

Exhibit H

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 Grace M. Osberg – 037577
10 cnuss@burgsimpson.com
11 pmanship@burgsimpson.com
12 gosberg@burgsimpson.com

13 *Attorneys for the Plaintiff*

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

16 GALLERY COMMUNITY ASSOCIATION,
17 an Arizona non-profit corporation,

18 Plaintiff,

19 v.

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

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

Case No. CV2020-008714

Assigned to Hon. Katherine Cooper

**PLAINTIFF’S NINETEENTH
SUPPLEMENTAL RULE 26.1
DISCLOSURE STATEMENT**

1 ARIZONA, INC., an Arizona corporation; K.
2 HOVNANIAN COMPANIES OF ARIZONA,
3 LLC, an Arizona limited liability company;

4 Third-Party Plaintiffs,

5 v.

6 CHAS ROBERTS AIR CONDITIONING,
7 INC., an Arizona corporation; DESERT
8 VISTA, INC., an Arizona corporation;
9 GOTHIC LANDSCAPING, INC., a California
10 corporation; HOME BUILDERS SITE
11 SERVICES OF ARIZONA, LLC, an Arizona
12 limited liability company; LEBLANC
13 BUILDING CO., INC., an Arizona corporation;
14 LIBERTY CONSTRUCTORS, LLC, an
15 Arizona limited liability company, dba
16 LIBERTY ARIZONA; RENCO LLC, an
17 Arizona limited liability company, dba RENCO
18 ROOFING; R/S SERVICE & SUPPLY, INC.,
19 an Arizona corporation; SARGON MASONRY
20 CONSTRUCTION, LLC, an Arizona limited
21 liability company; and DOES 1-50.

22 Third-Party Defendants.

23 The Plaintiff, by and through undersigned counsel, hereby submits its *nineteenth*
24 supplemental disclosure statement pursuant to Ariz. R. Civ. P. 26.1. Discovery is
25 ongoing in this matter and this statement is provided based upon information known and
26 available to Plaintiff at this time. Plaintiff specifically reserves the right to supplement
27 and/or amend this statement. Additions appear in *bold and italicized* type. Deletions
28 appear in ~~striketrough~~.

I. FACTUAL BASIS OF CLAIM

This is a construction defect lawsuit relating to The Gallery, an 18-unit residential development in Scottsdale, Arizona (the “Project”).

1 Plaintiff, Gallery Community Association (“Plaintiff” or the “Association”), is the
2 homeowners association for the Project. The Project is a townhome complex at the
3 northwest corner of East Earll Drive and North 71st Street in Scottsdale and was
4 constructed in approximately 2016-2017. The Project is comprised of four buildings with
5 a total of eighteen (18) three-story townhome units. One of the buildings has three (3)
6 units and the remaining three buildings each have five (5) units. The buildings are
7 constructed with stucco over conventional wood framing.

8 K. Hovnanian at Gallery, LLC (“KHov Gallery”) owned the property, developed
9 the project, conveyed the common elements of the project to the Association in a quit
10 claim deed dated October 6, 2016, and acted as the vendor by selling individual unit
11 owners their units at The Gallery. K. Hovnanian Arizona Operations, LLC (“KHOV
12 Operations”) was the general contractor responsible for the construction of The Gallery.
13 ***KHOV Operations was formerly known as K Hovnanian Great Western Building***
14 ***Company, LLC. KHov Gallery and KHOV Operations are collectively hereinafter***
15 ***referred to as Defendants.*** ~~K. Hovnanian Companies of Arizona, LLC (“KHov~~
16 ~~Companies”) was involved in the development, design, construction, and/or sale of The~~
17 ~~Gallery and the units.~~ K. Hovnanian Developments of Arizona, Inc. (“KHov
18 Developments”) was a member of KHov Gallery and KHov Operations ***and employed all***
19 ***of the individuals who worked on the Project on behalf of Defendants.***

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

24 The Association was formed as a nonprofit corporation under A.R.S. § 10-3101, et
25 seq., i.e., the Arizona Nonprofit Corporation Act, through the Articles of Incorporation of
26 Gallery Community Association (“Articles”). The Articles state that the Association’s
27 “Character of Affairs” is to “manage, maintain and administer the Common Area and
28

1 common facilities, ... and to administer and enforce, the Declaration of Covenants,
2 Conditions, Restrictions and Easements for Gallery”

3 The Declaration defines “Declarant” to include not only KHov Gallery, but also
4 “its successors and assigns, or any person or entity to whom all of Declarant’s rights
5 reserved to the Declarant hereunder are assigned.” The Declaration also defines
6 “Homebuilder” as “any homebuilder in the business of constructing residential
7 improvements on Lots and buys Lots from Declarant.” The Declarant is also an
8 “Owner,” as that term is defined in the Declaration, “so long as Declarant or a Related
9 Entity owns or has a Recorded option to purchase any Lot within the Property.”

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

23 The Declaration granted rights and duties to Declarant, KHov Gallery, and/or any
24 “Related Entity,” which is defined as “any entity related to Declarant or Homebuilder.”
25 The Declaration further states that it “grants to or confers upon the Declarant or upon any
26 affiliates of Declarant” “rights, privileges, easements, benefits, or exemptions.” Those
27 rights and duties include, but are not limited to:

28

1 • The right of “Declarant or a Related Entity” to “withdraw property from the
2 Property without the consent of any other Owner” (Declaration, Section 2.3).

3 • The duty to convey fee simple title to the Common Area to the Association,
4 which “shall automatically be deemed accepted by the Association.” (Declaration,
5 Section 1.8 and Section 3.5).

6 • The right of “Declarant, or its successors or assigns” to have at least one (1)
7 position on the Board of Directors for ten (10) years after the period of Declarant control
8 ceases” (Declaration, Section 4.3.1).

9 • The right to “maintain an absolute control over the Association, including
10 appointment and removal of the President, the members of the Board, and the members
11 of the Architectural Committee, until the Transition Date” (Declaration, Section 5.3).

12 • The right of “Declarant, Homebuilder or any entity related to Declarant or
13 Homebuilder (a ‘Related Entity’) ... to use any Lot owned or leased by Declarant,
14 Homebuilder or a Related Entity for purposes related to the development and marketing
15 of the Property ...” (Declaration, Section 8.1.1).

16 • The right to construct all Dwelling Units on the Property “as long as
17 Declarant or a Related Entity owns or has a Recorded option to purchase one or more
18 Lots.” (Declaration, Section 8.1.30).

19 • The right to consent to or withhold consent as to any modification,
20 amendment, or revocation of any provision of the “Declaration which grants to or confers
21 upon the Declarant or upon any affiliates of Declarant any rights, privileges, easements,
22 benefits or exemptions” (Declaration, Section 10.18).

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

25 • The duty to maintain “Association Property” for the benefit of all the
26 Owners. (Declaration, Section 1.8).

27 • “[S]uch rights, duties and powers as set forth [in the Declaration] and in the
28 Articles and Bylaws.” (Declaration, Section 4.4).

1 • “In order to insure a uniform appearance of the Property, the Association
2 will, from time to time, as it may determine appropriate, paint the exterior of the
3 Dwelling Units and repair, maintain and replace the exterior walls, stucco, façade, roofs
4 or other surfaces.” (Declaration, Section 8.1.7).

5 • “[T]he right, in its sole and absolute discretion, as to the Common Area ...
6 or as to any other area placed under its jurisdiction: . . . [to r]econstruct, repair, replace or
7 refinish any improvement or portion thereof upon the Common Area or any other area
8 placed under its jurisdiction” (Declaration, Section 8.2.3 and 8.2.3.2).

9 Finally, the Declaration grants rights and duties to Owners, which, by definition
10 includes the Declarant:

11 • “[E]ach Owner, ... binds itself ... to restrictions, covenants, conditions,
12 rules and regulations now or hereafter imposed by this Declaration and any amendments
13 thereof to the extent permitted by law.” (Declaration, § 10.1).

14 • “If any Common Area is damaged or destroyed by an Owner ... such
15 Owner does hereby authorize the Association to repair such damaged area, and the
16 Association shall so repair such damaged area in a good workmanlike manner in
17 conformity with the original plans and specifications of the area involved The amount
18 necessary for such repairs shall be paid by such Owner, to the Association,”
19 (Declaration, § 8.2.4).

20 • “If any portion of any Lot is maintained so as to: (a) present a public or
21 private nuisance, (b) substantially detract from or affect the appearance or quality of any
22 surrounding Lot or the Property, or (c) is used in a manner which violates this
23 Declaration, or if the Owner or Resident of any Lot fails to perform its obligation under
24 this Declaration ... the Association or any Owner may give notice to the violating Owner
25 that corrective action must be completed within fourteen (14) days of the receipt of such
26 notice. If the violating Owner fails to take corrective action within said period of time,
27 the Association, or the notifying Owner, may take, at the violating Owner's cost,
28 appropriate corrective action to remedy such nuisance, detraction, violation or failure of

1 performance including, without limitation, appropriate legal action. . . .” (Declaration, §
2 10.2).

3 The Bylaws of Gallery Community Association (“Bylaws”) were adopted on July
4 21, 2016. According to the Bylaws, “[i]t is the desire of Declarant to retain control of the
5 Association and its activities through the Board during the anticipated period of planning
6 and development of the Property until Declarant has sold one hundred percent (100%) of
7 the total Lots within the Property to Owners.” Defendants retained 100% control of the
8 Association by appointing all board members until December 17, 2016, when board
9 control transitioned from the Declarant to the other owners.

10 On October 7, 2016, prior to the transition to a homeowner elected board,
11 Defendant KHov Gallery for “\$10.00 and other valuable considerations,” quit-claimed
12 Tracts A through F of the Final Plat of The Gallery to the Association.

13 The homeowner-elected board members are solely volunteer homeowners and
14 have no experience or knowledge relating to construction or engineering. The
15 Association, through its counsel, retained experts to investigate Defendants’ work on the
16 Project.

17 *Pursuant to Defendants’ Master Subcontract Agreements with their*
18 *subcontractors, including the Third-Party Defendants, all work at the Project was to be*
19 *“performed in strict compliance with this Subcontract and the Contract Documents (as*
20 *defined in Paragraph 11 below) and all addenda, amendments and changes thereto,”*
21 *“to the entire satisfaction and approval of Contractor ... and all governing agencies,”*
22 *and in a “sound, workmanlike and substantial manner.” The “Contract Documents”*
23 *under the terms of the Master Subcontract Agreements include “all of the construction*
24 *plans, drawings, models, specifications, measurements, submittals of Subcontractor*
25 *approved by Contractor pursuant to Paragraph 18(a) below, and addenda thereto*
26 *relevant to the performance of the Work” Under the terms of the Master*
27 *Subcontract Agreement, each of the subcontractors hired by Defendants represented*
28 *and warranted that it “possesses all of the expertise, knowledge and skill necessary to*

1 *perform all of the Work in a good, careful and workmanlike manner.” Moreover, the*
2 *subcontractors could “not cover over, hide, or fail to disclose to Contractor any shoddy,*
3 *defective, incomplete, inadequate, nonconforming, or otherwise inferior Work, whether*
4 *performed by [subcontractor] or any other entity” and “shall be responsible for all*
5 *damages, costs, expenses, warranty work, consequential damages, or other Claims or*
6 *liability arising directly or indirectly from such conditions” if it fails to report such*
7 *work. Defendants and the subcontractors agreed that “[a]ll materials used in the Work*
8 *shall be furnished in ample quantities to facilitate the proper and expeditious execution*
9 *of the Work and shall be new and of the most suitable grade of their respective kinds*
10 *for the purpose,” and warranted and represented “that the workmanship of the Work,*
11 *all materials and equipment furnished for the Work, and all other aspects regarding*
12 *the Work to be performed under this Subcontract and any Work Agreement shall be in*
13 *conformance with all Laws, this Subcontract, the applicable Work Agreement and the*
14 *other Contract Documents, be of the finest quality, and be free from faults and defects*
15 *of design, material and workmanship” Under the terms of the Master Subcontract*
16 *Agreements, Defendants had the right to inspect the work of its subcontractors, and*
17 *Defendants did inspect and accept the work.*

18 *By obtaining a building permit for construction of the Project from the City of*
19 *Scottsdale, Defendants agreed that “[a]ll provisions of laws and ordinances governing*
20 *this type of work will be complied with whether specified herein or not.” Defendants*
21 *further agreed that “[t]he granting of a permit does not presume to give authority to*
22 *violate or cancel the provisions of any other state or local law regulating construction*
23 *or the performance of construction.” In addition, by obtaining a Certificate of*
24 *Occupancy from the City of Scottsdale Planning & Development Services Department,*
25 *Defendants understood that the “[i]ssuance of a certificate of occupancy shall not be*
26 *construed as an approval of a violation of the provisions of [the building code] or other*
27 *ordinances of the jurisdiction.”*

1 *The Project was not constructed in compliance with the plans, specifications,*
2 *applicable building codes, manufacturer’s installation instructions, and was not*
3 *constructed in a good and workmanlike manner as set forth in Plaintiff’s experts’*
4 *reports. Defendants attempted repairs to the stucco staircases and pool cabana during*
5 *the Purchaser Dwelling Act process under A.R.S. § 12-1363, but those repairs were*
6 *inadequate.*

7 **II. LEGAL THEORIES UPON WHICH CLAIMS ARE BASED**

8 The Association asserts claims for breach of implied covenant of good faith and
9 fair dealing, breach of implied warranty of workmanship and habitability, and breach of
10 contract.

11 **A. Breach of Contract – Against K. Hovnanian at Gallery, LLC, K.**
12 **Hovnanian Developments of Arizona, Inc., and K. Hovnanian Companies of**
13 **Arizona, LLC**

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

24 “CC&Rs must be construed as a whole and interpreted in view of their underlying
25 purposes, giving effect to all provisions contained therein.” *See Powell v. Washburn*, 211
26 Ariz. 553, 557, 125 P.3d 373, 377 (2006). The declarant is a party to a declaration. *See*
27 *e.g., Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55
28 Cal.4th 223 (2012) (citing *Villa Milano Homeowners Assn. v. IL Davorge*, 84 Cal.App.4th

1 819 (2000), for proposition that CC&R’s are a contract between the developer and
2 homeowners association); *Solowicz v. Forward Geneva Nat’l, LLC*, 780 N.W. 2d 111,
3 125 (Wis. 2010) (“The Community Declaration is a contract or agreement between the
4 Developer and those who choose to purchase property.”) *Maples v. Contorakes*, No.
5 BCD-CV-18-02, 2019 Me. Bus. & Consumer LEXIS 26, * 33 (2019) (“the Declaration
6 and Bylaws are contracts between the Declarant and the Association, on the one hand,
7 and the unit owners . . . on the other).

8 “A contract is formed if there is ‘manifestation of mutual assent to the exchange
9 and a consideration.’” *The Hill-Shafer P’ship v. Chilson Family Tr.*, 165 Ariz. 469, 474,
10 799 P.2d 810, 815 (1990) (quoting Restatement (Second) of Contracts § 17 (1979)). The
11 conveyance of the common area to the Association by KHov Gallery was also the basis
12 of a contract as evidenced by the Declaration which set forth the terms of the conveyance
13 and the Quit Claim Deed which stated the consideration given for the conveyance.

14 Defendants breached the contracts by not performing their work in accordance
15 with the terms of those contracts and by building a project that does not comply with
16 applicable laws and building codes. The defendants’ breach of contract has damaged the
17 Association and its members in an amount to be shown at trial.

18 **B. Breach of Implied Warranty of Workmanship and Habitability –**
19 **Against All Defendants**

20 An implied warranty of workmanship and habitability arises from residential
21 construction, including condominium construction, and both a builder-vendor and a
22 builder who is not a vendor are accountable for the implied warranty. *Lofts at Fillmore*
23 *Condo. Ass’n*, 218 Ariz. 574, 577 ¶ 13, 190 P.3d 733, 736 (2008) (citing *Moxley v.*
24 *Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979) (“We can see no difference
25 between a builder or contractor who undertakes construction of a home and a builder-
26 developer. . . . Those who hold themselves out as builders must be just as accountable for
27 the workmanship that goes into a home . . . as are builder-developers.”)). The Gallery’s
28

1 developer (seller) and builder provided implied warranties with The Gallery’s sale and/or
2 construction.

3 Privity of contract is not required to support a breach of implied warranty of
4 workmanship and habitability claim against a seller or a builder. *Richards v. Powercraft*,
5 139 Ariz. 242, 678 P.2d 427 (1984); *Lofts at Fillmore*, 218 Ariz. 574, 190 P.3d 73.
6 Moreover, a homeowners association may assert a breach of implied warranty claim
7 directly against the seller and/or builder. *See Lofts at Fillmore*, 218 Ariz. 574, 190 P.3d
8 733.

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

24 Pursuant to the Arizona Nonprofit Corporation Act, the Association’s Articles of
25 Incorporation, the Declaration, and the Quit Claim Deed transferring common element
26 ownership from Defendants to the Association, the Association holds legal interests in the
27 Common Area and bears the legal responsibility for maintaining and repairing the
28 Common Area and the exterior walls, stucco, façade, roofs or other surfaces of the

1 Dwelling Units. Therefore, the Association, as the entity responsible to maintain and
2 repair the alleged defects at The Gallery, is “someone equally deserving of recovery” for
3 Defendants’ breach of the implied warranty as expressed by the Arizona Supreme Court
4 in *Lofts at Fillmore*.

5 Moreover, that implied warranties arising from common area and unit construction
6 benefit homeowner associations who may bring such claims directly against builder-
7 vendors and builders is widely-accepted by other states’ appellate courts. *See Windham*
8 *at Carmel Mountain Ranch Ass’n v. Superior Ct.*, 135 Cal.Rptr.2d 834 (Cal. App. 2003)
9 (recognizing common element implied warranties, and stating that since “associations
10 generally are required to manage, maintain and repair a project’s common areas, *it would*
11 *be illogical to deprive associations of the ability to sue to recover for damage to common*
12 *areas they are obligated to repair”*); *Berish v. Bornstein*, 770 N.E.2d 961, 973-74 (Mass.
13 2002) *Berish v. Bornstein*, 2006 Mass. Super. LEXIS 330, *1, 21 Mass. L. Rep. 530
14 (implied warranties arise with regard to “improper design, material, or workmanship
15 [that] is responsible for a defect in a common area”); *Meadowbrook Condo. Ass’n v.*
16 *South Burlington Realty Corp.*, 565 A.2d 238, 240-11 (Vt. 1989) (implied warranties
17 arise from construction and sale of common interest communities, relying on principles
18 described in, and citing to, *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964)); *Starfish*
19 *Condominium Ass’n v. Yorkridge Service Corp., Inc.*, 458 A.2d 805, 811 (Md. App.
20 1983) (plaintiff association had right to sue for implied warranty in its own right);
21 *Herlihy v. Dunbar Builders Corp.*, 415 N.E.2d 1224, 1227-29 (Ill. App. 1980) (implied
22 warranties arise from common element defects in condominium community); *Gable v.*
23 *Silver*, 258 So.2d 11, 18 (Fla. App. 1972) (recognizing common element implied
24 warranties); *Point E. Condo. Owners’ Ass’n v. Cedar House Assocs. Co.*, 663 N.E.2d
25 343, 356-57 (Ohio Ct. App. 1995) (condominium association could assert implied
26 warranty claims against developer and general contractor); *Riverfront Lofts Condo.*
27 *Owners Ass’n v. Milwaukee/Riverfront Props. Ltd. P’ship*, 236 F.Supp.2d 918, 928 (E.D.
28

1 Wis. 2002) (conveyance of units to unit owners coupled with transfer of control of
2 common areas to HOA gives rise to implied warranties).

3 The defendants designed and executed their work at The Gallery. In the course of
4 doing that work, the defendants impliedly warranted that the work was designed and
5 performed in a workmanlike manner, suitable for its intended purpose, and free from
6 defects. The defendants breached this warranty by failing to perform their work in
7 accordance with the requirements of building code, the manufacturer's recommendations,
8 industry standards, and the requirements of the contract documents. The defendants'
9 breaches of the implied warranty have damaged the Association and its members in an
10 amount to be shown at trial.

11 **C. Breach of Implied Covenant of Good Faith and Fair Dealing – Against**
12 **Defendants K. Hovnanian at Gallery, LLC, K. Hovnanian Developments of Arizona,**
13 **Inc., and K. Hovnanian Companies of Arizona, LLC**

14 “The essence of [the duty imposed by a covenant of good faith and fair dealing] is
15 that neither party will act to impair the right of the other to receive the benefits which flow
16 from their agreement or contractual relationship.” *Rawlings v. Apodaca*, 151 Ariz. 149,
17 153, 726 P.2d 565, 569 (1986). A party breaches the implied covenant of good faith and
18 fair dealing either by “exercising express discretion in a way inconsistent with a party's
19 reasonable expectations” or by “acting in ways not expressly excluded by the contract's
20 terms but which nevertheless bear adversely on the party's reasonably expected benefits of
21 the bargain.” *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 424, 46 P.3d 431, 435 (App.
22 2002) (citing *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No.*
23 *395 Pension Trust Fund*, 201 Ariz. 474 at P67 (2002)).

24 The contracts included assurances that the work at the Project would be or had
25 been done correctly. The defendant's work was not done correctly, and the Project
26 suffers from project-wide defective conditions to the common elements that impair the
27 structural integrity, functionality or appearance.

28

1 Despite performing some limited patch repairs that proved ineffective, the
2 defendants have refused to correct the defects. In doing so, the defendants have deprived
3 the Association of the benefit of the bargain of their contracts. The defendants' defective
4 work has caused resultant damage to other property. The Association has been damaged
5 in an amount to be shown at trial.

6 **III. WITNESSES/ANTICIPATED TESTIMONY**

- 7 1. Robert Vander Waal
8 Board Member, Gallery Community Association
9 c/o Burg Simpson Eldredge Hersh & Jardine, PC
10 2390 East Camelback Road, Suite 403
11 Phoenix, Arizona 85016
12 (602) 777-7000

13 Mr. Vander Waal is expected to testify about the operation of the Association,
14 including maintenance and repairs at the Project, its communications with defendants, the
15 Association's warranty requests to defendants, and the Association's damages.

- 16 2. Representative
17 K. Hovnanian at Gallery, LLC
18 c/o Wilenchik & Bartness
19 2810 North Third Street
20 Phoenix, AZ 85004
21 (602) 606-2810

22 The Association will call at least one representative of K. Hovnanian at Gallery,
23 LLC to testify as to the development, construction, marketing and sale of the Project,
24 design and performance of the work, as well as selection of materials, review of
25 materials, supervision of the work, warranty work requests, the alleged defects and
26 damages and repairs at the Project, and communications with the Association.

- 27 3. Representative
28 K. Hovnanian Arizona Operations, LLC
 c/o Wilenchik & Bartness
 2810 North Third Street

1 Phoenix, AZ 85004
2 (602) 606-2810

3 The Association will call at least one representative of K. Hovnanian Arizona
4 Operations, LLC to testify as to the development, construction, marketing and sale of the
5 Project, design and performance of the work, as well as selection of materials, review of
6 materials, supervision of the work, warranty work requests, the alleged defects and
7 damages and repairs at the Project, and communications with the Association.
8

9 4. Representative
10 K. Hovnanian Developments of Arizona, Inc.
11 c/o Wilenchik & Bartness
12 2810 North Third Street
13 Phoenix, AZ 85004
14 (602) 606-2810

15 The Association will call at least one representative of K. Hovnanian
16 Developments of Arizona, Inc. to testify as to the development, construction, marketing
17 and sale of the Project, design and performance of the work, as well as selection of
18 materials, review of materials, supervision of the work, warranty work requests, the
19 alleged defects and damages and repairs at the Project, and communications with the
20 Association.

21 5. Representative
22 ~~K. Hovnanian Companies of Arizona, LLC~~
23 ~~c/o Wilenchik & Bartness~~
24 ~~2810 North Third Street~~
25 ~~Phoenix, AZ 85004~~
26 ~~(602) 606-2810~~

27 ~~The Association will call at least one representative of K. Hovnanian Companies~~
28 ~~of Arizona, LLC to testify as to the development, construction, marketing and sale of the~~
~~Project, design and performance of the work, as well as selection of materials, review of~~

1 ~~materials, supervision of the work, warranty work requests, the alleged defects and~~
2 ~~damages and repairs at the Project, and communications with the Association.~~

3 6. Representative
4 Chas Roberts Air Conditioning, Inc.
5 c/o Welsh Law Group, PLC
6 11811 North Tatum Boulevard, Suite P125
7 Phoenix, AZ 85028

8 The Association will call at least one representative of Chas Roberts Air
9 Conditioning, Inc., which on information and belief served as a subcontractor of the
10 defendants. That representative is expected to testify as to the design and performance of
11 the work, as well as selection of materials, review of materials, and communications with
12 defendants and the Association.

13 7. Representative
14 Desert Vista, Inc.
15 c/o Rai Duer Huff, P.C.
16 3033 North Central Avenue, Suite 500
17 Phoenix, AZ 85012
18 (602) 476-7100

19 The Association will call at least one representative of Desert Vista, Inc., which on
20 information and belief served as a subcontractor of the defendants. That representative is
21 expected to testify as to the design and performance of the work, as well as selection of
22 materials, review of materials, and communications with defendants and the Association.

23 8. Representative
24 Gothic Landscaping, Inc.
25 c/o Jaburg & Wilk, P.C.
26 3200 N. Central Avenue, 20th Floor
27 Phoenix, AZ 85012

28 The Association will call at least one representative of Gothic Landscaping, Inc.,
which on information and belief served as a subcontractor of the defendants. That

1 representative is expected to testify as to the design and performance of the work, as well
2 as selection of materials, review of materials, and communications with defendants and
3 the Association.

- 4 9. Representative
5 Home Builders Site Services of Arizona, LLC
6 1427 E Elwood Street
7 Phoenix, AZ 85040
8 (602) 232-1900

9 The Association will call at least one representative of Home Builders Site
10 Services of Arizona, LLC, which on information and belief served as a subcontractor of
11 the defendants. That representative is expected to testify as to the design and
12 performance of the work, as well as selection of materials, review of materials, and
13 communications with defendants and the Association.

- 14 10. Representative
15 LeBlanc Building Co., Inc.
16 c/o Jones, Skelton & Hochuli, P.L.C.
17 40 North Central Avenue, Suite 2700
18 Phoenix, Arizona 85004

19 The Association will call at least one representative of LeBlanc Building Co., Inc.,
20 which on information and belief served as a subcontractor of the defendants. That
21 representative is expected to testify as to the design and performance of the work, as well
22 as selection of materials, review of materials, and communications with defendants and
23 the Association.

- 24 11. Representative
25 Liberty Constructors, LLC d/b/a Liberty Arizona
26 c/o Shorall McGoldrick Brinkmann
27 1232 East Missouri Avenue
28 Phoenix, AZ 85014-2912
(602) 230-5400

1 The Association will call at least one representative of Liberty Constructors, LLC
2 d/b/a Liberty Arizona, which on information and belief served as a subcontractor of the
3 defendants. That representative is expected to testify as to the design and performance of
4 the work, as well as selection of materials, review of materials, and communications with
5 defendants and the Association.
6

7 12. Representative
8 Renco LLC d/b/a Renco Roofing
9 c/o Rai Duer Huff, P.C.
10 3033 North Central Avenue, Suite 500
11 Phoenix, AZ 85012
12 (602) 476-7100

13 The Association will call at least one representative of Renco LLC d/b/a Renco
14 Roofing, which on information and belief served as a subcontractor of the defendants.
15 That representative is expected to testify as to the design and performance of the work, as
16 well as selection of materials, review of materials, and communications with defendants
17 and the Association.

18 13. Representative
19 R/S Service & Supply, Inc.
20 10227 N El Mirage Rd
21 El Mirage, AZ 85335
22 (923) 536-9801

23 The Association will call at least one representative of R/S Service & Supply, Inc.,
24 which on information and belief served as a subcontractor of the defendants. That
25 representative is expected to testify as to the design and performance of the work, as well
26 as selection of materials, review of materials, and communications with defendants and
27 the Association.

28 14. Representative
Sargon Masonry Construction, LLC

1 c/o Springel & Fink LLP
2 3033 North Central Ave., Suite 500
3 Phoenix, AZ 85012

4 The Association will call at least one representative of Sargon Masonry
5 Construction, LLC, which on information and belief served as a subcontractor of the
6 defendants. That representative is expected to testify as to the design and performance of
7 the work, as well as selection of materials, review of materials, and communications with
8 defendants and the Association.

9 15. Building Official
10 City of Scottsdale
11 Planning & Development Services
12 3939 N. Drinkwater Blvd.
13 Scottsdale, AZ 85251
14 (480) 312-3111

15 The Association will call at least one representative of the City of Scottsdale
16 Planning & Development Services. The building official may have knowledge and
17 information relevant to the claims and defenses made in this litigation and disputed facts
18 alleged and is expected to testify as to the plans submitted by defendants, permits issued,
19 inspections of the Project, and defendants communications with the department.

20 16. Representative
21 Artistic Stairs, Ltd
22 4741 W Polk Street, #4
23 Phoenix, AZ 85040
24 (602) 437-5652

25 The Association will call at least one representative of Artistic Stairs, Ltd., which
26 on information and belief served as a subcontractor of the defendants. That
27 representative is expected to testify as to the design and performance of the work, as well
28 as selection of materials, review of materials, and communications with defendants and
the Association.

1 17. Representative
2 IDG Innovative Development Group, LLC
3 d/b/a Desert Services SWPPP Solutions
4 800 N. Mary Street
 Tempe, AZ 85281
 (480) 513-8986

5 The Association will call at least one representative of IDG Innovative
6 Development Group, LLC, which on information and belief served as a subcontractor of
7 the defendants. That representative is expected to testify as to the design and
8 performance of the work, as well as selection of materials, review of materials, and
9 communications with defendants and the Association.
10

11 18. Representative
12 Interior Logic Holdings, LLC
13 4323 E Cotton Center Blvd
14 Phoenix, AZ 85040
 (480) 967-1002

15 The Association will call at least one representative of Interior Logic Holdings,
16 LLC, which on information and belief served as a subcontractor of the defendants. That
17 representative is expected to testify as to the design and performance of the work, as well
18 as selection of materials, review of materials, and communications with the Association.
19

20 19. Representative
21 Paul Johnson Drywall, Inc.
22 1720 W. Parkside Lane
23 Phoenix, AZ 85027
 (602) 254-1320

24 The Association will call at least one representative of Paul Johnson Drywall, Inc.,
25 which on information and belief served as a subcontractor of the defendants. That
26 representative is expected to testify as to the design and performance of the work, as well
27 as selection of materials, review of materials, and communications with defendants and
28 the Association.

1 20. Every person identified in the documents identified in Part B of these
2 disclosures likely to have discoverable information relevant to disputed facts alleged with
3 particularity in the pleadings.

4 21. Every person identified and to be identified by Defendants in their initial
5 and in all their supplemental Rule 26 disclosures as likely to have discoverable
6 information relevant to disputed facts alleged with particularity in the pleadings, all of
7 which disclosures are incorporated herein by this reference.

8 22. Without waiving any objection to the testimony of any designated expert by
9 any party, Plaintiff endorses all experts identified by any party as witnesses who Plaintiff
10 may call at trial to testify to the matters on which they are endorsed or have given
11 deposition testimony. Such endorsement is for trial purposes and is not intended to, nor
12 shall it, be an admission that the testimony of any such expert is either accurate,
13 admissible, or credible.

14 23. *The Association will call the current community manager, as of the time*
15 *of trial. The community manager is expected to testify, among other things, regarding*
16 *the maintenance and repairs at the Project, the Association's documents, and the*
17 *Association's damages.*

18 **IV. PERSONS WHO HAVE RELEVANT KNOWLEDGE**

- 19 1. All witnesses listed in Section III above.
- 20 2. All current and former board members of the Association.
- 21 3. Community manager for the Association.
- 22 4. All subcontractors and materials suppliers used by the defendants in
23 connection with the work.

24 **V. STATEMENTS**

25 The plaintiff is unaware of any witnesses who have made statements in this matter.

26 **VI. EXPERT WITNESSES AND DISCLOSURE OF AREAS OF EXPERT**
27 **TESTIMONY**

28

1 1. Ed Fronapfel, M.S.C.E., P.E., CBIE, CFCC, EDI, CBCP
2 Solutions Before | Solutions After
3 5926 McIntyre St.
4 Golden, CO 80403
5 (303) 425-7272

6 Mr. Fronapfel is a registered Professional Engineer in the State of Arizona and is
7 expected to testify regarding his education, experience, training, and qualifications and as
8 to his investigation into the defects at issue in this case. Mr. Fronapfel has visited the
9 Project site, conducted visual and invasive site investigations, and reviewed critical
10 documents in this case. Mr. Fronapfel will testify as to the investigation performed, the
11 defective conditions observed, the appropriate and relevant design and construction
12 standards, and provide a repair methodology to remedy the defective construction and
13 repair the resultant damage. ***Mr. Fronapfel will also testify regarding the***
14 ***reasonableness and necessity of the fees and costs charged by SBSA to perform their***
15 ***forensic investigation and analysis at the Project.*** Mr. Fronapfel will testify consistent
16 with the findings in his reports disclosed in this matter ***and his deposition testimony on***
17 ***August 23, 2022.***

18 Mr. Fronapfel is expected to testify consistently with his report dated June 23,
19 2021 [***GALLERY-SBSA_004952 – GALLERY SBSA_005159***], ~~produced herewith,~~ ***and***
20 ***his Technical Memorandum dated July 22, 2021 [GALLERY-SBSA_005161 –***
21 ***GALLERY-SBSA_005162], Supplemental Construction and Design Compliance***
22 ***Report by Ed Fronapfel of SBSA, Inc., dated October 14, 2021 [GALLERY-***
23 ***SBSA_005163 – GALLERY-SBSA_005192], and his Rebuttal Reports dated May 2,***
24 ***2022 [GALLERY-SBSA_005399 – GALLERY-SBSA_005473].*** Mr. Fronapfel reserves
25 the right to respond to or rebut any expert opinion not available to him to date, or any
26 timely expert opinion subsequently made.

27 2. Stefen Gustafson, AIA
28 Nautilus Building Consultants, Inc.
 8033 Vickers St.
 San Diego, CA 82111

1
2 Mr. Gustafson is a licensed contractor and architect in the State of Arizona and is
3 expected to testify regarding his education, experience, training and qualifications and as
4 to his cost of repair estimate. Mr. Gustafson will testify regarding visual inspections of
5 the Project, review of critical documents in this case and as to how the costs, including
6 time, materials, and labor, are calculated. *Mr. Gustafson will also testify regarding the*
7 *reasonableness and necessity of the fees and costs charged by Nautilus to perform their*
8 *forensic investigation and analysis at the Project.*

9 Mr. Gustafson will also testify consistent with the findings in his reports disclosed
10 in this matter: *Preliminary Estimate of Costs dated July 23, 2021 [GALLERY-*
11 *NBC_000010 – GALLERY-NBC_000022], Preliminary Estimate of Costs revised*
12 *November 8, 2021 [GALLERY-NBC_005076 – GALLERY-NBC_005092], and*
13 *Rebuttal Response to Defense Estimate dated April 28, 2022 [GALLERY-NBC_005120*
14 *– GALLERY-NBC_005123]. He will also testify consistent with his deposition*
15 *testimony on August 24, 2022 in this matter and regarding the reasonableness of the*
16 *charges by Nautilus for testing and for temporary repairs at the Project.*

17 The Association discloses the following areas of expert testimony:

18 (1) The nature and extent of the construction defects at issue in this case,
19 including the investigation performed, the defective conditions observed,
20 including resultant damage, the appropriate and relevant design and construction
21 standards, and a repair methodology to remedy the defective construction and
22 repair the resultant damage which includes removing and putting back certain non-
23 defective materials.

24 (2) The cost, including time, materials, and labor, of performing the repairs
25 needed to remedy the construction defects at issue in this case.

26 **VII. DAMAGES**

27 The Association's damages include the cost of repairing the defects, the cost of
28 repairing resultant damage caused by the defects, and the cost of the expert investigation.

1 The Association is also entitled to its attorneys' fees pursuant to *A.R.S. § 12-1364(A)-*
 2 *(C)*, A.R.S. § 12-341.01 and the terms of the contract with K. Hovnanian at Gallery,
 3 LLC. *The Association is also entitled to its expert witness fees pursuant to A.R.S. § 12-*
 4 *1364(D) and court costs pursuant to A.R.S. § 12-341.*

5 The Association's damages also include the cost of repairing prior negligent
 6 *inadequate* repairs by Defendants to the pool canopy drywall and the stucco at the top of
 7 the adjacent stair walls located between the buildings, and the penthouse doors and the
 8 cost to repair the following conditions: defective pool lights, defective pool fireplace,
 9 defective pedestrian gate, defective entrance gate, dead trees and plants, defective
 10 irrigation, and standing water at monument sign and rear of project.

11 *Following is a computation of Plaintiff's damages:*

<u>Category</u>	<u>Amount</u>	<u>Documents</u>
<i>Cost to repair defects and damages, including repair prior inadequate repairs at pool canopy and stucco at stair walls, and cost to repair defective pool fireplace</i>	\$ 3,282,305.74	<i>GALLERY-NBC_005076-005092</i>
<i>Temporary repairs at 3124</i>	\$ 1,482.61	<i>GALLERY_006621-006628</i>
<i>Temporary repairs at 3104, 3109, 3112 & 3124</i>	\$ 16,281.73	<i>GALLERY_006631-006640</i>
<i>Expert investigation costs and expert witness fees</i>	\$ 350,391.89	<i>GALLERY-SBSA-JOBFILE_000112-000115; GALLERY-SBSA-JOBFILE_000653-000690; GALLERY-NBC-JOBFILE_000014-000023; GALLERY-NBC-JOBFILE_000128; GALLERY-NBC-JOBFILE_000133-000254</i>
<i>Litigation Costs</i>	\$ 33,138.43	
<i>Attorney's Fees</i>	\$ 1,825,230.99	

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26 *The Association expects to call the following witnesses to testify at trial on*
 27 *damages: Ed Fronapfel, Stefen Gustafson, Robert Vander Waal, and the Association's*
 28 *current community manager at the time of trial.*

1 **VIII. TANGIBLE EVIDENCE**

- 2 1. Construction and Design Compliance Report by Ed Fronapfel of SBSA,
3 Inc., dated June 23, 2021 [GALLERY-SBSA_004952 – GALLERY-SBSA_005159]
- 4 2. Cost of repair estimate to be provided by Steve Gustafson of Nautilus
5 Building Consultants [GALLERY-NBC_000010 – GALLERY-NBC_000022].
- 6 3. Curriculum Vitae of Edward Fronapfel of SBSA [GALLERY-
7 SBSA_004586 – GALLERY-SBSA_004627] updated version [GALLERY-
8 SBSA_005475 - GALLERY-SBSA_005520].
- 9 4. Curriculum Vitae and Testimony History of Steve Gustafson of Nautilus
10 Building Consultants [GALLERY-NBC_000001 - GALLERY-NBC_000005].
- 11 5. Reports of all other experts disclosed by other parties.
- 12 6. Condominium declaration, including all amendments, for the Association.
- 13 7. All plans, correspondence, and other documents related to the design and
14 construction of The Gallery.
- 15 8. All correspondence, submittals, and other documentation generated by the
16 defendants related to The Gallery.
- 17 9. All correspondence, submittals, and other documentation generated by
18 third-party defendants related to The Gallery.
- 19 10. Contracts and/or subcontracts between K. Hovnanian and its subcontractors
20 and suppliers.
- 21 11. Relevant excerpts from the building code.
- 22 12. Installation instructions and other documentation from product
23 manufacturers regarding materials used at The Gallery.
- 24 13. Documents downloaded from City of Scottsdale Building Department
25 website [GALLERY-BLDG DEPT 000001 – GALLERY-BLDG DEPT 001921].
- 26 14. Documents received from The Management Trust, the former property
27 management company at The Gallery [GALLERY_000001 – GALLERY_000939] and
28 [GALLERY_001066 - GALLERY_002648].

1 15. Documents received from Gallery owners [GALLERY_000940 –
2 GALLERY_001065] also marked [GALLERY-CHANG_3112-000001 - GALLERY-
3 CHANG_3112-000006], [GALLERY-JONES_3104-000001 - GALLERY-
4 JONES_3104-000009], [GALLERY-LINE_3110-000001 - GALLERY-LINE_3110-
5 000004], [GALLERY-SLUSARZ-000001 - GALLERY-SLUSARZ-000025], and
6 [GALLERY-STAVROFF_3124-000001 - GALLERY-STAVROFF_3124-000082].

7 16. SBSA Observation Drawing Set [GALLERY-SBSA_004552 –
8 GALLERY-SBSA004584].

9 17. SBSA Civil Repair Drawings [GALLERY-SBSA_004628 – GALLERY-
10 SBSA_004631].

11 18. SBSA Defect Matrix [GALLERY-SBSA_004585].

12 19. SBSA Photograph Log [GALLERY-SBSA_000001 – GALLERY-
13 SBSA_000002].

14 20. SBSA Observation Photographs [GALLERY-SBSA_000003 –
15 GALLERY-SBSA_004551].

16 21. SBSA Reference Table of Contents [GALLERY-SBSA_004632 –
17 GALLERY-SBSA_004634].

18 22. SBSA Reference Materials [GALLERY-SBSA_004635 – GALLERY-
19 SBSA_004951].

20 23. SBSA Rate Sheet [GALLERY-SBSA_005160].

21 24. SBSA Technical Memorandum dated July 22, 2021 [GALLERY-
22 SBSA_005161 – GALLERY-SBSA_005162].

23 25. Nautilus Building Company Site Inspection Notes & Photographs
24 [GALLERY-NBC_000023 - GALLERY-NBC_000470].

25 26. Documents received from AMCOR, the current property management
26 company at The Gallery [GALLERY_002649 – GALLERY_006392].

27 27. Photographs received from Gallery owner unit 3104 [GALLERY-
28 JONES_3104-000010 - GALLERY-JONES_3104-000012].

1 28. Photographs received from Gallery owner unit 3123 [GALLERY-
2 WOLIN_3123-000001 – GALLERY-WOLIN_3123-000027].

3 29. Observation Photographs taken by Nautilus Building Company during June
4 2020 repairs performed on behalf of K. Hovnanian [GALLERY-NBC_000471 -
5 GALLERY-NBC_004986].

6 30. Photographs taken by Nautilus Building Company at unit 3104 on July 26,
7 2021 [GALLERY-NBC_004987 - GALLERY-NBC_004998].

8 31. Photographs taken by Nautilus Building Company at unit 3106 on July 26-
9 27, 2021 [GALLERY-NBC_004999 - GALLERY-NBC_005012].

10 32. Photographs taken by Nautilus Building Company at unit 3110 on February
11 5, 2021 [GALLERY-NBC_005013 - GALLERY-NBC_005033].

12 33. Documents received from AMCOR, the current property management
13 company at The Gallery [GALLERY_006393 – GALLERY_006394].

14 34. Photographs received from Gallery owner unit 3104 [GALLERY-
15 JONES_3104-000013 - GALLERY-JONES_3104-000015].

16 35. Photographs and videos received from Gallery owner unit 3106
17 [GALLERY-FISCHER_3106-000001 - GALLERY-FISCHER_3106-000012].

18 36. Emails and photographs from MSW Contracting LLC related to unit 3106
19 and email from AMCOR, the current property management company at The Gallery
20 [GALLERY_006395 – GALLERY_006405].

21 37. Redacted versions of previously produced documents [GALLERY_001437;
22 GALLERY_001666 – GALLERY_001671; GALLERY_002446 – GALLERY_002447;
23 and GALLERY_006199 – GALLERY_006210].

24 38. Temporary Repair Photographs taken by Nautilus Building Company at
25 unit 3104 on August 24, 2021 [GALLERY-NBC_005034 - GALLERY-NBC_005041].

26 39. Temporary Repair Photographs taken by Nautilus Building Company at
27 unit 3110 on August 24, 2021 [GALLERY-NBC_005042 - GALLERY-NBC_005047].
28

1 40. Temporary Repair Photographs taken by Nautilus Building Company at
2 unit 3112 on January 28, 2020 [GALLERY-NBC_005048 - GALLERY-NBC_005051].

3 41. Documents received from AMCOR, the current property management
4 company at The Gallery [GALLERY_006406 – GALLERY_006422].

5 42. A privilege log listing all documents withheld or redacted on the basis of
6 privilege. The inadvertent production of any document, writing or other tangible thing
7 that is not subject to disclosure or discovery is not intended nor shall it effect the waiver
8 of any potentially applicable privilege or immunity from discovery/disclosure. If such
9 material is inadvertently produced, request is made that the person or party receiving the
10 information return the material to the Association’s counsel immediately without copying
11 or reading it, sharing it with others, in conformity with applicable ethical principles.

12 43. Photograph received from Gallery owner for unit 3116 [GALLERY-
13 SLUSARZ-000026].

14 44. Photographs received from Gallery owner for unit 3112 [GALLERY-
15 CHANG_3112-000007 - GALLERY-CHANG_3112-000008].

16 45. Temporary Repair Photographs taken by Nautilus Building Company at
17 unit 3112 on August 31, 2021 [GALLERY-NBC_005052 - GALLERY-NBC_005063].

18 46. Documents received from AMCOR, the current property management
19 company at The Gallery [GALLERY_006423 – GALLERY_006433].

20 47. A supplemental privilege log, dated September 22, 2021, listing additional
21 documents withheld or redacted on the basis of privilege. The inadvertent production of
22 any document, writing or other tangible thing that is not subject to disclosure or
23 discovery is not intended nor shall it effect the waiver of any potentially applicable
24 privilege or immunity from discovery/disclosure. If such material is inadvertently
25 produced, request is made that the person or party receiving the information return the
26 material to the Association’s counsel immediately without copying or reading it, sharing
27 it with others, in conformity with applicable ethical principles.

28

1 48. Photographs received from Gallery owner unit 3106 [GALLERY-
2 FISCHER_3106-000013 - GALLERY-FISCHER_3106-000022].

3 49. Repair Invoice from Nautilus General Contractors, Inc., dated September
4 30, 2021 for leaks at Gallery units 3104, 3106, 3110 and 3112 [GALLERY-NBC_005064
5 - GALLERY-NBC_005075].

6 50. Supplemental Construction and Design Compliance Report by Ed
7 Fronapfel of SBSA, Inc., dated October 14, 2021 [GALLERY-SBSA_005163 –
8 GALLERY-SBSA_005192].

9 51. SBSA Observation Drawings [GALLERY-SBSA_005193 – GALLERY-
10 SBSA_005197].

11 52. SBSA Observation Photographs [GALLERY-SBSA_005198 –
12 GALLERY-SBSA_005397].

13 53. SBSA Reference Materials [GALLERY-SBSA_005398].

14 54. February 21, 2020 Association's Response Letter to K. Hovnanian's
15 February 5, 2020 Notice of Intent to Repair [GALLERY_006434 – GALLERY_006438].

16 55. July 31, 2019 K. Hovnanian Letter Requesting Inspections of Common
17 Areas at Gallery Community Association [GALLERY_006439].

18 56. Certified Quit-Claim Deed dated October 6, 2016, recorded October 7,
19 2016, between K. Hovnanian at Gallery, LLC and Gallery Community Association
20 [GALLERY_006440 – GALLERY_006442].

21 57. Preliminary cost of repair estimate provided by Steve Gustafson of Nautilus
22 Building Consultants revised as of November 8, 2021 [GALLERY-NBC_005076 –
23 GALLERY-NBC_005092].

24 58. Certified copy of Articles of Organization for K. Hovnanian at Gallery,
25 LLC, dated June 5, 2015 [GALLERY_006443 - GALLERY_006446].

26 59. Certified copy of Articles of Amendment for K. Hovnanian Arizona
27 Operations, LLC, dated August 5, 2019 [GALLERY_006447 - GALLERY_006450].
28

1 60. Certified copy of Articles of Amendment for K. Hovnanian Arizona
2 Operations, LLC, dated November 4, 2019 [GALLERY_006451 – GALLERY_006454].

3 61. Certified copy of Articles of Organization for K. Hovnanian Arizona
4 Operations, LLC, dated August 11, 2003 [GALLERY_006455 - GALLERY_006462].

5 62. Certified copy of Articles of Organization for K. Hovnanian Companies of
6 Arizona, LLC, dated December 6, 2011 [GALLERY_006463 – GALLERY_006465].

7 63. Certified copy of Articles of Amendment for K. Hovnanian Phoenix
8 Division, Inc., dated August 2, 2019 [GALLERY_006466 - GALLERY_00006469].

9 64. Certified copy of Articles of Organization for K. Hovnanian Phoenix
10 Division, Inc., dated August 11, 2003 [GALLERY_006470 - GALLERY_006478].

11 65. Documents received from Trestle Management Group via Subpoena Duces
12 Tecum, the former property management company at The Gallery [GALLERY-
13 TRESTLE_000001 – GALLERY-TRESTLE_004065].

14 66. A supplemental privilege log, dated December 27, 2021, listing documents
15 withheld or redacted on the basis of privilege. The inadvertent production of any
16 document, writing or other tangible thing that is not subject to disclosure or discovery is
17 not intended nor shall it effect the waiver of any potentially applicable privilege or
18 immunity from discovery/disclosure. If such material is inadvertently produced, request
19 is made that the person or party receiving the information return the material to the
20 Association’s counsel immediately without copying or reading it, sharing it with others,
21 in conformity with applicable ethical principles.

22 67. Photographs received from Gallery owner for unit 3124 [GALLERY-
23 STAVROFF_3124-000083 - GALLERY-STAVROFF_3124-000086].

24 68. Email from Gallery owner for unit 3124 regarding the ceiling leak, redacted
25 for attorney-client and common interest privileged communication [GALLERY-
26 STAVROFF_3124-000087].

27
28

1 69. Temporary Repair Photographs taken by Nautilus Building Company at unit
2 3124 on December 13, 2021, and December 14, 2021 [GALLERY-NBC_005093 -
3 GALLERY-NBC_005119].

4 70. Rebuttal Report – BHA by Ed Fronapfel of SBSA, Inc., dated May 2, 2022
5 [GALLERY-SBSA_005399 – GALLERY-SBSA_005434].

6 71. References to Rebuttal Report – BHA by Ed Fronapfel of SBSA, Inc., dated
7 May 2, 2022 [GALLERY-SBSA_005435 – GALLERY-SBSA_005436].

8 72. Rebuttal Report – BSC by Ed Fronapfel of SBSA, Inc., dated May 2, 2022
9 [GALLERY-SBSA_005437 – GALLERY-SBSA_005440].

10 73. Rebuttal Report – MC Consultants by Ed Fronapfel of SBSA, Inc., dated
11 May 2, 2022 [GALLERY-SBSA_005441 – GALLERY-SBSA_005446].

12 74. References to Rebuttal Report – MC Consultants by Ed Fronapfel of SBSA,
13 Inc., dated May 2, 2022 [GALLERY-SBSA_005447 – GALLERY-SBSA_005448].

14 75. Rebuttal Report – PGG by Ed Fronapfel of SBSA, Inc., dated May 2, 2022
15 [GALLERY-SBSA_005449 – GALLERY-SBSA_005465].

16 76. Rebuttal Report – Shelton Consulting Group by Ed Fronapfel of SBSA, Inc.,
17 dated May 2, 2022 [GALLERY-SBSA_005466 – GALLERY-SBSA_005473].

18 77. Rebuttal Response to Defense Estimate provided by Steve Gustafson of
19 Nautilus Building Consultants dated April 28, 2022 [GALLERY-NBC_005120 –
20 GALLERY-NBC_005123].

21 78. Nautilus Agreement for Construction Services for Temporary Roof Repairs
22 at units 3104, 3109, 3112 & 3124 at Gallery Community Association [GALLERY_006479
23 – GALLERY_006487].

24 79. Temporary Roof Repair Photographs taken by Nautilus Building Company
25 at units 3104, 3109, 3112, and 3124 on June 13-15, 2022 [GALLERY-NBC_005124 -
26 GALLERY-NBC_005266].

27 80. Job file materials for Gallery Community Association maintained by the
28 Association’s expert SBSA, LLC. [GALLERY-SBSA-JOBFILE_000001 – GALLERY-

1 SBSA-JOBFILE_000652]. **NOTE: The SBSA job file also includes documents
2 previously disclosed by the parties in this matter, including but not limited to, documents
3 Bates stamped number GALLERY-NBC_000471-004986, and documents that are
4 referenced in SBSA's reports disclosed in this matter. Previously disclosed documents will
5 not be reproduced.

6 81. Job file materials for Gallery Community Association maintained by the
7 Association's expert Nautilus Building Consultants, Inc. [GALLERY-NBC-
8 JOBFILE_000001 – GALLERY-NBC-JOBFILE_000126]. **NOTE: The Nautilus job
9 file also includes documents previously disclosed by the parties in this matter. Previously
10 disclosed documents will not be reproduced.

11 82. Documents received from AMCOR, the current property management
12 company at The Gallery [GALLERY_006488 – GALLERY_006630].

13 83. Amendment to BHA Rebuttal Report by Ed Fronapfel of SBSA, Inc., dated
14 August 9, 2022 [GALLERY-SBSA_005474].

15 84. Additional SBSA Reference Materials [GALLERY-SBSA_005521 –
16 GALLERY-SBSA_005542].

17 85. Nautilus Building Consultants Billing Addendum [GALLERY-
18 NBC_005267 - GALLERY-NBC_005269].

19 86. Additional job file materials for Gallery Community Association maintained
20 by the Association's expert SBSA, LLC. [GALLERY-SBSA-JOBFILE_000653 –
21 GALLERY-SBSA-JOBFILE_000688].

22 87. Additional job file materials for Gallery Community Association maintained
23 by the Association's expert Nautilus Building Consultants, Inc. [GALLERY-NBC-
24 JOBFILE_000127 – GALLERY-NBC-JOBFILE_000128].

25 88. Additional reference material for Gallery Community Association
26 maintained by the Association's expert Nautilus Building Consultants, Inc. (as requested
27 by counsel at deposition) [GALLERY-NBC-JOBFILE_000129 – GALLERY-NBC-
28 JOBFILE_000132].

1 89. *Emails, documents, and photographs received from Gallery owner for*
2 *unit 3104 [GALLERY-JONES_3104-000016 - GALLERY-JONES_3104-000252].*

3 *Privilege Log:*

4 **GALLERY-JONES_3104-000016** *Redacted Attorney-Client Privilege*

5 **GALLERY-JONES_3104-000083** *Redacted Attorney-Client Privilege*

6 **GALLERY-JONES_3104-000115** *Redacted Attorney-Client Privilege*

7 90. *Invoice for temporary roof repairs at units 3104, 3109, 3112, and 3124*
8 *[GALLERY_006631 - GALLERY_006640].*

9 91. *Additional job file materials for Gallery Community Association*
10 *maintained by the Association's expert SBSA [GALLERY-SBSA-JOBFILE_000689 -*
11 *GALLERY-SBSA-JOBFILE_000690].*

12 92. *Additional job file materials for Gallery Community Association*
13 *maintained by the Association's expert Nautilus Building Consultants, Inc.*
14 *[GALLERY-NBC-JOBFILE_000133 - GALLERY-NBC-JOBFILE_000254].*

15 Bates labeled documents described above can be downloaded using the following
16 link:

17 <https://www.dropbox.com/sh/arih117dv0zfx9q/AAC6HOVaHwmRWNkS1Ful5JGxa?dl=0>

18 **OTHER RELEVANT DOCUMENTS**

19 At this time, the Association is not aware of other relevant documents which are
20 not listed above.

21
22 RESPECTFULLY SUBMITTED this 7th day of September, 2022.

23 BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

24 By: /s/ Penny Manship

25 Craig S. Nuss, Esq.

26 Penny J. Manship, Esq.

27 Grace M. Osberg, Esq.

28 8310 South Valley Highway, Suite 270

 Englewood, CO 80112

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(303) 792-5595
(303) 708-0527 (fax)
cnuss@burgsimpson.com
pmanship@burgsimpson.com
gosberg@burgsimpson.com
Attorneys for the Plaintiff Gallery Community Association

1 The foregoing E-MAILED this
2 7th of September 2022 to:

3 Dennis I. Wilenchik, Esq.
4 Barbara Stansil
5 Wilenchik & Bartness, P.C.
6 2810 North Third Street
7 Phoenix, AZ 85004
8 admin@wb-law.com
9 diw@wb-law.com
10 barbaras@wb-law.com

11 *Attorneys for Defendants/ThirdParty Plaintiffs*
12 *K. Hovnanian at Gallery, LLC; K. Hovnanian*
13 *Arizona Operations, LLC; K. Hovnanian*
14 *Developments of Arizona, Inc.; K. Hovnanian*
15 *Companies of Arizona, LLC*

16 Louis W. Horowitz, Esq.
17 Leslie K. Harrach, Esq.
18 Lorber, Greenfield & Polito, LLP
19 3930 E. Ray Road, Suite 260
20 Phoenix, AZ 85044
21 lorowitz@lorberlaw.com
22 lharrach@lorberlaw.com

23 *Attorneys for Defendants/Third-Party Plaintiffs*
24 *K. Hovnanian at Gallery, LLC; K. Hovnanian*
25 *Arizona Operations, LLC; K. Hovnanian*
26 *Developments of Arizona, Inc.; K. Hovnanian*
27 *Companies of Arizona, LLC*

28 Michael Ryan Williams, Esq. #029703
Liberty Mutual Group Field Legal Offices
P.O. Box 7218
London, KY 40742
MichaelR.Williams@LibertyMutual.com
Attorneys for Third Party Defendant Custom
Leasing, Inc. d/b/a Home Builders Site Services
of Arizona, LLC

Michael A. Ludwig, Bar #015481
Stephen F. Best, Bar #034976
JONES, SKELTON & HOCHULI, P.L.C.
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004

1 minuteentries@jshfirm.com

2 mludwig@jshfirm.com

3 sbest@jshfirm.com

4 *Attorneys for Third-Party Defendant LeBlanc
5 Building Co., Inc.*

6 Tom Shorall Jr., #010456

7 Jason J. Boblick, #026507

8 Shorall McGoldrick Brinkmann

9 1232 East Missouri Avenue

10 Phoenix, AZ 85014-2912

11 tomshorall@smbattorneys.com

12 jasonboblick@smbattorneys.com

13 smb@smbattorneys.com

14 *Attorneys for Third Party Defendant
15 Liberty Constructors*

16 Rina Rai, #018886

17 Marcus McGillivray, #034725

18 Rai Duer, P.C.

19 3033 North Central Avenue, Suite 500

20 Phoenix, AZ 85012

21 RRai@raiduer.com

22 MMcGillivray@raiduer.com

23 *Attorneys for Third Party Defendants Renco
24 Roofing and Desert Vista, Inc.*

25 Leonard T. Fink, Esq.

26 David S. Schopick, Esq.

27 SPRINGEL & FINK LLP

28 3033 North Central Ave., Suite 500

Phoenix, AZ 85012

lfink@springelfink.com

dschopick@springelfink.com

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

/s/ Jessica Harmon

Jessica Harmon