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THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION 1

THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION,

Respondent/Plaintiff

v.

LESCHI CORP.,

Appellant/Defendant.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I. THE HOA IS BOUND BY THE TERMS OF THE CONTRACT CONTAINING THE ARBITRATION AGREEMENT

Respondent/Plaintiff The Pier at Leschi Condominium Owners Association (“HOA”) argues that it has not consented as an entity to engage in binding arbitration, so that its claims against Appellant Leschi Corp.’s are only subject to judicial review. This argument is without merit.

1. There Is No Evidence of Subsequent Purchasers Since the Arbitration Agreements Were Signed

To be considered on appeal, a party must refer to documentary evidence in the record in support of each factual assertion in its brief, rather than merely reference pleadings which themselves contain unsupported factual assertions. See RAP 10.3(a)(5) (reference to record must be included for each factual statement); *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615, 160 P.3d 31 (2007) (declining to consider facts recited in the briefs but not supported by the record, pursuant to RAP 10.3(a)(5), 13.4(c)); *Grobe v. Valley Garbage Serv., Inc.*, 87 Wn.2d 217, 228-29, 551 P.2d 748 (1976) (deciding cases on appeal only from evidence in the record); *Truly v. Heuft*, 138 Wn. App. 913, 923, 158 P.3d 1276 (2007) (requiring all statements of fact be supported by citation to the record, pursuant to RAP 10.3(a)(5)).

The HOA presents no evidence that there were any subsequent purchasers since the original sales of the units by Leschi Corp., only unsupported and uncorroborated statements in its brief. In the HOA's opposition to Leschi Corp.'s motion to enforce arbitration, filed with the trial court, the HOA states as fact that there have been subsequent buyers of the units, but presents no evidence in support of this assertion. *See CP 443*. Without any evidence of subsequent sales, the Court should limit its review to the contracts relating to the sales to the original purchasers. *See CP 488-519*.

Moreover, the Limited Warranty automatically transfers to subsequent purchasers, as follows.

This Limited Warranty will transfer to new owners of the HOME for the remainder of the WARRANTY PERIOD. You agree to provide this LIMITED WARRANTY to any subsequent purchaser of the HOME as a part of the contract of sale of the HOME. OUR duties under this LIMITED WARRANTY to the new HOMEOWNER will not exceed the limit of liability then remaining, if any.

CP 394 ¶ B. Hence, the binding arbitration provisions of the Limited Warranty contractually apply to the subsequent purchasers, if any.

2. The HOA's Claims Are Primarily Limited to Those of Its Members

This Court in *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wn. App. 175, 159 P.3d 460 (Div. 1, 2007), clearly held that the

Association “stands in the shoes of the homeowners” and acts as their representative in the arbitration proceeding requested by the declarant:

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.

Id. at 181, 159 P.3d 460.

Other case law discussing the relationship between the individual condominium homeowners and their HOA as a representative entity is sparse. In *Stuart v. Coldwell Banker Comm. Group.*, 109 Wn.2d 406, 415, 745 P.2d 1284 (1987), the court decided the statute of limitations began to run in an action for construction defects when the homeowners, as the actual “plaintiffs” in interest, had notice of the defects, not when the HOA’s Board of Directors, the nominal “plaintiffs,” learned of the defects. *Id.* By holding that the homeowners are the parties who must have notice to bring their claims, the decision adds support to Leschi Corp.’s position that the claims brought in the instant case are really those of the Leschi Condominium homeowners, the actual “plaintiffs” in this matter, rather than those of their association, the nominal “plaintiff” for all claims except possibly one.¹

¹ The only claim the HOA may arguably maintain independently of its member homeowners is the declarant’s alleged failure to deliver certain documents to the HOA, pursuant to RCW 64.34.312(1)(j).

II. THE CONTRACT AT ISSUE IS THE ENTIRE PSA, NOT JUST THE LIMITED WARRANTY

The main thrust of the HOA's argument appears to be based on an extremely narrow interpretation that Federal Arbitration Act² ("FAA") preemption is entirely determinable by the interstate commerce effects of the Limited Warranty. This assertion ignores the factual basis for the underlying claims as arising from the PSA, and the express language of the actual PSA documents at issue. It also conveniently ignores the fact that the Limited Warranty is expressly incorporated into the broader PSA.

Parties to a contract may incorporate additional contractual terms by referring to a separate agreement, so long as the incorporation by reference in the parties' agreement is clear and unequivocal. *See Houghton v. Hoy*, 102 Wash. 358, 365, 172 P. 1148 (1918) (two contracts must be construed as one where one contract incorporates another contract by reference); *Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (quoting 11 Williston on Contracts § 30:25, at 233-34 (4th ed. 1999)) ("Incorporation by reference allows the parties to 'incorporate contractual terms by reference to a separate . . . agreement'"); *Turner v. Wexler*, 14 Wn. App. 143, 146-47, 538 P.2d 877 (1975) (where a writing refers to a separate agreement, the referenced agreement, or so

² 9 U.S.C. *et seq.*

much of it as referred to, should be considered part of the writing.).

Here, the integrated PSA clearly requires the individual homeowners, their representative association, and Leschi Corp. to resolve all construction-related disputes by binding arbitration conducted pursuant to the FAA. The PSA incorporates the provisions of all of the following writings into a single binding agreement governing the transfer of the units from Leschi Corp. to the purchasers/homeowners:

- a. Specific Terms;
- b. General Terms;
- c. Public Offering Statement Acknowledgement;
- d. Standard Addendum to the Condominium PSA;
- e. Addendum/Amendment to Purchase and Sale Agreement;
- f. Contract Checklist;
- g. Limited Home Warranty Addendum;
- h. Public Offering Statement Addendum; and
- i. The Public Offering Statement ("POS"), which includes (among other documents) the Limited Warranty and the Condominium Declaration ("Declaration").

See CP 350-363, 380-398. Other documents that form an integral part of the purchase transaction include the HUD-1 Settlement Statement, *CP 366*; the Home Builder's Limited Warranty Registration form, *CP 400*; and the Limited Warranty Validation Form, *CP 401*. There is no evidence any portion of the above

documents and writings were subsequently rescinded by the parties.

The Court should not consider the HOA's argument that the Declaration provision requiring binding arbitration is void, as that assertion has been raised for the first time on appeal. Had the HOA wished to strike a portion of the Declaration, a claim to that effect could have been incorporated into the HOA's complaint, but it failed to do so. Therefore, it is inappropriate for this Court to consider striking any portion of the Declaration in deciding this appeal.

Furthermore, contrary to the HOA's assertion that binding arbitration authority only derives from the Limited Warranty, the PSA expressly requires binding arbitration to resolve all construction-related disputes, as follows:

MEDIATION/ARBITRATION. All disputes involving Seller, Buyer and/or Owners Association **shall be resolved by the mediation/arbitration provisions** of the Limited Warranty for construction issues (whether based on express or implied warranties); or the Declaration for non-construction issues.

Standard Addendum ¶ 31, at CP 358 (emphasis added). The Limited Warranty is incorporated into the PSA to provide the specific procedures for initiating and conducting the binding arbitration on construction-related disputes. *See id. ¶ 15.i, at CP 357.*

III. THE PIER AT LESCHI INVOLVES INTERSTATE COMMERCE TO A GREATER DEGREE THAN IN *MARINA COVE* AND *SATOMI*

The facts of interstate involvement here are substantially broader than in *Satomi* and *Marina Cove Condominium Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 870 (2001). In addition to various out-of-state building materials incorporated into the structure and interior surfaces, Leschi Corp. expressly incorporated appliances and readily removable fixtures only obtainable through interstate commerce as an integral part of the PSA transaction.

1. The PSAs Specifically Require Transfer of Title and Warranties for Name-Brand Appliances and Fixtures

The PSAs specifically transferred to the purchasers the title and manufacturer warranties for all appliances, wall-to-wall carpeting, lighting fixtures, plumbing fixtures, and other fixtures. See CP 350-51, 369, 371, 394. This provides more evidence of direct impacts on interstate commerce than *Satomi*, because here the PSA directly affects interstate commerce by incorporating specified out-of-state manufactured brand-name appliances and fixtures as a part of the basis of the bargain. The following such title and warranty transfers all involve out-of-state items:

Appliances: Bosch washer/dryers CP 117, 118, 414; and General Electric range/ovens, microwaves, dishwashers, and refrigerators, CP 102-116, 414.

Carpeting: Home Foundations–Devonshire II, *CP 129–33, 415–16, 421–22, 424–25*; and Van Dijk, *CP 124–25, 127-28, 415*.

Lighting: Minka Lavery, *CP 165–68, 418*; Maxim *CP 169–71, 418*; Progress, *CP 153–55, 418*; Craftmade, *CP 156–58, 418*; Juno, *CP 159–62, 418*; and Pendant # MP Lighting, *CP 163–64, 418*.

Plumbing: Kilgore toilets, *CP 185–87, 419*; Elkay sinks, *CP 178–81, 419*; and Delta faucets, *CP 182–84, 419*.

Other fixtures: Schlage door hardware, *CP 172–77, 418*; and Norelco cabinets, *CP 133, 414*.

Significantly, the HOA's RCW 64.50 notices of defects implicate interstate commerce. The elastomeric deck coating, manufactured by a California corporation, is alleged to be "split at the metal edge flashing, allowing water intrusion." *CP 12, 122-23, 415*. Water intrusion around the windows may involve siding manufactured by a Nevada corporation based in California. *CP 12,188–190, 420*. It would be entirely unfair and inconsistent to characterize the very materials that the homeowners allege were defectively manufactured or installed as outside of their purchase agreement and not subject to FAA analysis. Because these allegedly defective materials were transported into Washington, the PSA necessarily affected interstate commerce.

2. **The PSAs Involve Substantially Different Aspects of Interstate Commerce than Found in Prior Cases.**

Further distinguishing this case from *Marina Cove* and *Satomi* is the following evidence of interstate commerce affecting The Pier at Leschi purchase and sale transactions:

a. Document exchange and recordkeeping necessary for performance of the terms of the Limited Warranty affect interstate commerce, because the Limited Warranty is entirely administered across state lines by PWC, a Virginia corporation, and affects every homeowner of the Association. *CP 88-91, 346, 387, 400, 579-607.*

b. Four of the transfers of Washington real property were to out-of-state purchasers, several of whom completed the purchase for investment purposes only, meaning these PSAs were not a contract between a Washington seller and buyer. *CP 350, 366-71.*

c. Nine of the transfers involved out-of-state lenders (from California, Maryland, Michigan and New Jersey) who provided funding for the purchase of the units. *CP 348, 429-37.* The PSA is a contract that involves two mutual promises to perform as the basis of the bargain; Leschi Corp. promises to transfer title to the purchasers at closing in exchange for the purchasers' promise to pay full price for their respective units. *See, generally, CP 350-53.* But for the participation of the lenders in providing the funds necessary for the purchasers to pay the full price at closing, there

would be no property transfer. Hence, all purchase transactions involving out-of-state lenders substantially affect interstate commerce.

d. Leschi Corp., as general contractor, hired two out-of-state subcontractors to perform general work affecting the entire the conversion: Haulaway Storage Containers, Inc., a California corporation; and Labor Express Temporary Services, a registered trade name for Arizona Labor Force, Inc., an Arizona corporation. *CP 94–100, 346*. But for the participation of these subcontractors in developing the property, there would be no property to transfer. Hence, all purchase transactions substantially affect interstate commerce.

e. The PSA integrates grants of easements to out-of-state cable television and broadband service providers, thus affecting interstate commerce for all purchase transactions, whether the purchasers use the services or not. *CP 92, 345–46, 373–78*.

f. Because boat slips were assigned to some of the purchasers of units at the Pier at Leschi, the PSA transactions necessarily integrate the aquatic land lease on which the boat slips depend. The lease, which is guaranteed by a performance bond issued a Connecticut corporation, presents yet additional evidence of interstate commerce. *CP 365, 369, 404–12*.

g. Federal statutes and regulations substantially govern Washington real property transfers, a fact the HOA ignored in its

brief. Whether the FHA or VA actually financed a given transaction is less important than the fact that federal regulations govern the form and conduct of the purchase and sale transactions. *CP 352*. For example, the federal government regulates the PSA by requiring information be provided to purchasers on the hazards of lead-based paint, *CP 351*; transactions are settled using HUD-1 forms pursuant to RESPA 12 U.S.C. §§ 2601–2617, *CP 366, 368, 370*; and the FAA governs arbitration proceedings when the parties contractually agree to arbitrate their disputes under that federal rule, *CP 393*. Just because FAA preemption is in dispute here on the particular claims brought by the homeowners does not mean that all disputes that might arise between the parties are exempt from the FAA rules governing arbitration of disputes.

IV. THE NON-WCA CLAIMS ARE SUBJECT TO BINDING ARBITRATION REGARDLESS OF FAA PREEMPTION

1. The HOA Has Failed to Address the Arbitrability of the Non-WCA Claims

The Respondent has utterly failed to address one of Leschi Corp.'s principal issues relating to the assignment of error, namely whether the HOA's statutory and common law claims that are not based on the Washington Condominium Act ("WCA") are subject to arbitration, regardless of the resolution of the FAA preemption issue. The HOA's Complaint alleges several violations of the WCA and three non-WCA claims, namely breach of the implied warranty

of habitability, breach of duty to disclose latent construction defects and violation of the Consumer Protection Act (“CPA”), RCW 19.86.020 *et seq.* See CP 5–9. Regardless of this Court’s decision on whether the FAA preempts contrary provisions of the WCA, at the very least those three claims should be resolved by binding arbitration because the WCA simply does not apply to them.

The WCA itself is strictly limited to judicial enforcement only of claims brought under the WCA, as follows:

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.

RCW 64.34.100(2) (emphasis added). As the claims of breach of the implied warranty of habitability, breach of duty to disclose latent construction defects, and violation of the CPA are nowhere to be found in chapters 64.34, 64.35, or 64.55 RCW, these three claims cannot be resolved by a WCA-mandated “judicial proceeding” as a matter of law. Thus, there is but one choice before this Court as to the resolution of those three claims, namely to enforce the binding arbitration procedure set forth in the mutually agreed PSA.

In determining whether parties to a contract agreed to arbitrate a particular dispute, the courts apply four guiding principles:

1) the duty to arbitrate arises from the contract; 2) a question of arbitrability is a judicial question unless the parties clearly provide otherwise; 3) a court should not reach the underlying merits of the controversy when determining arbitrability; and 4) as a matter of policy, courts favor arbitration of disputes.

Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 455-56, 45 P.3d 594 (2002) (quoting *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45-46, 17 P.3d 1266 (2001)). There can be no dispute that the CPA claims should be resolved by binding arbitration in this matter, because it is well settled in Washington that CPA claims are subject to arbitration under the FAA. *Mendez*, 111 Wn. App. at 454, 45 P.3d 594 (citing *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 590, 681 P.2d 253 (1984)). Likewise, binding arbitration is appropriate to resolve the claim of breach of the implied warranty of habitability. See *Satomi*, 139 Wn. App. at 191 n.3, 159 P.3d 460 (Agid, J., dissenting) (“the arbitration clause still applies to the Association’s implied warranty of habitability and Consumer Protection Act claims”). Because nowhere in the WCA is there a requirement for disclosure of latent construction defects, there can be no implication of the judicial proceedings under the WCA for that claim, and contractual arbitration is required pursuant to the express terms of the PSA.

2. Judicial Economy Will Be Best Served by Requiring Binding Arbitration to Resolve All Claims in a Single Proceeding

Given that the three non-WCA claims described above are

subject to binding arbitration regardless of FAA preemption of the WCA, judicial economy dictates that all remaining claims should be resolved in a single binding arbitration proceeding. Otherwise, two different proceedings based on the same facts and parties would occur, with a strong possibility of inconsistent results. Furthermore, it is likely the doctrines of res judicata³ and/or collateral estoppel⁴ would be invoked to further affect the final outcome. See, e.g., *Dunlap v. Wild*, 22 Wn. App. 583, 591, 591 P.2d 834 (1979) (party to an arbitration had a full and fair opportunity to completely explore issue of materiality of the misrepresentation, so it was not unjust to prevent him from relitigating the issue).

On the other hand, enforcing resolution of all the claims in a single binding arbitration proceeding will avoid needless delay and

³ Under the doctrine of res judicata, or claim preclusion, "a prior judgment will bar litigation of a subsequent claim if the prior judgment has 'a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'" *In re Election Contest Filed by Coday*, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006) (alteration in original) (quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wn. 2d 759, 763, 887 P.2d 898 (1995)), cert. denied, 127 S. Ct. 444, 166 L. Ed. 2d 309 (2006).

⁴ "When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel." *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. App. 1, 25, 154 P.3d 936 (2007). "Collateral estoppel, or issue preclusion, requires '(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action.'" *Id.* (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987)).

result in a single decision, all while preserving the agreements between the homeowners and Leschi Corp. to engage in binding arbitration of construction-related disputes. Final resolution of all claims likely would be accomplished in a matter of months, and at a far lower cost to both parties. There would be no chance of inconsistent decisions, and the judicial resources necessary to conduct an RCW 64.55 arbitration, trial de novo, appellate review and remand to trial court would not be necessary. If the HOA prevails in the binding arbitration proceeding, then the repairs will be funded years faster than if multiple proceedings are used.

Furthermore, there is little reason to believe that the multiple proceedings that will result from the HOA prevailing in this appeal would result in a substantially different outcome than a single arbitration proceeding to which Leschi Corp. and the homeowners expressly agreed. The courts have expressed the strong public policy favoring arbitration of disputes “to avoid the formalities, the expense, and the delays of the court system.” *Mendez*, 111 Wn. App. at 454, 45 P.3d 594. Enforcing the arbitration provisions of the PSA to resolve all claims in a single proceeding, as urged by Leschi Corp., will do just that.

V. LESCHI CORP. IS ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS IF IT IS THE PREVAILING PARTY

The HOA’s arguments in support of award of attorney’s fees

and costs to the prevailing party dictate that if Leschi Corp. prevails in this appeal, it should be awarded its reasonable attorney fees and costs. There are two bases for such an award: (1) the PSA itself, *see CP 353 ¶ q*, and (2) RCW 64.34.455 (“The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.”).

It is quite instructive that the HOA urges the Court to examine only the Limited Warranty when it argues against FAA preemption, but it has no trouble reaching into the General Terms of the PSA to find support for an award of attorney’s fees to the prevailing party. *See Respondent’s Brief, at 34.* This inconsistency demonstrates the fallacies inherent in the HOA’s entire argument regarding the Limited Warranty as the sole factor in determination of FAA preemption. The HOA picks and chooses from the various provisions of the PSA as it wishes, rather than viewing the contract as a whole. This sort of behavior must not be rewarded, and should result not only in reversal of the trial court’s order, but also should provide sufficient grounds for an attorney’s fees award to Leschi Corp.

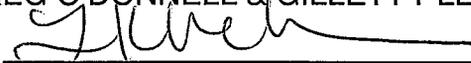
VI. CONCLUSION

Based on the foregoing, Leschi Corp. respectfully reiterates its request that this Court reverse the Superior Court’s order denying Leschi Corp.’s motion to enforce binding arbitration, and remand

with instructions to resolve all the HOA's claims by binding arbitration. Leschi Corp. also reiterates its request to stay further litigation, including non-binding arbitration under RCW 64.55.100, pending completion of the binding arbitration proceeding, and award it its reasonable attorney fees and costs for bringing this appeal.

Respectfully submitted this 1st day of October, 2007.

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DECLARATION OF
SERVICE

(Clerk's Action Required)

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of:

1. Reply Brief of Appellant;
2. This Declaration of Service;

directed to the following individuals:

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