

Supreme Court No. 80480-0  
Consolidated with Nos. 80584-9 and 81083-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON,

---

SATOMI OWNERS ASSOCIATION,

*Respondent*

v.

SATOMI, LLC,

*Petitioner.*

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2008 NOV 26 3:26  
BY RONALD F. J. DEWENTER  
CLERK

---

**APPELLANT LESCHI CORP.'S RESPONSE TO  
RESPONDENTS' SUPPLEMENTAL BRIEF RE CONFLICT  
PREEMPTION OF WASHINGTON CONDOMINIUM ACT'S  
ENFORCEMENT PROVISION**

---

Lori K. McKown, WSBA # 26537  
David E. Chawes, WSBA # 36322  
Attorneys for Appellant Leschi Corp.

PREG O'DONNELL & GILLETT  
PLLC  
1800 Ninth Ave., Suite 1500  
Seattle, WA 98101-1340  
(206) 287-1775

07712-0042 108692.doc

ORIGINAL

**TABLE OF CONTENTS**

	<u>Page</u>
<b>TABLE OF CONTENTS</b> .....	i
<b>TABLE OF AUTHORITIES</b> .....	ii
<b>I. IDENTITY OF RESPONDING PARTY</b> .....	1
<b>II. ARGUMENT</b> .....	1
<b>A. RCW 64.34.100 Enforcement Provisions Conflict with Section 2 of the FAA by Physical Impossibility and by Obstructing Congress' Intent to Enforce Private Agreements to Arbitrate.</b> .....	1
1. RCW 64.34.100 allows a party to select a judicial proceeding to enforce WCA claims.....	2
2. RCW 64.34.100 judicial proceedings conflict with section 2 of the FAA.....	4
<b>B. Judicial Enforcement under RCW 64.34.100 Actually and Directly Conflicts with FAA Section 2, which Requires Enforcement of Contractual Arbitration Provisions</b> .....	6
<b>C. RCW 64.34.100 Conflicts with FAA Section 2 by Obstructing the Clear Congressional Intent to Favor Contractual Arbitration</b> .....	8
1. RCW 64.34.100 allows a single party to unilaterally repudiate the parties' mutually agreed dispute resolution procedure.....	9
2. RCW 64.34.100 wastefully imposes separate proceedings for resolution of WCA and non-WCA claims. ....	11
3. RCW 64.34.100 alters the grounds for appealing a decision reached under contractual binding arbitration from one that is final to one that is subject to appeal as of right. ....	12
<b>D. RCW 64.55 Arbitration Conflicts with FAA Section 2</b> ....	14
<b>III. CONCLUSION</b> .....	15

## TABLE OF AUTHORITIES

Page

### Washington Cases

<i>Berger v. Personal Products, Inc.</i> , 115 Wn.2d 267, 797 P.2d 1148 (1990).....	9
<i>Beroth v. Apollo Coll., Inc.</i> , 135 Wn. App. 551, 145 P.3d 386 (2006) .....	7, 13
<i>Hue v. Farmboy Spray Co.</i> , 127 Wn.2d 67, 896 P.2d 682 (1995) ...	5
<i>McKee v. AT&amp;T Corp.</i> , 164 Wn.2d 372, 191 P.3d 845 (2008) 1, 4, 5, 8	
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2002).....	10
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).....	9
<i>Morrell v. Wedbush Morgan Securities, Inc.</i> , 143 Wn. App. 473, 178 P.3d 387 (2008) .....	10, 12, 13
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 161 P.3d 1000 (2007) 7, 9, 10	
<i>Stein v. Geonerco, Inc.</i> , 105 Wn. App. 41, 17 P.3d 1266 (2001) ...	10
<i>Washington State Physicians Ins. Exchange &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	8
<i>Westmark Properties, Inc. v. McGuire</i> , 53 Wn. App. 400, 76 P.2d 1146 (1989).....	7
<i>Yaw v. Walla Walla School District No. 140</i> , 106 Wn.2d 408, 411, 722 P.2d 803 (1986) .....	7

### Federal Cases

<i>Al-Safin v. Circuit City Stores, Inc.</i> , 394 F.3d 1254 (9th Cir. 2005) ..	6
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) .....	5
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).....	6

<i>Int'l Paper Co. v. Ouellette</i> , 479 U.S. 481, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987).....	8
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977).....	8
<i>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).....	7, 10, 12
<i>Perry v. Thomas</i> , 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).....	5
<i>Prima Paint Corp. v. Flood &amp; Conklin Mfg. Co.</i> , 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).....	10
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984).....	5

#### Court Rules

RAP 2.2(a).....	13
RAP 2.3(b).....	13

#### Statutes

9 U.S.C. § 2.....	4
Laws of 2005 ch. 456 § 20.....	3
RCW 64.34.073.....	14
RCW 64.34.100.....	2
RCW 64.34.100(2).....	12
RCW 64.55.005(2).....	14
RCW 64.55.100(1).....	2
RCW 64.55.100(4).....	14
RCW 7.04A.....	13, 14
RCW 7.04A.060(1).....	13
RCW 7.04A.070(1).....	14
RCW 7.04A.230.....	12
RCW 7.04A.240.....	12

## **I. IDENTITY OF RESPONDING PARTY**

Appellant Leschi Corp. hereby submits its response to Respondents' Supplemental Brief Re Conflict Preemption of Washington Condominium Act's Enforcement Provision. The Supplemental Briefing was requested by the Court to address whether the terms of RCW 64.34.100 conflict with the terms of section 2 of the Federal Arbitration Act ("FAA").

## **II. ARGUMENT**

### **A. RCW 64.34.100 Enforcement Provisions Conflict with Section 2 of the FAA by Physical Impossibility and by Obstructing Congress' Intent to Enforce Private Agreements to Arbitrate.**

The Washington Condominium Act's ("WCA") enforcement provision, set forth in RCW 64.34.100, directly conflicts with FAA section 2, 9 U.S.C. § 2, by the "physical impossibility strand" and by the "obstruction strand." Not only do these two statutes directly and actually conflict, but the state statute "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" by not allowing enforcement of binding arbitration agreements pursuant to the express terms of the parties' contracts. *See McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008). Consequently, the Court should find there is a direct conflict, and that FAA section 2 preempts the WCA enforcement provision.

**1. RCW 64.34.100 allows a party to select a judicial proceeding to enforce WCA claims.**

The WCA enforcement statute states in full:

(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.

RCW 64.34.100 (emphasis added). The judicial proceedings referenced in RCW 64.34.100(2) are applicable only to claims brought under the WCA. The RCW 64.55 arbitration proceedings referenced in the second sentence of RCW 64.34.100(2) are not mandatory unless at least one party elects those proceedings within three months of filing of a complaint alleging WCA claims. RCW 64.55.100(1). Thus, there is no dispute that election of RCW 64.55 arbitration is optional, and not required unless a party elects to enforce by those proceedings.

As a preliminary matter, it is important to point out that any issues concerning RCW 64.55 arbitration proceedings are not currently before this Court, so it is unnecessary to further analyze

whether the second sentence of RCW 64.34.100(2) conflicts with 9 U.S.C. § 2. That second sentence was first added in 2005, and the arbitration provisions of RCW 64.55 are not retroactive to claims noticed or suits filed before its August 1, 2005 effective date. See Laws of 2005 ch. 456 § 20. As the Appellant in *Blakeley* and the Petitioner in *Satomi* point out in their Response Brief, both the *Blakeley* and *Satomi* matters predate August 1, 2005, so the parties in those two cases are entirely unaffected by the issue of RCW 64.55 arbitration. The *Leschi* complaint was filed after August 1, 2005; however, the Appellant in that case does not seek enforcement of its demand for RCW 64.55 arbitration in this appeal. See *Leschi CP 22*; Opening Brief of Appellant Leschi Corp., at 1–3. Respondent in *Leschi* is similarly precluded from seeking such arbitration because it failed to demand RCW 64.55 arbitration before the statutory deadline and does not even identify such arbitration as an issue pertaining to the assignments of error. See Brief of Respondent the Pier at Leschi Condominium Owners Association, at 1.

This means arbitration under RCW 64.55 is not at issue in this appeal, rendering all of Respondent's arguments on the lack of a conflict between RCW 64.55 arbitration and FAA section 2 as

merely academic. The Court should not base its preemption decision on those arguments.<sup>1</sup>

**2. RCW 64.34.100 judicial proceedings conflict with section 2 of the FAA.**

Additionally, the Court's question may be narrowed to the following: Whether the portion of RCW 64.34.100 providing "any right or obligation declared by this chapter is enforceable by judicial proceeding" conflicts with the terms of section 2 of the FAA.

FAA section 2 states in pertinent part:

A written provision in . . . 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.

9 U.S.C. § 2.

Under the Supremacy Clause of the U.S. Constitution article VI, clause 2, state laws are not superseded by congressional legislation unless that is the clear and manifest purpose of Congress. *McKee v. AT&T Corp.*, 164 Wn.2d at 387, 191 P.3d 845 (citing *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 78, 896 P.2d 682

---

<sup>1</sup> In the event that the Court considers RCW 64.55 arbitration to be relevant to its analysis of conflict preemption, see discussion on the conflict between RCW 64.55 arbitration and FAA section 2 in Section II.D, *infra*.

(1995); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Conflict preemption is found where it is impossible to comply with both state and federal law or where state law “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *McKee*, 164 Wn.2d at 387, 191 P.3d 845, *citing Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). An analysis of whether a California state statute conflicted with FAA section 2 found clear FAA preemption of the state statute, as follows:

[T]he present appeal addresses the pre-emptive effect of the Federal Arbitration Act, a statute that embodies **Congress' intent to provide for the enforcement of arbitration** agreements within the full reach of the Commerce Clause. Its general applicability reflects that “[t]he preeminent concern of Congress in passing the Act was to **enforce private agreements** into which parties had entered....” We have accordingly held that **these agreements must be “rigorously enforce[d].”** This clear federal policy places § 2 of the Act in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.

*Perry v. Thomas*, 482 U.S. 483, 490-91, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (internal citations omitted) (emphasis added).

Here, FAA section 2 unmistakably conflicts with RCW 64.34.100's requirement that litigants be provided a judicial forum

for resolving construction defect disputes. As in *Perry*, the Washington statute must “give way” to the contractual binding arbitration provisions that the parties agreed would be used to resolve disputes relating to construction defects. The conflicts between the Washington and federal statutes make it impossible to comply with both state and federal law. Additionally, the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress “to enforce private agreements into which parties had entered” by not permitting enforcement of the parties’ contractual arbitration provisions.

**B. Judicial Enforcement under RCW 64.34.100 Actually and Directly Conflicts with FAA Section 2, which Requires Enforcement of Contractual Arbitration Provisions**

The FAA requires enforcement of contractual arbitration terms whenever the transaction evidences commerce. The FAA was enacted to “reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.” *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1257 (9th Cir. 2005) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)). FAA section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. *Scott v. Cingular Wireless*, 160 Wn.2d 843,

858, 161 P.3d 1000 (2007) citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

Arbitration is designed to settle controversies, not to serve as a prelude to litigation. *Beroth v. Apollo Coll., Inc.*, 135 Wn. App. 551, 557, 145 P.3d 386 (2006) (citing *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 402, 76 P.2d 1146 (1989)). Arbitration is a substitute forum designed to reach settlement of controversies by extrajudicial means, before they reach the state of an action in court. *Yaw v. Walla Walla School District No. 140*, 106 Wn.2d 408, 411, 722 P.2d 803 (1986).

Here, it is physically impossible to comply with both statutes, because RCW 64.34.100 expressly requires enforcement of a statutory judicial proceeding to resolve WCA disputes between the parties, while FAA Section 2 expressly requires enforcement of the parties' agreement to arbitrate all covered disputes. The single exception to the physical impossibility strand helps prove this point: Only if a contractual arbitration provision required express compliance with RCW 64.55 arbitration would it be physically possible to avoid any conflict between the two statutes. Obviously, this is not the situation here.

**C. RCW 64.34.100 Conflicts with FAA Section 2 by Obstructing the Clear Congressional Intent to Favor Contractual Arbitration**

The obstruction strand of conflict preemption focuses on both the objective of the federal law and Congress' chosen method to achieve that objective, taking into account the statute's text, application, history, and interpretation. *McKee*, 164 Wn.2d at 388, 191 P.3d 845, *citing Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987) ("state law . . . is preempted if it interferes with the **methods** by which the federal statute was designed to reach this goal") (emphasis added); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977) (courts should consider how law is applied and interpreted in addition to plain text).

Thus, the question here becomes would Congress' goals and intent be frustrated if the Appellant was required to give up its right to demand contractual arbitration and instead be forced to resolve the dispute only by a judicial proceeding.

In Washington, there is a presumption against federal preemption of state law unless the state law frustrates the clear and manifest purpose of the federal law. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993). Federal law preempts state law when Congress intends to occupy a given field, when state law directly conflicts with federal law, or when state law would hinder accomplishment of the

full purposes and objectives of the federal law. *Berger v. Personal Products, Inc.*, 115 Wn.2d 267, 270, 797 P.2d 1148 (1990). As the U.S. Supreme Court has noted, arbitration can be a perfectly appropriate place for individuals to vindicate legislative policy, so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum. *Scott*, 160 Wn.2d 843, 858-59, 161 P.3d 1000 (2007) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). As stated above, FAA's basic purpose is to overcome courts' unwillingness to enforce arbitration agreements. Here, RCW 64.34.100 directly conflicts with the FAA because the state statute frustrates the clear and manifest purpose of the FAA to enforce valid contractual binding arbitration provisions.

**1. RCW 64.34.100 allows a single party to unilaterally repudiate the parties' mutually agreed dispute resolution procedure.**

In legislating FAA section 2, Congress intended that contractual arbitration, if required in an otherwise valid contract provision, must be used for dispute resolution by all the parties to the contract, thereby retaining the benefit of the bargain and instilling certainty into what is otherwise a difficult time for the parties. The conflict between the statutes on the obstruction strand arises only where there exists a valid contractual arbitration provision and a transaction evidencing interstate commerce,

because otherwise, all RCW 64.34 disputes are resolvable by judicial enforcement procedures.

In determining whether parties 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)). Arbitration is also favored by the U.S. Congress, state legislatures, and private parties by mutual consent. See *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Scott*, 160 Wn.2d at 858, 161 P.3d 1000; *Morrell v. Wedbush Morgan Securities, Inc.*, 143 Wn. App. 473, 481, 178 P.3d 387 (2008)).

The Respondents incorrectly maintain there is no obstruction conflict between FAA section 2 and RCW 64.34.100, in essence arguing that a party's unilateral selection of the judicial enforcement procedure of RCW 64.34.100, made after the dispute arises, does not frustrate the clear Congressional intent to place pre-dispute private agreements to arbitrate on the same level with all other valid

contractual provisions. See Respondent's Supplemental Brief, at 15. To the contrary, a party's reliance on its pre-agreed contractual dispute resolution procedure will be completely shattered where the other party is unilaterally permitted to disregard the private agreement for binding arbitration, and instead replace it with a judicial proceeding elected after the inception of the dispute itself. Introducing such a high degree of uncertainty into the relationship of the parties leaves the other party guessing which method will be selected if a dispute arises.

By permitting invocation of statutory judicial procedures in place of contractual dispute resolution methods, costly litigation and resultant delays in addressing the underlying construction defect issues are the most likely results. Only by preempting the state statute in favor of the FAA's clear mandate to enforce the parties' private agreement can litigation be minimized or avoided, and defects, if any, be promptly repaired. Importantly, the Congressional intent to preempt conflicting statutory dispute resolution proceedings will not be frustrated by enforcing the private agreement of the parties.

**2. RCW 64.34.100 wastefully imposes separate proceedings for resolution of WCA and non-WCA claims.**

Judicial economy dictates that all claims brought by a party involving the same set of facts and the same parties be resolved in

a single proceeding, because piecemeal resolution of disputes and inconsistent results should be avoided. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20, 103 S. Ct. 927, 74 L. Ed. 2d 765. It is not possible to adjudicate non-WCA claims using the WCA judicial procedures. See RCW 64.34.100(2) ("any right or obligation declared by this chapter is enforceable by judicial proceeding").

On the other hand, contractual arbitration may be used to resolve all claims relating to construction and sale of the units. By upholding congressional intent, consolidation and resolution of all claims in a single contractual binding arbitration proceeding will uphold the private agreement of the parties, and avoid the high costs, delays, and inconsistent results, which would likely occur whenever separate proceedings are used.

**3. RCW 64.34.100 alters the grounds for appealing a decision reached under contractual binding arbitration from one that is final to one that is subject to appeal as of right.**

Contractual binding arbitration decisions are generally final, reviewable only in very limited circumstances. *Morrell*, 143 Wn. App. at 481, 178 P.3d 387. The trial court's review of an arbitrator's decision in Washington is limited to vacation of the award or to modification or correction of the award. See RCW 7.04A.230(1)(a);(b)(i)-(iii) (corruption, fraud, other undue means and evidence of corruption, misconduct or partiality on part of the arbitrator); RCW 7.04A.240(1)(a)-(c) (evident mathematical

miscalculation or mistake in description, award on a claim not submitted to the arbitrator, and award is imperfect in a matter of form not affecting the merits).

These grounds for judicial review are not unlike the grounds appellate courts use for acceptance of discretionary review. See RAP 2.3(b)(1)-(3) (obvious or probable errors, departure from accepted and usual course of judicial procedures). In obvious contrast, any party dissatisfied with decisions in a WCA judicial proceeding may seek review as a matter of right. See RAP 2.2(a) (e.g., final judgments, decisions determining actions, final orders after judgments that affect a substantial right).

Moreover, concluding that FAA section 2 pre-empts RCW 64.34.100 is entirely consistent with Washington's Revised Uniform Arbitration Act ("RUAA"), codified in chapter 7.04A RCW. See, generally, RCW 7.04A *et seq.* RUAA implements the state policy favoring arbitration of disputes where the parties agree to do so, because arbitration is an expeditious means of resolving conflicts without involving the courts. *Morrell*, 143 Wn. App. at 480, 178 P.3d 387 (citing *Berth*, 135 Wn. App. at 557, 145 P.3d 386). RUAA emphasizes that an agreement between parties to arbitrate "is **valid, enforceable, and irrevocable** except upon a ground that exists at law or in equity for the revocation of contract." RCW 7.04A.060(1) (emphasis added). The statute authorizes a party to an arbitration agreement to apply to the court for an order directing

the parties to proceed to arbitration. RCW 7.04A.070(1). “Unless the court finds that there is no enforceable agreement to arbitrate, it **shall** order the parties to arbitrate.” *Id* (emphasis added). Under RUAA, there is no provision for a trial de novo. *See, generally, RCW 7.04A et seq.*

#### **D. RCW 64.55 Arbitration Conflicts with FAA Section 2**

RCW 64.34.100 is not an anti-arbitration statute, but rather allows parties to optionally engage in RCW 64.55 nonbinding arbitration of their WCA implied or express warranty disputes, followed by a trial de novo if either party is dissatisfied with the arbitration decision. *See* RCW 64.34.073 (RCW 64.55 arbitration is expressly limited to “resolution of implied or express warranty disputes under chapter 64.34 RCW.”); RCW 64.55.005(2) (“RCW . . . 64.55.100 through . . . RCW 64.55.160 apply to any action that alleges breach of an implied or express warranty under chapter 64.34 RCW or that seeks relief that could be awarded for such breach, regardless of the legal theory pled . . . .”); RCW 64.55.100(4) (“any aggrieved party may file with the clerk a written notice of appeal and demand for a trial de novo . . .”).

Thus, even RCW 64.55 arbitration presents a clear obstruction conflict with FAA section 2. FAA section 2 does not permit one party to opt out of the contractual arbitration provisions and substitute statutory arbitration. Rather, only the contractual

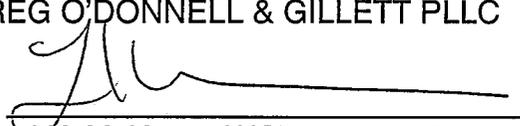
binding arbitration provision may be used by the parties to resolve their disputes under FAA section 2. The conflicts caused by piecemeal dispute resolution are even more apparent, as RCW 64.55 arbitration may only be used to resolve warranty issues, leaving all other WCA issues for RCW 64.34.100 non-arbitration judicial proceedings, and all remaining non-WCA claims for a contractual arbitration proceeding.

### III. CONCLUSION

Based on the foregoing, the Court should find that RCW 64.34.100 conflicts with FAA section 2, and that FAA section 2 preempts the judicial procedures of the WCA. Appellant Leschi Corp. respectfully reiterates its request that this Court reverse the Superior Court's order denying Leschi Corp.'s motion to enforce contractual arbitration and stay trial court proceedings pending completion of that arbitration.

Respectfully submitted this 26<sup>th</sup> day of November, 2008.

PREG O'DONNELL & GILLETT PLLC

By 

Lori K. McKown, WSBA # 26537

David E. Chawes, WSBA # 36322

Attorneys for Appellant/Defendant Leschi Corp.

PREG, O'DONNELL & GILLETT PLLC  
1800 Ninth Ave., Suite 1500  
Seattle, WA 98101-1340  
(206) 287-1775

## DECLARATION OF SERVICE

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. Appellant Leschi Corp.'s Response to Respondents' Supplemental Brief Re Conflict Preemption of Washington Condominium Act's Enforcement Provision;  
directed to the following individuals:

**Counsel for Respondent Satomi Owners**

**Association:**

Dean Martin, Esq.  
Marlyn K. Hawkins, Esq.  
Barker Martin, P.S.  
719 Second Ave., Suite 1200  
Seattle, WA 98104-1749

- Via Messenger  
 Via Facsimile – (206) 381-9807  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Petitioner Blakeley Village, LLC:**

Betsy A. Gillaspy, Esq.  
Daniel L. Dvorkin, Esq.  
Salmi & Gillaspy, PLLC  
821 Kirkland Ave., Suite 200  
Kirkland, WA 98033

- Via Messenger  
 Via Facsimile – (425) 462-4995  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Third-party Defendants Concrete  
& Steel Systems, Inc., St. John Caulking &  
Sealants, St. John Glass & Glazing, St. John  
Sealants d/b/a St. John Glass:**

Scott Noel  
Law Offices of Deborah Severson

- Via Messenger  
 Via Facsimile – (253) 272-1220  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Petitioner Satomi, LLC; Blakeley  
Village, LLC:**

Stellman Keehnel, Esq.  
DLA Piper US, LLP  
701 5th Ave., Suite 7000  
Seattle, WA 98104-7044

- Via Messenger  
 Via Facsimile – (206) 839-4801  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Amicus:**

Thomas F. Ahearne, Esq.  
Foster Pepper, PLLC  
1111 Third Ave., Suite 3400  
Seattle, WA 98101-3299

- Via Messenger
- Via Facsimile – (206) 749-1953
- Via U.S. Mail, postage prepaid
- Via Overnight Mail, postage prepaid
- Via Email, with recipient's approval

**Counsel for Amicus:**

Julie M. Sund, Esq.  
Building Industry Association of Washington  
P. O. Box 1909  
Olympia, WA 98507

- Via Messenger
- Via Facsimile – (360) 352-7801
- Via U.S. Mail, postage prepaid
- Via Overnight Mail, postage prepaid
- Via Email, with recipient's approval

**Counsel for Amicus:**

Kathryn E. Karcher, Esq.  
11011 NE Boulder Pl/  
Bainbridge Island, WA 98110-3166

- Via Messenger
- Via Facsimile –
- Via U.S. Mail, postage prepaid
- Via Overnight Mail, postage prepaid
- Via Email, with recipient's approval

**Counsel for Third-party Defendants Accurate Siding, Inc; Professional Homebuilders, LLC; Edmonds Roofing:**

Gregory P. Turner, Esq.  
Steven G. Wraith, Esq.  
Lee Smart Cook Martin & Patterson  
701 Pike St., Suite 1800  
Seattle, WA 98101-3929

- Via Messenger  
 Via Facsimile – (206) 624-5944  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Respondent Blakeley Commons Owners Association:**

Todd K. Skoglund, Esq.  
Adil A. Siddiki, Esq.  
Casey & Skoglund, PLLC  
114 W. McGraw St.  
Seattle, WA 98119

- Via Messenger  
 Via Facsimile – (206) 770-6427  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Third-party Defendant Custom**

**Aluminum, Inc.:**

Joanne Thomas Blackburn, Esq.  
Gordon Thomas Honeywell Malanca Peterson &  
Daheim, PLLC  
600 University Street, Suite 2100  
Seattle, WA 98101

- Via Messenger  
 Via Facsimile – (206) 676-7575  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Third-party Defendant My-Lan**

**Co., Inc.:**

Patrick N. Rothwell, Esq.  
Davis Rothwell Earle & Xochihua, P.C.  
701 Fifth Ave., Suite 5500  
Seattle, WA 98104-7047

- Via Messenger  
 Via Facsimile – (206) 340-0724  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Third-party Defendant Edmonds**

**Roofing, Inc.:**

Walter John Sinsheimer, Esq.  
Attorney at Law  
1001 4th Ave, Suite 2120  
Seattle, WA 98154-1106

- Via Messenger  
 Via Facsimile –  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Respondent Blakeley Commons**

**Owners Association:**

Joseph A. Grube, Esq.  
Ricci Grube Aita, PLLC  
1080 Broadacres Building  
1601 Second Avenue  
Seattle, WA 98101

- Via Messenger  
 Via Facsimile – (206) 260-7109  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Third-party Defendant Snyder  
Roofing of Washington, LLC:**

John C. Dippold, Esq.  
Carney Badley Spellman, P.S.  
701 Fifth Ave., Suite 3600  
Seattle, WA 98104-7010

- Via Messenger  
 Via Facsimile – (206) 467-8215  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Third-party Defendant Concrete  
and Steel Systems, Inc.:**

John Francis Kennedy  
Law Office of John Francis Kennedy  
8825 Franklin Avenue  
Gig Harbor, WA 98332

- Via Messenger  
 Via Facsimile – (253) 853-6479  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for :**

Pauline V. Smetka, Esq.  
Helsell Fetterman, LLP  
1001 Fourth Ave., Ste. 4200  
Seattle, WA 98154

- Via Messenger  
 Via Facsimile – (206) 340-0902  
 Via U.S. Mail, postage prepaid  
 Via Overnight Mail, postage prepaid  
 Via Email, with recipient's approval

**Counsel for Amicus:**

Bruce Thornton, Esq.  
Gemmill, Thornton & Baldrige, LLP  
5670 Wilshire Blvd., Suite 1500  
Los Angeles, CA 90036

- Via Messenger
- Via Facsimile –
- Via U.S. Mail, postage prepaid
- Via Overnight Mail, postage prepaid
- Via Email, with recipient's approval

DATED at Seattle, Washington, this 26 day of  
November, 2008.



\_\_\_\_\_  
Katie Hayes