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9 *Attorneys for Defendants/Third-Party Plaintiffs K. Hovnanian*  
10 *at Gallery, LLC and K. Hovnanian Arizona Operations, LLC*

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF MARICOPA**

13  
14 GALLERY COMMUNITY ASSOCIATION, an  
Arizona non-profit corporation,  
15  
16 Plaintiff,

17 v.

18 K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
HOVNANIAN ARIZONA OPERATIONS, LLC,  
19 an Arizona limited liability company; K.  
HOVNANIAN DEVELOPMENTS OF  
20 ARIZONA, INC., an Arizona corporation; K.  
HOVNANIAN COMPANIES OF ARIZONA,  
21 LLC, an Arizona limited liability company; JOHN  
DOES I-X AND JANE DOES I-X, WHITE  
22 CORPORATIONS I-X; BLACK  
PARTNERSHIPS I-X; AND GRAY LIMITED  
23 LIABILITY COMPANIES I-X,

24 Defendants.

25 K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
26 HOVNANIAN ARIZONA OPERATIONS, LLC,  
an Arizona limited liability company; K.  
27 HOVNANIAN DEVELOPMENTS OF  
ARIZONA, INC., an Arizona corporation; K.  
28 HOVNANIAN COMPANIES OF ARIZONA.

Case No. CV2020-008714

**DEFENDANT'S SEPARATE  
STATEMENT OF FACTS IN  
SUPPORT FOR SUMMARY  
JUDGMENT**

(Assigned to the Honorable Katherine  
Cooper)

1 LLC, an Arizona limited liability company;  
2  
3 Third-Party Plaintiffs,  
4  
5 v.  
6 CHAS ROBERTS AIR CONDITIONING, INC.,  
7 an Arizona corporation; DESERT VISTA, INC.,  
8 an Arizona corporation; GOTHIC  
9 LANDSCAPING, INC., a California corporation;  
10 HOME BUILDERS SITE SERVICES OF  
11 ARIZONA, LLC, an Arizona limited liability  
12 company; LEBLANC BUILDING CO., INC., an  
13 Arizona corporation; LIBERTY  
14 CONSTRUCTORS, LLC, an Arizona limited  
15 liability company, dba LIBERTY ARIZONA;  
16 RENCO LLC, an Arizona limited liability  
17 company, dba RENCO ROOFING; R/S SERVICE  
18 & SUPPLY, INC., an Arizona corporation;  
19 SARGON MASONRY CONSTRUCTION, LLC,  
20 an Arizona limited liability company; and DOES  
21 1-50.  
22  
23 Third-Party Defendants,  
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27  
28

14 K. Hovnanian at Gallery, LLC, and K. Hovnanian Arizona Operations, LLC, by and  
15 through undersigned counsel and pursuant to Ariz.R.Civ. 56, hereby submit their Separate  
16 Statement of Facts in Support of their Motion for Summary Judgment Regarding Claims of  
17 Unsupported Defects.

18 **DEFENDANTS' SEPARATE STATEMENT OF FACTS**

19 1. Plaintiff disclosed reports from its experts in construction liability, Ed Fronapfel of  
20 SBSA, and cost of repair expert, Stefen Gustafson of Nautilus. See Exhibit A, excerpts from SBSA  
21 report GALLERY-SBSA\_004952 and Exhibit C, Nautilus report, GALLERY-NBC\_005076-  
22 5092.

23 2. SBSA stated in its report that they identified defects in the Lateral Force Resisting  
24 System ("LFRS") and Non-Compliant Weather Resistant Barrier (WRB) for Stucco System, along  
25 with recommendations for repair of those defects. See Exhibit A at Gallery-SBSA\_004975-4980;  
26 005150-5151 and Gallery-SBSA\_005032-5041; 005153-5154.

1           3.       In support of SBSA’s claim for defects in the LFRS, SBSA points to one area,  
2 located at Building D at Unit 3111, adjacent to a window, in which SBSA observed OSB sheathing  
3 missing and distressed metal strap. See *Id* at Gallery-SBSA\_004979-4980.

4           4.       SBSA provided photos of these defects within its report. *Id.*

5           5.       SBSA has not identified any other location with the same observed defect. See  
6 Exhibit B, Deposition of E. Fronapfel at pp. 29:7-34:25.

7           6.       Mr. Fronapfel testified that SBSA generated a set of “Observation Drawings” which  
8 identify all locations where observations of conditions were made and are indexed to the  
9 photographs taken by SBSA. See Exhibit B pp 29:7-34:25. E. Fronapfel testified that his report  
10 does not include any index or summary of all conditions observed, but that his observations of  
11 intrusive testing would be identified in his Observation Drawings. *Id* at pp. 45:17-47:10.

12           7.       Mr. Fronapfel stated in his report that “Similar non-compliant LFRS issues will  
13 more likely than not be discovered during stucco repairs recommended in Section C.1.b. and  
14 C.1.c. of this report” and recommended that “[r]epair contractor to include 10-percent of the  
15 stucco repair costs for use as a contingency for the repairs for the non-compliance LFRS.” See *Id*  
16 at Gallery-SBSA\_004980 and Gallery-SBSA\_005150-5151.

17           8.       Based upon the SBSA report by Mr. Fronapfel, Mr. Gustafson, in his cost of repair  
18 report, included \$200,000 for the LFRS. See Exhibit C at pp. GALLERY-NBC\_005078-5079.  
19 See also Exhibit D, Deposition of S. Gustafson, at pp. 59:13-62:25.

20           9.       Mr. Gustafson testified that he calculated 10% of the stucco cost and came up with  
21 \$160,000, then his staff received further instructions from SBSA to round that total up to  
22 \$200,000. *Id.*

23           10.       Additionally, Mr. Fronapfel claims that Non-Compliant WRB was found after  
24 “[i]ntrusive examination revealed that a single layer of WRB was generally installed over open  
25 stud framing and solid sheathing. Occasionally, two layers of WRB of framing were identified to  
26 have been used.” See Exhibit A at GALLERY-SBSA\_005032-5041.

27           11.       In support of this claim, Mr. Fronapfel cites to various codes and standards that call  
28 for the use of Grade D kraft paper or equivalent water-resistive barriers, specifically stating that

1 where the application is over “wood-based sheathing,” two layers of Grade D kraft paper or  
2 equivalent are required (or one layer of EPS insulation board over one layer of grade D kraft paper  
3 or equivalent.) See *Id.* at GALLERY-SBSA\_005033-5035, citing IBC 1405.10.1.1, ESR-3529  
4 3.1.190, ICC R703.6.3, 2510.6, 1404.2, R703.2, and ESR2376.

5 12. Mr. Fronapfel’s report included photographs which appear to depict three separate  
6 locations where he purports to have found areas with one layer of WRB over sheathing of framing.  
7 See *Id.* at GALLERY-SSBA\_005036-5041.

8 13. Mr. Fronapfel further testified that areas of missing or mis-lapped WRB observed  
9 by SBSA would be identified on the observation drawings. Exhibit B at pp. 63:20-64:4.

10 14. Desert Vista’s expert West Harrington examined the above observation drawings  
11 and produced a document highlighting and counting eleven locations where there are references  
12 to observations of one or two layers of WRB over sheathing. See Exhibit E, marked-up copy of  
13 SBSA Observation Drawings with highlights on SBSA references to building paper, also  
14 introduced as Exhibit 130 to deposition for W. Harrington.

15 15. Mr. Harrington counted fifty-four locations where references were made to one or  
16 two layers of WRB over open framing or other conditions. *Id.*

17 16. SBSA’s Observation Drawings include notes describing two layers of WRB over  
18 sheathing observed by SBSA in most location, with only two notes describing locations where  
19 SBA identified one layer of WRB:

- 20 a. C1.11 Front Elevation “(1) Layer OSB Shingle lapped with Rainbuster  
21 Flashing / OSB Sheathing”.
- 22 b. C1.16 Bldg D Rear Elevation “(1) Layer WRB above window / (2) Layer  
23 WRB at Jamb.” See Exhibit E at pages GALLERY-SBSA\_004567 and  
GALLERY-SBSA\_004572.

24 17. Nine other notes in the SBSA report note observations of WRB over sheathing, and  
25 appear to reference observations of two layers of building paper. Exhibit E.

26 18. SBSA records indicates that areas where one layer of building paper/WRB over  
27 sheathing instead of two were identified at two locations total. *Id.*

1 19. SBSA recommended “full removal and replacement of the stucco and the exterior  
2 insulation is required to address the non-compliant installation of the WRB for the existing stucco  
3 system...” See “Exhibit A” GALLERY-SBSA\_005153-5154.

4 20. Mr. Stefen Gustafson of Nautilus produced reports for cost of repair for the WRB  
5 conditions. See “Exhibit B” GALLERY-NBC\_005076-5092 / Exhibit 59 to Deposition of S.  
6 Gustafson.

7 21. Mr. Gustafson testified that his scope of repair was to replace stucco in all locations  
8 based on SBSA’s repair protocol instructing him to do so. See Exhibit C at Deposition of S.  
9 Gustafson, p 43:15-43:22.

10 22. Mr. Fronapfel has opined that the EPS foam board installed as part of the stucco  
11 system contains defects. Exhibit A at GALLERY-SBSA\_5042-9. He summarizes his findings as  
12 “Intrusive examination revealed the foam board used at the Gallery site was generally 3/8- to 7/8-  
13 inch thick, did not have the required vertical grooves, and was installed tight to the improperly  
14 selected WRB.” *Id.* Exhibit A at GALLERY-SBSA\_5042.

15 23. Mr. Fronapfel cites to standards which state that the EPS foam boards should be 1”  
16 when over open stud areas, ½” over solid surfaces, and that the EPS foam boards should generally  
17 include vertical grooves. Exhibit A at GALLERY-SBSA\_5042-3.

18 24. Mr. Fronapfel opined that Non-complaint EPS board exists at locations where  
19 stucco is applied over solid substrates across the Gallery site” and refers to his Observation  
20 Drawings and Defect Matrix for locations and findings. Exhibit A at GALLERY-SBSA\_5049.

21 25. Mr. Fronapfel’s report includes 8 example photographs which he describes as  
22 showing EPS board with “vertical grooves generally missing at the inner face.” Exhibit A at  
23 GALLERY-SBSA\_5043-9.

24 26. Mr. Harrington reviewed the Observation Drawings from Mr. Fronapfel and  
25 counted three locations where Mr. Fronapfel had made reference to observation of missing  
26 grooves. See Exhibit F, marked up copy of Observation Drawings with highlights regarding  
27 references to EPS.

1 27. Mr. Harrington counted in Mr. Fronapfel's observation drawings contain 40  
2 references to EPS/and or foam overall. Exhibit F. Mr. Fronapfel stated in his report that EPS board  
3 was observed to be "generally 3/8- to 7/8-inch thick." 222 of the 40 references to EPS contain Mr.  
4 Fronapfel's notes regarding observing 1" EPS. *Id.*

5 28. Mr. Fronapfel identified 3/8" EPS at only three locations and no other locations  
6 under 1/2". *Id.*

7 29. SBSA stated that the repair to this EPS condition was also removal and replacement  
8 of the entire stucco system, and reinstallation of EPS board over solid substrates. ("Full removal  
9 and replacement of the stucco and the exterior insulation is required to address the non-compliant  
10 installation of the EPS foam board for the existing stucco system..." Exhibit A at GALLERY-  
11 SBSA\_5154.

12 Dated: September 30, 2022

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25 Original of the foregoing e-filed  
26 this 30<sup>th</sup> day of September, 2022 with:

27 Clerk of the Court  
28 Maricopa County Superior Court  
101 W. Jefferson  
Phoenix, AZ 85003

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