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

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

16 Plaintiff,

17 v.

18 K. HOVNANIAN AT GALLERY, LLC,
19 an Arizona limited liability company; et
20 al.

21 Defendants.

22 K. HOVNANIAN AT GALLERY, LLC,
23 an Arizona limited liability company; et
24 al.

25 Third-Party Plaintiffs,

26 v.

27 ARTISTIC STAIRS, LTD., an Arizona
28 limited liability company; et al.

 Third-Party Defendants.

Case No. CV2020-008714

Assigned to Hon. Michael Kemp

**PLAINTIFF’S RESPONSE IN
OPPOSITION TO DEFENDANTS’
MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING CLAIMS OF
UNSUPPORTED DEFECTS**

(Oral Argument Requested)

Plaintiff, Gallery Community Association (“Plaintiff” or “Association”), by and through undersigned counsel, objects and responds as follows to Defendants’ *Motion for*

1 *Partial Summary Judgment Regarding Claims of Unsupported Defects (“Motion”)*. This
2 response is supported by the following *Memorandum of Points and Authorities, Plaintiff’s*
3 *Response o Defendants’ Separate Statement of Facts (“Defendants’ SOF”)*, and Plaintiff’s
4 *Controverting Statement of Facts in Opposition to Defendants’ Motion (“Plaintiff’s SOF”)*.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. ARGUMENT SUMMARY**

7 The *Motion* asks this Court to “enter partial summary judgment that Plaintiff cannot
8 recover *any part of the claimed [] repairs*” for the following defects identified by the
9 Association’s experts: defects in the Lateral Force Resisting System (“LFRS”),¹ non-
10 compliant WRB (weather-resistive barrier) for stucco system, or non-compliant EPS Foam
11 Board (“EPS Foam”) for stucco system. *Motion* at 9-10. The *Motion* also argues “Plaintiff
12 should not be permitted to introduce opinions or estimates for repair costs which are based
13 solely on speculation that widespread defect conditions exist” at the Gallery residential
14 development (“Project”). *Motion* at 3. However, the *Motion* is both legally and factually
15 incorrect and should be denied.

16 Contrary to Defendants’ mischaracterizations, the Association’s experts have
17 conducted extensive visual examinations, intrusive examinations, measurements, and
18 photo-documentation of the Project and the Association’s experts’ opinions regarding the
19 appropriate scope of repairs are properly founded on this extensive record. Their opinions,
20 founded upon over 135 hours of examination, analysis, and research, are based on both
21 direct and indirect evidence, and the reasonable inferences drawn from such evidence. Their
22 opinions easily meet the admissibility standards of the Arizona Rules of Evidence because
23 the Association’s experts are qualified to opine on such matters, and the scientific principles
24 underlying their testimony are reasonably reliable.

25 Defendants refer to the Association’s experts’ opinions as “extrapolation evidence,”
26

27 ¹ The cost of repairs for the LFRS should have been included within the 10% construction
28 contingency for the total Project repairs, and the Association does not intend to seek at trial
a separate \$200,000 to repair the LFRS. Plaintiff’s response to Defendants’ SOF, ¶ 5.

1 *Motion* at 8, but “extrapolation” is a word commonly misused by some to describe any
2 investigatory forensic technique revealing construction defects, regardless of the
3 methodology employed or the particular circumstances of the case. Contrary to Defendants’
4 arguments, courts across the United States addressing what constitutes properly
5 “extrapolated” opinions, reveal no hostility whatsoever to such methodology, and the case
6 law embraces it as producing admissible opinion evidence where an adequate foundation is
7 laid. Here, the Association’s experts’ extensive forensic investigation provides more than
8 an adequate foundation for their opinions.

9 Alternatively, however, if the Court does not deny the *Motion* outright based on the
10 abundant evidence and the law described below, waiting to rule on the *Motion* until after
11 the foundation for the Association’s experts’ opinions has been laid at trial is by far the
12 superior approach. It will be difficult for the Court to fully appreciate the voluminous and
13 extensive evidence amassed by the Association’s forensic experts, and how the factual bases
14 for their expert opinions integrate, until that evidence is presented at trial.

15 **II. FACTUAL SUMMARY**

16 The Project consists of 18 residential units contained within 4 buildings. The
17 Association’s experts conducted a thorough forensic investigation of the Project’s defects
18 and resulting damage. Contrary to Defendants’ self-serving and unsupported assertions, the
19 Association’s evidence consists of hard facts, not speculation. *See generally* Plaintiff’s
20 SOF. These hard facts are based upon repeated and extensive visual and intrusive
21 examinations, measurements, photo-documentation and testing of the entire Project by the
22 Association’s experts, including forensic engineers from SBSA, Inc. (“SBSA”) and cost
23 estimating by Nautilus Consultants (“Nautilus”). Plaintiff’s SOF ¶¶ A-C, Y.

24 SBSA’s team of forensic engineers have spent over 135 hours on site investigating
25 the Project’s condition over Development’s condition and approximately 30 hours
26 analyzing the construction plans and related documents regarding how the construction was
27 performed. Plaintiff’s SOF ¶ C. The Association has spent almost \$200,000 financing the
28 forensic investigation, inspections and analysis, and report and Observation Drawing

1 generation. Id. at ¶¶ C-D. SBSA's forensic investigation included:

- 2 a. Visual examinations of various Project components on 9 separate days,
3 and 5 days of intrusive examinations (where an exterior element, such as
4 stucco, is removed so that otherwise hidden interior elements can be
5 examined), including, without limitation:
 - 6 i. visual examinations of all exterior elevations at all four Project
7 buildings;
 - 8 ii. intrusive examinations of the stucco systems at 100% of the buildings;
 - 9 iii. approximately 44 intrusive openings into the buildings, of which
10 approximately 26 openings were made into the stucco where OSB
11 sheathing or solid wood framing was present or should have been
12 present.
- 13 b. Photo-documentation, including thousands of photographs documenting
14 the observed conditions, defects, and resulting damage to the Project's
15 stucco systems and adjacent building components.
- 16 c. Preparation of 36 pages of Observation Drawings documenting the
17 findings from the intrusive examinations, including cross-references to
18 photographs documenting the observed distress and defects.
- 19 d. Examination of the Project's disclosed and discovered construction plans
20 and specifications.
- 21 e. Review of Defendants' expert reports, including their own observations,
22 measurements, analyses, and conclusions.
- 23 f. Review of the relevant documentation generated during construction
24 regarding how the Project was constructed, what materials and
25 construction techniques and practices were employed, and what problems
26 were encountered.
- 27 g. Preparation of voluminous evaluative and repair reports correlating
28 observed defects with their locations and needed repairs.

1 *Id.* at ¶ D. The Association’s experts attest that the above investigation, reports and data
2 comprise “information of a type reasonably relied on by other forensic engineers in forming
3 opinions like those SBSA has formed in this case relating to damages, defects, and
4 deficiencies at the Project and the scope of reasonable and necessary repairs.” *Id.* at ¶ X.
5 SBSA further affirms that its opinions offered in this case are held within a “reasonable
6 degree of engineering probability.” *Id.* at ¶ T.

7 Defendants’ assertions that SBSA found only “two locations” of WRB defects in the
8 stucco system, “three locations” of “insufficient thickness” of EPS Foam, and a “small
9 number” of locations with “missing grooves” in the EPS Foam, *Motion* at 9, are simply
10 wrong and unsupported by the extensive record evidence. *See* Plaintiff’s response to
11 Defendants’ SOF ¶¶ 11-18, 22-28. Instead, SBSA located all of the following defects
12 requiring stucco repairs at 100% of the Project buildings:

- 13 a. Missing Weep Mechanisms in Stucco
- 14 b. Non-Compliant WRB for Stucco System
- 15 c. Non-Compliant EPS Foam Board for Stucco System
- 16 d. Non-Compliant Slope of Horizontal Stucco Surfaces
- 17 e. Deficient Self-Adhered Membrane under Horizontal Stucco System
- 18 f. Missing Control/Movement Joints in Stucco
- 19 g. Missing Sheet Metal Flashing at Fenestrations
- 20 h. Non-Compliant Flashing to Stucco Interface
- 21 i. Non-Compliant Isolation Joints at Dissimilar Materials

22 Plaintiff’s SOF ¶¶ E-F.

23 SBSA made approximately 26 intrusive examination cuts over OSB sheathing or
24 solid wood framing, or in an area where OSB sheathing was required but missing, and in
25 100% of these locations, SBSA observed one or more of the following WRB or EPS Foam
26 defects: missing vertical grooves on the back of the EPS Foam, missing tongues and grooves
27 in the EPS Foam for horizontal joints, inadequate EPS Foam thickness, single-layer WRB
28 building paper, and/or mis-lapped WRB building paper. Plaintiff’s SOF ¶¶ N-O. In all of

1 its intrusive examinations of the Project, SBSA found zero locations with adequately
2 profiled grooved EPS Foam and zero locations with tongues and grooves in the EPS Foam.
3 *Id.* at ¶ P.

4 In addition, in 100% of the locations where SBSA visually examined the Project’s
5 stucco assemblies without intrusive examinations, SBSA observed non-compliant slope at
6 horizontal surfaces, missing weep mechanisms at horizontal terminations, missing control
7 joints, missing sheet metal flashings at fenestrations, non-compliant flashing to stucco
8 interface, and/or non-compliant isolation joints at dissimilar materials. *Id.* at ¶ Q.

9 Jeff Felderman of SBSA reviewed *Defendant’s Separate Statement of Facts in*
10 *Support for [sic] Summary Judgment* and opined that Mr. Harrington’s analysis of the
11 locations and types of defects SBSA identified is flawed because Mr. Harrington appears
12 to have relied solely on the text of the notes on the Observation Drawings, and failed to
13 conduct a careful review, which would have included examining the cross-referenced
14 photographs in conjunction with the Observation Drawings. *Id.* Mr. Felderman opined that
15 by doing so, Mr. Harrington failed to understand all of the locations where SBSA performed
16 intrusive examinations at locations with stucco over OSB sheathing or solid wood framing
17 (or where required OSB sheathing is missing), or all such locations where only a single
18 layer of WRB was present. *Id.* Thus, Mr. Felderman opined that “Mr. Harrington’s non-
19 rigorous review of the CDC Report, its attachments, and cross-referenced photographs and
20 findings have lead him to an incorrect conclusion.” Plaintiff’s SOF ¶ R.

21 Based on his experience and expertise in the examination of the built environment
22 on hundreds of projects, Mr. Felderman opined that “because SBSA found conditions
23 requiring removal and replacement of portions of the stucco at 100% of the areas where
24 SBSA performed intrusive examinations over OBS sheathing or solid wood framing at
25 various locations over the expanse of all four Project buildings, these same defective
26 conditions are, to a reasonable degree of engineering probability, likely to exist throughout
27 other areas of the Project not subject to intrusive examination.” *Id.* at ¶ T.

28 He also opined, “This is true in part because the stucco assembly is constructed with

1 rolls of asphalt paper, sheets of foam, and rolls of lathe, and correctly applying them requires
2 consideration of the layout from bottom to top on each building elevation to create a
3 properly lapped system. Based on finding an improperly lapped system in one or more
4 areas, the means and methods of construction, the products used, and their assembled state
5 in other locations on the same building can be inferred.” *Id.* at ¶ U.

6 SBSA recommended removal and replacement of all of the Project’s stucco not
7 because of one defect in isolation but because the combined effect of all of the identified
8 defects would result, at best, in a patchwork of small stucco locations where repairs are not
9 required. *Id.* at ¶ V. Mr. Felderman further opined that based on his “experience and
10 expertise, because of the significant quantity of stucco areas requiring removal and
11 replacement, it would not be practical, reasonable, or efficient to attempt to remove and
12 replace only the large areas of stucco where repairs must be performed.” *Id.* at ¶ W.

13 Plaintiff’s cost estimating expert, Stefan Gustafson, used an elevation drawing of a
14 typical Project building provided to him by SBSA, with locations where OSB sheathing is
15 present beneath the stucco marked as red shading, to illustrate the large areas of stucco that
16 the prescribed repairs would require him to remove. *Id.* at ¶ AA. He then highlighted in pink
17 the additional areas of stucco, outside the OSB sheathing areas, that must be removed and
18 replaced to repair or integrate the underlying or adjacent conditions because of the following
19 defects: non-compliant cross slope of sidewalks (requiring new stair landing heights),
20 missing weep mechanisms in stucco, non-compliant slope of horizontal stucco surfaces,
21 deficient self-adhered membrane under horizontal stucco system, missing control joints,
22 missing sheet metal flashing at window heads, non-compliant flashing to stucco interface,
23 and non-compliant isolation joints at dissimilar materials. *Id.* at ¶ BB.

24 In each location where stucco must be removed and replaced in order to repair
25 adjacent or underlying conditions, the removal results in the destruction of the underlying
26 WRB and EPS Foam board, which must also be removed and replaced. *Id.* at ¶ DD. If the
27 stucco were to be removed and replaced only in the locations marked with shading and
28 highlighting on Exhibit 2B, a section of stucco approximately 12-18 inches wide around

1 each repair must be removed and replaced in order to accommodate the repair and re-
2 integrate the new underlying WRB building paper and EPS Foam with the existing building
3 paper and EPS Foam beneath adjacent stucco areas. *Id.* at ¶ EE.

4 The amount of stucco required to be removed and replaced due to the WRB and EPS
5 Foam deficiencies at the areas over OSB sheathing (marked in red shading on Exhibit 2B),
6 together with the extensive amount of additional stucco removal and replacement required
7 in areas outside the OSB sheathing areas *because of other defects* (highlighted in pink on
8 Exhibit 2B) would leave only small, discrete areas of original stucco remaining in place. *Id.*
9 at ¶ FF.

10 Mr. Gustafson opined that in his professional experience, it would not be practical,
11 reasonable, or efficient to leave only these patches of stucco in place while implementing
12 the prescribed repairs. *Id.* at ¶ GG. From a constructability perspective, patching in the
13 numerous pre-existing stucco areas with the areas needing stucco repairs (marked in
14 shading and highlighting on Exhibit 2B) would be labor intensive, time consuming,
15 expensive, and less efficient than simply removing all of the stucco in one effort, and
16 making all of the stucco repairs together. *Id.* at ¶ HH.

17 Mr. Gustafson also opined that in his professional experience, he does “not believe
18 that any experienced and reasonably prudent contractor would be willing to warrant the
19 stucco repairs in the absence of completely removing and replacing the stucco system, given
20 the volume of areas needing repairs and the amount of patching and integrating into the
21 existing systems that a patchwork approach would require. *Id.* at ¶ II.

22 It is undisputed that the same subcontractor, Third-Party Defendant Desert Vista,
23 Inc., (“Desert Vista”) performed all of the Project’s original stucco construction, including
24 the WRB and EPS Foam installation. *Id.* at ¶ JJ.

25
26 **III. LEGAL STANDARD**

27 The party moving for summary judgment bears the “burden of persuasion.” Ariz. R.
28

1 Civ. P. 56(c); *Wells Fargo Bank, N.A. v. Allen*, 292 P.3d 195, 199 (Ariz. App. 2012) (citing
2 *Nat'l Bank of Ariz. v. Thruston*, 180 P.3d 977, 980 (Ariz. App. 2008). “The moving party’s
3 burden is a ‘heavy’ one” and “[t]his burden of persuasion never shifts to the non-moving
4 party.” *Id.* (internal citations omitted). In ruling on a motion for summary judgment, the
5 question for the court is not whether the responding party succeeded in presenting genuine
6 disputes of material fact, rather it is whether the moving party “presented sufficient
7 undisputed admissible evidence to establish its entitlement to judgment.” *Id.*

8 The party seeking summary judgment has the “burden of showing that no genuine
9 issue of material fact exists.” *Schwab v. Ames Constr.*, 207 Ariz. 56, 59-60 ¶ 15, 83 P.3d 56
10 (App. 2004) (citing *Chanay v. Chittenden*, 563 P.2d 287, 293 (1977)). Only when the
11 moving party makes a prima facie showing that no genuine issue of material fact exists does
12 the burden shift to the party opposing summary judgment “to produce sufficient competent
13 evidence to show that there is an issue.” *GM Dev. Corp. v. Community Am. Mortgage Corp.*,
14 795 P.2d 827, 831 (Ariz. App. 1990). “A party asserting a fact has the burden of proving
15 that fact.” *Id.* (citing *Yeazell v. Copins*, 402 P.2d 541, 546 (Ariz. 1965); *Prairie St. Bank v.*
16 *Internal Revenue Serv.*, 745 P.2d 966, 968 n.1A (Ariz. App. 1987).

17 A motion for summary judgment must be denied unless no genuine disputes of
18 material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R.
19 Civ. P. 56. In considering a motion for summary judgment, the facts and their reasonable
20 inferences must be viewed in the light most favorable to the non-moving party. *Doe v. Roe*,
21 955 P.2d 951, 962 (Ariz. 1998).

22 **IV. ARGUMENT**

23 **A. The Association’s experts’ well-credentialed opinions are based on actual** 24 **visual and intrusive examinations and accepted engineering principles,** 25 **and, thus, are plainly proper.**

26 Defendants incorrectly claim that the Association improperly seeks damages for
27 defect conditions “which were not observed or documented but instead based on
28 projection.” *Motion* at 2. However, as shown in Plaintiff’s SOF, the Association’s experts
have not “extrapolated” the existence of defects in one location based on known defects in

1 another location. Rather, the Association’s experts have properly made reasonable findings
2 and drawn appropriate inferences from those findings in formulating their opinions.

3 Defendants do not contend that the Association’s experts are not qualified to render
4 their opinions. The Arizona Rules of Evidence expressly permit experts to offer opinions
5 based on the evidence:

6 An expert may base an opinion on facts or data in the case that the expert has
7 been made aware of or personally observed. If experts in the particular field
8 would reasonably rely on those kinds of facts or data in forming an opinion
9 on the subject, they need not be admissible for the opinion to be admitted.

10 Ariz. R. Evid. 703. Such opinions *include inferences*. *Id.* at Comment to 2012 Amendment
11 (“All references to an ‘inference’ have been deleted on the grounds that the deletion made
12 the rule flow better and easier to read, and because any ‘inference’ is covered by the broader
13 term ‘opinion.’ Courts have not made substantive decisions on the basis of any distinction
14 between an opinion and an inference. No change in current practice is intended.”).

15 Ariz. R. Evid. 703 allows a testifying expert to reach and express an opinion in the
16 courtroom in the same way he or she would in the laboratory or other workplace. *State v.*
17 *Rogovich*, 932 P.2d 794 (Ariz. 1997). Arizona’s rules do not require proof that an expert’s
18 theory is indisputably correct or scientifically certain. *State ex. Rel. Montgomery v. Miller*,
19 321 P.3d 454, 463 (Ariz. App. 2014) (“While the expert’s methodology must be based on
20 more than speculation, its reliability need not be established to a degree of scientific
21 certainty.”).

22 Further, Arizona explicitly permits logical inferences, and not just by trained experts,
23 but by ordinary jurors:

24 Circumstantial evidence is the proof of a fact **from which another fact may**
25 **be inferred**. You must determine the weight to be given to all the evidence,
26 whether that evidence is direct or circumstantial.

27 Ariz. Jury Inst. Civ. 7th Preliminary 3. The law makes no distinction between the effect of
28 direct evidence and circumstantial evidence. *Id.* Thus, Arizona law does not prefer direct
evidence over circumstantial evidence, or over evidence based on logical inferences.

Here, the Association’s experts’ opinions are based both on direct evidence and

1 permissible inferences. The Association’s experts rely on over 165 hours of visual
2 examinations, intrusive examinations, and analysis, and their extensive experience, in
3 forming their opinions. Plaintiff’s SOF ¶¶ C, T, W, Z, GG, II. SBSA made intrusive
4 examinations at approximately 26 locations where stucco was installed over OSB sheathing
5 or solid wood framing (or where OSB sheathing should have been installed as part of the
6 LFRS but was missing), and in 100% of these locations found defects that require removal
7 and replacement of stucco and the layers beneath. *Id.* at ¶¶ N-O.

8 Moreover, at 100% of the 26 intrusive examination locations, SBSA found that the
9 EPS Foam lacked the requisite grooved profile. *Id.* at ¶ P. Moreover, in 100% of the many
10 locations where SBSA visually examined the stucco assemblies without intrusive
11 examinations, SBSA found defects requiring removal and replacement of the stucco to
12 repair. *Id.* at ¶ Q. From all of this direct evidence of improperly lapped and installed systems
13 in various areas across the Project, SBSA properly inferred that the stucco systems, which
14 require careful attention to detail to properly construct and lap, are consistently defective
15 (in other words, the stucco subcontractor’s work is consistently inconsistent). *Id.* at ¶¶ T-U.
16 From their extensive investigations, the Association’s experts appropriately determined,
17 based on their professional judgment, experience, and expertise, the widespread nature of
18 the Project’s many defects and resulting property damage, as well as the prescribed repairs.

19 Defendants cannot reasonably dispute that the Association’s experts’ opinions would
20 “help the trier of fact the understand the evidence or to determine a fact in issue” *See*
21 *Ariz. R. Evid. 702* (expert testimony proper if it helps the jury to understand the evidence,
22 is based on sufficient facts, and is the product of reliable methods applied to the facts of the
23 case). Further, the Association’s experts’ opinions are properly based on “facts or data . . .
24 that the expert has been made aware or of personally observed” of a type that “experts in
25 the particular field would reasonably rely on.” *Ariz. R. Evid. 703*. Because *Ariz. R. Evid.*
26 *402* mandates that all relevant evidence is admissible, including evidence that tends to
27 support a claimed inference, and *Ariz. R. Evid. 703* permits experts to draw inferences from
28 the direct and circumstantial evidence, the Association’s evidence regarding the Project’s

1 needed repairs is admissible. Thus, the *Motion* should be denied.

2 **B. The Association need not prove its damages with “certainty.”**

3 The Arizona Rules of Evidence and interpretive case law recognize the absurdity and
4 unfairness of requiring an injured plaintiff to prove every aspect of its damages with
5 “certainty.” “[C]ertainty in amount of damages is not essential to recovery when the *fact* of
6 damage is proven.” *Harris Cattle Co. v. Paradise Motors*, 104 Ariz. 66, 68 (Ariz. 1968).

7 A jury may properly draw all inferences from the evidence of damages, and consider,
8 in its best judgment, the strength and reasonableness of the plaintiff’s evidence. *Cf.* Ariz.
9 Jury Inst. Civ. 7th Preliminary 3. Furthermore, it is well-settled that a jury’s damages award
10 may consist of an estimate or fair approximation of the loss suffered. *Felder v.*
11 *Physiotherapy Assocs.*, 215 Ariz. 154, 162, ¶ 38, 158 P.3d 877 (App. 2007) (“Uncertainty
12 as to amount does not preclude recovery, so long as plaintiff’s evidence provides a basis for
13 “an approximately accurate estimate.”). Therefore, the evidence need only provide a
14 reasonable basis for computing damages.

15 **C. Defendants’ objections go to the weight, not the admissibility, of
16 Plaintiff’s experts’ opinions.**

17 To the extent Defendants disagree with Plaintiff’s experts’ opinions, they can
18 challenge them during cross examination. *Waterford v. Sanchez*, 2022 Ariz.App.Unpub.
19 LEXIS 237, ¶ 27, 2022 WL 806755 (Ariz. Mar. 17, 2022) (unpub.) (“Simply put, expert
20 opinion testimony is not inadmissible merely because the opposing party disagrees with
21 some of the experts’ underlying assumptions or the conclusions drawn. Rather, when expert
22 opinion testimony is predicated on facts and reliable principles, objections to the testimony
23 may be raised through robust cross-examination, allowing the jury, as fact-finder, ultimately
24 to decide whether the expert’s opinions are credible.”).

25 The common thread underlying the reasoning of “extrapolation” cases is simple
26 reason, practicality and economics. It would be absurd for a court to require construction
27 defect claimants’ experts to remove every inch of exterior cladding so they can confirm
28 every location where every construction defect exists. Such an argument is circular, i.e., the

1 Association should tear remove all of the stucco – and then by necessity replace it – to
2 determine if all of the stucco needs to be replaced, and makes no sense.

3 The Association has already spent almost \$200,000 on the extensive investigation
4 documentation of the Project’s defects to date. Plaintiff’s SOF ¶ C. It is not necessary to
5 effectively demolish the Project’s 4 building exteriors to render reasonable and properly
6 supported expert opinions regarding the defects and necessary repairs. The law is more
7 reasonable than Defendants suggest.

8 Defendants cite *Scottsdale Memorial Health Sys., Inc. v. Maricopa Cty.*, 224 Ariz
9 125, 141 (Ariz. App. 2010) for the proposition that Plaintiff’s expert opinions here require
10 certain statistical sampling methodologies not used by Plaintiff’s experts. *Motion* at 9.
11 However, *Scottsdale* is not a construction defect case. It is a mass tort case considering
12 “40,000-plus claims . . . with a management problem of staggering proportion,” *id.* at ¶ 43,
13 and it cites to “the use of sampling in mass tort cases” to support its ruling, *id.* at ¶ 51.

14 There, the trial court adopted a “statistical sampling methodology” to try selected
15 claims individually then extrapolate the results to apply to various other hospitals in a
16 hospital system. But this case is simply not a statistical sampling case and does not apply
17 here. In this case, in contrast, SBSA observed an incorrectly assembled and incorrectly
18 lapped stucco system, and, based on their construction experience and knowledge of the
19 relevant construction assemblies, including the knowledge that that the entire building
20 elevation stucco system must be carefully assembled together, considering the layout from
21 the bottom to top on each building to create a properly lapped system, and the fact that
22 100% of the locations they examined needed stucco repairs, inferred that one or more of
23 “these same defective conditions are, to a reasonable degree of engineering probability,
24 likely to exist throughout other areas of the Project not subject to intrusive examination.”
25 Plaintiff’s SOF ¶ U.

26 Court decisions considering “extrapolation” and analogous methodologies in
27 construction defect cases uniformly support the admission of the Association experts’
28 investigation and opinions here. *See, e.g., Sentinel Mgmt. Co. v. Aetna Cas & Sur. Co.*, 615

1 N.W.2d 819, 822-23 (Minn. 2000) (upholding opinion extrapolating that asbestos fibers
2 existed in all 450 units based on just four positive dust samples taken in five apartments,
3 where opinion was based on testing sample, property observation, and testimony regarding
4 materials used in project’s construction); *Consolidated Elec. Distributions, Inc. v. Kirkham,
5 Chaon & Kirkham, Inc.*, 18 Cal.App.3d 54 (Cal. App. 1971) (affirming use of
6 “extrapolation” to prove school construction claims); *Washington Courte Condo. Ass’n-
7 Four v. Washington-Golf Corp.*, 643 N.E.2d 199 (Ill. App. 1994) (affirming \$1,800,000
8 damages verdict based on an engineering expert’s extrapolation from limited data of the
9 need to extensively repair construction defects in areas never examined by the engineer or
10 his staff). *Cf. United States v. Fior D’Italia, Inc.*, 536 U.S. 238 (2002) (affirming I.R.S.’s
11 use of an aggregate estimate of total tip income to assess a restaurant for FICA taxes on
12 those tips); *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (2002) (rejecting oil company’s
13 argument in a price discrimination case that plaintiff retailers’ damages were based on
14 imprecise estimates and inferences and likely contained errors; recognizing that damage
15 issues in such cases “are rarely susceptible of the kind of concrete, detailed proof of injury
16 which is available in other contexts” and must rely upon “reasonable inference from the
17 proof”).

18 **V. CONCLUSION**

19 For all of the above-stated reasons, the *Motion* should be denied.
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1 Respectfully submitted,

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