8 CIT ESERVE / JURY DEMAND

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DALLAS COUNTY
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Belinda Hernandez

CAUSE NO. DC-18-09536

VINE CONDOMINIUMS OWNERS ASSOCIATION, INC. Plaintiff,	§	IN THE DISTRICT COURT
	§	OF DALLAS COUNTY, TEXAS
v.	§	
ECOM WILLMAX CARLISLE, L.P.; WILLMAX CARLISLE, LLC; KWA CONSTRUCTION, L.P.; KW & ASSOCIATES, L.L.C.; C.D. HENDERSON CONSTRUCTION, INC.; C.D. HENDERSON CONSTRUCTION GROUP, LLC; C.D HENDERSON CONSTRUCTION SERVICES, LTD.; C.D HENDERSON, INCORPORATED. Defendants.	§	J-191ST JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

Plaintiff, Vine Condominiums Owners Association, Inc. ("Association") respectfully files this Original Petition, and would show unto the Court as follows:

I. DISCOVERY-CONTROL PLAN

1. The Association intends to conduct discovery under Level 3 pursuant to TEX. R. CIV. P. 190.4 and affirmatively pleads that the suit is not governed by the expedited-actions process of TEX. R. CIV. P. 169.

II. PARTIES

2. The Association is a domestic non-profit corporation, organized and existing under and by virtue of the Texas Nonprofit Act, TEX. BUS. ORGS. CODE § 22.001, *et seq*. The Association provides for the management, maintenance, preservation, control, and operation of the Vine Condominiums, which consist of condominium units and related common elements. The units, common elements, and all other structures, spaces, and facilities that comprise the property owned by the Association and/or the individual unit owners, shall be referred to herein

as the "Project." The Association brings this action on behalf of itself and on behalf of its members pursuant to TEX. PROP. CODE § 82.102(a)(4).

3. Defendant Ecom WillMax Carlisle, L.P., a domestic limited partnership with its office located at 8111 Preston Road, Suite 715, Dallas, Texas 75225, may be served with process by serving its registered agent, John A. Wensinger, at 8111 Preston Road, Suite 715, Dallas, Texas 75225.

4. Defendant WillMax Carlisle, LLC, a domestic limited liability company with its office located at 8111 Preston Road, Suite 850, Dallas, Texas 75225, may be served with process by serving its registered agent, John A. Wensinger, at 8111 Preston Road, Suite 715, Dallas, Texas 75225.

5. Defendant KWA Construction, L.P., a domestic limited partnership with its office located at 16800 Westgrove Drive, Suite 400, Addison, Texas 75001, may be served with process by serving its registered agent, Daniel H. Bruce, at 16800 Westgrove Drive, Suite 400, Addison, Texas 75001.

6. Defendant KW & Associates, L.L.C., a domestic limited liability company with its office located at 16800 Westgrove Drive, Suite 300, Addison, Texas 75001, may be served with process by serving its registered agent, Daniel H. Bruce, at 16800 Westgrove Drive, Suite 400, Addison, Texas 75001.

7. Defendant C.D. Henderson Construction, Inc., a domestic for-profit corporation with its office located at 6664 Hunt County Road 2560, Quinlan, Texas 75474, may be served with process by serving its registered agent, Patricia L. Henderson, at 1985 Forest Lane, Garland, Texas 75042.

8. Defendant C.D. Henderson Construction Group, LLC, a domestic limited liability company with its office located at 6664 Hunt County Road 2560, Quinlan, Texas 75474, may be served with process by serving its registered agent, Charles D. Henderson, at 1985 Forest Lane, Garland, Texas 75042.

9. Defendant C.D. Henderson Construction Services, Ltd., a domestic limited partnership with its office located at 1985 Forest Lane, Garland, Texas 75042, may be served with process by serving its registered agent, Patsy L. Henderson, at 1985 Forest Lane, Garland, Texas 75042.

10. Defendant C.D. Henderson, Incorporated, a domestic for-profit corporation with its office located at 6664 Hunt County Road 2560, Quinlan, Texas 75474, may be served with process by serving its registered agent, Charles D. Henderson, at 1917 Copper Street, Garland, Texas 75042.

11. Ecom WillMax Carlisle, L.P., WillMax Carlisle, LLC, KWA Construction, L.P., KW & Associates, L.L.C., C.D. Henderson Construction, Inc., C.D. Henderson Construction Group, LLC, C.D. Henderson Construction Services, Ltd., and C.D. Henderson, Incorporated, shall be referred to collectively herein as "Defendants."

III. JURISDICTION

12. This Court has jurisdiction over the parties to this case, and the controversy made the basis of this case. The Association seeks monetary relief in excess of $1,000,000, which exceeds this Court's minimum jurisdictional requirements.

IV. VENUE

13. The Project is located in Dallas County, Texas, and the facts and events giving rise to this lawsuit occurred in Dallas County. Accordingly, venue is proper pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002 and TEX. PROP. CODE § 82.008.

V. FACTS

14. The Association was created under the laws of Texas, pursuant to its Certificate of Formation filed with the Office of the Secretary of State of Texas. The Association is a homeowners association which is comprised of and represents the owners of the units at the Project ("Members").

15. The Association is governed by the Declaration of Condominium Regime for the Vine Condominiums, and any amendments thereto ("Declaration"), and the Association Bylaws. Under its governing documents, the Association, through its Board of Directors, is responsible for certain maintenance, repair, and replacement of the Project. The Association, acting through its Board of Directors, has standing to bring this action under its governing documents, the Uniform Condominium Act, and the laws of Texas.

16. Defendants are developers, Declarants, general contractors, and/or builder-vendors engaged in the business of development, improvement, construction, marketing, sale, and/or repair of the Project. From the inception of the Association until the termination of the period of Declarant Control, Defendants controlled the Board of Directors for the Association.

17. As Declarant for the Project, Defendants had a duty to control the development, improvement, and sale of the Project, as well as the duty to keep the Project in good maintenance and repair during the period of Declarant Control, and to protect the Association's legal rights as fiduciaries controlling the Board of Directors.

18. As developers of the Project, Defendants had a nondelegable duty to exercise reasonable control and supervision over all construction and sale activities relating to the units and common elements, to act reasonably in hiring qualified contractors and subcontractors, to act reasonably in quality checking and approving the work performed by contractors and subcontractors, to ensure that all work was performed in accordance with all applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements, and to ensure that all work was done in a good and workmanlike manner.

19. As general contractors for the Project, Defendants had a nondelegable duty to exercise reasonable control and supervision over all construction activities relating to the units and common elements, to act reasonably in hiring qualified subcontractors, to act reasonably in quality checking and approving the work performed by subcontractors, to ensure that all work was performed in accordance with all applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements, and to ensure that all work was done in a good and workmanlike manner.

20. The Association is informed, believes, and thereon alleges that at all times material to this Petition, Defendants, and the contractors and subcontractors working on their behalf, were acting as agents and/or alter-egos of one another for the purposes of designing, developing, improving, constructing, marketing, selling, and/or repairing the units and common elements comprising the Project. Defendants are jointly and severally liable and/or vicariously liable for the each other's tortious and otherwise wrongful acts.

21. The Association is suffering from various construction deficiencies affecting the Project, including but not limited to:

A. ROOFS: The roofing system was improperly installed, including improper slope, drainage, attachment, flashing, sealing, and waterproofing. B-vents are also improperly installed with missing storm collars and caps. Improper roof installation reduces the lifespan of the roofing system, voids product warranties, and has resulted in water intrusion causing damage to the roof, structure, and units.

B. GARAGE LINTELS: The garage lintels were improperly installed and are failing. The brick veneer cavity is improper and the metal wall ties are improper for the cavity width and are improperly embedded and corroded. Veneer mortar joints are separating and the brick and structural end bearing conditions are failing and causing cracking and distress.

C. BUILDING ENVELOPE AND CLADDING: The building envelope and cladding were improperly installed, including improper masonry, precast, siding veneer installation, waterproofing, weather resistive barrier, flashings, sealant, painting, and integration of dissimilar materials. Improper building envelope and cladding installation creates paths for water intrusion and is causing staining, damage to building components and units, and other property damage.

D. WINDOWS AND DOORS: The windows and exterior doors at the Project were improperly installed. The windows and doors were improperly flashed, waterproofed, and/or sealed in violation of code, industry standards and/or manufacturer's installation instructions. Windows and doors are also improperly secured and/or aligned, improperly painted, and doors are installed with brick moulds in contact

with concrete. Improper window and door installation is resulting in damage to the windows and doors, surrounding building components, and building interiors.

E. DECKS: The decks at the Project were improperly installed, including improper railings, sealant, flashing, and waterproofing.

F. FOUNDATIONS: Distress to the buildings and garage slabs, including separations at gypsum board finishes, fractured floor tiles, and cracks in the garage slabs, is consistent with differential foundation movement.

G. STAIRS AND GUARDRAILS: Concrete stairs are installed without code required handrails creating a safety hazard. Site guardrails were improperly installed resulting in damage, deterioration and corrosion.

H. GRADING AND DRAINAGE: There is improper grading and drainage at the Project, including improper site drainage, inadequate slope away from the structures, bounded planter areas, and drainage paths blocked by flatwork and concrete.

I. RETAINING WALLS: The retaining walls were improperly installed, resulting mortar joint separations, and loose rocks.

J. MECHANICAL AND PLUMBING: Improper mechanical and plumbing installation is resulting in interior damage including damage to gypsum wallboard, mechanical platforms, HVAC registers, and shower enclosures.

22. As a result of the defects, deficiencies, and/or damages caused by Defendants, the Association and/or its Members have sustained damages including, but not limited to, property damage, repair costs, mitigation costs, loss of use of all or portions of the Project, attorneys' fees, litigation costs, and other damages. These defects will also result in probable future damage, including future property damage.

23. The Association is informed, believes, and thereon alleges that Defendants participated in, cooperated with, directed, sanctioned, conceived, authorized and/or otherwise implemented marketing, advertising, and sale statements that misrepresented the quality, condition, suitability, and fitness of the units and common elements. Specifically, Defendants represented or caused to be represented that the Project was built in accordance with all applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements, was built in a good and workmanlike manner, was free from defects, and suited for its intended use.

24. The Association is informed, believes, and thereon alleges that Defendants misrepresented the quality, condition, suitability and fitness of the Project by representing and/or failing to disclose that the Project was not of the particular standard or quality represented. In fact, the Project was not built in accordance with all applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements, was not built in a good and workmanlike manner, was not free from defects, and was not suited for its intended use.

25. The Association is informed, believes, and thereon alleges that each of the misrepresented or non-disclosed facts was an adverse material fact or piece of information pertinent to decisions of prospective purchasers and/or ultimate purchasers of the units and Members of the Association. These adverse facts should have been provided to the Members and the Association and its Board of Directors so that the Board could carry out the performance of its duties pursuant to the Declaration.

26. While Defendants were serving in multiple capacities as Declarant, developer, general contractor, and principal of agents appointed as Board Members of the Association, Defendants actively participated in and cooperated with, directed, sanctioned, conceived, authorized or otherwise implemented some or all of the negligent or otherwise wrongful conduct described herein. At that same time, Defendants owed the Association and its Members a duty to act in good faith and had a fiduciary responsibility to the Members of the Association to assure that it complied with its obligations as described herein, and that the legal rights of the Association were protected.

VI. NEGLIGENCE

27. The Association realleges and incorporates by reference the preceding paragraphs of this Petition as though fully and completely set forth herein.

28. Defendants had a nondelegable duty to the Association to design, supervise, improve, construct, market, sell, and/or repair the Project in a reasonable and non-negligent manner, including but not limited to, a duty to design, supervise, improve, construct, market, sell, and/or repair the Project in accordance with all plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements applicable to the construction of the Project.

29. Defendants' duty of care included the duty to ensure that all construction was designed and performed in a good and workmanlike manner by qualified contractors and subcontractors, and was suited for its reasonably anticipated use.

30. Defendants breached their duty to the Association by failing to properly design, supervise, improve, construct, market, sell, and/or repair the Project in a reasonable and non-negligent manner, including but not limited to failing to design, supervise, improve, construct,

market, sell, and/or repair the Project in accordance with all plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements applicable to the construction of the Project, resulting in construction defects and property damage, including but not limited to the damages described above.

31. Defendants also breached their duty to the Association by failing to ensure that the Project was designed and constructed in a good and workmanlike manner by qualified subcontractors and was suited for its reasonably anticipated use.

32. Defendants violated statutes, ordinances and/or building codes applicable to the Project by failing to develop, design, construct, market, sell, and/or repair the Project in accordance with applicable statutes, ordinances, and/or building codes. Defendants' violations of these statutes, ordinances, and/or building codes constitute negligence *per se*.

33. The above acts and/or omissions of Defendants have damaged the Association in an amount to be proven at trial.

VII. BREACH OF IMPLIED WARRANTY

34. The Association realleges and incorporates by reference the preceding paragraphs of this Petition as though fully and completely set forth herein.

35. Defendants impliedly warranted to the Association and/or its Members that: (1) the Project was of habitable quality throughout; (2) the Project was built in a good and workmanlike manner; (3) repairs at the Project were performed in a good and workmanlike manner; (4) the Project was built in compliance with all applicable building codes; and (5) construction was adequately supervised.

36. Defendants breached these implied warranties in that the Project is not of habitable quality throughout, the Project is not built in a workmanlike manner, repairs were not performed in a good and workmanlike manner, the Project is not built in compliance with all applicable building codes, and construction was not adequately supervised.

37. Within a reasonable time, the Association notified Defendants of said breaches.

38. Defendants' breaches of these warranties have damaged the Association in an amount to be proven at trial.

VIII. BREACH OF FIDUCIARY DUTY

39. The Association realleges and incorporates by reference the preceding paragraphs of this Petition as though fully and completely set forth herein.

40. Defendants created, controlled, were members of, and/or appointed agents as members of, the Association's Board of Directors from the inception of the Association until the termination of Declarant Control. During this period, Defendants were required to exercise their duties with the care required of a fiduciary for the Association. In addition, a relationship of trust and confidence existed between Defendants and the Association as well as its Members.

41. Defendants breached their fiduciary duties by their failure to exercise reasonable control over the development and construction of the Project, failure to construct the Project in accordance with all applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements, failure to reasonably exercise the powers conferred by the Declaration, failure to properly advise the Association of construction deficiencies at the Project, and failure to adequately repair construction deficiencies at the Project.

42. Defendants further breached their fiduciary duties to the Association and/or its Members by failing to disclose the existence of construction defects at the Project, by failing to establish adequate reserves, and by failing to act in their fiduciary capacity to protect the legal rights of the Association and its Members

43. In committing such breaches, Defendants:

A. Did not make reasonable use of the confidence that the Association and its Members placed in them;

B. Failed to act in the utmost good faith or exercise the most scrupulous honesty toward the Association and its Members;

C. Placed their own interests before those of the Association and its Members;

D. Used the advantage of their position to gain a benefit for themselves at the expense of the Association and its Members; and

E. Placed themselves in a position where their self-interest might conflict with their obligations as a fiduciary.

44. In addition, Defendants failed to fully and fairly disclose all important information to the Association and its Members concerning the sales of the units to homeowners, and the transfer of control of the Association from Defendants to homeowners. As a result, these transactions were not fair and equitable to the Association or its Members.

45. Defendants' breaches of these duties have damaged the Association in an amount to be proven at trial.

IX. NEGLIGENT MISREPRESENTATION

46. The Association realleges and incorporates by reference the preceding paragraphs of this Petition as though fully and completely set forth herein.

47. Defendants, in the course of their business, made representations to the Association and/or its Members that the units and common elements were built in a good and workmanlike manner, in accordance with all plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements applicable to the construction of the Project, were free from defects, and/or were suited for their intended purpose. These representations were made orally and/or in writing through advertising material, sales documentation, applications for building permits, and when repair and maintenance responsibilities were transferred from Defendants to the Association upon termination of Declarant Control.

48. The representations made by Defendants were material and were supplied by Defendants to guide the Association and/or its Members in their business transactions.

49. The representations made by Defendants were in fact false. The units and common elements were not built in a good and workmanlike manner, in accordance with all applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, and/or government agency requirements applicable to the construction of the Project, nor are they free from defects, nor built for their intended purpose.

50. In causing or permitting the foregoing information to be communicated to the Association and/or its Members, Defendants failed to exercise reasonable care or competence in

obtaining or communicating information to the Association and/or its Members, and in so doing acted negligently.

51. The Association and/or its Members reasonably relied on the information provided by Defendants.

52. The Association and/or its Members' reasonable reliance on the information provided by Defendants has damaged the Association and/or its Members in an amount to be proven at trial.

X. DECEPTIVE TRADE PRACTICES ACT

53. The Association realleges and incorporates by reference the preceding paragraphs of this Petition as though fully and completely set forth herein.

54. At all times material hereto, the Association and/or its Members were consumers as defined in TEX. BUS. & COMM. CODE § 17.45(4).

55. The Deceptive Trade Practices-Consumer Protection Act ("DTPA"), prohibits Defendants, in the course of their business, from doing any of the following:

A. Representing that goods or services have characteristics, uses, or benefits which they do not have;

B. Representing that goods or services are of a particular standard, quality, or grade if they are of another;

C. Advertising goods or services with intent not to sell them as advertised;

D. Failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;

E. Breaching an express or implied warranty; or

F. Engaging in an unconscionable action or course of action.

56. Defendants violated the DTPA when they represented to the Association and/or its Members that the Project was built in accordance with all applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements, was built in a workmanlike manner, was free from defects, and was suited for its intended use, when it was none of these things.

57. Defendants violated the DTPA when they represented to the Association and/or its Members that the materials and/or services used to construct the Project were of a particular standard, quality or grade, when said materials and services were of another.

58. Defendants violated the DTPA when they advertised that the Project was built in accordance with all applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements, was built in a good and workmanlike manner, was free from defects, and was suited for its intended use, with the intent not to sell the Project as advertised.

59. Defendants violated the DTPA by failing to disclose material information, including without limitation, the information specifically described herein concerning the materials and services provided by Defendants. Defendants knew of this information at the time of their advertising, marketing, and sale of the Project, and when repair and maintenance responsibilities were transferred from Defendants to the Association upon termination of Declarant Control. Defendants' failure to disclose was intended to induce the Association and/or its Members into purchasing the units at the Project, and to accept repair and maintenance responsibilities for the units and common elements upon termination of Declarant Control. The

Association and/or its Members would not have made such purchases, or accepted such responsibilities, had the material information been disclosed.

60. Defendants violated the DTPA when they breached warranties made to the Association and/or its Members, as described herein.

61. Defendants violated the DTPA by engaging in an unconscionable course of action when they engaged in the conduct described herein.

62. The Association is informed, believes, and thereon alleges that Defendants' violations of the DTPA described above were committed negligently, knowingly, and/or intentionally.

63. The Association and/or its Members reasonably relied on Defendants' wrongful conduct to their detriment, and Defendants' wrongful conduct was a producing cause of the Association and/or its Members' damages.

64. The Association is entitled to, and hereby demands as damages, three times the amount of its economic damages, plus costs and attorneys' fees, pursuant to TEX. BUS. & COMM. CODE § 17.50.

XI. DISCOVERY RULE

65. The Association's injuries were inherently undiscoverable and objectively verifiable. Therefore, the Association pleads the discovery rule with respect to all claims. The Association further pleads the "constitutional" discovery rule because the application of the statute of limitations before a person or entity has had a reasonable opportunity to discover the wrong and bring suit violates the Texas Constitution including, without limitation, the open courts doctrine.

XII. ATTORNEY'S FEES

66. The Association realleges and incorporates by reference the preceding paragraphs of this Petition as though fully and completely set forth herein.

67. As a result of Defendants' acts and omissions, the Association has been required to retain the services of attorneys to represent it. All conditions precedent to recovery of attorneys' fees have been satisfied, or have been waived. The Association seeks attorney's fees pursuant to TEX. BUS. & COMM. CODE § 17.50(d), TEX. PROP. CODE § 27.004(g)(6), and TEX. CIV. PRAC. & REM. CODE § 38.001. The Association is entitled to all reasonable and necessary costs and attorneys' fees in this case, which include attorneys' fees, court costs and fees, fees of experts, and all travel costs, for which recovery to the maximum extent permitted by law is sought herein. Additionally, pursuant to applicable law, the Association is entitled to recover pre-judgment and post-judgment interest on all amounts found to be due to the Association at the highest rate authorized by law, for which recovery to the maximum extent permitted by law is sought herein.

XIII. CONDITIONS PRECEDENT

68. All conditions precedent to the relief requested in this petition have occurred, been performed, been waived, or are excused by law. The Association has complied with the procedures set forth in TEX. PROP. CODE § 82.119. Service of a notice of claim pursuant to TEX. PROP. CODE § 27.004(a) has either occurred or been rendered impracticable and is not required pursuant to TEX. PROP. CODE § 27.004(c). Service of notice pursuant to TEX. BUS. & COMM. CODE § 17.505(a) has either occurred or been rendered impracticable and is thus not required pursuant to TEX. BUS. & COMM. CODE § 17.505(b).

XIV. DEMAND FOR JURY

69. The Association demands a jury trial and tenders the appropriate fee with this Petition.

XV. REQUEST FOR DISCLOSURE

70. Pursuant to TEX. R. CIV. P. 194, the Association requests that all Defendants disclose, within 50 days of the service of this request, the information or material described in TEX. R. CIV. P. 194.2.

XVI. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Association, on behalf of itself and its Members, prays that Defendants be cited according to law to appear and answer, and after a final trial, judgment be entered against Defendants for relief including, but not limited to:

A. That the Association recover its actual damages, including the cost to investigate and repair construction defects and resulting damages at the Project;

B. That the Association recover all litigation costs, including filing fees and expert witness fees;

C. That the Association recover attorney's fees;

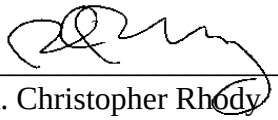
D. That the Association recover pre-judgment and post-judgment interest at the highest lawful rates, either as provided by law or as contractually agreed;

E. That the Association recover three times the amount of its economic and mental anguish damages, plus costs and attorneys' fees, pursuant to TEX. BUS. & COMM. CODE § 17.50; and

F. That the Association recover all such other and further relief, at law, or in equity, to which it may be entitled.

Respectfully submitted,

McKenzie Rhody, LLP

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