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

25 Third-Party Plaintiffs,

26 v.

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

Case No. CV2020-008714

**DEFENDANTS' RESPONSE TO  
PLAINTIFFS' MOTION *IN LIMINE* NO.  
1 TO EXCLUDE EVIDENCE RELATING  
TO PLAINTIFF'S ALLEGED  
"ACCEPTANCE" OF COMMON AREAS**

(Assigned to the Honorable Katherine  
Cooper)

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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, by and through undersigned counsel, and hereby submit their Response to  
11 Plaintiffs' Motion *in Limine* No. 1 to Exclude Evidence Relating to Plaintiff's Alleged  
12 "Acceptance" of Common Areas.

13 This case is based on Plaintiff's claims that the construction of the property has violated  
14 some term of CC&Rs, has violated the Covenant of Good faith and Fair Dealing (arising from the  
15 CC&Rs), and constitutes an actionable violation of the Implied Warranty of Workmanship and  
16 Habitability. Evidence regarding ownership of the property and other evidence regarding  
17 acceptance by Plaintiff of the condition of the common areas and acceptance of the maintenance  
18 responsibility for the common areas is relevant to the case and admissible pursuant to Ariz.R.Evid.  
19 402.

20 Some part of the allegations involve common areas. Evidence regarding the ownership,  
21 investigation, and confirmed acceptance of responsibility by Plaintiff is relevant to these claims.  
22 The information shows that Plaintiff had inspected the property, requested and received repairs,  
23 had funding for necessary future maintenance, and understood the extent of the seller's warranty  
24 to perform future repairs. This evidence is relevant to the claims and necessary to rebut Plaintiff's  
25 claims that terms of the CC&Rs were breached, that benefits of the CC&Rs were improperly  
26 impaired, or that the Plaintiff has a right to recover the Implied Warranty of Workmanship and  
27 Habitability aka the *Powercraft* Warranty. The evidence includes not only the quitclaim deed to  
28 the property described by Plaintiff but also documents such as the "Common Area, Landscape

1 and Fiscal Acceptance by Gallery Community Association” executed by the president of the  
2 homeowner-controlled board August 23, 2018, the attached are exhibits showing fiscal  
3 contributions from and extensive punch list items repaired by K. Hovnanian, and the testimony  
4 by the Association’s officer Robert Vander Waal regarding inspection, acceptance, and turnover.  
5 (See Plaintiff’s Exhibit 4, Also see Exhibit A hereto, excerpts of Deposition testimony of R.  
6 Vander Waal, pp. 39:12-47:22, and Exhibit B hereto, Acceptance document, Exhibit 39 to  
7 deposition of R. Vander Waal/ GALLERY-TRESTLE\_002555-2562.)

8 Plaintiff seems to be arguing that Defendants mean to mislead the jury to believe that  
9 transfer of ownership of the common areas occurred after the completion of construction. This is  
10 not what the document is intended to show, nor the only issue where the document has relevance.  
11 The quitclaim deed for common areas is relevant to the extent of the Plaintiff’s ownership of  
12 property.

13 Plaintiff has speculated the Defendants will argue that “the Association had a duty and  
14 opportunity to inspect the common areas and the Project, and therefore, Plaintiff is equivalent to  
15 a subsequent purchaser,” in the context of the Implied Warranty of Workmanship and Habitability.  
16 First, there is evidence that Plaintiff did in fact inspect and accept the common areas, and there is  
17 no basis to exclude that evidence. Second, the Plaintiff’s arguments regarding potential confusion  
18 regarding the elements of the Implied Warranty of Workmanship and Habitability/*Powercraft*  
19 Warranty are not a basis to exclude the evidence, since that remedy is not available to the Plaintiff,  
20 as argued in Defendants’ pending Motion For Summary Judgment Regarding Each Of Plaintiff’s  
21 Causes Of Action. Elements of a subsequent purchaser’s Implied Warranty claim are likely not to  
22 be at issue so there would not be confusion on that issue.

23 For these reasons, Plaintiff’s Motion *in Limine* No. 1 should be denied.

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1 Dated: January 30, 2023

LORBER, GREENFIELD & POLITO, LLP

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8 Original of the foregoing e-filed  
9 this 30<sup>th</sup> day of January, 2023 with:

10 Clerk of the Court  
11 Maricopa County Superior Court  
12 101 W. Jefferson  
13 Phoenix, AZ 85003

12 COPY of the foregoing emailed this  
13 30<sup>th</sup> day of January, 2023 to:

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