

Construction Defects: Update & Strategies

The Owner's Perspective

The Seminar Group
Seattle, WA
December 5, 2013

Daniel Zimberoff
Barker Martin, P.S.
danzimberoff@barkermartin.com
(206) 381-9806 x115

A. PowerPoint Presentation

**Construction Defects:
Update & Strategies**
The Owner's Perspective

The Seminar Group
Seattle, WA
December 5, 2013

Daniel Zimberoff
Barker Martin, P.S.
danzimberoff@barkermartin.com

Overview

- Boards' Perspectives
- Condo Defects Update
- Emerging & Developing Defects
- Products Liabilities Claims
- Plumbing Class Actions Update
- Investigations
- Roadmap to Efficient Resolution
 - RCW 64.55
 - ER 408

Condominium Update

- Condos, what condos?
- Types
 - Residential
 - Commercial
 - Mixed Use
 - Air space
- Conversions
- Tower

Factors Impacting A Condo Board's Perspective

- Statutory Guidance
 - The Association is responsible to maintain and repair common elements. RCW 64.34.328(1)
 - The Association may regulate maintenance, repairs and replacement. RCW 64.34.304(1)(f).
 - The board shall act in all instances on behalf of the association. RCW 64.34.308(1).
 - Elected board members must act with ordinary and reasonable care. RCW 64.34.308(2).

The Condo Board's Perspective

- Statutory Guidance
 - Condo Act Warranty (RCW 64.34.445)
 - Free From Defective Materials;
 - Constructed in accordance with sound engineering and construction standards;
 - Constructed in a workmanlike manner;
 - Constructed in compliance with all laws then applicable to such improvements.
 - Warranty Duration (RCW 64.34.452)
 - Typically lasts for 4 years after date first unit is conveyed.

Issues Impacting an HOA Board's Perspective

- Statutory Guidance (HOAs)
 - The Association may regulate maintenance, repairs and replacement. RCW 64.38.020(6).
 - Board shall act in all instances on behalf of the association. RCW 64.38.025(1).
 - Elected board members must act with the degree of care and loyalty required of an officer or director of a nonprofit corporation. RCW 64.38.025(1).
 - Governing Documents will dictate responsibilities.

The Owner's Perspective

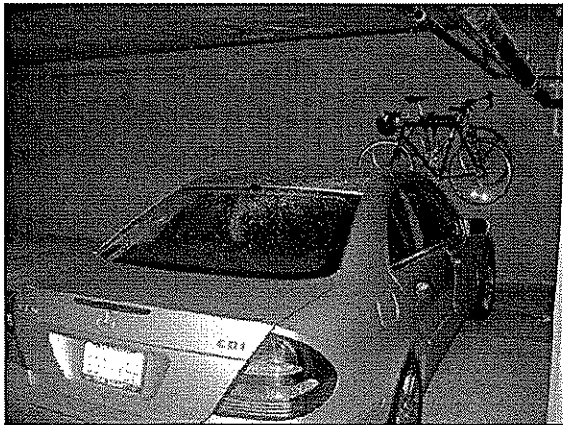
Daniel Zimberoff

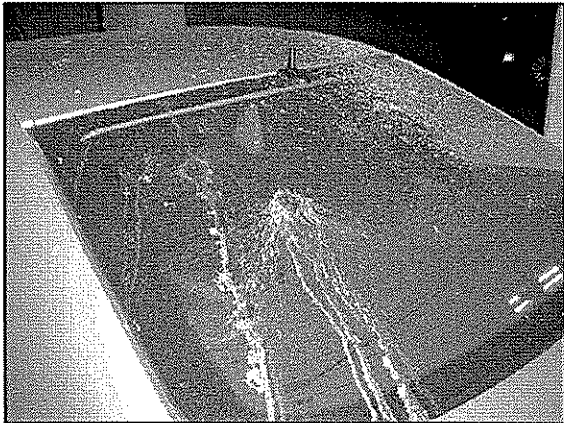
Page 3 of 22

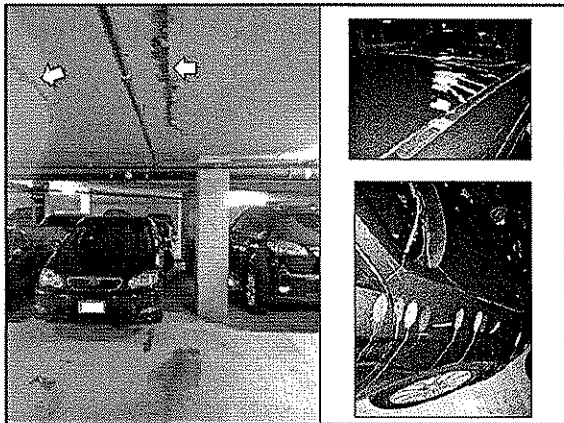
**Emerging & Developing Defects
Saying "Farewell" to Reverse-Lapped WRB**

- Leaky subterranean parking garages
- Fire resistance-rated construction
- Post-tensioned anchor corrosion
- Plumbing
- "Maintenance" costs
- Air barriers
- Metal-clad self-adhered membrane







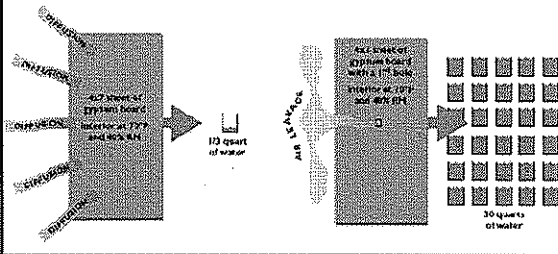


**Emerging & Developing Defects
Saying "farewell" to reverse-lapped WRB**

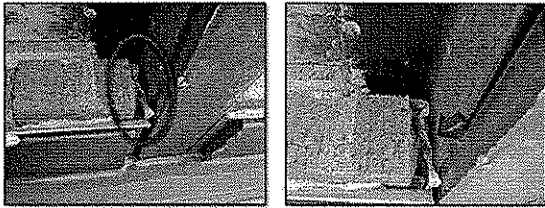
- Air barriers
- 2006 Seattle Building Code, §502.4.3.a:
Exterior joints around windows and door frames, openings between walls and foundation, between walls and roof and wall panels; openings at penetrations of utility services through walls, floors and roofs; and all other openings in the building envelope and all other openings in between units shall be sealed, caulked, gasketed or weatherstripped to limit air leakage. Other exterior joints and seams shall be similarly treated, or taped, or covered with moisture vapor permeable house wrap.

Emerging & Developing Defects Saying "Farewell" to Reverse-Lapped WRB

- Air barriers



Material spotlight: metal-clad self-adhered membrane, panacea or nostrum?



Product Liability Claims

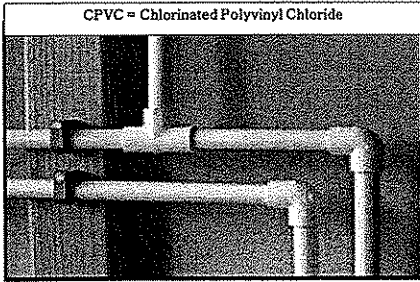
- Yellow brass
- Uponor/Wirsbo
- PEX
- Cast iron
- HVAC
- Declarant/Manufacturer

The Owner's Perspective

Daniel Zimmeroff

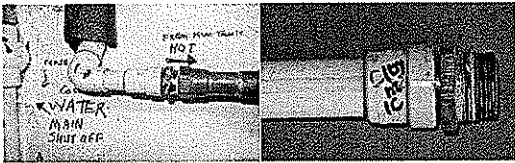
Page 6 of 22

CPVC



What is CPVC?

- Chlorinated Polyvinyl Chloride, or "CPVC" is a rigid plastic pipe used for potable water including supplying hot water.



What is the problem with CPVC?

- Embrittlement
- Discoloration
- Knit Line Fractures

Knit Line Fracture

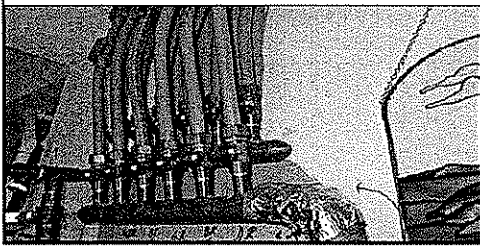
The most common CPVC failure



CPVC Knit Line

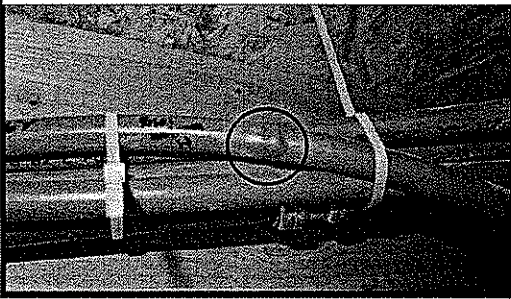
KITEC

A flexible plastic & aluminum pipe used for hydronic heating



THE PROBLEM

Kitec Pipe Blisters & Ruptures



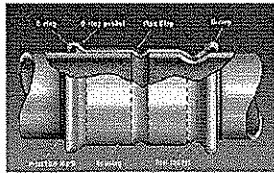
The Owner's Perspective

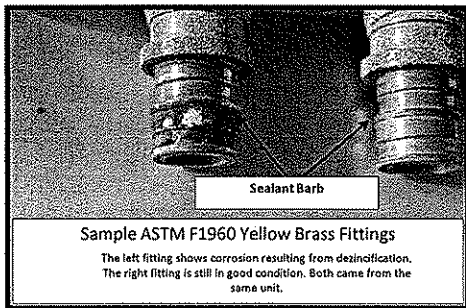
Daniel Zimberoff

Page 8 of 22

PRESSFIT

Stainless steel or copper pipes connected by "pressing" them together, fittings contain rubber gaskets or O rings





Why do the fittings corrode?

- Copper and zinc are the two main components of brass.
- When there is too much zinc, the brass corrodes.
- This corrosion is called dezincification because the zinc leaches out of the brass when exposed to water.
- Dezincification damages the pipe in two main ways:
 - It leaves behind a porous and weaker copper structure.
 - It damages the sealant barb by causing pitting or by reducing the diameter of the sealing barb.
- Damage caused by dezincification leads to leaks.

Statute of Limitations Product Liability

RCW 7.72.060

- Useful Safe Life
- 12 Year Presumption
- 3 years from discovery

Lawsuit Framework

- State Action/Federal Action
- Multi-District Litigation
- Class Action
 - State/national/international

Plumbing Class Action Update

See handout

- Uponor
- Kitec
- Viega
- PEX

Investigations

- Owner - Preliminary
- Joint – Comprehensive
- Timing
- Representative sampling
- Window testing

Roadmap to Efficient Resolution

- Conditions precedent
- Arbitration
- WRAP policies
 - Anti-suit provisions
- Subcontractors
- Manufacturers

Resolution Roadmap: RCW 64.55

- Doing the dance
- Pitfalls
- Practical solutions
- Tolling

Resolution Roadmap: ER 408 Agreements

See handout

- Investigation
- Discovery
- Scope of repair
- ER 408
- Mediation

**Construction Defects:
Update & Strategies**

The Owner's Perspective

Questions?

Comments?

Daniel Zimberoff
Barker Martin, P.S.
danzimberoff@barkermartin.com

B. Pertinent Statutes

RCW 64.34.445 Implied warranties of quality — Breach

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

(2) A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by such declarant or dealer will be:

(a) Free from defective materials;

(b) Constructed in accordance with sound engineering and construction standards;

(c) Constructed in a workmanlike manner; and

(d) Constructed in compliance with all laws then applicable to such improvements.

(3) A declarant and any dealer warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

(4) Warranties imposed by this section may be excluded or modified as specified in RCW 64.34.450.

(5) For purposes of this section, improvements made or contracted for by an affiliate of a declarant, as defined in RCW 64.34.020(1), are made or contracted for by the declarant.

(6) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

(7) In a judicial proceeding for breach of any of the obligations arising under this section, the plaintiff must show that the alleged breach has adversely affected or will adversely affect the performance of that portion of the unit or common elements alleged to be in breach. As used in this subsection, an "adverse effect" must be more than technical and must be significant to a reasonable person. To establish an adverse effect, the person alleging the breach is not required to prove that the breach renders the unit or common element uninhabitable or unfit for its intended purpose.

(8) Proof of breach of any obligation arising under this section is not proof of damages.

The Owner's Perspective

Daniel Zimmeroff

Page 13 of 22

Damages awarded for a breach of an obligation arising under this section are the cost of repairs. However, if it is established that the cost of such repairs is clearly disproportionate to the loss in market value caused by the breach, then damages shall be limited to the loss in market value.

RCW 64.34.452 Warranties of quality — Breach — Actions for construction defect claims

(1) A judicial proceeding for breach of any obligations arising under RCW 64.34.443, 64.34.445, and 64.34.450 must be commenced within four years after the cause of action accrues: PROVIDED, That the period for commencing an action for a breach accruing pursuant to subsection (2)(b) of this section shall not expire prior to one year after termination of the period of declarant control, if any, under *RCW 64.34.308(4). Such periods may not be reduced by either oral or written agreement, or through the use of contractual claims or notice procedures that require the filing or service of any claim or notice prior to the expiration of the period specified in this section.

(2) Subject to subsection (3) of this section, a cause of action or [for] breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(a) As to a unit, the date the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or the date of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(b) As to each common element, at the latest of (i) the date the first unit in the condominium was conveyed to a bona fide purchaser, (ii) the date the common element was completed, or (iii) the date the common element was added to the condominium.

(3) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

(4) If a written notice of claim is served under RCW 64.50.020 within the time prescribed for the filing of an action under this chapter, the statutes of limitation in this chapter and any applicable statutes of repose for construction-related claims are tolled until sixty days after the period of time during which the filing of an action is barred under RCW 64.50.020.

(5) Nothing in this section affects the time for filing a claim under chapter 64.35 RCW.

RCW 7.72.060 Length of time product sellers are subject to liability.

(1) Useful safe life. (a) Except as provided in subsection (1)(b) hereof, a product seller shall not be subject to liability to a claimant for harm under this chapter if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

The Owner's Perspective

Daniel Zimberoff

Page 14 of 22

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this chapter, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold. In the case of a product which has been remanufactured by a manufacturer, "time of delivery" means the time of delivery of the remanufactured product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

(b) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life, if:

(i) The product seller has warranted that the product may be utilized safely for such longer period; or

(ii) The product seller intentionally misrepresents facts about its product, or intentionally conceals information about it, and that conduct was a proximate cause of the claimant's harm; or

(iii) The harm was caused by exposure to a defective product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life had expired.

(2) Presumption regarding useful safe life. If the harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by a preponderance of the evidence.

(3) Statute of limitation. Subject to the applicable provisions of chapter 4.16 RCW pertaining to the tolling and extension of any statute of limitation, no claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.

C. Plumbing Class Actions Update

In re Uponor, Inc. F1807 Plumbing Fittings Product Liability Litigation (MDL No. 2247): You are part of the class if you have RTI Plumb-PEX systems containing ASTM F1807 brass insert fittings and stainless steel clamps installed after May 15, 1999.

- The opt-out deadline expired June 1, 2012.
- The earliest Claim Deadline is December 26, 2013. Actual deadlines will vary by property based on when a problem occurred and whether the system's original warranty is still in place.

www.rtisettlement.com

The Owner's Perspective

Daniel Zimmeroff

Page 15 of 22

In re Kitec Plumbing Systems Products Liability Litigation (TX District Court, Dallas Division, Case No. 09-MD-2098): You are part of the class if you own a unit or building in the U.S. (excluding Clark County, Nevada) or Canada that contains Kitec Plumbing Systems or Kitec components.

The opt-out deadline expired September 30, 2011.

- Claims can be submitted now. The deadline to submit a claim is January 9, 2020.
www.kitecsettlement.com

In re Kitec Fitting Litigation (NV District Court, Clark County, Case No. A493302): You are part of the class if you are an owner of a residence in Clark County, Nevada, that contains, or at any time contained, a Kitec and/or PlumBetter piping system and/or components.

- The Claims deadline expired on September 30, 2013.
www.plumbingdefect.com kitec.tcssettlements.com

Verdejo v. Vanguard Piping Systems, Inc. (CA Superior Court for Los Angeles County, Case No. BC448383): You may be part of the class if you own or have owned buildings, homes, residences or any other structures located in the U.S. that contain or have ever contained Viega Brass Fittings.

- The opt-out deadline expires on November 9, 2013.
- Claims can be submitted now. For claims accruing prior to September 25, 2013, Claim Forms must be submitted prior to December 24, 2013. For claims accruing on or after September 25, 2013, Claim Forms must be submitted within ninety (90) days of accrual.
www.verdejosettlement.com

In re Zurn PEX Plumbing Liability Litigation (MDL No. 1958): You are part of the class if you own or have owned buildings, homes, residences or any other structures located in the U.S. that contain or have ever contained Zurn yellow brass F1807 Fittings.

- The opt-out deadline expired on January 29, 2013.
- Claims can be submitted now. For a leak or occlusion that occurred on or before April 1, 2013, a Claim Form must be submitted no later than April 1, 2014. For a leak or occlusion that occurs after April 1, 2013, a Claim Form must be submitted no later than twelve (12) months after an eligible leak or occlusion occurs. However, no claims will be allowed after April 1, 2020.
www.plumbingfittingsettlement.com

Pending Class Actions

George v. Uponor (D. Minn., Case No. 12-CV-00249): Putative class consists of all owners in U.S. with ASTM F1960 fittings manufactured by Uponor/Wirsbo.

Winters v. Uponor (S.D. Ill., Case No. 3:12-CV-00116): Putative class consists of all owners in U.S. with ASTM F877 and/or F2080 fittings manufactured by Uponor/Wirsbo. This case was dismissed without prejudice on October 12, 2012.

Reverie at Marcato Owners Association v. Uponor (W.D. Wa., Case No. 3:12-CV-06035): Putative class consists of all owners in Washington state with ASTM F1960 fittings manufactured by Uponor/Wirsbo. The plaintiff's Motion for Class Certification was filed on September 16, 2013.

East Village at Orenco Station Association v. Uponor (D. Or., Case No. 3:11-CV-01169): Putative class consists of all owners in Oregon state with ASTM F1960 fittings manufactured by Uponor/Wirsbo. The plaintiff's Motion for Class Certification was filed on September 20, 2013. The hearing on the motion is scheduled for March 21, 2014.

D. Sample Tolling/ER 408 Agreement

RE: [REDACTED] Condominium

ER 408 INVESTIGATION AND LAWSUIT
TOLLING AGREEMENT

This Agreement is entered into between [REDACTED] Condominium Association, a Washington non-profit corporation, and [REDACTED] LLC, a Washington limited liability corporation, in the spirit of compromise and subject to the provisions of ER 408.

1. **Definitions:**

- a. Association. "Association" means the [REDACTED] Association, its trustees, representatives, assigns, predecessors or successors in interest, directors, officers, members, servants, employees, attorneys, and any other agents.
- b. Developer. "Developer" means developer/declarant [REDACTED] [REDACTED] LLC, its assigns, predecessors or successors in interest, servants, employees, trustees, members, insurers, representatives and any other agents, or whomsoever may be liable for its actions.
- c. Condominium. "Condominium" means the [REDACTED] Condominium, located in Tacoma, Washington.

d. Claims. "Claims" shall mean any and all claims, causes of action, or demands of whatever kind or nature, whether known or unknown, suspected or unsuspected, asserted or not asserted, at law or in equity, statutory or otherwise, which the Association has or may have against Developer (including but not limited to all claims under common law; the Washington Condominium Act, Chapter 64.34 RCW; Chapter 7.72 RCW (Product Liability Actions); Title 62A RCW (Uniform Commercial Code); Chapter 19.86 RCW (Consumer Protection Act); claims for breach of express or implied warranty; claims for misrepresentation or nondisclosure; claims for breach of contract; claims under Chapter 19.86 RCW; claims relating to the condition or quality of common areas or limited common areas; claims for defective or deficient repairs; claims for attorneys' fees and/or costs; counterclaims, or cross-claims), which arise out of, exist on account of, or in any way relate to the design, development, construction, repair, provision of goods or products, offering, sale, and/or management of [REDACTED] Condominium, or which otherwise arise out of, exist on account of, or in any way relate to [REDACTED] Condominium.

2. **Purpose.** The Parties desire to resolve warranty and construction defect issues cooperatively.

Accordingly, the parties agree and stipulate as follows:

3. **Discovery.** On or before **November 30, 2012**, Association shall provide to Developer investigation documents and photos from J2 and make available the Condominium for visual examination to Developer and its representatives. On or before **December 12, 2012**, Developer shall make available for review the following: (1) plans and specifications for the Condominium and (2) documents and correspondence related to insurance for Developer and the Condominium as otherwise discoverable under CR 26(b)(2).

4. **Joint Investigation.** The Parties hereby agree to jointly hire (payment split 50/50 between the Parties) third-party neutral professional _____ to plan and conduct an

intrusive investigation of the common elements of the Condominium identified in the Association's October 24, 2012 Notice of Claim.

a) Scope of Investigation: _____ shall prepare a proposed Scope of Investigation no later than **December 14, 2012**. Any materials utilized by _____ to formulate the Scope of Investigation shall be made available to the Parties. Within two weeks of receiving the proposed Scope of Investigation, the Parties shall meet together with _____ to review and discuss the proposed Scope of Investigation. The meeting shall take place in the presence and at the direction of the mediator (as selected in paragraph 9 below). A final Scope of Investigation shall be provided to the Parties by _____ within two weeks of the meeting with the Parties and prior to the beginning of the investigation.

b) The Investigation. The Parties shall also pay (payment split 50/50) for a licensed and bonded contractor mutually agreed upon by the Parties to make the openings as directed by _____. Following the investigation, all openings shall be repaired so that they meet or exceed their pre-investigation condition. The investigation shall take place sometime between **January 14 - 31, 2013** subject to change to accommodate the schedule of the expert.

5. **Scope of Repair.** The purpose of the investigation shall be to facilitate the development of a proposed joint scope of repair of alleged deficiencies and/or items identified by _____ as needing repairs at the project. On or before **March 15, 2013** _____ shall provide a draft scope of the proposed repairs, if any ("Scope of Repair"). On that same date, _____ shall provide to the Parties copies of all photographs, field notes or other materials generated by him or her that document the investigation and/or as-built construction at the Condominium. No later than **March 29, 2013**, the parties shall meet with _____ to

discuss the proposed Scope of Repair. Within two weeks of that meeting, _____ shall provide the Parties a final Scope of Repair.

6. **Cost Estimate.** Each party is free to retain its own pricing expert to cost, at its own expense, the joint Scope of Repair. All cost estimates shall be completed and disclosed no later than **May 24, 2013**.

7. **OEC 408 Protections.** Neither this Agreement nor ER 408 shall protect or prevent disclosure of photographs nor other documentation of the as-built conditions at the Condominium, including all information obtained as part of the investigation. Likewise, ER 408 shall not protect or prevent testimony by _____ employees regarding their factual observations or opinions related to the as-built conditions at Condominium, the significance of the as-built conditions, or the appropriate method of repair. The protections provided by ER 408 shall apply to discussions with and materials produced by experts for the purpose of generating the scopes of repair, including the ER 408 Scope of Repair and the pricing information referenced in paragraph 6 above. Each party may waive the ER 408 protection as it applies to that party's materials by providing written notice to the other party of its desire to waive the ER 408 protection and by specifically identifying the documents or protections that it desires to waive.

8. **No Admission of Liability.** By participating in this process the Developer is not conceding that any ultimately purported scope of repair is necessary or performed to repair defects caused or created by the Developer or its subcontractors.

9. **Insurance.** The entire investigation is without prejudice to any argument by any of the parties' insurers that some or all of the problems at the project are not covered by insurers' policies.

10. **Mediation.** All parties to this agreement shall mediate the case no later than **June 28, 2013**. The mediator shall be Chris Soelling, or such other mutually agreed mediator if Mr.


Soelling is not available. It is understood that the mediation date may be continued if necessary due to difficulty with scheduling of experts, site investigation, or mediation dates.

11. **Tolling Agreement.** All statutes of limitation applicable to the Claims* (as defined above) and all defenses related to corporate or entity status, including but not limited to dissolved, bankrupt, receivership or otherwise, shall be tolled effective the date this agreement is executed and shall remain tolled until **July 2, 2013**, or until 30 days after receipt of written notice of the other party's intent to terminate this agreement, whichever occurs first. Written notice shall be provided via registered mail, return receipt requested on the parties' attorneys as identified below.

Association

C/o Dan Zimberoff
Barker Martin, P.S.
719 Second Avenue, Suite 1200
Seattle, WA, 98104

Developer


Seattle, WA 98104

12. **Termination.** Either party may terminate the investigation or mediation by written notice as provided in paragraph 11 above. Upon receipt of notice of termination, either party may file suit without further notice. However, Paragraphs 7, 8 and 11 shall remain in full force and effect notwithstanding termination.

13. **Miscellaneous.**

A. This agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument. Signatures transmitted via facsimile shall be considered acceptable.

B. The preparation of this agreement has been a joint effort of the parties and the resulting documents shall not be construed more severely against any one of the Parties than against any other.

C. Each person signing this agreement represents and warrants that he or she has authority to enter into this agreement on behalf of the entity for which he or she is signing.

D. This agreement shall be interpreted and enforced according to the laws of the State of Washington.

E. Developer and Association hereby submit to the jurisdiction of the courts of the State of Washington in connection with any Claims and stipulate that the exclusive venue for any proceeding relating to the Claims shall be the King County Superior Court at Seattle, Washington.

F. If one or more of the provisions of this agreement is held invalid, illegal or unenforceable in any respect, such holding will not impair the validity, legality, or enforceability of the remaining provisions.

14. **Effective Date.** The effective date of this agreement shall be November 15, 2012.

BARKER MARTIN, PS

[REDACTED]

Daniel Zimberoff, OSBA No. 066931
Counsel for Association

[REDACTED] WSBA No. _____
Counsel for Developer

[REDACTED] CONDOMINIUM
ASSOCIATION

[REDACTED] LLC

Its President

Its