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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JACKSON

MEADOW WOOD CONDOMINIUMS)
OWNERS' ASSOCIATION, an Oregon)
nonprofit corporation)

Plaintiff,

v.

MEADOW WOOD INVESTORS, LLC, an)
Oregon limited liability company; BAVARIA)
HOME IMPROVEMENT LLC, an Oregon)
limited liability company, RALPH REEDER,)
an individual dba REEDER HOMES,)
PROGRESSIVE EXTERIORS, INC., an)
Oregon corporation THEODORE FRANKLIN)
FLETSCHER, an individual dba)
FLETSCHER BUILDING DESIGN, DAVID)
DOBRIN an individual dba DAVID DOBRIN)
CONSTRUCTION, RICK WISHCAMPER,)
an individual, and JOHN DOES 1-3.)

Defendants.

Case No.

COMPLAINT

Negligence, Negligence *Per Se*,
Negligent Misrepresentation, Breach of
Fiduciary Duty, Violations of the
Oregon Condominium Act, Breach of
Contract, and Nuisance

Not subject to Mandatory Arbitration

Jury Trial Requested

Prayer in the amount of \$3,000,000.00

Fee Authority ORS 21.160(1)(d);
100.470

Plaintiff Meadow Wood Condominiums Owners' Association hereby, alleges as follows:

GENERAL ALLEGATIONS

1.

Meadow Wood Condominiums ("Condominium") is a condominium created pursuant to
the provisions of the Oregon Condominium Act, ORS Chapter 100, located in Jackson County,

1 Oregon. The Condominium consists of eight-five (85) residential units housed in sixteen (16)
2 residential buildings, thirty-seven (37) parking units housed in five (5) garage buildings, general
3 common elements, and limited common elements. The Condominium's residential and garage
4 buildings and general and limited common elements were all originally built as part of an
5 apartment complex, but were converted into the Condominium years later. The Meadow Wood
6 Condominiums Owners' Association ("Plaintiff" or "Association") is now, and at all material
7 times herein has been, an association pursuant to ORS chapter 100 and incorporated under the
8 Oregon non-profit corporation act, established and organized for the governance of the affairs of
9 the Condominium and the mutual benefit of the Condominium's unit owners.

10 2.

11 The Condominium and Association were both established by the Declaration of
12 Condominium Ownership for Meadow Wood Condominiums ("Declaration"), recorded March
13 30, 2006, in the records of Jackson County, Oregon, as document number 2006-016158. The
14 Bylaws of Meadow Wood Condominiums Owners' Association ("Bylaws") were recorded as
15 Exhibit C to the Declaration.

16 3.

17 Pursuant to ORS 100.510, the individual unit owners own their respective units. Pursuant
18 to the Declaration, each unit (identified as "Primary Unit" in the Declaration) is bounded by the
19 interior surfaces of its perimeter and demising walls adjacent to adjoining units, floors, ceilings,
20 windows and window frames, doors and door frames, and trim, and shall include both the
21 interior surfaces so described (including the exposed face of the sheetrock or similar material and
22 the underside of the finished floor) and the air space so encompassed and shall exclude those
23 portion of the walls, floors or ceilings that materially contribute to the structural shear capacity of
24 the Condominium. Each unit shall include the nonbearing interior partitions, fixtures and
25 improvement within the boundaries of the unit and the outlet of any utility service lines,
26 including water, sewer, electricity, or cable television, and of ventilating or air conditioning
27 ducts, but shall not include any part of such lines or ducts themselves.

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1 4.

2 All owners own an undivided percentage ownership interest in the common elements of
3 the Condominium. Pursuant to Sections 5 and 6 of the Declaration the general and limited
4 common elements (hereinafter, collectively, "common elements") consist of all portions of the
5 Condominium that are not part of the units.

6 5.

7 The cost of maintaining, repairing and replacing the common elements is a common
8 expense. Common expenses are those costs and expenses incurred by the Association with
9 respect to the use, operation, maintenance, repair, and improvement of the common elements.
10 The performance of all maintenance, repair and replacement of the common elements is the
11 responsibility of the Association, but all costs thereof are assessed and apportioned among the
12 unit owners in the manner set forth in the Declaration and Bylaws.

13 6.

14 At all material times, Meadow Wood Investors, LLC was an Oregon limited liability
15 company doing business in the State of Oregon. Meadow Wood Investors, LLC acted as the
16 declarant and developer of the Condominium ("MWI," "Declarant," or "Developer").

17 7.

18 At all material times, Bavaria Home Improvement LLC was an Oregon limited liability
19 company doing business in the State of Oregon. Upon information and belief, Bavaria Home
20 Improvement, LLC acted as the general contractor, and/or a subcontractor for the conversion,
21 construction, repair and reconstruction of the Condominium ("Bavaria,").

22 8.

23 At all material times, Ralph Reeder dba Reeder Homes was an individual doing business
24 in the State of Oregon. Upon information and belief, Ralph Reeder dba Reeder Homes, acted as
25 the general contractor and/or a subcontractor for the conversion, construction, repair and
26 reconstruction of the Condominium ("Reeder").

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9.

At all material times, Progressive Exteriors, Inc. was an Oregon corporation doing business in the State of Oregon. Upon information and belief, Progressive Exteriors, Inc. acted as the general contractor and/or a subcontractor for the conversion construction, repair and reconstruction of the Condominium (“Progressive”).

10.

At all material times, Theodore Franklin Fletscher dba Fletscher Building Design was an Oregon limited liability company doing business in the State of Oregon. Upon information and belief, Theodore Franklin Fletscher dba Fletscher Building Design acted as a general contractor and/or a subcontractor for the construction, repair and reconstruction of the Condominium (“Fletscher”).

11.

At all material times, David Dobrin, dba David Dobrin Construction was an individual doing business in the State of Oregon. Upon information and belief, David Dobrin, dba David Dobrin Construction acted as a general contractor and/or subcontractor for the construction, repair and reconstruction of the Condominium (“Dobrin”). Bavaria, Reeder, Progressive, Fletscher and Dobrin are referred to collectively hereinafter as “Contractor Group.”

12.

At all material times, Rick Wishcamper (“Wishcamper”) was an individual residing in the State of Oregon. On information and belief, Wishcamper was a shareholder, director, officer, agent, and employee of MWI, and served as a pre-turnover director and officer of the Association.

13.

At all material times, John Does 1-3 were shareholders, directors, officers, agents or employees of MWI, who also served as directors and/or officers of the Association prior to turnover.

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1 14.

2 Pursuant to ORS 100.405(4)(e), the Association is authorized to initiate this litigation on
3 its own behalf and on behalf of the unit owners because the matters alleged herein relate to and
4 affect the common elements (ORS 100.405(4)(e)(D)) and/or units or interests of unit owners
5 (ORS 100.405(4)(e)(E)).

6 15.

7 At all relevant times herein, MWI, under the control and direction of Wishcamper and
8 John Does 1-3, caused the Condominium to be developed, converted, and constructed, including,
9 but not limited to, hiring contractors, overseeing construction, and guaranteeing and warranting
10 the quality and completion of construction and repair work. During all relevant times herein,
11 Contractor Group constructed the Condominium as the general contractors, including, but not
12 limited to, hiring contractors, overseeing and supervising construction, and performing
13 construction of the Condominium. MWI, under the control and direction of Wishcamper and
14 John Does 1-3, acted as the seller of the Condominium units.

15 16.

16 In the course of developing the Condominium, MWI caused the Association to be
17 organized. MWI acted as “Declarant” of the Condominium and the Association, as the term is
18 defined by ORS 100.005(11), and recorded the Declaration pursuant to ORS 100.100 and
19 100.110. Until turnover, MWI, under the direction of Wishcamper and John Does 1-3,
20 controlled the Association pursuant to ORS 100.200 and the terms of the Declaration and
21 Bylaws.

22 17.

23 MWI, under the control and direction of Wishcamper and John Does 1-3 acted as the
24 agents and real estate managers of the Condominium and the Association from their inception
25 and until turnover. During that period, MWI, Wishcamper, and John Does 1-3 performed,
26 supervised or in turn appointed, employed and contracted with contractors and subcontractors to
27 perform and/or supervise various activities and functions, including (without limitation)
28 employing and supervising all labor for the development, construction, operation and

1 maintenance of the Condominium; negotiating, executing in the name of the Association, and
2 supervising performance of contractors for the operation, maintenance and safety of the
3 Condominium; keeping all necessary books and records for the Condominium and the
4 Association; and establishing a budget, assessment amounts, and a reserve account, conducting
5 and updating a reserve study, and collecting assessments for the Condominium and the
6 Association. The Association and unit owners were third-party beneficiaries of any
7 arrangements made between MWI, Wishcamper, and John Does 1-3, other contractors,
8 subcontractors or other entities or persons hired by MWI, Wishcamper, and John Does 1-3.

9 18.

10 The Condominium has experienced and continues to experience one or more accidental
11 event(s) that include exposure to and actual repeated and/or continuous substantial water
12 intrusion through the foundation, floors, siding, sidewalls, exterior walls, doors, windows, door
13 and window trim, roofs, and decks. In this and subsequent paragraphs of this Complaint, such
14 events are referred to separately and collectively as “water intrusion.”

15 19.

16 This water intrusion has caused and continues to cause one or more accidental events of
17 extensive property damage to the common elements, units and personal property within the units
18 to such an extent that some or all of the units and personal property within the units are and/or
19 will become unsafe, unlivable, unsanitary and/or unusable. The property damage includes dry
20 rot, water stains, mold, fungi and/or mildew and other water damage to and on the trim, beams,
21 headers, sills, ledgers, plywood, sheetrock, joists, siding, wall studs, dry wall, exterior and
22 interior walls, particle board, windows, window frames, doors, door frames, insulation, sub-
23 floors, other flooring and/or other parts of the common elements and the units. In this and
24 subsequent paragraphs of this Complaint, such damage is referred to separately and collectively
25 as “water damage.” At some locations, the water intrusion has caused damage severe enough to
26 compromise the structural integrity of common elements and units. This damage is referred to
27 separately and collectively as “structural damage.”

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1 20.

2 MWI, under the control and direction of Wishcamper and John Does 1-3, made oral and
3 written representations about the construction methods and materials, buildings' condition, and
4 remaining useful life of the buildings, including, but not limited to, in marketing materials and in
5 the Condominium Disclosure Statements, which were provided to each unit purchaser.

6 21.

7 The water intrusion, water damage, and structural damage are the direct and proximate
8 result of the following non-exhaustive list of items of faulty workmanship, improper or defective
9 materials, improper construction, violations of manufacturers' installation instructions and/or
10 specifications, violations of industry standards, deviations from approved building plans, and/or
11 noncompliance with state and local building codes:

12 **A) Vinyl Siding**

- 13
- 14 1. Vinyl siding fastener spacing is greater than the maximum 16-inches on center
 - 15 2. Improper fastening patterns in the vinyl siding prevents the siding from being fully
 - 16 3. Fasteners are not corrosive resistant in violation of 1998 OSSC Section 1404.2.
 - 17 4. The "J" channel along the roofline is installed in direct contact with the asphalt shingle
 - 18 5. Siding is missing and/or discontinuous through the project in violation of 1998 OSSC
 - 19 6. Sealant and caulking joins were omitted at penetrations in the vinyl siding and
 - 20 7. Horizontal wood caps installed at the guardrails of the unit access stair, landing and decks
 - 21 2. Improper fastening patterns in the vinyl siding prevents the siding from being fully
 - 22 3. Fasteners are not corrosive resistant in violation of 1998 OSSC Section 1404.2.
 - 23 4. The "J" channel along the roofline is installed in direct contact with the asphalt shingle
 - 24 5. Siding is missing and/or discontinuous through the project in violation of 1998 OSSC
 - 25 6. Sealant and caulking joins were omitted at penetrations in the vinyl siding and
 - 26 7. Horizontal wood caps installed at the guardrails of the unit access stair, landing and decks
 - 27 were not adequately fastened, resulting in excessive movement, curling and warping.
 - 28

24 **B) Weather Resistant Barrier (WRB)**

- 25
- 26 1. WRB is reverse lapped at numerous locations in violation of 1998 OSSC Section 1402.1.
 - 27 2. WRB contains void, tears and lacks laps exposing the underlying wood wall and
 - 28 structural framing components to moisture ingress and property damage in violation of

3. WRB is omitted and/or discontinuous in numerous locations in violation of 1998 OSSC Section 1402.1
4. WRB lacks horizontal-vertical overlap as required by 1998 OSSC section 1402.1 and Dow WeatherMate Housewrap Insulation Instructions.
5. WRB is reverse lapped at the deck and landing locations and behind the flashing, trapping moisture and resulting in property damage, in violation of the Dow WeatherMate Housewrap Installation Instructions.

C) Fenestration/Window Installation

1. Fasteners securing the window to the wood wall assembly were not adequately corrosion resistant and were corroded at multiple locations in violation of Section 5.2.2. of AAMA 2400-02.
2. Sealant between the window flanges and wall assembly was omitted at several locations in violation of 1998 OSSC Section 1307.1.7.2, Section 5.4.2 of AAMA 2400-02, Section 5.5.3.4 of AAMA 2400-02.
3. Fasteners were improperly installed in the corner weld joins of the window flange instead of in manufacturer's pre-punched nailing slots in violation of AAMA 2400-03 Section 5.6.3.
4. WRB is reverse lapped and tapped over the windowsill nailing flange, trapping incidental moisture entering between the vinyl siding J-Channel and window in violation of 1998 OSSC Section 1402.2
5. Metal heading flashing was omitted at all windows and doors, allowing for moisture ingress and preventing incidental moisture from exiting the system as intended in violation of 1998 OSSC 1402.2.

D) Flashing

1. Code required flashing was omitted above windows and doors in violation of 1998 OSSC Section 1402.2
2. Flashing was reverse lapped over the WRB at numerous locations in violation of 1998 OSSC Section 1402.2.
3. Unsealed fasteners were installed through the horizontal surfaces of the flashing creating an avenue for moisture ingress in violation of 1998 OSSC Section 1402.2.

E) Roof Systems

1. Diverter flashings were omitted at roof-to-wall transitions above gutter end conditions allowing moisture to ingress into the building in violation of 1998 OSSC Section 1402.2 and 1998 OSSC Section 1509.
2. Underlayment does not extend up the sidewall at roof-to-wall intersections, allowing incidental moisture into the attic and wall cavities in violation of 1998 OSSC Section 1509 and ASTM D226.

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1 F) Waterproof Decks and Landings

- 2 1. The decks and landings do not have the code-required minimum 1/4” per foot of slope
3 away from the building, which his allowing moisture impairment of the deck support
4 members in violation of 1998 OSSC Section1402.3.
5 2. Flashing installed at the outside deck edge was not adequately secured to the concrete
6 topping slab, allowing the flashing to oil can, shift and creating tears in the waterproof
7 membrane.
8 3. Fluid-applied waterproofing installed on the concrete topping slabs of decks and landings
9 is of insufficient thickness and is not sufficiently bonded, allowing moisture to penetrate
10 the concrete topping slab and gain access to the underlying wood substrate and framing,
11 resulting in decay and structural impairment in violation of 1998 OSSC Section 2306.9.
12 4. Posts supporting the decks were not treated or naturally resistant to decay and are
13 installed in direct contact with the concrete slab on grade in violate of 1998 OSSC section
14 n2306.5.

15 In this and subsequent paragraphs of this Complaint, the faulty workmanship, improper or
16 defective materials, improper construction, violations of manufacturer installation instructions
17 and/or specifications, violations of construction industry standards, deviations from approved
18 building plans, and/or noncompliance with local and state building codes are referred to
19 separately and collectively as “construction defects.”

20 22.

21 Despite being provided with notice and opportunity to cure, MWI, Bavaria, Reeder,
22 Progressive, Fletscher, and Dobrin have failed to repair and correct, or cause to be repaired and
23 corrected, the list of defects and problems at the Condominium, as provided by Plaintiff,
24 including, but not limited to, the construction defects listed in paragraph 21, above, and the water
25 damage and structural damage.

26 23.

27 The water intrusion, water damage, structural damage, and construction defects have
28 caused and will cause loss of use and/or diminished value of the common elements, units, and
personal property within units. Such loss of use of the units and property within units has
resulted or will result from a nuisance or defect or damage to the common elements, or will
result from requirements to facilitate repairs to the common elements.

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24.

The water intrusion, water damage, structural damage, and construction defects have caused consequential damage, including, but not limited to, the water damage and structural damage described in paragraphs 18-21. It has also caused high moisture content in walls, decks, and floors; the growth and spread of mold, fungi, and/or mildew; the spread of odors; the general deterioration of the indoor air quality; and an increased risk that occupants of the Condominium will suffer personal and physical injuries for which the Association may be sued.

25.

Pursuant to ORS 701.565, Notices of Construction Defects containing all required information were sent to MWI, Bavaria, Reeder, Progressive, Fletscher, and Dobrin. MWI, Bavaria, Reeder, Progressive, Fletscher, and Dobrin have failed to produce a written response to the Notice of Defect as required by ORS 701.570 or, as of the date of this Complaint, have not yet responded.

26.

As a result of the problems and deficiencies set forth in paragraphs 18-21, and elsewhere herein, the Condominium is imminently, inherently, and unreasonably dangerous. Moreover, unless the problems and deficiencies set forth in paragraphs 18-21 and elsewhere herein are corrected, there is a real and substantial risk that the Association may be liable for (1) additional repairs and replacement of property damage to the Condominium; (2) repairs and replacement of property damage to the units and personal property within the units caused by or through problems with the common elements; (3) personal and physical injuries to Condominium residents or occupants; and (4) consequential damages to the Condominium and its residents.

FIRST CLAIM FOR RELIEF

Count One

(Negligence by MWI, Wishcamper, and John Does 1-3)

27.

Plaintiff realleges paragraphs 1-26, and incorporates them by reference herein.

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28.

MWI, developed, converted, constructed, and supervised the construction of the Condominium; inspected the construction progress, quality, and compliance with the construction plans, manufacturers' installation instructions and/or specifications, industry standards, and state and local building codes; and managed and sold units at the Condominium. MWI, as declarant and through its appointed directors and officers, Wishcamper, and John Does 1-3, managed, administered, and operated the Association until turnover. MWI prepared or caused to be prepared a budget and established and maintained or caused to be established and maintained a level of assessments to fund the Association's operating, maintenance, and other expenditures and to provide for adequate replacement funds and sufficient reserves. MWI also acted as a real estate manager for the Association and the property until turnover.

29.

Wishcamper and John Does 1-3, as directors and officers of the Association and as shareholders, directors, officers, agents and/or employees of the Declarant, prepared, or caused to be prepared, a budget, and established the level of assessments to fund the Association's operating, maintenance, and other expenditures and to provide sufficient reserves for the replacement of the Condominium's common elements.

30.

Wishcamper, and John Does 1-3 were directors and officers of the Association prior to turnover and, as such, were responsible for proper maintenance and repairs at the Condominium, establishment of a reserve account, and preparation and update of a reserve study.

31.

As a result of their intimate association with, participation in, and oversight of the development, conversion, construction, construction supervision, inspection of construction progress and quality, compliance with the building plans, building codes, industry standards, and manufacturers' installation instructions and/or specifications, sales of Condominium units; establishment, oversight, and operation of the Association; preparation and updating of the Association's budget and reserve study; and establishment and maintenance of assessment levels,

1 MWI, Wishcamper, and John Does 1-3 knew or, in the exercise of reasonable care, should have
2 known:

3 a) that the construction defects described in paragraph 18-21, above, and elsewhere
4 herein, existed;

5 b) that the Condominium had not been and was not being constructed in compliance
6 with the plans, building code standards, industry standards, and manufacturers' installation
7 instructions and/or specifications;

8 c) that the Condominium had suffered water intrusion, water damage, structural
9 damage, and consequential damage and/or that there was a substantial and unreasonable risk that
10 the Condominium had or in the near future would suffer the water intrusion, water damage,
11 structural damage, and consequential damage described in paragraphs 18-21;

12 d) that a failure to address and repair the construction defects and damages during
13 the activities in which it was engaged would result in such water intrusion, water damage,
14 structural damage, and consequential damage, or posed an unreasonable risk of resulting therein;

15 e) that the construction defects, damages, and risks would remain undetected by the
16 Association and its owner-members for a substantial period of time, thereby increasing the
17 damage and cost of repairing or remedying them, or that there was a substantial and
18 unreasonable risk that such would occur;

19 f) that the Association's budget had not been prepared with due care in light of the
20 construction defects, damage, and risks of water intrusion, water damage, structural damage, and
21 consequential damages at the Condominium;

22 g) that a reserve study had not been prepared or updated with due care to adequately
23 reflect the estimated remaining useful life of components required to be in the study and to
24 adequately account for the repair or replacement costs of those components;

25 h) that the level of assessments had not been established and/or maintained at an
26 adequate level to meet the operating, maintenance, and other common expenditures and to also
27 provide for adequate replacement costs and sufficient reserves in light of the construction
28

1 defects, damage, and risks of water intrusion, water damage, structural damage, and
2 consequential damages being suffered by the Association and owner members; and

3 i) that the Association would incur costs and expenses as a result of Defendants'
4 failure to properly construct and/or address problems at the Condominium, including inspection,
5 repair costs, and legal fees.

6 32.

7 Notwithstanding what it knew, or in the exercise of reasonable care should have known,
8 MWI failed to address and repair the water intrusion, water damage, structural damage,
9 consequential damage, construction defects and risks described herein during their activities at
10 the Condominium, and failed to disclose and/or concealed the water intrusion, water damage,
11 structural damage, consequential damage, construction defects, and/or risks thereof to the
12 Association and the unit owners.

13 33.

14 As a result of MWI's, Wishcamper's, and John Does 1-3's, negligence, as described
15 above, and elsewhere herein, Plaintiff has directly, naturally, and proximately been damaged as
16 follows:

17 a) in the amount of \$3,000,000.00 for the cost of past and future repairs and
18 replacements of and to the units and other elements of the Condominium, incurred and to be
19 incurred, because of such conduct reflecting:

20 i) the difference between the value the Condominium would have had if the
21 MWI had not been guilty of the negligence alleged above and the value it did and does in fact
22 have,

23 ii) costs that otherwise would not have been incurred, or

24 iii) the physical damages to and loss of use of the Condominium.

25 b) \$3,000,000.00 for the loss of value of the Condominium, which amount will
26 increase as time passes, and which damage has occurred and will continue to occur regardless of
27 repairs.

28 \\\

1 c) \$3,000,000.00 for the loss of past and future profits for all common elements and
2 units, which amount will increase as time passes.

3 d) \$3,000,000.00 for MWI's share of the general and special assessments of the
4 Condominium because the budget and assessment level created by MWI was unreasonably low
5 and the level of assessments was insufficient to provide for adequate replacement costs and
6 sufficient reserves for the Condominium.

7 **Count Two**

8 **(Negligence *per se* by MWI)**

9 34.

10 The Oregon Building Code governs the construction of buildings in Oregon and
11 establishes uniform performance standards to protect the health, safety, welfare, comfort and
12 security of Oregon residents.

13 35.

14 At all material times herein, MWI is and was required to follow the Oregon Building
15 Code. This duty exists independently of other duties owed to Plaintiff.

16 36.

17 MWI violated the Oregon Building Code by building the Condominium with the
18 construction defects described in paragraph 21, above.

19 37.

20 The Oregon Building Code is designed to protect residents, such as those unit owners of
21 the Condominium, from the kinds of damages described in this Complaint, which result from
22 MWI's violations of the Building Code.

23 38.

24 As a result of MWI's negligence *per se*, Plaintiff has been damaged as set forth in
25 paragraph 33, above.

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1 **SECOND CLAIM FOR RELIEF**

2 **Count One**

3 **(Negligence by Contractor Group)**

4 39.

5 Plaintiff realleges paragraphs 1-26 and 27-38, and incorporates them by reference herein.

6 40.

7 Contractor Group were at all material times the general contractors and/or subcontractors
8 responsible for the proper and workmanlike construction, repair and reconstruction of the
9 Condominium.

10 41.

11 Contractor Group selected subcontractors and design professionals, entered into
12 construction contracts; scheduled and sequenced the construction; supervised the construction;
13 inspected the construction progress, quality, and compliance with the building plans, building
14 codes, industry standards, and manufacturers' installation instructions and/or specifications; and
15 performed construction of the Condominium.

16 42.

17 As a result of providing the services outlined above, Contractor Group knew or, in the
18 exercise of ordinary care, should have known:

19 a) that the construction defects described in paragraphs 18-21 existed;

20 b) that the Condominium had not been and was not being constructed in compliance
21 with the building plans, building codes, industry standards, and manufacturers' installation
22 instructions and/or specifications;

23 c) that the Condominium had suffered water intrusion, water damage, structural
24 damage and consequential damage and/or that there was a substantial and unreasonable risk that
25 the Condominium had or in the near future would suffer the water intrusion, water damage,
26 structural damage, and consequential damage described in paragraphs 18-21;

27 d) that a failure to address and repair the construction defects, damage, and risks
28 during the activities in which they were engaged would result in water intrusion, water damage,

1 structural damage, and consequential damage, or posed an unreasonable risk of resulting therein;
2 and

3 e) that the construction defects, damage, and risks would remain undetected by the
4 Association and unit owners for a substantial period of time, thereby increasing the damages and
5 costs of repairing and remedying them, or that there was a substantial and unreasonable risk that
6 such would occur.

7 43.

8 Notwithstanding what Contractor Group knew, or in the exercise of reasonable care
9 should have known, it failed to address and repair and failed to cause others to address or repair
10 the conditions, physical damage, and risks described herein and in paragraphs 18-21, above,
11 during its activities at the Condominium. Contractor Group also failed to disclose and/or
12 concealed and failed to cause others to disclose the water intrusion, water damage, construction
13 defects, and/or risks thereof to the Association and to the unit owners.

14 44.

15 As a direct, natural, and proximate result of Contractor Group's negligence, Plaintiff has
16 been damaged as described in paragraph 33, above.

17
18 **Count Two**

19 **(Negligence *per se* by Contractor Group)**

20 45.

21 The Oregon Building Code governs the construction of buildings in Oregon and
22 establishes uniform performance standards to protect the health, safety, welfare, comfort and
23 security of Oregon residents.

24 46.

25 At all material times herein, as licensed contractors, Contractor Group is and was
26 required to follow the Oregon Building Code. This duty exists independently of other duties
27 owed to Plaintiff.

28 \\\

1 47.

2 Contractor Group violated the Oregon Building Code by building the Condominium with
3 the construction defects described in paragraph 21, above.

4 48.

5 The Oregon Building Code is designed to protect residents, such as those unit owners of
6 the Condominium, from the kinds of damages described in this Complaint, which result from
7 Contractor Group's violations of the Building Code.

8 49.

9 As a result of Contractor Groups' negligence *per se*, Plaintiff has been damaged as set
10 forth in paragraph 33, above.

11
12 **THIRD CLAIM FOR RELIEF**

13 **(Negligent Misrepresentation by MWI, Wishcamper, and John Does 1-3)**

14 50.

15 Plaintiff realleges paragraphs 1-26, 27-38, and 39-49 and incorporates them by reference
16 herein.

17 51.

18 As the developer and declarant (MWI), shareholders, directors, officers and agents of the
19 developer and declarant (Wishcamper and John Does 1-3), real estate managers of the
20 Condominium and Association (MWI, Wishcamper, and John Does 1-3), and the parties who
21 controlled the appointment of directors and officers of the Association (MWI, Wishcamper and
22 John Does 1-3), MWI, Wischcamper, and John Does 1-3 were fiduciaries of the Association and
23 the current and future unit owners. In other words, MWI, Wishcamper, and John Does 1-3 were
24 in a special relationship with the Association and the unit owners. In this capacity, MWI,
25 Wishcamper, and John Does 1-3 owed a duty to exercise independent judgment on the
26 Association's and unit owners' behalf and interests, including furthering the Association's and
27 unit owners' economic interests. MWI, Wishcamper, and John Does 1-3 exercised independent
28

1 judgment on the Association's and unit owners' behalf and interests, including their economic
2 interests.

3 52.

4 By virtue of this special relationship, the Association and the unit owners were dependent
5 on MWI, Wishcamper, and John Does 1-3 for proper management, protection, and control of the
6 Condominium, the needed disclosures of its condition, and the concomitant operation,
7 management, protection and control of the Association. This special relationship imposed on
8 MWI, Wishcamper, and John Does 1-3 a special responsibility to exercise reasonable care to
9 avoid making misrepresentations and misleading statements to the Association and the unit
10 owners, to ascertain and disclose facts material to the well-being of the Association

11 53.

12 During and following the construction of the Condominium, as a result of its intimate
13 association with and oversight of the development, construction, construction supervision,
14 inspection of construction progress, and sales of the Condominium; establishment, oversight, and
15 operation of the Association; preparation of the Association's budget; and/or establishment and
16 maintenance of assessment levels, MWI, Wishcamper, and John Does 1-3 knew or, in the
17 exercise of reasonable care, should have known:

18 a) that the construction defects and code violations in paragraph 21, above, existed;

19 b) there was a substantial and unreasonable risk that the Condominium had suffered
20 or, in the near future, would suffer the water intrusion, water damage, structural damage, and
21 consequential damage described in paragraphs 18-21, above;

22 c) a failure to address and repair the construction defects, deviations from the
23 building plans, code violations, violations of industry standards, and violations of manufacturers'
24 installation instructions and/or specifications would result in water intrusion, water damage,
25 structural damage, and consequential damage, or pose an unreasonable risk of resulting therein;
26 and

27 d) the construction defects, deviations from the building plans, code violations,
28 violations of industry standards, and violations of manufacturers' installation instructions and/or

1 specifications, water intrusion, water damage, structural damage, and consequential damage
2 would remain undetected by the Association and unit owners for a substantial period of time,
3 thereby increasing the damage and cost of repairing or remedying it, or that there was a
4 substantial and unreasonable risk that such would occur.

5 54.

6 Additionally, in light of the construction defects, deviations from the building plans, code
7 violations, violations of industry standards, and violations of manufacturers' installation
8 instructions and/or specifications, water intrusion, water damage, structural damage, and
9 consequential damage, MWI, Wishcamper, and John Does 1-3 knew or, in the exercise of
10 reasonable care, should have known that the Association's budget projections did not provide for
11 adequate monthly assessments to establish reserves sufficient to repair and replace damaged or
12 destroyed components of the Condominium.

13 55.

14 However, notwithstanding that they knew or, in the exercise of reasonable care should
15 have known, prior to the sale of the units, MWI, Wishcamper, and John Does 1-3 expressly (in
16 writing or orally) represented and/or implied the following facts regarding the construction and
17 condition of the Condominium:

- 18 a) That the condominiums were quality homes;
- 19 b) That living in the community was affordable;
- 20 c) The condominiums were extensively renovated;
- 21 d) That the extensive renovations would preserve the long-term value of the
22 condominium and would minimize maintenance costs;
- 23 e) That the condominiums did not have the hassles of maintenance and upkeep;
- 24 f) That the condominiums were of good quality, convenient and affordable;
- 25 g) That the siding was all-new;
- 26 h) That the condominiums were for quality living and an exceptional value;
- 27 i) That the roofing was new and would last 40 years;

1 j) the Condominium was built according to the city-approved plans and in
2 compliance with local and state building code standards, industry standards, and manufacturers'
3 installation instructions and/or specifications;

4 k) they had inspected the Condominium or had caused the Condominium to be
5 professionally inspected during and following its construction for quality and compliance with
6 the city-approved plans and local and state building code standards;

7 l) the Condominium had no faulty workmanship, improper or defective materials,
8 improper construction, and/or material structural defects;

9 m) the Condominium had no water intrusion or water damage problems or risks
10 thereof;

11 n) the Condominium had no moisture problems in the structure or risks thereof;

12 o) the Condominium had no other material defects affecting the buildings;

13 p) the monthly assessments were sufficient to pay the operating, maintenance and
14 other common expenses and also to provide for adequate replacement reserves; and

15 q) the estimated remaining useful life and reserve fund allocations set forth in the
16 reserve study were adequate for planning for future reserve fund needs.

17 56.

18 Inasmuch as the knowledge and disclosure of the construction defects, code violations,
19 water intrusion, water damage and consequential damage described in paragraphs 18-21, above,
20 and elsewhere herein, were and are material to the sales, value, and use, repair and maintenance
21 of the condominiums, and the amounts of general and special assessments necessary to maintain,
22 repair and replace the same, MWI, Wishcamper and John Does 1-3 knew, or in the exercise of
23 reasonable care should have known, that the misrepresentations and failures to disclose herein
24 would be relied upon by the Association and condominium purchasers.

25 57.

26 At the time of the misrepresentations and failures to disclose, MWI, Wishcamper, and
27 John Does 1-3 knew or, in the exercise of reasonable care should have known that such
28 representations were false and the true facts are as they are alleged in paragraphs 18-21.

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58.

As a direct, natural, and proximate result of MWI's, Wishcamper, and John Does 1-3's negligent misrepresentations as described herein, Plaintiff has been damaged as set forth in paragraph 33.

FOURTH CLAIM FOR RELIEF
(Breach of Fiduciary Duties by Wishcamper and John Does 1-3)

59.

Plaintiff realleges paragraphs 1-26, 27-38, 39-49, and 50-58 and incorporates them by reference herein.

60.

ORS 100.417(1) subjects the Association's directors and officers to the standards of care set forth in ORS 65.357, 65.361, 65.367, 65.369 and 65.377.

61.

Before the turnover from Developer control of the Association to the Owners ("turnover"), Wishcamper and John Does 1-3 were directors and officers of the Association, exercised the power to appoint the directors and officers of the Association, and controlled all the Association's appointments, operations, expenditures, repairs, acts, and failures to act. Pursuant to ORS 65.357(1), Wishcamper and John Does 1-3 owed fiduciary duties of care and loyalty to the Association and its minority owner members to exercise said control in the best interests of the Association and the unit owners, including appointing directors and officers who would act in the best interests of the Association and the unit owners.

62.

Wishcamper and John Does 1-3 simultaneously maintained control of MWI and, as such, had a conflict of interest in transactions between the MWI and the Association. In their capacities as directors and officers of the Association, Wishcamper and John Does 1-3 had a statutory obligation to ensure fairness to the Association. Conflicts involving both MWI and the Association included, but were not limited to:

1 a) taking all reasonable steps to remedy problems in the Condominium, including
2 water intrusion, construction defects, deviations from the building plans, code violations,
3 violations of industry standards, and violations of manufacturers' installation instructions and/or
4 specifications, water damage, structural damage, and consequential damage – while marketing
5 and selling units;

6 b) disclosing all problems and areas of concern with the Condominium to all unit
7 owners and the owner officers and directors of the Association – while marketing and selling
8 units;

9 c) keeping, maintaining, and providing to the Association, its directors, officers, and
10 authorized agents, all records of activities and problems at the Association – while marketing and
11 selling units;

12 d) preparing with due care a budget for the Association to provide for the operation,
13 maintenance, and other common expenditures and to provide for adequate replacement costs and
14 sufficient reserves for the Condominium – while marketing and selling units;

15 e) establishing assessments at an adequate level to meet the operating, maintenance,
16 and other common expenditures, and to provide for adequate replacement costs and sufficient
17 reserves for the Association – while marketing and selling units;

18 f) causing a reserve study to be prepared and updating the reserve study on an
19 annual basis to determine the estimated remaining useful life and estimated cost to fund major
20 maintenance and repair of those common elements that would normally require major
21 maintenance, repair or replacement within the next thirty (30) years; and

22 g) ensuring that the Condominium was constructed properly and in accordance with
23 the building plans, state and local building codes, industry standards, and manufacturers'
24 installation instructions and/or specifications.

25 63.

26 Wishcamper and John Does 1-3 breached their fiduciary duties of care and loyalty to the
27 Association and the Owners by exercising control of the Association for their own interests by:
28

1 a) failing to disclose to the Association and its unit owners the construction defects
2 listed herein by preventing their discovery thereof, and by failure to warn them thereof;

3 b) failing to cause a proper investigation to be made and reported regarding the need
4 for repairs of damage to Condominium, as well as the need for protective measures to prevent
5 future damage thereto, and failing to cause such needed repairs and protective measures to be
6 achieved;

7 c) causing the Association to pay for repairs of damage to the Condominium
8 resulting from water intrusion or dry rot that should have been paid for by MWI;

9 d) failing to verify that all repairs and protective measures were done in a
10 workmanlike manner;

11 e) failing to prepare with due care the budget for the Association as to the operating,
12 maintenance, reserves and other expenses of the Association;

13 f) failing to establish assessments at an adequate level to meet the operating,
14 maintenance, and other common expenditures, and by failing to provide adequate replacement
15 costs and sufficient reserves for the Association; and

16 g) failing to prepare or caused to be prepared or update on an annual basis a reserve
17 study to determine the estimated remaining useful life and estimated cost to fund major
18 maintenance and repair of those common elements that would normally require major
19 maintenance, repair or replacement within the next thirty (30) years.

20 64.

21 As a result of such conduct, the Association is responsible for arranging for the repair and
22 replacement of the building envelope and other elements of the Condominium and to raising, by
23 assessment or otherwise, the funds to complete the repairs and reconstruction.

24 65.

25 Each breach alleged above resulted in a savings of cost and/or increased net cash received
26 at closing to Wishcamper, John Does 1-3, or MWI. To the extent that amount increased at the
27 expense of the Association, the savings to Wishcamper, John Does 1-3, or MWI are also a
28 distribution from the Association to one of its members. Wishcamper and John Does 1-3 are

1 personally liable for the distributions under ORS 65.367. As a direct and proximate result of the
2 breaches of fiduciary duties to the Association and Owners, the Condominium suffered property
3 damage as described in paragraph 18-21 and Plaintiff has been damaged as set forth in paragraph
4 33, above.

5 66.

6 Plaintiff is entitled to recover its reasonable attorney fees under the Oregon
7 Condominium Act, ORS 100.470.

8
9 **FIFTH CLAIM FOR RELIEF**

10 **(Violations of the Oregon Condominium Act by MWI, Wishcamper, and John Does 1-3)**

11 67.

12 Plaintiff realleges paragraphs 1-26, 27-38, 39-49, 50-58, and 59-66 and incorporates them
13 by reference herein.

14 68.

15 In all of the conduct of MWI, Wishcamper, and John Does 1-3 described in this Fifth
16 Claim, MWI, Wishcamper, and John Does 1-3 acted in concert with other defendants and with
17 the same knowledge, designs and purposes that one another had, but not as a partnership or joint
18 venture.

19 a) In all of MWI's conduct described in this Fifth Claim, MWI acted as Declarant.
20 As Declarant, MWI prepared and submitted to the State of Oregon Real Estate Agency for
21 approval all of the Association's governing documents, statutorily required disclosures and draft
22 unit sales agreements.

23 b) In all of the conduct of MWI, Wishcamper, and John Does 1-3 described in this
24 Fifth Claim, MWI, Wishcamper, and John Does 1-3 acted as directors, officers, and real estate
25 managers for the Association, and seller's agent in the sales of units at the Condominium.

26 c) In the conduct of MWI, Wishcamper, and John Does 1-3 described in this Fifth
27 Claim, each acted in concert with the other pursuant to a common design, with knowledge that
28 their conduct therein constituted a breach of each other's statutory and common law duties; each

1 gave substantial assistance and encouragement to each other therein; and the conduct of each was
2 of substantial assistance to each other in accomplishing the results described in this Fifth Claim,
3 while the conduct of each, separately considered, was a breach of statutory and common law
4 duty to the Association and the unit owners.

5 69.

6 MWI and/or agents acting on its behalf made written misrepresentations as more
7 specifically alleged hereafter.

8 70.

9 ORS 100.770 prohibits developers or their agents from using any misrepresentation,
10 omission, or other fraudulent means in connection with the sale of any condominium unit; or to
11 make any untrue statement of material fact or fail to state a material fact necessary to make other
12 statements not misleading; or to engage in any conduct that would operate as a fraud or
13 deception. ORS 100.780 voids any condition, stipulation, or provision in a unit sales contract or
14 lease or other legal document that binds any purchaser to waive any legal rights the purchaser
15 may have against a developer.

16 71.

17 Plaintiff and the unit owners are within the class of persons intended to be protected by
18 these statutes, and the harms that have been caused to Plaintiff and the unit owners are the types
19 of harms intended to be protected against by these statutes.

20 72.

21 In the course of developing the property into the Condominium, MWI participated in the
22 adoption, issuance, and filing of the statutorily required Disclosure Statement with the Real
23 Estate Commissioner of the State of Oregon. A copy of the Disclosure Statement was distributed
24 to all unit owners when they purchased their units.

25 73.

26 In the Disclosure Statement, MWI represented that it had prepared, with due care, a
27 budget as to the operating, maintenance, and other common expenses and replacement reserves
28 of the Condominium. MWI also represented that it had prepared, with due care, a reserve study

1 detailing the expected useful life of the elements of the Condominium and the amount of reserve
2 funds needed to replace those elements.

3 74.

4 By not disclosing the problems with the Condominium buildings, MWI represented that:

5 a) the Condominium was built according to the city-approved plans and in
6 compliance with local and state building code standards, industry standards, and manufacturers'
7 installation instructions and/or specifications;

8 b) it had inspected the Condominium or had caused the Condominium to be
9 professionally inspected during and following its construction;

10 c) the Condominium's units and common elements were in good condition and had
11 been fully and properly maintained;

12 d) the Condominium had no faulty workmanship, improper or defective materials,
13 improper construction and/or material structural defects;

14 e) the Condominium had no water intrusion or water damage problems, or risks
15 thereof;

16 f) the Condominium had no moisture problems in the structure or risks thereof;

17 g) the Condominium had no other material defects affecting the buildings;

18 h) the budget and reserve study were accurate and adequate to fund the Association's
19 operating, maintenance and other expenditures, to determine the estimated useful life of the
20 common elements of the Condominium, and to provide for adequate replacement costs and
21 sufficient reserves for the Condominium;

22 i) the monthly assessments were sufficient to pay the operating, maintenance, and
23 other common expenses and also to provide for adequate replacement reserves;

24 j) the Condominium had no moisture problems in the structure; and

25 k) any problems or defects with the Condominium had been repaired.

26 75.

27 Furthermore, in the course of marketing the units, MWI, Wishcamper, John Does 1-3
28 and/or their agents repeatedly and expressly told or implied to potential purchasers that:

- 1 a) the condominiums were quality homes;
- 2 b) living in the community was affordable;
- 3 c) The condominiums were extensively renovated;
- 4 d) the extensive renovations would preserve the long-term value of the condominium
- 5 and would minimize maintenance costs;
- 6 e) the condominiums did not have the hassles of maintenance and upkeep;
- 7 f) the condominiums were of good quality, convenient and affordable;
- 8 g) the siding was all-new;
- 9 h) the condominiums were for quality living and an exceptional value;
- 10 i) the roofing was new and would last 40 years;
- 11 j) the Condominium was built and/or repaired in compliance with the city-approved
- 12 building plans, local and state building code standards, industry standards, and manufacturers'
- 13 installation instructions and/or specifications;
- 14 k) it had inspected the Condominium or had caused the Condominium to be
- 15 professionally inspected during and following its construction for quality and compliance with
- 16 the city-approved building plans, local and state building code standards, industry standards, and
- 17 manufacturers' installation instructions and/or specifications;
- 18 l) the Condominium's units and common elements were in good condition and had
- 19 been properly and fully maintained;
- 20 m) the Condominium had no faulty workmanship, improper or defective materials,
- 21 improper construction and/or material structural defects;
- 22 n) the Condominium had no water intrusion or water damage problems, or risks
- 23 thereof;
- 24 o) the Condominium had no moisture problems in the structure or risks thereof;
- 25 p) the Condominium had no other material defects affecting the buildings;
- 26 q) the budget and reserve study were accurate and adequate to fund the Association's
- 27 operating, maintenance, and other expenditures, to determine the estimated useful life of the
- 28

1 common elements of the Condominium and to provide for adequate replacement costs and
2 sufficient reserves for the Condominium; and

3 r) the monthly assessments were sufficient to pay the operating, maintenance and
4 other common expenses and also to provide for adequate replacement reserves.

5 76.

6 Likewise, MWI, Wishcamper, and John Does 1-3 failed to disclose and/or concealed the
7 water intrusion; water damage; structural damage; construction defects; consequential damage;
8 evidence of water intrusion problems and consequential damage; actual material defects and
9 conditions, risks and material non-conformities and inaccuracies or possibilities thereof; and
10 inaccuracy and insufficiency of the budget, reserve study, and level of assessments, as all set
11 forth, above, and elsewhere herein, to the unit owners and the Association.

12 77.

13 Each of the representations in the Disclosure Statement and to the unit owners, the
14 failures to disclose, and the concealment made by MWI, Wishcamper, and John Does 1-3 and/or
15 their agents was of material facts and was false and misleading, in that belief in them and
16 ignorance of the true facts and conditions naturally tended to influence:

17 a) the purchasers of the units to purchase them for the amounts paid;

18 b) the Association to delay making investigations of the true facts and making
19 arrangements for needed maintenance and repairs and preventive measures; and

20 c) the Association to delay recognition of the need for corrected budgets,
21 projections, estimates of useful life and increased assessments and reserves.

22 78.

23 The conduct of MWI, Wishcamper, and John Does 1-3 and/or its agents, as described
24 above, constituted violations of ORS 100.770 by:

25 a) the issuance of documents, printed matter, literature, public reports and
26 advertisements containing untrue statements of material fact and failure to state material facts
27 necessary in order to make their other statements not misleading; and
28

1 **SIXTH CLAIM FOR RELIEF**

2 **(Breach of Contract by MWI)**

3 85.

4 Plaintiff realleges paragraphs 1-26, 27-38, 39-49, 50-58, 59-66, and 67-84 and
5 incorporates them by reference herein.

6 86.

7 The Condominium units were sold by MWI to the unit owners pursuant to unit sales
8 agreements.

9 87.

10 MWI materially breached the terms of the unit sales agreements by failing to provide the
11 unit owners with defect free and habitable units, and by refusing and/or failing to repair or cause
12 to be repaired all defects at the condominium, including defect in or to components of the units
13 and common elements as set forth in paragraphs 18-21, and elsewhere herein and all damage
14 resulting from these defects.

15 88.

16 Plaintiff Association and the unit owners have performed all of their obligations required
17 under the unit sales agreements and disclosure statement, and all conditions precedent to MWI's
18 obligations have been performed or have occurred.

19 89.

20 As a direct, natural and proximate result of MWI's breach of contract, Plaintiff has been
21 damaged as set forth in paragraph 33, above. All such damages were reasonably foreseeable at
22 the time of the sales of the units and the making of the contracts.

23 90.

24 Pursuant to the unit sales agreements, Plaintiff is entitled to its reasonable attorney fees
25 incurred in protecting and defending its rights under the contract.

26 \\\

27 \\\

28 \\\

1 **SEVENTH CLAIM FOR RELIEF**

2 **(Nuisance by MWI)**

3 91.

4 Plaintiff realleges paragraphs 1-26, 27-38, 39-49, 50-58, 59-66, 67-84, and 85-90 and
5 incorporates them by reference herein.

6 92.

7 The continued water intrusion, water damage, construction defects, and consequential
8 damage at the Condominium, which was and is being caused by MWI, has and continued to
9 substantially and unreasonably interfere with Plaintiff's and/or the individual unit owners; use
10 and enjoyment of the common elements and units and constitutes a private nuisance.

11 93.

12 As the direct and proximate result of such nuisance, Plaintiff and the individual unit
13 owners have been damaged as set forth in paragraph 33, above.

14
15
16 WHEREFORE, Plaintiff prays for a judgment as follows:

17 1. On Plaintiff's First Claim for Relief, Count One against MWI, Wishcamper, and
18 John Does 1-3, damages as set forth in paragraph 33, above;

19 2. On Plaintiff's First Claim for Relief, Count Two against MWI, damages as set
20 forth in paragraph 33, above;

21 4. On Plaintiff's Second Claim for Relief, Count One against Contractor Group,
22 damages as set forth in paragraph 33, above;

23 5. On Plaintiff's Second Claim for Relief, Count Two against Contractor Group,
24 damages as set forth in paragraph 33, above;

25 6. On Plaintiff's Third Claim for Relief against MWI, Wishcamper, and John Does
26 1-3, damages as set forth in paragraph 33, above;

27 7. On Plaintiff's Fourth Claim for Relief against Wishcamper and John Does 1-3,
28 damages as set forth in paragraph 33, above, and Plaintiff's reasonable attorney fees;

1 8. On Plaintiff's Fifth Claim for Relief against MWI, Wishcamper, and John Does 1-
2 3, damages as set forth in paragraph 33, above, and Plaintiff's reasonable attorney fees;

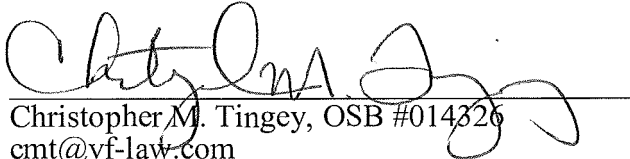
3 9. On Plaintiff's Sixth Claim for Relief against MWI, damages as set forth in
4 paragraph 33, above, and Plaintiff's reasonable attorney fees;

5 10 On Plaintiff's Seventh Claim for Relief against MWI, damages as set forth in
6 paragraph 33, above;

7 14. For Plaintiff's costs and disbursements incurred herein; and

8 15. Such other relief as the Court deems just and equitable.

9
10 DATED this 3 day of September, 2015. **VIAL FOTHERINGHAM LLP**

11 

12 Christopher M. Tingey, OSB #014326

13 cmt@vf-law.com

14 Ryan D Harris, OSB# 083569

15 rdh@vf-law.com

16 *Of Attorneys for Plaintiff*