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**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; et  
al.

Defendants.

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K. HOVNANIAN AT GALLERY, LLC,  
an Arizona limited liability company; et  
al.

Third-Party Plaintiffs,

v.

ARTISTIC STAIRS, LTD., an Arizona  
limited liability company; et al.

Third-Party Defendants.

Case No. CV2020-008714

Assigned to Hon. Michael Kemp

**PLAINTIFF’S RESPONSE IN  
OPPOSITION TO DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT  
REGARDING EACH OF PLAINTIFF’S  
CAUSES OF ACTION**

**(Oral Argument Requested)**

Plaintiff, Gallery Community Association (“Plaintiff” or “Association”), by and  
through undersigned counsel, objects and responds as follows to Defendants’ *Motion for*

1 *Summary Judgment Regarding Each of Plaintiff's Causes of Action ("Motion")*. This  
2 response is supported by the following *Memorandum of Points and Authorities* and  
3 *Plaintiff's Response to Defendants' Separate Statement of Facts* ("Defendants' SOF").

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. ARGUMENT SUMMARY**

6 K. Hovnanian at Gallery, LLC ("KHov Gallery") and K Hovnanian Arizona  
7 Operations, LLC ("KHov Arizona") (collectively, "Defendants") argue that the Court  
8 should dismiss all of the Plaintiff's claims against them because (1) Arizona law does not  
9 permit a homeowners association such as the Plaintiff here to assert breach of implied  
10 warranty claims, *Motion* at 5-6; and (2) the contractual provisions Plaintiff relies on for its  
11 contract-based claims do not require KHov Gallery to "perform construction" or "warrant  
12 the work." *Motion* at 6, 7. Defendants' arguments are both legally and factually incorrect,  
13 and the *Motion* should be denied for all of the following reasons:

14 First, well-settled and controlling Arizona law, which Defendants fail to cite, permits  
15 homeowner associations to assert breach of implied warranty claims against developers and  
16 builders such as Defendants for latent defects in multifamily residential developments.  
17 Arizona public policy articulated in both *Richards v. Powercraft*, 139 Ariz. 242, 678 P.2d  
18 427 (1984) and *Lofts at Fillmore Condo. Ass'n v. Reliance Commerc. Constr.*, 218 Ariz.  
19 574, 190 P.3d 733 (2008) applies equally to homeowner associations for townhome  
20 developments as to homeowner associations for condominium developments and individual  
21 homeowners, because in all such cases the developer and builder are "in a better position  
22 than a subsequent owner to prevent occurrence of major problems," thus, "the costs of poor  
23 workmanship should be [theirs] to bear." *Richards*, 139 Ariz. at 245; 678 P.2d at 430.

24 Second, with respect to the Association's claims for breach of contract and breach  
25 of the implied covenant of good faith and fair dealing, KHov Gallery argues that Plaintiff's  
26 breach of covenant of good faith and fair dealing and breach of contract claims must fail  
27 because no contract between KHov at Gallery and the Association required this Defendant  
28 to "perform construction" or "warrant the work." *Motion* at 6, 7. However, as shown below,

1 Defendants mischaracterize Plaintiff's contract-based claims and ignore the contractual  
2 obligations imposed on KHov Gallery by the Declaration. Because KHov Gallery does not  
3 challenge with record evidence the Association's allegations that KHov Gallery breached  
4 these contractual obligations, KHov Gallery has failed to satisfy its summary judgment  
5 burden as to the contract-based claims.

## 6 **II. FACTUAL SUMMARY**

7 The undisputed allegations and record evidence show that in addition to being the  
8 Project's Declarant, KHov Gallery owned and "developed the project," "conveyed the  
9 common elements of the project to the Association in a quit claim deed dated October 6,  
10 2016," and "acted as the vendor by selling individual unit owners their units at The Gallery."  
11 Assoc. SOF ¶ A. Defendant K. Hovnanian Arizona Operations, LLC ("KHov Arizona")  
12 was the Project's general contractor. *Id.* at ¶ B.

13 The Gallery Community Association was formed as a nonprofit corporation under  
14 A.R.S. § 10-3101, et seq., *i.e.*, the Arizona Nonprofit Corporation Act, through the Articles  
15 of Incorporation of Gallery Community Association ("Articles"). *Id.* at ¶ C. The Articles  
16 state that the "Character of Affairs" of the Association is to "manage, maintain and  
17 administer the Common Area and common facilities, ... and to administer and enforce, the  
18 Declaration of Covenants, Conditions, Restrictions and Easements for Gallery..." *Id.* at ¶  
19 D.

20 The Declaration of Covenants, Conditions, Restrictions and Easements for Gallery  
21 ("Declaration" or "CC&R's") defines "Owner" to "include Declarant so long as Declarant  
22 or a Related Entity owns or has a Recorded option to purchase any Lot within the Property."  
23 *Id.* at ¶ E. The Declaration states that the Declarant formed the Association "for the purpose  
24 of the efficient preservation of the values and amenities of the Property" and the Declaration  
25 gives the Association "powers of administering and maintaining the Common Area [and]  
26 enforcing this Declaration." *Id.* at ¶ F.

27 The Declaration was made to establish "**mutually beneficial** covenants, conditions,  
28 restrictions, easements and obligations with respect to the proper **development**, use and

1 maintenance of the Property” for **Declarant’s “own benefit”** and the “mutual **benefits of**  
2 **all future Owners, or other holders of interests** in any portion of the Property.” *Id.* at ¶  
3 G (emphasis added).

4 The Declaration was “declared and agreed to be in furtherance of Declarant’s general  
5 plan for, and improvement and sale of, the Property and is established for the purpose of  
6 enhancing and perfecting the value, desirability and attractiveness of the Property.” *Id.* at ¶  
7 H. The Declaration provides that it “shall run with all of the Property for all purposes and  
8 **shall be binding upon and inure to the benefit of Declarant, the Association, all**  
9 **Owners, Members and their respective successors in interest.”** *Id.* (emphasis added).

10 The Declaration granted rights and duties to Declarant, KHov Gallery, and/or any  
11 “Related Entity,” which is defined as “any entity related to Declarant or Homebuilder.” *Id.*  
12 at ¶ I. The rights and duties granted to Declarant, its affiliates and Related Entities, include  
13 but are not limited to:

- 14 • The duty to convey fee simple title to the Common Area to the Association, which  
15 “shall automatically be deemed accepted by the Association.” (“Declarant covenants  
16 that it shall convey fee simple title to the Common Area to the Association, free of  
17 all encumbrances except current real and personal property taxes and other  
18 easements, conditions, reservations and restrictions then of record.”).
- 19 • The right of “Declarant, or its successors or assigns” to have at least one (1) position  
20 on the Board of Directors for ten (10) years after the period of Declarant control  
21 ceases ....”
- 22 • The right to “maintain an absolute control over the Association, including  
23 appointment and removal of the President, the members of the Board, and the  
24 members of the Architectural Committee, until the Transition Date ....”
- 25 • The right of “Declarant, Homebuilder or any entity related to Declarant or  
26 Homebuilder (a ‘Related Entity’) ... to use any Lot owned or leased by Declarant,  
27 Homebuilder or a Related Entity for purposes related to the development and  
28 marketing of the Property ...”
- The right to construct all Dwelling Units on the Property “as long as Declarant or a  
Related Entity owns or has a Recorded option to purchase one or more Lots.”

23 *Id.* at ¶ J.

24 The Declaration further states: “Construction. As long as **Declarant or a Related**  
25 **Entity owns or has a Recorded option to purchase one or more Lots**, all Dwelling Units  
26 on the Property must be constructed by Declarant or its designees....” (Emphasis added.)

27 The Declaration also granted the Association certain rights and duties, including but  
28 not limited to:

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

*Id.* at ¶ K. Defendants admit that the Declaration creates the Association’s repair and maintenance obligation. *Id.*

A. Finally, the Declaration also grants the Owners, which by definition includes Declarant, rights and obligations:

- “By acceptance of a deed or by acquiring any ownership interest in any portion of the Property, each Owner, its heirs, representatives, successors, transferees and assigns, binds itself, its heirs, representatives, successors, transferees and assigns, to restrictions, covenants, conditions, rules and regulations now or hereafter imposed by this Declaration and any amendments thereof to the extent permitted by law.”
- **“If any Common Area is damaged or destroyed by an Owner or any of its guests, tenants, licensees or agents, such Owner does hereby authorize the Association to repair such damaged area, and the Association shall so repair such damaged area in a good workmanlike manner in conformity with the original plans and specifications of the area involved, or as the area may have been modified or altered subsequently by the Association, in the discretion of the Association. The amount necessary for such repairs shall be paid by such Owner, to the Association, and the Association may enforce collection of such amounts in the same manner as provided elsewhere in this Declaration for collection and enforcement of Assessments.”**
- “If any portion of any Lot is maintained so as to: (a) present a public or private nuisance, (b) substantially detract from or affect the appearance or quality of any surrounding Lot or the Property, or (c) is used in a manner which violates this Declaration, or if the Owner or Resident of any Lot fails to perform its obligation under this Declaration or the Community Rules and Regulations, the Association or any Owner may give notice to the violating Owner that corrective action must be completed within fourteen (14) days of the receipt of such notice. If the violating Owner fails to take corrective action within said period of time, the Association, or the notifying Owner, may take, at the violating Owner’s cost, appropriate corrective action to remedy such nuisance, detraction, violation or failure of performance including, without limitation, appropriate legal action....”

*Id.* at ¶ M (emphasis added).

KHov Gallery retained 100% control of the Association by appointing all board members until the transition to homeowner control on December 17, 2016. *Id.* at ¶ N.

### III. LEGAL STANDARD

A motion for summary judgment must be denied unless no genuine disputes of

1 material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R.  
2 Civ. P. 56. In considering a motion for summary judgment, the facts and their reasonable  
3 inferences must be viewed in the light most favorable to the non-moving party. *See Doe v.*  
4 *Roe*, 191 Ariz. 313, 314, 955 P.2d 951, 962 (1998). The party seeking summary judgment  
5 has the “burden of showing that no genuine issue of material fact exists.” *Schwab v. Ames*  
6 *Constr.*, 207 Ariz. 56, 59-60 ¶ 15, 83 P.3d 56 (App. 2004) (citing *Chanay v. Chittenden*,  
7 115 Ariz. 32, 38, 563 P.2d 287, 293 (1977)). “As a general rule, an unsworn and unproven  
8 assertion is not a fact that a trial court can consider in ruling on a motion for summary  
9 judgment.” *GM Dev. Corp. v. Community Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d  
10 827, 831 (App. 1990).

#### 11 **IV. ARGUMENT**

##### 12 **A. Arizona law entitles the Association to assert its breach of implied** 13 **warranty of workmanship and habitability claims.**

##### 14 **1. Well-settled Arizona law establishes that developers and builders** 15 **like Defendants are liable for the breach of implied warranty.**

16 An implied warranty of workmanship and habitability arises from residential  
17 construction, including condominium construction, and both a builder-vendor and a builder  
18 who is not a vendor are accountable for the implied warranty. *Lofts at Fillmore Condo.*  
19 *Ass’n*, 218 Ariz. at 577 ¶ 13, 190 P.3d at 736 (citing *Moxley v. Laramie Builders, Inc.*, 600  
20 P.2d 733, 735 (Wyo. 1979) (“We can see no difference between a builder or contractor who  
21 undertakes construction of a home and a builder-developer.... Those who hold themselves  
22 out as builders must be just as accountable for the workmanship that goes into a home ...  
23 as are builder-developers.”)). Defendants have admitted that they are the Project’s  
24 developer (seller) and builder, respectively. Assoc. SOF ¶ A-B.

##### 25 **2. Privity of contract is not required to prove breach of implied** 26 **warranty.**

27 Privity of contract is not required to support a breach of implied warranty of  
28 workmanship and habitability claim against a seller or a builder. *Richards*, 139 Ariz. 242,  
678 P.2d 427; *Lofts at Fillmore*, 218 Ariz. 574, 190 P.3d 73. The Arizona Supreme Court

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

5 The homeowners association in *Lofts at Fillmore*, formed by the individual unit  
6 owners *after* sale of the units by the developer, sued the developer and the builder for breach  
7 of the implied warranty of workmanship and habitability. *Id.* at 575. There, the developer  
8 hired the multifamily residential project’s builder; the builder had no contractual  
9 relationship with the owners or the association. *Id.* Holding that the association could sue  
10 the non-vendor builder directly for breach of the implied warranty, despite a lack of privity,  
11 the Arizona Supreme Court noted that a rule requiring privity “‘might encourage sham first  
12 sales to insulate builders from liability.’” *Id.* at 577 (quoting *Richards*, 139 Ariz. at 245,  
13 678 P.2d at 430).

14 **3. Arizona’s implied warranties apply equally to protect**  
15 **“condominium” associations and the Plaintiff homeowners**  
16 **association.**

17 Affirming a homeowner association’s breach of implied warranty claim against a  
18 multifamily residential community’s builder, the Arizona Supreme Court in *Lofts at*  
19 *Fillmore* quoted its prior opinion in *Richards v. Powercraft*, and explained that “given the  
20 policies behind the implied warranty – to protect innocent buyers and hold builders  
21 responsible for their work – ‘any reasoning which would arbitrarily interpose a first buyer  
22 as an obstruction **to someone equally deserving of recovery is incomprehensible.**” *Id.* at  
23 577 (quoting *Richards v. Powercraft*, 139 Ariz. at 245, 678 P.2d at 430) (emphasis added).

24 *Richards v. Powercraft* also held that the builder-vendor is better able to prevent  
25 construction defects and should, therefore, as a matter of public policy, bear the costs of  
26 poor workmanship in multi-family construction. *Richards*, 139 Ariz. at 245; 678 P.2d at  
27 430 (“**Because the builder-vendor is in a better position than a subsequent owner to**  
28 **prevent occurrence of major problems, the costs of poor workmanship should be his**  
**to bear.**”) (emphasis added). *See also Nastri v. Wood Bros. Homes*, 142 Ariz. 439, 443, 690

1 P.2d 162 (App. 1984) (“The warranty of habitability is a creature of public policy.... If  
2 construction of a new house is defective, its **repair costs should be borne by the**  
3 **responsible builder-vendor who created the latent defect.**”) (emphasis added), overruled  
4 in part on other grounds, *Flagstaff Affordable Housing Limited Partnership v. Design*  
5 *Alliance, Inc.*, 223 P.3d 664 (Ariz. 2010).

6 Moreover, in *Lofts at Fillmore*, the Arizona Supreme Court discussed the evolving  
7 commercial relationships between entities involved in residential construction and sale, and  
8 held that the *form of the business deals developers and builders choose cannot insulate*  
9 *them from liability*:

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

20 *Lofts at Fillmore*, 218 Ariz. at 577, 190 P.3d at 736 (emphasis added).

21 Other states’ appellate courts also widely hold that homeowner associations may sue  
22 for implied warranties arising from common area and unit construction they are responsible  
23 to repair and maintain. *See Windham at Carmel Mountain Ranch Ass’n v. Super. Ct.*, 135  
24 Cal.Rptr.2d 834 (Cal. App. 2003) (recognizing common element implied warranties, and  
25 stating that since “associations generally are required to manage, maintain and repair a  
26 project’s common areas, *it would be illogical to deprive associations of the ability to sue to*  
27 *recover for damage to common areas they are obligated to repair*”); *Berish v. Bornstein*,  
28 770 N.E.2d 961, 973-74 (Mass. 2002) *Berish v. Bornstein*, 2006 Mass. Super. LEXIS 330,  
\*1, 21 Mass. L. Rep. 530 (implied warranties arise with regard to “improper design,  
material, or workmanship [that] is responsible for a defect in a common area”);  
*Meadowbrook Condo. Ass’n v. South Burlington Realty Corp.*, 565 A.2d 238, 240-11 (Vt.  
1989) (implied warranties arise from construction and sale of common interest

1 communities, relying on principles described in, and citing to, *Carpenter v. Donohoe*, 388  
2 P.2d 399 (Colo. 1964)); *Starfish Condo. Ass'n v. Yorkridge Serv. Corp., Inc.*, 458 A.2d 805,  
3 811 (Md. App. 1983) (plaintiff association had right to sue for implied warranty in its own  
4 right); *Herlihy v. Dunbar Builders Corp.*, 415 N.E.2d 1224, 1227-29 (Ill. App. 1980)  
5 (implied warranties arise from common element defects in condominium community);  
6 *Gable v. Silver*, 258 So.2d 11, 18 (Fla. App. 1972) (recognizing common element implied  
7 warranties); *Point E. Condo. Owners' Ass'n v. Cedar House Assocs. Co.*, 663 N.E.2d 343,  
8 356-57 (Ohio Ct. App. 1995) (condominium association could assert implied warranty  
9 claims against developer and general contractor); *Riverfront Lofts Condo. Owners Ass'n v.*  
10 *Milwaukee/Riverfront Props. Ltd. P'ship*, 236 F.Supp.2d 918, 928 (E.D. Wis. 2002)  
11 (conveyance of units to unit owners coupled with transfer of control of common areas to  
12 HOA gives rise to implied warranties).

13 Pursuant to Arizona's Nonprofit Corporation Act, the Association's Articles of  
14 Incorporation, the Declaration, and the Quit Claim Deed transferring common element  
15 ownership from Defendants to the Association, the Association holds legal interests in the  
16 Common Area and bears the legal responsibility for maintaining and repairing the Common  
17 Area and the exterior walls, stucco, façade, roofs or other surfaces of the Dwelling Units.  
18 Assoc. SOF ¶¶ A, C-D, K-L. Defendants have admitted the Association's obligation for this  
19 maintenance and repair under the Declaration. Assoc. SOF ¶ L. Therefore, the Association,  
20 as the entity responsible to maintain and repair the alleged defects at the Gallery, is  
21 "someone equally deserving of recovery" for Defendants' breach of implied warranties  
22 under *Lofts at Fillmore*, and the Association may properly assert these claims.

23 Defendants argue, without citing evidentiary support, that "[t]he parties' interactions  
24 show clearly that the interests of the Association were protected and preserved throughout  
25 the process," *Motion* at 8, but then argue that the Association, which owns the Common  
26 Area and bears responsibility for maintaining and repair it, has no legal remedy under  
27 Arizona law for latent construction defects. Defendants' position contravenes Arizona law  
28 and public policy, and the *Motion* should be denied as to the Association's breach of implied

1 warranty claims.

2 **B. KHov at Gallery LLC has failed to satisfy its summary judgment burden**  
3 **to demonstrate record evidence that it satisfied its contractual obligations**  
4 **to the Association.**

5 Defendants argue that Plaintiff’s breach of covenant of good faith and fair dealing  
6 and breach of contract claims must fail because no contract between KHov at Gallery and  
7 the Association required this Defendant to “perform construction” or “warrant the work.”  
8 *Motion* at 6, 7. However, as shown below, Defendants mischaracterize Plaintiff’s contract-  
9 based claims and ignore the contractual obligations imposed on KHov Gallery by the  
10 Declaration, and the *Motion* should be denied as to these claims.

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

21 A Declaration is a legally enforceable contract. No Arizona case has held that  
22 declarations cannot support a breach of contract claim against a declarant. To the contrary,  
23 “CC&Rs must be construed as a whole and interpreted in view of their underlying purposes,  
24 giving effect to all provisions contained therein.” *Powell v. Washburn*, 211 Ariz. 553, 557,  
25 125 P.3d 373, 377 (2006). Other states have also held that the declarant is a party to a  
26 declaration, which is a contract. *See e.g., Pinnacle Museum Tower Assn. v. Pinnacle Market*  
27 *Development (US), LLC*, 55 Cal.4th 223 (2012) (citing *Villa Milano Homeowners Assn. v.*  
28 *IL Davorge*, 84 Cal.App.4th 819 (2000), for proposition that CC&R’s are a contract  
between the developer and homeowners association); *Solowicz v. Forward Geneva Nat’l*,

1 *LLC*, 780 N.W. 2d 111, 125 (Wis. 2010) (“The Community Declaration is a contract or  
2 agreement between the Developer and those who choose to purchase property.”); *Maples v.*  
3 *Contorakes*, No. BCD-CV-18-02, 2019 Me. Bus. & Consumer LEXIS 26, \* 33 (2019) (“the  
4 Declaration and Bylaws are contracts between the Declarant and the Association, on the  
5 one hand, and the unit owners ... on the other).

6 Here, the Declaration is a contract that by its express terms granted rights to, and  
7 imposed duties and obligations on, the Declarant, KHov at Gallery. Assoc. SOF ¶¶ F-J, M;  
8 *see, e.g.*, Declaration, Page 1, Recitals § C (“Declarant desires to establish for its own  
9 benefit ... certain **mutually beneficial** covenants, conditions, restrictions, easements and  
10 obligations with respect to the proper development, use and maintenance of the Property”)  
11 (emphasis added). Moreover, when the Declarant controlled the Association from June 27,  
12 2016, through turnover on December 14, 2017, and was the Owner of multiple units, the  
13 Declarant was a party to the Declaration as an Owner, Assoc. SOF ¶¶ E, N, and the  
14 Declaration also imposes duties on Project “Owners,” including the duty to **pay the**  
15 **Association to repair any Common Area the Owner or its guests damages**, *id.* at ¶ M.

16 The *Motion* does not challenge the Association’s allegations that when the Declarant  
17 controlled the Association, the Declarant breached its obligations under the Declaration to  
18 properly maintain and repair the Project’s common elements and the building exteriors in  
19 accordance with applicable laws and building codes. Instead, KHov Gallery argues that the  
20 Declaration’s “promises or agreements concerning the Declarant” “do not relate to the  
21 claims at issue” because the terms purportedly do not “include[] an agreement to perform  
22 work.” *Motion* at 7. As shown in the Factual Summary, above, and in the Association’s  
23 separate Statement of Facts, this is simply not the case. The Declaration did impose  
24 performance obligations on KHov Gallery, and KHov Gallery has not disputed the  
25 Association’s allegations that KHov failed to perform these obligations. Therefore, KHov  
26 Gallery has failed to satisfy its summary judgment burden to prove that the Association’s  
27 contract-based claims fail as a matter of law, and the *Motion* should be denied as to these  
28 claims.

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**I. CONCLUSION**

For all of the above-stated reasons, the *Motion* should be denied in its entirety.  
Respectfully submitted this 9<sup>th</sup> day of November 2022,

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

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