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SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOAN KIRSCH; individually and on
behalf of the class members at the
Anthem and; and RO E
HOMEOWNERS 1 through 9500;

Plaintiffs,

v.

DEL WEBB COVENTRY HOMES,
INC., an Arizona Corporation;
ANTHEM ARIZONA, LLC, an Arizona
limited liability company; PULTE
HOME CORPORATION, an Illinois
corporation; DEL WEBB'S COVENTRY
HOMES CONSTRUCTION CO., an
Arizona corporation, and DOES 1
through 100, inclusive,

Defendants.

CASE NO.: CV 2007-023536

The Honorable J. Richard Gama

(Electronic Filing Case)

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
DEL WEBB'S MOTION FOR SUMMARY ON 287 HOMES**

COMES NOW plaintiff Joan Kirsch, individually and on behalf of all similarly
situated persons, (hereinafter "Kirsch" or "Plaintiff") by and through Feinberg Grant
Mayfield Kaneda & Litt, LLP, her attorneys of record, in opposition to the motion for
summary judgment filed by Del Webb Coventry Homes, Inc.; Pulte Homes Corporation;
and Del Webb's Coventry Homes Construction Co. (hereinafter, collectively, "Del Webb")
as follows:

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1 **ISSUES PRESENTED**

2 Del Webb's concealment of its knowledge of thermalgalvanic corrosion and its
3 covert repairs of leaks at the Subject Property, estop it from asserting a statute of repose
4 defense.

5 **INTRODUCTION**

6 Before the Court is Del Webb's motion for summary judgment wherein it asserts
7 that 287 homes at Anthem were substantially completed prior to eight years before the
8 complaint in this action was filed and, therefore, are time barred by A.R.S. § 12-552.
9 What Del Webb does not reveal to the Court is the fact that even before a single shovel
10 was put to the ground at Anthem, Del Webb knew that the conditions at the project were
11 ripe for TGC of copper pipes placed in the same trench, that Del Webb actively concealed
12 this knowledge from all home buyers and caused the homeowners who suffered leaks in
13 their underslab copper pipes to refrain from telling their neighbors about the defective
14 condition.

15 **LEGAL STANDARDS**

16 The Court is well aware of the standards for granting summary judgment and
17 Plaintiff will not dwell on them at length. Summary judgment should not be granted
18 unless a review of the record satisfies the Court "that there is no genuine issue as to any
19 material fact." A.R.C.P. Rule 56(c); *Wells Fargo Bank v. Arizona Laborers, Teamsters*
20 *and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474 (2002). The burden
21 is on the moving party. *MacConnell v. Mitten*, 131 Ariz. 22 (1981).

22 **STATEMENT OF FACTS**

23 **BACKGROUND OF LITIGATION**

24 To date, 88 homes in the Anthem Arizona community have experienced failures in
25 their underslab unsleeved copper water pipes. This exact same problem occurred in
26 another Del Webb community in Sun City Summerlin, Las Vegas, Nevada. There are
27 approximately 7,779 homes in the Summerlin community; construction began in 1986.
28 Ultimately, 5,742 of the Summerlin homes would be constructed with unsleeved copper

1 water pipe that ran beneath the cement slab foundations of the homes. The hot and cold
2 water copper pipe were run side by side in a trench beneath the concrete slabs of each
3 home - - a construction practice identical to what would be used 9 years later in the
4 community of Anthem, thirty miles north of Phoenix, Arizona.

5 The Summerlin homeowners began reporting underslab pipe leaks to Del Webb in
6 February 1996. In most instances, the homeowner would notice an increase in water
7 usage and discover a warm spot in the floor of their residence. In May of 1996, Del Webb
8 hired M.J. Schiff and Associates Inc., corrosion engineers, to investigate the failure of the
9 copper water lines in Summerlin. Graham Bell, PhD, President of M.J. Schiff, was the
10 principal investigator. Dr. Bell's preliminary report and recommendations were published
11 June 25, 1996. His conclusion was that the cause of the leaks in underslab copper water
12 pipe in Sun City Summerlin was thermalgalvanic corrosion ("TGC"). Dr. Bell reported
13 as follows:

14 "If mitigation measures are not taken, leaks will continue to occur, probably
15 at an increasing rate. It is likely that there are homes which are leaking
16 which have yet to be reported. Eventually, the leaks will manifest
themselves either as by physical (warm spots in the floor) or economic
factors (increased energy cost)."

17 Dr. Bell's final report of "Cathodic Protection Feasibility Study for Domestic
18 Underslab Copper Tubing" for the Summerlin development was published October 21,
19 1996.

20 After Graham Bell confirmed that TGC was causing copper water pipe failures in
21 Sun City Summerlin, Dr. Bell was asked to investigate the house of Phillip Dion, the
22 Chief Executive Officer and Chairman of the Board for Del Webb in Phoenix, Arizona.
23 See Bell Report dated September 23, 1996.

24 A video conference to provide information concerning TGC and soil corrosivity
25 testing guidelines in September of 1996 was held for all Del Webb's Vice-President of
26 Construction and Vice-President of Land Development across the nation.

27 On November 1, 1996, Frank D. Pankratz, Senior Vice-President and General
28 Manager for Del Webb in Las Vegas, Nevada, wrote to all Sun City Summerlin residents.

1 In this letter, just days after Mr. Bell's final report concerning TGC was published, Mr.
2 Pankratz advised the Sun City Summerlin homeowners that 17 homes in Summerlin had
3 experienced TGC. On May 23, 1997, Mr. Pankratz again wrote the Sun City Summerlin
4 residents concerning TGC and the failure of 29 homes spread throughout the community.
5 Mr. Pankratz wrote the homeowners a third time on June 22, 2001. At that time, Mr.
6 Pankratz reported that TGC had occurred in less than 300 of the approximately 7,800
7 homes in Sun City Summerlin.

8 On July 17, 2001, a group of Sun City Summerlin residents filed a construction
9 defect class action lawsuit against Del Webb based upon the underslab copper water pipe
10 failures due to TGC in the community.

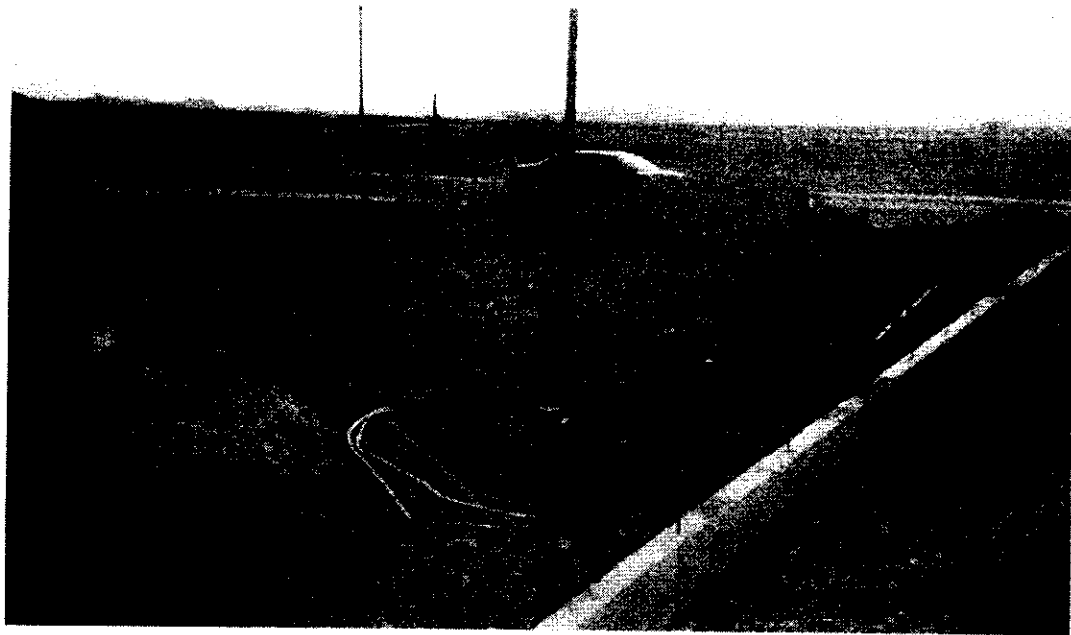
11 The Sun City Summerlin TGC class action was certified by the Clark County
12 District Court on January 15, 2002. On October 4, 2002, Chris Haynes, Division
13 President for Del Webb Communities, Inc. wrote all Sun City Summerlin homeowners
14 and encouraged them not to opt-out of the class action lawsuit.

15 On June 18, 2004, after nearly 3 years of discovery and negotiations, 3 days prior
16 to the commencement of trial, the parties reached a proposed settlement which was
17 preliminarily approved by the Clark county District Court Judge Nancy M. Saitta (now
18 a Justice on the Nevada Supreme Court) on June 21, 2004. The final class action
19 settlement in the Sun City Summerlin matter was approved on August 24, 2004.
20 Through August of 2004, 695 homes with unsleeved underslab copper water pipe had
21 failed due to TGC in Sun City Summerlin. The total settlement reached in the Silver case
22 was \$21,500,000.00; each class member received \$5,000.00 to re-plumb their underslab
23 copper pipe overhead.

24 ANTHEM ARIZONA

25 Anthem Arizona is a master planned community in Anthem, Arizona. There are
26 9,364 single family homes in the Anthem Community. Approximately 3,623 homes have
27 unsleeved copper water pipe running in a single trench beneath the concrete slabs of the
28 homes. Both the hot and cold water pipes are run in a trench beside one another,

1 identical to the construction practice employed in Sun City Summerlin, Las Vegas,
2 Nevada.



14 **Unsleeved Copper Pipes at 40701 N. Apollo Way, Anthem, AZ**

15 Homes with unsleeved copper pipe closed escrow between July 9, 1999 and
16 December 2003. In 2002 - 2003, a decision was made to stop using copper pipe in the
17 Anthem community and plumb Ipex pipe overhead. Before the decision was made to use
18 Ipex pipe, all of the homes in Anthem were built with underslab, unsleeved copper water
19 lines. Mr. Ray Noble was a Lead Superintendent, Project Manager, and Director of
20 Construction at Anthem from its inception until he left in 2003. While at Anthem, either
21 Riggs Plumbing or AMPAM Riggs Plumbing did all of the underslab copper water pipe
22 installation at Anthem. The hot and cold copper water pipe was run in a trench
23 unsleeved underslab.

24 Construction began in Anthem in 1998, two years after the first TGC pipe leaks in
25 unsleeved underslab copper pipe were found in Sun City Summerlin, Las Vegas, Nevada.
26 The first underslab copper water pipe leak attributed to TGC in Anthem was reported by
27 Del Webb between 1999 - 2001.

1 Matthew Spina was the General Manager of all special operations for Del
2 Webb/Pulte. Mr. Spina first heard of underslab unsleeved copper pipe leaks in 1999 or
3 2000. Mr. Spina participated in the first investigations of TGC pipe leaks. It is his
4 recollection that a sample of the pipe was sent to Brad Oberg, a consultant with IBACOS,
5 who determined that the cause of the leak was TGC. IBACOS is an acronym which
6 stands for Integrated Building and Construction Solutions. IBACOS is Pulte Homes'
7 consultant of choice across the country for issues where they need to get scientific
8 answers. IBACOS was asked to investigate TGC in Anthem, and published a report
9 October 26, 2006.

10 CONTRIBUTING FACTORS TO PIPE CORROSION

11 Several important facts were emphasized in the IBACOS Report:

12 "Corrosive Soil Soils tested in the area have shown moderate or low
13 corrosiveness potential. If soil testing reports could be found, the typical
14 comment is that the soil tested is moderate or low, but not free of corrosion
15 potential. . ."

16 "Conductive Soil Soils testing in the area has shown moderate to high
17 conductivity potential. It does not appear that anyone considered these
18 measurements important. Even without corrosiveness potential, highly
19 conductive soils will contribute to a galvanic group. When conductive soils
20 combine with even low levels of corrosiveness, a large potential for corrosion
21 is set up. . ."

22 "Water Temperature TGC is driven by temperature differences between the
23 hot anode and the cold cathode. Temperature difference creates an
24 electrical potential, particularly when water is running. This potential
25 combined with the electrical conductivity of the soils can result in copper
26 ions leaving the hot water pipe onto the cold water pipe."

27 "Hot Water Circulating Systems . . . The combination of moving water and
28 temperature will exasperate TGC."

"Proximity of Hot and Cold Water Pipe The proximity of the hot and cold
water pipes to each other contributes to higher rates of TGC. When the hot
and cold pipes are buried in the same trench, and sometimes touching or
crossing, it doesn't take a very highly conductive soil to allow a conductive
loop to be created."

To date, the total number of TGC underslab leaks in copper pipe at Anthem that
have been documented is 88. However, testimony of Del Webb customer relation
managers in the special operations group, which was assigned to respond to, repair, and

1 track underslab TGC copper water pipe leaks, gives rise to a strong inference that the
2 number of TGC leaks has been under-reported.

3 Steve Koebele became the general manager of customer relations special operations
4 group for Del Webb sometime in 2006. The special operations group was a division
5 formed to handle warranty issues on homes between 18 months and ten years after their
6 close of escrow. This special operations division succeeded the Special Projects team
7 sometime in 2005. The customer relations managers in the Special Projects division,
8 when it was originally formed, were Matthew Spina, who was the manager of the
9 division, Toby Loughrige, Steve Koebele, and several Others. Matthew Spina testified
10 at deposition that at some point in time, Del Webb developed a protocol for repairing
11 thermalgalvanic leaks which did not include any investigation of the corroded copper
12 pipe. If the tell-tale signs of a TGC leak is present in a home - - underslab pipe, warm
13 floor and increased water usage - - the Del Webb repair was to abandon the copper hot
14 water pipe and re-plumb the hot water service overhead. In part, the decision to re-plumb
15 the hot water pipe overhead was based upon the fact that repair of the pipe beneath the
16 slab did not prevent the reoccurrence of TGC and additional underslab leaks.

17 The other significant reason Del Webb's ceased investigating TGC leaks in the
18 Anthem community was to avoid gathering evidence which could be used against it in any
19 subsequent class action lawsuit in Anthem. In Sun City Summerlin, Del Webb repeatedly
20 notified the homeowners of the TGC underslab copper water pipe leak problem as the
21 number of leaks increased over time. Summerlin homeowner questions were answered
22 at homeowner meetings and with mailings which described what TGC was, how to
23 recognize it, and how it would be repaired if a homeowner experienced such a leak.

24 Disturbingly, in Anthem, Del Webb has clearly made a decision to not notify
25 homeowners about the occurrence of underslab copper pipe leaks due to TGC. Charles
26 Meyer has been a customer relations manager with Pulte since 2005 and he has been the
27 manager of the special operations team of customer relations managers since mid to late
28 2007; his responsibility includes the Anthem community and repair of underslab copper

1 pipe leaks due to TGC. At the time of Mr. Meyer's deposition in March of 2009, he had
2 undertaken no investigation concerning the TGC problem in Anthem; nor had he asked
3 any of his customer relations managers to track underslab copper pipe leaks, and as far
4 as he knew no one is tracking the occurrence of underslab copper pipe leaks in Anthem
5 at the present time. When asked how many leaks would have to occur in underslab
6 copper pipe in Anthem before Del Webb would notify the homeowners, Mr. Meyer
7 responded "I don't know."

8 Pulte's decision to not disclose the occurrence of TGC in the Anthem community
9 has also been imposed upon homeowners whose homes suffered a TGC pipe leak which
10 Del Webb repaired. In emails sent from Chuck Meyer to Jeff Salmon, Vice-President in
11 charge of customer relations in Anthem, Mr. Meyer specifically indicates that the
12 homeowners were given a release letter which required that they were "not to discuss the
13 repairs with other homeowners."

14 Mr. Meyer has never seen any matrices or maps tracking underslab copper water
15 pipe leaks. Steve Koebele, a prior manager of the special operations team of customer
16 relation managers, testified that several maps were prepared showing the location of TGC
17 copper pipe failures. Equally puzzling, is the fact that Mr. Meyers was unaware of and
18 had never seen the IBACOS report which determined that TGC was occurring in Anthem.

19 Toby Loughrige left the Anthem community in June or July of 2007. When Mr.
20 Loughrige left the Anthem community, he did not know who would have the
21 responsibility of keeping track of TGC copper pipe leaks and does not know if anyone is
22 keeping track of the leaks at this time. During the time that Mr. Loughrige was tracking
23 and recording TGC leaks in the Anthem community, there was never a letter sent to
24 homeowners concerning TGC, nor was there any town hall meeting with the homeowners
25 to discuss underslab leaks. Toby Loughrige was the only individual at Del Webb with
26 responsibility for mapping TGC leaks in the Anthem community.

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ARGUMENT

I. **The Motion for Summary Judgment Must be Denied Because Del Webb is Estopped From Asserting a Statute of Repose Defense.**

Del Webb asserts that 287 houses at the Subject Property were substantially completed more than eight years prior to the filing of the complaint and, consequently, the claims for the defective condition in those houses are time barred. In making that assertion, Del Webb ignores or overlooks its conduct in concealing a known problem from the homeowners.

In *Lantzy v. Centex Homes*, 31 Cal.4th 363 (2003), the California Supreme Court explained the difference between equitable tolling and equitable estoppel with respect to construction defect statute of repose (California Code of Civil Procedure section 337.15), a similar statute to A.R.S. § 12-552 that imposes an absolute requirement that a suit to recover damages for a latent construction defect be brought within 10 years, regardless of the date of discovery. See *Regents of University of California v. Hartford Acc. & Indem. Co.*, 21 Cal.3d 624, 631 (1978). The *Lantzy* court explained that equitable tolling:

“[I]s a judge-made doctrine which operates independently of the literal wording of the Code of Civil Procedure to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness. This Court has applied equitable tolling in carefully considered situations to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice. ... ¶...[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitation’s period, thus extending the deadline for suit by the entire length of the time during which the tolling event previously occurred.”

Lantzy, 21 Cal.3d at 370, citations and emphasis omitted.

The *Lantzy* court further explained:

“Equitable tolling and equitable estoppel are distinct doctrines. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. Equitable estoppel, however, comes into play only after the limitations period has run and addresses the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct induced another into forbearing suit within the applicable limitations period.”

1 *Id.*, 21 Cal.3d at 383.

2 In Arizona, the elements of equitable estoppel are: “(1) There must be a false
3 representation *or concealment of material facts*; (2) it must have been made with
4 knowledge, actual or constructive, of the facts; (3) the party to whom it was made must
5 have been without knowledge of or the duty of inquiring further as to the real facts; (4)
6 it must have been made with the intention it should be acted upon; and (5) the party to
7 whom it was made must have relied on or acted on it to his prejudice.” *Contreras v.*
8 *Industrial Commission*, 98 Ariz. 221, 227 (1965), quoting *Lillywhite v. Coleman*, 46 Ariz.
9 523, 529 (1935) (“It will be observed that estoppel may arise either from the making of
10 false representations or the concealment of facts that it is the duty of the party estopped
11 to reveal”), original emphasis. “Ordinarily, each of these inquiries will involve questions
12 of fact, and therefore will be resolved by the fact finder.” *Nolde v. Frankie*, 192 Ariz. 276,
13 281 (1998). “[A] court may conclude as a matter of law that no reasonable jury could find
14 for the plaintiff on one or more of these inquiries.” *Ibid.*

15 Two years prior to the beginning of the construction of the Anthem houses, Del
16 Webb was placed on notice of the effects of placing unsleeved copper pipes in a common
17 trench in the desert Southwest. First, Del Webb had actual knowledge of similar
18 circumstances in the Summerlin homes, and, secondly, Del Webb had actual knowledge
19 from the report Dr. Bell provided Del Webb after investigation of Mr. Dion’s home in
20 Phoenix that the soils conditions in the Phoenix area were similar to those in Nevada and
21 that there was a TGC risk of placing unsleeved copper pipes in the same trench. None
22 of this information was disclosed to the Anthem purchasers. And, in fact, Del Webb went
23 out of its way to ensure that information about known leaks did not spread by word of
24 mouth by causing homeowners, who had Del Webb make repairs, to refrain from
25 disclosure of the repairs to their neighbors. Del Webb also did not disclose to purchasers
26 that after installing underslab copper pipes in over 3,600 homes, it made the decision to
27 stop using underslab copper pipe and plumb the remaining 5,800 homes with Ibex pipe
28 run through the attics rather than under the slabs.

1 In *S Development Company v. Pima Capital*, 201 Ariz. 10, 16 (2002), the Supreme
2 Court held that “[i]n keeping with the covenant of good faith and fair dealing, ... a vendor
3 must disclose *latent* defects in property that are known to the vendor ...” Original
4 emphasis. Defective pipes that are buried under a structure certainly meet the definition
5 of a “latent defect” which is a defect that “could not be discovered by reasonable and
6 customary observation or inspection.” *Ibid*.

7 The primary purpose for a construction defect statute of repose is to protect
8 developers and contractors from having to defend stale claims, but that protection runs
9 counter to the Arizona stated public policy to protect innocent purchasers and hold
10 builders accountable for their work¹ where the builder fails to disclose latent defects about
11 which it knew when a home is originally sold. “[O]ne cannot justly or equitably lull his
12 adversary into a false sense of security, and thereby cause his adversary to subject his
13 claim to the bar of the statute of limitations, and then be permitted to plead the very
14 delay caused by his course of conduct as a defense to the action when brought.” *Carruth*
15 *v. Fritch*, 36 Cal.2d 426, 433 (1950), quoting *Howard v. West Jersey & S.S.R. Co.*, 1
16 Backes 517, 102 N.J.Eq. 517, 141 A.755, 757-58 (N.J.Ch.1928). The equitable maxim that
17 no man may profit from his own wrong was long a part of common law. See H. Broom, A
18 Selection of Legal Maxims 202, 204 (3rd ed. 1852); see also *Glus v. Brooklyn E. District*
19 *Terminal*, 359 U.S. 231, 232-33 (1959).

20 A reasonable trier of fact could conclude that the reason Del Webb did not disclose
21 to purchasers that which it knew about TGC in the desert Southwest, Dr. Bell’s reports
22 of the Summerlin homes and Mr. Dion’s home, the “silent” repairs and the decision to use
23 Ibex pipe was to induce the owners of the homes with underslab copper pipes not to bring
24 suit. And, clearly, because the defects were latent, there was no way that the owners
25 could have discovered the condition on their own. Therefore, applying equitable
26
27

28 ¹ See *Richards v. Powercraft*, 139 Ariz. 242, 245 (1984); see also *Nastri v. Wood Bros. Homes,*
Inc., 142 Ariz. 439, 442 (1984).

1 principles long established in Arizona law, the Court must estop Del Webb from asserting
2 a statute of repose defense.

3 **CONCLUSION**

4 Del Webb is not entitled to the assert the statute of repose defense because it
5 concealed information from the class that clearly had bearing on the issue for which the
6 class was certified. It cannot now use the statute of repose as a sword against those class
7 members from whom it concealed its knowledge of the faulty construction practice of
8 placing unsleeved copper pipe under the house foundational slabs in the same trench.

9 DATED this 11th day of May, 2010

10 **FEINBERG GRANT MAYFIELD**
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CERTIFICATE OF E-FILING & SERVICE

The below hereby certifies that on the 11th day of May, 2010, she submitted **Memorandum of Points and Authorities in Opposition To Del Webb's Motion for Summary on 287 Homes** to the court for electronic filing; and furthermore she served the foregoing **Memorandum of Points and Authorities in Opposition To Del Webb's Motion for Summary on 287 Homes** via U. S. Mail, first class postage pre-paid as follows:

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