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

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 GALLERY COMMUNITY ASSOCIATION, an
10 Arizona non-profit corporation,

11 Plaintiff,

12 v.

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

19 Defendants.

20 K. HOVNANIAN AT GALLERY, LLC, an
21 Arizona limited liability company; K.
HOVNANIAN ARIZONA OPERATIONS, LLC,
22 an Arizona limited liability company; K.
HOVNANIAN DEVELOPMENTS OF
23 ARIZONA, INC., an Arizona corporation; K.
HOVNANIAN COMPANIES OF ARIZONA,
24 LLC, an Arizona limited liability company;

25 Third-Party Plaintiffs,

26 v.

27 CHAS ROBERTS AIR CONDITIONING, INC.,
an Arizona corporation; DESERT VISTA, INC.,
an Arizona corporation; GOTHIC
28 LANDSCAPING, INC., a California corporation;

Case No. CV2020-008714

**DEFENDANTS' REPLY IN SUPPORT
OF THEIR MOTION FOR PARTIAL
SUMMARY JUDGMENT
REGARDING CLAIMS OF
UNSUPPORTED DEFECTS**

(Oral Argument Requested)

*(Assigned to the Honorable Katherine
Cooper)*

1 HOME BUILDERS SITE SERVICES OF
2 ARIZONA, LLC, an Arizona limited liability
3 company; LEBLANC BUILDING CO., INC., an
4 Arizona corporation; LIBERTY
5 CONSTRUCTORS, LLC, an Arizona limited
6 liability company, dba LIBERTY ARIZONA;
7 RENCO LLC, an Arizona limited liability
8 company, dba RENCO ROOFING; R/S SERVICE
& SUPPLY, INC., an Arizona corporation;
SARGON MASONRY CONSTRUCTION, LLC,
an Arizona limited liability company; and DOES
1-50.

Third-Party Defendants,

9 COME NOW Defendants K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona
10 Operations, LLC (“Hovnanian”), by and through undersigned counsel, and submit their Reply in
11 Support of their Motion for Partial Summary Judgment Regarding Claims Of Unsupported
12 Defects. Hovnanian showed that Plaintiff Gallery Community Association’s claims of widespread
13 defect lack support and that Partial Summary Judgment should be entered on the unsupported
14 claims for extensive repairs. Plaintiff’s Response fails to identify admissible evidence that raises
15 a material question of fact as to the claims of major repairs based on unsupported projections of
16 widespread conditions. Plaintiff argues that its expert’s speculative opinions about the existence
17 of project-wide conditions should be allowed for various reasons, but has failed to show the
18 opinions are based on accepted methodology and not just speculation. The Motion should be
19 granted for the reasons set forth in the Motion and in the following Memorandum of Points and
20 Authorities.

21 MEMORANDUM OF POINTS AND AUTHORITIES

22 **I. Introduction**

23 Plaintiff’s experts have provided opinions which include claims of widespread construction
24 defects and associated costs of repair. Certain conditions are claimed by Ed Fronapfel of SBSA
25 to exist in all potential locations and require widespread repair. Plaintiff has introduced cost of
26 repair evidence from Stephen Gustafson of Nautilus based on the scope of repair identified by Mr.
27 Fronapfel. In particular three conditions were identified by Plaintiff which were the subject of the

1 original Motion as they were, according to Plaintiff’s evidence, purportedly observed in limited
2 locations. According to Plaintiff’s experts, these three opinions require project-wide repair:

- 3 1. Lateral Force Resistive System (“LFRS”) – repairs throughout the property to this
4 condition at a cost of 10% of the repairs to stucco condition (although adjusted up
5 by the experts) based on observation at one location of claimed conditions with
6 missing shear wall and one bent strap (Motion pp. 3-4 and SSOF ¶¶ 3-9);
- 7 2. Weather Resistive Membrane (“WRB”) – repairs to remove and replace the entire
8 stucco system at all buildings based on documented observation of insufficient
9 layers of WRB over sheathing at two identified locations (Motion pp. 4-6 and SSOF
10 ¶¶ 10-21);
- 11 3. EPS foam board – the same proposed repairs to remove and replace the entire stucco
12 system at all buildings based on documented observation three locations with
13 improper or missing groove and documented observation of three locations with
14 insufficient thickness of the board (Motion pp. 6-7 and SSOF ¶¶ 19, 22-28);

15 The locations and counts of the conditions come from Plaintiff’s expert’s testimony. The
16 expert did not itemize where he located items in his report or other documents produced. Mr.
17 Fronapfel agreed that the LFRS conditions he describes were only seen and located at one
18 location, and he assumes other locations will exist. Plaintiffs did not dispute this (See SOF ¶¶ 3-
19 5 and Plaintiff’s response.) Mr. Fronapfel described a process where readers could identify the
20 number of locations where he identified a condition he considers defective by review of the notes
21 on his Observation Drawings. (SOF ¶ 6.) Following the steps described by Mr. Fronapfel shows
22 that limited instances exist where Mr. Fronapfel’s employees observed or documented locations
23 where the WRB did not contain the number of layers required or where the EPS foam board was
24 documented to lack grooves or have insufficient thickness (SOF ¶ 26-28.)

25 Plaintiff argues in the response that there are “factual errors” in the Motion. Plaintiff
26 disputes the counts of items from its notes but does not provide a specific count of its own or
27 significantly different figure. For example, in its SOF ¶ 12, Plaintiff appears to describe four total
28 locations where its experts identified locations with one layer of WRB over sheathing in sheathing
instead of two layers. Defendant had produced a highlighted copy of the Observation Drawings
which appeared to only show references to this condition in three locations. Ultimately it does not
change the fact that the condition was observed and documented at a handful of locations. The
evidence does not support projection throughout the community whether the condition exists at
two locations or four. However, Plaintiff’s response does not necessarily show that the instances

1 of the condition were counted incorrectly by Mr. West Harrington (expert for Desert Vista) when
2 he counted the references to a missing layer of WRB over sheathing. Plaintiff’s SOF ¶ 12 lists
3 five photographs which do appear to show four locations at Buildings A B, and D as Plaintiff
4 contends. However, these do not all show the condition at issue. Two of the photographs are
5 described by SBSA as showing a condition where one layer or building paper is present over
6 sheathing. Two photographs purport to show areas where one layer of building paper was present
7 over framing. One photograph describes a location with one layer of building paper and does not
8 describe whether it is over sheathing or framing. In any event, Plaintiff has not either in its report
9 or now produced any clear or comprehensive list of the locations where it even observed the
10 conditions which it claims should be projected to exist project-wide.

11 **II. New Affidavits Should Be Disregarded for Various Reasons Including Contradicting**
12 **the Sworn Deposition Testimony of Plaintiff’s Disclosed Expert**

13 Plaintiff’s expert Ed Fronapfel of SBSA opined in his report that the Weather-Resistive
14 Barrier (WRB) defect claim required a project-wide replacement of the stucco and that the EPS
15 foam board issue also required a project-wide replacement of the stucco. He also opined that
16 defects in the Lateral Force Resistive System (LFRS) would require repairs throughout the
17 property for a cost of 10% of the stucco replacement cost. Now Plaintiff raises new opinions from
18 its cost of repair expert Stefen Gustafson and from SBSA employee Jeffrey Felderman, P.E., that
19 repairs to other stucco defect claims repair items could not be replaced by spot repairs but instead
20 require widespread repair.

21 Mr. Fronapfel testified in detail about the documentation of repairs in his disclosed report.
22 He testified that he did not provide a list or summary of the locations where he observed the defect.
23 He testified to the process of review of the notes from his “Observation Drawings” that would
24 identify each of the locations where a condition was observed. (SOF ¶ 14.) Plaintiff did not dispute
25 this testimony or this fact in its Response to Defendants’ Statement of Facts. (See Plaintiff’s
26 Response to SOF ¶ 14.) Now Plaintiff submits an affidavit from Mr. Felderman stating that
27 following the steps described by Mr. Fronapfel would not identify all locations where a condition
28 was observed, and that additional review of SBSA’s photographs would be needed to identify

1 areas where a defective condition existed (or where Plaintiff's expert would opine that one
2 existed).

3 Plaintiff produced an affidavit from Jeffrey Felderman, P.E., in support of its Response to
4 Hovnanian's motion. Mr. Felderman is an employee of expert firm SBSA, LLC, and performed
5 at least some of the work involved in generating the SBSA report attributed to and sealed by
6 Plaintiff's expert Ed Fronapfel. (See SBSA report, Plaintiff's Exhibit 1B, at pp. 1-2 / GALLERY-
7 SBSA_004592-3.) Plaintiff did not disclose Mr. Felderman as a potential witness or expert.
8 Plaintiff's disclosures include Mr. Fronapfel as the testifying expert of SBSA. The affidavit of
9 Mr. Felderman should not be considered to raise any question of fact as to whether defects exist,
10 especially when he presents affidavit testimony that contradicts the deposition testimony of
11 Plaintiff's disclosed expert, Mr. Fronapfel.

12 Mr. Fronapfel clearly testified to the following:

- 13 1. There was no summary or matrix which would show all locations where the claimed
14 WRB condition existed.
- 15 2. A reader could review his observation drawings and see a reference to each location
16 where SBSA's employees identified the claimed defect condition (SOF ¶ 6).

17 Mr. Felderman now says in his affidavit that it is not possible to identify all locations where
18 SBSA's employees identified a claimed defect condition. Per his affidavit he suggests it is
19 necessary to review all of SBSA's photographs to determine what locations SBSA purports to
20 have identified defective conditions:

21 "Felderman Affidavit, ¶ 15: The notes on the Observation Drawings do not contain
22 an exhaustive list of all conditions observed at each location. In order to determine
23 the conditions present at each location, the Observation Drawings with associated
24 notes must be examined in conjunction with the cross-referenced photographs of
25 each location."

26 Despite all of the new comments by Mr. Felderman, he still does not provide any list or
27 explanation of locations where any of these conditions were observed. Evidence has not been
28 submitted to raise a question of fact about the extent of documented conditions.

29 Plaintiff describes the length and extent of the investigation performed by employees of
30 SBSA. Plaintiff does not describe where its designated expert Mr. Ed Fronapfel of SBSA ever
31 identified the locations where he observed the conditions which are at issue in the report. His

1 report identifies a single location where LFRS issues were observed, which is not contested. His
2 report identifies a handful of locations where WRB and EPS foam board issues were observed.

3 Plaintiff describes the cost incurred spent by its experts in investigation of the property and
4 reporting on opinions. This does not speak to any standard. Given the costs at issue,
5 documentation and disclosure of the observed conditions would have been a relatively
6 insignificant cost.

7 What Plaintiff does instead is try to combine and muddle the lines between the separate
8 defect issues that the expert claims to exist at the property. Plaintiff argues that its experts observed
9 “one or more” of multiple conditions in the WRB or the EPS foam board in each of 26 intrusive
10 testing cut locations. (Response, p. 5.) Plaintiff argues that it observed other stucco defects at
11 “100% of the locations where SBSA visually examined the Project’s stucco assemblies without
12 intrusive examinations[.]” (Response, p. 6.)

13 Plaintiff’s arguments here combine observations of paper over sheathing with paper over
14 open stud framing. Plaintiff’s expert identified multiple applicable standards which require one
15 layer of paper at open stud framing and only require two layers when it is covering sheathing.
16 Plaintiff did not dispute this in its response to Hovnanian’s Statement of Facts. (SOF ¶ 11 and
17 Plaintiff’s Response. Plaintiff disputed only the language of the codes which noted that EPS board
18 could be a substitute for one layer. See Plaintiff’s Response to SOF ¶ 11.) Plaintiff’s expert claims
19 to have observed one layer of building paper over framing or over sheathing at 26 locations.
20 (Response to SOF ¶ 16.) Areas where one layer of paper was observed over framing are not
21 material to the claims, because the condition does not violate any standard Mr. Fronapfel has
22 identified. The issue as identified in the report and standards cited is that two layers are required
23 where sheathing is covered. This is undisputed. (Again, see Plaintiff’s Response to SOF ¶ 11.)

24 The Motion does not concern issues where Plaintiff purports to have observed and
25 documented the conditions that its experts claim to require repair. For those issues, the parties’
26 experts can each address their position on which if any of the observed conditions require repair.
27 The Motion concerns issues where Plaintiff speculates or projects the existence of conditions
28 which are not visible and which are not supported by admissible evidence.

1 Plaintiff has taken the position that performing repairs to the multiple different stucco
2 conditions will require total replacement of the stucco over a large area. (Response, pp. 7-8.) First
3 of all, this position is supported by an affidavit from Mr. Jeffrey Felderman of SBSA, not from
4 Plaintiff’s report, from expert deposition testimony, or even from the disclosed testifying witness.
5 (Response pp. 6-7 and Plaintiff’s SOF ¶¶ R, T, U, and W.) It does not constitute a timely or
6 admissible opinion. Further, it is not material to the request for relief in the Motion which is to
7 eliminate the claims of extensive unobserved defects in 1) the LFRS system, 2) the WRB, and 3)
8 the EPS Foam Board. The WRB and EPS foam board stucco conditions which are a subject of the
9 motion are claimed to each be independent reasons to replace the entire system. Plaintiff’s expert
10 opined in his report that “full removal and replacement of the stucco and the exterior insulation is
11 required to address the non-compliant installation of the WRB for the existing stucco system” and
12 “Full removal and replacement of the stucco is required to address the non-compliant installation
13 of the EPS foam board for the existing stucco system.” (SOF ¶¶ 19, 29.) Repairs for these
14 unobserved conditions is not supported and Defendants are entitled to the relief requested. If
15 Plaintiff has documented support for other repair claims, that is a separate issue which does not
16 prevent partial summary judgment on the claims at issue.

17 **III. Standards**

18 Plaintiff takes the position that its experts believe their investigation is sufficient to support
19 a claim that there are widespread unobserved defect conditions. This does not speak to any
20 recognized standard. Ariz.R.Evid. 703 requires that experts use accepted methodology. The
21 experts’ own assertion that they believe they can project the existence of unobserved defects does
22 not meet the standard.

23 Plaintiff’s experts seek to introduce opinion testimony that they are able to project the
24 existence of defects throughout the property based on their observation of limited conditions.
25 Plaintiff seeks to introduce this testimony through its identified experts as their opinions based on
26 their specialized knowledge and expertise. Plaintiff has not shown that the experts have
27 implemented accepted scientific methodology in making these projections. Instead Plaintiff has
28 produced new affidavit testimony that says its experts believe that widespread repairs are

1 necessary due to a confluence of issues. Specifically, Mr. Felderman testifies in his affidavit that
2 “Based on my experience and expertise in the examination of the built environment on hundreds
3 of projects, because SBSA found conditions requiring removal and replacement of portions of the
4 stucco at 100% of the areas where SBSA performed intrusive examinations over OBS sheathing
5 or solid wood framing at various locations over the expanse of four Project buildings, these same
6 defective conditions are, to a reasonable degree of engineering probability, likely to exist
7 throughout other areas of the Project not subject to intrusive examination.” Affidavit of
8 Felderman, ¶ 23. The statements and other potential evidence cited by Plaintiff cite to Mr.
9 Felderman’s “experience and expertise” but do not contain an explanation of how this is based on
10 application of accepted methodology. Neither the affiant nor the SBSA expert actually designated
11 by Plaintiff to testify, Ed Fronapfel, have demonstrated that Mr. Fronapfel’s proposed opinions
12 about projected unobserved defects are based on application of accepted methodology. Moreover,
13 Plaintiff seeks to avoid scrutiny of the individual claimed defects by suggesting that there are
14 multiple different defects that require widespread repairs even if any individual issue does not.
15 Plaintiff must prove the existence of defects requiring repair with admissible evidence, whether it
16 is a single defect claimed to exist in every possible location or some different set of defect at every
17 location. Plaintiff has not produced evidence that its experts used accepted methodology in
18 determining that the LFRS, WRB, or foam EPS board issues exist throughout the property.

19 Plaintiff argues that its experts are permitted to form opinions based on facts or data that
20 are not necessarily admissible pursuant to Ariz.R.Evid. 703. Rule 703 refers to facts or data that
21 are reasonably relied on by experts in the particular field. Here, the issue is that Plaintiff’s experts
22 seek to present opinion testimony regarding instances of defect conditions that are not supported
23 by facts or data.

24 Defendant does not take the position that every plaintiff must remove every component of
25 cladding in order to establish its damages in a construction defect claim. Defendant’s position is
26 that there must be admissible evidence to support the claims and pass the standards of Arizona
27 law and Rules including Ariz.R.Evid. 703. If Plaintiff had provided evidence purporting to show
28 that its experts’ testing was performed based on a statistical survey, then Defendants could have

1 the opportunity to evaluate and rebut with their own expert testimony regarding the proper
2 application and interpretation of the accepted methodologies. Here, Plaintiff seeks to introduce
3 evidence of widespread unobserved conditions by experts who have not identified any accepted
4 methodology used. If these claims or evidence are presented, this will suggest to the jury that
5 some scientific basis does exist, despite the lack of one and without Defendants' ability to rebut.
6 Here, there is no statistical methodology to dispute and instead just proposed testimony regarding
7 that widespread unobserved conditions exist.

8 **IV. Conclusion**

9 Whether Plaintiff has evidence of a condition in four locations of five locations is not
10 material to the question of whether there is evidence sufficient to allow opinion testimony
11 regarding unobserved conditions throughout the property.

12 Plaintiff cannot raise questions of fact by new affidavits that contradict the specific
13 testimony at deposition by its expert. When asked at deposition, the expert testified all locations
14 of documented observed conditions could be discerned from the notes. Now Plaintiff takes the
15 position that this cannot be done. Plaintiff's expert's associate provides new affidavit testimony
16 which states that a reader cannot determine where SBSA purports to have observed defective
17 conditions but instead must review every one of its photos to do so.

18 Plaintiff has not provided any evidence that its expert's opinions of projected or
19 extrapolated defects are based on application of scientific statistical theory. Plaintiff does not
20 claim to have done so. Plaintiff has not identified any accepted methodology to support its
21 projections. Instead Plaintiff has argued that its experts are capable of determining that conditions
22 exist in 100% of all potential locations based on their limited investigation.

23 Dated: December 5, 2022

LORBER, GREENFIELD & POLITO, LLP

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