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Supreme Court No. _____
Court of Appeals No. 56265-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

SATOMI, LLC,

Petitioner,

v.

SATOMI OWNERS ASSOCIATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR REVIEW
(filed by the *Amicus* below, Master Builders Association of King and
Snohomish Counties)

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9 U.S.C. § 2	2, 8
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I. IDENTITY OF PARTY FILING THIS BRIEF

This brief is filed by the Master Builders Association of King and Snohomish Counties. It was an *amicus* party in the Court of Appeals proceeding below because its over 4,100 members have a substantial interest in the issue presented by this case – namely, the enforceability of arbitration clauses in condominium contracts.¹

II. THE COURT OF APPEALS' PUBLISHED DECISION

The Petition For Review in this case seeks review of the Court of Appeals' decision in *Satomi Owners Association v. Satomi LLC*, -- Wn.App. --, 156 P.3d 460 (2007), no. 56265-7-I, which was filed on June 11, 2007. A copy of the Court of Appeals' majority opinion and dissenting opinion is attached as Appendix Exhibit A. No motion for reconsideration has been filed.

¹ As explained in its Court of Appeals filings below, the *amicus* Master Builders Association of King and Snohomish Counties was founded in 1909 to address issues affecting the housing industry. It is now the largest such home builders association in the United States, consisting of more than 4,100 professional home builders, architects, remodelers, suppliers, manufacturers, and sales and marketing professionals. As a voice for the home building industry in this region, the Master Builders Association works closely with government to develop legislation so that quality homes may be built at reasonable costs while maintaining the environment and quality of life in the Puget Sound region. The Master Builders Association is dedicated to making homes affordable for the residents of King and Snohomish counties, and in carrying out that mission on behalf of its over 4,100 members, it takes an active role in all facets of residential construction. See *Opposition To Respondent's Motion To Terminate Review By [Proposed] Amicus Master Builders Association Of King And Snohomish Counties* (filed January 19, 2007), courtesy copy attached at Appendix Exhibit C; see also www.mba-ks.com.

III. THE ISSUE PRESENTED FOR REVIEW

The residential construction and sales industry is a key component of our nation's economy, with condominium construction and sales playing a major role. Virtually all condominium contracts in our State include a binding arbitration clause. The majority opinion below held that the Washington State Condominium Act renders those arbitration clauses unenforceable with respect to that Act's statutory warranties – even though the Federal Arbitration Act requires arbitration clauses to be enforced. That published (and thus citable as precedent) majority opinion presents a single, straightforward legal question for review:

Is the anti-arbitration provision of the Washington State Condominium Act (RCW 64.34.100(2)) preempted by the Federal Arbitration Act (9 U.S.C. §2)?

Since this legal question affects the validity of a State statutory provision, this Petition is also being served upon the Washington Attorney General.

IV. STATEMENT OF THE CASE

A. **Prevalence of Condominium Construction & Arbitration Clauses.**

Condominium construction and sales are a significant part of the residential construction and sales industry in our country. For example, over the past three decades condominiums have represented about one fifth of new multifamily construction nationwide,² and during the past

² *Office of Policy Development and Research, U.S. Department of Housing and Urban Development, U.S. Housing Market Conditions, Condos and Co-Ops: Unique Forms of Housing, (Summer 2003), online at http://www.huduser.org/periodicals/ushmc/summer03/summary_2.html.*

12 months have represented over 40% of such construction in Washington.³

The sales contracts for virtually all condominiums sold in our State include a binding arbitration clause.⁴

B. The Condominium Construction & Arbitration Clause in this Particular Case.

This case arises out of the residential condominium project built and sold by Satomi LLC. Over 70% of the materials it used in that construction were manufactured outside Washington and shipped in interstate commerce.⁵

The Satomi condominium sales contracts included a Warranty Addendum that warranted to the owners that the condominium units and common elements were “free from defective materials and have been constructed in accordance with applicable law, in accordance with sound engineering and construction standards, and in a workmanlike manner.”⁶ That warranty comes from the statutory warranty under the Washington Condominium Act.

³ *Indeed, approximately 40% of the new multifamily-unit construction in Washington in the twelve months ending March 2007 was for condominiums in the Seattle area alone. Office of Policy Development and Research, U.S. Department of Housing and Urban Development, U.S. Housing Market Conditions, Regional Activity (Spring 2007), p.48, online at http://www.huduser.org/periodicals/ushmc/spring07/ushmc_q107.html.*

⁴ *Declaration Of Leslie Williams In Support Of Opposition To Respondent's Motion To Terminate Review By [Proposed] Amicus Master Builders Association Of King And Snohomish Counties (filed January 19, 2007), ¶¶ 2-3 (courtesy copy attached at Appendix Exhibit C).*

⁵ *CP 135-137.*

⁶ *CP 167.*

This Warranty Addendum in the Satomi condominium sales contracts also included a typical binding arbitration clause, which provided for binding AAA arbitration as to any claim “under this Warranty or any other claimed warranty relating to the Unit or Common Elements.”⁷

C. The Trial Court Proceeding.

This case is the condominium owners’ suit against the developer for breaches of the above warranties – namely, the express warranty under the condominium contract, the statutory warranty under the Washington Condominium Act, and the overlapping implied habitability warranty under Washington common law.⁸ This suit seeks damages caused by alleged defects in construction and the previously-noted construction materials.⁹ For example, the Complaint alleges defects in “siding and trim”, and it is undisputed that the siding came from California.¹⁰

The defendant developer demanded binding arbitration pursuant to the condominium contracts’ arbitration clause. The trial court quashed that demand, holding the anti-arbitration provision of the Washington State Condominium Act (RCW 64.34.100(2)) rendered that arbitration clause unenforceable.

⁷ CP 170.

⁸ CP 3-9.

⁹ CP 3-9.

¹⁰ CP 4, 101.

D. The Court of Appeals' 2-1 Decision.

The developer filed a timely appeal as of right.¹¹ The parties then fully briefed and argued the legal issue presented by that appeal – namely, the enforceability of arbitration clauses in a condominium contract.

Before the Court of Appeals issued its decision, however, the parties reached a financial settlement. The Association moved to terminate review, and the defendant developer opposed that termination. Given the importance of this arbitration clause issue to the condominium market and to pending condominium defect cases in various stages of litigation in our State, the Master Builders Association filed *amicus* briefing in opposition to such termination, noting that an unequivocal and clear resolution of the arbitration clause enforceability issue in this case is of significant and continuing public importance to both the home-buying and home-building public of our State.¹²

The Court of Appeals declined to terminate review, and issued the decision at issue. -- Wn.App. --, 156 P.3d 460 (2007), copy attached as Appendix Exhibit A.

¹¹ A trial court order quashing arbitration is appealable on an interlocutory basis as of right under RAP 2.2(a)(3). E.g., Stein v. Geonerco, 105 Wn.App. 41, 44, 17 P.3d 1266 (2001).

¹² See *Opposition To Respondent's Motion To Terminate Review By [Proposed] Amicus Master Builders Association Of King And Snohomish Counties (filed January 19, 2007); Declaration Of Leslie Williams In Support Of Opposition To Respondent's Motion To Terminate Review By [Proposed] Amicus Master Builders Association Of King And Snohomish Counties (filed January 19, 2007); Response To Respondent's Supplemental Motion To Terminate Review By [Proposed] Amicus Master Builders Association Of King And Snohomish Counties (filed February 8, 2007)*. Courtesy copies are attached at Appendix Exhibit C.

The dissenting opinion concluded that binding arbitration clauses in condominium contracts are enforceable because the Washington State Condominium Act's anti-arbitration provision is preempted by the Federal Arbitration Act. 156 P.3d at 469.

The majority opinion acknowledged that the Federal Arbitration Act guarantees the freedom of contract to enter binding arbitration clauses, and that it preempts contrary State law pursuant to the supremacy clause of the federal Constitution.¹³ It also acknowledged that the United States Supreme Court has recently reaffirmed that the Federal Arbitration Act extends to "the broadest permissible exercise of Congress' Commerce Clause Power," which "may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity would represent a general practice ... subject to federal control."¹⁴

The majority opinion held, however, that the Washington State Condominium Act (rather than the Federal Arbitration Act) governed the enforceability of a condominium contract's arbitration clause because condominium sales transactions are not "economic activity that in the aggregate would represent a general practice subject to federal control." 156 P.3d at 467. The majority opinion then imposed a duplicative, two-track dispute resolution procedure for condominium claims in our

¹³ 156 P.3d at 464; see also *U.S. Const., Art. VI, cl. 2 (the supremacy clause)*.

¹⁴ 156 P.3d at 465.

State, holding that a condominium contract's arbitration clause is not enforceable with respect to implied statutory warranties under the State Condominium Act, but is enforceable with respect to express warranties under the contract and the overlapping implied habitability warranty under Washington common law. 156 P.3d at 467.

V. ARGUMENT

A. Summary of Argument.

The published Court of Appeals decision in this case merits review under RAP 13.4(b) for three separate and independent reasons:

First, this Court should accept review under RAP 13.4(b)(3) because this appeal involves a significant question of law under the Constitution of the United States. The Court of Appeals' majority erroneously held that the Washington State Condominium Act's anti-arbitration provision survives federal preemption because the interstate commerce clause of the federal Constitution (Article I, §8, cl. 3) does not allow federal regulation of residential condominium construction defect disputes.

Second, this Court should accept review under RAP 13.4(b)(1) because the majority opinion published by the Court of Appeals in this case is in conflict with this Court's case law holding that the Federal Arbitration Act's enforcement of contractual arbitration clauses "clearly

preempts any state law to the contrary,” and that Washington courts must enforce the corresponding arbitrability law created by the federal courts.¹⁵

Third, this Court should accept review under RAP 13.4(b)(4) because this appeal involves an issue of substantial public interest that should be determined by the Supreme Court rather than by a divided Court of Appeals. The majority opinion published by the Court of Appeals in this case nullifies the right of home-buying and home-building members of our State’s citizenry under the Federal Arbitration Act to enter into (and enforce) binding arbitration clauses for a single, speedy, efficient, and private dispute resolution procedure for condominium-related claims, and creates in its place a duplicative, two-track process for the Washington public that consists of court litigation for the statutory warranty claims and binding arbitration for the overlapping common law and contract warranty claims.

B. This Court Should Accept Review Under RAP 13.4(b)(3) Because, As A Matter Of Fundamental Constitutional Law, The State Condominium Act’s Anti-Arbitration Provision Is Preempted By The Federal Arbitration Act.

The Federal Arbitration Act makes a written arbitration provision “in any...contract evidencing a transaction involving commerce...valid, irrevocable, and enforceable.” 9 U.S.C. §2.

The United States Supreme Court has repeatedly held that the Federal Arbitration Act’s “involving commerce” term triggers “the

¹⁵ *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 341, 103 P.3d 773 (2004).

broadest permissible exercise of Congress' Commerce Clause power", and has therefore repeatedly rejected the notion that the Federal Arbitration Act applies only when the transaction in a case is multi-state or when that transaction by itself had a substantial effect on interstate commerce. *Citizens Bank v. Alafabco*, 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265, 273-74, 123 S.Ct. 2037, 156 L.Ed.2d 46 (1995); see also U.S. Const., Art. I, §8, cl. 3 (the interstate commerce clause).

For example, the governing Alabama statute in *Allied-Bruce* prohibited arbitration – but the defendant bug exterminator invoked the Federal Arbitration Act to demand arbitration pursuant to its home exterminating contract with the plaintiff homeowner. The State court refused to compel arbitration because “the connection between the termite contract and interstate commerce was too slight” for the Federal Arbitration Act to apply. 513 U.S. at 269. Noting that the large defendant exterminator used materials from outside of the State, however, the U.S. Supreme Court reversed – reiterating that the Federal Arbitration Act extends to the full limits of the federal Constitution's interstate commerce clause, and that it therefore applied to the plaintiff homeowner's termite contract because it “involved interstate commerce.” 513 U.S. at 282.

The Alabama bank in *Citizens Bank* similarly sought to compel arbitration of its loan dispute with an Alabama construction company. 539 U.S. at 53. The State courts refused because none of the parties' loan contracts were part of interstate transactions or inextricably intertwined

with out-of-State projects. 539 U.S. at 56. The U.S. Supreme Court reversed – holding that the Alabama courts’ narrow inquiry was “misguided”, and that the constitutionally correct inquiry is instead whether commercial loan transactions are part of an “economic activity [that] would represent ... a general practice [that] bear[s] on interstate commerce in a substantial way.” 539 U.S. at 56-57 (internal quotation marks omitted). The U.S. Supreme Court held that the loan dispute was therefore within the scope of the interstate commerce clause (and thus the Federal Arbitration Act) because (1) commercial lending, even on a purely local basis, affects interstate commerce in the aggregate; (2) the security for the loan included goods that had moved in interstate commerce; and (3) the construction company did some business out of State. 539 U.S. at 57-58.

As the cases cited in that *Citizens Bank* decision illustrate, the Supreme Court’s above holdings on the Federal Arbitration Act’s broad preemptive scope are squarely in line with its Constitutional jurisprudence subjecting local commercial activity to federal regulation under the interstate commerce and supremacy clauses of the United States Constitution:

- *Katzenbach* held that the federal Civil Rights Act applies to a local neighborhood barbecue restaurant because discriminatory practices affect the amount of raw goods which a restaurant buys that travel in interstate commerce.¹⁶

¹⁶ *Katzenbach v. McClung*, 379 U.S. 294, 300, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964).

- *Mandeville Island Farms* similarly held that the federal Antitrust Act applies to price-fixing in a local beet market.¹⁷
- *Wickard* held that federal law may prevent a farmer from growing wheat for his own (local) consumption.¹⁸

Citizens Bank, 539 U.S. at 57-58 (citing above cases).

The federal Courts of Appeal similarly recognize the supremacy of federal law in even “local” commercial activity. For example, an apartment building owner who directs construction on his own building is subject to federal occupational safety regulations because of the aggregate effect of local construction on our nation’s interstate commerce, as well as because some materials used in the specific project at issue had traveled in interstate commerce. *Usery v. Lacy*, 628 F.2d 1226, 1229 & n.2 (9th Cir. 1980).

In light of this broad reach of the federal Constitution’s interstate commerce and supremacy clauses, State appellate courts across the country hold that the Federal Arbitration Act applies to disputes arising from home construction. For example, *Shepard v. Edward Mackay Ents., Inc.*, 148 Cal.App.4th 1092, 1095-96, 56 Cal.Rptr.3d 326 (2007), was a home owner’s suit against the developer for breach of implied warranties and related claims based on alleged construction defects. Based on a State statutory provision similar to the anti-arbitration provision of the

¹⁷ *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed. 1328 (1948).

¹⁸ *Wickard v. Filburn*, 317 U.S. 111, 129, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

Washington Condominium Act provision here, the trial court denied the defendant developer's request to enforce the parties' arbitration agreement. The California appellate court reversed. It held that even though neither party was from another State, used interstate media in advertising, or used contractors from another State, the use of building materials from out of State placed the transaction within the scope of the interstate commerce clause – and thus the Federal Arbitration Act preempted the California statute's anti-arbitration provision. 148 Cal.App.4th at 1100-1101. The decisions of other States' courts agree.¹⁹

The above case law confirms that the Court of Appeals' majority opinion in this cases is Constitutionally incorrect. That majority opinion concludes that the Washington statute's anti-arbitration provision survives federal preemption because of the "local" features of the underlying transaction – a conclusion the U.S. Supreme Court squarely rejected in cases such as the previously-noted *Katzenbach* and *Mandeville Island*

¹⁹ E.g., *McKay Building v. Juliano*, 949 So.2d 882, 886 (Ala. 2006) (Federal Arbitration Act applies where the only evidence of interstate activity relating to the home kitchen remodeling contract at issue was that some of the materials used for that remodel were from out of State); *Wise v. Tidal Constr. Co.*, 583 S.E.2d 466, 469 (Ga. App. 2003) (Federal Arbitration Act applies to home construction warranty because most building materials pass in interstate commerce); *Elizabeth Homes, L.L.C. v. Gantt*, 882 So.2d 313, 316-17 (Ala. 2003) (Federal Arbitration Act applies to in-State home construction contract between State residents); *Lost Creek Mun. Util. Dist. v. Travis Indus. Painter, Inc.*, 827 S.W.2d 103, 105 (Tex. App. 1992) (Federal Arbitration Act applies to contract to paint reservoir because paint was manufactured out of State and surety was located out of State).

Farms cases. The Court of Appeals' majority opinion opines that this was merely a "private dispute", and was accordingly "[u]nlike *Citizens Bank* and *Allied-Bruce*, where the very subject matter of the contracts involved interstate commerce." 156 P.3d at 468. But that description cannot be reconciled with the facts of those two cases – namely, loans by a local bank to a construction company for local construction, and an individual home owner's termite extermination contract.

In short, the interstate commerce clause (and hence the Federal Arbitration Act) applies to transactions in areas of commerce, such as condominium development and sales, that rely on materials that move in interstate commerce. And as noted earlier, over 70% of the materials used in the condominium project at issue here were from out of State. The Federal Arbitration Act accordingly requires the binding arbitration clause in this case's condominium contract – and all other condominium contracts like it – to be enforced. The Washington Condominium Act's anti-arbitration provision to the contrary is invalid as a matter of Constitutional law. This Court should accept review under RAP 13.4(b)(3) because the majority opinion published by the Court of Appeals violates this fundamental principle of law under the United States Constitution.

C. This Court Should Accept Review Under RAP 13.4(b)(1) Because The Majority Opinion Published By The Court Of Appeals Conflicts With This Court's Case Law Holding That The Federal Arbitration Act Preempts State Law.

The Court of Appeals' majority opinion also contradicts this Court's precedent.

This Court has held that the Federal Arbitration Act embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary", and that the Federal Arbitration Act "clearly preempts" any contrary State laws. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 341, 343-44, 103 P.3d 773 (2004).

This Court therefore held in *Adler* that the Federal Arbitration Act preempts a Washington statute reserving the right to a judicial forum for employment discrimination claims.²⁰ This Court similarly held in *Garmo* that the Federal Arbitration Act preempts judicial resolution of Washington State consumer protection and securities claims.²¹ And this Court similarly struck down in *Allison* the Washington statute requiring a judicial forum for breach of franchise agreement claims.²²

The Washington statutory provision at issue here similarly purports to reserve a sphere for certain claims to be immune from binding arbitration.²³ This sort of "state legislative attempt[] to undercut the

²⁰ *Adler*, 153 Wn.2d at 344.

²¹ *Garmo v. Dean, Witter, Reynolds*, 101 Wn.2d 585, 590 & n.2, 681 P.2d 253 (1984).

²² *Allison v. Medicab Intern.*, 92 Wn.2d 199, 203-04, 597 P.2d 380 (1979).

²³ When this case was filed, RCW 64.34.100(2) made condominium warranties enforceable solely by judicial proceeding. That statute was

enforceability of arbitration agreements” is precisely what the Federal Arbitration Act was intended to prevent.²⁴ Congress enacted the Federal Arbitration Act in order to overcome “the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.”²⁵ The majority opinion in this case, however, falls prey to that very anti-arbitration hostility. This Court should accept review under RAP 13.4(b)(1) because the majority opinion published by the Court of Appeals contradicts this Court’s prior rulings on the broad preemptive reach of the Federal Arbitration Act.

D. This Court Should Accept Review Under RAP 13.4(b)(4) Because The Enforceability Of Condominium Contract Arbitration Clauses Is An Issue Of Substantial Public Interest That Should Be Determined By This Supreme Court Instead Of By A Divided Court Of Appeals Decision.

Binding arbitration has many advantages over court litigation – for it is usually cheaper and faster than litigation, its procedures are simpler and more flexible, and it is less disruptive of ongoing relationships. *Allied-Bruce*, 513 U.S. at 280. And as noted earlier, nearly all condominium sales contracts entered into by the home-buying and home-building public in our State include arbitration provisions similar to the one at issue here.

subsequently amended to allow the option of non-binding arbitration as well, but under this statute and the Court of Appeals’ majority opinion, parties to those disputes still cannot enforce binding arbitration provisions. RCW 64.34.100(2).

²⁴ *Southland v. Keating*, 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

²⁵ *Southland*, 465 U.S. at 14.

The enforceability of those arbitration clauses is significant because condominium construction and sales represent a large and growing portion of our State's economy. For example, 7,828 condominium units were sold in Washington in just the first six months of this year, with an average list price of \$260,000 – which calculates to over \$2 billion of business.²⁶

Under the Court of Appeals' majority opinion in this case, arbitration clauses in this significant and growing area of commerce can compel binding arbitration for only a subset of condominium claims. That majority opinion creates a duplicative two-track dispute resolution procedure under which arbitration clauses are not enforceable with respect to implied statutory warranties under the State Condominium Act, but are enforceable with respect to the parallel express warranties under the contract and overlapping implied warranty of habitability under Washington common law. This two-track process defeats the efficiency that is a primary purpose of binding arbitration provisions in the first place.

In short, the home-buying and home-building public's interest in whether an inefficient two-track system should be imposed in lieu of enforcing arbitration clauses (and enforcing the federal Constitution and Federal Arbitration Act) in this large and growing area of commerce is

²⁶ *June 2007 Statistical Report of the Northwest Multiple Listing Service (a centralized real estate listing service for Washington State) at 35 (courtesy copy attached at Appendix Exhibit D).*

real and substantial. This Court should accept review under RAP 13.4(b)(4) because this question of broad public significance should be determined by our State's Supreme Court instead of by a divided Court of Appeals decision.

E. The Propriety Of This Court's Reviewing (And Correcting) A Published Decision By The Court Of Appeals Is Not Nullified By The Original Parties' Reaching A Financial Settlement.

As noted earlier, the Petitioner reached a financial settlement after this case was fully briefed and argued to the Court of Appeals. The same reasons that supported the Court of Appeals proceeding to issue a published decision on that fully submitted briefing warrant this Court's now reviewing that briefing to determine whether the majority opinion or the dissenting opinion correctly states the law.

Such review is especially appropriate in a case such as this that applies a State statute likely to be faced again by the trial courts of our State. For example, the *In Re Marriage of Horner* case concerned the issue of a trial court's failure to enter specific findings or articulate in its oral opinion certain child relocation matters in the context of a parenting plan. 151 Wn.2d 884, 891, 93 P.3d 124 (2004). Although the proposed parenting plan was voluntarily revoked, this Court determined that review was nonetheless appropriate – noting that that case's issue was of a public nature because it concerned the interpretation of a statute, that the lower court's incorrect application of that statute “demonstrates that our guidance is necessary”, and that the issues surrounding the application of

that statute were likely to recur “given the frequency of dissolution, joint custody and relocation in today’s society.” 151 Wn.2d at 892-93.²⁷

Review is similarly appropriate here. The straightforward legal issue presented in this case is of a public nature because it concerns the validity of a State statute’s anti-arbitration provision. As the dissenting opinion’s explanation confirms, the majority opinion’s incorrectly upholding that anti-arbitration provision demonstrates that Supreme Court guidance is necessary. And the issues surrounding the application of that anti-arbitration provision in the Washington Condominium Act are likely to recur given the frequency of condominium disputes in today’s society and the fact that nearly all condominium contracts in our State contain a binding arbitration clause. Indeed, as noted in the Court of Appeals briefing, other cases challenging those arbitration clauses are already active. To delay until one of those other cases proceeds far enough to eventually reach this Court would be an unnecessary waste of time and resources given that this case was already thoroughly briefed and submitted on appeal before the financial settlement was reached.

²⁷ See also, e.g., *Mendez v. Palm Harbor Homes*, 111 Wn.App. 446, 45 P.3d 594 (2002) (even though technically moot, appellate court should review the enforceability of an arbitration provision in a mobile home contract because it involved “significant public policy issues in need of clarification with respect to arbitrability of statutory claims under [Washington’s Dealers & Manufacturers Act]”, and because there is a “strong public policy in Washington State favoring arbitration of disputes”); *King County v. Boeing*, 18 Wn.App. 595, 606, 570 P.2d 713 (1977) (moot issue of arbitrability of lease agreement is a continuing issue worthy of review).

In short, the enforceability of arbitration clauses in condominium contracts remains a significant and pressing issue to the home-buying and home-building public in our State. The Court of Appeals' failure to recognize the enforceability of those arbitration clauses under the Federal Arbitration Act was a significant error of broad public import in our State. No individual settlement by any individual party can change that fact or nullify the propriety of this Court's reviewing (and correcting) the Court of Appeals' erroneous published decision pursuant to RAP 13.4(b).

VI. CONCLUSION

This Court should accept review of the Court of Appeals' published decision for three separate and independent reasons.

This Court should accept review under RAP 13.4(b)(3), because the Court of Appeals' majority opinion is Constitutionally incorrect. The federal Constitution's interstate commerce and supremacy clauses do allow federal regulation of residential condominium construction defect disputes.

This Court should also accept review under RAP 13.4(b)(1), because the majority opinion published by the Court of Appeals conflicts with this Court's case law holding that the Federal Arbitration Act preempts anti-arbitration provisions in State law.

And this Court should also accept review under RAP 13.4(b)(4), because the enforceability of arbitration clauses in condominium contracts is an issue of substantial public interest that should be determined by our State's Supreme Court rather than by a divided Court of Appeals.

RESPECTFULLY SUBMITTED this 11th day of July, 2007.

FOSTER PEPPER PLLC

A handwritten signature in black ink, appearing to read 'T. Ahearne', is written over a horizontal line. The signature is stylized and somewhat obscured by the line it crosses.

Thomas F. Ahearne, WSBA No. 14844
Attorney for *Amici* below, Master Builders
Association of King and Snohomish Counties

80480-0

Supreme Court No. _____
Court of Appeals No. 56265-7-1

SUPREME COURT OF THE STATE OF WASHINGTON

SATOMI, LLC,

Petitioner,

v.

SATOMI OWNER ASSOCIATION,

Respondent.

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APPENDIX

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Original

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EXHIBIT A

Westlaw.

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Satomi Owners Ass'n v. Satomi, LLC
Wash.App. Div. 1, 2007.

Court of Appeals of Washington, Division 1.
SATOMI OWNERS ASSOCIATION, a
Washington nonprofit corporation, Respondent,
v.
SATOMI, LLC, a Washington limited liability
company, Appellant.
No. 56265-7-I.

June 11, 2007.

Background: Condominium owners' association brought action against construction company, alleging breach of contractual warranties, breach of implied and express warranties under the Washington Condominium Act, breach of implied warranty of habitability, and violations of the Consumer Protection Act. Construction company demanded arbitration of claims. The Superior Court, King County, Bruce W. Hilyer, J., quashed the arbitration demand. Construction company appealed.

Holdings: The Court of Appeals, Ellington, J., held that:

(1) contractual and common law warranty claims were subject to arbitration, and

(2) statutory warranty claims under the Washington Condominium Act were not subject to arbitration under the Federal Arbitration Act.

Affirmed in part, reversed in part, and remanded.

Agid, J., filed a dissenting opinion.

West Headnotes

[1] Alternative Dispute Resolution 25T ↪141

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk141 k. Persons Affected or Bound.

Most Cited Cases

Purchase and sale agreements for condominium units expressly required the original unit owners to bind later purchasers to the terms of the warranty addendum, and thus, all owners were bound by the arbitration agreement contained in the addendum.

[2] Condominium 89A ↪17

89A Condominium

89Ak17 k. Actions. Most Cited Cases

If a condominium association merely represents its owner/members, its standing is derivative, and it is subject to any defenses and limitations that may be asserted against them and is without a separate right to recover; its claim is only as good as that of its constituent members.

[3] Contracts 95 ↪205.35(2)

95 Contracts

95II Construction and Operation

95II(C) Subject-Matter

95k205 Warranties

95k205.35 Sale of Dwellings;

Habitability

95k205.35(2) k. New Buildings;

Sales by Builders and Commercial Activity. Most Cited Cases

The implied warranty of habitability runs from the builder-vendor to the original purchaser.

[4] Antitrust and Trade Regulation 29T ↪290

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

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29TIII(E) Enforcement and Remedies

29TIII(E)1 In General

29Tk287 Persons Entitled to Sue or Seek Remedy

29Tk290 k. Private Entities or Individuals. Most Cited Cases
Private rights of action under the Consumer Protection Act belong only to the individual allegedly deceived in a consumer transaction. West's RCWA 19.86.090.

[5] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk141 k. Persons Affected or Bound. Most Cited Cases

Condominium 89A 17

89A Condominium

89Ak17 k. Actions. Most Cited Cases

Condominium unit owners' association brought action against construction company in a representative capacity on behalf of unit owners, and thus, if the claims were subject to arbitration in accordance with arbitration agreement that individual owners entered into, then the association was required to arbitrate its claims against company.

[6] Alternative Dispute Resolution 25T 113

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk113 k. Arbitration Favored; Public Policy. Most Cited Cases

Alternative Dispute Resolution 25T 139

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk136 Construction

25Tk139 k. Construction in Favor of Arbitration. Most Cited Cases
Washington has a strong policy favoring arbitration of disputes, and any doubts about the scope of

arbitrable issues are resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

[7] Alternative Dispute Resolution 25T 114

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases
The Federal Arbitration Act's (FAA) basic purpose is to overcome courts' unwillingness to enforce arbitration agreements. 9 U.S.C.A. § 2.

[8] Commerce 83 5

83 Commerce

83I Power to Regulate in General

83k2 Constitutional Grant of Power to Congress

83k5 k. Commerce Among the States. Most Cited Cases

Commerce 83 7(2)

83 Commerce

83I Power to Regulate in General

83k2 Constitutional Grant of Power to Congress

83k7 Internal Commerce of States

83k7(2) k. Activities Affecting Interstate Commerce. Most Cited Cases

Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control; only the general practice subject to federal control need have a substantial effect on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[9] Alternative Dispute Resolution 25T 119

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk118 Matters Which May Be Subject

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to Arbitration Under Law

25Tk119 k. In General. Most Cited Cases

Contractual and common law warranties are subject to arbitration.

[10] Alternative Dispute Resolution 25T ⇨122

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk118 Matters Which May Be Subject to Arbitration Under Law

25Tk122 k. Property Ownership and Rights. Most Cited Cases

Condominium 89A ⇨17

89A Condominium

89Ak17 k. Actions. Most Cited Cases

The right to a judicial forum for resolution of Washington Condominium Act warranty disputes cannot be waived. RCW 64.34.100(2).

[11] Alternative Dispute Resolution 25T ⇨114

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases

Commerce 83 ⇨80.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

Purchase and sale transaction of condominium units did not involve interstate commerce for purposes of the Federal Arbitration Act (FAA), and thus, condominium unit owners' association's statutory warranty claims under the Washington Condominium Act were not subject to arbitration, even though the condominium project used materials from out of state, where the transaction represented a garden variety Washington real estate deal, involving a Washington company and

Washington residents, the sale of property was entirely governed by state law, the warranties in question arose entirely from state law, and the transactions had none of the earmarks of an economic activity that in the aggregate represented a general practice subject to federal control. 9 U.S.C.A. § 2; West's RCWA 64.34.443; 64.34.445.

[12] Alternative Dispute Resolution 25T ⇨114

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases

Commerce 83 ⇨80.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

Where the issue is federal regulation of the business itself, for example, enforcement of the rights of employees to nondiscriminatory and healthy workplaces, the transaction involves the internal operation of the business, and business' use of materials shipped in interstate commerce is enough to characterize that business as affecting commerce for purposes of the Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

[13] Condominium 89A ⇨4

89A Condominium

89Ak4 k. Sales by Developer. Most Cited Cases

Warranty under the Washington Condominium Act that the condominium be free from defective materials and constructed in accordance with applicable state law amounts to a guarantee that the builder has examined the materials used and ensures they are of sound quality and suitable for the use to which they are put, on site, in Washington state. RCW 64.34.445.

Stellman Keehnel, Rogelio Omar Riojas, DLA Piper U.S. LLP, Anthony Todaro, Peterson Young

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ELLINGTON, J.

¶ 1 The chief question here is whether the Washington statute providing for judicial enforcement of statutory condominium warranties must yield to the federal arbitration statute, solely because some construction materials came from outside Washington state. We hold that under the circumstances here, the commerce clause does not reach so far, and the state statute controls.

BACKGROUND

¶ 2 Satomi, LLC (the Company) developed the Satomi Condominium, an 85-unit complex located in Bellevue. In 2005, the Satomi Owners Association (the Association) filed suit against the Company alleging numerous construction defects and other deficiencies throughout the complex, and claiming breach of contractual warranties, breach of implied and express warranties under the Washington Condominium Act, chapter 64.34 RCW (WCA), breach of the implied warranty of habitability, and violations of the Consumer Protection Act, chapter 19.86 RCW (CPA).

¶ 3 The Company denied the allegations and demanded arbitration based on the arbitration clause in the warranty addendum, which was an attachment to the original purchase and sale agreements. The Company asserted that most of the building materials used to construct the

condominium were manufactured and shipped in interstate commerce, and the Association's claims were therefore subject to arbitration under the Federal Arbitration Act, 9 U.S.C.A. §§ 1-6(FAA).

*463 ¶ 4 The Association moved to quash the demand for arbitration, contending it is not bound by the agreement and that in any event, the agreement violates the judicial enforcement provision of the WCA, which is not preempted by the FAA because the contract does not involve interstate commerce.

¶ 5 The trial court quashed the demand for arbitration motion on three grounds:

(1) The Company did not prove that all of the individual owners agreed to arbitrate.

(2) Even if the individual owners agreed to arbitrate, the Association "is a legally separate corporate entity which is neither a 'successor or transferee' to [the Association]. Thus, the arbitration clause is simply inapplicable."^{FN1}

FN1. Clerk's Papers at 144.

(3) The FAA does not apply because *Marina Cove Condominium Owners Ass'n v. Isabella Estates*^{FN2} held that condominium sales primarily impact Washington residents.

FN2. 109 Wash.App. 230, 34 P.3d 870 (2001).

¶ 6 The Company appeals. Our review is de novo.^{FN3}

FN3. *Walters v. A.A.A. Waterproofing*, 120 Wash.App. 354, 357, 85 P.3d 389 (2004).

DISCUSSION

¶ 7 The Company argues the court erred, and that all unit owners agreed to arbitrate their claims, the Association is bound to arbitrate these issues in the

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same manner as the unit owners, and the FAA applies and mandates arbitration. We agree with the first two arguments, but not the third.

I. Applicability of Arbitration Agreement to Association

[1] ¶ 8 The Association acknowledges that all original owners signed the warranty addendum, but contends that later purchasers are not bound by it. This argument has no merit. The purchase and sale agreement expressly required original unit owners to bind later purchasers to the terms of the addendum. All owners are therefore bound by the agreement to arbitrate.

¶ 9 The Association next contends the agreement has no application here because the Association is a separate legal entity.

[2] ¶ 10 The WCA requires condominiums to have a homeowners' association whose membership consists solely of the unit owners, all of whom must belong.^{FN4} Among other powers, a homeowners' association may "[i]nstitute, 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."^{FN5} An association may act on its own behalf when the proceedings occur "in connection with its own functions and activities."^{FN6} But if an association merely represents its owner/members, its standing is derivative, and it is subject to any defenses and limitations that may be asserted against them and is without a separate right to recover.^{FN7} In other words, "[i]ts claim ... is only as good as that of its constituent members."^{FN8}

FN4. RCW 64.34.300.

FN5. RCW 64.34.304(1)(d).

FN6. 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 12.5, at 40 (2d ed.2004) (citing RCWA 64.34.304(1)(d)).

FN7. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 413-14, 745 P.2d 1284 (1987) (under previous version of WCA, homeowners' association was not separate juristic entity, and claims were brought in representative capacity for individual homeowners whose rights were at issue); *see also Klay v. Pacificare Health Sys., Inc.*, 389 F.3d 1191, 1202-03 (11th Cir.2004) ("associations suing in a representative capacity are bound by the same limitations and obligations as their members"); *Meadowbrook Condo. Ass'n v. S. Burlington Realty Corp.*, 152 Vt. 16, 565 A.2d 238, 241 (1989).

FN8. *Meadowbrook Condo. Ass'n*, 565 A.2d at 241 (quoting trial court).

[3][4] ¶ 11 Such is the case here. The claims asserted belong to the individual unit owners. In addition to violations of the CPA, the Association alleges breaches of warranties*464 under the WCA, the purchase contract, and the implied warranty of habitability, resulting in damage to property owned by its members.^{FN9} But the WCA's express and implied warranties run to the unit purchasers, not the Association,^{FN10} the implied warranty of habitability runs from the builder-vendor to the original purchaser,^{FN11} the contract warranties do not run to the Association, and private rights of action under the CPA belong only to the individual allegedly deceived in a consumer transaction.^{FN12} Given the nature of the claims here, the Association necessarily brought this action in a representative capacity, not on its own behalf as a separate juristic entity.

FN9. Common elements are all of the portions of a condominium other than the units. RCW 64.34.020(6). Limited common elements are portions of the common elements reserved for the exclusive use of one or more but fewer than all of the units. RCW 64.34.020(22). The individual unit owners own the common elements and the limited common

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elements. See RCW 64.34.204(2), (4), .224(1), .228(1).

FN10. See RCW 64.34.443(1) ("Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows..."); RCW 64.34.445(6) ("Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.").

FN11. *Stuart*, 109 Wash.2d at 416, 745 P.2d 1284.

FN12. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 792-93, 719 P.2d 531 (1986) (only a person injured in his business or property may bring a private action under the CPA).

[5] ¶ 12 The Association stands in the shoes of the individual unit owners. The trial court erred when it concluded the arbitration clause does not apply to the Association. If the claims are subject to arbitration, the Association must arbitrate.

¶ 13 The remaining question is whether statutory warranty claims are subject to arbitration because the Federal Arbitration Act preempts state law.

II. Applicability of The Federal Arbitration Act

¶ 14 The Association contends that we decided this issue in *Marina Cove*, wherein we held that condominium purchase and sale agreements between Washington companies and Washington residents do not implicate the FAA. FN13 But as explained below, we must revisit this issue here.

FN13. *Marina Cove*, 109 Wash.App. at 244, 34 P.3d 870.

[6] ¶ 15 Washington has a strong policy favoring arbitration of disputes, FN14 and any doubts about the scope of arbitrable issues are resolved in favor of arbitration "whether the problem at hand is the construction of the contract language itself or an

allegation of waiver, delay, or a like defense to arbitrability.'" FN15

FN14. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash.2d 293, 301 n. 2, 103 P.3d 753 (2004).

FN15. *Kamaya Co., Ltd. v. American Prop. Consultants, Ltd.*, 91 Wash.App. 703, 714, 959 P.2d 1140 (1998) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

[7] ¶ 16 Congress also favors arbitration of disputes, and to that end enacted the Federal Arbitration Act. The FAA's basic purpose is to overcome courts' unwillingness to enforce arbitration agreements. FN16 Where it applies, the FAA preempts state law, prohibiting application of state statutes that invalidate arbitration agreements. FN17 The FAA provides as follows:

FN16. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

FN17. *Id.* at 272, 115 S.Ct. 834.

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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. FN18

FN18. 9 U.S.C.A. § 2 (emphasis added).

*465 ¶ 17 The United States Supreme Court most recently considered the scope of the FAA in *Citizens Bank v. Alafabco, Inc.*, FN19 which

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involved debt restructuring arrangements between an Alabama bank and an Alabama construction company. In concluding the transactions were governed by the FAA, the Court described the phrase “involving commerce” as the “functional equivalent of the more familiar term ‘affecting commerce’-words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.”^{FN20}

FN19. 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003).

FN20. *Id.* at 56, 123 S.Ct. 2037.

[8] ¶ 18 The Court emphasized that the Commerce Clause power “ ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ *if in the aggregate the economic activity in question would represent ‘a general practice ... subject to federal control.’* ”^{FN21} Only the general practice subject to federal control need have a substantial effect on interstate commerce.^{FN22}

FN21. *Id.* at 56-57, 123 S.Ct. 2037 (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed. 1328 (1948)) (emphasis added).

FN22. *Id.* at 57, 123 S.Ct. 2037.

¶ 19 The *Citizens Bank* debt restructuring agreements, although executed in Alabama by Alabama residents, easily met the “involving commerce” test for at least three reasons: (1) Alafabco used funds from loans that were the subject of the debt restructuring agreements to finance large projects throughout the southeastern United States; (2) the restructured debt was secured in part by Alafabco’s inventory of goods assembled from out-of-state parts and raw materials; and (3) the general practice represented by the transactions at issue, commercial lending, has a broad impact on the national economy and is clearly within Congress’ regulatory power.^{FN23}

FN23. *Id.* at 57-58, 123 S.Ct. 2037.

¶ 20 *Citizens Bank* confirmed the broad reach of the FAA announced in 1995 in *Allied-Bruce Terminix Cos. v. Dobson*.^{FN24} *Allied-Bruce* involved a homeowner’s lawsuit against the companies with whom he contracted for termite protection. An Alabama statute disallowed predispute arbitration agreements. *Allied-Bruce* and *Terminix* operated in multiple states and “the termite-treating and house-repairing material used by *Allied-Bruce* in its (allegedly inadequate) efforts to carry out the terms of the [contract], came from outside Alabama.”^{FN25} The United States Supreme Court held that the transaction evidenced by the contract need only “in fact” involve interstate commerce,^{FN26} which the parties did not dispute. Thus, the FAA applied and preempted the state statute.^{FN27}

FN24. 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

FN25. *Id.* at 282, 115 S.Ct. 834.

FN26. *Id.* at 279-80, 115 S.Ct. 834.

FN27. *Id.*

¶ 21 In another 1995 decision, *United States v. Lopez*,^{FN28} the Court described the test of Congress’ power to regulate as whether the activity sought to be regulated “substantially affects” interstate commerce. This language in *Lopez* resulted in a number of decisions, including ours in *Marina Cove*, which came between *Lopez* and *Allied-Bruce* in 1995, and *Citizens Bank* in 2003.

FN28. 514 U.S. 549, 559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

¶ 22 In *Marina Cove*, we adopted an interpretation of *Lopez* enunciated in *L & L Kempwood Associates, L.P. v. Omega Builders*,^{FN29} in which the Texas Court of Appeals held that a contract for repairs to a Texas apartment complex, entered into by an out-of-state property owner and a Texas

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contractor, was “not a transaction substantially affecting*466 interstate commerce.”^{FN30} We applied the same rationale in *Marina Cove* to hold the FAA did not preempt the WCA:

FN29. 972 S.W.2d 819, 822 (Tex.App.Corporis Christi 1998). The Texas Supreme Court reversed, using the same rationale later applied in *Citizens Bank, L & L Kempwood Assocs., L.P. v. Omega Builders, Inc. (In re L & L Kempwood Assocs., L.P.)*, 9 S.W.3d 125 (Tex.1999).

FN30. *Marina Cove*, 109 Wash.App. at 244, 34 P.3d 870.

Similarly here, Marina Cove Condominiums were constructed, marketed, and sold solely within the state of Washington. 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.^[FN31]

FN31. *Id.*

¶ 23 But in *Citizens Bank*, the Court rejected the “substantially affecting” interpretation as an “improperly cramped view” of the Commerce Clause power,^{FN32} and held that a significant effect on interstate commerce must be shown only as to the general practice subject to federal control.^{FN33} Given our application of the discredited “substantially affecting interstate commerce” test, *Marina Cove's* continuing validity is questionable.

FN32. *Citizens Bank*, 539 U.S. at 58, 123 S.Ct. 2037.

FN33. *Id.* at 57, 123 S.Ct. 2037.

¶ 24 We know of only one other case similar to this one, *Basura v. U.S. Home Corporation*.^{FN34} A California statute permits court actions in construction defect cases, even where the parties have agreed to arbitrate. The California Court of Appeals held the FAA preempted the statute and required arbitration, on grounds that where a subdivision developer utilized out-of-state architects and contractors, engaged in nationwide marketing and advertising using interstate media, and used building materials and equipment manufactured and shipped from multiple states, the purchase agreement involved interstate commerce.^{FN35}

FN34. 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328 (2002).

FN35. *Id.* at 1214, 120 Cal.Rptr.2d 328.

¶ 25 With these authorities in mind, we turn to the claims and facts of this case. The Association's complaint alleges a “variety of construction defects and other deficiencies in building components and/or installation”^{FN36} constituting breaches of common law, statutory, and contractual warranties. The common law warranty is the implied warranty of habitability.^{FN37} The statutory warranties are set forth in RCW 64.34.443,^{FN38} which requires condominium declarants to provide specific implied warranties, and RCW 64.34.445,^{FN39} *467 which permits declarants to make express warranties. The warranty addendum to the purchase and sale agreement^{FN40} set forth express warranties, which appear identical to those implied by the statute:

FN36. Clerk's Papers at 4.

FN37. *Brickler v. Myers Constr., Inc.*, 92 Wash.App. 269, 275, 966 P.2d 335 (1998).

FN38. RCW 64.34.443(1) specifies that the formal words “warranty” or “guarantee” are not needed to create an express warranty, which arise from any one of the

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following:

“(a) Any written affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

“(b) Any model or written description of the physical characteristics of the condominium at the time the purchase agreement is executed, including plans and specifications of or for improvements, creates an express warranty that the condominium will conform to the model or description except pursuant to RCW 64.34.410(1)(v);

“(c) Any written description of the quantity or extent of the real property comprising the condominium, including plats or surveys, creates an express warranty that the condominium will conform to the description, subject to customary tolerances; and

“(d) A written provision that a buyer may put a unit only to a specified use is an express warranty that the specified use is lawful.”

FN39. RCW 64.34.445 provides in pertinent part:

“(1) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear and damage by casualty or condemnation excepted.

“(2) 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.”

FN40. The Association's complaint alleges the creation of express warranties by public offering statement, advertising materials, advertising statements, and samples. *See Clerk's Papers* at 6. But the warranty addendum limited the warranties to those in the contract. *See Clerk's Papers* at 171, 197.

1. Limited Warranty. The Unit in the Condominium identified above and the Common Elements are suitable for the ordinary uses of real estate of their type and, except as provided below, all parts of the Unit and Common Elements constructed by or for the Declarant are free from defective materials and have been constructed in accordance with applicable law, in accordance with sound engineering and construction standards, and in a workmanlike manner.^[FN41]

FN41. Clerk's Papers at 193.

¶ 26 The warranty addendum purports to require arbitration of all warranty disputes:

7. *Seller's Right to Arbitration.* At the option of the Seller, Seller may require that any claim asserted by Purchaser or by the Association *under this Warranty or any other claimed warranty* relating 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.^[FN42]

FN42. Clerk's Papers at 196 (emphasis added).

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[9][10][11] ¶ 27 Contractual and common law warranties are subject to arbitration. WCA warranties, however, are not: “[A]ny right or obligation declared by this chapter is enforceable by judicial proceeding.”^{FN43} The right to a judicial forum for resolution of WCA warranty disputes cannot be waived.^{FN44} The contract warranties are thus arbitrable to the extent they exceed the protections required by RCW 64.34.445, but the statutory right to trial applies to the statutory warranties unless the statute is preempted by the FAA. We must therefore decide whether the purchase and sale transactions involved interstate commerce for purposes of the FAA. We believe they do not, for several reasons.

FN43. RCW 64.34.100(2).

FN44. *Marina Cove*, 109 Wash.App. at 236-37, 34 P.3d 870 (RCW 64.34.100(2) creates a right to judicial enforcement of the WCA that may not be waived).

¶ 28 First, the transaction represented by the contracts here was a garden variety Washington real estate deal. It involved a Washington company and Washington residents. No national marketing occurred, no interstate media were used, no out-of-state architects or contractors were involved.

¶ 29 Second, real property law has historically been the law of each state.^{FN45} The sale of property, including the requirements for and interpretation of purchase agreements, is entirely governed by state law.

FN45. In addition to an ages-old common law, the state thoroughly regulates real estate law in areas including broker licensing, chapters 18.85-.86 RCW, real estate sale financing, chapters 61.12, .30 RCW, sale and transfer procedures, chapters 64.04-.06 RCW, taxation, Title 84 RCW, and eminent domain, Title 8 RCW.

¶ 30 Third, the warranties in question arise entirely

from state law. Unlike *Citizens Bank* and *Allied-Bruce*, where the very subject matter of the contracts involved interstate commerce, here the issues are confined to claims founded in warranties created by the Washington legislature.

¶ 31 Fourth, these transactions have none of the earmarks of an economic activity that in the aggregate would represent a general practice subject to federal control. The Company offers no authority holding that *468 local real estate transactions represent such a practice, or that warranties required by state law for state condominium projects represent such a practice, or that local regulation of real estate transactions can constitute an economic activity that in the aggregate would represent a general practice subject to federal control. The Company relies upon a single fact: that construction materials came from outside Washington state. In some cases, this is adequate for FAA preemption. Here, it is not.

[12] ¶ 32 Where the issue is federal regulation of the business itself—for example, enforcement of the rights of employees to nondiscriminatory and healthy workplaces—the “transaction” involves the internal operation of the business, and its use of materials shipped in interstate commerce is enough to characterize that business as affecting commerce for purposes of the FAA.^{FN46} In such cases, the question is the applicability of federal regulation to the conduct of the business.

FN46. See *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (Civil Rights Act); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Civil Rights Act); *Daniel v. Paul*, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969) (Civil Rights Act); *EEOC v. Ratliff*, 906 F.2d 1314 (9th Cir.1990) (Title VII); *Usery v. Lacy*, 628 F.2d 1226 (9th Cir.1980) (OSHA).

¶ 33 Where the issue is a private dispute, however, the analysis must identify the transaction involving commerce. In *Citizens Bank*, the Court reasoned

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that because the Commerce Clause gives Congress “the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce,” it followed that it also permits regulation of “substantial commercial loan transactions secured by such goods.”^{FN47} In *Basura v. U.S. Home Corp.*,^{FN48} construction materials and appliances came from out of state. In neither case, however, was the presence of interstate materials the only interstate aspect of the case.

FN47. *Citizens Bank*, 539 U.S. at 57, 123 S.Ct. 2037.

FN48. 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328 (2d Dist.2002).

[13] ¶ 34 Here, the only connection to interstate commerce is that materials from elsewhere were used in construction, and some of those were allegedly unsound or unsuitable, thereby violating the warranty required by RCW 64.34.445 that the condominium be free from defective materials and constructed in accordance with applicable state law. This warranty amounts to a guarantee that the builder has examined the materials used and ensures they are of sound quality and suitable for the use to which they are put, on site, in Washington state. The origin of the materials is irrelevant to the warranty, and the giving of the warranty is not a transaction involving commerce, because in the aggregate or otherwise, it does not represent a general practice subject to federal control. Whether the condominium declarant violated the warranty is not a dispute involving interstate commerce.

¶ 35 It has been often observed that the “affects commerce” test is easily met.^{FN49} But no court has held that the use of materials from other states is, by itself, sufficient to render a private transaction as one “involving interstate commerce.” Very few services are rendered and very few products are made using exclusively local materials. While the use of goods shipped in interstate commerce may subject a business to substantive federal regulation, a private contract that is entirely local in subject matter, substantive law, and parties does not acquire

an interstate character simply because a refrigerator or a brick was manufactured in another state. The condominium owners purchased real property, not building materials, goods or services. Whatever hold the FAA had or continues to have over the transactions preceding integration of the materials, goods and services into the real estate does not extend to the sale of the real property interest itself.

FN49. *See, e.g., Ratliff*, 906 F.2d at 1316.

¶ 36 Here, a significant right created by state law is at issue. The legislature of Washington state retains sovereignty over local real estate transactions. Despite its *469 strong policy favoring arbitration, the legislature created warranty rights in condominium purchasers and provided an exclusively judicial remedy. We do not think this legislative determination as to the appropriate forum for adjudicating legislatively created rights is preempted solely because construction materials may have crossed state lines.

¶ 37 The reach of the Commerce Clause is broad, but it is not unlimited. We hold that WCA statutory warranty claims are not arbitrable, that contract and common law claims are, and remand for further proceedings consistent with this opinion.
FN50

FN50. The parties recently advised the court that Satomi Owners Association and the Company have settled. The Association seeks to terminate review, which the Company resists. In addition, proposed amici Master Builders and Blakeley Village, LLC have filed briefs opposing termination of review. We agree with the Company that the issues here will recur and should be determined, and we hereby deny the motion to terminate review. (Judge Susan Agid took no part in the determinations required by these motions.)

APPELWICK, C.J., concur.

AGID, J. (dissenting).

¶ 38 I respectfully dissent from Part II of the

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majority opinion. Despite recognizing that the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-6, “signals[s] the broadest permissible exercise of Congress’ Commerce Clause power” (majority at 465), the strong policy of both state law and the FAA favoring arbitration (majority at 464-65), the purpose of the FAA “to overcome courts’ unwillingness to enforce arbitration agreements” (majority at 464), and the “questionable” viability of our decision in *Marina Cove Condominium Owners Ass’n v. Isabella Estates*,^{FN1} (majority at 466), the majority still tries to rescue the judicial review provision of the Washington Condominium Act (WCA)^{FN2} from federal preemption. Given the interstate nature of condominium sales and the building materials used to construct this condominium, the Warranty Addendum which contains the arbitration clause and covers those very materials evidences a transaction “involving interstate commerce” within the expensive coverage the courts have given the FAA. The FAA thus preempts the Washington Condominium Act’s (WCA) judicial resolution provision. I would reverse and allow arbitration under the Warranty Addendum.^{FN3}

FN1. 109 Wash.App. 230, 34 P.3d 870 (2001).

FN2. RCW 64.34.100(2) (right of action); .030 (non-waiver provision).

FN3. As the majority recognizes (majority at 468-69), even if the FAA did not preempt the WCA remedy here, the arbitration clause still applies to the Association’s implied warranty of habitability and Consumer Protection Act claims. It would clearly promote judicial economy to resolve these claims, which arise from identical facts, in one arbitration hearing.

¶ 39 There are two major problems with the majority’s approach. First, it relies on authority it admits is of questionable continuing validity for one of its major premises: that “[t]he right to a judicial forum for resolution of WAC warranty disputes

cannot be waived.”^{FN4} And, even if this premise is still an accurate statement of the law, the United States Supreme Court has had no difficulty striking down similar non-waiver provisions in Montana,^{FN5} Alabama,^{FN6} and California^{FN7} when they run afoul of the FAA. Second, the majority does everything it can to localize, encapsulate, and miniaturize the transaction at issue here so it can conclude that the business of building condominiums “does not acquire an interstate character simply because a refrigerator or a brick was manufactured in another state.” (Majority at 468). This characterization completely misses the point of the cases the majority so carefully outlines at pages 464-66, of its opinion. In the end, it is left relying on distinctions without differences, “facts” that do not distinguish this *470 case from the letter or the spirit of the Supreme Court’s decisions in *Allied-Bruce Terminix Cos. v. Dobson*^{FN8} and *Citizens Bank v. Alafabco, Inc.*^{FN9} I would hold that the “general practice”^{FN10} involved here is building condominiums, not executing local real estate contracts or signing warranty addenda. Interstate commerce is clearly implicated by a project on which not one brick or refrigerator but 70 percent of the building components are manufactured, ordered, and shipped from other states.

FN4. Majority at 467 (citing *Marina Cove*, 109 Wash.App. at 236-37, 34 P.3d 870).

FN5. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

FN6. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

FN7. *Basura v. U.S. Home Corp.*, 98 Cal.App.4th 1205, 1212, 120 Cal.Rptr.2d 328, review denied, 2002 Cal. Lexis 6245 (2002).

FN8. 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

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FN9. 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003).

FN10. *Id.* at 57, 123 S.Ct. 2037.

¶ 40 The FAA provides that 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.^[FN11]

FN11. 9 U.S.C.A. § 2 (emphasis added).

The party moving to compel arbitration must make a threshold showing that there is a written agreement to arbitrate and that the contract at issue involves interstate commerce.^{FN12}

FN12. *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wash.App. 354, 358, 85 P.3d 389 (2004) (citing *Maxum Found., Inc. v. Salus Corp.*, 779 F.2d 974, 978 n. 4 (4th Cir.1985)).

¶ 41 The Company argues the transactions evidenced by the Warranty Addendum involve interstate commerce because over 70 percent of the building materials used to construct the condominium complex were manufactured in and shipped from outside Washington. The Association asserts the origin of the building materials is too remote an interstate connection for the FAA to apply. It contends this court in *Marina Cove* established that condominium purchase and sale agreements between Washington companies and Washington residents do not implicate the FAA.
FN13

FN13. 109 Wash.App. 230, 34 P.3d 870.

¶ 42 The FAA's basic purpose is to overcome courts' refusals to enforce arbitration agreements.^{FN14} The FAA preempts state law, prohibiting state courts from applying state statutes that invalidate arbitration agreements.^{FN15} The U.S. Supreme Court has interpreted the phrase "involving commerce" to be the

FN14. *Allied-Bruce*, 513 U.S. at 270, 115 S.Ct. 834.

FN15. *Id.* at 272, 115 S.Ct. 834 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15-16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)).

functional equivalent of the more familiar term "affecting commerce"-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"-that is, within the flow of interstate commerce.^[FN16]

FN16. *Citizens Bank*, 539 U.S. at 56, 123 S.Ct. 2037 (internal quotations and citations omitted).

¶ 43 In *Allied-Bruce*, the Gwins entered into a termite protection contract for their home with Allied-Bruce and Terminix.^{FN17} They sold their home to the Dobsons, who discovered the house was infested with termites and, along with the Gwins, sued Allied-Bruce and Terminix in Alabama state court. Allied-Bruce and Terminix argued the contract's arbitration clause was enforceable under the FAA despite an Alabama statute which, like the one in question here, made written, predispute arbitration agreements unenforceable. The Alabama Supreme Court ruled the FAA did not apply because *471 the connection between the termite contract and interstate commerce was too

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tenuous considering the parties never “contemplated” substantial interstate activity. ^{FN18} The U.S. Supreme Court reversed.

FN17. 513 U.S. 265, 115 S.Ct. 834.

FN18. *Id.* at 269, 115 S.Ct. 834.

¶ 44 After holding that the words “involving commerce” invoked the full extent of Congress' Commerce Clause powers, the Court disapproved of the “ ‘contemplation of the parties’ ” test and held the transaction evidenced by the contract need only “in fact” involve interstate commerce.^{FN19} The parties did not contest that the transaction involved interstate commerce. Allied-Bruce and Terminix operated in multiple states and “the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the [contract], came from outside Alabama.” ^{FN20} Thus, the FAA applied. ^{FN21}

FN19. *Id.* at 279-80, 115 S.Ct. 834.

FN20. *Id.* at 282, 115 S.Ct. 834.

FN21. *Id.*

¶ 45 In *Basura v. U.S. Home Corp.*, homeowners brought suit against a developer for alleged design and construction defects, and the developer moved to compel arbitration based on the arbitration clause in the sale agreements. ^{FN22} The California Court of Appeals ruled that *United States v. Lopez*^{FN23} did not change *Allied-Bruce's* broad interpretation of the FAA's coverage. It then held that the “indicia of interstate commerce are far greater” than in *Allied-Bruce* because constructing the homes involved using building materials and equipment manufactured and shipped from states all over the country.^{FN24} The court also noted that the developer had contracted with out-of-state architects, trade contractors, and sub-contractors, and engaged in marketing and advertising throughout the country using interstate media.

FN22. 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328, *review denied*, 2002 Cal. LEXIS 6245 (2002).

FN23. 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). This is the case we erroneously relied on in *Marina Cove* to narrow the test for applying the FAA. 109 Wash.App. at 243, 34 P.3d 870.

FN24. *Basura*, 98 Cal.App.4th at 1214, 120 Cal.Rptr.2d 328.

¶ 46 In *Citizens Bank*,^{FN25} the U.S. Supreme Court reaffirmed its holding in *Allied-Bruce* and rejected the proposition that *Lopez* had narrowed that ruling. An Alabama bank had entered into debt-restructuring arrangements with an Alabama construction company, and each arrangement included an arbitration clause. The company brought suit against the bank alleging several claims, and the bank moved to compel arbitration under the FAA. The Alabama Supreme Court again held there was an insufficient nexus with interstate commerce to invoke the FAA. The U.S. Supreme Court again reversed.

FN25. 539 U.S. 52, 123 S.Ct. 2037.

¶ 47 The Court reiterated that Congress' Commerce Clause power “ ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice ... subject to federal control.’ ” ^{FN26} It held that only the general practice need have a substantial effect on interstate commerce. ^{FN27} The Court held the debt-restructuring agreements, although executed in Alabama by Alabama residents, easily passed the FAA's “involving commerce” test for at least three reasons: (1) Alafabco financed projects throughout the southeastern United States using loans that were the subject of the debt-restructuring agreements; (2) the restructured debt was secured in part by Alafabco's inventory of goods assembled from out-of-state materials; and (3) the general practice represented by the transactions at issue, commercial

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lending, had a broad impact on *472 the national economy and was clearly within Congress' regulatory power.^{FN28} The Court stated the Alabama Supreme Court's decision "adheres to an improperly cramped view of Congress' Commerce Clause power.... *Lopez* did not restrict the reach of the FAA or implicitly overrule *Allied-Bruce Terminix Cos.*-indeed, we did not discuss that case in *Lopez*." ^{FN29}

FN26. *Id.* at 56-57, 123 S.Ct. 2037 (alteration in original) (quoting *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed. 1328 (1948)).

FN27. *Id.* (citing *Maryland v. Wirtz*, 392 U.S. 183, 196-97 n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), overruled on other grounds, *Nat'l League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-38, 57 S.Ct. 615, 81 L.Ed. 893 (1937)).

FN28. *Id.* at 57-58, 123 S.Ct. 2037.

FN29. *Id.* at 58, 123 S.Ct. 2037. Notably, the Texas Supreme Court had earlier used the same reasoning, that *Lopez* did not affect *Allied-Bruce*, in granting mandamus relief and essentially overruling the Texas Court of Appeals' decision in *Kempwood Associates*, which we had relied on in *Marina Cove*. See *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125 (Tex.1999). Although the only interstate feature of that contract was that the parties lived in different states, the court ruled the contract still involved interstate commerce, so the FAA applied. *Id.* at 127.

¶ 48 If there was any question about whether the far-reaching "involving interstate commerce" test in *Allied-Bruce* remained valid, *Citizens Bank* answered that question in the affirmative. I agree with the majority that our decision in *Marina Cove* is no longer viable. And, as this case and *Basura*

highlight, this is especially true because in *Marina Cove* we did not consider whether the manufacture and movement of the building materials in interstate commerce triggers a transaction involving interstate commerce under the FAA.

¶ 49 Here, the Warranty Addendum containing the arbitration clause evidences a transaction "involving interstate commerce" within the U.S. Supreme Court's expansive interpretation of the FAA. The Addendum states in part:

The Unit in the Condominium identified above and the Common Elements are suitable for the ordinary uses of real estate of their type and, except as provided below, all parts of the Unit and Common Elements constructed by or for the Declarant *are free from defective materials* and have been constructed in accordance with applicable law, in accordance with sound engineering and construction standards, and in a workmanlike manner.^[FN30]

FN30. (Emphasis added.)

As the Association points out, the Warranty Addendum evidences an agreement between a Washington company and primarily Washington-resident purchasers about warranties on condominiums located within Washington. But the Addendum also specifically addresses the materials used to construct the condominium complex, most of which were manufactured and shipped from outside Washington. *Basura* and *Citizens Bank* give this interstate materials connection significant weight in determining whether the FAA applies. Most importantly, the general practice represented by the transactions at issue, condominium warranties and sales, has an undeniably broad impact on the national economy.^{FN31}

FN31. "[E]ven when a transaction is entered into between residents of the same state and consummated in that state, the transaction implicates the FAA when 'in the aggregate the economic activity in question' represents a 'general practice

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subject to federal control.’ ” *Legacy Wireless Servs., Inc. v. Human Capital, L.L.C.*, 314 F.Supp.2d 1045, 1052 (D.Or.2004) (quoting *Citizens Bank*, 539 U.S. at 57, 123 S.Ct. 2037). The parties disagree about whether the “general practice” represented by the transactions at issue is condominium sales or the more specific practice of warranties in condominium sales. But both transactions are integral parts of the same general practice-housing construction-which is a multibillion dollar business that obviously affects interstate commerce when the materials are manufactured and shipped from state to state.

¶ 50 That the parties to the Warranty Addendum and the location of the condominium complex are local does not resolve the question whether the transaction involves interstate commerce. While the Addendum may not have as significant an overall interstate nexus as the debt-restructuring agreements in *Citizens Bank* or the sale agreements in *Basura*, this has not been the focus of the Supreme Court's decisions in *Allied-Bruce* and *Citizens Bank*. The interstate nature of the building materials and the “general practice” of condominium construction and sales is enough to evidence a transaction “involving interstate commerce,” given the broad interpretation we must now give that phrase under the cases interpreting the FAA. In this *473 connection, it is important to note that the same out-of-state building materials which implicate interstate commerce are the focus of the Association's claims.^{FN32}

FN32. The Association's complaint alleged causes of action based on a “variety of construction defects and other deficiencies in building components and/or installation including, but not limited to, siding and trim, sealant joints, building paper, flashing, penetration wraps, concrete entry patios and walkways, parapet guardrails on walkways, columns, shear walls, windows and concrete slabs on grade.”

¶ 51 The majority characterizes this as a “private dispute” to which the FAA does not apply and the warranty as the “general practice” to which we must look under *Citizens Bank*. (Majority at 468). The first characterization begs the question and the second is an attempt to miniaturize the transactions at issue to shield them from interstate significance. All the disputes discussed in *Allied-Bruce*, *Basura* and *Citizens Bank* were “private.” Yet the courts held the FAA applied to them all because, when viewed through the lens of interstate commerce and the purpose of the FAA, all were a part of broader “aggregate economic activity,” i.e., pest control using out-of-state products, home building, and loans. Similarly, each of those transactions could have been reduced to its lowest common denominator had the courts wished to ignore the “general practice” of which it was a part. But the U.S. Supreme Court made it very clear when it repudiated the *Lopez* approach in *Citizens Bank* that we may not compartmentalize transactions to avoid the strong federal mandate in favor of arbitration.

¶ 52 Finally, the majority seeks to downplay the significance of the out-of-state materials at issue in this dispute. (Majority at 468). If anything, the connection this condominium project has to interstate commerce is far greater than in *Allied-Bruce*. If any contract would seem to be remote from the reach of the Commerce Clause, it is one between a homeowner and his local Terminex outlet to spray for bugs. Yet the Supreme Court found FAA preemption based solely on *Allied-Bruce*'s multistate operations and the fact that a single commodity-the bug spray-was manufactured in another state. Here, virtually all the materials at issue come from another State. This, too, is a contract that “in fact” involved interstate commerce.^{FN33}

FN33. *Allied-Bruce*, 513 U.S. at 279-80, 115 S.Ct. 834.

¶ 53 I agree with the majority that “a significant right created by state law is at issue.” (Majority at 468-69). But so were the similar laws invalidated in *Allied-Bruce*, *Basura*, and *Citizens Bank*. I simply do not think we can ignore the very clear

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mandate of the U.S. Supreme Court that, where a contract involves a general practice that has a substantial effect on interstate commerce, state laws limiting or prohibiting arbitration must yield to the Federal Arbitration Act.

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EXHIBIT B

U.S.C.A. Const. Art. VI cl. 2

United States Code Annotated Currentness
Constitution of the United States

^■ Annotated

^■ Article VI. Debts Validated--Supreme Law of Land--Oath of Office (Refs & Annos)

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.C.A. Const. Art. I § 8, cl. 3

United States Code Annotated Currentness

Constitution of the United States

↳ Annotated

↳ Article I. The Congress (Refs & Annos)

↳ **Section 8, Clause 3. Regulation of Commerce**

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

9 U.S.C.A. § 2

United States Code Annotated CurrentnessTitle 9. Arbitration (Refs & Annos)*Chapter 1. General Provisions➔**§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate**

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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

Derivation

Act Feb. 12, 1925, c. 213, § 2, 43 Stat. 883.

West's RCWA 64.34.100

West's Revised Code of Washington Annotated Currentness

Title 64. Real Property and Conveyances (Refs & Annos)

^ Chapter 64.34. Condominium Act (Refs & Annos)

^ Article 1. General Provisions

64.34.100. Remedies liberally administered

(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. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.

(2) Except as otherwise provided in RCW 64.55.100 through 64.55.160 or chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter.

CREDIT(S)

[2005 c 456 § 20, eff. August 1, 2005; 2004 c 201 § 2, eff. July 1, 2004; 1989 c 43 § 1-113.]

HISTORICAL AND STATUTORY NOTES

Captions not law--Effective date--2005 c 456: See RCW 64.55.900 and 64.55.901.

Laws 2004, ch. 201, § 2, in subsec. (2), inserted "Except as otherwise provided in chapter 64.--RCW (sections 101 through 2002 of this act)," preceding "any right or obligation".

2005 Legislation

Laws 2005, ch. 456, § 20 rewrote subsec. (2), which formerly read:

"(2) Except as otherwise provided in chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding."

EXHIBIT C

No. 56265-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION, a Washington
Non-Profit Corporation,

Respondent,

v.

SATOMI, LLC, a Washington Limited Liability Company,

Appellant.

**OPPOSITION TO RESPONDENT'S
MOTION TO TERMINATE REVIEW
BY [PROPOSED] *AMICUS*
MASTER BUILDERS ASSOCIATION
OF KING AND SNOHOMISH COUNTIES**

Sharon E. Cates, WSBA # 29273
Thomas F. Ahearne, WSBA #14844
Attorneys for [Proposed] *Amicus*
Master Builders Association of
King and Snohomish Counties

FOSTER PEPPER PLLC
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I. INTRODUCTION AND RELIEF REQUESTED

The organization identified below asks this Court to deny Respondent's Motion To Terminate Review, and to instead continue review in order to provide an opinion in this appeal argued on June 5, 2006.

II. STATEMENT OF INTEREST OF PROPOSED *AMICUS*

The Master Builders Association of King and Snohomish Counties ("MBA") was founded in 1909 by a group of Seattle builders to address many of the concerns and issues affecting the housing industry. Now consisting of more than 4,100 professional home builders, architects, remodelers, suppliers, manufacturers and sales and marketing professionals, the MBA is the largest local home builders association in the United States.¹

The MBA is dedicated to making homes affordable for the residents of King and Snohomish counties. In carrying out that mission, the MBA takes an active role in all facets of home construction, including working with government, the public, the media and homeowners. In addition, as a collective voice representing the home building industry in this region, the MBA works closely with government to develop legislation to regulate development so that quality homes may be built at

¹ See the MBA's website at www.mba-ks.com.

reasonable costs while maintaining the environment and quality of life in the Puget Sound region.²

The MBA has an interest in ensuring that professionals in the residential building industry, as well as Washington's homebuyers, have a clear understanding of the law under which disputes regarding the construction of condominiums will be resolved. If this Court terminates this appeal, the state of Washington law on the issue of whether arbitration provisions are or are not enforceable in condominium defect cases under the Federal Arbitration Act will remain unclear until the next case in the pipeline makes its way to this Court. Given those other cases in the pipeline, granting Respondent's motion to terminate this appeal without issuing a decision from last June 5's oral argument does nothing other than delay (for no good reason) this Court's inevitably having to issue a ruling on the issue already squarely before it, fully briefed, and fully argued in this case.

That unnecessary delay, moreover, is harmful because this Court's decision and guidance on this appeal's arbitration clause issue is critical not only to the more than 4,100 home builders, architects, remodelers, suppliers, manufacturers, and other professionals who are members of the MBA, but also to our State's trial courts and the public in general.

² *See id.*

III. PROPOSED *AMICUS*' FAMILIARITY WITH ISSUE

The MBA is an organization that represents residential builders and other professionals in the building industry. The MBA and its over 4,100 members have an interest in there being certainty on the currently unclear (and frequently recurring) issue of whether arbitration clauses in condominium sales contracts are enforceable under the Federal Arbitration Act in our State's trial courts. Therefore, the MBA has closely monitored this suit. This includes reviewing both the briefing and record before the trial court and this Court. Accordingly, the MBA is highly versed in the issues before this Court and qualified to present this opposition to Respondent's motion asking this Court to terminate and withhold its decision in this case.

IV. ISSUE ADDRESSED

The following Opposition addresses why this Court should continue review of this appeal and enter an opinion with regard to the applicability of the Federal Arbitration Act to arbitration provisions in Washington condominium sales contracts.

V. NECESSITY OF *AMICUS* BRIEFING

The Respondent (Satomi Owners Association) and Appellant (Satomi, LLC) have resolved their individual dispute, and thus Respondent now seeks to terminate review of this appeal as moot. However, even if this appeal were to be considered moot, continued review of a moot appeal is appropriate when it involves issues of a continuing and substantial public interest.

The MBA's over 4,100 members, the multitude of other professionals in Washington's residential building industry, and the home buying public as a whole, all have an important stake in the outcome of this appeal concerning whether arbitration clauses are enforceable in the residential condominium context. The MBA's opposition to Respondent's motion provides this Court with the information it needs to determine whether continued review is appropriate.

VI. OPPOSITION TO MOTION TO TERMINATE REVIEW

Respondent has sought to terminate review of this appeal on the grounds that the named parties have resolved their dispute, rendering the appeal moot. The Rules of Appellate Procedure contemplate the dismissal of purely moot appeals to conserve judicial resources, and thus provide that, "[t]he appellate court will, on motion of a party, dismiss review of a

case ... (2) if the application for review is ... moot.”³ An appeal is moot where it presents purely academic issues and it is not possible for the court to provide effective relief.⁴ However, the language of the Rules of Appellate Procedure suggest that a motion to terminate review of an appeal is appropriate only “if the motion is made before oral argument on the merits.”⁵ Here, the merits of the appeal were vigorously briefed and argued, and the dispute between the named parties remained active long after the oral argument.

More importantly, even if this appeal were to be considered moot, a recognized exception to the general rule of dismissal is that this Court retains the discretion to continue review of a moot appeal when “matters of continuing and substantial public interest are involved.”⁶

In *Sorenson*, the Washington Supreme Court adopted three essential criteria to consider in deciding whether a matter, though moot, is still reviewable due to its continuing and

³ See also RAP 18.9(c) (“The appellate court will, on motion of a party, dismiss review of a case ... (2) if the application for review is ... moot.”)

⁴ See *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390 (1994); *BBG Group, LLC v. City of Monroe*, 96 Wn. App. 517, 521, 982 P.2d 1176 (1999).

⁵ RAP 18.2 provides that a stipulated motion to dismiss an appeal may be granted only if the motion is made before oral argument. See also Washington Appellate Practice Deskbook, (3d ed. 2005), Vol. 2, §33.6 (“Although granting a motion to terminate the appeal is discretionary, the court will almost always do so at the request of the appellant, *made before oral argument*, in a civil case.”) (Emphasis added.)

⁶ *Hart v. DSHS*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

substantial public interest: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.⁷

A fourth factor also plays a role in a case such as this: “the level of genuine adverseness and the quality of the advocacy of the issues.”⁸ This fourth factor serves to limit review of otherwise moot cases to those in which a hearing on the merits has occurred.⁹ The Washington Supreme Court in *Orwick* held that, in such cases, the facts and legal issues have been fully litigated by parties with a stake in the outcome of a live controversy and that, “[a]fter a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future.”¹⁰

Cases in which Washington courts have determined that continued review of a moot appeal was appropriate support continued review in this case. In *Westerman*, our state’s Supreme Court was asked to determine whether the Spokane County District Court’s issuance of a general order providing

⁷ 80 Wn.2d at 558; see also *State v. Kuhn*, 74 Wn. App. 787, 790, 875 P.2d 1225 (1994).

⁸ *Hart*, 111 Wn.2d at 448.

⁹ *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1995) (citing *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)).

¹⁰ *Id.*; see also *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004) (holding that “[t]o deny review at this point [after genuinely adverse parties had fully litigated the merits of the case] would be a waste of judicial resources”).

that domestic violence offenders be detained in custody pending their first appearance in court raised federal and state constitutional issues.¹¹ The *Westerman* Court determined that the appeal was moot, but held that continued review was appropriate because the issues were public in nature, guidance in this area was both desirable and necessary, and the issue was likely to recur. It further noted that a hearing had been held on the merits and the briefs were of good quality.¹²

But issues need not rise to the level of the constitutional to be appropriate for continued review. Cases involving the interpretation of statutes, regulations or court rules, or other issues likely to be faced again by the trial courts have similarly been found to support continued review. For example, in *Marriage of Horner*, the issue raised was the trial court's failure to enter specific findings or articulate in its oral opinion certain child relocation issues in the context of a parenting plan.¹³ Although the proposed parenting plan was voluntarily revoked and the issue was rendered moot, our state's Supreme Court determined that continued review was appropriate. The *Marriage of Horner* Court held that the issue was of a public nature because it concerned interpretation of a statute, and that

¹¹ 125 Wn.2d at 280.

¹² *Id.* at 287.

¹³ 151 Wn.2d 884, 891, 93 P.3d 124 (2004).

the lower court's inconsistent application of that statute "demonstrates that our guidance is necessary."¹⁴ In addition, it found that the issues surrounding the interpretation of the statute were likely to recur "given the frequency of dissolution, joint custody and relocation in today's society."¹⁵

The Washington Supreme Court's decision to continue review in *Mendez v. Palm Harbor Homes* is particularly instructive here.¹⁶ That case involved the enforceability of an arbitration provision in the sale of a mobile home. Mr. Mendez, the purchaser of the mobile home, raised in a cross-appeal the threshold issue of whether his statutory claims of violations of the Dealers and Manufacturers Act and Consumer Protection Act were subject to arbitration under Chapter 7.04 RCW, or 9 U.S.C. § 10, the Federal Arbitration Act, or both.¹⁷ The *Mendez* Court held that, while the cross-appeal was technically moot, it "raised significant public policy issues in need of clarification with respect to arbitrability of statutory claims under Chapter 7.04 RCW," and therefore continued review was appropriate.¹⁸ In particular, that Court found that "the question of arbitrability of statutory claims

¹⁴ *Id.* at 892.

¹⁵ *Id.* at 892-93.

¹⁶ 111 Wn. App. 446, 45 P.3d 594 (2002).

¹⁷ *Id.* at 453.

¹⁸ *Id.* at 471.

under Chapter 7.04 RCW is a continuing public policy issue worthy of clarification.”¹⁹ The *Mendez* Court’s decision was based in part on the ““strong public policy in Washington State favoring arbitration of disputes.””²⁰

The circumstances presented here similarly support a finding that continued review is appropriate. This Court has been asked to clarify Washington law with regard to the enforceability of arbitration provisions in condominium purchase and sale documents. Here, the plaintiff homeowners’ association argued that claims arising out of the Washington Condominium Act, Chapter 64.34 RCW (the “WCA”), “are not subject to binding arbitration because the language of the [WCA] specifically provides for ‘judicial’ enforcement” of the WCA’s provisions. In response, the defendant condominium seller argued that the WCA’s judicial enforcement provision is preempted by the Federal Arbitration Act, which requires the enforcement of the arbitration provision because the plaintiff’s claims relate to the construction of the condominiums, which involved interstate commerce.²¹

¹⁹ *Id.* at 454 (citing *King County v. Boeing Co.*, 18 Wn. App. 595, 606, 570 P.2d 713 (1977) (reasoning moot issue of arbitrability of lease agreement a continuing issue worthy of review)).

²⁰ *Id.* (quoting *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997)).

²¹ See Opening Brief of Appellant Satomi, LLC at p. 8-9.

The Superior Court's determination that the Federal Arbitration Act is not applicable in this case is apparently based on a conclusion that there were insufficient ties to interstate commerce to bring the transaction within the Commerce Clause of the United States Constitution. However, there is reason to believe that this conclusion was reached based on a misreading of *Marina Cove Condo. Owners Ass'n v. Isabella Estates*²² that all condominium sales in Washington are *per se* exempt from the Federal Arbitration Act because "condo sales are a matter which primarily impacts Washington residents." United States Supreme Court case law after the *Marina Cove* decision, however, confirms that such a conclusion would constitute a significant legal error and fundamental misreading of the interstate commerce clause of the United States Constitution.²³

In short, all of the elements supporting continued review of an otherwise moot appeal are present here:

First, the issue is public in nature. Because of Washington's strong public policy in favor of arbitration, the public has a need for clarification of whether all condominium sales are *per se* exempt from the Federal Arbitration Act, or whether it will apply if sufficient ties to interstate commerce can be shown. The arbitration clause at issue in this case is a

²² 109 Wn. App. 230, 34 P.3d 870 (2001).

²³ See Reply Brief of Appellant Satomi, LLC at p. 8-13.

standard clause in Washington condominium declarations, as well as in the public offering statements of condominium purchase and sale agreements. In fact, it is estimated that nearly all condominium sales in Washington include the same or similar arbitration provision.²⁴ The over 4,100 members of the MBA and all other similarly situated residential building professionals, as well as all purchasers or potential purchasers of condominium homes, deserve – and have a need for – clarification on this issue.

Second, an authoritative determination on this issue is certainly desirable to provide future guidance to our state’s trial courts, arbitrators, and parties to condominium sales contracts. The lower court’s apparent misreading of *Marina Cove* and the federal interstate commerce case law “demonstrates that [this Court’s] guidance is necessary.”²⁵

Third, the issue is likely to recur because the same or similar arbitration provision exists in nearly all condominium purchase and sale documents entered into by members of the public in our state.²⁶

²⁴ See Declaration of Leslie Williams (“Williams Decl.”) at ¶ 3, submitted herewith.

²⁵ *In re Marriage of Horner*, 151 Wn.2d at 892.

²⁶ See Williams Decl. at ¶ 3.

Fourth, this case has been fully litigated on the merits by genuinely adverse parties through quality briefing and oral argument in this Court. Therefore, it would be a waste of judicial resources to dismiss this appeal.

VII. CONCLUSION

For the above reasons, the Proposed Amicus Master Builders Association respectfully requests that this Court continue review and issue an opinion in this important appeal.

DATED this 19th day of January, 2007.

FOSTER PEPPER PLLC



Sharon E. Cates, WSBA #29273
Thomas F. Ahearne, WSBA # 14844
Attorneys For [Proposed] *Amicus*
Master Builders Association of
King and Snohomish Counties

REVISED DECLARATION OF SERVICE

I hereby declare that on January 19, 2007, I caused to be served true and correct copies of the Opposition To Respondent's Motion To Terminate Review By [Proposed] *Amicus* Master Builders Association Of King & Snohomish Counties, and the Declaration of Leslie Williams in support by Hand Delivery to:

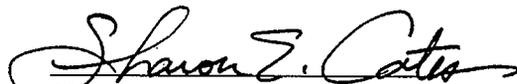
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Mr. Joel T. Salmi
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Bellevue, Washington 98004

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

Dated this 19th day of January, 2007.


Sharon E. Cates

RECEIVED

No. 56265-7-I

JAN 19 2007

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BARKER, MARTIN, P.S.

SATOMI OWNERS ASSOCIATION, a Washington
Non-Profit Corporation,

Respondent,

v.

SATOMI, LLC, a Washington Limited Liability Company,

Appellant.

**DECLARATION OF LESLIE WILLIAMS
IN SUPPORT OF OPPOSITION TO
RESPONDENT'S MOTION TO TERMINATE REVIEW
BY [PROPOSED] *AMICUS*
MASTER BUILDERS ASSOCIATION
OF KING AND SNOHOMISH COUNTIES**

Sharon E. Cates, WSBA # 29273
Thomas F. Ahearne, WSBA #14844
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Copy

LESLIE WILLIAMS declares:

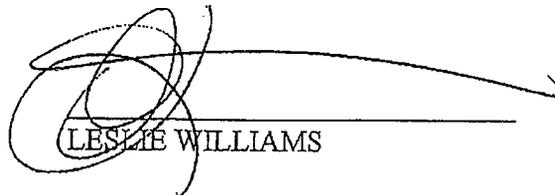
1. I am the founder and President of Williams Marketing, Inc. I am of legal age, have personal knowledge of the facts contained in this declaration, and if asked to testify regarding the same, could and would competently do so.

2. My company is the leader for the marketing and sales of condominiums and townhomes in the Puget Sound region. We are responsible for more than \$1 Billion in sales since 1994. I personally have over 25 years of professional experience in the real estate market and estimate that I have sold over 10,000 condominium homes.

3. Arbitration provisions that are the same or similar to that found in the condominium purchase and sale documents in this matter are commonplace in condominium sales in Washington. In fact, it is my considered opinion that nearly all condominium sales in this state include the same or similar arbitration provision.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED in Seattle, Washington, this 21st day of December 2006.


LESLIE WILLIAMS

No. 56265-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION, a Washington
Non-Profit Corporation,

Respondent,

v.

SATOMI, LLC, a Washington Limited Liability Company,

Appellant.

**RESPONSE TO RESPONDENT'S
SUPPLEMENTAL MOTION TO TERMINATE REVIEW
BY [PROPOSED] *AMICUS*
MASTER BUILDERS ASSOCIATION
OF KING AND SNOHOMISH COUNTIES**

Sharon E. Cates, WSBA # 29273
Thomas F. Ahearne, WSBA #14844
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I. INTRODUCTION

Proposed *amicus* Master Builders Association of King and Snohomish Counties (“MBA”) submits this response to oppose Respondent’s Supplemental Motion To Terminate Review. MBA respectfully requests that this Court consider MBA’s submission, deny Respondent’s motion, and continue review of this fully briefed and fully argued appeal in order to resolve an important and unsettled issue in Washington law.

II. MBA’S RESPONSE TO RESPONDENT’S SUPPLEMENTAL MOTION TO TERMINATE REVIEW

A. MBA’s Opposition to Respondent’s Motion To Terminate Review is Timely.

Respondent attempts to dispose of MBA’s briefing by arguing that it is untimely under RAP 10.2(f). But that rule relates to *amicus* briefs before oral argument on the merits. MBA’s submission relates to the motion Respondent filed after that oral argument on the merits had long passed. And MBA filed its submission promptly after Respondent filed its motion. Respondent’s invocation of RAP 10.2(f) to oppose MBA’s submission is misplaced.

B. MBA has Standing to Oppose Termination of Review.

The Rules of Appellate Procedure do not specifically address the circumstances here – *i.e.*, where the proposed *amici* seek to oppose a motion filed by the Respondent after oral

argument on the merits of the case has occurred. However, the Rules do not prohibit the consideration of such an *amicus* filing, and instead provide that *amicus* briefing may be considered if it “would assist the appellate court.”¹

Briefing by such an *amicus* applicant must be accompanied by a statement setting forth the following information: (1) the applicant’s interest and the group the applicant represents; (2) the applicant’s familiarity with the issues; (3) the specific issues to which the applicant’s briefing will be directed; and (4) the applicant’s reason for believing that additional argument is necessary.² MBA’s opposition to Respondent’s Motion To Terminate Review included all of this required information. And, contrary to Respondent’s implication, MBA limited its briefing solely to the issues of concern to MBA’s over 4,100 members. This Court’s Rules accordingly allow this Court to consider MBA’s briefing if it will assist the Court in coming to a decision on whether to complete review of this important appeal.

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¹ RAP 10.6(a).

² RAP 10.6(b).

C. MBA's Interest in this Case is that of the Public at Large.

Respondent attempts to discredit MBA by disparaging MBA's selection of counsel. This argument is disingenuous at best, considering that counsel for Respondent is a niche law firm in the condominium defect litigation industry that stands to profit by the continued unsettled and confused state of the law that would remain if this appeal were dismissed as Respondent requests. This point is only confirmed by the fact that Respondent counsel's client no longer has any interest in how this appeal is resolved given Respondent's settlement of the matter. Instead, it is members of the public, like the over 4,100 MBA members, who are the ones with a direct and significant interest in this Court's issuing a decision to resolve this currently unsettled issue in Washington law.

Moreover, the fact that MBA selected counsel with knowledge of the issues raised in this appeal does not support a finding that MBA does not have a sufficient or proper interest in the outcome of this appeal. As MBA explained in its prior submission, MBA represents over 4,100 professional home builders, architects, remodelers, suppliers, manufacturers, and sales and marketing professionals in the State of Washington. MBA's membership, as well as members of the condominium buying public at large, have a strong and legitimate interest in

the issuance of a decision resolving the issue of significant importance raised in this appeal. MBA's choosing knowledgeable counsel confirms – rather than negates – the seriousness and significance of that public interest. Respondent's attempt to change the subject by trying to discredit MBA in this manner should be disregarded.

D. The *Sorenson* Factors Support Continued Review.

This Court can continue review of even a moot appeal when “matters of continuing and substantial public interest are involved.”³ Respondent's attempts to distinguish this case from others in which review has continued under the *Sorenson* factors are not well taken.

1. *This case involves an issue of continuing and substantial public interest.*

Respondent attempts to minimize the substantial public interest in the outcome of this appeal by arguing that the facts are so complex that this exact case is unlikely to recur. This argument is misleading because the legal issue is simple: *i.e.*, whether arbitration clauses in condominium sales contracts are *per se* exempt from the Federal Arbitration Act. The specific factual circumstances here need not recur with precision for a decision in this case to have significant precedential value on

³ *Hart v. DSHS*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

that legal issue for the literally thousands upon thousands of condominium sellers and purchasers in our State.

The trial court's decision in this case was based on an apparent misreading of *Marina Cove Condo. Owners Ass'n v. Isabella Estates*⁴ as being a ruling that all condominium sales in Washington are *per se* exempt from the Federal Arbitration Act. United States Supreme Court case law after the *Marina Cove* decision confirms that such a conclusion would constitute a significant legal error, and a fundamental misreading of the interstate commerce clause of the United States Constitution.⁵

The trial court's erroneous decision in this case confirms the current confusion in the law concerning condominium sales contracts in our State. And if left uncorrected, that confusion (and error) will only be perpetuated. This confusion affects MBA's over 4,100 members. It affects all other similarly situated residential building professionals. And it affects all purchasers and potential purchasers of condominium homes in our State. Especially in light of the widespread use of arbitration clauses in condominium sales contracts and Washington's strong public policy in favor of arbitration, the public would indisputably benefit from this Court's resolving the question of whether all condominium sales in Washington

⁴ 109 Wn. App. 230, 34 P.3d 870 (2001).

⁵ See Reply Brief of Appellant Satomi, LLC at p. 8-13.

are *per se* exempt from the Federal Arbitration Act, or whether the Act will apply when the requisite interstate commerce connection exists.

Respondent claims that the Washington Supreme Court's decision to continue review in *Mendez v. Palm Harbor Homes*⁶ is inapposite because it merely involved the interpretation of a statute. However, the continued review of moot appeals is not limited to statutory interpretation. This Court's rules allow it to continue the review of any otherwise moot appeal in which a substantial and continuing public interest is involved.

The *Mendez* case, moreover, confirms the propriety of this Court's completing its review in this case. In *Mendez*, the Court was asked to decide whether the Federal Arbitration Act was applicable to certain statutory claims related to the sale of mobile homes in Washington.⁷ That Court held that the case "raised significant public policy issues in need of clarification with respect to arbitrability of statutory claims under Chapter 7.04 RCW."⁸ Similarly here, the ultimate issue to be decided is whether the Federal Arbitration Act is applicable to certain statutory and other claims related to the sale of condominium homes. Therefore, this case involves the same scope as

⁶ 111 Wn. App. 446, 45 P.3d 594 (2002).

⁷ *Id.* at 453.

⁸ *Id.* at 471.

Mendez. Because nearly all condominium sales contracts in Washington contain the same or similar arbitration clause to the one at issue here,⁹ the applicability of the Federal Arbitration Act to such contracts is an issue that is likely to recur at least as regularly as the statutory claims addressed in *Mendez*. Just like the appeal before the Supreme Court in *Mendez*, the appeal before this Court in this case raises significant public policy issues in need of clarification with respect to the arbitrability of certain claims. And thus, as in *Mendez*, continued review is appropriate here.

2. *Washington courts and others are entitled to guidance on this issue.*

Respondent also attempts to minimize the substantial public interest involved here by arguing that a decision in this case would provide guidance only to the courts, rather than other entities such as administrative agencies. However, an authoritative determination on this issue is desirable to provide future guidance not only to our State's trial courts, but also to arbitrators and parties to condominium sales contracts. The lower court's apparent misreading of *Marina Cove* and the federal interstate commerce case law "demonstrates that [this Court's] guidance is necessary."¹⁰

⁹ See Declaration of Leslie Williams at ¶ 3.

¹⁰ *In re Marriage of Horner*, 151 Wn.2d 884, 892, 93 P.3d 124 (2004).

Respondent apparently argues, without citation to authority, that in order to continue review of this appeal, the Court must find that lower courts already have been inconsistently applying the law on this issue. This is not the standard. As our State Supreme Court made clear in *Hart*, the Rules of Appellate Procedure allow this Court to continue and complete review if “matters of continuing and substantial public interest are involved.”¹¹ A matter is of continuing interest if it is likely to recur – which is undoubtedly the case here given the nearly universal use of such arbitration clauses in our State’s condominium market. And as the lower court’s misunderstanding and misapplication of the law in this case confirms, the current state of the law regarding these arbitration clauses is (at best) unclear and confused. Continued review and the entry of a decision to resolve this issue of widespread and significant public interest is thus both appropriate and necessary.

III. CONCLUSION

The completion of review of an otherwise moot appeal is appropriate and necessary when issues of substantial and continuing public interest are involved. MBA, like the public in general, has a significant and legitimate interest in the

¹¹ 111 Wn.2d at 447.

completion of review in this appeal because it involves just such issues. The proposed *amicus* Master Builders Association of King and Snohomish Counties respectfully requests that this Court consider MBA's submission and complete review of this appeal so the condominium buying and selling public in our State may have an answer to the important legal issue that has already been fully briefed and fully argued on the merits in this case.

DATED this 8th day of February, 2007.

FOSTER PEPPER PLLC



Sharon E. Cates, WSBA #29273
Thomas F. Ahearne, WSBA # 14844
Attorneys For [Proposed] *Amicus*
Master Builders Association of
King and Snohomish Counties

DECLARATION OF SERVICE

I hereby declare that on February 8, 2007, I caused to be served true and correct copies of the Response To Respondent's Supplemental Motion To Terminate Review By [Proposed] *Amicus* Master Builders Association Of King & Snohomish Counties by Hand Delivery to:

Mr. Dean Martin
Barker, Martin
719 Second Avenue, Suite 1200
Seattle, WA 98104

Mr. Stellman Keehnel
DLA Piper Rudnick Gray Cary
701 Fifth Avenue, 70th Floor
Seattle, WA 98104-7044

Mr. Joel T. Salmi
Salmi & Gillaspy PLLC
500 108th Avenue NE, Suite 215
Bellevue, Washington 98004

In addition, the MBA's letter to the Court, dated February 5, 2007, which sets forth its intent to file this Response, was served on above counsel with this Response.

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

Dated this 8th day of February, 2007.


Sharon E. Cates

EXHIBIT D



NWMLS[®]

Statistical Report

King County

June 2007

Closed Sales Report - Condominium

Area Statistics Report for the Month of June

County	Units				Average Price (LIST)				Median Price (LIST)				Average Time On Market			
	JUN 2007	JUN 2006	Y-T-D 2007	Y-T-D 2006	JUN 2007	JUN 2006	Y-T-D 2007	Y-T-D 2006	JUN 2007	JUN 2006	Y-T-D 2007	Y-T-D 2006	JUN 2007	JUN 2006	Y-T-D 2007	Y-T-D 2006
King	1,002	988	4,909	4,624	\$330,795	\$297,055	\$328,244	\$292,426	\$280,250	\$249,999	\$285,000	\$242,000	39	33	42	33
Snohomish	282	261	1,351	1,343	\$283,749	\$224,836	\$261,804	\$217,230	\$253,500	\$211,900	\$239,950	\$200,000	54	30	43	35
Pierce	124	105	651	564	\$240,097	\$238,494	\$244,337	\$235,438	\$224,500	\$219,950	\$224,950	\$208,725	83	93	89	75
Kitsap	27	63	163	216	\$308,486	\$238,637	\$364,637	\$222,349	\$260,000	\$222,000	\$335,000	\$179,950	189	118	142	76
Mason	01	02	13	07	\$365,000	\$349,450	\$361,224	\$321,628	\$365,000	\$349,450	\$350,000	\$319,000	111	64	191	243
Skagit	10	11	53	69	\$290,187	\$423,932	\$282,684	\$283,291	\$255,500	\$360,000	\$226,667	\$279,950	180	83	144	86
Grays Harbor	05	03	25	62	\$181,200	\$317,000	\$194,375	\$183,521	\$250,000	\$358,000	\$193,900	\$167,000	203	30	149	113
Lewis	00	00	00	00	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	00	00	00	00
Cowlitz	03	02	09	08	\$163,800	\$150,400	\$160,878	\$153,887	\$172,500	\$150,400	\$172,500	\$159,900	69	108	72	104
Grant	02	02	06	07	\$235,450	\$192,450	\$260,467	\$170,414	\$235,450	\$192,450	\$229,500	\$165,000	210	11	160	92
Thurston	20	09	136	44	\$206,366	\$166,266	\$194,500	\$208,202	\$202,475	\$154,000	\$179,673	\$173,500	128	37	83	35
San Juan	03	03	12	14	\$394,833	\$246,167	\$367,083	\$276,301	\$353,500	\$207,500	\$330,000	\$222,500	321	136	213	128
Island	09	07	46	36	\$208,444	\$196,207	\$194,565	\$173,352	\$183,000	\$201,000	\$179,500	\$171,000	128	34	118	28
Kittitas	09	03	19	08	\$257,850	\$135,000	\$201,584	\$125,368	\$244,950	\$127,000	\$170,000	\$122,500	46	42	44	78
Jefferson	03	01	17	14	\$172,333	\$279,000	\$301,941	\$302,849	\$179,000	\$279,000	\$282,500	\$299,000	31	44	136	55
Okanogan	00	00	04	01	\$0	\$0	\$219,750	\$192,000	\$0	\$200,350	\$212,250	\$192,000	00	00	87	617
Whatcom	68	64	298	324	\$225,730	\$213,089	\$209,664	\$212,176	\$201,950	\$200,350	\$189,250	\$195,000	140	96	135	125
Clark	20	00	86	00	\$193,985	\$0	\$210,718	\$0	\$164,900	\$0	\$176,000	\$0	36	00	76	00
Pacific	04	00	11	03	\$108,250	\$0	\$179,364	\$200,333	\$132,500	\$0	\$178,000	\$0	121	00	90	45
Outarea	07	02	19	33	\$174,314	\$217,700	\$203,581	\$199,171	\$152,000	\$217,700	\$199,000	\$170,200	44	20	83	58
Total	1,599	1,526	7,828	7,377	\$303,701	\$273,665	\$299,845	\$265,820	\$260,900	\$234,950	\$260,000	\$225,000	56	43	56	44

All Dollar Figure Shown are Based on Sale Price