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5 *Attorney for Third-Party Defendants Renco, LLC dba Renco Roofing and Desert Vista, Inc.*

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF MARICOPA**

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

10 Plaintiff;

11 v.

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

20 Defendants.

21  
22 KHOVNIANIAN AT GALLERY, LLC,  
an Arizona limited liability company;  
23 KHOVNIANIAN ARIZONA  
OPERATIONS, LLC, an Arizona limited  
24 liability company; KHOVNIANIAN

NO. CV2020-008714

**THIRD-PARTY DEFENDANTS RENCO,  
LLC DBA RENCO ROOFING AND  
DESERT VISTA, INC.'S JOINT  
RESPONSE TO PLAINTIFF'S MOTIONS  
IN LIMINE #1 AND #2**

*(Assigned to the Honorable Katherine  
Cooper)*

1 DEVELOPMENTS OF ARIZONA, INC.,  
2 an Arizona corporation; KHOVNANIAN  
3 COMPANIES OF ARIZONA, LLC, an  
4 Arizona limited liability company;

5  
6 Third-Party Plaintiffs

7 v.

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

Third-Party Defendants.

Third-Party Defendants, Desert Vista, Inc. and Renco, LLC dba Renco Roofing (“Third-Party Defendants”), by and through counsel, hereby submit their Response to Plaintiff’s Motions *in Limine* #1 and #2 dated January 19, 2023, and January 20, 2023, respectively.

Third-Party Defendants hereby join Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery LLC and K. Hovnanian Arizona Operations, LLC’s Responses to Plaintiff’s Motions in *Limine* #1 and #2 both dated January 30, 2023. The facts, legal analysis and substance provided in Defendants’ Responses equally apply to Third-Party Defendants Renco, LLC dba Renco

1 Roofing and Desert Vista. Inc. Third-Party Defendants further respond to Plaintiff’s Motions in  
2 Limine #1 and #2 as follows:

3 **RESPONSE TO PLAINTIFF’S MOTION IN LIMINE # 1**

4 Plaintiff has argued to exclude evidence of Plaintiff’s “Acceptance” of common areas  
5 and moved to preclude any evidence, testimony, or argument regarding Plaintiff accepting the  
6 common areas at The Gallery planned community development on grounds that it is irrelevant,  
7 unfairly prejudicial, and confusing to the jury. However, Plaintiff is misinformed, and the  
8 evidence must be allowed.

9 Relevant evidence is evidence “having any tendency to make the existence of any fact  
10 that is of consequence to the determination of the action more probable or less probable than it  
11 would be without the evidence. Ariz. R. Evid., 401. The test for relevance is whether the offered  
12 evidence tends to make the existence of any fact in issue more or less probable. *State v.*  
13 *Fulminante*, 193 Ariz. 485, 975 P.2d 75 (1999).

14 Further, the Court may exclude relevant evidence if its probative value is substantially  
15 outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues,  
16 misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.  
17 Ariz. R. Evid., 403.

18 Here, the evidence Plaintiff has requested to be excluded is relevant and none of the  
19 dangers in Rule 403 exist such that the evidence should be excluded.

20 First, the evidence related to the common areas are relevant regardless of whether it was  
21 completed at the time of the conveyance as Plaintiff argues because the common areas are still  
22 part of the Project at The Gallery – and Plaintiff has alleged defects with the common areas. The  
23 execution of a quit claim deed does not negate Plaintiff’s claims. The common areas were still  
24 constructed by some of the named parties and thus, any evidence related to Plaintiff’s

1 acceptance, whether before or after the conveyance is certainly still relevant. The evidence of  
2 acceptance of the common areas has a tendency to make the existence of whether a defect was  
3 “accepted” or approved by Plaintiff for the common area more (or less) probable than without  
4 it because this acceptance of the common areas is of consequence to the claims brought by  
5 Plaintiff against Defendant and Third-Party Defendants, in that claims of breach of warranties  
6 hinge on whether Plaintiff accepted the common areas.

7         Some of the many defenses available to the Defendants and Third-Party Defendants are  
8 consent, completion, acceptance, and estoppel. The pleading of these defenses gives rise to the  
9 relevance of whether Plaintiff accepted and/or approved the Project, which included the  
10 common areas. Therefore, the evidence, testimony, and arguments related to Plaintiff’s  
11 acceptance of the common areas is certainly relevant, by the very definition under Rule 401, and  
12 thus admissible. The quit claim deed does not negate the relevancy regardless of the time of  
13 construction.

14         Next, Plaintiff argues that the admissibility of this evidence would mislead and confuse  
15 the jury such that Plaintiff would be unfairly prejudiced, however Plaintiff is incorrect. Given  
16 Plaintiff’s claims of construction defects and breach of warranties, allowing evidence of  
17 “acceptance” of the common areas would **not** be unfairly prejudicial to Plaintiff because that  
18 evidence is in aid of Defendants and Third-Party Defendants’ defenses, and it appears Plaintiff  
19 is only attempting to exclude this evidence to rob Defendants and Third-Party Defendants of  
20 their adequate defenses.

21         This evidence should be admissible, and the jury should have the opportunity to weigh  
22 the evidence in rendering a verdict – there is no confusion or misleading information because  
23 the jury will have instructions differentiating between “acceptance” of the common areas and  
24 the “acceptance” of defects. Just because Plaintiff accepted the common areas does not

1 automatically mean Plaintiff accepted the defects such that it would mislead the jury – as  
2 Plaintiff incorrectly argues. In actuality, the jury will be instructed as such and thus, the evidence  
3 should be admissible.

4 Further, Plaintiff speculates how the jury would infer or interpret certain evidence,  
5 however the exclusion of any evidence is not predicated on speculation of how the jury would  
6 interpret evidence, that is for the jury to do after each party advocates at trial. *See Plaintiff's*  
7 *Motion in Limine #1*, p. 5, ¶¶ 9 – 13. Excluding evidence based on hypotheticals would create a  
8 slippery slope where parties prematurely argue the weight of evidence on behalf of the jury prior  
9 to the jury even having an opportunity to review it and make their own interpretation, resulting  
10 in an increase in unnecessary motions *in limine* of evidence that should otherwise not be  
11 excluded – this is certainly against public policy.

12 Therefore, based on the reasons above, Plaintiff's Motion *in Limine #1* should be denied  
13 because “acceptance” of the common areas is relevant, is admissible, and its probative value is  
14 substantially outweighed by any potential unfair prejudice.

## 15 **RESPONSE TO PLAINTIFF'S MOTION IN LIMINE # 2**

16 In Plaintiff's Motion *in Limine #2*, Plaintiff argued to exclude evidence that the building  
17 department inspected and approved the design and construction of the Gallery Project and  
18 moved to preclude any evidence, testimony, or argument regarding the building department of  
19 the City of Scottsdale inspecting and/or approving the design and construction of The Gallery  
20 project. However, Plaintiff's Motion *in Limine #2* should be denied, and the evidence must be  
21 allowed.

22 Relevant evidence is evidence “having any tendency to make the existence of any fact  
23 that is of consequence to the determination of the action more probable or less probable than it  
24 would be without the evidence. Ariz. R. Evid., 401. The test for relevance is whether the offered

1 evidence tends to make the existence of any fact in issue more or less probable. *State v.*  
2 *Fulminante*, 193 Ariz. 485, 975 P.2d 75 (1999).

3 Further, the Court may exclude relevant evidence if its probative value is substantially  
4 outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues,  
5 misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.  
6 Ariz. R. Evid., 403.

7 Here, the evidence Plaintiff has requested to be excluded is relevant and none of the  
8 dangers in Rule 403 exist such that the evidence should be excluded.

9 The evidence related to the building department's inspection and approval of the design  
10 is certainly relevant because it may lead to a reasonable basis as to why certain work was  
11 performed. The jury may hear testimony about something that was discussed between the  
12 building inspector and another party such that certain work was allowed, which may have led to  
13 the alleged defects. Evidence related to the building department's inspection will not relate to  
14 what is defective or evidence related to a specified knowledge – that is what the experts are for,  
15 however, it is relevant if the building inspector approved certain actions to be taken by another  
16 party. The building department's inspection and approval of the design has a tendency to make  
17 the existence of certain actions being taken by certain parties more (or less) probable, which is  
18 of consequence to those actions being related to the alleged defects, thereby making it relevant.

19 Further, Plaintiff argues that the City of Scottsdale, HUD, nor any other governmental  
20 agency is a party to this action. *See Plaintiff's Motion in Limine #2*, p. 2, ¶¶ 17-19. However,  
21 that is not the threshold for relevant evidence or the exclusion of evidence. Hence the existence  
22 of a notice of non-parties at fault pursuant to ARCP, Rule 26(b)(5) and A.R.S. § 12-2506. This  
23 evidence is certainly relevant, not only to defend against Plaintiff's claims but also to support  
24 defenses that the alleged defects were not the result of Third-Party Defendants' workmanship.

1 Plaintiff's Motion *in Limine* #2 incorrectly argues the merits and weight of the evidence,  
2 rather than the inadmissibility of it – specifically, that it anticipates the Defendants and Third-  
3 Party Defendants will argue to the jury that various building departments may have inspected  
4 their work and “approved” it to avoid liability. *See Plaintiff's Motion in Limine* #2, p. 2 ¶¶ 19 –  
5 22. This is not for Plaintiff to argue because this notion will be distinguished by experts and jury  
6 instructions. Excluding this evidence would actually unfairly prejudice Defendants and Third-  
7 Party Defendants because it would rob them of the relevant evidence required to prove their  
8 defense that the alleged defects were a result of something other than Third-Party Defendants'  
9 workmanship. Plaintiff's arguments are a thinly veiled attempt at excluded evidence that is  
10 otherwise admissible.

11 The argument of construction defects and the argument of building inspectors inspecting  
12 the Project are mutually exclusive and just because evidence is introduced that the building  
13 department approved the design does not negate the existence of construction defects, should  
14 any exist. Plaintiff is attempting to argue that evidence that a building inspector inspecting the  
15 Project is irrelevant to the existence of construction defects and liability, however, Plaintiff is  
16 confusing the issue. *Id.*, at p. 3 ¶¶ 6 – 8. Not only is the evidence relevant to the existence of a  
17 construction defect, there are experts in this matter that can expand on this issue for the jury.  
18 The evidence is still relevant, it is up to Plaintiff to utilize its expert to differentiate that, not to  
19 speculate that it is inadmissible.

20 Further, regardless of whether this evidence is relevant to the existence of construction  
21 defects, the evidence is relevant to determine if the building inspector made statement's that  
22 would cause another party to take a certain action that affected the outcome and construction of  
23 the Project.

24 Lastly, the evidence's probative value substantially outweighs any unfair prejudice,

1 confusion of the issues, misleading of the jury, undue delay, wasting time, or needless  
2 presentation of cumulative evidence, because none exist. The evidence's probative value to  
3 support defenses and determine if the building inspector made statements approving certain  
4 work such that there is a reasonable basis as to why certain work was performed substantially  
5 outweighs Plaintiff's argument that it is unfairly prejudiced, misleading the jury, undue delay,  
6 wasting time, confusion of the issues, or needless presentation because it speculates that the jury  
7 will be confused when that is the purpose of jury instructions and the expert witnesses.

8 Therefore, for the reasons mentioned above, Plaintiff's Motion *in Limine* #2 should be  
9 denied because the building department's inspection and approval of the design and construction  
10 of The Gallery is relevant, is admissible, and its probative value is substantially outweighed by  
11 any potential unfair prejudice.

12  
13 **DATED** this 30<sup>th</sup> day of January, 2023.

14 **RAI DUER P.C.**

15 By: /s/ Mohamad Tokko

16 Rina Rai

17 Mohamad H. Tokko

18 ***Attorneys for Renco Roofing and Desert Vista,  
Inc.***

19  
20 **ORIGINAL** of the foregoing e-filed  
21 This 30<sup>th</sup> day of January, 2023, with:

22 Clerk of the Court  
23 **Maricopa County Superior Court**  
24 201 W. Jefferson  
Phoenix, Arizona 85003

1 **COPY** of the foregoing e-delivered  
This 30<sup>th</sup> day of January, 2023, to:

2  
3 The Honorable Katherine Cooper  
4 Maricopa County Superior Court  
5 **East Court Building – 711**  
101 W Jefferson  
Phoenix, AZ 85003

6 **COPIES** of the foregoing e-mailed  
This 31<sup>st</sup> day of January, 2023, to:

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By: /s/ Tracy L. O'Brien