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

**GALLERY COMMUNITY ASSOCIATION,
an Arizona non-profit corporation,**

Plaintiff,

v.

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

Defendants.

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

Third-Party Plaintiffs,

v.

Case No. CV2020-008714

**DEFENDANTS'/
THIRD-PARTY PLAINTIFFS'
SEPARATE STATEMENT OF FACTS
IN SUPPORT OF DEFENDANTS'/
THIRD-PARTY PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

(Assigned to the Hon. Michael Kemp)

1 **ARTISTIC STAIRS, LTD., an Arizona**
2 **limited liability company; CHAS ROBERTS**
3 **AIR CONDITIONING, INC., an Arizona**
4 **corporation; DESERT VISTA, INC. an**
5 **Arizona corporation; HOME BUILDERS**
6 **SITE SERVICES OF ARIZONA, LLC an**
7 **Arizona limited liability company; IDG**
8 **INNOVATIVE DEVELOPMENT, GROUP,**
9 **LLC, an Arizona limited liability company,**
10 **dba DESERT SERVICES SWPPP**
11 **SOLUTIONS; INTERIOR LOGIC**
12 **HOLDINGS, LLC, a Delaware limited**
13 **liability company; LEBLANC BUILDING**
14 **CO., INC., an Arizona corporation;**
15 **LIBERTY CONSTRUCTORS, LLC, an**
16 **Arizona limited liability company, DBA**
17 **LIBERTY ARIZONA; PAUL JOHNSON**
18 **DRYWALL, INC., an Arizona corporation;**
19 **RENCO LLC, an Arizona limited liability**
20 **company, dba RENCO ROOFING; R/S**
21 **SERVICE & SUPPLY, INC., an Arizona**
22 **corporation; SARGON MASONRY**
23 **CONSTRUCTION, LLC, an Arizona limited**
24 **liability company; AND DOES 1-50,**

25 **Third-Party Defendants.**

26 Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC, K. Hovnanian Arizona
27 Operations, LLC, K. Hovnanian Developments of Arizona, Inc., and K. Hovnanian Companies of
28 Arizona, LLC (collectively, “Defendants”), hereby submit their Separate Statement of Facts In
Support Of Defendants’ Motion For Summary Judgment (“DSOF”), pursuant to Ariz. R. Civ. P.
56.

1. Plaintiff is an Arizona nonprofit corporation that acts as the property owner’s
association (the “Association” or “HOA”) for the common areas of the property known as The
Gallery in Scottsdale, Arizona. (Complaint at ¶ 1), a townhouse community alleged to have been
built by K Hovnanian Defendants. Plaintiff’s July 27, 2020 Complaint is attached hereto as
Exhibit 1.

1 2. Plaintiff admits it is governed by the recorded Declaration of Covenants,
2 Conditions, Restrictions and Easements (CC&R's) for Gallery. (Complaint at ¶ 4).

3 3. However, those CC&R's require the Association, after the turnover from the
4 Declarant occurred to the HOA and not any of these Defendants, to repair and maintain the
5 common elements on the Association Property and Common Areas thereafter, as defined therein,
6 as well as the common exterior walls, stucco, façade, roofs, or other surfaces of the Dwelling
7 Units. (Complaint at ¶ 5).

8 4. There is no known express or implied warranty running to the HOA after acceptance
9 of the Declarant rights to the Property conveyed. That acceptance occurred after inspection and
10 no limitation was placed on the conveyance by the HOA at that time.

11 5. In the publicly recorded October 6, 2016 “Quit Claim Deed, only Defendant K
12 Hovnanian at Gallery, LLC (“KHov Gallery”), which had developed the project and was the
13 Declarant under the CC&R's, conveyed the common areas to the Association. (Complaint at ¶ 8).

14 6. There is no privity of contract alleged in the Complaint as to any contract the
15 Association has with any of the other Defendants, with KHov Gallery, or with the actual builder,
16 K Hovnanian Arizona Operations, LLC (“KHov Operations”). (Complaint at ¶ 10,11).

17 7. Moreover, there is no stated basis for why K Hovnanian Developments of Arizona,
18 Inc., alleged to be a “member” of KHov Gallery or KHov Operations, has any possible liability
19 to Plaintiff. (Complaint at ¶ 11).

20 8. Defendant K Hovnanian Companies of Arizona, LLC is simply alleged to be
21 somehow “involved in the development, design, construction, and/or sale of The Gallery and the
22 units” in the Complaint and nothing more. (Complaint at ¶ 12).

23 9. The Complaint, as to the other entities, is woefully deficient even for notice
24 purposes, and states no claim at all, even under Rule 12 (b) (6) Ariz. R. Civ. Proc., let alone under
25 a summary judgment standard.

26 10. There is no allegation of any warranty claim, or compliance with A.R.S. 12-1361 et
27 seq. by any owner, nor is any owner a Plaintiff concerning construction defects in their units. The
28

1 claim here is solely made by an HOA, for construction defects in common areas. (Complaint at ¶
2 1 and generally)

3 11. Plaintiff’s Count Two, Breach of Implied Covenant of Good Faith and Fair Dealing,
4 and Count Four, Breach of Contract Claim are contract claims. (Complaint at ¶ 25, 39)

5 12. The purported “contract” that Plaintiff mistakenly bases its claims on can only be
6 the Declaration of Covenants, Conditions, & Restrictions for Gallery. (Complaint at ¶¶ 4, 5, 25,
7 39)

8 13. Plaintiff does not even allege that Defendants K. Hovnanian Arizona Operations,
9 LLC, K. Hovnanian Developments of Arizona, Inc, and K. Hovnanian Companies of Arizona,
10 were in privity of any contract whatsoever. (Complaint at ¶¶ 24 – 31, 37 – 40)

11 14. Plaintiff itself clearly alleged, albeit wrongfully, that “The Association and
12 defendant K. Hovnanian at Gallery, LLC entered into a contract,” with no mention of any other
13 entity named in the underlying Complaint. (Complaint, at ¶¶ 24 - 31).

14 15. In Plaintiff’s Breach of Implied Warranty of Workmanship and Habitability Claim,
15 Plaintiff conclusively alleges that “Defendants” impliedly warranted that “they” would perform
16 their work in a “workmanlike manner.” (Complaint at ¶¶ 33-35).

17 **RESPECTFULLY SUBMITTED** this 19th day of February, 2021.

18 **WILENCHIK & BARTNESS, P.C.**

19 */s/ Dennis I. Wilenchik*

20 _____
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24
25 **ELECTRONICALLY** filed February 19, 2021
26 via AZTurboCourt.com.

27 **ELECTRONICALLY** transmitted via
28 AZTurboCourt.com to the Honorable
Michael Kemp.

1 **ELECTRONICALLY** served February 19, 2021
Via AZTurboCourt.com upon:

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/s/ *Christine M. Ferreira*

EXHIBIT 1



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JUL 27 2020



CLERK OF THE SUPERIOR COURT
V. GARCIA
DEPUTY CLERK

Attorneys for the Plaintiff

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

GALLERY COMMUNITY
ASSOCIATION, an Arizona non-profit
corporation,

Plaintiff,

vs.

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

Defendants.

Case No. CV2020-008714

COMPLAINT AND JURY DEMAND

The plaintiff, by and through undersigned counsel, hereby complains against the
defendants as follows:

1 1. The plaintiff is Gallery Community Association (“Association”), an Arizona
2 nonprofit corporation that acts as the property owners association for the property known
3 as The Gallery, located in Scottsdale, Arizona with authority and capacity to institute and
4 prosecute this action in the State of Arizona.

5 2. Pursuant to the Articles of Incorporation of Gallery Community Association
6 (the “Articles”), the plaintiff was incorporated under the laws of the State of Arizona,
7 including A.R.S. Section 10-3101, et seq., dealing with nonprofit corporations, as
8 amended from time to time (the “Nonprofit Corporation Act”).

9 3. Pursuant to the Articles, the plaintiff’s purpose is “to act as a property
10 owners association and to perform all things and exercise all the power and rights of a
11 corporation that are lawful and consistent with the foregoing purposes”

12 4. The plaintiff is governed by the Declaration of Covenants, Conditions,
13 Restrictions, and Easements for Gallery recorded at Maricopa County Recorder’s Office
14 at instrument 2016-0317923 on May 10, 2016 (“Declaration”), as amended.

15 5. The Declaration requires the Association to repair and maintain the common
16 elements including, but not limited to, the “Association Property” and “Common Area” as
17 those terms are defined in the Declaration and the exterior walls, stucco, façade, roofs or
18 other surfaces of the “Dwelling Units” as defined in the Declaration.

19 6. The Association brings this action pursuant to A.R.S. § 12-1361, et seq. and
20 § 33-2001, et seq.

21 7. Pursuant to A.R.S. § 12-1363(N), the Affidavit of Bob Vander Waal,
22 President of the Board of Directors of the Association, is attached hereto as Exhibit A.

23 8. Defendant K. Hovnanian at Gallery, LLC developed the project, was the
24 declarant for the project, and conveyed the common elements of the project to the
25 Association’s name in a quit claim deed dated October 6, 2016, recorded at document
26 2016-0736922 in the Maricopa County Recorder’s Office.

27 9. Defendant K. Hovnanian at Gallery, LLC also acted as the vendor by selling
28 individual unit owners their units at The Gallery.

1 workmanlike manner, and by providing a product that violates applicable building codes,
2 product manufacturer installation instructions, and is not suitable for its intended use.

3 18. Defendants' defective work has caused resultant damage at The Gallery.

4 19. Through their negligence, defendants damaged the Association and its
5 members in an amount to be shown at trial.

6 20. Defendants acted to serve their own interests, and had reason to know and
7 consciously disregarded a substantial risk that their conduct might significantly injure the
8 rights of the Association and its members.

9 21. Defendants consciously pursued a course of conduct knowing that it created
10 a substantial risk of significant harm to others, including the Association and its members.

11 22. The Association is entitled to punitive damages.

12
13 **SECOND CAUSE OF ACTION**

14 **(Breach of Implied Covenant of Good Faith and Fair Dealing - Against Defendants**
15 **K. Hovnanian at Gallery, LLC, K. Hovnanian Developments of Arizona, Inc., and K.**
16 **Hovnanian Companies of Arizona, LLC)**

17 23. The Association incorporates herein by reference all allegations included in
18 paragraphs 1-22.

19 24. Arizona law implies a covenant of good faith and fair dealing in every
20 contract.

21 25. The Association and defendant K. Hovnanian at Gallery, LLC entered into a
22 contract in the form of the Declaration.

23 26. The contract made assurances that the work would be or had been done
24 correctly.

25 27. The defendants' work was not done correctly.

26 28. The Association had justified expectations that the work would be
27 completed correctly, and if not, that the defendants would correct any deficiencies.

28 29. The defendants have refused to correct the deficiencies.

1 38. The Association is in privity of contract with defendant K. Hovnanian at
2 Gallery, LLC in the Declaration.

3 39. Defendant K. Hovnanian at Gallery, LLC breached the Declaration by not
4 performing its work in compliance with the terms of that contract and by building a
5 project that does not comply with applicable laws and building codes.

6 40. The defendants' breaches of their contracts damaged the Association and its
7 members in an amount to be proven at trial.

8
9 WHEREFORE, the Association prays for judgment against the defendants as
10 follows:

11 a. For compensatory damages in an amount to be shown at trial,
12 including but not limited to the cost of repairing all defective work and resultant
13 damage, as well as the cost of the Association's expert investigation required to
14 prove the existence, nature, and cause of every defect, as well as the appropriate
15 repair methodology, and the cost of performing those repairs;

16 b. For punitive damages in an amount sufficient to punish the
17 defendants and/or to deter the defendants and others from similar misconduct in the
18 future;

19 c. For its reasonable attorneys' fees pursuant to the parties' contracts as
20 appropriate and pursuant to A.R.S. § 12-341.01 and § 12-1364 as determined upon
21 application to the Court;

22 d. For its court costs pursuant to the parties' contracts as appropriate
23 and pursuant to A.R.S. § 12-341;

24 e. For pre- and post-judgment interest on all sums awarded; and

25 f. For such other and further relief as the Court deems just and proper.

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**THE ASSOCIATION HEREBY DEMANDS TRIAL BY A JURY OF ALL ISSUES
SO TRIABLE**

RESPECTFULLY SUBMITTED this 24th day of July, 2020.

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

By: 

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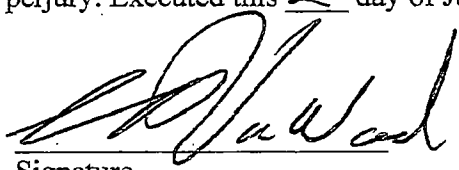
AFFIDAVIT OF BOB VANDER WAAL

STATE OF ARIZONA)
)
County of Maricopa)

I, Bob Vander Waal, representing the Board of Directors of Gallery Community Association hereby affirm as follows:

1. I am the President of the Board of Directors of Gallery Community Association (the "Association").
2. I have read the entire Complaint accompanying this Affidavit and prepared on behalf of the Association.
3. On behalf of the Association, I agree with all of the allegations and facts contained in the Complaint.
4. The Association and its Board of Directors are not receiving and have not been promised anything of value in exchange for filing the Complaint.

This affidavit is signed under the penalty of perjury. Executed this 22nd day of July, 2020


Signature