

EXHIBIT 5



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Attorneys for Defendants/Third Party Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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

Plaintiff,

v.

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

Defendants.

**K. HOVNANIAN AT GALLERY, LLC, an
Arizona limited liability company; K.
HOVNANIAN ARIZONA OPERATIONS,
LLC, an Arizona limited liability company;
K. HOVNANIAN DEVELOPMENTS OF
ARIZONA, INC., an Arizona corporation;**

Case No. CV2020-008714

**DEFENDANTS'/
THIRD PARTY PLAINTIFFS'
FIRST SUPPLEMENTAL
DISCLOSURE STATEMENT**

(Assigned to the Hon. Michael Kemp)

(Cumulative)

1 **K. HOVNANIAN COMPANIES OF**
2 **ARIZONA, LLC, an Arizona limited**
3 **liability company,**

4 **Third-Party Plaintiffs**

5 **v.**

6 **ARTISTIC STAIRS, LTD., an Arizona**
7 **limited liability company; CHAS**
8 **ROBERTS AIR CONDITIONING, INC.,**
9 **an Arizona corporation; DESERT VISTA,**
10 **INC. an Arizona corporation; HOME**
11 **BUILDERS SITE SERVICES OF**
12 **ARIZONA, LLC an Arizona limited**
13 **liability company; IDG INNOVATIVE**
14 **DEVELOPMENT, GROUP, LLC, an**
15 **Arizona limited liability company, dba**
16 **DESERT SERVICES SWPPP**
17 **SOLUTIONS; INTERIOR LOGIC**
18 **HOLDINGS, LLC, a Delaware limited**
19 **liability company; LEBLANC BUILDING**
20 **CO., INC., an Arizona corporation;**
21 **LIBERTY CONSTRUCTORS, LLC, an**
22 **Arizona limited liability company, DBA**
23 **LIBERTY ARIZONA; PAUL JOHNSON**
24 **DRYWALL, INC., an Arizona corporation;**
25 **RENCO LLC, an Arizona limited liability**
26 **company, dba RENCO ROOFING; R/S**
27 **SERVICE & SUPPLY, INC., an Arizona**
28 **corporation; SARGON MASONRY**
CONSTRUCTION, LLC, an Arizona
limited liability company; AND DOES 1-50,

Third-Party Defendants.

22 Defendants/Third-Party Plaintiffs K Hovnanian at Gallery, LLC, K. Hovnanian Arizona
23 Operations, LLC, K Hovnanian Developments of Arizona, Inc. and K Hovnanian Companies of
24 Arizona, LLC (collectively, “Defendants”), by and through undersigned counsel, hereby
25 disclose to all other parties in this action the information required under Rule 26.1 of the
26 Arizona Rules of Civil Procedure (“ARCP”). This Disclosure Statement is based on
27 Defendants’/Third Party Plaintiffs’ investigation to date and may be supplemented based upon
28

1 further discovery efforts. **This supplemental disclosure statement is cumulative. Any**
2 **additions will be BOLD and *italic*. Any deletions will be STRICKEN.**

3 **I. FACTUAL BASIS OF DEFENSES**

4 Plaintiff is an Arizona nonprofit corporation that acts as the property owner’s association
5 (the “Association” or “HOA”) for the common areas of the property known as The Gallery, in
6 Scottsdale, Arizona (the “Property” or “The Gallery”), a townhouse community alleged to have
7 been built by Defendants. Plaintiff is governed by the recorded Declaration of Covenants,
8 Conditions, Restrictions, and Easements (“CC&R’s”) for The Gallery. Those CC&Rs require
9 the Association, after the Declarant’s (listed as K Hovnanian at Gallery LLC) turnover to the
10 HOA, to repair and maintain the common elements of the Property and Common Areas
11 thereafter, as defined therein, as well as the common exterior walls, stucco, façade, roofs, or
12 other surfaces of the Dwelling Units. There is no known expressed or implied warranty running
13 to the HOA from the Declarant, after acceptance of the Declarant’s rights to the Property
14 conveyed. That acceptance occurred after the HOA’s inspection, and the HOA placed no
15 limitation or condition on the conveyance to the HOA at that time. In the publicly recorded
16 October 6, 2016 “Quit Claim Deed”, only Defendant/Declarant K Hovnanian at Gallery, LLC
17 (“KHov Gallery”), which developed the project, conveyed the common areas to the Association.
18 Defendants offered to and did complete repairs at Plaintiff’s request

19 **II. LEGAL THEORIES SUPPORTING DEFENSES**

20 **A. DEFENSES TO CLAIMS**

21 1. Plaintiff’s Breach of Implied Covenant of Good Faith and Fair Dealing Claim
22 fails, because Plaintiff is not in privity of contract with any of the Defendants. As breach of
23 implied covenant and fair dealing claims must be based on a valid contract between the parties,
24 there is no basis for the claim. Furthermore, Plaintiff has suffered no loss of a “benefit of the
25 bargain” expected by the Plaintiff, as is required to bring such a claim.

26 2. Plaintiff’s claim of Breach of Implied Warranty of Workmanship and Habitability
27 fails because Arizona has never directly found such an implied contract in cases such as this
28 one. The implied warranty of habitability and fitness has been recognized in Arizona, but only in

1 specified circumstances, and specifically as to homeowners. As Plaintiff is not a homeowner,
2 but is instead the recipient of a grant of Property by the Declarant, and in fact, was granted the
3 Property with no warranties provided, no implied warranty of habitability and fitness exists;
4 therefore, there can be no breach.

5 3. Plaintiff's Breach of Contract Claim fails, because Plaintiff is not in privity of
6 contract with any of the Defendants. Because breach of contract claims must be based on a valid
7 contract between the parties, there is no basis for the claim.

8 **B. AFFIRMATIVE DEFENSES TO CLAIMS**

9 Defendants pled the following as their affirmative defenses in this case: accord and
10 satisfaction, assumption of risk, estoppel, failure of consideration, fraud, laches, license,
11 payment, release, statute of frauds, waiver, and any other matter constituting an avoidance or
12 affirmative defense. In order to preserve and not waive all affirmative defenses under Ariz. R.
13 Civ. P. 8(d) and 12(b), Defendants hereby allege them all generally. Should, through discovery,
14 disclosure, or other means, Defendants become aware of facts or law which support these
15 additional defenses or support adding additional ones, Defendants will specifically disclose the
16 defenses and supplement their disclosure statement, in compliance with the Arizona Rules of
17 Civil Procedure, Orders of the Court and/or the agreement of the parties.

18 **III. FACTUAL BASIS OF THIRD-PARTY CLAIMS**

19 This construction defect case arises out of allegations pertaining to the construction of
20 The Gallery condominium complex. Plaintiff Gallery Community Association alleges numerous
21 deficiencies in the complex's construction of the common areas. Defendant/Third Party-Plaintiff
22 K Hovnanian at Gallery, LLC served as the developer of the project. In that capacity, K Hov
23 Gallery entered into subcontractor agreements with each of the third-party defendants. Third
24 Party Defendants supplied plans, material, labor, installation or professional/ engineering/design
25 services to The Gallery in connection with their respective subcontractor agreements with
26 Defendant/Third Party Plaintiff. On July 5, 2019 Plaintiff served Defendant/Third Party Plaintiff
27 K Hovnanian with a notice of defect letter alleging defects that implicated the work provided by
28 Third Party Defendants' provision of plans, material or labor subject to the agreement.

1 **IV. LEGAL THEORIES SUPPORTING DEFENSES**

2 1. **Breach of express warranty-** Defendant’s contract and subcontract agreements
3 with the named Third-Party Defendants contain the named Third-Party Defendants’ express
4 provisions warranting that their plans, workmanship, materials, and/or
5 professional/engineering/design services shall be of merchantable quality, safely and properly
6 designed, constructed, and erected, and reasonably fit for their intended purpose. They also
7 contain express provisions giving an implied warranty of their maintenance service and/or repair
8 of the subject property. To the extent that Plaintiff’s allegations are true (and Defendants do not
9 hereby concur that such is the case and additionally, continue to reserve all of their rights to
10 deny same), the named Third-Party Defendants have breached this alleged express warranty, as
11 their plans, workmanship, materials, professional/engineering/design services, maintenance,
12 service, and/or repair, as alleged by Plaintiff, were not safely and/or properly designed,
13 constructed and/or erected, serviced, maintained, or repaired in a reasonably fit manner for their
14 intended purpose, and/or of merchantable quality and free from defects As a direct and
15 proximate result of these breaches of express warranty, Defendants/Third Party Plaintiffs have
16 sustained, and in the future will sustain, direct and consequential damages in an amount not yet
17 known but in excess of the Court’s minimal jurisdictional amount, and Defendants/Third Party
18 Plaintiffs are entitled to recover these amounts from the named Third-Party Defendants

19 2. **Breach of Implied Warranty-** An implied warranty exists without any express
20 statement of warranty between two parties. *See Kubby v. Crescent Steel*, 105 Ariz. 459, 466 P.2d
21 753 (1970). It requires that a party perform its work in a good, workmanlike manner and in a
22 manner befitting a skilled contractor. *Id.* The standard to be applied in determining whether or
23 not there has been a breach of implied warranty is one of reasonableness in light of surrounding
24 circumstances. *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 245, 678 P.2d 427, 430
25 (1984). The named Third-Party Defendants impliedly warranted that their plans, workmanship,
26 materials, and/or professional/engineering/design services would be of merchantable quality,
27 safely and properly designed, constructed and erected, reasonably fit for their intended purpose,
28 and/or that they have exercised their skills with care and diligence and in a reasonable, non-

1 negligent manner. They also impliedly warranted their maintenance, service, and or repair/ of
2 the subject property. To the extent that Plaintiff’s allegations are true (and Defendants do not
3 hereby concur that such is the case and additionally, continue to reserve all of their rights to
4 deny same)the named Third-Party Defendants’ workmanship, materials,
5 professional/engineering/design services, maintenance, service, and/or repair as alleged by
6 Plaintiff, were not properly designed, constructed and/or erected, serviced, maintained, or
7 repaired in a reasonably fit manner for their intended purpose, of merchantable quality, free
8 from defects, and/or they have failed to exercise their skills with care and diligence. As a direct
9 and proximate result of these breaches of warranty, K. Hovnanian has sustained, and in the
10 future will sustain, direct and consequential damages in an amount not yet known but in excess
11 of the Court’s minimal jurisdictional amount, and K. Hovnanian is entitled to recover these
12 amounts from the named Third-Party Defendants.

13 3. **Breach of Contract.** In order to succeed on this claim, Defendants must prove: 1)
14 the existence of a contract between the parties; 2) the Defendants’ breach of the contract’s
15 terms; and 3) damages. *See Graham v. Asbury*, 112 Ariz. 184, 540 P.2d 656 (1975). By their
16 failure to perform as required by the express, implied, and warranted terms of the contracts and
17 subcontracts, as alleged by the Plaintiff, the Third-Party Defendants breached the contracts and
18 subcontract agreements. As a direct and proximate result of these breaches, Defendants have
19 sustained, and in the future will sustain, direct and consequential damages in an amount not yet
20 known but in excess of the Court’s minimal jurisdictional amount, and Defendants are entitled
21 to recover these amounts from the Third-Party Defendants.

22 4. **Negligence-** To prevail on a negligence claim, Claimants must prove 1) that
23 Defendant owed them a duty to act in accordance with a specific standard of care; 2) that
24 Defendant breached said duty by failing to meet its standard of care; 3) that said breach resulted
25 in injury to Claimants; and 4) damages. *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200,
26 204 (1983). At the time the subject property was constructed, the named Third-Party Defendants
27 owed Defendants a duty to exercise reasonably prudent and ordinary care in the design and
28 construction of the subject property. Third-Party Defendants violated this duty, to the extent that

1 the Plaintiff's allegations are true (and Defendants do not hereby concur that such is the case and
2 additionally, continue to reserve all of their rights to deny same), by performing their work in a
3 negligent manner. After the subject property was constructed, the Third-Party Defendants owed
4 Defendants a duty to exercise reasonably prudent and ordinary care in the continued
5 maintenance, service, and repair of the subject property. The Third-Party Defendants violated
6 this duty, to the extent that the Plaintiff's allegations are true (and Defendants do not hereby
7 concur that such is the case and additionally, continue to reserve all of their rights to deny
8 same), by performing their work in a negligent manner. The Third-Party Defendants' negligent
9 acts or omissions are, among other things: a. failing to design, construct, and market the subject
10 property in a reasonable or safe manner; b. failing to provide, establish, or follow proper and
11 adequate quality control methods and procedures to provide a reasonably safe property; failing
12 to maintain, service, and repair the subject property in a reasonable or safe manner; d. failing to
13 act as a reasonably prudent person would have under the same or similar circumstances; and e.
14 otherwise failing to use due care under the circumstances. Each of Third-Party Defendants' acts
15 or omissions, singularly or in combination with others, constituted negligence, which
16 proximately caused the Plaintiff's alleged damages, which are in excess of the minimum
17 jurisdictional limits of this Court.

18 5. **Common Law Implied Indemnity.** Defendants are entirely without active fault
19 with regard to the acts and omissions alleged by Plaintiff. Pursuant to the facts of this case and
20 the parties' relationships, Defendants are entitled to common law indemnity from the Third-
21 Party Defendants as to any amounts sought against Defendants by the Plaintiff in any action that
22 maybe brought against Defendants, together with attorneys' fees and costs giving rise to the
23 claims alleged by the Plaintiff.

24 6. **Contractual Indemnity** Third-Party Defendants entered into written agreements
25 with Defendant(s) which contain an indemnity provision. The damages claimed by the Plaintiff,
26 if proven to be true, were caused by the named Third-Party Defendants and Third-Party DOE
27 Defendants, and each of them, arising out of, or relating in any way, directly or indirectly, with
28 the performance of the Third-Party Defendants' obligations pursuant to the written/oral

1 contracts entered into by each of them with K. Hovnanian. There are valid contracts between
2 Defendant(s) and the Third-Party Defendants, pursuant to which the Third-Party Defendants are
3 required to defend, indemnify and hold Defendant(s) harmless.

4 7. **Duty to Defend**-. Express written/oral contracts exists between Defendant(s), and
5 the Third-Party Defendants. The express written/oral contracts required the Third-Party
6 Defendants to defend Defendant(s) from any claims respecting the Third-Party Defendants'
7 scope of work under the contracts. A claim, loss, or suit, within the meaning of the express
8 written/oral , has arisen by virtue of the fact that the Plaintiff has sued for damages against
9 Defendants for alleged breaches of a duty to design, construct, maintain, service, and/or repair
10 alleged construction deficiencies to the subject property which is the subject matter of this
11 lawsuit, and that construction deficiencies claimed by the Plaintiff pertain to the scope of work
12 performed and/or materials provided by the Third-Party Defendants . Third-Party Defendants
13 have a present duty to defend against any claims made against Defendants pursuant to the
14 subcontracts , and as a result of the assertion of a claim, loss and/or suit arising out of the work
15 of the Third-Party Defendants, and each of them, Defendants have a present legal right to be
16 provided a defense by the Third-Party Defendants.

17 8. **Duty to Indemnify**.- the Third-Party Defendants are obligated to indemnify
18 Defendants from any claim, liability, loss, damage, cost, expenses, including attorneys' fees, etc.
19 in this action relating to matters embraced by the indemnity and arising out of the scope of work
20 of the Third-Party Defendants, and each of them. A dispute has arisen and an actual controversy
21 now exists between Defendants and the Third-Party Defendants in that Defendants assert that
22 the subcontractor agreements indemnify them from any claim, liability, loss, damage, cost,
23 expenses, including attorneys' fees, etc.

24 9. **Contribution**.- As a direct result of the Third-Party Defendants' conduct as set
25 forth herein, liability, if any, for the damages claimed by the Plaintiff rests, at least in part, on a
26 comparative-fault basis, on the Third-Party Defendants, and, only in part, if any, on a
27 comparative basis on Defendants. The Third-Party Defendants are obligated to reimburse
28 Defendants for their attorneys' fees and legal costs and to indemnify Defendants for any sums

1 Defendants pay, is compelled to pay, or may be compelled to pay as a result of settlement,
2 damages, judgment or other awards herein, and to pay a share of any judgment rendered against
3 Defendants which is in proportion to the comparative fault of the Third Party Defendants in
4 causing the Plaintiff's alleged damages, if any, under A.R.S. §12-2501 and A.R.S. 12-2506 et.
5 Seq.

6 **V. WITNESSES THAT DEFENDANTS MAY CALL AT TRIAL**

7 The following individuals have knowledge of the facts surrounding the claims in this
8 matter and may be called as witnesses at trial.

- 9 1. Representatives of Gallery Community Association
10 C/O Craig S. Nuss, Penny J. Manship
11 BURG SIMPSON ELDREDGE HERSH & JARDINE PC
12 8310 S. Valley Highway, Suite 270
13 Englewood, CO 80112

14 Gallery Community Association is the Plaintiff in this matter. The representatives are
15 expected to testify regarding their knowledge of the facts and circumstances alleged in the
16 Complaint.

- 17 2. Representatives of K Hovnanian at Gallery, LLC
18 C/O Dennis I. Wilenchik, Barbara J. Stansil
19 WILENCHIK AND BARTNESS, PC
20 2810 N. Third Street
21 Phoenix, Arizona 85004

22 It is anticipated that representatives of K Hovnanian at Gallery LLC will testify regarding
23 knowledge of construction of the Common Areas, the CC&Rs entered into, and the condition of
24 the construction of the Common Areas. They are also expected to testify concerning their
25 recollection of any conversations and communications with witnesses and Plaintiff or Plaintiff's
26 representatives regarding the allegations in the Complaint. It is further anticipated that this
27 Defendant's representatives will testify consistent with Defendants' disclosure statement,
28 Defendants' discovery responses and any deposition Defendants' representatives may give in
this matter.

1 3. Representatives of K. Hovnanian Developments of Arizona, Inc.
2 C/O Dennis I. Wilenchik, Barbara J. Stansil
3 WILENCHIK & BARTNESS
4 2810 N Third Street
5 Phoenix, Arizona 85004

6 It is anticipated that representatives of K Hovnanian Developments of Arizona, Inc will
7 testify regarding their knowledge of the Common Areas being constructed. They are also
8 expected to testify concerning their recollection of any conversations and communications with
9 witnesses and Plaintiff’s representatives regarding the allegations in the Complaint. It is further
10 anticipated that this Defendant’s representatives will testify consistent with Defendants’
11 disclosure statement, Defendants’ discovery responses and any deposition Defendants’
12 representatives may give in this matter.

13 4. Representatives of K Hovnanian Arizona Operations, LLC
14 C/O Dennis I Wilenchik, Barbara J. Stansil
15 WILENCHIK & BARTNESS, PC
16 2810 N Third Street
17 Phoenix, Arizona 85004

18 It is anticipated that representatives of K Hovnanian Arizona Operations, LLC will testify
19 regarding their knowledge of the Common Areas being constructed. They are also expected to
20 testify concerning their recollection of any conversations and communications with witnesses
21 and Plaintiff’s representatives regarding the allegations in the Complaint. It is further anticipated
22 that this Defendant’s representatives will testify consistent with Defendants’ disclosure
23 statement, Defendants’ discovery responses and any deposition Defendants’ representatives may
24 give in this matter.

25 5. Representatives of K Hovnanian Companies of Arizona LLC
26 C/O Dennis I Wilenchik, Barbara J. Stansil
27 WILENCHIK & BARTNESS, PC
28 2810 N. Third Street
 Phoenix, Arizona 85004

 It is anticipated that representatives of K. Hovnanian Companies of Arizona LLC will
testify regarding their knowledge of the Common Areas being constructed. They are also
expected to testify concerning their recollection of any conversations and communications with

1 witnesses and Plaintiff's representatives regarding the allegations contained in the Complaint. It
2 is further anticipated that this Defendant's representatives will testify consistent with
3 Defendants' disclosure statement, Defendants' discovery responses and any deposition
4 Defendants' representatives may give in this matter.

5 6. Representatives from Chas Roberts Air Conditioning, Inc.
6 C/O Teresa Hayashi Wales
7 WELSH LAW GROUP PLC
8 11811 N. Tatum Blvd., Suite P125
9 Phoenix, Arizona 85028

10 Chas Roberts Air Conditioning is a Third Party Defendant. Its representative(s) is/are
11 expected to testify regarding their recollections of facts and circumstances surrounding
12 allegations appearing in the Complaint. They are also expected to testify regarding their
13 recollections of any conversations with witnesses regarding the allegations contained in the
14 Complaint.

15 7. Representatives of Desert Vista, LLC

16 Desert Vista, Inc, is a Third Party Defendant, whose Representative(s) is/are expected to
17 testify regarding their recollections of facts and circumstances surrounding allegations contained
18 in the Complaint. They are also expected to testify regarding their recollections of any
19 conversations with witnesses regarding the allegations appearing in the Complaint.

20 8. Representatives Gothic Landscaping, Inc.
21 C/O Cole Crabtree, Amanda R. Hough
22 JABURG & WILK, PC
23 3200 N. Central Avenue, 20th Floor
24 Phoenix, Arizona 85012

25 Gothic Landscaping, Inc. is a Third Party Defendant, whose Representative(s) is/are
26 expected to testify regarding their recollections of facts and circumstances surrounding
27 allegations contained in the Complaint. They are also expected to testify regarding their
28 recollections of any conversations with witnesses regarding the allegations appearing in the
29 Complaint.

1 9. Representatives of Home Builders Site Services of Arizona, LLC

2 Home Building Site Services of Arizona, LLC is a Third-Party Defendant. Its
3 representative(s) is/are expected to testify regarding their recollections of facts and
4 circumstances surrounding allegations contained in the Complaint. They are also expected to
5 testify regarding their recollections of any conversations with witnesses regarding the
6 allegations appearing in the Complaint.

7 10. Representatives of LeBlanc Building Co., Inc
8 C/O Michael A. Ludwig, Stephen F. Best
9 JONES SKELTON & HOCHULI, PLC
10 40 N. Central Avenue, Suite 2700
11 Phoenix, Arizona 85004

12 LeBlanc Building Co., Inc. is a Third Party Defendant. Its representative(s) is/are
13 expected to testify regarding their recollections of facts and circumstances surrounding
14 allegations contained in the Complaint. They are also expected to testify regarding their
15 recollections of any conversations with witnesses regarding the allegations appearing in the
16 Complaint.

17 11. John Leblanc
18 C/O Michael A. Ludwig, Stephen F. Best
19 JONES SKELTON & HOCHULI, PLC
20 Phoenix, Arizona 85004

21 John Leblanc is the President of Leblanc Building Co., Inc. Mr. Leblanc is expected to
22 testify regarding his recollections of facts and circumstances surrounding allegations contained
23 in the Complaint. He is also expected to testify regarding his recollections of any conversations
24 with witnesses and Plaintiff regarding the allegations appearing in the Complaint.

25 12. Representatives of Liberty Constructors, LLC, dba Liberty Arizona

26 Liberty Constructors, LLC is a Third-Party Defendant. Its representative(s) is/are
27 expected to testify regarding their recollections of facts and circumstances surrounding
28 allegations contained in the Complaint. They are also expected to testify regarding their

1 recollections of any conversations with witnesses regarding the allegations appearing in the
2 Complaint.

3 13. Representatives of Renco, LLC, dba Renco Roofing

4 Renco, LLC is a Third Party Defendant. Its representative(s) is/are expected to testify
5 regarding their recollections of facts and circumstances surrounding allegations contained in the
6 Complaint. They are also expected to testify regarding their recollections of any conversations
7 with witnesses regarding the allegations appearing in the Complaint.

8 14. Representatives of R/S Service & Supply, Inc.

9 C/O Scott McClure
10 LEWIS BRISBOIS BISGAARD & SMITH, LLP
11 2929 North Central Avenue, Suite 1700
12 Phoenix, Arizona 85012

13 R/S Service & Supply, Inc. is a Third-Party Defendant. Its representative(s) is/are
14 expected to testify regarding their recollections of facts and circumstances surrounding
15 allegations appearing in the Complaint. They are also expected to testify regarding their
16 recollections of any conversations with witnesses regarding the allegations appearing in the
17 Complaint.

18 15. Representatives of Sargon Masonry Construction, LLC

19 C/O Leonard Fink, David S. Schopick
20 SPRINGEL & FINK LLP
21 3033 N. Central Avenue, Suite 500
22 Phoenix, Arizona 85012

23 Sargon Masonry Construction, LLC is a Third-Party Defendant. Its representative(s) is/are
24 expected to testify regarding their recollections of facts and circumstances surrounding
25 allegations contained in the Complaint. They are also expected to testify regarding their
26 recollections of any conversations with witnesses regarding the allegations appearing in the
27 Complaint.

28 16. All custodians of records or witnesses necessary to lay foundation for all
documents, photographs, illustrations or other documentary evidence.

1 17. All persons identified, or to be identified, in disclosure statements or
2 discovery requests.

3 18. Any and all witnesses listed by the other parties in this action, regardless of
4 whether they attempt to de-list the witness or fail to call the witness at the time of trial.

5 19. Any and all witnesses deposed in this litigation.

6 20. Any and all persons identified as having knowledge in any party's
7 disclosure statement.

8 This section will be supplemented as additional information becomes available.

9 **VI. PERSONS WHO HAVE GIVEN STATEMENTS**

10 Defendants are not aware of any persons who have given statements at this time. This
11 section will be supplemented as additional information becomes available.

12 **VII. EXPERT WITNESSES**

13 **Defendants anticipate calling the following individuals to provide expert testimony:**

14 **Terry Ingo**
15 **Bert. L Howe and Associates, Inc.**
16 **c/o Dennis I. Wilenchik, Barbara J. Stansil**
17 **2810 N Third Street**
Phoenix, AZ 85004

18 **Curt Peterson,**
19 **Peterson Geotechnical Group**
20 **c/o Dennis I. Wilenchik, Barbara J. Stansil**
21 **2810 N. Third Street**
Phoenix, AZ 85004

22 **These experts will be called to rebut testimony by any expert employed by Plaintiffs**
23 **and/or Third Party Defendants regarding alleged construction defects and alleged costs of**
24 **repairs and or replacement to the extent any exist. It is anticipated that these experts will**
25 **testify regarding their qualifications, review of construction and repair records, site**
26 **inspections and conditions and Plaintiffs' expert reports and expert deposition testimony**
27 **regarding their estimated cost of repairs. They are also expected to testify consistent with**
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1 **their expert reports produced herewith. This section will be supplemented as additional**
2 **information becomes available.**

3 **VIII. MEASURE OF DAMAGES**

4 Defendants contest any and all of Plaintiff's damages, based on the evidence to date.

5 Defendants' damages thus far consist of its attorney's fees and costs incurred in defense of
6 this case.

7 **IX. EXHIBITS TO BE USED AT TRIAL BY DEFENDANTS**

- 8 1. See Exhibit A.
- 9 2. All pleadings and records on file in this matter.
- 10 3. All discovery in this lawsuit, unless objected to by Defendants.
- 11 4. All reports and CVs prepared by any party's expert witness in this matter.
- 12 5. All depositions and exhibits taken in this matter.
- 13 6. All non-objectionable exhibits listed by Plaintiff and/ or other Defendants or Third-
14 Party Defendants in this matter.

15 Defendants reserve the right to supplement as additional information becomes available.
16 Copies of the above referenced documents and exhibits are being evaluated for privilege and
17 content and will be provided.

18 **X. OTHER RELEVANT DOCUMENTS KNOWN TO DEFENDANT**

19 None known at this time. Defendants reserve the right to supplement as additional
20 information becomes available.

21 **DATED** August 11, 2021.

22 **WILENCHIK & BARTNESS, P.C.**

23
24 /s/ Dennis I. Wilenchik
25 Dennis I. Wilenchik, Esq.
26 Barbara J. Stansil, Esq.
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2 *Attorneys for Third-Party Defendant*
3 *Sargon Masonry Construction, LLC*

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5 /s/ Hilary Myers
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**EXHIBIT A TO K HOVNANIAN'S DISCLOSURE STATEMENT
(Cumulative)**

Beginning Bates	End Bates	Description
KHOV00000001	KHOV00000001	2015-09-08 Final Walk Map
KHOV00000002	KHOV00000045	2016-05-10 Gallery CCRS_recorded
KHOV00000046	KHOV00000051	2018-08-23 K Hov_Gallery-Sign off
KHOV00000052	KHOV00000066	2007-01-01 Home Builders Ltd Warranty_PWC form No 117 Revised 01_2007
KHOV00000067	KHOV00000108	2008-03-11 Gothic Landscape Inc Master Subcontract Agreement
KHOV00000109	KHOV00000150	2008-03-19 Chas Roberts Master Subcontract Agreement
KHOV00000151	KHOV00000195	2008-04-08 Home Builder Services Master Subcontract Agreement
KHOV00000196	KHOV00000234	2008-04-15 Aztec Lighting Master Subcontract Agreement
KHOV00000235	KHOV00000269	2008-04-15 R_S Service and Supply Master Subcontract Agreement with attachments
KHOV00000270	KHOV00000302	2008-04-15 R_S Service and Supply Master Subcontract Agreement
KHOV00000303	KHOV00000335	2008-04-24 ProTex Master Subcontract Agreement
KHOV00000336	KHOV00000373	2009-01-05 ProTex Master Subcontractor Agreement
KHOV00000374	KHOV00000413	2009-08-31 X O Windows Master Subcontract Agreement
KHOV00000414	KHOV00000467	2010-03-03 Desert Vista, Inc Master Subcontract Agreement
KHOV00000468	KHOV00000523	2013-08-13 Liberty Constructors Inc Master Subcontract Agreement
KHOV00000524	KHOV00000560	2015-03-18 Proex GeoTech Report
KHOV00000561	KHOV00000612	2015-06-08 LeBlanc Building Co Master Subcontract Agreement with Work Agreement
KHOV00000613	KHOV00000628	2016-03-08 Felten Group Index to Structural Calculations_Building A
KHOV00000629	KHOV00000644	2016-03-08 Felten Group Index to Structural Calculations_Building B
KHOV00000645	KHOV00000660	2016-03-08 Felten Group Index to Structural Calculations_Building C
KHOV00000661	KHOV00000676	2016-03-08 Felten Group Index to Structural Calculations_Building D
KHOV00000677	KHOV00000727	2016-03-08 Felten Group Index to Structural Calculations_Unit 30-1210 Rev. 05-26-17
KHOV00000728	KHOV00000783	2016-03-08 Felten Group Index to Structural Calculations_Unit 31-1211 Rev. 05-26-17
KHOV00000784	KHOV00000842	2016-03-08 Felten Group Index to Structural Calculations_Unit 32-1212 Rev. 05-26-17

**EXHIBIT A TO K HOVNIANIAN'S DISCLOSURE STATEMENT
(Cumulative)**

Beginning Bates	End Bates	Description
KHOV00000843	KHOV00000843	2016-03-15 The Gallery Certificate of Special Inspection_Soils_Double SIC
KHOV00000844	KHOV00000874	2016-06-08 Felton Group_ Gallery Stuctural Set
KHOV00000875	KHOV00000928	2016-06-24 Renco Roofing Master Subcontract Agreement
KHOV00000929	KHOV00000946	2016-07-21 Chas Roberts Air Cond Work Agreement with attachments
KHOV00000947	KHOV00000948	2016-07-21 Desert Vista Inc Work Agreement
KHOV00000949	KHOV00000952	2016-07-21 Gothic Landscape Inc Work Agreement
KHOV00000953	KHOV00000954	2016-07-21 Home Builders Site Services Work Agreement_Grading
KHOV00000955	KHOV00000961	2016-07-21 Liberty Arizona Work Agreement - Concrete Foundation & Flatwork
KHOV00000962	KHOV00000968	2016-07-21 Renco Roofing Work Agreement
KHOV00000969	KHOV00000970	2016-07-21 Sargon Masonry Construction Master Subcontract Agreement_Fence
KHOV00000971	KHOV00000973	2016-07-21 Sargon Masonry Construction Work Agreement_Block Wall
KHOV00000974	KHOV00000982	2016-07-21 Sargon Masonry Costruction Work Agreeemnyt_Stone Veneer
KHOV00000983	KHOV00001040	2016-08-02 Gallery Arch Set
KHOV00001041	KHOV00001168	2016-08-24 City Approved_Building Set
KHOV00001169	KHOV00001296	2016-08-24 City Approved_Fire Set
KHOV00001297	KHOV00001330	2016-08-24 City Approved_Planning Applicant Set
KHOV00001331	KHOV00001458	2016-08-24 City Approved_Planning Set
KHOV00001459	KHOV00001460	2016-08-25 R_S Service and Supply Inc Work Agreement_Wrought Iron
KHOV00001461	KHOV00001492	2016-08-26 LeBlanc Building Co Inc Work Agreement_Framing
KHOV00001493	KHOV00001498	2016-10-26 Gallery - HOA Orientation
KHOV00001499	KHOV00001507	2016-10-27 Gallery Improvement Plan
KHOV00001508	KHOV00001510	2016-10-27 Sargon Masonry Construction Work Agreement_Metal Stairs
KHOV00001511	KHOV00001511	2016-12-01 Gallery Community Assoc Key Fob Acceptance
KHOV00001512	KHOV00001569	2017-06-01 Gallery Architectural
KHOV00001570	KHOV00001570	2018-01-05 Letter_Scottsdale_R. Noriega to Rhino Contracting Notice of Warrantee Compliance
KHOV00001571	KHOV00001574	2018-10-12 FINAL WALK PHOTOS.docx
KHOV00001575	KHOV00001575	2018-10-18 Sidewalk_pavers photo.jpg
KHOV00001576	KHOV00001620	2019-07-03 BurgSimpson Notice of Claim

**EXHIBIT A TO K HOVNANIAN'S DISCLOSURE STATEMENT
(Cumulative)**

Beginning Bates	End Bates	Description
KHOV00001621	KHOV00001652	2019-08-20 Standard Specifications_ Gallery
KHOV00001653	KHOV00001655	2019-09-09 Tender Letter K Hov to Chas Roberts AC Inc.
KHOV00001656	KHOV00001658	2019-09-09 Tender Letter K Hov to Desert Vista Inc
KHOV00001659	KHOV00001661	2019-09-09 Tender Letter K Hov to Gothic Grounds Management, Inc.
KHOV00001662	KHOV00001664	2019-09-09 Tender Letter K Hov to Home Builders Site Services of AZ LLC
KHOV00001665	KHOV00001667	2019-09-09 Tender Letter K Hov to Leblanc Building Co Inc.
KHOV00001668	KHOV00001670	2019-09-09 Tender Letter K Hov to Liberty Constructors LLC
KHOV00001671	KHOV00001673	2019-09-09 Tender Letter K Hov to Renco
KHOV00001674	KHOV00001676	2019-09-09 Tender Letter K Hov to Sargon Masonry Construction LLC
KHOV00001677	KHOV00001679	2019-09-10 Tender Letter K Hov to Gothic Landscaping
KHOV00001680	KHOV00001682	2020-04-27 Sargon Masonry Repair Invoices
<u>KHOV00001683</u>	<u>KHOV00001700</u>	<u>2021-08-10 Civil and Geotechnical Engineering Evaluation</u>
<u>KHOV00001701</u>	<u>KHOV00001721</u>	<u>2021-08-11 Defense Response Report</u>

Gallery HOA v. K. Hovnanian
The Gallery
3104-3124 N 71st Street
Scottsdale, Arizona 85251

Civil and Geotechnical Engineering Evaluation

PREPARED BY:

Peterson Geotechnical Group
4100 South Lindsay Road, Suite 122
Gilbert, AZ 85297

PREPARED FOR:

Dennis Wilenchik, Esq.
Wilenchik & Bartness
2810 N. 3rd Street
Phoenix, Arizona 85004

August 10, 2021

Project No. 2209



KHOV00001683



August 10, 2021
Project No. 2209

Dennis Wilenchik, Esq.
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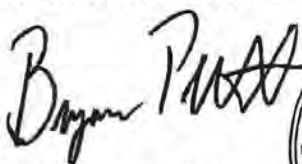
Subject: Preliminary Geotechnical and Civil Engineering Evaluation
Gallery HOA v. K. Hovnanian
The Gallery
3104 – 3124 N. 71st Street
Scottsdale, Arizona 85251

Dear Mr. Wilenchik:


In accordance with your request, Peterson Geotechnical Group, LLC (PGG) has performed a preliminary geotechnical and civil engineering evaluation related to alleged construction defects related to common area improvements at The Gallery Condominiums (Gallery) located south of the intersection of N. 71st Street and E. Earll Drive in Scottsdale, Arizona. We were engaged to evaluate and respond to alleged defects that were detailed in reports prepared by SBSA, Inc. (SBSA) dated July 2, 2019, and July 23, 2021 that they prepared on behalf of the homeowner's association (HOA). Our scope of work has included review and analysis of the alleged defects and the construction plans, a site visit to observe and document the condition of the condominiums and the common area improvements, and preparation of this letter detailing our preliminary observations, conclusions, and recommendations.

If you have any questions or comments regarding this report, please contact the undersigned.

Respectfully submitted,
Peterson Geotechnical Group, LLC


Bryan E. Peltzer, P.E.
Senior Project Engineer




Curt R. Peterson, P.E.
Principal Engineer



Distribution: (1) Addressee

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1. SITE DEVELOPMENT

The Gallery is a gated multi-unit condominium development located approximately 1/10th of a mile to the west of the intersection of N. Scottsdale Rd. and E. Earll Drive in Scottsdale, Arizona. The condominiums consist of 3-story, wood framed structures with stucco wall and foam roof exterior finishes. Two car garages occupy the majority of the lower level of the condominiums; kitchens, family rooms, and bedrooms are located on the second and third floors. Based upon our review of plans that were prepared prior to development and historic aerial photographs available for review at the Maricopa County Assessor's website and from GoogleEarth®, we understand the following:

- The condominiums were constructed between the 2016 and 2018; aerial photographs from January of 2016 depict the site prior to development and February of 2018 depict the site after development had finished. Prior to development, the site was used as an equipment storage/dirt parking lot. The site slopes approximately 3-feet from the north lot line down to the south lot line.
- Yards are located to the rear of each of the units, with masonry fences that surround and enclose the rear yards providing privacy. Surface drainage is collected in the rear yards which is conveyed via drainage swales or drain pipes towards the retention basins located along the north and south sides of the development. The roof drains discharge in the front yard and front yard drainage slopes towards the street.
- Relatively short (less than 5-feet) concrete driveways are located between the common asphalt drive between the units and the garages.
- A common area is located at the northwest corner of the site, between 3124 N. 71st Drive and E. Earll Drive. Improvements in the common area include a shallow swimming pool, paver pool deck, masonry and wooden covered ramada, and a masonry privacy fence.

2. PRE-CONSTRUCTION PLANNING

As part of the development of the Gallery, K. Hovnanian engaged engineering and architectural firms to evaluate the conditions at the site, prepare recommendations for development, design the streets and flatwork, and prepare plans for use during construction. With regards to the geotechnical and civil engineering work at the site, the following sections describe our review of the work performed by ProTex and Hoskin Ryan Consultants, Inc. (HRC).

2.1 ProTex Geotechnical Evaluation

On March 18, 2015, ProTex issued a report of their geotechnical evaluation for the Gallery property to K. Hovnanian. ProTex noted that their understanding was that the project would include one- or two-story single-family homes that imparted relatively light to moderate foundation loads. The site consisted of 1.2-acres of vacant land with scattered weeds and palm trees.

As part of their evaluation, ProTex advanced two soil borings to depths of 15-feet below the existing grade. Soil that they encountered consisted of "...clayey sands and sandy clays of medium to medium-high plasticity". Laboratory testing was performed to evaluate the engineering characteristics of the soils. The testing performed by ProTex indicated the following:

- The in-situ dry density of samples collected from depths of 1.5 to 5-feet below grade ranged between 94.5 and 94.6 pounds per cubic foot (pcf). The in-situ moisture content ranged between 7.3 and 9.9-percent.
- The soil plasticity index in the upper 5 feet was 12 and 15. The soil below 5 feet had a soil plasticity index ranging between 13 and 22.
- The expansion index in the upper 5 feet was 18 (very low expansion) while the expansion index between 6 and 8 feet was 41 (low expansion).
- Response to wetting testing performed upon two relatively undisturbed samples of the native soil collapsed approximately 0.5 and 3.0-percent when saturated at approximate footing loads.

Based upon these results, ProTex provided recommendations for the design and construction of conventional (footing, stemwall, and interior floor slab) and post-tensioned monolithic foundations. Embedment depth and allowable bearing pressures were recommended for each foundation type; parameters regarding the coefficient of subgrade reaction, edge moisture variation, and maximum differential soil movement were provided for use by a structural engineer in design of the post-tensioned foundation system.

ProTex recommended that the soils at the site be over-excavated to a depth of 1-foot beneath the existing grade or the finished pad grade, whichever was lower. After removing the soil, the underlying soils should be scarified and recompact. Recommendations for site grading were provided to address the potential for post-construction movement due to the loose native soils

that were encountered near the surface during the subsurface evaluation. Recommendations were also included for controlling the drainage at the site during and after construction of the homes. Recommendations were also provided for pavement sections for the local/residential street at the site in accordance with the City of Scottsdale's design requirements

2.2 Hoskin-Ryan Consultants Civil Improvement Plans

HRC prepared the civil engineering improvement plan set for the Gallery. HRC signed and sealed the original plans on March 31, 2016; the as-built certification was sealed on October 27, 2016. The plan set included sheets depicting the construction of the grading and drainage, paving (asphalt and concrete flatwork), sanitary and storm sewer, and associated details. Information that we gleaned from review of the plans included the following:

- A site map depicts Lots 1-8 located along the west side of N. 71st Street and Lots 9-18 located along the east side of the street. We should note that SBSA provided an aerial photograph on page 12 of their 2021 report which labels the buildings as A, B, C, and D; we have adopted their nomenclature to provide clarity in this report.
- Surface runoff in the front of the units and roof runoff was designed to be collected and directed to the concrete curb and gutter (in the front yards). Rear yard drainage flows to area drains (for Lots 1-8) or a drainage swale (for Lots 9-18) and then directed towards on-site retention basins at the corners of the site.
- Area drains (depicted in Section A on Sheet 3) from Building A appeared to collect and direct rear yard runoff to the retention area at the northwest corner of the site; area drains from Building B appeared to collect and direct rear yard runoff to the retention area at the southwest corner of the site.
- Section B on Sheet 3 depicts slope away from the rear wall of the homes at Lots 9-18 into a drainage swale that is oriented north-south along the eastern edge of the site. The drainage swale is depicted with a high point and grade break between Lots 14 and 15. In this regard, runoff from the rear yards of Building C is directed to the retention basin at the northeast corner of the site and runoff from Building D is directed to the retention basin at the southeast corner of the site.

Concrete sidewalks are depicted between the front yards of the homes in Buildings A and B and N. 71st Street, paralleling the street. Entry sidewalks are also depicted from the street to the stairs that are located at the north and south ends of each of the buildings. The units that are located at the building ends were constructed with entry doors midway between the 1st and 2nd floor elevations.

3. HOA ALLEGATIONS & EXPERT REPROTS

In their July 3, 2019, letter to K. Hovnanian at Gallery, LLC/K. Hovnanian Developments of Arizona, Inc. (K. Hovnanian), Burg, Simpson, Eldredge, Hersh, Jardine, P.C. (Burg Simpson) noted that they represented the HOA with respect to alleged construction defects at the condominium units and within the common areas. Burg Simpson retained SBSA to evaluate the allegations and included their report as an attachment to the letter.

3.1 SBSA Reports

SBSA issued two reports on behalf of the HOA to Burg Simpson. The initial report, entitled *Notice of Claim Summary*, dated July 2, 2019, and the second report was entitled *Construction Design and Compliance Report*, dated June 23, 2021. Based upon information that SBSA included in the reports, it appears that SBSA initially visited the site on December 19, 2018 and returned on May 13 and 14, 2019 to perform destructive testing; observations and conclusions related to those site visits were contained in the July 2, 2019 report. Dated photographs in their June 23, 2021, report indicate that SBSA visited the site in March of 2021. PGG was not present during the SBSA inspections.

Based upon our review of these reports, SBSA was provided with the pre-construction geotechnical report, civil engineering grading and drainage plans, and the structural foundation plans. With regards to the civil and geotechnical issues, SBSA's evaluation included a review of these design documents, the site visits noted previously, a review of various building codes, standards, and manufacturer's installation recommendations, and preparation of their reports that contained the alleged construction defects and their recommendations. The following sections detail information that SBSA included in both of their 2021 report and are included in the most recent cost estimate.

A.1. Structural – Compliance with Geotechnical Report

- SBSA reviewed the United States Department of Agriculture, Natural Resources Conservation Service's Web Soil Survey (NRCS WSS) website for information regarding the soil conditions at the site and noted that near surface soils at the site consisted of Mohall loam. SBSA noted that the website lists the soil as "...somewhat limited for shallow foundation systems, due to minor shrink swell issues (rated at 0.05), that would be moderately favorable for shallow foundation system use". (2019 SBSA report, page 2)

- SBSA also noted that with regards to roadways and streets “...the site is considered limited due to the low strength of the on-site soils (rated at 1.00) and, to a lesser degree, the shrink swell associated with the loam”. (2019 SBSA report, page 4)
- SBSA provided a review of the information contained within the March 18, 2015 ProTex report. SBSA noted that the information contained in the Natural Resources Conservation Service’s Web Soil Survey website “...varie[d] somewhat from the findings contained within the ProTex report...”. (2021 SBSA report, pages 20-23)
- Felten Group (Felten) was noted as the structural engineer of record. SBSA indicated that the general notes in the structural plans by Felten were “...generally consistent with the ProTex recommendations”. (2021 SBSA report, page 24)

B.1.Civil – Grading and Drainage

- Hoskin Ryan Consultants, Inc. (HRC) was noted as the civil engineer of record for the development of the Gallery and provided a narrative of their review of HRC’s plans and report. SBSA observed that the Drainage Design Report by HRC dated November 17, 2015 noted a waiver for the requirement to store runoff on-site was obtained for the project and that storm runoff was removed from the site via a 90-inch diameter storm drain at E. Earll Street. (2021 SBSA report, pages 30-31)

B.1.a – Drainage Bounded by Concrete Flatwork

- SBSA was critical of unpaved areas that are bound by concrete flatwork next to the foundation of the buildings/units. SBSA alleged that stormwater ponds in these areas and that the geotechnical report and structural drawings recommend against such conditions due to the “...potential for adverse effects due to the collapsible soils...”. SBSA alleges that surface runoff, roof runoff, and air conditioner condensate that is allowed to drain into these areas “...creates ongoing conditions of high moisture content in the soil adjacent to the buildings”. They further allege that “...it is reasonable to assume that this condition will impair the bearing capacity of soils below the buildings’ post tension slabs on grade, resulting in a loss of structural integrity of the slabs and the supported building elements”. SBSA cited the “...existing Mohall Loam...” and it’s “...somewhat limited rating for construction of buildings without basement due to its shrink-swell potential” as potentially problematic with respect to the long-term foundation performance. SBSA alleges that at the unpaved areas bound between flatwork and the building/unit foundations, “...large quantities of water are able to infiltrate into the bearing soils below the foundations, sidewalks, and driveways”. (2021 SBSA report, pages 31-32)
- Numerous codes and portions of industry standards are referenced to provide the foundation for SBSA’s opinions regarding the unpaved landscape areas bound by concrete flatwork and building/unit foundations. Many of the references note settlement and/or cracks of foundation/flatwork elements that can occur due to soil movement that is triggered by moisture content increases from ponding adjacent to such elements. (2021 SBSA report, pages 32-37)

- Captions for the example photographs included in the SBSA report state that the roof scuppers discharge “drain water adjacent to foundation bound by concrete flatwork into the electrical vault”. The photograph does not depict an electrical vault, but rather a water meter. (2021 SBSA report, page 38)
- SBSA recommends that repairs include a site survey between the curb and front elevation of the units, removal and replacement of sidewalks and curbs, with modifications performed to regrade unpaved areas, install drains/sidewalk chases, and adjust the “electrical and irrigation boxes”. (2021 SBSA report, page 200)

B.1.b. Non-Compliant Management of Concentrated Flows

- SBSA alleges that at “...the Gallery site, the discharge of roof drainage directly into the undrained areas creates a condition where large quantities of water area able to infiltrate into the bearing soils below the foundations, sidewalks, and driveways”. They allege that the “...condition constitutes a deficiency that directly violates the requirements of the site-specific geotechnical report and impairs the functionality of the site to direct surface flows away from the structures”. By citing portions of the ProTex geotechnical report that discusses the possibility for collapsible soils, SBSA appears to take the position that such drainage conditions will lead to or have led to post-construction soil movement. (2021 SBSA report, pages 40-41)
- SBSA opined that “drainage conveyance structures” were required at the roof scuppers to convey roof runoff into the curb/gutter system at the edges of the streets. Further, SBSA opined that such device would convey drainage into the curb/gutter system without flowing on top of the existing sidewalks. (2021 SBSA report, page 40)
- SBSA recommends that repairs include construction of concrete aprons below the roof drain terminations, with installation of sidewalk chases at locations where sidewalks exist. (2021 SBSA report, page 200)

B.2 Concrete Flatwork

- SBSA notes that the concrete flatwork at the site serves several purposes: pedestrian and vehicle egress and building access and site drainage conveyance. As such, they note that several competing sets of codes and requirements were required to be adhered to in the design and construction of the flatwork. (2021 SBSA report, page 47)

B.2.a – Non-compliant Cross-Slope of Sidewalks

- SBSA notes that details in the HRC plans for the sidewalk in front of the homes on the west side of N. 71st Street (Lots 1-8) depict maximum cross-slopes for sidewalk flatwork as 2.0-percent, while MAG standard detail depicts the same cross-slope as 1.5-percent and City of Scottsdale Standard Detail 2210 depicts the cross-slope as 1.0-percent.
- SBSA alleges that cross-slopes in excess of 2-percent exist on the sidewalk flatwork at some locations. SBSA notes “[t]here is generally no evidence of settlement of the

sidewalks or adjacent grade, an indication that the sidewalks were originally constructed with the non-compliant cross-slopes”.

- Sidewalks from the street to the upper levels of buildings located in Tracts D and E were also noted to contain 4-foot wide concrete sidewalks that SBSA opines were required to have been constructed per MAG Detail 230. SBSA alleges that the cross slopes of these sections of flatwork exceed the maximum allowable of 1.5-percent per MAG Detail 230. SBSA also contends that the Otak Architectural plans “...require that the construction comply with the 2012 IRC, ICC/ANSI 11.7.1, and 2010 ADA standards”. A cross-slope of 4.1-percent is depicted in a photograph at the northeast corner of Building A and a cross-slope of 3.0-percent is depicted in a photograph at the southeast corner of Building B. (2010 SBSA report, pages 47-52)
- SBSA recommends that repairs include removal and replacement of concrete to the nearest construction/control joint, preparation of the subgrade, and ensuring that “...all new flatwork meets slope requirements set forth in the current applicable building code as amended by the City of Scottsdale, MAG Standard Details, and ADA/ANSO standards”. Full depth, ½-inch wide expansion material to be provided where flatwork directly abuts building foundations. (2021 SBSA report, page 201)

B.2.a – Non-compliant Longitudinal Slope of Sidewalks

- SBSA noted that the maximum allowable longitudinal slope for a ramp that is part of an accessible route is 8.33-percent per ANSI A117.1. SBSA noted that the longitudinal sidewalk slopes they measured ranged between 10 and 15.5-percent and were “...attributable to poor construction”. SBSA recommends that all concrete flatwork at locations “...where these conditions occur...” (exceed 8.33-percent) be removed and replaced, with “...code-compliant construction...”.
- “Applicable code/industry standard references/project-specific documents” that are referenced by SBSA include the Paving Notes included on sheet 5 of 7 of the HRC plans, City of Scottsdale Amendments to the International Building Code, The International Residential Code, among others. The sections of these codes and references that are noted generally address accessibility requirements for disabled persons.
- SBSA recommends that repairs include removal and replacement of concrete to the nearest construction/control joint, preparation of the subgrade, and ensuring that “...all new flatwork meets slope requirements set forth in the current applicable building code as amended by the City of Scottsdale, MAG Standard Details, and ADA/ANSO standards”. SBSA notes that stairs may be required in order to achieve compliance with their recommendations. Full depth, ½-inch wide expansion material to be provided where flatwork directly abuts building foundations. (2021 SBSA report, page 201)

B.2.c – Non-Compliant Landings

- SBSA notes that the 2012 International Residential Code provides requirements for landings at the top and bottom of stairways which includes minimum dimensions and

maximum cross-slopes. SBSA alleges that the cross-slopes at the bottoms of the stairs exceed the maximum allowable of 2.0-percent.

SBSA recommends that repairs include removal and replacement of concrete to the nearest construction/control joint, preparation of the subgrade, and ensuring that "...all new flatwork meets slope requirements set forth in the current applicable building code as amended by the City of Scottsdale, MAG Standard Details, and ADA/ANSO standards". The maximum slope is also noted to be 2.0-percent. Full depth, ½-inch wide expansion material to be provided where flatwork directly abuts building foundations. (2021 SBSA report, pages 201-202)

4. PGG EVALUATION

PGG was retained on behalf of K. Hovnanian by Wilenchik & Bartness to evaluate and respond to the geotechnical and civil engineering related allegations of construction defects that are contained within the Burg Simpson letter and the SBSA report. To date, our scope of work has included review and analysis of background documents, site visits to observe and document the condition of the alleged conditions, and preparation of this letter.

4.1 PGG Site Visit

PGG personnel visited the site on October 14 through 16, 2019 to observe and document the condition of the alleged defects in the units and in the common areas. During the site visits, we were able to evaluate the condition of the interior and exterior of the homes, focusing upon the allegations contained within the July 2, 2019, report by SBSA. As we noted previously, several of the allegations contained within the June 23, 2021, SBSA report were not alleged at the time of our site visit in 2019. We have not been afforded an opportunity to re-inspect the site in light of the more recent allegations.

During our site inspections, we generally noted the following:

- The homes appeared to be performing well from a geotechnical standpoint. Little to no distress that we would consider to be an indication of post-construction foundation movement was observed in the interior or exterior finishes of the homes.
- Distress to the interior and exterior finishes that we did observe was generally cosmetic in nature and not in excess of the Workmanship Standards for Licensed Contractors as established by the Arizona Registrar of Contractors. Distress that we observed generally

included hairline wide drywall cracks in ceilings, nail pops, trim separations at door frames, and hairline to 1/32-inch wide concrete cracks.

- Area drains and fence block drains were observed in the rear yards of units in Buildings A and B (Lots 1 through 8), which was consistent with the intent of the HRC grading and drainage plans. Based upon our review of the HRC plans, surface runoff was to be directed towards area drains located at a corner of each rear yard, that were serviced by a 12-inch diameter solid HDPE pipe that would daylight at the retention basins in the northwest and southwest corners of the site.
- Fence gates provided an outlet for surface runoff in the rear yards of Buildings C& D (Lots 9 through 18), consistent with the HRC grading and drainage plans. Based upon our review of these plans, the surface runoff for units in Building C (Lots 14 through 18) would flow out beneath the fence gates from the rear yards, into the to the swale along the eastern side of the site and to the retention basin at the northeast corner of the site. Surface runoff from the units in Building D (Lots 9 through 13) would flow from the rear yards into the swale, but to the retention basin at the southeast corner of the site. A grade break and high point in the swale was noted near the lot line between lots 13 and 14.
- Small landscape areas were observed between the entry sidewalks, driveways, common sidewalk along the street, and the building foundation. The areas were landscaped with plants/shrubs and gravel ground cover. Water meter valve boxes were located within some of these areas and roof scuppers were also observed to discharge in a few of these areas. These areas were noted to have sufficient slope to away from the buildings and towards the street and the height of the sidewalk or curb along the street was relatively shallow. In general, it appeared that roof runoff (discharged from the scuppers) and surface drainage would drain towards the curb, flowing over top of the concrete sidewalk and/or curb into the gutter along the street.

4.2 PGG Response to SBSA Allegations

As we previously discussed, part of our engagement was to respond to the allegations of construction defects by SBSA. The following sections contain our responses to those allegations in the SBSA 2021 report.

SBSA Allegation:

A.1. Structural – Compliance with Geotechnical Report

PGG Response:

In their review of the geotechnical information available for the project, SBSA implies that there is some inconsistency between the information contained within the NRCS Web Soil Survey and the ProTex pre-construction geotechnical report. SBSA notes that according to the NRCS WSS, there are construction limitations due to the soils present at the site. It is our

opinion that the NRCS WSS provides generalized guidance that is intended to be utilized on rural projects in lieu of a pre-construction geotechnical report. Applicable use of the information is indicated on the NRCS WSS website:

“Soil surveys can be used for general farm, local, and wider area planning. Onsite investigation is needed in some cases, such as soil quality assessments and certain conservation and engineering applications.”

Language from the NRCS WSS indicates that the “suitability and limitations ratings” for “dwellings without basements” noted:

“Dwellings are single-family houses of three stories or less. For dwellings without basements, the foundation is assumed to consist of spread footings of reinforced concrete built on undisturbed soil at a depth of 2-feet or at the maximum frost penetration, whichever is deeper.”

As such, this information is generic information and should not be used in lieu of a site-specific geotechnical study. In fact, a site-specific study should supersede the information contained within the NRCS WSS website.

As part of their site-specific geotechnical study, ProTex provided earthwork recommendations for the site that mitigated the potentially problematic conditions that were generally indicated by the NRCS WSS and specifically uncovered by the advancement of their soil borings and laboratory testing. In our opinion, this makes any generalized problems contained in the NRCS WSS a moot point as the soil conditions at the site have been engineered to be suitable for construction of the Gallery.

SBSA observes that the NRCS WSS provides a suitability and limitation rating of very limited for development of streets and roads. However, we should point out that the soil type noted by the NRCS WSS (Mohall Loam) is quite common in the Phoenix/Scottsdale area and that local geotechnical and civil engineers have developed pavement sections and designs that accommodate the limitations of such soil conditions. As we noted previously, ProTex provided recommendations for the design and construction of the pavement section of the road at the site. Therefore, the ProTex evaluation was much more in-depth than the information contained in the NRCS WSS and provided site-specific recommendations to address the soil conditions, it is our opinion that there are no inconsistencies between the information contained within the

NRCS WSS and the ProTex reports. Furthermore, during construction, ProTex was retained by K. Hovnanian to perform compaction testing to ensure the building pads were built in accordance with their recommendations. In a letter dated September 1, 2016, ProTex states “In accordance to your request ProTex has completed the moisture and density testing following processing of the building pads. The density test results are in accordance to the specifications included in the Geotechnical Investigation conducted by ProTex the PT Experts, LLC (Job No. 4222), dated March 18, 2015)”.

SBSA Allegation:

B.1.a – Drainage Bounded by Concrete Flatwork

PGG Response:

In general, SBSA alleges that landscaped areas bound by concrete flatwork (common sidewalk, entry sidewalk, driveway, and building foundations) in front of some of the units trap surface runoff, which could potentially lead to a moisture content increase in the soils beneath the flatwork and building foundations and cause post-construction movement and damage.

In our opinion, SBSA fails to recognize that earthwork recommendations by ProTex were provided to mitigate the potential for post-construction movement to occur. SBSA’s concern is based upon what ProTex found during their evaluation of the in-situ condition of the soils at the site; earthwork recommendations were provided to mitigate those findings. Further, it is our understanding that SBSA has not advanced any soil borings, collected any soil samples, or performed any laboratory testing. Nowhere in their report do they identify any distress to the interior or exterior finishes of the homes or the concrete flatwork at the site as having been the result of post-construction soil movement. As such, SBSA has not alleged that there is any resultant damage, and they are not able to demonstrate that there is the potential for post-construction movement should the soils beneath the flatwork or building foundations experience an increase in their moisture content or become saturated.

Furthermore, based on our observations, it appears most of the water in these areas will flow towards the curb/sidewalk and into the street. In addition, we found no indication of soil movement in the flatwork or residences indicating that this condition had resulted in problems.

We also reviewed special inspection reports by ProTex performed during construction at the site. Reports dated November 21, 2016, March 24, 2017, June 15, 2017, and October 18, 2017, indicate that drainage inspections were performed by ProTex near the completion of the project and the drainage was found to be in compliance with the plans and specifications.

SBSA Allegation:

B.1.b. Non-Compliant Management of Concentrated Flows

PGG Response:

In general, SBSA alleges that discharge of roof runoff into the landscape areas bound by concrete flatwork is non-compliant with the pre-construction geotechnical report by ProTex. SBSA opined that discharge of roof scuppers into these areas "...creates a condition where large quantities of water are able to infiltrate into the bearing soils below the foundations, sidewalks, and driveways". SBSA notes that "[d]rainage conveyance structures are required..." as part of the repairs to prevent water from crossing over sidewalks and pedestrian access routes in order to flow into the gutters along the street.

As we noted previously, SBSA has failed to produce photographs of resultant damage to the homes or concrete flatwork at these locations. No laboratory testing or logs of any exploratory soil borings have been included in their reports or produced either that justify their assumptions. The reference to "large quantities of water" infiltrating into the ground has not been demonstrated to be possible through any experimentation such as performance of percolation testing.

In addition, the notion that portions of sidewalk are required to be removed and replaced with sidewalk chases to convey surface runoff beneath the sidewalk rather than allowing surface runoff to flow over the sidewalk is contrary to nearly all developments in the Phoenix/Scottsdale area. Drainage swales that convey roof runoff from rear, side, and front yards commonly abut or terminate at the concrete sidewalk flatwork that parallels roadways in residential subdivisions; such practice is common and accepted. Furthermore, as stated above, ProTex visited the site near completion of the project and approved the as-built drainage conditions at the site.

SBSA Allegation:

B.2.a – Non-compliant Cross-Slope of Sidewalks

B.2.a – Non-compliant Longitudinal Slope of Sidewalks

B.2.c – Non-Compliant Landings

PGG Response:

Due to the similarity of the allegations, these responses have been combined. In general, SBSA alleged that the cross-slopes and longitudinal slopes as well as the dimensions of (or lack thereof) landings in the concrete flatwork violated various accessibility codes. SBSA notes discrepancies between slopes depicted in the HRC plans, MAG standards, and City of Scottsdale standards.

However, what SBSA omits is that the Gallery is a gated community with private streets and sidewalks. As such, MAG standards and City of Scottsdale standards are not applicable as there is no public right-of-way. ADA standards also do not apply to the private sidewalks at the Gallery.

During our evaluation, we noted that the distance between the asphalt street and the front of the homes in Buildings A and B on the west side of the street was relatively short. Due to the elevation change across this distance (which provides flood protection for the interior of the homes) a relatively steep slope is present; the entry sidewalks between the entry door and the street sidewalk follow this slope.

During our evaluation we also noted that many of the homes have entry doors on the second floor that are accessed by a set of stairs; in addition, the homes are three-story dwellings with interior stairs and no elevators. It appears that SBSA is attempting to apply ADA standards which do not apply to this gated development.

While the repair recommendations by SBSA may make the short stretch of concrete flatwork accessible, what is left unmentioned in their report is that it would provide an accessible route to a set of stairs. In other cases, SBSA has acknowledged that due to the elevation change across the portion of flatwork that they are recommending removing and replacing, that the replacement panel would include steps. Both of these instances illustrate the conflict between the SBSA recommendations.

4.3 PGG Recommendations

Based on our observations at the site and our experience with numerous residential projects, it is our opinion that SBSA has not demonstrated that defective civil/geotechnical conditions exist that have resulted in problems at the site. As such, we offer no repair recommendations at this time.

5. LIMITATIONS

The geotechnical and civil engineering services described in this report have been conducted in general accordance with the standard of care exercised by geotechnical and civil engineering consultants. No warranty, expressed or implied, is made regarding the conclusions, and recommendations presented in this report. Our conclusions and recommendations are based on an analysis of the observed site conditions, the references listed, and our experience with similar projects. If additional information becomes available, PGG reserves the right to update our opinions as appropriate.

6. DOCUMENTS REVIEWED

Burg Simpson Eldredge Hersh Jardine, PC., *Notice of Claim, The Gallery*, dated July 3, 2019

Hoskin Ryan Consultants, Inc., *Improvement Plan, Gallery*, dated

ProTex, *Geotechnical Evaluation, 71st and Earll*, dated March 18, 2015

ProTex, *Finish Grade and Roof Inspection, Building A Units 1-3*, dated November 21, 2016

ProTex, *Finish Grade and Roof Inspection, Building B Units 4-8*, dated October 18, 2017

ProTex, *Finish Grade and Roof Inspection, Building C Units 14-18*, dated March 24, 2017

ProTex, *Finish Grade and Roof Inspection, Building D Units 9-13*, dated June 15, 2017

ProTex, *Building Pad-Post-Tension Foundation*, dated September 1, 2016

SBSA, Inc., *Notice of Claim Summary – Gallery*, dated July 2, 2019

SBSA, Inc., *Construction and Design Compliance Report*, dated June 23, 2021

Gallery Condominium Association

v.

K. Hovnanian at Gallery, LLC

BHA # 19-7096

Defense Response Report

August 11, 2021



Prepared By:

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KHOV00001701

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Project Summary and Task Analysis

I. Scope of Analysis:

Bert L. Howe & Associates, Inc. (BHA) has been retained by K. Hovnanian at Gallery, LLC ("KHov" or "Builder") to respond to allegations of construction defect brought by the Condo Owners Association ("Claimant") of an 18 three-story-unit (four building) residential development constructed by KHov known as The Gallery located in Scottsdale, Arizona ("Project"). BHA understands this project was built between 2016 and 2017.

The Claimant retained SBSA, LLC ("SBSA") as their general construction expert and Nautilus General Contractors, Inc. as their cost to repair expert. BHA is not aware of any other experts retained by Claimant. Each designated plaintiff expert recorded their evaluation and/or repair recommendations in the following reports/statements (Claimant Expert's Reports):

- SBSA "Construction and Design Compliance Report", dated June 23, 2021
- Nautilus "Preliminary Estimate of Costs", dated July 23, 2021

The following report summarizes BHA's responses to the defect allegations and opinions of construction defects as set forth in the Claimant's reports. KHov also retained Peterson Geotechnical Group ("PGG") to offer opinions regarding SBSA's allegations of defective site improvements and opinions associated with soils related issues. PGG prepared a separate report expressing its observations, responses, and opinions.

BHA representatives investigated Claimant claims by evaluating the Claimant expert's reports, analyzing the plans and specifications, reviewing code requirements, conducting visual inspections of the project, and conferring with KHov representatives having knowledge of the project. BHA reserves the right to respond to Claimant expert's rebuttal reports, deposition testimony, and additional information when available. It is BHA's understanding Claimants have an ongoing investigation of roof issues. BHA reserves the right to evaluate any new claims Claimants may put forth and offer or revise its opinions accordingly as new information is disclosed.

II. Documents Reviewed:

BHA has reviewed and utilized the following documents in the preparation of this report.

- Preliminary Estimate of Costs prepared by Nautilus General Contractors, Inc., July 23, 2021
- Construction and Design Compliance Report prepared by SBSA, dated June 23, 2021
- Architectural Drawings by Otak, Inc, dated March 11, 2016 and revised June 8, 2016 and August 2, 2016
- SBSA's inspection and destructive testing photographs and field notes
- Job files of SBSA
- Arizona Registrar of Contractors ("AROC") Workmanship Standards, June 2009
- 2012 International Residential Code
- 2012 International Building Code
- MI Windows and Door Installation Recommendations

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III. Defense Inspection Dates

Defense inspections at the site took place on the following dates:

- October 14, 2019 – Non-Invasive Visual Inspection of unit interiors, building exteriors, and roofs
- October 15, 2019 – Non-Invasive Visual Inspection of unit interiors, building exteriors, and roofs
- October 16, 2019 – Non-Invasive Visual Inspection of unit interiors, building exteriors, and common areas
- March 9, 2021 – Claimant Destructive Testing of building exteriors
- March 10, 2021 – Claimant Destructive Testing of building exteriors
- March 11, 2021 – Claimant Destructive Testing of building exteriors
- July 27, 2021 – Observation of Claimant temporary roof repair

IV. Construction Defect Allegations Analysis

As a basis for analysis, BHA maintains that construction defect claims must be founded on an evaluation of the original constructed components. Any alterations of the original as-built conditions modify the project compromising both the analysis and the significance of alleged defects. Alterations could take the form of intentional modifications, damage by Claimant, failure to maintain, improper maintenance, etc.

In construction, there is seldom a single method to build something. Like other manufacturing industries, construction has guidelines and tolerances to govern the process. Construction documents, building codes, and manufacturer installation recommendations provide those guidelines, however, deviations from those guidelines, in and of themselves, do not constitute a defect. Local industry standards, established by the applicable building code as adopted, interpreted, and enforced by local Building Officials establishes the accepted standards for local construction. When a building component is originally constructed in accordance with local industry standards or approved by the building inspector it cannot be considered defective and repairs are not necessarily warranted. If a building component is performing its intended purpose, it cannot be considered defective, and repairs are not reflexively warranted.

BHA employs a two-part test to determine if a construction defect exists:

- 1) The material deficiency must impair the structural and/or function of the dwelling (or there is a reasonable likelihood impairment will occur if not repaired)
- and
- 2) The impairment is caused by either substandard materials or substandard workmanship.

The Arizona Registrar of Contractors ("AROC") establishes the workmanship standards for construction in Arizona in its publication titled "The Workmanship Standards for Licensed Contractors". BHA considers both the industry standards and AROC standards when evaluating an alleged construction defect.

The AROC recognizes that a contractor should not be responsible for repairing building components indefinitely. The AROC establishes a reasonable period for which a contractor is responsible for repairs. The AROC provides a two-year jurisdiction period where an owner can report the issues regarding failed building components to the builder for remedy. There were no AROC complaints filed by the COA or the condo owners, which is indicative of no systemic problem with construction. It's important to note that repair remedies only apply to construction items installed as part of original construction. Any component that has been modified through owner or COA improvement, neglect or abuse is no longer the responsibility of the contractor to repair as outline by the AROC:

"The contractor should stand behind the product, but the buyer should be responsible for owner-maintenance items. Contractor responsibility under these standards should not extend to items which have been subject to owner neglect, modification or abnormal use."

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The AROC further establishes the start date for the period for which the contractor is responsible:

“The effective date for the start of coverage of these standards should begin with the close of escrow, when the buyer occupies the structure, or the date of discovery, whichever occurs first or as otherwise noted.”

Regardless of its two-year jurisdiction, the AROC Workmanship Standards are the industry standards for construction in Arizona.

V. Defense Response to Claimant Allegations

SBSA's report alleges defective conditions exist in the building stucco, window installations, decks, and roofs. For many of SBSA's claims, SBSA cites deviations from the construction plans as the reason the condition is defective. The Gallery is a private development. Like any private development, the developer has the right to make design alterations and to make decisions that affect construction costs, schedules, and performance requirements. Also, like any private development, a developer works and coordinates with construction crews and the design team during construction to address site conditions, as-built conditions, and real estate market factors. On any project, it is typical for a value engineering process to take place. It is also typical for additive and deductive change orders to occur as a project is being constructed. A deviation from construction plans, in and of itself, is not a defect. To properly determine a defect exists, the performance of a building component must be considered. SBSA provides little physical evidence any of the alleged conditions have failed to perform their intended purpose.

BHA does acknowledge some of the building components on some of the buildings are not performing and appropriate repairs should be made. BHA does BHA includes its repair recommendations in its evaluation of SBSA's allegations below.

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The list of allegations below are drawn from SBSA "Construction and Design Compliance Report", dated June 23, 2021.

I. STRUCTURAL

1.0 Compliance with Geotechnical Report (Informational Only)

Plaintiff Description:

The original geotechnical report presents recommendations for over excavation, soil stabilization, and drainage on the site. Review the original geotechnical report for applicable design and construction recommendations for informational purposes.

Plaintiff Location:

N/A

Plaintiff Quantity:

N/A

Plaintiff Repair Scope:

N/A

Plaintiff Cost:

N/A

Defense Analysis and Repair Recommendations:

This allegation is being addressed by PGG. See PGG report.

2.0 Lateral Force Resisting System (LFRS)

2.0A Non-Compliant LFRS

Plaintiff Description:

Intrusive examination revealed the framing at Unit 3111 of Building D of the Gallery site was constructed without the proper LFRS that was clearly detailed on structural braced/ shear wall plans.

Plaintiff Location:

Unit 3111

Plaintiff Quantity:

Qty. 100%

Plaintiff Repair Scope:

- All LFRS repairs shall be performed per the braced/ shear wall and holddown schedule provided on Sheets S3.1 through S3.6 of the Felten structural plans as designed by the Structural EOR. Sections C.1 and C.2 of engineer's report. (Included in Building Envelope 1.0B) 2. Repair contractor to include 10-percent of the stucco repair costs for use as a contingency for the repairs for the noncompliant LFRS. (Included below 2.a.). a. Provide allowance for all structural repairs as described above. Includes removal and reinstallation of windows and door as required to accommodate variations in wall thickness after repairs are performed. (1 al) (Allowance pending further investigation)
- For Unit 3111 of Building D, perform the following repairs to the LFRS.
 - Remove existing stucco to coordinate with repairs recommended in Sections C.1 and C.2 of SBSA's report.
 - Repair contractor to verify and confirm the extent of repairs to the LFRS.

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- Where exterior sheathing is identified as missing, install new 3/8-inch minimum-rated sheathing using specified nails spaced to provide minimum shear resistance of 306-plf per the braced/ shear wall schedule.
- Where existing strap is identified as installed incorrectly, remove and replace with new strap per the holddown schedule. Install according to the manufacturer's installation requirements.
- Reinstall cladding per the repairs recommended in Sections C.1 and C.2 of SBSA's report.
- Repair contractor to include 10-percent of the stucco repair costs for use as a contingency for the repairs for the non-compliant LFRS. The as-built construction of the LFRS will be compared with LFRS design on the Felten structural plans as designed by the Structural EOR after the stucco system is removed.

Plaintiff Cost:

\$200,000.00

Defense Analysis and Repair Recommendations:

SBSA asserts the shear panel was missing and a framing strap was not properly fastened at unit 3111 which likely "reduces the structural integrity of the building". SBSA bases this allegation on its observations during its destructive testing of the building envelope at one unit, unit 3111. With this observation at one unit, SBSA extrapolates that all the units at every building have the same condition and require repair. BHA disagrees with SBSA's extrapolation practice.

BHA was present for SBSA's destructive testing at a pot shelf beneath the XOX window unit at unit 3111. The pot shelf overlaps the juncture between the first and second floors. Inspecting inside the pot shelf, BHA documented one framing strap between the first and second floors was buckled slightly. BHA also observed the fasteners were covered by the horizontal framing of the pot shelf. It is unknown to BHA how SBSA determined "fasteners in the CS16 strap connecting the exterior sheathing below the triple panel window were missing" as the fasteners were not exposed. BHA did observe other straps at unit 3111 exposed by SBSA that were completely fastened and secure. In addition, framing inspections were conducted by the local building officials, as well as third-party engineers, and the framing was found to be compliant at every building.

SBSA also removed stucco from on top of the pot shelf and approximately 18" up the wall adjacent to the window unit. BHA documented open framing behind the stucco. BHA also observed a strip of exterior sheathing was installed inside the pot shelf between the first and second floors, as well as at the top of the second-floor wall across the juncture with the third-floor wall.

SBSA claims a defect exists without providing any evidence the omission of some strap fasteners and a single shear panel has compromised the structural integrity of the building. BHA is unaware of any calculations or other analyses SBSA made to support this claim. SBSA simply did not observe what they expected to find and deemed the deficiency a defect. BHA disagrees with SBSA's assumption that a building's structural integrity is automatically compromised by the omission of some fasteners and a portion of a shear panel. Further, unit 3111 is the center unit of a five-plex. For SBSA to not consider the structural integrity of the entire building as a whole and to opine "the non-compliant condition more likely than not reduces the structural integrity of the LFRS, as intended by the Structural Engineer of Record (EOR)" is unreasonable. SBSA does not provide any evidence the structure is not performing. In fact, SBSA removed stucco from several locations and found framing straps in place and properly fastened. BHA disagrees that a technical deficiency, in and of itself, is a defect. No structural repairs are needed.

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II. CIVIL

1.0 Grading and Drainage

1.0 A Drainage Bounded by Concrete Flatwork

Plaintiff Description:

There are unpaved areas next to the buildings at the front elevations where the grading is such that the ground surface is below the concrete flatwork (sidewalks and driveways). This condition creates bounded conditions because the concrete prevents positive drainage away from the foundations.

Plaintiff Location:

Perform repairs at all locations noted in the Civil Repair Drawings.

Plaintiff Quantity:

N/A

Plaintiff Repair Scope:

- Perform repairs at all locations noted in the Civil Repair Drawings.
- Coordinate sidewalks, curbs, and roadway to allow for proper site geometric integration in all new construction. A full topographical survey from the curb line to the face of the building will be required due to the limited site elevation difference to enable design to correct the deficient construction.
- Construct concrete aprons below roof drain terminations. Where sidewalks exist, remove sidewalk to nearest joint and provide sidewalk chase. Where no sidewalks are constructed, construct curb cut to allow flow out of bounded area and regrade unpaved area to drain.
- Place rocks (4- to 6-inch diameter) in concrete aprons.
- Adjust existing electrical and irrigation boxes as required.

Plaintiff Cost:

\$25,532.88

Defense Analysis and Repair Recommendations:

This allegation is being addressed by PGG. See PGG report.

1.0B Non-Compliant Management of Concentrated Flows

Plaintiff Description:

The discharge of roof drainage directly into the undrained areas creates a condition where large quantities of water are able to infiltrate into the bearing soils below the foundations, sidewalks, and driveways.

Plaintiff Location:

Perform repairs at all locations noted in the Civil Repair Drawings.

Plaintiff Quantity:

N/A

Plaintiff Repair Scope:

- Perform repairs at all locations noted in the Civil Repair Drawings.
- Construct concrete aprons below roof drain terminations. Where sidewalks exist, remove sidewalk to nearest joint and provide sidewalk chase. Where no sidewalks are constructed, construct curb cut to allow flow out of bounded area.
- Place rocks (4- to 6-inch diameter) in concrete aprons.
- Adjust existing electrical and irrigation boxes as required.



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Plaintiff Cost:

N/A

Defense Analysis and Repair Recommendations:

This allegation is being addressed by PGG. See PGG report.

2.0 Concrete Flatwork

2.0A Non-Compliant Cross-Slope of Sidewalks

Plaintiff Description:

At some locations on the site, the cross-slopes of the sidewalks exceed 2-percent.

Plaintiff Location:

Perform repairs at all locations noted in the Civil Repair Drawings.

Plaintiff Quantity:

5 locations

Plaintiff Repair Scope:

- Remove and replace concrete as noted in Civil Repair Drawings. Coordinate between asphalt roadway, curb profile, and sidewalks to achieve geometric integration.
- Concrete removal shall be to the nearest construction/ control joint.
- Ensure that subgrade is prepared in compliance with the recommendations of a geotechnical engineer prior to the placement of concrete.
- Ensure grading and drainage direct runoff away from flatwork subbase.
- Ensure all new flatwork meets slope requirements set forth in the current applicable building code as amended by the City of Scottsdale, MAG Standard Details, and ADA/ ANSI standards.
- At all locations where new concrete flatwork is to be constructed directly adjacent to vertical building elements, provide full-depth, 1/2-inch expansion joints in compliance with applicable codes and/ or industry standards.

Plaintiff Cost:

\$ 32,703.46

Defense Analysis and Repair Recommendations:

This allegation is being addressed by PGG. See PGG report.

2.0B Non-Compliant Longitudinal Slope of Sidewalks

Plaintiff Description:

The longitudinal slopes of the sidewalks at some locations exceed the maximum allowable. Per ANSI A117.1 guidelines, the maximum allowable slope for a ramp that is part of an accessible route is 8.33-percent, and the slopes measured are excessive. The sidewalks as constructed exceed the allowable maximum slopes for ramps and are non-compliant both as ramps and as sidewalks.

Plaintiff Location:

Perform repairs at all locations noted in the Civil Repair Drawings.

Plaintiff Quantity:

N/A



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Plaintiff Repair Scope:

- Remove and replace concrete as noted in Civil Repair Drawings.
- Concrete removal shall be to the nearest construction/ control joint.
- Ensure that subgrade is prepared in compliance with the recommendations of a geotechnical engineer prior to the placement of concrete.
- Ensure grading and drainage direct runoff away from flatwork subbase.
- Ensure all new flatwork meets slope requirements set forth in the current applicable building code as amended by the City of Scottsdale, MAG Standard Details, and ADA/ ANSI standards.
- Verify final geometry using topographic survey. If required, construct code compliant stairs at entrances to buildings or at bottoms of existing stairways.
- At all locations where new concrete flatwork is to be constructed directly adjacent to vertical building elements, provide full-depth, 1/2-inch expansion joints in compliance with applicable codes and/ or industry standards.

Plaintiff Cost:

N/A

Defense Analysis and Repair Recommendations:

This allegation is being addressed by PGG. See PGG report.

2.0C Non-Compliant Landings

Plaintiff Description:

The landings at the bottoms of the stairs were constructed with slopes exceeding the 2.0-percent maximum as shown on the Civil Observation Drawings. These landings do not provide the prescriptive surface required at stairs and ramps to allow for safe usage of the sidewalk.

Plaintiff Location:

Perform repairs at all locations noted in the Civil Repair Drawings.

Plaintiff Quantity:

N/A

Plaintiff Repair Scope:

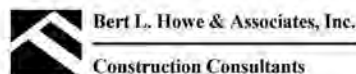
- Remove and replace concrete as noted in Civil Repair Drawings.
- Concrete removal shall be to the nearest construction/ control joint.
- Ensure that subgrade is prepared in compliance with the recommendations of a geotechnical engineer prior to the placement of concrete.
- Ensure grading and drainage direct runoff away from flatwork subbase.
- Ensure all new flatwork meets slope requirements set forth in the current applicable building code as amended by the City of Scottsdale, MAG Standard Details, and ADA/ ANSI standards. Maximum slope of landings to be 2-percent.
- Verify final geometry using topographic survey. If required, construct code-compliant stairs at entrances to buildings or at bottoms of existing stairways.
- At all locations where new concrete flatwork is to be constructed directly adjacent to vertical building elements, provide full-depth, 1/2-inch expansion joints in compliance with applicable codes and/ or industry standards.

Plaintiff Cost:

N/A

Defense Analysis and Repair Recommendations:

This allegation is being addressed by PGG. See PGG report.



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III. BUILDING ENVELOPE

1.0 Facade (Exterior Cladding and Sealants) Type 1 – Stucco

1.0A Missing Weep Mechanism in Stucco

Plaintiff Description:

The weep casing beads were missing at fenestration heads, stucco roof pop-outs, and soffit terminations, which violates the architectural drawings, the stucco manufacturer requirements, and the building code requirements.

Plaintiff Location:

Buildings A-D

Plaintiff Quantity:

Qty. 100%

Plaintiff Repair Scope:

- Coordinate with replacement of the WRB and the stucco system as described in Sections C.1.b and C.1.c of SBSA's report.
- Install new weep mechanisms at the following horizontal terminations.
- At window heads, slider door heads, swing door heads, and garage door heads, terminate the weep casing bead 1/4-inch above sheet metal head flashing.
- At soffits, install weeps per the architectural Detail 4/ AS.03 and manufacturer's requirements.
- Shingle-lap WRB with new weep mechanisms.
- Coordinate repair with related stucco and underlying moisture-management repair recommendations as well as all adjacent civil repair recommendations.

Plaintiff Cost:

\$33,862.76

Defense Analysis and Repair Recommendations:

SBSA asserts stucco weep mechanisms were omitted at fenestration heads, stucco pop-outs, and at stuccoed soffits. An analysis of SBSA's exemplar photos show SBSA is grouping two different conditions together, missing weep mechanisms at window heads and missing weep mechanisms at wall-to-soffit transitions. SBSA cites construction plan details to support its claim.

BHA was present for SBSA's destructive testing and observed several locations where SBSA removed stucco at window heads. The windows at this project were manufactured by MI Windows and Doors ("MI"). All the window heads exposed by SBSA were flashed according to MI installation guidelines. BHA examined the flashing and WRB tested by SBSA and did not observe any evidence of non-performance. SBSA has not provided any evidence to support this claim other than asserting the construction drawings specified it. BHA maintains that a deviation from the drawings is not, in and of itself, a defect. The project architect clearly states in the "Method of Construction" section of the General Structural Notes:

"The contractor shall be solely responsible for construction means, methods, technique, sequences, and procedure."

The intent of the architect's design is to integrate the stucco system around the window to not allow water to collect on the window head and damage the WRB. SBSA's invasive testing of the window showed the as-constructed condition is meeting the architect's intent and has performed and can be expected to continue to perform. No repairs are needed at the window heads.

As part of SBSA's destructive testing protocol, stucco was removed at several wall-to-soffit transitions. BHA observed some locations with clear evidence the lack of a weep mechanism at the soffit has allowed moisture to accumulate behind the stucco system and deteriorate the WRB. While not every wall-to-soffit

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transition exhibited signs of water damage, the condition is problematic and should be repaired. At large wall-to-soffit locations, remove a 12-inch strip of stucco from the wall and soffit and install weeps integrated with WRB before restoring the stucco system. The repairs should be painted to match the adjacent finishes.

1.0B Non-Compliant WRB for Stucco System

Plaintiff Description:

The applied WRB does not meet the nominal weight, the number of required layers, the water resistance requirements of the applicable building code, and the ESR-3529 report for the Amerimix stucco system specified on the architectural drawings.

Plaintiff Location:

Buildings A-D

Plaintiff Quantity:

Qty. 100%

Plaintiff Repair Scope:

- Full removal and replacement of the stucco and the exterior insulation is required to address the non-compliant installation of the WRB for the existing stucco system. Remove existing WRB to perform following repairs.
- Install missing exterior sheathing and straps, as necessary, per the LFRS repairs recommended in Section A.2 of SBSA's report.
- Install sheet metal flashings per Section C.2.a of SBSA's report.
- Ensure that the WRB above is shingle-lapped with the sheet metal flashing.
- Install new WRB per the requirements of ESR-3529 for the existing stucco system.
 - Repair contractor to estimate using between two layers of Grade D kraft building paper or one layer of Grade D kraft paper with minimum water-resistance rating of 60-minutes or using Tyvek products such as Stucco Wrap or Drain Wrap as specified in Section 3.2.4 and Section 3.2.10 of ESR-3529.
- Ensure all WRB terminations shingle-lap with all surrounding rigid and flexible flashings, weeps, and accessories.
- Install EPS foam boards per repairs recommended in Section C.1.c of SBSA's report.
- Install new stucco system to comply with the current requirements of ESR-2359.
- Install lath per the stucco manufacturer and ASTM C1063.
- Install control joints at fenestration comers, floor lines, top plate/truss lines, and within the field of the wall to comply with ASTM C1063 and the stucco manufacturer.
- Install weep casing beads with 3-1/2-inch vertical legs at all stucco terminations Ensure that the WRB shingle-laps with the new weep casing beads.
- Coordinate with adjacent repairs, including underlying moisture-management and stucco repair recommendations.

Plaintiff Cost:

\$ 1,255,881.62

Defense Analysis and Repair Recommendations:

As part of SBSA's destructive testing protocol, the stucco system was removed at several locations and the water restive barrier ("WRB") was observed. SBSA observed some locations where one layer of WRB covered the solid OSB shear panel. SBSA asserts two-layers of WRB are required over OSB sheathing or if one layer is used, it must meet the water resistance requirements of the applicable building code and ESR-3529 report. BHA observed SBSA's destructive testing of the stucco and documented the appropriate WRB was installed over open framing which makes up most of the wall construction. At serval locations multiple layers of WRB was installed. BHA also noted, at some locations, a single layer of WRB



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covered strips of OSB sheathing installed at floor-to-floor transitions. BHA observed, at those locations, the OSB did not run the full height of the wall. BHA examined the WRB and OSB at every location exposed and noted none of the OSB and WRB had any stains or other evidence of water damage. SBSA is alleging a technical deficiency at a few locations is a defect that requires the removal and replacement of the entire stucco system at every building. SBSA has not provided any evidence to support its claim that the:

“deficiency in material properties and number of WRB layers impairs the functionality of the stucco system as required in the building codes and the stucco manufacturer's product specifications”.

Except for the wall-to-soffit areas discussed above, the WRB installed at this project is performing. No defect exists and no repairs needed.

BHA strongly disagrees with SBSA's repair protocol. SBSA's repair to remove all the stucco, lath, EPS foam, and WRB at every building and then install new WRB and new stucco system is excessive and unnecessary. However, if the trier of fact determines a widespread repair is needed, all windows and stucco penetrations can be sealed, and the entire existing stucco exterior can be painted with a quality elastomeric paint. This much more reasonable and appropriate repair will create a weatherproof barrier on the exterior of the stucco and address all of SBSA's stucco and fenestration allegations. BHA estimates it will cost less than \$100,000 total to perform this repair at all the buildings.

1.0C Non-Compliant EPS Foam Board for Stucco System

Plaintiff Description:

Intrusive examination revealed that the foam board used at the Gallery site was generally 3/8- to 7/8-inch thick, did not have the required vertical grooves, and was installed tight to the improperly selected WRB.

Plaintiff Location:

Buildings A-D

Plaintiff Quantity:

Qty. 100%

Plaintiff Repair Scope:

- Full removal and replacement of the stucco is required to address the non-compliant installation of the EPS foam board for the existing stucco system.
- Where installed over solid substrates, remove existing EPS foam board to perform the following repairs. Also refer to other stucco repairs in this report.
- Ensure all EPS foam boards have 3/8-inch projecting tongues with compatible grooves at horizontal joints.
- At solid substrates, install new minimum 1/2-inch-thick EPS foam board with vertical grooves spaced at a maximum 12-inches on-center on the back face of the boards. The vertical grooves should be a minimum 1/4-inch wide by 1/8-inch deep as required by ESR-3529.
- As an alternative to EPS foam boards with vertical grooves, flat-faced EPS foam boards may be installed over the solid substrates provided the WRB recommended in Section 3.2.4 of ESR-3529 is used.
- Coordinate with adjacent repairs, including underlying moisture-management and stucco repair recommendations.
- Where EPS foam board repairs are necessary at open stud framing, use minimum 1-inch-thick EPS boards installed in compliance with ESR-3529.)

Plaintiff Cost:

Included in costs for 1.0B

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Defense Analysis and Repair Recommendations:

SBSA asserts the stucco manufacturer, Amerimix, required EPS foam with vertical grooves be used where the stucco was applied over solid OSB sheathing. SBSA further alleges:

"This non-compliant condition, along with the combination of other construction defects of the stucco system, will more likely than not reduce the integrity of the structural components and the general appearance of the cladding in the foreseeable future."

BHA documented the condition of the EPS foam and WRB at every location SBSA tested and did not observe any damage that would suggest the lack of grooves in EPS foam over short sections of OSB was not performing as well as the EPS foam on the rest of the wall. A technical deficiency, in and of itself, is not a defect. The EPS installed at this project is performing as intended. No defect exists. No repairs needed.

1.0D Non-Compliant Slope of Horizontal Stucco Surfaces

Plaintiff Description:

Stucco roof parapet caps, roof pop-out boxes, and pop-out boxes at front and rear elevations with inadequate slope are present at locations across all buildings.

Plaintiff Location:

Buildings A-D

Plaintiff Quantity:

Qty. 100%

Plaintiff Repair Scope:

- Repair to be performed at all stucco parapet walls and pop-out boxes sloped less than 2:1.
- Remove existing stucco, lath, and building paper as required to perform the repair as described below.
- Install continuous shims to provide a 2:1 minimum slope on stucco wall caps.
- Install new self-sealing SAM that reduces the potential for water intrusion due to fastener holes. Install new SAM over the top of the continuous shim, ensuring SAM shingle-laps over the adjacent WRB on all sides and forms a continuous saddle at the intersections with the adjacent wall.
- Reinstall stucco as described in Repair Section C.1.c.
- Repair to be performed at all stucco parapet walls and pop-out boxes sloped less than 2:1.
- Remove existing stucco, lath, and building paper as required to perform the repair as described below.
- Install continuous shims to provide a 2:1 minimum slope on stucco wall caps.
- Install new self-sealing SAM that reduces the potential for water intrusion due to fastener holes. Install new SAM over the top of the continuous shim, ensuring SAM shingle-laps over the adjacent WRB on all sides and forms a continuous saddle at the intersections with the adjacent wall.
- Reinstall stucco as described in Repair Section C.1.c.

Plaintiff Cost:

\$ 26,200.00

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Defense Analysis and Repair Recommendations:

SBSA asserts the stucco parapet caps and pop-out boxes, commonly referred to in Arizona as "pot shelves", are not properly sloped. SBSA further opines:

"Where stucco slope does not meet industry standards, and combined with the cracks in the stucco, water is allowed to penetrate under the stucco system."

BHA inspected every location where SBSA performed destructive testing at pot shelves and parapet caps and documented the condition of the framing exposed during the testing. None of the framing was stained or showed any evidence of water damage resulting from inadequate slope.

BHA also inspected all the roof parapet caps and observed all had positive slope. BHA did not observe any signs of standing water on top of any of the parapet caps. BHA argues the intent of the designer was prevent water from standing on the parapet caps. It doesn't matter if the slope at one spot of the parapet cap is 1 percent and another spot 6 feet away is 5 percent. What matters is the as-constructed condition is performing as intended. A technical deficiency, in and of itself is not a defect. SBSA has not provided any evidence of non-performance. No defect exists. No repairs are needed.

1.0E Deficient Self-Adhered Membrane under Horizontal Stucco System

Plaintiff Description:

The Xtraflash SAM installed by the contractor failed to self-seal around fastener holes, which allowed water intrusion resulting in damage to the moisture-sensitive building components.

Plaintiff Location:

N/A

Plaintiff Quantity:

N/A

Plaintiff Repair Scope:

- Refer to Repair Section C.1.d of SBSA's report.

Plaintiff Cost:

Included in costs for 1.0B.

Defense Analysis and Repair Recommendations:

SBSA asserts the Self Adhesive Membrane ("SAM") installed on the horizontal surfaces of the parapet caps and pot shelves has failed. SBSA further opines:

"The Xtraflash SAM installed by the contractor failed to self-seal around fastener holes, which allowed water intrusion resulting in damage to the moisture-sensitive building components. As constructed, the stucco surface cracks and the puncture holes in the deficient SAM have and will allow moisture intrusion and do not comply with the weather-resistance requirements of the applicable building code."

BHA inspected every location where SBSA exposed SAM during its destructive testing. SBSA did not perform any water testing at any of the locations. BHA documented the SAM was properly installed. One of the characteristics of the XtraFlash SAM is its ability to "self-heal" which seals any fastener penetration. SBSA has not provided any evidence fastener penetrations have caused the SAM to fail. The SAM, as installed, is performing as intended. No defect exists. No repairs are needed.

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1.0F Missing Control/Movement Joints

Plaintiff Description:

No horizontal control joints were installed at any of the building elevations and no vertical control joints were installed on the front and rear elevations at any of the buildings.

Plaintiff Location:

N/A

Plaintiff Quantity:

N/A

Plaintiff Repair Scope:

- Refer to Repair Section C.1.b of SBSA's report

Plaintiff Cost:

Included in costs for 1.0B.

Defense Analysis and Repair Recommendations:

SBSA asserts stucco control joints are required accessories and are missing. SBSA further opines:

"Failure to install compliant control/ movement joints violates the manufacturer's installation instructions and industry standards, contributing to the cracking throughout the stucco system."

For many of SBSA's stucco allegations, SBSA cites standards that apply to traditional three-coat stucco systems. The stucco system used at this project is a one-coat system. The stucco thickness is half that of three-coat stucco. In addition, the one-coat stucco material has fiberglass or acrylic fibers added to the mix to assist in minimizing cracking. Control joints are installed in concrete or other cementitious materials to try to "control" where expected cracking occurs. While one-coat stucco is a cementitious product and does crack it does not crack the same way three-coat stucco does. Most of typically minor cracking observed in one-coat stucco occurs during the curing process. One-coat stucco does not have an on-going need to control cracking like three-coat stucco does. As such, the use of control joints in a one-coat stucco system is typical used by an architect as a design element. Such is the case at this project. SBSA argues the architect's design intent was to use control joints at every elevation, however, the architect only specified control joints on the side elevation drawings. If the architect wanted to use the same design element on the front elevation it is not unreasonable to assume the front elevation would reflect it. BHA maintains there is no practical need for control joints in a one-coat stucco system. SBSA's has not provided any evidence the lack of control joints has adversely affected the stucco in any way.

All the stucco cracks observed at this project are hairline with none being larger than 1/32 inches wide. The cracking is well within AROC guidelines. The stucco system is performing as intended. No defect exists. No repairs are needed.

2.0 Moisture-Management System (Barriers, Flashings, Drainage, Etc.)

2.0A Missing Sheet Metal Flashing at Window Head

Plaintiff Description:

The sheet metal flashings were generally missing at the fenestration heads.

Plaintiff Location:

Buildings A-D

Plaintiff Quantity:

Qty. 100%



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Plaintiff Repair Scope:

- Coordinate with replacement of the WRB and the stucco system as described in the stucco repair sections of SBSA's report.
- Where sheet metal flashing is missing at fenestration heads, perform the repair described below.
- Install new pre-finished sheet metal flashings with 4-inch vertical legs and horizontal legs sloped 10- to 15-degrees as detailed on the architectural plans with hemmed drip edges.
- Apply sealant at ends of sheet metal flashing to provide end dams.
- Ensure all flashing joints and comers are sealed.
- Ensure that the WRB above is shingle-lapped with the sheet metal flashing.
- Reinstall cladding per manufacturer instructions with a minimum 1/4-inch clearance between the bottom of cladding and the back of the sloped sheet metal flashing. Gap between the cladding and flashing to remain unsealed.
- Coordinate repair with related cladding and underlying moisture-management repair recommendations.

Plaintiff Cost:

\$ 19,732.57

Defense Analysis and Repair Recommendations:

SBSA asserts the window heads of every window are missing sheet metal flashing as specified in the construction drawings. SBSA further opines:

"The ineffectiveness of the flashing at fenestration heads is further compounded when cladding is installed tight to fenestration heads without a weep mechanism as discussed in Section C.1.a. This allows water to drain directly onto the fenestration frame and accumulate."

As part of SBSA's destructive testing protocol, stucco was removed from the corner of several window heads. SBSA did not perform any water testing at any window units prior to the stucco removal. BHA was present for the testing and documented the condition of the head flashing at each window tested. At every window the head flashing did not show any sign of failure. To support its claim, SBSA cites IRC section R703.8 Flashing:

"R703.8: Flashing. Approved corrosion-resistant flashing shall be applied shingle-fashion in a manner to prevent entry of water into the wall cavity or penetration of water to the building structural framing components. Self-adhered membranes used as flashing shall comply with AAMA 711. The flashing shall extend to the surface of the exterior wall finish. Approved corrosion-resistant flashings shall be installed at all of the following locations:

1. Exterior window and door openings. Flashing at exterior window and door openings shall extend to the surface of the exterior wall finish or to the water-resistive barrier for subsequent drainage..."

SBSA omitted the rest of the section that specifies how the flashing should be installed:

"Flashing at exterior window and door openings shall be installed in accordance with one or more of the following:

1.1. The fenestration manufacturer's installation and flashing instructions..."

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The windows were flashed following the window manufacturers recommendations, which does not require any metal head flashing.

SBSA argues the lack of metal flashing does not comply to the construction drawings. A deviation from a non-structural detail is not a defect. BHA is unaware of any leaks at any of the windows at this project. The performance of the window installation has not been compromised. BHA maintains that intent of the code requirements has been met. No defect exists. No repairs are needed.

2.0B Non-Compliant Flashing to Stucco Interface

Plaintiff Description:

The metal flashing at the perimeter of the decks and cantilevered awnings is inset above the stucco and water drains into the stucco system below.

Plaintiff Location:

Buildings A-D

Plaintiff Quantity:

Qty. 100%

Plaintiff Repair Scope:

- At elevated decks and awnings, remove existing edge flashing and membrane/ coating to allow for stucco repairs described below.
- Remove and replace stucco as required by the architectural details 12/ A8.03 and 5/ A8.04, Coordinate with replacement of the WRB and the stucco system as described in the stucco repair sections of SBSA's report.
- Install new edge flashing at decks per Section C.4.a of SBSA's report. New deck coating and new awning TPO perimeter edge membrane will be required to facilitate the repairs. Ensure the flashing is integrated with the new deck coating and awning TPO membrane.

Plaintiff Cost:

\$ 48,307.74

Defense Analysis and Repair Recommendations:

SBSA asserts some of the balcony decks have edge metal that is buried by the stucco it is designed to cover. BHA agrees the condition is problematic and should be repaired. BHA disagrees with SBSA's excessive repair to remove the stucco and deck coating to access the existing edge metal and to reflash the decks before restoring the finishes. Where deck edge metal is buried in the stucco, extend the edge metal past the stucco face by installing new sheet metal under the existing drip edge. The new sheet metal should have a break to match the existing edge metal and be installed in a continuous bed of silicone sealant and then painted to match. No stucco or deck coating needs to be removed to facilitate this repair.

2.0C Non-Compliant Isolation Joints at Dissimilar Materials

Plaintiff Description:

Interfaces of dissimilar cladding materials with each other, fenestrations, and penetrations were generally installed without a sealant joint and a backer rod. Where installed, the sealant joint width was inadequate.

Plaintiff Location:

Buildings A-D

Plaintiff Quantity:

Qty. 100%



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Plaintiff Repair Scope:

- At locations where stucco interfaces with dissimilar materials, perform the following repairs. Typical locations for repair include joints at fenestrations, penetrations at all cladding types, vertical joints between cladding types, and joints between all cladding types and wood trim, including fascia trim at re-entrant corners.
- Reinstall cladding as required to address other repair recommendations, providing 3/8- to 1/2-inch-wide gap between dissimilar materials. The depth to width ratio for the joint should be equal to 2:1. At stucco, provide casing bead at edge of joint.
- Install type B backer rod and low-modulus elastomeric sealant to provide compliant butt isolation joint at dissimilar material interfaces with joint widths that are 3/8-inch or greater.
- Install polyethylene bond breaker tape and low-modulus elastomeric sealant to provide compliant fillet isolation joint at dissimilar material interfaces where the existing space is less than 3/8-inch wide or the dissimilar materials are out of plane.
- Following installation of sealant isolation joints at penetrations through the cladding, set surface-mounted objects in continuous sealant against the face of the cladding. Where applicable, profile the sealant at the top of the surface-mounted objects to promote drainage over the top flanges.

Plaintiff Cost:

\$ 14,946.68

Defense Analysis and Repair Recommendations:

SBSA asserts isolation joints at junctures between dissimilar materials is missing or is improper. From SBSA exemplar photographs in its report it appears SBSA is alleging this condition exists at windows, sliding glass doors, and stucco penetrations. SBSA does not provide any evidence of damage or non-performance.

BHA inspected the windows and stucco penetrations and did not observe any damage resulting from missing isolation joints. BHA did observe finish cracks along the tops of the adjacent CMU stairways at some buildings. At these stairways, repairs are warranted. At junctures between adjacent entry stairways, remove stucco and existing sealant, add foam backer rod and seal gap with high grade flexible sealant. Touch up paint to match adjacent finishes.

3.0 Roofing System Type 1 - Spray Polyurethane Foam (SPF)

3.0A Non-Compliant Slope to Roof Drains

Plaintiff Description:

The as-built slope measurements along the roof crickets and adjacent to the drains at the units of the buildings have slopes less than required by the project-specific drawings. In some cases, the roof is sloped away from the means of drainage.

Plaintiff Location:

Repairs to be performed at all roof decks with non-compliant drainage.

Plaintiff Quantity:

Qty. 100%

Plaintiff Repair Scope:

- Repairs to be performed at all roof decks with non-compliant drainage.
- Remove and replace membrane and underlying substrates as necessary to perform repairs described below.
- Remove and replace damaged underlying coverboard and structure, if present.
- Install tapered insulation to provide positive drainage (1/4-inch minimum) towards roof drains.
- Slope cricket a minimum of 1/4-inch-per-foot along the valley.



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Plaintiff Cost:

\$ 168,616.70

Defense Analysis and Repair Recommendations:

SBSA asserts the foam roofs are not properly sloped which will allow water to collect on the roof and deteriorate the roof coating. SBSA did not evaluate the roof performance beyond a visual inspection. During its visual inspection SBSA observed:

"The as-built slope measurements along the roof crickets and adjacent to the drains at the units of the buildings have slopes less than required by the project-specific drawings."

While SBSA inspected all the roofs, SBSA does not make any specific roof allegations other than improper slope. SBSA did document some very small areas of ponding. The AROC recognizes ponding on flat roofs is to be expected. The AROC Workmanship Standards states:

"Minor ponding (up to 1/2" deep in small areas equivalent to no more than 1/3 of span) is acceptable providing roof is dry within 48 hours after rainfall."

BHA inspected all the roofs and did not observe any evidence the roofs are not performing. SBSA does note that two homeowners reported roof leaks but SBSA does not opine as to the cause. BHA is unaware if SBSA has performed any water testing on any of the roofs to determine if ponding water exceeds AROC allowable tolerances.

It is important to note that a foam roof needs to be maintained regularly for it to perform properly. BHA did not observe any evidence the roofs have received any maintenance other than minor repairs KHOV made during the PDA period of this litigation.

SBSA has not provided any evidence the roof is not draining properly. No defect exists. No repairs are needed.

4.0 Elevated Decks, Balconies, or Walkways

4.0A Non-Compliant Slope of Deck

Plaintiff Description:

Where access to elevated decks was provided, the slope of the deck at the deck edge was inadequate to promote positive drainage and allows ponding of water.

Plaintiff Location:

Repairs to be performed at all decks with non-compliant slope and drainage at edge flashing.

Plaintiff Quantity:

Building A: Units 3118, 3122, 3124

Building B: Units 3106, 3110, 3112, 3116

Building C: Units 3113, 3123, 3125, 3127

Building D: Units 3105, 3125

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Plaintiff Repair Scope:

- Repairs to be performed at all decks with non-compliant slope and drainage at edge flashing.
- Remove existing deck edge flashing, membrane, and underlying substrates as necessary to perform repairs described below. Remove and replace damaged underlying structure, if present.
- Provide a notch equivalent to the thickness of the metal flashing and deck coating for a length equal to the horizontal leg of the flashing. Ensure the notch slopes positively towards the deck edge.
- Install new flashing and deck coating flush to the existing deck surface and sloped a minimum of 2-percent to the deck edge.
- Coordinate with repairs recommended in this report.

Plaintiff Cost:

Included in costs for 2.0B.

Defense Analysis and Repair Recommendations:

SBSA asserts the private balcony decks are not properly sloped which allows water to pond. SBSA further opines:

"As built, the ponding water that collects on top of the membrane system provides an unsafe condition for residents and will lead to premature deterioration and eventual failure of the waterproofing."

SBSA did not perform any destructive or water testing at any of the balcony decks. SBSA's opinion is limited to its visual inspection of several decks. SBSA does not provide any support to its claim the decks are unsafe or are deteriorating prematurely. BHA inspected every deck made available and did not observe any evidence the decks are not performing. BHA did note some small spots where water had ponded at a few decks, but noted the area was very shallow. The AROC Workmanship Standards regarding flat roofs applies to balcony decks. The guideline states:

"Minor ponding (up to 1/2" deep in small areas equivalent to no more than 1/3 of span) is acceptable providing roof is dry within 48 hours after rainfall."

SBSA has not provided any evidence the private decks are not draining properly. No defect exists. No repairs are needed.

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5.0 Improper Wall & Ceiling Assembly and Fire Feature at Pool

Plaintiff Description:

Not provided by SBSA

Plaintiff Location:

Not provided by SBSA

Plaintiff Quantity:

Not provided by SBSA

Plaintiff Repair Scope:

- Provide allowance for repairs. Repair scope to be determined.

Plaintiff Cost:

\$ 35,000.00

Defense Analysis and Repair Recommendations:

SBSA does not include this allegation in its report, yet Nautilus includes a \$35,000 cost for this condition in its repair estimate. It is unclear to BHA as to what the alleged defect is and, as such, BHA cannot properly evaluate it. BHA reserves the right to offer its opinion once information has been provided that supports this claim. Until then, no repairs are needed.

VI. Analysis of Nautilus' Cost of Repairs Estimate

BHA will be preparing a repair cost estimate that delineates the recommended repair protocols and quantities as outlined in the defense experts' respective reports. BHA's repair cost estimate, which includes appropriate overhead, profit, and contingency, will be Attachment #1 to this report. Based on BHA's experience and knowledge of construction practices, it is BHA's opinion that the costs presented for the work described in the BHA repair cost estimate are consistent with the current construction market conditions. It is BHA's opinion that if bids were solicited to perform the defense scope of repairs, they would be comparable to BHA's estimate amount.

In addition to the defense cost to repair estimate, BHA also evaluated Nautilus's estimate and found costs and fees that are believed to be excessive and/or unnecessary. These costs and fees serve no other purpose than to inflate the estimate total. An example of this is Nautilus' inclusion of "Architectural Professional Fees" calculated as 12% of the construction costs equating to \$331,177. Nautilus applies the 12% Architectural Professional Fees to every single cost item in their estimate, even though not a single cost item in their estimate would require any architectural design services. SBSA's repair recommendations are based on its assertion the original construction plans, manufacturer requirements, and code requirements were not followed. SBSA recommends all the issues be repaired and made compliant with the original plans and requirements. SBSA has not taken issue with the original architectural and engineering plans and does not offer any new repair design requirements. It is not unreasonable to conclude from SBSA's repair recommendations that all the design work has already provided by the original designers, and therefore, no additional design work is needed.