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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

NO. 63358-9-I

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EQUITY RESIDENTIAL, et al.,  
Plaintiffs/Appellants.

v.

ACE AMERICAN INSURANCE COMPANY, et al.,  
Respondent.

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**RESPONDENTS AISLIC, NATIONAL UNION FIRE INSURANCE  
COMPANY AND ILLINOIS NATIONAL INSURANCE  
COMPANY'S RESPONSE BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

It has long been the law in Washington that a trial court can determine whether a lawsuit is more appropriately litigated in another jurisdiction. The *forum non conveniens* doctrine permits a trial court to evaluate a variety of factors that bear on the efficiency and expense of litigation.

The lower court in this matter engaged in the traditional *forum non conveniens* analysis and properly concluded that Illinois represents a superior forum for the resolution of an insurance dispute between Equity (a national corporation domiciled in Illinois) and its insurers (none of which are domiciled in Washington). Despite the fact Equity has availed itself of the Illinois courts for insurance disputes in the past and continues to litigate these identical issues against some of these defendants in Illinois, it now challenges the lower court's decision to decline jurisdiction over this dispute under the *forum non conveniens* doctrine. Regardless of Equity's inconsistent words and conduct, the lower court's decision to decline jurisdiction under the *forum non conveniens* doctrine was supported by the facts and the law developed in Washington. Therefore, in the absence of an abuse of discretion by the lower court, respondents American International Specialty Lines Insurance Company ("AISLIC"), National Union Fire Insurance Company ("National Union") and Illinois National Insurance

Company (“Illinois National”) respectfully request that the lower court’s ruling be affirmed, and this insurance dispute should be referred to an Illinois court.

**II. COUNTERSTATEMENT OF ISSUE ON APPEAL**

Did the lower court properly exercise its discretion when it declined to retain jurisdiction over this declaratory judgment action under the doctrine of *forum non conveniens*?

**III. COUNTERSTATEMENT OF THE CASE**

**A. Underlying Condominium Lawsuits**

Equity Residential is a Maryland real estate investment trust that is domiciled in Illinois. (CP 2140-2152.) Equity Residential is a Fortune 500 company, with more than \$12 billion in assets. (CP 522.) Equity Residential has operations in at least 24 states, including Washington and the District of Columbia (CP 2152).

Plaintiffs Equity Residential, Balaton Condominium, LLC, Country Club Condominium, LLC, EC-Sterling Heights, LLC and EC-Timber Ridge, LLC and three of their non-party affiliates (Equity Residential Properties Management Corp., ERP Operating Limited Partnership and ERP Holding Company, Inc.)<sup>1</sup> allegedly were declarants on four separate condominium conversion projects in the State of Washington: Balaton, Country Club,

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<sup>1</sup> For the sake of brevity, these respondents will refer to the Equity entities collectively as “Equity.” To the extent a distinction between these entities is necessary, it will be noted.

Sterling Heights and Timber Ridge. (CP 378.) The homeowners associations (“HOAs”) for these condominium developments filed suit against Equity in five separate lawsuits (“Underlying Lawsuits”): *Balaton Condo. Ass’n. v. Balaton Condo., LLC*, King County Superior Court Cause No. 07-2-14061-1 SEA; *Country Club Estates Condo. Homes Ass’n v. Country Club Condo., LLC*, Snohomish County Superior Court Cause No. 08-2-03135-5; *Timber Ridge Condo Ass’n. v. EC-Timber Ridge LLC*, King County Superior Court Cause No. 07-2-38036-1 SEA; *Ogard v. EC-Timber Ridge, LLC*, King County Superior Court Cause No. 08-2-17079 SEA; and *Sterling Height Condo. Ass’n. v. EC-Sterling Heights, LLC*, King County Superior Court Cause No. 08-2-02978-6 SEA. The complaints in the Underlying Lawsuits each allege that the Equity defendants are liable for construction defects and other problems at the four condominiums. (CP 2477-2650.) The existence, scope and causation of any property damage associated with those developments are disputed.

**B. Prior Coverage Litigation Involving Equity**

In the past, Equity has engaged in extensive litigation in Illinois over insurance coverage for claims arising out of its national operations. In this prior litigation, Equity has repeatedly taken the position that Illinois is an appropriate forum for resolving issues with its insurers, opposing any effort to have the coverage issues heard by a non-Illinois court.

For example, in 2004, Equity Residential commenced litigation against Admiral Insurance Company and Connecticut Specialty Insurance Company in Cook County, Illinois. (“Admiral Lawsuit”) (CP 2194-2206.) In that case, Equity sought insurance coverage for discrimination claims arising out of its operations in Florida. In the Admiral Lawsuit, Equity asserted that the court should apply Illinois law because Equity was domiciled in Illinois, where the policies were delivered. (CP 2208-2221.) In addition, Equity opposed a motion to dismiss in the Admiral Lawsuit pursuant to the doctrine of *forum non conveniens*, asserting that Illinois was the “optimal forum” in which to litigate a dispute with its insurers over its out-of-state operations. (CP 2209.)

In 2004, Equity filed a second lawsuit against Connecticut Specialty, in which it sought coverage for the underlying Florida litigation. Equity again opposed application of *forum non conveniens*, arguing that Illinois “is the most convenient forum for adjudicating the claim...” (CP 2223-2237.)

In 2004, another Equity insurer, Genesis Indemnity Insurance Company, filed a separate coverage action in Florida. (CP 2239-2256.) Equity subsequently moved to have the Genesis Lawsuit dismissed pursuant to the doctrine of *forum non conveniens*, arguing that Illinois was the most convenient forum. (CP 2255.)

### C. The Current Coverage Lawsuit

On or about May 2, 2008, Equity commenced this lawsuit seeking a declaration that it is entitled to insurance coverage under policies issued by the various defendant insurance companies for the Underlying Lawsuits. (CP 1242-1251.) Although the condominiums at issue in the Underlying Lawsuits were not converted until after 2000, Equity is seeking coverage under insurance policies issued as far back as 1995. Equity asserted that each defendant insurer was a foreign corporation doing business in the State of Washington. (CP 1243.) Respondents AISLIC, Illinois National and National Union responded to Equity's lawsuit, each asserting the affirmative defense of *forum non conveniens*.<sup>2</sup> (CP \_\_\_\_.)

On or about March 13, 2009, Defendant National Surety Insurance Company filed two motions for summary judgment. The first motion requested dismissal on the basis of *forum non conveniens*. (CP 437-458.) The second motion requested a ruling that Illinois law applied to the substantive issues in the insurance litigation. (CP 1714-1731.) Other defendant insurers joined in one or both of these motions.

On April 10, 2009, after hearing oral argument from the parties, the

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<sup>2</sup> These Respondents have submitted a supplemental designation of clerk's papers, which includes the three Answers referenced above. Upon receipt of the supplemental clerk's papers, Respondents will file a corrected page with the appropriate citation. To assist the Court, the Answers are included in the Appendix: AISLIC (Ex. C); Illinois National (Ex. D) and National Union (Ex. E).

Honorable Mary Yu ruled that Equity's lawsuit should be dismissed based on the application of *forum non conveniens*, since Illinois was a more appropriate forum for this insurance dispute. (CP 1216-1219.) Judge Yu declined to rule on the choice of law issue. Equity has appealed that ruling. (CP 1220-1227.)

Since filing this appeal, Equity has filed a second lawsuit against Illinois National and National Union in Illinois state court. See Appendix, Ex. A. Just as in this case, Equity asserts in the Illinois action that Illinois National and National Union owe it coverage in the Underlying Lawsuits.

#### **IV. ARGUMENT**

The sole issue on appeal is whether the lower court properly declined jurisdiction over an insurance dispute between a national corporation domiciled in Illinois and multiple insurers, all of which are also headquartered outside the State of Washington.

Under the doctrine of "*forum non conveniens*," Washington courts are granted the discretionary power to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 20, 177 P.3d 1122 (2008).

A trial court's dismissal on *forum non conveniens* grounds is reviewed for an abuse of discretion, and will be reversed only if the trial

court's decision is manifestly unfair, unreasonable, or untenable. *J.H. Baxter & Co. v. Cent. Nat'l Ins. Co. of Omaha*, 105 Wn.App. 657, 661, 20 P.3d 967 (2001). "A proper exercise of judicial discretion means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." As will be discussed below, the lower court properly exercised its discretion when it concluded that there was a more appropriate forum for this insurance dispute.

**A. When Assessing *Forum Non Conveniens*, Washington Courts Have Adopted A Balancing Test That Assesses Pertinent Private And Public Factors.**

The decision in *Sales v. Weyerhaeuser, supra*, demonstrates the continuing viability of the doctrine of *forum non conveniens* in Washington. In deciding whether to decline its own jurisdiction in favor of another forum, the court must engage in a balancing test that focuses on certain private and public factors. *Sales*, 163 Wn.2d at 20.

The balancing analysis presumes the existence of an adequate alternative forum. *Id.* "An alternative forum is adequate as long as a plaintiff can litigate the essential subject matter in that forum and recover if successful." *Sales v. Weyerhaeuser Co.*, 138 Wn.App. 222, 229, 156 P.3d 303 (2007), *aff'd*, 163 Wn.2d 14, 177 P.3d 1122 (2008). "[I]t is the

rare case where ‘the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all....’” *Hill v. Jawanda Transport Ltd.*, 96 Wn.App. 537, 541, 983 P.2d 666 (1999) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)).

The private factors require the court to consider the convenience of litigation in the alternative forum, including the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *Myers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990).

The public factors also focus on the litigation, including

[a]dministrative difficulties ... for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty ... imposed upon the people of a community which has no relation to the litigation.... There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case.

*Gulf Oil Corp.*, 330 U.S. at 508-09.

To examine “ ‘the relative ease of access to sources of proof’ ” and the availability of witnesses, the court must examine the substance of the dispute to evaluate what proof is required, and determine whether the pieces of evidence the parties cite are critical, or even relevant, to the cause of action and any potential defense. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988) (quoting *Gulf Oil*, 330 U.S. at 509). In examining the public interest factors, the court must consider the locus of the alleged culpable conduct and the connection of that conduct to the plaintiff’s chosen forum. *Van Cauwenberghe*, 486 U.S. at 528.

No specific set of facts mandates *forum non conveniens* dismissal in every case. “ ‘Each case turns on its facts’ ” because “[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (quoting *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 557, 66 S.Ct. 284, 90 L.Ed. 311 (1946)). The trial court’s decision will only be reversed when it is “ ‘manifestly unfair, unreasonable, or untenable.’ ” *Myers*, 115 Wn.2d at 128, 794 P.2d 1272 (quoting *General Tel. Co. v. Util. & Transp. Comm’n*, 104 Wn.2d 460, 474, 706 P.2d 625 (1985)).

**B. The Public/Private Factor Balancing Test Supports the Lower Court's Determination that Illinois is a More Appropriate Forum for this Insurance Dispute.**

Between the defendants' motion for dismissal based on *forum non conveniens* and the defendants' motion regarding choice of law, the parties presented comprehensive information regarding the status of Equity and its insurers and the various contacts with the States of Illinois and Washington, respectively. In other words, the lower court was well informed with respect to the public and private factors that must be considered when assessing *forum non conveniens*. After reviewing this information the lower court was left with one conclusion: Illinois was a more appropriate forum for the insurance dispute between Equity and its insurers.

**1. Illinois is an adequate alternative forum.**

There can be no rational argument that Illinois is not an adequate alternative forum for the resolution of insurance disputes. It would not be hyperbole to state that there are thousands of Illinois cases involving insurance disputes. In fact, Equity is currently seeking declaratory relief from its insurers in an Illinois court. (See Appendix, Ex. A.) In addition, other Equity insurers are prosecuting declaratory judgment actions against Equity in Illinois. (CP 2292-2303; 2305-2360; 2362-2371.)

Equity does not dispute that it can litigate the essential subject

matter – insurance coverage – in Illinois and recover from its insurers if successful. Such an argument would be absurd, since Equity, in other lawsuits, has argued that Illinois is the proper forum for litigating coverage disputes between itself and its insurers. (CP 2209; 2255.) Rather, Equity fashions a convoluted argument that because potentially interested parties – the plaintiff HOAs in the underlying construction defect lawsuits – are not amenable to the jurisdiction of Illinois courts, Illinois is not an acceptable alternative forum. This argument is not borne out by the law or by Equity’s conduct.

Citing a handful of Illinois cases, Equity argues that the underlying plaintiff HOAs are necessary or indispensable parties to any lawsuit between Equity and its insurers, since these plaintiffs allegedly have an interest in Equity’s insurance proceeds. According to Equity, this interest can only be protected if the underlying plaintiffs are made a party to the coverage litigation.

Illinois courts have articulated three criteria to determine whether a party is an indispensable or necessary party:

There have been enumerated three reasons to consider a party “necessary” such that a lawsuit ought not to proceed in his or her absence: (1) to protect an interest which the absentee has in the subject matter of the controversy which would be materially affected by a judgment entered in his absence; (2) to protect the interests of those who are

before the court; or (3) to enable the court to make a complete determination of the controversy.

*Safeco Insurance Co. of Illinois v. Treinis*, 238 Ill.App.3d 541, 546, 606 N.E.2d 379, 382 (1992). Despite Equity's tortured analysis, the HOAs are not necessary parties to this coverage litigation.

The plaintiff HOAs do not have a present interest in the outcome of the coverage litigation between Equity and its insurers, and therefore would not be considered "necessary" parties under the Illinois rule. Illinois courts have held that there must be a present interest that must be protected and a present interest is necessary to the determination. *American Home Assurance Co. v. Northwest Industries, Inc.*, 50 Ill.App.3d 807, 365 N.E.2d 956, 961 (Ill. App. 1977). (the determination of whether a party is indispensable includes examining whether the absent party has a "present substantial interest as distinguished from a mere expectancy or future contingent interest"). The current lawsuit involves claims by Equity that some of its insurers must defend the underlying lawsuits and that some or all of its insurers must potentially indemnify Equity for the underlying construction defect claims.

Illinois courts have acknowledged that there may be situations where a potential claimant may be an indispensable party to a related coverage lawsuit. See, e.g. *Allied American Insurance Company v. Ayala*,

247 Ill.App.3d 538, 616 N.E.2d 1349, 1355 (Ill. App. 1993). However, these cases are based on the public policy of ensuring that innocent victims of tortious conduct can receive compensation from a liable tortfeasor. The cases cited by Equity generally involve automobile claims, where the only potential source of recovery might be insurance proceeds. *See e.g., Ayala, supra.* However, unlike a garden-variety automobile tort claim, the existence of insurance coverage will not affect the HOAs' recovery, should Equity be found liable. Equity has admitted that it has assets of over \$12 billion, which could certainly be tapped to satisfy any judgment from the underlying construction defect lawsuits.

A recent development in the *Balaton* lawsuit further illuminates this "present" interest issue. After a six-week trial, the jury returned a verdict in favor of the HOA in the amount of \$742,869. In opposing a post-trial motion on the alter ego doctrine, the Equity defendants represented that they had \$742,869 available to satisfy the verdict, which they were prepared to deposit into the registry of the court. See Appendix, Ex. B. Thus, even where some of the Equity entities have been found liable, they have indicated the ability to satisfy their legal obligation, regardless of insurance coverage.

The Illinois Supreme Court has acknowledged that the necessary party rule has limitations, stating that the rule:

is inflexible, yielding only when the allegations of the bill disclose a case so extraordinary and exceptional in character as that it is practically impossible to make all parties in interest parties to the suit, and further, that others are made parties who have the same interest as have those not brought in, and are equally certain to bring forward the entire merits of the controversy as would the absent persons.

*Oglesby v. Springfield Marine Bank* 385 Ill. 414, 423-24, 52 N.E.2d 1000 (1944).

In *Zurich Insurance Co. v. Baxter International, Inc.*, 173 Ill.2d 235, 670 N.E.2d 664 (Ill. App. 1996), an Illinois appellate court considered whether the necessary party rule, as applied to insurance disputes, impermissibly limited the ability of Illinois courts to address insurance coverage lawsuits involving national or international corporations headquartered in Illinois. In *Zurich*, a liability insurer filed a declaratory judgment action against its insured, Baxter, over potential coverage for claims arising out of contaminated blood products. The trial court raised the issue of whether the individual claimants, which totaled more than 30,000, were necessary parties who would need to be added to the coverage lawsuit. The insurer opposed application of the rule.

On appeal, the Illinois appellate court recognized the unintended consequences of the strict application of the rule:

Holding that all the underlying claimants are necessary parties would have severe consequences. Illinois courts would be closed to Illinois residents involved in mass-tort litigation because such proceedings almost always involve underlying claimants beyond the courts' *in personam* jurisdiction. Additionally, Illinois courts could not decide mass-tort cases with substantial relationships to Illinois because of the existence of out-of-State underlying claimants. The development of Illinois law in this area would stagnate. Many of the most important questions -- at least in terms of the number of individuals affected -- of Illinois insurance defense law would be decided by the courts of other States. Other States issuing declaratory judgments on such questions would attempt to rule on the merits as would Illinois courts. This would be done even though Illinois courts -- by virtue of Baxter's interpretation of the necessary parties rule -- would never rule on the merits. This result is as absurd as it is unacceptable. The necessary parties rule does not require Illinois courts to sacrifice at the altar of the doctrine of joinder their responsibility to oversee the orderly development of this important area of law. Indeed, it has been stated " 'the desirability of requiring full joinder to maximize the value of the judicial resources expended by resolving the entire controversy in one action should not operate to foreclose the plaintiff's right to a forum, at least where a better one is not clearly available.' " (*Safeco Insurance Co.*, 238 Ill.App.3d at 547, 179 Ill.Dec. 547, 606 N.E.2d 379, quoting 4 R. Michael, Illinois Practice § 29.2, at 34-35 (1989) (cited in support of not requiring joinder of parties who were necessary to a complete resolution of a declaratory judgment action).) In light of the foregoing, we find the present case to be of the "extraordinary and exceptional \* \* \* character" envisioned by the supreme court in *Oglesby*.

*Zurich*, 670 N.E.2d at 1179.

Admittedly, *Zurich* involved a mass tort situation, which has some unique characteristics. However, the *Zurich* court's concerns would still be valid here. Equity is domiciled in the State of Illinois, but conducts business throughout the United States. Equity purchased insurance policies from various insurance carriers, some of which have a presence in Illinois, while others are domiciled elsewhere. Illinois courts certainly have an interest in addressing the contractual relationship between an Illinois business and its insurers.

Strict application of the necessary party rule would foreclose Illinois courts from "overseeing" the development of Illinois insurance law as it relates to an Illinois corporation such as Equity. Rather, Illinois insurance law will be developed by courts in other jurisdictions. In this case, it would be a Washington court. The next case could be in any state where Equity conducts its business. This is a recipe for inconsistent results and conflicting decisions. Equity, its insurers and the citizens of Illinois deserve more. Thus, as demonstrated in *Zurich*, it is far from certain that an Illinois court will blindly apply the necessary party rule to the detriment of an Illinois business.

Equity's current concern about the potential interests of the HOA plaintiffs is simply a ruse to protect its choice of forum. It is striking that

Equity did not name the HOAs as defendants in this coverage lawsuit. (CP 1242-1251.) It is also notable that none of the plaintiff HOAs has moved to intervene into the current coverage lawsuit, despite their alleged interest in Equity's insurance coverage.

Furthermore, even in other Illinois coverage actions initiated by Equity, it has not named any of the claimants as a defendant or even suggested that they may be necessary parties. In fact, in the Genesis Lawsuit, Equity asserted that underlying claimants are not necessary parties to an insurance coverage lawsuit and that if they "truly are interested...they are free to file their own actions... or seek to intervene." (CP 2273-2274.) Based on its prior positions, Equity apparently believes the necessary party rule can be invoked as a procedural weapon when it suits its needs.

Equity's recent conversion to the necessary party rule cannot erase Equity's past conduct and positions on this issue. Illinois is an appropriate alternate forum for the resolution of this insurance dispute. As such, the analysis turns to balancing the relevant private and public factors.<sup>3</sup>

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<sup>3</sup> Equity's argument that Illinois is not an acceptable alternative forum is disingenuous at best. Since filing this appeal, Equity filed a second lawsuit in Illinois state court against Illinois National and National Union over coverage for the four underlying Washington construction defect claims. See Appendix, Ex. A. While Equity's decision to file a second lawsuit raises questions regarding Equity's intentions regarding this appeal, there can be no question that Equity considers Illinois state court to be an acceptable alternative forum for resolution of the insurance dispute with these insurers.

## 2. Private Factors

The *forum non conveniens* balancing test requires the court to consider the parties' private interests relating to the litigation forum. These include access to sources of proof; availability of witnesses; site access, if necessary; and other practical problems that would bear on the cost and/or ease of trial. *Myers*, 115 Wn.2d at 128. When evaluating the private factors, it is important to keep in mind that this is an insurance dispute between a national corporation headquartered in Illinois and various insurance companies, none of which are headquartered in Washington. Although the underlying losses are in Washington, this is incidental to the coverage dispute. The coverage litigation will not require replication of the underlying construction defect lawsuits, which necessarily minimizes the significance of the State of Washington.

In previous insurance litigation, Equity argued that these disputes present simple contract interpretation issues that merely call for a court to interpret the parties' rights and obligations under the subject insurance policies. (CP 2248.) It necessarily follows that the relevant "sources of proof" relate to the insurance policies at issue, which have little, if any, connection to the State of Washington.

To the extent information from the underlying construction defect lawsuits bears on the insurance litigation, that information can easily be

obtained by the parties in electronic or hard form.

It is difficult to comprehend what Equity has in mind when it suggests that the availability of information in the underlying lawsuits mandates litigating the insurance dispute in Washington. Surely Equity is not suggesting that the parties in the coverage lawsuit will engage in discovery that effectively replicates or shadows the discovery in the underlying lawsuits. To the contrary, since this coverage lawsuit was filed by Equity in May 2008, there has been no such discovery directed at the underlying litigants.

As with the documentary evidence, access to witnesses will also be enhanced with the insurance lawsuit venued in Illinois. There is no evidence that the company witnesses for Equity and the party insurers are located in Washington. Illinois stands in stark contrast with Washington on the witness issue, since many Equity employees are located in that State as well as some insurance company representatives. (CP 2408-2414.)

Equity has suggested that there may be Washington witnesses who may need to testify in the coverage action, such as experts. To the extent this supposition is accurate, the applicable discovery rules address this contingency. An out-of-state witness can be compelled to attend a deposition in his or her own state. In the event a Washington witness is unwilling or unable to attend trial in Illinois, their testimony can be

perpetuated and presented to the Illinois jury via videotape or transcript. There is nothing controversial or unusual about this issue or the solution.

The simple fact is that there are potential witnesses located throughout the United States who may be asked to provide testimony in the insurance litigation. However, the vast majority of potential witnesses are located in Illinois, thereby making this venue far more economical and efficient. (CP 2408-2414.)

A jury site visit, which would not be possible if the insurance litigation is venued in Illinois, should not be a factor. This is an insurance contract dispute. In the unlikely event evidence regarding the physical condition of the four condominium developments needs to be presented to the fact finder in the insurance lawsuit, it can be presented in an alternative format, e.g., photographs, video, exemplars. It is improbable that a trial court in Washington would undertake the time and expense to allow a site visit to four separate condominium developments when these acceptable alternatives are available.<sup>4</sup>

Overall, Equity is unable to identify any realistic private interest consideration that would favor Washington. Other than identifying potential problems that could arise in the event the insurance lawsuit is litigated in Illinois, Equity offers no concrete example of how an Illinois

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<sup>4</sup> In the recent Balaton trial, the jury did not take a site visit.

lawsuit would be less efficient or more expensive. This is not surprising, since common sense dictates that a lawsuit between an Illinois corporation and its insurers venued in Illinois would be more efficient and less expensive than litigating that same dispute in Washington, where none of the parties are located.

### **3. Public Factors**

The *forum non conveniens* balancing test also requires the court to consider such public interest factors as: administrative difficulties that the court must endure if a case is not litigated at its origin; the desire to impose jury duty on the citizens of the community that has the relationship to the litigation; local interest in having localized controversies decided at home; and the desire to litigate the case in the forum whose law governs the case, rather than having a court in another forum interpret foreign law. *Myers*, 115 Wn.2d at 129. As with the private interest factors, the public interest factors favor Illinois as the venue for this insurance dispute.

With respect to insurance disputes, Equity is already on record that the public interest factors favor Illinois because the outcome of this type of case would have a significant impact on an Illinois resident (Equity). (CP 2264-2268.) For example, in the Admiral Lawsuit, Equity opposed a motion to transfer the insurance lawsuit to Florida based on the doctrine of *forum non conveniens*. Equity successfully argued that there was no

evidence that court congestion in Illinois was any greater than in Florida. (CP 2253.)

There can be no dispute that we are living in a time of limited resources for court administration, which necessarily means that Washington trial courts must do more with less. Thus, it makes little sense to impose the administrative cost on a Washington court and the burden of jury duty on Washington citizens over an insurance dispute between foreign corporations.

The administrative burden and expense is only magnified by the fact that Illinois, rather than Washington, has the greater interest in deciding an insurance coverage dispute between an Illinois corporation and its insurers. Illinois courts have expressed a strong public interest in presiding over insurance disputes involving Illinois policyholders, particularly where the dispute will be resolved through application of Illinois law. *See e.g., Zurich*, 670 N.E.2d at 1179.

Finally, Equity asserts that Washington law applies to this dispute, thereby triggering Washington's public interest in having the case decided by a Washington court. Although choice of law has not been resolved, the insurers presented ample basis for the court to conclude that Illinois has the most significant contacts with this insurance dispute and, therefore, Illinois law should apply. (CP 1714-1731; 2085-2101; 2106-2118.)

Washington employs a two-step approach to choice of law questions. First, Washington choice-of-law principles require the application of Washington law unless there is an “actual conflict” with another applicable body of law. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 103, 864 P.2d 937 (1994). Second, if there is a conflict, Washington uses a “most significant relationship” test. *See Mulcahy v. Farmers Ins. Co.*, 152 Wn.2d 92, 100, 95 P.3d 313 (2004). For contract disputes, the test focuses on the place of contracting, negotiation, performance, the subject matter, and the parties. *Mulcahy*, 152 Wn.2d at 100-101.

The sole contact between this insurance dispute and Washington is the fact that the underlying disputes arise out of property located in Washington. This is not a sufficient contact to trigger application of Washington law to this insurance contract dispute.

That Illinois courts have an interest in addressing Illinois insurance law can not be disputed. In *Zurich, supra*, the court addressed the trial court’s decision to stay the Illinois coverage action out of deference of another coverage suit filed in California. The *Zurich* court confirmed the Illinois courts’ interest in addressing these issues:

Baxter is an Illinois corporation. Zurich is a Swiss corporation with its United States administrative headquarters in Illinois. Baxter’s risk management

department is located in Illinois. Because of this, the insurance contracts at issue were negotiated and entered into in Illinois. The insurance contracts do not contain choice of law provisions. In light of the foregoing, Zurich's duty to Baxter will be determined by applying Illinois law. (See *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.* (1995), 166 Ill.2d 520, 526-527, 211 Ill.Dec. 459, 655 N.E.2d 842.) The coverage determination in the present case may affect thousands of individuals across the nation, two major multinational corporations, and their employees (many of whom undoubtedly reside in Illinois). We find the relationship between this litigation and Illinois is legitimate and substantial.

*Zurich*, 655 N.E.2d at 1181. This public factor also favors Illinois.

**C. The Location of the Properties in the Underlying Lawsuits is not Determinative of the *Forum Non Conveniens* Analysis.**

Equity has continuously cited to insurance cases involving claims for environmental contamination. These cases are distinguishable and do not undermine the lower court's conclusion under the private/public factors balancing test.

The first case cited by Equity is *J.H. Baxter & Co. v. Central National Insurance Co. of Omaha*, 105 Wn.App. 657, 20 P.3d 967 (2001), in which the primary issue was whether there was insurance coverage for contaminated properties located in Washington and California. The insured argued that Washington was the appropriate forum for resolving the coverage dispute. However, this Court noted that the existence or non-

existence of insurance coverage would not affect the determination of whether the Washington properties would be cleaned up.

As in *J.H. Baxter*, the resolution of the coverage dispute will have no effect on the underlying plaintiffs' ability to recover against Equity. Equity has sufficient resources to satisfy its obligation regardless of insurance coverage. (CP 2273-2274.)

Equity also relies on an Alabama decision for the proposition that the location of the property is somehow determinative of the *forum non conveniens* issue. *Vulcan Materials Co. v. Alabama Insurance Guaranty Association*, 985 So.2d 376 (Ala. 2007) is another insurance case involving polluted property. In deciding whether to permit an Alabama lawsuit to go forward when there was another competing lawsuit in California, the *Vulcan* court was not concerned with the location of the contaminated property. Rather, the court focused on the potential adverse ramifications of duplicative lawsuits. In reaching its decision, the Alabama Supreme Court noted that the insured filed suit in Alabama despite the fact that all but one of the defendants in the Alabama action were already defendants in another coverage action filed in California over the same claim. *Vulcan*, 985 So.2d at 379. In its conclusion, the *Vulcan* court specifically stated that "permitting this case to go forward in Alabama, while a case identical in all material respects is pending in California, would unnecessarily and unjustifiably

burden the parties and the respective judicial systems.” *Vulcan*, 985 So.2d at 384.

With respect to these respondents, the duplicative litigation was created by Equity, when it filed a second lawsuit against Illinois National and National Union in Illinois state court while this appeal was pending.

Two misinterpreted cases do not constitute a blanket rule regarding the site of the property when assessing *forum non conveniens*. Rather, the private/public balancing test addresses any concerns surrounding the location of the property at issue in the underlying lawsuit.

#### V. CONCLUSION

In light of its past willingness to litigate insurance issues in Illinois, Equity’s motives in this case are obvious: it prefers the courts and/or law of the State of Washington for tactical reasons. However, Equity should not be permitted to flaunt the doctrine of *forum non conveniens* when it suits its purposes. Fortunately, the private/public factor balancing test advances the analysis beyond the parties’ strategic motivations.

The lower court properly considered the private and public factors and concluded that Illinois was a more appropriate forum for this insurance dispute. Appellants have failed to establish that the lower court abused its discretion in reaching this conclusion. In the complete absence of reversible error, these respondents respectfully request that the lower

court's ruling be affirmed.

Respectfully submitted this 19<sup>th</sup> day of August, 2009.

JOHNSON ANDREWS & SKINNER, P.S.

By   
STEPHEN G. SKINNER, WSBA #17317  
200 W. Thomas Street, Suite 500  
Seattle, WA 98119  
(206) 223-9248

# **APPENDIX**

# **Exhibit A**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

BALATON CONDOMINIUM, LLC, a Delaware limited liability company; COUNTRY CLUB CONDOMINIUM, LLC, a Delaware limited liability company; EC-STERLING HEIGHTS, LLC, a Delaware limited liability company; and EC-TIMBER RIDGE, LLC, a Delaware limited liability company,

Plaintiffs,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a foreign insurance company, and ILLINOIS NATIONAL INSURANCE COMPANY, an Illinois insurance company

Defendants.

09 CH 17460

No. \_\_\_\_\_

FILED - 2  
2009 MAY 28 PM 3:05  
CIRCUIT COURT OF COOK  
COUNTY, ILLINOIS  
CHANCERY DIV.  
DOROTHY BROWN  
CLERK

COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES AND OTHER RELIEF

Plaintiffs, Balaton Condominium, LLC, a Delaware limited liability company ("Balaton"); Country Club Condominium, LLC, a Delaware limited liability company ("Country Club"); EC-Sterling Heights, LLC, a Delaware limited liability company ("Sterling Heights"); and EC-Timber Ridge, LLC, a Delaware limited liability company ("Timber Ridge"), by their attorneys, Aronberg Goldgehn Davis & Garmisa, and for their Complaint for Declaratory Judgment, Damages and other Relief against Defendants National Union Fire Insurance Company of Pittsburgh, PA. ("National Union"), a foreign insurance company, and Illinois National Insurance Company ("Illinois National"), an Illinois insurance company, state as follows:

RECEIVED

AIG Commercial Insurance  
Law Department

## **I. Parties**

1. Plaintiffs are Delaware limited liability companies with their principal places of business in Illinois.
2. The sole member of each Plaintiff is a corporation with its principal place of business in Illinois.
3. Defendant Illinois National is a corporation formed under the laws of Illinois and transacting the business of insurance in Illinois.
4. On information and belief, Defendant National Union is a foreign corporation transacting the business of insurance in Illinois.

## **II. Jurisdiction and Venue**

5. This Court has jurisdiction over the subject matter of this lawsuit.
6. This Court has personal jurisdiction over Defendants under 735 ILCS 5/2-209 in that both Defendants conduct business in Illinois.
7. Venue is proper in this Court under 735 ILCS 5/2-101 and 2-102 because Defendants transact business in Cook County.

## **III. The Underlying Lawsuits**

8. Equity Residential is a real estate investment trust formed under the laws of Maryland. Before May 15, 2002, Equity Residential was known as Equity Residential Properties Trust.
9. Equity Residential is the general partner of ERP Operating Limited Partnership, which is the sole shareholder of ERP Holding Co., Inc.
10. ERP Holding Co., Inc. is a Delaware corporation with its principal place of business in Illinois.

11. ERP Holding Co., Inc. is currently the sole member of each Plaintiff.

12. Balaton, Country Club, Sterling Heights, and Timber Ridge are the “declarants” of four Washington condominiums, the names of which correspond to the four declarants: Balaton Condominium Homes, Country Club Estates Condominium Homes, Sterling Heights Condominium Homes, and Timber Ridge Condominium Homes.

13. The condominium associations comprised of the unit owners at these four condominiums (“the Associations”) have sued Plaintiffs in four separate lawsuits in the State of Washington: *Balaton Condominium Association v. Balaton Condominium, LLC, et al.*, King County Superior Court Cause No. 07 2 14031 1SEA (“the Balaton Suit”); *Country Club Estates Condominium Homes Association v. Country Club Condominium, LLC et al.*, Snohomish County Superior Court Cause No. 08 2 03135-5 (“the Country Club Suit”); *Sterling Heights Condominium Association v. EC-Sterling Heights, LLC et al.*, King County Superior Court Cause No. 08 2 02978 6 SEA (“the Sterling Heights Suit”); and *Timber Ridge Condominium Association v. EC-Timber Ridge, LLC, et al.*, King County Superior Court Cause No. 08 2 38036 1SEA (“the Timber Ridge Suit”). In addition, certain condominium unit owners at Timber Ridge Condominium Homes brought a fifth lawsuit against Plaintiff EC-Timber Ridge, LLC – *Sierra J. Ogard, et al. v. EC-Timber Ridge, LLC, et al.*, King County Cause No. 08-2-17079-9SEA (“the Ogard Suit”). This Complaint will collectively refer to all of the lawsuits identified in this paragraph as “the Underlying Lawsuits.” Copies of the complaints filed in the Balaton Suit, the Country Club Suit, the Sterling Heights Suit, the Timber Ridge Suit and the Ogard Suit are attached to and incorporated in this Complaint as Exhibits A through E, respectively.

14. The complaints in the Underlying Lawsuits each allege that the respective Plaintiff involved in that lawsuit is liable as a condominium “declarant” under RCW Chapter

64.34 (the "Condominium Act") and applicable Washington case law, such that each Plaintiff is liable to the respective Association or unit owner under the implied "suitability" warranty set forth in RCW 64.34.445(2) ("A declarant . . . impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type . . .").

15. The Underlying Lawsuits allege that Plaintiffs are liable for breach of the Condominium Act's "suitability" warranty in part because of the existence of property damage at the four condominiums.

#### The National Union Policy

16. National Union issued a commercial umbrella insurance policy number BE 357-15-66, with a policy period of December 15, 1997 to December 15, 1998 (the "National Union Policy"), a copy of which is attached to and incorporated in this Complaint as Exhibit F. Each of the Plaintiffs is insured under the National Union Policy.

17. The National Union Policy contains the following provision regarding the scope of coverage afforded:

**We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay by reason of liability imposed by law or assumed by the Insured under an Insured Contract because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world....**

18. The National Union Policy provides as follows, in pertinent part, with respect to National Union's duty to defend suits against its insureds:

**A. We shall have the right and duty to defend any claim or suit seeking damages covered by the terms and conditions of this policy when:**

1. The applicable Limits of Insurance of the underlying policies listed in the Schedule of Underlying Insurance and the Limits of Insurance of any other underlying insurance providing coverage to the **Insured** have been exhausted by payment of claims to which this policy applies; or
2. Damages are sought for **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** covered by this policy but not covered by any underlying insurance listed in the Schedule of Underlying Insurance or any other underlying insurance providing coverage to the **Insured**.

**The Illinois National Policy**

19. Illinois National issued a commercial umbrella insurance policy number BE 74006679, with a December 15, 2000 to May 1, 2002 policy period (the "Illinois National Policy"), a copy of which is attached to and incorporated in this Complaint as Exhibit G. Each of the Plaintiffs is insured under the Illinois National Policy.

20. The Illinois National Policy contains the following provision regarding the scope of coverage afforded:

We will pay on behalf of the **Insured** those sums in excess of the Retained Limit that the **Insured** becomes legally obligated to pay by reason of liability imposed by law or assumed by the **Insured** under an [sic] **Contract** because of **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** that takes place during the Policy Period and is caused by an **Occurrence** happening anywhere in the world....

21. The Illinois National Policy provides as follows, in pertinent part, with respect to Illinois National's duty to defend suits against its insureds:

A. We shall have the right and duty to defend any claim or suit seeking damages covered by the terms and conditions of this policy when:

1. The applicable Limits of Insurance of the underlying policies listed in the Schedule of Underlying Insurance and the Limits of Insurance of any other underlying insurance providing

coverage to the **Insured** have been exhausted by payment of claims to which this policy applies; or

2. Damages are sought for **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** covered by this policy but not covered by any underlying insurance listed in the Schedule of Underlying Insurance or any other underlying insurance providing coverage to the **Insured**.

### COUNT I

#### **(Declaratory Judgment – Duty to Defend the Balaton Suit)**

22. Balaton realleges and restates paragraphs 1 through 21 as this paragraph 22, as if fully set forth.

23. The complaint in the Balaton Suit alleges property damage giving rise to the alleged “suitability” warranty violations, and such alleged property damage potentially occurred during the policy periods of the National Union Policy and the Illinois National Policy.

24. As to Balaton only, damages sought from it for property damage in the Balaton Suit are covered under the National Union Policy and the Illinois National Policy, but have not been accepted as covered by any underlying insurance.

25. Defendants had and have a contractual duty to defend Balaton against the Balaton Suit.

26. Balaton requested that Defendants defend Balaton against the Balaton Suit, but Defendants refused.

27. An actual controversy exists between Balaton and Defendants as a result of Defendants’ failure and refusal to provide a defense against the Balaton Suit.

WHEREFORE, Plaintiff Balaton Condominium, LLC, respectfully requests the following relief:

- a. That this Court declare the rights of the parties with respect to Defendants' duty to defend Balaton against the Balaton Suit;
- b. That this Court find and declare that Defendants have a duty to defend Balaton against the Balaton Suit;
- c. That the Court award Balaton its costs and attorneys' fees incurred in this action; and
- d. That the Court award such other relief as the Court deems just and equitable.

**COUNT II**

**(Breach of Contract – Failure to Defend the Balaton Suit)**

28. Balaton realleges and restates paragraph 1 through 26 as this paragraph 28, as if fully set forth.

29. Defendants have breached their duty to defend Balaton against the Balaton Suit, proximately causing harm to Balaton in an amount to be proven at trial, as Balaton has incurred costs and attorneys' fees in defending itself in the Balaton Suit.

WHEREFORE, Plaintiff Balaton Condominium, LLC, respectfully requests:

- a. That the Court award all money damages legally available as a result of Defendants' breaches, acts and/or omissions;
- b. That the Court award attorneys' fees and other costs of litigation, as well as pre- and post-judgment interest, as applicable; and
- c. That the Court award all other relief that this Court deems just and equitable.

**COUNT III**

**(Declaratory Judgment – Duty to Defend the Country Club Suit)**

30. Country Club realleges and restates paragraphs 1 through 21 as this paragraph 30, as if fully set forth.

31. The complaint in the Country Club Suit alleges property damage giving rise to the alleged "suitability" warranty violations, and such alleged property damage potentially occurred during the periods of the National Union Policy and the Illinois National Policy.

32. As to Country Club only, damages sought from it for property damage in the Country Club Suit are covered under the National Union Policy and the Illinois National Policy, but have not been accepted as covered by any underlying insurance.

33. Defendants had and have a contractual duty to defend Country Club against the Country Club Suit.

34. Country Club requested that Defendants defend Country Club against the Country Club Suit, but Defendants refused.

35. An actual controversy exists between Country Club and Defendants as a result of Defendants' failure and refusal to provide a defense against the Country Club Suit.

WHEREFORE, Plaintiff Country Club Condominium, LLC, respectfully requests the following relief:

- a. That this Court declare the rights of the parties with respect to Defendants' duty to defend Country Club against the Country Club Suit;
- b. That this Court find and declare that Defendants have a duty to defend Country Club against the Country Club Suit;
- c. That the Court award Country Club its costs and attorneys' fees incurred in this action; and
- d. That the Court award such other relief as the Court deems just and equitable.

**COUNT IV**

**(Breach of Contract – Failure to Defend the Country Club Suit)**

36. Country Club realleges and restates paragraphs 30 through 34 as this paragraph 36, as if fully set forth.

37. Defendants have breached their duty to defend Country Club against the Country Club Suit, proximately causing harm to Country Club in an amount to be proven at trial, as Country Club has incurred costs and attorneys' fees in defending itself in the Country Club Suit.

WHEREFORE, Plaintiff Country Club Condominium, LLC, respectfully requests:

- a. That the Court award all money damages legally available as a result of Defendants' breaches, acts and/or omissions;
- b. That the Court award attorneys' fees and other costs of litigation, as well as pre- and post-judgment interest, as applicable; and
- c. That the Court award all other relief that this Court deems just and equitable.

**COUNT V**

**(Declaratory Judgment – Duty to Defend the Sterling Heights Suit)**

38. Sterling Heights realleges and restates paragraphs 1 through 21 as this paragraph 38, as if fully set forth.

39. The complaint in the Sterling Heights Suit alleges property damage giving rise to the alleged "suitability" warranty violations, and such alleged property damage potentially occurred during the periods of the National Union Policy and the Illinois National Policy.

40. As to Sterling Heights only, damages sought from it for property damage in the Sterling Heights Suit are covered under the National Union Policy and the Illinois National Policy, but have not been accepted as covered by any underlying insurance.

41. Defendants had and have a contractual duty to defend Sterling Heights against the Sterling Heights Suit.

42. Sterling Heights requested that Defendants defend Sterling Heights against the Sterling Heights Suit, but Defendants refused.

43. An actual controversy exists between Sterling Heights and Defendants as a result of Defendants' failure and refusal to provide a defense against the Sterling Heights Suit.

WHEREFORE, Plaintiff EC-Sterling Heights, LLC, respectfully requests the following relief:

- a. That this Court declare the rights of the parties with respect to Defendants' duty to defend Sterling Heights against the Sterling Heights Suit;
- b. That this Court find and declare that Defendants have a duty to defend Sterling Heights against the Sterling Heights Suit;
- c. That the Court award Sterling Heights its costs and attorneys' fees incurred in this action; and
- d. That the Court award such other relief as the Court deems just and equitable.

#### COUNT VI

##### (Breach of Contract – Failure to Defend the Sterling Heights Suit)

44. Sterling Heights realleges and restates paragraphs 38 through 42 as this paragraph 44, as if fully set forth.

45. Defendants have breached their duty to defend Sterling Heights against the Sterling Heights Suit, proximately causing harm to Sterling Heights in an amount to be proven at trial, as Sterling Heights has incurred costs and attorneys' fees in defending itself in the Sterling Heights Suit.

WHEREFORE, Plaintiff EC-Sterling Heights, LLC, respectfully requests:

- a. That the Court award all money damages legally available as a result of Defendants' breaches, acts and/or omissions;
- b. That the Court award attorneys' fees and other costs of litigation, as well as pre- and post-judgment interest, as applicable; and
- c. That the Court award all other relief that this Court deems just and equitable.

**COUNT VII**

**(Declaratory Judgment – Duty to Defend the Timber Ridge Suit)**

46. Timber Ridge realleges and restates paragraphs 1 through 21 as this paragraph 46, as if fully set forth.

47. The complaint in the Timber Ridge Suit alleges property damage giving rise to the alleged "suitability" warranty violations, and such alleged property damage potentially occurred during the periods of the National Union Policy and the Illinois National Policy.

48. As to Timber Ridge only, damages sought from it for property damage in the Timber Ridge Suit are covered under the National Union Policy and the Illinois National Policy, but have not been accepted as covered by any underlying insurance.

49. Defendants had and have a contractual duty to defend Timber Ridge against the Timber Ridge Suit.

50. Timber Ridge requested that Defendants defend Timber Ridge against the Timber Ridge Suit, but Defendants refused.

51. An actual controversy exists between Timber Ridge and Defendants as a result of Defendants' failure and refusal to provide a defense against the Timber Ridge Suit.

WHEREFORE, Plaintiff EC-Timber Ridge, LLC, respectfully requests the following relief:

- a. That this Court declare the rights of the parties with respect to Defendants' duty to defend Timber Ridge against the Timber Ridge Suit;
- b. That this Court find and declare that Defendants have a duty to defend Timber Ridge against the Timber Ridge Suit;
- c. That the Court award Timber Ridge its costs and attorneys' fees incurred in this action; and
- d. That the Court award such other relief as the Court deems just and equitable.

**COUNT VIII**

**(Breach of Contract – Failure to Defend the Timber Ridge Suit)**

52. Timber Ridge realleges and restates paragraphs 46 through 50 as this paragraph 52, as if fully set forth.

53. Defendants have breached their duty to defend Timber Ridge against the Timber Ridge Suit, proximately causing harm to Timber Ridge in an amount to be proven at trial, as Timber Ridge has incurred costs and attorneys' fees in defending itself in the Timber Ridge Suit.

WHEREFORE, Plaintiff EC-Timber Ridge, LLC, respectfully requests:

- a. That the Court award all money damages legally available as a result of Defendants' breaches, acts and/or omissions;
- b. That the Court award attorneys' fees and other costs of litigation, as well as pre- and post-judgment interest, as applicable; and
- c. That the Court award all other relief that this Court deems just and equitable.

**COUNT IX**  
**(Declaratory Judgment – Duty to Defend the Ogard Suit)**

54. Timber Ridge realleges and restates paragraphs 1 through 21 as this paragraph 54, as if fully set forth.

55. The complaint in the Ogard Suit alleges property damage giving rise to the alleged “suitability” warranty violations, and such alleged property damage potentially occurred during the periods of the National Union Policy and the Illinois National Policy.

56. As to Timber Ridge only, damages sought from it for property damage in the Ogard Suit are covered under the National Union Policy and the Illinois National Policy, but have not been accepted as covered by any underlying insurance.

57. Defendants had and have a contractual duty to defend Timber Ridge against the Ogard Suit.

58. Timber Ridge requested that Defendants defend Timber Ridge against the Ogard Suit, but Defendants refused.

59. An actual controversy exists between Timber Ridge and Defendants as a result of Defendants’ failure and refusal to provide a defense against the Ogard Suit.

WHEREFORE, Plaintiff EC-Timber Ridge, LLC, respectfully requests the following relief:

- a. That this Court declare the rights of the parties with respect to Defendants’ duty to defend Timber Ridge against the Ogard Suit;
- b. That this Court find and declare that Defendants have a duty to defend Timber Ridge against the Ogard Suit;
- c. That the Court award Timber Ridge its costs and attorneys’ fees incurred in this action; and

- d. That the Court award such other relief as the Court deems just and equitable.

**COUNT X**

**(Breach of Contract – Failure to Defend the Ogard Suit)**

60. Timber Ridge realleges and restates paragraphs 54 through 58 as this Paragraph 60, as if fully set forth.

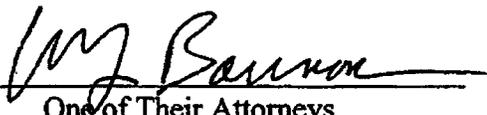
61. Defendants have breached their duty to defend Timber Ridge against the Ogard Suit, proximately causing harm to Timber Ridge in an amount to be proven at trial, as Timber Ridge has incurred costs and attorneys' fees in defending itself in the Ogard Suit.

WHEREFORE, Plaintiff EC-Timber Ridge, LLC, respectfully requests:

- a. That the Court award all money damages legally available as a result of Defendants' breaches, acts and/or omissions;
- b. That the Court award attorneys' fees and other costs of litigation, as well as pre- and post-judgment interest, as applicable; and
- c. That the Court award all other relief that this Court deems just and equitable.

BALATON CONDOMINIUM, LLC; COUNTY CLUB  
CONDOMINIUM, LLC; EC-STERLING HEIGHTS, LLC;  
AND EC-TIMBER RIDGE, LLC

By: \_\_\_\_\_

  
One of Their Attorneys

Christopher J. Bannon  
Lisa J. Brodsky  
Aronberg Goldgehn Davis & Garmisa  
330 North Wabash Avenue, Suite 1700  
Chicago, Illinois 60611  
(312) 828-9600  
Attorney No. 30375

523150.v1

# **Exhibit B**

FILED

09 JUL 17 PM 3:57

KING COUNTY  
SUPERIOR COURT CLERK  
Honorable Judge Specter  
Hearing Date: July 21, 2009  
Hearing Time: 9:00 a.m.  
CASE NUMBER: 07-2-14061-1 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

BALATON CONDOMINIUM  
ASSOCIATION, a Washington nonprofit  
corporation,

Plaintiff,

v.

BALATON CONDOMINIUM, LLC, et  
al.,

Defendants.

No. 07-2-14061-1 SEA

(consolidated with No. 07-2-39745-  
1 SEA)

DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION  
REGARDING ALTER  
EGO/CORPORATE DISREGARD  
LIABILITY

I. INTRODUCTION

Piercing the corporate veil is a rarely-imposed equitable remedy for a defendant's fraudulent abuse of the corporate form that results in severe injustice to a plaintiff. In this case, regardless of whether Delaware or Washington law applies, there is no legal or factual bases to disregard defendants' corporate forms or deem them "alter egos" of one another. There is no evidence of fraudulent abuse of the corporate form and no prospect of severe injustice to the Association. Lacking both merit and purpose, the pending motion must be denied.

DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION REGARDING ALTER  
EGO/CORPORATE DISREGARD LIABILITY - 1

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K&L GATES LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 The jury, after weeks of testimony and several days of deliberations, considered  
2 and rejected the Association's claims that defendants BCLLC, ERPMC, ERPOP and EQR  
3 are a single "indivisible being" under the law. In the Special Verdict Form designed by  
4 the Association, the jury was given numerous opportunities to find each defendant equally  
5 liable under the Association's multiple theories and causes of action. Instead of ignoring  
6 the factual and legal distinctions between each defendant, the jury took great care in  
7 reaching its verdict, finding only BCLLC and ERPMC liable for the Association's claims.  
8 Those defendants have since moved for an order authorizing them to deposit the entire  
9 verdict amount (\$742,869) into the registry of the Court.

10 Having lost on its claims against EQR and ERPOP at trial, the Association now  
11 asks the Court to disregard the jury's verdict and find that each defendant is an alter ego of  
12 the other, and that all are liable to the Association. The Association's request ignores the  
13 jury's verdict, and is unsupported by fact or legal precedent.

14 In essence, the motion seeks the imposition of "alter ego liability" as a sanction for  
15 discovery violations. There is no legal precedent for that relief and the Court has  
16 instructed the parties to separately brief outstanding matters related to discovery sanctions.  
17 Moreover, the Court previously denied an identical request.

18 Defendants respectfully ask the Court to restrict its focus to the facts and law  
19 relevant to the alter ego remedy and enter Defendants' proposed Findings of Fact and  
20 Conclusions of Law on the relevant issues.

## 21 II. STATEMENT OF FACTS

22 The facts supporting this Response are set forth in the Declaration of Jesse O.  
23 Franklin IV and exhibits thereto. The factual matters set forth therein are hereby  
24 incorporated by reference in their entirety. All exhibits upon which defendants rely to  
25 support the factual statements set forth Mr. Franklin's Declaration are described in

DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION REGARDING ALTER  
EGO/CORPORATE DISREGARD LIABILITY - 2

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K&L GATES LLP  
925 FOURTH AVENUE  
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1 Appendix A attached hereto.<sup>1</sup> Among the facts material to the pending motion are the  
2 following:

3 EQR is a Maryland real estate investment trust publicly traded on the New York  
4 Stock Exchange. EQR's precise legal structure is known as an "umbrella partnership real  
5 estate investment trust" (*i.e.* "UPREIT") because the real estate portfolio was created, in  
6 part, from real estate contributed to a limited partnership. At all times relevant to this  
7 lawsuit, EQR was governed by a Board of Trustees and a Second Amended and Restated  
8 Declaration of Trust dated May 30, 1997. EQR is the sole general partner of ERPOP and  
9 owns approximately 94.2 percent of ERPOP.

10 ERPOP is a limited partnership organized under the laws of Illinois. At all times  
11 relevant to this lawsuit, ERPOP was governed by its Fifth Amended and Restated  
12 Agreement of Limited Partnership dated August 1, 1998. ERPOP's Partnership  
13 Agreement identifies thirty-seven (37) limited partners, none of whom are defendants in  
14 this suit.

15 ERPMC is a corporation organized under the laws of Delaware. At all times  
16 relevant to this lawsuit, ERPMC was governed by written bylaws. ERPMC is one of  
17 EQR's taxable REIT subsidiaries formed pursuant to the REIT Modernization Act. *See*  
18 26 U.S.C. § 856.

19 BCLLC is a limited liability company organized under the laws of Delaware.  
20 BCLLC was formed upon the filing of its Certificate of Formation in the office of the  
21 Secretary of State for the State of Delaware on August 29, 2003. At all times relevant to  
22  
23

24 <sup>1</sup> All trial Exhibits referenced in Appendix A (except 174, 504-638, 915, 918 and 919) are submitted in a  
25 working notebook for the Court. Exhibits 174 (Purchase and Sale Agreements), 504-638 (Statutory  
Warranty Deeds), 915 (BCLLC General Ledgers) and 918-919 (EQR's 10-ks) are in the Court's set of trial  
exhibits.

1 this lawsuit, BCLLC was governed by a written Limited Liability Company Agreement  
2 dated August 29, 2003.

3 On August 29, 2003, BCLLC applied to register as a foreign limited liability  
4 company conducting business in Washington State. On September 8, 2003, the  
5 Washington Secretary of State issued a Certificate of Registration authorizing BCLLC to  
6 conduct business in Washington State. In 2004, 2005 and 2006, BCLLC timely renewed  
7 its registration to do business in Washington with the Washington Secretary of State. On  
8 August 29, 2003, BCLLC applied for a federal taxpayer identification number from the  
9 Internal Revenue Service. In doing so, it was classified as a single member LLC  
10 disregarded entity for federal income tax purposes. On September 5, 2003, the Internal  
11 Revenue Service issued BCLLC a federal tax payer identification number. At all times  
12 relevant to this lawsuit, ERPMC was the sole manager and member of BCLLC.

13 BCLLC was initially capitalized with \$2,115,093 in cash by an initial capital  
14 contribution from ERPMC. On September 17, 2003, BCLLC acquired the Cherry Hill  
15 Apartments from ERPOP for a purchase price of \$10,275,000, plus an allocated share of  
16 closing costs. This transaction was completed pursuant to a written Real Estate Sale  
17 Agreement between BCLLC and ERPOP for purchase and sale of the Cherry Hill  
18 Apartments. Cherry Hill Apartments ultimately became known as Balaton Condominium  
19 Homes.

20 In connection with BCLLC's acquisition of the Cherry Hill Apartments, ERPOP  
21 loaned \$8,220,000 to BCLLC (the "Mortgage Loan"). The Mortgage Loan was  
22 documented with a promissory note dated September 15, 2003 payable by BCLLC to  
23 ERPOP. The note carried interest and the rate of seven percent per annum (7%) and was  
24 secured by Purchase Money Mortgage and Security Agreement made by BCLLC in favor  
25

DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION REGARDING ALTER  
EGO/CORPORATE DISREGARD LIABILITY - 4

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1 of ERPOP (the "Mortgage"). On September 17, 2003, the Mortgage was recorded in the  
2 real property records of King County, Washington.

3 BCLLC fully satisfied the Mortgage Loan with proceeds from the sale of Balaton  
4 condominium units. Over the term of the Mortgage Loan, BCLLC paid ERPOP \$472,899  
5 in mortgage interest. BCLLC accounted for interest paid on the Mortgage as an interest  
6 expense and ERPOP accounted for interest received on the Mortgage as interest income.

7 As calculated under Generally Accepted Accounting Principles, BCLLC realized  
8 net income of \$1,945,000 on the conversion of Cherry Hill Apartments to Balaton  
9 Condominium Homes. As of December 31, 2008, BCLLC had access to \$2,929,000  
10 including ERPMC's initial capital contribution of \$2,115,093. Pursuant to internal  
11 accounting and cash management procedures, at all times relevant to this lawsuit ERPMC  
12 maintained a comprehensive general ledger documenting disbursements and deposits of  
13 Balaton sales proceeds made on behalf of BCLLC.

### 14 III. STATEMENT OF ISSUE

15 Whether the Court should disregard the corporate forms of defendants BCLLC,  
16 ERPMC, ERPOP and EQR.

### 17 IV. EVIDENCE RELIED UPON

18 This Response relies upon the Declaration of Jesse O. Franklin IV filed herewith  
19 ("Franklin Decl.") and the pleadings and papers filed in this action.

### 20 V. LEGAL AUTHORITY

#### 21 A. Delaware Law Governs the Alter Ego/Veil Piercing Analysis.

22 Under the Washington Limited Liability Company Act, the law of the state of  
23 organization applies to the internal affairs of an LLC and the liability of its members.  
24 RCW 25.15.310(1)(a). This principle is generally accepted. *See, e.g., McKesson HBOC,*  
25 *Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003) (applying

1 Delaware law to veil piercing analysis where both companies were Delaware  
2 corporations); 17 William Meade Fletcher, et al., Fletcher Cyclopeda of the Law of  
3 Private Corporations § 8326 (rev. ed. 2006) (“[L]iability of a shareholder for corporate  
4 debts and the extent and character of that liability are to be determined by the law of the  
5 incorporating state . . .”). Because BCLLC is organized under the laws of Delaware,  
6 Delaware law governs whether the Court should pierce its corporate veil.<sup>2</sup>

7 **B. The Association Fails to Establish a Basis for Piercing the Corporate Veil**  
8 **or Disregarding Defendants’ Corporate Forms Under Either Delaware or**  
9 **Washington Law.**

10 **1. BCLLC and ERPMC have demonstrated their ability to satisfy the**  
11 **jury verdict in full by moving to tender \$742,869 to the registry of the**  
12 **Court.**

13 The Association should not prevail on its veil piercing claim because it has  
14 suffered no unjustified loss and cannot demonstrate any injustice arising from defendants’  
15 use of various corporate forms. Under both Delaware and Washington law, veil piercing  
16 is appropriate only where a plaintiff can show it is required to prevent injustice or  
17 unjustified loss. *Wallace v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999) (“Piercing the  
18 corporate veil under the alter ego theory “requires that the corporate structure cause fraud  
19 or similar injustice.”); *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn. 2d 403

20 <sup>2</sup> Civil Rule 9(k) does not compel the application of Washington law to the veil piercing analysis. CR 9(k)  
21 provides:

22 A party who intends to raise an issue concerning the law of the a state . . . shall set forth in  
23 his pleading facts which show the law of another United States jurisdiction may be  
24 applicable, or shall state in his pleading or serve other reasonable written notice that the  
25 law of another United States jurisdiction may be relied upon.

26 Defendants’ Answer to the Association’s Second Amended Complaint sets forth that BCLLC is a Delaware  
27 limited liability company and defendants thoroughly briefed this issue in their Motion to Bifurcate filed on  
28 October 30, 2008. Defendants have thus provided ample “reasonable written notice” that Delaware law  
29 would be relied upon with respect to this issue.

30 DEFENDANTS’ RESPONSE TO PLAINTIFF’S  
31 MOTION REGARDING ALTER  
32 EGO/CORPORATE DISREGARD LIABILITY - 6

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1 (1982) (“[D]isregard must be “necessary and required to prevent unjustified loss to the  
2 injured party.”) (quoting *Morgan v. Burks*, 93 Wn.2d 580, 587 (1980) ).

3 Losing on the merits at trial is not the type of “injustice” contemplated by the veil  
4 piercing rule. See *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del.  
5 1989) (“Any breach of contract and any tort . . . is, in some sense, an injustice. Obviously  
6 this type of “injustice” . . . is not what is contemplated by the common law rule that  
7 piercing the corporate veil is appropriate only upon a showing of fraud or something like  
8 fraud.”).

9 Further, BCLLC and ERPMC have demonstrated their ability to satisfy the jury  
10 verdict in full by their July 13, 2009 motion to tender the entire verdict amount (\$742,869)  
11 into the registry of the Court. BCLLC and ERPMC even went so far as to attach a copy of  
12 a check in that amount to its pleadings related to that motion. BCLLC and ERPMC stand  
13 before the Court with the ability to satisfy any final judgment that may be entered against  
14 them in these proceedings. No Delaware or Washington case has *ever* pierced a party’s  
15 corporate veil or disregarded its corporate form where the party was able to timely pay its  
16 liabilities in full. There is no reason for this Court to become the first.

17 **2. There is no evidence of intentional abuse of the corporate form to**  
18 **commit a fraud upon the Association.**

19 Both Delaware and Washington law require a showing of intent to defraud related  
20 to defendant’s abuse of the corporate form. *E.g.*, *Mobil Oil*, 718 F. Supp. at 260; *Minton*  
21 *v. Ralston Purina Co.*, 146 Wn.2d 385, 389 (2002); *Morgan*, 93 Wn.2d at 585. The  
22 corporate form is properly disregarded only where the corporation exists for no other  
23 purpose than as a vehicle for fraud. *Wallace*, 752 A.2d 1175, 1184 (Del. Ch. 1999). The  
24 evidence in the record demonstrates that, in the context of a publicly traded real estate  
25 investment trust governed by myriad Internal Revenue Code provisions, defendants’

DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION REGARDING ALTER  
EGO/CORPORATE DISREGARD LIABILITY - 7

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1 lawful corporate structures serve numerous legitimate business purposes and are in no  
2 conceivable way a “vehicle for fraud.” *See generally*, Franklin Decl. and trial exhibits  
3 referenced therein.

4 **3. There are no other grounds for piercing the corporate veil of BCLLC**  
5 **or ERPMC.**

6 Both Delaware and Washington law provide that courts may consider several  
7 factors in determining the existence of intentional, fraudulent abuse of corporate forms  
8 supporting veil piercing. In Delaware, courts have considered whether an entity is  
9 undercapitalized or insolvent, whether entities are commonly managed, and whether  
10 corporate formalities have been followed. *See Mason v. Network of Wilmington, Inc.*,  
11 2005 WL 1653954, at \*3 (Del. Ch. July 1, 2005). In Washington, courts consider  
12 common ownership, use of corporate formalities, and insolvency. *E.g., Minton*, 146  
13 Wn.2d at 399; *Meisel*, 97 Wn.2d at 411.

14 Both states’ courts, however, make clear that none of these factors alone is  
15 sufficient to justify veil piercing. *See Mason*, 2005 WL 1653954, at \*3 (holding that mere  
16 insolvency is not enough); *id.* at \*4 (“Being the sole shareholder of two different legal  
17 entities, housed in the same office building and possessing the same phone number at  
18 separate (and not sequential) times does not constitute a sham that ‘exists for no other  
19 purpose than as a vehicle for fraud.’”); *id.* (“All the Plaintiff points to is a part of  
20 Schlecker’s deposition . . . when he had difficulty recalling the names of the companies he  
21 was involved with, the dates they were sold, and the acquirer of the companies. While  
22 this may not reflect managerial diligence, it surely does not demonstrate a lack of regard  
23 for corporate formalities.”).

24 The Association has made no showing that any of the defendants is  
25 undercapitalized, insolvent or ignored corporate formalities. The Association’s emphasis

1 on common ownership and management is also misplaced.<sup>3</sup> *See Minton*, 146 Wn.2d at  
2 399. These factors are merely a “starting point” for the alter ego analysis. *Mason*, 2005  
3 WL 1653954, at \*3. Absent a showing of fraud in the abuse of corporate forms that has  
4 caused some injustice or unjustified loss, the Association’s claim for veil piercing is  
5 baseless and must be denied.

6 **C. The Association’s Discussion of Discovery Misconduct Has No Relevance**  
7 **to the Issues Before the Court.**

8 The Association’s arguments related to discovery sanctions and related issues seek  
9 relief this Court already considered and rejected. Those issues are not relevant to the  
10 issues now before the Court. The Court instructed the parties to brief the issue of alter ego  
11 liability and then provide a separate round of briefing related to pending discovery  
12 sanctions.

13 Nonetheless, the Association’s proposed Conclusion of Law No. 8 asks this Court  
14 to “arrive” at its alter ego decision based on “the four entity defendants’ willful and  
15 egregious discovery violations.” Proposed Findings and Conclusions, p. 21, ¶ 8; *see also*  
16 *id.* at ¶ 7 (seeking Conclusion of Law that “defendants are estopped from contesting” the  
17 alter ego issue, which is tantamount to a default finding). This requested relief—that the  
18 Court find certain corporate defendants liable as alter egos as a discovery sanction—was  
19 already presented to the Court in the Association’s February 19, 2009 Motion for  
20 Sanctions Pursuant to Special Master’s February 6, 2009 Order. There, the Association  
21 specifically requested that the Court order as a discovery sanction “that all entity  
22 defendants are liable as alter egos” of BCLLC. Franklin Decl., Ex. A (Motion and

23 <sup>3</sup> *See, e.g.*, Proposed Finding of Fact 4(d) (citing as “evidence” that “BCLLC is a front company that was  
24 formed by Equity Residential in an effort to avoid liability to the Balaton homeowners” and the fact that  
25 BCLLC is a subsidiary of ERPOP); Proposed Finding of Fact 10 (citing testimony of David Neithercut as  
evidence that “Equity Residential, Equity Residential’s high-level executives and/or officers, and Equity  
Residential’s Board of Trustees exercise complete and ultimate control over the various entities.”)

1 Proposed Order). That motion, as well as the Association's other sanctions motion, was  
2 before the Court at the April 21 hearing. Franklin Decl., Ex. B (Transcript of Apr. 21  
3 Proceedings), at 5-6.

4 Thus, in previously sanctioning defendants, the Court specifically denied the  
5 Association's request to enter a default on the grounds of alter ego liability.<sup>4</sup> Having  
6 already determined the appropriate form of sanction, the sole remaining issue for the  
7 Court to consider is the monetary sanction to be imposed. Per the Court's instructions,  
8 that question is the focus of separate proceedings.

9 Similarly, with respect to the Court's April 30, 2009 order on CR 30(b)(6), the  
10 Association suggests that defendants should be punished yet again for Mr. Yunker's  
11 performance at his CR 30(b)(6) deposition. As the Court is aware, defendants were  
12 precluded from presenting testimony to the jury based on the Court's ruling on the  
13 Association's motion *in limine* No. 7.<sup>5</sup>

14 The Association's baseless assertions that defendants' discovery misconduct  
15 impacted the Association's ability to try its case as a whole are simply not relevant to the  
16 narrow issue before the Court—whether piercing the corporate veils of BCLLC *and*  
17 ERPMC to hold ERPOP and EQR liable is justified.<sup>6</sup> Nevertheless, the fact that the jury  
18 ultimately found in the Association's favor on some of its claims against two solvent  
19

20 <sup>4</sup> Docket No. 634 (Order on Sanctions and Exclusion of Witnesses), at 7.

21 <sup>5</sup> The Association's proposed Finding of Fact No. 7 misrepresents this Court's *in limine* ruling. It states that  
22 the Court found that defendants committed "egregious discovery misconduct" with respect to the CR  
23 30(b)(6) deposition and cites the Court's *in limine* Order. The Order, however, does not label Mr. Yunker's  
24 performance as "egregious discovery misconduct." Franklin Decl., Ex. D.

25 <sup>6</sup> *See, e.g.*, Proposed Findings and Conclusions, pp. 6-7, ¶ 6 ("Through willfully withholding and  
suppressing documents, the four entity defendants deprived the plaintiff of a fair opportunity to present its  
entire case"); pp. 8-9, ¶ 8 (discovery violations "impacted the entirety of plaintiff's case, including  
plaintiff's claims for 'declarant' and 'dealer' liability under the Washington Condominium Act, violations of  
the Consumer Protection Act, and fraudulent concealment."); p. 20-21, ¶ 7 (referencing "entire case"); *see*  
*also* Pl.'s Mtn., at 1 (discussing entitlement to attorneys' fees); *id.* at 3-5.

1 defendants capable of satisfying any judgment against them—albeit not in the amount(s)  
2 the Association had hoped for—eviscerates the Association’s claims of “irreparable harm”  
3 and “severe prejudice.”

4 **VI. CONCLUSION**

5 For the foregoing reasons, Defendants respectfully request that the Association’s  
6 Motion Regarding Alter Ego/Corporate Disregard Liability be denied, and that the Court  
7 enter defendants’ Proposed Finds of Fact, Conclusions of Law and Order submitted  
8 herewith.

9  
10 DATED this 17th day of July, 2009.

11 K&L GATES LLP

12  
13 By   
14 Jesse O. Franklin, WSBA # 13755  
15 Timothy L. Pierce, PHV - CA #141170  
16 Michael K. Ryan, WSBA # 32091  
17 Brian L. Lewis, WSBA # 33560  
18 Attorneys for Defendants  
19 Balaton Condominium, LLC, et al.

APPENDIX A

**INDEX OF DEFENDANTS' EXHIBITS  
RE: ALTER EGO/CORPORATE DISREGARD**

30	Statement of Organization by Authorized Person of BCLLC; Action by Sole Member of BCLLC	Admitted
174	Purchase and Sale agreements for Balaton Condominium Homes	Admitted
224	BCLLC Limited Liability Company Agreement dated August 29, 2003	Admitted
247	State of Washington registration renewal documents for BCLLC	Admitted
504 - 638	Certified copies of statutory warranty deeds for Balaton Condominium Homes	Admitted
1860	Real Estate Sale Agreement dated September 4, 2003 between ERPOP and BCLLC for purchase and sale of Cherry Hill Apartments	Admitted
1877	Special Warranty Deed conveying Cherry Hill Apartments from ERPOP to BCLLC	Admitted
1879	Purchase Money Mortgage by BCLLC in favor of ERPOP	Admitted
44	Property Management Agreement dated September 15, 2003 between BCLLC and ERPMC	Pending
88	Agenda for June 3, 2004 Meeting of EQR's Board of Trustees	Pending
162	Balaton Condominiums Cash Flow chart	Pending
246	State of Delaware Certificate of Formation of "Balaton Condominium LLC"	Pending
500	Fifth Amended and Restated ERPOP Operating Limited Partnership Agreement of Limited Partnership	Pending
502	By-Laws of ERPMC	Pending

DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION REGARDING ALTER  
EGO/CORPORATE DISREGARD LIABILITY - 12

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915	Balaton Condominium LLC General Ledgers - BCLLC	Pending
918	EQR 10-K (2003)	Pending
919	EQR 10-K (2004)	Pending
1856	BCLLC Limited Liability Company Agreement dated August 29, 2003; Certificate of Formation dated August 29, 2003; Certificate of Delaware Good Standing dated September 4, 2003; Statement of Organization by Authorized Person of BCLLC; Application for Admission by BCLLC to Conduct Business in State of Illinois; Certificate of Registration issued to BCLLC by Washington Secretary of State; Application for Employer Identification Number by BCLLC; Action by Sole Member of BCLLC; State of Illinois registration renewal documents for BCLLC; State of Washington registration renewal documents for BCLLC	Pending
1872	Assignment and Assumption of Leases, Security Deposits and Service Contracts	Pending
1875	Promissory Note dated September 15, 2003 by BCLLC in favor of ERPOP	Pending

DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION REGARDING ALTER  
EGO/CORPORATE DISREGARD LIABILITY - 13

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The Honorable Julie A. Spector

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

BALATON CONDOMINIUM  
ASSOCIATION, a Washington nonprofit  
corporation,

Plaintiff,

v.

BALATON CONDOMINIUM, LLC, a  
Delaware limited liability company,  
EQUITY RESIDENTIAL PROPERTIES  
MANAGEMENT CORP., a Delaware  
corporation; ERP OPERATING LIMITED  
PARTNERSHIP, an Illinois limited  
partnership; EQUITY RESIDENTIAL, a  
Maryland real estate investment trust;  
EQUITY RESIDENTIAL  
CONDOMINIUMS, LLC, a Delaware  
limited liability company; DAVID  
ATTLESON, an individual; MARK  
GOLDSTEIN, an individual; NATALIA  
PICOULAS, an individual; SUSAN  
WIEMER, an individual; JOHN DRYK,  
an individual; JOHN YUNKER, an  
individual; and DOES 1-50,

Defendants.

No. 07-2-14061-1 SEA

[consolidated with  
No. 07-2-39745-1 SEA]

[DEFENDANTS' PROPOSED]  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD  
LIABILITY CLAIM

[DEFENDANTS' PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 1

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1 Plaintiff's Twelfth Claim for Alter Ego/Corporate Disregard Liability, came on for  
2 trial before the Court in the above-captioned matter. The Court, having heard the  
3 testimony of witnesses offered by both parties, having reviewed the exhibits submitted by  
4 both parties and admitted by the Court, and having heard the argument of counsel for both  
5 parties and deeming itself fully advised, NOW THEREFORE, the Court enters the  
6 following:

7 I. FINDINGS OF FACT

8 1. Plaintiff's Second Amended Complaint ("Complaint") (Dkt. # 73) includes  
9 a Twelfth Claim for "Alter Ego/Corporate Disregard Liability" against defendants Balaton  
10 Condominium, LLC ("BCLLC"), Equity Residential Properties Management Corp.  
11 ("ERPMC"), ERP Operating Limited Partnership ("ERPOP") and Equity Residential  
12 ("EQR"). Complaint, ¶¶ 74-75. Plaintiff Balaton Condominium Association alleges that  
13 BCLLC, ERPMC, ERPOP and EQR are "alter egos of one another" and that their separate  
14 corporate form should be disregarded. *Id.*, ¶ 75. The claim is, in essence, an attempt to  
15 pierce BCLLC's corporate veil. *Id.*

16 **Corporate Structure and Relationships between the Corporate Defendants**

17 2. Each of EQR, ERPMC, ERPOP, and BCLLC was duly organized in its  
18 respective state of domicile at all times relevant to this suit.

19 3. Defendant EQR is a real estate investment trust within the meaning of  
20 Internal Revenue Code (IRC) Sec. 856. It is organized as a Maryland real estate  
21 investment trust and was formed in March 1993. EQR shares trade on the New York  
22 Stock Exchange under the symbol "EQR." Its precise legal structure is known as an  
23 "umbrella partnership real estate investment trust" (*i.e.* "UPREIT") because the real estate  
24 portfolio was created, in part, from real estate contributed to a limited partnership

25 [DEFENDANTS' PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 2

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1 (ERPOP). At times relevant to the is lawsuit, EQR was governed by a Board of Trustees  
2 and a Second Amended and Restated Declaration of Trust dated May 30, 1997.

3 4. ERPOP is an Illinois limited partnership. ERPOP was formed in March  
4 1993. At times relevant to this lawsuit, ERPOP was governed by its Fifth Amended and  
5 Restated Agreement of Limited Partnership dated August 1, 1998.

6 5. EQR is the sole general partner of ERPOP, and it owns approximately 94.2  
7 percent of ERPOP. All property ownership and business operations are conducted  
8 through ERPOP primarily because all land, buildings, and investments are owned by  
9 ERPOP or subsidiaries owned by ERPOP. As the general partner of ERPOP, EQR directs  
10 the partnership's business activities.

11 6. As of December 31, 2008, there were 477 properties in 23 states and the  
12 District of Columbia that were directly or indirectly 100 percent owned by ERPOP.  
13 Nearly all of these properties are apartment complexes, and the primary business activity  
14 of EQR has always been the investment in and the management of residential apartment  
15 complexes.

16 7. As of December 31, 2008, there were 851 separately organized  
17 subsidiaries of ERPOP and EQR. These entities include limited partnerships,  
18 partnerships, limited liability companies, and corporations.

19 8. EQR and ERPOP must comply with myriad rules and regulations in order  
20 to remain qualified for REIT status under the Internal Revenue Code. Compliance with  
21 these rules and regulations is mandatory in order for REIT tax status to be maintained.

22 9. Beginning in approximately 2000, the Internal Revenue Code was  
23 amended to allow REIT's to own taxable REIT subsidiaries ("TRS's"). Generally, a TRS  
24 can own assets otherwise forbidden to REIT's and have income sources not allowed for a

25 [DEFENDANTS' PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 3

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1 REIT. However, there are strict limits on TRS's (e.g. no more than 20 percent of a  
2 REIT's total assets can be represented by securities in a TRS). In addition, income taxes  
3 on TRS income and gain are paid at full corporate rates.

4 10. In 2003, ERPOP owned 100 percent of the common stock of defendant  
5 ERPMC, a TRS.

6 11. ERPMC was incorporated in Delaware in 1993. In 2003, ERPMC was the  
7 primary property management company for all REIT properties. Because management of  
8 the REIT's portfolio (i.e. leasing) accounted for an overwhelming percentage of the total  
9 business activity for the REIT, ERPMC was also the employer of all employees affiliated  
10 with EQR in 2003-2004.

11 12. Because condominium sales are a prohibited REIT activity, only a TRS  
12 would be allowed to do it under the applicable tax rules and regulations. In the second  
13 half of 2003, ERPMC began to create, own, and operate "single-purpose" limited liability  
14 companies which acquired and sold condominium properties. BCLLC is one such entity.  
15 It was organized in Delaware on August 29, 2003. At the time, BCLLC was ERPMC's  
16 fourth condominium project. ERPMC owned 100 percent of the membership interests in  
17 BCLLC and acted as BCLLC's managing member.

#### 18 Balaton Condominium Homes

19 13. Balaton Condominium Homes ("Balaton") is a 108-unit conversion  
20 condominium complex in Lake Forest Park, Washington. Balaton was created on  
21 December 10, 2003 when BCLLC executed and recorded the Condominium Declaration  
22 for Balaton Condominium Homes (the "Declaration") and the survey maps and plans with  
23 the King County Recorder's Office.

24  
25 [DEFENDANTS' PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 4

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1 14. Prior to the conversion, the property was known as Cherry Hill Apartments  
2 and was owned and operated by ERPOP. Cherry Hill Apartments was originally built in  
3 approximately 1991. ERPOP acquired the property on or about May 30, 1997 for a  
4 purchase price of approximately \$7.2 million.

5 15. In 2003, ERPOP obtained an independent opinion of value for Cherry Hill  
6 Apartments which estimated its value to be \$10.265 million.

7 16. On September 4, 2003, ERPOP, as seller, and BCLLC, as purchaser,  
8 entered into a Real Estate Sale Agreement for the purchase and sale of the Cherry Hill  
9 Apartments.

10 17. On September 17, 2003, BCLLC acquired the Cherry Hill Apartments  
11 from ERPOP for a purchase price of \$10,275,000, plus an allocated share of closing costs  
12 and pro-rations which were split between ERPOP and BCLLC under the terms of their  
13 agreement.

14 18. In connection with BCLLC's acquisition of the Cherry Hill Apartments,  
15 ERPOP loaned \$8,220,000 to BCLLC (the "Mortgage Loan"). The Mortgage Loan was  
16 documented with a promissory note dated September 15, 2003 payable by BCLLC to  
17 ERPOP. The note carried interest and the rate of seven percent per annum (7%) and was  
18 secured by a Purchase Money Mortgage and Security Agreement made by BCLLC in  
19 favor of ERPOP (the "Mortgage").

20 19. The purchase price was paid through an \$8.22 million, nine-year mortgage  
21 loan from ERPOP and a capital contribution from ERPMC in the amount of \$2,115,093.

22 20. The first Balaton unit was sold on or about December 17, 2003; the last  
23 unit sold on or about September 16, 2004. Ultimately, BCLLC's net total proceeds from  
24

25 [DEFENDANTS' PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 5

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1 Balaton condominium sales were \$15,227,530; net profit calculated under Generally  
2 Accepted Accounting Principles was approximately \$1,945,000.

3 21. BCLLC has control over the revenue generated by the conversion process  
4 and does not lack assets to respond to liability assessed in this litigation. As of December  
5 31, 2008, BCLLC had \$747,554 in cash and access to approximately \$2.2 million in other  
6 assets.

7 22. In addition, BCLLC has admitted the truth of each of the following:

- 8 • It sold the condominium units and owned all sales proceeds (Defendants'  
9 Answer to Plaintiff's Second Amended Complaint ("Answer"), ¶ 3).
- 10 • It created and signed the Declaration for Balaton Condominium Association  
11 (*Id.*, ¶¶ 3 and 43).
- 12 • It was the original owner and the seller of the Balaton condominium units (*Id.*,  
13 ¶ 16).
- 14 • It signed all purchase contracts with unit buyers (*Id.*, ¶ 31).
- 15 • It appointed the home owners' association board during the period of declarant  
16 control (*Id.*, ¶ 42).
- 17 • It performed duties under the Declaration (*Id.*, ¶ 43).
- 18 • It contracted for the work to be done during the conversion (*Id.*, ¶ 55).

19 23. The Court finds that EQR, ERPOP, ERPMC and BCLLC have maintained  
20 the required corporate formalities by keeping separate business records, conducting  
21 periodic meetings, documenting various transactions by written agreement, maintaining  
22 qualifications and authorizations to conduct business in multiple jurisdictions and  
23 operating under formal written governing documents.

24  
25 [DEFENDANTS' PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 6

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1 • **Violation of Washington Condominium Act's Public Offering Statement**  
2 **provisions: in favor of BCLLC, ERPMC, ERPOP and EQR**

3 28. The jury thus found that Plaintiff suffered total damages of \$742,869.

4 29. The jury found in favor of defendants ERPOP and EQR as to each claim  
5 asserted against each of them.

6 30. On July 13, 2009, defendants BCLLC and ERPMC moved the Court for an  
7 Order authorizing them to deposit \$742,869 into the registry of the Court. In support of  
8 that Motion, BCLLC and ERPMC attached a copy of a check drawn on defense counsel's  
9 trust account in the amount of \$742,869 made payable to the King County Superior Court.

10 31. The Court finds that BCLLC and ERPMC have demonstrated their ability  
11 to satisfy the jury verdict in full by their July 13, 2009 motion to tender the entire verdict  
12 amount (\$742,869) into the registry of the Court.

13 **II. CONCLUSION OF LAW**

14 1. Under both Delaware and Washington law, veil piercing is appropriate  
15 only where a plaintiff can show it is required to prevent injustice or unjustified loss.  
16 *Wallace v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999) ("Piercing the corporate veil  
17 under the alter ego theory "requires that the corporate structure cause fraud or similar  
18 injustice."); *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn. 2d 403 (1982)  
19 ("[D]isregard must be "necessary and required to prevent unjustified loss to the injured  
20 party.") (quoting *Morgan v. Burks*, 93 Wn.2d 580, 587 (1980)).

21 2. Further, both Delaware and Washington law require a showing of intent to  
22 defraud related to defendant's abuse of the corporate form. *E.g.*, *Mobil Oil*, 718 F. Supp.  
23 at 260; *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 389 (2002); *Morgan*, 93 Wn.2d at  
24

25 [DEFENDANTS' PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 8

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1 585. The corporate form is properly disregarded only where the corporation exists for no  
2 other purpose than as a vehicle for fraud. *Wallace*, 752 A.2d 1175, 1184 (Del. Ch. 1999).

3 3. Both Delaware and Washington law provide that courts may consider  
4 several factors in determining the existence of intentional, fraudulent abuse of corporate  
5 forms supporting veil piercing. In Delaware, courts have considered whether an entity is  
6 undercapitalized or insolvent, whether entities are commonly managed, and whether  
7 corporate formalities have been followed. See *Mason v. Network of Wilmington, Inc.*,  
8 2005 WL 1653954, at \*3 (Del. Ch. July 1, 2005). In Washington, courts consider  
9 common ownership, observance of corporate formalities, and insolvency. See, e.g.,  
10 *Minton*, 146 Wn.2d at 399; *Meisel*, 97 Wn.2d at 411. However, none of these factors  
11 alone is sufficient to justify veil piercing.

12 4. The Court has considered the relevant factors under both Delaware and  
13 Washington law and finds that the facts presented in this case do not support veil piercing  
14 or a finding that the Defendants are “alter egos” of one another.

15 5. Because the Court finds that BCLLC is able to satisfy the amount of  
16 damages assessed by the jury, and that Defendants’ use of various corporate forms was  
17 not made with intent to commit a fraud or other injustice upon Plaintiff or its members,  
18 the Court concludes that there is no basis in law to grant relief under Plaintiff’s Twelfth  
19 Claim for Alter Ego/Corporate Disregard Liability. *Meisel*, 97 Wn.2d at 410; *Wallace*,  
20 752 A.2d at 1184.

21 6. Accordingly, Plaintiff’s Twelfth Claim for Alter Ego/Corporate Disregard  
22 Liability is hereby dismissed with prejudice.

23 //

24 //

25 [DEFENDANTS’ PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF’S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 9

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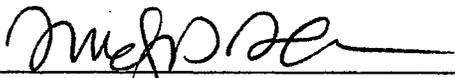
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DATED this \_\_\_\_ day of July, 2009.

HONORABLE JULIE A. SPECTOR

Presented by,

K&L GATES LLP

By 

Jesse O. Franklin IV, WSBA # 13755

Timothy L. Pierce, PHV - CA #141170

Brian L. Lewis, WSBA # 33560

Trudy D. Tessaro, WSBA # 27511

Attorneys for Defendants

Balaton Condominium, LLC *et al.*

[DEFENDANTS' PROPOSED] FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
REGARDING PLAINTIFF'S ALTER  
EGO/CORPORATE DISREGARD LIABILITY  
CLAIM - 10

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Honorable Julie Spector  
Hearing Date: July 22, 2009  
Hearing Time: 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

BALATON CONDOMINIUM  
ASSOCIATION, a Washington nonprofit  
corporation,

Plaintiff,

v.

BALATON CONDOMINIUM, LLC, et  
al.,

Defendants.

No. 07-2-14061-1 SEA

[PROPOSED] ORDER DENYING  
PLAINTIFF'S MOTION  
REGARDING ALTER  
EGO/CORPORATE DISREGARD  
LIABILITY

**ORDER**

This matter having come before the Court on Plaintiff's Motion Regarding Alter  
Ego/Corporate Disregard Liability;

The Court being familiar with the papers and pleadings filed herein;

The Court having considered Plaintiff's Motion, Defendants' Response, the  
parties' Replies (if any), the supporting materials thereto, and the papers and pleadings  
herein;

[PROPOSED] ORDER DENYING PLAINTIFF'S  
MOTION REGARDING ALTER  
EGO/CORPORATE DISREGARD LIABILITY - 1  
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NOW THEREFORE, it is

ORDERED:

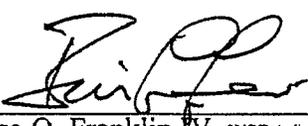
1. Plaintiff's Motion Regarding Alter Ego/Corporate Disregard Liability is DENIED.

DATED this \_\_\_\_ day of July, 2009.

\_\_\_\_\_  
HONORABLE JULIE SPECTOR

Presented by:

K&L GATES LLP

By  \_\_\_\_\_

Jesse O. Franklin IV, WSBA # 13755  
Timothy L. Pierce—PHV—CBA # 141170  
Brian L. Lewis, WSBA # 33560  
Michael K. Ryan, WSBA # 32091  
Attorneys for Defendants

[PROPOSED] ORDER DENYING PLAINTIFF'S  
MOTION REGARDING ALTER  
EGO/CORPORATE DISREGARD LIABILITY - 2

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# **Exhibit C**

*Return*

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THE HONORABLE BRUCE W. HELLER

2008 JUN 30 PM 4: 22

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

EQUITY RESIDENTIAL, a Maryland real estate investment trust,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY, a foreign corporation; AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, a foreign corporation; ILLINOIS NATIONAL INSURANCE, a foreign corporation; NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation; ADMIRAL INSURANCE COMPANY, a foreign corporation; NATIONAL SURETY COMPANY, a foreign corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a foreign corporation;

Defendants.

No.: 08-2-15092-5 SEA

**AMERICAN INTERNATIONAL  
SPECIALTY LINES INSURANCE  
COMPANY'S ANSWER AND  
AFFIRMATIVE DEFENSES**

Defendant American International Specialty Lines Insurance Company ("AISLIC"), by and through its attorneys of record at Nicoll Black & Feig PLLC, as for its Answer and Affirmative Defenses to Plaintiff's Complaint for Damages and Declaratory Relief ("Complaint"), alleges upon knowledge, information and belief, as follows:

(08-2-15092-5 SEA)  
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY'S ANSWER AND AFFIRMATIVE DEFENSES - 1

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I. PARTIES

1. Answering paragraph 1, defendant AISLIC lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

2. Answering paragraph 2, AISLIC lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

3. Answering paragraph 3, AISLIC lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

4. Answering paragraph 4, AISLIC admits the allegations contained in that paragraph.

5. Answering paragraph 5, AISLIC lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

6. Answering paragraph 6, AISLIC lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

7. Answering paragraph 7, AISLIC lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

8. Answering paragraph 8, AISLIC lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.



1           16.     Answering paragraph 16, the complaints in the Underlying Lawsuits speak for  
2 themselves. To the extent any further answer is required by AISLIC, AISLIC lacks knowledge  
3 or information sufficient to form a belief as to the truth or falsity of the allegations and,  
4 therefore, denies those allegations.

5           17.     Answering paragraph 17, the complaints in the Underlying Lawsuits speak for  
6 themselves. To the extent any further answer is required by AISLIC, AISLIC lacks knowledge  
7 or information sufficient to form a belief as to the truth or falsity of the allegations and,  
8 therefore, denies those allegations.

9           18.     Answering paragraph 18, to the extent the allegations of that paragraph relate to  
10 other defendants, AISLIC lacks knowledge or information sufficient to form a belief as to the  
11 truth or falsity of the allegations and, therefore, denies those allegations. To the extent the  
12 allegations are directed at AISLIC, AISLIC admits only that it issued one or more liability  
13 insurance policies to named insured Equity Residential and that any issued policy speaks for  
14 itself. AISLIC denies the remaining allegations of that paragraph.

15           19.     Answering paragraph 19, the complaints in the Underlying Lawsuits speak for  
16 themselves. To the extent any further answer is required by AISLIC, AISLIC lacks knowledge  
17 or information sufficient to form a belief as to the truth or falsity of the allegations and,  
18 therefore, denies those allegations.

19           20.     Answering paragraph 20, to the extent the allegations of that paragraph relate to  
20 other defendants, AISLIC lacks knowledge or information sufficient to form a belief as to the  
21 truth or falsity of the allegations and, therefore, denies those allegations. To the extent the  
22 allegations are directed at AISLIC, AISLIC admits only that it received notice more than 30  
23 days before the date on which Plaintiff filed its Complaint of three lawsuits in King County  
24 Superior Court against Equity Residential and one lawsuit in Snohomish County Superior  
25 Court against Equity Residential. AISLIC denies that it owed any duty to affirm or deny  
26

(08-2-15092-5 SEA)  
AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY'S ANSWER  
AND AFFIRMATIVE DEFENSES - 4

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1 coverage by the date on which Plaintiff filed its Complaint and, therefore, denies the remaining  
2 allegations of that paragraph.

3 21. Answering paragraph 21, to the extent the allegations of that paragraph relate to  
4 other defendants, AISLIC lacks knowledge or information sufficient to form a belief as to the  
5 truth or falsity of the allegations and, therefore, denies those allegations. To the extent the  
6 allegations are directed at AISLIC, AISLIC denies the allegations.

7 22. Answering paragraph 22, to the extent the allegations of that paragraph relate to  
8 other defendants, AISLIC lacks knowledge or information sufficient to form a belief as to the  
9 truth or falsity of the allegations and, therefore, denies those allegations. To the extent the  
10 allegations are directed at AISLIC, AISLIC denies the allegations.

11 **IV. CLAIMS UNIQUE TO ADMIRAL, NSC, AND USF&G**

12 23. Answering paragraph 23, the allegations of that paragraph are not directed at  
13 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
14 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
15 allegations and, therefore, denies those allegations.

16 24. Answering paragraph 24, the allegations of that paragraph are not directed at  
17 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
18 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
19 allegations and, therefore, denies those allegations.

20 25. Answering paragraph 25, the allegations of that paragraph are not directed at  
21 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
22 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
23 allegations and, therefore, denies those allegations.

24 26. Answering paragraph 26, the allegations of that paragraph are not directed at  
25 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
26

(08-2-15092-5 SEA)  
AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY'S ANSWER  
AND AFFIRMATIVE DEFENSES - 5

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1 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
2 allegations and, therefore, denies those allegations.

3 27. Answering paragraph 27, the allegations of that paragraph are not directed at  
4 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
5 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
6 allegations and, therefore, denies those allegations.

7 28. Answering paragraph 28, the allegations of that paragraph are not directed at  
8 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
9 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
10 allegations and, therefore, denies those allegations.

11 29. Answering paragraph 29, the allegations of that paragraph are not directed at  
12 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
13 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
14 allegations and, therefore, denies those allegations.

15 30. Answering paragraph 30, the allegations of that paragraph are not directed at  
16 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
17 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
18 allegations and, therefore, denies those allegations.

19 31. Answering paragraph 31, the allegations of that paragraph are not directed at  
20 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
21 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
22 allegations and, therefore, denies those allegations.

23 V. CLAIMS UNIQUE TO ACE

24 32. Answering paragraph 32, the allegations of that paragraph are not directed at  
25 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
26

1 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
2 allegations and, therefore, denies those allegations.

3 33. Answering paragraph 33, the allegations of that paragraph are not directed at  
4 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
5 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
6 allegations and, therefore, denies those allegations.

7 34. Answering paragraph 34, the allegations of that paragraph are not directed at  
8 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
9 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
10 allegations and, therefore, denies those allegations.

11 35. Answering paragraph 35, the allegations of that paragraph are not directed at  
12 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
13 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
14 allegations and, therefore, denies those allegations.

15 36. Answering paragraph 36, the allegations of that paragraph are not directed at  
16 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
17 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
18 allegations and, therefore, denies those allegations.

19 37. Answering paragraph 37, the allegations of that paragraph are not directed at  
20 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
21 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
22 allegations and, therefore, denies those allegations.

23 38. Answering paragraph 38, the allegations of that paragraph are not directed at  
24 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
25 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
26 allegations and, therefore, denies those allegations.

(08-2-15092-5 SEA)  
AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY'S ANSWER  
AND AFFIRMATIVE DEFENSES - 7

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(206) 838-7555

1           39.     Answering paragraph 39, the allegations of that paragraph are not directed at  
2 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
3 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
4 allegations and, therefore, denies those allegations.

5           40.     Answering paragraph 40, the allegations of that paragraph are not directed at  
6 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
7 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
8 allegations and, therefore, denies those allegations.

9           41.     Answering paragraph 41, the allegations of that paragraph are not directed at  
10 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
11 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
12 allegations and, therefore, denies those allegations.

13          42.     Answering paragraph 42, the allegations of that paragraph are not directed at  
14 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
15 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
16 allegations and, therefore, denies those allegations.

17          43.     Answering paragraph 43, the allegations of that paragraph are not directed at  
18 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
19 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
20 allegations and, therefore, denies those allegations.

21          44.     Answering paragraph 44, the allegations of that paragraph are not directed at  
22 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
23 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
24 allegations and, therefore, denies those allegations.

25          45.     Answering paragraph 45, the allegations of that paragraph are not directed at  
26 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC

(08-2-15092-5 SEA)  
AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY'S ANSWER  
AND AFFIRMATIVE DEFENSES - 8

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1 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
2 allegations and, therefore, denies those allegations.

3 46. Answering paragraph 46, the allegations of that paragraph are not directed at  
4 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
5 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
6 allegations and, therefore, denies those allegations.

7 47. Answering paragraph 47, the allegations of that paragraph are not directed at  
8 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
9 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
10 allegations and, therefore, denies those allegations.

11 48. Answering paragraph 48, the allegations of that paragraph are not directed at  
12 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
13 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
14 allegations and, therefore, denies those allegations.

15 49. Answering paragraph 49, the allegations of that paragraph are not directed at  
16 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
17 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
18 allegations and, therefore, denies those allegations.

19 50. Answering paragraph 50, the allegations of that paragraph are not directed at  
20 AISLIC and, therefore, no answer is required. To the extent an answer is required, AISLIC  
21 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
22 allegations and, therefore, denies those allegations.

## 23 VI. PRAYER FOR RELIEF

24 With respect to Plaintiff's prayer for relief, no response from defendant AISLIC is  
25 required. To the extent a response from AISLIC is required, AISLIC denies that Plaintiff is  
26 entitled to any relief.

(08-2-15092-5 SEA)  
AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY'S ANSWER  
AND AFFIRMATIVE DEFENSES - 9

LAW OFFICES OF  
**NICOLL BLACK & FEIG PLLC**  
216 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 838-7555

1 OMNIBUS DENIAL

2 To the extent Plaintiff has made allegations not otherwise answered by defendant  
3 AISLIC, AISLIC denies the allegations.

4 AFFIRMATIVE DEFENSES

5 By way of further answer to the Complaint and by way of affirmative defenses thereto,  
6 defendant AISLIC alleges as follows:

7 1. Plaintiff's claims against AISLIC are barred to the extent they fail to state a  
8 claim upon which relief may be granted.

9 2. Plaintiff's claims against AISLIC are barred by the equitable doctrines of  
10 estoppel, laches, and waiver.

11 3. The Court lacks personal jurisdiction over AISLIC.

12 4. The Court should decline to exercise subject matter jurisdiction pursuant to the  
13 doctrine of *forum non conveniens*.

14 5. Plaintiff's claims against Farmers are barred by the doctrine of unclean hands.

15 6. To the extent any policy of insurance issued by AISLIC is implicated by  
16 Plaintiff's claims, Plaintiff's claims are barred in whole or in part by the terms, definitions,  
17 exclusions, conditions and/or limitations contained therein.

18 7. Plaintiff has failed to join parties that might be necessary and/or indispensable  
19 for the just adjudication of Plaintiff's claims.

20 8. The laws of other jurisdictions of the United States might apply, either in whole  
21 or in part, to the allegations in Plaintiff's Complaint.

22 9. Plaintiff has failed to produce documents and information demonstrating that  
23 AISLIC has any obligation to Plaintiff under any insurance policy that AISLIC has issued.

24 10. An actual justiciable controversy does not exist between Plaintiff and AISLIC,  
25 and Plaintiff's claims against AISLIC are not ripe.

26 (08-2-15092-5 SEA)  
AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY'S ANSWER  
AND AFFIRMATIVE DEFENSES - 10

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NICOLL BLACK & FEIG PLLC  
816 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 839-7555

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**RESERVATION OF RIGHTS**

Plaintiff's Complaint does not describe the claims made against AISLIC with sufficient particularity to enable AISLIC to determine all of its defenses (including defenses based upon the terms, conditions, or exclusions of any applicable policy). AISLIC fully reserves its right to supplement its answers and affirmative defenses.

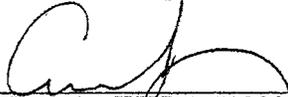
**PRAYER FOR RELIEF**

WHEREFORE, AISLIC prays for judgment and affirmative relief as follows:

1. For a judgment dismissing Plaintiff's Complaint with prejudice;
2. Alternatively, for a judgment declaring that AISLIC owes no duty to Plaintiff under any insurance policy that AISLIC issued; and
3. For such other and further relief that the Court determines is fair, just and equitable.

DATED this 30th day of June, 2008.

NICOLL BLACK & FEIG PLLC




---

Curt H. Feig, WSBA #19890  
 Thomas J. Braun, WSBA #34209  
 Attorneys for Defendant  
 American International Specialty Lines  
 Insurance Company

1 **DECLARATION OF SERVICE**

2 I, Julie Voiland, hereby declare and state as follows:

3 I am a citizen of the United States and a resident of Seattle, Washington; I am over the  
4 age of eighteen years and not a party to the within action; my business address is Nicoll  
5 Black & Feig PLLC, 816 Second Avenue, Suite 300, Seattle, WA 98104.

6 On June 30, 2008, I caused to be served:

7 **• AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE**  
8 **COMPANY'S ANSWER AND AFFIRMATIVE DEFENSES**

9 in the within matter by arranging for a copy to be delivered on the interested parties in said  
10 action, in the manner described below, addressed as follows:

11 Todd Christopher Hayes  
12 Charles K. Davis  
13 Harper Hayes, PLLC  
14 600 University Street, Suite 2420  
15 Seattle, WA 98101-1129  
16 Phone: (206) 340-8010  
17 Fax: (206) 260-2852

VIA HAND DELIVERY  
 VIA OVERNIGHT MAIL  
 VIA FACSIMILE  
 VIA U.S. MAIL

16 Michelle Menely  
17 James Horne  
18 Gordon, Thomas, Honeywell, Malanca,  
19 Peterson & Daheim  
20 600 University Street, Suite 2100  
21 Seattle, WA 98101  
22 Phone: 206-676-7500  
23 Fax: 206-676-7575

VIA HAND DELIVERY  
 VIA OVERNIGHT MAIL  
 VIA FACSIMILE  
 VIA U.S. MAIL

21 M. Colleen Barrett  
22 Barrett & Worden, PS  
23 2101 Fourth Avenue, Suite 700  
24 Seattle, WA 98121  
25 Phone: 206-436-2020  
26 Fax: 206-436-2030

VIA HAND DELIVERY  
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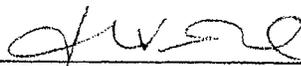
Robert A. Meyers  
Cozen O'Connor  
1201 Third Avenue, Suite 5200  
Seattle, WA 98101  
Phone: 206-340-1000  
Fax: 206-621-8783

VIA HAND DELIVERY  
 VIA OVERNIGHT MAIL  
 VIA FACSIMILE  
 VIA U.S. MAIL

Michael A. Patterson  
Nicholas L. Jenkins  
Angela R. Vogel  
Patterson, Buchanan, Fobes, Leitch & Kalzer  
601 Union Street, Suite 4200  
Seattle, WA 98101  
Phone: 206-652-3500  
Fax: 206-652-3501

VIA HAND DELIVERY  
 VIA OVERNIGHT MAIL  
 VIA FACSIMILE  
 VIA U.S. MAIL

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 30, 2008, at Seattle, Washington.

  
\_\_\_\_\_  
Julie Voiland

# **Exhibit D**

*cutman*

RECEIVED  
2008 JUN 30 PM 4: 22  
KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

THE HONORABLE BRUCE W. HELLER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

EQUITY RESIDENTIAL, a Maryland real estate investment trust,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY, a foreign corporation; AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, a foreign corporation; ILLINOIS NATIONAL INSURANCE, a foreign corporation; NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation; ADMIRAL INSURANCE COMPANY, a foreign corporation; NATIONAL SURETY COMPANY, a foreign corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a foreign corporation;

Defendants.

No.: 08-2-15092-5 SEA

**ILLINOIS NATIONAL INSURANCE COMPANY'S ANSWER AND AFFIRMATIVE DEFENSES**

Defendant Illinois National Insurance Company ("Illinois National"), by and through its attorneys of record at Nicoll Black & Feig PLLC, as for its Answer and Affirmative Defenses to Plaintiff's Complaint for Damages and Declaratory Relief ("Complaint"), alleges upon knowledge, information and belief, as follows:

(08-2-15092-5 SEA)  
ILLINOIS NATIONAL INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 1

LAW OFFICES OF  
**NICOLL BLACK & FEIG PLLC**  
816 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 838-7555

1 I. PARTIES

2 1. Answering paragraph 1, defendant Illinois National lacks knowledge or  
3 information sufficient to form a belief as to the truth or falsity of the allegations contained in  
4 that paragraph and, therefore, denies those allegations.

5 2. Answering paragraph 2, Illinois National lacks knowledge or information  
6 sufficient to form a belief as to the truth or falsity of the allegations contained in that paragraph  
7 and, therefore, denies those allegations.

8 3. Answering paragraph 3, Illinois National lacks knowledge or information  
9 sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph  
10 and, therefore, denies those allegations.

11 4. Answering paragraph 4, Illinois National lacks knowledge or information  
12 sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph  
13 and, therefore, denies those allegations.

14 5. Answering paragraph 5, Illinois National admits the allegations contained in  
15 that paragraph.

16 6. Answering paragraph 6, Illinois National lacks knowledge or information  
17 sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph  
18 and, therefore, denies those allegations.

19 7. Answering paragraph 7, Illinois National lacks knowledge or information  
20 sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph  
21 and, therefore, denies those allegations.

22 8. Answering paragraph 8, Illinois National lacks knowledge or information  
23 sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph  
24 and, therefore, denies those allegations.



1           14.     Answering paragraph 14, Illinois National lacks knowledge or information  
2 sufficient to form a belief as to the truth or falsity of the allegations and, therefore, denies those  
3 allegations.

4           15.     Answering paragraph 15, on information and belief, Illinois National admits the  
5 allegations of that paragraph.

6           16.     Answering paragraph 16, the complaints in the Underlying Lawsuits speak for  
7 themselves. To the extent any further answer is required by Illinois National, Illinois National  
8 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
9 allegations and, therefore, denies those allegations.

10          17.     Answering paragraph 17, the complaints in the Underlying Lawsuits speak for  
11 themselves. To the extent any further answer is required by Illinois National, Illinois National  
12 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
13 allegations and, therefore, denies those allegations.

14          18.     Answering paragraph 18, Illinois Union lacks knowledge or information  
15 sufficient to form a belief as to the truth or falsity of the allegations and, therefore, denies those  
16 allegations.

17          19.     Answering paragraph 19, the complaints in the Underlying Lawsuits speak for  
18 themselves. To the extent any further answer is required by Illinois National, Illinois National  
19 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
20 allegations and, therefore, denies those allegations.

21          20.     Answering paragraph 20, to the extent the allegations of that paragraph relate to  
22 other defendants, Illinois National lacks knowledge or information sufficient to form a belief as  
23 to the truth or falsity of the allegations and, therefore, denies those allegations. To the extent  
24 the allegations are directed at Illinois National, Illinois National admits only that it received  
25 notice more than 30 days before the date on which Plaintiff filed its Complaint of three  
26 lawsuits in King County Superior Court against Equity Residential and one lawsuit in

(08-2-15092-5 SEA)  
ILLINOIS NATIONAL INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 4

LAW OFFICES OF  
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816 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 838-7555

1 Snohomish County Superior Court against Equity Residential. Illinois National denies that it  
2 owed any duty to affirm or deny coverage under any applicable policy by the date on which  
3 Plaintiff filed its Complaint and, therefore, denies the remaining allegations of that paragraph.

4 21. Answering paragraph 21, to the extent the allegations of that paragraph relate to  
5 other defendants, Illinois National lacks knowledge or information sufficient to form a belief as  
6 to the truth or falsity of the allegations and, therefore, denies those allegations. To the extent  
7 the allegations are directed at Illinois National, Illinois National denies the allegations.

8 22. Answering paragraph 22, to the extent the allegations of that paragraph relate to  
9 other defendants, Illinois National lacks knowledge or information sufficient to form a belief as  
10 to the truth or falsity of the allegations and, therefore, denies those allegations. To the extent  
11 the allegations are directed at Illinois National, Illinois National denies the allegations.

12 **IV. CLAIMS UNIQUE TO ADMIRAL, NSC, AND USF&G**

13 23. Answering paragraph 23, the allegations of that paragraph are not directed at  
14 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
15 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
16 falsity of the allegations and, therefore, denies those allegations.

17 24. Answering paragraph 24, the allegations of that paragraph are not directed at  
18 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
19 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
20 falsity of the allegations and, therefore, denies those allegations.

21 25. Answering paragraph 25, the allegations of that paragraph are not directed at  
22 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
23 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
24 falsity of the allegations and, therefore, denies those allegations.

25 26. Answering paragraph 26, the allegations of that paragraph are not directed at  
26 Illinois National and, therefore, no answer is required. To the extent an answer is required,

(08-2-15092-5 SEA)  
ILLINOIS NATIONAL INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 5

LAW OFFICES OF  
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816 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 838-7555

1 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
2 falsity of the allegations and, therefore, denies those allegations.

3 27. Answering paragraph 27, the allegations of that paragraph are not directed at  
4 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
5 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
6 falsity of the allegations and, therefore, denies those allegations.

7 28. Answering paragraph 28, the allegations of that paragraph are not directed at  
8 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
9 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
10 falsity of the allegations and, therefore, denies those allegations.

11 29. Answering paragraph 29, the allegations of that paragraph are not directed at  
12 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
13 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
14 falsity of the allegations and, therefore, denies those allegations.

15 30. Answering paragraph 30, the allegations of that paragraph are not directed at  
16 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
17 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
18 falsity of the allegations and, therefore, denies those allegations.

19 31. Answering paragraph 31, the allegations of that paragraph are not directed at  
20 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
21 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
22 falsity of the allegations and, therefore, denies those allegations.

23 **V. CLAIMS UNIQUE TO ACE**

24 32. Answering paragraph 32, the allegations of that paragraph are not directed at  
25 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
26

1 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
2 falsity of the allegations and, therefore, denies those allegations.

3 33. Answering paragraph 33, the allegations of that paragraph are not directed at  
4 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
5 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
6 falsity of the allegations and, therefore, denies those allegations.

7 34. Answering paragraph 34, the allegations of that paragraph are not directed at  
8 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
9 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
10 falsity of the allegations and, therefore, denies those allegations.

11 35. Answering paragraph 35, the allegations of that paragraph are not directed at  
12 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
13 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
14 falsity of the allegations and, therefore, denies those allegations.

15 36. Answering paragraph 36, the allegations of that paragraph are not directed at  
16 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
17 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
18 falsity of the allegations and, therefore, denies those allegations.

19 37. Answering paragraph 37, the allegations of that paragraph are not directed at  
20 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
21 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
22 falsity of the allegations and, therefore, denies those allegations.

23 38. Answering paragraph 38, the allegations of that paragraph are not directed at  
24 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
25 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
26 falsity of the allegations and, therefore, denies those allegations.

(08-2-15092-5 SEA)  
ILLINOIS NATIONAL INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 7

LAW OFFICES OF  
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816 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 838-7555

1           39.     Answering paragraph 39, the allegations of that paragraph are not directed at  
2 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
3 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
4 falsity of the allegations and, therefore, denies those allegations.

5           40.     Answering paragraph 40, the allegations of that paragraph are not directed at  
6 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
7 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
8 falsity of the allegations and, therefore, denies those allegations.

9           41.     Answering paragraph 41, the allegations of that paragraph are not directed at  
10 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
11 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
12 falsity of the allegations and, therefore, denies those allegations.

13          42.     Answering paragraph 42, the allegations of that paragraph are not directed at  
14 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
15 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
16 falsity of the allegations and, therefore, denies those allegations.

17          43.     Answering paragraph 43, the allegations of that paragraph are not directed at  
18 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
19 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
20 falsity of the allegations and, therefore, denies those allegations.

21          44.     Answering paragraph 44, the allegations of that paragraph are not directed at  
22 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
23 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
24 falsity of the allegations and, therefore, denies those allegations.

25          45.     Answering paragraph 45, the allegations of that paragraph are not directed at  
26 Illinois National and, therefore, no answer is required. To the extent an answer is required,

(08-2-15092-5 SEA)  
ILLINOIS NATIONAL INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 8

LAW OFFICES OF  
**NICOLL BLACK & FEIG PLLC**  
816 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 838-7555

1 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
2 falsity of the allegations and, therefore, denies those allegations.

3 46. Answering paragraph 46, the allegations of that paragraph are not directed at  
4 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
5 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
6 falsity of the allegations and, therefore, denies those allegations.

7 47. Answering paragraph 47, the allegations of that paragraph are not directed at  
8 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
9 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
10 falsity of the allegations and, therefore, denies those allegations.

11 48. Answering paragraph 48, the allegations of that paragraph are not directed at  
12 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
13 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
14 falsity of the allegations and, therefore, denies those allegations.

15 49. Answering paragraph 49, the allegations of that paragraph are not directed at  
16 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
17 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
18 falsity of the allegations and, therefore, denies those allegations.

19 50. Answering paragraph 50, the allegations of that paragraph are not directed at  
20 Illinois National and, therefore, no answer is required. To the extent an answer is required,  
21 Illinois National lacks knowledge or information sufficient to form a belief as to the truth or  
22 falsity of the allegations and, therefore, denies those allegations.

23 **VI. PRAYER FOR RELIEF**

24 With respect to Plaintiff's prayer for relief, no response from defendant Illinois  
25 National is required. To the extent a response from Illinois National is required, Illinois  
26 National denies that Plaintiff is entitled to any relief.

(08-2-15092-5 SEA)  
ILLINOIS NATIONAL INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 9

LAW OFFICES OF  
**NICOLL BLACK & FEIG PLLC**  
816 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 838-7555

1 OMNIBUS DENIAL

2 To the extent Plaintiff has made allegations not otherwise answered by defendant  
3 Illinois National, Illinois National denies the allegations.

4 AFFIRMATIVE DEFENSES

5 By way of further answer to the Complaint and by way of affirmative defenses thereto,  
6 defendant Illinois National alleges as follows:

7 1. Plaintiff's claims against Illinois National are barred to the extent they fail to  
8 state a claim upon which relief may be granted.

9 2. Plaintiff's claims against Illinois National are barred by the equitable doctrines  
10 of estoppel, laches, and waiver.

11 3. The Court lacks personal jurisdiction over Illinois National.

12 4. The Court should decline to exercise subject matter jurisdiction pursuant to the  
13 doctrine of *forum non conveniens*.

14 5. Plaintiff's claims against Farmers are barred by the doctrine of unclean hands.

15 6. To the extent any policy of insurance issued by Illinois National is implicated by  
16 Plaintiff's claims, Plaintiff's claims are barred in whole or in part by the terms, definitions,  
17 exclusions, conditions and/or limitations contained therein.

18 7. Plaintiff has failed to join parties that might be necessary and/or indispensable  
19 for the just adjudication of Plaintiff's claims.

20 8. The laws of other jurisdictions of the United States might apply, either in whole  
21 or in part, to the allegations in Plaintiff's Complaint.

22 9. Plaintiff has failed to produce documents and information demonstrating that  
23 Illinois National has any obligation to Plaintiff under any insurance policy that Illinois National  
24 has issued.

25 10. An actual justiciable controversy does not exist between Plaintiff and Illinois  
26 National, and Plaintiff's claims against Illinois National are not ripe.

(08-2-15092-5 SEA)  
ILLINOIS NATIONAL INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 10

LAW OFFICES OF  
NICOLL BLACK & FEIG PLLC  
816 SECOND AVENUE, SUITE 300  
SEATTLE, WASHINGTON 98104  
(206) 838-7555



1 **DECLARATION OF SERVICE**

2 I, Julie Voiland, hereby declare and state as follows:

3 I am a citizen of the United States and a resident of Seattle, Washington; I am over the  
4 age of eighteen years and not a party to the within action; my business address is Nicoll  
5 Black & Feig PLLC, 816 Second Avenue, Suite 300, Seattle, WA 98104.

6 On June 30, 2008, I caused to be served:

7 **• ILLINOIS NATIONAL INSURANCE COMPANY'S ANSWER AND**  
8 **AFFIRMATIVE DEFENSES**

9 in the within matter by arranging for a copy to be delivered on the interested parties in said  
10 action, in the manner described below, addressed as follows:

11 Todd Christopher Hayes  
12 Charles K. Davis  
13 Harper Hayes, PLLC  
14 600 University Street, Suite 2420  
15 Seattle, WA 98101-1129  
16 Phone: (206) 340-8010  
17 Fax: (206) 260-2852

X  VIA HAND DELIVERY  
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  VIA FACSIMILE  
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24 Seattle, WA 98121  
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26 Fax: 206-436-2030

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(08-2-15092-5 SEA)  
ILLINOIS NATIONAL INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 12

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SEATTLE, WASHINGTON 98104  
(206) 838-7555

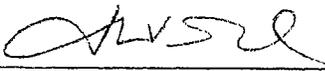
1 Robert A. Meyers  
2 Cozen O'Connor  
3 1201 Third Avenue, Suite 5200  
4 Seattle, WA 98101  
5 Phone: 206-340-1000  
6 Fax: 206-621-8783

VIA HAND DELIVERY  
 VIA OVERNIGHT MAIL  
 VIA FACSIMILE  
 VIA U.S. MAIL

5 Michael A. Patterson  
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8 Patterson, Buchanan, Fobes, Leitch & Kalzer  
9 601 Union Street, Suite 4200  
10 Seattle, WA 98101  
11 Phone: 206-652-3500  
12 Fax: 206-652-3501

VIA HAND DELIVERY  
 VIA OVERNIGHT MAIL  
 VIA FACSIMILE  
 VIA U.S. MAIL

10 I declare under penalty of perjury that the foregoing is true and correct, and that this  
11 declaration was executed on June 30, 2008, at Seattle, Washington.

12  
13   
14 \_\_\_\_\_  
15 Julie Voiland

# **Exhibit E**

*return*

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

EQUITY RESIDENTIAL, a Maryland real estate investment trust,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY, a foreign corporation; AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, a foreign corporation; ILLINOIS NATIONAL INSURANCE, a foreign corporation; NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation; ADMIRAL INSURANCE COMPANY, a foreign corporation; NATIONAL SURETY COMPANY, a foreign corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a foreign corporation;

Defendants.

No.: 08-2-15092-5 SEA

**NATIONAL UNION FIRE  
INSURANCE COMPANY'S ANSWER  
AND AFFIRMATIVE DEFENSES**

Defendant National Union Fire Insurance Company ("National Union"), by and through its attorneys of record at Nicoll Black & Feig PLLC, as for its Answer and Affirmative Defenses to Plaintiff's Complaint for Damages and Declaratory Relief ("Complaint"), alleges upon knowledge, information and belief, as follows:

(08-2-15092-5 SEA)  
NATIONAL UNION FIRE INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 1

LAW OFFICES OF  
**NICOLL BLACK & FEIG PLLC**  
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I. PARTIES

1. Answering paragraph 1, defendant National Union lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

2. Answering paragraph 2, National Union lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

3. Answering paragraph 3, National Union lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

4. Answering paragraph 4, National Union lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

5. Answering paragraph 5, National Union lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

6. Answering paragraph 6, National Union admits the allegations contained in that paragraph.

7. Answering paragraph 7, National Union lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.

8. Answering paragraph 8, National Union lacks knowledge or information sufficient to form a belief as the truth or falsity of the allegations contained in that paragraph and, therefore, denies those allegations.



1           14.     Answering paragraph 14, National Union lacks knowledge or information  
2 sufficient to form a belief as to the truth or falsity of the allegations and, therefore, denies those  
3 allegations.

4           15.     Answering paragraph 15, on information and belief, National Union admits the  
5 allegations of that paragraph.

6           16.     Answering paragraph 16, the complaints in the Underlying Lawsuits speak for  
7 themselves. To the extent any further answer is required by National Union, National Union  
8 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
9 allegations and, therefore, denies those allegations.

10          17.     Answering paragraph 17, the complaints in the Underlying Lawsuits speak for  
11 themselves. To the extent any further answer is required by National Union, National Union  
12 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
13 allegations and, therefore, denies those allegations.

14          18.     Answering paragraph 18, to the extent the allegations of that paragraph relate to  
15 other defendants, National Union lacks knowledge or information sufficient to form a belief as  
16 to the truth or falsity of the allegations and, therefore, denies those allegations. To the extent  
17 the allegations are directed at National Union, National Union admits only that it issued one or  
18 more liability insurance policies to named insured Equity Residential and that any issued policy  
19 speaks for itself. National Union denies the remaining allegations of that paragraph.

20          19.     Answering paragraph 19, the complaints in the Underlying Lawsuits speak for  
21 themselves. To the extent any further answer is required by National Union, National Union  
22 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the  
23 allegations and, therefore, denies those allegations.

24          20.     Answering paragraph 20, to the extent the allegations of that paragraph relate to  
25 other defendants, National Union lacks knowledge or information sufficient to form a belief as  
26 to the truth or falsity of the allegations and, therefore, denies those allegations. To the extent

(08-2-15092-5 SEA)  
NATIONAL UNION FIRE INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 4

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1 the allegations are directed at National Union, National Union admits only that it received  
2 notice more than 30 days before the date on which Plaintiff filed its Complaint of three  
3 lawsuits in King County Superior Court against Equity Residential and one lawsuit in  
4 Snohomish County Superior Court against Equity Residential. National Union denies that it  
5 owed any duty to affirm or deny coverage by the date on which Plaintiff filed its Complaint  
6 and, therefore, denies the remaining allegations of that paragraph.

7 21. Answering paragraph 21, to the extent the allegations of that paragraph relate to  
8 other defendants, National Union lacks knowledge or information sufficient to form a belief as  
9 to the truth or falsity of the allegations and, therefore, denies those allegations. To the extent  
10 the allegations are directed at National Union, National Union denies the allegations.

11 22. Answering paragraph 22, to the extent the allegations of that paragraph relate to  
12 other defendants, National Union lacks knowledge or information sufficient to form a belief as  
13 to the truth or falsity of the allegations and, therefore, denies those allegations. To the extent  
14 the allegations are directed at National Union, National Union denies the allegations.

15 **IV. CLAIMS UNIQUE TO ADMIRAL, NSC, AND USF&G**

16 23. Answering paragraph 23, the allegations of that paragraph are not directed at  
17 National Union and, therefore, no answer is required. To the extent an answer is required,  
18 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
19 falsity of the allegations and, therefore, denies those allegations.

20 24. Answering paragraph 24, the allegations of that paragraph are not directed at  
21 National Union and, therefore, no answer is required. To the extent an answer is required,  
22 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
23 falsity of the allegations and, therefore, denies those allegations.

24 25. Answering paragraph 25, the allegations of that paragraph are not directed at  
25 National Union and, therefore, no answer is required. To the extent an answer is required,  
26

1 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
2 falsity of the allegations and, therefore, denies those allegations.

3 26. Answering paragraph 26, the allegations of that paragraph are not directed at  
4 National Union and, therefore, no answer is required. To the extent an answer is required,  
5 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
6 falsity of the allegations and, therefore, denies those allegations.

7 27. Answering paragraph 27, the allegations of that paragraph are not directed at  
8 National Union and, therefore, no answer is required. To the extent an answer is required,  
9 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
10 falsity of the allegations and, therefore, denies those allegations.

11 28. Answering paragraph 28, the allegations of that paragraph are not directed at  
12 National Union and, therefore, no answer is required. To the extent an answer is required,  
13 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
14 falsity of the allegations and, therefore, denies those allegations.

15 29. Answering paragraph 29, the allegations of that paragraph are not directed at  
16 National Union and, therefore, no answer is required. To the extent an answer is required,  
17 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
18 falsity of the allegations and, therefore, denies those allegations.

19 30. Answering paragraph 30, the allegations of that paragraph are not directed at  
20 National Union and, therefore, no answer is required. To the extent an answer is required,  
21 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
22 falsity of the allegations and, therefore, denies those allegations.

23 31. Answering paragraph 31, the allegations of that paragraph are not directed at  
24 National Union and, therefore, no answer is required. To the extent an answer is required,  
25 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
26 falsity of the allegations and, therefore, denies those allegations.

(08-2-15092-5 SEA)  
NATIONAL UNION FIRE INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 6

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SEATTLE, WASHINGTON 98104  
(206) 838-7555

V. CLAIMS UNIQUE TO ACE

1  
2 32. Answering paragraph 32, the allegations of that paragraph are not directed at  
3 National Union and, therefore, no answer is required. To the extent an answer is required,  
4 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
5 falsity of the allegations and, therefore, denies those allegations.

6 33. Answering paragraph 33, the allegations of that paragraph are not directed at  
7 National Union and, therefore, no answer is required. To the extent an answer is required,  
8 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
9 falsity of the allegations and, therefore, denies those allegations.

10 34. Answering paragraph 34, the allegations of that paragraph are not directed at  
11 National Union and, therefore, no answer is required. To the extent an answer is required,  
12 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
13 falsity of the allegations and, therefore, denies those allegations.

14 35. Answering paragraph 35, the allegations of that paragraph are not directed at  
15 National Union and, therefore, no answer is required. To the extent an answer is required,  
16 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
17 falsity of the allegations and, therefore, denies those allegations.

18 36. Answering paragraph 36, the allegations of that paragraph are not directed at  
19 National Union and, therefore, no answer is required. To the extent an answer is required,  
20 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
21 falsity of the allegations and, therefore, denies those allegations.

22 37. Answering paragraph 37, the allegations of that paragraph are not directed at  
23 National Union and, therefore, no answer is required. To the extent an answer is required,  
24 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
25 falsity of the allegations and, therefore, denies those allegations.  
26

(08-2-15092-5 SEA)  
NATIONAL UNION FIRE INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 7

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SEATTLE, WASHINGTON 98104  
(206) 838-7555

1           38.     Answering paragraph 38, the allegations of that paragraph are not directed at  
2 National Union and, therefore, no answer is required. To the extent an answer is required,  
3 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
4 falsity of the allegations and, therefore, denies those allegations.

5           39.     Answering paragraph 39, the allegations of that paragraph are not directed at  
6 National Union and, therefore, no answer is required. To the extent an answer is required,  
7 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
8 falsity of the allegations and, therefore, denies those allegations.

9           40.     Answering paragraph 40, the allegations of that paragraph are not directed at  
10 National Union and, therefore, no answer is required. To the extent an answer is required,  
11 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
12 falsity of the allegations and, therefore, denies those allegations.

13          41.     Answering paragraph 41, the allegations of that paragraph are not directed at  
14 National Union and, therefore, no answer is required. To the extent an answer is required,  
15 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
16 falsity of the allegations and, therefore, denies those allegations.

17          42.     Answering paragraph 42, the allegations of that paragraph are not directed at  
18 National Union and, therefore, no answer is required. To the extent an answer is required,  
19 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
20 falsity of the allegations and, therefore, denies those allegations.

21          43.     Answering paragraph 43, the allegations of that paragraph are not directed at  
22 National Union and, therefore, no answer is required. To the extent an answer is required,  
23 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
24 falsity of the allegations and, therefore, denies those allegations.

25          44.     Answering paragraph 44, the allegations of that paragraph are not directed at  
26 National Union and, therefore, no answer is required. To the extent an answer is required,

1 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
2 falsity of the allegations and, therefore, denies those allegations.

3 45. Answering paragraph 45, the allegations of that paragraph are not directed at  
4 National Union and, therefore, no answer is required. To the extent an answer is required,  
5 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
6 falsity of the allegations and, therefore, denies those allegations.

7 46. Answering paragraph 46, the allegations of that paragraph are not directed at  
8 National Union and, therefore, no answer is required. To the extent an answer is required,  
9 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
10 falsity of the allegations and, therefore, denies those allegations.

11 47. Answering paragraph 47, the allegations of that paragraph are not directed at  
12 National Union and, therefore, no answer is required. To the extent an answer is required,  
13 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
14 falsity of the allegations and, therefore, denies those allegations.

15 48. Answering paragraph 48, the allegations of that paragraph are not directed at  
16 National Union and, therefore, no answer is required. To the extent an answer is required,  
17 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
18 falsity of the allegations and, therefore, denies those allegations.

19 49. Answering paragraph 49, the allegations of that paragraph are not directed at  
20 National Union and, therefore, no answer is required. To the extent an answer is required,  
21 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
22 falsity of the allegations and, therefore, denies those allegations.

23 50. Answering paragraph 50, the allegations of that paragraph are not directed at  
24 National Union and, therefore, no answer is required. To the extent an answer is required,  
25 National Union lacks knowledge or information sufficient to form a belief as to the truth or  
26 falsity of the allegations and, therefore, denies those allegations.

(08-2-15092-5 SEA)  
NATIONAL UNION FIRE INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 9

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1 **VI. PRAYER FOR RELIEF**

2 With respect to Plaintiff's prayer for relief, no response from defendant National Union  
3 is required. To the extent a response from National Union is required, National Union denies  
4 that Plaintiff is entitled to any relief.

5 **OMNIBUS DENIAL**

6 To the extent Plaintiff has made allegations not otherwise answered by defendant  
7 National Union, National Union denies the allegations.

8 **AFFIRMATIVE DEFENSES**

9 By way of further answer to the Complaint and by way of affirmative defenses thereto,  
10 defendant National Union alleges as follows:

11 1. Plaintiff's claims against National Union are barred to the extent they fail to  
12 state a claim upon which relief may be granted.

13 2. Plaintiff's claims against National Union are barred by the equitable doctrines  
14 of estoppel, laches, and waiver.

15 3. The Court lacks personal jurisdiction over National Union.

16 4. The Court should decline to exercise subject matter jurisdiction pursuant to the  
17 doctrine of *forum non conveniens*.

18 5. Plaintiff's claims against Farmers are barred by the doctrine of unclean hands.

19 6. To the extent any policy of insurance issued by National Union is implicated by  
20 Plaintiff's claims, Plaintiff's claims are barred in whole or in part by the terms, definitions,  
21 exclusions, conditions and/or limitations contained therein.

22 7. Plaintiff has failed to join parties that might be necessary and/or indispensable  
23 for the just adjudication of Plaintiff's claims.

24 8. The laws of other jurisdictions of the United States might apply, either in whole  
25 or in part, to the allegations in Plaintiff's Complaint.

26  
(08-2-15092-5 SEA)  
NATIONAL UNION FIRE INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 10

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(206) 838-7555

1 9. Plaintiff has failed to produce documents and information demonstrating that  
2 National Union has any obligation to Plaintiff under any insurance policy that National Union  
3 has issued.

4 10. An actual justiciable controversy does not exist between Plaintiff and National  
5 Union, and Plaintiff's claims against National Union are not ripe.

6 **RESERVATION OF RIGHTS**

7 Plaintiff's Complaint does not describe the claims made against National Union with  
8 sufficient particularity to enable National Union to determine all of its defenses (including  
9 defenses based upon the terms, conditions, or exclusions of any applicable policy). National  
10 Union fully reserves its right to supplement its answers and affirmative defenses.

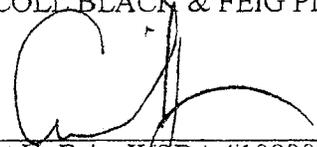
11 **PRAYER FOR RELIEF**

12 WHEREFORE, National Union prays for judgment and affirmative relief as follows:

- 13 1. For a judgment dismissing Plaintiff's Complaint with prejudice;  
14 2. Alternatively, for a judgment declaring that National Union owes no duty to  
15 Plaintiff under any insurance policy that National Union issued; and  
16 3. For such other and further relief that the Court determines is fair, just and  
17 equitable.

18 DATED this 30th day of June, 2008.

19 NICOLL BLACK & FEIG PLLC



21 Curt H. Feig, WSBA #19890  
22 Thomas J. Brauh, WSBA #34209  
23 Attorneys for Defendant  
24 National Union Fire Insurance Company

1 **DECLARATION OF SERVICE**

2 I, Julie Voiland, hereby declare and state as follows:

3 I am a citizen of the United States and a resident of Seattle, Washington; I am over the  
4 age of eighteen years and not a party to the within action; my business address is Nicoll  
5 Black & Feig PLLC, 816 Second Avenue, Suite 300, Seattle, WA 98104.

6 On June 30, 2008, I caused to be served:

7 **• NATIONAL UNION FIRE INSURANCE COMPANY'S ANSWER AND**  
8 **AFFIRMATIVE DEFENSES**

9 in the within matter by arranging for a copy to be delivered on the interested parties in said  
10 action, in the manner described below, addressed as follows:

11 Todd Christopher Hayes  
12 Charles K. Davis  
13 Harper Hayes, PLLC  
14 600 University Street, Suite 2420  
15 Seattle, WA 98101-1129  
16 Phone: (206) 340-8010  
17 Fax: (206) 260-2852

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16 Michelle Menely  
17 James Horne  
18 Gordon, Thomas, Honeywell, Malanca,  
19 Peterson & Daheim  
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21 Seattle, WA 98101  
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23 Fax: 206-676-7575

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21 M. Colleen Barrett  
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(08-2-15092-5 SEA)  
NATIONAL UNION FIRE INSURANCE COMPANY'S  
ANSWER AND AFFIRMATIVE DEFENSES - 12

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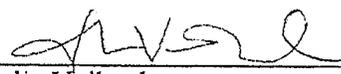
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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 30, 2008, at Seattle, Washington.

  
\_\_\_\_\_  
Julie Voiland