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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
9 corporation,

10 Plaintiff;

11 v.

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

20 Defendants.

21

KHOVNIANIAN AT GALLERY, LLC,
22 an Arizona limited liability company;
KHOVNIANIAN ARIZONA
23 OPERATIONS, LLC, an Arizona limited
24 liability company; KHOVNIANIAN

NO. CV2020-008714

**THIRD-PARTY DEFENDANTS' REPLY
IN SUPPORT OF THEIR 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 DEVELOPMENTS OF ARIZONA, INC.,
2 an Arizona corporation; KHOVNANIAN
3 COMPANIES OF ARIZONA, LLC, an
4 Arizona limited liability company;

5
6 Third-Party Plaintiffs

7 v.

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

Third-Party Defendants.

18
19 Third-Party Defendants, Desert Vista, Inc. and Renco, LLC dba Renco Roofing (“Third-
20 Party Defendants”), hereby file their Reply in support of their Objection and Motion to Preclude
21 KHov’s untimely New Expert Reports. KHov, in its response, spends considerable time
22 attempting to justify and deflect that it outright violated the Scheduling Order by the untimely
23 disclosure of its New Expert Reports resulting in prejudice to the Third-Party Defendants. More
24 importantly, KHov failed to establish it sought this Court’s consent and good cause to allow the

1 untimely disclosure. For the foregoing reasons, the parties request this Court grant the Motion to
2 Preclude.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 As KHov has asserted serious allegations against the Third-Party Defendants as to the
5 quality of their workmanship, KHov bears the responsibility to timely apprise the Third-Party
6 Defendants as to the basis for its claims against them. This duty applies particularly to expert
7 testimony in construction defect cases, inasmuch as such testimony establishes the particulars of
8 the Third-Party Defendants’ alleged negligence or factual basis for the claims. *See* A.R.S. § 12-
9 2602. KHov was on notice of the deadlines set forth in the Scheduling Order for this case,
10 including the deadline to disclose the identity and opinions of its experts. As the party with the
11 burden of proof against the Third-Party Defendants, it was incumbent on KHov to timely produce
12 its expert opinions.

13 Here, on August 23, 2021, KHov provided its expert report authored Bert L. Howe &
14 Associates, Inc.’s Preliminary Defense Cost of Defense Scope Estimate¹ (“Original COR”) *See*,
15 Exhibit C to underlying Motion. Third-Party Defendants relied upon those expert opinions, and
16 in turn, on January 31, 2022, in compliance with the Court’s November 24, 2021, Amended
17 Scheduling Order, timely disclosed their respective expert witnesses, reports, and opinions. Then,
18 without a court order or stipulation modifying its expert deadlines, on February 25, 2022, KHov
19 arbitrarily produced its untimely New Expert Reports, resulting in prejudice to the Third-Party
20 Defendants and additional, unwarranted litigation burdens. Accordingly, the Court must
21 preclude the New Expert Opinions.

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

1 **I. KHov Ignored the Scheduling Order Deadlines and Arbitrarily Produced its New**
2 **Expert Reports Without Relief from the Court or Stipulation from the Parties.**

3 The May 25, 2021, Scheduling Order is clear. It provides in relevant part:

4 KHov’s liability expert witnesses and reports due by July 23, 2021².

5 KHov’s cost of repair expert witnesses and reports due by August 23, 2021.

6 ...the dates are “**firm dates**” and “no stipulation of the parties that alters
7 a filing deadline...contained in this scheduling order will be effective
8 without an order of this court approving the stipulation” and that **dates**
9 “**may be modified only with this court’s consent and for good cause.**
10 This court ordinarily will not consider a lack of preparation as good
11 cause.” *Id.* Emphasis added.

12 KHov deflects from its disclosure violation by arguing the Third-Party Defendants
13 “improperly seek to hold KHov to deadlines set forth in the original schedule, despite the fact
14 that the same were subsequently revised and continued at least twice to accommodate expert
15 discovery...” *See, KHov’s Response*, p. 2, ¶¶ 26028. KHov’s argument is without merit. First,
16 these deadlines were imposed by this Court – not the Third-Party Defendants. Further, KHov
17 intentionally omits one critical detail – KHov never sought a court order or stipulation modifying
18 its expert deadlines.

19 The record shows the parties jointly moved to amend the Scheduling Order on the
20 following occasions, summarized below:

- 21 • May 25, 2021, Original Scheduling Order.
- 22 • August 17, 2021: Court enters Order grating Stipulation extending mediation and
23 Third-Party Defendants’ expert disclosure deadline.
- 24 • November 24, 2021, Court enters Order granting Stipulation to extend select
deadlines, including Third-Party Defendants’ expert disclosure deadline.

22 ² On August 4, 2021, counsel for Plaintiff advised via email Plaintiff and KHov had informally agreed to
23 extend KHov’s expert witness report deadline from July 23, 2021 to **August 11, 2021**, without Third-Party
24 Defendants or the Court being advised or consulted regarding the extension. (*Exhibit I*) **This is the one and only
extension KHov every requested or received, albeit from Plaintiff, only.** Emphasis added.

1 The parties collectively submitted those Stipulations to the Court based on good cause.
2 Despite those requests, KHov never requested an extension of its expert report deadlines and
3 never sought leave of court to amend its expert disclosure deadlines. *Emphasis added.* KHov
4 was aware of its obligation to seek leave of Court to amend expert report deadlines, **as it**
5 **previously objected to Plaintiff on that exact basis by stating:** “The Scheduling Order does
6 not let you amend/supplement your expert reports. You would need to seek leave from the Court
7 to do so. This was not done.” *See, Exhibit 2*, correspondence dated October 27, 2021. *Emphasis*
8 *added.* As such, KHov should not be allowed to circumvent the very rules it set out to enforce.

9 Here, the Third-Party Defendants relied upon KHov’s timely disclosed expert reports and,
10 in turn, timely produced their final expert reports and opinions in compliance with the operative
11 Scheduling Order.

12 **II. KHov’s New Expert Reports Contain Nothing but New Opinions Never Disclosed by**
13 **KHov to the Detriment and Prejudice of the Third-Party Defendants.**

14 Next, KHov argues Third-Party Defendants “spend much time discussing values raised in
15 the ... [New Expert Reports]” and that “prejudice does not depend on the substance (magnitude
16 of the cost estimates) ...” *See, KHov Response*, p. 8, ¶¶ 1-8. However, the substance of the New
17 Expert Reports is exactly what is required to show that the reports are entirely new expert
18 opinions untimely disclosed to the detriment and prejudice of Third-Party Defendants. As set
19 forth in the Motion, Third-Party Defendants identified examples of the new opinions which were
20 not based on “additional investigation” or “supplemental reports.” To the contrary, KHov failed
21 to provide any examples or evidence that the substance of its New Expert Reports was timely
produced or based upon “additional investigation” or “supplemental reports.”

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1 **III. Third-Party Defendant Desert Vista worked Diligently with its Experts to Meet the**
2 **Court Ordered Deadlines Which Further Supports the Motion to Preclude.**

3 Next, KHov presents an interesting argument that Third-Party Defendant, Desert Vista,
4 cannot be prejudiced by the untimely New Expert Reports because it recently answered and
5 appeared in this matter on October 25, 2021. *See, Response*, p. 5. To the contrary, KHov's point
6 further supports Desert Vista's argument for precluding the untimely opinions. Desert Vista
7 arguably is even *more* prejudiced by the fact it first appeared on October 25, 2021. Desert Vista
8 had to quickly obtain the project information, case information, and relevant disclosures related
9 to experts' opinions. After collecting the relevant data, its experts conducted onsite inspections
10 to observe the alleged construction defects, and then had to turn around and timely reduce its
11 investigation, analysis, and findings to a written report and cost of repair. Desert Vista and its
12 experts had minimal time to complete its expert discovery in defense of the significant claims
13 against it, and yet, it still managed to timely disclose its expert opinions in compliance with the
14 Scheduling Order. Allowing KHov to proceed with its New Expert Reports greatly prejudices
15 the Third-Party Defendants, as they will now be forced to again reopen expert discovery and
16 incur tens of thousands of dollars in unnecessary expert costs and attorneys' fees over and above
17 the tens of thousands of dollars already spent on expert discovery.

17 **IV. This Court Should Deny KHov's Purported Request for Leave to Allow the New**
18 **Expert Reports.**

19 The May 25, 2021, Scheduling Order clearly states that lack of preparation does not
20 warrant good cause. Here, KHov arbitrarily disclosed the New Expert Reports after the Third-
21 Party Defendants completed their expert disclosures. Then, only in response to the underlying
22 Motion to Preclude, KHov seeks this Court's permission to disclose the New Expert Reports but
23 fails to set forth good cause for its request. KHov's request should be denied. Allowing the
24 untimely disclosure, eight (8) months after the disclosure deadline, without good cause or timely

1 leave from the Court, would only serve to reward KHov for its lack of preparation and deliberate
2 failure to comply with the Court ordered deadlines to the prejudice of the Third-Party Defendants.

3 Lastly, KHov cites to *Allstate Ins. Co. v. O'Toole*, 896 P.2d 254, 182 Ariz. 284 (Ariz.
4 1995), and stated that the sanction of exclusion of evidence is not meant to be a weapon of
5 destruction in the hands of “win at all costs” litigators and lying-in wait is not an acceptable
6 strategy. However, KHov’s reliance is misled. This is not a matter of excluding evidence as a
7 weapon of destruction; but rather, it is precluding evidence produced in violation of the Court
8 ordered deadlines to the determine of the Third-Party Defendants.

9 KHov also leaves out that in *Allstate* the Court held, “commonsense approach should be
10 accorded to interpretation and application of discovery rule, providing that in addition to any
11 other sanction court may impose, *court shall exclude at trial evidence offered by party that was*
12 *not timely disclosed except by leave of court for good cause shown*. *Id.* Emphasis added. Here,
13 the Court should exclude the New Expert Reports because they were untimely new expert
14 opinions that KHov failed to show good cause to disclose, to the detriment and prejudice of
15 Third-Party Defendants.

16 **V. CONCLUSION**

17 Based on the foregoing, the Third-Party Defendants respectfully request the Court grant
18 this Motion to Preclude.

19 **DATED** this 28th day of April, 2022.

20 **RAI DUER HUFF P.C.**

21 By: /s/ Shannon Huff

22 Shannan Huff

23 Mohamad H. Tokko

24 ***Attorneys for Renco Roofing and Desert Vista,
Inc.***

1 **ORIGINAL** of the foregoing e-filed
2 This 28th day of April, 2022, with:

3 Clerk of the Court
4 **Maricopa County Superior Court**
5 201 W. Jefferson
6 Phoenix, Arizona 85003

7 **COPY** of the foregoing e-delivered
8 This 28th day of April, 2022, to:

9 The Honorable Katherine Cooper
10 Maricopa County Superior Court
11 **East Court Building – 711**
12 101 W Jefferson
13 Phoenix, AZ 85003

14 **COPIES** of the foregoing e-mailed
15 This 28th day of April, 2022, to:

16 *(See Attached Service List)*

17 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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