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9 *Attorneys for Defendants/Third-Party Plaintiffs K. Hovnanian*
10 *at Gallery, LLC and K. Hovnanian Arizona Operations, LLC*

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

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

17 v.

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

24 Defendants.

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

Case No. CV2020-008714

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT REGARDING
EACH OF PLAINTIFF'S CAUSES OF
ACTION**

(Oral Argument Requested)

(Assigned to the Honorable Katherine
Cooper)

1 LLC, an Arizona limited liability company;
2
3 Third-Party Plaintiffs,
4
5 v.
6 CHAS ROBERTS AIR CONDITIONING, INC.,
7 an Arizona corporation; DESERT VISTA, INC.,
8 an Arizona corporation; GOTHIC
9 LANDSCAPING, INC., a California corporation;
10 HOME BUILDERS SITE SERVICES OF
11 ARIZONA, LLC, an Arizona limited liability
12 company; LEBLANC BUILDING CO., INC., an
13 Arizona corporation; LIBERTY
14 CONSTRUCTORS, LLC, an Arizona limited
15 liability company, dba LIBERTY ARIZONA;
16 RENCO LLC, an Arizona limited liability
17 company, dba RENCO ROOFING; R/S SERVICE
18 & SUPPLY, INC., an Arizona corporation;
19 SARGON MASONRY CONSTRUCTION, LLC,
20 an Arizona limited liability company; and DOES
21 1-50.
22
23 Third-Party Defendants,
24

25 COME NOW Defendants K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona
26 Operations, LLC, by and through undersigned counsel, and hereby move for Summary
27 Judgment pursuant to Ariz.R.Civ.P. 56 on each of Plaintiff Gallery Community Association's
28 causes of action. Plaintiff is a homeowner's association making claims in its own name.
Plaintiff's causes of action each fail as a matter of law and based on the uncontested facts. The
claims actually available to Plaintiff are not as broad as Plaintiff presumes. Plaintiff has raised
various causes of action arising from alleged obligations to construct. It simply does not have
valid rights to recover on the claims and bases alleged. Summary Judgment should be entered in
favor of both remaining Defendants on all three remaining Causes of Action, reasons set forth
more fully in the following Memorandum of Points and Authorities, incorporated herein by
reference. Undersigned counsel has consulted with Plaintiff's counsel regarding the motion and
confirmed that it is opposed.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case involves causes of action which are not available to the Plaintiff. Plaintiff is a
4 homeowner’s association. It is bringing its own claims and is not pursuing claims on behalf of
5 its individual members. Plaintiff is not a condominium association and does not have any power
6 to do so under Arizona law. Plaintiff’s own rights and agreements govern its potential recovery.

7 Plaintiff’s causes of action must have some origin and basis in Arizona law and the
8 factual record. Plaintiff’s claims partly rely on legal definitions of claims that individual
9 homebuyers might bring under the judicially created Implied Warranty remedy or per the
10 express terms of their sale contracts. Those claims as raised by this Plaintiff lack legal
11 sufficiency when evaluated in their proper context. Other claims alleged by Plaintiff are
12 inconsistent with Arizona law and would not support recovery by homebuyers or anyone.
13 Plaintiff’s own rights do not support the claims it has alleged and pursued.

14 Cause of Action 1 – Negligence - This claim is not recognized in Arizona as a basis for
15 damages for cost to repair of structures. Plaintiff voluntarily dismissed the claim. (See Notice of
16 Voluntary Dismissal Of Negligence Cause Of Action Only, dated August 25, 2020.) Note that
17 Plaintiff has requested punitive damages, but has dismissed the only non-contractual claim it
18 raised.

19 Cause of Action 2 - Breach of Implied Covenant of Good Faith and Fair Dealing – This
20 claim is based on alleged assurances and warranties, and not based on any identified interference
21 with expected benefits of any contract.

22 Cause of Action 3 - Implied Warranty of Workmanship and Habitability – This claim is a
23 judicially-created remedy which is not available to Plaintiff because it is not a homebuyer, is not
24 pursuing claims of homebuyers, and is not empowered to bring any homebuyer’s claims in its
25 own name.

26 Cause of Action 4- Breach of Contract (Declaration) – Plaintiff’s allegations are based on
27 alleged failure to construct, not based on any actual term from the Declaration of Conditions
28

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1 Covenants and Restrictions for The Gallery (the “Declaration” or “CC&Rs.”) No term of any
2 agreement involving Plaintiff has been breached.

3 **II. RELEVANT FACTUAL BACKGROUND**

4 The claims at issue involve allegations of construction defects and related damages at a
5 townhome community known as The Gallery in Scottsdale, Arizona.

6 Plaintiff is the Homeowner’s Association formed to maintain common areas, collect
7 assessments, and enforce terms of the Declaration of Covenants, Conditions, Restrictions, and
8 Easements for Gallery. (See STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS’
9 MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF’S CAUSES
10 OF ACTION, herein “SOF,” at ¶ 1.) Plaintiff is not a condominium association.

11 The Declarant who formed the Association is K. Hovnanian at Gallery, LLC. (SOF 2.)

12 The Declaration/CC&Rs do not include any agreement to perform construction or any
13 warranty regarding the construction of improvements at the property. (SOF 3, 4.)

14 Sales agreements were entered between K. Hovnanian at Gallery, LLC and purchasers of
15 homes at The Gallery. (SOF 5.)

16 Terms of the purchase agreements include limited warranties to the homebuyers. The
17 warranties include specific provisions for raising claims and for arbitration of all disputes. (SOF
18 6, 7.)

19 Plaintiff has had professional management including during the process of turnover of
20 common areas. (SOF 8.)

21 Plaintiff accepted responsibility for all common area improvements in 2018 and
22 acknowledged at that time that requested punch list repairs had been completed. (SOF 9.)

23 Plaintiff, through its counsel, gave notice of claims by correspondence purporting to be a
24 Notice of Claim under A.R.S. § 12-1363. (SOF 10). Plaintiff’s counsel confirmed in related
25 correspondence that its claims were not based on rights of individual homeowners. (SOF 11).

26 ///

28 ///

1 **III. EACH OF PLAINTIFF’S CLAIMS FAIL**

2 **A. Implied Warranty of Workmanship and Habitability**

3 The Implied Warranty of Workmanship and Habitability is a special right of action
4 available to individual purchasers of single-family homes. The Court first recognized it in
5 *Columbia Western Corp. v. Vela*, 122 Ariz. 28, 592 P.2d 1294 (App. 1979), and defined it
6 further in *Richards v. Powercraft Homes*, 139 Ariz. 242, 678 P.2d 427 (1984). The claim arises
7 from the agreement for purchase of a home. It is enforceable by subsequent purchasers of the
8 home. *Richards v. Powercraft Homes*, 139 Ariz. at 245, 678 P.2d at 430. The claim gives a
9 contract-based cause of action for claims of latent defect that manifested after the owner’s
10 purchase, resultant damages, and proof that the defect had its origin and cause with the builder-
11 vendor. *Id.* and *Dillig v. Fisher*, 142 Ariz. 47, 50-51, 688 P.2d 693, 696-697 (Ariz. App. 1984).

12 Plaintiff is not a homeowner. Plaintiff is a non-profit corporation created with certain
13 powers to manage common areas and to enforce the covenants, conditions, and restrictions for
14 the Gallery. (SOF 1)

15 Plaintiff is not pursuing claims on behalf of individual homebuyers at the property. No
16 facts have been alleged or identified to suggest that Plaintiff has a right to bring claims
17 belonging to any unit owner. Plaintiff does have such a right under any statute, law, or
18 assignment. Plaintiff expressly confirmed in correspondence from counsel regarding its pre-
19 litigation Notice of Claim under A.R.S. § 12-1361 et seq. and 33-2002 et seq. that “The Notice
20 was on behalf of the Association only and for issues that are within the Association’s
21 responsibility to maintain and repair under the Declaration of Covenants, Conditions,
22 Restrictions and Easements for Gallery [and] The Association is not bringing claims on behalf
23 of one or more individual unit owners for issues that the owners are solely responsible to
24 maintain and repair.” (SOF 11).

25 Notably, the Plaintiff is not a condominium association and would not have any right to
26 pursue claims on behalf of the rights of individual owners in its own name. (Compare A.R.S. §
27 33-1801 et seq. with condominium statutes A.R.S. § 33-1201 et seq. and in particular A.R.S. §
28 33-1242 defining powers of a condominium.)

1 This Plaintiff does not have a right to pursue claims arising from the Implied Warranty of
2 Habitability and Workmanship. This Plaintiff does not have the power or right to pursue other
3 parties' claims that may arise under the Implied Warranty of Habitability and Workmanship.

4 **B. Breach of Covenant of Good Faith and Fair Dealing**

5 Plaintiff's Count Two alleges Breach of Implied Covenant of Good Faith and Fair
6 Dealing.

7 Plaintiff alleges that Defendant K. Hovnanian at Gallery, LLC and Plaintiff entered into a
8 contract in the form of the Declaration/CC&Rs "the contract made assurances that the work
9 would be or had been done correctly." (Complaint at ¶¶ 25-26.) Plaintiff alleges that Defendant
10 K. Hovnanian at Gallery, LLC breached the contract by "not performing work in compliance
11 with the terms of that contract and by building a project that does not comply with applicable
12 laws and building codes." (*Id.*, ¶ 39.) The Cause of Action is directed against 3 of the 4 original
13 named defendants but not against K. Hovnanian Arizona Operations, LLC.

14 This claim must be based upon an actual contract, and the "duty of good faith and fair
15 dealing arises by virtue of that contractual relationship," *See, Rawlings v. Apodaca*, 151 Ariz.
16 149, 726 P.2d 565 (1986); *see also, Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466, 967
17 P.2d 607 (App. 1998) ("[I]mplied covenants of good faith and fair dealing presume the existence
18 of a valid contract").

19 Here, Plaintiff has alleged and presumed that the contract includes an obligation to
20 perform 'work' or construct, and an obligation to warrant the work. The Declaration/CC&Rs do
21 not contain terms regarding any agreement to perform 'work.' The Declaration/CC&Rs mainly
22 concerns agreements between the individual lot owners and the Association, for the benefit of
23 owners and other interest holders in the subject lots and common areas. (SOF 4.)

24 Plaintiff's Complaint describes "assurances" and breaches of contractual terms. The
25 allegations fail to describe any terms which can be located within the actual document described
26 and further the allegations fail to identify claims which can support a claim for Breach of the
27 Covenant of Good Faith and Fair Dealing.

1 Few terms of the Declaration that involve any promises or agreements concerning the
2 Declarant, and those do not relate to the claims at issue. Plaintiff has not cited to or identified
3 any term which includes an agreement to construct for Plaintiff, perform other ‘work’ for
4 Plaintiff, or to guarantee or warranty to Plaintiff the sufficiency of any construction at the Lots
5 or Common Areas which make up The Gallery.

6 Plaintiff has identified in its Disclosures a number of provisions of the Declaration that
7 reference the Declarant. (SOF 12.) Plaintiff has not identified any provision where the Declarant
8 made promises to the Association to warrant the sufficiency of construction. Nor has Plaintiff
9 identified any expected benefits which were impaired by any alleged deficiency.

10 Plaintiff’s allegation directing this claim to Defendant K. Hovnanian at Gallery, LLC
11 appears to be an attempt to extend the special remedy of the Implied Warranty of Habitability
12 and Workmanship to this Defendant. The allegation goes further than Arizona law provides for
13 this remedy, as already discussed.

14 **C. Breach of Contract**

15 This claim is also directed against Defendant K. Hovnanian at Gallery, LLC and against
16 two dismissed Defendants, not against Defendant K. Hovnanian Arizona Operations, LLC.

17 Plaintiff’s breach of contract claim alleges that Defendants breached terms of a contract
18 “by building a contract that does not comply with applicable laws and building codes.” Plaintiff
19 never entered any contract with Defendants to perform construction.

20 The claim does not identify any particular terms of any agreement between Defendant K.
21 Hovnanian at Gallery, LLC and Plaintiff. The claim incorporates the previous allegations and
22 presumably refers again to the same provisions of the Declaration/CC&Rs cited to in the claim
23 for Breach of the Covenant of Good Faith and Fair Dealing. The Complaint does not identify
24 any terms of the Declaration/CC&Rs that concern an agreement to perform construction for the
25 Plaintiff or to warrant any construction or improvements to property. Plaintiff has not identified
26 any actual term of the Declaration/CC&Rs which relates in any way to its claims of construction
27 defects and related damages.

1 **IV. FACTS DO NOT SUPPORT EXPANSION OF THE ASSOCIATION’S RIGHTS**

2 The law and applicable facts do not support claims by Plaintiff for the remedies it has
3 sought. Defendant expects Plaintiff to take the position that the legal claims should be extended
4 to allow it to pursue claims like a homebuyer under the *Powercraft* warranty. Modification of
5 the law is not warranted and strict enforcement of the actual law is appropriate.

6 The parties’ interactions show clearly that the interests of the Association were protected
7 and preserved throughout the process. Plaintiff is a professionally managed non-profit
8 association. Its management was involved throughout its existence including through the
9 turnover process where Plaintiff accepted transfer of the common area property. (SOF 8, 9).

10 Each purchaser of units received a Home Builder’s Limited Warranty Agreement with an
11 agreed method for requesting repairs and determining whether any condition was a defect
12 covered by the warranty. (SOF 5, 6.) The agreement included an agreement to arbitrate any
13 disputes under the warranty. (SOF 7.) Each owner had an agreed remedy and procedure
14 including arbitration requirements. To the extent any purchaser had claims, they would be
15 subject to the agreement. The individual homebuyers are not party to the case and their claims
16 are not at issue. Any rights or claims belonging to them can be raised by them through
17 appropriate procedures. Plaintiff cannot be permitted to raise claims belonging to the individual
18 homebuyers at Gallery without any basis to do so or to somehow rewrite the contractual
19 agreement between the seller and those non-party homebuyers.

20 **V. CONCLUSION**

21 The claims alleged and pursued by Plaintiff are not supported by law. The facts as
22 relevant to the parties and claims cannot support claims for the Implied Warranty of
23 Workmanship and Habitability by this Plaintiff, which is not empowered to pursue this
24 judicially-created remedy against either Defendant. The facts as relevant to the claims asserted
25 by Plaintiff against Defendant K. Hovnanian at Gallery, LLC, do not support either breach of
26 contract or breach of the Covenant of Good Faith and Fair Dealing. Plaintiff has not asserted this
27 claim against Defendant K. Hovnanian Arizona Operations, LLC, and would not have any basis
28 to do so.

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1 Dated: September 30, 2022

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13 Original of the foregoing e-filed
this 30th day of September, 2022 with:

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16 Phoenix, AZ 85003

17 COPY of the foregoing emailed this
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