

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 10-cv-02495-PAB-KMT

**HILDA M., a/k/a HILDY, FEUERBACH, as Personal Representative of the Estates of Parker W. Lofgren, deceased, and Caroline F. Lofgren, deceased;  
JEAN RITTENOUR as Co-Personal Representatives of the Estates of Owen P. Lofgren, deceased, and Sophie J. Lofgren, deceased;  
FREDERICK J. FEUERBACH, JR., as Co-Personal Representatives of the Estates of Owen P. Lofgren, deceased, and Sophie J. Lofgren, deceased;  
JEAN RITTENOUR, individually, and  
FREDERICK J. FEUERBACH, JR., individually**

Plaintiffs,

v.

**MARLIN W. BROWN  
ROARING FORK PLUMBING AND HEATING COMPANY, a Colorado corporation;  
BLACK DIAMOND LAND DEVELOPMENT CORPORATION, a Colorado corporation;  
JONATHAN M. THOMAS;  
INTEGRITY CONSTRUCTION MANAGEMENT GROUP, LLC a/k/a ICM GROUP,  
LLC, a Colorado Limited Liability Company;  
JOHN H. WHEELER;  
EAGLE AIR SYSTEMS, INC., a Colorado corporation;  
PROGUARD PROTECTION SERVICES, INC., a Colorado corporation;  
PRECISION MECHANICAL, INC., a Colorado corporation;  
MYERS ENTERPRISES, LLC, a Colorado limited liability company;  
HEAT TRANSFER PRODUCTS, INC., a Massachusetts corporation;  
ERIK PELTONEN;  
BRIAN PAWL;  
PITKIN COUNTY COMMUNITY DEVELOPMENT DEPARTMENT; and  
BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY, COLORADO**

Defendants.

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**SECOND AMENDED COMPLAINT FOR DAMAGES AND JURY DEMAND**

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Plaintiffs, by and through their counsel, William J. Hansen and McDermott & McDermott, LLP, for their First Amended Complaint for Damages against Defendants, state and allege as follows:

**TABLE OF CONTENTS**

**PRELIMINARY ALLEGATIONS** ..... 4

**INTRODUCTION**..... 4

**THE PLAINTIFFS AND DECEDENTS** ..... 4

**THE DEFENDANTS** ..... 6

**THE INCIDENT** ..... 10

**THE PITKIN COUNTY BUILDING CODES AND REGULATIONS** ..... 15

**CONSTRUCTION LEADING UP TO THE INCIDENT**..... 16

**THE IMPROPER INSTALLATION OF THE BOILER-OPERATED SNOW-MELT SYSTEM AND ITS VENTING**..... 18

**THE IMPROPER DESIGN AND INSTALLATION OF THE OTHER MECHANICAL AND HEATING EQUIPMENT** ..... 24

**THE INTRODUCTION OF GAS SERVICE TO THE LODGE**..... 26

**THE FAILURE TO INCLUDE ONE OR MORE CARBON MONOXIDE DETECTORS AT THE LODGE** ..... 26

**THE GRANTING OF THE CERTIFICATE OF OCCUPANCY** ..... 28

**MAINTENANCE AND MANAGEMENT OF THE LODGE FOLLOWING THE COMPLETION OF CONSTRUCTION**..... 29

**THE STATUS OF THE PARTIES UNDER THE PREMISES LIABILITY ACT, SECTION 13-21-115, C.R.S.**..... 31

**BOILER DESIGN HISTORY LEADING UP TO THE INCIDENT** ..... 34

<b>DAMAGES ALLEGATIONS APPLICABLE TO ALL CLAIMS EXCEPT THE § 1983 CLAIM</b> .....	38
<b>FIRST CLAIM FOR RELIEF</b> .....	42
(Negligence Against All “Landowner” Defendants under the Premises Liability Act, § 13-21-115, C.R.S.).....	42
<b>SECOND CLAIM FOR RELIEF</b> .....	48
(Construction Defect Action Reform Act Claim).....	48
<b>THIRD CLAIM FOR RELIEF</b> .....	49
(Negligent Performance of an Inherently Dangerous Activity).....	49
<b>FOURTH CLAIM FOR RELIEF</b> .....	50
(Felonious Killing by Certain “Landowner” Defendants) .....	50
<b>FIFTH CLAIM FOR RELIEF</b> .....	52
(Strict Products Liability Against Heat Transfer).....	52
<b>SIXTH CLAIM FOR RELIEF</b> .....	54
(Products Liability for Negligence Against Heat Transfer).....	54
<b>SEVENTH CLAIM FOR RELIEF</b> .....	56
(Heat Transfer’s Violation of the Colorado Consumer Protection Act).....	56
<b>EIGHTH CLAIM FOR RELIEF</b> .....	57
(Civil Rights Claim for Violation of 42 USC § 1983).....	57

**PRELIMINARY ALLEGATIONS**  
**(Applicable to all Claims)**

**INTRODUCTION**

1. This case involves the unnecessary and tragic death of an entire family, i.e., Parker W. Lofgren and Caroline F. Lofgren, and their two minor children, Owen P. Lofgren and Sophie J. Lofgren, (“The Lofgren Family”).

2. The Lofgren Family died as a result of carbon monoxide poisoning after retiring to bed following Thanksgiving Day, November 27, 2008, while staying at a newly renovated and constructed multi-million dollar home known as “The Lodge” (The Lodge) located at 10 Popcorn Lane, near Independence Pass, just east of Aspen, in Pitkin County, Colorado.

**THE PLAINTIFFS AND DECEDENTS**

3. The Plaintiff Hilda M., a/k/a Hildy, Feuerbach is the Personal Representative of the Estate of Parker W. Lofgren, deceased, appointed December 11, 2008 by the Denver Probate Court in Case No. 08PR1612.

4. The Plaintiff Hilda M., a/k/a Hildy, Feuerbach is the Personal Representative of the Estate of Caroline F. Lofgren, deceased, appointed December 11, 2008 by the Denver Probate Court in Case No. 08PR1650.

5. The Plaintiffs Jean Rittenour and Frederick J. Feuerbach, Jr. are the Co-Personal Representatives of the Estate of Owen P. Lofgren, deceased, appointed January 28, 2009 by the Denver Probate Court in Case No. 09PR142.

6. The Plaintiffs Jean Rittenour and Frederick J. Feuerbach, Jr. are the Co-Personal Representatives of the Estate of Sophie J. Lofgren, deceased, appointed January 28, 2009 by the

Denver Probate Court in Case No. 09PR141.

7. The decedents Parker W. Lofgren and Caroline F. Lofgren were married on September 9, 1995 and resided with their two minor children, Owen P. Lofgren and Sophie J. Lofgren, at 637 Franklin Street, Denver, Colorado 80218.

8. The decedent Parker W. Lofgren was born April 9, 1969, and, after graduating from Colorado College and receiving an M.B.A. degree from the University of Washington, became a successful investment banker, and was a managing partner and co-founder of St. Charles Capital.

9. The decedent Caroline F. Lofgren was born June 26, 1966 and, after graduating from the University of Vermont, worked as a senior professional in risk management before their children, Owen and Sophie, were born.

10. The decedent Owen P. Lofgren was born November 8, 1998 and was in the Fourth Grade at St. Anne's Episcopal School.

11. The decedent Sophie J. Lofgren was born April 24, 2000 and was in the Third Grade at St. Anne's Episcopal School.

12. The Plaintiff Jean Rittenour is the mother of Parker W. Lofgren and the grandmother of Owen P. Lofgren and Sophie J. Lofgren, and resides in Portland, Oregon. She is the sole currently surviving heir of Parker W. Lofgren, deceased, whose father, William Lofgren, died in May 2006.

13. The Plaintiff Frederick J. Feuerbach, Jr. is the father of Caroline F. Lofgren, and the grandfather of Owen P. Lofgren and Sophie J. Lofgren, and resides in Lenox, Massachusetts. He is the sole currently surviving heir of Caroline F. Lofgren, whose mother, Mary Jane

Feuerbach, died in June 2008.

**THE DEFENDANTS**

14. At all times pertinent to this action, the Defendant Marlin W. Brown was an owner, manager and principal employee of the Defendant Roaring Fork Plumbing and Heating Company (“Roaring Fork”), a Colorado corporation having its principal place of business at 85 County Road 165, Glenwood Springs, Colorado

15. At all times pertinent to this action, the Defendant Roaring Fork was a licensed plumbing and heating contractor and engaged in the business of providing plumbing and heating services, including the construction, installation and servicing of various plumbing and heating devices in commercial and residential properties.

16. At all times pertinent to this action, the Defendant Black Diamond Land Development Corporation (“Black Diamond”) was a Colorado corporation engaged in the business of acquiring, owning, developing, and selling real estate with its principal place of business located at 1601 Arapahoe Street, Suite 700, Denver, Colorado.

17. At all times pertinent to this action, the Defendant Black Diamond had acquired and owned the property at 10 Popcorn Lane, Pitkin County, Colorado, had contracted for its improvement, alteration, addition and remodeling, and was offering the finished residence known as The Lodge for sale at an asking price of \$8,950,000.

18. At all times pertinent to this action, the Defendant Jonathan M. Thomas was a principal owner and manager of Black Diamond, served on its Board of Directors, and was its Resident Agent and currently resides in Denver, Colorado.

19. At all times pertinent to this action, the Defendant Jonathan M. Thomas held

himself out as the “owner” of the residence known as The Lodge, regularly occupied the residence, and had the right to control, and exercised primary control over, its use and occupancy.

20. At all times pertinent to this action, the Defendant Integrity Construction Management Group, LLC, a/k/a ICM Group, LLC (“Integrity Construction”) was a Colorado limited liability company with its principal place of business at 100 Elk Run Drive, Basalt, Colorado.

21. At all times pertinent to this action, the Defendant Integrity Construction was a licensed contractor and in the business of the development and construction of real property, general contracting, and construction management and supervision of real estate projects.

22. At all times pertinent to this action, the Defendant Integrity Construction worked as a “team partner” with the Defendant Black Diamond, contracted with Black Diamond to serve as the general contractor, construction manager and construction supervisor for the residence known as The Lodge in Pitkin County, Colorado, and, upon information and belief, was engaged in a joint venture with the Defendant Black Diamond with respect to this project.

23. At all times pertinent to this action, the Defendant John H. Wheeler (also known as John H. Wheeler IV, and “Jack” Wheeler), was a principal owner, manager, and employee of the Defendant Integrity Construction and was primarily responsible for its services at The Lodge.

24. At all times pertinent to this action, the Defendant Eagle Air Systems, Inc. (“Eagle Air”) was a Colorado corporation and had its principal place of business at 259 Arapahoe, Carbondale, Colorado.

25. At all times pertinent to this action, the Defendant Eagle Air was a licensed

contractor and engaged in the business of designing, fabricating and installing heating, ventilation and air conditioning (“HVAC”) systems for residential and commercial properties.

26. At all times pertinent to this action, the Defendant Proguard Protection Services, Inc. (“Proguard”) was a Colorado corporation with its principal place of business for sales at 400 West Main Street, Aspen, Colorado and its corporate offices at 0074 Sunset Drive, Unit A, Basalt, Colorado.

27. At all times pertinent to this action, Proguard was in the business of designing, installing and servicing various types of monitoring, fire, and security systems for residential and commercial properties, which services also included the installation of carbon monoxide detectors.

28. At all times pertinent to this action, the Defendant Precision Mechanical, Inc. (“Precision Mechanical”) was a Colorado corporation and had its principal place of business at 0566 County Road 113, Carbondale, Colorado.

29. At all times pertinent to this action, Precision Mechanical was a licensed plumbing contractor and engaged in the business of designing, fabricating, installing, and servicing plumbing, mechanical and HVAC systems for residential and commercial properties.

30. At all times pertinent to this action, the Defendant Myers Enterprises, LLC (“Myers”) was a Colorado limited liability company and had its principal place of business at 412 Summit Drive, Carbondale, Colorado.

31. At all times pertinent to this action, the Defendant Myers was a licensed contractor and engaged in the business of designing, fabricating, installing and servicing HVAC systems for residential and commercial properties.

32. At all times pertinent to this action, the Defendant Heat Transfer Products, Inc. (“Heat Transfer”) was and is a Massachusetts corporation with its principal place of business at 120 Braley Road, East Freetown, Massachusetts.

33. At all times pertinent to this action, the Defendant Heat Transfer was and is in the business of designing, manufacturing, marketing and distributing high efficiency gas-fired hot water boilers, including the “Munchkin”<sup>TM</sup> gas-fired hot water boiler.

34. At all times pertinent to this action, the Defendant Heat Transfer designed, manufactured, marketed and distributed a “Munchkin”<sup>TM</sup> gas-fired hot water boiler, Model 199M R1 S/N: A17L1603, manufactured in January 2005, which was installed in The Lodge.

35. At all times pertinent to this action, the Defendant Erik Peltonen was a Building Inspector regularly employed by the City of Aspen.

36. At all times pertinent to this action, the Defendant Pitkin County Community Development Department was and is a department of the Defendant Board of County Commissioners of Pitkin County, a political subdivision of the State of Colorado (“Pitkin County”) and is responsible by law for the approval of residential construction projects, granting of Building Permits, performing building inspections, issuing Certificates of Occupancy, and the administration and enforcement of the Pitkin County Code and related resolutions and ordinances regulating construction projects in Pitkin County, Colorado.

37. At all times pertinent to this action, the Defendant Brian Pawl was a Building Inspector for the Defendant Pitkin County and was employed by the Defendant Pitkin County Community Development Department and was performing services within the course and scope of that employment.

38. At all times pertinent to this action, the Defendants Pitkin County and Pitkin County Community Development Department were and are responsible for the adequate employment, training, and supervision of its Building Inspectors and the adoption of adequate protocols, systems, and requirements for the approval of residential construction projects and the enforcement of its Building Codes and related resolutions and ordinances regulating construction projects in Pitkin County, Colorado.

### **THE INCIDENT**

39. On Saturday, May 3, 2008, the St. Anne's Parents Association of St. Anne's Episcopal School held an auction at a "Life is Sweet Benefit" to raise funds for the school.

40. The decedents Owen P. Lofgren and Sophie J. Lofgren were students at St. Anne's Episcopal School.

41. Among the items offered was:

**Five Night Stay in Aspen home . . . . Value: \$10,000**

For those of you looking for a refreshing summertime blast, this is the house for you! This 3,200 square foot, three-bedroom house is 3.5 miles from Aspen, but feels a world away. This historic home was meticulously renovated by a renowned team of craftsman and has a kitchen designed by Chef Charles Dale. Located in Morningstar at Independence Pass, this house with its old-world warmth and gorgeous decorating will be a sweet break from everyday living. Enjoy five nights in June, August, September or October, 2008. No smoking allowed. Donor: Carla and Jonathan M. Thomas

42. The five night stay in the Aspen home donated by the Defendant Jonathan M. Thomas and his wife was for a stay at The Lodge located at 10 Popcorn Lane in Pitkin County, Colorado.

43. The decedents Parker W. Lofgren and Caroline F. Lofgren, together with their friends, Don and Suzanne MacKenzie, successfully bid \$6,000 for the five-night stay at The Lodge, with each couple paying \$3,000.

44. The Lofgren Family exercised their five-night stay during the Thanksgiving weekend starting on November 26, 2008 with the MacKenzies to join them on the day following Thanksgiving on November 28, 2008.

45. On November 27, 2008, the Lofgren Family was staying at The Lodge and, following a Thanksgiving day turkey dinner at the residence, the Lofgren Family retired to bed: the parents to a guest suite and their two children to bunk beds in another guest suite.

46. The guest suite occupied by Parker and Caroline Lofgren was located above a mechanical room and crawl space under a stairwell where the “Munchkin”<sup>TM</sup> gas-fired boiler was located, together with its intake and exhaust vent piping, as well as other HVAC systems, with the children’s guest suite located further away.

47. The mechanical room was accessible only by lifting up the staircase to the elevated guest suite above the mechanical room adjacent or through a small entry behind an armoire in the dining room and was joined to a crawl space through a small opening where other HVAC equipment was also located.

48. That evening, it began to snow.

49. As snow accumulated, an outdoor sensor detected the snow and caused the “Munchkin”<sup>TM</sup> gas-fired boiler to start so as to melt the snow on the outside patio and walkways.

50. At approximately 5:00 p.m. on Friday, November 28, 2008, the MacKenzies

arrived at the residence at 10 Popcorn Lane and found the dead bodies of the entire Lofgren Family in the parents' guest suite above the mechanical room.

51. The decedents Parker and Caroline Lofgren were found in their nightclothes on the bed. Caroline had hemorrhaged from her mouth or nose. Owen was found on the floor by his father beside a nightstand. Sophie was found on the floor by her mother with her face bloodied. Blood was also found on the bedding of one of the bunk beds in the children's guest suite.

52. It was later determined that all four members of the Lofgren Family had died of carbon monoxide poisoning and inhalation.

53. Carbon monoxide is a colorless, odorless, and slightly lighter than air gas that is poisonous when inhaled.

54. Carbon monoxide is rapidly absorbed through the lungs and has a greater affinity to hemoglobin than oxygen, displacing oxygen and creating carboxyhemoglobin, which reduces oxygen transport, delivery, and utilization by the body causing tissue hypoxia and eventual death by suffocation.

55. The duration and severity of symptoms of carbon monoxide poisoning and the likelihood of death are dependent upon conditions such as the concentration of carbon monoxide in the air, the duration of exposure, and the general health of the individual exposed.

56. Carbon monoxide results from incomplete combustion of fuels such as natural gas in gas-fired boilers often due to an improper fuel-air mixture from an inadequate supply of fresh air.

57. The source of the carbon monoxide that killed the Lofgren Family was the "Munchkin"™ gas-fired boiler installed in the mechanical room beneath the parent's guest suite

for the purpose of providing a snowmelt system for the patio and walkways outside.

58. The causes of the carbon monoxide poisoning of the Lofgren Family included, but were not limited to, a combination of the following factors and conditions, several of which were open and obvious violations of the Pitkin County Code:

- a. **A disconnected exhaust vent.** The exhaust containing the carbon monoxide from the “Munchkin”<sup>TM</sup> boiler escaped from a disconnected elbow joint in the polyvinyl chloride (PVC) exhaust vent pipe in the mechanical room that had neither been properly primed, glued or sealed and was not securely attached, supported or braced in any way.
- b. **A disconnected fresh air intake vent.** The carbon monoxide exhaust released into the mechanical room was recirculated back into the “Munchkin”<sup>TM</sup> boiler through a disconnection between the “Munchkin”<sup>TM</sup> boiler and a fresh air intake PVC pipe from the outside that was similarly not supported, braced, or securely attached in any way and that was also stressed, distorted, and warped around an adjacent water tank, such that it had pulled out at its slip-fitted connection into the rear of the “Munchkin”<sup>TM</sup> boiler.
- c. **A defectively designed boiler.** Despite the exhaust gas containing the carbon monoxide escaping from the disconnected exhaust vent and being recirculated back into the “Munchkin”<sup>TM</sup> boiler through the disconnected fresh air intake vent, creating an increasingly improper fuel-air mixture and resulting in increasingly unsafe, inefficient and improper incomplete

combustion such as to thereby discharge increasing levels of carbon monoxide into the confined mechanical room and crawl space, the “Munchkin”™ boiler failed to sense this danger and shut off but, rather, continued to operate producing yet deadlier levels of carbon monoxide.

- d. **An improperly installed HVAC System.** The carbon monoxide exhaust spewing from the “Munchkin”™ boiler disseminated, circulated, and migrated from the mechanical room into the living areas of the residence, and, especially, the guest suite above the mechanical room, through various unsealed dampers, gaps, penetrations and holes in the duct work of the gas forced-air heating system located in the mechanical room and crawl space.
- e. **The absence of a carbon monoxide detector.** There was no carbon monoxide detector located in the residence to warn the Lofgren Family of the dangerous rising levels of carbon monoxide entering the living quarters.

59. The absence, elimination, or correction of any one of these conditions may have prevented the deaths of one or more members of the Lofgren Family, or substantially reduced the risk of such deaths.

60. As the “Munchkin”™ spewed increasing levels of carbon monoxide which eventually disseminated to the living quarters, each of the Lofgren Family members likely suffered initially mild headaches and shortness of breath; followed by throbbing frontal headaches; then nausea, dizziness, dimness of vision, confusion, impaired judgment, and fatigue;

followed by decreased blood pressure, syncope, sleepiness and lack of muscle control; then weakness, faintness and collapse; and culminating in convulsions, unconsciousness and eventual death from respiratory failure. Hemorrhaging often accompanies these symptoms.

### **THE PITKIN COUNTY BUILDING CODES AND REGULATIONS**

61. In 2003, the Board of County Commissioners of Pitkin County passed an ordinance adopting the International Residential Code, 2003 Edition, as part of the building requirements and Code of Pitkin County, so as to “. . . provide for and promote the health, safety, and welfare of Pitkin County residents and visitors.”

62. On or about February 26, 2003, the Defendant Pitkin County Board of County Commissioners adopted an “Efficient Building Code,” by Ordinance No. 03-009, effective on or about April 1, 2003, which, as one of its purposes, was to address and promote enhanced indoor air quality in residential buildings.

63. Section 11.8 of the Efficient Building Code mandated the installation of an “electric hard-wired or AC/DC carbon monoxide detector located according to manufacturer’s recommendations.”

64. These Building Codes were adopted under authority of § 30-28-201, C.R.S. *et seq.*

65. Pursuant to § 30-28-203, C.R.S.: “[T]he provisions of any building code shall be made with reasonable consideration of, and in accordance with, the public health, safety, morals, and general welfare and the safety, protection, and sanitation of such dwellings, buildings and structures.”

66. Pursuant to § 30-28-205(1), C.R.S.: “After the adoption of such Building Code, it shall be unlawful to erect, construct, reconstruct, alter or remodel any structure, dwelling, or

building in the designated area . . . without first obtaining a building permit from such county building inspector.”

67. Pursuant to § 30-28-210(1), C.R.S.: “It is unlawful to erect, construct, reconstruct, alter, maintain, or use any building, structure, or land in violation of this part 2 or any provisions of the area Building Code.”

68. The Lofgren Family were members of the particular class of persons the Pitkin County Building Codes and regulations were intended to protect.

69. The deaths of each member of the Lofgren Family were the types of injuries and harms the Pitkin County Codes and building regulations were intended to protect.

#### **CONSTRUCTION LEADING UP TO THE INCIDENT**

70. In October 2003, the Defendant Black Diamond secured a Building Permit, Permit No. 2355.2003, from the Defendant Pitkin County Community Development Department to make alterations and additions to a historic property, then described as located at 122 Difficult Circle or Lane, Aspen, Colorado.

71. In November 2005, the address of the property was changed from 122 Difficult Lane to 10 Popcorn Lane.

72. There were several successive general contractors for this construction project: initially Resort Properties, LLC, then Weitz Norris Custom Homes; and, by late 2004, the Defendant Integrity Construction.

73. The Defendant John H. Wheeler, as well as Alan Thomas (deceased), had previously been involved in the project as employees for Resort Builders LLC and, later, together, formed Integrity Construction to assume general contractor responsibilities for this

project.

**THE IMPROPER INSTALLATION OF THE BOILER-OPERATED SNOW-MELT SYSTEM AND ITS VENTING**

74. In approximately January 2005, the Defendant Integrity Construction subcontracted the mechanical and plumbing work for The Lodge to the Defendants Roaring Fork and Eagle Air.

75. On or about February 7, 2005, the Defendant Roaring Fork applied for a Mechanical Permit, Permit No. 0034.05 PMEC, from the Pitkin County Community Development Department to install a boiler fueled by natural gas at 10 Popcorn Lane for the purpose of providing domestic hot water as well as approximately 1200 square feet of snowmelt to the premises, which Mechanical Permit Application was issued on February 8, 2005.

76. The Defendant Roaring Fork, through its owner and primary employee, the Defendant Marlin W. Brown, proceeded to perform the mechanical work associated with the installation of the boiler and snowmelt system, with the assistance of an unlicensed, untrained and inexperienced helper.

77. The Defendant Roaring Fork, through its employees, the Defendant Marlin W. Brown and his helper, installed a “Munchkin”<sup>TM</sup> gas-fired hot water boiler, Model 199M R1 S/N: A17L603, manufactured in January 2005, at 10 Popcorn Lane to service the snowmelt system and provide domestic hot water to the premises.

78. The Defendant Roaring Fork also contracted with the Defendant Integrity Construction to perform plumbing work at the Lodge under various Plumbing Permits, and such plumbing work included the installation of a water storage tank, heated by the Munchkin boiler, to provide domestic hot water to the residence.

79. The “Munchkin”<sup>TM</sup> boiler was installed in the mechanical room under a staircase where other equipment, appliances and devices were located, including the water storage tank which was installed adjacent to the “Munchkin”<sup>TM</sup> boiler.

80. The installation of the “Munchkin”<sup>TM</sup> boiler installed in The Lodge required the installation of a properly sealed gas-tight vent system including both (a) a fresh air intake vent from the outside to provide fresh air to the “Munchkin”<sup>TM</sup> boiler for combustion, and (b) an exhaust vent from the “Munchkin”<sup>TM</sup> boiler to the outside of the residence to exhaust the products of combustion.

81. The vents were installed with three inch polyvinyl chloride (“PVC”) piping consisting of various joints and elbows connecting the vent system from the “Munchkin”<sup>TM</sup> boiler to vent terminals protruding from the roof of the structure.

82. Proper installation of the sealed fresh air intake vent to the “Munchkin”<sup>TM</sup> boiler required that it be properly supported, firmly engaged by slip-fitting it into the inlet of the “Munchkin”<sup>TM</sup> boiler, and secured against distortion, warpage or other stresses to maintain a fixed relationship between the vent piping and the boiler.

83. Within the mechanical space of The Lodge, the fresh air intake PVC piping was improperly designed such as to have contact with, and was distorted, warped or stressed around, the hot water storage tank, also installed by the Defendant Roaring Fork next to the “Munchkin”<sup>TM</sup> boiler, before being “slip-fitted” without fasteners into the rear of the “Munchkin”<sup>TM</sup> boiler, and, without a secure fitting and without support hangers or brackets, created stresses on the fresh air intake PVC piping at its connection to the inlet of the “Munchkin”<sup>TM</sup> boiler such that it would foreseeably, predictably, and inevitably disengage from

the “Munchkin”™ boiler.

84. The fresh air intake PVC pipe thereafter disengaged from the “Munchkin”™ boiler inlet such that the air intake to the “Munchkin”™ boiler came not from fresh outside air but from the air within the mechanical room.

85. The improper design and installation of the fresh air intake to the “Munchkin”™ boiler violated the manufacturer’s instructions and warnings, the American National Standards Institute ANSI Z21.47 1993 governing vent air intake pipes to gas-fired central furnaces, the International Residential Code 2003 Edition, and the Pitkin County Code and building requirements and was open and obvious to any reasonable inspection of the system.

86. The proper installation of the exhaust vent going from the “Munchkin”™ boiler to the outside required that the exhaust vent piping:

- a. Be properly cleaned, primed, cemented, and sealed completely at all connections and elbows to create pressure-tight joints so as to prevent leakage of exhaust products from the positive pressure exhaust vent into the mechanical room and living space;
- b. Use priming of contrasting color before applying the glue or cement;
- c. Be pitched horizontally at a minimum of ¼ inch per foot back toward the boiler to allow drainage of condensate which can block the exhaust vent piping; and
- d. Be properly, adequately, and securely supported, along both horizontal and vertical courses, with support hangers or brackets, to firmly secure it in place and maintain a fixed relationship as to the entire venting system.

87. At The Lodge, the Defendant Roaring Fork, through the Defendant Marlin W. Brown, improperly installed the “Munchkin”<sup>TM</sup> exhaust vent including, but not limited to, the following acts or omissions:

- a. By not using the proper glue or cement, if any, at the PVC pipe connections to create pressure-tight sealed joints;
- b. By not applying any primer of contrasting color before applying any glue or cement to the joints;
- c. By not providing adequate sealing of the pressurized PVC exhaust vent piping to avoid leakage of the exhaust products into the mechanical room and living space;
- d. By not providing any support of any kind by way of support hangers or brackets to secure the exhaust vent piping in place and create a fixed relationship between the venting, the “Munchkin”<sup>TM</sup>, and the exhaust terminals outside; and
- e. By not adequately protecting the exhaust vent system from disconnection as a result of known, foreseeable, and inevitable pressurization of the exhaust gases emitted from the “Munchkin”<sup>TM</sup> as well as vibrations, movements, and other foreseeable stresses on the exhaust vent piping.

88. The improper installation of the exhaust vent piping violated the manufacturer’s instructions and warnings, the International Residential Code, 2003 Edition, ANSI and ASTM standards, and the Pitkin County Code and building requirements and was open and obvious to any reasonable inspection of the system.

89. Sometime prior to the deaths of the Lofgren Family, the inadequately glued, unprimed, unsecured, and unsupported exhaust vent piping inevitably disconnected at an elbow between the horizontal and vertical exhaust vent piping in the mechanical room spewing exhaust gases containing carbon monoxide into the mechanical space.

90. The exhaust gas containing carbon monoxide spewing from the disconnected exhaust vent piping spilled into the mechanical room and reentered into, and recirculated into, the “Munchkin”<sup>TM</sup> boiler through the disconnected fresh air intake vent, thereby interfering with combustion of the “Munchkin”<sup>TM</sup> boiler fuel, creating further incomplete combustion, and thereby exponentially increasing the emission of carbon monoxide exhaust into the mechanical room and eventually disseminating increasing levels of carbon monoxide into and throughout the living space of The Lodge.

91. At the time of the installation of the “Munchkin”<sup>TM</sup> boiler at The Lodge it was well known among installers, building inspection officials, and manufacturers that improper installation of the fresh air intake vent and exhaust vent system could result in serious injury or death, including death from carbon monoxide poisoning.

92. After completion of the installation, and before starting up the boiler, installers knew to inspect the intake piping and exhaust vent piping to verify that they were intact, correctly installed, and sealed from any leaks.

93. The International Residential Code, 2003 Edition, and prior or related building codes and standards governing residential construction in Pitkin County, required that boiler and venting installations conform to the manufacturer’s instructions.

94. The Defendant Pitkin County Community Development Department was charged

with the enforcement of the Pitkin County Code and regulations governing construction in Pitkin County.

95. The Defendant Brian Pawl was a Building Inspector employed by the Defendant Pitkin County Community Development Department whose primary responsibilities included, but were not limited to:

- a. Perform inspections of construction projects for which a Building Permit had been taken out.
- b. Ensure that all work complied with the requirements of the Pitkin County Code and Regulations governing building projects in Pitkin County.
- c. Accept or reject such work under each Building Permit to ensure such compliance.
- d. Enter and maintain documents showing daily work schedules, inspection logs, and the results of any inspection.
- e. Generally, to ensure enforcement of the Pitkin County Code and Regulations so as to protect the public from shoddy and unsafe construction practices.

96. The Defendant Erik Peltonen was a Building Inspector employed by the City of Aspen and, by inter-governmental contract, agreement, custom and practice, performed building inspection services outside the Aspen City limits for and on behalf of the Defendant Pitkin County Community Development Department, and, by so doing, was charged with the same duties and responsibilities as any other Building Inspector working for the Defendants Pitkin County and Pitkin County Community Development Department, and was, in effect, a loaned

servant thereof.

97. Upon information and belief, the Defendant Erik Peltonen supposedly performed various inspections of the mechanical work, including Mechanical Permit No. 00034.05 P MEC, on or about June 20, 2005, with one or more further inspections supposedly performed by the Defendant Brian Pawl on such mechanical work on or about August 16, 2005.

98. If such mechanical inspections took place, the Defendants Erik Peltonen and Brian Pawl passed the inspection of the snowmelt system, operated by the “Munchkin”<sup>TM</sup> boiler and its venting, installed by the Defendants Roaring Fork and Marlin W. Brown, despite open and obvious violations of the Pitkin County Code and building regulations.

**THE IMPROPER DESIGN AND INSTALLATION OF THE OTHER  
MECHANICAL AND HEATING EQUIPMENT**

99. In approximately January 2005, the Defendant Integrity Construction subcontracted with the Defendant Eagle Air to install various heating, venting and air conditioning (HVAC) systems at The Lodge including, among other items, three forced air gas heating systems, three air conditioning systems, and other equipment and appliances.

100. On or about January 27, 2005, the Defendant Eagle Air applied for a Mechanical Permit to perform such work with the Pitkin County Community Development Department which issued such a Permit on or about February 8, 2005 as Mechanical Permit No. 0023-2005 P MEC.

101. The Defendant Eagle Air thereafter designed the mechanical room and adjoining crawl space at The Lodge to install the HVAC equipment and other appliances and proceeded to install the HVAC systems, with its associated vents, ductwork, and other equipment.

102. The Defendant Eagle Air installed one gas forced-air furnace in the mechanical room and two additional gas forced-air furnaces in the adjacent crawl space accessible through a small opening between the mechanical room and the crawl space.

103. Each of the gas forced-air furnaces were to be operated with fresh air from the outside through sealed fresh air intake vent piping, from terminals in the roof to the furnaces and were not to rely upon air within the mechanical room or crawl space to operate the furnaces.

104. The Defendant Eagle Air improperly designed, located, fabricated and installed the two gas forced-air furnaces within the crawl space by cutting off one or more of the fresh air intake vents serving those furnaces such that the furnaces relied upon air from the mechanical room and from the outside.

105. In addition, the Defendant Eagle Air created various unsealed dampers, holes, penetrations and tears in the duct work from its gas forced-air furnaces to the living quarters which served as a means of migration, circulation, and dissemination of the carbon monoxide exhaust gas accumulating in the mechanical room and crawl space to enter the living quarters of The Lodge.

106. Such HVAC design, fabrication and installation was in violation of the manufacturer's instructions, the International Residential Code, 2003 Edition, and the building requirements of Pitkin County Code, which violations were open and obvious to any reasonable inspection of the system.

107. The improper installation of the HVAC system by the Defendant Eagle Air was a primary source of the circulation, spread and migration of the deadly levels of carbon monoxide from the mechanical space into the living quarters of The Lodge occupied by the Lofgren

Family.

108. Upon information and belief, either the Defendant Brian Pawl or the Defendant Erik Peltonen supposedly performed an inspection of the rough-in system and flues of the Defendant Eagle Air's Mechanical Permit No. 0023.2005 PMEC on or about March 28, 2005; the Defendant Erik Peltonen supposedly performed a final inspection on or about June 20, 2005, with one or more further inspections supposedly performed by the Defendant Brian Pawl on the mechanical work, including Mechanical Permit No. 0023.2005, on or about August 16, 2005.

109. If such mechanical inspections took place, the Defendants Erik Peltonen and Brian Pawl passed the inspections of the HVAC system installed by Eagle Air at The Lodge under Mechanical Permit No. 0023.2005 PMEC despite open and obvious violations of the Pitkin County Code and building regulations.

#### **THE INTRODUCTION OF GAS SERVICE TO THE LODGE**

110. Natural gas service from the utility company could not be introduced to The Lodge until the above mechanical inspections had been completed and the work approved such that a gas tag was placed on the common gas line by a Building Inspector.

111. Upon approval of the above mechanical inspections, either the Defendant Erik Peltonen or the Defendant Brian Pawl placed such a gas tag on the gas line and natural gas was thereafter introduced into the mechanical systems and gas-fueled appliances at The Lodge.

#### **THE FAILURE TO INCLUDE ONE OR MORE CARBON MONOXIDE DETECTORS AT THE LODGE**

112. The Pitkin County Efficient Building Code required the installation of a carbon monoxide detector.

113. An “Efficient Building Program Checklist” was drafted for use by contractors and Building Inspectors by the Defendant Pitkin County Community Development Department which included the mandated “carbon monoxide detector.”

114. The “Efficient Building Program Checklist” was included in the documentation created for the design, planning, specifications, and construction work for The Lodge by the architect, owner and general contractors and was known, or should have been known, by the owners and general contractors, including the Defendant John H. Wheeler and his partner Alan Thomas (deceased), while first employed by Resort Builders LLC on that project and, later, as owners and project managers for the Defendant Integrity Construction.

115. On or about January 28, 2004, the Defendant Proguard submitted a proposal to Resort Builders, LLC, which then included Alan Thomas (deceased) and the Defendant John H. Wheeler, to provide a fire alarm, environmental, and security system for The Lodge.

116. The proposal submitted by the Defendant Proguard included only as an “option” the Efficient Building Code’s mandatory carbon monoxide detectors for each of The Lodge’s three bedrooms at a cost of \$165.00 each.

117. On or about March 21, 2005, the Defendant Proguard contracted with the Defendant Integrity Construction to install a fire alarm system, followed by a contract dated on or about June 22, 2005 to add a heat detector and sprinkler system to the fire alarm system, and, on or about August 2005, a contract to add an intrusion protection and security system to The Lodge.

118. The Defendant Proguard did not urge, warn, or require, nor did the Defendant Integrity Construction contract for, a carbon monoxide detector to be installed at The Lodge to

comply with the mandatory requirements of the Efficient Building Code.

119. The presence of a carbon monoxide detector mandated by the Efficient Building Code of Pitkin County, and set forth on the Pitkin County Efficient Building Checklist, was to be confirmed by the Building Inspectors at the Final Inspection of the residence, and before issuance of a Certificate of Occupancy by the Pitkin County Community Development Department.

120. On or about June 20, 2005 the Defendant Erik Peltonen supposedly performed the Final Inspection of The Lodge and on or about August 16, 2005, the Defendant Brian Pawl supposedly performed a further Final Inspection of the premises.

121. No mandatory carbon monoxide detector was present at The Lodge at the time of either Final Inspection, which absence was open and obvious.

122. Despite the open and obvious lack of mandatory carbon monoxide detectors and the clear violation of the Pitkin County Efficient Building Code, the Final Inspection of The Lodge was passed on or about August 16, 2005.

#### **THE GRANTING OF THE CERTIFICATE OF OCCUPANCY**

123. The Lodge at 10 Popcorn Lane could not be occupied until the Pitkin County Community Development Department issued a Certificate of Occupancy.

124. On or about June 1, 2006, Anthony Fusaro, as Chief Building Official for the Defendant Pitkin County Community Development Department, issued a Certificate of Occupancy for 10 Popcorn Lane stating that:

It certifies that at the date of issuance, the structure as described below was in compliance with the various resolutions and ordinances regulating building construction and use in this

jurisdiction.

125. The Certificate of Occupancy was issued despite numerous open and obvious violations of those various resolutions and ordinances regulating building construction and use in Pitkin County, which compromised the health, safety, and welfare of guests to Pitkin County, including the Lofgren Family staying at The Lodge.

**MAINTENANCE AND MANAGEMENT OF THE LODGE FOLLOWING THE  
COMPLETION OF CONSTRUCTION**

126. Following the completion of construction, the Defendant Integrity Construction and its principal, the Defendant John H. Wheeler, contracted with the Defendants Black Diamond and Jonathan M. Thomas to perform ongoing inspections, maintenance, repair, upkeep, warranty work, and supervision of the condition at The Lodge pending its eventual sale.

127. On or about May 2, 2006, a “Maintenance Schedule” for The Lodge was drafted assigning certain functions to the Defendants Integrity Construction and John H. Wheeler, which responsibilities included, but were not limited to, “check for snowmelt operation in winter time” and “check heating and air conditioning in the Lodge for proper operation.”

128. The “Munchkin”<sup>TM</sup> manual required periodic inspection and maintenance of the system once per year by a qualified service technician to assure that it was in safe operating condition which required work should have included, before each heating season, such tasks as checking the condition of the vent piping and checking joints of the vent piping for possible leaks.

129. Upon information and belief, the manufacturers of the other HVAC appliances installed at The Lodge included similar such instructions in their manuals and it was the

recommended standard and practice among contractors to perform such yearly maintenance and inspections of residential HVAC systems.

130. In October 2006, the Defendant Integrity Construction contracted with the Defendant Precision Mechanical to service the hot water and snowmelt system.

131. The Defendant Precision Mechanical was not qualified, trained or competent to service the “Munchkin”<sup>TM</sup> boiler, was unfamiliar with its operation and “error codes”, and had no Operator’s Manual to consult, as should have been left on the premises by the Defendant, Roaring Fork.

132. The Defendant Precision Mechanical nonetheless proceeded to attempt to service the “Munchkin”<sup>TM</sup> boiler, the snowmelt system, and the hot water system but failed to perform the necessary maintenance and servicing, including, but not limited to, the checking of the integrity of the venting system.

133. In January 2007, the Defendant Precision Mechanical was again contacted by the Defendant Integrity Construction and performed further servicing of the boiler and snowmelt system.

134. In January 2008, the Defendant Integrity Construction contracted with Myers to service the heating system at the Lodge which service was performed.

135. In June 2008, the Defendant Integrity Construction contracted with the Defendant Myers to perform a “complete maintenance review of three forced warm air systems with refrigerated air conditioning” at the Lodge.

136. The Defendant Myers performed such a “complete maintenance review” and made various changes and adjustments to the HVAC system at the Lodge.

137. In the alternative to the previous alleged creation of some or all of the above defects and conditions during the construction phase, the Defendants Integrity Construction, John H. Wheeler, Precision Mechanical and Myers, made or contracted with others to make various alterations, servicing, maintenance and repairs to the Lodge, without obtaining necessary Building Permits, and created some or all of the defective conditions found at the time of the death of the Lofgren Family.

138. The Defendants Integrity Construction, John H. Wheeler, Precision Mechanical, and Myers, failed to adequately perform the necessary inspection, maintenance, service and repairs to the HVAC system, the “Munchkin”<sup>TM</sup> boiler, the hot water system, and the snowmelt system so as to discover and correct the defective conditions found at the time of the death of the Lofgren Family.

**THE STATUS OF THE PARTIES UNDER THE PREMISES LIABILITY ACT,  
SECTION 13-21-115, C.R.S.**

139. At all times pertinent hereto, Parker Lofgren, Caroline Lofgren, Owen Lofgren, and Sophie Lofgren were invitees on the premises known as The Lodge, as defined by § 13-21-115(5)(a), C.R.S.

140. At all times pertinent to this action, the Defendant Black Diamond was a “landowner” under § 13-21-115(1), C.R.S., by holding legal title to the real property; by being in possession of The Lodge at 10 Popcorn Lane in Pitkin County, Colorado; by being legally responsible for the condition of that residence; and by being legally responsible for the activities conducted or circumstances existing on that real property.

141. At all times pertinent to this action, the Defendant Jonathan M. Thomas was a

“landowner” under § 13-21-115(1), C.R.S., by holding himself out as the owner of The Lodge, having the right to control and actually controlling the occupancy and usage of the premises, by being legally responsible for the condition of that residence, and by being legally responsible for the activities conducted or circumstances existing on that real property.

142. At all times pertinent to this action, the Defendants Integrity Construction and John H. Wheeler were “landowners” under § 13-21-115(1), C.R.S., by being legally responsible for the condition of that residence and by being legally responsible for the activities conducted or circumstances that existed on that real property.

143. By providing mechanical and plumbing services for The Lodge, the Defendants Roaring Fork and Marlin W. Brown were “landowners” under § 13-21-115(1), C.R.S., because they were legally responsible for the condition of that residence and the circumstances existing on that real property.

144. By installing the HVAC system and other equipment and appliances at The Lodge, the Defendant Eagle Air was a “landowner” under § 13-21-115(1), C.R.S., because it was legally responsible for the condition of that residence and the circumstances existing on that real property.

145. By installing the fire, environmental and security system at The Lodge, the Defendant Proguard was a “landowner” under § 13-21-115(1), C.R.S., because it was legally responsible for the condition of that residence and the circumstances existing on that real property.

146. By performing inspection, maintenance, servicing and repairs to the “Munchkin”<sup>TM</sup> boiler, the hot water system, and the snowmelt system, the Defendant Precision Mechanical was

a “landowner” under § 13-21-115(1) C.R.S., because it was legally responsible for the condition of that residence and the circumstances existing on that real property.

147. By performing inspection, maintenance, servicing and repairs to the HVAC system, the Defendant Myers was a “landowner” under § 13-21-115(a) C.R.S., because it was legally responsible for the condition of that residence and the circumstances existing on that real property.

148. Due to their status as “landowners” and having the right to control and exercising control over the premises, the Defendants Black Diamond, Jonathan M. Thomas, Integrity Construction, and John H. Wheeler also each owed nondelegable duties to the Lofgren Family and are vicariously responsible regardless of independent contracts with other Defendants or others, which nondelegable duties included, but were not limited to:

- a. Adequately protect invitees under § 13-21-111(5), C.R.S., the Premises Liability Act;
- b. Adequately protect invitees from construction work on the premises by unsafe conditions caused by that construction work after they had resumed possession upon completion of the work;
- c. Ensure compliance with all ordinances and regulations, including the Pitkin County Code;
- d. Ensure that special precautions, such as an adequate and sealed vent and flue system to gas-fired appliances, were taken to avoid an unreasonable risk of injury or death to invitees on the premises; and
- e. Adequately perform an inherently dangerous activity involving the

installation of a gas-fired appliance within the premises which, if improperly installed, created a known risk of carbon monoxide poisoning.

149. Upon information and belief, the Defendants Black Diamond and Integrity Construction were also engaged in a joint venture with respect to the construction and maintenance at The Lodge, and its offering for sale to the public, and therefore are jointly liable for each other's misconduct.

#### **BOILER DESIGN HISTORY LEADING UP TO THE INCIDENT**

150. On or about July 7, 1976, the U.S. Consumer Product Safety Commission (CPSC) was petitioned to provide a standard which would keep carbon monoxide fumes out of a residence in the event of a furnace failure which might result from such events as improper installation.

151. The CPSC determined at that time that most carbon monoxide poisoning cases connected with gas furnaces resulted from improperly installed or maintained furnaces or damaged or blocked vents.

152. On or about January 21, 1977, the CPSC announced that it had denied the petition to develop mandatory standards for gas furnaces to reduce the hazard of carbon monoxide fumes finding:

- a. That a device which will shut off gas appliances when abnormal amounts of carbon monoxide are present was not then practicable or economically feasible, but
- b. hoping that industry would undertake research and development that would lead to an inexpensive and reliable carbon monoxide detector.

153. In a letter dated October 29, 1996, the engineering staff of the CPSC advised industry that the American National Standard for Gas-fired Central Furnaces, ANSI Z21.47, was inadequate and should be expanded to require appliance shut off in the event that a vent pipe becomes disconnected.

154. At a meeting and in a letter dated May 14, 1997 to an industry standards organization, the CPSC staff reiterated its concerns over carbon monoxide deaths and injuries associated with disconnected vents from gas-fired furnaces, characterizing these as an “avoidable risk of CO poisoning,” and urging development of technology necessary to sense a disconnected vent condition and shut the furnace off.

155. By July 22, 1997, the CPSC engineering staff had completed its review of a sample of carbon monoxide poisonings associated with gas-fired central furnaces and found that one-sixth of such cases involved disconnected vents, which “clearly demonstrated the need for appliance shut off technology if the vent pipe becomes disconnected.”

156. On August 30, 2000, and again on September 19, 2002, the CPSC updated the 1997 sample of incident reports showing numerous deaths and injuries lending further confirmation that a disconnected vent pipe posed a risk of CO exposure to consumers that should be addressed by a standard requiring the furnace to shut off in the event of a disconnected vent pipe.

157. In June 1999, the CPSC staff began emissions testing of gas-fired central furnaces and, in August 31, 2000, reported preliminary test results again supporting the CPSC staff proposal to require the furnace to shut off in the event that a vent pipe becomes disconnected.

158. On November 14, 2000, the CPSC staff continued its efforts to reduce the serious

health risk posed to consumers from carbon monoxide poisoning due to vent blockage and separation and recommended that, if technology was not available to require the furnace to shut off in the event a vent pipe became disconnected, alternative technologies could be developed to either (1) require a means to prevent furnace CO emissions from exceeding certain limits; or (2) require a means to shut down the furnace if CO emissions exceeded certain limits.

159. By October 16, 2001, the CPSC staff, after undertaking further testing programs, found that it was technically feasible to use combustion sensors to monitor furnace CO levels and provide a shut off signal to a furnace control system or other sensor technology if the CO levels exceeded a predetermined threshold, such as 400 ppm, so as to address vent blockage or separation that allows combustion materials to reach hazardous levels in the living space.

160. Long before 2005, foreign countries such as Japan required that gas water heaters and boilers incorporate “incomplete combustion sensors” or other sensor technology to shut off the appliance in the event it generates CO concentrations in excess of 300 ppm in the equipment room with the cost of such sensors estimated at \$6.00 to \$13.00 per unit.

161. Long before 2005, direct vent gas-fired furnace and boiler manufacturers in other countries, such as Japan, had incorporated various sensor technology into such appliances to shut off the appliance in the event of excessive emissions.

162. By 2005, the CPSC had determined the technical feasibility of adding various sensors to boiler and furnace chambers and systems to cause the appliance to shut down if dangerous levels of CO were generated, thereby stopping unsafe CO levels at their source.

163. By 2005, there were numerous patents available to gas-fired boiler manufacturers for various sensor devices that would shut down boiler operation in the event of such problems

as incomplete combustion, oxygen depletion, or excess carbon monoxide generation by the system.

164. By 2005, the Defendant Heat Transfer was, or should have been, aware of incidents involving carbon monoxide deaths or injuries from improper installation of gas-fueled appliances, including disconnected vents.

165. Upon information and belief, by 2005, the Defendant Heat Transfer had received information from its distributor representatives, inquiries or complaints from installers, service technicians and consumers, warranty claims and returns, and other sources advising it of various installation problems, including improper venting, improper combustion related to improper venting, and other concerns such that it knew, or should have known, that installation of venting related to the “Munchkin”<sup>TM</sup> and other boilers it distributed was not being properly undertaken, despite its instruction and warnings.

166. By 2005, the Defendant Heat Transfer was aware, or should have been aware, of the availability and feasibility of sensor technology to minimize or eliminate the risk of carbon monoxide deaths or injuries from the improper installation of gas-fueled appliances, including disconnected vents, and had in fact added a pressure sensor device to shut down the boiler in the event of a blocked exhaust vent.

167. By 2005, it was a well known safety practice for manufacturers of all types, including manufacturers of gas-fired boilers, to perform safety analyses so as to anticipate abuse and misuse of a product and to take appropriate action to minimize the risk associated with that abuse and misuse.

168. By 2005, it was a well known safety practice for manufacturers to address known

or foreseeable hazards by (1) changing the design to eliminate the hazard; (2) controlling the hazard by capturing, enclosing or guarding at the source of the hazard; and (3) if and only if neither of the above design strategies were feasible, to instruct and warn concerning the hazard.

169. Before the manufacture of the “Munchkin”<sup>TM</sup> boiler that was installed at The Lodge at 10 Popcorn Lane, the Defendant, Heat Transfer promoted its “Munchkin”<sup>TM</sup> boiler as a “high efficiency boiler” with “Features and Benefits” including “state of the art controls,” including a blocked vent pressure switch to shut off the boiler in the event of a blocked vent, and claimed that it’s “sealed combustion” system was “the safest operating appliance available” and was “ideal for home use.”

170. At the time of the manufacture of the “Munchkin”<sup>TM</sup> boiler that was installed at 10 Popcorn Lane, the Defendant Heat Transfer had incorporated no sensing devices into its “Munchkin”<sup>TM</sup> boiler, nor had it undertaken any design efforts to develop such sensing devices, that would detect incomplete combustion, oxygen depletion, excess carbon monoxide generation, or other conditions that would shut off the boiler as a result of such foreseeable hazards as disconnected exhaust venting within the mechanical space or recirculation of exhaust products into its boiler and prevent dissemination of carbon monoxide into the living space.

171. As of the date of the filing of this action, in addition to the deaths of the four Lofgren Family members, carbon monoxide poisoning from improperly vented “Munchkin”<sup>TM</sup> boilers has resulted in at least six other deaths and two injuries.

**DAMAGES ALLEGATIONS APPLICABLE TO ALL CLAIMS EXCEPT THE § 1983 CLAIM**

172. It is currently unknown as to the timing of the deaths of each member of the

Lofgren Family such as to determine who can sue and for what damages.

173. It is therefore necessary to plead the wrongful death and survival damages claims in the alternative.

174. If all the members of the Lofgren Family are determined to have died simultaneously, then the right to sue and recover damages under the Wrongful Death Act is as follows:

- a. The Plaintiff Jean Rittenour, individually, as sole surviving parent and heir to the decedent Parker W. Lofgren, claims damages for her past and future economic and non-economic losses, including grief, loss of companionship, pain and suffering and emotional stress, and impairment of the quality of her life resulting from the wrongful death of Parker W. Lofgren in such amounts as to be determined by the trier of fact.
- b. The Plaintiff Frederick J. Feuerbach, Jr., individually, as sole surviving parent and heir to the decedent Caroline F. Lofgren, claims damages for his past and future economic and non-economic losses, including grief, loss of companionship, pain and suffering and emotional stress, and impairment of quality of his life resulting from the wrongful death of Caroline F. Lofgren in such amounts as to be determined by the trier of fact.
- c. The Plaintiffs Jean Rittenour and Fred Feuerbach, individually and as sole surviving lineal grandparents of Owen Lofgren and Sophie Lofgren, each claims damages for their past and future noneconomic losses, including

grief, loss of companionship, pain and suffering and emotional stress and impairment of their quality of life resulting from the wrongful death of each of their grandchildren in such amounts to be determined by the trier of fact.

175. If all of the members of the Lofgren Family are determined to have died simultaneously, the Estates may recover under the Colorado Survival Statute as follows:

- a. The Plaintiff Hilda M., a/k/a Hildy Feuerbach, as Personal Representative of the Estate of Parker W. Lofgren, deceased, claims damages to the Estate for all expenses related to the funeral and burial of Parker W. Lofgren, as well as other economic damages in such amounts as to be determined by the trier of fact.
- b. The Plaintiff Hilda M. a/k/a Hildy Feuerbach, as Personal Representative of the Estate of Caroline F. Lofgren, deceased, claims damages to the Estate for all expenses related to the funeral and burial of Caroline F. Lofgren as well as other economic damages in such amounts to be determined by the trier of fact.
- c. The Plaintiffs Jean Rittenour and Frederick J. Feuerbach, Jr., as Co-Personal Representatives of the Estate of Owen P. Lofgren, deceased, claims damages to the Estate for all expenses related to the funeral and burial of Owen P. Lofgren as well as other economic damages in such amounts to be determined by the trier of fact.
- d. The Plaintiffs Jean Rittenour and Frederick J. Feuerbach, Jr., as Co-

Personal Representatives of the Estate of Sophie J. Lofgren, deceased, claims damages to the Estate for all expenses related to the funeral and burial of Sophie J. Lofgren as well as other economic damages in such amounts to be determined by the trier of fact.

176. If all of the Lofgren Family members did not die simultaneously such that certain members survived the deaths of other members, and their status and the amount of damages are fixed at the time of the death of each decedent under Colorado's Wrongful Death Statute, and such claims survived under the Colorado Survival Statute, § 13-20-101, C.R.S., then the Estates of each of the later surviving family members claim wrongful death and survival damages for the deaths of each pre-deceased family member. For example:

- a. If the parents pre-deceased the children, each estate of each child, Owen P. Lofgren and Sophie J. Lofgren, claims past and future damages including economic losses arising from the death of each parent including, but not limited to, loss of support, maintenance, and inheritance, including loss of each of their parent's estates, Trusts and life insurance to which they were or would be beneficiaries, and their own funeral and burial expenses, as well as noneconomic losses arising out of each parent's death, including, grief, loss of companionship, pain and suffering and emotional stress, and impairment of the quality of life in such amounts to be determined by the trier of fact.
- b. If either spouse pre-deceased the other spouse, then the estate of that spouse also claims past and future damages, including economic losses arising out

of the death of the other spouse, including, but not limited to, loss of support, maintenance, and inheritance, including loss of the other spouse's estate, Trusts and life insurance to which the surviving spouse was or would be a beneficiary, and their own funeral and burial expenses, as well as noneconomic losses arising out of the death of their spouse, including their grief, loss of companionship, pain and suffering and emotional stress, and impairment of the quality of life, in such amounts to be determined by the trier of fact.

- c. Other sequences of death create similar such permutations of the damages claims.
- d. The Estates of each decedent also claims economic losses for that decedent's funeral and burial expenses and other economic damages, including the loss of entitlement to the predeceased individuals' estate, Trusts and life insurance to which they were beneficiaries.

**FIRST CLAIM FOR RELIEF**  
**(Negligence Against All "Landowner" Defendants under the Premises Liability Act, § 13-21-115, C.R.S.)**

177. Plaintiffs incorporate by reference those allegations set forth in Paragraphs 1 through 176 inclusively.

178. Each of the "landowner" Defendants, i.e., Roaring Fork, Marlin Brown, Eagle Air, Integrity Construction, John H. Wheeler, Black Diamond, Jonathan Thomas, Proguard, Precision Mechanical, and Myers, knew or should have known of the dangers and construction defects that existed at the Lodge, and, particularly, the violations of the codes, regulations, and ordinances of

Pitkin County.

179. Each of these same “landowner” Defendants failed to exercise reasonable care to protect the Lofgren Family members from those dangers, which negligence included, but was not limited to, violations of the codes, regulations, and ordinances of Pitkin County.

180. The Defendants Roaring Fork and Marlin W. Brown failed to exercise reasonable care and were negligent, in the installation of the “Munchkin”<sup>TM</sup> boiler and its venting system at The Lodge, which negligence included, but was not limited to, the following acts and omissions:

- a. By allowing inadequately trained, supervised and qualified employees to perform the installation;
- b. By failing to read and follow the manufacturer’s instructions and warnings;
- c. By failing to comply with the building requirements for mechanical installations in Pitkin County;
- d. By failing to properly install the “Munchkin”<sup>TM</sup> boiler;
- e. By failing to properly install the fresh air intake venting to the “Munchkin”<sup>TM</sup> boiler;
- f. By failing to properly install the exhaust venting from the “Munchkin”<sup>TM</sup> boiler;
- g. By failing to properly locate and place the venting terminals on the roof;
- h. By failing to adequately inspect the completed installation to ensure its proper installation and safety, and
- i. By failing to adequately instruct and warn others as to the necessary periodic inspection and maintenance of the system, as well as leaving the

manufacturer's manual at the site.

181. The Defendant Eagle Air failed to exercise reasonable care and was negligent in the design and installation of the HVAC system and other appliances and equipment at The Lodge, which negligence included, but was not limited to, the following acts and omissions.

- a. The improper design and layout of the mechanical room and crawl space;
- b. The failure to coordinate its work with other contractors, including Roaring Fork, so that all systems could be safely installed within the limited confines of the mechanical room and crawl space.
- c. Improper installation of a sealed air system including cutting off one or more fresh air vents to one or more of the gas forced-air furnaces such that combustion air came from the mechanical room and crawl space as opposed to fresh air from the outside;
- d. Improperly fabricating and installing the duct-work from the gas forced-air furnaces to the living space including the use of unsealed dampers as well as creating various gaps, penetrations and holes in the duct work allowing the poisoned air from the mechanical room to enter the living space;
- e. The failure to adequately inspect the completed installation to ensure it's proper installation and safety;
- f. By failing to adequately instruct and warn others as to the necessary periodic inspection and maintenance of the HVAC system, as well as leaving the manufacturer's manuals on the premises; and
- g. Upon information and belief, following the issuance of the Certificate of

Occupancy, performing improper repairs and modifications to the HVAC system without a required Building Permit and failing to adequately inspect and maintain the system.

182. The Defendant Proguard failed to exercise reasonable care and was negligent which negligence included, but was not limited to, the installation of the fire protection, environmental and security systems at The Lodge, without also urging, recommending, or requiring the installation of carbon monoxide detectors as required by the Pitkin County Code.

183. The Defendant Precision Mechanical failed to exercise reasonable care and was negligent, which negligence included, but was not limited to, the following acts and omissions at The Lodge:

- a. By servicing the “Munchkin”<sup>TM</sup> boiler when it was inadequately trained, qualified or competent to do so.
- b. By failing to obtain or consult the manufacturer’s manual or operator’s manual, maintenance and service requirements.
- c. By failing to adequately inspect the “Munchkin”<sup>TM</sup> boiler as well as its venting system to ensure that it was adequately glued, connected, supported, anchored, and not stressed.
- d. By dislodging one or both of the vent pipes to the “Munchkin”<sup>TM</sup> boiler during the course of servicing.
- e. By failing to correct, repair or remedy the obvious defective installation made by others.

184. The Defendant Myers failed to exercise reasonable care and was negligent, which

negligence included, but was not limited to, the following acts and omissions:

- a. By inadequately inspecting, servicing and repairing the HVAC system and other components of the mechanical system.
- b. By improperly repairing, or altering the HVAC system and other components of the mechanical room.

185. The Defendants Integrity Construction and John H. Wheeler failed to exercise reasonable care and were negligent, which negligence included, but was not limited to, the following acts and omissions at The Lodge:

- a. Failing to adequately budget, perform, supervise and inspect the construction and installation work performed by its subcontractors and the overall work on the project;
- b. The failure to install, or contract to install, carbon monoxide detectors as required by the Pitkin County Code;
- c. Misleading the Pitkin County Building Inspectors as to the compliance with certain Pitkin County Code requirements;
- d. Improperly making, installing, or contracting to make or install, repairs, modifications, or other work, including to the snowmelt and HVAC systems in the mechanical room and adjacent crawl space, without necessary Building Permits and after the issuance of the Certificate of Occupancy; and
- e. Failing to perform, or contracting to perform, necessary periodic inspections, maintenance, and repairs to the systems within the mechanical

room and adjacent crawl space.

186. The Defendants Black Diamond and Jonathan M. Thomas failed to exercise reasonable care and were negligent, which negligence included, but was not limited to, the following acts and omissions at The Lodge:

- a. Failing to adequately plan, budget, and secure necessary and Code-required safety equipment, such as carbon monoxide detectors;
- b. Failing to oversee, supervise and inspect the construction and installation work done by its contractors and subcontractors; and
- c. Failing to adequately ensure the necessary inspections, maintenance, up-keep and repair of the premises following the completion of construction and the issuance of the Certificate of Occupancy.

187. Based upon nondelegable duties owed to invitees at The Lodge, such as the Lofgren Family, as well as a joint venture relationship between them, the Defendants Black Diamond, Jonathan M. Thomas, Integrity Construction, and John H. Wheeler, are vicariously liable for the negligent work of the other contractors including, but not limited to, Roaring Fork, Eagle Air, Proguard, Precision Mechanical, and Myers, as well as others performing work at The Lodge.

188. Based upon non-delegable duties owed to invitees at The Lodge, such as the Lofgrens, as well as a joint venture relationship, the Defendants Black Diamond and Jonathan M. Thomas are vicariously liable for the negligence of the general contractor, Integrity Construction, and John H. Wheeler.

189. As a direct and proximate result of the negligence of the “landowner” Defendants,

all members of the Lofgren Family died of carbon monoxide poisoning, including Parker W. Lofgren, Caroline F. Lofgren, Owen P. Lofgren and Sophie J. Lofgren.

190. As a direct and proximate result of the deaths of each member of the Lofgren Family, the Plaintiffs claim damages as previously described.

**SECOND CLAIM FOR RELIEF**  
**(Construction Defect Action Reform Act Claim)**

191. Plaintiffs incorporate by reference those allegations as contained in Paragraph 1 through 176 inclusively.

192. Because Plaintiffs and the Lofgren Family were not “property owners”, Plaintiffs claim that they are not subject to the provisions of the Construction Defect Reform Act, § 13-20-801 *et seq.*, C.R.S. but, should such Act apply, Plaintiffs assert such a claim to preserve it under the statute of limitations.

193. The Defendants Marlin W. Brown, Roaring Fork, Integrity Construction, John H. Wheeler, Eagle Air, Proguard, Precision Mechanical, and Myers were all “construction professionals” as defined by § 13-20-803.5(4), C.R.S.

194. These construction professionals created defects in the construction of an improvement to real property known as The Lodge located at 10 Popcorn Lane, Pitkin County, Colorado.

195. The defects caused by these Defendants are specifically set forth in the previous allegations of this Complaint such that no further list of defects is necessary pursuant to § 13-20-803, C.R.S.

196. Any Notice of Claim required by § 13-20-803.5, C.R.S., has been substantially

complied with; these Defendants have had actual notice of both the defects and claim; the construction professionals and their counsel and engineering experts have fully inspected, or had an opportunity to fully inspect, the premises following this incident; all such defects have been corrected as ordered by the Pitkin County Community Development Department; and any further Notice of Claim would be both unnecessary and futile.

197. The defects caused by the above construction professionals caused the death of the Lofgren Family.

198. As a direct and proximate result of the deaths of each member of the Lofgren Family, the Plaintiffs claim damages as previously described.

**THIRD CLAIM FOR RELIEF**  
**(Negligent Performance of an Inherently Dangerous Activity)**

199. Plaintiffs incorporate by reference those allegations as set forth in Paragraphs 1 through 176, inclusively.

200. The Defendants Marlin W. Brown, Roaring Fork Plumbing, and Precision Mechanical were involved in an inherently dangerous activity, i.e., the installation and servicing of a gas-fired boiler within The Lodge requiring an adequate venting system.

201. The Defendants Marlin W. Brown, Roaring Fork Plumbing, and Precision Mechanical owed a duty to exercise the highest degree of care which was breached as above described.

202. The Defendants Black Diamond, Jonathan M. Thomas, Integrity Construction and John H. Wheeler are vicariously liable and owed nondelegable duties to invitees at The Lodge by contracting with Roaring Fork and Precision Mechanical to perform the inherently dangerous

activity.

203. As a direct and proximate result of the above Defendants' negligent performance of an inherently dangerous activity, the members of the Lofgren Family died.

204. As a direct and proximate result of the deaths of each member of the Lofgren Family, the Plaintiffs claim damages as previously described.

**FOURTH CLAIM FOR RELIEF**  
**(Felonious Killing by Certain "Landowner" Defendants)**

205. Plaintiffs incorporate by reference those allegations as set forth in Paragraphs 1 through 176, inclusively.

206. Pursuant to § 13-21-203(1)(a) and § 15-11-803(1)(b), C.R.S. the death of each member of the Lofgren Family constituted a "felonious killing," which includes "manslaughter" under § 18-3-1104, C.R.S.

207. The Defendants Marlin W. Brown and Roaring Fork recklessly caused the death of each member of the Lofgren Family in performing their installation work by consciously disregarding a substantial and unjustifiable risk that a death would occur and, as such, constituted "manslaughter."

208. The actions of the Defendants Eagle Air, Proguard, Integrity Construction, John H. Wheeler, Black Diamond, Jonathan M. Thomas, Precision Mechanical and Myers in causing the death of each member of the Lofgren Family were also reckless by consciously disregarding a substantial and unjustifiable risk that death would occur and, as such, also constituted "manslaughter."

209. As a direct and proximate result of the reckless "manslaughter" by the above

Defendants, each member of the Lofgren Family died.

210. As a direct and proximate result of the deaths of each member of the Lofgren Family, the Plaintiffs seek damages as previously described.

**FIFTH CLAIM FOR RELIEF**  
**(Strict Products Liability Against Heat Transfer)**

211. Plaintiffs incorporate by reference those allegations as set forth in Paragraphs 1 through 176, inclusively.

212. The Defendant Heat Transfer was a manufacturer of the “Munchkin”<sup>TM</sup> boiler installed at The Lodge.

213. The Defendant Heat Transfer was engaged in the business of selling such “Munchkin”<sup>TM</sup> boilers for resale to, and use by, residential owners.

214. The “Munchkin”<sup>TM</sup> boiler was defective and, because of the defects, was unreasonably dangerous to persons who might reasonably be expected to be affected by the product, such as occupants of dwellings in which it was installed, such as guests at The Lodge.

215. The “Munchkin”<sup>TM</sup> boiler was defective and unreasonably dangerous, including but not limited to, the following:

- a. It had design defects, which, among others, included, but were not limited to, the failure to incorporate some form of sensor technology to shut off the boiler in the event of incomplete combustion, oxygen depletion, excess carbon monoxide generation, disconnected vents, or other conditions which would prevent carbon monoxide poisoning at its source as well as the failure to design and provide secure vent connections to the boiler itself; and
- b. its warnings and instructions were defective in failing to adequately instruct and warn installers, contractors and consumers concerning the proper

installation, venting, and maintenance of the system.

216. The “Munchkin”<sup>TM</sup> boiler was defective and unreasonably dangerous in its design because:

a. It created a risk of harm to persons that would not ordinarily be expected;

or

b. the risk of harm was not outweighed by the benefits to be achieved by the design.

217. The correction of the design defects was technologically feasible at the time of the manufacture of the “Munchkin”<sup>TM</sup> boiler.

218. The “Munchkin”<sup>TM</sup> boiler was defective at the time it was sold by the Defendant Heat Transfer or left its control.

219. The “Munchkin”<sup>TM</sup> boiler was expected to reach the user without substantial change in the condition in which it was sold.

220. The “Munchkin”<sup>TM</sup> boiler did reach the user without substantial change in the condition in which it was sold.

221. The Lofgren Family consisted of persons who would reasonably be expected to be affected by the “Munchkin”<sup>TM</sup> boiler.

222. As a direct and proximate result of the defective and unreasonably dangerous condition of the “Munchkin”<sup>TM</sup> boiler, the Lofgren Family died of carbon monoxide poisoning.

223. As a direct and proximate result of the deaths of each member of the Lofgren Family, the Plaintiffs claim damages as previously described.

**SIXTH CLAIM FOR RELIEF**  
**(Products Liability for Negligence Against Heat Transfer)**

224. Plaintiffs incorporate by reference those allegations as set forth in Paragraphs 1 through 176, inclusively.

225. The Defendant Heat Transfer was negligent, which negligence included, but was not limited to, the following acts and omissions:

- a. The failure to adequately monitor and respond to complaints, service calls, distributor contacts, warranty claims, and other sources of information concerning installation problems, improper venting, improper combustion related to venting, and other concerns related to all of its boiler products and the adequacy of its instructions and warnings;
- b. The failure to adequately monitor and respond to incidents, claims and lawsuits related to improper venting and carbon monoxide injuries and deaths associated therewith related to all of its boiler products;
- c. The failure to adequately investigate and respond to incidents involving carbon monoxide injuries and death from improper venting, claiming, instead, that the injuries and deaths were solely due to the fault of the installers, technicians, or owners, not reporting such incidents to the CPSC, and not considering changes in the design and instructions and warning to address those risks;
- d. The failure to adequately keep abreast of CPSC activities, industry practices, professional literature, available technology, patents, and the

work being done by various standards organizations, to address the issue of carbon monoxide poisonings caused by blocked or disconnected venting in gas-fueled boilers or furnaces;

- e. The failure to perform adequate research and development in sensor technology to address the risk of carbon monoxide poisoning caused by blocked or disconnected vents;
- f. The failure to adopt an adequate safety program and fault analysis so as to address a design strategy that adequately eliminated or reduced the risk of carbon monoxide poisoning from blocked or disconnected vents;
- g. The failure to explore and incorporate various sensor technologies to shut off the boiler in the event of incomplete combustion, oxygen depletion, excess carbon monoxide generation, or disconnected vents which would prevent carbon monoxide poisoning at its source;
- h. The improper reliance on instructions and warnings when a design solution was technologically feasible to prevent or minimize the risk of carbon monoxide poisoning;
- i. The failure to include adequate instructions and warnings with the “Munchkin”<sup>TM</sup> boiler; and
- j. Negligently misrepresenting the qualities, benefits and safety of the “Munchkin”<sup>TM</sup> boiler.

226. As a direct and proximate result of the negligence of the Defendant Heat Transfer, the Lofgren Family died of carbon monoxide poisoning.

227. As a direct and proximate result of the deaths of each member of the Lofgren Family, the Plaintiffs claim damages as previously described.

**SEVENTH CLAIM FOR RELIEF**  
**(Heat Transfer's Violation of the Colorado Consumer Protection Act)**

228. Plaintiffs incorporate by reference those allegations as set forth in Paragraphs 1 through 176, inclusively.

229. The Defendant Heat Transfer engaged in a deceptive trade practice as defined in § 6-1-105, C.R.S., by knowingly making false representations as to the characteristics, uses, or benefits of the "Munchkin"<sup>TM</sup> high efficiency boiler, including, but not limited to, representations that the boiler utilized "state of the art controls," that its "sealed combustion system" was "the safest operating appliance available," and was "ideal for home use."

230. The Defendant Heat Transfer also authorized, approved, or acquiesced in a knowingly false statement by one of its authorized agents in December 2003 that "exhaust gas re-circulation will cause the unit to fire then fail almost immediately or fail if the wind causes re-circulation at the termination" which likewise was a deceptive trade practice as defined in §6-1-105, C.R.S.

231. The deceptive trade practices occurred in the course of the Defendant Heat Transfer's business.

232. The deceptive trade practices significantly impacted the public as actual or potential consumers of the Defendants goods.

233. The Defendant Heat Transfer engaged in bad faith conduct as defined in § 6-1-113, C.R.S. of the Colorado Consumer Protection Act, including fraudulent, willful, knowing, or

intentional misconduct.

234. Each member of the Lofgren Family was an actual or potential consumer of the Defendant's goods by being exposed to carbon monoxide while a guest at The Lodge where the "Munchkin"<sup>TM</sup> boiler had been installed.

235. The entire Lofgren Family died as a result of the deceptive trade practice.

236. The deceptive trade practices caused damages to the Plaintiffs as previously described.

237. Plaintiffs are also entitled to recover costs of this action and reasonable attorney's fees.

238. Based on the bad faith conduct of the Defendant Heat Transfer, Plaintiffs are also entitled to three times the amount of actual damages sustained.

**EIGHTH CLAIM FOR RELIEF**  
**(Civil Rights Claim for Violation of 42 USC § 1983)**

239. Plaintiffs incorporate by reference those allegations as set forth in Paragraphs 1 through 176, inclusively.

240. The Defendant Pitkin County Community Development Department was charged by the Defendant Pitkin County with the administration and enforcement of the Pitkin County Code and rules and regulations for safe building construction ". . . to provide for and promote the safety and welfare of Pitkin County residents and their guests."

241. The Defendant Pitkin County Community Development Department was acting under color of law when it issued building permits, performed various inspections, ensured enforcement of all Pitkin County Codes and rules and regulations governing construction in

Pitkin County, and issued a Certificate of Occupancy certifying that a “. . . structure . . . was in compliance with the various resolutions and ordinances regulating building construction and use in this jurisdiction.”

242. Residential structures could not be lawfully occupied in Pitkin County until and unless a “Certificate of Occupancy” was issued.

243. Building permit applications, inspections and approvals, as well as the eventual granting of a Certificate of Occupancy, were intended to ensure safety to a discrete group of individuals, i.e., those that used or occupied the residential structures, such as the Lofgren Family.

244. Building permit applications, inspections and approvals, as well as the eventual granting of “Certificates of Occupancy,” were intended to protect such persons as the Lofgren Family from shoddy, improper, and unsafe building practices of individuals or contractors performing such work.

245. Defendants Erik Peltonen and Brian Pawl were acting under color of law when they supposedly performed and actually passed the mechanical inspection of the installation of the “Munchkin”<sup>TM</sup> boiler and its venting system under Mechanical Permit 0034.05 P MEC that had been performed by the Defendant Roaring Fork.

246. At the time of the supposed mechanical inspections by Defendants Erik Peltonen and Brian Pawl of the work under Mechanical Permit 0034.05 P MEC, the sole focus of the inspection should have been the proper installation of the “Munchkin”<sup>TM</sup> boiler, its gas line, and the venting system located in the mechanical room at 10 Popcorn Lane, and protruding from the roof.

247. The deficiencies of the installation of the “Munchkin”<sup>TM</sup> boiler and its venting system, and the clear violation of the Pitkin County Code and resolutions and ordinances regulating building construction in Pitkin County, were open and obvious upon inspection by the Defendants Erik Peltonen and Brian Pawl, had such inspections been properly performed.

248. The Defendants Erik Peltonen and Brian Pawl, in the course of their supposed inspection of the work under Mechanical Permit 0034.05 P MEC, recklessly disregarded known or obvious risks that were so great that it was highly probable that death or serious harm would follow and recklessly passed the inspections in conscious and unreasonable disregard of the consequences.

249. By doing so, the Defendants Erik Peltonen and Brian Pawl took affirmative conduct by passing the mechanical inspection and creating the danger or increasing the vulnerability to danger in failing to protect future occupants such as the Lofgren Family from the obvious violations encountered.

250. The Defendants Erik Peltonen and Brian Pawl were acting under color of law when they supposedly performed and actually passed the mechanical inspection for the installation of the HVAC system under Mechanical Permit 0023-2005 P MEC that had been performed by Defendant Eagle Air.

251. At the time of the supposed mechanical inspections by the Defendants Erik Peltonen and Brian Pawl of the work under Mechanical Permit 0023-2005 P MEC, the sole focus of the inspections should have been the proper installation of the HVAC system located in the mechanical room and crawl space at 10 Popcorn Lane.

252. The deficiencies of the installation of the HVAC system were in clear violation of

the Pitkin County Code and the resolutions and ordinances regulating building construction in Pitkin County and were open and obvious to the Defendants Erik Peltonen and Brian Pawl.

253. The Defendants Erik Peltonen and Brian Pawl, by supposedly performing the inspections of the work under Mechanical Permit 0023-2005 PMEC, recklessly disregarded a known or obvious risk that was so great that it was highly probable that death or serious harm would follow but they none-the-less recklessly passed the inspections in conscious and unreasonable disregard of the consequences.

254. The Defendants Eric Peltonen and Brian Pawl took affirmative actions by passing the mechanical inspections and providing a gas tag to the gas line serving the property and approving gas service to The Lodge and thereby creating the danger or increasing the vulnerability to danger in failing to protect future occupants such as the Lofgren Family from the obvious violations encountered.

255. The Defendants Erik Peltonen and Brian Pawl were acting under color of law when they allegedly performed and actually passed the Final Inspection of the residence at 10 Popcorn Lane under Building Permit No. 2355.2003.

256. At the time of the supposed Final Inspections by the Defendants Erik Peltonen and Brian Pawl of the residence under Building Permit No. 2355.2003, both the absence and/or deficiencies of the mechanical inspections under Mechanical Permits 0034.05 PMEC and 0023-2005 PMEC, as well as the absence of a carbon monoxide detector, were open and obvious and in clear violation of the Pitkin County Code and the various resolutions and ordinances regulating building construction in Pitkin County.

257. The Defendants Erik Peltonen and Brian Pawl, in the course of their Final

Inspections of Building Permit No. 2355.2003, recklessly disregarded known or obvious risks such that it was highly probable that death or serious harm would follow and recklessly passed the Final Inspection in conscious and unreasonable disregard of the consequences.

258. By doing so, the Defendants Erik Peltonen and Brian Pawl took affirmative conduct by passing the Final Inspection and creating the danger or increasing the vulnerability to danger in failing to protect future occupants, such as the Lofgren Family, from the obvious violations encountered.

259. The enforcement of the Pitkin County Code regulating construction in Pitkin County by the Building Inspectors in the performance of their duties was mandatory and not discretionary.

260. The conduct of the Defendants Erik Peltonen and Brian Pawl in approving and passing the above inspections represented a knowing, purposeful and reckless pattern of nonenforcement or selective enforcement of the Pitkin County Code.

261. The Defendants Erik Peltonen and Brian Pawl acted unreasonably, without a good faith belief in the propriety of their actions, in light of clearly established laws governing their actions.

262. On or about July 22, 2010, the Pitkin County Grand Jury indicted the Defendant Erik Peltonen for criminally negligent homicide and reckless endangerment in the deaths of each member of the Lofgren Family.

263. On or about July 22, 2010, the Pitkin County Grand Jury indicted the Defendant Brian Pawl for reckless endangerment in the death of each member of the Lofgren Family.

264. The Defendants Erik Peltonen and Brian Pawl are liable for violation of Civil

Rights under 42 U.S.C. § 1983 by depriving each member of the Lofgren Family of their Constitutional right of life guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

265. The Defendant Pitkin County and Pitkin County Community Development Department, on behalf of the Defendant Pitkin County, was acting under color of law when it issued the Certificate of Occupancy for the residence located at 10 Popcorn Lane certifying that the “. . . structure . . . was in compliance with the various resolutions and ordinances regulating building construction and use in Pitkin County.”

266. The Defendants Pitkin County and Pitkin County Community Development Department were acting under color of the law with the responsibility to adequately staff, train, and supervise Building Inspectors in Pitkin County and execute and implement government policy, protocols, and customs with respect to the safe construction of residences in Pitkin County.

267. The issuance of the Certificate of Occupancy for 10 Popcorn Lane, the inadequate training and supervision of Building Inspectors in Pitkin County, the execution and implementation of government policy, protocols, and customs with respect to the safe construction of structures in Pitkin County, and the knowing approval of a pattern of nonenforcement or selective enforcement of the Pitkin County Code by its Building Inspectors, demonstrated a reckless, conscious, and unreasonable disregard of the consequences.

268. By doing so, the Defendants Pitkin County and the Pitkin County Community Development Department took affirmative conduct and created the danger or increased the vulnerability to danger by failing to protect future occupants of The Lodge, such as the Lofgren

Family, from the obvious risks encountered.

269. Upon investigation of the deaths of the Lofgren Family, the Defendants Pitkin County and the Pitkin County Community Development Department knowingly ratified the actions of its Building Inspectors; took no actions to discipline the Building Inspectors or remediate the deficiencies leading up to their actions; and fully supported and acquiesced in their actions, even after criminal charges were brought.

- a. The Pitkin County Attorney is reported to have stated, upon issuance of the criminal indictment of Brian Pawl, “I can’t imagine this would affect his employment . . . He is absolutely still working.”
- b. A Pitkin County Commissioner was reported to have criticized the criminal charges as “bullshit” and brought against “our Building Inspectors” for “doing their job,” when the criminal charges addressed the failure to do their job, and characterizing the criminal charges against the Building Inspectors as a “greater tragedy” than the deaths of the Lofgren Family.
- c. All of the five County Commissioners of Pitkin County unanimously agreed to pay for the criminal defense of its employee, Brian Pawl and contribute to the criminal defense of Erik Peltonen.

270. The Defendants Pitkin County and the Pitkin County Community Development Department are liable for violation of civil rights under 42 USC § 1983 by depriving each member of the Lofgren Family of their Constitutional right of life guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

271. The estates of the decedents are entitled to significant damages to compensate them

for the deprivation of each of the decedent's Constitutional right of life, to allow a remedy for wrongful killings, and to provide an appropriate deterrent.

272. The remedies provided under the Wrongful Death Statute and the Survival Statute of the State of Colorado are insufficient and unsuited to enforce the substantive rights of 42 USC § 1983, and the estates of each decedent should be allowed recovery for each decedent's future economic losses and conscious pain and suffering prior to death.

273. The Plaintiff, Hilda M., a/k/a Hildy, Feuerbach, as Personal Representative of the Estate of Parker W. Lofgren, deceased, claims damages for economic losses for all expenses related to the funeral and burial of Parker W. Lofgren, past and future economic losses sustained by Parker W. Lofgren, and noneconomic damages for the decedent's conscious pain and suffering prior to death, as well as all attorney's fees and costs associated with bringing this action.

274. The Plaintiff, Hilda M., a/k/a Hildy Feuerbach, as Personal Representative of the Estate of Caroline F. Lofgren, deceased claims damages for economic losses for all expenses related to the funeral and burial of Caroline F. Lofgren, past and future economic losses sustained by Caroline F. Lofgren, and noneconomic damages for the decedent's conscious pain and suffering prior to death, as well as all attorney's fees and costs associated with bringing this action.

275 The Plaintiffs, Jean Rittenour and Frederick J. Feuerbach, Jr., as Co-Personal Representative of the Estate of Owen P. Lofgren, deceased, claims damages for economic losses for all expenses related to the funeral and burial of Owen P. Lofgren, past and future economic losses sustained by Owen P. Lofgren, and noneconomic damages for the decedent's conscious

pain and suffering prior to death, as well as all attorney's fees and costs associated with bringing this action.

276. The Plaintiffs, Jean Rittenour and Frederick J. Feuerbach, Jr., as Co-Personal Representative of the Estate of Sophie J. Lofgren, deceased claims damages for economic losses for all expenses related to the funeral and burial of Sophie J. Lofgren, past and future economic losses sustained by Sophie J. Lofgren, and noneconomic damages for the decedent's conscious pain and suffering prior to death, as well as all attorney's fees and costs associated with bringing this action.

WHEREFORE, Plaintiffs pray that judgment be entered against the Defendants for their compensatory damages in such amounts to be determined by a trier of fact; as well as treble damages and attorney's fees and costs for violation of the Colorado Consumer Protection Act; attorneys fees under 42 USC § 1983; as well as costs, expert witness fees, all interest as provided by law, and for such further and other relief as the Court deems just and proper.

PLAINTIFFS DEMAND A TRIAL BY JURY OF ALL ISSUES SO TRIABLE.

Dated this 10th day of November 2010.

Respectfully submitted,

**McDERMOTT & McDERMOTT, LLP**

*Duly signed original by William J. Hansen  
on file at McDermott & McDermott, LLP*

/s/ William J. Hansen

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Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 10th day of November 2010, a true and correct copy of the foregoing **PLAINTIFF’S SECOND AMENDED COMPLAINT FOR DAMAGES AND JURY DEMAND** was electronically filed and served, addressed to the following:

<p>Yeulin V. Willett                  Younge &amp; Hockensmith, PC                  743 Horizon Court, Suite 200                  Grand Junction, Colorado 81506-8716                  Email: <a href="mailto:yeulin@younge.com">yeulin@younge.com</a>                  Fax: 970-241-5719  <i>Attorney for Marlin Brown and Roaring Fork Plumbing &amp; Heating Company</i></p>	<p>James Goldfarb                  Joel Palmer                  Senter Goldfarb &amp; Rice, LLC                  1700 Broadway, Suite 1700                  Denver, Colorado 80290                  Email: <a href="mailto:jpalmer@sgrllc.com">jpalmer@sgrllc.com</a>                  Fax: 303-320-0210  <i>Attorney for Black Diamond Development Corporation and Jonathan M. Thomas</i></p>
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<p>Josh A. Marks Berg, Hill, Greenleaf &amp; Ruscitti, LLP 1712 Pearl Street Boulder, Colorado 80302 Email: <a href="mailto:jam@bhgrlaw.com">jam@bhgrlaw.com</a> Fax: 303-402-1601 <i>Attorney for Brian Pawl</i></p>	
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*Duly signed original on file at McDermott,  
& McDermott, LLP*

*/s/ Toni M. Cruz*