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

16                  GALLERY COMMUNITY ASSOCIATION,  
17                  an Arizona non-profit corporation,

18                                   Plaintiff,

19                                   v.

20                  K. HOVNANIAN AT GALLERY, LLC, an  
21                  Arizona limited liability company; K.  
22                  HOVNANIAN ARIZONA OPERATIONS,  
23                  LLC, an Arizona limited liability company; K.  
24                  HOVNANIAN DEVELOPMENTS OF  
25                  ARIZONA, INC., an Arizona corporation; K.  
26                  HOVNANIAN COMPANIES OF ARIZONA,  
27                  LLC, an Arizona limited liability company;  
28                  JOHN DOES I-X AND JANE DOES I-X,  
                                  WHITE CORPORATIONS I-X; BLACK  
                                  PARTNERSHIPS I-X; AND GRAY LIMITED  
                                  LIABILITY COMPANIES I-X,

                                  Defendants.

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                                  K. HOVNANIAN AT GALLERY, LLC, an  
                                  Arizona limited liability company; K.  
                                  HOVNANIAN ARIZONA OPERATIONS,  
                                  LLC, an Arizona limited liability company; K.  
                                  HOVNANIAN DEVELOPMENTS OF

Case No. CV2020-008714

Assigned to Hon. Katherine Cooper

**PLAINTIFF’S RESPONSE AND  
OBJECTION TO DEFENDANTS’  
MOTION FOR AWARD OF  
ATTORNEY’S FEES AND  
STATEMENT OF TAXABLE  
COSTS**

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

4 Third-Party Plaintiffs,

5 v.

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

22 Third-Party Defendants.

23 The plaintiff, Gallery Community Association (the “Association” or “Plaintiff”), by  
24 and through undersigned counsel, hereby submits this Response to Defendants K.  
25 Hovnanian at Gallery, LLC and K. Hovnanian Arizona Operations, LLC (collectively  
26 “Defendants”) Motion for Award of Attorney’s Fees and Statement of Taxable Costs  
27 (“Motion”).

## 28 **I. INTRODUCTION/BACKGROUND**

The Association and Defendants engaged in the pre-litigation notice process under the Purchaser Dwelling Act, A.R.S. § 12-1361, et seq. Manship Decl. ¶ 2. Defendants did not argue during the PDA process that the Association was not the proper party to assert the claim. Manship Decl. ¶ 3. Defendants offered nominal repairs during the PDA process and several of the repairs were inadequate and the defective conditions returned. Manship Decl.

¶ 4.

The Association filed its Complaint on July 27, 2020 against Defendants K. Hovnanian at Gallery, LLC, K. Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc. and K. Hovnanian Companies of Arizona, LLC. Defendants agreed to withdraw their motion to dismiss and answer the Complaint in exchange for a dismissal of the Association’s negligence cause of action. Manship Decl., ¶ 5. Defendants answered the Complaint on September 22, 2020 and filed their Third-Party Complaint on or about October 6, 2020, naming eight third-party defendants. Third-Party Defendant Liberty Constructors, LLC performed work related to the concrete flatwork at the Gallery project. Third-Party Defendant Home Builders Site Services of Arizona, LLC performed work related to earthwork and grading at the Gallery project. Third-Party Defendant Gothic Landscaping, Inc. performed work related to the landscaping at the Gallery project. Third-Party Defendant Chas Roberts Air Conditioning, Inc. performed work related to the air conditioning at the Gallery project. The Association did not allege any defects related to the air conditioning or Chas Robert’s work in this lawsuit. Manship Decl. ¶ 6.

On February 19, 2021, Defendants filed their original motion for summary judgment. Defendants’ original motion for summary judgment did not include an argument that the Association lacked standing to bring a claim for breach of implied warranty. Manship Decl. ¶ 17. During a status conference on April 27, 2021, set to address the Association’s request for an extension of time to file an amended response so the parties could engage in discovery, Defendants’ counsel admitted on the record that:

- “The case will proceed in some form against probably the builder [K. Hovnanian Arizona Operations, LLC], who we’ve admitted is the builder, who they’ve alleged is the builder, and we’ve admitted.”
- The motion is about “who [among the Defendants] are the proper parties.”
- Defendants’ counsel said to the Association’s counsel, “we don’t have a problem with you suing the builder right now, there may be other issues that we raise on summary judgment in the future on that, but of course I understand

1 that their claim against the builder may proceed to a certain extent.”

- 2 • “This is a very complicated area of the law because it is not fleshed out.”

3 Manship Decl. ¶ 17.

4 After hearing from the parties at the status conference, Judge Kemp considered,  
5 parsing out a portion of the motion for summary judgment, but denied that request. Manship  
6 Decl. ¶ 7; Exh. 2, Apr. 27, 2021, Minute Entry. Ultimately, Defendants withdrew their  
7 original motion for summary judgment on March 10, 2022. Manship Decl. ¶ 8; Exh. 3,  
8 Notice of Withdrawal of Motion without Prejudice.

9 Prior to Defendants filing their Motion for Summary Judgment upon which this  
10 Motion for fees and costs is based, Plaintiff and Defendants agreed to the dismissal of two  
11 of the original defendants, K. Hovnanian Companies of Arizona, LLC and K. Hovnanian  
12 Developments of Arizona, Inc., with each side to bear their own attorney’s fees and costs.  
13 Manship Decl. ¶ 9-10; Exhs. 4 and 5, Orders re Dismissal. In addition, Plaintiff and  
14 Defendants settled claims related to civil grading and drainage and concrete issues, and the  
15 settlement included an agreement for the parties to bear their own attorney’s fees and costs  
16 with respect to those issues.<sup>1</sup> Manship Decl. ¶ 11.

17 The Association is a non-profit corporation formed “for the purpose of the efficient  
18 preservation of the values and amenities” of the Gallery project. Manship Decl. ¶ 12; Exh.  
19 6, Excerpts from Declaration of Covenants, Conditions Restrictions and Easements for  
20 Gallery (“CC&Rs”), Recitals, Section B. The Association is funded through the collection  
21 of assessments from the homeowner members. Jones Decl. ¶ 4. Manship Decl. ¶ 12; Exh.  
22 6, CC&Rs Section 6. Moreover, the funds in the Association’s reserve account may not be  
23 used to pay any attorney fee award. Jones Decl. ¶ 5. Manship Decl. ¶ 12; Exh. 6, CC&Rs  
24 Section 6.9 (Declaration requires reserve funds to be used for maintenance, repairs, and  
25 capital improvements).

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26 <sup>1</sup> The settlement related to civil grading and drainage and concrete issues contains a  
27 confidentiality clause which prevents disclosure of the terms of the agreement. Plaintiff is willing  
28 to provide a copy of the draft settlement agreement to the Court for in camera review upon  
request.

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## II. ARGUMENT

### A. Defendants cannot meet their burden to prove entitlement to attorney's fees under A.R.S. § 12-341.01

Defendants, as the parties requesting an award of attorney fees, have the burden of proving their entitlement to the award. *Woerth v. Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990). A.R.S. § 12-341.01 provides that in an action arising out of contract, “the court **may** award the successful party reasonable attorney fees.” A.R.S. § 12-341.01(A) (emphasis added). An award of attorney’s fees under A.R.S. § 12-341.01 is discretionary, and “there is no presumption that the successful party is entitled to attorney’s fees.” *Layne v. Transamerica Fin. Servs.*, 146 Ariz. 559, 563, 707 P.2d 963, 967 (App. 1985) (citing *Associated Indemnity Corporation v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985)).

Courts consider six factors in order to determine whether to award attorney fees under Section 12-341.01:

- (1) whether the unsuccessful party’s claim or defense was meritorious;
- (2) whether the litigation could have been avoided or settled and the successful party’s efforts were completely superfluous in achieving the result;
- (3) whether assessing fees against the unsuccessful party would cause an extreme hardship;
- (4) whether the successful party prevailed with respect to all of the relief sought;
- (5) whether the legal question presented was novel and whether such claim or defense had previously been adjudicated in this jurisdiction; and
- (6) whether the award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney fees.

*Wheel Estate Corp. v. Webb*, 139 Ariz. 506, 508-509, 679 P.2d 529, 531-532, (App. 1983); *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184, (1985); *Phoenix Cent. v. Dean Witter Reynolds, Inc.*, 768 F. Supp. 702, 703-704 (D. Ariz. 1991); *Lehman v. Mutual of Omaha Ins. Co.*, 806 F. Supp. 859, 865, (D. Ariz. 1992); *Moses v.*

1 *Phelps Dodge Corp.*, 826 F. Supp. 1234, 1236, (D. Ariz. 1993).

2 A review of these factors in this case supports denying Defendants an award of  
3 attorney's fees.

4 **1. Defendants did not succeed on all claims on the merits and agreed**  
5 **to pay their own attorney's fees and costs as to some claims and**  
6 **parties.**

7 The first factor, whether the unsuccessful party's claim or defense was meritorious,  
8 does not support an attorney fee award here. First, Defendants did not succeed as to all  
9 claims because Plaintiff and Defendants settled claims related to civil grading and drainage  
10 and concrete issues, and the settlement included an agreement for the parties to bear their  
11 own attorney's fees and costs with respect to those issues. Manship Decl., ¶ 11. Second,  
12 Plaintiff and Defendants agreed to the dismissal of two of the original defendants, K.  
13 Hovnanian Companies of Arizona, LLC and K. Hovnanian Developments of Arizona, Inc.,  
14 with each side to bear their own attorney's fees and costs. Manship Decl. ¶ 9-10; Exhs. 4  
and 5, Orders re Dismissal.

15 Third, in deciding Defendants' summary judgment motion, the Court did not rule  
16 that no construction defects exist at the Gallery project or that Defendants are not liable for  
17 those defects. Instead, as to the claim for breach of implied warranty of workmanship and  
18 habitability, the Court ruled that "[t]he homes – and the implied warranty – belongs to the  
19 homeowners," and Plaintiff, as the homeowner's association, "has no authority to bring an  
20 action for the affected homeowners." Manship Decl. ¶ 13; Exh. 7, Rulings re Motions for  
21 Summary Judgment, February 8, 2023, at 4. This was not a ruling on the *merits* of the  
22 implied warranty claim. Rather, the Court found that the Association lacked *standing* to  
23 bring the implied warranty claim with respect to the homes. *Cf. Magellan Health, Inc. v.*  
24 *Duncan*, 252 Ariz. 400, 403, 503 P.3d 851, 854 (App. 2021) ("Because standing is  
25 jurisdictional, lack of standing *precludes a ruling on the merits.*"; emphasis added) (quoting  
26 *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003).

27 In sum, because Defendants did not succeed on the merits as to all claims and against  
28

1 all parties, and the Court did not find that the alleged defect claims failed *on their merits*,  
2 this factor weighs against awarding Defendants attorney's fees.

3 **2. Defendants could have avoided the vast majority of their attorney**  
4 **fees by seeking a ruling on the standing issue early in the litigation.**

5 The second factor, whether the litigation could have been avoided or settled and  
6 whether the successful party's efforts were superfluous in achieving the result, also does  
7 not support a fee award here. Defendants could have avoided the vast majority of the  
8 litigation and related attorney's fees and litigation expenses by obtaining a ruling on the  
9 issue of the Association's standing to bring the claims at the outset of the case. Instead,  
10 Defendants answered the Complaint, filed a third-party complaint, settled with several  
11 third-party defendants, and litigated the case for over two years. Defendants proceeded with  
12 the litigation, through discovery and expensive expert investigations, until shortly before  
13 the scheduled trial date. All of these litigation efforts, *unrelated to the purely legal standing*  
14 *issue*, were "superfluous" in achieving the result in this case. Therefore, this factor does not  
15 support awarding Defendants' requested attorney fees.

16 **3. Assessing fees against the Association would cause an extreme**  
17 **hardship to the Association and its unit owner members.**

18 The third factor, whether assessing fees against the unsuccessful party would cause  
19 extreme hardship, also favors denying Defendants' fee request. The Association is a non-  
20 profit corporation formed "for the purpose of the efficient preservation of the values and  
21 amenities" of the Gallery project. Manship Decl. ¶ 12; Exh. 6, CC&Rs, Recitals, Section B.  
22 The Association is funded through the collection of assessments from the homeowner  
23 members. Jones Decl. ¶ 4. Manship Decl. ¶ 12; Exh. 6, CC&Rs Section 6. Moreover, the  
24 funds in the Association's reserve account may not be used to pay any attorney fee award.  
25 Jones Decl. ¶ 5. Manship Decl. ¶ 12; Exh. 6, CC&Rs Section 6.9 (Declaration requires  
26 reserve funds to be used for maintenance, repairs, and capital improvements). Thus, the  
27 homeowner members in effect must *themselves* pay any attorney's fees awarded to  
28 Defendants, while the defects in their homes remain unresolved.

1 As set forth in the Declaration of Matthew Jones, the Association does not have the  
2 funds to pay Defendants' requested attorney's fees, and such an award would cause an  
3 extreme hardship on the Association, (Jones Decl. ¶ 3, 6-7; Exh. 1, Balance Sheet and  
4 Income Statement), and, thus, by extension, on its individual homeowner unit owners.  
5 Therefore, this factor weighs strongly in favor of denying Defendants' fee request.

6 **4. Defendants did not prevail with respect to all of the relief sought.**

7 The fourth factor, whether the successful party prevailed with respect to all of the  
8 relief sought, also weighs against Defendants' fee request. As shown above, Defendants  
9 settled with the Association for the Association's claims related to civil grading and  
10 drainage and concrete issues and agreed to waive any request for fees and costs as to the  
11 grading and drainage and concrete issues, and as to the Association's claims against two of  
12 the original defendants in this case. Therefore, Defendants did not prevail with respect to  
13 all claims asserted by the Association, and the Association obtained some portion of the  
14 relief it sought in this action. Accordingly, this factor weighs against Defendants' requested  
15 fee award.

16 **5. The legal question upon which the Court granted summary  
17 judgment was novel and had not previously been adjudicated in  
18 this jurisdiction.**

19 The fifth factor, whether the legal question presented was novel and whether such  
20 claim or defense had previously been adjudicated in this jurisdiction, also supports denying  
21 Defendants' requested fees. There are no published Arizona appellate cases directly  
22 addressing the standing issue Defendants successfully raised in this case.

23 Defendants argued, and the Court agreed, that the Association could not bring the  
24 breach of implied warranty claims because the Association does not own the Gallery  
25 community's units and did not have statutory authority to bring claims on behalf of the unit  
26 owners. No Arizona court of appeal decision has directly addressed whether a non-  
27 condominium homeowner association which has the duty to repair and replace the unit  
28 exteriors may bring an action for breach of implied warranty against the builder/vendor of

1 those units.

2 Many construction defect lawsuits have been filed and resolved by townhome  
3 associations similarly situated to the Plaintiff in this case, without a ruling that the  
4 association does not have standing to bring a breach of implied warranty claim. *See, e.g.,*  
5 *Aire on McDowell Cmty. Ass'n v. K. Hovanian at Aire on McDowell, LLC*, No. CV2022-  
6 008601 (Maricopa Cty. Super. Ct.) (case pending). Undersigned counsel is unaware of any  
7 another superior court rulings on the specific standing issue raised in this case. Manship  
8 Decl. ¶ 14.

9 In addition, Defendants did not seek a ruling on whether the Association had  
10 standing to bring a claim for breach of implied warranty at the outset of the case. If  
11 Defendants felt that this issue was unambiguously was determinative of the case, they  
12 would have made that argument in a motion to dismiss or in their original motion for  
13 summary judgment. During the status conference before Judge Kemp, Defendants' counsel  
14 admitted that the Association's case would proceed against "the builder." Counsel also  
15 admitted that this is a complicated area of law that is not "fleshed out." Manship Decl. ¶ 17.

16 Clearly, the standing issue was novel and not the subject of settled case law. For this  
17 additional reason, the Court should deny Defendants' fee request.

18 **6. Awarding Defendants' requested fees would discourage other**  
19 **parties from litigating legitimate claims.**

20 The sixth factor, whether the award would discourage other parties with tenable  
21 claims or defenses from litigating or defending legitimate contract issues for fear of  
22 incurring liability for substantial amounts of attorney fees, also supports denying the fee  
23 request. An award of attorney's fees to Defendants in this case would discourage  
24 homeowners who are members of an association from litigating legitimate claims for  
25 construction defects. As discussed above, the Association is funded by assessments received  
26 from its homeowner members. Any fee award will ultimately be funded by the Gallery  
27 homeowners who Defendants argued, and the Court has ruled, are the ones the implied  
28 warranty claim belongs to.

1           Moreover, an award of attorney’s fees in this case is not necessary to discourage  
2 other similarly situated associations from asserting similar claims. The costs necessary to  
3 prosecute a construction defect case are substantial due to the expert investigation required.  
4 Here, the Association incurred litigation costs, including expert investigation costs, in  
5 excess of \$400,000. Manship Decl. ¶ 15. The inability to recover those expert costs are a  
6 sufficient disincentive to similar claims. This factor, too, weighs in favor of denying  
7 Defendants’ fee request.

8           **B. Defendants cannot meet their burden to prove entitlement to attorney’s**  
9           **fees under A.R.S. § 12-1364.**

10           A.R.S. § 12-1364 is part of the Purchaser Dwelling Act (“PDA”), A.R.S. § 12-1361,  
11 *et seq.*, and states that a court “**may** award the prevailing party with respect to a contested  
12 issue reasonable attorney fees and taxable costs.” A.R.S. § 12-1364(A) (emphasis added).  
13 Defendants are “deemed the prevailing party with respect to a contested issue if the relief  
14 obtained by the [Plaintiff] for that contested issue, exclusive of any fees and taxable costs,  
15 is not more favorable than the repairs or replacements and offers made by the [Defendants]  
16 before the [Plaintiff] filed a dwelling action pursuant to section 12-1363.” *Id.* Section 12-  
17 1364(E)(1) defines a “contested issue” as “an issue that relates to an alleged construction  
18 defect and that is contested by [Claimants] following the conclusion of the repair and  
19 replacement procedures prescribed in section 12-1363.”

20           In determining the reasonableness of attorney fees under Section 12-1364, the Court  
21 “**shall** consider all of the following”:

- 22           1. The repairs, replacements or offers made by the seller, if any, before the  
23 purchaser filed the dwelling action pursuant to section 12-1363.
- 24           2. The purchaser’s response to the seller’s repairs, replacements or offers  
25 made or proposed, if any, before the purchaser filed the dwelling action  
26 pursuant to section 12-1363.
- 27           3. The relation between the fees incurred over the duration of the dwelling  
28 action and the value of the relief obtained with respect to the contested  
issue.
4. The amount of fees incurred in responding to any unsuccessful motions,  
claims and defenses during the duration of the dwelling action.

1 A.R.S. § 12-1364(B). (emphasis added).

2 Defendants did not present any information to this Court regarding what occurred  
3 during the PDA process prior to Plaintiff filing the action. Defendants' only reference to  
4 Section 12-1364 is two sentences on Page 3 of their Motion. *See* Motion at 3:8-12. They do  
5 not set forth what contested issues were involved in the PDA process or discuss the factors  
6 that the Court must consider in order to determine the reasonableness of the fees under  
7 Section 12-1364. Therefore, there is no way for the Court to determine whether to award  
8 attorney's fees, or the reasonableness of the requested fees under Section 12-1364.

9 Moreover, as shown above, several factors weigh in favor of determining that  
10 Defendants' request for fees is not reasonable:

- 11 • Defendants did not argue during the PDA process that the Association was  
12 not the proper party to assert the claim;
- 13 • Defendants offered nominal repairs during the PDA process and several of  
14 the repairs were inadequate and the defective conditions returned;
- 15 • Plaintiff and Defendants reached a settlement with respect to the civil grading  
16 and drainage and concrete issues, which were contested issues in this case;
- 17 • The Parties agreed to the dismissal of two of the original Defendants who  
18 were involved in the PDA process, with each side to bear their own attorney's  
19 fees and costs.

20 **C. The requested fees are not reasonable.**

21 Defendants made no attempt to allocate their request for attorney's fees based upon  
22 the claims or the parties. A court may properly deny a fee award for "separate and distinct  
23 claims which are unrelated to the claim upon which the [party] prevailed." *Pioneer Roofing*  
24 *Co. v. Mardian Constr. Co.*, 152 Ariz. 455, 467-68, 733 P.2d 652, 664-65 (Ct. App. 1986)  
25 (quoting *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933  
26 (App.1983); *see also Trus Joist Corp. v. Safeco Ins. Co.*, 153 Ariz. 95, 110, 735 P.2d 125,  
27 140 (App. 1986).

28 As discussed above, Plaintiff and Defendants settled claims for civil grading and

1 drainage and concrete issues, with the parties agreeing to bear their attorney’s fees and costs  
2 for these issues. Defendants have not parsed out the portion of their fees related to these  
3 claims. In addition, Plaintiff and Defendants agreed to the dismissal of two of the original  
4 defendants, with each party to bear their own attorney’s fees and costs. Again, Defendants  
5 made no attempt to eliminate attorney’s fees related to the two dismissed defendants.<sup>2</sup>

6 Moreover, Defendants’ request for attorney’s fees for two law firms is unreasonable.  
7 The Lorber law firm was retained to represent all four of the original K Hovnanian  
8 defendants in August 2021. Horowitz Decl. ¶ 2. Therefore, if the Court does award  
9 Defendants any attorney’s fees, all fees billed by the Wilenchik firm after the Lorber firm  
10 began working on the file in August 2021, which amount totals \$17,090.75, should not be  
11 awarded.

12 In addition, if the Court determines Defendants are entitled to some portion of their  
13 attorney’s fees, the Court should reduce the requested fees as follows:

- 14 • **Reduce the attorney’s fees requested by 50%** because two of the four  
15 original K Hovnanian defendants were dismissed from the case with an  
16 agreement that each side would bear their own attorney’s fees and costs;
- 17 • **Reduce the attorney’s fees requested by an additional 50%** because the

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18  
19 <sup>2</sup> Several time entries in Defendants’ counsel records clearly establish time that was spent  
20 working solely on issues related to the dismissed defendants, including responding to discovery  
21 requests directed to the dismissed defendants and working on the dismissals. *See* Wilenchik  
22 Decl. Exh. 1, pp. 140 and 142 (entries re draft responses to discovery as K  
23 Hovnanian/Development and K Hovnanian/Companies); Horowitz Decl. Exh. B (Inv. # 1204092,  
24 Dated March 26, 2022, entry for January 19, 2022 “Review and evaluate ... with plaintiffs  
25 counsel regarding dismissal of [K Hovnanian] companies entity”; Inv. #1205363, Dated May 17,  
26 2022, entry for March 7, 2022 “Review ... to communicate with counsel and client, finalize  
27 dismissal”). Time entries in Defendants’ counsel records clearly establish time that was spent  
28 working solely on issues related to third-party defendants involved in the civil grading and  
drainage and concrete issues. *See* Wilenchik Decl. Exh. 1, pp. 11 (“Review Colony Specialty  
Insurance’s response to tender letter and request for Liberty Constructors-related documents ...”);  
Horowitz Decl., Exh. B (Inv. # 1203124, Dated January 13, 2022, entry for December 27, 2021  
“Exchange correspondences T. Ingo, Bert Howe, regarding support for claims against Liberty”;  
Inv. # 1208303, Dated November 9, 2022, entry for October 3, 2022 “Review Third-Party  
Defendant Liberty Constructors’ Motion for Summary Judgment ....”).

1 work performed at the Gallery project by four of the eight named third-party  
2 defendants were either implicated in the settlement of civil grading and  
3 drainage and concrete issues or were not part of any alleged defects asserted  
4 by Plaintiff in this action. The civil grading and drainage and concrete issues  
5 implicated the work of three of the named third-party defendants, Liberty  
6 Constructors, Gothic Landscaping, and Home Builders Site Services of  
7 Arizona, LLC, and Plaintiff and Defendants agreed to bear their own  
8 attorney's fees and costs with respect to these issues. The work of a fourth  
9 named third-party defendant, Chas Roberts Air Conditioning, Inc., was not  
10 implicated in any of the alleged defects Plaintiff asserted in this matter.

11 Finally, Defendants unsuccessfully opposed Third-Party Defendants Renco and  
12 Desert Vista's motion to preclude expert reports, which was based upon Defendants'  
13 attempt to disclose new expert reports after the disclosure deadlines passed. Plaintiff should  
14 not be responsible for paying Defendants' attorney's fees incurred related to Third-Party  
15 Defendants' motion to preclude, which was wholly unrelated to Plaintiff's claims.

16 Pursuant to Section 12-341.01(B), an award of reasonable attorney's fees "should  
17 mitigate the burden of the expense of litigation ...." Here, Defendants are large, national  
18 developers, building and selling homes in 14 states across the country, and they were  
19 provided defense counsel by their insurer and did not come out of pocket financially for  
20 their representation. Defendants did not include invoices from the Wilenchik firm  
21 establishing that Defendants incurred the attorney's fees identified in the Wilenchik time  
22 records. The Lorber firm's records indicate that the attorney's fees were paid by the  
23 insurance carrier for Defendants. Therefore, Defendants did not establish the reasonable  
24 attorney's fees that it incurred, rather than fees that were incurred by their insurance carrier.

25 **D. Defendants Statement of Taxable Costs includes costs that the parties**  
26 **agreed to bear on their own.**

27 Defendants Statement of Taxable Costs includes costs related to the civil grading  
28 and drainage and concrete issues that Plaintiff and Defendants settled, with each side to bear

1 their own attorney's fees and costs. Alan Shelton was Liberty Constructors' expert witness,  
2 and Todd Sarager (incorrectly spelled as Sarger in the Statement of Costs) was the Rule  
3 30(b)(6) deponent for Liberty Constructors. Manship Decl. ¶ 16.

4 Per the Parties settlement of the civil grading and drainage and concrete issues, the  
5 following costs should not be awarded to Defendants:

Date	Name	Amount	Description
9/14/2022	Shelton Consulting Group, LLC	\$910.00	Deposition of Alan Shelton
9/14/2022	Esquire Deposition Solutions, LLC	\$915.40	Deposition (Shelton)
9/1/2022	Esquire Deposition Solutions, LLC	\$1,797.95	Deposition (Sarger [sic], Jones & Thorton) <sup>3</sup>

11 In addition, while the parties agreed to mediate, Defendants should not recover  
12 mediation fees that are related to the four third-party defendants involved in settlement of  
13 the civil grading and drainage and concrete issues or related to alleged defects that Plaintiff  
14 did not assert in this action. Therefore, the mediation fees should be reduced by 50%, or  
15 \$2,083.33 because Defendants should not recover costs for mediation related to four of the  
16 eight named third-party defendants.

17 The total request for taxable costs should be reduced by \$5,706.68.

18 **III. CONCLUSION**

19 Based upon the foregoing, Plaintiff respectfully requests that the Court deny  
20 Defendants' Motion for Award of Attorney's Fees, or in the alternative, to reduce the  
21 requested fees as set forth herein, and reduce the amount of taxable costs requested by  
22 Defendants by \$5,706.68.

23 RESPECTFULLY SUBMITTED this 10th day of March, 2023.

24 BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

25 By: /s/ Penny J. Manship

26 \_\_\_\_\_  
27 <sup>3</sup> Defendants failed to separate out the deposition transcript fee related solely to Mr. Sarager and  
28 did not include a copy of this invoice in support of its Statement of Taxable Costs; therefore,  
Plaintiff requests that this entire amount be considered non-taxable.

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