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5 *Attorney for Defendants/Third-Party Plaintiffs K. Hovnanian*
6 *at Gallery, LLC and K. Hovnanian Arizona Operations, LLC*

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

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

10 Plaintiff,

11 v.

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

19 Defendants.

20 K. HOVNANIAN AT GALLERY, LLC, an
Arizona limited liability company; K.
21 HOVNANIAN ARIZONA OPERATIONS, LLC,
an Arizona limited liability company; K.
22 HOVNANIAN DEVELOPMENTS OF
ARIZONA, INC., an Arizona corporation; K.
23 HOVNANIAN COMPANIES OF ARIZONA,
LLC, an Arizona limited liability company;

24 Third-Party Plaintiffs,

25 v.

26 CHAS ROBERTS AIR CONDITIONING, INC.,
27 an Arizona corporation; DESERT VISTA, INC.,
an Arizona corporation; GOTHIC
28 LANDSCAPING, INC., a California corporation;

Case No. CV2020-008714

**DEFENDANTS/THIRD-PARTY
PLAINTIFFS K. HOVNANIAN AT
GALLERY, LLC AND K.
HOVNANIAN ARIZONA
OPERATIONS, LLC'S RESPONSE
TO THIRD-PARTY DEFENDANTS
DESERT VISTA, INC. AND RENCO
ROOFING'S JOINT OBJECTION
AND MOTION TO PRECLUDE
EXPERT REPORTS**

(Assigned to the Honorable Katherine
Cooper)

(Oral Argument Requested)

1 HOME BUILDERS SITE SERVICES OF
2 ARIZONA, LLC, an Arizona limited liability
3 company; LEBLANC BUILDING CO., INC., an
4 Arizona corporation; LIBERTY
5 CONSTRUCTORS, LLC, an Arizona limited
6 liability company, dba LIBERTY ARIZONA;
7 RENCO LLC, an Arizona limited liability
8 company, dba RENCO ROOFING; R/S SERVICE
& SUPPLY, INC., an Arizona corporation;
SARGON MASONRY CONSTRUCTION, LLC,
an Arizona limited liability company; and DOES
1-50.

Third-Party Defendants,

Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona Operations, LLC. (collectively “K. Hovnanian”) hereby submit their Response to Third-Party Defendants Desert Vista, Inc. and Renco Roofing’s Joint Objection and Motion to Preclude K. Hovnanian’s Expert Reports.

Desert Vista and Renco, (hereinafter “Moving Defendants”) seek to have K. Hovnanian’s expert reports excluded in this matter based on alleged untimeliness, despite the facts that the reports were, in actuality, issued in a timely manner, and Third-Party Defendants had ample time for their own responsive expert investigation and reporting based on the twice-revised schedule. Moving Defendants have not established a basis for exclusion, which would be extremely prejudicial to K. Hovnanian, and their Motion must be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

The purported basis of Moving Defendants’ Motion is the alleged untimely disclosure of K. Hovnanian’s expert reports. However, Moving Defendants’ mischaracterize the timeline of expert discovery in this matter, leaving out the continued investigation and reporting by all experts retained in this matter following the original schedule adopted by the parties, and the stipulations to continue these deadlines to accommodate the same along with the parties’ mediation and settlement efforts. Moving Defendants improperly seek to hold K. Hovnanian to deadlines set forth in the original schedule, despite the fact that the same were subsequently revised and continued at least twice to accommodate expert discovery and other continued

1 efforts by the parties. The actual timeline related to expert discovery thus far in this matter is as
 2 follows.

3	DATE	EVENT
4	7/27/20	Plaintiff files Complaint.
5	10/6/20	K. Hovnanian files Third-Party Complaint naming Moving Defendants, among others.
6	3/9-11/21	Plaintiff's experts conduct destructive testing of building exteriors.
7	4/5/21	Renco files Answer.
8	5/27/21	Court adopts the parties original stipulated scheduling order.
9	6/23/21	Plaintiff's produces original report by SBSA. <i>See Exhibit "A"</i> ¹
10	7/23/21	Plaintiff's produces original Preliminary Estimate of Costs by expert Nautilus. <i>See Exhibit "B"</i> .
11	8/11/21	K Hovnanian produces Reports by BHA and PGG. <i>See Exhibit "B" to Moving Defendants' Motion.</i>
12	8/23/21	K Hovnanian produces BHA's Preliminary Defense Cost of Defense Scope Estimate. <i>See Exhibit "C" to Moving Defendants' Motion.</i>
13	10/15/21	Plaintiff's produces Supplemental Report by expert SBSA. <i>See Exhibit "C"</i> .
14	10/25/21	Desert Vista files Answer.
15	11/11/21	Plaintiff produces expert Nautilus' Revised Preliminary Cost of Repair Estimate. <i>See Exhibit "D"</i> .
16	11/12/21	Parties conduct visual inspections at the Project.
17	11/18/21	Parties Stipulate to Amended Scheduling Order based on the recent appearance of Desert Vista, Co-Counsel for K. Hovnanian, and the resetting of mediation in matter. <i>See Stipulation and Order entered November 24, 2021.</i>
18	11/21/21	Desert Vista serves is Initial Disclosure Statement. <i>See Exhibit "E"</i> .
19	12/9/21	Pre-mediation Expert Meeting between K. Hovnanian and Desert Vista's experts. <i>See Exhibit "F"</i> .
20	12/30/21	Mediation is held.
21	1/21/22	Parties tentatively agree to extending schedule to accommodate continued expert discovery and post-mediation settlement efforts. <i>See Exhibit "G"</i> .
22	1/31/22	Moving Defendants produce expert reports from their experts. <i>See Moving Defendants' Motion at Page 4, Lines 3-6.</i>
23	2/25/22	K. Hovnanian produces its final reports and opinions from BHA. <i>See Exhibit "F" to Moving Defendants' Motion.</i>
24	3/3/22	Parties file Stipulation to Amend Scheduling Order to accommodate the post-mediation settlement efforts and continued expert investigations (additional site inspects, repair observations and Plaintiff's experts' supplemental reports), granted by this Court by Order entered March 15, 2022.

27
 28 1. K. Hovnanian produces select portions of the cited disclosure statements herewith to avoid inundating the Court and parties with documents not necessarily related to the instant Motion. However, K. Hovnanian will produce entire documents, as well as any documents referenced therein, upon request.

1 As all are aware, in construction defect claims, such as the instant, expert discovery is
2 sequenced with Plaintiff producing its expert opinions first, followed by Defendants, followed
3 by Third-Party Defendants, to allow each party time to investigate those claims being made
4 against it and respond. K. Hovnanian’s disclosure of the Defense Response Report,
5 Subcontractor Allocation of Plaintiff’s Cost Estimate and Defense Cost to Repair from Bert
6 Howe and Associates produced on February 25, 2022 (collectively “BHA Report”), which
7 Moving Defendants seek to preclude, were based on BHA’s investigation as of that date,
8 including the additional investigation by the parties and their experts, and supplemental reports
9 by Plaintiff, all of which occurred *after* BHA’s original report. K. Hovnanian was entitled to
10 have its experts respond to the supplemental reporting by Plaintiff’s experts, as well as the
11 additional investigation which had occurred. Further, the parties stipulated to accommodate the
12 additional expert investigation and reporting, which allowed additional time for third-party
13 expert investigation and reporting such that no parties would be prejudiced by the same. Thus,
14 there is no basis for precluding the BHA Report and doing so would result in substantial, undue
15 prejudice to K. Hovnanian.

16 **II. ARGUMENT**

17 **A. K. Hovnanian’s expert disclosures were timely and Moving Defendants are**
18 **not prejudiced thereby, in an event, as they had knowledge of the same, prior**
19 **to disclosure, as well as ample time to respond.**

20 As stated Moving Defendants use a false, or at least incomplete, timeline in an effort to
21 preclude K. Hovnanian’s rightful expert reports. Moving Defendants claim the “operative”
22 scheduling order was the May 25, 2021 Order entered by this Court, ignoring the fact that the
23 schedule was modified twice after the same to accommodate the continued expert investigation
24 which had occurred. Significantly for the purposes of Moving Defendants’ Motion, the
25 following **after** K. Hovnanian’s experts, BHA, issued its original, preliminary opinions in this
26 matter in August of 2021,

- 26 · Plaintiff’s produced supplemental reports and cost to repair estimates from its
27 experts;
- 28 · The parties conducted defense visual inspections;

- 1 · Plaintiff's experts conducted multiple roof inspections and repairs (observed
2 by defense experts);
- 3 · Desert Vista answered and served its Initial Disclosure Statement;
- 4 · Pre-Mediation meeting is held between experts for Desert Vista and K.
5 Hovnanian where Desert Vista was informed of BHA's anticipated disclosure
6 regarding stucco conditions;
- 7 · Parties adopted two new schedules expressly to accommodate the ongoing
8 expert investigations, new party appearances, and mediation efforts.

9 Moving Defendants claim the BHA Report is "extremely untimely" and K. Hovnanian
10 failed to show "good cause" for production of the same, ignoring the above events. As the BHA
11 Report was based on and addressed the supplemental reports of Plaintiff, additional inspections
12 and investigation, that occurred after the original report, and within the timeline adopted by the
13 parties in their stipulation, the BHA Report was not untimely. Regardless, good cause would
14 exist, given these events that occurred affecting the expert investigation and reporting timeline.

15 Furthermore, Moving Defendants' argument that the BHA Report is "untimely" and they
16 are somehow prejudiced thereby is not well taken as, in addition to the foregoing, Desert Vista
17 only answered and appeared in this matter on October 25, 2021, more than a year after it had
18 been served with the third-party complaint, well after the original scheduling order was entered
19 into and Plaintiff and K. Hovnanian produced their initial expert reports. In fact, Plaintiff had
20 already produced its supplemental expert reports by the time Desert Vista answered. The parties
21 promptly stipulated to a revised schedule on November 18, 2021, to accommodate the recent
22 appearance of Desert Vista, Co-Counsel for K. Hovnanian, and the parties' resetting mediation.
23 Desert Vista only served its Initial Disclosure on November 21, 2021. Thus, Desert Vista was
24 only even active in the matter when the additional expert investigations took place and a new
25 schedule was adopted.

26 Additionally, Desert Vista and its Counsel, who also serves as counsel for Renco, were
27 present at the pre-mediation video-conference between the experts of Desert Vista and K.
28 Hovnanian, on December 9, 2021. As Moving Defendants have put directly at issue by their
Motion their knowledge of the timing of expert discovery and that BHA intended to serve what
would be the BHA Report and, without revealing the substance of what was discussed at the

1 meeting or waiving any privilege regarding the same, it should suffice that the general findings
2 of BHA’s investigation to that date, and the fact that BHA intended to prepare and serve a report
3 and the anticipated contents of the same (what would ultimately become the BHA Report) were
4 discussed at the meeting with Desert Vista. Desert Vista and its shared-counsel with Renco,
5 cannot claim they were unaware that BHA intended to produce what would become the BHA
6 Report as the same was expressly previewed to them in good faith.

7 More importantly and again, given the sequencing of reporting and the stipulated
8 extension of expert discovery, Moving Defendants had ample time to conduct their investigation
9 and respond to the BHA Report. There is no trial date in this matter, no depositions have been
10 taken, and there is ample time remaining in the current schedule for any investigation and
11 reporting. Moving Defendants claim, in their Motion, they would suffer prejudice if the BHA
12 Report were permitted, claiming they would need additional time to “restart” their expert
13 discovery and conduct inspections, prepare new opinions, etc. However, this argument is a red
14 herring as, first, Moving Defendants had the time given the amended schedule. Next, they were
15 aware of the anticipated contents and intent to produce the BHA Report given the pre-Mediation
16 conference which occurred within weeks of Desert Vista appearing in the matter, and well in
17 advance of Moving Defendants’ production of their own expert reports. Additionally, if Moving
18 Defendants required more time, K. Hovnanian would attempt to accommodate the same, but this
19 was never requested.

20 Moving Defendants cite an unpublished under advisement ruling from *City of Phoenix v.*
21 *Pulte Home Company, LLC, et al.*, for the proposition that a party should not be allowed to
22 disclose new expert opinions which were untimely, claiming the same had similar facts.
23 However, the ruling in that matter dealt with expert reports produced by the plaintiff *after* the
24 Court had already heard a dispute as to the same and issued a new deadline expressly cautioning
25 “new opinions may be excluded” and Plaintiff’s produced reports thereafter which were
26 excluded. In the instant case, the litigation schedule was amended to accommodate the
27 additional expert discovery and mediation. Further, K. Hovnanian’s expert is responding to
28 supplemental reports by Plaintiff and additional investigation which occurred in this matter.

1 Unlike the cited Ruling, the supplemental reporting by Plaintiff and additional investigation by
2 all parties warranted the additional reporting. More importantly, the parties stipulated to adjust
3 the expert and other discovery dates to accommodate the same. Regardless such an unpublished
4 Order with wholly distinguishable facts is neither binding nor relevant.

5 It appears Moving Defendants are attempting to create a technical timing issue where one
6 does not exist to improperly use its discovery motion as a dispositive motion. Excluding K.
7 Hovnanian’s expert reports would be extremely prejudicial. Indeed, if we assumed for the sake
8 of the Motion that K. Hovnanian’s disclosure was untimely, good cause exists for allowing the
9 disclosure, given the timeline of expert and other discovery in the matter, the late appearances of
10 parties, including Desert Vista, and the amendments to the litigation schedule. Further, as
11 Moving Defendants were aware of the BHA Report and the continuances to the expert
12 discovery, they cannot purport to be prejudiced by the same. The sanction of exclusion of
13 evidence is not meant to be a weapon of destruction in the hands of “win at all costs” litigators
14 and lying-in wait is not an acceptable strategy. *Allstate Ins. Co. v. O’Toole*, 896 P.2d 254, 182
15 Ariz. 284 (Ariz. 1995). Such a discovery sanction, which may deprive a party of litigation on the
16 merits, is not warranted where there is no trial date, or the trial date is months away, and there is
17 no prejudice to the other party. *Id* at 257-258. Each situation must necessarily be evaluated on its
18 own facts. *Id*. Excluding the BHA Report would be extremely prejudicial to the Moving
19 Defendants, who themselves were aware of the BHA Report and afforded time under the
20 amended scheduling orders to respond.

21 Accordingly, the BHA Report was disclosed in a timely manner and based on the
22 discovery and events that occurred after the original, preliminary report issued in the matter.
23 Moving Defendants were aware of and not prejudiced by the disclosure.

24 **B. Moving Defendants’ had notice of the BHA Report and cannot be prejudiced**
25 **thereby.**

26 Moving Defendants argue the BHA Report, which includes its Defense Response Report,
27 Subcontractor Allocation of Plaintiff’s Cost Estimate and Defense Cost to Repair, is prejudicial,
28 because of the magnitude of the same. However, if, assuming arguendo the BHA Report was

1 deemed untimely, whether Moving Defendants suffer prejudice does not depend on the
2 substance (magnitude of the cost estimates therein), but rather the effect of alleged untimeliness,
3 i.e. harm caused by delay. Moving Defendants cannot establish they were prejudiced by the
4 disclosure of the BHA Report as, in addition to being timely, Moving Defendants had prior
5 knowledge of and ample time to respond to the same.

6 In their argument, Moving Defendants spend much time discussing the values raised in
7 the Defense Estimate and the Allocation of Plaintiff’s Estimate, from the BHA Report,
8 appearing at time to conflate the values addressed in the two. The latter is an allocation of
9 Plaintiff’s COR produced in this matter. Moving Defendants cite the numbers, claiming the
10 same are “new” to them. However, the values in the Allocation are taken directly from
11 Plaintiff’s Preliminary Estimate of Costs by Nautilus dated July 23, 2021, and revised
12 November 8, 2021. Moving Defendants are not objecting to the timeliness of Plaintiff’s expert
13 disclosures, despite the fact that the final Nautilus Estimate was produced November 8, 2021,
14 after the deadlines set forth in the original scheduling order for Plaintiff’s disclosures.
15 Regardless, the numbers in the BHA Allocation cannot be said to be “new” as they were
16 disclosed to all parties by Plaintiff as stated. The Allocation is merely the allocation of
17 Plaintiff’s cost to repair estimate based on the respective scopes of work of the Third-Party
18 Defendant trades. As Moving Defendants are well aware of their own scopes of work and are
19 not objecting to the timeliness of Plaintiff’s cost to repair, the Allocation cannot be reasonably
20 deemed “new” information as to Moving Defendants. Further, Moving Defendants have/had
21 ample opportunity to respond to the Allocation pursuant to the amended, stipulated scheduling
22 order and are further not prejudiced thereby. Regardless, K. Hovnanian maintains it produced
23 the same in accordance with the amended and stipulated timeline.

24 Moving Defendants are further critical that BHA’s Defense Estimate increased from the
25 preliminary Estimate produced in August. However and again, BHA’s original estimate was
26 produced prior to the additional inspections and investigations, prior to Desert Vista’s
27 appearance in the matter, and prior to the supplemental reports issued by Plaintiff’s experts. To
28 claim the same were not based on any new evidence, completely ignores the discovery which

1 has occurred in this matter, discussed herein. Further, Moving Defendants were aware of BHA’s
2 investigation and anticipated reporting as of December 9, 2021, within weeks of Desert Vista
3 appearing in the matter, given the discussion of the same in the pre-mediation conference
4 between these parties and their experts and cannot, in good faith, claim to be prejudiced thereby.

5 **III. CONCLUSION**

6 K. Hovnanian disclosed the BHA Report in a timely manner. The original BHA report
7 was produced prior to all of the Third-Party Defendants having appeared in the matter, including
8 Desert Vista, prior to Plaintiff’s supplemental experts disclosures, prior to the additional defense
9 inspections, prior to the roof inspection and repairs, and prior to the video-conference between
10 the experts and counsel for Desert Vista and K. Hovnanian, all of which affected the expert
11 investigation and final reporting by BHA. Further, the litigation schedule was adjusted to
12 accommodate the additional expert investigation, among other things, such that Third-Party
13 Defendant would have time to respond. Further, even if the disclosure was deemed untimely,
14 good cause would exist for the disclosure and there is no prejudice to Moving Defendants.
15 Conversely, if the Motion were granted, K. Hovnanian would suffer extreme prejudice which is
16 not warranted.

17 Based on the foregoing, K. Hovnanian respectfully requests this Court deny the Moving
18 Defendants Motion.

19 Dated: April 18, 2022

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