

EXHIBIT 8

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Attorney for Third-Party Defendant Desert Vista, Inc.

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

GALLERY COMMUNITY
ASSOCIATION, an Arizona non-profit
corporation,

Plaintiff;

v.

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

NO. CV2020-008714

**THIRD-PARTY DEFENDANT DESERT
VISTA, INC.'S FIRST SUPPLEMENTAL
RULE 26.1 DISCLOSURE STATEMENT**

(Assigned to the Honorable Michael Kemp)

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

7 Third-Party Plaintiffs

8 v.

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

Third-Party Defendants.

Third-Party Defendant Desert Vista, Inc. (“Desert Vista”) by and through undersigned counsel, hereby submits its **First Supplemental** Rule 26.1 Disclosure Statement pursuant to Arizona Rules of Civil Procedure. Discovery is ongoing in this matter and Desert Vista reserves its right to supplement this disclosure as discovery progresses. **Supplemental information appears in bold, italic font.**

1 **I. FACTUAL BACKGROUND**

2 This construction defect case arises out of the construction of the Gallery Condominium
3 Complex located at 3124 North 71st Street, Scottsdale, Arizona 85251 (the “Project”). The
4 Project included four buildings and eighteen units. The Certificate of Occupancy was issued
5 on or about July 13, 2017. The Gallery Community Association (“Plaintiff”) is an Arizona
6 nonprofit corporation that acts as the property owners’ association for the Property.

7 Defendant/Third-Party Plaintiff K. Hovnanian Arizona Operations, LLC. was the
8 general contractor responsible for the construction of the Project. Based on available
9 information, Defendant/Third-Party Plaintiff K. Hovnanian Developments of Arizona, Inc., is
10 and was a member of Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC and K.
11 Hovnanian Arizona Operations, LLC. Plaintiff is asserting Defendant/Third-Party Plaintiff K.
12 Hovnanian Companies of Arizona, LLC (Third-Party Plaintiffs collectively, “K. Hovnanian”)
13 was involved in the development, design, construction and/or sale of the Project and the units.

14 On or about March 3, 2010, Desert Vista entered into a Master Subcontractor
15 Agreement with K. Hovnanian, and on July 21, 2016, Desert Vista entered into a Work
16 Agreement with K. Hovnanian, incorporating the Master Subcontractor Agreement and
17 defining the scope of work for the Project to include stucco. Desert Vista fulfilled its
18 obligations in a workmanlike manner in accordance with applicable construction standards
19 and project documents. Therefore, Desert Vista denies the allegations as set forth in this
20 disclosure.

21 **II. LEGAL THEORIES OF DEFENSE**

22 Desert Vista raises all defenses set forth in Rule 8 and 12(b) of the *Arizona Rules of*
23 *Civil Procedure*. Additional defenses when known or discovered through discovery will be
24 asserted and this section will be supplemented. Desert Vista asserts the following defenses at
25 this time:

1 **A. Breach of Contract**

2 The party alleging a breach of contract has the burden of proving both the existence of
3 a valid contract and breach of the same. *See U.S. West Communications, Inc. v. Arizona Corp.*
4 *Com'n*, 197 Ariz. 16, 22, 3 P.3d 936, 942 (App. 1999). In the present case, this requires K.
5 Hovnanian to prove 1) that a contract existed between K. Hovnanian and Desert Vista; 2) that
6 K. Hovnanian performed pursuant to the contract's terms; 3) that Desert Vista did not perform
7 pursuant to the contract's terms; and 4) that Desert Vista's failure to perform resulted in
8 damages to K. Hovnanian. *See Watson Construction Co. v. Amfac Mortgage Corp.*, 124 Ariz.
9 570, 581, 606 P.2d 421, 432 (App. 1979). K. Hovnanian is attempting to pass through any
10 and all claims as asserted by Plaintiff. K. Hovnanian does not have independent damages. K.
11 Hovnanian has not alleged any facts to support its breach of contract claim, and Desert Vista
12 denies there was a breach, causation or damages in this matter. Desert Vista also affirmatively
13 asserts that the work it performed under the Contract was done in a good and workmanlike
14 manner. All work by Desert Vista was done at the direction, under the supervision, and with
15 the approval of K. Hovnanian. Accordingly, Desert Vista did not breach any terms of the
16 Contract, express or implied, nor did it breach any express or implied warranties regarding the
17 same.

18 **B. Breach of Implied Warranty of Workmanship and Express Warranty**

19 Desert Vista denies any breach of warranty, express or implied. Arizona law imposes
20 upon the builder an implied warranty that the construction is performed in a workmanlike
21 manner and that the structure is habitable. *Columbia Western Corp. v. Vela*, 122 Ariz. 28; 592
22 P.2d 1294 (App. 1979). The test for breach of the implied warranty of habitability and proper
23 workmanship is "reasonableness, not perfection; the standard being, ordinarily, the quality of
24 work that would be done by a worker of average skill and intelligence." *Nastri v. Wood Bros.*
25 *Homes, Inc.*, 142 Ariz. 439, 444; 690 P. 2d 158 (App. 1984). Desert Vista performed its

1 contractual obligations in a workmanlike manner and in compliance with contract
2 specifications and all applicable codes, usages, procedures, practices, and standards.

3 **C. Negligence**

4 To prove a negligence, K. Hovnanian must establish: 1) the existence of a duty
5 recognized by law; 2) a breach of that duty; 3) a causal connection between the breach and
6 injury; and 4) actual injuries or damages. *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d
7 200, 204 (1983) (citation omitted). The Arizona Supreme Court has held that the duty or
8 obligation must be recognized by law in order to maintain a negligence action. *Ferguson v.*
9 *Cash, Sullivan and Cross Ins. Agency, Inc.*, 171 Ariz. 381, 384, 831 P.2d 380, 383 (App.
10 1991) (citing *Hamman v. County of Maricopa*, 161 Ariz. 58, 61, 775 P.2d 1122, 1125 (1989)).
11 The danger reasonably perceived defines the duty owed, and when a duty exists, the defendant
12 must conform to a particular standard of conduct in order to protect others from unreasonable
13 risks of harm. *Id.* (citations omitted).

14 Here, K. Hovnanian failed to meet its burden of proof. Desert Vista affirmatively asserts
15 that it performed its work in accordance with industry standards, and thus did not breach any
16 duty owed to K. Hovnanian. Further, Desert Vista was not the cause of K. Hovnanian's alleged
17 damages. K. Hovnanian's damages are wholly attributable to parties other than Desert Vista.

18 **D. Indemnification**

19 Arizona law precludes a developer/general contractor from simultaneously recovering
20 under claims for express indemnity and common law indemnity. Arizona law is clear that if a
21 written contract addresses indemnity issues, then no common law rights exist. *See Insurance*
22 *Company of North America v. Valley Forge Insurance Company*, 150 Ariz. 248, 722 P.2d 975
23 (App. 1986). In this case, K. Hovnanian has set forth both a contractual indemnity claim and
24 a common-law indemnity claim; however, K. Hovnanian cannot recover under both.

1 **1. Implied Indemnity**

2 In Arizona, the existence of a written indemnity clause wholly displaces any right to
3 common law indemnity. *See INA Ins. Co. of North America v. Valley Forge Ins. Co.*, 150 Ariz.
4 248, 722 P.2d 975 (App. 1986). If K. Hovnanian can prove that a contract exists between them
5 and Desert Vista, covering the homes at issue in this matter, and that the contract contains a
6 written indemnity provision, then K. Hovnanian’s claims of common law indemnity are
7 inappropriate and should be dismissed as a matter of law. To be sure, even if K. Hovnanian
8 had a viable common law indemnity claim, K. Hovnanian would not be able to recover under
9 that legal theory.

10 Common law indemnity is an “all or nothing” proposition. *See Herstam v. Deloitte &*
11 *Touche*, 186 Ariz. 110, 919 P.2d 1381 (App. 1996). If K. Hovnanian is found to have breached
12 any of its duties or obligations to Plaintiff, then K. Hovnanian is not entitled to common law
13 indemnity from Desert Vista. Any alleged omission of the general contractor necessarily
14 excludes subcontractors from indemnity liability. This is because an “omission” is considered
15 active negligence. *See Cella Barr Associates, Inc. v. Cohen*, 177 Ariz. 480, 868 P.2d 1063
16 (App. 1994). If K. Hovnanian is not found liable for damages, then there is no indemnity duty
17 that Desert Vista would owe to K. Hovnanian. To the extent that the Plaintiff claimed injuries
18 to work other than that performed by Desert Vista on the Project, K. Hovnanian has suffered
19 no injury from Desert Vista, and K. Hovnanian is not entitled to recovery on a theory of
20 indemnity from Desert Vista.

21 **2. Express Indemnity**

22 K. Hovnanian alleges that the express indemnity provisions of the subcontract
23 agreement require Desert Vista to defend and indemnify K. Hovnanian against all claims
24 “arising out of, resulting from or relating to Contractor’s performance of Work” under the
25 Contract. K. Hovnanian bears the burden of proving that the purported indemnification

1 provision contains the required language of *Washington Elementary School District No. 6 v.*
2 *Baglino Corp.*, 169 Ariz. 58, 817 P.2d 3 (1991). If the agreement fails to specifically address
3 the effect of K. Hovnanian's own negligence, the provision is deemed to be general. *See*
4 *Pioneer Roofing Co. v. Mardin Constr. Co.*, 152 455, 733 P.2d 652 (App. 1986) (holding that
5 a general indemnity agreement is one which does not specifically address what effect the
6 indemnitee's negligence will have on the indemnitor's obligation to indemnify). The alleged
7 indemnification provision needs to clearly and specifically require Desert Vista to indemnify
8 K. Hovnanian for its own active negligence as required in *Hauskins v. McGillicuddy*, 175 Ariz.
9 45, 852 P.2d 1226 (App. 1992) (citing, *inter alia*, *Baglino*). To the extent that Plaintiff and K.
10 Hovnanian claim injuries to work other than that performed by Desert Vista on the Project, K.
11 Hovnanian has suffered no injury from Desert Vista and is not entitled to recovery on a theory
12 of indemnity from Desert Vista.

13 Arizona's anti-indemnity statute, A.R.S. § 32-1159, states that any clause affecting a
14 construction contract which purports to indemnify a party from or against liability resulting
15 from the sole negligence of the party is void as against public policy of the state. Some or all
16 of K. Hovnanian's purported indemnification provisions may violate A.R.S. § 32-1159, as they
17 seek to indemnify K. Hovnanian for its sole negligence. As such, K. Hovnanian's claim for
18 express indemnity may be barred by A.R.S. § 32-1159.

19 Furthermore, A.R.S. § 32-1159.01 prevents subcontractors from being obligated to
20 indemnify general contractors for more than its proportional share of fault and liability. Under
21 this statute, any provisions entitling K. Hovnanian to indemnification for damages that are a
22 result of its own fault are invalid.

23 **E. Declaratory Relief re: Duty to Defend/Duty to Indemnify**

24 K. Hovnanian's alleged right to defense and/or indemnity arises exclusively out of the
25 written agreements between Desert Vista and K. Hovnanian. *Schweber Elec. V. Nat'l*

1 *Semiconductor Corp.*, 174 Ariz. 406, 410, 850 P.2d 119, 123 (App. 1992) (“When the parties
2 expressly agree upon indemnity provisions in their contract, the extent of the duty is defined
3 by the contract itself rather than common law principles.”). Of course, “[t]he extent of a
4 contractual duty to indemnify must be determined from the contract itself.” *Superior Cos v.*
5 *Kaiser Cement Corp.*, 152 Ariz. 575, 577, 733 P.2d 1158, 1160 (App. 1986) (citations
6 omitted). The Master Agreement does not grant K. Hovnanian a right to defense and/or
7 indemnity when materials installed at the Project by Desert Vista are damaged as the result of
8 another subcontractor’s work, or for claims arising solely out of K. Hovnanian’s negligence.
9 As such, no Arizona court will impute such a right into the Agreements. *See MT Builders, LLC*
10 *v. Fisher Roofing, Inc.*, 219 Ariz. 297, 303 (App. 2008) (interpreting indemnity agreement
11 based “specific language” of the indemnification provision); *Grubb & Ellis Mgmt. Servs., Inc.*
12 *v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 88, 138 P.3d 1210, 1215 (App. 2006) (“We construe
13 contracts to cover losses or liabilities that reasonably appear to have been intended by the
14 parties.”). K. Hovnanian is thus precluded from claiming any right of indemnity or defense
15 from Desert Vista in this action.

16 In any event, a conflict of interest prevents Desert Vista from assuming the defense of
17 K. Hovnanian in this action. Under Arizona law, a conflict of interest exists when “the injured
18 person’s claim against the indemnitee is such that it could be sustained on different grounds,
19 one of which is within the indemnitor’s obligation to indemnify and another of which is not.”
20 *Manzanita Park, Inc. v. Insurance Company of North America*, 857 F.2d 549, 552 (1988);
21 *citing Vagnozzi*, 675 P.2d at 708 (*quoting* Restatement (Second) of Judgments § 58 (1982)).
22 The Restatement (Second) of Judgments explains exactly why such a conflict precludes the
23 assumption of defense:

24 In such circumstances, it is to the interests of the indemnitee that, if
25 liability be established against him, it be established on a ground
within the indemnity obligation so that he can shift the loss to the
indemnitor. It is to the interest of the indemnitor that, if liability be

1 established against the indemnitee, it be on a ground outside the
2 indemnity obligation. Neither of them could defend the action in a
3 way that would fairly protect the interests of the other in all respects.
4 Because of the conflict, the indemnitor cannot properly be called
5 upon to take control of the defense of the action, for he would be
6 required either to sacrifice his own interests without a fair
7 opportunity to litigate questions concerning his liability or to commit
8 a breach of his duty to conduct a vigorous defense of the indemnitee.
9 Accordingly, when the claim against the indemnitee is one as to
10 which he and the indemnitor have a conflict of interest, the
11 indemnitor is not estopped in a subsequent action on the indemnity
12 obligation to dispute the existence or extent of the indemnitee's
13 liability to the injured person.

14 Restatement (Second) of Judgments, § 57 (1982).

15 Assuming, *arguendo*, that Desert Vista assumed K. Hovnanian's defense in the action,
16 an insurmountable conflict of interest would arise. Desert Vista would have to defend Desert
17 Vista's work by showing that Plaintiff's claims arose solely out of K. Hovnanian's negligence
18 – in order to avoid any express, indemnity-based liability or obligation. At the same time and
19 contrary to Desert Vista's own interests, Desert Vista would have to defend K. Hovnanian's
20 interests by showing that any ultimate liability incurred by K. Hovnanian falls within the
21 express indemnity obligations that arise out of the Master Agreement. Such a conflict of
22 interest precludes Desert Vista from effectively defending both parties' interests. K.
23 Hovnanian's claim for declaratory relief – duty to defend/indemnify cannot be maintained as
24 a matter of law.

25 Under no circumstances, therefore, can K. Hovnanian claim against Desert Vista and/or
Desert Vista a right to defense or indemnity in this action.

F. Declaratory Relief re: Contractual Duties

Upon information and belief, Desert Vista complied with all duties and obligations
arising out of the Master Agreement, whether express or implied. K. Hovnanian, therefore, has
no basis to seek a declaration from the Court with respect to any alleged failure by Desert Vista
to comply with any contractual duties or obligations.

1 **G. Contribution**

2 According to K. Hovnanian, Desert Vista should be compelled to reimburse K.
3 Hovnanian for its attorneys’ fees and legal costs resulting from any settlement, damages or
4 judgment against K. Hovnanian, provided that such reimbursement is in proportion to the
5 comparative fault of Desert Vista. However, Desert Vista affirmatively alleges that all of
6 Desert Vista’s work at the Project was performed in a workmanlike manner and in compliance
7 with all applicable plans, specifications, codes and industry standards in effect at the time of
8 original construction. Desert Vista, therefore, did not cause any damage to K. Hovnanian or
9 the Plaintiff. As such, K. Hovnanian has no claim to a right of contribution under either the
10 Master Agreement or A.R.S. § 12-2501.

11 **H. Comparative Fault of Parties and Non-Parties**

12 In assessing the “percentage of fault” of each party, the fact-finder must assess the fault
13 of all parties and non-parties who have been designated, and who contributed to the injuries
14 or damages. *See* ARIZ.R.CIV.P., Rule 26(b)(5); *see also* A.R.S. § 12-2506(B) (Uniform
15 Contribution Among Tortfeasors Act) (hereinafter “The Act”). The Act broadly defines fault
16 as:

17 an actionable breach of legal duty, act or omission proximately causing or
18 contributing to injury or damages sustained by a person seeking recovery,
19 including negligence in all of its degrees, contributory negligence, assumption
of risk, strict liability, breach of express or implied warranty of a product,
products liability and misuse, modification or abuse of a product.

20 A.R.S. §12-2506(F)(2); *see also* *Zuern v. Ford Motor Co.*, 188 Ariz. 486, 490-91, 937 P.2d
21 676, 680-81 (App. 1996).

22 Any alleged defects or damage to the Project likely resulted from work, actions or
23 inactions of other persons or entities, and not the work of Desert Vista. Those other entities
24 include Plaintiff, K. Hovnanian and all other subcontractors, anyone who performed repairs,
25 maintenance, inspections, and expert testing at the Project, other than Desert Vista.

1 Additionally, K. Hovnanian was supposed to, and agreed to, supervise, direct, inspect, and
2 approve the work of Desert Vista to ensure that all applicable requirements were met. K.
3 Hovnanian also possessed the duty to act reasonably and prudently to ensure that all of the
4 work undertaken and performed by Desert Vista was performed in a workmanlike manner
5 before it was accepted. K. Hovnanian must take responsibility for its own failure to adequately
6 supervise or inspect Desert Vista's work before said work product was accepted and payment
7 made. K. Hovnanian is, therefore, subject to the contributory/comparative affirmative defense
8 if they indeed failed to properly ensure the work conducted at their direction and to the extent
9 that they altered or approved Desert Vista's work. Desert Vista reserves the right to argue that
10 K. Hovnanian failed to supervise/instruct Desert Vista.

11 **I. Non-Parties at Fault**

12 Pursuant to A.R.S. § 12-2506(B) and ARIZ.R.CIV.P., Rule 26(b)(5), Desert Vista hereby
13 gives notice that the following individuals or entities may be wholly or partially at fault for
14 damages alleged in this matter:

15 **1.** Each individual unit owner to the extent any damages alleged relate to
16 unit owners' conduct, repairs, maintenance, modifications, or failure to maintain, and further
17 based on the their failure to provide notice at the time of identification of alleged deficiencies
18 at the Project. This delay in identification of the alleged deficiency may have caused all or part
19 of the damages identified in its subsequent claim to Desert Vista;

20 **2.** Any design professionals, architects, and consultants responsible for the
21 design and development of the plans and specifications for the Project to the extent that any
22 damages alleged relate to design or specification issues;

23 **3.** Any individuals or entities who performed repair, maintenance, warranty,
24 or other work at the Project to the extent their work caused or contributed to the alleged
25 damages complained of;

1 4. Any municipal, county, state, or other inspector if they performed
2 inspections at the Project and approved the work as complete and in accordance with
3 applicable codes and standards;

4 5. Any municipal, county, state, or other inspector who performed
5 inspections/reviews of the plans of the Project and approved the plans as in compliance with
6 applicable codes and standards; and

7 6. Any person or entities that damaged, removed, or altered the work
8 performed by Desert Vista while investigating or performing testing at the Project prior to, or
9 during, the course of this litigation. To the extent that any of these non-parties caused or
10 contributed to damages alleged by Plaintiffs, or liabilities incurred by Plaintiffs, the jury must
11 allocate said damages to the respective non-parties at fault and Desert Vista cannot be held
12 liable for said damages.

13 **J. Statutory Defenses**

14 Desert Vista affirmatively alleges all defenses available under A.R.S. § 12-2501 and
15 Rules 8, 12, and 19 of the Arizona Rules of Civil Procedure, as they may apply to this litigation.

16 **K. Failure to Comply with A.R.S. § 12-2602**

17 Desert Vista is a licensed contractor, and therefore, K.Hovnanian has a duty to comply
18 with A.R.S. § 12-2601 et seq.

19 **L. Attorneys' Fees**

20 Pursuant to A.R.S. §§ 12-341 and 12-341.01, and any contract between the parties,
21 Desert Vista is entitled to recover its costs and reasonable attorneys' fees in defending this
22 litigation. To the extent that attorneys' fees are allowed to any party, the Court should award
23 such fees and costs based upon a party's percentage of success as to each separate claim for
24 damages and not based upon a party's status as the prevailing party as to the claims as a whole.

1 *Pioneer Roofing Company v. Mardian Construction Company*, 152 Ariz. 455, 467, 733 P.2d
2 652, 664 (App.1986).

3 **M. Waiver**

4 Waiver is an intentional relinquishment of a known right. *See Am. Cont'l Life Ins. Co.*
5 *v. Ranier Constr. Co.*, 125 Ariz. 53, 607 P.2d 372 (1980). A waiver may be express or implied
6 by actions that are inconsistent with an intention to assert a particular contractual right. *See id.*
7 Similarly, by knowingly and unconditionally accepting defective performance, a party has
8 waived any objections to it. *See id.* To the extent K. Hovnanian relinquished any of its rights
9 to bring a cause of action for work performed by Desert Vista, K. Hovnanian has waived its
10 right to bring those claims. Furthermore, Plaintiff and K. Hovnanian waived their right to
11 recover where they or others made modifications with respect to Desert Vista's work which
12 caused or contributed to the alleged defects.

13 Moreover, K. Hovnanian has waived its right to pursue Desert Vista for breach of
14 contract for failing to procure required insurance by allowing Desert Vista to start work and
15 paying Desert Vista for its work at the Project. *See Bott v. J.F. Shea Co., Inc.*, 388 F.3d 530
16 (5th Cir. 2004) (holding general contractor waived insurance requirement of subcontract by
17 allowing subcontractor to start work without required insurance, allowing subcontractor to
18 complete the work and paying subcontractor in full without required insurance).

19 **N. Consent, Completion, Acceptance, and Estoppel**

20 K. Hovnanian consented to and accepted the work performed by Desert Vista. Upon
21 completion of Desert Vista's work on the Project, K. Hovnanian accepted and approved Desert
22 Vista's work. Therefore, K. Hovnanian is estopped from arguing Desert Vista's work was
23 performed improperly and that it is entitled to indemnification or recovery for any alleged
24 damage as a result of Desert Vista's work on the project.

1 **O. Economic Waste**

2 Arizona has adopted the rule of economic waste from the first Restatement of Contracts,
3 §346, in *Blecick v. School District No. 18 of Cochise County*, 2 Ariz.App. 115, 406 P.2d 750
4 (1996) and *County of Maricopa v. Walsh & Oberg Architects*, 16 Ariz. App. 439, 441, 494
5 P.2d 44, 46 (1972). The rule prohibits a party pursuing a breach of contract claim from
6 measuring damages based on cost of repair when the measure would create economic waste.
7 *Blecick*, at 122, 406 P.2d 757. If economic waste is to occur, the rule requires the measure of
8 damages to be “the difference between the value that the product contracted for would have
9 had and the value of the performance that has been received by the Plaintiff.” *Id.*

10 In *Fairway Builders, Inc. v. Malouf Towers Rental Company*, 125 Ariz. 242, 602 P.2d
11 513 (App. 1979), the Court addressed the question whether economic waste would result given
12 the proposed cost of repair measure for the repair to exterior walls in the building. The Court
13 quoted a comment to the Restatement (First) of Contract, §346, explaining:

14 The purpose of money damages is to put the injured party in as good
15 a condition as that in which full performance would have put him;
16 but that does not mean that he is to be put in the same specific
17 physical position . . . There are numerous cases . . . in which the value
18 of the finished product is much less than the cost of producing it after
19 the breach has occurred. Sometimes the defect in a completed
 structure cannot be physically remedied without tearing down and
 rebuilding, at a cost that would be imprudent and unreasonable. The
 law does not require damages to be measured by the method
 requiring such an economic waste.

20 *Id.* at 253, 603 P.2d 515, 524. The Court noted that economic waste occurs, for example, when
21 there will be reasonable duplication of effort or substantial destruction of a building to affect
22 the repair in question. *Id.* The result of such proof is that damages must be awarded “on the
23 basis of the difference in the value of the building had it been completed in accordance with
24 the contract and the value of the building as erected,” rather than based on the cost to repairs
25 to conform. *Id.*

1 Desert Vista intends to assert this affirmative defense at the time of trial.

2 **P. Other Affirmative Defenses**

3 Desert Vista further alleges the additional following affirmative defenses: stigma
4 damages; accord and satisfaction; arbitration and award; assumption of risk; lack of
5 jurisdiction; lack of standing; payment; release; *res judicata*; collateral estoppel, statute of
6 limitations and/or repose; failure to provide notice of defective condition; failure to provide
7 notice of breach of warranty; laches; settlement and release; and waiver. Desert Vista hereby
8 reserves the right to amend its Disclosure Statement to allege such additional further
9 affirmative defenses including, but not limited to, those affirmative defenses set forth in Rules
10 8(c) and 12(b), Arizona Rules of Civil Procedure and any others as may be developed through
11 subsequent investigation and discovery.

12 **III. WITNESSES**

13 A. Chris Thornton
14 Desert Vista, Inc.
15 **c/o Rai & Barone, P.C.**
16 3033 North Central Avenue, Suite 500
Phoenix, Arizona 85012

17 Chris Thornton is the president of Desert Vista, Inc. He is expected to testify regarding
18 his knowledge of the nature and quality of services performed by Desert Vista, as well as scope
19 of work, with respect to the construction of the Project with regard to the written contract, if
20 any exists, at issue in this matter.

21 B. Robert Vander and/or Representative of Gallery Community Association
22 **c/o Burg Simpson Eldredge Hersh & Jardine P.C.**
23 8310 South Valley Highway, Suit 270
Englewood, CO 80112

24 One or more representative for Plaintiff are expected to testify concerning the nature of
25 their claims against K. Hovnanian.

1 C. Representative(s) of K. Hovnanian at Gallery, LLC
2 c/o **Dennis I. Wilenchik, Matthew V. Moosbrugger**
3 Wilenchik & Bartness
4 2810 N Third Street
5 Phoenix, AZ 85004

6 One or more representatives of K. Hovnanian at Gallery, LLC are expected to testify
7 regarding K. Hovnanian's knowledge, direction and oversight of Desert Vista's work at the
8 Project, K. Hovnanian's acceptance of Desert Vista's work at the Project, with regard to the
9 written contract, if any exists, and regarding any and all further knowledge pertaining to this
10 litigation. K. Hovnanian at Gallery, LLC is also expected to testify regarding knowledge of
11 alleged construction deficiencies, inspections, repairs and warranties undertaken, and alleged
12 resultant damages.

13 D. Representative(s) of K. Hovnanian Arizona Operations, LLC
14 c/o **Dennis I. Wilenchik, Matthew V. Moosbrugger**
15 Wilenchik & Bartness
16 2810 N Third Street
17 Phoenix, AZ 85004

18 One or more representatives of K. Hovnanian Arizona Operations, LLC are expected
19 to testify regarding K. Hovnanian's knowledge, direction and oversight of Desert Vista's work
20 at the Project, K. Hovnanian's acceptance of Desert Vista's work at the Project, with regard to
21 the written contract, if any exists, and regarding any and all further knowledge pertaining to
22 this litigation. K. Hovnanian Arizona Operations, LLC is also expected to testify regarding
23 knowledge of alleged construction deficiencies, inspections, repairs and warranties
24 undertaken, and alleged resultant damages.

25 E. Representative(s) of K. Hovnanian Developments of Arizona, Inc.
c/o **Dennis I. Wilenchik, Matthew V. Moosbrugger**
Wilenchik & Bartness
2810 N Third Street
Phoenix, AZ 85004

1 One or more representatives of K. Hovnanian Developments of Arizona, Inc. are
2 expected to testify regarding K. Hovnanian's knowledge, direction and oversight of Desert
3 Vista's work at the Project, K. Hovnanian's acceptance of Desert Vista's work at the Project,
4 with regard to the written contract, if any exists, and regarding any and all further knowledge
5 pertaining to this litigation. K. Hovnanian Developments of Arizona, Inc. is also expected to
6 testify regarding knowledge of alleged construction deficiencies, inspections, repairs and
7 warranties undertaken, and alleged resultant damages.

8 F. Representative(s) of K. Hovnanian Companies of Arizona, Inc.
9 c/o **Dennis I. Wilenchik, Matthew V. Moosbrugger**
10 Wilenchik & Bartness
11 2810 N Third Street
12 Phoenix, AZ 85004

13 One or more representatives of K. Hovnanian Companies of Arizona, Inc. are expected
14 to testify regarding K. Hovnanian's knowledge, direction and oversight of Desert Vista's work
15 at the Project, K. Hovnanian's acceptance of Desert Vista's work at the Project, with regard to
16 the written contract, if any exists, and regarding any and all further knowledge pertaining to
17 this litigation. K. Hovnanian Companies of Arizona, Inc. is also expected to testify regarding
18 knowledge of alleged construction deficiencies, inspections, repairs and warranties
19 undertaken, and alleged resultant damages.

20 G. Gallery Unit Owners

21 It is expected the unit owners will testify regarding any alleged defects and/or
22 damages at the Project and regarding any and all further knowledge pertaining
23 to this litigation.

24 H. Representative(s) of Chas Roberts Air Conditioning, Inc.
25 c/o Teresa Hayashi Wales
WELSH LAW GROUP, PLC
11811 North Tatum Blvd.
Suite P125
Phoenix, AZ 85028

- 1 I. Representative(s) of Gothic Landscaping, Inc.
2 c/o Amanda Hough
3 **JABURG WILK**
4 3200 N. Central Ave.
5 Phoenix, AZ 85012
- 6 J. John Leblanc and/or Representative(s) of LeBlanc Building Co., Inc.
7 c/o Stephen Best
8 **JONES, SKELTON & HOCHULI, P.L.C.**
9 40 N. Central Ave.
10 Suite 2700
11 Phoenix, AZ 85004
- 12 K. Representative(s) of Liberty Constructors d/b/a Liberty Arizona
13 c/o Tom Shorall
14 Jason Boblick
15 **SHORALL MCGOLDRICK BRINKMAN**
16 1232 E. Missouri Ave.
17 Phoenix, AZ 85014
- 18 L. Representative(s) of Sargon Masonry Construction, LLC
19 c/o Leonard Fink
20 **SPRINGEL & FINK**
21 9075 W. Diablo Dr.
22 Suite 302
23 Las Vegas, NV
- 24 M. Representative(s) of Renco, LLC dba Renco Roofing.
25 c/o Shannon Huff
RAI & BARONE, PC
3033 N. Central Ave
Phoenix, AZ 85012
- N. Representative(s) of Home Builders Site Services of Arizona, LLC.
- O. Representative(s) of R/S Service & Supply, Inc.
- P. Any and all individuals, companies, contractors, subcontractors, experts and/or entities responsible for performing warranty, repairs, maintenance, destructive testing, or other work that altered, modified, corrected, transformed, updated, adjusted, and/or amended the Project.

1 Q. Applicable city and county inspectors who viewed, inspected, and approved all
2 work by Defendant during construction of the project.

3 R. Any Arizona Registrar of Contractors' inspectors who viewed or inspected
4 Desert Vista's work at the Project.

5 S. Any and all custodians of records.

6 T. Any and all witnesses listed on K. Hovnanian's and other Third-Party
7 Defendants' disclosure statements and witness lists, subject to available
8 objections, even if later withdrawn.

9 **IV. PERSONS WHOM DESERT VISTA BELIEVES MAY HAVE KNOWLEDGE**
10 **OR INFORMATION TO THE EVENTS, TRANSACTIONS, OR**
11 **APPEARANCES GIVING RISE TO THIS ACTION**

12 All persons with relevant knowledge or information have been identified above. Desert
13 Vista reserves the right to reserve this section that may be revealed in future discovery
14 proceedings.

15 **V. WITNESS STATEMENTS**

16 Desert Vista is not aware of any statements given by anyone relative to the work of
17 Desert Vista at the project at this time.

18 **VI. EXPERT WITNESSES**

19 **A. West Harrington**
20 **Harrington Construction Co., Inc. ("HCCI")**
21 10470 Foothills Boulevard, Suite 230
22 Rancho Cucamonga, CA 91730

23 West Harrington is a licensed general contractor. Mr. Harrington is expected to testify
24 regarding any and all allegations asserted by the Plaintiff, K. Hovnanian, or any other party,
25 along with alleged cost of repair, methods of repair, and responding to other experts' opinions.
Mr. Harrington is also expected to testify regarding the standards of care employed by Desert

1 Vista. Mr. Harrington will also testify regarding his personal observations of the defects and
2 repairs.

3 Further, Mr. Harrington will also testify to the contents of the reports prepared by
4 himself and other experts employed in this matter, as they become available. It is expected that
5 Mr. Harrington will testify regarding the conditions observed at the Project, the results of any
6 inspections or testing performed, and his general impressions regarding the Project. A copy of
7 Mr. Harrington's CV and Fee Schedule are attached hereto and Bates Stamped No.: DV
8 000958 – 000961.

9 *Desert Vista reserved the right to supplement this portion of its disclosure statement*
10 *as discovery continues.*

11 **VII. DAMAGES**

12 Desert Vista is seeking its costs and all expenses incurred in the defense of this action,
13 pursuant to A.R.S. §12-341. Desert Vista also seeks its attorneys' fees insofar as such fees are
14 recoverable under Arizona law and/or Rules of Civil Procedure.

15 **VIII. TANGIBLE EVIDENCE AND DOCUMENTS**

16 1. The following documents, subject to any and all privileges that may be asserted
17 by Desert Vista:

Document Name/Details	Bates Stamp Nos.
Gallery Townhomes Approved Plans	DV 000001 - 000128
Gallery Address Listing	DV 000129
K. Hovnanian Memorandum re Bid 5.3.2016	DV 000130 – 000131
K. Hovnanian Award Memo 6.10.2016	DV 000132
Final Gallery Plat Map and Vicinity Map	DV 000133- 000134
K. Hovnanian Bid Prices	DV 000135 - 000137
Schedule A Pricing 7.11.2016	DV 000138
K. Hovnanian Gallery Standard Specifications	DV 000139 - 000167

1	K. Hovnanian Work Agreement 7.21.2016	DV 000168 - 000169
2	Gallery Lot 001-1210A Job File, Related Documents, Plans, Invoices, and Initial Repairs	DV 000170 - 000220
3	Gallery Lot 002-1212A Model, Roof Deck Job File, Related Documents, Plans, Invoices, and Initial Repairs	DV 000221 - 000299
4		
5	Gallery Lot 003-1210A Model Job File, Related Documents, Plans, Invoices, and Initial Repairs	DV 000300 – 000381
6	Gallery Lot 004-1210A Job File, Related Documents, Plans, and Invoices	DV 000382 – 000436
7	Gallery Lot 005-1211A Job File, Related Documents, Plans, and Invoices	DV 000437 - 000481
8	Gallery Lot 006-1212A Roof Deck Job File, Related Documents, Plans, and Invoices	DV 000482 - 000537
9	Gallery Lot 007-1211A Roof Deck Job File, Related Documents, Plans, and Invoices	DV 000538 - 000605
10		
11	Gallery Lot 008-1210A Job File, Related Documents, Plans, and Invoices	DV 000606 - 000661
12	Gallery Lot 009-1210A Job File, Related Documents, Plans, and Invoices	DV 000662 – 000685
13	Gallery Lot 010-1212A Roof Deck Job File, Related Documents, Plans, and Invoices	DV 000686 - 000709
14	Gallery Lot 011-1211A Roof Deck Job File, Related Documents, Plans, and Invoices	DV 000710 - 000733
15	Gallery Lot 012-1212A Roof Deck Job File, Related Documents, Plans, and Invoices	DV 000734 – 000757
16	Gallery Lot 013-1210A Job File, Related Documents, Plans, and Invoices	DV 000758 - 000778
17		
18	Gallery Lot 014-1210A Job File, Related Documents, Plans, and Invoices	DV 000779 – 000814
19	Gallery Lot 015-1212A Roof Deck Job File, Related Documents, Plans, and Invoices	DV 000815 - 000851
20	Gallery Lot 016-1211A Roof Deck Job File, Related Documents, Plans, and Invoices	DV 000852 - 000887
21	Gallery Lot 017-1212A Roof Deck Job File, Related Documents, Plans, Invoices, and Initial Repairs	DV 000888 – 000930
22		
23	Gallery Lot 0018-1210A Job File, Related Documents, Plans, and Invoices	DV 000931 - 000957
24	West Harrington’s CV and Fee Schedule	DV 000958 - 000961
25	United Specialty Insurance Company, Policy Number ANT-ATL1750809, effective	DV 000962 - 001017

December 7, 2017 through December 7, 2018. (Bates Stamp Nos.:	
<i>HCCI Investigation & Preliminary Report</i>	<i>DV 001018 - 001134</i>

2. Any photographic evidence regarding defective work allegedly performed by Desert Vista.

3. Any other documents related to agreements between K. Hovnanian and Desert Vista only with regard to the Project, including non-privileged communication.

4. Any and all documents listed by any other party, subject to available objections, even if later withdrawn.

5. Any and all depositions and exhibits which may be obtained through discovery, subject to available objections, even if later withdrawn.

6. Any and all documents, evidence, exhibits, or other materials produced through subsequent discovery and produced by other parties, subject to available objections, even if later withdrawn.

7. Any and all exhibits listed by any other party, even if later withdrawn, subject to available objections.

8. Any and all discovery responses, even if later withdrawn, subject to available objections.

9. Any other relevant tangible evidence or documents as they are provided through discovery or otherwise come to light.

IX. INSURANCE AGREEMENT

During the relevant timeframe, Desert Vista was insured under the following general liability insurance policies:

United Specialty Insurance Company, Policy Number ANT-ATL1750809, effective December 7, 2017 through December 7, 2018. (Bates Stamp Nos.: DV 000962 – 001017).

Service List

Gallery Community Association v. K. Hovnanian at Gallery, LLC

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