obligations by suing through a representative association. Further, the United States District Court for the Southern District of Florida has not enacted a local rule preventing citation to its unpublished decisions. And its sister Court, the United States District Court for the Middle District of Florida, has affirmatively recognized that unpublished decisions are persuasive authority. *Bechtold v. Massanari*, 152 F. Supp. 2d 1340, 1346 n.6 (M.D. Fla. 2001). Finally, under 11th Circuit Local Rule 36-2, which Circuit includes the *In re Managed Care* Court, unpublished opinions “may be cited as persuasive authority.” See 11th Cir. R. 36-2. As for the Association’s argument that Satomi mis-cites *In re Managed Care*, the case speaks for itself and is consistent with the authorities cited above at pp. 20-21.

proceed on his own behalf directly against an asset (insurance) of the dissolved corporation, especially because, as the *Powell* Court found, the seaman's claims did not relate to the corporation-insurer agreement. 97 Wn. App. at 894. Further, the *Powell* Court agreed that if the seaman were trying to "stand in the shoes of [his] former employer []," then he would be bound by the arbitration clause. *Id.* at n.21. And that is precisely our situation: The Association, in suing on behalf of the homeowners, is "stand[ing] in the shoes of the homeowners, and thus the Association is bound by the Arbitration Agreement."¹⁹

The Association's status as a legally separate entity only begins the debate, although the Association would have this Court believe that the Association's status ends the debate. The key issue is whether the Association is suing on behalf of its members. Because the Association plainly is suing on behalf of its members, the Association is bound by all

¹⁹ The Association also quotes from *Morewitz v. West of England Ship Owners*, 62 F.3d 1356 (11th Cir. 1995). But while the court there "question[ed] whether the arbitration clause ... applies to the deceased new members," (62 F.3d at 1365) the court did not decide the issue. Rather, it held that, assuming the arbitration clause applied, the insurer had waived its right to arbitrate. *Id.*; and *See Morewitz*, criticizing the majority for its speculative dicta (6 F.3d at 1367). Further, the *Morewitz* court's analysis is based on the particular wording of the arbitration clause, which is limited to claims between "owners" (not employees) and the "association." 62 F.3d at 1364-65. The contrast with the arbitration clause signed by the 85 homeowners is dramatic. The arbitration clause at issue here applies to "any claim asserted by Purchaser or by the Association. . . . " CP 163-76, 1383-84 (emphasis added). App. Br. at 3. Thus, the in-the-shoes analysis of *Powell* and the contract analysis of *Morewitz* both support arbitration here.

restrictions that would apply if the members sued on their own behalf, including the Arbitration Agreement.

C. **The Superior Court was Required to Hold a Hearing Before Denying Arbitration.**

At a minimum, the Superior Court was required to hold a hearing before denying arbitration. *See* App. Br. at 31-33. The Association argues that this Court should not consider this issue because Satomi supposedly did not request a hearing. Resp. Br. at 32-33. In fact, Satomi did request a hearing (CP 109-10), but the Superior Court did not grant Satomi's request. No hearing was held despite Satomi's request. Further, Satomi did not have to request a hearing. RCW 7.04.040(2) states that "[i]f the court shall find that a substantial issue is raised as to the existence or validity of the arbitration agreement or the failure to comply therewith, the court *shall* proceed immediately to the trial of such issue." (Emphasis added). *See also Mendez*, 111 Wn. App. at 455 (where a trial court finds significant issues regarding the enforceability of an arbitration agreement, pursuant to RCW 7.04.040, special proceedings are to be invoked, resulting in a "mini-trial" regarding the issues in question).

CONCLUSION

Post *Allied-Bruce*, there cannot be a serious question whether the FAA governs (and preempts the WCA's anti-arbitration clause) where

70% of the Condominium's components traveled in interstate commerce.

Each of the 85 homeowners agreed that any construction defect claim against Satomi would be arbitrated, regardless of whether the homeowners brought the claim directly or brought the claim through their association. CP 3. Under fundamental legal principles establishing that a party suing on behalf of others is subject to the same limitations/obligations (including the duty to arbitrate) binding those on whose behalf the representative is suing, the Association's warranty claim, implied warranty of habitability claim and CPA claim must be arbitrated.

The Association's refusal to arbitrate is depriving Satomi of the benefits of the arbitration clause agreed to by each of the homeowners. This despite the fact that the 85 homeowners *are* the Association.

Satomi asks this Court to reverse the Superior Court, stay the lawsuit, and require the Association to proceed to arbitration.

RESPECTFULLY SUBMITTED this 13th day of March, 2006.

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I, Pam Wallace, certify that on the 13th day of March, 2006, I caused to be served copies of the following:

1. Reply Brief of Appellant Satomi, LLC; and
2. this Certificate of Service.

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