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**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON**

ARBOR ROSES HOMEOWNERS
ASSOCIATION, an Oregon non-profit
corporation,

Plaintiff,

vs.

ARBOR ROSES, LLC, an Oregon
corporation, WEST HILLS
DEVELOPMENT, an Oregon corporation,
and JOHN DOES 1-3,

Defendants.

Case No. C110462CV

COMPLAINT

Negligence, Negligent Misrepresentation,
Nuisance, Breach of Fiduciary Duty,
Misrepresentation and Nondisclosure,
Breach of Contract, Breach of Implied
Warranty, Unlawful Trade Practices,
Negligence Per Se, and Failure to Warn

Not subject to Mandatory Arbitration

Jury Trial Requested

Construction Defect

Amount of Claim: \$8,120,000.00

Plaintiff, the Arbor Roses Homeowners Association ("Association") hereby alleges as follows:

GENERAL ALLEGATIONS

1.

The Arbor Roses Development ("Project") is a planned community created pursuant to the provisions of the Oregon Planned Community Act, ORS Chapter 94.550 et seq., located in

1 the City of Hillsboro, Washington County, Oregon. The Arbor Roses Homeowners Association
2 (“Plaintiff” or “Association”) is now and, at all material times herein, has been an Oregon non-
3 profit corporation established and organized for the mutual benefit of the homeowners. The
4 Project and Association were initially established by the Declaration of Covenants, Conditions
5 and Restrictions for Arbor Roses (“Declaration”) recorded in the records of Washington County
6 on January 30, 2004 as Document No. 2004-009331. Each homeowner within the Project is
7 automatically a member of the Association by virtue of ownership of their home.

8 **2.**

9 ORS 94.630(1)(e) authorizes the Association to initiate litigation in its own name
10 without joining individual owners on matters related to enforcement of governing documents,
11 matters affecting common interests of the owners, matters affecting the common property, and
12 matter affecting the lots or interest of the owners, including damage to individually owned
13 property where the Association is responsible for the cost of maintenance, repair or replacement
14 of that property. Plaintiff is also a nonprofit corporation and, pursuant to ORS 65.077(1), is
15 authorized to sue and be sued, complain, and defend in its corporate name.

16 **3.**

17 Pursuant to Article 4, Section 4.6 of the Declaration, the Association is obligated to
18 maintain and repair the exterior portions of all Attached Townhome Buildings. The
19 Association’s maintenance obligation for the Townhomes include: painting, repairing and
20 replacing the exteriors, replace and care for roofs, gutters, downspouts, drainage lines, and other
21 exterior improvements, including, without limitation, exterior mounted lighting fixtures and the
22 exterior portions of any chimneys. The cost of maintaining, repairing and replacing the
23 buildings’ exteriors is a common expense. The performance of all maintenance, repair and
24 replacement of the buildings’ exteriors is the responsibility of the Association, but all costs are
25 assessed and apportioned among the Townhome owners in the manner set forth in Article 10 of
26 the Declaration.

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4.

All Townhome owners share in the rights and appurtenances belonging to the property which are set forth in the Planned Community Act and include, but are not limited to establishment of a reserve study reasonably estimating the cost and useful life of the building components; an operating and reserve funding structure adequate to balance against the actual condition of the buildings; a legally constituted board of directors; and adequately funded reserve and operating accounts.

5.

Pursuant to ORS 701.565, a Notice of Construction Defect was sent to Defendants and in all regards complied with ORS 701.565 and 701.575.

6.

At all material times, Arbor Roses LLC was an Oregon limited liability company. Arbor Roses, LLC acted as the declarant for the Townhomes. Defendant Arbor Roses, LLC was a developer of the Townhomes and was responsible for the construction and marketing of the Townhomes to individual owners.

7.

At all material times, West Hills Development, (hereinafter "West Hills Development") was an Oregon Corporation who constructed and was the general contractor for the Townhomes.

8.

Arbor Roses, LLC caused the Association to be organized and until control of the Association was turned over to the owners, Arbor Roses, LLC controlled the Association pursuant to ORS 94.600, through appointment of their employees or agents as members of the Board of Directors of the Association. Said developer's appointed directors are DOES 1-3.

9.

Arbor Roses, LLC acted as the agent and real estate manager of the Townhomes and the Association from their inception and continuing until turnover. During all of that period, Arbor Roses, LLC, and West Hills Development performed, supervised, or in turn appointed,

1 employed and contracted with construction contractors and subcontractors to perform and/or
2 supervise various activities and functions, including (without limitation) employing and
3 supervising all labor for the construction, operation and maintenance of the Townhomes. The
4 Association and owners were intended third-party beneficiaries of any arrangements and
5 contracts between Arbor Roses, LLC, West Hills Development, other contractors,
6 subcontractors or other entities or persons hired by Defendants.

7 **10.**

8 The Townhomes have experienced and continue to experience one or more accidental
9 event(s) that include exposure to and actual repeated and/or continuous and substantial water
10 intrusion through the siding, exterior walls, doors, windows, trim, and roofs. In this and
11 subsequent paragraphs of this Complaint, such events are referred to separately and collectively
12 as "Water Intrusion."

13 **11.**

14 This Water Intrusion has caused and continues to cause one or more accidental events of
15 extensive property damage to the Townhomes and buildings' exteriors to such an extent that
16 some or all of the homes are and/or will become unsafe, unlivable, unsanitary and/or unusable.
17 The property damage includes dry rot, water stains, and/or mildew and other water damage to
18 and on the beams, headers, sills, ledgers, plywood, oriented strand board sheathing, joists, siding,
19 wall studs, dry wall, decks, exterior and interior walls, interior trim, particle board, windows,
20 window frames, doors, door frames, insulation, sub-floors, other flooring and/or other parts of
21 homes. In this and subsequent paragraphs of this Complaint, such damage is referred to
22 separately and collectively as "Water Damage."

23 **12.**

24 Arbor Roses, LLC or its selling agents, made representations about the construction
25 methods and materials, condition and remaining useful life of the buildings to each home
26 purchaser. Assessments were calculated based on said representations and purchasers were told
27 that the assessments were reasonably calculated to maintain the buildings. The homes
28

1 themselves and the financial structure established to fund perpetual maintenance, repair and
2 replacement of the buildings' exteriors were sold as an integral package to purchasers.

3 **13.**

4 The Water Intrusion and Water Damage and other damage are the direct and proximate
5 result of the following non-exhaustive list of items of faulty workmanship, improper or
6 defective materials, improper construction and/or noncompliance with state and local building
7 standards:

8 Exterior Walls

- 9 **A.** The cladding products were installed in close proximity to, or in contact with,
10 concrete flatwork at entry landings and patios, projecting sheet metal flashing and
11 along certain areas of sloped roofing.
- 12 **B.** The fiber-cement siding fasteners were commonly located too close along panel
13 edges and were often overdriven. In several observed locations, fiber-cement
14 fasteners were left exposed.
- 15 **C.** The cladding assemblies interface details were installed with joinery that is prone
16 to water intrusion at penetrations, transitions and terminations (i.e., windows,
17 doors, small penetrations, trim elements, sheet metal flashing elements, inside and
18 outside corners, roof-to-wall transitions, base-of-wall, transitions to dissimilar
19 materials, etc.).
- 20 **D.** Wood trims with low resistance to decay (i.e., SPF – “white wood”) were installed
21 without drainage provisions at locations exposed to the weather.
- 22 **E.** Concealed wood trim field cuts were not primed or painted prior to installation.
- 23 **F.** Projected wood trim was installed without sheet metal counter flashing to protect
24 the exposed top sides.
- 25 **G.** Wood trim was commonly secured with fasteners that were not adequately
26 corrosion resistant.
- 27 **H.** Wood trim was commonly not secured adequately in order to prevent excessive
28 movement (i.e., cupping, racking, twisting, etc.).
- I.** The joints within the wood trim were not embedded with sealant prior to
installation.
- J.** Sealant joints installed around windows, doors, miscellaneous penetrations and
along transitions within the cladding were improperly profiled and tooled.

- 1 **K.** Sheet metal flashing was commonly installed flat or back sloped, discontinuously,
2 without end dams and with no drip edge. Additionally, laps in sheet metal joinery
3 were not sealed to achieve a watertight assembly.
- 4 **L.** Sheet metal flashing was not shipped lapped with the weather-resistive barrier at
5 all observed locations including above window heads and belly bands.
- 6 **M.** The weather-resistive barrier was discontinuous, torn, and/or missing at observed
7 roof to wall locations.
- 8 **N.** The weather-resistive barrier was not always adequately lapped in the field of the
9 wall.
- 10 **O.** The weather-resistive barrier was not flashed or sealed to miscellaneous wall
11 penetrations (i.e., exhaust vents, electrical junction boxes, pipes, electrical meters,
12 etc.) in a durably weatherproof manner or properly flashed along wall transitions
13 and terminations.
- 14 **P.** The weather-resistive barrier was inappropriately secured with staples instead of
15 the manufacturer recommended cap fasteners.
- 16 **Q.** Moisture sensitive OSB sheathing at bottom of framed walls was in close
17 proximity with concrete flatwork.
- 18 **R.** The exterior wall assemblies (i.e. window and door penetrations, wall
19 terminations, miscellaneous penetrations, etc...) were not sealed to limit air
20 leakage.
- 21 **S.** The cladding components were installed directly over the weather-resistive barrier
22 system with little provision for drainage at exit points.

23 Windows and Doors

- 24 **T.** Several observed large operable windows exhibited defection of the frame along
25 the sill.
- 26 **U.** Window and sliding glass door fasteners were not properly located, not adequately
27 spaced, or not provide at all along many flanges.
- 28 **V.** Windows and sliding glass doors were commonly secured with non-corrosion
 resistant fasteners.
- W.** Cladding fasteners were commonly driven through window and sliding glass door
 flanges, sometimes resulting in damage to flanges.

1 X. Broken vinyl flanges and other miscellaneous frame damage were documented at
2 various locations.

3 Y. The windows and sliding glass doors were not flashed in a durably weatherproof
4 manner.

5 Z. Sealant was not applied behind window flange at one observed location.

6 Roofs and Canopies

7 AA. Sheet metal diverters were not adequately constructed at gutter ends.

8 BB. Wall assemblies were not integrated with the roof assemblies in a durably
9 weatherproof manner at gutter ends and other similar transitions.

10 CC. The downspouts from the upper roofs spill directly onto the shingles of the lower
11 roofs below.

12 DD. The roof underlayment was not turned up the wall behind the step flashing at
13 certain locations.

14 EE. Waterproof membrane flashing was poorly integrated with roof assemblies along
15 valleys at all observed locations.

16 Attics

17 FF. Penetrations into the attic from conditioned spaces below (i.e., attic hatches, light
18 fixtures, exhaust fans and the tops of walls and partitions) were not sealed to limit
19 air leakage.

20 GG. Exhaust ducts routed through the attic were not tight-lined to the exterior through
21 the roof assemblies.

22 HH. Fire tape over the joints of the gypsum sheathing to create the fire separation at
23 party walls was not provided. This is a potential fire and life safety issue.

24 Crawl Spaces

25 II. The polyethylene ground cover did not consistently turn 12 in. up the foundation
26 walls. In many areas, the polyethylene that was turned up at the foundations had
27 dropped.

28 JJ. The crawl space hatches and other floor penetrations were not sealed to limit air
leakage.

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Miscellaneous

1
2 **KK.** Column trim and cedar plywood paneling were in contact with concrete flatwork.

3 In this and subsequent paragraphs of this Complaint, the faulty workmanship, improper
4 or defective materials, improper construction, and/or noncompliance with local and state
5 building code standards are referred to separately and collectively as "Construction Defects."

6 **14.**

7 Despite being provided with notice and opportunity to cure, Arbor Roses, LLC and West
8 Hills Development have failed to repair and correct, or cause to be repaired and corrected, the
9 list of defects and problems at the Townhomes, as provided by Plaintiff, including, but not
10 limited to, the Construction Defects listed in paragraph 13, above.

11 **15.**

12 The Water Intrusion, Water Damage and Construction Defects have caused and will
13 cause loss of use and/or diminished value to homes. Such loss of use of the homes will result
14 from a nuisance or defect or damage to the Association-maintained exteriors, or will result from
15 requirements to facilitate repairs to those areas. Until repaired, the homes will suffer loss of
16 value and unmarketability due to the risk to owners of a special assessment.

17 **16.**

18 As a result of the problems and deficiencies set forth in paragraphs 10-15, and elsewhere
19 herein, the Townhomes suffer from damage that will continue to worsen with subsequent events
20 of Water Intrusion. Furthermore, the Construction Defects and damage are latent, difficult to
21 discover, and otherwise remained undetected by the Association and Townhome owners. The
22 Association now has the responsibility to repair the problems and deficiencies set forth in
23 paragraphs 10-15 and elsewhere herein pursuant to the Declaration and Bylaws.

24 **FIRST CLAIM FOR RELIEF**

25 **(Negligence by Arbor Roses, LLC, West Hills Development, DOES 1-3)**

26 **17.**

27 Plaintiff realleges paragraphs 1-16, and incorporates them by reference herein.
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18.

Arbor Roses, LLC and West Hills Development, acted as real estate managers before, during and after construction of the Townhomes and continued to control or direct the Association's acts, appointed and controlled its directors and otherwise continued to manage the property until control of the Association was turned over to the purchasers. Arbor Roses, LLC developed, constructed and repaired; supervised the construction and repairs; inspected the construction and repair progress and quality and compliance with the local and state building code standards; and sold the Townhomes. West Hills Development constructed and repaired; supervised the construction and repairs; inspected the construction and repair progress, quality and compliance with local and state building code standards and materially participated in the sales of the Townhomes.

19.

As a result of their intimate association with, participation in, and oversight of the development, construction and repairs, construction and repair supervision, inspection of construction and repair progress, quality and compliance with the building codes, manufacturers' specifications, and sales of the Townhomes; establishment, oversight and operation of the Association; preparation of the Association's budget and reserve study; and establishment and maintenance of assessment levels, Arbor Roses, LLC, West Hills Development, and DOES 1-3, in the exercise of reasonable care, should have:

- a) identified the Construction Defects described in paragraph 13, above, and elsewhere herein;
- b) constructed or repaired the Townhomes in compliance with local and state building code standards and/or manufacturers' specifications;
- c) identified the Water Intrusion, Water Damage and consequential damages, as described in paragraphs 10-15, above;
- d) properly corrected the Construction Defects and damage,

1 e) properly or fully maintained the Townhomes in light of the Construction Defects,
2 damage and risks during the period of Arbor Roses, LLC control of the Association and the
3 Townhomes;

4 f) budgeted for and prepare a reserve study with due care in light of the Construction
5 Defects, damage, risks and consequential damage at the Townhomes;

6 g) established assessments at an adequate level to meet the operating, maintenance, and
7 other common expenditures or to provide for adequate replacement costs and sufficient reserves
8 of the Townhomes in light of the Construction Defects, damage, risks, and consequential
9 damage at the Townhomes; and

10 h) warned the post-turnover Association of the conditions present, and how to properly
11 repair and maintain the buildings to prevent Water Intrusion.

12 **20.**

13 Notwithstanding what they, in the exercise of reasonable care, should have done, Arbor
14 Roses, LLC, West Hills Development and DOES 1-3, failed to address and repair the Water
15 Intrusion, Water Damage, Construction Defects and risks described in paragraphs 10-15, and
16 19, above, during their activities at the Townhomes, and failed to disclose the Water Intrusion,
17 Water Damage, Construction Defects, and/or risks thereof to the Association and the
18 Townhome owners. In management of the Association, they furthermore caused maintenance
19 and repairs to be incorrectly performed which made the conditions worse or concealed the
20 defective work.

21 **21.**

22 As a result of the negligence of Arbor Roses, LLC, West Hills Development and DOES
23 1-3, as described above and elsewhere herein, Plaintiff has directly, naturally, and proximately
24 been damaged in the amount of \$8,120,000.00 as follows:

25 a) damages incurred necessary to repair the buildings' exteriors of the Townhomes,
26 incurred and to be incurred because of Defendants' conduct reflecting:

1 independent judgment on the Association's and Townhome owners' behalf and interests,
2 including their economic interests, as more specifically alleged in paragraphs 3-5 and 10-15.

3 **24.**

4 By virtue of this special relationship, the Association and Townhome owners were
5 dependent on Arbor Roses, LLC for the proper management, protection, and control of the
6 Townhomes, the needed disclosures of its condition, and the concomitant operation,
7 management, protection, and control of the Association. This special relationship imposed on
8 Arbor Roses, LLC a special responsibility to exercise reasonable care to avoid making
9 misrepresentations and misleading statements to the Association and the Townhome owners, to
10 ascertain and disclose facts material to the well-being of the Association and the Townhome
11 owners and to protect and act in the best interests of the Association and the Townhome
12 owners. The Association and the Townhome owners have a right to rely upon the actions and
13 representations Arbor Roses, LLC made within the scope of the special relationship as a result
14 of the duties owed by Arbor Roses, LLC.

15 **25.**

16 During and following the construction of the Townhomes, as a result of their intimate
17 association with and oversight of the development, construction and repairs, construction and
18 repair supervision, inspection of construction and repair progress, quality and compliance with
19 the building codes, manufacturers' specifications and sales of the Townhomes; establishment,
20 oversight, and operation of the Association; preparation of the Association's budget and reserve
21 study; and establishment and maintenance of assessment levels, Arbor Roses, LLC, in the
22 exercise of reasonable care, should have investigated and disclosed:

23 a) that the Construction Defects described in paragraph 13, above, and elsewhere
24 herein existed;

25 b) that the Townhomes were not constructed in compliance with the local and state
26 building code standards and/or manufacturers' specifications;

27 c) that Water Intrusion, Water Damage and consequential damage existed in the
28 Townhomes, and/or that there was a substantial and unreasonable risk that the Townhomes had

1 suffered or, in the near future, would suffer Water Intrusion, Water Damage, and consequential
2 damage described in paragraphs 10-15 and 19, above;

3 d) that a failure to address and repair the Construction Defects, damage, and risks
4 during the activities in which they were engaged would result in Water Intrusion, Water
5 Damage and consequential damage, or posed an unreasonable risk of resulting therein;

6 e) that the Townhomes had not been properly and fully maintained in light of the
7 Construction Defects, damage and risk thereof during the period of Arbor Roses, LLC control
8 of the Association and the Townhomes;

9 f) that the Townhomes contained undetected defects which would cause damage over
10 time, increasing the cost of repairing, or that there was a substantial and unreasonable risk that
11 such defects existed;

12 g) that the Association's budget and reserve study were not prepared with due care in
13 light of the Construction Defects, damage, risk of damage and consequential damage at the
14 Townhomes;

15 h) that the level of assessments had not been established and/or maintained at an
16 adequate level to meet the operating, maintenance and other common expenditures, and to also
17 provide for adequate replacement costs and sufficient reserves of the Townhomes in light of the
18 Construction Defects, damage, risks, and consequential damage at the Townhomes; and

19 i) that the Association would incur costs and expenses as a result of Arbor Roses, LLC's
20 and West Hills Development's failure to properly construct, maintain and/or address problems
21 at the Townhomes, including inspection and repair costs and legal fees.

22 **26.**

23 Notwithstanding what they, in the exercise of reasonable care, should have disclosed,
24 said Defendant failed to make those disclosures. Instead, prior to and after the sale of the homes
25 and after repairs were made, Arbor Roses, LLC expressly (in writing or orally) represented
26 and/or implied the following facts regarding the construction and condition of the Townhomes:

27 a) the Townhomes were in good condition and had been built in compliance with
28 local and state building code standards and manufacturers' specifications;

1 amounts of general and special assessments necessary to maintain, repair, and replace the same,
2 Arbor Roses, LLC, in the exercise of reasonable care, should have known that the
3 misrepresentations and failures to disclose described in paragraphs 19 and 26 above, and
4 elsewhere herein, would be relied upon by the Association and home purchasers.

5 **28.**

6 The representations made by Arbor Roses, LLC in paragraph 26 above were false and
7 the true facts were/are as they are alleged in paragraphs 10-15, above, and elsewhere herein.

8 **29.**

9 Arbor Roses, LLC negligently made the misrepresentations of material facts and/or
10 negligently failed to make disclosures of material facts as alleged and attributed to them,
11 respectively, in paragraphs 19 and 26, above and elsewhere herein, and under the facts and
12 circumstances therein alleged.

13 **30.**

14 As a direct, natural, and proximate result of Arbor Roses, LLC's negligent
15 misrepresentations and failures to disclose as described above, Plaintiff has been damaged as set
16 forth in paragraph 21, above.

17 **THIRD CLAIM FOR RELIEF**

18 **(Nuisance against Arbor Roses, LLC and West Hills Development)**

19 **31.**

20 Plaintiff re-alleges paragraphs 1-16, 18-21, and 23-30, and incorporates them by
21 reference herein.

22 **32.**

23 The continued Water Intrusion, Water Damage, Construction Defects, and consequential
24 damage at the Townhomes, which was and is being caused by Arbor Roses, LLC and West
25 Hills Development has and continues to substantially and unreasonably interfere with Plaintiff's
26 and/or the individual Townhome owners' use and enjoyment of their homes and constitutes a
27 private nuisance.

28 ////

1 33.

2 As a result of such nuisance, Plaintiff and the individual Townhome owners have been
3 damaged as set forth in paragraph 21, above.

4 **FOURTH CLAIM FOR RELIEF**

5 **(Breach of Fiduciary Duties by Arbor Roses, LLC, and JOHN DOES 1-3)**

6 34.

7 Plaintiff realleges paragraphs 1-16, 18-21, 23-30, and 23-33, and incorporates them by
8 reference herein.

9 35.

10 Arbor Roses, LLC was the initial owner of all of the Townhomes. Arbor Roses, LLC
11 developed and constructed; supervised the development and construction; inspected the
12 development and construction progress, quality and compliance with local and state building
13 code standards and manufacturers' specifications; and sold the Townhomes.

14 36.

15 Before "turnover," Arbor Roses, LLC was the controlling member of the Association
16 and had and exercised the power to appoint or elect the directors of the Association and
17 effectively control all the Association's appointments, elections, operations, expenditures,
18 repairs, acts and failures to act. As such, Arbor Roses, LLC owed the non-delegable fiduciary
19 duties of care and loyalty to the Plaintiff Association and all existing and future Townhome
20 owners to exercise said control in the best interests of the Association and said Townhome
21 owners, including to elect directors who would act in the best interests of the Association and
22 said Townhome owners. Arbor Roses, LLC elected DOES 1-3 as directors of the Association.
23 DOES 1-3 conducted the day-to-day operations of the Association. As director and/or officer,
24 DOES 1-3 managed the affairs of the Association and the Townhomes, but actually under the
25 control of and/or in the best interests of Arbor Roses, LLC. However as directors and officers,
26 DOES 1-3 owed fiduciary duties of care and loyalty to the Association and the Townhome
27 owners.

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37.

The duties of Arbor Roses, LLC as controlling member included:

- a) taking all reasonable steps to remedy problems of common concern to the Association and Townhome owners, including Water Intrusion problems, Water Damage, dry rot, and consequential property damage;
- b) disclosing all problems and areas of concern with the buildings' exteriors and homes to all Townhome owners and the officers and directors of the Association;
- c) preparing with due care a budget and reserve study for the Association to provide for the operating, maintenance, and other common expenditures, and to provide for replacement costs and reserves of the Townhomes;
- d) acting on and preserving the rights of the Association and the Townhome owners against the Developer, general contractors, and subcontractors to remedy the Water Intrusion, Water Damage, Construction Defects and consequential property damage;
- e) establishing assessments at an adequate level to meet operating, maintenance, and other common expenditures, and to provide for replacement costs and reserves of the Townhomes; and
- e) keeping, maintaining, and providing to the Association, its directors, officers and authorized agents all records of activities and problems at the Association.

38.

At all material times, DOES 1-3, while serving as directors and officers of the Association, were, in fact, acting as agents of Arbor Roses, LLC, or employees of Arbor Roses, LLC or West Hills Development and acting in their capacity as such. DOES 1-3 failed to investigate and disclose the true facts about the condition of the Townhomes to the Association and other Townhome owners.

39.

Arbor Roses, LLC and DOES 1-3 breached their initial fiduciary duties of care and loyalty to the Association and the Townhome owners by exercising their control of the Association in their own interests and by appointing and electing directors and causing

1 appointment of officers that they, in the exercise of reasonable care, should have known, would
2 act in the best interests of Developer and not in the best interests of the Association or the
3 Townhome owners, as more fully described below and elsewhere herein.

4 **40.**

5 Arbor Roses, LLC, and DOES 1-3, in the exercise of reasonable care, should have
6 investigated the buildings' exteriors and discovered the Water Intrusion and Water Damage as
7 more fully alleged in paragraph 10-15, and elsewhere herein.

8 **41.**

9 a) Arbor Roses, LLC, and DOES 1-3 further breached their fiduciary duties of care
10 and loyalty by:

11 i) failing to investigate, discover, and take all reasonable steps to remedy
12 problems of common concern to the Association and Townhome owners, including Water
13 Intrusion problems, Water Damage, Construction Defects and consequential property damage;

14 ii) failing to disclose all problems and areas of concern with the buildings'
15 exteriors and Townhomes to all Townhome owners and the officers and directors of the
16 Association;

17 iii) failing to prepare with due care a budget and reserve study for the
18 Association to provide for the operating, maintenance and other common expenditures, to
19 determine the estimated useful life of the buildings' exteriors of the Townhomes, and to provide
20 for replacement costs and reserves of the Townhomes;

21 iv) failing to act on and preserve the rights of the Association and the
22 Townhome owners against the Developer, general contractors, and subcontractors to remedy the
23 Water Intrusion, Water Damage, Construction Defects and consequential property damage;

24 v) failing to establish assessments at an adequate level to meet the
25 operating, maintenance, and other common expenditures and to provide for replacement costs
26 and reserves of the Townhomes;

27 vi) failing to keep, maintain, and provide to the Association, its directors,
28 officers, and authorized agents all records of activities and problems at the Association; and

1 Arbor Roses, LLC and/or their agents failed to disclose the true facts to purchasers and the
2 Association, as more specifically alleged, above, and elsewhere herein.

3 **46.**

4 As more specifically alleged, above, the written and oral representations, failures to
5 disclose the true facts about the Townhomes by Arbor Roses, LLC were of material facts and
6 were false and misleading, and the disclosures were inaccurate and insufficient to describe the
7 material facts as set forth in paragraphs **10-15**, and **19**, above, and elsewhere herein.

8 **47.**

9 Each of the representations, failures to disclose described, above, and elsewhere herein
10 was of material facts in that belief in them and ignorance of the true facts and conditions
11 naturally tended to influence:

- 12 a) the purchasers of the Townhomes to purchase them for the amounts paid;
13 b) the Association to delay making investigations of the true facts and making
14 arrangements for needed maintenance and repairs and preventive measures; and
15 c) the Association to delay recognition of the need for corrected budgets,
16 projections, estimates of useful life and increased assessments and reserves.

17 **48.**

18 Arbor Roses, LLC made the representations recklessly without regard for whether they
19 were true and gave a false impression.

20 **49.**

21 Arbor Roses, LLC knew that Plaintiff Association and the Townhome owners would
22 rely on the accuracy of the sales agreement, the oral representations, and the lack of any
23 disclosure of Water Intrusion, Water Damage and dry rot. Arbor Roses, LLC intended that
24 Plaintiff and the Townhome owners so rely.

25 **50.**

26 In spite of using reasonable care to discover the facts, neither Plaintiff nor the
27 Townhome owners knew Arbor Roses, LLC's or its agents' representations and/or failures to
28 disclose were false or of the true condition of the Townhomes as above described.

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51.

Plaintiff and Townhome owners reasonably believed and relied on Arbor Roses, LLC's oral representations; the lack of disclosure as to said Water Intrusion, Water Damage, and dry rot; and the prohibition against misrepresentations, omissions, and other fraudulent means of selling the Townhomes. The Townhome owners relied thereon by not seeking additional information and by their purchases of homes. Plaintiff Association relied thereon by not seeking additional information and by not providing for repairs, replacements and preventative measures, and by delaying its recognition of the need for inspection and repairs and corrected budget, projections, estimates of useful life and increased assessments and reserves.

52.

As a direct, natural, and proximate result of the misrepresentations, and failures to disclose by Arbor Roses, LLC as described above, Plaintiff has been damaged as set forth in paragraph 21, above.

53.

Plaintiff reserves the right to move to amend to allege punitive damages pursuant to ORS 18.535.

SIXTH CLAIM FOR RELIEF

(Breach of Contract by Arbor Roses, LLC)

54.

Plaintiff realleges paragraphs 1-16, 18-21, 23-30, 23-33, 35-43, and 45-53, and incorporates them by reference herein.

55.

The Townhomes were sold by Arbor Roses, LLC to the Townhome owner pursuant to sales agreements.

56.

Arbor Roses, LLC Materially breach the terms of the sales agreements by failing to provide the Townhome owners with defect free and habitable home, and by refusing to and/or failing to repair or cause to be repaired all defects at the Townhomes, including defect in or to

1 components of the homes and buildings' exteriors as set forth in paragraph 13, and elsewhere
2 herein and all damage resulting from these defects. The Association is an intended third-party
3 beneficiary because of its obligations in the declaration to maintain the Townhomes' buildings'
4 exteriors.

5 **57.**

6 Plaintiff Association and the Townhome owners have performed all of their obligations
7 required under the sales agreements and all conditions precedent to Developer's obligations
8 have been performed or have occurred.

9 **58.**

10 As a direct, natural and proximate result of Arbor Roses, LLC's breach of contract,
11 Plaintiff has been damaged as set forth in paragraph 21, above. All such damages were
12 reasonably foreseeable at the time of the sales of the homes and the making of the contracts.

13 **59.**

14 Pursuant to the term of the sales agreement's Plaintiff is entitled to its reasonable
15 attorney fees incurred in protecting and defending its rights under the contract.

16 **SEVENTH CLAIM FOR RELIEF**

17 **(Breach of Implied Warranty by Arbor Roses, LLC and West Hills Development)**

18 **60.**

19 Plaintiff realleges paragraphs 1-16, 18-21, 23-30, 23-33, 35-43, 45-53, and 55-59, and
20 incorporates them by reference herein.

21 **61.**

22 Arbor Roses, LLC and West Hills Development, by selling newly constructed homes,
23 impliedly warranted that the Townhomes and those areas and components that the Association
24 is required to maintain were professionally constructed, fit for habitation and would be free
25 from defective materials or defective installation of the materials. More specifically, Arbor
26 Roses, LLC and West Hills Development, impliedly warranted that the building envelope was
27 fit for its ordinary purpose to prevent Water Intrusion and Water Damage. Arbor Roses, LLC
28 and West Hills Development also impliedly warranted that the financial mechanism for

1 maintaining the Townhomes exteriors was adequately funded at current assessment levels to
2 finance any repairs necessary to correct any Construction Defects. Said defendants alternatively
3 warranted that the buildings were of such quality and durability that they are capable of being
4 maintained, repaired and replaced for the monthly assessment level the units were sold with.

5 **62.**

6 Arbor Roses, LLC and West Hills Development, in the exercise of reasonable care,
7 should have discovered and disclosed the construction defects, damage, and risks alleged in
8 paragraphs 10-15, and elsewhere herein. The purchasers of the townhomes had no such
9 knowledge and were incapable of inspecting all of the exteriors of all of the buildings for which
10 they are liable for a pro rata share of the expenses to maintain.

11 **63.**

12 The purchasers of the individual Townhomes were not in an equal bargaining position
13 with Arbor Roses, LLC and West Hills Development and were forced to rely on Arbor Roses,
14 LLC's and West Hills Development's skill and knowledge with respect to the adequacy of
15 construction and with respect to the adequacy of the funding mechanism put in place in order to
16 maintain the Townhomes' exteriors.

17 **64.**

18 Arbor Roses, LLC's and West Hills Development breached their implied warranties of
19 habitability, professional construction and fitness for purpose by acting and/or failing to identify
20 or to correct the Construction Defects, as more specifically alleged in the Association's First
21 Claim for Relief, and by failing to set assessments, or otherwise fund the financial mechanism,
22 at an adequate level to repair the Construction Defects.

23 **65.**

24 As a result of Arbor Roses, LLC's and West Hills Development's breaches of their
25 implied warranties of professional construction and fitness for habitation, Plaintiff has been
26 damaged as alleged in paragraph 21, above.

27 ////

28 ////

1 **EIGHTH CLAIM FOR RELIEF**

2 **(Unlawful Trade Practices by Arbor Roses, LLC and West Hills Development)**

3 **66.**

4 Plaintiff realleges paragraphs 1-16, 18-21, 23-30, 23-33, 35-43, 45-53, 55-59, and 61-65,
5 and incorporates them by reference herein.

6 **67.**

7 The home and common property are "real estate" as defined in ORS 646.605(6), as
8 "they are or may be obtained for personal, family or household purposes."

9 **68.**

10 The construction and sale of the homes and buildings' exteriors was within the course of
11 the business, occupation, or vocation of Arbor Roses, LLC and West Hills Development.

12 **69.**

13 Arbor Roses, LLC and West Hills Development expressly represented or implied that
14 the real estate being sold had the following approvals, characteristics, uses, benefits, or qualities
15 and were of the following standards and quality:

16 a) the Townhomes were in good condition and had been built in compliance with
17 local and state building code standards and manufacturers' specifications;

18 b) the Townhomes had been professionally inspected during construction for
19 quality and compliance with the local and state building code standards and manufacturers'
20 specifications;

21 c) the Townhomes had no faulty workmanship, improper or defective materials,
22 improper construction and/or material structural defects, which should have been discovered;

23 d) the Townhomes had no Water Intrusion or Water Damage problems, or risks,
24 which should have been discovered;

25 e) the Townhomes had no moisture problems in the structure, which should have
26 been discovered;

27 f) the budget and reserve study were accurate and adequate to fund the

28 Association's operating, maintenance, and other expenditures, to determine the estimated useful

1 life of the buildings' exteriors of the Townhomes and to provide for adequate replacement costs
2 and sufficient reserves for the Townhomes;

3 g) the monthly assessments were sufficient to pay the operating, maintenance, and
4 other common expenses, and also to provide for adequate replacement reserves. Defendants
5 also failed to disclose the Water Intrusion, Water Damage, Construction Defects, consequential
6 damage, and/or the risks thereof to the Association and the Townhome owners;

7 h) that declarant and contractor had the experience, skill and knowledge to
8 competently construct the Townhomes;

9 i) that there were no additional material facts necessary to make other statements
10 made, in the light of the circumstances under which they were made, not misleading.

11 j) that there were no conditions which were progressive and would cause damage
12 to other portions of the building not yet damaged; and

13 k) there was no need to warn that the financial structure, an integral part of the
14 purchase agreements, did not account for the damage then present or for the progressive damage
15 that resulted from non-repair.

16 **70.**

17 Furthermore, by failing to disclose the Water Intrusion, Water Damage, consequential
18 damages, Construction Defects, and/or risks thereof at the Community, as more particularly
19 alleged in paragraphs 10-15, and 19 above, and elsewhere herein, Arbor Roses, LLC implied
20 that the homes and buildings' exteriors had approvals, characteristics, uses, benefits, or
21 qualities, and were of the standards and quality as stated above.

22 **71.**

23 The representations made by Arbor Roses, LLC were false. In fact, the true conditions
24 were and are as set forth in paragraphs 10-15, 19, and 26 above, and elsewhere herein.

25 **72.**

26 Concurrent with the delivery of the homes sold, Arbor Roses, LLC failed to disclose the
27 Water Intrusion, Water Damage, Construction Defects, consequential damage, and/or risks or
28 possibilities thereof as set forth herein.

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73.

Such representations and conduct were and are declared unlawful by ORS 646.608(1)(e), (g) and (t).

74.

The defects and conditions were not apparent to the Association or the Owners and were latent. In the exercise of reasonable care, the Association and the Owners affected by the particular conduct did not discover any or some of the unlawful methods, acts, or practices described in this claim until less than one (1) year prior to the filing of this Complaint.

75.

As a direct, natural, and proximate result of the unlawful trade practices of Arbor Roses, LLC Plaintiff has been damaged as set forth in paragraph 21 above. Plaintiff is entitled to receive its reasonable attorney fees pursuant to ORS 646.638(3).

NINTH CLAIM FOR RELIEF

(Negligence Per Se Against Arbor Roses, LLC and West Hills Development)

76.

Plaintiff realleges paragraphs 1-16, 18-21, 23-30, 23-33, 35-43, 45-53, 55-59, 61-65, and 67-75, and incorporates them, herein.

77.

The Oregon Building Code governs the construction, alteration and repair of residential buildings in Oregon and establishes uniform performance standards to protect the health, safety, welfare, comfort and security of Oregon residences. The building code is designed to protect owners and tenants of residential property.

78.

As contractors, Defendants West Hills Development and Arbor Roses, LLC are required to follow building code. Plaintiff relied upon Defendants to construct the Townhomes in compliance with the building code.

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1 79.

2 West Hills Development and Arbor Roses, LLC failed to follow the building code
3 during the construction work described, resulting in defects as described in paragraphs 10-15
4 above and elsewhere herein. This conduct constitutes negligence per se.

5 80.

6 As a direct, natural, and proximate result of West Hills Development's and Arbor Roses,
7 LLC's negligence per se, Plaintiff has suffered losses and property damage and is entitled to
8 recover damages as described in paragraph 21 above.

9 **TENTH CLAIM FOR RELIEF**

10 **(Failure to Warn by Arbor Roses, LLC and West Hills Development)**

11 81.

12 Plaintiff realleges paragraphs 1-16, 18-21, 23-30, 23-33, 35-43, 45-53, 55-59, 61-65, 67-
13 75, and 77-80, and incorporates them, herein.

14 82.

15 Arbor Roses, LLC is in the business of selling the Townhomes. Arbor Roses, LLC sold
16 the individual homes to the Townhome owners. West Hills Development is in the business of
17 constructing Townhomes. Both of the defendants are in the business of building, developing
18 and selling planned unit developments, where significant costs of maintenance, repair or
19 replacement is borne by an Association and spread among unwary purchasers that may not
20 inspect or even live in the buildings for which they are financially responsible.

21 83.

22 At the time the Townhomes were sold, said Defendants should have discovered that the
23 Construction Defects described in paragraphs 10-15 above, and elsewhere herein, posed an
24 unreasonable danger to both the property and the health of the Townhome owners and the
25 Association. Specifically said defendants should have been aware that the Construction Defects
26 and current damage were progressive, and that failure to warn the Townhome owner and the
27 Association of the damage would cause the damage to progress to other portions of the building
28 not yet damaged. Defendants also failed to warn the Association and Townhome owners that

1 the financial structure that was an integral part of the purchase agreements did not account for
2 the damage or for the progressive damage that did or would result from non-discovery or non-
3 repair. Further, defendants failed to warn that their failure to set the reserves and assessments at
4 a level that would accumulate the funds required to maintain, repair and replace the exteriors of
5 the buildings could lead to substantial loss of equity in the form of a future special assessment.
6 Said warnings were an integral part of the lots and Townhomes sold.

7 **84.**

8 Said defendants were required to provide a warning of this progressive condition and of
9 the integrity of the Association's financial structure to the Association and the Townhome
10 owners because they posed an unreasonable danger to Plaintiff and because a reasonable person
11 in the same position would have warned Plaintiff or the potential purchasers of the Townhomes.

12 **85.**

13 Despite its responsibility to warning, the defendants failed to provide adequate
14 warnings.

15 **86.**

16 The Construction Defects present in the Townhomes have injured and will continue to
17 injure the property of the current and future owners of the Townhomes, as described in
18 paragraphs 14-20 above, and elsewhere herein. Based on their experience, defendants knew or
19 should have known such damage would result from the failure to warn.

20 **87.**

21 As a direct and proximate result of Arbor Roses, LLC's and West Hills
22 Development's failure to warn, Plaintiff has suffered losses and property damage and is entitled
23 to recover damages as described in paragraph 21 above.

24
25 WHEREFORE, Plaintiff prays for judgment as follows:

26 1. On Plaintiff's First Claim for Relief against Arbor Roses, LLC and West Hills
27 Development, jointly and severally, damages as set forth in paragraph 21, above;

1 2. On Plaintiff's Second Claim for Relief against Arbor Roses, LLC, damages as
2 set forth in paragraph 21, above;

3 3. On Plaintiff's Third Claim for Relief against Arbor Roses, LLC, and West Hills
4 Development, jointly and severally, damages as set forth in paragraph 21, above;

5 4. On Plaintiff's Fourth Claim for Relief against Arbor Roses, LLC and DOES 1-3,
6 jointly and severally, damages as set forth in paragraph 21, above, pre-judgment interest, and
7 Plaintiff's reasonable attorney fees;

8 5. On Plaintiff's Fifth Claim for Relief against Arbor Roses, LLC, damages as set
9 forth in paragraph 21, above.

10 6. On Plaintiff's Sixth Claim for Relief against Arbor Roses, LLC, damages as set
11 forth in paragraph 21, above, pre-judgment interest, and Plaintiff's reasonable attorney fees;

12 7. On Plaintiff's Seventh Claim for Relief against Arbor Roses, LLC, and West
13 Hills Development, damages as set forth in paragraph 21, above, pre-judgment interest, and
14 Plaintiff's reasonable attorney fees;

15 8. On Plaintiff's Eighth Claim for Relief against Arbor Roses, LLC, damages as set
16 forth in paragraph 21, above, pre-judgment interest, and Plaintiff's reasonable attorney fees;

17 9. On Plaintiff's Ninth Claim for Relief against Arbor Roses, LLC and West Hills
18 Development, jointly and severally, damages as set forth in paragraph 21, above;

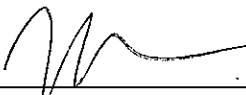
19 10. On Plaintiff's Tenth Claim for Relief against Arbor Roses, LLC, damages as set
20 forth in paragraph 21, above;

21 11. For Plaintiff's costs and disbursements incurred herein; and

22 12. Such other relief as the Court deems just and equitable.

23 DATED this 25th day of January, 2010.

VIAL FOTHERINGHAM LLP

24
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28 503-684-4111
Of Attorneys for Plaintiffs
Trial Attorney