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Attorney for Third-Party Defendants Renco, LLC dba Renco Roofing and Desert Vista, Inc.

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF MARICOPA**

8 GALLERY COMMUNITY
ASSOCIATION, an Arizona non-profit
corporation,

9 Plaintiff;

10 v.

11 KHOVNIANIAN AT GALLERY, LLC,
an Arizona limited liability company;
12 KHOVNIANIAN ARIZONA
OPERATIONS, LLC, an Arizona limited
13 liability company; KHOVNIANIAN
DEVELOPMENTS OF ARIZONA, INC.,
14 an Arizona corporation; KHOVNIANIAN
COMPANIES OF ARIZONA, LLC, an
15 Arizona limited liability company; JOHN
DOES I-X AND JANE DOES I-X,
16 WHITE COPRORATIONS I-X ;
17 BLACK PARTNERSHIPS I-X; AND
18 GRAY LIMITED LIABILITY
COMPANIES I-X,

19 Defendants.

20
21 KHOVNIANIAN AT GALLERY, LLC,
an Arizona limited liability company;
22 KHOVNIANIAN ARIZONA
OPERATIONS, LLC, an Arizona limited
23 liability company; KHOVNIANIAN
DEVELOPMENTS OF ARIZONA, INC.,
24

NO. CV2020-008714

**THIRD-PARTY DEFENDANTS' JOINT
OBJECTION AND MOTION TO
PRECLUDE DEFENDANTS/THIRD-
PARTY PLAINTIFFS' UNTIMELY AND
NEW EXPERT REPORTS AND
OPINIONS**

[ORAL ARGUMENT REQUESTED]

*(Assigned to the Honorable Katherine
Cooper)*

1 an Arizona corporation; KHOVNANIAN
2 COMPANIES OF ARIZONA, LLC, an
Arizona limited liability company;

3 Third-Party Plaintiffs

4 v.

5 CHAS ROBERTS AIR
6 CONDITIONING, INC., an Arizona
corporation; DESERT VISTA, INC., an
7 Arizona corporation; GOTHIC
LANDSCAPING, INC., a California
8 corporation; HOME BUILDERS SITE
SERVICES OF ARIZONA, LLC an
9 Arizona limited liability company;
LEBLANC BUILDING CO., INC., an
10 Arizona corporation; LIBERTY
CONSTRUCTORS, LLC, an Arizona
11 limited liability company DBA LIBERTY
ARIZONA; RENCO LLC, an Arizona
12 limited liability company; dba RENCO
ROOFING; R/S SERVICE & SUPPLY,
13 INC., an Arizona corporation; SARGON
MASONRY CONSTRUCTION, LLC, an
14 Arizona limited liability company; and
15 DOES 1-50.

16 Third-Party Defendants.

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18 Third-Party Defendants, Desert Vista, Inc. and Renco, LLC dba Renco Roofing (“Third-
19 Party Defendants”), by and through counsel, hereby object and move to preclude
20 Defendants/Third-Party Plaintiffs’ untimely production of the following three expert reports and
21 opinions disclosed on February 25, 2022: (1) Defense Response Report ; (2) Preliminary Defense
22 Cost of Repair; and (3) Subcontractor Allocation Summary (collectively, the “New Expert
23 Reports”).
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1 Defendants/Third-Party Plaintiffs, K. Hovnanian at Gallery, LLC. and K. Hovnanian
2 Arizona Operations, LLC., (“KHov”) disclosed their New Expert Reports, which contain new
3 expert opinions related to standard of care, allocation of fault, repair methodologies, and cost of
4 repair significantly past the discovery deadlines established in the operative Scheduling Order to
5 the detriment and prejudice of the moving parties.

6 This objection and request to preclude is filed in accordance with the Court’s Orders,
7 including the Scheduling Order dated May 25, 2021. The following Memorandum of Points and
8 Authorities supports Third-Party Defendants’ position in this matter.

9 MEMORANDUM OF POINTS AND AUTHORITIES

10 **I. STATEMENT OF FACTS**

11 Pursuant to the May 25, 2021 Scheduling Order, KHov’s expert reports were due **July 23,**
12 **2021;** and its cost of repair report was due August 23, 2021.

13 Two (2) weeks after KHov’s July 23, 2021 expert report deadline, Plaintiff’s counsel
14 advised that Plaintiff and KHov had informally agreed to extend KHov’s expert witness report
15 deadline from July 23, 2021 to August 11, 2021. **See, Exhibit A.** Neither the Third-Party
16 Defendants nor the Court were advised or stipulated to said “informal extension”. It should be
17 noted, both KHov and Plaintiff stand to gain from the untimely disclosures.

18 On August 11, 2021, KHov disclosed its expert reports including a Peterson Geotechnical
19 Group’s Civil and Geotechnical Engineering Evaluation dated August 10, 2021; and a Bert L.
20 Howe & Associates, Inc.’s Defense Response Report dated August 11, 2021 (“Original Expert
21 Reports”). **See, Exhibit B**

1 On August 23, 2021, KHov provided the Bert L. Howe & Associates, Inc.’s Preliminary
2 Defense Cost of Defense Scope Estimate¹ (“Original COR”) *See, Exhibit C.*

3 On January 31, 2022, in compliance with the Court’s November 24, 2021 Amended
4 Scheduling Order, Third-Party Defendants Renco LLC dba Renco Roofing, Desert Vista, Inc.,
5 Gothic Landscaping, Inc., and Liberty Constructors completed extensive expert investigation and
6 discovery and timely disclosed their respective expert witnesses, reports, and opinions.²

7 After the Third-Party Defendants completed their discovery and issued expert reports,
8 KHov indicated it planned to disclose new expert reports and opinions. *See, Exhibit D.* The
9 Third-Party Defendants, through counsel, immediately objected as the production of new KHov
10 expert reports and opinions would be extremely untimely, prejudicial, costly and essentially
11 restart expert discovery in this expert-driven case. *See, Exhibit E.* Without a stipulation from
12 all parties, nor permission from this Court, and in complete disregard for the May 25, 2021
13 Scheduling Order, KHov emailed its Third Supplemental Disclosure Statement (**Exhibit F**), that
14 included the three New Expert Reports on February 25, 2022. *See, Bert L. Howe & Associates’*
15 *Defense Response Report dated February 25, 2022 (Exhibit G), Bert L. Howe & Associates’*
16 *Preliminary Defense Cost of Repair dated February 25, 2022 (Exhibit H), and Bert L. Howe &*
17 *Associates’ Subcontractor Allocation Summary dated February 25, 2022 (Exhibit I).* Again, on
18 March 10 and March 11, 2022, counsel for Third-Party Defendants objected to the New Expert
19 Reports and requested KHov withdraw the untimely opinions. *See, Exhibit E.*

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23 ¹ It is worth noting that *KHov has never properly or formally disclosed this Original COR report.*

24 ² Gothic Landscaping disclosed only the identity of its expert witnesses.

1 As explained below, the new Defense Report, new Cost of Repair, and new Allocation
2 contain new expert opinions to the detriment and prejudice of the Third-Party Defendants.
3 Moreover, the untimely disclosure of new expert opinions violates the Court’s May 25, 2021
4 Scheduling Order and deadlines. As such, the Court must grant this objection and Motion to
5 Preclude the New Expert Reports disclosed on February 25, 2022.

6 **II. LAW AND ARGUMENT**

7
8 KHov has brought claims against multiple subcontractors in this construction defect
9 matter. It is well settled that an allegation that the subcontractors work was not performed in a
10 good and workmanlike manner, fell below the standard of care and/or caused any damages must
11 be introduced through expert testimony. A.R.S. § 12-2602(B); *See, e.g., Kreisman v. Thomas*, 12
12 Ariz. App. 215, 220, 469 P.2d 107, 112 (1970); *see also* § 12-2601(3) (“Licensed professional’
13 means a . . . corporation . . . that is licensed by this state to practice a profession or occupation
14 under title 20 or 32”); A.R.S. § 32-1101 *et. seq.* (regulating contractors). KHov bears the
15 burden to provide expert testimony addressing both causation and damages. Under A.R.S. § 12–
16 2602(A), “[i]f a claim against a licensed professional is asserted in a civil action, the claimant or
17 the claimant's attorney shall certify in a written statement that is filed and served with the claim
18 whether or not expert opinion testimony is necessary to prove the licensed professional's standard
19 of care or liability for the claim.”

20 Further, a party who fails to timely disclose information, witnesses, or documents
21 required by the Rules may not, use the information, witnesses, or documents as evidence at trial,
22 at a hearing, or with respect to a motion unless the court specifically finds that such failure
23 caused no prejudice or orders otherwise for good cause.
24

1 **A. KHov Arbitrarily Produced its Untimely Expert Reports Without a**
2 **Stipulation and Without Relief from the Court Ordered Deadlines Resulting**
3 **in Prejudice to the Third-Party Defendants.**

4 Here, KHov’s extremely untimely expert reports and opinions are highly prejudicial to
5 the Third-Party Defendants. Moreover, not only did KHov not seek a stipulation to extend its
6 deadlines from the parties– it never presented any basis for good cause for its severely delinquent
7 new reports. Incredibly, KHov did not seek relief from this Court and unilaterally determined
8 its untimely disclosures are proper. It simply disclosed the New Reports in an outright violation
9 of the Court’s Orders.

10 The Third-Party Defendants, and their respective experts, relied upon KHov’s Original
11 Expert Reports in their planning, investigation, and defense of the claims. After the Third-Party
12 Defendants’ experts completed their respective investigations, in accordance with the Court’s
13 Scheduling Order, the Third-Party Defendants timely disclosed their expert reports and opinions.
14 Now, seven months past this Court’s ordered deadline, KHov is disclosing untimely, new
15 opinions, thereby prejudicing Third-Party Defendants.

16 If the New Opinions are permitted, the Third-Party Defendants will be extremely
17 prejudiced and forced to “restart” expert discovery. Their expert witnesses will be forced to
18 reopen their investigations to evaluate the new claims, the three new reports, the new expert
19 opinions, the new repair protocols, and the new allocation. The experts will be required to
20 conduct additional inspections; prepare new opinions; calculate new costs of repair; and reduce
21 all of it into new expert reports and opinions. Aside from the unnecessary delay in the case, those
22 tasks will force the Third-Party Defendants to incur tens of thousands of dollars in unnecessary
23 expert costs and attorneys’ fees over and above the tens of thousands of dollars already spent and
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1 render Third-Party Defendants’ expert discovery to date meaningless. Third-Party Defendants
2 should not be prejudiced and forced to bear the burden, cost, and severe prejudice of KHov’s
3 complete and continued disregard for the Court ordered deadlines. Therefore, Third-Party
4 Defendants respectfully request the New Expert Reports be precluded.

5 Further, Maricopa County Superior Court judges have been consistent on this issue. In
6 *City of Phoenix v. Pulte Home Company, LLC, et. al.*, the Court addressed the issue of whether
7 plaintiff was allowed to unilaterally disclose new expert opinions without a stipulation by the
8 parties and more importantly, without leave from the Court, after a significant amount of time
9 has passed.³ In *City of Phoenix*, the Court precluded plaintiff’s new expert opinions, which
10 included a new allocation of damages summary similar to this matter, because it was untimely,
11 new opinions that greatly prejudiced defendants since so much time had passed and plaintiff
12 failed to demonstrate good cause or seek leave from the court to disclose. **See Exhibit J. Under**
13 **Advisement Ruling dated June 14, 2021, and Minute Entry dated August 23, 2021.**⁴ The
14 facts in *City of Phoenix* are strikingly similarly to this matter in that plaintiff is attempting to
15 disclose new expert opinions in a construction defect case, months after the Court imposed
16 deadline, without good cause or leave from the Court. *Id.* Therefore, the Court should remain
17 consistent with its previous rulings on this issue and preclude KHov’s New Expert Opinions as
18 untimely and prejudicial to Third-Party Defendants.
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22 ³ CV2019-011921. Although the case is not published, pursuant to A.R.S. Sup.Ct.Rules, Rule 111(c), the Minute Entry may
23 be used as persuasive authority.

24 ⁴ Plaintiff filed a Motion for Reconsideration and the Court denied it in the Minute Entry dated August 23, 2021.

1 **B. KHov's untimely Cost of Repair Estimate is brand new and extremely**
2 **prejudicial by increasing KHov total Cost of Repair by 1,006%.**

3 The resulting prejudice to the Third-Party Defendants is even more evident when
4 comparing the Original COR to the New COR. KHov's Original COR totaled \$49,905.00 as the
5 direct cost of repair and \$67,612.00 as the burdened cost of repair for the entire Project. *See,*
6 **Exhibit C.** In the New COR, KHov's cost of repair shockingly increased by 1,006%, now
7 totaling \$507,389.00 in direct costs and \$747,892.00 in burdened costs. **Exhibit H.** The stark
8 differences in KHov's COR reports are easily identifiable when comparing the two tables of the
9 issue summary in each report:

Issue Summary	Original COR Direct Cost	Original COR Burdened Cost	New COR Direct Cost	New COR Burdened Cost
1.0 Structural	\$0	\$0	\$0	\$0
2.0 Civil	\$0	\$0	\$0	\$0
3.0 Building Envelope	\$49,905.00	\$67,612.00	\$496,198.00	\$731,396.00
4.0 Miscellaneous	\$0	\$0	\$11,191.00	\$16,496.00
TOTAL	\$49,905.00	\$67,612.00	\$507,389.00	\$747,892.00

16 ***See, Exhibit C and Exhibit H.***

17 **i. Desert Vista, Inc.**

18 Third-Party Defendant Desert Vista applied the stucco at the Project. The New COR
19 analysis for the first time imputes **\$2,392,931.00** in construction defect damages to Desert Vista
20 specifically. *See, Exhibit I.* Other new expert opinions include the increase in the Building
21 Envelope cost of repair from \$49,905.00 direct cost (\$67,612.00 burdened cost) to now
22 \$496,198.00 direct cost (\$731,396.00 burdened cost). *See, Exhibit C and Exhibit H.* As it
23 relates to the Façade, the new opinions and COR increase from \$43,975.00 direct cost
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1 (\$59,578.00 burdened cost) to now a whopping \$449,355.00 total cost. *Id.* Further, the Moisture-
2 Management System section increased from \$5,930.00 direct cost (\$8,034.00 burdened cost) to
3 now \$19,663.00 total cost. *Id.* There is no new evidence, nor investigation, completed by KHov
4 that could possibly justify these new figures.

5 Not only does the New COR introduce new costs and damages, but it also changes the
6 quantity, scope, and overall repair protocols. For example, KHov's new expert opinions call for
7 a new repair to "apply elastomeric stucco paint to entire stucco plane to match adjacent surfaces,
8 install backer rod and sealant at all joints" which totals a whopping \$173,088.00 new cost of
9 repair alone, which was not included in KHov's Original COR. *Id.*

10 Additionally, KHov's New COR introduces a new expert opinion to "set-up and tear down
11 scaffolding to access repair area, which totals \$144,240.00. *Id.* In another example, KHov's
12 Original COR only called to "install new Amerimix stucco system" totaling \$1,718.43, but now
13 in KHov's New COR, its experts offer new opinions to install new soffit drip screed, new stucco
14 foam insulation and stucco lath, and new stucco cladding system, collectively totaling another
15 \$102,508.40. *Id.* All examples of new untimely expert opinions.

16
17 **ii. Renco, LLC dba Renco Roofing**

18 Third-Party Defendant Renco Roofing performed roof and deck work at the Project.
19 KHov's New COR analysis for the first time imputes \$378,334.00 in construction defect damages
20 to Renco Roofing specifically. *See, Exhibit I.* Other new opinions include calling for a complete
21 removal and replacement of the deck coating at the Project. *See, Exhibits G and H.* KHov's new
22 opinions also now call for the "remov[al] [of] existing deck coating over edge metal flashing and
23 remove flashing. Adjust stucco and reinstall edge metal flashing to extend over stucco. Apply
24

1 new deck coating per manufacturer recommendations to integrate flashing with existing deck
2 coating.” **See, Exhibit G ep.19.** The addition of these new repair recommendations on their face
3 support the finding that the New Expert Reports are new opinions, untimely disclosed.

4 In the roofing section, the new opinions now call for roof tune-ups at every roof, thereby
5 jumping from \$0 in the Original COR to \$27,180.00 in the New COR. *See, Exhibit H ep. 10.*
6 KHov’s new report also adds a new scope of opinions for Moisture-Management System at the
7 Pool Area, with an increased cost from \$0 to \$3,550.00. *Id at ep. 11.* Additionally, KHov’s
8 experts have added an entirely new section of “miscellaneous” items that were not included in
9 KHov’s Original COR, thereby exceeding the scope of its original expert reports and untimely
10 disclosing new expert opinions to the detriment and prejudice of the Third-Party Defendants.

11
12 **C. KHov’s untimely Allocation Summary is new and extremely prejudicial and**
13 **seeks to allocate \$3,282,306 to the Third-Party Defendants.**

14 KHov’s Subcontractor Allocation Summary (“Allocation”) is an entirely new report not
15 timely disclosed by the Court ordered deadlines and seeks to allocate \$3,282,306 in damages to
16 the Third-Party Defendants. For example, the Allocation attributes **73%** of fault to Third-Party
17 Defendant Desert Vista for a total of **\$2,392,931.00** in damages. Emphasis added. *See, Exhibit*
18 **I.** Like Rummel, this is a brand-new expert opinion. No allocations were previously disclosed.
19 It allocates **11%** of fault to Third-Party Defendant Renco, for a total of **\$378,334.00** in damages.
20 Emphasis added. *Id.* Moreover, the Allocations fails to provide any reliable or independent basis
21 as to how the allocations were arrived at. Overall, the entire Allocation report, including the
22 allocations and opinions expressed therein, are untimely and prejudicial and must be precluded.
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24

1 **III. CONCLUSION**

2 Based on the foregoing, KHov has blatantly violated the expert discovery deadlines in the
3 Scheduling Order and has attempted to introduce three new expert reports and opinions related
4 to the standard of care, allocation of fault, repair methodologies, and cost of repair to the
5 detriment and prejudice of the Third-Party Defendants. Accordingly, the Third-Party Defendants
6 respectfully request the Court grant this Motion to preclude KHov’s New Expert Reports.
7

8 **DATED** this 29th day of March, 2022.

9 **RAI DUER HUFF P.C.**

10
11 By: /s/ Shannon Huff
12 Shannan Huff
13 Mohamad H. Tokko
*Attorneys for Renco Roofing and Desert Vista,
Inc.*

14 **ORIGINAL** of the foregoing e-filed
15 This 29th day of March, 2022, with:

16 Clerk of the Court
17 **Maricopa County Superior Court**
18 201 W. Jefferson
Phoenix, Arizona 85003

19 **COPY** of the foregoing e-delivered
20 This 29th day of March, 2022, to:

21 The Honorable Katherine Cooper
22 Maricopa County Superior Court
East Court Building – 711
23 101 W Jefferson
Phoenix, AZ 85003
24

1 **COPIES** of the foregoing e-mailed
2 This 29th day of March, 2022, to:

3 (See Attached Service List)

4 By: /s/ Tracy L. O'Brien

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Service List

Gallery Community Association v. K. Hovnanian at Gallery, LLC

CV2020-008714

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