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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; et al.

Defendants.

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

Third-Party Plaintiffs,

v.

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

Third-Party Defendants.

Case No. CV2020-008714

Assigned to Hon. Michael Kemp

PLAINTIFF'S RESPONSE TO DEFENDANT'S SEPARATE STATEMENT OF FACTS IN SUPPORT FOR SUMMARY JUDGMENT

AND

PLAINTIFF'S CONTROVERTING STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING CLAIMS OF UNSUPPORTED DEFECTS

Plaintiff, Gallery Community Association ("Plaintiff" or "Association"), by and through undersigned counsel, submits the following Response to *Defendant's Separate Statement of Facts in Support for [sic] Summary Judgment* ("Defendants' SOF") and *Plaintiff's Controverting Statement of Facts in Opposition to Defendants' Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects* ("Assoc. SOF").

I. Plaintiff's Response and opposition to Defendants' Separate Statement of Facts.

1. Plaintiff disclosed reports from its experts in construction liability, Ed Fronapfel of SBSA, and cost of repair expert, Stefen Gustafson of Nautilus. See Exhibit A, excerpts from SBSA report GALLERY-SBSA_004952 and Exhibit C, Nautilus report, GALLERY-NBC_005076-5092.

Undisputed.

2. SBSA stated in its report that they identified defects in the Lateral Force Resisting System ("LFRS") and Non-Compliant Weather Resistant Barrier (WRB) for Stucco System, along with recommendations for repair of those defects. See Exhibit A at Gallery-SBSA_004975-4980; 005150-5151 and Gallery-SBSA_005032-5041; 005153-5154.

Undisputed.

3. In support of SBSA's claim for defects in the LFRS, SBSA points to one area, located at Building D at Unit 3111, adjacent to a window, in which SBSA observed OSB sheathing missing and distressed metal strap. See *Id* at Gallery-SBSA_004979-4980.

Undisputed.

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

Undisputed.

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

It is undisputed that SBSA located only one area with missing OSB sheathing where it should have been as part of the Lateral Force Resisting System ("LFRS"), and with a disengaged and buckled metal strap during the intrusive examinations. SBSA

opined that other such locations may be discovered during the Project repairs, and to the extent that these defects do exist in other locations, they should be repaired using the 10% construction contingency built into the cost of repair estimate. Exh. 1B, SBSA CDC Report at 29, 199-200.

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

It is undisputed that the Observation Drawings, *together with the cross-referenced photographs* and the SBSA CDC Report, identify and summarize all of the locations where SBSA observed defects. Fronapfel Dep. 29:7-34:25, 45:17-47:10; Exh. 1, Felderman Aff. ¶¶ 13, 15.

7. Mr. Fronapfel stated in his report that "Similar non-compliant LFRS issues will more likely than not be discovered during stucco repairs recommended in Section C.1.b. and C.1.c. of this report" and recommended that "[r]epair contractor to include 10-percent of the stucco repair costs for use as a contingency for the repairs for the non-compliance LFRS." See *Id* at Gallery-SBSA_004980 and Gallery-SBSA_005150-5151.

Undisputed.

8. Based upon the SBSA report by Mr. Fronapfel, Mr. Gustafson, in his cost of repair report, included $200,000 for the LFRS. See Exhibit C at pp. GALLERY-NBC_005078-5079. See also Exhibit D, Deposition of S. Gustafson, at pp. 59:13-62:25.

Undisputed.

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

Undisputed.

10. Additionally, Mr. Fronapfel claims that Non-Compliant WRB was found after "[i]ntrusive examination revealed that a single layer of WRB was generally installed over open stud framing and solid sheathing. Occasionally, two layers of WRB of framing were identified to have been used." See Exhibit A at GALLERY-SBSA_005032-5041.

Undisputed.

11. In support of this claim, Mr. Fronapfel cites to various codes and standards that call for the use of Grade D kraft paper or equivalent water-resistive barriers, specifically stating that where the application is over "wood-based sheathing," two layers of Grade D kraft paper or equivalent are required (or one layer of EPS insulation board over one layer of grade D kraft paper or equivalent.) See *Id*. at GALLERY-SBSA_005033-5035, citing IBC 1405.10.1.1, ESR-3529 3.1.190, ICC R703.6.3, 2510.6, 1404.2, R703.2, and ESR2376.

Undisputed except for the alternative WRB characterized as "(or one layer of EPS insulation board over one layer of grade D kraft paper or equivalent.)" The SBSA CDC Report cites ESR-352, § 3.2.10, which requires two layers of Grade D kraft paper or one layer of EPS foam board "having horizontal tongue-and-groove edges" over one layer of 60 minute Grade D kraft building paper. Exh. 1B, SBSA CDC Report at 82.

12. Mr. Fronapfel's report included photographs which appear to depict three separate locations where he purports to have found areas with one layer of WRB over sheathing or framing. See *Id*. at GALLERY-SSBA_005036-5041.

Disputed. The body of the SBSA CDC Report contains example photos depicting one layer of WRB over sheathing or framing at four locations. Exh. 1B, SBSA CDC Report at 85-90 (Disc IT6, Photo. 314, Bldg. A; Disc IT5, Photo. 178, Bldg. B; Disc. IT5, Photo. 72, Bldg. B; Disc. IT7, Photo. 136, Bldg. D; Disc IT8, Photo. 114, Bldg. D).

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

Undisputed.

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

The accuracy of Mr. Harrington's analysis is disputed. *See* Exh. 1, Felderman Aff. ¶¶ 21-22. Mr. Harrington's analysis of the locations and types of defects SBSA identified is flawed because Mr. Harrington appears to have relied solely on the text of the notes on the Observation Drawings, and failed to conduct a careful review, which would have included examining the cross-referenced photographs in conjunction with the Observation Drawings. *Id.* By doing so, Mr. Harrington failed to understand all of the locations where SBSA performed intrusive examinations at locations with stucco over OSB sheathing or solid wood framing (or where required OSB sheathing is missing), or all such locations where only a single layer of WRB was present. *Id.* The Observations Drawing and cross-referenced photographs identify 26 areas where SBSA observed one or two layers of WRB over sheathing. *Id.*; Exh. 1D, Observation Drawings (with Felderman highlights); Exh. 1E, cross-referenced photographs.

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

Disputed. See response to paragraph 14.

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

a. C1.11 Front Elevation "(1) Layer OSB Shingle lapped with Rainbuster Flashing / OSB Sheathing".

b. C1.16 Bldg D Rear Elevation "(1) Layer WRB above window / (2) Layer WRB at Jamb." See Exhibit E at pages GALLERY-

SBSA_004567 and GALLERY-SBSA_004572.

Disputed." The Observation Drawings and cross-referenced photographs identify 26 intrusive examinations at stucco assemblies over OBS sheathing or solid wood framing where SBSA observed and documented one layer of building paper in 20 locations and two layers of building paper in six locations." Exh. 1, Felderman Aff. ¶ 22; Exh. 1D, Observation Drawings (with Felderman highlights); Exh. 1E, cross-referenced photographs.

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

Disputed. See response to paragraph 16.

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

Disputed. See response to paragraph 16.

19. SBSA recommended "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..." See "Exhibit A" GALLERY-SBSA_005153-5154.

It is undisputed that paragraph 19 accurately quotes one sentence from SBSA's report. However, SBSA recommended removal and replacement of all of the Project's stucco "not because of one defect in isolation but because of the combined effect of all of the identified defects," Exh. 1, Felderman Aff. ¶ 25, described in more detail below in Plaintiff's Controverting Statement of Facts ("Plaintiff's SSOF").

20. Mr. Stefen Gustafson of Nautilus produced reports for cost of repair for the WRB conditions. See "Exhibit B" GALLERY-NBC_005076-5092 / Exhibit 59 to Deposition of S. Gustafson.

Undisputed.

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

Undisputed.

22. Mr. Fronapfel has opined that the EPS foam board installed as part of the stucco system contains defects. Exhibit A at GALLERY-SBSA_5042-9. He summarizes his findings as "Intrusive examination revealed 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." Id. Exhibit A at GALLERY-SBSA_5042.

It is undisputed that SBSA opined that the EPS Foam installation was defective and that the above-quoted sentence captures some of the defects in the EPS Foam installation. In addition, ESR-3529 required EPS Foam with tongues and grooves forming the horizontal joints as part of the building envelope, and SBSA's intrusive examinations found zero instances of tongue-and-grooved EPS Foam used. Exh. 1, Felderman Aff. ¶ 19; Exh. 1B, SBSA CDC Report at 91.

23. Mr. Fronapfel cites to standards which state that the EPS foam boards should be 1" when over open stud areas, ½" over solid surfaces, and that the EPS foam boards should generally include vertical grooves. Exhibit A at GALLERY-SBSA_5042-3.

Undisputed except that the standards require the grooves to be "a minimum 1/4-inch wide by 1/8-inch deep spaced a maximum of 12-inches to allow efficient drainage of moisture between the EPS foam boards and the WRB." Exh. 1B, SBSA CDC Report at 91.

24. Mr. Fronapfel opined that Non-complaint EPS board exists at locations where stucco is applied over solid substrates across the Gallery site" and refers to his Observation Drawings and Defect Matrix for locations and findings. Exhibit A at GALLERY-SBSA_5049.

Undisputed.

25. Mr. Fronapfel's report includes 8 example photographs which he describes as showing EPS board with "vertical grooves generally missing at the inner face." Exhibit A at GALLERY-SBSA_5043-9.

Disputed. The SBSA CDC Report contains 10 example photographs with notations

stating that vertical grooves were found to be missing in those locations. Exh. 1B, SBSA CDC Report at 94-95, 97-98.

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

As described above, SBSA disputes the accuracy of Mr. Harrington's analysis. Exh. 1, Felderman Aff. ¶¶ 21-22. SBSA did not find adequately sized EPS Foam grooves at any of the 26 intrusive examination locations over OBS sheathing or solid wood framing. *Id.* at ¶ 19.

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

Disputed. The Observation Drawings contain 42 references to measured EPS Foam thickness. Exh. 1D, Observation Drawings. Plaintiff does not dispute that 22 notes reference measurements of 1" EPS Foam.

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

Disputed. The notes on the Observation Drawings contain six references to 3/8" EPS Foam. The notes contain 12 references to EPS Foam less than one inch, including EPS Foam of less than 1/2 inch thickness in areas over OSB sheathing or solid wood framing, and EPS Foam of less than 1 inch thickness in areas over open framing. Exh. 1D, Observation Drawings (*see* notes at C1.04 – "3/8" insulation" over OSB; C1.06 – "1/2" EPS" over open framing; C1.07 – "7/8" EPS" at open framing; C1.08 – "3/8" insulation" over OSB (Exh. 1E at p. 2, cross-referenced photo 162D, disc IT5, confirms OSB); C1.08 – "3/8" insulation board" over OSB (Exh. 1E at p. 2, cross-referenced photo 177D, disc IT5, confirms OSB); C1.08 – "3/8" insulation

board" over open framing; C1.10 – "3/8" EPS" over OSB at water shutoff opening; C1.15 – "1/2" EPS on face" at open framing; C1.15 – "3/4" EPS at face" over open framing; C1.16 – "3/8" EPS" over OSB; C1.16 – "7/8" EPS" over open framing; C1.16 – "3/8" and 7/8" EPS").

29. SBSA stated that the repair to this EPS condition was also removal and replacement of the entire stucco system, and reinstallation of EPS board over solid substrates. ("Full removal and replacement of the stucco and the exterior insulation is required to address the non-compliant installation of the EPS foam board for the existing stucco system…" Exhibit A at GALLERY-SBSA_5154.

It is undisputed that paragraph 29 accurately quotes one sentence from SBSA's report. However, SBSA recommended removal and replacement of all of the Project's stucco "not because of one defect in isolation but because of the combined effect of all of the identified defects," Exh. 1, Felderman Aff. ¶ 25, described in more detail below in Plaintiff's SSOF.

II. Plaintiff's Controverting Statement of Facts in Opposition to Defendants' Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects.

A. Plaintiff hired forensic engineers Charles Taylor Engineering Technical Services, f/k/a SBSA, LLC a Charles Taylor Company, f/k/a SBSA, Inc. ("SBSA") as its engineering experts in this case. Exh. 1, Felderman Aff. ¶¶ 3-4.

B. SBSA performed a number of engineering visual examinations, intrusive examinations, and analyses in this case, and generated a number of reports, including its June 23, 2021, Construction and Design Compliance Report ("SBSA CDC Report"). *Id*. at 4; Exh. 1B, SBSA CDC Report excerpts.

C. As part of SBSA's work in this case, SBSA's team of forensic engineers spent approximately 136 hours on site investigating the Gallery community's (the "Project") condition and approximately 30 hours reviewing and analyzing the construction plans and related documentation regarding how the construction was performed. Exh. 1, Felderman Aff. ¶ 5. For all of its work on this case to date, SBSA has billed Plaintiff approximately

$ 197,000. *Id.* at ¶ 6.

D. As is relevant to the Project's proposed stucco repairs, SBSA's forensic investigation included, among other things, the following:

a. Visual examinations of various Project components on 9 separate days, and 5 days of intrusive examinations (where an exterior element, such as stucco, is removed so that otherwise hidden interior elements can be examined), including, without limitation:

i. visual examinations of all exterior elevations at all four Project buildings;

ii. intrusive examinations of the stucco systems at 100% of the buildings;

iii. approximately 44 intrusive openings into the buildings, of which approximately 26 openings were made into the stucco where OSB sheathing or solid wood framing was present or should have been present.

b. Photo-documentation, including thousands of photographs documenting the observed conditions, defects, and resulting damage to the Project's stucco systems and adjacent building components.

c. Preparation of 36 pages of Observation Drawings documenting the findings from the intrusive examinations, including cross-references to photographs documenting the observed distress and defects.

d. Examination of the Project's disclosed and discovered construction plans and specifications.

e. Review of Defendants' expert reports, including their own observations, measurements, analyses, and conclusions.

f. Review of the relevant documentation generated during construction regarding how the Project was constructed, what materials and construction techniques and practices were employed, and what problems were encountered.

g. Preparation of voluminous evaluative and repair reports correlating observed defects with their locations and needed repairs.

Id. at ¶ 7.

E. The following construction defects and deficiencies identified in the SBSA CDC Report require repairs which each separately require removal and replacement of some portion of the Project's stucco systems:

a. Non-compliant Lateral Force Resisting System (LFRS)

b. Missing Weep Mechanisms in Stucco

c. Non-Compliant WRB for Stucco System

d. Non-Compliant EPS Foam Board for Stucco System

e. Non-Compliant Slope of Horizontal Stucco Surfaces

f. Deficient Self-Adhered Membrane under Horizontal Stucco System

g. Missing Control/Movement Joints in Stucco

h. Missing Sheet Metal Flashing at Fenestrations

i. Non-Compliant Flashing to Stucco Interface

j. Non-Compliant Isolation Joints at Dissimilar Materials

Id. at ¶ 8; Exh. 2, Gustafson Aff. ¶ 8.

F. SBSA located each of the above-listed defects requiring stucco repairs at 100% of the four Project buildings. Exh. 1, Felderman Aff. ¶ 9; Exh. 1C, SBSA Defect Matrix (summarizing findings on a per-building basis).

G. In areas where the stucco assembly was placed over OSB sheathing or solid wood framing, including shear walls and deck beams, the Non-Compliant Weather Resistive Barrier ("WRB") for Stucco System defect consists of single-layer WRB building paper rather than the necessary two layers of building paper for drainage control. In addition to the lack of proper two layer asphaltic paper, the single layers were also mis-lapped. *Id.* at ¶ 10.

H. In areas where the stucco assembly was placed over OSB sheathing or solid

wood framing, the Non-Compliant EPS Foam Board ("EPS Foam") defect consists of inadequately sized or missing vertical grooves on the back of the EPS Foam. The grooves are required to allow water drainage due to the foam creating a capillary condition against the asphaltic paper. In addition to the inadequate or missing grooves, the ESR report installation requirements for this project required foam board with tongues and grooves that create the assembly's horizontal joints. The required minimum EPS Foam thickness was also not provided. *Id.* at ¶ 11.

I. The photographs contained within the body of the SBSA CDC Report were intended to show examples of the commonality of the Project's conditions, and were not intended to document every location where a defective condition exists. *Id.* at ¶ 12.

J. SBSA's Observation Drawings, which constitute an attachment to the CDC Report and were cross-referenced in the CDC Report, together with the photographs cross-referenced on the Observation Drawings, document the observed locations of distress, defects, and deficiencies. *Id.* at ¶ 13; Exh. 1D, Observations Drawing excerpts (with Felderman highlights).

K. The notes on the Observation Drawings do not contain an exhaustive list of all conditions observed at each location of the Project. In order to determine the conditions present at each location, the Observation Drawings with associated notes must be examined in conjunction with the cross-referenced photographs of each location. *Id.* at ¶ 15.

L. Mr. Felderman of SBSA reviewed the Observation Drawings with its associated notes and cross-referenced photographs. *Id.* at ¶ 16. He highlighted the portions of the Observation Drawing notes that specify intrusive examinations showing the presence of OSB sheathing, solid wood framing, or missing OSB sheathing where it should have been present for the LFRS. *Id.* In addition to the highlights Mr. Felderman made on the Observation Drawings, the third note down on the right side of page C1.15 documents the "missing OSB" at Unit 3111 discussed in SBSA's CDC Report. *See* Exh. 1D, Observation Drawings at C1.15; Exh. 1B, SBSA CDC Report at 24-29.

M. Where the notes on the Observation Drawings do not specify whether OSB

sheathing or solid wood framing was present at a particular intrusive examination cut, Mr. Felderman reviewed the cross-referenced photographs and highlighted the photograph numbers or photograph number ranges corresponding to the photographs which show the presence of OSB sheathing or solid wood framing behind the stucco. Exh. 1, Felderman Aff. ¶ 16; *see also* Exh. 1E, photographs documenting presence of OSB and solid wood framing. Each highlighted section of text or photograph numbers corresponds to one intrusive examination cut where SBSA found OSB sheathing or solid wood framing. *Id.*

N. SBSA made approximately 26 intrusive examination cuts over OSB sheathing or solid wood framing, or in an area where OSB sheathing was required but missing. Exh. 1, Felderman Aff. ¶ 17.

O. In 100% of these locations, SBSA observed one or more of the following: missing vertical grooves on the back of the EPS Foam, missing tongues and grooves in the EPS Foam for horizontal joints, inadequate EPS Foam thickness, single-layer WRB building paper, and/or mis-lapped WRB building paper. *Id.* at ¶ 18.

P. In all of its intrusive examinations of the Project, SBSA found zero locations with adequately profiled grooved EPS Foam and zero locations with tongues and grooves in the EPS Foam. *Id.* at ¶ 19.

Q. In addition, in 100% of the locations where SBSA visually examined the stucco assemblies without intrusive examinations, SBSA observed non-compliant slope at horizontal surfaces, missing weep mechanisms at horizontal terminations, missing control joints, missing sheet metal flashings at fenestrations, non-compliant flashing to stucco interface, and/or non-compliant isolation joints at dissimilar materials. *Id.* at ¶ 20.

R. Mr. Felderman reviewed *Defendant's Separate Statement of Facts in Support for [sic] Summary Judgment*. *Id.* at ¶ 21. He has opined that Mr. Harrington's analysis of the locations and types of defects SBSA identified is flawed because Mr. Harrington appears to have relied solely on the text of the notes on the Observation Drawings, and failed to conduct a careful review, which would have included examining the cross-referenced photographs in conjunction with the Observation Drawings. *Id.* Mr. Felderman

opined that by doing so, Mr. Harrington failed to understand all of the locations where SBSA performed intrusive examinations at locations with stucco over OSB sheathing or solid wood framing (or where required OSB sheathing is missing), or all such locations where only a single layer of WRB was present. *Id.* Thus, Mr. Felderman opined that "Mr. Harrington's non-rigorous review of the CDC Report, its attachments, and cross-referenced photographs and findings have lead him to an incorrect conclusion." *Id.*

S. For example, Mr. Harrington incorrectly concluded that the Observation Drawings reference nine instances of two layers of building paper over OSB sheathing and two instances of one layer of building paper over sheathing. *Id.* at ¶ 22. Instead, Mr. Felderman determined that the Observation Drawings and cross-referenced photographs when examined together identify 26 intrusive examinations at stucco assemblies over OBS sheathing or solid wood framing where SBSA observed and documented one layer of building paper in 20 locations and two layers of building paper in six locations. *Id*. And in those six locations with two layers of building paper, other defects and deficiencies were present, requiring removal and replacement of portions of the stucco assemblies to perform repairs. *Id.*

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

U. "This is true in part because the stucco assembly is constructed with rolls of asphalt paper, sheets of foam, and rolls of lathe, and correctly applying them requires consideration of the layout from bottom to top on each building elevation to create a properly lapped system. Based on finding an improperly lapped system in one or more areas, the means and methods of construction, the products used, and their assembled state

in other locations on the same building can be inferred." *Id.* at ¶ 24.

V. SBSA recommended removal and replacement of all of the Project's stucco not because of one defect in isolation but because the combined effect of all of the identified defects would result, at best, in a patchwork of small stucco locations where repairs are not required. *Id.* at ¶ 25.

W. Mr. Felderman further opined that based on his "experience and expertise, because of the significant quantity of stucco areas requiring removal and replacement, it would not be practical, reasonable, or efficient to attempt to remove and replace only the large areas of stucco where repairs must be performed." *Id.* at ¶ 25.

X. Mr. Felderman also confirmed that SBSA's above-described investigation, reports, and data comprise information of a type reasonably relied on by other forensic engineers in forming opinions like those SBSA has formed in this case relating to damages, defects, and deficiencies at the Project and the scope of reasonable and necessary repairs." *Id.* at ¶ 26.

Y. Plaintiff hired Nautilus Contractors, Inc. to perform destructive testing and reconstruction during the discovery phase of this case as directed by SBSA. Exh. 2, Gustafson Aff. ¶ 1. Plaintiff hired Nautilus Consultants ("Nautilus") to perform a cost of repair estimate for the scope of Project repairs specified by SBSA. *Id*.

Z. Stefan Gustafson of Nautilus has 38 years of experience in the construction industry. He attested that the defect repairs "require removal and replacement of specific portions of the stucco on every exterior wall plane on the Project in order to repair or integrate the underlying or adjacent conditions." *Id.* at ¶ 9.

AA. Mr. Gustafson used an elevation drawing of a typical Project building provided to him by SBSA, with locations where OSB sheathing is present beneath the stucco marked as red shading, to illustrate the large areas of stucco that the prescribed repairs would require him to remove. *Id.* at ¶ 7; Exh. 2B, Repair Drawing.

BB. He then highlighted in pink the additional areas of stucco, outside the OSB sheathing areas, that must be removed and replaced to repair or integrate the underlying or

adjacent conditions because of the following defects: non-compliant cross slope of sidewalks (requiring new stair landing heights), missing weep mechanisms in stucco, non-compliant slope of horizontal stucco surfaces, deficient self-adhered membrane under horizontal stucco system, missing control joints, missing sheet metal flashing at window heads, non-compliant flashing to stucco interface, and non-compliant isolation joints at dissimilar materials. Exh. 2, Gustafson Aff. ¶¶ 8-9.

CC. Neither Plaintiff nor its experts concede that the red shaded and pink highlighted areas marked on Exhibit 2B constitute all of the areas where SBSA identified defects beneath the stucco. For purposes of this analysis only, Mr. Gustafson has been asked to assume that "the *WRB and EPS Foam deficiencies* require removal and replacement of stucco only in locations where OSB sheathing, or other solid substrates, such as wood framing, are present beneath the stucco." Exh. 2, Gustafson Aff. ¶ 7 (emphasis added). These areas are represented by the red shading on Exhibit 2B. *Id.* The additional pink shading represents where stucco repairs are required because of *other defects*. *Id.* at ¶¶ 8-9.

DD. In each location where stucco must be removed and replaced in order to repair adjacent or underlying conditions, the removal results in the destruction of the underlying WRB and EPS Foam board, which must also be removed and replaced. *Id.* at ¶ 10.

EE. If the stucco were to be removed and replaced only in the locations marked with shading and highlighting on Exhibit 2B, a section of stucco approximately 12-18 inches wide around each repair must be removed and replaced in order to accommodate the repair and re-integrate the new underlying WRB building paper and EPS Foam with the existing building paper and EPS Foam beneath adjacent stucco areas. *Id.* at ¶ 11.

FF. The amount of stucco required to be removed and replaced due to the WRB and EPS Foam deficiencies at the areas over OSB sheathing (marked in red shading on Exhibit 2B), together with the extensive amount of additional stucco removal and replacement required in areas outside the OSB sheathing areas *because of other defects* (highlighted in pink on Exhibit 2B) would leave only small, discrete areas of original stucco remaining in place. *Id.* at ¶ 12.

GG. Mr. Gustafson opined that in his professional experience, it would not be practical, reasonable, or efficient to leave only these patches of stucco in place while implementing the prescribed repairs. *Id.* at ¶ 13. In addition to re-integrating the new WRB building paper and EPS Foam with the existing WRB and EPS Foam under adjacent stucco areas, the patchwork stucco repair approach would require the repair contractor to texture coat and paint the entire wall plane on each wall to match the existing stucco patches to the newly-replaced stucco. *Id.*

HH. From a constructability perspective, patching in the numerous pre-existing stucco areas with the areas needing stucco repairs (marked in shading and highlighting on Exhibit 2B) would be labor intensive, time consuming, expensive, and less efficient than simply removing all of the stucco in one effort, and making all of the stucco repairs together. *Id.* at ¶ 14.

II. Mr. Gustafson also opined that in his professional experience, he does "not believe that any experienced and reasonably prudent contractor would be willing to warrant the stucco repairs in the absence of completely removing and replacing the stucco system, given the volume of areas needing repairs and the amount of patching and integrating into the existing systems that a patchwork approach would require. *Id.* at ¶ 15.

JJ. It is undisputed that the same subcontractor, Third-Party Defendant Desert Vista, Inc., ("Desert Vista") performed all of the Project's original stucco construction, including the WRB and EPS Foam installation. Exh. 3, Desert Vista 30(b)(6) (Jones) Dep. 38:6-40:8, 69:21-73:4, 74:15-75:1 (discussing Desert Vista's scope of work).

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