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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 KHOVNANIAN AT GALLERY, LLC,  
an Arizona limited liability company;  
13 KHOVNANIAN ARIZONA  
OPERATIONS, LLC, an Arizona limited  
14 liability company; KHOVNANIAN  
DEVELOPMENTS OF ARIZONA, INC.,  
15 an Arizona corporation; KHOVNANIAN  
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 KHOVNANIAN AT GALLERY, LLC,  
an Arizona limited liability company;  
23 KHOVNANIAN ARIZONA  
OPERATIONS, LLC, an Arizona limited  
24 liability company; KHOVNANIAN

NO. CV2020-008714

**THIRD-PARTY DEFENDANTS RENCO,  
LLC DBA RENCO ROOFING AND  
DESERT VISTA, INC.'S JOINT  
APPLICATION FOR ATTORNEYS'  
FEES, COSTS, & EXPERT FEES**

*(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.

18 Pursuant to A.R.S. § 12-341.01, Third-Party Defendants Renco, LLC d/b/a Renco  
19 Roofing and Desert Vista, Inc., by and through undersigned counsel, hereby submit this Joint  
20 Application for Award of Attorneys' Fees. Pursuant to the Court Under Advisement Ruling  
21 dated February 8, 2023, granting Defendant KHov's Motion for Summary Judgment, Renco and  
22 Desert Vista respectfully request the Court award its reasonable attorneys' fees incurred in the  
23 defense of this matter.

24 Renco and Desert Vista submit that the foregoing amount of attorneys' fees is reasonable

1 and was necessarily incurred in litigation in this matter, as set forth in the Declaration of Rina  
2 Rai filed concurrently herewith.

3 **I. LEGAL ARGUMENT**

4 **A. RENCO AND DESERT VISTA ARE PREVAILING PARTIES & THUS**  
5 **ENTITLED TO ATTORNEYS' FEES & EXPERT FEES PURSUANT TO**  
6 **THE CONTRACT**

7 Renco and Desert Vista each entered into a Master Subcontract Agreement with KHov  
8 wherein the parties agreed that, "should either party ... institute suit ... for the resolution of a  
9 dispute ... or to collect damages for the breach of this Subcontract ... **the prevailing party shall**  
10 **be entitled to recover its attorneys' fees, consultants and expert fees, costs, charges and**  
11 **expenses expended or incurred therein."** (Emphasis added). *See Renco Master Subcontract*  
12 *Agreement attached as **Exhibit A** BATES KHOV00000893, p. 19, ¶34(c); See also Desert Vista*  
13 *Master Subcontract Agreement attached as **Exhibit B**, BATES KHOV00000431, p. 18, ¶34(c).*

14 Here, both Renco and Desert Vista are the prevailing parties in this matter as Plaintiff's  
15 Complaint was dismissed, which dismissed KHov's Third-Party Complaint against Renco and  
16 Desert Vista, when the Court granted KHov's Motion for Summary Judgment against Plaintiff.

17 The Courts have held a subcontractor (third-party defendant) is the prevailing party for  
18 purposes of attorneys' fees when the initial complaint is dismissed. *Fulton Homes Corp. v. BBP*  
19 *Concrete*, 214 Ariz. 566, 155 P.3d 1090 (Ct. App. 2007).

20 In *Fulton*, the Court held that, "the Concrete subcontractors who were defendants in third-  
21 party complaint filed by home builder were "successful parties" for purposes of attorney's fee  
22 claim after homeowners who filed initial action against builder abandoned claim upon which  
23 builder's third-party complaint was contingent; although actual claims asserted in third-party  
24 complaint were never litigated, subcontractors were forced to expend money..." *Id.*

Similarly, here the Court dismissed the initial complaint of Plaintiff's claims against

1 KHov in granting KHov's Motion for Summary Judgment for lack of standing, the same  
2 complaint upon which KHov's third-party complaint was contingent, and while the third-party  
3 complaint was never adjudicated, Renco and Desert Vista were forced to expend money in  
4 defending this litigation and completing discovery that could have been avoided since Plaintiff  
5 lacked standing to bring the initial action. As such, the Court should award Renco and Desert  
6 Vista its attorneys' fees, expert fees, and costs to defend this action as the prevailing party  
7 consistent with its previous opinion in *Fulton Homes Corp.* and as agreed upon in the parties'  
8 Master Subcontract Agreement.

9 In exercising its discretion to award attorneys' fees to the successful party in a contested  
10 action arising out of a contract, the trial court should consider the merits of the unsuccessful  
11 party's claim, whether the claim could have been avoided or settled, whether the successful  
12 party's efforts were completely superfluous in achieving the result, whether assessing fees  
13 against the unsuccessful party would cause an extreme hardship, whether the successful party  
14 did not prevail with respect to all of the relief sought, the novelty of the legal question presented,  
15 and whether an award to the prevailing party would discourage other parties with tenable claims  
16 from litigating legitimate contract issues for fear of incurring liability for substantial amounts of  
17 attorneys' fees. *Fulton Homes Corp.*, 214 Ariz. 566, 155 P.3d 1090.

18 Here, based on the Court granting KHov's Motion for Summary Judgment that Plaintiff  
19 lacked standing to bring the initial complaint, the merits of the unsuccessful party, Plaintiff, is  
20 literally none. Further, these claims could have been avoided had Plaintiff, knowing it lacked  
21 standing, never filed its initial complaint, or if KHov moved for dismissal sooner, prior to the  
22 completion of discovery. By defending this action and completing discovery, Renco and Desert  
23 Vista were unfairly prejudiced in incurring unnecessary litigation and expert fees and costs. In  
24 weighing the factors to consider by the Court, it is clear that Renco and Desert Vista should be

1 awarded their attorneys' fees and costs and expert fees pursuant to the Master Subcontract  
2 Agreement as the prevailing party.

3 Additionally, the parties attended multiple mediations and numerous settlement offers  
4 have been provided throughout the process of litigation, none of which was ever accepted. As a  
5 prevailing party with no obligation to pay KHov or Plaintiff, Renco and Desert Vista obtained  
6 a favorable outcome significantly better than any settlement offered to Plaintiff. As such, Renco  
7 and Desert Vista are entitled to their fees. The incurring of legal fees and costs could have been  
8 avoided because Plaintiff had multiple instances where it could have accepted these offers at  
9 various points in litigation to avoid unnecessary legal fees and costs. It failed to do so, and Renco  
10 and Desert Vista are entitled to their attorneys' fees, costs, and expert fees pursuant to the terms  
11 of the parties' Master Subcontract Agreement with KHov. *See Exhibit A and Exhibit B.*

12 It should be Plaintiff's obligation to pay for attorneys' fees, costs, and expert fees because  
13 it lacked standing to bring its complaint, yet still filed it. The only reason KHov filed a third-  
14 party complaint was because of Plaintiff's initial complaint, which lacked standing and merit.  
15 The Purchaser Dwelling Act (PDA) statutes requires the general contractor (KHov) to place all  
16 subcontractors on notice when an action is filed. A.R.S. § 12-1363. Here, KHov was required to  
17 put Renco and Desert Vista on notice of Plaintiff's complaint and file its third-party complaint,  
18 which resulted in unnecessary litigation. Plaintiff lacked standing to bring its complaint, which  
19 was the catalyst that resulted in unnecessary fees and costs. As such, Plaintiff should be  
20 responsible for payment of all fees and costs.

21 **B. RENCO AND DESERT VISTA'S REQUESTED FEES ARE REASONABLE**

22 Renco fees to present are \$115,209. Desert Vista's fees to present are \$86,715.50. The  
23 fees requested are reasonable and should be granted in full. Factors to consider in determine the  
24 amount of the fee award include: (1) the qualities of the advocate, including his or her ability,

1 training, education, experience, professional standing and skill; (2) the character of work to be  
2 done, including its difficulty, its intricacies, its importance, time and skill required, the  
3 responsibility imposed and the prominence and character of the parties where they affect the  
4 importance of the litigation; (3) the hourly rate charged; (4) the work actually performed by the  
5 lawyer, including the skill, time and attention given to the work; and (5) the result, which  
6 includes whether the attorney was successful and what benefits were derived. *Schweiger v.*  
7 *China Doll Restaurant*, 138 Ariz. 183, 187, 673 P.2d 927, 931 (App. 198). All of these factors  
8 support the fee award requested here.

9 Based upon the Court's Order, Renco and Desert Vista were the prevailing party  
10 regarding KHov's Motion for Summary Judgment. As the prevailing party, Renco and Desert  
11 Vista are entitled to and requested attorneys' fees it has incurred to date.

12 Rina Rai is the partner of Rai Duer, PC and has in excess of 25 years of experience in  
13 insurance defense construction defect civil litigation. Ms. Rai's time was billed at \$195.00 per  
14 hour, which is significantly less than someone of similar experience and is reasonable given her  
15 expertise and experience, along with the complexity of this coverage case.

16 **C. RENCO & DESERT VISTA ARE ENTITLED TO ATTORNEYS FEES**  
17 **PURSUANT TO STATUTE, ARS § 12-341.01, AS THIS MATTER ARISES**  
**OUT OF A CONTRACT**

18 Furthermore, and alternatively, Renco and Desert Vista are entitled to attorneys' fees  
19 pursuant to statute. A.R.S. § 12-341.01 allows for the recovery of fees for the prevailing party  
20 in a contract dispute arising out of a contract. It is in the Court's discretion to determine who is  
21 the successful prevailing party. *Fulton Homes Corp.*, 214 Ariz. 566, 569, 155 P.3d 1090, 1093.

22 It is undisputed that this matter arises out of a contract given that this is a PDA action  
23 wherein each party entered into a Master Subcontract Agreement. *See Exhibit A and Exhibit B.*  
24 As such, whether this matter arises out of a contract for purposes of awarding attorneys' fees

1 pursuant to A.R.S. § 12-341.01 is without question and thus, the only other factor to consider is  
2 whether Renco and Desert Vista are prevailing parties. As discussed above and below, Renco  
3 and Desert Vista are prevailing parties.

4       Among the circumstances which may be considered by the Court is exercising its  
5 discretion to award fees are the following: (1) the merits of the claim or defense presented by  
6 the unsuccessful party; (2) the litigation could have been avoided or settled and the successful  
7 party's efforts were completely superfluous in achieving the result (3) assessing fees against the  
8 unsuccessful party would cause an extreme hardship; (4) the successful party did not prevail  
9 with respect to all the relief sought. *Associated Indemnity Corporation v. Warner*, 143 Ariz. 585,  
10 589, 694 P.2d 119, 1203 (Ct. App. 1983), modified, 143 Ariz. 567, 694 P.2d 1181 (1985).

11       Renco and Desert Vista are entitled to their attorneys' fees in that the litigation associated  
12 with KHov's Third-Party Complaint against Subcontractors could have been avoided because  
13 Plaintiff Gallery lacked standing from the outset and the third-party complaint should not have  
14 been filed, it was only filed because Plaintiff filed the initial complaint and the PDA statutes  
15 require it.

16       Additionally, there has been no showing that Plaintiff Gallery, in any way, would suffer  
17 any financial distress in paying such fees. As mentioned, litigation could have been avoided or  
18 settled when multiple settlement offers were presented, and Plaintiff rejected each one.  
19 Moreover, Plaintiff lacked standing to bring its complaint. Further, Renco and Desert Vista were  
20 the successful parties and prevailed with respect to claims brought against KHov in that the  
21 third-party complaint is dismissed upon the dismissal of Plaintiff's initial complaint in the  
22 Court's Under Advisement Ruling. It is without a doubt that attorneys' fees are awarded to third-  
23 party defendants (subcontractors) in derivative claims as evidence by the Court holding in  
24 *Fulton Homes Corp.*, even if the third-party complaint was never adjudicated. 214 Ariz. 566,

1 569, 155 P.3d 1090, 1093.

2 It is worth noting that the PDA statute A.R.S. § 12-1364 allows for the award of attorneys’  
3 fees, costs, and expert fees. Under statute, the factors to consider are: (1) the repairs,  
4 replacements or offers made by the seller before the filing of the action; (2) the response to the  
5 seller’s repairs, replacements or offers made; (3) the relation between the fees incurred over the  
6 duration of the dwelling action and the value of the relief obtained with respect to contested  
7 issues; and (4) the amount of fees incurred in responding to any unsuccessful motions, claims  
8 and defenses during the duration of the dwelling action. A.R.S. § 12-1364(B).

9 Here, for the reasons mentioned above, and due to Plaintiff’s lack of standing to bring its  
10 claims, being the unsuccessful party, and the significant fees incurred by Renco and Desert Vista  
11 to defend against this meritless action, Renco and Desert Vista are entitled to their attorneys’  
12 fees pursuant to PDA statute, A.R.S. § 12-1364 as the prevailing parties.

13 **D. CONCLUSION**

14 Based upon the above, Renco and Desert Vista should be awarded their attorneys’ fees,  
15 costs, and expert fees as the prevailing parties in the defense of this meritless litigation, pursuant  
16 to the terms of the parties’ Master Subcontract Agreement, case law, and statute A.R.S. § 12-  
17 341.01 and PDA statute A.R.S. § 12-1364.

18 **DATED** this 24<sup>th</sup> day of February, 2023.

19 **RAI DUER P.C.**

20  
21 By: /s/ Rina Rai  
22 Rina Rai  
23 Mohamad H. Tokko  
24 ***Attorneys for Renco Roofing and Desert Vista,  
Inc.***

1 **ORIGINAL** of the foregoing e-filed  
This 24<sup>th</sup> day of February, 2023, with:

2  
3 Clerk of the Court  
4 **Maricopa County Superior Court**  
201 W. Jefferson  
5 Phoenix, Arizona 85003

6 **COPY** of the foregoing e-delivered  
This 24<sup>th</sup> day of February, 2023, to:

7 The Honorable Katherine Cooper  
8 Maricopa County Superior Court  
9 **East Court Building – 711**  
101 W Jefferson  
Phoenix, AZ 85003

11 **COPIES** of the foregoing e-mailed  
This 24<sup>th</sup> day of February, 2023, to:

12 *(See Attached Service List)*

13 By: /s/ Tracy L. O'Brien

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## Service List

### *Gallery Community Association v. K. Hovnanian at Gallery, LLC*

**CV2020-008714**

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