

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WINTHROP HOUSE ASSOCIATION, :
INC. :
 :
v. : CIV. NO. 3:00CV328 (AHN)
 :
BROOKSIDE ELM ASSOCIATES :
LIMITED PARTNERSHIP, ET AL :
 :
 :
OPINION

This matter was referred for decision on the following
question:

Did the Declarant properly exclude the implied
warranties and/or express warranties?

I. PROCEDURAL BACKGROUND

On February 18, 2000, Winthrop House Association, Inc. (the
"Association") filed an action against Brookside Elm Associates
Limited Partnership; Collins Properties, LLC; Collins Enterprises,
LLC; and Arthur Collins, II (referred to collectively as "the
defendants"),¹ arising from the conversion of a six story apartment

¹Defendant Preiss Breismeister Architects, P.C. notified the
Court, by letter dated August 7, 2001, that it did not intend to file
a brief on this question, stating in part that it believed that this
question did "not concern the conduct of Preiss Breismeister." [Doc.
#31, under seal]. Preiss Breismeister reserved the right to file a
reply brief "in the event that plaintiff or any other party does in
fact allege liability on the part of Preiss Breismeister with respect
to the issues presented." Id. No reply brief was filed by Preiss
Breismeister.

building located in Greenwich, Connecticut, into a condominium complex. Plaintiff alleges construction defects and/or code violations and seeks damages. The parties agreed to submit the matter to mediation, and on May 20 and 21, 2001, the parties met with a mediator, Attorney Robert Rubin, for the purposes of touring Winthrop House and mediating the issues raised by the Association in its Amended Complaint.

During the course of the mediation it became apparent to the mediator and the parties that advice on issues relating to the exclusion of various alleged warranties would be instructive to move mediation forward. This matter was referred for an "advisory opinion" on June 27, 2001. This is not an advisory opinion. Church of Scientology of California v. United States, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."); Barr v. Matteo, 355 U.S. 171, 172 (1957) ("[A]n advisory opinion cannot be extracted from a federal court by agreement of the parties."). Rather, the parties have submitted this question of law for decision with the belief that the decision may facilitate the mediation of their dispute.

The parties filed their position papers under seal on August 7, 2001. [Doc. ##33, 34, 35, 36]. Reply briefs were filed on September

18, 2001. [Doc. ##37, 38]. Oral argument was held on February 6, 2003. Leave to file supplemental motions was granted on March 12, 2003 [Doc. #46]. The parties submitted their supplemental briefing on March 28 and April 17, 2003. [Doc. ##49, 50].

II. FACTUAL BACKGROUND²

The Winthrop House opened in 1938 as an apartment building at 25 West Elm Street in downtown Greenwich, Connecticut. The building originally housed fifty-three apartments on six floors.

In 1993, Brookside Elm purchased Winthrop House, intending to convert it to a condominium and perform certain renovations. Renovations began on the building in 1994, with most work completed by 1997. Winthrop House now consists of forty-eight individual residential units, as several apartments were combined to make larger units during the renovations.

Brookside Elm is the Declarant. Collins Properties was the Management Company for the condominium. Collins Enterprises was the original construction manager for the Winthrop House renovations. However, when the scope of planned work increased, Collins Enterprises turned over specific responsibilities as general contractor to Wernert Associates, Inc.

²The following facts are provided as background and are undisputed for purposes of this opinion.

Plaintiff's Master Punch List

Exhibit BB to plaintiff's Amended Complaint, entitled "Master Punch List Memorandum," dated April 17, 2000, lists over thirty-nine categories of alleged defects or problems with the following systems or components including, but not limited to:

The exterior facade including lintels, balconies, windows, window caulking and trim, brickwork and the chimney; roof; HVAC system; elevator; plumbing and electrical; water damage; code violations & safety omissions; fire doors, fire extinguishers, fire pump system/sprinkler; carbon monoxide gas systems; emergency phone; PTAC pipes and valves; water tanks; pump systems; drainage systems; and dryer vents.

[Compl. Ex. BB]. The Master Punch List also includes actual Association costs to date and estimated Association costs to repair for each category. The Master Punch List was prepared by counsel to summarize its experts' findings of alleged defects to the property. Actual repair cost to the Association as of April 2000 was \$153,169. The Association's estimated cost to repair 8 of the 39 categories totaled \$955,932. The Association provided no estimate to repair the other 31 categories.³

³For purposes of this ruling, the Court has not considered the expert reports plaintiff appended to its complaint and has not considered the alleged deficiencies. The Court notes that the Master Punch List was created in April 2000, nearly four and a half years after the first units were sold.

Town of Greenwich Permits/Code Compliance

The Town of Greenwich Building Department issued more than 54 permits for the repair and renovation work. Permits were pulled and certificates of occupancy were issued on a unit-by-unit basis, including buyer generated customizing changes, as well as for common areas, exteriors, and site improvements. The Building Department has not cited the defendants for any unremediated code violations and has issued certificates of occupancy. [Doc. #34 at 4-5; Def. Ex. E].

The boilers and the elevators were inspected and passed by the State of Connecticut authorities. [Def. Ex. B]. The Deputy Fire Marshal confirmed compliance with the Connecticut Fire Safety Code. [Def. Ex. C].

The Public Offering Statement

Pursuant to the Connecticut Common Interest Ownership Act, Conn. Gen. Stat. §§47-200 et seq. ("CIOA"), Brookside Elm, as Declarant, prepared a Public Offering Statement (the "POS") in April 1995 for the purpose of submitting Winthrop House as a condominium. Each prospective purchaser of a unit was provided with a copy of the POS. The following provisions were designated by the parties as relevant to the present matter.

Paragraph 2(c) of the POS provides:

(c) Rehabilitation Work: The buildings are currently being operated as residential

apartment buildings. The Declarant will undertake repair and rehabilitation work with respect to all Units except those whose present tenants-in-possession have a statutory right to remain in their Units as tenants and any Unit purchased by a present tenant-in-possession who requests that repair and rehabilitation work not be done in his Unit. Such repair and rehabilitation work may include the renovation of kitchens, the upgrading of electrical systems, the upgrading of some plumbing systems, and the painting of Units. It is also possible that fireplaces will be added to one or more Units. The Declarant has also begun to have repaired and rehabilitated portions of the Common Elements including the painting of hallways, the reconstruction of the front entrance, the repainting and recaulking of windows, and the reconstruction of the building parapet. **All repair and rehabilitation work will be done at the sole discretion of the Declarant. The Declarant makes no representation as to the specific repair and rehabilitation work to be done or as to the date of completion of any such work.**

Rehabilitation work on common areas has commenced. Individual Units will be repaired and rehabilitated as they are vacated by current tenants. The Declarant discloses that there is no schedule of such rehabilitation.

[Def. Ex. A, POS ¶2(c) (emphasis added)].

Paragraphs 10A.1, 10A.2, and 10A.3 describe the creation of express warranties of quality, implied warranties of quality, and exclusion or modification of implied warranties of quality pursuant to CIOA, Conn. Gen. Stat. §§47-274, 47-275, and 47-276, respectively.

[Def. Ex. A, POS ¶¶10A.1, 10A.2 and 10A.3].

Paragraph 10A.3 of the POS states,

Section 47-276. Exclusion or Modification of Implied Warranties of Quality.

(a) Except as limited by subsection (b) of this section with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality: (1) May be excluded or modified by agreement of the parties; and (2) are excluded by expression of disclaimer, such as "as is", "with all faults", or other language that in common understanding calls the purchaser's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant may disclaim liability in an instrument signed by the purchaser for a specified defect or class of defects or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

Similarly, paragraph 10B creates express and implied warranties under the New Homes Warranties Act (NHWA), Conn. Gen. Stat. §§47-116, "Definitions"; 47-117, "Express Warranties"; 47-118, "Implied Warranties"; 47-119, "Vendor Not to Evade by Intermediate Transfer"; and 47-120, "Warranties Created by Chapter 827 Additional to Any Other Warranties."

Section 47-118 of the NHWA states,

Implied warranties

(a) In every sale of an improvement by a vendor to a purchaser, except as provided in subsection (b) of this section or excluded or modified pursuant to subsection (d), warranties

are implied that the improvement is: (1) Free from faulty materials; (2) constructed according to sound engineering standards; (3) constructed in a workman-like manner, and (4) fit for habitation, at the time of the delivery of the deed to a completed improvement, or at the time of completion of an improvement not completed when the deed is delivered.

(b) The implied warranties of subsection (a) of this section shall not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed.

(c) If the purchaser, expressly or by implication, makes known to the vendor the particular purpose for which the improvement is required, and it appears that the purchaser relies on the vendor's skill and judgment, there is an implied warranty that the improvement is reasonably fit for the purpose.

(d) Neither words in the contract of sale, nor the deed, nor merger of the contract of sale into the deed is effective to exclude or modify any implied warranty; provided, if the contract of sale pertains to an improvement then completed, an implied warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it.

(e) The implied warranties created in this section shall terminate: (1) In the case of an improvement completed at the time of the delivery of the deed to the purchaser, one year after the delivery or one year after the taking of possession by the purchaser, whichever occurs first; and (2) in the case of an improvement not completed at the time of delivery of the deed to the purchaser, one year after the date of the completion or one year

after taking of possession by the purchaser, whichever occurs first.

Paragraph 10B also sets forth the limitations on warranties which are part of each purchase agreement. The Limitations of Warranties section is set forth in large, upper case type as follows:

LIMITATIONS ON WARRANTIES

PURSUANT TO SECTIONS 47-276(b) AND 47-118(d) OF THE CONNECTICUT GENERAL STATUTES, THE DECLARANT WILL INCLUDE IN ITS PURCHASE AGREEMENT THE FOLLOWING PARAGRAPHS WHICH PROVIDE THAT CERTAIN OF THE WARRANTIES DESCRIBED ABOVE ARE EXCLUDED:

1. THE IMPLIED WARRANTIES OF SECTIONS 47-275(b) AND 47-118(A) THAT THE IMPROVEMENTS ARE: (1) FREE FROM FAULTY AND/OR DEFECTIVE MATERIALS, (2) CONSTRUCTED IN ACCORDANCE WITH APPLICABLE LAW AND ACCORDING TO SOUND ENGINEERING AND CONSTRUCTION STANDARDS, (3) CONSTRUCTED IN A WORKMANLIKE MANNER, AND (4) FIT FOR HABITATION ARE EXCLUDED TO THE EXTENT THE IMPROVEMENTS ARE COMPLETED AS OF THE DATE OF THE PURCHASE AGREEMENT. SPECIFICALLY, THE DECLARANT MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER WITH RESPECT TO ANY STRUCTURAL COMPONENT OF THE BUILDING; THE EXTERIOR FACADE OF THE BUILDING; THE ROOF; THE BOILERS OR ANY OTHER PART OF THE HEATING SYSTEM; THE ELECTRICAL SYSTEM, THE HOT WATER SYSTEM, OR THE PLUMBING SYSTEM OR ANY PART OF ANY SUCH SYSTEMS; OR WITH RESPECT TO ANY KITCHEN CABINETS, CARPETING, TILING, WALLPAPER, PAINT OR OTHER SURFACE FINISHINGS OF ANY KIND, WOODWORK, BATHROOM FIXTURES, OR UTILITY FIXTURES OR OUTLETS.

2. THE DECLARANT MAKES NO WARRANTIES AS TO THE CONDITION OF ANY HOT WATER HEATER, AIR CONDITIONER, KITCHEN EQUIPMENT OR APPLIANCES OR OTHER ITEMS CONSIDERED CONSUMER PRODUCTS UNDER THE MAGNUSEN-MOSS FEDERAL TRADE COMMISSION ACT. THE DECLARANT WILL DELIVER TO BUYER ANY

MANUFACTURER'S WARRANTIES THAT ARE BOTH APPLICABLE TO SUCH EQUIPMENT OR APPLIANCES AND FOR THE SOLE BENEFIT OF THE CONSUMER PURCHASER. IMPROVEMENTS AND APPLIANCES INSTALLED BY DECLARANT AT A PURCHASER'S REQUEST AND EXPENSE, IF ANY, SHALL BE COVERED BY THE MANUFACTURER'S OR CONTRACTOR'S WARRANTY, IF ANY.

3. THE DECLARANT MAKES NO REPRESENTATIONS OR WARRANTIES AS TO THE CONDITION OR HEALTH OF ANY SHRUBS, TREES OR PLANTINGS LOCATED ON THE AREAS SURROUNDING THE BUILDINGS. THE DECLARANT WILL DELIVER TO THE ASSOCIATION ANY NURSERY'S WARRANTIES THAT ARE BOTH APPLICABLE TO SUCH VEGETATION AND FOR THE SOLE BENEFIT OF THE CONDOMINIUM ASSOCIATION.

4. THE PURCHASER ACKNOWLEDGES BY SIGNING THIS PURCHASE AGREEMENT THAT THE PURCHASER AGREES TO AND UNDERSTANDS THE AGREED TO AS PART OF THE BASIS OF THE PURCHASER'S BARGAIN IN PURCHASING THE UNIT.

NO ADDITIONAL EXPRESS OR IMPLIED WARRANTIES, UNLESS REQUIRED BY LAW, ARE MADE BY THE DECLARANT.

[Def. Ex. A, POS ¶10B].

Paragraph 19(a) of the POS provides that:

(a) The Declarant plans to repair and rehabilitate most of the units. **However, the Declarant has reserved the right, in its sole discretion, to convey a Unit on an "as is" basis,** except for a legally required electrical upgrade, to purchasers bargaining for such a conveyance if (1) the present tenant in possession elects to purchase his Unit and requests such an arrangement, or (2) the present tenant in possession has a statutory right to remain in possession as a tenant.

[Def. Ex. A, POS ¶19(a), (emphasis added)].

Exhibit G to the POS consists of a document entitled "Architect/Engineering Survey," dated October 1994, prepared by Preiss Breismeister P.C. Architects. Exhibit G describes the then-current condition of 38 various building components and their replacement costs. Many of the building components were described as being in poor condition, and the survey notes that, for many components, their condition varied. Preiss Breismeister opined the cost of replacement to be \$7,390,500. The Architects noted that the "report [was] based upon observations of the visible and apparent condition of the building and its major components on the date of inspection." They further warned that, "[t]here may be other hidden or partially hidden problems with the building structure and/or systems." [Def. Ex. A, POS-Ex.G].

Every prospective purchaser of a unit signed a document acknowledging that he or she reviewed and agreed to the terms of the POS. [Doc. #34 at 10].

The Limited Warranty Administration Program

Exhibit L to the Connecticut POS and the New York Supplement is entitled "Limited Warranty Administration Program for Winthrop House." The Administration Program consists of four Warranty Work Request Forms, to be submitted by the buyer of a unit to Brookside Elm at closing, 14 days after closing, 60 days after closing and 1

year after closing. The forms reiterate that the buyer, by signing, accepts the warranty terms described in the POS and Purchase Agreement.⁴ Each buyer was given the opportunity to list any items for which the buyer was requesting repair or completion. [POS Ex. L].

The New York Supplement

Pursuant to New York law, prospective purchasers residing in New York State were provided both the Connecticut POS and a New York Supplement (the "Supplement"), which together comprise the Offering Plan.⁵

⁴Each Warranty Work Request Form states,

Pursuant to the Warranty Program described in our Purchase Agreement and the Public Offering Statement, the terms of which (I) (We) hereby accept and agree to, (I) (We) request completion or repair of the following warranty items, without limiting our rights to submit subsequent requests under the Warranty Program.

[Def. Ex. L to POS].

⁵The cover page of the Supplement states in capital letters,

THIS IS A SUPPLEMENT TO AND IS ONLY TO BE USED IN CONJUNCTION WITH THE PUBLIC OFFERING STATEMENT FOR WINTHROP HOUSE, GREENWICH, CONNECTICUT. PURCHASERS WITH REGARD TO WHOM THIS OFFERING IS MADE IN OR FROM THE STATE OF NEW YORK MUST RECEIVE BOTH THE PUBLIC OFFERING STATEMENT AND THIS SUPPLEMENT.

[Def. Ex. D].

Part I(A) entitled "Special Risks," paragraph 4, states,

4. The Declarant plans to repair and rehabilitate most of the units. **However, the Declarant has reserved the right to convey units on an as-is basis** except for a legally required electrical upgrade (100 amp service to each unit), to purchasers bargaining for such a conveyance if (a) the present tenant in possession elects to purchase his unit as is and requests such an arrangement, or (b) the present tenant in possession has a statutory right to remain in possession as a tenant. Existing tenants have certain rights to purchase, or continue to lease, their respective units under Connecticut law (See Section F-Rights of Existing Tenants).

The Declarant will undertake repair and rehabilitation work with respect to all units except as set forth above. Such repair and rehabilitation work may include the renovation of the kitchen, the upgrading of electrical systems, the upgrading of some plumbing systems, and the painting of units. It is also possible that fireplaces will be added to one or more of the units. In addition, the Declarant has also begun to have repaired and rehabilitated portions of the common elements. **All repair and rehabilitation will be done at the sole discretion of the Declarant. The Declarant makes no representation as to the specific repair and rehabilitation work to be done or as to the date of the completion of any such work.** Rehabilitation work on common areas has commenced. Individual units will be repaired and rehabilitated as they are vacated by current tenants or when under contract at the Declarant's option. The Declarant discloses that there is no schedule of such rehabilitation work. Because not all such repair and renovation work shall be completed prior to the conveyance of units, such work may create an inconvenience to unit purchasers who purchase prior to the completion of such work.

(Emphasis added).

Paragraph 13 of the Supplement states,

13. The Declarant is performing the rehabilitation work on the condominium with the proceeds of a mortgage loan from The Hong Kong and Shanghai Banking Corporation Limited, New York branch. No assurances are given that these proceeds shall be sufficient to complete all contemplated rehabilitation work or that the proceeds will be fully advanced. In the event that the Declarant defaults pursuant to such mortgage, the mortgagee is not obligated to complete any such work.

The Supplement further states, at page 8, that it "is not directed to, nor shall it create, any rights in or obligations to any other person other than a New York purchaser."

Section F to the Supplement, "Rights of Existing Tenants," states in part,

The Declarant plans to repair and rehabilitate **most of** the units. However, the Declarant has reserved the right to convey one or more units on an **"as is" basis** except for a legally required electrical upgrade (100 amp service to each unit), to purchasers bargaining for such a conveyance if (1) the present tenant in possession elects to purchase his unit as is and requests such an arrangement, or (2) the present tenant in possession has a statutory right to remain in possession as a tenant under Connecticut law.

(Emphasis added).

Section X to the Supplement, "Sponsor's Statement of Building Condition," states,

The Declarant has no knowledge of any material defect or need for major repairs to the Condominium except as set forth in the description of property and building condition included in Part II of this Supplement. The rehabilitation work to be completed by the Declarant may include the renovation of the kitchens, the upgrading of electrical systems, the upgrading of some plumbing systems, and the painting of Units. It is also possible that fireplaces will be added to one (1) or more Units. The Declarant will also repair and rehabilitate portions of the common elements, including the painting of hallways, the reconstruction of the front entrance, the repainting and recaulking of windows, and the reconstruction of the building parapet. **All repair and rehabilitation work will be done at the sole discretion of the Declarant, and the Declarant makes no representation as to the specific repair and rehabilitation work to be done or as to the date of completion of any such work,** but it is anticipated that the repair and rehabilitation work to be done with respect to the common elements will be completed within approximately one (1) year of the date of this Supplement. There are presently not [sic] certificates of occupancy for the building comprising the Condominium or the individual Units, because the building predates the requirement for certificates of occupancy.

[emphasis added].

Preiss Breismeister Letter

Attached to the revised survey is an unsigned memorandum on Preiss Breismeister letterhead, dated November 14, 1995, and addressed "to whom it may concern." [Pl. Ex. F]. The memorandum lists 11 areas of improvements the writer indicated would be made.

In the Architect's Certificate signed by Frederick Preiss on behalf of Preiss Breismeister on December 27, 1995, the architect emphasized that the survey and revised survey were based on visual inspections only, stating, "it is to be understood that all aspects of the physical condition of the property cannot be determined by a visual inspection and that all statements contained in the certification are premised on and limited to such visual inspection." [Def. Ex. D, Supplement, §AF, (viii) "Certificate"].

The New York Supplement was amended twice. Both Amendments are labeled "First Amendment." The May 2 Amendment corrected certain internal references to sections and pages, added some information regarding payment of deposits and attached a new form Purchase Agreement. The December 31 Amendment attached another new form Purchase Agreement, which superseded the form attached to the May 2 Amendment.

Architect/Engineering Survey

Part II of the N.Y. Supplement, referenced in Section X quoted above, contains both the Architect/Engineering Survey, dated October 1994, at Exhibit G, and the Architect/Engineering Report dated October 1994, revised November 14, 1995, at Section AC. The October 1994 Architect/Engineering Survey is located at Exhibit G to the POS.

Both the revised survey and the original survey, which are

identical, list the condition of various building components. However, the revised survey includes some additional notes. One note indicates that some units show leakage at window sills and jams, and there is evidence of older leaks at the ceiling, which the architect assumed were inactive. [Def. Ex. D, Supplement, §AC, "Units, General"]. Active water leaks and water damage were observed in the basement. [Def. Ex. D, Supplement, §AC, "Basement, General"]. The roof was found to be in poor condition generally. [Def. Ex. D, Supplement, §AC, "Roof, General"].

The remaining notes in the revised survey are identical to the notes in the original survey, with the exception of some additional information regarding lot line windows, installation of a new boiler, an elevator inspection, and boiler inspection.

The revised report, like the original report, was based on a visual survey of the building only, and indicated that there might be hidden or partially hidden problems with the building structure or systems. [Def. Ex. D, Supplement, §AC, "Please Note"].

Purchase Agreements

The purchase agreement provided that the buyer accepted those portions of the unit, common elements, and limited common elements that had already been completed "as is," in their existing condition subject to normal wear and tear. [Def. Ex. D, part II, §Y, ¶12

"Limited Warranties"].

According to the purchase agreement, the only warranties are those described and limited in the Limited Warranty Administration Program set forth in the POS. Id.

All implied warranties are hereby disclaimed and excluded with respect to defects which exceed the specific standards of the Limited Warranty Administration Program, (the "Warranty Standards"), and Buyer consents to the exclusion of implied warranties exceeding said specific standards from whatever source. Buyer agrees that the price paid contemplates this exclusion.

Id.

The purchase agreement incorporates the POS by reference and makes it a part of the agreement. [Def. Ex. D. Part II, §Y, ¶1 "Unit"]. Throughout the purchase agreement, reference is made to the terms and conditions of the POS, id. ¶¶3, 12, 20, 22, 26. By signing the purchase agreement, buyers acknowledged that they received and accepted the terms of the POS. Id. ¶¶24, 27.

A "Winthrop House New York Rider to Purchase Agreement" was incorporated into the purchase agreements for New York residents only, pursuant to New York General Business Law. [Def. Ex. D, Part II, §Y, at 14, "Winthrop House New York Rider to Purchase Agreement"]. Paragraph 1 of the New York Rider states, in relevant part,

Prior to my execution of the Purchase Agreement

and this New York Rider to it, I have been presented with both the Public Offering Statement for Winthrop House and the New York Supplement. I understand that together the Public Offering Statement and the New York Supplement are referred to as the "Offering Plan". I understand that the documents comprising the Offering Plan, including all exhibits and schedules, are incorporated in this Purchase Agreement by Reference and are made a part of this Purchase Agreement with the same force and effect as if fully set forth herein. **In the event of any inconsistency between the terms of this Purchase Agreement and the terms of the Offering Plan, the terms of the Offering Plan shall govern.**

[Id. at 14 (emphasis added)].

The Sorrow Rider II

On or about April 23, 1996, Jerry W. Sorrow and Pamela B. Sorrow entered into a Purchase Agreement for Winthrop House Unit No. 55. [Amend. Compl. Ex. QQ]. Attached to the Sorrow Purchase Agreement are two undated documents, labeled "Rider" and "Rider II." "Rider" consists primarily of a list of finishes for the unit and work to be completed, identified as A-H. "Rider II" contains 9 numbered paragraphs. Plaintiff argues that the Sorrow Rider II created "unconditional" express warranties and relies on its paragraphs 1, 3, 4 and 7(a),(b),(e) and (h). [Doc. #33 at 18-19].

The Sorrow Rider II states in its introduction,

This Rider is attached to an Agreement between BROOKSIDE ELM ASSOCIATES LIMITED PARTNERSHIP, Seller and JERRY W. SORROW and PAMELA B. SORROW, Purchaser and is incorporated into said Agreement as if set forth therein. In the event that there is a conflict between the terms of the Agreement and the terms of the Rider, the terms of the Rider shall control:

Plaintiff relies on the following language contained in the Sorrow Rider II.

Paragraph 1,

Seller represents that at the time of delivery of the deed and possession, there shall exist no violations of governmental (including zoning and planning rules), regulations or limitations

. . . .

In addition, Seller represents that all construction on and improvement to said property has been in accordance with applicable zoning ordinances and building codes of the Town or City where the premises are located and State of Connecticut

Paragraph 3 states,

Seller expressly guarantees the Unit renovations constructed or to be constructed on said premises together with the fixtures and systems located thereon against defects in workmanship and material for a period of one (1) year from the date of the delivery of the deed, reasonable wear and tear excepted. Seller further warrants that the Building and Unit and all renovations and improvements constructed or to be constructed on the premises were constructed in a workmanlike manner and that all materials and fixtures used in the construction (or to be used) were (or will be) of new and marketable quality.

Paragraph 4 states,

In the event of a material defect in the renovation of the Building and the Unit performed by Seller, its systems or fixtures, Purchaser shall give notice to Seller and Seller shall remedy such defect at Seller's expense and to Purchaser's reasonable satisfaction within a reasonable period of time following such notification, subject to the warranty provision in the Public Offering Statement as may be modified by Rider Paragraph 7 below.

Plaintiff relies on the following subsections of paragraph 7,

The seller hereby represents, warrants and guaranties, which representations warranties and guaranties shall survive the Closing, as follows:

(a) the roof of the building shall be replaced by a reputable professional roofing company, which company shall (i) use top quality materials, (ii) complete such repair and replacement in a good and workmanlike manner and (iii) provide a warranty for a term of not less than 10 years, which warranty shall be for labor and materials, and shall run to the Association.

(b) the exterior of the building has been repointed and repaired where needed in a good and workmanlike manner so as to prohibit seepage into the building as described in the Public Offering Statement; any warranty for such repointing and repair shall run to the Association.

(d) the elevator will be repaired to insure accurate leveling at each floor and smooth ride on or before issuance of the final Certificate of Occupancy for the Building, and all such repair work shall be completed in a good and workmanlike manner; the requisite inspection of such elevator is current and the elevator

otherwise has passed inspection by the engineer.

(e) all repairs recommended in the Public Offering Statement relating to the central boiler and heating system have been completed and any and all warranties will run to the Association.

(h) all work to be completed by Seller shall be completed in a good and workmanlike manner and shall be of a quality consistent with the first floor model unit used by Seller in the Building.

III. ANALYSIS

This matter was referred for a decision on the following question:

Did the Declarant properly exclude the implied warranties and/or express warranties?

The plaintiff Association contends that the defendants warranted the condition of every building component and system, by virtue of the warranty provisions provided in the Connecticut New Homes Warranties Act ("NHWA"), Conn. Gen. Stat. §§47-116 et seq., and the Common Interest Ownership Act ("CIOA"), Conn. Gen. Stat. §§47-200 et seq. See Association's Master Punch List Memorandum, Pl. Ex. BB. Plaintiff argues that defendants failed to properly exclude the implied warranties and/or express warranties under the NHWA and CIOA. Defendants argue that "no express warranties were created with respect to the building systems and components complained about and that, in addition, they have excluded and/or disclaimed the implied

and express warranties" [Doc. #34 at 19].

Does the NHTA apply? No.

The Court finds that the Association and subsequent purchasers do not meet the statutory definition of "purchaser" under §47-116.

NHTA §47-116 "Vendor"

Under §47-116 of the NHTA, express warranties pursuant to §47-117 can only be created by a "vendor" and only run to a "purchaser." Defendants argue "only Brookside Elm fits within the definition of "vendor" as set forth in §47-116."⁶ [Doc. #34 at 20]. They contend that "Collins Enterprises acted as construction manager only during the initial renovation phase dealing with cosmetic improvements, and not during the renovation work with which the plaintiff takes issue." Id. While plaintiff argues that this argument is "not relevant to the issue of the effectiveness of the disclaimers" [Doc. #38 at 22], plaintiff asserts that "Mr. Collins, along with his three alter ego entities, were continually active and controlling parties with

⁶A "vendor" is defined as

any person engaged in the business of erecting or creating an improvement on real estate, any declarant of a conversion condominium, or any person to whom a completed improvement has been granted for resale in the course of his business.

Conn. Gen. Stat. §47-116.

respect to the Declarant (and precisely fit the definition of an "affiliate of a declarant," . . . [and] are jointly and severally liable with the Declarant with regard to the Association's tort claims arising from the breaches of the [implied warranties] and [express warranties] under both Acts." [Doc. #38 at 23-24]. Whether all of the defendants are "vendors" raises a question of fact that is not currently before the Court.

NHWA §47-116 "Purchaser"

Under §47-116 of the NHWA, "purchaser" is defined as "the original buyer, his heirs or designated representatives of any improved real estate" Defendants correctly assert that the Association is not a "purchaser" under the NHWA and thus "has no independent warranty rights under this Act." Defendants represent that "[a]t least 10 of the original purchasers have sold their units . . . [and] subsequent unit owners are not "purchasers" under the Act and cannot claim the benefit of any warranty under the Act." [Doc. #34 at 21]. While claiming that this argument is also not relevant to the issue before the Court, plaintiff does not address whether the Association is a "purchaser" under the NHWA and does not address the application of the NHWA to subsequent buyers. [Doc. #38 at 18-19, 21-22].

Under Conn. Gen. Stat. §47-117, express warranties run from the

"vendor" to the "purchaser." "Vendor" is defined to mean the declarant of the conversion condominium and "purchaser" means the original buyer, his heirs, or designated representatives. Conn. Gen. Stat. §47-116. Under §47-274(c), "[a]ny conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers only to the extent such a conveyance would transfer warranties pursuant to Chapter 827" [Conn. Gen. Stat. §47-116, et seq.]. Under §47-119 of Chapter 827, warranties are not transferred to subsequent purchasers except in the case of a vendor conveying an improvement to an intermediate purchaser to evade the provisions of the NHTA, a situation not applicable here. Conn. Gen. Stat. §47-119.

There is no case law addressing this issue and the legislative history provides no guidance.⁷ Moreover, the NHTA does not have a statutory provision defining "Association", as does the CIOA at

⁷Connecticut's legislative history indicates that the New Homes Warranty Act statute was based on Maryland's Real Property Act Title 10 Sales of Property. Connecticut General Assembly House Proceedings 1975, Vol. 18, Part 10, p. 114 (remarks of Rep. Burke). According to Maryland Real Property Section 10-201, "Purchaser" means the original purchaser of improved realty, and the heirs and personal representatives of the original purchaser." Maryland's Section 10-240(c) specifically states that "[t]he warranties provided under this section do not expire on the subsequent sale of a dwelling by the original purchaser to a subsequent purchaser, but continue to protect the subsequent purchaser until the warranties provided under subsection (b) of this section expires." While Maryland's Section 10-240(c) was available for consideration, Connecticut did not adopt the language set forth in Maryland's Section 10-240(c) when drafting the NHTA.

Section 47-244(a)(4). See Starfish Condominium Assoc. v. Yorkridge Service Corp., Inc., 295 Md. 693, 702-03 (Md. App. 1983) (holding "each of the original purchasers of condominium units from the Joint Venture obtained from the Joint Venture the implied warranties as described in [Maryland's Real Property Code] §10-203(a), on that particular unit" and that the condominium association had standing to sue over common elements on behalf of the unit owner under §11-109(d)(4)).⁸

Accordingly, the Court finds that the Association and any subsequent buyers are not "purchasers" as defined under §47-116 of the NHWA. Scott v. Regency Dev, Inc., No. 417639, 2000 WL 1781846, *3 (Conn. Super. Ct. Nov. 8, 2000) ("By its terms, the [NHWA] applies in situations where the vendor constructs the improvement on real estate owned directly or indirectly by the vendor and subsequently conveys the improved real estate to the purchaser."); see Jablonsky v. Klemm, 377 N.W. 2d 560 (N.D. 1985) (affirming trial court decision apportioning damages between the individual unit owners and denying

⁸Maryland's Real Property §11-109(d)(4) provides that a council of unit owners has the power:

(4) to sue and be sued, complain and defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.

Connecticut's CIOA contains a similar provision at §47-244(a)(4), whereas the NHWA does not contain such a provision.

recovery to those subsequent owners who purchased their units with notice of the defective retaining wall).

Does the CIOA Apply? Yes.

CIOA §47-244(a)(4) "Association"

Section 47-244(a)(4) of the CIOA states that an Association may "[i]nstitute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community." Plaintiff contends that §47-244(a)(4) provides the Association with full statutory rights to represent the Unit Owners in a breach of warranty action [Doc. #38 at 18], citing, Candlewood Landing Condo. Assoc., Inc. v. Town of New Milford, 44 Conn. App. 107 (1997) (holding Conn. Gen. Stat. §47-244(a)(4) includes right of Association to take tax appeals on behalf of unit owners); and Caswell Cove Condo. Assoc., Inc. v. Milford Partners, Inc., 58 Conn. App. 217 (2000) (condominium association has standing to bring quiet title action against land development company). Clearly, §47-244(a)(4) of the CIOA does not confer independent express warranty rights under the CIOA on the Association, as express warranties do not run to the Association, Conn. Gen. Stat. §§47-117, 47-274(a). Nevertheless, "§47-244(a)(4) contains no limitations on a condominium association's authority to act on behalf of the unit owners as long as at least two unit owners agree . . . a condominium may act in litigation and administrative proceedings." Candlewood Landing Condo. Assoc. Inc., 44 Conn. App. at 111; Caswell Cove Condo. Assoc. Inc., 58 Conn. App. at 224

(Section 47-244(a)(4) "contains no exceptions or limitations on a condominium association's authority to act on behalf of the unit owners as long as at least two unit owners agree.").

Did the Public Offering Statement Comply with Connecticut Law? Yes.

Connecticut law requires that, "before offering any interest in a unit to the public, [a declarant of a common interest community or condominium conversion] shall prepare a public offering statement conforming to the requirements of sections 47-264 to 47-267."⁹

Section 47-264(a)(2) requires that a POS "shall contain or fully and accurately disclose," among other things, "[a] general description of the common interest community, including to the extent known, the types, number and declarant's schedule of commencement and completion of construction of buildings and amenities that the declarant anticipates including in the common interest community." Conn. Gen. Stat. §47-264(a)(2). The POS for Winthrop House, at paragraph 2(c), "Rehabilitation Work," states, in relevant part, "[a]ll repair and rehabilitation work will be done at the sole discretion of the Declarant. The Declarant makes no representation as to the specific repair and rehabilitation work to be done or as to

⁹See The Common Interest Ownership Act, Part IV, entitled "Protection of Purchasers," Conn. Gen. Stat. §47-263(a).

the date of completion of any such work." [Def. Ex. A, ¶2(c)]
(emphasis added).

Section 47-264(a)(10) also requires that a POS contain "[t]he terms and significant limitations of any warranties provided by declarant, including statutory warranties and limitations on the enforcement thereof or on damages." Conn. Gen. Stat. §47-264(a)(10). The POS for Winthrop House at paragraph 10(A) sets out the statutory warranties under the Connecticut Common Interest Ownership Act, in full text, as follows: (1) Section 47-274, "Express Warranties of Quality"; (2) Section 47-275 "Implied Warranties of Quality"; (3) Section 47-276, "Exclusion or Modification of Implied Warranties of Quality"; (4) Section 47-277, "Statute of Limitation for Warranties". Paragraph 10(B) of the Winthrop House POS provides a "second statutory warranty" from the New Home Warranties Act, in full text, as follows: (1) Section 47-116, "Definitions"; (2) Section 47-117, "Express Warranties"; (3) Section 47-118, "Implied Warranties"; (4) Section 47-119, "Vendor Not to Evade by Intermediate Transfer; and (5) "Warranties Created by Chapter 827 Additional to Any Other Warranties.

Limitations on Warranties

In compliance with Conn. Gen. Stat. §47-264(a)(10), the Winthrop House POS contains a section in paragraph 10, entitled

"LIMITATIONS ON WARRANTIES," which states,

PURSUANT TO SECTIONS 47-276(b) [exclusion or modification of implied warranties of quality] AND 47-118(d) [exclusion or modification of implied warranties] OF THE CONNECTICUT GENERAL STATUTES, THE DECLARANT WILL INCLUDE IN ITS PURCHASE AGREEMENT THE FOLLOWING PARAGRAPHS WHICH PROVIDE THAT CERTAIN OF THE WARRANTIES DESCRIBED ABOVE ARE EXCLUDED:

1. THE IMPLIED WARRANTIES OF SECTIONS 47-275(b) AND 47-118(a) THAT THE IMPROVEMENTS ARE: (1) FREE FROM FAULTY AND/OR DEFECTIVE MATERIALS, (2) CONSTRUCTED IN ACCORDANCE WITH APPLICABLE LAW AND ACCORDING TO SOUND ENGINEERING AND CONSTRUCTION STANDARDS, (3) CONSTRUCTED IN A WORKMANLIKE MANNER, AND (4) FIT FOR HABITATION ARE EXCLUDED TO THE EXTENT THE IMPROVEMENTS ARE COMPLETED AS OF THE DATE OF THE PURCHASE AGREEMENT. SPECIFICALLY, THE DECLARANT MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER WITH RESPECT TO ANY STRUCTURAL COMPONENT OF THE BUILDING; THE EXTERIOR FACADE OF THE BUILDING; THE ROOF; THE BOILERS OR ANY OTHER PART OF THE HEATING SYSTEM; THE ELECTRICAL SYSTEM, THE HOT WATER SYSTEM, OR THE PLUMBING SYSTEM OR ANY PART OF ANY SUCH SYSTEMS; OR WITH RESPECT TO ANY KITCHEN CABINETS, CARPETING, TILING, WALLPAPER, PAINT OR OTHER SURFACE FINISHINGS OF ANY KIND, WOODWORK, BATHROOM FIXTURES, OR UTILITY FIXTURES OR OUTLETS.

2. THE DECLARANT MAKES NO WARRANTIES AS TO THE CONDITION OF ANY HOT WATER HEATER, AIR CONDITIONER, KITCHEN EQUIPMENT OR APPLIANCES OR OTHER ITEMS CONSIDERED CONSUMER PRODUCTS UNDER THE MAGNUSEN-MOSS FEDERAL TRADE COMMISSION ACT. THE DECLARANT WILL DELIVER TO BUYER ANY MANUFACTURER'S WARRANTIES THAT ARE BOTH APPLICABLE TO SUCH EQUIPMENT OR APPLIANCES AND FOR THE SOLE BENEFIT OF THE CONSUMER PURCHASER. IMPROVEMENTS AND APPLIANCES INSTALLED BY DECLARANT AT A PURCHASER'S REQUEST AND EXPENSE, IF ANY, SHALL BE COVERED BY THE MANUFACTURER'S OR CONTRACTOR'S WARRANTY, IF ANY.

3. THE DECLARANT MAKES NO REPRESENTATIONS OR WARRANTIES AS TO THE CONDITION OR HEALTH OF ANY SHRUBS, TREES OR PLANTINGS LOCATED ON THE AREAS SURROUNDING THE BUILDINGS. THE DECLARANT WILL DELIVER TO THE ASSOCIATION ANY NURSERY<S WARRANTIES THAT ARE BOTH APPLICABLE TO SUCH VEGETATION AND FOR THE SOLE BENEFIT OF THE CONDOMINIUM ASSOCIATION.

4. THE PURCHASER ACKNOWLEDGES BY SIGNING THIS PURCHASE AGREEMENT THAT THE PURCHASER AGREES TO AND UNDERSTANDS THE AGREED TO AS PART OF THE BASIS OF THE PURCHASER<S BARGAIN IN PURCHASING THE UNIT.

NO ADDITIONAL EXPRESS OR IMPLIED WARRANTIES, UNLESS REQUIRED BY LAW, ARE MADE BY THE DECLARANT.

[Def. Ex. A, POS ¶10B].

Architect/Engineering Survey

When the community interest ownership involves a building conversion, such as Winthrop House, Connecticut law sets additional requirements for the POS. Conn. Gen. Stat. Section 47-267(a) provides,

The public offering statement of a common interest community containing any conversion building shall contain, in addition to the information required by section 47-264: (1) A statement by the declarant, incorporating a report prepared by a registered architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building; (2) a statement by the declarant of the approximate dates of construction, installation and major repairs, and the expected remaining useful life of each

item reported on in subdivision (1) of this subsection, together with the estimated cost, in current dollars, of replacing each of the same; and (3) a list of any outstanding notices from the municipality of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations.

The Winthrop House POS includes an Architect/Engineering Survey dated December 28, 1994, prepared for Brookside Elm by Preiss Breismeister P.C., Architects. [Def. Ex. G to the POS]. The Survey contains thirty-eight separate entries, "describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building", including the following information required by Conn. Gen. Stat. §47-267(a): the present condition, approximate date of construction/installation, approximate date of major repair, remaining useful life, current cost to replace. The Survey estimates the total building replacement cost to be \$7,390,500. Regarding building codes or municipal regulations, §47-267(a)(3), the Survey states,

Electrically, the entire building should be upgraded, as well as the fire alarm and smoke systems. There are a number of issues which do not meet current codes, many of which would be considered to be "grandfathered" and allowed to remain unchanged provided there are no renovations to these portions of the building. There are certain life safety issues which may be required to be updated by code and by law (such as smoke detection). There are other

issues which must be "repaired" such as the cracks, leaks, door operation, etc. Other repairs will be required very shortly and should be made as a part of a preventative maintenance program - reroofing, plumbing traps, etc.

[POS Ex. G].

The Survey further states,

This report is based upon the observations of the visible apparent condition of the building and its major components on the date of inspection. Preiss Breismeister P.C. Architects makes no representation regarding latent or concealed defects which may exist and no warranty or guarantee is expressed or implied.

. . .

[POS Ex. G].

The Purchase Agreement

The Purchase Agreement at paragraph 12, Limited Warranties, states in relevant part,

Portions of the Unit, Common Elements and Limited Common Elements have already been completed. Buyer has inspected those portions to the extent desired by Buyer and agrees to accept them, "as is," in their existing condition subject to normal wear and tear between now and the time of Closing.

Seller makes no warranties except those specifically required under Sections 75 through 78 of the Act, Conn. Gen. Stat. Section 47-274-Section 47-277, if any, as more fully described and limited in the Limited Warranty

Administration Program set forth in the Public Offering Statement at Exhibit H. THESE WARRANTIES ARE LIMITED TO THE DURATION SET FORTH IN THE STATUTE . . . All implied warranties are hereby disclaimed and excluded with respect to defects which exceed the specific standards of the Limited Warranty Administration Program, (the "Warranty Standards"), and Buyer consents to the exclusion of implied warranties exceeding said specific standards from whatever source. Buyer agrees that the price paid contemplates this exclusion.

The Purchase Agreement at paragraph 24, Acknowledgments, states in relevant part,

Buyer acknowledges that he has read this Agreement and that he understands its terms. Buyer further acknowledges that prior to the date hereof Buyer received a copy of the Public Offering Statement for Winthrop House, including the Declaration and the Bylaws. This Agreement, together with any exhibits attached hereto or to the Public Offering Statement, contains the entire Agreement of the parties and no oral representations or statements, whether by the Broker, its agents or employees, or otherwise, shall be considered binding upon either of the parties. Except as otherwise specifically provided herein, this Agreement shall not be terminated, modified or waived except by a writing signed by both parties . . .
. . .

The Purchase Agreement at paragraph 17, Important, states in relevant part,

RECEIPT OF A COPY OF THE PUBLIC OFFERING STATEMENT FOR WINTHROP HOUSE NOT LATER THAN THE DATE SET FORTH ABOVE IS HEREBY ACKNOWLEDGED, AND BUYER UNDERSTANDS THAT THE STATEMENT SHOULD BE EXAMINED.

. . . .

IN THE EVENT THAT BUYER FAILS TO CANCEL THIS AGREEMENT, IT SHALL BE ACKNOWLEDGED THAT BUYER IS RELYING ON THE DISCLOSURES, DESCRIPTIONS, AND REPRESENTATIONS MADE IN THE PUBLIC OFFERING STATEMENT AND THIS AGREEMENT AS THE BASIS FOR THIS PURCHASE, AND NOT ANY REPRESENTATIONS, INFERENCES OR UNDERSTANDINGS NOT INCLUDED IN THESE DOCUMENTS.

[Pl. Ex. DD; Def. Ex. D, §Y].

The Court finds, and the parties do not dispute, that the Winthrop House POS complied with the requirements of Conn. Gen. Stat. §§47-263 (preparation of public offering statement. Liability); 47-264 (public offering statement. General provisions and requirements); and 47-267 (requirements for public offering statement when community contains conversion building). The warranty provision contained in paragraph 10 of the POS listed the statutory warranties available to each buyer under the NHTA and CIOA. The limitations on warranties, set forth in capital letters, specify the statutory warranties that are excluded, stating, "the declarant makes no representation or warranty whatsoever with respect to any structural component of the building." [POS ¶10]. Declarant also stated there were no warranties as to several specific improvements and systems. Finally, declarant complied with the statutory requirement of section 47-267, requiring that the POS for a conversion condominium contain a statement by an architect or engineer describing the present condition of all the structural components and mechanical and electrical installations,

major repairs, expected remaining useful life of each item reported, and estimated cost for replacement. The Architect/Engineering Report served a second purpose, informing the buyer of the condition of the building based on a visual inspection of nearly all the systems about which the plaintiff is now complaining. See Pl. Ex. BB Master Punchlist. In addition to receiving the Architect/Engineering Report, each prospective buyer was free to conduct his own inspection. The plain language of section 47-118(b) warns that no implied warranties shall "apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed." Plaintiff, at a minimum, was on notice of the defects listed in the Report. Conn. Gen. Stat. §47-118(b) ("Implied Warranties").

Were Express Warranties Created? Yes.

Yes, as to the eleven improvements in the Preiss-Breismeister letter and the building plans only.

1. The New York Supplement

The Association asserts that express warranties were created by declarant in the Preiss Breismeister Letter¹⁰ dated November 14,

¹⁰This document is also referred to by plaintiff as the "Remediation Guaranty." Defendants strongly disagree that the unsigned Preiss Breismeister letter, dated November 14, 1995, is a "remediation guaranty." [Doc. #37 at 13-14].

1995, and the Architect's Certification and Sponsor's Certification that were appended to the New York Supplement Offering Plan. [Doc. #33 at 13; Pl. Ex. F].

a. Preiss Breismeister Letter

"Special Risks"

Plaintiff relies on the following passage in paragraph one of the Preiss Breismeister Letter as the first confirmation of express warranties. [Doc. #33 at 14].

As part of the renovation of Winthrop House . . . we will be making many repairs and upgrades to the building. This work will eliminate any "Special Risks" as defined for the New York State Offering Plan.¹¹

Plaintiff argues that, because the "Special Risks" section of

¹¹"Special risks" are defined in the Martin Act regulations, 20 NYCRR §20.3(c), as follows:

(c) Special risks. This section, if applicable, must be on a separate page following the table of contents. All features of a plan which involve significant risk or are reasonably likely to affect disproportionately or unusually the common charges or obligations of unit owners in future years of condominium operation must be conspicuously disclosed and highlighted. A brief description of the nature of the risk should be given in this section and a more thorough description should be given in a referenced later section. Uncertainties as to whether a risk should be described in this section would be resolved in favor or inclusion.

the N.Y. Supplement makes no reference to any remedial work to be done by the Association with regard to the defects, then "all remedial work detailed [in the Preiss Breismeister letter] would be undertaken by [Brookside Elm Association]." [Doc. #33 at 15].

Paragraph 5 Improvements

Plaintiff relies on the following passage in paragraph five of the Preiss Breismeister Letter as the second confirmation of express warranties. [Doc. #33 at 15].

The Sponsor will make the following improvements to correct defects noted in the [11/14/95] Architect~~s~~/Engineer~~s~~ Report.

(Emphasis added).

The Letter further states, "the work will include but is not limited to" the: basement floor (¶1), exterior wall brickwork (¶2), balconies (¶3), roof (¶4), plumbing (¶5), electric (¶6), elevator (¶7), heating (¶8), garage (¶9), doors and frames (¶10), and safety and alarm systems (¶11). [Pl. Ex. F] (Emphasis added).

Defendants assert that "[m]uch of the work described in the [letter] was, in fact, performed and in many instances work exceeding that described in the [letter] was completed." [Doc. #34 at 39-40].

b. Architect~~s~~ Certification

Plaintiff contends that express warranties were also confirmed in the Architect~~s~~ Certification, dated December 27, 1995, appended

to the N.Y. Supplement and required under 13 NYCRR §20.4. [Pl. Ex. C]. Plaintiff relies on the following paragraphs:

We certify that the report based on our visual inspection:

(iv) does not contain any untrue statement or a material fact.

(v) does not contain any fraud, deception, concealment, or suppression.

(vi) does not contain any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances.

[Pl. Ex. C].

The certificate also contains a statement, not relied on by plaintiff, that "[w]e certify that the report and all documents prepared by us disclose all the material facts which were then discernable for a visual inspection of the property." [Pl. Ex. C]. The architects also stated that "it is to be understood that all aspects of the physical property cannot be determined by a visual inspection and that all statements contained in the certification are premised on and limited to such visual inspection" and that "[t]his statement is not intended as a guaranty or warranty of the physical condition of the property." Id.

c. Declarant's Certification

Finally, plaintiff locates a fourth confirmation of the creation of express warranties in the Declarant's Certification appended to the New York Supplement. [Pl. Ex. A]. Plaintiff relies on the following passages in support of its argument.

We jointly and severally certify that the Offering Plan does, and that documents submitted hereafter by us which amend or supplement the Offering Plan will:

(4) not contain any untrue statement of material fact;

. . . .

(6) not contain any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;

. . . .

This certification is made under penalty of perjury for the benefit of all persons to whom this offer is made.

[Pl. Ex. A].

Express warranties may be created by a written affirmation of fact or promise; by a written description of the improvement, including plans and specifications; or by sample or modes, all as provided in §47-274. Brookside Elm states that the Letter "lists 11 areas of improvements the writer indicated would be made." [Doc. #34 at 15]. The Court finds that the affirmative language "will" followed by a list of eleven items to be worked on created express warranties under the CIOA §47-274(a)(2).

Defendants point out that the N.Y. Supplement specifically states that it was "not directed to, nor shall it create, any rights

in or obligations to any other person other than a New York purchaser." [Def. Ex. D at 8]. They argue, and the Court agrees, that "even assuming arguendo that the Press/Breismeister [letter] . . . created certain express warranties (a position Brookside Elm vigorously disputes) the alleged warranties would only run to the 6 New York Purchasers." [Doc. #37 at 15]. By its terms, any express warranties created in the N.Y. Supplement do not run to the Association, would not run to subsequent purchasers, and would not run to purchasers who did not receive the N.Y. Supplement. N.Y. Suppl. at 8.

Defendants also argue that "[t]here were no express warranties made by Brookside Elm that Winthrop House would be made fully compliant with all current codes, and that every defect or every item requiring maintenance or repair work would be repaired, replaced, or rebuilt so that the building would be in "like-new" condition." [Doc. #37 at 13]. The Court agrees that the unsigned Preiss Breismeister letter dated November 14, 1995 does not create an express warranty to rebuild the building in "like-new condition." Defendants also assert that the Preiss Breismeister letter is not a "Remediation Guarantee," arguing that nowhere in the document is it referred to as a "Remediation Guarantee," and nowhere in the document "is there any guaranty or warranty with respect to the performance of any building system or component." [Doc. #37 at 13]. The Court

agrees that the letter is not a remediation guarantee as plaintiff contends. Indeed, plaintiff's Master Punch List demands a far broader scope of remediation than what is listed in the Preiss Breismeister Letter. That letter states that Brookside Elm "will make the following improvements to correct defects noted in the Architect's/Engineer Report." The Court finds no promise to remediate defects to plaintiff's specifications as set forth in the Master Punchlist, or to remediate defects to a "like new" condition.

The Court finds that, at best, the Letter created a promise to the six N.Y. purchasers to make "improvements to correct defects" in the eleven items listed, the scope of which is described by Brookside Elm in the Preiss Breismeister Letter.¹² Finally, Brookside

¹²The Court is unable to determine on this record whether Brookside Elm completed the eleven itemized improvements to Winthrop House as detailed in the Preiss Breismeister Letter. Nevertheless, plaintiff's Master Punchlist asserts the remediation that it contends needs to be completed. Plaintiff states that the work to the Garage ¶9 was completed. [Doc. #33 at 25]. Brookside Elm states "[m]uch of the work described in the memorandum was, in fact, performed and in many instances work exceeded that described in the [Letter] was completed." [Doc. #34 at 39-40]. Defendants state that the building received a new roof with a twelve year warranty from the manufacturer. [Doc. #37 at 14, Pl. Ex. F. ¶4]. Defendants also correctly state that there is no mention in the Preiss Breismeister Letter of replacing the structural steel beams as listed by plaintiff in the Master Punchlist. [Doc. #37 at 14, Pl. Ex. F. ¶3]. Defendants also point out there is no mention in the Letter promising repairs or promising to conduct various tests of the heating system or to bring Winthrop House into compliance with all current codes as is listed in plaintiff's Master Punchlist. [Pl. Ex. BB ¶¶9-19; ¶¶2,9 11-16, 20-25, 27, 32, 33]. Brookside Elm states it "spent in excess of \$6,100,000 on upgrades and renovations." [Doc. #34 at 40].

Elm argues "no where in the [Letter] is there any indication that it overrides the clear, explicit, and oft-repeated language of the POS that, while some repairs are contemplated, Brookside Elm retains the right in its sole discretion to determine what repair, if any, will be made and to determine the scope of any repairs undertaken." [Doc. # 37 at 14-15]. Defendants correctly point out that there is nothing in the Letter to negate this language contained in the POS. [Doc. #34 at 39].

The burden then shifts to defendants to show that, once they created the expectation that the eleven items listed in the Preiss Breismeister Letter would be repaired, there was a "new agreement" negating these eleven express warranties. See Breckenridge, 616 N.E.2d at 620 ("Since the defendant is claiming waiver, it had the burden of proving at trial that the plaintiffs knew of their right to an implied warranty of habitability and that the plaintiffs knowingly waived that right."). The Court finds under the CIOA §47-274, that defendants did not specifically disclaim these eleven improvements listed in the November 1995 letter.

Comments to the Uniform Common Interest Ownership Act ("UCIOA") provide guidance in interpreting §47-274 of Connecticut's CIOA. Comment 2 to the UCIOA states,

This section . . . deals with express warranties, that is, with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of

the sale. It is based on the principle that, "once it is established that the declarant has acted so as to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

See Uniform Common Interest Ownership Act §4-113, Cmt. 2 (1982).

Here, the Preiss Breismister letter provided a written affirmation to the N.Y. purchasers that eleven improvements would be completed. The Court finds that defendants did not specifically disclaim these eleven improvements in the form required by the CIOA.

The Court does not find any express warranties created in the Architect's Certification or the Declarant's Certification, both appended to the N.Y. Supplement.

2. Building Plans

Plaintiff argues that "[a]nother example of Declarant's ineffective disclaimers of the [express warranties] are in its Building Plans." [Doc. #38 at 13]. Pursuant to Conn. Gen. Stat. §47-274(a)(2), "[a]ny model or description of the physical characteristics of the common interest community, including plans and specifications of or for improvements, creates an express warranty that the common interest community will substantially conform to the model or description." Conn. Gen. Stat. §47-274(a)(2). Specifically, plaintiff cites the 7/29/94 Electrical Plans approved

by the Greenwich Fire Marshal's Office. The Electrical Plans show that "G" Units of 969 square feet were to have four smoke detectors installed by defendants; however, plaintiff points out that only two smoke detectors were installed in "G" Units.¹³ [Doc. #38 at 13]. Defendants offer no response to this claim. Although plaintiff states that there exist "many" express warranties in the Building Plans, it offers no other examples. Id. The Court finds that the plain language of Conn. Gen. Stat. §47-274(a)(2) supports a finding that the Electrical Plans created an express warranty to install four smoke detectors in the six "G" Units and that defendants have not demonstrated that they disclaimed this express warranty.

3. The Sorrow Rider II

Plaintiff contends that Brookside Elm made unconditional express warranties in the Sorrow Rider II [Doc. #33 at 17-20]. The "Sorrow Rider II" is an attachment to a purchase agreement between Brookside Elm and Jerry and Pamela Sorrow, the purchasers of Unit 55 in Winthrop House.¹⁴ [Pl. Ex. QQ]. The Sorrow Rider II was attached only to the Unit 55 purchase agreement. [Doc. #37 at 17]. A certificate

¹³Plaintiff states there are six "G" Units at Winthrop House. [Doc. #38 at 13].

¹⁴The first rider, labeled "Rider," does not appear to be at issue in the present matter. The document labeled "Rider II" is the document relied on by plaintiff, specifically paragraphs 1, 3, 4, and 7(a), (b), (d), (e) and (h). [Doc. #33 at 19].

of occupancy for Unit 55 was issued May 2, 1996. [Doc. #34 at 38]. The Sorrows closed on their unit on May 3, 1996, Id., and have sold their unit and no longer reside at Winthrop House. [Doc. #37 at 17].

Plaintiff argues that Brookside Elm "explicitly warranted" in the Sorrow Rider II "that the subject Unit(s) and also the Building, inter alia, would be free of any Code violations and would be constructed in accordance with the customary standard of workmanlike quality." Id. at 17. In its reply brief, the Association contends there are twenty-seven express warranties created in the Sorrow Rider II, three express warranties for the specific benefit of the Association; and twenty-four express warranties for the specific benefit of the Sorrows.¹⁵ [Doc. #38 at 15].

Brookside Elm first argues that the Association is not a third party beneficiary of the Sorrow Rider II, as "[t]here is nothing in the purchase agreement or the rider . . . that even suggests that Brookside Elm intended that the Association could enforce the terms and conditions of, and that the Association would be bound by the terms and conditions of, the purchase agreement and rider." [Doc. #37 at 17]. The Court agrees. The purchase agreement clearly states

¹⁵The Association assert that twelve of the twenty-four express warranties "were with respect to the Common Elements, to the de facto benefit of all Purchasers and the Association, because the Declarant obviously could not repair for example the leveling function of the Elevator, as required in the Sorrow Rider, at Paragraph 7(c), so that it leveled properly only when the Sorrows used the Elevator)." [Doc. #38 at 15].

that the terms of the Agreement apply to the parties to the Agreement, namely Brookside Elm and the Sorrows.

The only sections of Rider II which purport to run to the Association are paragraph 7, sections (a), (b) and (e), which state that specific warranties, if any, "shall run to the Association." The Association relies on language contained in paragraph 7 that provides any roof warranty provided by a roof company shall run to the Association [¶7(a)]; any warranty for repointing and repair of the exterior of the building shall run to the Association [¶7(b)]; and any and all warranties for repairs relating to the central boiler and heating system shall run to the Association [¶7(e)]. It is undisputed that a twelve- year warranty was provided to the Association by GS Roofing Products Company Inc. [Def. Ex. F]. Brookside Elm correctly states that the paragraphs 7(b) and (e) both state that the terms of the POS dictated the scope of work to be done. Paragraph 7(b) and (e) state that the exterior repair and boiler work were to be completed as recommended in the POS, which "gave the declarant the sole discretion with respect to what repairs, if any, would be done." [Doc. #34 at 38-39]. The Association argues that, as there is no reference in the Sorrow Rider II to defendant having "sole discretion," then the terms of the Rider control. It cites the introductory paragraph which states, in relevant part, "[i]n the event that there is a conflict between the terms of the

Agreement and the terms of the Rider, the terms of the Rider shall control" [Doc. #38 at 14-15]. The Court finds no conflict here between the Agreement and the Sorrow Rider II, as paragraphs 7(b) and (e) specifically reference the POS. The POS in turn specifically provided that "[a]ll repair and rehabilitation work will be done at the sole discretion of [Brookside Elm]." [POS ¶2(c)]. .

Brookside Elm argues, and the Court finds, that often "contractors performing certain work are often required to provide a warranty for materials and/or labor for their work." [Doc. #37 at 19]. Defendant argues that warranties, such as those contained in ¶7(a), (b) and (e), are usually provided to "the owner of the property, even if the contractor or subcontractor did not contract directly with the owner for the work. In this case, any labor or material warranties would name the Association." [Doc. #37 at 19]. The Court agrees that the warranties set forth in paragraph 7, sections (a), (b) and (e) relate only to any labor or material warranties provided by Contractors and did not confer on the Association a right of action as a third party beneficiary against Brookside Elm. As the Sorrows are not Winthrop House residents, the Court finds that the Association may not enforce the other terms of the Sorrow Rider II.

Were Express and Implied Warranties Properly Excluded Under the CIOA?

Express Warranties: No

The Association argues that "[t]here is no provision in the CIOA permitting the exclusion of a CIOA [express warranty]." [Doc. #33 at 21]. In other words, "[express warranties] simply cannot be disclaimed under CIOA." Id.

Defendants do not address this argument or offer any case law. Rather, they argue that "no express warranties for the conditions at issue were created." [Doc. #34 at 32]. Defendants argue that the POS and N.Y. Supplement "described in detail the present condition of Winthrop House . . . [and] "repeatedly advised prospective purchasers that any repair or rehabilitation work would be done at the sole discretion of the declarant Purchasers, thus, had no reasonable expectation the declarant was guaranteeing that any specific rehabilitation work would be undertaken." [Doc. #34 at 32].

The Court finds that express warranties cannot be excluded under the CIOA. As set forth above, the Court finds that certain express warranties were created.

First, the Preiss Breismeister Letter created a promise to the six New York purchasers to make "improvements to correct defects" in the eleven listed items. Express warranties created in the N.Y. Supplement do not run to the Association, or subsequent purchasers and do not run to a purchaser who did not receive the N.Y.

Supplement.¹⁶

Second, the Electrical Plans created an express warranty to install four smoke detectors in the six "G" Units and that defendants have not demonstrated that they disclaimed this express warranty.

Implied Warranties: Yes

Implied warranties may be excluded or modified under the CIOA, §47-276, "by agreement of the parties."¹⁷

¹⁶The Court notes that at oral argument defendants argued that most of the work had been done. Defendants contend that plaintiff's chief complaint was that it was unhappy with the quality of the completed work.

¹⁷§47-276, Exclusion or modification of implied warranties of quality, states

(a) Except as limited by subsection (b) of this section with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality: (1) May be excluded or modified by agreement of the parties; and (2) are excluded by expression of disclaimer, such as "as is", "with all faults", or other language that in common understanding calls the purchaser's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant may disclaim liability in an instrument signed by the purchaser for a specified defect or class of defects or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

The Association argues that CIOA §47-276(b) has "very detailed requirements which must be strictly met by a declarant." [Doc. #38 at 3]. It urges that the Declarant "is unable to specifically point to any document (or set of documents) which, statutory subsection by statutory subsection, satisfies the explicit and very detailed requirements of the [CIOA]." [Doc. #38 at 3]. As set forth above, the Court finds to the contrary. The Court has identified detailed disclaimers that satisfy the statutory requirements of §47-276 in the POS at paragraphs 2(c), 10(a), and 10(b); the Architect/Engineering Survey (POS Ex. G specifying defects or classes of defects), and the Purchase Agreement at paragraphs 12, 24, and 17. The buyers acknowledged in writing their acceptance and understanding of these terms, and that these terms became part of the basis of the bargain.

In its briefs, plaintiff disregarded entirely paragraph 10 of the POS, in favor of characterizing as "[t]ypical of the Declarant's ineffective language" the expansive disclaimer language contained in paragraph 12 of the Purchase Agreement with the New York purchasers, stating in part, "[a]ll implied warranties are hereby disclaimed and excluded" [Doc. #38 at 4]. Plaintiff argues that this language "is precisely the conclusory, one-line type language that the Appellate Court found in Cafro v. Brophy, 62 Conn. App. 113, 123 (2001), to be so fatally defective "that it warrants no further

discussion." "¹⁸ Id. at 4-5. This case is readily distinguishable from Cafro. Where the one-line disclaimer in Cafro was found only in the sales agreement, here the warranty disclaimers are contained in the public offering statements, the Architect/Engineering Survey and limited warranty forms, as well as in the purchase agreements. Cafro involved new home construction, while Winthrop House involved a condominium conversion where the condition of the building was fully disclosed to prospective buyers. The Cafro disclaimer was contained in one sentence and did not set forth the same detail provided in the Winthrop House documents; for example, the POS details the various building systems and components for which no express or implied warranties are given. Moreover, plaintiff selectively cites a sentence from the Purchase Agreements provided to New York purchasers that does not apply to all the unit owners and seemingly ignores all of the other documents provided to the owners.

State courts outside Connecticut considering warranty disclaimers have recognized valid waivers of warranty provisions in similar circumstances. Alexander v. Henderson Condo. Assoc., Inc.,

¹⁸In Cafro v. Brophy, 62 Conn. App. 113, 116 (2001), a case on which plaintiff heavily relied on, the warranty disclaimer at issue was contained in paragraph five of the parties' sales agreement. "Paragraph five of their agreement stated that the buyer accepts home without any warranty express or implied except for the following: seller shall warranty for a period of one year, the structural integrity of [the] residence and that the major mechanical systems are operational." Id.

778 So.2d 627 (La. Ct. App. 2002), involved a sale of a unit in condominium conversion. In granting summary judgment, the Court found

[t]he waiver of warranty is clear, explicit and strongly worded. The waiver of warranty expressly limits any warranty to the appliances, and provides that the unit is sold "as is", without any warranty whatsoever, either express or implied, including but not limited to, any such warranties with respect to fitness for intended purpose or any such warranties against vices and defect, even hidden or latent defects that could not be discovered by inspection.¹⁹

Id. at 629 (emphasis added).

In affirming summary judgment, the New York Court of Appeals in Fumarelli v. Marsam Dev., Inc., 92 N.Y.2d 298, 307 (1998), found that the limited warranty, "express or implied," contained in the purchase agreement demonstrated that the parties "agreed to exclude all warranties other than those expressly agreed to within their purchase agreement."²⁰ Hughes v. Potter Homes, Inc., No. CL99-242,

¹⁹The waiver of warranty at issue in Alexander was printed in all capital letters and stated that the unit was conveyed "AS IS, WITHOUT ANY WARRANTY WHATSOEVER, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, ANY SUCH WARRANTIES WITH RESPECT TO FITNESS FOR INTENDED PURPOSE OR ANY SUCH WARRANTIES AGAINST VICIES AND DEFECTS EVEN HIDDEN OR LATENT DEFECTS THAT COULD NOT BE DISCOVERED BY AN INSPECTION." The Louisiana Appellate Court found the waiver of warranty was "clear, explicit and strongly worded." 778 So. 2d at 629 (emphasis added).

²⁰The purchase agreement in Fumarelli contained the following provision,

THE SPONSOR MAKES NO HOUSING MERCHANT IMPLIED

2000 WL 1672922, *2 (Va. Cir. Ct. Oct. 27, 2000) held "it is obvious that [the parties] intended to waive or exclude all warranties ["either express or implied"] from this sale" "The words are conspicuously set forth, they are in capital letter, they are at least two points larger than the other type, and they specify with adequate particularity the warranties being waived."²¹ See Hirshorn v. Little Lake Estates, Inc., 674 N.Y.S.2d 109 (N.Y. App. Div. 1998) (Among several riders to the contract was a limited warranty which

WARRANTY OR ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, IN CONNECTION WITH THIS PURCHASE AGREEMENT OR THE UNIT, AND ALL SUCH WARRANTIES ARE EXCLUDED, EXCEPT AS PROVIDED IN THE LIMITED WARRANTY ANNEXED TO THIS PURCHASE AGREEMENT. THE EXPRESS TERMS OF THE ANNEXED LIMITED WARRANTY ARE HEREBY INCORPORATED IN AND MADE A PART OF THIS PURCHASE AGREEMENT; THEY SHALL SURVIVE THE CLOSING OF TITLE; AND THERE ARE NO OTHER WARRANTIES WHICH EXTEND BEYOND THE FACE THEREOF.

92 N.Y. 2d at 301 (emphasis added).

²¹The parties' preprinted contract contained the following warranty provision:

11. WARRANTIES. (a) PURCHASER acknowledges he has been afforded the opportunity to review the written builder's limited warranty prior to execution of this AGREEMENT, and agrees to accept this warranty as the sole warranty of the SELLER, IN SO ACCEPTING, PURCHASER HEREBY WAIVES ALL OTHER WARRANTIES, EITHER EXPRESSED OR IMPLIED, INCLUDING THOSE PROVIDED IN SECTION 55-70.1 OF THE CODE OF VIRGINIA CONCERNING STRUCTURAL DEFECTS, WORKMANLIKE CONSTRUCTION AND HABITABILITY.

excluded all other warranties. The Court found that "the limited warranty, which limited the defendants' liability to "the cost of reasonable repairs by the seller or his designee" and excluded "any and all other warranties, express or implied," complied with General Business Law 777-b." (emphasis added); Smith v. Randolph Williams, Inc., No. 110267, 1994 WL 1031188, *9 n. 10, *10 (Va. Cir. Ct. May 13, 1994) (Court found the language of the Limited Home Warranty Agreement "clear and unambiguous"; the Court further upheld the waiver of warranties contained in the Sales Agreement); Breckenridge v. Cambridge Homes, Inc., 616 N.E.2d 615, 620 (Ill. App. Ct. 1993) ("evidence showed that the disclaimer language was brought to [buyers] attention, that the consequences of agreement were made known to them, and that they knowingly waived their rights to pursue an action against defendant for any alleged breach of the implied warranty of habitability."); Rosenblum v. Santa Fe Dev. Corp., No. 108764, 1992 WL 884974, *2 (Va. Cir. Ct. Oct. 20, 1992) (finding the waiver of statutory warranties in the Agreement of Sale and the language in the Limited Home Warranty Agreement "clearly prevent plaintiffs from bringing suit").

Other state courts have imposed a "heavy burden" of proof when considering limitations/disclaimers of implied warranties. In Crowder v. Vandendeale, the Missouri Supreme Court held that the burden of proving that a bargain intended to vary implied warranties

was great.

[O]ne seeking the benefit of such a disclaimer must not only show a conspicuous provision which fully discloses the consequences of its inclusion but also that such was in fact the agreement reached. The heavy burden thus placed upon the builder is completely justified, for by his assertion of the disclaimer he is seeking to show that the buyer has relinquished protection afforded him by public policy. A knowing waiver of this protection will not be readily implied.

564 S.W.2d 879, 881, n.4 (Mo. 1978)(en banc). In demonstrating "the fact of the bargain" to vary implied warranty terms, the Crowder court added, "boilerplate clauses, however worded, are rendered ineffective, thereby affording the consumer the desired protection without denying enforcement of what is in fact the intention of the parties." Id. at 881. See Crawford v. Whittaker Constr., Inc., 772 S.W.2d 819, 822 (Mo. App. E.D. 1989)(applying Crowder, the Court held that "[o]ne asserting a disclaimer of the warranties implied by public policy in a new home purchase must establish that such protections were knowingly relinquished as a result of a bargain in fact, i.e. an agreement reached through discussion and negotiation, and boilerplate clauses in a form contract alone do not establish these requirements."); Centex Homes v. Buecher, No. 00-0479, 2001 WL 1946128, *7 (Tex. Aug. 29, 2002) (Applying Crowder, the court held that "only in unique circumstances, such as when a purchaser buys a problem house with express and full knowledge of the defects that

affect its habitability, should a waiver of this warranty be recognized."); Tusch Enter. v. Coffin, 740 P.2d 1022, 1031 (Idaho 1987) (disclaimers fell "woefully short of fulfilling the requirements" set forth in Crowder. "Clearly, when no mention is made of the implied warranty of habitability in a contract, and the contract contains only general language stating there are no warranties other than those contained within its four corners, any purported waiver of the implied warranty of habitability is ineffective."); Peterson v. Hubschman Constr. Co., 389 N.E.2d 1154 (Ill. 1979) (Illinois Supreme Court adopting Crowder). See also Board of Managers of the Village Centre Condo. v. Wilmette Partners, 760 N.E.2d 976, 981 (Ill. 2001) (disclaimer was not valid because it did not refer to the implied warranty of habitability by name.); Pontiere v. James Dinert, Inc., 627 A.2d 1204, 1207 (Pa. Super. Ct. 1993) ("builder-vendor may not exclude the implied warranty of habitability absent "particular" language which is designed to put the buyer on notice of the rights he is waiving."); Dewberry v. Maddox, 755 S.W.2d 50, 54 (Tenn. Ct. App. 1988) (Disclaimer provision stating "Purchaser accepts Property in its existing condition, no warranties or representations having been made by Seller or Agent which are not expressly stated herein" is inadequate to disclaim implied warranty.); Starfish Condo. Assoc. v. Yorkridge Serv. Corp. Inc., 458 A.2d 805, 810 (Md. 1983) ("As is" provision did not satisfy

statutory requirements to "[set] forth in detail the warranty to be excluded or modified"); Casavant v. Campopiano, 327 A.2d 831, 834 (R.I. 1974) (Holding contract language "in the same condition in which they now are" does not meet the standard of specificity to exclude implied warranties.).

Based on the parties' contract language, quoted extensively above, there is no ambiguity with regard to the limitations on implied warranties here. The text is conspicuously set forth, in capital letters, and specifies the warranties being waived. Paragraph 10 particularly refers to the statutory warranties created by Conn. Gen. Stat. §§47-275(b) (implied warranty of quality under the CIOA) as well as more generally to all "representations or warranties whatsoever." [POS ¶10]. Paragraph 10(1) specifically excludes the implied warranties provided in §47-118(a) that improvements will be: "(1) FREE FROM FAULTY AND/OR DEFECTIVE MATERIALS, (2) CONSTRUCTED IN ACCORDANCE WITH APPLICABLE LAW AND ACCORDING TO SOUND ENGINEERING AND CONSTRUCTION STANDARDS, (3) CONSTRUCTED IN A WORKMANLIKE MANNER, AND (4) FIT FOR HABITATION. To exclude or modify an implied warranty under §47-118(d), the statute requires that the parties "[set] forth in detail the warranty to be excluded or modified" "The obvious purpose of this requirement is to advise the purchaser of the rights which the statute confers and which the purchaser is asked contractually to waive." Starfish Condo. Assoc., 458 A.2d at 810

(Construing Maryland's statute, §10-203(d), ("exclusion or modification of implied warranty"), that requires parties to "[set] forth in detail the warranty to be excluded or modified").

This was not a newly constructed building. The parties were clearly on notice that Winthrop Arms was a conversion of an apartment building built in 1938. Here, declarant provided, as required under Connecticut law, an Architects/Engineering Report that set forth in detail the structural problems with the property. Buyers had notice of the building's defects.²² See Centex Homes, 2001 WL 1946128, *7 ("the implied warranty of habitability extends only to latent defects. It does not include defects, even substantial ones, that are known by or expressly disclosed to the buyer.").

This case differs significantly from the many "new home" cases reviewed by this Court, because Winthrop Arms involved the conversion of a then-56-year-old apartment building whose units declarant did not purport to convey in "as new" condition. See Kelley v. Astor Investors, Inc., 478 N.E.2d 1346 (Ill. 1985) (affirming holding that implied warranty of habitability should not be extended to a condominium-conversion when defendants had not undertaken any

²²Conn. Joint Standing Committee Hearings, General Law, Pt. 1, 1975 Sess. p. 3, remarks of Representative Burke introducing Proposed House Bill 5110 entitled "An Act Concerning Implied Warranties in the Sale of New Single Family Dwellings" that implied warranties "would only apply to defects that were latent and undiscoverable by a reasonable inspection." The Bill was later codified as Conn. Gen. Stat. §§47-117 and 47-118.

significant refurbishing or renovations and where the defects were not latent and did not arise out of new construction. "Plaintiffs at least knew of the defects in their own units when they purchased them and could have discovered the other defects in the common elements in an ordinarily careful inspection."); Towers Tenant Assoc. Inc. v. Towers Limited Partnership, 563 F. Supp. 566, 575 (D.C.C. 1983) (implied warranty of habitability recognized where defendants had undertaken extensive rehabilitative construction and the defects the plaintiff~~s~~s complained of were defects in the "new" construction.) The Court finds that the parties~~<~~ contract here advised the buyers of the exclusion of implied warranties and is effective.

Based on the foregoing analysis, the Court finds that the implied warranties were properly excluded under the CIOA, §47-276(b).²³ The CIOA "is largely modeled on the Uniform Common Interest Ownership Act ("UCIOA")," Linden Condo. Assoc., Inc. v. McKenna, 247 Conn. 575, 584 (1999), whose comments provide guidance

²³Section 47-276(b) of the CIOA states,

With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant may disclaim liability in an instrument signed by the purchaser for a specified defect or class of defects or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

in interpreting §§47-274 and 47-275 of Connecticut's CIOA. Ward v. TRC Realty Corp., No. CV-89-0357578, 1992 WL 172142, *8-9 (Conn. Super. Ct. July 14, 1992).

Comment 4 to §4-115 of the UCIOA states,

general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion common interest community might, consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials comprising or supporting the roof, and all components of the air conditioning system.

Uniform Common Interest Ownership Act §4-115, Cmt. 4 (1982), 7 U.L.A. 635. As detailed above, the Court finds that the disclaimers here exceed the detailed language recommended in the official comments of the UCIOA.²⁴

²⁴Paragraph 10 of the POS specifically lists, "any structural component of the building; the exterior facade of the building; the roof; the boilers or any other part of the heating system; the electrical system, the hot water system, or the plumbing system or any part of any such systems; or with respect to any kitchen cabinets, carpeting, tiling, wallpaper, paint or other surface

finishings or any kind, woodwork, bathroom fixtures, or utility fixtures or outlets, hot water heater, air conditioner, kitchen equipment or appliances or other items considered consumer products . . . shrubs, trees or plantings."

IV. CONCLUSION

In summary, the Court finds that the Association and subsequent purchasers do not meet the statutory definition of "purchaser" under §47-116 of the NHTA. Accordingly, plaintiff may not bring a cause of action under the NHTA.

The Court finds that the Association may bring an action under the CIOA.

To the first question posed - whether the declarant properly excluded express warranties under the CIOA-the answer is no.²⁵

The Court finds that Brookside Elm promised the six New York purchasers to make "improvements to correct defects" in the eleven items listed, as described in the Preiss Breismeister Letter. These express warranties could not be excluded under the CIOA. Any express

²⁵The Court finds plaintiff's reliance on Emlee Equipment Leasing Corp. v. Waterbury Transmission, Inc, et al, 31 Conn. App. 455 (1993), inapposite. Emlee involved an equipment finance lease. The defendant argued in Emlee that several provisions of the lease were unconscionable, among them an accelerated payment clause and a disclaimer of warranty clause. Id. at 468-472. The equipment finance lease was governed by Article 2 of the Uniform Commercial Code ("UCC"), as adopted in Connecticut, Id. at 461 n. 5, and Article 2A of the UCC relating to leases of goods. Id. at 466. Applying this framework, the Emlee court found the disclaimer of warranties provision was not unconscionable. Id. at 471-72. The Court agrees with defendant that "[t]here is nothing in Emlee which addresses or has any bearing on an analysis of warranty disclaimers under the Connecticut Interest Ownership Act, Conn. Gen. Stat. §§47-200 et seq., or under the New Home Warranties Act, Conn. Gen. Stat. §§47-116 et seq. This Court is unwilling to extend the analysis in Emlee, or for that matter the other equipment financing lease cases cited by plaintiff, to the issues in this case.

warranties created in the N.Y. Supplement do not run to the Association or subsequent purchasers, and do not run to purchasers who did not receive the N.Y. Supplement.

The Court finds that the Electrical Plans created an express warranty to install four smoke detectors in the six "G" Units and that defendants have not demonstrated that they disclaimed this express warranty.

The Court finds that implied warranties were properly excluded under the CIOA.

SO ORDERED at Bridgeport this 19th day of December 2003.

HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE