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

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

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

17 v.

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

24 Defendants.

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

Case No. CV2020-008714

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

(Assigned to the Honorable Katherine
Cooper)

1 LLC, an Arizona limited liability company;

2 Third-Party Plaintiffs,

3 v.

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

20 Third-Party Defendants,

21 Defendants/Third Party Plaintiffs K. Hovnanian at Gallery, LLC and K. Hovnanian
22 Arizona Operations, LLC (“KHov”) hereby submits its Controverting Statement of Facts to Desert
23 Vista, Inc. and Renco, LLC’s Separate Statement of Facts in support of their Joint Motion for
24 Summary Judgment.

25 **CONTROVERTING STATEMENT OF FACTS**

26 1. The statement set forth in Paragraph 1 of Movants’ Separate Statement of Facts is
27 not contested.

28 2. Not contested.

1 The statement set forth in Paragraph 3 of Movants’ Separate Statement of Facts is
2 not contested. Renco however omits reference to its Work Agreement specific to the project.
3 Exhibit A hereto, RENCO 000041-47.

4 The statement set forth in Paragraph 4 of Movants’ Separate Statement of Facts is
5 not contested.

6 The statement set forth in Paragraph 5 of Movants’ Separate Statement of Facts is
7 not contested.

1 6. The statement set forth in Paragraph 6 of Movants’ Separate Statement of Facts is
2 not contested.

3 7. The statement set forth in Paragraph 7 of Movants’ Separate Statement of Facts is
4 not contested.

5 8. The statement set forth in Paragraph 8 of Movants’ Separate Statement of Facts is
6 not contested.

7 9. The statement set forth in Paragraph 9 of Movants’ Separate Statement of Facts is
8 not contested.

9 10. The statement set forth in Paragraph 10 of Movants’ Separate Statement of Facts is
10 not contested.

11 11. The statement set forth in Paragraph 11 of Movants’ Separate Statement of Facts is
12 not contested.

13 12. The statement set forth in Paragraph 12 of Movants’ Separate Statement of Facts is
14 not contested.

15 13. The statement set forth in Paragraph 13 of Movants’ Separate Statement of Facts is
16 not contested.

17 14. The statement set forth in Paragraph 14 of Movants’ Separate Statement of Facts is
18 not contested.

19 15. The statement set forth in Paragraph 15 of Movants’ Separate Statement of Facts is
20 not contested.

21 16. The statement set forth in Paragraph 16 of Movants’ Separate Statement of Facts is
22 not contested.

23 17. Contested. The report does address opinions regarding responsibility. “As of this
24 date, no party has allocated specific defects to Desert Vista. HCCI has responded to those items
25 which are typically attributed to the stucco contractor. Movants’ Exhibit 9 at p p. 4 / DV 001021.
26 Further, Desert Vista’s expert West Harrington of HCCI quotes the report of Plaintiff’s expert Ed
27 Fronapfel of SBSA regarding opinions regarding the standard of care for work performed on the
28 stucco system. These include, in pertinent part, the following:

1 “Where weep mechanisms in stucco are missing, the as-built condition falls short
2 of the prescriptive requirements of the relevant codes, design, and industry standards
3 and, therefore, the developer, contractor, and subcontractors who performed the
work fell below the standard of care.” As quoted in Movants’ Exhibit 9 at p. 9 / DV
001026

4 “Where non-compliant WRB for stucco system exists, the as-built condition falls
5 short of the prescriptive requirements of the relevant codes, design, and industry
standards and, therefore, the developer, contractor, and subcontractors who
6 performed the work fell below the standard of care.” As quoted in Movants’ Exhibit
9 at p. 16 / DV 001033.

7 “Where non-compliant EPS foam board exists, the as-built condition falls short of
8 the prescriptive requirements of the relevant codes, design, and industry standards
and, therefore, the developer, contractor, and subcontractors who performed the
9 work fell below the standard of care.” As quoted in Movants’ Exhibit 9 at p. 21 /
DV 001038.

10 “Where non-compliant slope of stucco at horizontal surfaces exists, the as-built
11 condition falls short of the prescriptive requirements of the relevant codes, design,
and industry standards and, therefore, the developer, contractor, and subcontractors
12 who performed the work fell below the standard of care.” As quoted in Movants’
Exhibit 9 at p. 25 / DV 001042.

13 “Where non-compliant control/ movement joints exist, the as-built condition falls
14 short of the prescriptive requirements of the relevant codes, design, and industry
standards and, therefore, the developer, contractor, and subcontractors who
15 performed the work fell below the standard of care.” As quoted in Movants’ Exhibit
9 at p. 33 / DV 001050.

16 “Where non-compliant [sheet metal flashing at window head] issue exists, the as-
17 built condition falls short of the prescriptive requirements of the relevant codes,
design, and industry standards and, therefore, the developer, contractor, and
18 subcontractors who performed the work fell below the standard of care.” As quoted
in Movants’ Exhibit 9 at p. 37 / DV 001054.

19 “Where non-compliant flashing to stucco interface exists, the as-built condition falls
20 short of the prescriptive requirements of the relevant codes, design, and industry
standards and, therefore, the developer, contractor, and subcontractors who
21 performed the work fell below the standard of care.” As quoted in Movants’ Exhibit
9 at p. 42 / DV 001059.

22 “Where non-compliant isolation joints at dissimilar materials exist, the as-built
23 condition falls short of the prescriptive requirements of the relevant codes, design,
and industry standards and, therefore, the developer, contractor, and subcontractors
24 who performed the work fell below the standard of care.” As quoted in Movants’
Exhibit 9 at p. 47 / DV 001064.

25 Counsel for movants has tried to suggest that Desert Vista’s expert did not present opinions
26 regarding cause of defects or the responsible party, but the report and the testimony clearly include
27 the expert’s opinions about the issues. Mr. Harrington makes repeated reference to Desert Vista’s
28

1 performance and its work in relation to applicable standards and whether Desert Vista’s work
2 requires repair:

3 “The manner in which Desert Vista terminated their plaster system around windows
4 is consistent with the predominant custom and practice in the Greater Phoenix
5 region. In fact, the windows are specifically manufactured to receive the stucco
6 system without additional weeping mechanisms. The as-built condition is consistent
7 with regional practices and is performing as intended. No modification to the
8 window assemblies associated with Desert Vista’s work is required.” As quoted in
9 Movants’ Exhibit 9 at P. 13 / DV 001030.

10 “The manner in which Desert Vista terminated their plaster system at window heads
11 is consistent with the predominant custom and practice in the Greater Phoenix
12 region.” As quoted in Movants’ Exhibit 9 at P. 31 / DV 001058.

13 “The as-built condition is consistent with regional practices and is performing as
14 intended. No modification to the window assemblies associated with Desert Vista’s
15 work is required.” *Id.*

16 “This condition [non-compliant flashing to stucco interface] does not relate in any
17 part to the work of Desert Vista. No repairs associated with Desert Vista are
18 required.” As quoted in Movants’ Exhibit 9 at P. 42 / DV 001062.

19 “The manner in which Desert Vista terminated their plaster system around windows
20 and other penetrations is consistent with the predominant custom and practice in the
21 Greater Phoenix region. In fact, the windows are specifically manufactured such
22 that they do not require that the stucco system terminate into an isolation joint. The
23 as-built condition is consistent with regional practices and is performing as
24 intended. No modification to the window assemblies, or other penetrations,
25 associated with Desert Vista’s work is required.” As quoted in Movants’ Exhibit 9
26 at P. 51 / DV 001068.

27 18. Not disputed that Renco retained as its expert Chad Polivka of MC Consultants.
28 However, Mr. Polivka did provide opinions regarding causation of defects and parties’
responsibility. He opined in his report that certain of Plaintiff’s defect claims did not arise from
his client Renco’s scope of work. Movants’ Exhibit 9, MC Consultants report, at pp. 6, 10,
15/RENCO 252-4.) He described observation of site inspections and testing of roofs and opined
that the testing did not provide proof of a failure of the roof. (*Id.*, pp. 13-14/RENCO 258-9). He
opined that “No significant roof repairs relevant to client’s scope of work are warranted and the
roofs are generally performing as intended,” and recommended “tune-up” roof repairs. (p.
14/RENCO 259).

Mr. Polivka opined in his report on Plaintiff’s Issue B.2.b Non-Compliant Flashings to
Stucco Interface, Polivka evaluated the plans and proper methods of construction, and opined that

1 “The responsibility for this allegation includes the general contractor, framer, stucco subcontractor and
2 our client.” (Movants’ Exhibit 9, MC Consultants report, at pp. 7-9/RENCO 252-4, quotation at p.
3 9/RENCIO 254.)

4 19. This paragraph and paragraph 20 concern notice and production of supplemental
5 expert opinions. The correspondence on February 18, 2022 makes reference to disclosure of
6 supplemental expert reports and opinions from Burt Howe & Associates. However, Movant’s
7 statement here suggests, wrongly, that this was the date “counsel indicated” they would disclose
8 additional opinions. It has already been shown on the record that movants were informed about
9 Defendants’ intent to provide supplemental expert opinions in November and December 2021,
10 including through discovery responses dated November 2021, through an expert conference
11 December 9, 2021, and through copies of the allocation report produced to Desert Vista and Renco
12 with settlement correspondence on December 17, 2021. See Exhibits A, B, C, and D to JOINT
13 NOTICE OF FILING SUPPLEMENTAL DOCUMENTATION PURSUANT TO THE
14 COURT’S JUNE 10, 2022 ORDER. Further, Desert Vista’s expert has confirmed in his testimony
15 that he received a copy of the Subcontractor Allocation Summary on December 10, 2021:

16 Q. Okay. And you've got a column for dates received, or "Received Date," in
17 your case document index?

18 A. Correct.

19 Q. Okay. Did you generate this index?

20 A. No. It's just maintained by our project coordinators.

21 Q. Okay. This document contains a reference to "Plaintiff demand to Desert
22 Vista dated 12/10/21 and Subcontractor Allocation Summary," Bates number 5,
23 receive date 12/10/21. Do you see that?

24 A. I do.

25 Q. Is that a document that you recall receiving?

26 A. I mean, I don't specifically recall receiving it, but I mean, it's -- I reviewed
27 everything that's in this matrix.

28 Q. Okay. And your staff prepared this matrix?

A. Correct.

29 Exhibit B hereto Deposition of W. Harrington, pp. 12:22-13:13.

30 The Court excluded the expert disclosures that are the subject of this paragraph. The reason
31 for Movants to reference it here does not appear to have any legitimate purpose. Defendants must
32 respond however to the repeated false statements by Movants concerning lack of notice of the
33 intent to produce supplemental opinions and in particular allocations of responsibility keyed to

1 Plaintiff’s final costs. Movants argued in their motion that they had not received notice prior to
2 their own experts’ disclosures in January 2022. Movants argued at oral argument that they were
3 “blindsided” by the disclosure. Movants submitted supplemental filings stating that their experts
4 would incur extensive additional costs to address the supplemental opinions by Defendants’
5 expert. See NOTICE OF FILING LIST OF ANTICIPATED DISCOVERY AND
6 DECLARATIONS OF WEST HARRINGTON AND CHAD POLIVKA, filed July 1, 2022, and
7 Exhibits 1 and 2 thereto. This Court ruled on July 29, 2022 that the opinions were untimely and
8 would be excluded, and so Movant’s statement should be disregarded as irrelevant as well as
9 contrary to the factual record.

10 20. Defendants do not contest that supplemental expert opinions regarding allocation of
11 responsibility for repair costs were made on February 25, 2022. Again, the Court has ruled that
12 the opinions are excluded so the reference does not appear to be relevant to the motion or relief
13 requested.

14 21. Defendants do not contest that discussion of the parties’ dispute included
15 correspondence on this date. Again, the Court has ruled that the opinions are excluded so the
16 reference does not appear to be relevant to the motion or relief requested.

17 22. Defendants do not contest that the motion practice as described was filed. Again,
18 the Court has ruled that the opinions are excluded so the reference does not appear to be relevant
19 to the motion or relief requested.

20 23. Defendants do not contest that oral argument was held on the Motion. Again, the
21 Court has ruled that the opinions are excluded so the reference does not appear to be relevant to
22 the motion or relief requested.

23 24. Defendants do not contest that the Court issued an Order as described. Again, the
24 Court has ruled that the opinions are excluded so the reference does not appear to be relevant to
25 the motion or relief requested.

26 25. Movants have not supported their statement with evidence to support the facts
27 asserted pursuant to Ariz.R.Civ.P. 56. Further, Movants have provided incomplete details which
28 may be misleading on its own. Movants have not provided any detail regarding the dates of

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1 acceptance or the extent of coverage provided. Defendant does not contest that an insurer provided
2 additional insured coverage from a policy.

4 Dated: November 7, 2022

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

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

22 COPY of the foregoing emailed this
23 7th day of November, 2022 to:

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