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

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

9 GALLERY COMMUNITY ASSOCIATION, an
10 Arizona non-profit corporation,

11 Plaintiff,

12 v.

13 K. HOVNANIAN AT GALLERY, LLC, an
14 Arizona limited liability company; K.
HOVNANIAN ARIZONA OPERATIONS, LLC,
15 an Arizona limited liability company; K.
HOVNANIAN DEVELOPMENTS OF
16 ARIZONA, INC., an Arizona corporation; K.
HOVNANIAN COMPANIES OF ARIZONA,
17 LLC, an Arizona limited liability company; JOHN
DOES I-X AND JANE DOES I-X, WHITE
18 CORPORATIONS I-X; BLACK
PARTNERSHIPS I-X; AND GRAY LIMITED
LIABILITY COMPANIES I-X,

19 Defendants.

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

24 Third-Party Plaintiffs,

25 v.

26 CHAS ROBERTS AIR CONDITIONING, INC.,
27 an Arizona corporation; DESERT VISTA, INC.,
an Arizona corporation; GOTHIC
28 LANDSCAPING, INC., a California corporation;

Case No. CV2020-008714

**DEFENDANTS' REPLY IN SUPPORT
OF THEIR MOTION FOR
SUMMARY JUDGMENT
REGARDING EACH OF
PLAINTIFF'S CAUSES OF ACTION**

(Oral Argument Requested)

(Assigned to the Honorable Katherine
Cooper)

1 HOME BUILDERS SITE SERVICES OF
2 ARIZONA, LLC, an Arizona limited liability
3 company; LEBLANC BUILDING CO., INC., an
4 Arizona corporation; LIBERTY
5 CONSTRUCTORS, LLC, an Arizona limited
6 liability company, dba LIBERTY ARIZONA;
7 RENCO LLC, an Arizona limited liability
8 company, dba RENCO ROOFING; R/S SERVICE
& SUPPLY, INC., an Arizona corporation;
SARGON MASONRY CONSTRUCTION, LLC,
an Arizona limited liability company; and DOES
1-50.

Third-Party Defendants,

9 COME NOW Defendants K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona
10 Operations, LLC, (“Hovnanian”), by and through undersigned counsel, and hereby submit their
11 Reply in Support of their Motion for Summary Judgment on each of Plaintiff’s causes of action.
12 Plaintiff has not identified a valid legal or factual basis to support the claims or raised any material
13 question of fact as to any of the causes of action. The Motion should be granted and Summary
14 Judgment should be entered on each remaining cause of action pursuant to Ariz.R.Civ.P. 56 for
15 the reasons set forth in the Motion and in the following Memorandum of Points and Authorities.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. Introduction**

18 Plaintiff Gallery Community Association alleged four causes of action against Defendants
19 Hovnanian. Hovnanian showed in its Motion that none of the remaining causes of action were
20 appropriate.

21 Cause of Action 1 – Negligence – Already dismissed.

22 Cause of Action 2 - Breach of Implied Covenant of Good Faith and Fair Dealing – This
23 claim is based on alleged assurances and warranties, and not based on any identified interference
24 with expected benefits of any contract. Plaintiff argued in its response that the Declaration made
25 some references to construction, but has not identified a valid basis for this claim against either
26 Hovnanian defendant.

27 Cause of Action 3 - Implied Warranty of Workmanship and Habitability – This claim is a
28 judicially-created remedy which is not available to Plaintiff because it is not a homebuyer, is not

1 pursuing claims of homebuyers, and is not empowered to bring any homebuyer’s claims in its
2 own name. Plaintiff argued that case law empowers an association to bring these claims, but has
3 inaccurately understood the cited decisions. Plaintiff further argued that the law should provide a
4 broader remedy to homeowner’s associations based on references to other states’ law. Arizona
5 has not expanded this special remedy in the way Plaintiff proposes.

6 Cause of Action 4- Breach of Contract (Declaration) – Plaintiff’s allegations are based on
7 alleged failure to construct, not based on any actual term from the Declaration of Conditions
8 Covenants and Restrictions for The Gallery (the “Declaration” or “CC&Rs.”) Plaintiff has not
9 identified a term that was breached.

10 **II. Implied Warranty**

11 Plaintiff argued that “ well-settled and controlling Arizona law, which Defendants fail to
12 cite, permits homeowner associations to assert breach of implied warranty claims against
13 developers and builders such as Defendants for latent defects in multifamily residential
14 developments.” (Response, p. 2). No part of the cited decisions supports Plaintiff’s argument.

15 The Implied Warranty of Workmanship and Habitability is a judicially-created remedy that
16 runs in favor of purchasers of homes. *Richards v. Powercraft*, 139 Ariz. 242, 678 P.2d 427 (1984).
17 The *Powercraft* Implied Warranty arises from the construction of a new home. Arizona’s courts
18 have created a narrow exception to privity requirements that allows subsequent purchasers of a
19 home to pursue the right. This was expanded to allow the homebuyers to assert the claim against
20 a builder what was not the vendor. *Lofts at Fillmore Ass’n v. Reliance Commercial Const., Inc.*,
21 218 Ariz. 574190 P.3d 733 (2008).

22 Some Arizona decisions involved a condominium association pursuing rights of its
23 homebuyer members which included this Implied Warranty. No decisions have found that any
24 homeowners’ association has its own right to recover under this theory.

25 *Richards v. Powercraft*, *Supra*, involved a single-family home. No association was
26 involved.

27 *Lofts at Fillmore Condo. Ass’n v. Reliance Commmerc. Constr.*, *Supra*, involved claims
28 brought by a condominium association in its own name asserting rights of the purchasers including

1 the claim of Implied Warranty of Habitability and Workmanship. No part of the *Lofts at Fillmore*
2 decision creates or supports a rule that an association possesses the right to pursue the *Powercraft*
3 warranty arising from its own rights. A condominium association like the Lofts at Fillmore
4 Condominium Association, is empowered by statute to bring claims on behalf of its members in
5 its own name pursuant to A.R.S. § 33-1242. Plaintiff in this case is not a condominium, nor has it
6 purported to assert rights on behalf of the individual owners (SOF ¶ 11 and Plaintiff’s Response
7 to ¶ 11.) The Implied Warranty of Workmanship and Habitability runs to individual homebuyers.
8 Plaintiff has not alleged that it was pursuing claims belonging to members and Plaintiff does not
9 have a demonstrated right to do so.

10 Plaintiff cites multiple cases from other jurisdictions to support its argument that the law
11 should be changed to give an association its own right of action under the *Powercraft* warranty.
12 Most of these cases are between 50 and 20 years old, and our courts have not chosen to adopt their
13 reasoning. Arizona’s courts and legislature have not chosen to expand the *Powercraft* remedy to
14 follow the position expressed in those sister state decisions.

15 Plaintiff has argued that it should be deemed to be “equally deserving of recovery” as a
16 homeowner (Response, p. 9). To the extent that the Association has been damaged by any proven
17 condition requiring repair, it should look to remedies that it actually possesses.

18 Plaintiff does have some obligation to perform maintenance to unit exteriors under the
19 CC&Rs. However, under the same provisions, it does not own the buildings or exteriors, and they
20 are not part of the common areas.

21 “8.1.7...In order to insure a uniform appearance of the Property, the Association will, from
22 time to time, as it may determine appropriate, paint the exterior of the Dwelling Units and repair,
23 maintain and replace the exterior walls, stucco, façade, roofs or other surfaces.” (Declaration,
24 Exhibit A, at pp. GALLERY_00189.)

25 “1.12 “Common Area” shall mean all areas (including the improvements thereon) owned,
26 or to be owned, by the Association for the common use and enjoyment of the Owners and/or
27 Residents of the Property, and any other areas that the association is required to maintain, either
28

1 by this Declaration or the recorded subdivision plat, other than those areas located on the Lots.”
2 (Exhibit A at pp. GALLERY_00169.)

3 “1.25 “Lot” shall mean any numbered parcel of real property shown upon any recorded
4 plat of the Property together with any improvements constructed thereon, with the exception of
5 the areas designated as lettered tracts and areas dedicated to the public.”(Exhibit A at pp.
6 GALLERY_00171.)

7 The Association is not entitled to pursue a claim that was created in favor of home buyers
8 that addresses the value of the home being less than expected. To the extent it is aggrieved by
9 increased costs to paint, maintain, or repair property it is required to repair, it must pursue those
10 claims through a cause of action that is actually available to it under Arizona law.

11 **III. Breach of Contract**

12 The cause of action alleges that “Defendant K. Hovnanian at Gallery, LLC breached the
13 Declaration by not performing its work in compliance with the terms of that contract and by
14 building a project that does not comply with applicable laws and building codes. (Complaint, ¶
15 39.)”

16 Plaintiff now argues that this Defendant has a “performance obligation” based on terms of
17 the CC&Rs that obligate a unit owner to be responsible “to pay the Association to repair any
18 Common Area the Owner or its guests damages[.] (Response, p. 11.) Plaintiff has not identified
19 any contractual obligation by K. Hovnanian at Gallery, LLC to perform or warrant construction
20 for the Association. Warranting original construction is not the same as being responsible for
21 damage caused to the property.

22 Plaintiff also argues that Hovnanian did not “challenge the Association’s allegations that
23 when the Declarant controlled the Association, the Declarant breached its obligations under the
24 Declaration to properly maintain and repair the Project’s common elements and the building
25 exteriors in accordance with applicable laws and building codes. (Response, p. 11.)” The
26 Complaint makes no such allegations. The Complaint refers to negligent construction, defective
27 construction, and construction of a project that does not comply with applicable laws and codes.

1 (Complaint ¶¶ 16-18, 26-28, 33-35, 39.) The allegation regarding breach of the Declaration is
2 specifically that the project was built in non-compliance with applicable codes. (Complaint ¶ 39.)

3 Plaintiff has not identified a term of the CC&Rs/Declaration that was violated by either
4 Defendant. The cause of action requires privity and is not subject to the narrow exception to privity
5 for enforcement of the Implied Warranty of Workmanship and Habitability under *Powercraft* and
6 *Lofts*.

7 **IV. Breach of Covenant of Good Faith and Fair Dealing**

8 This cause of action requires some showing that a party to a contract took steps to impair
9 the expected benefit of an agreement. Plaintiff only ever argued that the property was improperly
10 constructed. Plaintiff did not name Defendant K. Hovnanian Arizona Operations, LLC as a target
11 of this claim, nor would it be proper to do so. This cause of action is not supported.

12 **V. Conclusion**

13 Negligence claims have been dismissed and no other tort claims were alleged. Punitive
14 damages are not available.

15 Plaintiff does not have its own right to pursue claims under the *Powercraft* Implied
16 Warranty and does not have a right to bring the owners' *Powercraft* Implied Warranty claims.

17 Plaintiff has alleged a breach of the Declaration/CC&Rs but not identified any actionable
18 breach of the Declaration. Nor has Plaintiff identified an actionable breach of the Covenant of
19 Good Faith and Fair Dealing.

20 None of the causes of action have merit as a matter of law and uncontested fact. Defendants
21 respectfully request that Summary Judgment be entered on each cause of action for the reasons
22 set forth in the Motion and herein.

23 Dated: December 7, 2022

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1 Original of the foregoing e-filed
this 7th day of December, 2022 with:

2 Clerk of the Court
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4 Phoenix, AZ 85003

5 COPY of the foregoing emailed this
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