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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
AWARD OF ATTORNEY'S FEES**

(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 Operations,
26 LLC, (“Hovnanian”), by and through undersigned counsel, and, pursuant to Ariz.R.Civ.P. 54 and
27 A.R.S. 12-341.01(A) and 12-1364, hereby move for an award of attorney’s fees as successful and
28 prevailing parties against Plaintiff Gallery Community Association.

Each cause of action asserted by Plaintiff against Defendants has been resolved, some through stipulated dismissal and the rest through the Court’s ruling granting Defendants’ Motion for Summary Judgment on February 8, 2023. A permissive award of fees to Defendants is authorized by statute and all relevant factors discussed in the controlling authorities support a fee award.

I. BASES FOR FEE AWARD

A.R.S. § 12-341.01(A) provides that the court may award a successful party’s reasonable attorney’s fees in matters arising out of express or implied contract. Arizona’s Supreme Court confirmed in *Sirrah Enterprises, LLC v. Wunderlich*, 242 Ariz. 542, 544–47, 399 P.3d 89, 91–94 (2017) that a claim based on the Implied Warranty of Workmanship and Habitability arises from

1 contract and authorizes a fee award for the successful party under A.R.S. § 12-341.01(A).
2 Plaintiff's claims include allegations of breach of the Implied Warranty of Habitability and
3 Workmanship (Third Cause of Action). Other causes of action arise from express written
4 agreement. These include allegations of express Breach of Contract (Fourth Cause of Action)
5 alleging breach of the Declaration of Covenants, Conditions Restrictions and Easements for
6 Gallery ("Declaration"), and Breach of Implied Covenant of Good Faith and Fair Dealing (Second
7 Cause of Action) arising from the same Declaration.

8 A.R.S § 12-1364 provides an additional basis for an award of fees to Hovnanian as
9 prevailing parties. A.R.S § 12-1364(A) provides that the Court may award reasonable attorney's
10 fees and taxable costs to a prevailing party with respect to a contested issue. The seller is deemed
11 the prevailing party if the relief obtained by a purchaser is not more favorable than the repairs,
12 replacements, and offers made prior to filing the action.

13 Arizona's courts have interpreted the statute to apply even when a party ultimately fails to
14 show that they have a right to recover upon the contract that forms the basis for the claim. *Shirley*
15 *v. Hartford Accident & Indemnity Co.*, 607 P.2d 389 (Ariz. App. 1979). Proof of the non-existence
16 of a contract can form the basis for an award. *Mullins v. S. Pac. Transp. Co.*, 174 Ariz. 540, 543
17 (App.1992).

18 The statute can apply to allow recovery of fees in connection with tort claims which are
19 intertwined with and could not exist without a breach of contract. *Sparks v. Republic National*
20 *Life Insurance Co.*, 647 P.2d 1127 (Ariz. 1982).

21 Defendants Hovnanian have received summary judgment in their favor. They are
22 successful and prevailing parties for all purposes on all issues even before considering offers or
23 repairs performed pursuant to the Purchaser Dwelling Act process or considering written offers to
24 settle the claims.

25 **II. PERMISSIVE FEE FACTORS**

26 A.R.S. § 12-341.01(A) provides that the Court may award reasonable attorney's fees. The
27 factors that apply to determining a reasonable fee under the permissive fee statute are set forth in
28

1 *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985) and each
2 of the factors weighs in Defendants’ favor.

3 **A. “The merits of the claim or defense presented by the unsuccessful party.”**

4 Plaintiffs brought multiple causes of action and the moving Defendants and other entities.
5 A Negligence claim and claims against certain parties were resolved by stipulation. The three
6 contract-based claims and the fraud claim were the subject of motions for summary judgment
7 which were ultimately resolved by Motion.

8 **B. “The litigation could have been avoided or settled and the successful party’s
9 efforts were completely superfluous in achieving the result.”**

10 The parties participated in a pre-litigation repair and offer process pursuant to the Purchaser
11 Dwelling Act, two formal mediation sessions before Hon. Lawrence Fleischman, Ret., and
12 multiple further exchanges of settlement offers, including offers exchanged through January 2023.
13 Attempts at resolution of the remaining claims were largely unsuccessful.

14 The litigation could not have been avoided or settled without the defense efforts including
15 the motion practice which ultimately led to the withdrawal of some claims and rulings on the
16 others. Defendants’ efforts were not superfluous.

17 **C. “Assessing fees against the unsuccessful party would cause an extreme
18 hardship.”**

19 Defendants recognize that any unexpected expense may constitute a “hardship” but no
20 evidence suggests that an award of fees against either business entity Plaintiff in the amount at
21 issue would constitute an “extreme hardship.” Here it would not inappropriate to subject Plaintiff
22 to the risk of some expense to discourage further pursuit of claims. If litigation bears no risk of
23 fee exposure to Plaintiff as supposedly subject to “extreme hardship” then Plaintiff has no
24 deterrent to pursuing claims that lack legal merit. The statute should be enforced equally.

25 **D. “The successful party did not prevail with respect to all relief sought.”**

26 This factor also weighs in favor of granting all incurred fees, since the matter was resolved
27 entirely in favor of Defendants.

1 **E. “[T]he novelty of the legal question presented and whether such claim or**
2 **defense had previously been adjudicated in this jurisdiction.”**

3 The legal issues that were ultimately dispositive on the remaining motion practice were not
4 new or novel, and were addressed in prior published Arizona Supreme Court and Appellate
5 decisions.

6 **F. “[T]he trial court should consider whether the award in any particular case**
7 **would discourage other parties with tenable claims or defenses from litigating**
8 **or defending legitimate contract issues for fear of incurring liability for**
9 **substantial amounts of attorney’s fees.”**

10 The community of practitioners in the field is limited and the result here will be known and
11 considered by them in further decisions both as to whether to continue attempts to recover in this
12 matter and as to how far to continue with a flawed case in other matters. Attorneys in the field
13 will be able to evaluate the circumstances of this award and the particular factors which led to the
14 award.

15 Failure to award fees here would definitely discourage parties from defending claims
16 because it would tell litigants, especially those in the field of construction defect litigation, that a
17 weak or unsupported claim presents no fee exposure risk because even an entirely successful result
18 offers no chance for the builder or vendor to recover.

19 **III. DESCRIPTION AND SPECIFICITY OF FEES**

20 Defendants have set forth its fees with the specificity and detail required by Arizona law.
21 *See Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 623 P.2d 921 (App. 1983). The attached
22 Declaration of Dennis Wilenchik and Declaration of Louis Horowitz include summaries from
23 counsel of the amounts and counsel’s affirmation that these amounts, the rates, and the billed tasks
24 were reasonable and necessary.

25 **IV. CONCLUSION**

26 An award of defense fees is legally authorized under Arizona law, is strongly supported by
27 Arizona’s factors for permissive fee awards, and supported by the declarations confirming
28 reasonableness of the rates and tasks.

1 Dated: February 24, 2023

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9 Original of the foregoing e-filed
10 this 24th day of February, 2023 with:

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

15 COPY of the foregoing emailed this
16 24th day of February, 2023 to:

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