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No. 56265-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SATOMI, LLC, a Washington Limited Liability Company,

Appellant.

v.

SATOMI OWNERS ASSOCIATION, a Washington Non-Profit
Corporation,

Respondent

BRIEF OF RESPONDENT SATOMI OWNERS ASSOCIATION

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STATE OF WASHINGTON
2007 SEP 9 PM 3:15

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Association can be compelled to arbitrate under the Federal Arbitration Act ("FAA") when the contract containing the arbitration clause did not evidence a transaction affecting interstate commerce as already decided by this Court in *Marina Cove Condo. Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 236, 34 P.3d 870 (2001).
2. Whether the Association can be compelled to arbitrate pursuant to a clause in an agreement that neither it, nor any of its agents, executed or otherwise agreed to?

II. STATEMENT OF THE CASE

Satomi Condominiums is an 85-unit condominium complex located in Bellevue, Washington. CP 4, 11. Respondent is the Satomi Owners Association ("Association"). CP 4. On February 10, 2005, the Association filed its "Complaint for Damages to Condominium" alleging breach of the implied and express warranties of the Washington Condominium Act (RCW 64.34 *et seq.*), breach of the implied warranty of habitability, and violation of the Consumer Protection Act. CP 3-9. Appellant Satomi, LLC was the developer and condominium declarant of Satomi Condominiums ("Declarant"). CP 3, 11.

Prior to Declarant's demand to arbitrate, counsel for the Association had been in contact with Declarant's counsel for well over a year. CP 1413. The first the Association had ever heard of Declarant's position on arbitration, however, was in Declarant's faxed letter and Answer of March 24, 2005. CP 1414, 1434-42.

On March 24, 2005, Declarant faxed the Association an Answer that included an arbitration demand pursuant to an agreement between Declarant and unit purchasers, and under state and federal law. CP 1413 1437-42, Declarant's letter referred to a Warranty Addendum allegedly provided to condominium unit purchasers that references arbitration. CP 1413, 1443-48.

On March 30, the Association responded to Declarant's demand for arbitration by asking counsel to withdraw the demand. CP 1483-84. Until the Association moved to quash Declarant's demand for arbitration, Declarant never requested a stay of discovery nor moved to compel arbitration.

The trial court granted the Association's motion to quash the demand for arbitration and denied Declarant's motion to reconsider after reviewing briefing from both parties. CP 143-44. In its order granting the Association's "Motion to Quash the Demand for Arbitration", the Court stated its alternative bases for the ruling:

The Court's ruling is based upon:

- (1) The [Defendant] did not prove that all the individual condo owners agreed to arbitrate. (The Nordstrom [declaration] phrasing "I am not aware" of who did not is insufficient).
- (2) Moreover, even if they did, the Plaintiff is a legally separate corporate entity which is neither a "successor or transferee" to Plaintiff. Thus, the arb[itation] clause is simply inapplicable.
- (3) While Def[endant] made a more particularized showing than did the the Def[endant] in Marina Cove (Ross Decl. "More than 70% . . . "), the thrust of the Court of Appeals analysis in Marina Cove was that condo sales are a matter which primarily impacts Washington residents.

CP 143-44.

On reconsideration, Declarant improved its evidence by providing proof that 84 of the 85 original purchasers signed agreements containing the arbitration clause at issue here. CP 163-1272. Declarant has not provided proof that the 85th original purchaser signed, nor has it even attempted to provide evidence that any of these original purchasers acted as agents of the Association in so doing. In fact, the Declarant generally maintains control of the Association until 60 days after 75% of the sales of any condominium are concluded,¹ so it is highly doubtful that any unit purchaser could have been acting as an agent of the Association.

¹ RCW 64.34.308(4).

III. ARGUMENT

A. Summary of Argument

The court did not err when it ruled that the Association's claims are not subject to arbitration for two primary reasons. First, as distinguished from the various Commerce Clause cases cited by Declarant, the analysis under the FAA² requires that the contract containing the arbitration clause impact interstate commerce. Since the Warranty Addendum containing the arbitration clause does not affect commerce, as already held by this Court in *Marina Cove Condominium Owners Ass'n v. Isabella States*, 109 Wn. App. 230, 236, 34 P.3d 870 (2001), arbitration cannot be compelled and the trial court should be affirmed.

Second, even if this court fails to follow its own precedent in *Marina Cove*, the Court should affirm the trial court by deciding a secondary issue not reached in that case: that the Association is not a party to the Warranty Addendum, *under agency principals and therefore*, cannot be bound by it.

² See 9 U.S.C. § 1, *et seq.*

B. The Declarant May Not Compel Arbitration Under the FAA Because the Contract Containing the Arbitration Clause Does Not Affect Interstate Commerce.

Declarant cannot compel the Association to arbitrate its construction defect claims against it because the FAA only operates to compel arbitration where the contract containing the arbitration clause affects interstate commerce. Here, as in *Marina Cove*, the limited warranty addendum does not affect interstate commerce by either its terms, or its subject matter. In fact, this case is in all relevant aspects identical to *Marina Cove*. Declarant's attempts to distinguish this case from *Marina Cove* based on the purported failure of counsel to produce certain evidence or raise certain arguments in *Marina Cove* are weak. Thus, the same result should be compelled and the trial court's decision granting the Association's motion to quash the demand for arbitration affirmed.

1. The Federal Arbitration Act Requires Proof that the Contract Containing the Arbitration Clause Affects Interstate Commerce.

Declarant devotes almost half of its Brief to the discussion of the commerce clause and its broad application, including the citation of a litany of civil rights cases interpreting the Civil Rights Act of 1964. These cases have nothing whatsoever to do with arbitration, nor do they have the same standard of analysis as the FAA. In relying almost exclusively upon

these cases, Declarant demonstrates is misunderstanding of the analysis required under the FAA. The barrage of Commerce Clause cases cited by Declarant focus upon whether the various businesses or “operations of public accommodations” affect interstate commerce for the purpose of determining whether federal anti-discrimination law applies. The key difference between these and the FAA cases is that in order for the FAA to apply, *the contract containing the arbitration clause* must evidence a transaction affecting interstate commerce, whereas the Civil Rights cases require only that the *business* sought to be regulated affects interstate commerce. This distinction derives from the plain language of the FAA itself:

A written provision in any maritime transaction or *a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. In contrast, the Civil Rights cases merely analyze whether a particular business was a “public accommodation” sufficient for Congress to exercise its power to regulate interstate commerce. Thus, the instant action does not turn upon the breadth of the Commerce Clause or upon the court-packing and civil rights precedents, but upon an analysis of whether

the contract containing the arbitration clause affects interstate commerce.

This is Declarant's burden.

Declarant's statement of issues pertaining to its assignment of error demonstrates its misinterpretation of the analysis required to compel arbitration under the FAA. First, Declarant misinterprets the court's ruling when it states that the trial court ruled that "this *case* does not involve interstate commerce" Appellant's Brief at p. 1 (emphasis added). Again, the FAA analysis does not turn on whether the *case* or *condominium* affects interstate commerce, but whether the *contract containing the arbitration clause* does. Thus, the trial court properly ruled that the contract containing the arbitration clause did not affect interstate commerce and therefore, arbitration could not be compelled under the FAA.

2. The Warranty Addendum Here Does Not Affect Interstate Commerce.

To compel arbitration under the FAA, Declarant "must make a threshold showing that a written agreement to arbitrate exists and that *the contract at issue* involves interstate commerce." *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 392, 85 P.3d 389 (2004) (emphasis added). This can only be done by analyzing the terms of the contract, which are central to this inquiry. *Id.*

Here, the “contract at issue” containing the arbitration clause is the Warranty Addendum. The arbitration clause can be found in paragraph seven of the Warranty Addendum, which states, in relevant part:

Seller’s Right to Arbitration. At the option of Seller, Seller may require that any claim asserted by Purchaser or by the Association under this Warranty or any other claimed warranty related to the Unit or Common Elements must be decided by arbitration, in King County, Washington, under the Construction Arbitration Rules of the American Arbitration Association (AAA) in effect on the date hereof, as modified by this Warranty. . . . There shall be no substantive motions or discovery, except the arbitrator shall authorize such discovery as may be necessary to ensure a fair hearing, which shall be held within 120 days of the demand and concluded within two days. . . . The decision rendered by the arbitrator shall be final and binding without appeal or review and may be enforced in any court of competent jurisdiction.

See, e.g. CP 167, 170. Thus, Declarant must prove that the Warranty Addendum, not the business of constructing condominiums, involves interstate commerce.

Here, the terms of the contract do not evidence interstate commerce. Because the legal focus is upon the contract containing the arbitration clause, interstate commerce must bear some relationship to the parties or terms of the Warranty Addendum itself. The Warranty Addendum relates solely to agreements regarding warranties on Washington homes. The parties to the agreement are the seller (Declarant, Satomi, LLC as Washington limited liability company formed solely for

the purpose of developing and selling the Satomi condominiums) and purchasers buying condominium units within the state of Washington. The Warranty Addendum is part of a specific agreement pertaining to Washington law and warranties. Thus, there is simply no interstate connection that would justify compelling arbitration under the FAA.

The mere assertion that some *or even all* of the parts of the condominium were shipped in interstate commerce does not mean that the Warranty Addendum evidences a transaction that involves interstate commerce. At most, Declarant'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. It may even be that the contracts to construct the Satomi condominiums affects interstate commerce, but that is not the contract at issue here. The Warranty Addendum containing the arbitration provision here simply does not affect interstate commerce. As described below, this conclusion was already reached by this Court in *Marina Cove Condominium Owners Ass'n v. Isabella States*, 109 Wn. App. 230, 236, 34 P.3d 870 (2001).

The present case, in every relevant aspect, is identical to that of *Marina Cove*. In that case, this Court ruled that the arbitration clause contained in the warranty addendum was not enforceable under the FAA

because the warranty addendum did not affect interstate commerce. On practically identical relevant facts, this Court in *Marina Cove* stated:

[T]he Texas Court of Appeals held that a contract between an out-of-state property owner and a Texas contractor to perform repair work on an apartment complex located in Texas was not a transaction substantially affecting interstate commerce and therefore the FAA did not apply. Similarly here, the Marina Cove Condominiums were constructed, marketed and sold solely within the state of Washington.

Id. at 243-44. More importantly, this Court appropriately focused upon the contract containing the arbitration clause to determine whether the contract (not the claims brought or the subject matter of the lawsuit) affects interstate commerce:

The contract at issue is a limited warranty offered by a Washington corporation on condominium units located within the state, whose owners all reside in Washington. The only connection to other states involves one buyer, who moved to Washington from another state, and another buyer, who transferred funds from an out-of-state bank account for use as a down payment on one unit purchased. That negligible contact with other states does not constitute a substantial effect on interstate commerce. The FAA does not apply.

Id. (emphasis added).

Here, the analysis is exactly the same because the contract is of the same type: a limited warranty between a Washington buyer and Washington builder. The terms of both agreements purport to limit Declarant's liability under the Washington Condominium Act and to

provide unit purchasers with warranties in lieu of that Act. As decided in *Marina Cove*, these agreements simply do not involve interstate commerce. Declarant has provided no evidence that any of the buyers had connections with interstate commerce any more than the buyers in *Marina Cove* did. Thus, this Court has already ruled that under such circumstances, interstate commerce is not implicated and arbitration cannot be compelled under the FAA.

3. The Subject Matter of Condominium Warranty Addendums Do Not Affect Interstate Commerce According to *Marina Cove*.

Declarant has cited a single Alabama case, *Service Corp. Int'l v. Fulmer*, 883 So.2d 621, 629 (Ala. 2003), for the proposition that arbitration can be compelled under the FAA if the subject matter of the case generally affects interstate commerce. But this interpretation is inaccurate. The pivotal analysis is not whether the subject matter of the case affects interstate commerce, but whether the subject matter of the contract does so.

In the seminal Supreme Court FAA case, *Citizen's Bank v. Alafabco*, 539 U.S. 52, 56-57, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003), an appeal from the Alabama supreme court, the Court held that a dispute arising out of a debt-restructuring contract containing an arbitration clause was arbitrable under the FAA because the subject of the contract in

dispute – debt restructuring – was “in the aggregate” an economic activity subject to federal control. The Court further held that the subject matter of the contract must bear on interstate commerce in a “substantial way.” *Id.* at 57. In support of its finding that the debt-restructuring agreement affected interstate commerce, the Court cited Alafabco’s business and obtainment of loans throughout the southeastern United States, the fact that the debt-restructuring agreement was secured by out-of-state inventory, and finally, the “magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged . . .” *Id.* at 57-58.

The Warranty Addendum in this case simply does not share the same attributes as the massive debt-restructuring agreement in *Alafabco*. In fact, this Court has already held in *Marina Cove* that “the contract at issue is a limited warranty offered by a Washington corporation on condominium units located within the state, whose owners all reside in Washington.” *Marina Cove*, 109 Wn. App. at 244. In so doing, this Court did not ignore the broad reach of the commerce clause, but fully acknowledged that that the “involving commerce” language in the FAA means the “full limit of the Congress’ Commerce Clause power.” *Id.* Still, the Court focused upon the contract containing the arbitration clause to properly determine that that agreement did not and does not affect

interstate commerce. The Warranty Addendum here, as in *Marina Cove*, simply does not rise to the level of an economic activity subject to federal control, the magnitude of which substantially effects interstate commerce. Thus, even under the broad interpretation of the FAA in *Citizens' Bank*, the Warranty Addendum fails to evidence a transaction involving interstate commerce.

4. Cases Analyzing Whether Businesses Impact Interstate Commerce are Irrelevant because the FAA Requires a Focus Upon the Contract, not the Business.

With *Marina Cove* directly on point, Declarant has little choice but to attempt to convince this Court that its opinion in *Marina Cove* was wrong, as Declarant ultimately admits.³ Thus, Declarant resorts to citing a barrage of unrelated cases emphasizing pro-arbitration policy and a number of civil rights cases holding that certain businesses affected interstate commerce. Aside from comparing the Association to segregationists of the '60's and '70s, Declarant's Brief does nothing more than give a history lesson on the unrelated analysis of whether *a business* affects interstate commerce sufficient to allow the federal government to enforce anti-segregation laws.

³ Appellant's Brief at 22, n. 12.

The single and simple distinguishing factor between the condominium cases and the civil rights cases is that the FAA's focus is whether *the contract containing the arbitration clause* affects interstate commerce. In contrast, the Civil Rights cases focus upon whether the business as a whole does so. The distinction derives from the statutes themselves. The FAA expressly requires "A . . . contract evidencing a transaction involving commerce." 9 U.S.C. § 2. In contrast, the civil rights cases provide for equal enjoyment of "any place of public accommodation without discrimination" Section 201(a) of Title II of the Civil Rights Act.⁴ The Act further provides, in relevant part: "Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title *if its operations affect commerce*" Title II, Sec. 201(b).⁵ The Act goes on to list types of establishments such as motels, restaurants and theaters. Thus, the analysis under the civil rights cases is whether a public accommodation's "*operations affect commerce.*" This is markedly different from the FAA, which requires that the interstate commerce be affected, not by the entire operations of an entity, but by the contract containing the arbitration clause.

⁴ 42 U.S.C. § 2000a(a).

Thus, each of the civil rights cases cited by Declarant focuses not upon the contract as required by the FAA, but on the business as a whole to determine whether it sufficiently impacted interstate commerce to be regulated by the federal government. *See, e.g., Daniel v. Paul*, 395 U.S. 298, 89 S. Ct. 1697, 23 L. Ed. 2d 318 (1969) (recreational facility's snack bar operations affected interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964) (barbeque restaurant's operations impacted interstate commerce); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (motel business impacts interstate commerce); *E.E.O.C. v. Ratliff*, 906 F.2d 1314 (9th Cir. 1990) (fitness center's business impacted interstate commerce); *Usery v. Lacy*, 628 F.2d 1226, 1229 (9th Cir. 1980) ("The use of material that has at any point moved in commerce is enough to establish *that a business affects commerce . . .*" (emphasis added)); *N.L.R.B. v. Maxwell*, 637 F.2d 698, 704 (9th Cir. 1981) (concrete supplier's business sufficiently impacted commerce for application of federal labor laws). Such cases are simply inapplicable in this context and should be disregarded.

On the other hand, the FAA cases cited by Declarant appropriately focus the analysis. In those cases, the determining factor was that the *contract at issue* evidenced interstate commerce – a fact that was

⁵ 42 U.S.C. § 2000a(b).

stipulated in two of the cited cases. *See Allied Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 282, 115 S. Ct. 834, 130 L.Ed. 2d 753 (1995) (parties did not contest that the contract involved interstate commerce in fact); *1745 Wazee LLC v. Castle Builders, Inc.*, 89 P.3d 422, 425 (Colo.Ct.App. 2003), *cert. denied*, 2004 WL 1088499 (Colo., 2004) (“Castle did not dispute that the contract involved interstate commerce in the trial court”)

Finally, in the only FAA-related Washington case cited by Declarant’s, *Krueger Clinic Orthopaedics, LLC v. Regence Blueshield*, this Court determined that a breach of contract action between a medical clinic and national health care service contractor was subject to the FAA “because the provider agreement contains an agreement to arbitrate and involves commerce.” 123 Wn. App. 355, 363, 98 P.3d 66 (2004) . While this Court properly ruled that the contract at issue in *Krueger* did affect interstate commerce, *Krueger* is easily distinguishable from this case. First, Regence Blueshield, one of the parties to the contract containing the arbitration provision in *Krueger* is a provider of health insurance “to patients throughout the nation through various subscriber agreements.” *Krueger*, 123 Wn. App. at 360. Moreover, the provider agreement itself incorporates “subscriber agreements” held by the federal government and patients from other states. *Id.* at 362. Thus, the parties to the contract and

the subject matter of contract (insurance) in *Krueger* had a substantial impact on interstate commerce, allowing application of the FAA. The same is not true here. The Warranty Addendum, between Washington residents and relating solely to intangible warranties relating to Washington real estate, simply does not impact interstate commerce in the same way that a national health provider service agreement does.

While the civil rights cases apply a standard irrelevant to the present analysis, the FAA cases clearly require a nexus between interstate commerce and the contract containing the arbitration clause, which the Warranty Addendum does not demonstrate. Without this, arbitration cannot be compelled under the FAA.

5. *Marina Cove* Is Not Distinguishable Based on Allegations Made in the Complaints for Both Cases.

Declarant tries to make much of the fact that the Association's Complaint alleges "defective materials"⁶ and therefore, the case or the claims affect interstate commerce. First, the allegations contained in the complaint are not relevant to the interstate commerce analysis. This is borne out by this Court's decision in *Marina Cove*, in which the plaintiff also alleged defective materials, yet this information played no part in the interstate commerce analysis. Second, when taken in context, it is clear

that such allegations contained in the Association's complaint are only a small part of the claims for breach of the implied warranties of quality contained in the Washington Condominium Act.

The fact that the Association has sued the developer for breach of the warranty that the condominium is "free from defective materials" does not bring the case within the ambit of the FAA. In this respect, the present case is *identical* to *Marina Cove*. Declarant's attempt to distinguish this case (characterized as a "defective product claim") from *Marina Cove* (characterized as a "breach of workmanship warranty claim"⁷) is completely without merit. Both the "defective product" and "breach of workmanship" warranties are part of the set of implied warranties of quality contained within the Washington Condominium Act:

A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by such declarant or dealer will be:

- (a) *Free from defective materials*;
- (b) Constructed in accordance with sound engineering and construction standards;
- (c) Constructed in a workmanlike manner; and
- (d) Constructed in compliance with all laws then applicable to such improvements.

⁶ RCW 64.34.445(2)(a).

⁷ See Declarant's Motion to Reconsider at CP 151:5-12, 157:16-18. ("On these facts, and with only allegations of a breach of workmanship warranty claims, the court in *Marina Cove*, held . . ." (Emphasis added.))

RCW 64.35.445(2) (emphasis added).

In its Brief, Declarant states that the distinguishing factor between the present case and *Marina Cove* is that this Association has made claims for defective materials, while the *Marina Cove* plaintiff did not. Appellant's Brief at 21. This contention is without merit. Declarant further implies that had the Plaintiff in *Marina Cove* claimed any defective materials, federal arbitration would have been compelled. This assertion is also completely unfounded.

The Plaintiff in *Marina Cove* made an arguably broader claim for "defective materials" as was made here, as evidenced by the *Marina Cove* complaint:

12. Pursuant to Section 64.34.445 of the Condominium Act, the Developer Declarants impliedly warranted that the units and its common elements in the Project were suitable for the ordinary uses of real estate of its type, and that the improvements made or contracted for by the Developer Declarants were *free from defective materials* and were constructed in accordance with sound engineering and construction standards, and in a workmanlike manner in compliance with then applicable law.

13. The Developer Declarants breached their implied warranties in that there *are defective materials*, installation, and/or design with respect to the following components of the building:

- a. Flashing;
- b. Exterior building cladding
- c. Mechanical systems;

- d. Structural;
- e. Fire safety;
- f. Acoustical;
- g. Fireplaces; and
- h. Unit interior finishes.

....

26. Such damages include, among other things, the cost of repairing the damage to the property caused by the defective workmanship and materials, investigative costs, and the loss of use and marketability of the units.

CP 1509-1515.

As in *Marina Cove*, Declarant's liability here for "defective materials" is inexorably tied to the implied warranties contained in the Washington Condominium Act. Such liability is not predicated on Declarant as the developer, contractor or manufacturer of such materials, but on Declarant as the declarant and warrantor of the condominium. More importantly, the existence of such claims, contained in both the complaint here and in the *Marina Cove* complaint, do not affect the FAA analysis.

Declarant argues that distinction lies in the fact that the *Marina Cove* declarant did not argue that the claimant's claim for defective materials brought it within the purview of the FAA. But it is far more likely that the declarant's failure to raise such issues in *Marina Cove* stemmed from its realization that it is irrelevant whether the *case* or *claims* impact interstate commerce in some tangential way. Contrary to

Declarant's implications, the Declarants in *Marina Cove* could have, but in their better judgment, chose not to rely upon the association's claim for defective materials as a basis for compelling federal arbitration because it is simply irrelevant. Thus, because this factor does not distinguish *Marina Cove*, the Court should follow its own precedent and affirm the trial court's ruling.

6. *Marina Cove* Is Not Distinguishable Based on the Evidence Presented to the Court.

In another strained attempt to distinguish this case from *Marina Cove*, Declarant argues that federal arbitration was not compelled in that case because the lawyers for the association in *Marina Cove* "did not argue that interstate commerce was established because of defective materials shipped from outside Washington." Opening Brief of Appellant Satomi, LLC ("Brief of Appellant") at 21. There is no doubt that, like the Bellevue condominium here, the Kenmore condominium in *Marina Cove* was also built with materials that were shipped in interstate commerce, but this fact does not affect the analysis. It certainly does not mean, as Declarant states, that the nexus between the claims here and interstate

commerce are “far more substantial,”⁸ they are just of a different sort: an irrelevant sort.

Again, the declarant’s failure to raise this argument in *Marina Cove* is more likely the result of its inevitable acknowledgment that the information is irrelevant to the true analysis of whether the *contract* containing the arbitration clause evidences interstate commerce. Thus, the *Marina Cove* declarants attempted to trigger the FAA by focusing upon the parties to the warranty contract and the existence of a few out-of-state connections of the individual owners. Here, Declarant has failed to do even that. In this respect, there is simply nothing to distinguish the present case from *Marina Cove*, which held that a warranty contract by and between Washington residents does not evidence a transaction involving interstate commerce.

To compel arbitration under the FAA, this Court would have to ignore applicable language in the FAA and overrule the countless cases in which the applicability of the FAA focuses upon the contract containing the arbitration clause, including *Marina Cove*. This is why Declarant ultimately argues that this Court’s decision in *Marina Cove* was wrong.⁹ *Marina Cove* was correctly decided on relevant facts nearly identical to

⁸ Appellant’s Brief at p. 22.

the ones present here. Thus, the trial court did not err and its ruling should be affirmed.

Declarant cannot compel the Association to arbitrate its construction defect claims against it because the contract at issue here, the Warranty Addendum, simply does not affect interstate commerce as already held in *Marina Cove*. Declarant's attempt to distinguish *Marina Cove* should be seen for what it represents: an understanding that that if this Court follows its own precedent in *Marina Cove*, the Court is compelled to affirm the trial court's decision quashing the demand for arbitration.

C. The Association Cannot Be Compelled to Arbitrate Because It Is Not a Party to the Warranty Addendum.

To compel arbitration under the FAA, Declarant "must make a threshold showing that a written agreement to arbitrate exists" *Walters*, 120 Wn. App. at 392 (2004) (emphasis added). Implicit in that threshold showing is proof that the party to the dispute is also a party to the agreement containing the arbitration clause. Here, Declarant has the burden of proving that the Association is a party to the arbitration agreement. Thus, even if the arbitration clause in the Warranty

⁹ Appellant's Brief, p. 22, n. 12.

Addendum can be enforced against those who signed it, it cannot be enforced against the Association since it was not a party.

1. The Association is a Separate Legal Entity and Cannot be Bound by Agreements Made by *Some* of its Members.

In order to enforce the terms of the Warranty Addendum *against the Association*, the Declarant has the threshold burden of proving that the Association was a party to that agreement. As this Court held in *Powell v Sphere Drake*, 97 Wn. App. 890, 898, 988 P.2d 12 (1999), “. . . despite the strong policy in favor of arbitration, parties to a dispute will generally not be compelled to arbitrate unless they have agreed to do so.”¹⁰ The Association is made up of all 85 *current* unit owners at Satomi, whether they were original or subsequent purchasers. RCW 64.34.300; CP 4, 11.. The Association was created with the filing of the Declaration in July of 2001. CP 4, 11. Declarant has never averred (because it is not true) that the Association consists only of original purchasers.¹¹ Because the

¹⁰ This issue was raised, but not decided in *Marina Cove*, 109 Wn. App. at 235 (“Isabella Estates argues that the parties are bound by their agreement to submit to binding arbitration under the Lakewood Construction Limited Warranty. The Association argues that the limited warranty was not a negotiated agreement of the parties, but contends that we need not determine whether the parties entered into such an agreement because the Washington Condominium act does not permit parties to waive enforcement of its provisions by judicial proceeding.”).

¹¹ Despite the fact that Declarant only proved that 84 of the original purchasers signed the Warranty Addendum, Declarant argues that it was the Association’s burden to demonstrate that not all of its members (including original and subsequent purchasers)

subsequent purchasers were not parties to the Warranty Addendum, the Declarant can only claim that *some* of the Association's members signed the Warranty Addendum. Furthermore, even if the Warranty Addendum purports to bind the Association, Declarant cannot prove that an individual member of the Association had the authority to bind the Association in such a way.¹² Put simply, the Association, as a separate entity, is not bound to the terms of the Warranty Addendum.

As the court noted in its Order on the Association's motion to quash the demand for arbitration, even if Declarant could prove that all homeowners, both original and subsequent purchasers, signed the Warranty Addendum, "the plaintiff is a legally separate corporate entity which is neither a 'successor or transferee'" of the homeowners. CP 144. As a separate entity, Declarant has the burden of demonstrating that the Association was bound to the terms of the Warranty Addendum. "A person who is not a party to an agreement to arbitrate may be bound to such an agreement only by ordinary principles of contract and agency."

signed the Warranty Addendum. But this attempt to shift the burden of production of evidence is inappropriate. It is Declarant's burden to demonstrate the existence of the agreement and that the Association is a party. Moreover, 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. CP 163.

¹² This argument was also raised, but not decided in *Marina Cove*, 109 Wn. App. at 235 (2001), because the court held that no party could waive the statutory right to judicial enforcement of the Condo Act, as discussed *infra*.

Powell v. Sphere Drake Ins. P.L.C., 97 Wn. App. 890, 892, 988 P.2d 12 (1999) (citing *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)); see also *Cariaga v. Local No. 1184 Laborers Int'l Union of N. Am.*, 154 F.3d 1072, 1074 (9th Cir. 1998) (“Because arbitration is matter of contract, a party will not be required to submit to arbitration unless that party has agreed to do so.”); *Beach Air Conditioning & Heating Inc. v. Sheet Metal Workers Int'l Ass'n Local 102*, 55 F.3d 474, 476 (9th Cir. 1995) (because arbitration is a matter of contract, a party “cannot be required to submit to arbitration any dispute which he has not agreed to so submit.”)

The individual unit owners were not agents of the Association and therefore, had no authority to bind the Association to the Warranty Addendum. Consent between the agent and principal and control are key elements of an agency relationship. *Barker v. Skagit Speedway, Inc.*, 119 Wn. App. 807, 82 P.3d 244 (2003). Declarant has provided no evidence or authority that the Association consented to an agency relationship in which its mere members could bind it by contract. Thus, the Association simply is not a party to the Warranty Addendum and the arbitration clause cannot be enforced against it.

Declarant's attempt to strip the Association of its separate legal status by focusing on the ownership of the property is a red herring. If

anything, the Association's failure to own the real estate that is the subject of the Warranty Addendum proves that it is not bound. Moreover, the Association has the power to "institute, defend, or intervene in litigation or administrative proceedings in its own name *on behalf of itself* or two or more unit owners on matters affecting the condominium." RCW 64.34.304(d).¹³ Declarant's argument completely ignores the fact that the Association may bring claims "on behalf of itself." Thus, its powers are not solely derivative, as Declarant argues.

Under Declarant's flawed reasoning, mere Microsoft corporate shareholders, who, like the residents at Satomi, are the actual owners of Microsoft, could bind the company to arbitration clauses contained in sales agreements between sellers and purchasers of such stock. Only those with authority to bind the corporation may bind it. Declarant still has cited no authority to the contrary. Thus, the Association is not bound.

Declarant also claims that the Association is bound to the Warranty Addendum's arbitration clause because it has brought this action on behalf of the unit owners. But a party bringing an action on another's behalf is only bound by the contract if that party's claim derives from a contract containing the arbitration clause. *Powell*, 97 Wn. App. at 896-97 (*citing*

¹³ Declarant baldly states, without any authority, that the Association has only made one claim on its own behalf. See Appellant's Brief, p. 35, n. 21. It is difficult to see where

Aasma v. Am. S.S. Owners Mut. Prot. Indem. Ass'n, Inc., 95 F.3d 400 (6th Cir. 1996). In *Powell*, this Court held that the claimant could not be compelled to arbitrate where he was not a party to the agreement to arbitrate even though the subject matter concerned his claim, citing relevant federal authority as well. *Id.* at n. 21 (“*See, e.g., Zimmerman v. Int’l Cos. & Consulting, Inc.*, 107 F.3d 344, 346 (5th Cir. 1997); *Morewitz v. West of England Ship Owners Mut. Prot. Indem. Ass’n*, 62 F.3d 1356, 1365 (11th Cir. 1995) (“Although we recognize that *Morewitz* now ‘stands in the shoes of *General Development*, we are reluctant to mandate arbitration where the claimants clearly did not bargain to do so.”), cert. denied, 516 U.S. 1114, 116 S.Ct. 915 (1996).”)).

The solitary case cited by Declarant in favor of its proposition that an association is controlled by agreements made by its members should be considered for what it is: an *unpublished opinion outside this jurisdiction* that is in direct conflict with this Court’s decision in *Powell*. This Court has held:

Reading RAP 10.4(g) and (h) in relation to each other, it is clear that the citation to unpublished opinions of this court is forbidden and the citation to unpublished opinions of other jurisdictions is also inappropriate. “The reliance upon unpublished opinions is a dubious practice at best, and we decline the invitation under the present circumstances.”

Declarant comes by this information, as it is simply inaccurate.

Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 45 P.3d 594 (2002). By citing this unpublished decision for its holding and asking that the Court apply that holding here,¹⁴ Declarant directly violates RAP 10.4. Even providing such materials under the guise of “noncontrolling authority” is inappropriate and parties doing so are subject to admonishment or sanctions. See *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 520, 108 P.3d 1273 (2005); see also *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000) (this Court ordered sanctions for counsel’s citation and discussion of an unpublished opinion).

Even if it were marginally appropriate to cite the unpublished case, *In re Managed Care Litig.*, 2003 WL 22410373 (S.D. Fla. 2003), the case is easily distinguished by observing the portion of the block quote omitted in Declarant’s Brief.

These medical associations have brought suit for declaratory and injunctive relief both individually and on behalf of their respective memberships. *Analysis of this issue can be neatly divided into alleged direct and derivative claims.* Associations suing in a representative capacity . . .

¹⁴ See Appellant’s Brief at p. 45 (“The court held that the association was bound by the doctors’ arbitration clauses, even though the claims arose out of the contract containing the arbitration clause (as the homeowners wrongly content in our case)”).

Id. at 9. Thus, it is clear that the case makes a distinction between claims being brought directly and those that derive from its members. Moreover, the court's analysis quoted by Declarant, when taken in context, is related not to the issue of whether an association is bound by its members' contracts, but whether it has standing to bring claims on behalf of only some of its members. The Florida court focused upon the medical association's "prudential requirement that an association can only sue when it can obtain prospective relief on behalf of all of its allegedly injured members." *Id.* at 10. A condominium association is a different best from a medical association in this, and in many other, respects. The Association's right to bring claims is simply not at issue here. Finally, the conclusion Declarant hopes will be drawn from the section, taken out of context, is anathema to its actual conclusion. As the Florida court noted, "*Because the associational Defendants themselves are not subject to enforceable arbitration clauses, this issue will be best resolved in the context of motions to dismiss of standing, not motions to compel arbitration.*" *Id.* (emphasis added).

The Association's right to bring the claims it has does not arise from the Warranty Addendum. The Association's right arises out of unique language in the Washington Condominium Act which provides the Association with separate legal status and the ability to bring claims in its

own name and on its own behalf. Thus, Declarant cannot hold the Association liable as a signatory to the Warranty Addendum and the Association cannot be compelled to arbitrate.

Declarant raises a number of other specters irrelevant to the issue of whether the Association can be bound by contracts signed by its members that have no authority to do so, including the obligations of the various signatories to the contracts. Whether the individual signatories of the Warranty Addendum (the unit purchasers) have failed to exercise some duty in the contract is irrelevant to the present analysis. Even if it was relevant, Declarant offers no authority in support of its proposition that the unit owners who signed the Warranty Addendum have a duty to force the Association to comply without the commensurate ability to do so.¹⁵ Nor is it relevant that the Declaration may require a vote in favor of litigation prior to pursuing litigation or arbitration. Finally, arbitration may always be elected, so its reference in the declaration proves nothing. These issues are completely irrelevant to the question of whether the Association is bound to an agreement it did not sign and was not a party to.

¹⁵ Declarant argues only that “[i]t is common in the formation of juristic entities . . . to bind the juristic entity by binding the constitute members to cast their votes in a particular way.” Appellants Brief at 43. But Declarant offers no statutory support for this general statement. Nor does it provide that the same would be true of a condominium association, which is an entity of an entirely different sort, affected in a number of unique ways by the Washington Condominium Act.

Finally, Declarant implies that the Association is bound by the agreement because unit purchasers purported to bind “successors and transferees.” The Association is neither a successor nor transferee of a unit purchaser for this warranty. Unit purchasers are mere members of the Association. Interpreting the agreement to allow any one of them to bind the Association to the arbitration without specific authority to do so is the equivalent of allowing Microsoft shareholders to bind Microsoft to arbitration of any of its disputes. No individual purchaser had the authority to bind the Association.

Finally, Declarant argues that the Court should have held a hearing or trial on the issue of “whether all the individual condominium owners agreed to the Warranty Addendum” under RCW 7.04.040(2).¹⁶ First, this issue was not raised at the trial court level and should therefore not be considered here. *Powell*, 97 Wn. App at 898-99 (the appellate court generally does not consider arguments raised for the first time on appeal). In fact, though Declarant initially demanded arbitration under both the FAA and state law, it tacitly withdrew its arguments in favor of any state law procedure affecting the determination by failing to argue anything in

¹⁶ Appellant’s Brief at 31.

support of its application in its Opposition to the Association's Motion to Quash Arbitration.¹⁷

Second, the issue as phrased by Declarant would not have been the proper issue before the trial court because Declarant wishes to compel *the Association* into arbitration, not some of its members. This Court has already held that Declarant has the threshold burden of at least demonstrating that the Association is a party to the agreement. *See Powell*, 97 Wn. App. at 898 (“parties to a dispute will generally not be compelled to arbitrate unless they have agreed to do so.”) Only then does the opposing party have the burden of raising “a substantial issue as to the existence or validity of the arbitration agreement.” Otherwise, parties who are not signatories could be completely unrelated to contractual disputes, yet would be tagged with the burden of proving they are not bound.

Moreover, Declarant never made an application for such a hearing to the court, nor did it advise the court of its belief that a hearing was required under 7.04 *et seq.* RCW. In fact, the Association was forced to move the court to quash Declarant's demand, which was granted by the trial court.

Finally, RCW 7.04.040 only compels a hearing when a “substantial issue is raised as to the existence or validity of the arbitration agreement . .

¹⁷ *See generally* CP 109-118; *see also*, CP 139, ll 4-7.

. .” RCW 7.04.040(2). Here, the issue was not a factual dispute as to the existence or validity of the arbitration agreement, but a legal dispute relating to whether the Association is bound by the agreement. The Association does not dispute the only evidence produced by Declarant: that 84 of the 85 original owners signed the Warranty Addendum. The Association disputes, as a pure matter of law based on agency principals, that the Association is thus bound as a party to the agreement. Moreover, even if such a hearing were to have taken place, Declarant offered no evidence that any of the original purchasers acted on behalf of the Association in signing the Warranty Addendum. Thus, Declarant’s eleventh hour plea for remand for a factual hearing should be denied.

Declarant has the burden of proving that the Association is bound by the terms of the Warranty Addendum. Its only evidence, though undisputed, was insufficient to demonstrate, as a matter of law, that the Association was bound by the arbitration agreement. Declarant has failed to create a substantial issue of fact sufficient to require a hearing. Nor has it demonstrated as a matter of law that the Association is bound. The trial court properly quashed the demand for arbitration and its decision should be affirmed.

2. Even if the Association was a Party, the Arbitration Clause is Only Applicable to Certain Claims.

Declarant admits that even if the arbitration clause is enforceable against the Association, the Warranty Addendum is only applicable to certain claims. The arbitration clause states, in relevant part:

Seller's Right to Arbitration. At the option of Seller, Seller may require that any claim asserted by Purchaser or by the Association under this Warranty or any other claimed warranty related to the Unit or Common Elements must be decided by arbitration, . . .

See, e.g. CP 167, 170. According to this clause, arbitration is triggered for claims asserted: 1) “under this Warranty;” or 2) under “any other claimed warranty related to the Unit or Common Elements.” Neither scenario impacts the present case because the first clause is inapplicable and the second is void.

a. The Association Has Brought No Claims “Under This Warranty.”

Arbitration is not mandatory under the first clause because no claims have been brought by the Association “under this Warranty.” The Warranty referred to is the Warranty provided by Declarant, which is separate and apart from the implied warranties of the Condominium Act or

any other warranties.¹⁸ The Association's claims are limited to breaches under the Condominium Act, Consumer Protection Act and implied warranty of habitability. *See generally* CP 3-9. No claim is made pursuant to the Warranty primarily because the period for claims under the Warranty Addendum would likely have expired years ago. For purposes of this appeal, it may be assumed that the claim period for the warranty under the Warranty Addendum is essentially one year.¹⁹ Thus, any claim under the warranty would likely have expired by the time the Association gave notice of its claims. Thus, the Associations remaining claims cannot be considered to be made "under this Warranty." Where claims fall outside of the reach of the contract, those claims are not arbitrable. *See Powell*, 97 Wn. App. 890, 895 (1999) (Claims based on Consumer Protection Act and fraudulent conveyance act, not having arisen from the insurance policy containing the arbitration clause, were "statutory claims that are separate from the insurance contract itself" and therefore, not arbitrable). Thus, there is no doubt that the claims being pursued by the Association have not been brought "under this warranty" and are, therefore, not subject to arbitration.

¹⁸ The distinction is important because the written Warranty also constitutes an express warranty under RCW 64.34.443, which the Association can pursue separate from the terms of the Warranty itself, and which generally has a four-year statute of limitations.

**b. The Arbitration Clause Purporting to Cover
“Any Other Warranty” is Unenforceable Under
Marina Cove.**

As for the portion of the arbitration clause purporting to cover “any other claimed warranty related to the Unit or Common Elements,” it is void as an unenforceable waiver of the statutory right to court review. The Washington Supreme Court has held that claims arising out of the Condominium Act are not subject to binding arbitration because the language of the Act specifically provides for “judicial” enforcement:

The text of RCW 64.34.100(2) provides the method by which a claim is maintained. The Legislature’s choice of language, that the act is “enforceable by judicial proceeding” is definitive, and any argument that it should be interpreted as permissive is eclipsed by RCW 64.34.030, which states:

Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived

Marina Cove, 109 Wn. App. at 236. Moreover, the court held it would “not defy express provisions of a statute” to further public policy favoring alternate dispute resolution. *Id.* Thus, the second part of the arbitration clause is unenforceable.

The claims brought in this action are neither brought “under this Warranty,” nor subject to the clause based on *Marina Cove*. Therefore,

¹⁹ See note. 17, *supra*.

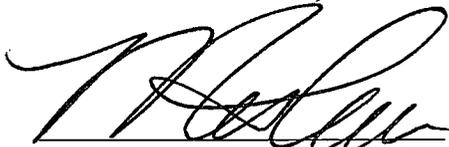
the Warranty Addendum provides no basis upon which to demand arbitration and the trial court decision should be affirmed.

IV. CONCLUSION

The trial court did not err when it ruled that the Association's claims are not subject to arbitration because the FAA requires that the contract containing the arbitration clause affects interstate commerce. Since the Warranty Addendum containing the arbitration clause in this case does not affect commerce, as already held by this Court in *Marina Cove*, arbitration cannot be compelled and the trial court should be affirmed. In the alternative, the trial court's ruling should be affirmed because the Association was not a party to the Warranty Addendum under agency principals and therefore, cannot be bound by it. For all of the above reasons, the Association respectfully requests that this Court affirm the trial court's order quashing Declarant's demand for arbitration.

Respectfully submitted this 9th day of February, 2006

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