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**SUPREME COURT OF THE STATE  
OF WASHINGTON**

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

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CINDY ALEXANDER; et al.,

Petitioners,

v.

GARY SANFORD; et al.,

Respondents.

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**PETITIONERS' SUPPLEMENTAL BRIEF**

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**A. Assignments of Error by Petitioners**

Appellants make the following assignments of error with respect to the Court of Appeals' decision:

1. The Court of Appeals erred in holding that the Complaint does not allege deceptive conduct within "trade or commerce" under the Consumer Protection Act ("CPA") by declarant-appointed Association directors ("the Executive Defendants") and their principal Lozier Homes ("Lozier").
2. The Court of Appeals erred in holding that a condominium director who conceals the presence of hidden construction defects from unit owners, and conceals and disregards the advice of professionals to investigate, repair, and make a warranty claim for those defects, owes no duty of care to unit owners who purchase after the director's term expires.
3. The Court of Appeals erred in holding that the presumption of adverse domination a non-profit corporation's board may be defeated by showing independent knowledge and motive to bring a claim for director misconduct on the part of non-party members other than plaintiffs.

**B. Argument on Appellant's Assignments of Error**

**1. Standard of Review and Decisional Standard**

On a CR 12(b)(6) motion, all facts alleged in a complaint are treated as true, even hypothetical facts. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissals under CR 12(b)(6) are warranted only if, beyond a reasonable doubt, the plaintiff cannot prove *any* state of facts justifying recovery. *West v. Wash. Ass'n of County Officials*, 162 Wn.App. 120, 128, 252 P.3d 406 (2011). Thus, CR 12(b)(6) motions should only be granted "sparingly and with care." *Orwick v. Seattle*, 103

Wn.2d 249, 245-255 (1984). This Court's review is de novo. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.2d 1082 (2012).

**2. The Executive Defendants' and Lozier Homes' Conduct Was Within "Trade or Commerce."**

The Court of Appeals held that the Complaint alleges no deceptive conduct by the Executive Defendants and Lozier within "trade or commerce" as required by the CPA because they did not personally sell the units and were "not in the business of selling condominiums." *Alexander v. Sanford*, 181 Wn. App. 135, 182, 325 P.3d 341 (2014).<sup>1</sup> But CPA liability does not require a sale transaction or consumer relationship. *Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 359-360, 581 P.2d 1349 (1978). Rather, deceptive conduct that deprives plaintiffs of valuable rights acquired in trade or commerce, for the purpose of furthering the defendants' entrepreneurial interests, is actionable under the CPA. *Id.*

The Complaint alleges a unity of ownership and control among the Executive Defendants, Lozier, and the Declarant. (CP 3-5). It alleges that they concealed known defects and professional advice in order to protect their interests in their enterprise and its profits by depriving purchasers of

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<sup>1</sup> The Court of Appeals' assertion that Lozier and the Executive Defendants were "not in the business of selling condominiums" is untenable on its face. The Complaint alleges that Declarant is a wholly-owned subsidiary and alter ego of Lozier, run by its executives and owners, the Executive Defendants, for the purpose of creating and selling the Project. The Complaint thus manifestly alleges that Lozier and the Executive Defendants were in the business of creating and selling condominiums through a wholly-owned, single-asset, alter-ego declarant "shell" company, which is now in default.

warranty rights. (CP 6-19). Logically, these respondents' entrepreneurial interests in their real estate development enterprise would have been adversely affected by assertion of a multi-million dollar warranty claim.

The CPA is to be construed liberally, RCW 19.86.920, and "shows a carefully drafted attempt to bring within its reaches every person who conducts unfair or deceptive acts or practices in any trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). "Trade or commerce" "shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). "The legislature intended these terms to be construed broadly." *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 173, 159 P.3d 10 (2007) citing *Hangman Ridge*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). The result is that **the CPA extends to post-sale, unfair or deceptive entrepreneurial activities.** *Salois*, 90 Wn.2d at 359-360.

In *Salois*, an insurer's refusal to pay policy benefits was held a violation of the CPA, even though it was not a sale transaction, because the CPA reaches unfair conduct that deprives plaintiffs, in effect, of what they have purchased. 90 Wn.2d at 359-360. Here, the respondents concealed defects to deprive plaintiffs of the benefit of their purchase – a condominium built in accordance with sound construction standards under the WCA, and a warranty to match. The purpose of respondents'

deception was to protect their interests in a real estate development enterprise. Their conduct was therefore within the sphere of “trade or commerce,” as broadly construed by the CPA and case law.<sup>2</sup>

**3. A Condominium Director’s Duty Extends to Post-Tenure Purchasers Injured by Director Malfeasance.**

The Court of Appeals held that a condominium director’s duty of care does not extend to those who purchase a unit after the director has resigned (the opinion calls them “future owners.”) *Alexander*, 181 Wn.App. at 175. The Court of Appeals’ holding is contrary to the plain language of the WCA and Washington case law.

The WCA directs that *anyone* who is in fact injured by a defendant’s breach of a WCA requirement, such as a director’s duty of care under RCW 64.34.308(1), has a right of action.

**If . . . any . . . person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons**

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<sup>2</sup> See also *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213-214, 969 P.2d 486 (1998) (Concealment of defects in homes by a builder-vendor alleges a violation of the CPA because “**The CPA applies to activities both before and after a sale, and may be violated by failure to disclose material facts.**”) (Emphasis added.)

Under the Court of Appeals’ opinion, the Executive Defendants’ and Lozier’s liability for violating the CPA is excused merely because they acted through a shell limited liability company in selling units! But Washington law of CPA liability holds:

If a corporate officer participates in the wrongful conduct [that violates the CPA], or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties. Corporate officers cannot use the corporate form to shield themselves from individual liability [for violating the CPA.]

*State v. Ralph Williams’ N. W. Chrysler Plymouth*, 87 Wn.2d 298, 322, 553 P.2d 42 (1976).

**adversely affected by the failure to comply has a claim for appropriate relief.**

RCW 64.34.455 (emphasis added). Owners who are predictably injured by a director's breach that occurred before they purchased constitute a "person or class of persons who are adversely affected" by breach of a WCA provision, and therefore have a right of action.

Condominium directors must make decisions about maintenance and repair of the common elements, planning capital replacements, budgeting reserves, and instituting warranty litigation. RCW 64.34.304(1)(b, d, f, p, & q). These decisions impact the long-term interests of owners, so interests of "future owners" are *always* at stake when a condominium board acts on these topics. To that extent, "future owners" are a protected "class of persons" under RCW 64.34.455 who will predictably suffer from concealed director malfeasance.

Even without statutory direction, the result would be the same. In evaluating whether the legislature intended a statutory duty to extend to a given plaintiff, courts examine legislative purpose, analogous case law, and whether a proposed construction leads to absurd results. *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998).

Duties are imposed on condominium association directors by RCW 64.34.308(1). The comments note that "The WCA "imposes a very high

standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.”” Official Comment 1 to §3-103 of the 1980 Model Uniform Condominium Act.

The legislative purpose of protecting unit purchasers’ interests from negligent governance, and from governance affected by director conflicts of interest, is stymied by the Court of Appeals’ decision. The decision rewards directors who successfully conceal their wrongdoing until after resignation and sale of units to “future owners,” *even though a change in the injured owner’s identity has no material impact on the how the directors behaved or should have behaved, on the property interest injured, or on the extent and nature of the injury.*

Analogous law shows that director duties extend to all owners predictably injured by a director’s misconduct. For example, in *Schooley, supra*, the question was whether a statute prohibiting sale of alcohol to a minor created in the retailer a duty to a purchasing minor’s drinking partners, who were also minors. The legislation was enacted to prevent minors from drinking based on their inability to drink responsibly. *Id.* at 476. Because minors commonly drink together, including all minors who are injured in fact from the sale of liquor in the protected class was held the best way to serve the legislative purpose. *Id.* at 477. Similarly here,

the legislative interest in protecting all condominium owners from director malfeasance and conflict of interest is best served by extending the director's duty to all owners who would naturally be injured by his conduct. Whether a special assessment or other damages was a foreseeable result would be for the jury. *Id.* at 478.

Finally, where a director's concealed wrongs come to light and cause injury long after he has resigned, denying a remedy to later purchasers while granting it to earlier ones imposes an arbitrary and unjust distinction. The distinction is *arbitrary* because the nature of the wrong and the extent of the injury do not depend on when the unit owner who ends up being the ultimate victim of a director's wrong happened to purchase. The distinction is *unjust* because the Executive Defendants' *plan* was to cause warranties of quality to expire, regardless of who owned the rights at the time of their expiration.<sup>3</sup> The fact of intervening sales after a board member has resigned is, in this case, mere happenstance of no legal significance to the question of duty.<sup>4</sup>

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<sup>3</sup> WCA warranty rights transfer to subsequent successor owners automatically on sale of a unit. RCW 64.34.445(6). Elected board members concealed what they knew about widespread defects in order to sell their units to unwitting buyers, to maximize their returns, and to avoid paying a special assessment. The nature of their wrongs and the resulting injury also do not depend on the identity or time of purchase of the benighted unit owner who ends up bearing the cost.

<sup>4</sup> The Court of Appeals relied on *Frances T. v. Village Green Owners Ass'n*, 42 Cal.3d 490, 229 Cal.Rptr. 456, 723 P.2d 573 (1986) to support its holding that condominium board member duties do not extend to "future owners." That reliance is

Finally, including post-tenure purchasers in the protected class poses no threat of a limitless group of plaintiffs because the number of persons in fact injured by the respondents' breach is limited to those owners on whom the cost of repair and related damages ultimately falls.

**4. Adverse Domination of a Non Profit Board Is Not Defeated By a Non-Party's Independent Knowledge and Incentive to Bring His or Her Own Claim.**

The Court of Appeals' decision suggests that proof that "someone other than the wrongdoing directors had knowledge of the basis for the cause of action, combined with the ability and the motivation to bring an action" can dispel the adverse domination presumption. *Alexander*, 181 Wn.App. at 154 (citing *Fed. Deposit Ins. Corp. v. Smith*, 328 Or. 420, 430, 980 P.2d 141 (1999)). *Smith* involved a for-profit corporation, which makes a considerable difference on this narrow point. In for-profit corporations, when a shareholder has knowledge of board member malfeasance and enough interest to assert a claim, he or she *must* commence a derivative action on behalf of the corporation and in the interests of similarly-situated shareholders in order to preserve his or her rights. CR 23.1.

But here, because the Association is a non-profit corporation, its members have no legal ability to commence a derivative action. *Lundberg*

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badly misplaced for reasons explained in appellants' Petition for Review at page 18, fn. 2, and in appellants' Motion for Reconsideration to the Court of Appeals at pages 18-23.

*v. Coleman*, 115 Wn.App. 172, 177-178, 60 P.3d 595 (2002). If homeowners in a non-profit association are to protect their interests against board misconduct, they must do so by commencing claims individually. To commence a personal claim, a homeowner must know or have good reason to suspect wrongdoing on the part of directors. Knowledge or suspicion on the part of *other* unit owners is simply not germane unless and until the knowledge is communicated to a party.

Allowing the defense to adduce evidence that non-plaintiff homeowners may have independently known of facts supporting a claim would (1) potentially nullify the adverse domination doctrine without the defense having met its burden of showing when, if at all, control actually shifted to a majority of neutral directors, thus making the doctrine essentially meaningless; (2) contravene Washington's standard discovery rule jurisprudence which looks to the knowledge of the actual party plaintiff, not the knowledge of strangers, *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998); and (3) present a serious danger of jury confusion and prejudice by introducing evidence which is not relevant to whether the plaintiff homeowners themselves had sufficient knowledge that could have enabled them to commence suit earlier.

**5. Even If the Court Rejects The Adverse Domination Doctrine, It Should Still Apply the Discovery Rule.**

Limitations periods begin to run when the cause of action accrues. *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn.App. 655, 659, 37 P.3d 309 (2001). Under the discovery rule, a cause of action does not accrue until a plaintiff knows, or in the exercise of reasonable diligence should know, *all* of the essential elements of the cause of action. *Green*, 136 Wn.2d at 95. The discovery rule applies to all claims at issue in this matter.<sup>5</sup>

As explained in appellants' briefs to the Court of Appeals, and in the Court of Appeals' opinion herein, the Executive Defendants' reliance on *Quinn v. Connely*, 63 Wn.App. 733, 741, 821 P.2d 1256 (1992) and *Gillespie v. Seattle First Nat'l Bank*, 70 Wn.App. 150, 158-59, 855 P.2d 680 (1993) in support of a bright-line rule of accrual of all claims on a director's resignation is badly misplaced. *Alexander*, 181 Wn.App. at 152. The cited cases are inapposite, and respondents' proposed bright-line rule is thus not supported by any applicable law.

Worse, respondents' proposed rule would reward successful fraud and grant retiring directors a special immunity for successful concealment

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<sup>5</sup> The discovery rule applies to claims for: breaches of fiduciary duty, *Douglass v. Stanger*, 101 Wn.App. 243, 256, 2 P.3d 243 (2000); fraud or misrepresentation by omission, RCW 4.86.080(4) and *Young v. Savidge*, 155 Wn.App. 806, 823, 230 P.3d 222 (2010); negligent misrepresentation, *First Md. Leasacorp v. Rothstein*, 72 Wn.App. 278, 286, 864 P.2d 17 (1993); simple common law negligence as a director's breach of duty of care, *In re Estates of Hibbard*, 118 Wn.2d 737, 752, 826 P.2d 690 (1992); and violation of the Consumer Protection Act. *Mayer v. Sto Indus. Inc.*, 123 Wn. App. 443, 463, 98 P.3d 116 (2004), *affirmed in part, reversed in part on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006).

of their malfeasance. Accordingly, even if it does not adopt the adverse domination doctrine, the Court should make it clear that the discovery rule applies to the appellant homeowners' claims.

The discovery rule is unavailable to a plaintiff who knows enough facts to be on "inquiry notice," such that a reasonable investigation would have disclosed all of the elements of his claim. See., e.g., *1000 Virginia Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006). But here, there is no allegation in the Complaint that appellants had any knowledge of any of the material facts. On the contrary, the Complaint specifically alleges that this material information was deliberately and systematically suppressed by the respondents.<sup>6</sup>

Even on summary judgment, the question of due diligence in discovery of a claim is ordinarily for the jury unless reasonable minds could reach only one conclusion. *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995); *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006), review denied, 161 Wn.2d 1005 (2007); *Samuelson v. Community College Dist. No. 2*, 75 Wn.App. 340, 347, 877 P.2d 734

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<sup>6</sup> There is no allegation that appellants otherwise knew of defects, that they knew other owners had complained of water intrusion, that they knew about the professional warnings the Board had received of hidden defects and the need to assert a warranty claim, that they knew of the respondents' self-serving efforts to conceal knowledge of defects in order to sell units, that they knew of the conflict of interest under which at least two directors served, or that they knew that the true reason for Peter's resignation was his discomfort at the prospect of calling his employer to account for warranty violations.

(1994). Plainly, then, dismissal on a mere CR 12(b)(6) motion concluding that discovery of all claim elements indisputably occurred on director resignation (or at any other point) would have been improper.

Unable to show inquiry notice, respondents contend that unit owners should be deemed to know what their “agents” (the property manager and the corrupt directors on the Board) knew. But the rule imputing an agent’s knowledge to the principal is founded merely on a rebuttable presumption that an agent can be expected to do his duty. *Paulson v. Mont. Life Ins. Co.*, 181 Wash. 526, 536, 43 P.2d 971 (1935).<sup>7</sup>

Here, the property manager and the Board did *not* convey any of the material information to the homeowners, but instead concealed it out of self-interest or conflict of interest. Under these facts, it is improper to impute knowledge to appellants because the presumption “will not prevail ...where the agent... is *in reality* acting in his own or another's interest, and adversely to that of his principal.” *Lowman v. Guie*, 130 Wash. 606, 611, 228 P. 845 (1924) (emphasis added).<sup>8</sup>

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<sup>7</sup> That presumption “is not conclusive.” *Neuson v. Macy's Dep't Stores, Inc.*, 160 Wn.App. 786, 794, 249 P.3d 1054 (2011). “Once there is contrary evidence, the presumption disappears. . . .” *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 619-620, 244 P.3d 1 (2010) (Sanders, J., dissenting. Citations omitted.)

<sup>8</sup> See also *Lewis v. Bertero*, 198 Wash. 296, 309-310, 88 P.2d 433 (1939) and *State v. Jackson*, 112 Wn.2d 867, 873-74, 774 P.2d 1211 (1989). Moreover, respondents fail to show that disclosure of the material facts known to the directors was even a duty within the scope of the property managers’ supposed agency in the first place.

Unable to deem early notice by agency presumption, the Executive Defendants and Lozier contend they are excused from the discovery rule because succeeding elected directors did not reveal the Executive Defendants' misconduct when they should have figured it out. Respondents cite to *United States v. Read*, 658 F.2d 1225, 1233 (7<sup>th</sup> Cir., 1991), *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1402 (9<sup>th</sup> Cir. 1995), and *Griffin v. McNiff*, 744 F.Supp. 1237 (S.D.N.Y. 1990). But as the Court of Appeals recognized, these cases are inapposite. *Alexander*, 181 Wn.App. at 159, fn. 3. Limitations periods were tolled by the Executive Directors' own concealment, not that of later directors. This is more fully discussed in appellants' briefs to the Court of Appeals.

**C. Argument on Issues Raised by Respondents**

**1. Appellants' Claims Are Not "End Runs" Around WCA Warranty Limitations Periods.**

Respondents contend that claims for breach of director duties, fraud, misrepresentation, and negligence all amount to "end runs" around the warranty statute of limitations (RCW 64.34.445) or the contractor's statute of repose (RCW 4.16.310). This contention is easily debunked, as set forth in appellants' Reply Brief to the Court of Appeals at pages 7-8, and in appellant's Answer to Respondents' Joint Petition for Review at

pages 1-2. The Court of Appeals did not address respondents' football analogy at all.

Respondents also offer a new, related contention at pages 7 and 10 of their Joint Petition for Review, that "condominium boards always start with declarant-appointed board members" such that allowing suits against them for breaching their fiduciary duties could render the statute of limitations on WCA warranty claims a nullity, and make volunteer service on a board unattractive. But in fact, a declarant is **never** required to appoint condominium directors, or to exert any control over an association at all.<sup>9</sup> Even if a declarant chooses to appoint an interim board pending a minimum number of unit sales, a declarant could appoint independent, professional property managers instead of its own personally-interested executives and agents. Thus it is by no means inevitable that declarant executives will be sued when a statute of limitations on a WCA warranty claim expires without their having taken action.<sup>10</sup>

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<sup>9</sup> The WCA provides that "the declaration **may** provide for a period of declarant control of the association, during which period a declarant, or persons designated by the declarant, **may**: (i) Appoint and remove the officers and members of the board of directors..." RCW 64.34.308(5)(a). (Emphasis added.) There is no requirement under the WCA that the declarant exercise control over the Association at all, and certainly no requirement that the declarant appoint its own executives and insiders as directors.

<sup>10</sup> This case notwithstanding, a declarant-appointed director should ordinarily **never** be responsible for missing the limitations period on a WCA warranty claim because he should have been off the board long before that happens. The claim only arises in this case because of highly unusual efforts by the Declarant (along with its parent company Lozier, and the Executive Defendants) to manipulate the Association

**2. The Complaint Alleges Participation by Executive Defendants in Concealing Facts Supporting the Appellant Unit Owners' Claims.**

Respondents contend that the Complaint does not allege that the Executive Defendants participated in “the decision” to forego a timely warranty claim, and therefore the Executive Defendants could not have dominated the Board on that issue. This entirely new argument by respondents is factually inaccurate and unavailing.

The Complaint alleges that the Executive Defendants engaged in a long pattern of concealing defects and misdirecting the Board as to the cause of leaks for the purpose of causing the warranty period to expire without appropriate action. The Complaint alleges that Executive Defendant Sanford *remained on the Board* during critical events, for example, when the Board ignored the advice of counsel and construction professionals to take action before the warranty period expired. The

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board by installing a declarant-appointed director on the board for the *full duration of the WCA warranty period*.

Normally the statute of limitations on WCA warranty claims for common element defects is the longer of four years from the first sale of a unit, or a year after control of the association is turned over to a board elected by homeowners (which occurs shortly after 75% of units are sold.) RCW 64.34.308(5)(b) and RCW 64.34 .452(1). Thus, under the statute, declarant-appointed directors should not be serving on a board when WCA warranties expire. But here, a declarant-appointed director remained on the board for many years *after* all the units were sold, *after* control of the Association had been turned over to the homeowners, and until shortly after the statute of limitations on common element warranty claims had expired.

The decision by the Executive Defendants to insert themselves on the Association’s board for the long term carried risks, including the risk of liability for allowing the warranty to lapse. Presumably whoever came up with the idea of keeping a developer “mole” on the Board throughout the warranty period explained the risks of doing so to respondents.

Complaint alleges that Sanford remained on the Board falsely ascribing problems to “maintenance” during this critical period as well.

Respondents’ new argument that the Executive Defendants did not participate in the Board’s ignoring the need for a warranty claim is thus based on an insupportable view of the allegations of the Complaint.

**3. Domination by a Majority of Adverse Directors Is a Better Standard Than Complete Domination.**

Respondents argue that only “complete” domination should be sufficient because the “flow of information” in a non-profit association is “not the same” as the flow of information in a for-profit corporation. (Joint Petition for Review at page 17). Whatever speculative notions respondents have in mind regarding the “flow” of information in different types of corporations, here the critical information *in fact* was never passed on by any director to the members until the special assessment. (CP 9-22). Instead, discussions of recurring leaks and expert advice were systematically omitted from board minutes by respondents. (CP 13, 19-20). The directors did this to serve their interests in selling units. (CP 20-21). In short, there was **no** “flow” of relevant information at all.

There is, moreover, no difference at law between the required “flow of information” in a *for*-profit corporation governed by a corrupt board on the one hand, and a *non*-profit corporation governed by a corrupt

board on the other. The laws governing the flow of information and imposing disclosure duties on directors are essentially equivalent.

The Board functioned by majority rule of a quorum of directors when it failed to reveal its construction defect concerns and the expert advice it had received. RCW 24.03.110. No dissents or abstentions are alleged to be in the minutes. Accordingly, the Complaint describes facts from which it is fair to presume that information supporting a claim against the Board would never reach owners while the respondents served. These systematic omissions establish, at least for purposes of CR 12(b)(6), that the Board was effectively adverse to the owners.

**4. The Plaintiff Homeowners Fraud Claims Are Valid.**

Respondents contend that fraud claims should be dismissed because (1) they supposedly had no duty as board members to disclose known construction defects (citing *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.*, 125 Wn.App. 227 (2005)); (2) the only actionable fraud a declarant or its employees can commit with respect to a unit owner is supposedly a misrepresentation contained in the project Public Offering Statement (“POS”) (citing RCW 64.34.443(2)); and (3) respondents supposedly had no duty to disclose known defects to “future owners” under RCW 64.06.020. Respondents misapprehend the nature of the claims and misconstrue the law.

The Executive Defendant directors had a duty to disclose known defects and expert advice, and to pursue a warranty claim.<sup>11</sup> Elected directors had the duty to do the same, if a reasonable person would have done so.<sup>12</sup> Most appellant owners relied on the respondents' statements and omissions by not taking timely steps to address the unsuspected defects or assert warranty claims. Others who purchased after the warranty expired would not have purchased had defects been disclosed.

*Kelsey Lane* in no way holds that declarant-appointed directors may conceal knowledge of defects in the execution of their directorial duties to see to the maintenance and upkeep of common elements. In *Kelsey Lane*, the declarant had hired a general contractor, had *no* involvement in the construction work, and thus no reason to know of defects. 125 Wn.App. at 235. There being *no evidence* that the declarant-appointed directors knew or should have known of defects, the homeowners *at summary judgment* could not show a breach of fiduciary duty in their failing to disclose them while on the board. *Id.* at 243.

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<sup>11</sup> *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977) (“[F]iduciaries owe . . . the highest degree of good faith, care, loyalty and integrity. This duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests.”) See also *Raven's Cove Townhomes, Inc.*, 114 Cal. App. 3d 783 (declarant-appointed director’s fiduciary duty to present and future condominium buyers included disclosure of known defects).

<sup>12</sup> RCW 24.03.127; RCW 64.34.309(1)(b); *Waltz v. Tanager Estates Homeowner's Ass'n*, 183 Wn. App. 85, 91, 332 P.3d 1133 (2014).

Our case is profoundly different. While constructing the project themselves, the Declarant, Lozier, and the Executive Defendants learned of the existence of widespread defects. The Executive Defendants had knowledge of the defects during their tenure as directors, and did not act reasonably by disclosing it and commencing a warranty claim. *Kelsey Lane* provides no safe harbor at all for that conduct.

Respondents' suggestion that condominium developers can commit fraud or misrepresentation only when a unit owner relies on a statement in a Public Offering Statement, or signed by an agent identified in it, borders on the absurd. RCW 64.34.443(2), on which respondents rely, merely describes what qualifies as an "express warranty of quality" by a declarant. It imposes no limits on the liability of culpable directors for fraud and misrepresentation during governance of the Association.

Respondents would disclaim all duties of disclosure by pretending in this argument that their misrepresentations and fraud occurred in the context of sales only. They did not. And even if sales were all that is at issue, the respondents had reason to know that their misrepresentations and omissions would be passed on because a unit seller has a duty to disclose known defects to purchasers on a Form 17. This means, as the Court of Appeals noted, that homeowners and "future owners" considering

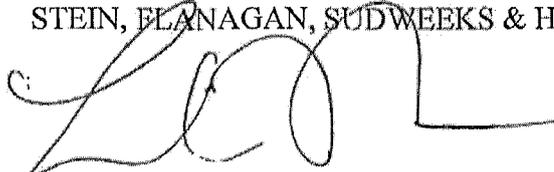
a purchase must rely on the board's knowledge and communications about common element defects. 181 Wn.App. at 180.<sup>13</sup>

**D. Conclusion**

Based on the foregoing, the Court should reverse the Court of Appeals' dismissal of CPA claims against Executive Defendants and Lozier, reverse its dismissal of claims by "future owners" against respondent directors and Lozier, reverse its holding that a showing of independent knowledge and incentive by non-party owners may defeat adverse domination of a non-profit corporation's board. In all other respects, the Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of February, 2015.

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<sup>13</sup> Under RCW 64.06.020 and RCW 64.06.005(2)(b) a condominium unit sale requires a Form 17 disclosure, unless the sale is an initial one by the declarant, which requires a public offering statement instead. See RCW 64.06.005(2)(b) and RCW 64.34.405(3). The Court of Appeals was correct that if sellers are not advised of the presence of concealed defects known to the directors, they cannot deliver accurate Form 17 disclosures to subsequent buyers – the so-called "future owners." And even if a Form 17 disclosure were not required, "future owners" have a right to a "resale certificate" from the board, which must disclose the existence of known defects. RCW 64.34.425. Given that requirement, the directors knew that their misrepresentations and concealment of defects would ultimately injure subsequent unit buyers.

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**Subject:** 90642-4 - Cindy Alexander, et al. v. Gary Sanford, et al.

Dear Clerk,

Attached is Petitioners' Supplemental Brief for filing today in the matter of Alexander, et al. v. Sanford, et al., Supreme Court cause no. 90642-4. Thank you for your assistance in filing this.

Thank you.

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