

respond to a notice of claim, the construction professional shall be subject to the treble damages provision of section 6-1-113(2)(a)(III), C.R.S.; except that a construction professional shall be subject to the treble damages provision only if the claimant otherwise prevails on the claim that a violation of the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S., has occurred.

(3) Notwithstanding any other provision of law, the aggregate amount of treble damages awarded in an action under section 6-1-113(2)(a)(III), C.R.S., and attorney fees awarded to a claimant under section 6-1-113(2)(b), C.R.S., shall not exceed two hundred fifty thousand dollars in any action against a construction professional.

(4) (a) In an action asserting personal injury or bodily injury as a result of a construction defect in which damages for noneconomic loss or injury or derivative noneconomic loss or injury may be awarded, such damages shall not exceed the sum of two hundred fifty thousand dollars. As used in this subsection (4), "noneconomic loss or injury" has the same meaning as set forth in section 13-21-102.5(2)(a).

(b) The limitations on noneconomic damages set forth in this subsection (4) shall be adjusted for inflation as of July 1, 2003, and as of July 1 of each year thereafter until and including July 1, 2008. The adjustment made pursuant to this paragraph (b) shall be rounded upward or downward to the nearest ten dollar increment.

(c) As used in paragraph (b) of this subsection (4), "inflation" means the annual percentage change in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Boulder, all items, all urban consumers, or its successor index.

(d) The secretary of state shall certify the adjusted limitation on damages within fourteen days after the appropriate information is available, and such adjusted limitation on damages shall be the limitation applicable to all claims for relief that accrue on or after July 1, 2003.

(5) Claims for personal injury or bodily injury as a result of a construction defect shall not be subject to the treble damages provisions of the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S.

(6) In any case in which the court determines that the issue of a violation of the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S., will be submitted to a jury, the court shall not disclose nor allow disclosure to the jury of an offer of settlement or offer to remedy made under section 13-20-803.5 that was not accepted by the claimant.

54. Parts of the above-referenced CDARA provisions are unconstitutional, illegal and unenforceable under the U.S. and Colorado Constitutions because they: (a) deny Equal Protection under the law to similarly situated persons and constitute unlawful Special Legislation, (b) deny Due Process of Law, (c) are derived from legislation improperly comprised

of more than one subject, and/or (d) constitute unlawful retrospective legislation with retroactive effect. Alternatively, the portions of CDARA should be construed in a fashion so as to render them Constitutional.

55. Without limitation, and in the event the Court finds that CDARA applies to the Association's claims, this Court should find and declare that:

- a. H.B. 03-1161, codified as CDARA, is comprised improperly of more than one subject in violation of law and, therefore, is ineffective and unenforceable.
- b. CDARA irrationally treats people who suffer damage to their property due to construction defects differently from people who suffer injury to their property due to other kinds of wrongful or otherwise tortious acts and omissions and, as such, the damages limitations provided for by C.R.S. § 13-20-806 and embedded in C.R.S. § 13-20-802.5(2) and C.R.S. § 13-20-802.5(4) deny Equal Protection, constitute unlawful Special Legislation, and are void and unenforceable.
- c. Application of CDARA's damages limitations provided for by C.R.S. § 13-20-804, C.R.S. § 13-20-806 and embedded in C.R.S. § 13-20-802.5(2) and C.R.S. § 13-20-802.5(4) to causes of action that accrue on claims for relief before CDARA's effective date is not provided for by CDARA; or, alternatively, that to the extent CDARA is interpreted to apply to causes of action that accrue on claims for relief before CDARA's effective date, such retrospective, retroactive application renders these parts of CDARA void and ineffective to limit the damages available on such claims for relief.
- d. Application of CDARA's damages limitations provided for by C.R.S. § 13-20-804, C.R.S. § 13-20-806 and embedded in C.R.S. § 13-20-802.5(2) and C.R.S. § 13-20-802.5(4) to claims for annoyance, aggravation, discomfort, and inconvenience constitute limitations to recoverable "personal injury" damages subject only to any Constitutionally valid limitations provided for by CDARA and/or C.R.S. § 13-21-102.5.
- e. Application of CDARA's damages limitations provided for by C.R.S. § 13-20-804, C.R.S. § 13-20-806 and embedded in C.R.S. § 13-20-802.5(2) and C.R.S. § 13-20-802.5(4) so as to prohibit a punitive damage award against "construction professionals" irrationally treats "construction professionals" differently from other tortfeasors, and, as such, any prohibition against awarding punitive damages arguably arising from CDARA denies Equal Protection and is void and unenforceable.
- f. Application of CDARA's damages limitations provided for by C.R.S. § 13-20-806(3) so as to limit treble damage and attorney fee awards against "construction professionals" under Colorado's *Consumer Protection Act*, C.R.S. §§ 6-1-101, *et seq.*, treats "construction professionals" differently from

other persons who violate Colorado's *Consumer Protection Act*, and, as such, such limitation denies Equal Protection and is void and unenforceable.

- g. Exemption of personal injury and bodily injury claims resulting from construction defects from the treble damages provisions of Colorado's *Consumer Protection Act*, C.R.S. §§ 6-1-101, *et seq.*, treats persons liable for such claims differently from persons liable for personal injury and bodily injury claims not resulting from construction defects and who violate Colorado's *Consumer Protection Act*, and, as such, such limitation denies Equal Protection and is void and unenforceable.
- h. Termination of CDARA's inflationary adjustment of its noneconomic damages limitations provided for by C.R.S. § 13-20-806(4)(b) on July 1, 2008, irrationally treats "construction professionals" differently from other tortfeasors, and, as such, enforcement of this termination date denies Equal Protection and is void and unenforceable.

56. The Association represents and is comprised of persons actually adversely affected by and within the class of persons that are the subject of these statutory provisions. Defendants, or some of them, are "construction professionals" and/or otherwise persons seeking the benefits of CDARA's damages limitations and the other provisions described above.

57. Because a real and justiciable controversy exists as to whether all or part of CDARA is unconstitutional and otherwise illegal and unenforceable, a declaration of the parties' respective rights and obligations under CDARA with regard to the Association's pursuit of its claims and claimed damages as set forth elsewhere in this *Complaint* is dependent on the Court's answer to these questions and is proper.

WHEREFORE, the Association prays that this Court enter judgment declaring the matters set forth in Paragraph 55 above, and that the Court order and provide such other relief and declarations as are just and proper.

SECOND CLAIM FOR RELIEF
(Negligence Resulting in Property Damage – All Defendants)

58. The Association incorporates the above paragraphs herein.

59. Defendants, and each of them, owed a duty to the Association and/or its Member unit owners to cause the Project to be designed and constructed in a good and workmanlike manner, and to exercise reasonable care in their specifications, retention of contractors and employees, supervision, inspection, design, construction, installation of materials and quality control relating to the Project.

60. Defendants' duty of care included the duty to ensure that all design and construction was performed in accordance with industry standards, applicable building codes,

and/or applicable plans and specifications, or a greater duty of care if reasonably required under the circumstances.

61. Defendants' duty of care included the duty to ensure that all design and construction was performed in a good and workmanlike manner, suited for its reasonably anticipated uses, met appropriate standards of care, and that all repairs were done in a good and workmanlike manner.

62. Defendants breached these duties of care.

63. The negligence of Defendants in relation to the design and construction of the Project has damaged the Project, including its Common Elements, causing the Association resultant and consequential property and other damages in an amount to be proven at trial.

WHEREFORE, the Association prays below.

THIRD CLAIM FOR RELIEF

(Negligent Repair Resulting in Property Damage – All Defendants)

64. The Association incorporates the above paragraphs herein.

65. Defendants owed a duty to the Association to cause the Project, including its Common Elements, to be repaired in a non-negligent manner.

66. These Defendants breached their duty by failing to cause the Project, including its Common Elements, to be repaired in a non-negligent manner such that foreseeable damage would be prevented.

67. These Defendants' negligence has proximately caused damage to the Project, including its Common Elements, causing the Association resultant and consequential property and other damages in an amount to be proven at trial.

WHEREFORE, the Association prays below.

FOURTH CLAIM FOR RELIEF

**(Breach of Implied Warranty Resulting in Property Damage –
Eagle, Riverwalk and Edwards)**

68. The Association incorporates the above paragraphs herein.

69. Eagle, Riverwalk and/or Edwards impliedly warranted that the Project was built in a good and workmanlike manner, was fit for its reasonably intended use, and would comply with generally acceptable codes, standards and all applicable plans and specifications. These warranties were intended to benefit the Association both as a matter of fact and a matter of law.

70. Eagle, Riverwalk and/or Edwards breached their implied warranties.

71. To the extent Eagle, Riverwalk and/or Edwards should ever urge that the Association and/or its predecessors in interest ever waived, or that Eagle, Riverwalk and/or Edwards ever effectively disclaimed, the right to sue on the above-described warranties, such waiver or disclaimer is void as violative of public policy and/or was not made sufficiently conspicuous and clear so as to comply with C.R.S. § 6-1-105, and/or was not sufficiently particular, and/or such alleged disclaimer or waiver is unconscionable and/or constitutes a breach of Fieldstone and Riverwalk Associates' express duty of good faith.

72. Eagle, Riverwalk and/or Edwards' breach of their implied warranties has caused damages to the Association, including resultant and consequential damages, in an amount to be proven at trial.

WHEREFORE, the Association prays below.

FIFTH CLAIM FOR RELIEF

(Misrepresentation/Nondisclosure Resulting In Property Damage – All Defendants)

73. The Association incorporates the above paragraphs herein.

74. Defendants caused or permitted misrepresentations to be made to the Association and/or its Member unit owners (and/or their predecessors in interest) as more fully set forth above.

75. Alternatively, Defendants failed to disclose or caused the failure to disclose certain material facts as more fully set forth above, when Defendants had a duty to disclose these facts.

76. Defendants knowingly, intentionally, recklessly or negligently failed to disclose, caused the failure to disclose, or ratified the non-disclosure of information from the Association and/or its Member unit owners (and/or their predecessors in interest), including, without limitation, the information specifically described above, which information was material and which information Defendants were under a duty to disclose.

77. Defendants, or the persons whose acts and omissions they ratified, had a duty to cause the disclosure to the Association and/or its Member unit owners (and/or their predecessors in interest) of the true adverse material facts or information in an understandable manner.

78. Defendants failed to cause the disclosure of these adverse material facts or information to the Association and/or its Member unit owners (and/or their predecessors in interest) with the intent that the Association and/or its Member unit owners (and/or their predecessors in interest) rely on such information.

79. This reliance was a cause of the physical harm to the property of, or property beneficially belonging to, the Association, as well as economic loss.

80. Such conduct, to the extent it rises only to the level of negligence, constitutes negligence *per se* because it violates the provisions of C.R.S. §§ 12-61-801, *et seq.*

WHEREFORE, the Association prays below.

SIXTH CLAIM FOR RELIEF
(Colorado Consumer Protection Act Violations Resulting in Property Damage
– All Defendants)

81. The Association incorporates the above paragraphs herein.

82. Defendants made, caused to be made, or ratified the misrepresentations and nondisclosure of the material facts described above and incorporated herein by this reference and otherwise made misleading statements that induced the Association and its Member unit owners (and/or their predecessors in interest) to act or refrain from acting, making these representations or nondisclosures knowing them to be untrue or recklessly and willfully making them without regard to the consequences or intending to deceive, such misrepresentations and nondisclosures having the capacity or tendency to deceive.

83. Defendants made these misrepresentations and nondisclosures of material fact reasonably expecting that the Association and/or its Member unit owners (and/or their predecessors in interest) would act, or refrain from acting, in reliance upon the misrepresentations or nondisclosures.

84. The Association and/or its Member unit owners (and/or their predecessors in interest) reasonably relied upon these misrepresentations and nondisclosures to their detriment.

85. Upon information and belief, these representations were contained in (and nondisclosures were omitted from) brochures, verbal representations, conduct, signage, model homes, plans and/or contracts, all or some of which were widely distributed to the public and which were approved by Defendants.

86. These representations and/or concealments constitute violations of Colorado's *Consumer Protection Act*, which law prohibits Defendants, in the course of their business, from doing any of the following, among other things:

- a. misrepresenting that property would be suited for its intended use when they knew it was not (C.R.S. § 6-1-105(1)(e));
- b. misrepresenting that goods, services, or property are of a particular standard, quality, or grade if they know or should know that they are of another (C.R.S. § 6-1-105(1)(g));
- c. advertising goods, services, or property with intent not to sell them as advertised (C.R.S. § 6-1-105(1)(i));

- d. failing to disclose material information concerning property or services, if such failure to disclose such information was intended to induce another agree to a transaction (C.R.S. § 6-1-105(1)(u)); and,
 - e. failing to disclose material information regarding the scope and applicability of purported warranties applicable to the property (C.R.S. § 6-1-105(1)(r)).
87. Defendants are liable to the Association under the CCPA because:
- a. Defendants engaged in an unfair or deceptive trade practice as defined by the CCPA, as described above;
 - b. the challenged practice occurred in the course of these Defendants' business, vocation, or occupation;
 - c. the significant and widespread challenged practice significantly impacts the public as actual or potential consumers of Defendants' services and property in that a number of consumers were directly affected by the challenged practices, the consumers were not of the same level of sophistication as were Defendants and did not have comparable bargaining power, and such conduct by Defendants has and will in the future impact yet other consumers, since Defendants has developed and sold real estate in Eagle County and, on information and belief, continue to sell real estate in Eagle County and/or other Colorado counties;
 - d. Defendants' misrepresentations and/or nondisclosures also concerned violations of the applicable building code; because such building code was adopted to protect the public's property from property damage and premature deterioration, such misrepresentations and/or nondisclosures involve a matter of public interest and have a public impact as a matter of law;
 - e. the making of these representations and nondisclosures by Defendants was bad faith conduct because the conduct was fraudulent, willful, knowing, and/or intentional and such conduct falsely misled and caused injury to the Association;
 - f. the Association suffered injury in fact to a legally protected interest due to the challenged practices, which included the fact that many actual and potential purchasers of the Units and Common Elements Defendants built and sold in the Project were exposed to and impacted by the misrepresentations and nondisclosures (the challenged practices) through brochures, flyers, and other marketing efforts and conduct by or at the direction of Defendants, as well as the many Members of the Association who ultimately must bear the economic burden of the harm caused by the practice, and the Association itself suffered injury in fact to its legally protected interests; and,
 - g. significant damage to the Association's property and economic interests

resulted.

88. The Association is entitled to, and hereby demands as additional damages, three times the amount of its actual damages, plus costs and attorney fees, pursuant to C.R.S. § 6-1-113.

WHEREFORE, the Association prays below.

SEVENTH CLAIM FOR RELIEF
(Negligence (Violation of CCIOA) – All Defendants)

89. The Association incorporates the above paragraphs herein.

90. Defendants, as Declarant and those who controlled the Declarant, owed the following duties to the Association:

- a. to exercise control of the development and improvement of the property that was to become the Project;
- b. to develop and improve the Project in accordance with applicable standards of care and the Uniform Building Code, as well as applicable municipal and county building codes and regulations, the plans, and the specifications;
- c. to use reasonable care in the hiring of contractors, including design professionals;
- d. to use reasonable care in the supervision of development, design, and construction of the Project, including its Common Elements;
- e. to use reasonable care in the exercise of powers conferred by the Declaration; and
- f. to use reasonable care in the exercise of any other power necessary and proper for the governance and operation of the Association during construction of the Project.

91. Defendants breached these duties of care in a willful and wanton manner by their negligent failure to exercise control of the development and improvement of the property that was to become the Project; their negligent failure to develop and improve the Project in accordance with applicable standards of care and the Uniform Building Code, as well as applicable municipal and county building codes and regulations, and the plans and specifications; their negligent failure to use reasonable care in the hiring of contractors, including design professionals; their negligent failure to supervise the development, design or construction and repair of the Project which they knew or should have known would not meet minimally acceptable construction standards, their own development plans, and applicable municipal and county building codes and regulations and was not constructed in accordance with the recognized standards of the industry; their negligent failure to exercise the powers conferred by the Declaration; and their negligent failure to fully and reasonably communicate with the

Association after construction regarding the deficiencies and inadequacies described above so as to allow the Association to act upon that information in a timely manner, including the decision to commence litigation.

92. Defendants' conduct was negligently or purposefully committed, and Defendants should have realized that such conduct was dangerous, and was done heedlessly or recklessly without regard for the consequences and without regard for the rights and safety of others, including the Association.

93. Defendants' negligence in relation to the supervision of the design and construction of the Project has damaged the Association in an amount to be proven at trial.

94. The willful and wanton breach of Defendants' duty of care caused the Association to incur damages in an amount to be proven at trial.

WHEREFORE, the Association prays below.

EIGHTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty – Christner, Williams and Nacht)

95. The Association incorporates the foregoing paragraphs by this reference.

96. From development of the Project, through construction, and until turnover or later, Defendants Christner, Williams and Nacht, on information and belief, served as members of the Association's Board of Directors.

97. During some or all of such times, Defendant Christner, Williams and Nacht served as Board members appointed by the Declarant.

98. C.R.S. § 38-33.3-303(2)(a) provides that if appointed by the Declarant, members of an association board are required to exercise their duties with the care required of fiduciaries of the Unit owners.

99. As Declarant-appointed Board members, Christner, Williams and Nacht were each a fiduciary of the Unit owners who constitute the membership of the Association.

100. Defendant Christner, Williams and Nacht breached their fiduciary duties by their failure to exercise control of the development and improvement of the property that was to become the Project, their failure to develop and improve the Project in accordance with applicable standards of care and the Uniform Building Code, as well as applicable municipal and county building codes and regulations, and the plans and specifications; their failure to use reasonable care in the hiring of contractors, including design professionals; their negligent failure to supervise the development, design or construction and repair of the Units and Common Elements which they knew or should have known would not meet minimally acceptable construction standards, the development plans, and applicable municipal and county building codes and regulations and were not constructed in accordance with the recognized standards of

the industry; their failure to exercise the powers conferred by the Declaration; and their failure to fully and reasonably communicate with the Association after construction regarding the deficiencies and inadequacies described above so as to allow the Association to act upon that information in a timely manner, including the decision to commence litigation

101. These breaches of fiduciary duties have damaged the Association in an amount to be proven at trial.

WHEREFORE, the Association prays below.

PRAYERS FOR RELIEF

WHEREFORE, the Association requests that judgment enter against all Defendants on its behalf and as applicable to the separate claims made against all Defendants, and that such judgment enter jointly and severally where the Defendants have acted jointly or in concert:

1. For declaratory judgment on the matters set forth in paragraph 55 above, and such other relief and declarations as are just and proper;

2. For the Association's actual damages, costs of suit, fees of experts, including engineering and construction experts, attorney fees, interest as permitted by law from the date of occurrence to the date of entry of judgment, as well as post-judgment interest until paid;

3. For the cost of repairing the Project to a reasonably good condition, and to a better condition, if that is what was promised or represented by Defendants;

4. For the cost of the replacement of any defective construction elements, as well as the repair of those portions of the Project for which the Association has the legal responsibility to repair, and which were damaged by these defective construction elements;

5. For the costs and expenses incurred for storage charges and cleaning costs incurred as a result of such repairs, if any;

6. For the reasonable costs of rental or similar housing during the reasonable periods of repair, if any;

7. For loss of the use of the Project, as well as for all annoyance, discomfort, inconvenience, and aggravation arising from the injury to the Project and any required investigation and repair efforts;

8. For specific performance of the promises made by Defendants that remain unfulfilled, and for specific performance of the representations made by Defendants that were false; or, alternatively, for specific restitution and payment to the Association in the amount necessary for the Association to fund the cost of fulfilling such promises and/or effecting such representations.

9. For treble damages, costs and attorney fees pursuant to C.R.S. § 6-1-113, and for attorney fees and costs as provided for by any applicable statute, law or contract;

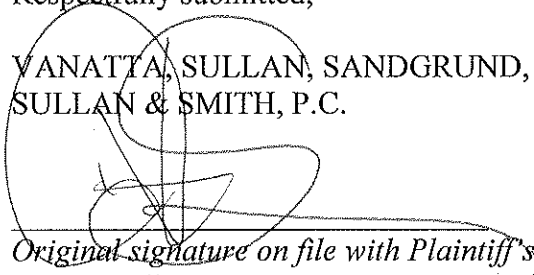
10. For the reasonable cost of lost revenue, lost income, business interruption and other related damages to all of the tenants, through assignment or otherwise; and,

11. For moratory damages.

**THE ASSOCIATION DEMANDS TRIAL BY A JURY OF
ALL ISSUES SO TRIABLE**

Respectfully submitted,

VANATTA, SULLAN, SANDGRUND,
SULLAN & SMITH, P.C.


Original signature on file with Plaintiff's counsel
Curt T. Sullan, Esq.

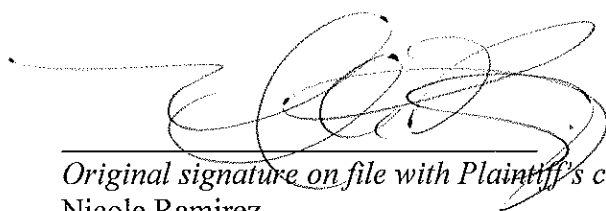
Plaintiff's Address:

The Riverwalk Emerald Building Association
c/o Ed McMillan
175 Main Street, Unit 203
Edwards, CO 81632

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2007, a true and correct copy of the foregoing *Complaint and Jury Demand* was mailed, postage prepaid, to the following:

Office of the Attorney General of Colorado
1525 Sherman Street, Fifth Floor
DENVER CO 80203


Original signature on file with Plaintiff's counsel
Nicole Ramirez