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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

**DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
REGARDING CLAIMS OF  
UNSUPPORTED DEFECTS**

(Oral Argument Requested)

(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,  
24

25 COME NOW Defendants Defendants K. Hovnanian at Gallery, LLC, and K. Hovnanian  
26 Arizona Operations, LLC, by and through undersigned counsel and pursuant to Ariz.R.Civ. 56,  
27 move for Partial Summary Judgment regarding claims asserted by Plaintiff Gallery Community  
28 Association for damages based on defect conditions which were not observed or documented but  
instead based upon projection. Plaintiff and its experts have raised claims based on cost of repair  
of conditions which they claim are widespread, but have not produced admissible evidence to  
support the existence of widespread conditions. Specifically, Plaintiff seeks damages for structural  
repairs throughout all buildings and for removal and replacement of all stucco at the project. These  
repair claims are based on observation of a structural condition which Plaintiff's expert claims to  
exist in one observed location, a stucco weather-resistive barrier condition which the expert  
identified at two locations, and a stucco EPS foam board issue which he identified at three  
locations. The claims widespread repairs are unsupported and based on speculation. These  
unsupported repairs make up over \$1.8 million Plaintiff's claimed costs for the repairs themselves  
plus hundreds of thousands of dollars in mark-ups. For these reasons, and as set forth in further  
detail in the following Memorandum of Points and Authorities, Movants request Partial Summary

1 Judgment regarding Plaintiff’s claims for repair of unobserved or projected defect conditions.  
2 Undersigned counsel has consulted with Plaintiff’s counsel regarding the motion and confirmed  
3 that it is opposed.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 The matter at issue concerns allegations by Plaintiff regarding the existence of defective  
6 conditions and related damage at property known as The Gallery (“Gallery”), a townhome  
7 development in Scottsdale, Arizona. Plaintiff has disclosed opinion reports from its construction  
8 liability expert Ed Fronapfel of SBSA and its cost of repair expert Stefen Gustafson or Nautilus.  
9 SOF ¶ 1. The repair items and costs as set forth by the experts include extensive repairs and costs  
10 for defects which, according to Plaintiff’s experts, have only been observed in limited areas.  
11 Plaintiff has not introduced evidence based on any scientific statistical survey or other evidence  
12 which could justify damages based on the existence of conditions which were not actually  
13 observed at the property. Plaintiff should not be permitted to introduce opinions or estimates for  
14 repair costs which are based solely on speculation that widespread defect conditions exist at  
15 Gallery.

16 **I. RELEVANT FACTS**

17 Plaintiff’s expert SBSA stated that it identified certain conditions and documented limited  
18 locations where they occur. SBSA recommended repairs and Plaintiff’s cost of repair expert  
19 Nautilus provided costs for those repairs as if they existed throughout The Gallery. The numbering  
20 and description of the defect items comes from Plaintiff’s experts:

- 21 2. Lateral Force Resisting System (LFRS) / 2.a. Non-Compliant LFRS
- 22 3.C.1.b Non-Complaint WRB for Stucco System.
- 23 3.C.1.c Non-Complaint EPS Foam Board for Stucco System. SSOF ¶ 2.

24 **A. Lateral Force Resisting System (“LFRS”) (Plaintiff’s item 2.a)**

25 Mr. Fronapfel claims to have identified one location at Gallery where structural OSB  
26 sheathing is missing. Plaintiff’s expert claims that the missing sheathing is a deficiency in the  
27 Lateral Force Resisting System (“LFRS”) The location is adjacent to a window on Building D at  
28

1 Unit 3111. SBSA provided photographs of the area. SBSA also claims to have observed distress  
2 to a metal strap attached to OSB sheathing at the same Unit. SSOF ¶¶ 3, 4.

3 Plaintiff and its experts have not identified any other location of observed defects in the  
4 LFRS or any sign of deficiency in the system. SSOF ¶¶ 5, 6.

5 Mr. Fronapfel stated in his report that “Similar non-compliant LFRS issues will more likely  
6 than not be discovered during stucco repairs recommended in Section C.1.b. and C.1.c. of this  
7 report. He made repair recommendations for the “Repair contractor to include 10-percent of the  
8 stucco repair costs for use as a contingency for the repairs for the non-compliance LFRS.” SOF ¶  
9 7.

10 Mr. Gustafson’s cost of repair report included a cost of repair of \$200,000 for the LFRS  
11 repair. SSOF ¶ 8. He testified that his repair estimate was based on the instruction from Mr.  
12 Fronapfel. SSOF ¶ 9. Specifically, he testified that he calculated 10% of the stucco cost and came  
13 up with \$160,000, then his staff received further instructions to round that total up to \$200,000.  
14 *Id.* Mr. Gustafson did not identify costs for repair to any condition actually observed at the site.  
15 All parts of Mr. Gustafson’s reported opinion regarding the cost of repair for issue 2.0/2.0.a LFRS  
16 were based on Mr. Fronapfel’s instructions to assume that defects will be identified in the future.

17 **B. Non-Compliant WRB for Stucco System (Plaintiff’s item 3.C.1.b.)**

18 Mr. Fronapfel has opined that the weather-resistive barrier (WRB) installed underneath the  
19 stucco system contains defects. He summarizes his findings as “Intrusive examination revealed  
20 that a single layer of WRB was generally installed over open stud framing and solid sheathing.  
21 Occasionally, two layers of WRB of framing were identified to have been used.” SSOF ¶ 10

22 Various codes and standards cited by Mr. Fronapfel call for the use of Grade D kraft  
23 building paper or other water-resistive barriers. According to his citations, where the application  
24 is over “wood-based sheathing,” two layers of Grade D kraft paper or equivalent are required (or  
25 one layer of EPS insulation board over one layer of grade D kraft paper or equivalent.) SSOF ¶  
26 11.

1 Mr. Fronapfel’s report includes example photographs which appear to show three separate  
2 locations where he purports to have found locations with one layer of WRB over sheathing or  
3 framing. SSOF ¶ 12.

4 Mr. Fronapfel testified that SBSA generated a set of “observation drawings” which identify  
5 all locations where observations of conditions were made and are indexed to the photographs  
6 taken by SBSA. SSOF ¶ 6.

7 He testified that areas of missing or mislapped building paper or WRB observed by SBSA  
8 would be identified on the observation drawings. SSOF ¶ 13.

9 Desert Vista’s expert West Harrington examined the observation drawings produced by  
10 Mr. Fronapfel and produced a document which highlights the references to weather-resistive  
11 barrier in SBSA’s observation drawings. SSOF ¶ 14. All locations where the building paper/WRB  
12 layers were referenced were counted and highlighted. Mr. Harrington noted eleven references to  
13 observation of one or two layers of building paper over sheathing (with either one or two layers).  
14 *Id.* He noted fifty-four locations where references were made to one or two layers of building  
15 paper over open framing or other conditions. SSOF ¶ 15.

16 SBSA’s Observation Drawings include notes describing two layers of building paper/WRB  
17 over sheathing observed by SBSA in most locations. There are only two notes from SBSA  
18 describing locations where SBSA identified one layer:

19 C1.11 Front Elevation “(1) Layer OSB Shingle lapped with Rainbuster  
20 Flashing / OSB Sheathing”

21 C1.16 Bldg D Rear Elevation “(1) Layer WRB above window / (2) Layer  
22 WRB at Jamb” (SSOF ¶ 19).

23 SBSA’s other nine notes regarding observations of WRB over sheathing appear to  
24 reference observations of two layers of building paper in those locations. SSOF ¶ 16.

25 The records identified by SBSA and Plaintiff indicate that the condition of one layer of  
26 WRB/building paper over sheathing instead of two is a condition located at two locations at most.  
27 SSOF ¶ 17.

28 The evidence produced by SBSA does not include any reference to the observed quantities  
of the condition.

1 SBSA recommended removal and replacement of the entire stucco system in order to  
2 address the non-complaint WRB condition. (“Full removal and replacement of the stucco and the  
3 exterior insulation is required to address the non-compliant installation of the WRB for the  
4 existing stucco system...” SSOF ¶ 19.

5 Plaintiff’s cost of repair expert Stefen Gustafson of Nautilus produced reports which  
6 include costs of repair for the WRB repair conditions. SSOF ¶ 20. He testified that his scope of  
7 repair was to replace stucco in all locations based on SBSA’s repair protocol instructing him to  
8 do so. SSOF ¶ 21.

9 **C. Non-Compliant EPS Foam Board for Stucco System (Plaintiff’s item 3.C.1.c.)**

10 Mr. Fronapfel has opined that the EPS foam board installed as part of the stucco system contains  
11 defects. SSOF ¶ 22. He summarizes his findings as “Intrusive examination revealed the foam  
12 board used at the Gallery site was generally 3/8- to 7/8-inch thick, did not have the required  
13 vertical grooves, and was installed tight to the improperly selected WRB.” *Id.* He cites to standards  
14 which state that the EPS foam boards should be 1” when over open stud areas, ½” over solid  
15 surfaces, and that the EPS foam boards should generally include vertical grooves. SSOF ¶ 23. He  
16 opined that Non-complaint EPS board exists at locations where stucco is applied over solid  
17 substrates across the Gallery site” and refers to his Observation Drawings and Defect Matrix for  
18 locations and findings. SSOF ¶ 24.

19 Mr. Fronapfel’s report includes 8 example photographs which he describes as showing EPS  
20 board with “vertical grooves generally missing at the inner face.” SSOF ¶ 25. These are the  
21 descriptions used by the expert. Defendants do not concede that the photographs actually show  
22 that grooves are missing, as the photographs include show side views and some narrow sections  
23 of the EPS board that would not necessarily identify the presence or absence of vertical grooves  
24 spaced a maximum of 12 inches on the back face of the boards. *Id.*

25 Mr. Harrington reviewed the observation drawings from Mr. Fronapfel and counted three  
26 locations where Mr. Fronapfel had made reference to observation of missing grooves. SSOF ¶ 26.

27 Mr. Harrington counted in Mr. Fronapfel’s observation drawings contain 40 references to  
28 EPS/and or foam overall. Mr. Fronapfel stated in his report that EPS board was observed to be

1 “generally 3/8- to 7/8-inch thick.” This is not reflected in his actual Observation Drawings where  
2 at least 22 of the 40 references to EPS contain Mr. Fronapfel’s notes regarding observing 1” EPS.  
3 SSOF ¶ 27.

4 Mr. Fronapfel identified 3/8” EPS at only three locations and no other locations under 1/2”.  
5 SSOF ¶ 28. His cited references state that EPS should be 1” in open frame locations and 1/2” over  
6 substrates, and his conclusion as set forth in the report is only that he found non-compliant  
7 locations “where stucco is applied over solid surfaces.” The condition he identified with improper  
8 thickness appears to be in no more than three locations.

9 SBSA stated that the repair to this EPS condition was also removal and replacement of the  
10 entire stucco system, and reinstallation of EPS board over solid substrates. (“Full removal and  
11 replacement of the stucco and the exterior insulation is required to address the non-compliant  
12 installation of the EPS foam board for the existing stucco system...” SSOF 19.

13 The extremely limited observations of the EPS foam board cannot establish that a  
14 widespread conditions exists with the lack of grooves or with improper thickness of EPS board  
15 over solid substrates. Minimal observations of the EPS groove issue were identified. Plaintiff’s  
16 expert claims to have identified EPS foam board that is 1/8” less than the required thickness in  
17 three locations project-wide.

18 **II. PROOF OF CLAIMS REQUIRES EVIDENCE, AND PLAINTIFFS FAILED TO**  
19 **DISCLOSE ANY THAT CAN SUPPORT THEIR EXTENSIVE CLAIMS**

20 Plaintiff alleges that defective conditions exist in the homes at The Gallery and that it  
21 should be compensated for the claimed cost of repair of those conditions. Plaintiff has alleged  
22 Negligence and has alleged various contract-based causes of action based on Express Warranties,  
23 and Implied Warranties, and the Covenant of Good Faith and Fair Dealing. Each of the claims is  
24 based on allegations that the property was not properly constructed and that damage has resulted.

25 Generally, the measure of damages in a construction defect case is the reasonable cost of  
26 construction and completion in accordance with the contract, i.e. the cost of repair. *See Fairway*  
27 *Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 253-254, 603 P.2d 513, 524-525

1 (App. 1979). Under any of Plaintiff’s theories, it must establish that there is a defective condition  
2 requiring repair in order to establish a right to recover.

3 Here, Plaintiff seeks to recover damages without proof of loss and without any evidence  
4 beyond speculation. The claim for repairs to an estimated amount of future identified structural  
5 issues is not supported by any admissible evidence. The claim for repairs to the WRB throughout  
6 the property in not supported by admissible evidence. Speculation that a defect condition might  
7 exist is not a substitute for evidence. Plaintiff had years to investigate and substantiate its claims  
8 before and during litigation up to its disclosure deadline. Plaintiff instead chose to disclose cost  
9 of repair estimates that are unrelated to and unsupported by any proof of damage. “Mere  
10 speculation does not substitute for proof.” *Cybrus Bagdad Copper Corp. v. Arizona Dept. of Rev.*,  
11 196 Ariz. 5, 8, 992 P.2d 5, 8 (App. 2000). Damages cannot be recovered if they are “speculative,  
12 remote, or uncertain.” Moreover, “the speculations, guesses, or estimates of witnesses form no  
13 better basis of recovery than the speculations of the jury themselves.” *Coury Bros. Ranches, Inc.*  
14 *v. Ellsworth*, 103 Ariz. 515, 521, 446 P.2d 458, 463 (1968). Ariz.R.Evid. 404(b)(2) does not allow  
15 speculation that some wrongful acts occurred based solely on evidence that other wrongs existed.

16 This situation has some similarity to cases where parties have attempted to maintain claims  
17 based on extrapolation of the existence of widespread defects based on limited testing and  
18 observation. The difference here is that Plaintiffs have provided no information whatsoever about  
19 the scope or results of testing of the surveyed population, and seek to project isolated observations  
20 to 100% of the population.

21 Projection of claims based on statistical theory instead of individual evidence requires  
22 application of proper accepted methods, which are absent here. In 2010, the Arizona Court of  
23 Appeals held the following:

24 “[T]he superior court may adopt statistical sampling and extrapolation as a case  
25 management tool only when the specific methodology to be used is tailored to  
26 produce a result at least as fair and accurate as would be produce by traditional  
27 particularistic fact-finding methods. In making this determination, the court must at  
28 a minimum consider the number of claims in the relevant universe, the number and  
nature of the variable present in those claims, the sample size and whether the  
sample is truly representative of the universe of claims. *Scottsdale Memorial Health  
Systems, Inc. v. Maricopa County*, 224 Ariz. at 125, 141, 228 P.3d 117, 133  
(emphasis added).

1 “The critical aspect of a sample is that it be representative of the population from which it  
2 is drawn. A sample that is non-representative is called a biased sample.” *Hibbs v. Calcot, LTD.*,  
3 166 Ariz. 210, 217, 801 P.2d 445 (Ct. App. 1990). With this, the proponent of extrapolation  
4 evidence “bears the burden of establishing conformity with generally recognized statistical  
5 standards.” *Id.*

6 No part of the LFRS repair is based on any quantities of observed conditions. Plaintiff  
7 identified a condition at one location and did not include any repair costs for the cost or quantity  
8 of the issue which its expert observed. Plaintiff and its experts chose not to identify costs for repair  
9 of the observed defect and only to present a projected cost for the repair of defects that might be  
10 found in the future.

11 Plaintiff’s claim for “3.C.1.b Non-Complaint WRB for Stucco System” is not supported  
12 by evidence of a widespread defect. Plaintiff’s expert identified the locations of the condition in  
13 its repair observation drawings, which appear to describe at most only two locations. Plaintiff’s  
14 repair costs for this issue are based on removal and replacement of the entire stucco system, not  
15 repair or replacement of the locations where insufficient WRB layers over sheathing were  
16 observed. Similarly, Plaintiff’s claim for “3.C.1.c Non-Complaint EPS for Stucco System” is not  
17 supported by evidence of widespread defects either in the thickness of the material or the absence  
18 of vertical grooves. Claims that the installation was ‘generally deficient’ are not supported by the  
19 expert’s observations which show only three locations where he purports to have observed  
20 insufficient thickness and a small number of locations where he identified missing grooves.  
21 Movants anticipate that Plaintiff will argue that widespread stucco repairs are required for other  
22 bases, however there is no support for repairs to the WRB or EPS foam board on a project-wide  
23 basis or removal and replacement of the stucco system for these claimed deficiencies.

24 **III. CONCLUSION**

25 Partial Summary Judgment is appropriate on every Plaintiff’s claim for these three  
26 unsupported repair costs. The Court should enter partial summary judgment that Plaintiff cannot  
27 recover any part of the claimed for repairs to Plaintiff’s defect item “2. Lateral Force Resisting  
28

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1 System (LFRS) / 2.a. Non-Compliant LFRS,” its defect item “C.1.b. Non-Compliant WRB for  
2 Stucco System,” or its defect item “C.1.c. Non-Complaint EPS Foam Board for Stucco System.”

3  
4 Dated: September 30, 2022

LORBER, GREENFIELD & POLITO, LLP

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18 Original of the foregoing e-filed  
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