

1 LORBER, GREENFIELD & POLITO, LLP
Louis W. Horowitz, Esq. [S.B. #020842]
2 3930 E. Ray Road, Suite 260
Phoenix, AZ 85044
3 TEL: (602) 437-4177
FAX: (602) 437-4180
4 lorowitz@lorberlaw.com

5 WILENCHIK & BARTNESS, P.C.
Dennis I. Wilenchik, Esq. [S. B. #005350]
6 2810 North Third Street
Phoenix, AZ 85004
7 admin@wb-law.com
diw@wb-law.com

8
9 *Attorneys for Defendants/Third-Party Plaintiffs K. Hovnanian*
10 *at Gallery, LLC and K. Hovnanian Arizona Operations, LLC*

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

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

15
16 Plaintiff,

17 v.

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

24 Defendants.

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

Case No. CV2020-008714

**DEFENDANTS'/THIRD-PARTY
PLAINTIFFS' SEPARATE
STATEMENT OF FACTS IN
SUPPORT OF ITS RESPONSE TO
THIRD-PARTY DEFENDANTS
DESERT VISTA, INC. AND RENCO
LLC dba RENCO ROOFING'S JOINT
MOTION FOR SUMMARY
JUDGMENT**

(Assigned to the Honorable Katherine
Cooper)

1 LLC, an Arizona limited liability company;
2
3 Third-Party Plaintiffs,
4
5 v.
6 CHAS ROBERTS AIR CONDITIONING, INC.,
7 an Arizona corporation; DESERT VISTA, INC.,
8 an Arizona corporation; GOTHIC
9 LANDSCAPING, INC., a California corporation;
10 HOME BUILDERS SITE SERVICES OF
11 ARIZONA, LLC, an Arizona limited liability
12 company; LEBLANC BUILDING CO., INC., an
13 Arizona corporation; LIBERTY
14 CONSTRUCTORS, LLC, an Arizona limited
15 liability company, dba LIBERTY ARIZONA;
16 RENCO LLC, an Arizona limited liability
17 company, dba RENCO ROOFING; R/S SERVICE
18 & SUPPLY, INC., an Arizona corporation;
19 SARGON MASONRY CONSTRUCTION, LLC,
20 an Arizona limited liability company; and DOES
21 1-50.
22
23 Third-Party Defendants,
24

25 Defendants/Third-Party Plaintiffs’ K. Hovnanian at Gallery, LLC and K. Hovnanian
26 Arizona Operations, LLC (“Defendants”) hereby submit their Separate Statement of Facts in
27 support of its Response and Opposition to Third-Party Defendants Desert Vista, Inc. and Renco
28 LLC dba Renco Roofing’s Joint Motion for Summary Judgement.

SEPARATE STATEMENT OF FACTS

1. Plaintiff disclosed reports from its experts in construction liability, Ed Fronapfel of SBSA, regarding defective installation, applicable standard of care for the stucco system and recommendations for removal and replacement. See Exhibit A, SBSA Report dated June 23, 2021, GALLERY-SBSA_004952-5159 / GALLERY-SBSA_005150-5158.

2. Nautilus expert Stefen Gustafson’s basis for his opinions on cost and repairs relies on repair recommendations made by SBSA expert Mr. Fronapfel. See Exhibit B, Deposition of S. Gustafson, p 6:15-21.

3. Mr. Gustafson opined cost to repair the stucco system exceeds two million dollars (\$2,000,000.00). See Exhibit C, Nautilus Report, GALLERY-NBC_005076-5079.

1 4. Mr. Fronapfel addressed the stucco system generally, along with applicable code
2 standards, industry standards, and project-specific standards, including standards set forth in
3 Defendants' project specifications, design documents, and manufacturer's instructions for
4 material used. Exhibit A at GALLERY-SBSA_005011-5015.

5 5. Mr. Fronapfel opined on missing weeps in the stucco system as item "C.1.0.a.
6 Missing Weep Mechanism in Stucco." *Id.* at GALLERY-SBSA_050015-5031.

7 6. Mr. Fronapfel identified applicable standards which he opined, required installation
8 of weep screeds in the stucco above fenestration heads (i.e. above windows and doors), and at
9 junctions where the stucco terminates at soffits. *Id.*

10 7. Mr. Fronapfel provided a detail from the project design to illustrate the proper
11 installation of weeps at the soffit junction. *Id.* See detail from plans at GALLERY-SBSA_005019.

12 8. Defendant's expert Terry Ingo of BHA and Desert Vista's expert West Harrington
13 of HCCI disagree with Plaintiff's expert as to whether appropriate standards require installation
14 of weep screeds above fenestration heads at Gallery. See Exhibit D, BHA Report August 11,2021,
15 KHOV 00001710-1711; See also Exhibit E, HHCI report January 31,2022, DV001029-1031.

16 9. West Harrington testified that he disagreed with Plaintiff's expert, that weeps above
17 the windows were necessary or the standard practice. See Exhibit F, Deposition of W. Harrington
18 at pp. 29:9-30:19.

19 10. All experts, including Defendant's expert and Desert Vista's agree that weeps
20 should have been installed at the soffit junctures, that missing weep conditions existed in those
21 locations, and the condition requires repair. Exhibit D at KHOV 00001710-1711; Exhibit E at
22 DV001029-1031; Exhibit F at Deposition of W. Harrington pp. 30:22-31:03.

23 a. "As part of SBSA's destructive testing protocol, stucco was removed at several
24 wall-to-soffit transitions. BHA observed some locations with clear evidence the lack
25 of a weep mechanism at the soffit has allowed moisture to accumulate behind the
26 stucco system and deteriorate the WRB. While not every wall-to-soffit transition
27 exhibited signs of water damage, the condition is problematic and should be
28 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." Exhibit D at
KHOV 00001710-1711.

1 b. “It is HCCI’s opinion that there is only minimal evidence of water intrusion at
2 the wall to soffit intersections. However, the absence of a weep mechanism may
3 result in damage over the life of the building. Accordingly, HCCI has recommends
4 the installation of weep mechanism at the large wall to soffit locations. HCCI has
independently evaluated the developer expert’s scope and cost of \$59,579.47
associated with this issue and has determined that it is an appropriate scope and cost
to repair for this issue.” Exhibit E, at DV 001031.

5 11. Plaintiff’s expert Mr. Fronapfel opined on the Weather Restrictive Barrier (“WRB”)
6 in section 3.1.0b. “Non-compliant WRB for Stucco System” of his report. Exhibit A at
7 GALLERY-SBSA_005032-5041.

8 12. Mr. Fronapfel opined on the standards he believes are applicable regarding the WRB
9 material to be used and where one or two layers of WRB were required. *Id.* at GALLERY-
10 SBSA_005032-5035.

11 13. Defendant’s expert, Mr. Ingo, noted limited areas where WRB installation had a
12 technical deficiency however, he disagreed that a technical deficiency at a few locations is a defect
13 that requires the removal and replacement of the entire stucco system at every building. Exhibit
14 D at KHOV 00001711-17112.

15 14. Desert Vista’s expert observed limited conditions which he acknowledged there
16 were areas where the WRB did not comply with applicable standards however, he did not believe
17 there was evidence the system was not performing as intended.

18 a. “During SBSA’s destructive testing, stucco was removed at a number of locations
19 and the WRB was inspected. At some locations, there was a single layer of WRB
20 over OSB shear panel. While HCCI agrees that the building code and ESR-3529
21 prescribe either two-layers of WRB (or 60-minute Grade D paper separated from
the stucco by an intervening non-water-absorbing layer or drainage space) there is
no evidence that the as-built condition is not performing as intended.” Exhibit E at
DV 001036.

22 15. Desert Vista’s expert West Harrington testified about other opinions on the standard
23 for the WRB:

- 24 a. 18. You understand the basic allegation here is
25 19. that the project is missing a second layer of
26 20. weather-resistive barrier in some or all locations,
27 21. correct?
28 22. . . . A. . . Correct. . In particular, over sheathing, OSB or
23. plywood sheathing.
24. . . . Q. . . Okay. . Did you generally agree with BHA's

1 25 observations and opinions in connection with this issue?

39

2 1. A. I'm sorry. With BHA's?

3 2. Q. Yeah.

4 3. A. Correct.

5 4. Q. With BHA's opinions. Okay.

6 5. A. Yes.

7 6. Q. Did you see or locate --

8 7. Let me ask a different way. You say in your
9 report that "HCCI observed evidence of the use of a single
10 layer of WRB during our extensive review of plaintiff and
11 developer photographs."

12 11. A. Correct. But the single layer that -- I relied
13 on SBSA's exemplar photographs --

14 13. Q. Okay.

15 14. A. --- as being evidence of a condition they found,
16 and I relied on SBSA's assertion that they -- I think they
17 used the language -- if I may, I'm going to refer back to
18 it -- that they generally saw that.

19 18. Q. Okay. You don't agree that that was what was
20 generally observed in the testing, do you?

21 20. A. No. And that's what my -- what I did and what is
22 reflected in that 33-page document that was recently
23 deposited was sort of my quantification of what I can see
24 what Plaintiff said they saw.

25 24. Q. Okay.

26 25. A. So -- and that had never been really done.

40

27 1. And I'll just say, Plaintiff's photographs
28 2. are not organized in a fashion that lend themselves to
3. quantification, so I looked at the document that I believe
4. they were using to be reflective of what they saw. And
5. those are those annotated elevation drawings that I marked
6. up.

7. Q. Okay. And I'm going to ask about those in a
8. minute.

9. As far as what you had observed in
10. connection with generating your report, you had seen --
11. you had seen evidence where the weather barrier was
12. installed with two layers at many locations, correct?

13. A. Correct.

14. Q. And you had identified at least some locations
15. where it was short or where it was missing in limited
16. locations, correct?

1 17. . . A. . Correct.
2 18. . . Q. . Did you do any kind of quantification of the
3 19. photographs or other information that you had seen
4 20. regarding the extent that the weather-resistive barrier
5 21. was present or missing in a two-layer configuration?
6 22. . . A. . Not at the time of my report. . At the time of my
7 23. report, I was just looking at it generally, but I hadn't
8 24. found a method by which I could examine the data and
9 25. quantify it in a way that was reasonable. . And that's what

41

1 . I was since able to do, and that's where I came to --
2 First of all, just backing up as to my
3 . opinion, I didn't see evidence of water intrusion that I
4 . believed was associated with a deficiency in the
5 . installation or type of WRB at the time I prepared my
6 . report.
7 . . . Q. . Okay.
8 . . . A. . Because I agreed generally that the -- that the
9 . code requires the use of two layers over sheathing, to the
10 . extent that that condition existed, I was -- I believed
11 . that a reasonable approach to that would have been to use
12 . a coating, and that's why I developed the cost and concept
13 . of using a -- essentially moving the weather-resistive
14 . barrier to the face.
15 I -- between the submission of my report and
16 . my deposition, I did find a way that I thought was a
17 . reasonable, scientific, accurate method of quantifying
18 . Plaintiff's own evidence, and that's what that 33-page
19 . document was.

Exhibit F, Deposition of W. Harrington at pp. 38:18-41:19

20 b. 22. . . A. . Well, again, they're highlighted not because I
21 23. think they're significant or not, just because I'm using
22 24. sheathing versus open framing, but it's significant in
23 25. review to see that, at a location where there is

50

1 . sheathing, you see that there are two layers of
2 . weather-resistive barrier.
3 . . . Q. . Okay. . Is this location one of the eleven
4 . locations you counted?
5 . . . A. . Correct.
6 . . . Q. . Okay.
7 . . . A. . Yeah. . The 11 locations, again, aren't an
8 . indication that there is 11 locations of improper WRB at
9 . sheathing. . It's just, there are only 11 references to WRB

1 10· over sheathing --
2 11· · · Q· · Okay.
3 12· · · A· · --- and it happens that many of them are two
4 13· layers.
5 14· · · Q· · There aren't even 11 locations where SBSA claims
6 15· there to be a missing layer of sheathing at framed
7 16· locations; is that correct?
8 17· · · · · · · MS. MANSHIP:· Objection.· Form, foundation.
9 18· · · · · · · THE WITNESS:· Frankly, I haven't done that
10 19· assessment, but --
11 20· BY MR. HOROWITZ:
12 21· · · Q· · What's your -- I'm trying to understand what your
13 22· 11 is.· I'm sorry to cut you off, but --
14 23· · · A· · No, no; not at all.
15 24· · · Q· · --- I want a clear record here.· I'm trying to
16 25· understand what your count of 11 is, and I'm not -- I'm

51

17 ·1· asking again because it wasn't clear before.
18 ·2· · · A· · Sure.
19 ·3· · · Q· · You're giving us some qualifications about what
20 ·4· something is or isn't, but I just want to understand, are
21 ·5· you counting the entire time you made a pink highlight?
22 ·6· Or are you counting every instance that you found where
23 ·7· SBSA identifies a missing layer of WRB?
24 ·8· · · A· · I am counting every time the pink -- the 11 pink
25 ·9· are any reference to paper over sheathing, not whether
26 10· it's one or two layers.
27 11· · · Q· · Okay.· Thank you.
28 12· · · A· · So --
1 13· · · Q· · Okay.· Based on your review and evaluation of the
2 14· chart and the specific locations with references to the
3 15· weather-resistive barrier, did you have any --
4 16· · · · · · · Let me ask this a different way.
5 17· · · · · · · What information did you get from reviewing
6 18· the chart and the photograph descriptions in the exercise
7 19· that led to the generation of Exhibit 130?
8 20· · · A· · Well, what I came to believe was that Plaintiff
9 21· had virtually no evidence of single-layer WRB over
10 22· sheathed locations.
11 23· · · Q· · And was your finding there generally consistent
12 24· with the opinions set forth by BHA in their report --
13 25· · · A· · Yes.

52

1 ·1· · · Q· · --- regarding the extent to which missing second

1 ·2· layer of WRB was observed at Gallery?
2 ·3· · · A. ·Yes· It's consistent with BHA's findings.
3 ·4· · · Q. ·Okay· And was that consistent with your own
4 ·5· findings as set forth in your January 2022 report?
5 ·6· · · A. ·Yes.
6 *Id.* at 49:23-52:06

7 16. Plaintiff's expert Mr. Fronapfel opined and takes the position that the EPS foam
8 board installed as a component of the stucco system does not comply with the manufacturer's
9 requirements as set forth in the ICC Evaluation Service Reports. Exhibit A at GALLERY-
10 SBSA_005042-5049.

11 17. Defendant's expert Mr. Ingo opined that no damage was observed from the alleged
12 technical deficiency regarding the EPS foam component. See Exhibit D at KHOV 00001712-
13 1713.

14 18. Desert Vista expert Mr. Harrington opined that no damage was observed from the
15 alleged technical deficiency regarding the EPS foam component. Exhibit E at DV001040-1041.

16 19. Mr. Harrington testified that he formed new opinions regarding the EPS foam
17 component after speaking with Desert Vista's principal, in which Desert Vista disclosed that it
18 understood they were required to install an EPS foam board with grooves on center and did in fact
19 order and install, that testing by the Plaintiff's expert was not sufficient to establish a deficiency
20 because it did not expose enough to show the grooves.

21 a. 7 Q. Did you get any information from Desert Vista's
22 8 principals or employees regarding the actual work
23 9 performed by Desert Vista or contracted to be performed by
24 10 Desert Vista on the Gallery project?

25 11 A. Well, I did have a discussion, probably an
26 12 hour-long discussion, with the principal of Desert Vista,
27 13 who was very knowledgeable and very familiar with this
28 14 project, and he -- he did provide me with some information
15 that I could not otherwise have had.

16 Q. Okay.

17 A. So that was important.

18 And by the way, we were talking about things
19 that I wanted that I wasn't able to get. The one other
20 thing that I was interested in having, I understood that
21 that person -- I forget Todd's last name, but Todd is his

1 first name, the principal of Desert Vista. I understand
2 that he was deposed last week. Again, I don't believe his
3 transcript was available, but that was another thing that
4 I would have wanted, though I would say I don't feel

25

1 particularly impaired, since I had a long and detailed
2 conversation with him just prior to his deposition.

3 Q. Okay. Did you get any new information from him
4 that modified or changed any of your opinions?

5 A. I think the most significant information I got
6 from him was just that -- his confirmation that the EPS
7 material that they used, the foam under the one-coat
8 system, that it screwed at 12 inches on center.

9 And we looked at the photographs that
10 Plaintiff and other parties had taken of some of the
11 destructive testing, and we concluded that, at least to
12 the extent we could tell, there wasn't an area where there
13 had been a sufficient piece of EPS exposed during
14 destructive testing that would have established that there
15 was a systemic occurrence of non-grooved foam.

16 In other words -- that's a little
17 convoluted, but the EPS that they order from their
18 supplier is grooved at 12 inches on center, so if one is
19 removing a strip of foam that's less than 12 inches of
20 center -- on center, one can't conclusively determine that
21 in that piece of foam grooves were missing.

22 So I did go on to look at photographs of the
23 foam, and I concurred that I could not find places where
24 there was -- it was alleged that foam was not grooved and
25 the width of that foam was -- the width of the exposed

26

1 foam was at least 12 inches. And then of course, I did
2 see instances of photographs of grooved foam.

3 So that was important to me. It seems to be
4 a significant allegation by Plaintiff, and it seemed,
5 based on that, that the centers of the grooving -- that
6 Plaintiff had not established that there was a deficiency
7 in the EPS.

8 Q. Okay. And just for some context, this discussion
9 was in response to Plaintiff's claim that the EPS foam
10 material used in the construction of the stucco at Gallery
11 did not contain the required grooves?

12 A. Correct.

13 Q. Okay. The information you obtained from Todd at

1 14 Desert Vista was that Desert Vista did understand that a
2 15 grooved foam material was needed, did order a material
3 16 that had grooves at 12-inch on center, and did install
4 17 that?

5 18 A. Correct.

6 19 Q. Okay.

7 20 A. Well put.

8 Exhibit F at Deposition of W. Harrington pp. 24:7-26:20.

9 20. Plaintiff's expert Mr. Fronapfel opined to the standards of care applicable to alleged
10 defects marked as C.1.0.d., "Non-compliant slope of horizontal stucco surfaces" including the
11 project plans and standards from the Stucco Manufacturer's Association. Exhibit A at GALLERY-
12 SBSA_005050-5063.

13 21. Defendant's expert Mr. Ingo opined that the the conditions at issue had generally
14 positive slope and disagreed that a technical deficiency in slope in one location constituted a defect
15 requiring repair. Exhibit D at KHOV00001713-14.

16 22. Desert Vista's expert Mr. Harrington testified he observed conditions that did not
17 comply with the design but opined that the condition as performing and not suffering from damage
18 the justified repair. Exhibit E at DV 001405; Exhibit F Deposition of W. Harrington at pp.116:01-
19 117:10.

20 23. Mr. Fronapfel opined to there was deficiency in the Self-adhered membrane under
21 the horizontal stucco system, in which he believed the SAM failed to self-seal around fastener
22 penetrations and caused damage.

23 a. "Where breaches in the SAM applied under horizontal stucco
24 surfaces exist, the as built condition falls short of the prescriptive
25 requirements of the relevant codes, design, and industry standards
26 and, therefore, the developer, contractor, and subcontractors who
27 performed the work fell below the standard of care." Exhibit A at
28 GALLERY-SBSA_005064-5073.

29 24. Experts for Defendant and Desert Vista both disagreed with Mr. Fronapfel's
30 contention that a failure had occurred in the SAM. Exhibit D at KHOV 00001714; Exhibit E at
31 DV 001049.

1 25. Plaintiff's expert identified standards of care for the installation of stucco control
2 joints, including the project designs, ASTM standards, and Amerimix product instructions and
3 ESR reports. Exhibit A at GALLERY-SBSA_00005073-5084.

4 26. Defense expert Mr. Ingo provided his own opinions regarding the standard and the
5 need for control joints in a one-coat stucco system and as to his interpretation of the design intent.
6 Exhibit D at KHOV00001715.

7 27. Desert Vista's expert noted that Mr. Fronapfel has made inconsistent statements
8 about the interpretation of the design and design intent and also denies there is sufficient cracking
9 to justify repair to this issue.

10 a. "Furthermore, the configuration of these buildings does not result
11 in any large, uninterrupted planes of stucco and consequently, would
12 not benefit from the addition of control joints. The cracking that exists
13 is well within industry tolerances. No repairs associated with Desert
14 Vista are required." Exhibit E at DV 001053.

15 28. Plaintiff's expert opined regarding issue C.2.0.a. "Missing Sheet Metal Flashing at
16 Window Head" and said that standards including the plans, and the International Building Code
17 required metal flashing at window heads supported his claim of defective installation. Exhibit A
18 at GALLERY-SBSA_5085-5093.

19 29. Mr. Ingo disputed Mr. Fronapfel's opinion, stating the applicable standard for
20 installation of the vinyl finned windows used in this property was to follow the manufacturer's
21 instructions, which did not require metal flashing. Exhibit D at KHOV 00001715-1717.

22 30. Mr. Harrington opined on the standard of sheet metal flashing at window head,
23 stating:

24 a. "The manner in which Desert Vista terminated their plaster system
25 at window heads is consistent with the predominant custom and
26 practice in the Greater Phoenix region. In fact, the windows are
27 specifically manufactured to receive the stucco system without
28 additional weeping mechanisms... The as-built condition is consistent
with regional practices and is performing as intended. No
modification to the window assemblies associated with Desert Vista's
work is required." Exhibit E at DV 001058.

31. Plaintiff's expert Mr. Fronapfel provided opinions regarding his issue C.2.0b. "Non-
Compliant Flashing to Stucco Interface," in which he identified applicable standards including

1 the project plans and Sheet Metal and Air Conditioning Contractors' National Association
2 (SMACNA) requirements referenced by the architect. Exhibit A at GALLERY-SBSA_005093-
3 5102.

4 32. Defendant's expert Mr. Ingo agreed the condition of metal flashing buried in the
5 stucco was deficient and required repair. Exhibit D at KHOV 0001717.

6 33. Mr. Harrington opined that he observed the condition of metal flashing buried in the
7 stucco but stated, "[f]rom a sequencing standpoint, this flashing would have been installed after
8 Desert Vista performed their work. This condition does not relate in any part to the work of Desert
9 Vista. No repairs associated with Desert Vista are required." Exhibit E at DV 001061-1062.

10 34. Plaintiff's expert provided opinions regarding standards applicable to his issue
11 C.2.0.c, "Non-Compliant Isolation Joints at Dissimilar Materials," which included the plans,
12 various codes, American Architectural Manufacturers Association/AAMA and ASTM standards.
13 See Exhibit A at GALLERY-SBSA_005104-5120.

14 35. Defendant's expert disagreed that there were improper isolation joints at some of
15 the areas claimed but agreed repairs were needed along the tops of certain stairways. Exhibit D at
16 KHOV 00001717-1718.

17 36. Mr. Harrington again opined that the work by Desert Vista complied with applicable
18 standards and disagreed that the standards required isolation joints at windows as Plaintiff's expert
19 had opined:

20 a. "The manner in which Desert Vista terminated their plaster system
21 around windows and other penetrations is consistent with the
22 predominant custom and practice in the Greater Phoenix region. In
23 fact, the windows are specifically manufactured such that they do not
24 require that the stucco system terminate into an isolation joint. The as-
built condition is consistent with regional practices and is performing
as intended. No modification to the window assemblies, or other
penetrations, associated with Desert Vista's work is required." Exhibit
E at DV 001068.

25 37. Movants produced a Master Subcontractor Agreement and Work Agreement which
26 they acknowledge provided that Desert Vista would provide labor and materials related to the
27 stucco at Gallery. See Movant's Statement of Facts, ¶ 4, and Movant's Exhibit 2.

1 38. Desert Vista's Ariz.R.Civ.P. 30(b)(6) representative designated to testify regarding
2 the scope of work confirmed that Desert Vistas' work included supply and installation of the
3 WRB, weeps "at the sole plate," supply and installation of the EPS foam board, and installation
4 of control joint; and lacked knowledge of who installed the SAM under the horizontal stucco and
5 whether or not anyone else was responsible for installing weep screeds.

6 19 Q. Was it within your scope of work to provide and
7 20 install the weather-resistant barrier at Gallery?

8 21 A. Yes.

9 22 Q. Was it within your scope of work to provide all
10 23 weeps and weep screeds at the Gallery project?

11 24 A. At the sole plate, yes.

12 25 Q. Well, was anybody else providing or installing
13 72

14 1 weep screeds at Gallery?

15 2 MS. RAI: Form, foundation.

16 3 Q. Let me ask a different way.

17 4 If there's a weep screed in the stucco at

18 5 Gallery would that have been within your scope of work or
19 6 within someone else's scope of work?

20 7 A. What I can answer is that I know that weep
21 8 screed at the sole plate was in our specifications to be
22 9 done, but as to what others were required to do, I don't
23 10 know.

24 11 Q. I'm not asking what -- I'm not asking where a
25 12 weep screed is required, I'm asking who did them. Did
26 13 framers install any weep screeds at the project?

27 14 A. I have no idea.

28 15 Q. Did KHOV self-install any weep screeds at the
16 project?

17 A. That, I can't tell you either.

18 Q. Did any part of your scope of work exclude any
19 of the weep screeds that were necessary to be installed
20 and integrated into the stucco system or the one-coat
21 system at the project?

22 A. I don't know.

23 Q. You're aware that plaintiff and its expert are
24 critical of the EPS insulation foam boards that were
25 installed at the project, correct?

73

1 A. I am.

2 Q. Okay. Was the installation of EPS foam board

1 3 within Desert Vista's scope of work?

2 4 A. Yes.

3 5 Q. Okay. You're aware that plaintiff and its
4 6 expert are critical regarding the self-adhered membrane
5 7 under horizontal portions of the stucco system, correct.

6 8 A. I'm sorry, could you say that again?

7 9 Q. Sure.

8 10 Are you aware that plaintiff and its expert are
9 11 critical about the self-adhered membrane installed under
10 12 horizontal parts of the stucco system?

11 13 A. Yes.

12 14 Q. Okay. Was the installation of the self-adhered
13 15 membrane part of Desert Vista's scope of work?

14 16 A. I don't completely recall, but I would think
15 17 it -- I don't know. It's not on the specifications listed
16 18 here and it's been a while.

17 19 Q. Okay. If there is weather-resistant barrier
18 20 that goes over the top of a wall or a parapet wall and
19 21 self-adhered membrane that's supposed to be integrated
20 22 with that, do you know if that's something that would be
21 23 within your scope of work or not?

22 24 A. I don't know.

23 25 Q. No, you don't know or, no, it didn't?

74

26 1 A. No, I don't know. It depends on the
27 2 circumstances, I guess, of where on the building it is.

28 3 Q. What if it's on a parapet wall?

1 4 A. Well, the parapet walls I'm not sure. I'm not
2 5 sure who did it on those.

3 6 Q. What if it's under stucco?

4 7 A. That doesn't mean somebody else couldn't have
5 8 put it on before we got there.

6 9 Q. But you don't know if that's within your scope
7 10 of work?

8 11 A. No, I don't know if we were the ones that were
9 12 required to install it or not. Kind of like I was saying,
10 13 the metal flashing was supposed to be on top of our work
11 14 out there.

12 15 Q. Was it within your scope of work to install
13 16 control joints or movement joints in the stucco?

14 17 A. Yes, per plan.

15 18 Q. Now, you're aware that plaintiff and its expert
16 19 are critical of the placement and extent of the control
17 20 and movement joints, correct?

1 21 A. I'm aware of this, yes.

2 22 Q. I'm not asking if you disagree or agree with
3 23 their comments.

4 24 Do you agree that it is within your scope of
5 25 work to install control joints in your stucco product?

6 75

7 1 A. Per plan.

8 See Exhibit G, Deposition of Desert Vista 30(b)(6) representative T. Jones, at pp. 71:19-75:01.

9 39. Mr. Harrington agreed that weeps were part of Desert Vista's scope of work, that
10 weeps are part of the plaster system, and are typically installed by the plasterer. Exhibit F at
11 Deposition of W. Harrington pp. 32:4-33:6.

12 40. Mr. Harrington testified that the EPS board was installed by Desert Vista and was
13 informed of such by Desert Vista Principal. *Id.* at W. Harrington pp. 29:1-4; 26:13-20.

14 41. Mr. Harrington testified that the WRB is typically installed by the plasterer. *Id.* at
15 Deposition of W. Harrington pp. 52:7-17.

16 42. Mr. Harrington denied knowledge of who installed the self-adhered
17 membrane/SAM underneath horizontal stucco, and testified that it would sometimes be a sheet
18 metal subcontractor and sometimes a plasterer. *Id.* at Deposition of W. Harrington pp. 56:18-
19 57:18.

20 43. Plaintiff's liability expert Mr. Fronapfel identified repairs arising from each of his
21 separate defect claims conditions, including stucco and moisture management system and roofing
22 repairs. Exhibit A at GALLERY-SBSA_5150-5157.

23 44. Plaintiff's cost of repair expert Stefen Gustafson testified that he implemented the
24 repairs as identified by Mr. Fronapfel, totaling \$3,282,305.74 in repair costs. See Exhibit C at
25 GALLERY-NBC_005077.

26 45. Defendant's expert Mr. Ingo identified and opined on cost of repairs for each
27 particular defect claimed in Plaintiff's expert report. See Exhibit H BHA Preliminary Defense
28 Cost of Defense Scope Estimate.

1 46. In Desert Vista’s Expert report, Mr. Harrington provide his own opinions as to
2 certain repair costs, including his agreements with certain cost estimates made by T. Ingo. Exhibit
3 E at DV 001025-001069.

4 47. Plaintiff’s expert Mr. Fronapfel identified standards of care including IBC code
5 sections for slope of sprayed polyurethane foam roofs, claimed that non-compliant slopes exist
6 throughout all locations at all buildings and that cuts and blisters in the roof membrane surface
7 contribute to the problems. Exhibit A at GALLERY-SBSA_005120-5136.

8 48. Mr. Fronapfel testified he saw splits and blisters and evidence of water migrating
9 through those areas. See Exhibit I, Deposition of E. Fronapfel at pp. 76:22-78:6.

10 49. Defendant’s expert opined the Plaintiff had not established a defect or failure to
11 drain the decks. Exhibit D at KHOV00001719-20

12 50. Defendants’ expert Mr. Ingo and Renco’s expert Chad Polivka of MC Consultants
13 disputed that there was a defect. *Id.*; See Exhibit J, MC Consultants Defect issue Report Dated
14 1/23/2022 at RENCO 000256-261.

15 51. Plaintiff’s expert addressed additional leaks at multiple units that occurred after the
16 initial reports stating, “Where roof leaks exist, the as-built condition falls short of the prescriptive
17 requirements of the relevant codes, design, and industry standards and, therefore, the developer,
18 contractor, and subcontractors who performed the work fell below the standard of care.” See
19 Exhibit K, SBSA Supplemental Report dated 10/14/2 at GALLERY-SBSA_005165-5176.

20 52. Mr. Fronapfel testified that there was evidence of ponding from natural precipitation
21 and reports of interior damage that he determined was a direct result and that he performed some
22 water testing in one roof location in which he did not identify a leak. Exhibit I at Deposition of E.
23 Fronapfel, pp. 107:11-109:05.

24 53. Other roof leak incidents have been identified by Plaintiff since the October 2021
25 reports. As of Plaintiff’s Nineteenth Supplemental Disclosure dated, September 7, 2022, Exhibit
26 L hereto, Plaintiff has claimed the following for “temporary repairs” at multiple roof locations:

27 “a. Temporary repairs at 3124 - \$1,482.61 GALLERY_006621-006628
28

1 b. Temporary repairs at 3104, 3109, 3112 & 3124 - \$16,281.73
2 GALLERY_006631-006640” See Exhibit L Plaintiff’s Nineteenth Supplemental
3 Disclosure, p. 24.

4 54. Plaintiff’s expert Mr. Fronapfel identified alleged defects regarding deficiencies in
5 the decks and balconies, citing Specifications for the property calling for “Polydeck 355 Decking
6 System die by the Roofing Trade Partner” and referenced standards including the specifications
7 and project plans, claiming that non-compliant deck slope at the edge flashing exists at seven
8 units. Exhibit A at GALLERY-SBSA_005137-5149.

9 55. Defendants’ expert opined that Plaintiff had not established a defect or failure to
10 drain at the decks. Exhibit D KHOV 001720.

11 56. Renco states in its Motion and SOF that it entered an agreement to provide labor
12 and materials “relating to foam roofs and walking decks.” See Renco’s SOF 3 and Exhibit 1.

13 57. Renco’s Ariz.R.Civ.P. 30(b)(6) designee Jeffrey Paul Nickerson testified that the
14 scope of work performed was the flat roof and walk deck:

15 14. Q. · Okay. · In your own words, can you tell me what
16 work was performed by RenCo at the Gallery?
17 A. · We installed a roofing system on the flat roofs
18 and we installed a walk deck pedestrian system on the
19 balcony.

20 See Exhibit I, Deposition of J. Nickerson pp. 31:14-18

21 58. Mr. Fronapfel calls for repairs to roofs and to decks for the conditions that he
22 described. Exhibit A at GALLERY-SBSA_005156-7.

23 59. Plaintiff’s cost expert, Mr. Gustafson provided costs for the particular defect items.
24 Exhibit C at GALLERY-NBC_005077-5092.

25 60. Movants were obligated per their contact to provide additional insured
26 endorsements to Defendants. See MOVANTS’ EXHIBITS 1 and 2, sec. 14.

27 ///

28 ///

///

1 Dated: November 7, 2022

LORBER, GREENFIELD & POLITO, LLP

2
3 By: /s/Louis W. Horowitz
4 Louis W. Horowitz, Esq.
5 3930 E. Ray Road, Suite 260
6 Phoenix, AZ 85044
7 *Attorneys for Defendants/Third-Party*
8 *Plaintiffs K. Hovnanian at Gallery, LLC and*
9 *K. Hovnanian Arizona Operations, LLC*

10 WILENCHIK & BARTNESS, P.C.

11 By: /s/Dennis I. Wilenchik w/approval
12 Dennis I. Wilenchik
13 2810 North Third Street
14 Phoenix, AZ 85004
15 *Attorneys for Defendants/Third-Party Plaintiffs*
16 *K. Hovnanian at Gallery, LLC and K.*
17 *Hovnanian Arizona Operations, LLC*

18 Original of the foregoing e-filed
19 this 7th day of November, 2022 with:

20 Clerk of the Court
21 Maricopa County Superior Court
22 101 W. Jefferson
23 Phoenix, AZ 85003

24 COPY of the foregoing emailed this
25 7th day of November, 2022 to:

26 Craig S. Nuss
27 Penny J. Manship
28 BURG SIMPSON ELDREDGE
HERSH & JARDINE P.C.
8310 South Valley Highway, Suite 270
Englewood, CO 80112
cnuss@burgsimpson.com
pmanship@burgsimpson.com
Attorneys for the Plaintiff

Dennis I. Wilenchik
WILENCHIK & BARTNESS, P.C.
2810 North Third Street
Phoenix, AZ 85004
admin@wb-law.com
diw@wb-law.com
Attorneys for Defendants/Third-Party Plaintiffs
K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona
Operations, LLC

1 Michael A. Ludwig
JONES, SKELTON & HOCHULI, P.L.C.
2 40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
3 minuteentries@jshfirm.com
mludwig@jshfirm.com
4 *Attorneys for Third-Party Defendant*
LeBlanc Building Co., Inc.

5 Tom Shorall Jr.
6 Jason J. Boblick
SHORALL MCGOLDRICK ZERLAUT
7 1232 East Missouri Avenue
Phoenix, AZ 85014-2912
8 tom@shorallmccgoldrick.com
jason@shorallmccgoldrick.com
9 *Attorneys for Third Party Defendant*
Liberty Constructors

10 Rina Rai
11 Marcus McGillivray
RAI DUER, P.C.
12 3033 North Central Avenue, Suite 500
Phoenix, AZ 85012
13 RRai@raiduer.com
MMcGillivray@raiduer.com
14 *Attorneys for Third Party Defendants*
Renco Roofing and Desert Vista, Inc.

15 Leonard T. Fink
16 David S. Schopick
SPRINGEL & FINK LLP
17 3033 North Central Ave., Suite 500
Phoenix, AZ 85012
18 lfink@springelfink.com
dschopick@springelfink.com
19 *Attorneys for Third-Party Defendant*
Sargon Masonry Construction, LLC

20
21 By: /s/Erikka Rico
22
23
24
25
26
27
28