

1 **BURG SIMPSON ELDREDGE**
2 **HERSH & JARDINE P.C.**

3 8310 South Valley Highway, Suite 270
4 Englewood, CO 80112
5 Phone: (303) 792-5595
6 Fax: (303) 708-0527
7 Craig S. Nuss – 033839
8 Penny J. Manship – 034985
9 pmanship@burgsimpson.com

10 *Attorneys for the Plaintiff*

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

13 GALLERY COMMUNITY
14 ASSOCIATION, an Arizona non-profit
15 corporation,
16 Plaintiff,

17 vs.

18 K. HOVNANIAN AT GALLERY, LLC,
19 an Arizona limited liability company; et
20 al.
21 Defendants.

22 K. HOVNANIAN AT GALLERY, LLC,
23 an Arizona limited liability company; et
24 al.
25 Third-Party Plaintiffs,

26 v.

27 ARTISTIC STAIRS, LTD., an Arizona
28 limited liability company; et al.
 Third-Party Defendants.

Case No. CV2020-008714

Assigned to Hon. Michael Kemp

**PLAINTIFF’S RESPONSE TO
DEFENDANTS’/THIRD-PARTY
PLAINTIFFS’ MOTION FOR
SUMMARUY JUDGMENT**

(Oral Argument Requested)

Plaintiff, Gallery Community Association (“Plaintiff” or “Association”), by and through undersigned counsel, objects and responds as follows to Defendants’ Motion for Summary Judgment (“*Motion*”). The Association’s Response is supported by the following Memorandum of Points and Authorities, Plaintiff’s Response and Opposition to Defendants’ Separate Statement of Facts (“Defendants’ SOF”), and Plaintiff’s Controverting Statement of Facts in Opposition to Defendants’ *Motion* (“Assoc. SOF”).

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. BACKGROUND**

3 This case is not at issue and the parties have not engaged in any formal discovery.
4 See Manship Affidavit in support of Plaintiff’s Request for Rule 56(d) Relief and
5 Expedited Hearing filed contemporaneously herewith, ¶ 4. The parties previously agreed
6 to exchange initial disclosures after the case is at issue. *Id.*

7 The evidence obtained to date establishes, at a minimum, Defendants involvement
8 in the development, design, construction and/or sale of The Gallery and units included:

- 9
- 10 • K. Hovnanian at Gallery, LLC (“KHov Gallery”) owned the property, “developed
the project,” “conveyed the common elements of the project to the Association in a
quit claim deed dated October 6, 2016,” and “acted as the vendor by selling
individual unit owners their units at The Gallery.” (Assoc. SOF ¶ A).
 - 11 • K. Hovnanian Arizona Operations, LLC (“KHov Operations”) was “the general
contractor responsible for the construction of The Gallery.” (Assoc. SOF ¶ B).
 - 12 • K. Hovnanian Companies of Arizona, LLC (“KHov Companies”) was involved in
the development, design, construction, and/or sale of The Gallery and the units.
13 (Assoc. SOF ¶ C).
 - 14 • K. Hovnanian Developments of Arizona, Inc. (“KHov Developments”) was a
member of KHov Gallery and KHov Operations. (Assoc. SOF ¶ D). Defendants
15 present no evidence that KHov Developments was not involved in the
development, design, construction and/or sale of The Gallery and units.

16 The Declaration of Covenants, Conditions, Restrictions and Easements for Gallery
17 (“Declaration” or “CC&R’s”) was recorded on May 10, 2016, and identifies KHov
18 Gallery as the Declarant and the “owner and developer” of the property subject to the
19 Declaration. (Assoc. SOF ¶ E).

20 The Association was formed as a nonprofit corporation under A.R.S. § 10-3101, et
21 seq., *i.e.*, the Arizona Nonprofit Corporation Act, through the Articles of Incorporation of
22 Gallery Community Association (“Articles”). (Assoc. SOF ¶ F). The Articles state that
23 the Association’s “Character of Affairs” is to “manage, maintain and administer the
24 Common Area and common facilities, ... and to administer and enforce, the Declaration
25 of Covenants, Conditions, Restrictions and Easements for Gallery ...” (Assoc. SOF ¶ G).

26 The Declaration defines “Declarant” to include not only KHov Gallery, but also
27 “its successors and assigns, or any person or entity to whom all of Declarant’s rights
28 reserved to the Declarant hereunder are assigned.” (Assoc. SOF ¶ H). The Declaration

1 also defines “Homebuilder” as “any homebuilder in the business of constructing
2 residential improvements on Lots and buys Lots from Declarant.” (Assoc. SOF ¶ I). The
3 Declarant is also an “Owner,” as that term is defined in the Declaration, “so long as
4 Declarant or a Related Entity owns or has a Recorded option to purchase any Lot within
5 the Property.” (Assoc. SOF ¶ K). Because discovery has not commenced, it is unknown
6 at this time, whether KHov Gallery assigned any Declarant’s rights to another Defendant,
7 whether any Defendant is a “Related Entity,” and whether any Defendant is a
8 “Homebuilder” as defined in the Declaration. Record evidence establishing disputed
9 issues of material fact regarding any Defendant’s status as a Declarant, Related Entity or
10 Homebuilder would require denial of the *Motion*, as explained in more detail below.

11 The Association was formed by Declarant “for the purpose of the efficient
12 preservation of the values and amenities of the Property” and was given “powers of
13 administering and maintaining the Common Area [and] enforcing this Declaration.”
14 (Assoc. SOF ¶ L). The Declaration was made to establish “**mutually beneficial**
15 covenants, conditions, restrictions, easements and obligations with respect to the proper
16 development, use and maintenance of the Property” for **Declarant’s “own benefit”** and
17 the “mutual **benefits of all future Owners, or other holders of interests** in any portion
18 of the Property” (Assoc. SOF ¶ M). (emphasis added). The Declaration was “declared and
19 agreed to be in furtherance of Declarant's general plan for, and improvement and sale of,
20 the Property and is established for the purpose of enhancing and perfecting the value,
21 desirability and attractiveness of the Property.” (Assoc. SOF ¶ N). The Declaration
22 provides that it “shall run with all of the Property for all purposes and **shall be binding**
23 **upon and inure to the benefit of Declarant, the Association, all Owners, Members**
24 **and their respective successors in interest.”** (Assoc. SOF ¶ N). (emphasis added).

25 The Declaration granted rights and duties to Declarant, KHov Gallery, and/or any
26 “Related Entity,” which is defined as “any entity related to Declarant or Homebuilder.”
27 (Assoc. SOF ¶ O). The Declaration further states that it “grants to or confers upon the
28 Declarant or upon any affiliates of Declarant” “rights, privileges, easements, benefits, or

1 exemptions.” (Assoc. SOF ¶ P). Those rights and duties include, but are not limited to:

- 2 • The right of “Declarant or a Related Entity” to “withdraw property from the
- 3 Property without the consent of any other Owner” (Assoc. SOF ¶ Q, Section
- 4 2.3).
- 5 • The duty to convey fee simple title to the Common Area to the Association, which
- 6 “shall automatically be deemed accepted by the Association.” (Assoc. SOF ¶ Q,
- 7 Section 1.8 and Section 3.5).
- 8 • The right of “Declarant, or its successors or assigns” to have at least one (1)
- 9 position on the Board of Directors for ten (10) years after the period of Declarant
- 10 control ceases” (Assoc. SOF ¶ Q, Section 4.3.1).
- 11 • The right to “maintain an absolute control over the Association, including
- 12 appointment and removal of the President, the members of the Board, and the
- 13 members of the Architectural Committee, until the Transition Date” (Assoc.
- 14 SOF ¶ Q, Section 5.3).
- 15 • The right of “Declarant, Homebuilder or any entity related to Declarant or
- 16 Homebuilder (a ‘Related Entity’) ... to use any Lot owned or leased by Declarant,
- 17 Homebuilder or a Related Entity for purposes related to the development and
- 18 marketing of the Property ...” (Assoc. SOF ¶ Q, Section 8.1.1).
- 19 • The right to construct all Dwelling Units on the Property “as long as Declarant or a
- 20 Related Entity owns or has a Recorded option to purchase one or more Lots.”
- 21 (Assoc. SOF ¶ Q, Section 8.1.30).
- 22 • The right to consent to or withhold consent as to any modification, amendment, or
- 23 revocation of any provision of the “Declaration which grants to or confers upon the
- 24 Declarant or upon any affiliates of Declarant any rights, privileges, easements,
- 25 benefits or exemptions” (Assoc. SOF ¶ Q, Section 10.18).

26 The Declaration also grants rights and duties to Association, including but not limited to:

- 27 • The duty to maintain “Association Property” for the benefit of all the Owners.
- 28 (Assoc. SOF ¶ R, Section 1.8).
- 29 • “[S]uch rights, duties and powers as set forth [in the Declaration] and in the
- 30 Articles and Bylaws.” (Assoc. SOF ¶ R, Section 4.4).
- 31 • “In order to insure a uniform appearance of the Property, the Association will, from
- 32 time to time, as it may determine appropriate, paint the exterior of the Dwelling
- 33 Units and repair, maintain and replace the exterior walls, stucco, façade, roofs or
- 34 other surfaces.” (Assoc. SOF ¶ R, Section 8.1.7).
- 35 • “[T]he right, in its sole and absolute discretion, as to the Common Area ... or as to
- 36 any other area placed under its jurisdiction: . . . [to r]econstruct, repair, replace or
- 37 refinish any improvement or portion thereof upon the Common Area or any other
- 38 area placed under its jurisdiction” (Assoc. SOF ¶ R, Section 8.2.3 and 8.2.3.2).
- 39 • These maintenance and repair obligations under the Declaration are admitted by
- 40 Defendants. (Assoc. SOF ¶ R).

41 Finally, the Declaration grants rights and duties to Owners, which, by definition includes

42 the Declarant:

- 43 • “[E]ach Owner, ... binds itself ... to restrictions, covenants, conditions, rules and
- 44 regulations now or hereafter imposed by this Declaration and any amendments
- 45 thereof to the extent permitted by law.” (Assoc. SOF ¶ S, § 10.1).
- 46 • “If any Common Area is damaged or destroyed by an Owner ... such Owner does
- 47 hereby authorize the Association to repair such damaged area, and the Association
- 48 shall so repair such damaged area in a good workmanlike manner in conformity
- with the original plans and specifications of the area involved The amount

necessary for such repairs shall be paid by such Owner, to the Association,” (Assoc. SOF ¶ S, § 8.2.4).

- “If any portion of any Lot is maintained so as to: (a) present a public or private nuisance, (b) substantially detract from or affect the appearance or quality of any surrounding Lot or the Property, or (c) is used in a manner which violates this Declaration, or if the Owner or Resident of any Lot fails to perform its obligation under this Declaration ... the Association or any Owner may give notice to the violating Owner that corrective action must be completed within fourteen (14) days of the receipt of such notice. If the violating Owner fails to take corrective action within said period of time, the Association, or the notifying Owner, may take, at the violating Owner's cost, appropriate corrective action to remedy such nuisance, detraction, violation or failure of performance including, without limitation, appropriate legal action. . . .” (Assoc. SOF ¶ S, § 10.2).

The Bylaws of Gallery Community Association (“Bylaws”) were adopted on July 21, 2016. (Assoc. SOF ¶ T). According to the Bylaws, “[i]t is the desire of Declarant to retain control of the Association and its activities through the Board during the anticipated period of planning and development of the Property until Declarant has sold one hundred percent (100%) of the total Lots within the Property to Owners.” (Assoc. SOF ¶ U). Defendants in fact retained 100% control of the Association by appointing all board members until December 17, 2016, when board control transitioned from the Declarant to the other owners. (Assoc. SOF ¶ V).

On October 7, 2016, prior to the transition to a homeowner elected board, Defendant KHov Gallery for “\$10.00 and other valuable considerations,” quit-claimed Tracts A through F of the Final Plat of The Gallery to the Association. (Assoc. SOF ¶ W). Pursuant to the Declaration, and as explained above, Declarant was required to “convey fee simple title to the Common Area to the Association, free of all encumbrances except current real and personal property taxes and other easements, conditions, reservations and restrictions then of record.” (Assoc. SOF ¶ Q, Decl. § 3.5). Therefore, Defendants controlled the Association board when this conveyance occurred.

The homeowner-elected board members are solely volunteer homeowners and have no experience or knowledge relating to construction or engineering. (Assoc. SOF ¶ X).

II. ARGUMENT SUMMARY

Defendants failed to meet their summary judgment burden because they submit no evidence in support thereof, and the Court should deny the *Motion* outright for this reason

1 alone.¹ Defendants' *Motion* also blatantly misrepresents both the facts and applicable law.

2 Based upon the evidence in the Association's possession, thus far, and presented in
3 this Response, the *Motion* should be denied. Defendants that Defendants KHov Gallery,
4 KHov Operations, and KHov Companies were involved with the development, design,
5 construction and/or sale of The Gallery and the units. With respect to Defendant KHov
6 Developments, Defendants fail to present any evidence that it was not involved in the
7 development, design, construction and/or sale of The Gallery and the units. A
8 homeowners association may properly assert a breach of implied warranty claim against a
9 builder-vendor or builder, despite the lack of privity of contract. *See Lofts at Fillmore*
10 *Condo. Ass'n v. Reliance Commc. Constr.*, 218 Ariz. 574, 190 P.3d 73 (2008); *Richards*
11 *v. Powercraft*, 139 Ariz. 242, 678 P.2d 427 (1984).

12 With respect to the Association's claims for breach of contract and breach of the
13 implied covenant of good faith and fair dealing, the Association's evidence establishes the
14 existence of contracts between the Association and Defendants in the form of the
15 Declaration and the Quit Claim Deed conveying the Common Area to the Association.

16 **III. LEGAL STANDARD**

17 The party moving for summary judgment bears the "burden of persuasion." Ariz.
18 R. Civ. P., Rule 56(c); *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, 292 P.3d 195,
19 199 (App. 2012) (citing *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 15, 180 P.3d
20 977, 980 (App. 2008). "The moving party's burden is a 'heavy' one" and "[t]his burden
21 of persuasion never shifts to the non-moving party." *Id.* (internal citations omitted). In
22 ruling on a motion for summary judgment, the question for the court is not whether the
23 responding party succeeded in presenting genuine disputes of material fact, rather it is
24 whether the moving party "presented **sufficient undisputed admissible evidence** to
25 establish its entitlement to judgment." *Id.* (emphasis added).

26
27 ¹ Alternatively, if the Court is inclined to consider the merits of the Motion's merits, the Association is
28 contemporaneously filing a Request for Rule 56(d) Relief seeking additional time to conduct discovery regarding
Defendants' corporate structure and the roles, responsibilities and respective involvement in the Project's
development, design, construction, and sale.

1 The party seeking summary judgment has the “burden of showing that no genuine
2 issue of material fact exists.” *Schwab v. Ames Constr.*, 207 Ariz. 56, 59-60 ¶ 15, 83 P.3d
3 56 (App. 2004) (citing *Chanay v. Chittenden*, 115 Ariz. 32, 38, 563 P.2d 287, 293 (1977)).
4 Only when the moving party makes a prima facie showing that no genuine issue of
5 material fact exists does the burden shift to the party opposing summary judgment “to
6 produce sufficient competent evidence to show that there is an issue.” *GM Dev. Corp. v.*
7 *Community Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990).

8 “As a general rule, an unsworn and unproven assertion is not a fact that a trial court
9 can consider in ruling on a motion for summary judgment.” *Id.* Moreover, “[a] party
10 asserting a fact has the burden of proving that fact.” *Id.* (citing *Yeazell v. Copins*, 98 Ariz.
11 109, 116, 402 P.2d 541, 546 (1965); *Prairie State Bank v. Internal Revenue Service*, 155
12 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987).

13 A motion for summary judgment must be denied unless no genuine disputes of
14 material fact exist and the moving party is entitled to judgment as a matter of law. *See*
15 Ariz. R. Civ. P. 56. In considering a motion for summary judgment, the facts and their
16 reasonable inferences must be viewed in the light most favorable to the non-moving party.
17 *See Doe v. Roe*, 191 Ariz. 313, 314, 955 P.2d 951, 962 (1998).

18 **IV. ANALYSIS**

19 **A. Defendants Failed to Satisfy Their Initial Summary Judgment Burden**

20 Defendants’ *Motion* is entirely void of any facts or evidence. Defendants’ Separate
21 Statement of Facts cites only Association’s Complaint. As explained in the legal standard
22 discussion, above, Defendants cannot carry their summary judgment burden by citing only
23 a complaint’s allegations. Moreover, Before the burden shifts to Plaintiff, Defendants, as
24 the moving party, must make a prima facie showing that no genuine issue of material fact
25 exists. To carry this burden, Defendants must ““point out by specific reference to the
26 relevant discovery that no evidence exist[s] to support an essential element of the claim.””
27 *Hydroculture v. Coopers & Lybrand*, 174 Ariz. 277, 283, 848 P.2d 856, 862 (App. 1992)
28 (quoting *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990)). If

1 Defendants fail to adequately challenge Plaintiff’s ability to present a prima facie case,
2 then responding Plaintiff need not do so. *Id.* Defendants cite no admissible record
3 evidence to support their *Motion*. The *Motion* should be denied outright for this reason
4 alone. Alternatively, the *Motion* should be denied for each of the reasons stated below.

5 **B. Defendants Cannot Carry Their Burden to Prove Association’s Breach**
6 **of Implied Warranty of Workmanship and Habitability Claim Fails**

7 **1. Well-settled Arizona law establishes that developers and builders**
8 **like Defendants are liable for the breach of implied warranty**

9 Contrary to the *Motion’s* arguments, an implied warranty of workmanship and
10 habitability arises from residential construction, including condominium construction, and
11 both a builder-vendor and a builder who is not a vendor are accountable for the implied
12 warranty. *Lofts at Fillmore Condo. Ass’n*, 218 Ariz. at 577 ¶ 13, 190 P.3d at 736 (citing
13 *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979) (“We can see no
14 difference between a builder or contractor who undertakes construction of a home and a
15 builder-developer. ... Those who hold themselves out as builders must be just as
16 accountable for the workmanship that goes into a home ... as are builder-developers.”)).

17 The Gallery’s developer (seller) and builder provided implied warranties with The
18 Gallery’s sale and/or construction. Here, the following admissions in Defendants’
19 Answer and Separate Statement of Facts conclusively establish that Defendants KHov
20 Gallery, KHOV Operations, and KHov Companies served as Project’s Declarant,
21 developer, general contractor and/or were otherwise involved in the Project’s
22 development. *See Schwartz v. Schwerin*, 85 Ariz. 242, 249, 336 P.2d 144, 148 (1959)
23 (“The law is well settled that an admission in an answer is binding on the party making it,
24 and is conclusive as to the admitted fact. No evidence may be shown to contradict the
25 admitted fact, and a finding contrary thereto is erroneous.”) (internal citations omitted):

- 25 • “Defendant K. Hovnanian at Gallery, LLC conveyed the common elements of the
26 project to the Association in a quit claim deed dated October 6, 2016,” and “also
27 acted as the vendor by selling individual unit owners their units at The Gallery.”
28 (Assoc. SOF ¶ A).
- “Defendant K. Hovnanian Arizona Operations, LLC was the general contractor
responsible for the construction of The Gallery.” (Assoc. SOF ¶ B).
- “Defendant K. Hovnanian Companies of Arizona, LLC was involved in the

development, design, construction, and/or sale of The Gallery and the units.
(Assoc. SOF ¶ C).

- KHov Gallery “developed the project.” (Defendants’ SOF, ¶ 5).

Significantly, Defendants presented no evidence disputing their involvement in the Project’s development, construction and/or sale.² Through their admissions or their failure to present any undisputed evidence on their roles at the Project, Defendants cannot carry their heavy summary judgment burden to prove that they did not provide implied warranties under the circumstances here.

2. Privity is not required for breach of implied warranty

Privity of contract is not required to support a breach of implied warranty of workmanship and habitability claim against a seller or a builder. *Richards*, 139 Ariz. 242, 678 P.2d 427; *Lofts at Fillmore*, 218 Ariz. 574, 190 P.3d 73. Moreover, a homeowners association may assert a breach of implied warranty claim directly against the seller and/or builder. *See Lofts at Fillmore*, 218 Ariz. 574, 190 P.3d 73.

The Arizona Supreme Court ruled more than ten years ago that a homeowners association may assert a claim for breach of the implied warranty of workmanship and habitability against a builder, despite a lack of privity between the association or the homeowners and the builder. *Lofts at Fillmore*, 218 Ariz. at 575, 190 P.3d at 734.

In *Lofts at Fillmore*, the association, formed by the individual unit owners *after* sale of the units by the developer, sued the developer and the builder for breach of the implied warranty of workmanship and habitability. *Id.* at 575.³ Significantly, the developer hired the multifamily residential project’s builder; the builder had no contractual relationship with the owners or the association. *Id.* Holding that the association could sue the non-vendor builder directly for breach of the implied warranty, despite a lack of privity, the Arizona Supreme Court noted that a rule requiring privity

² The Association’s contemporaneously-filed Request for Rule 56(d) Relief explains, without access to Defendants’ initial disclosures or any other discovery, Association does not have access to highly relevant information about Defendants’ corporate structure and their respective involvement in the Project’s development, construction and sale, and needs to complete additional discovery to provide the Court with a complete record on these issues.

³ Neither party in the case disputed that the association could properly bring an implied warranty claim against the developer. *Id.* at 576, n.2.

1 “‘might encourage sham first sales to insulate builders from liability.’” *Id.* at 577 (quoting
2 *Richards*, 139 Ariz. at 245, 678 P.2d at 430). Notably, here, Defendants assert the “sham
3 first sales” argument that the rule eliminating the privity requirement precludes when they
4 argue that Defendant KHov Gallery was the original owner, and the Association is
5 analogous to a subsequent owner. *See, Motion* at 9, 15-24. Their argument fails pursuant
6 to *Loft at Fillmore*, which Defendants inexcusably fail to cite.

7 In its opinion, the Court also emphasized the evolving commercial relationships
8 between entities involved in residential construction and sale:

9 In today's marketplace, as this case illustrates, there has been some shift
10 from the traditional builder-vendor model to arrangements under which a
11 construction entity builds the homes and a sales entity markets them to the
12 public. In some cases, the builder may be related to the vendor; in other
13 cases, the vendor and the builder may be unrelated. But whatever the
14 commercial utility of such contractual arrangements, they should not affect
15 the homebuyer's ability to enforce the implied warranty against the builder.
16 Innocent buyers of defectively constructed homes should not be denied
17 redress on the implied warranty simply because of the form of the business
18 deal chosen by the builder and vendor.

19 *Lofts at Fillmore*, 218 Ariz. at 577, 190 P.3d at 736. Defendants cannot be insulated from
20 liability for breach of implied warranty due to lack of privity. *Id.* at 578 (Builder “may not
21 rely upon an agreement it has with the Developer respecting allocation of eventual
22 responsibility for defective construction to escape its obligations to the Association on the
23 implied warranty. ... For the foregoing reasons, we hold that the superior court erred in
24 dismissing the Association’s implied warranty claim for lack of privity.”)

25 Defendants admit their involvement in the Project’s development, design,
26 construction, and/or sale, and/or failed to present any undisputed evidence establishing
27 that they are not the Project’s sellers or builders.

28 **3. The public policy behind not requiring privity extends to the Association in this case**

Affirming an association’s breach of implied warranty claim against a
community’s builder, the Arizona Supreme Court in *Lofts at Fillmore*, quoted its prior
opinion in *Richards v. Powercraft* and explained that “given the policies behind the
implied warranty -- to protect innocent buyers and hold builders responsible for their work

1 -- ‘any reasoning which would arbitrarily interpose a first buyer as an obstruction to
2 **someone equally deserving of recovery** is incomprehensible.’” *Id.* at 577 (quoting
3 *Richards, supra*, 139 Ariz. at 245, 678 P.2d at 430). (Emphasis added). The rule
4 eliminating the privity requirement also considered that the builder-vendor is better able to
5 prevent construction defects and should, therefore, bear the costs of poor workmanship.
6 *Richards, supra* 139 Ariz. at 245; 678 P.2d at 430 (“Because the builder-vendor is in a
7 better position than a subsequent owner to prevent occurrence of major problems, the
8 costs of poor workmanship should be his to bear.”). *See also, Nastri v. Wood Bros.*
9 *Homes*, 142 Ariz. 439, 443, 690 P.2d 162 (App. 1984), overruled in part on other grounds,
10 *Flagstaff Affordable Housing Limited Partnership v. Design Alliance, Inc.*, 223 P.3d 664
11 (Ariz. 2010) (“The warranty of habitability is a creature of public policy. ... Privity of
12 contract is not required. ... If construction of a new house is defective, its repair costs
13 should be borne by the responsible builder-vendor who created the latent defect.”)

14 Pursuant to the Arizona Nonprofit Corporation Act, the Association’s Articles of
15 Incorporation, the Declaration, and the Quit Claim Deed transferring common element
16 ownership from Defendants to the Association, the Association holds legal interests in the
17 Common Area and bears the legal responsibility for maintaining and repairing the
18 Common Area and the exterior walls, stucco, façade, roofs or other surfaces of the
19 Dwelling Units. (Assoc. SOF ¶¶ F-G, R, W). The Association’s obligation for this
20 maintenance and repair under the Declaration is admitted by Defendants. (Assoc. SOF ¶
21 R). Therefore, the Association, as the entity responsible to maintain and repair the alleged
22 defects at The Gallery, is “someone equally deserving of recovery” for Defendants’
23 breach of the implied warranty as expressed by the Arizona Supreme Court in *Lofts at*
24 *Fillmore*. Based upon the Arizona Supreme Court’s holding in *Lofts at Fillmore*, the
25 Association in this case may properly bring a claim for breach of implied warranty against
26 Defendants who are builder-vendors and/or builders of The Gallery.

27 Moreover, that implied warranties arising from common area and unit construction
28 benefit homeowner associations who may bring such claims directly against builder-

1 vendors and builders is widely-accepted by other states' appellate courts. *See Windham at*
2 *Carmel Mountain Ranch Ass'n v. Superior Ct.*, 135 Cal.Rptr.2d 834 (Cal. App. 2003)
3 (recognizing common element implied warranties, and stating that since "associations
4 generally are required to manage, maintain and repair a project's common areas, *it would*
5 *be illogical to deprive associations of the ability to sue to recover for damage to common*
6 *areas they are obligated to repair*"); *Berish v. Bornstein*, 770 N.E.2d 961, 973-74 (Mass.
7 2002) *Berish v. Bornstein*, 2006 Mass. Super. LEXIS 330, *1, 21 Mass. L. Rep. 530
8 (implied warranties arise with regard to "improper design, material, or workmanship [that]
9 is responsible for a defect in a common area"); *Meadowbrook Condo. Ass'n v. South*
10 *Burlington Realty Corp.*, 565 A.2d 238, 240-11 (Vt. 1989) (implied warranties arise from
11 construction and sale of common interest communities, relying on principles described in,
12 and citing to, *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964)); *Starfish Condominium*
13 *Ass'n v. Yorkridge Service Corp., Inc.*, 458 A.2d 805, 811 (Md. App. 1983) (plaintiff
14 association had right to sue for implied warranty in its own right); *Herlihy v. Dunbar*
15 *Builders Corp.*, 415 N.E.2d 1224, 1227-29 (Ill. App. 1980) (implied warranties arise from
16 common element defects in condominium community); *Gable v. Silver*, 258 So.2d 11, 18
17 (Fla. App. 1972) (recognizing common element implied warranties); *Point E. Condo.*
18 *Owners' Ass'n v. Cedar House Assocs. Co.*, 663 N.E.2d 343, 356-57 (Ohio Ct. App. 1995)
19 (condominium association could assert implied warranty claims against developer and
20 general contractor); *Riverfront Lofts Condo. Owners Ass'n v. Milwaukee/Riverfront Props.*
21 *Ltd. P'ship*, 236 F.Supp.2d 918, 928 (E.D. Wis. 2002) (conveyance of units to unit owners
22 coupled with transfer of control of common areas to HOA gives rise to implied warranties).

23 **4. Defendants fail to address *Lofts at Fillmore* in their Motion**

24 Defendants did not merely fail to mention *Lofts at Fillmore* in their *Motion*, but
25 falsely stated that, as to the breach of implied warranty of workmanship and habitability,
26 "[n]o such implied warranty exists as to any of the Defendants other than arguably the
27 Declarant ..., and there is no known appellate case in Arizona squarely addressing the
28 issue presented, of whether such a warranty runs as a matter of law," and "such a warranty

1 has only been found as to homeowner claims against builder/vendors in Arizona.” *See*
2 *Motion* p. 7, 18-22. Defendants’ *Motion* completely ignores and fails to address the
3 Arizona Supreme Court’s ruling in *Lofts at Fillmore*, which is directly on point and holds
4 that a homeowners association may bring a claim for breach of implied warranty against a
5 builder with which it has no privity of contract.

6 **C. The Association May Properly Maintain Claims for Breach of Contract**
7 **and the Implied Covenant of Good Faith and Fair Dealing**

8 Defendants have failed to provide any evidence to support their argument that the
9 Association’s breach of contract claim fails as a matter of law. Alternatively, the Court
10 should deny the *Motion* for the reasons stated below or should grant the Association leave
11 to conduct additional discovery relevant to its breach of contract claim, as explained in its
12 concurrently-filed Rule 56(d) Motion.

13 **1. The Declaration is a contract between the Association and**
14 **Defendants**

15 The Declaration is a contract that granted rights to, and imposed duties and
16 obligations on, the Declarant. (Assoc. SOF ¶¶ M-Q) *See, e.g.*, Declaration, Page 1,
17 Recitals § C (“Declarant desires to establish for its own benefit . . . certain **mutually**
18 **beneficial** covenants, conditions, restrictions, easements and obligations with respect to
19 the proper development, use and maintenance of the Property”) (Emphasis added).
20 Moreover, when the Declarant controlled the Association from June 27, 2016 through
21 turnover on December 14, 2017 and was the Owner of multiple units, the Declarant was a
22 party to the Declaration as an Owner. (Assoc. SOF ¶¶ K, V). When the Declarant
23 controlled the Association, the Declarant breached its obligations under the Declaration to
24 properly maintain and repair the Project’s common elements and the building exteriors in
25 accordance with applicable laws and building codes. (Assoc. SOF ¶¶ L-Q, S).

26 No Arizona case has held that the CC&Rs cannot support a breach of contract
27 claim against a declarant. To the contrary, “CC&Rs must be construed as a whole and
28 interpreted in view of their underlying purposes, giving effect to all provisions contained
therein.” *See Powell v. Washburn*, 211 Ariz. 553, 557, 125 P.3d 373, 377 (2006). Indeed,

1 other courts have held and affirmed that the declarant is a party to a declaration. *See e.g.*,
2 *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal.4th
3 223 (2012) (citing *Villa Milano Homeowners Assn. v. IL Davorge*, 84 Cal.App.4th 819
4 (2000), for proposition that CC&R’s are a contract between the developer and
5 homeowners association); *Solowicz v. Forward Geneva Nat’l, LLC*, 780 N.W. 2d 111, 125
6 (Wis. 2010) (“The Community Declaration is a contract or agreement between the
7 Developer and those who choose to purchase property.”) *Maples v. Contorakes*, No.
8 BCD-CV-18-02, 2019 Me. Bus. & Consumer LEXIS 26, * 33 (2019) (“the Declaration
9 and Bylaws are contracts between the Declarant and the Association, on the one hand, and
10 the unit owners . . . on the other).

11 Defendants incorrectly assert that “[i]t is well established under Arizona law that
12 CC&Rs only ‘constitute a contract between the property owners as a whole and the
13 individual lot owners.’” *Motion* at 4, lines 27-28 (quoting *Cypress on Sundland*
14 *Homeowners Ass’n v. Orlandi*, 227 Ariz. 288, ¶ 31, 57 P.3d 1168, 1177 (App. 2011)); see
15 also, *College Book Centers, Inc. v. Carefree Foothills Homeowners’ Ass’n*, 225 Ariz. 533,
16 241 P.3d 897 (App. 2010)). Neither cited case involved a declarant or held that a
17 declaration is a contract between only property owners/an HOA and individual owners.

18 *Sundland Homeowners Ass’n* involved a dispute over lien priority that arose after a
19 homeowner failed to pay an assessment owed to the HOA. The Court noted that the
20 “CC&Rs constitute a contract between property owners as a whole and individual lot
21 owners” and held that “the first deed of trust on the property has priority over and is
22 senior to the HOA assessment lien.” *Id.* at ¶¶ 31 & 38. The case did not involve a
23 declarant and did not hold that a community’s CC&Rs bind only a homeowner and an
24 HOA. See generally *id.* *College Book Centers, Inc.* involved a dispute between a
25 homeowner and an HOA regarding a declaration provision’s application. Noting that the
26 CC&Rs constitute a contract between the parties, *id.* at ¶ 11, the Court construed the
27 disputed provision. The case did not involve a declarant and did not hold that a
28 community’s CC& Rs bind only a homeowner and an HOA. See generally *id.*

1 Accordingly, Defendants’ argument that the Association’s breach of contract claim
2 is not supported by a contract fails.

3 2. **The grant of the common area from Defendants to the**
4 **Association constitutes a contract**

5 The *Motion* severely misrepresents the grant of the common area transaction, and
6 Defendants’ argument that the grant of the common area was not a contract/bargain fails.

7 Contrary to Defendants’ statement that there was no consideration for the grant of
8 the common area, the Quit Claim Deed, which they failed to present as evidence,
9 specifically states that it was supported by consideration:

10 **“FOR THE CONSIDERATION of Ten Dollars (\$10.00) and other**
11 **valuable considerations, K. HOVNANIAN AT GALLERY, LLC, an**
12 **Arizona limited liability company ("Grantor"), hereby quit-claims to**
13 **GALLERY COMMUNITY ASSOCIATION, an Arizona nonprofit**
14 **corporation ("Grantee"), all right, title and interest in the following real**
15 **property (the "Property") situated in Maricopa County, Arizona”**

16 (Assoc. SOF ¶ W, Exh. C, Certified Copy Quit Claim Deed). (emphasis added).

17 Defendants further argue that the only bargain between the parties involved the
18 Quit Claim Deed in exchange for the Association accepting the common areas “as is.”
19 *Motion* at 5, 25-26. First, this contradicts Defendants’ later argument that the Association
20 could have negotiated the bargain based on an inspection. *Motion* at 7, 10-15. Second, the
21 Declaration provides: “Declarant covenants that it shall convey fee simple title to the
22 Common Area to the Association, free of all encumbrances except current real and
23 personal property taxes and other easements, conditions, reservations and restrictions then
24 of record. The conveyance shall be made to the Association prior to the First
25 Conveyance.” (Assoc. SOF ¶ Q, Decl. § 3.5). The Declaration provides that when the
26 Declarant conveys property to the Association, “such property shall **automatically be**
27 **deemed accepted** by the Association.” (Assoc. SOF ¶ Q, Decl. § 1.8) (emphasis added).

28 Therefore, the Declaration contract required that Declarant convey fee simple title
to the Association, free of encumbrances, for the consideration the Quit Claim Deed
describes. The Association was required to accept the conveyance and there was no
opportunity for inspection by the Association.

1 Moreover, the conveyance of the common area occurred upon the recording of the
2 Quit Claim Deed on October 6, 2016. (Assoc. SOF ¶ W). However, as of that date, the
3 Declarant was in control of the Association through the Board of Directors because
4 transition to homeowner control did not occur until December 2017. (Assoc. SOF ¶ V).
5 Therefore, assuming, *arguendo*, that Defendants are correct that the Association had the
6 opportunity to inspect the common area before accepting the conveyance, it is Defendants
7 who should have inspected as the members of the Board of Directors of the Association
8 and failed to do so. Such conduct could give rise to a claim for breach of fiduciary duty
9 by the Association against Defendants and their appointed board members. *See Raven's*
10 *Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal. App. 3d 783, 800, 171 Cal. Rptr.
11 334, 344 (1981) (“[T]he failure of the initial Association directors to exercise supervision
12 which permits mismanagement or nonmanagement is an independent ground for the
13 breach of fiduciary duty by the Developer during the initial period of the Association,
14 when the Developer and its employees controlled the Association.”).

15 **3. The Association established the existence of a contract upon**
16 **which a claim for breach of good faith and fair dealing may rest**

17 With respect to Plaintiff’s cause of action for breach of the implied covenant of
18 good faith and fair dealing, Defendants only argument is that there can be no bad faith
19 claim where there is no contract between the Association and Defendants. As set forth in
20 detail above, both the Declaration and the grant of the common area to the Association,
21 constitute contracts between the Association and Defendants. Therefore, Defendants’
22 argument fails and summary judgment should be denied.

23 **4. Defendants present no evidence that the Association did not lose**
24 **a benefit of the bargain**

25 Without citation to any legal authority, Defendants argue that “there is no breach of
26 contract or breach of the duty of good faith and fair dealing where there is no loss of the
27 benefit of the bargain expected by the Plaintiff.” *Motion* at 5, 17-18. They also argue
28 without presenting any evidence that “[t]here is no bargain and no consideration was
alleged” and “[t]here is no loss of expectation.” *Motion* at 5, 18-21. However, as

1 explained at length above, there was a bargain and consideration.

2 Although it is difficult to determine what Defendants' argument is relative to the
3 "benefit of the bargain" as related to the Association's breach of contract claim, perhaps
4 Defendants are arguing that the Association has not suffered any damage because the loss
5 of the "benefit of the bargain" is a contractual remedy. *See Arrow Leasing Corp. v.*
6 *Cummins Ariz. Diesel*, 136 Ariz. 444, 447, 666 P.2d 544, 547 (App. 1983) ("...traditional
7 contract remedies are designed to redress loss of the benefit of the bargain..."); *Flagstaff*
8 *Affordable Hous. Ltd. P'ship v. Design All., Inc.*, 223 Ariz. 320, 327, 223 P.3d 664, 671
9 (2010) ("The principal function of the economic loss doctrine, in our view, is to encourage
10 private ordering of economic relationships and to uphold the expectations of the parties by
11 limiting a plaintiff to contractual remedies for loss of the benefit of the bargain.").
12 Defendants fail to present any evidence that the Association has not suffered any damage.

13 Alternatively, perhaps Defendants are addressing the covenant of good faith and
14 fair dealing which is defined as follows: "The essence of [the duty imposed by a covenant
15 of good faith and fair dealing] is that neither party will act to impair the right of the other
16 to receive the benefits which flow from their agreement or contractual relationship."
17 *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986). A party breaches the
18 implied covenant of good faith and fair dealing either by "exercising express discretion in
19 a way inconsistent with a party's reasonable expectations" or by "acting in ways not
20 expressly excluded by the contract's terms but which nevertheless bear adversely on the
21 party's reasonably expected benefits of the bargain." *Bike Fashion Corp. v. Kramer*, 202
22 Ariz. 420, 424, 46 P.3d 431, 435 (App. 2002) (citing *Wells Fargo Bank v. Ariz. Laborers,*
23 *Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474 at P67
24 (2002). Again, Defendants fail to present any evidence that the Association received the
25 benefits of the contract. Defendants have not met their burden on summary judgment and
26 the *Motion* should be denied.

27 V. CONCLUSION

28 For the reasons described above, the Motion should be denied.

1 RESPECTFULLY SUBMITTED this 22ND day of March, 2021.

2 BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

3 By: /s/ Penny J. Manship

4 Craig S. Nuss, Esq.

5 Penny J. Manship, Esq.

6 8310 South Valley Highway, Suite 270

7 Englewood, CO 80112

8 pmanship@burgsimpson.com

9 *Attorneys for Plaintiff Gallery Community Association*

10 The foregoing E-FILED via AZTurboCourt
11 Electronic filing system and E-MAILED this
12 22nd day of March, 2021 to:

13 Dennis I. Wilenchik, Esq.

14 Heather Zwick

15 Barbara Stansil

16 Wilenchik & Bartness, P.C.

17 2810 North Third Street

18 Phoenix, AZ 85004

19 admin@wb-law.com

20 diw@wb-law.com

21 heatherz@wb-law.com

22 barbaras@wb-law.com

23 *Attorneys for Defendants/ThirdParty Plaintiffs K. Hovnanian at Gallery, LLC; K.*
24 *Hovnanian Arizona Operations, LLC; K. Hovnanian Developments of Arizona, Inc.; K.*
25 *Hovnanian Companies of Arizona, LLC*

26 Teresa Hayashi Wales

27 WELSH LAW GROUP, PLC

28 11811 North Tatum Boulevard, Suite P125 Phoenix, AZ 85028

minuteentries@welshlawgroup.com

twales@welshlawgroup.com

Attorneys for Chas Roberts Air Conditioning, Inc.

Leonard T. Fink, Esq.

David S. Schopick, Esq.

1 SPRINGEL & FINK LLP

2 3033 North Central Ave., Suite 500

3 Phoenix, AZ 85012

4 lfink@springelfink.com

5 dschopick@springelfink.com

6 *Attorneys for Third-Party Defendant, SARGON MASONRY CONSTRUCTION, LLC*

7 C. Cole Crabtree

8 Amanda R. Hough

9 Jaburg & Wilk, P.C.

10 3200 N. Central Avenue, 20th Floor

11 Phoenix, AZ 85012

12 ccc@jaburgwilk.com

13 aah@jaburgwilk.com

14 *Attorneys for Third-Party Defendant Gothic Landscaping, Inc.*

15 Michael A. Ludwig, Bar #015481

16 Stephen F. Best, Bar #034976

17 JONES, SKELTON & HOCHULI, P.L.C.

18 40 North Central Avenue, Suite 2700

19 Phoenix, Arizona 85004

20 minuteentries@jshfirm.com

21 mludwig@jshfirm.com

22 sbest@jshfirm.com

23 *Attorneys for Third-Party Defendant LeBlanc*
24 *Building Co., Inc.*

25 Tom Shorall Jr., #010456

26 Jason J. Boblick, #026507

27 Shorall McGoldrick Brinkmann

28 1232 East Missouri Avenue

Phoenix, AZ 85014-2912

tomshorall@smbattorneys.com

jasonboblick@smbattorneys.com

smb@smbattorneys.com

Attorneys for Third Party Defendant
Liberty Constructors

26 /s/ Jessica Harmon

27 Jessica Harmon

28