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NO. 69637-8-1
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CINDY ALEXANDER; BLOCKER VENTURES, LLC; CHRIS CLARK; R. BRUCE EDGINGTON; KIPP JOHNSON and JENNIFER JOHNSON; GOPIKRISHNA KANURI and HIMABINDU KANURI; CHRIS KASPRZAK and ELIZABETH KASPRZAK; PAUL LARKINS and JOYCE HYOJUNG LARKINS; KRISTINE MAGNUSSEN; SCOTT McKILLOP; CAINE OTT and DANA OTT; MARA PATTON; PETER RICHARDS; DANTE SCHULTZ; WINFRED D. SMITH; ROBERT STODDARD and COLETTE STODDARD; NEIL WEST; LIANG XU and JIA LU DUAN,

Appellants

v.

GARY SANFORD AND JANE DOE SANFORD; PAUL BURCKHARD and MURIEL BURCKHARD; JAMES SANSBURN and JANE DOE SANSBURN; RICHARD PETER and JANE DOE PETER; SHANA HOLLEY and RICHARD HOLLEY; BRETT BACKUES and JANE DOE BACKHUES; JOSEPH CUSIMANO and JANE DOE CUSIMANO; JASON FARNSWORTH; PATRICIA HOVDA and JOHN DOE HOVDA; ALEXANDER W. PHILIP and NATALIA T. PHILIP; HUCKLEBERRY CIRCLE, LLC; LOZIER HOMES CORPORATION; DOE DECLARANT AFFILIATES 1-20; DIANE GLENN and JOHN DOE GLENN; CONSTRUCTION CONSULTANTS OF WASHINGTON, LLC,

Respondents.

REPLY BRIEF OF APPELLANTS / BRIEF OF CROSS-RESPONDENTS

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A. Plaintiffs Have Individual Standing To Sue Board Members.

1. Plaintiffs Cannot Maintain A Derivative Action.

As members of a non-profit, plaintiffs were not required or able to file a derivative action because the WNCA contains no provision for such an action. *Lundberg v Coleman,* 115 Wn.App. 172, 177-178, 60 P.3d 595 (2002); *Save Columbia v. Columbia,* 134 Wn.App. 175, 191, 139 P.3d 386 (2006). Accordingly, any claim that plaintiffs could or should have complied with CR 23.1 or 23.2 should be rejected.

2. The WCA Grants Individual Unit Owners Standing to Sue.

Under RCW 64.34.304(1) of WCA, "In the performance of their duties, the officers and members of the board of directors are required to exercise: (a) If appointed by the declarant, the care required of fiduciaries of the unit owners; or (b) if elected by the unit owners, ordinary and reasonable care." Defendants' duty of care to "unit owners" is coupled with an obligation to exercise good faith in the performance of their duties as board members. RCW 64.34.090 ("Every...duty governed by this chapter imposes an obligation of good faith in its performance...")

The defendants' duties to unit owners are enforceable by judicial proceeding. RCW 64.34.100(2) ("**any right or obligation declared by this chapter is enforceable by judicial proceeding.**" (Emphasis added).)

Under RCW 64.34.455, "**If . . . any . . . person subject to this chapter fails to comply with any provision hereof** or any provision of the declaration or bylaws, **any person** or class of persons **adversely affected by the failure to comply has a claim for appropriate relief**." (Emphasis added). Finally, under RCW 64.34.100(1), "The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed."

Thus, under the WCA, a unit owner ("any person") who is "adversely affected" by a board member's breach of fiduciary duty has "a claim for appropriate relief" that is "enforceable by judicial proceeding" to be "liberally administered to put [them] in as good a position as if" the director had not breached his duties.

These rights of action vested in unit owners individually by the WCA are not defeated by any contrary law respecting corporations generally. Under RCW 64.34.300, a condominium "association shall be organized as a profit or nonprofit corporation. **In case of any conflict** between Title 23B RCW, the business corporation act, chapter 24.03 RCW, the nonprofit corporation act, or chapter 24.06 RCW, the nonprofit miscellaneous and mutual corporations act, and this chapter, **this chapter shall control**." (Emphasis added.)

***Nowhere* in the WCA is there any provision suggesting that the right of an injured unit owner to a judicial remedy for breach of a director's fiduciary or other duties *must* be enforced by the HOA, or not at all, as defendants contend.**

In light of the specific and individual grant of a judicial remedy under the WCA for breach of statutory duties to affected owners, and in light of the express supremacy of the WCA on the question of standing, defendants' reliance on general corporate law applicable to for-profit corporations is misplaced. Thus, both *Hunter v. Knight*, 18 Wn.App. 640, 571 P.2d 212 (1977) and *Interlake Porsche & Audi, Inc. v. Blackburn*, 45 Wn.App. 502, 509, 728 P.2d 597 (1986) are basically irrelevant.

The closest defendants come to relevant authority is *Myer v. Cuevas*, 119 S.W.3d 830 (2003), which held that a unit owner could not sue board members for damage to common elements and breach of fiduciary duty without joining all his co-tenants. But that court based its ruling largely on *for profit* corporate law. The *Myer* court did not consider whether derivative actions were or were not available to condominium owners, and for procedural reasons did not permit the plaintiff the join the other co-tenants under the Texas equivalent of Washington's CR 19.

Because it is based on the law of for-profit corporations, *Myer* is inapposite. Moreover, Texas courts are divided on this issue. For

example, *Celotex Corp. v. Gracy Meadows Owners Ass'n*, 847 S.W.2d 384 (Tex. App. Austin, 1993) holds that individual condominium unit owners may sue for defective common element roofing, and be awarded damages on the basis of percentage of ownership, when the number of co-tenants makes joinder of all of them impractical. And, in *Mitchell v. Laflamme*, 60 S.W.3d 123, 128 (Tex. App. Houston 14th Dist. 2000), the court *rejected* the argument that defendants make in our case, that unit owner remedies are limited to seeking to enjoin *ultra vires* action by the HOA's board because "**we can find no case law. . . that the failure to maintain exteriors and common areas constitutes an *ultra vires* act by a homeowners' association.**" (Citations omitted, emphasis added).

In Maine, which has a statutory scheme similar to Washington's, the high court recognized an individual unit owner's right to bring an action for breach of board member duties, because a derivative action was unavailable. In *America v. Sunspray Condo Ass'n.*, 2013 ME 19, 61 A.3d 1249, 1256 (2013), the Supreme Judicial Court ruled that a condominium owner has no right to sue members of am HOA board in a derivative action for refusing to enforce the condominium's smoking ban, because the HOA was a not-for-profit corporation. **The court therefore allowed**

plaintiff's *individual claims* for breach of the board members' duty to enforce the smoking ban to proceed.[1]

Defendants urge that "The only actions permitted these appellants are proceedings to enjoin officers or directors from acting *ultra vires,* or to dissolve the non-profit." (Defendants' Brief at 20).[2] According to defendants, homeowners whose associations happen to take the form of non-profit corporations instead of for-profit corporations have no standing to vindicate their statutory rights to good faith stewardship of their property interests by board members. These homeowners must *persuade* the board to spend scarce HOA resources (here, in a project saddled with an enormous repair bill) to vindicate their rights for them, or go without any remedy. That result is flatly contrary to the WCA's provision that any person injured has a judicial claim for appropriate relief. Moreover, unless members of non-profit HOAs have a right of individual action for board member breaches, the result advocated by defendants would render the WBCA and the WNCA unconstitutional by creating an undue burden

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[1] However, those individual claims were dismissed for failure to state a legally actionable injury or harm within the meaning of the Maine Condominium Act's provision that, like Washington's, grants "any person" subject to the act who is "adversely affected" a "claim for appropriate relief."

[2] Grounds for dissolving the HOA do not currently exist, and the tortious board actions are not *ultra vires* of the Association's authority, so the power of the attorney general or others to seek an injunction or dissolve the HOA are not remedies. An action to remove a director is also a hollow remedy when the issue is actual injury caused by a past director's misconduct.

on the plaintiffs' access to the courts[3], and by denying them equal protection under the law.[4]

3. The Issue Is More Properly Considered Under CR 19.

The most intellectually honest approach to the issue defendants allude to would be to evaluate it under CR 19, and ask whether the remaining unit owners (or perhaps the HOA as their representative) should be joined because complete relief cannot be accorded among those already parties without doing so, or because of a risk of multiple or inconsistent obligations on the part of the defendants. Of course, the defense has not raised this issue because the remedy under CR 19 is simply an order that

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[3] In *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009), plaintiff's suit for medical malpractice was dismissed for failure to comply with a statute requiring a "certificate of merit" for her claim from a medical expert. The court held that a pre-suit certification unduly hinders the right of access to the courts, because it is "Through the discovery process [that] plaintiffs uncover the evidence necessary to pursue their claims. . . . . Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts." Id. (Citation omitted). Similarly, requiring that plaintiff homeowners persuade volunteer board members, in the absence of any discovery, that their claims have merit and should be pursued through commitment of an HOA's limited resources poses a similar (and far greater) burden on plaintiffs' right of access to the courts than the measure struck down as unconstitutional in *Putman*. Under defendants' reading of the law, the plaintiffs' access to justice would depend on the uninformed judgment or whim of persons who may have no interest in assisting them, or who at worst may have interests diametrically opposed to theirs.

[4] See generally *McDevitt v. Harborview Med. Ctr.*, 2012 Wash. LEXIS 883, 291 P.3d 876, 880-881 (2012). Assuming that the rational basis test should apply here, defendants' construction of the WCA, WBCA and WNCA fails, as applied. A classification that creates one group of condominium homeowners who *can* maintain a derivative suit with respect to their rights (that is, owners in an HOA that happens to have been formed under the WBCA) and another group of homeowners that has no legal right to seek judicial relief (those in an HOA formed under the WNCA) simply has no legitimate state purpose behind it.

such a person be made a party, and not dismissal. But if defendants wish to address the *advisability* of adding additional homeowners as involuntary plaintiffs in order to effectuate complete relief in this matter, CR 19 provides a procedure for doing exactly that. That question should be left for the trial court to determine, if it is ever properly raised.

However, the law relating to derivative actions by shareholders in for-profit corporations offers no justification for barring at the threshold the legitimate claims of condominium homeowners who have been injured through what is at best gross malfeasance and at worst outright fraud by HOA board members, and who would otherwise have no forum for their grievances.

B. Claims for Board Member Torts Do Not Threaten to Circumvent the Limitations Period on WCA Warranty Claims.

The current action is *not* an "end run" around the limitations period on warranty actions in the WCA. RCW 64.34.452. A timely warranty claim would certainly have included far more than the limited work the HOA is funding by special assessment, and thus an order of magnitude larger than the $3 million in assessments. Plaintiffs' claims aggregate only a fractional share of those limited expenses. Thus the claims here do not begin to approach the potential liability defendants *should* have faced, but for their successful scheme to inveigle the HOA into missing the

statute of limitations on owner warranty rights, and their reckless, self-serving disregard of explicit attorney advice.

Moreover, the burdens of proof plaintiffs face are much more burdensome than a claim for breach of WCA warranties. Defendants' premise that the plaintiffs' claims represent an "end run" around the statute of limitations on WCA warranty claims is simply untrue.

C. Defendants' Knowledge of Material Facts Regarding the Presence of Defects and Missing the Warranty Limitations Period Should Not Be Imputed to Plaintiffs.

Defendants contend that their knowledge of defects should be presumptively imputed to the plaintiff homeowners. But the presumption merely establishes which party has the burden of producing evidence on whether knowledge was communicated by an agent to its principal; the presumption disappears once evidence contradicting the presumption is presented. *Nelson v. Macy's Dep't Stores, Inc.*, 160 Wn.App. 786, 794, 249 P.3d 1054 (2011). Moreover, the presumption will not apply where, as here, an agent "is in reality acting in his own or another's interest..." *Lowman v. Guie,* 130 Wash. 606, 611, 228 P. 845 (1924).[5]

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[5] This, of course, is exactly what the Complaint alleges: that the defendant board members, out of various forms of self-interest, systematically and/or deliberately failed to convey to the homeowners (in meeting minutes, at homeowner meetings, and presumably in resale certificates) the facts which would have disclosed the existence of plaintiffs' claims including: (1) that the "licensed inspector", Glenn, was an unlicensed developer crony; (2) that Glenn was instructed by developer executives not to do an intrusive investigation; (3) that serious defects were specifically known to developer defendants during construction but not disclosed during their service on the board; (4) that

Defendants' reliance on *Deep Water Brewing* is misplaced because it restates the rule that the presumption of imputed knowledge does not apply when the agent acts in its own interests or against the corporation's. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 269, 215 P.3d 990 (2009).

Defendants' citation to *Interlake Porsche & Audi*, 45 Wn.App. 502, 517-518, is similarly unpersuasive. The showing in *Interlake Porsche* was that one board member had knowledge of wrongdoing by another, such that by reasonable diligence he (on behalf of the corporation) should have discovered the alleged wrongdoing. But this is not a derivative action, so imputation of knowledge from a non-corrupt board member to the corporation as a whole is irrelevant. And here, the

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attorney/architect Harer advised the defendants that there were signs of serious problems and the warranty limitations period was approaching, and the board did not respond; (5) that building envelope expert Jobe saw signs of serious hidden defects, and the board did not respond; (6) that defendant Peters resigned out of conflict of interest over the question of potential warranty responsibility of the developer, who was also his employer; (7) that multiple similar leaks were occurring and recurring in several units; (8) that the board was not, as it claimed, working to solve issues surrounding flat deck leaks – it in fact did nothing; (9) that the homeowner board members agreed among themselves to conceal the scope of suspected defect issues in order to keep property values up and thereby facilitate their own unit sales; (10) that an investigation in 2008 was merely for purposes of "future maintenance and repairs" when in fact it was to determine the full extent of serious suspected defects in original construction; (11) that the board chose to remain deliberately ignorant of the findings of that final investigation for as long as possible, again in order to keep property values up (which could only be accomplished by concealing the truth from buyers); and (12) that the HOA's board had allowed the association's warranty rights to expire. (CP 1-30)

allegation is that **all board members participated in the cover-up until October of 2009.** (CP 22).

D. Defendants' Resignation From The Board Is Irrelevant To Accrual of the Claims By Discovery.

Defendants' argument that claims for breach of their duties accrued immediately upon their resignations from the board, regardless of discovery, relies on a less-than-candid reading of the law. *Quinn v. Connely,* 63 Wn.App. 733, 741, 821 P.2d 1256 (1992) stands for the proposition that a claim for attorney malpractice occurring at trial accrues upon verdict, by which time the injury is clearly known. *Gillespie v. Seattle First Nat'l Bank*, 70 Wn.App. 150, 158-59, 855 P.2d 680 (1993) is a rule that pertains to fiduciary duty claims against trustees of express trusts, which are subject to a unique statutory limitations rule.

The other Washington cases defendants rely on are likewise inapposite. In *Janicki Logging v. Schwabe, Williamson*, 109 Wn.App. 655, 661, 37 P.3d 309 (2001), the court adopted the continuous representation rule of tolling in cases of attorney malpractice. The case does not deal with concealment of material facts, or application of the discovery rule. If anything, *Janicki Logging* supports plaintiffs' position because, as the court explains in reference to *Quinn* and *Matson v. Weidenkopf*, 101 Wn. App. 472, 482-83, 3 P.3d 805 (2000): "**the**

determining factor in these cases has always been whether the plaintiffs had actual or constructive knowledge of enough facts to justify a holding that they had "discovered" the claim for purposes of the discovery rule." (Emphasis added.)

In *Matson*, *supra,* an attorney who failed to timely prosecute a suit compounded his misconduct by failing to advise his clients for a year and a half that the statute of limitations on their claim had run. When sued for malpractice, he raised the year and a half period in which he delayed disclosing the truth to argue that the claims against him had expired. The court rejected this attempt. "Because [the attorney] encouraged the [plaintiffs] not to act quickly on their claim [by failing to reveal the facts], the trial court did not err in applying the discovery rule" to the claim. *Matson*, 101 Wn. App. at 484. In our case, likewise, had defendants revealed what they knew about hidden defects in the project, and that they were doing nothing about them, then discovery would have occurred and the limitations periods on claims for malfeasance would have begun. Because they did not, the question becomes whether plaintiffs, under the facts as they actually appear, should have discovered the defendants' malfeasance more than three years before they filed suit.

Defendants cannot explain how their mere resignation, unaccompanied by any disclosure of facts establishing the existence of

plaintiffs' causes of action, constitutes the "actual or constructive knowledge" required to conclude that the plaintiffs discovered or should have discovered the factual basis for their claims.

Defendants' assertion that "other jurisdictions" follow their supposed "rule" that claims against directors accrue upon resignation, irrespective of discovery, is false. *Westchester Religious Institute v. Kamerman*, 262 A.D.2d 131, 691 N.Y.S.2d 502, 503 (1st Dept. 1999) states that a cause of action against a board member of a non-profit *for an accounting on an express trust* accrues on "open repudiation" of the trust relationship.[6] So what? That is not our situation.

A situation far closer to ours was presented in *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (Cal. App. 2d Dist.

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[6] In New York law, the statute of limitations for breach of fiduciary duty by a trustee of an express trust generally begins to run when the trustee renounces his role, regardless of discovery of the breach. *Craig v. Bank of N.Y.*, 169 F. Supp. 2d 202, 207 (S.D.N.Y. 2001). This "open repudiation" rule ***does not apply in cases of concealment and fraud by the trustee***. *Matter of Lyon*, 25 Misc. 3d 1204(A), 1204A (N.Y. Sup. Ct. 2009). Where breach of fiduciary duty is grounded in fraud, the discovery rule applies, even in the express trust setting. *Weisshaus v. Fagan*, 2010 U.S. Dist. LEXIS 70918 (S.D.N.Y. July 15, 2010). Not only does the law that defendants cite apply only to express trust situations, and not only is that law inapplicable in cases of fraud and concealment, but there is also no "open repudiation" of one's duty as fiduciary in merely resigning a post as director. "The law requires proof of a repudiation by the fiduciary which is clear and made known to the beneficiaries." *In re Estate of Barabash*, 31 N.Y.2d 76, 80 (N.Y. 1972). Thus for example, in California, the court explained that where a trustee wrongfully concealed her conversion of trust property, that concealment tolls the statute of limitations on breach fiduciary duty even under an express trust, until beneficiary knows or has reason to know of the conversion, and the trustee's conversion of trust property is "brought home" to beneficiary as part of the trustee's open repudiation of trust obligation. *Strasberg v. Odyssey Group*, 51 Cal. App. 4th 906, 918, 59 Cal. Rptr. 2d 474 (Cal. App. 2d Dist. 1996).

1983) where, unbeknownst to one joint venturer, his partner destroyed videotapes of a television show they had produced, without notice. Plaintiff discovered the destruction of the tapes as much as 6 years after it occurred, and filed suit. The trial court dismissed claims for breach of fiduciary duty on the basis of the limitation period, and the appellate court reversed:

> **It is well-settled that the discovery rule applies to causes of action involving the breach of a fiduciary relationship.** (E.g., *Cortelyou v. Imperial Land Co.* (1913) 166 Cal. 14, 20 [134 P. 981] -- breach of trustee's duty; *Allsopp v. Joshua Hendy Machine Works* (1907) 5 Cal.App. 228, 234 [90 P. 39], overruled on other grounds, *Jefferson v. J. E. French Co.* (1960) 54 Cal.2d 717, 720 [7 Cal.Rptr. 899, 355 P.2d 643] -- breach of agent's duty to his principal; ***San Leandro Canning Co., Inc. v. Perillo* (1931) 211 Cal. 482, 486-487 [295 P. 1026] -- breach of corporate director's duty**; *Schneider v. Union Oil Co.* (1970) 6 Cal.App.3d 987, 993 [86 Cal.Rptr. 315] -- breach of corporation's duty to stockholder; *National Automobile & Cas. Ins. Co. v. Pitchess* (1973) 35 Cal.App.3d 62, 64-65 [110 Cal.Rptr. 649] -- sheriff's breach of duty to attaching creditor; *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, supra, 6 Cal.3d 176, 190 -- breach of attorney's duty to client.) These cases articulate various rationales for holding that delayed accrual applies in such circumstances. In *Neel*, our high court noted that **postponement of the period of limitations until discovery "prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure."** (Id., at p. 189.) . . . . Thus, the date-of-discovery rule is applied to a fiduciary when strict adherence to the date of injury rule would result in unfairness to the plaintiff and would encourage wrongdoers to mislead their fiduciary to delay bringing suit. It is particularly appropriate when the defendant maintains custody and control of a plaintiff's property or interests.
>
> **[A fiduciary] relationship compels a rule of delayed**

> **accrual to avoid barring a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence.** Moreover, the wrongful act in the instant case consisted of destruction of the videotapes while they were in respondents' exclusive custody and control. Under these circumstances **respondents cannot, in fairness, expect the statute of limitations to begin running the moment the clandestine act was completed**. By failing to inform appellant of the tape erasure, respondents ran the risk the statute of limitations would not activate until sometime in the future when appellant discovered the injury. Accordingly, the discovery rule applies. . .

April Enterprises, Inc. v. KTTV, 147 Cal. App. 3d 805, 827-828, 195 Cal. Rptr. 421 (Cal. App. 2d Dist. 1983) (Footnote omitted, emphasis added).

As in *April Enterprises*, defendants are merely saying that their clandestine acts were completed when they stepped down from the board. But that does not equate to discovery of the wrong by plaintiffs, and would in effect give defendants immunity based on a breach of their duty to disclose that was never cured.

Finally, defendants fail to articulate why their supposed rule of accrual of fiduciary duty claims on resignation from a board applies to claims for the homeowner directors' breaches of their duties of ordinary care. No authority or reason is offered to explain why they are entitled to "presumed discovery" of their malfeasance upon resigning from a board.

E. Defendants' *Own* Concealment of Facts, Not Concealment by Later Board Members, Tolled The Limitations Period Until Reasonable Discovery By Plaintiffs.

Whether a plaintiff should, in the exercise of due diligence, have discovered all the elements of a claim by a particular time is ordinarily a question of fact. *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995); *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006); *Samuelson v. Community College Dist. No. 2*, 75 Wn.App. 340, 347, 877 P.2d 734 (1994). The burden of proving that all of the elements of a claim were or should have been known by a plaintiff rests with the defendant, because the statute of limitations is an affirmative defense. *Haslund v. Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976); *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000).

Instead of trying to demonstrate why reasonable minds, under the facts as alleged, could only conclude that plaintiffs should have known about their malfeasance, the developer defendants continue to play with presumptions. They argue in essence that later homeowner board members should be presumed to have discovered and revealed the facts to the plaintiffs, and if the later board members didn't do that, why then the developer defendants should get a free pass. They say that "fraudulent concealment by subsequent Board members only extends the statute of

limitations for claims against *those* Board members, not against Board member who had already resigned." (Respondent's Brief at 30).

In support, defendants again cite to *Hyde v. United States,* 225 U.S. 347, 369 (1912); *United States v. Read,* 658 F.2d 1225, 1233 (7th Cir., 1991); and a footnote in *Griffin v. McNiff*, 744 F.Supp. 1237 (S.D.N.Y. 1990). These four cases do not remotely support the propositions for which they are cited by the developer defendants, as discussed at pages 36-40 of plaintiffs' opening brief.

Under the discovery rule, the plaintiffs' claims are tolled until under the facts of the case, they should reasonably have been discovered. Here, the facts are that all board members participated in a cover-up of the material facts until October 2009. (CP 1-22). The statute was tolled by virtue of the developer defendants' *own* misrepresentations and concealment. The fact that later board members, for their own reasons, *also* lied to and misled the homeowners simply explains (in part) why the developer defendants' misconduct was not discovered earlier, but is not itself the source of the tolling as defendants suggest.

F. Plaintiffs' Negligent Misrepresentation Claims are Not Barred.

Developer defendants say the Complaint is devoid of an allegation that defendants communicated anything to plaintiffs, and that "[a]n omission alone cannot constitute negligent misrepresentation, since the

plaintiff must justifiably rely on a misrepresentation," citing *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). Defendants misunderstand the law and misconstrue the Complaint.

In *Ross,* the defendant had no legal duty to speak. But where, as here, the defendant is charged with a fiduciary duty to speak, ***justifiable reliance on an omission of material fact is presumed***, though a defendant may rebut the presumption of reliance by showing that the plaintiff's conduct would have been unaffected even if the omitted fact had been disclosed. *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 119, 86 P.3d 1175 (2004).

Further, the Complaint alleges that the developer defendants conveyed information that was misleading because it omitted material facts. The Complaint alleges (1) that developer defendants advised that Glenn was a "licensed inspector," when she was in fact their unlicensed and incompetent crony, (2) that they conspired in instructing her to do no intrusive investigation of the project (which would have revealed the serious defects immediately), (3) that they prepared board minutes that said nothing about advice of counsel and building envelope professionals to act on signs of hidden defects, (4) that they prepared board minutes that did not mention repeated similar leak complaints and did not mention the board's suspicions of a design defect, (5) that they misrepresented the true

reason for Peter's resignation in minutes and at a homeowners meeting, and (6) that they deceitfully told the board that the leak problems were maintenance-related without disclosing serious defects they knew existed from their involvement during construction. (CP 1-22).

G. Plaintiffs Fraud Claims are Not Barred.

Developer defendants never revealed that Glenn was their incompetent and unlicensed crony, and never disclosed their knowledge of hidden defective construction. Sanford never disclosed that the board had been advised by counsel to investigate and prosecute a warranty action against his company, never disclosed that repeated leaks of a similar nature were occurring, and never disclosed that his promises of inspection and repair by Lozier were intended to induce the board to miss the warranty period. Developer defendants' mere resignations from active service on the board did not end these deceptions or disclose the existence of the fraud.

Developer defendants say, without authority, that the fraud claims "belong to" the HOA. That is not true. While the HOA might choose to prosecute some fraud actions in a representative capacity under the WCA, the underlying rights still belong to the injured owners. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 812, 225 P.3d 213 (2009) (Claims asserted by HOA for breach of implied warranty under the WCA, breach

of implied warranty of habitability, breach of fiduciary duty, violation of the CPA, and breach of contract were prosecuted by HOA as representative of unit owners, but the claims "belong to the individual unit owners" and HOA has no separate standing to prosecute them.)

Developer defendants say that the fraud claims are barred by the construction statute of repose at RCW 4.16.310. But the statute of repose applies only to activities for which the defendant must be a licensed professional under section .300. Defendants did not need to be licensed to serve on the HOA board and commit fraud. Nor do the claims arise out of construction activities. Rather, they arise out of developer defendants' decisions to conceal their company's shoddy construction practices, in hopes of the warranty period expiring.

H. Plaintiffs' Civil Conspiracy Claims Are Not Barred

Sanford claims he cannot be sued for conspiring with Lozier, Huckleberry and Glenn to inveigle the HOA into not asserting the owners' warranty rights because the conspiracy claim "belongs to the Association." (Respondents' Brief at 44). Not so. Under *Satomi*, both the claim for breach of fiduciary duty and the warranty rights that were lost "belong to" the owners, not the HOA. 167 Wn.2d at 812.

Sanford says that he cannot have conspired with his principal (meaning Huckleberry or Lozier) to breach his fiduciary duty to the unit

owners as an HOA board member. But Sanford's "principals," for purposes of the conspiracy claim, were the plaintiff homeowners to whom he owed a fiduciary duty. He conspired with third parties, namely Glenn, Lozier and Huckleberry, to deprive his principals of their valuable warranty rights. He did so by making false promises of inspection and repair by Glenn and Lozier, and misrepresenting the condition of the project, in order to benefit Lozier, Huckleberry, and himself personally. (CP 8-11, 16, 28-29).

Sanford's status as an officer of Lozier while serving on the HOA board serves to highlight his conflict of interest, and to show the reason for his participation in the conspiracy. That conflict of interest does not provide him a source of immunity from a claim of civil conspiracy.

Sanford's reliance on *Everest Investors 8 v. Whitehall Real Estate LP XI*, 100 Cal.App.4th1102, 123 Cal.Rptr. 2d 297 (2002) is of no help to him. There, the court held that

> The question on this appeal is whether a nonfiduciary defendant [here, Glenn or Lozier] can be liable for conspiring with a fiduciary defendant [here, Sanford] to breach the fiduciary's duty to the plaintiff. The answer, in our view, is sometimes yes and sometimes no. When the nonfiduciary [Glenn or Lozier] is an agent or employee of the fiduciary [Sanford], the nonfiduciary is entitled to the benefit of the "agent's immunity rule" (and thus not liable on a conspiracy theory) unless the nonfiduciary was acting for its own benefit. If the nonfiduciary [Lozier] is neither an employee nor agent of the fiduciary, it is not liable to the

> plaintiff on a conspiracy theory because a nonfiduciary is legally incapable of committing the tort underlying the claim of conspiracy (breach of fiduciary duty).

100 Cal. App. 4th at 1102.

Everest Investors suggests that non-fiduciaries Glenn, Lozier and Huckleberry cannot be liable for conspiring with Sanford to breach his fiduciary duties, *unless they were acting as Sanford's agent and receiving some personal benefit for doing so.* But so what? The liability of Glenn, Lozier and Huckleberry are not at issue, and in any event the Complaint can reasonably be read to assert that they stood to benefit by participating in the conspiracy with Sanford, thus taking them out of the "agent's immunity" rule.

There is nothing in Sanford's status as officer of Lozier that confers on him any immunity for his conspiracy with Glenn and Lozier to breach his fiduciary duty to HOA owners, defraud the owners, and to deprive plaintiffs of their warranty rights.

I. Defendants' Consumer Protection Act Arguments Fail.

Defendants' arguments as to why the plaintiffs' Consumer Protection Act claim should be time barred are all unworthy of serious consideration. Specifically: (1) Defendants' claim that they committed no deceptive acts after they resigned is irrelevant because CPA claims are subject to the discovery rule. *Mayer v. Sto Indus. Inc.*, 123 Wn. App. 443,

463, 98 P.3d 116 (2004), *affirmed in part, reversed in part on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006). (2) While failure to comply with industry standards of construction is not a deceptive act, the defendants' alleged *failure to disclose* grossly defective construction, coordination of sham inspections, and inducing the board to ignore the advice of counsel by promises of repair that were not carried out *are* deceptive acts. (3) The construction statute of repose only applies to claims arising out of work for which a person must be a licensed professional under RCW 4.16.300; a board member needs no license. More, the CPA claims do not arise out of "construction" activities.[7] (4) The developer defendants acted deceptively and unfairly for the benefit of Lozier and Huckleberry in their trade or business, in order to insulate them from statutory warranty responsibility for erecting shoddy construction. (CP 6-11). Thus the allegations state a claim for unfair practices in "trade

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[7] Defendants also assert that the construction statute of repose applies to claims for negligent inspection of buildings that have been completed and occupied for years. They reach this conclusion because RCW 4.16.300 applies to "supervision or observation of construction"; however, an inspection to evaluate the quality of completed buildings is not "supervision or observation of construction." The "supervision ...of construction" plainly refers to monitoring a *process*, not evaluating the quality or condition of a completed project. If the legislature had meant "inspection of completed buildings" it could easily have said as much.

Defendants then claim, mistakenly, that inspectors are included as "construction professionals" under RCW 64.50.010, a wholly unrelated statute. But again RCW 64.50.010 deals with professionals involved in the process of construction. This is clear because the statute refers to "inspection, construction, or observation of the construction of any improvement to real property," all of which plainly refers to monitoring a *process*.

Accordingly, the construction statute of repose has no application to negligent inspection of completed buildings (as the trial court specifically ruled in this case.)

or commerce" because the wrongs were intended to aid the defendants' business interests at the expense of plaintiffs.

J. Defendants Owed a Duty to Foreseeable Future Owners.

Defendants decline to analyze whether a board member's duty of care is owed to predictable future purchasers of condominium units under Washington common law principles. They contend that the matter is governed instead by the WCA. (Respondents' Brief at 46.)

Defendants note that under the WCA, "the board of directors shall act in all instances for the association"; the "association" is defined as "all the unit owners"; and "owners" is in turn defined as a person "who owns a unit." Therefore, defendants say, when a board acts it is only acting for the benefit of current owners. This tortured construction leads to absurd results whereby a board could with impunity disregard reserve funding, long term maintenance, and disclosures to potential buyers.

The provision that the Board shall act in all instances for the association defines neither the duty of the directors nor the duty's scope. It merely describes how a condominium association acts – to wit, through its board of directors. The fact that membership in a condominium association is defined to include unit owners does not answer the question of whether a director's fiduciary duty of care extends to future "owners" who would be predictably injured by the director's breach.

Defendants cannot cite a single relevant case or statute for their proposition that their duties as directors were owed exclusively to current owners during their tenure. California has expressly considered whether the fiduciary duty of a condominium director extends to future members of the association, and concluded quite logically that it does. In *Raven's Cove Townhomes, Inc.* v. *Knuppe Development Co.*, 114 Cal.App.3d 783, 171 Cal.Rptr. 334 (1981), for example, "the court found that **the developer/directors breached their fiduciary duty to the future owners** of the units by failing to fund a reserve account which would have helped pay for the needed repairs," acting out of a serious conflict of interest. *Troy v. Village Green Condominium Project,* 149 Cal. App. 3d 135 (Cal. App. 2d Dist. 1983) (Emphasis added). This makes perfect sense. A director's duty includes providing for the upkeep and maintenance of a real asset that will predictably pass into new hands.[8]

The HOA board on which defendants served was charged with the long term maintenance of buildings in which units would predictably be sold. It is only happenstance that plaintiffs are in some instances not the original owners of the units; yet based on that mere happenstance,

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[8] See also *Iverson v. Solsbery*, 641 P.2d 314 (Colo. Ct. App. 1982) ("[A]n owner of real property owes a duty to future owners not to construct or remodel in such a way that the property is in direct violation of the applicable building code" and "a breach of that duty which results in damage to the violator's successors in interest will give rise to a cause of action.")

defendant would unjustly force them to bear the consequences of defendants' wrongs, now that they have come to light. Had defendants timely made the disclosures they were obliged to make, a warranty claim would have been asserted, or the plaintiffs would not have purchased, and the issue of injury to future owners would not have arisen at all.

K. Plaintiffs' Claims for Negligent Inspection Are Not Barred.

The Complaint alleges that Sanford volunteered Lozier to make inspections of the project (CP 15), that the offer was accepted (CP 16), and that Lozier's inspections breached its duty of care because Lozier failed to evaluate the constructed conditions at the project. (CP 23 and 24).

The claim is not about Lozier's construction in the first instance, but about incompetent and/or misleading inspections done by Lozier, Huckleberry, and their crony Glenn, such that warranty rights were lost.

Lozier's obligation to inspect in a non-negligent manner arose not from the contracts of unit sales, but was an independent duty arising from Sanford's assurances on its behalf to the HOA's Board that it would inspect the buildings, report on what it found, and fix the leaks.

RCW 4.16.310 plainly does not apply to inspection of *completed* and *occupied* buildings.

Lozier's reliance on the former economic loss rule is, as already articulated at pages 46-48 of plaintiff's opening brief, misplaced.

Plaintiffs did not buy from Lozier, have no contract with it, and in no way participated in the original construction process so as to allocate risk of defective construction on the basis of contract.

This is a tort claim, pure and simple, arising out of Lozier negligently performing an inspection service it undertook to provide for the benefit of the project owners.

APPELLANT / CROSS RESPONDENT'S BRIEF

A. Decisional Standards

Under RCW 4.84.185, the trial court may enter written findings that a claim is "frivolous and advanced without reasonable cause" and thereafter award attorney fees in opposing frivolous claims. In making this determination, "The judge shall consider all evidence presented at the time of the motion to determine whether the position of the non-prevailing party was frivolous and advanced without reasonable cause."

Sanctions are appropriate if a party's Complaint lacks a factual or legal basis, and the person signing the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1258 (1992).

Awards under the statute are not proper when *any* of the claims of a party are meritorious. *In re Cooke*, 93 Wn.App. 526, 969 P.2d 127 (1999). That is, a lawsuit must be frivolous *in its entirety* before attorney

fees may be awarded under this statute. *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992).

Debatable legal issues of substantial public importance and issues of first impression are not frivolous. *Collins v. John L. Scott, Inc.*, 55 Wn.App. 481, 778 P.2d 534 (1989); *Moorman v. Walker*, 54 Wn.App. 461, 773 P.2d 887 (1989).

The standard of review is abuse of discretion, and in examining the trial court's decision whether a case, taken as a whole, is advanced without reasonable cause, the trial will be reversed only if its denial of attorney fees was untenable or manifestly unreasonable. *Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, 153 Wn.2d 657, 666-667, 105 P.3d 985 (2005).

B. Plaintiffs' Claims Have Factual Merit.

As noted in plaintiff's responsive papers below, the factual basis of the Complaint was exhaustively researched and is well-supported by potentially admissible evidence. (CP 411-437).

C. Plaintiffs Were Entitled to Rely on the Discovery Rule.

At the same time, plaintiffs' conclusion that the discovery rule applies to breach of fiduciary duty and breach of board member duty claims was based on well-established law. Generally, the discovery rule can apply to cases of breach of fiduciary duty where the nature of the

injury makes it difficult to learn of it, or its cause, or there has been fraudulent concealment of material facts. *Burns*, 135 Wn.App. at 299-300; *Matson*, 101 Wn.App. 472.

D. The Defense Theories Advanced on Their CR 12(b)(6) Motion Lack Foundation in Law.

Defendants' contention that claims for breach of fiduciary and board member duties accrue upon resignation from a board has no basis in established case law. The trial court acknowledged as much by characterizing the case law as "analogous."

Similarly, defendants' contention that fraud claims accrue on resignation of a board member, and the trial court's apparent acceptance of that contention, was without support in decisional law. In fact, the statute is expressly contrary. RCW 4.16.080(4).

Moreover, the trial court's conclusion that claims for breach of fiduciary and board member duty accrue on resignation from a board has no rational or explicable application to the question of whether the discovery rule applies to claims based on Lozier's negligent inspection, and to the defendants' CPA violations.

The question of whether later purchasers have a cause of action against past board members was not addressed by the trial court in its ruling. The modern understanding of the law of misrepresentation accords

with plaintiffs' position. See Restatement of Torts 2d §§ 531, 532, 533, & 536. Thus,

The Restatement (Second) of Torts provides:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

(Italics ours.) Restatement § 531.

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, *is made to a third person and the maker intends or has reasons to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction* or type of transaction involved.

(Italics ours.) Restatement § 533.

Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 167, 744 P.2d 1032 (1987).

In particular, as to resales, the Association through its board was required to issue resale certificates which, among other things, disclose known code violations. RCW 4.34.425. Under the Restatement (Second) of Torts, §536: "If a statute requires information to be furnished. . . for the protection of a particular class of persons, one who makes a fraudulent

misrepresentation in so doing is subject to liability to the persons for pecuniary loss suffered through their justifiable reliance upon the misrepresentation in a transaction of the kind in which the statute is intended to protect them."

The fact that two defendants served on the Board for only a short time is of little weight in the question of frivolity, given the clear evidence that they knew or at least should have known of the defective construction (which was there to be seen), that they fired their original construction superintendent halfway through the project, that they went to extraordinary lengths to place obstacles to discovery and assertion of warranty claims in the HOA's governing documents, and that they did not reveal what the defendants presumably knew while they served.

Developer defendants advanced a spate of creative arguments below on their motion for fees that were all essentially disingenuous.

Defendants contended that the action was frivolous because the HOA is pursuing a separate action for breach of contract against the declarant entity. But the HOA's action is limited to contract claims arising out of 22 decks that the declarant entity undertook to repair, while this action concerns the entire gamut of defective conditions and resulting assessments against the plaintiffs as a result of defendants' fraud,

misrepresentations, and breaches of duty. The actions are not remotely the same under the "single action rule." Under that rule,

> In deciding whether two causes of action are the same we are to consider the following four factors: (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Hayes v. City of Seattle, 131 Wn.2d 706, 713, 934 P.2d 1179 (1997). It is also not logically or legally possible for an individual (Sanford) to claim immunity from suit because a separate company (the declarant Huckleberry, which has never even answered in this matter) is being sued by another plaintiff on a wholly different cause of action.

Moreover, no decision in the narrow suit by the HOA against the declarant could possibly be *res judicata* here, as the defendants suggested, because the doctrine requires (1) a subsequent action, (2) the same cause of action, and (3) the same persons or parties. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). Not one of those prerequisites of *res judicata* are present.[9]

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[9] At most, issue preclusion (collateral estoppel) as to the cost of deck repairs at 22 decks might be applicable to bar an award of damages against Huckleberry Circle, LLC for that specific condition, if a final decision on that point is ever made in the HOA's lawsuit, which is doubtful.

Defendants' contention below that the plaintiffs' claims for breach of fiduciary duties "belong to" the HOA, and that this suit therefore should have been brought as a derivative action under CR 23.1, has now morphed into a claim that owners may never maintain any suit, whether derivative or not – ***even though an Association's representational standing for unit owners is not exclusive under the WCA***. As noted in the plaintiffs' Reply Brief, the defense construction of the WNCA and WBCA runs afoul of the plain and superseding language of the WCA, would unconstitutionally impede plaintiffs' access to the courts, and would if applied result in a violation of plaintiffs' constitutional rights to equal protection under the law.

DATED this 3rd day of July, 2013.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC

By: _____

Leonard Flanagan, WSBA 20966
Justin Sudweeks, WSBA 28755
Daniel S. Houser, WSBA 32327
Attorneys for the Association

CERTIFICATE OF SERVICE

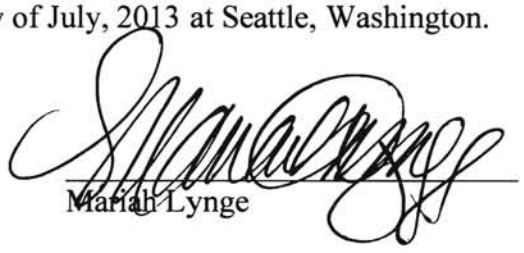
This is to certify that on this date I did cause to be served true and correct copies of the foregoing to be delivered to the persons listed below by the method(s) as indicated:

Attorneys for Brett Backues and Jane Doe Backues; Shana Holley; Patricia Hovda and William Pedersen; Alexander W. Philip and Natalia T. Philip; Joseph Cusimano and Vanessa Cusimano; Richard Peter; Sanford, James M. and Jane Doe Sansburn, Lozier Homes Corporation, and Paul and Muriel Burckhard Jerret E Sale Deborah L Carstens BULLIVANT HOUSER BAILEY PC 1700 Seventh Avenue, Suite 1810 Seattle, WA 98101-1397	**X** via US Mail, first class prepaid __ via Hand Delivery __ via Facsimile __ via legal messenger __ via E-Mail: Jerret.Sale@Bullivant.com; Deb.carstens@bullivant.com
(Co-Counsel) Attorneys for Defendants Gary R. and Jane Doe Sanford, James M. and Jane Doe Sansburn, Lozier Homes Corporation, and Paul and Muriel Burckhard Brian W. Esler Miller Nash, LLP 601 Union St, Suite 4400 Seattle, WA 98101	**X** via US Mail, first class prepaid __ via Hand Delivery __ via Facsimile __ via legal messenger __ via E-Mail: brian.esler@millernash.com; Gill.Fadaie@millernash.com
Attorneys for Construction Consultants of Washington, LLC; Diane and John Doe Glenn Andrew H. Salter LYBECK MURPHY, LLP 7900 SE 28th Street, Fifth Floor Mercer Island, WA 98040	**X** via US Mail, first class prepaid __ via Hand Delivery __ via Facsimile __ via legal messenger __ via E-Mail: ahs@lybeckmurphy.com

Attorneys for Huckleberry Circle, LLC M. Colleen Barrett 2101 Fourth Avenue, Suite 700 LEWIS BRISBOIS BISGAARD & SMITH, LLP Seattle, WA 98121	X via US Mail, first class prepaid __ via Hand Delivery __ via Facsimile __ via legal messenger __ via E-Mail: cbarrett@lbbslaw.com

I certify under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 3rd day of July, 2013 at Seattle, Washington.



Mariah Lynge

APPENDIX A

STATE of WASHINGTON

SECRETARY of STATE

I, RALPH MUNRO, Secretary of State of the State of Washington and custodian of its seal, hereby issue this

CERTIFICATE OF INCORPORATION

to

HUCKLEBERRY CIRCLE CONDOMINIUM
OWNERS ASSOCIATION

a Washington Non Profit corporation. Articles of Incorporation were filed for record in this office on the date indicated below.

UBI Number: 602 049 675

Date: June 29, 2000

Given under my hand and the Seal of the State of Washington at Olympia, the State Capital

Ralph Munro, Secretary of State

2-929037-6

JUN 2 7 2000

ARTICLES OF INCORPORATION
OF
HUCKLEBERRY CIRCLE CONDOMINIUM OWNERS ASSOCIATION

The undersigned, for the purpose of forming a corporation under the nonprofit laws of the State of Washington, RCW 24.03, and as required by the Washington Condominium Act, RCW 64.34 ("Act"), hereby adopts the following Articles of Incorporation.

Article 1
NAME

The name of the corporation is Huckleberry Circle Condominium Owners Association, hereinafter called the "Association."

Article 2
REGISTERED OFFICE AND AGENT

The name of the initial Registered Agent of the Association is James M. Sansburn. The street address of the Registered Office, which is also the address of the Registered Agent, is 1203 114th Avenue SE, Bellevue WA. 98004

Article 3
PURPOSE AND POWERS OF THE ASSOCIATION

This Association does not contemplate pecuniary gain or profit to the members thereof, and the specific purposes for which it is formed are to provide for maintenance, preservation and management of the Condominium created by the recording of that certain Declaration of Covenants, Conditions and Restrictions ("Declaration") recorded with the County in which the property is located, and to promote the health, safety and welfare of the owners of Units within said Condominium and any additions thereto as may be brought within the jurisdiction of this Association, and for this purpose to exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in the Act as amended from time to time, and the Declaration, and as the same may be amended from time to time as therein provided, said Declaration being incorporated herein as if set forth at length; and any and all powers, rights and privileges which a corporation organized under the Non-Profit Corporation Law of the State of Washington by law may now or hereafter have or exercise.

Article 4
MEMBERSHIP AND VOTING

Provisions for the qualification and voting rights of members of the Association are as set forth in the Declaration and the Bylaws of the Association, as the same may be amended from time to time.

Article 5
BOARD OF DIRECTORS

The affairs of the Association shall initially be governed by a Board composed of at least one (1) but not more than three (3) members as determined by Declarant. Commencing with the first Association meeting at which the Unit Owners are to elect the entire Board pursuant to the terms of Article 10 of the Declaration (other than a meeting held when Declarant still owned all of the units), and unless the Bylaws are amended at that meeting, the Board shall be composed of three (3) Members, a majority of whom must be Owners of Units in the Condominium. The address and name(s) of the person(s) who shall initially serve in the capacity of directors until the selection of their successors is: 1203 114th Avenue SE, Bellevue WA; James M. Sansburn; Paul F. Burckhard; Gary R. Sanford.

Article 6
LIABILITY

Provisions limiting the liability of Board members and other persons participating in the management of the Association, and providing for indemnification of such persons by the Association, are as set forth in the Declaration, as the same may be amended from time to time, and shall apply to any initial Board elected by Declarant as well as to any Board elected by Unit Owners other than Declarant.

Article 7
DISSOLUTION

The Association may be dissolved by removal of the Property from the provisions of the Act, by the procedures outlined in RCW 64.34.268, as amended, and in the Declaration, as amended. In the event of such dissolution, then, unless members of the Association having at least 80% of the total votes in the Association elect to sell the assets of the Association as prescribed in the Act, the assets of the Association shall be owned by all members of the Association as tenants in common according to their percentages of undivided interest in common areas and facilities, as set forth in the Declaration, as amended.

Article 8
DURATION

The corporation shall exist perpetually.

Article 9
INCORPORATOR

The name and address of the incorporator is James M. Sansburn, 1203 114th Avenue SE, Bellevue WA.

The undersigned incorporator has signed these Articles of Incorporation as duplicate signed originals dated as of July 25, 1999, under penalty of perjury.

James M. Sansburn, Incorporator

CONSENT TO APPOINTMENT AS REGISTERED AGENT OF HUCKLEBERRY CIRCLE CONDOMINIUM OWNERS ASSOCIATION

James M. Sansburn hereby consents to serve as Registered Agent, in the State of Washington, for the above-named Association. The undersigned understands that as agent for the Association, it will be his or her responsibility to receive Service of Process in the name of the Association; to forward all mail to the Association; and to immediately notify the Office of the Secretary of State in the event of resignation by the undersigned, or of any change in the Registered Office address of the Association.

DATED as of October 10, 1999

James M. Sansburn

Address of Registered Agent: 1203 114th Avenue SE, Bellevue WA