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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. HOVNIANIAN AT GALLERY, LLC,  
19                   an Arizona limited liability company; K.  
20                   HOVNIANIAN ARIZONA  
21                   OPERATIONS, LLC, an Arizona  
22                   limited liability company; K.  
23                   HOVNIANIAN DEVELOPMENTS OF  
24                   ARIZONA, INC., an Arizona  
25                   corporation; K. HOVNIANIAN  
26                   COMPANIES OF ARIZONA, LLC, an  
27                   Arizona limited liability company;  
28                   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.

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Case No. CV2020-008714

Assigned to Hon. Michael Kemp

**PLAINTIFF’S RESPONSE TO  
DEFENDANTS’/THIRD-PARTY  
PLAINTIFFS’ SEPARATE STATEMENT  
OF FACTS IN SUPPORT OF  
DEFENDANTS’/THIRD-PARTY  
PLAINTIFFS’ MOTION FOR  
SUMMARY JUDGMENT**

**AND PLAINTIFF’S CONTROVERTING  
FACTS IN OPPOSITION TO  
DEFENDANTS’/THIRD-PARTY  
PLAINTIFFS’ MOTION FOR  
SUMMARY JUDGMENT**

**(Oral Argument Requested)**

1 K. HOVNANIAN AT GALLERY, LLC,  
2 an Arizona limited liability company; K.  
3 HOVNANIAN ARIZONA  
4 OPERATIONS, LLC, an Arizona  
5 limited liability company; K.  
6 HOVNANIAN DEVELOPMENTS OF  
7 ARIZONA, INC., an Arizona  
8 corporation; K. HOVNANIAN  
9 COMPANIES OF ARIZONA, LLC, an  
10 Arizona limited liability company;

11 Third-Party Plaintiffs,

12 v.

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

Third-Party Defendants.

1 Plaintiff, Gallery Community Association (“Plaintiff” or “Association”), by and  
2 through undersigned counsel, submits the following Response to Defendants’/Third-Party  
3 Plaintiffs’ Separate Statement of Fact and Plaintiff’s Controverting Facts in Opposition to  
4 Defendants’/Third-Party Plaintiffs’ Motion for Summary Judgment:

5 **I. Plaintiff’s Response and opposition to Defendants’/Third-Party Plaintiffs’**  
6 **Separate Statement of Facts:**

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

12 **Objection, fails to cite evidence. Undisputed.**

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

15 **Objection, fails to cite evidence. Undisputed.**

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

21 **Objection, fails to cite evidence and partially disputed.** Undisputed that the  
22 CC&R’s require the Association to repair and maintain the common elements on  
23 the Association Property and Common Areas thereafter, as defined therein, as well  
24 as the common exterior walls, stucco, façade, roofs, or other surfaces of the  
25 Dwelling Units. Defendants present no evidence that they are not liable for the  
26 defects alleged in the Complaint or their failure to repair and maintain The Gallery  
27 prior to turnover or as Owners under the Declaration. Assoc. SOF ¶¶ K, M-Q, S.

28 4. There is no known express or implied warranty running to the HOA after

1 acceptance of the Declarant rights to the Property conveyed. That acceptance occurred  
2 after inspection and no limitation was placed on the conveyance by the HOA at that time.

3 **Objection, fails to cite evidence. Disputed.** The Declaration provides:

4 “Declarant covenants that it shall convey fee simple title to the Common Area to  
5 the Association, free of all encumbrances except current real and personal property  
6 taxes and other easements, conditions, reservations and restrictions then of record.

7 The conveyance shall be made to the Association prior to the First Conveyance.”

8 The Declaration also provides that when the Declarant conveys property to the  
9 Association, “such property shall automatically be deemed accepted by the  
10 Association.” Assoc. SOF ¶ Q.

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

15 Moreover, the conveyance of the common area occurred upon the recording  
16 of the Quit Claim Deed on October 6, 2016. Assoc. SOF ¶ W. However, as of that  
17 date, the Declarant was in control of the Association through the Board of  
18 Directors because turnover to homeowner control did not occur until December  
19 2017. Assoc. SOF ¶ V.

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

24 **Objection, fails to cite evidence. Undisputed.**

25 6. There is no privity of contract alleged in the Complaint as to any contract the  
26 Association has with any of the other Defendants, with KHov Gallery, or with the actual  
27 builder, K Hovnanian Arizona Operations, LLC (“KHov Operations”). (Complaint at ¶  
28 10,11).

1           **Objection, fails to cite evidence. Disputed.** The Declaration is a contract  
2 between an association and a developer, and grants rights and duties to the  
3 Declarant, its Related Entities and affiliates. Assoc. SOF ¶ Q. The Complaint also  
4 alleges the conveyance of the common elements by quit claim deed to the  
5 Association, which was given for consideration. Assoc. SOF ¶ W.

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

9           **Objection, fails to cite evidence; not a “fact” upon which summary judgment**  
10 **may be found.** Pursuant to Rule 56(d), the Association requires discovery on the  
11 role that Defendant K Hovnanian Developments of Arizona, Inc. played in the  
12 development, design, construction, and/or sale of The Gallery and the units. See  
13 Request for Rule 56(d) Relief filed contemporaneously herewith.

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

17           **Objection, fails to cite evidence. Disputed.** Defendants admit in their Answer  
18 that “Defendant K. Hovnanian Companies of Arizona, LLC was involved in the  
19 development, design, construction, and/or sale of The Gallery and the units. See  
20 Complaint ¶ 12, and Exh.\*, Answer ¶ 12.

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

24           **Objection, this is not a “fact” upon which summary judgment may be found;**  
25 **it is vague and ambiguous with respect to what “other entities” it is referring.**

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  
28 units. The claim here is solely made by an HOA, for construction defects in common

1 areas. (Complaint at ¶ 1 and generally)

2 **Objection, fails to cite evidence misstates Complaint; these are not “facts”**

3 **upon which summary judgment may be found.** The Complaint states that the  
4 Association brings the action pursuant to A.R.S. § 12-1361, et seq. and § 33-2001,  
5 et seq.

6 11. Plaintiff’s Count Two, Breach of Implied Covenant of Good Faith and Fair  
7 Dealing, and Count Four, Breach of Contract Claim are contract claims. (Complaint at ¶  
8 25, 39)

9 **Objection, this is not a “fact” upon which summary judgment may be found.**

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

13 **Objection, fails to cite evidence.** The Complaint also alleges the conveyance of  
14 the common elements by quit claim deed to the Association, which was given for  
15 consideration. Assoc. SOF 20 W

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

19 **Objection, fails to cite evidence; not a “fact” upon which summary judgment**  
20 **may be found.**

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

24 **Objection, fails to cite evidence; not a “fact” upon which summary judgment**  
25 **may be found.**

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

1           **Objection, fails to cite evidence; not a “fact” upon which summary judgment**  
2           **may be found.**

3  
4           **II. Plaintiff’s Controverting Statement of Facts in Opposition to**  
5           **Defendants’/Third-Party Plaintiffs’ Motion for Summary Judgment**  
6           **(“Assoc. SOF”)**

7           A.     K. Hovnanian at Gallery, LLC (“KHov Gallery”) was the owner of the property,  
8           “developed the project,” “conveyed the common elements of the project to the  
9           Association in a quit claim deed dated October 6, 2016,” and “acted as the vendor by  
10          selling individual unit owners their units at The Gallery.”

- 11                 1. Defendants admit in their Answer that “Defendant K. Hovnanian at Gallery,  
12                 LLC conveyed the common elements of the project to the Association in a  
13                 quit claim deed dated October 6, 2016,” and “also acted as the vendor by  
14                 selling individual unit owners their units at The Gallery.” See Complaint ¶¶  
15                 8-9, and Exh. A, Answer ¶¶ 8-9.
- 16                 2. The Declaration identifies KHov Gallery as the Declarant and the “owner  
17                 and developer” of the property subject to the Declaration. Exh. B, Decl.  
18                 Recitals § A.
- 19                 3. “In the publicly recorded October 6, 2016 “Quit Claim Deed, only  
20                 Defendant K Hovnanian at Gallery, LLC (“KHov Gallery”), which had  
21                 developed the project and was the Declarant under the CC&R’s, conveyed  
22                 the common areas to the Association.” Defendants’ SOF ¶ 5; Exh. C., Quit  
23                 Claim Deed.

24          B.     Defendant K. Hovnanian Arizona Operations, LLC was the general contractor  
25          responsible for the construction of The Gallery.

- 26                 1. Defendants admit in their Answer that “Defendant K. Hovnanian Arizona  
27                 Operations, LLC was the general contractor responsible for the construction  
28                 of The Gallery.” See Complaint ¶ 10, and Exh. A, Answer ¶ 10.

1 C. Defendant K. Hovnanian Companies of Arizona, LLC was involved in the  
2 development, design, construction, and/or sale of The Gallery and the units.

3 1. Defendants admit in their Answer that “Defendant K. Hovnanian  
4 Companies of Arizona, LLC was involved in the development, design,  
5 construction, and/or sale of The Gallery and the units.” See Complaint ¶ 12,  
6 and Exh. A, Answer ¶ 12.

7 D. Defendant K. Hovnanian Developments of Arizona, Inc. is a member of K.  
8 Hovnanian at Gallery, LLC, and K. Hovnanian Arizona Operations, LLC.

9 1. Defendants admit in their Answer that “Defendant K. Hovnanian  
10 Developments of Arizona, Inc. is a member of K. Hovnanian at Gallery,  
11 LLC, and K. Hovnanian Arizona Operations, LLC.” See Complaint ¶ 11,  
12 and Exh. A, Answer ¶ 11.

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

17 1. “Declarant is the owner and developer of certain real property in the City of  
18 Scottsdale, Maricopa County, Arizona, which is more particularly described  
19 in Exhibit A attached hereto and by reference incorporated herein (the  
20 *Property*’).” Exh. B, Decl. Page 1, Recitals § A. (emphasis in original).

21 F. The Gallery Community Association was formed as a nonprofit corporation under  
22 A.R.S. § 10-3101, et seq., *i.e.*, the Arizona Nonprofit Corporation Act, through the  
23 Articles of Incorporation of Gallery Community Association (“Articles”).

24 1. “The undersigned incorporator hereby adopts the following Articles of  
25 Incorporation (the “Articles”), for the purpose of forming a nonprofit  
26 corporation under the laws of the State of Arizona, including A.R.S. Section  
27 10-3101, et seq., dealing with nonprofit corporations, as amended from time  
28 to time (the ‘*Nonprofit Corporation Act*’). Exh. E Articles. (emphasis

1 added).

2 G. The Articles state that the “Character of Affairs” of the Association is to “manage,  
3 maintain and administer the Common Area and common facilities, ... and to administer  
4 and enforce, the Declaration of Covenants, Conditions, Restrictions and Easements for  
5 Gallery ....”

6 1. “Character of Affairs. ... “the Association is organized to manage, maintain  
7 and administer the Common Area and common facilities, to collect and  
8 disburse assessments lawfully charged against the Owners of the Lots  
9 subject to assessment, and to perform or exercise all duties of and to  
10 administer and enforce, the Declaration of Covenants, Conditions,  
11 Restrictions and Easements for Gallery (the ‘*Declaration*’), ....” Exh. E,  
12 Articles § 2. (emphasis in original).

13 H. The Declaration defines “Declarant” to include not only KHov Gallery, but also  
14 “its successors and assigns, or any person or entity to whom all of Declarant’s rights  
15 reserved to the Declarant hereunder are assigned.”

16 1. “1.15 ‘Declarant’ shall mean and refer to the entity that is the developer of  
17 the Property, and shall be K. Hovnanian at Gallery, LLC, an Arizona limited  
18 liability company, **its successors and assigns, or any person or entity to  
19 whom all of Declarant’s rights reserved to the Declarant hereunder are  
20 assigned** in accordance with the provisions hereof. ...” Exh. B, Decl. § 1.15.  
21 (emphasis added).

22 I. The Declaration also defines “Homebuilder” as “any homebuilder in the business  
23 of constructing residential improvements on Lots and buys Lots from Declarant.”

24 1. “1.26 ‘Homebuilder’ shall mean any homebuilder in the business of  
25 constructing residential improvements on Lots and who buys Lots from  
26 Declarant. Exh. B, Decl. § 1.26

27 K. The Declarant is also an “Owner,” as that term is defined in the Declaration, “so  
28 long as Declarant or a Related Entity owns or has a Recorded option to purchase any Lot

1 within the Property.”

2 1. “1.34 ‘Owner’ shall mean the record owner, whether one or more Persons,  
3 of equitable or beneficial title in fee simple ( or legal title if same have  
4 merged) of any Lot, and shall include the Purchaser under a Recorded deed  
5 pursuant to a contract for sale of any Lot. The foregoing does not include a  
6 Person who holds an interest in any Lot merely as security for the  
7 performance of an obligation. Except as stated otherwise herein, Owner(s)  
8 shall not include a lessee or tenant of a Lot. Owners shall include Declarant  
9 so long as Declarant or a Related Entity owns or has a Recorded option to  
10 purchase any Lot within the Property.” Exh. B, Decl. § 1.34.

11 L. 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 1. Declarant formed the Association “as an Arizona nonprofit corporation, for  
15 the purpose of the efficient preservation of the values and amenities of the  
16 Property and to which shall be delegated certain powers of administering  
17 and maintaining the Common Area, enforcing this Declaration, and  
18 collecting and disbursing the Assessments created herein.” Exh. B, Decl.  
19 Page 1, Recitals § B.

20 M. The Declaration was made to establish “**mutually beneficial** covenants,  
21 conditions, restrictions, easements and obligations with respect to the proper development,  
22 use and maintenance of the Property” for **Declarant’s “own benefit”** and the “**mutual**  
23 **benefits of all future Owners, or other holders of interests** in any portion of the  
24 Property.”

25 1. “Declarant desires to establish for its own benefit and for the mutual benefit  
26 of all future Owners, or other holders of interests in any portion of the  
27 Property, certain mutually beneficial covenants, conditions, restrictions,  
28 easements and obligations with respect to the proper development, use and

1 maintenance of the Property.” Exh. B, Decl. Page 1, Recitals § C.

2 N. The Declaration was “declared and agreed to be in furtherance of Declarant's  
3 general plan for, and improvement and sale of, the Property and is established for the  
4 purpose of enhancing and perfecting the value, desirability and attractiveness of the  
5 Property. This Declaration shall run with all of the Property for all purposes and **shall be**  
6 **binding upon and inure to the benefit of Declarant, the Association, all Owners,**  
7 **Members and their respective successors in interest.”**

8 1. “2.1 General Declaration. Declarant hereby declares that the Property is and  
9 shall be held, conveyed, hypothecated, encumbered, leased, occupied, built  
10 upon or otherwise used, improved or transferred, in whole or in part, subject  
11 to this Declaration, as amended from time to time; provided, however,  
12 Property which is not part of a Lot and which is dedicated or transferred to a  
13 public authority or utility pursuant to Section 4.8 shall not be subject to this  
14 Declaration while owned by the public authority or utility. This Declaration  
15 is declared and agreed to be in furtherance of Declarant's general plan for,  
16 and improvement and sale of, the Property and is established for the purpose  
17 of enhancing and perfecting the value, desirability and attractiveness of the  
18 Property. This Declaration shall run with all of the Property for all purposes  
19 and **shall be binding upon and inure to the benefit of Declarant, the**  
20 **Association, all Owners, Members and their respective successors in**  
21 **interest.” Exh. B Decl. § 2.1. (emphasis added).**

22 O. The Declaration granted certain rights and duties to the Declarant, KHov Gallery,  
23 and/or any “Related Entity,” which is defined as “any entity related to Declarant or  
24 Homebuilder.”

25 1. Section 8.1.1 of the Declaration defines “Related Entity” as “Homebuilder  
26 or any entity related to Declarant or Homebuilder.” Exh. B, Decl. § 8.1.1.

27 P. The Declaration further states that it “grants to or convers upon the Declarant or  
28 upon any affiliates of Declarant” “rights, privileges, easements, benefits, or exemptions.”

1 1. “10.18 Amendments Affecting Declarant Rights. Notwithstanding any  
2 other provision of this Declaration to the contrary, no provision of this  
3 Declaration (including but not limited to, this Section) **which grants to or**  
4 **converts upon the Declarant or upon any affiliates of Declarant any**  
5 **rights, privileges, easements, benefits or exemptions** (except for rights,  
6 privileges, easements, benefits or exemptions granted to or conferred upon  
7 Owners generally) may be modified, amended or revoked in any way, so  
8 long as the **Declarant, any affiliate of Declarant or a trustee for the**  
9 **benefit of the Declarant or any affiliate of Declarant owns or has a**  
10 **Recorded option to purchase any portion of the Property**, without the  
11 express written consent of the Declarant.” Exh. B, Decl. § 10.18. (emphasis  
12 added).

13 Q. The rights and duties granted to Declarant its affiliates and Related Entities,  
14 include but are not limited to:

- 15 • The right of “Declarant or a Related Entity” to “withdraw property from the  
Property without the consent of any other Owner ....”
- 16 • The duty to convey fee simple title to the Common Area to the Association, which  
17 “shall automatically be deemed accepted by the Association.” (“Declarant  
18 covenants that it shall convey fee simple title to the Common Area to the  
Association, free of all encumbrances except current real and personal property  
19 taxes and other easements, conditions, reservations and restrictions then of  
record.”).
- 20 • The right of “Declarant, or its successors or assigns” to have at least one (1)  
21 position on the Board of Directors for ten (10) years after the period of Declarant  
control ceases ....”
- 22 • The right to “maintain an absolute control over the Association, including  
23 appointment and removal of the President, the members of the Board, and the  
members of the Architectural Committee, until the Transition Date ....”
- 24 • The right of “Declarant, Homebuilder or any entity related to Declarant or  
Homebuilder (a ‘Related Entity’) ... to use any Lot owned or leased by Declarant,  
25 Homebuilder or a Related Entity for purposes related to the development and  
marketing of the Property ...”
- 26 • The right to construct all Dwelling Units on the Property “as long as Declarant or a  
Related Entity owns or has a Recorded option to purchase one or more Lots.”
- 27 • The right to consent to or withhold consent as to any modification, amendment, or  
28 revocation of any provision of the “Declaration which grants to or converts upon  
the Declarant or upon any affiliates of Declarant any rights, privileges, easements,  
benefits or exemptions ....”

1. “2.3 Withdrawal of Property. At any time that **Declarant or a Related**

1           **Entity** owns or has a Recorded option to purchase any portion of the  
2           Property, Declarant has the right to withdraw property from the Property  
3           without the consent of any other Owner or Person (other than the Owner of  
4           such property, if other than the Declarant). ...” Exh. B, Decl. § 2.3.  
5           (emphasis added).

6           2. “1.8 ‘Association Property’ shall mean the Common Area, along with any  
7           other part or parts of the Property, together with any buildings, structures,  
8           streets, gates and improvements thereon, and other real property, held by  
9           Declarant or by a trustee, for conveyance to the Association as may be  
10          provided for herein, or that the Association now or hereafter owns in fee or  
11          in which the Association now or hereafter has a leasehold or easement  
12          interest, for as long as the Association is the owner of the unofficial copy  
13          stamp old or easement interest, or such property is so held by Declarant for  
14          conveyance to the Association. Except as otherwise provided in this  
15          Declaration, all Association Property shall be maintained by the Association  
16          for the benefit of all the Owners. From time to time Declarant may convey  
17          easements, leaseholds or other property within the Property to the  
18          Association and such property shall automatically be deemed accepted by  
19          the Association.” Exh. B, Decl. § 1.8.

20          3. “3.5 Title to Common Area. Declarant covenants that it shall convey fee  
21          simple title to the Common Area to the Association, free of all  
22          encumbrances except current real and personal property taxes and other  
23          easements, conditions, reservations and restrictions then of record. The  
24          conveyance shall be made to the Association prior to the First Conveyance.”  
25          Exh. B, Decl. § 3.5.

26          4. “4.3.1. **Declarant, or its successors or assigns**, shall be entitled to at least  
27          one (1) position on the Board of Directors for ten (10) years after the period  
28          of Declarant control ceases, as provided in Section 5.3 below. ...” Exh. B,

1 Decl. § 4.3.1. (emphasis added).

2 5. “5.3 Declarant’s Control of Association. Notwithstanding anything in this  
3 Declaration to the contrary, . . .” **Declarant shall maintain an absolute**  
4 **control over the Association, including appointment and removal of the**  
5 **President, the members of the Board, and the members of the**  
6 **Architectural Committee, until the Transition Date. . . .”** Exh. B, Decl. §  
7 5.3. (emphasis added).

8 6. 8.1.1: “**...Declarant, Homebuilder or any entity related to Declarant or**  
9 **Homebuilder (a "Related Entity") shall have the right to use any Lot**  
10 **owned or leased by Declarant, Homebuilder or a Related Entity for**  
11 **purposes related to the development and marketing of the Property**  
12 and/or other property owned by Declarant, Homebuilder or a Related Entity,  
13 and the sale of Lots and/or Dwelling Units on the Property or other property  
14 owned by Declarant, Homebuilder or a Related Entity, including, without  
15 limitation, the right to place a temporary structure (e.g., a temporary sales or  
16 construction trailer), store construction materials and construct and use  
17 model homes on any such Lots.” Exh. B, Decl. § 8.1.1. (emphasis added).

18 7. “8.1.30 Construction. As long as **Declarant or a Related Entity owns or**  
19 **has a Recorded option to purchase one or more Lots**, all Dwelling Units  
20 on the Property must be constructed by Declarant or its designees. . . .” Exh.  
21 B, Decl. § 8.1.30. (emphasis added).

22 8. “10.18 Amendments Affecting Declarant Rights. Notwithstanding any  
23 other provision of this Declaration to the contrary, no provision of this  
24 Declaration (including but not limited to, this Section) **which grants to or**  
25 **converts upon the Declarant or upon any affiliates of Declarant any**  
26 **rights, privileges, easements, benefits or exemptions** (except for rights,  
27 privileges, easements, benefits or exemptions granted to or conferred upon  
28 Owners generally) may be modified, amended or revoked in any way, so

1 long as the **Declarant, any affiliate of Declarant or a trustee for the**  
2 **benefit of the Declarant or any affiliate of Declarant owns or has a**  
3 **Recorded option to purchase any portion of the Property**, without the  
4 express written consent of the Declarant.” Exh. B, Decl. § 10.18. (emphasis  
5 added).

6 R. The Declaration also grants certain rights and duties to the Association, including  
7 but not limited to:

- 8 • The duty to maintain “Association Property” for the benefit of all the Owners.
- 9 • “[S]uch rights, duties and powers as set forth [in the Declaration] and in the  
10 Articles and Bylaws.”
- 11 • “In order to insure a uniform appearance of the Property, the Association will, from  
12 time to time, as it may determine appropriate, paint the exterior of the Dwelling  
13 Units and repair, maintain and replace the exterior walls, stucco, fayade, roofs or  
14 other surfaces.”
- 15 • “the right, in its sole and absolute discretion, as to the Common Area conveyed,  
16 leased or transferred to it or as to any other area placed under its jurisdiction: . . .  
17 Reconstruct, repair, replace or refinish any improvement or portion thereof upon  
18 the Common Area or any other area placed under its jurisdiction . . .”

19 1. The Association’s obligation for maintenance and repair under the  
20 Declaration is admitted by Defendants. See Complaint ¶ 5, Exh. A, Answer  
21 ¶ 5.

22 2. “1.8 ‘Association Property’ shall mean the Common Area, along with any  
23 other part or parts of the Property, together with any buildings, structures,  
24 streets, gates and improvements thereon, and other real property, held by  
25 Declarant or by a trustee, for conveyance to the Association as may be  
26 provided for herein, or that the Association now or hereafter owns in fee or  
27 in which the Association now or hereafter has a leasehold or easement  
28 interest, for as long as the Association is the owner of the unofficial copy  
stamp old or easement interest, or such property is so held by Declarant for  
conveyance to the Association. Except as otherwise provided in this  
Declaration, all Association Property shall be maintained by the Association  
for the benefit of all the Owners. From time to time Declarant may convey  
easements, leaseholds or other property within the Property to the

1 Association and such property shall automatically be deemed accepted by  
2 the Association.” Exh. B, Decl. § 1.8.

3 3. “4.4 Powers and Duties of the Association. The Association shall have such  
4 rights, duties and powers as set forth herein and in the Articles and Bylaws.”  
5 Exh. B, Decl. § 4.4.

6 4. “8.1.7 Repair of Buildings. No Dwelling Unit or any other improvement  
7 upon any Property shall be permitted to fall into disrepair, and each such  
8 Dwelling Unit or improvement shall at all times be kept in good condition  
9 and repair and adequately painted or otherwise finished. Notwithstanding  
10 the foregoing to the contrary, in no event shall an Owner apply any paint to  
11 the exterior of its Dwelling Unit, including, without limitation, window or  
12 other trim, doors, eaves, roof deck, fences or other exterior features or  
13 replace the exterior masonry or other surface installed by Declarant. In order  
14 to insure a uniform appearance of the Property, the Association will, from  
15 time to time, as it may determine appropriate, paint the exterior of the  
16 Dwelling Units and repair, maintain and replace the exterior walls, stucco,  
17 façade, roofs or other surfaces. Exh. B, Decl. § 8.1.7.

18 5. “8.2.3 Maintenance by Association. Except as may otherwise be provided  
19 herein, the Association, or its duly delegated representative, shall maintain  
20 and otherwise manage all Common Areas in a manner deemed appropriate  
21 by the Board, in its sole and absolute discretion. Without the Owners'  
22 approval, **the Association shall have the right, in its sole and absolute**  
23 **discretion, as to the Common Area conveyed, leased or transferred to it**  
24 **or as to any other area placed under its jurisdiction: . . . 8.2.3.2**  
25 **Reconstruct, repair, replace or refinish any improvement or portion**  
26 **thereof upon the Common Area or any other area placed under its**  
27 **jurisdiction** (to the extent that such work is not the responsibility of any  
28 governmental entity or public utility); 8.2.3.3 Do all such other and further

1 acts that the Board deems necessary to preserve and protect the Common  
2 Area and the beauty thereof, in accordance with the general purposes  
3 specified in this Declaration; and 8.2.3.4 Be the sole judge as to the  
4 appropriate maintenance within the Common Area and individual front  
5 yards.” Exh. B, Decl. §§ 8.2.3 and 8.2.3.2. (emphasis added).

6 S. Finally, the Declaration grants rights and duties upon Owners, which, by definition  
7 includes Declarant:

- 8 • “By acceptance of a deed or by acquiring any ownership interest in any portion of  
9 the Property, each Owner, its heirs, representatives, successors, transferees and  
10 assigns, binds itself, its heirs, representatives, successors, transferees and assigns,  
11 to restrictions, covenants, conditions, rules and regulations now or hereafter  
12 imposed by this Declaration and any amendments thereof to the extent permitted  
13 by law.”
- 14 • “If any Common Area is damaged or destroyed by an Owner or any of its guests,  
15 tenants, licensees or agents, such Owner does hereby authorize the Association to  
16 repair such damaged area, and the Association shall so repair such damaged area in  
17 a good workmanlike manner in conformity with the original plans and  
18 specifications of the area involved, or as the area may have been modified or  
19 altered subsequently by the Association, in the discretion of the Association. The  
20 amount necessary for such repairs shall be paid by such Owner, to the Association,  
21 and the Association may enforce collection of such amounts in the same manner as  
22 provided elsewhere in this Declaration for collection and enforcement of  
23 Assessments.”
- 24 • “If any portion of any Lot is maintained so as to: (a) present a public or private  
25 nuisance, (b) substantially detract from or affect the appearance or quality of any  
26 surrounding Lot or the Property, or (c) is used in a manner which violates this  
27 Declaration, or if the Owner or Resident of any Lot fails to perform its obligation  
28 under this Declaration or the Community Rules and Regulations, 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. . . .”

1. “10.1 The Declaration. By acceptance of a deed or by acquiring any  
ownership interest in any portion of the Property, each Owner, its heirs,  
representatives, successors, transferees and assigns, binds itself, its heirs,  
representatives, successors, transferees and assigns, to restrictions,  
covenants, conditions, rules and regulations now or hereafter imposed by  
this Declaration and any amendments thereof to the extent permitted by law.

1 In addition, each Owner by so doing hereby acknowledges that this  
2 Declaration sets forth a general scheme for the improvement and  
3 development of the Property and thereby evidences its interest that all the  
4 restrictions, conditions, covenants, rules and regulations contained herein  
5 shall run with the land and be binding on all subsequent and future Owners,  
6 grantees, purchasers, transferees and assignees thereof. Furthermore, each  
7 such Owner fully understands and acknowledges that this Declaration shall  
8 be mutually beneficial, prohibitive and enforceable by the various future  
9 Owners.” Exh. B, Decl. § 10.1.

10 2. “8.2.4 Damage or Destruction of Common Area by Owners. If any Common  
11 Area is damaged or destroyed by an Owner or any of its guests, tenants,  
12 licensees or agents, such Owner does hereby authorize the Association to  
13 repair such damaged area, and the Association shall so repair such damaged  
14 area in a good workmanlike manner in conformity with the original plans  
15 and specifications of the area involved, or as the area may have been  
16 modified or altered subsequently by the Association, in the discretion of the  
17 Association. The amount necessary for such repairs shall be paid by such  
18 Owner, to the Association, and the Association may enforce collection of  
19 such amounts in the same manner as provided elsewhere in this Declaration  
20 for collection and enforcement of Assessments.” Exh. B, Decl. § 8.2.4.

21 3. “10.2 Enforcement. The Association, or any Owner, shall have the right, but  
22 not the duty, to enforce, by any proceeding at law or in equity, the  
23 provisions of this Declaration. Failure by the Association or by any Owner  
24 to enforce any covenant or restriction herein contained shall in no event be  
25 deemed a waiver of the right to do so thereafter. If any portion of any Lot is  
26 maintained so as to: (a) present a public or private nuisance, (b)  
27 substantially detract from or affect the appearance or quality of any  
28 surrounding Lot or the Property, or (c) is used in a manner which violates

1 this Declaration, or if the Owner or Resident of any Lot fails to perform its  
2 obligation under this Declaration or the Community Rules and Regulations,  
3 the Association or any Owner may give notice to the violating Owner that  
4 corrective action must be completed within fourteen (14) days of the receipt  
5 of such notice. If the violating Owner fails to take corrective action within  
6 said period of time, the Association, or the notifying Owner, may take, at  
7 the violating Owner's cost, appropriate corrective action to remedy such  
8 nuisance, detraction, violation or failure of performance including, without  
9 limitation, appropriate legal action. . . .” Exh. B, Decl. § 10.2.

10 T. The Bylaws of Gallery Community Association (“Bylaws”) were adopted on July  
11 21, 2016.

12 1. Exh. F, Bylaws.

13 U. According to the Bylaws, “[i]t is the desire of Declarant to retain control of the  
14 Association and its activities through the Board during the anticipated period of planning  
15 and development of the Property until Declarant has sold one hundred percent (100%) of  
16 the total Lots within the Property to Owners.”

17 1. Exh. F, Bylaws § 14.2.

18 V. Defendants did in fact retain 100% control of the Association by appointing all  
19 board members until the transition on December 17, 2016.

20 1. Transition from control of the Association from the Declarant to a  
21 homeowner-elected board occurred on December 14, 2017. Exh. D, Vander  
22 Waal Decl. ¶¶ 3 and 7, Exhs. G and H.

23 2. Prior to December 14, 2017, all members of the Association’s board of  
24 directors were appointed by the Declarant and none were homeowners at  
25 The Gallery. Exh. D, Vander Waal Decl. ¶ 4.

26 W. On October 7, 2016, prior to the transition to a homeowner elected board,  
27 Defendant K. Hovnanian at Gallery, LLC, for the consideration of “\$10.00 and other  
28

1 valuable considerations,” quit-claimed Tracts A through F of the Final Plat of The Gallery  
2 to the Association.

3 1. Exh. C, Quit Claim Deed.

4 X. The homeowner-elected board members are solely volunteer homeowners and have  
5 no experience or knowledge relating to construction or engineering.

6 1. Since December 14, 2017, the Association’s board of directors has been  
7 comprised solely of volunteer homeowners. Exh. D, Vander Waal Decl. ¶

8 5.

9 2. None of the homeowner elected board members have experience or  
10 knowledge relating to construction or engineering. Exh. D, Vander Waal  
11 Decl. ¶ 6.

12  
13 RESPECTFULLY SUBMITTED this 22<sup>ND</sup> day of March, 2021.

14  
15 BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

16  
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