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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' REPLY IN SUPPORT
OF MOTION FOR 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 (“Defendants”), by and through undersigned counsel, and submit the following as their Reply
27 in Support of their Motion for Attorney’s fees. Defendants are entitled to an award of attorney’s
28 fees for the reasons set forth in the Motion and herein.

29 **I. FEES RELATED TO DISMISSED DEFENDANTS AND RESOLVED CIVIL**
30 **IMPROVEMENT CLAIMS**

31 Defendants agree that fees and costs related specifically to defense and settlement of claims
32 against the dismissed Defendant entities should be removed from the fee request because the
33 parties agreed to bear related fees and costs. Plaintiff has suggested that these issues support a
34 50% reduction in fees, but this grossly overestimates the costs associated with these items. The
35 estimate is not accurate and is not a specific objection as required by *State ex rel. Corbin v. Tocco*,
36 173 Ariz. 587, 594, 845 P.2d 513, 520 (App. 1992). Plaintiff has identified a handful of examples
37 in p. 12, footnote 2, but the records do not show that 50% of the fees or even 50% of the fees
38 incurred up to the time of dismissal related specifically to the defense and settlement of the claims.
39 Defendants have provided a summary of items attached hereto as Exhibit A listing fees and costs

1 related to the dismissed parties which amount to \$2,422.00 in total attorney’s fees (\$405 incurred
2 from Wilenchik & Bartness, P.C. and \$2,017 incurred from Lorber Greenfield & Polito, LLP).
3 These amounts should be removed from the fee request to reflect the fees and costs to be borne
4 by the parties, instead of the 50% reduction requested by Plaintiff.

5 Defendants agree that fees and costs related specifically to defense of claims related to civil
6 improvements and related indemnity claims should be removed from the fee request. Plaintiff has
7 suggested that these issues support another 50% reduction in fees, but again this grossly
8 overestimates the amount of fees and costs incurred in relation to defense of claims based on civil
9 improvements. Defendants have provided a summary of items attached hereto as Exhibit B listing
10 fees related to the civil improvement claims which amounts to \$6,245.75 in total attorney’s fees
11 (\$718.25 from Wilenchik & Bartness, P.C. and \$5,527.50 from Lorber, Greenfield & Polito, LLP).
12 These amounts should be removed from the fee request to reflect the fees and costs to be borne
13 by the parties, instead of the 50% reduction requested by Plaintiff. Exhibit B includes items related
14 to pursuit of indemnity from subcontractors who performed work on civil improvements, but does
15 not include fees related to the pursuit of insurance coverage as an additional insured on policies
16 obtained by those subcontractors.

17 **II. MERITS OF THE CLAIMS**

18 Plaintiff has argued in its response that there was not ruling “on the merits” since the
19 summary judgment was largely based on Plaintiff’s lack of authority to pursue Implied Warranty
20 of Workmanship and Habitability claims. Plaintiff argued that the Court’s ruling was based on
21 standing and not the “merits” of the case.

22 First of all, the ruling included findings that three separate causes of action failed as a
23 matter of law and undisputed fact. See Minute Entry dated February 8, 2023, granting relief in
24 Defendants’ favor on Plaintiff’s Counts 3 (Implied Warranty of Workmanship and Habitability),
25 2 (Breach of Contract), and 4 (Breach of Implied Covenant of Good Faith and Fair Dealing).

26 Second, there is no requirement under the applicable statutes or authorities that a case be
27 determined on factual bases in order to justify a fee award.

28

1 “An adjudication on the merits is not a prerequisite to recovering attorneys’ fees under
2 [A.R.S. § §12-341.01].’ ” *Med. Protective Co. v. Pang*, 740 F.3d 1279, 1283 (9th Cir. 2013)
3 (quoting *Fulton Homes Corp.*, 214 Ariz. 566, 572, 155 P.3d 1090, 1096 (App.Div.1, 2007).

4 Defendants have claimed a right to fees under A.R.S. §§ 12-341.01(A) and 12-1364. A.R.S.
5 § 12-341.01(A) defines the right as owed to the “successful party.” A.R.S. § 12-1364 refers to the
6 prevailing party based on the relief obtained. Neither statute includes a finding of factual issues
7 such as the existence or non-existence of a defect.

8 Finally, the factors for granting a permissive fee award under *Associated Indemnity* include
9 “The merits of the claim or defense presented by the unsuccessful party.” *Associated Indemnity*
10 *Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (En Banc, 1985), and see *Scottsdale*
11 *Mem’l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 216, 791 P.2d 1094, 1099 (Ct. App. 1990).
12 Plaintiff has not shown here that the claims had considerable legal merit that would warrant a
13 reduction or mitigation of the amount of appropriate fees.

14 **III. WHETHER EFFORTS WERE SUPERFLUOUS**

15 Plaintiff argues that the ultimately successful issues were not raised previously and should
16 have been addressed or raised sooner. However, Defendants argued in prior motion practice
17 including Defendants/Third-Party Plaintiffs’ Motion for Summary Judgment dated February 19,
18 2021. Defendants argued that the Breach of Contract and Covenant of Good Faith and Fair
19 Dealing claims fail, and that the Implied Warranty of Good Faith and Fair Dealing claims could
20 only be brought by the homeowners. (*Id.*, p. 4.) Plaintiff is incorrect when it argues that the issue
21 of the Association’s lack of standing was not raised in this prior motion.

22 **IV. WHETHER AN AWARD WOULD CONSTITUTE AN EXTREME HARDSHIP**

23 “[A]lthough the party requesting fees has the burden of proving his entitlement to an award
24 of fees, the party asserting financial hardship has the burden of coming forward with prima facie
25 evidence of financial hardship.” *Woerth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297,
26 305 (Ct. App. 1990).

27 Here, Plaintiff has submitted a sworn declaration from its president, Matthew Jones, who
28 states that the Association is unable to pay a fee judgment. He provided a financial summary

1 identifying \$191,800 in assets, mostly accounts. He stated that funds must be used for capital
2 assessments. He concluded that a fee award would be an “extreme hardship” for the association.
3 Although the Declaration does provide evidence the court could consider, it is at best conclusory.
4 The Association certainly has the ability to pay some fee award from amounts on hand and cannot
5 be said on the evidence submitted to be subject to extreme hardship through a reasonable fee
6 award.

7 **V. TOTAL RELIEF**

8 Plaintiff argues that the relief obtained was not total because the parties agreed to resolve
9 civil improvement issues. The civil improvement issues amounted to around 3% of Plaintiff’s
10 total claim for damages.

11 Plaintiff identified \$58,236.34 in direct costs for civil improvement issues including site
12 grading and flatwork. All direct costs include around 76.5% markup or “burden,” which means
13 the total burdened cost for all civil improvement claims is around \$102,787.14. This was out of a
14 total claim for \$1,859,725.41 in total direct costs and \$3,282,305.74 in total burdened costs.
15 (Exhibit C hereto, Nautilus Cost of Repair report, GALLERY_NBC-5076-5092).

16 The parties resolved a claim which amounted to 3% of Plaintiff’s claimed costs. This does
17 not constitute a significant portion of the case nor does it support an argument that Defendants did
18 not obtain total relief on the claim and contested issues.

19 **VI. NOVEL LEGAL QUESTION**

20 Here the legal cause of action was not “novel” so much as the cause of action was
21 inapplicable and not supported by the applicable statutes and law. Plaintiff argued that it could
22 pursue rights arising from a judicially created remedy granted to purchasers of homes against
23 builder-vendors. The Implied Warranty rights created and defined by *Columbia Western. Corp. v.*
24 *Vela*, 122 Ariz. 28, 32 (App. 1979) and *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242 (1984)
25 have never run to a homeowners association. Later authorities have expanded the scope of the
26 warranty to run against builders and vendors such as *Lofts at Fillmore Condo. Ass’n v. Reliance*
27 *Com. Constr., Inc.*, 218 Ariz. 574 (2008). As addressed in Defendants’ Reply in Support of their
28 Motion for Summary Judgment, no authorities have ever expanded the right to belong to a

1 homeowner's association on its own. A condominium association is empowered by statute to
2 pursue claims on behalf of individual owners' rights and the cases involving claims by an
3 association all arise from claims where a condominium exercised that statutory power.

4 **VII. DISCOURAGING PURSUIT OF LEGITIMATE CLAIMS**

5 Plaintiff has argued that the cost of investigation and the inability to recover those amounts
6 are already a disincentive to pursue claims. Plaintiff's own expenses are not appropriate to
7 consider in evaluating the *Associated Indemnity* factors.

8 The possibility of a fee award against an unsuccessful party is always a factor but does not
9 appear to have discouraged claims and litigation over construction defect issue claims.

10 **VIII. A.R.S. § 12-1364 AS AN ADDITIONAL BASIS FOR AWARDING FEES**

11 Defendant has not addressed the extent of repairs offered and made pursuant to A.R.S. §
12 12-1363 because they are not necessary to address the right to recovery under A.R.S. § 12-1364.
13 The statute provides for an award to the prevailing parties. A.R.S. § 12-1364 includes the
14 following definition:

15 "The seller is deemed the prevailing party with respect to a contested issue if the
16 relief obtained by the purchaser for that contested issue, exclusive of any fees and
17 taxable costs, is not more favorable than the repairs or replacements and offers made
18 by the seller before the purchaser filed a dwelling action pursuant to section 12-
19 1363."

20 Plaintiff did not obtain relief on any of its defect claims, and did not obtain a more favorable result
21 on any issue.

22 **IX. REASONABLENESS OF FEES**

23 As for the reasonableness of fees incurred by multiple firms, Plaintiff has not shown how
24 any fees incurred by Wilenchik & Bartness were unreasonable for any reason. Retention of
25 attorneys at two firms on its own is not unreasonable on its face, especially in a case with over \$3
26 million in claimed damages. Duplicative work has not been identified. Plaintiff has also had three
27 or more attorneys appear in this matter and the case appears to have been reasonably staffed given
28 the extent of the claims and issues.

Again, Plaintiff has not identified specific examples of any fee items that were excessive,
not necessary, duplicative, or otherwise not reasonable. No basis for reduction of fees on the basis

1 of reasonableness has been identified.

2 To the extent any fees should be excluded from the fee award due to the parties' agreement
3 to bear their own fees and costs on party dismissals or civil improvements, the relevant fee and
4 cost items have been listed in Exhibits A and B hereto. Additional reductions for these items are
5 not appropriate, especially based on the excessive reductions of 50% and 50% proposed by
6 Plaintiff. The tasks related to these items amount to \$2,422 and \$6,245.75 total.

7 **X. COSTS RELATED TO MOTION TO PRECLUDE EXPERT REPORTS**

8 Costs involved in pursuit of indemnity rights, including the motion practice over expert
9 reports, are recoverable.

10 Pursuit of indemnity and perfection of other rights to be indemnified, defended, and
11 protected by insurance are necessary steps in pursuing a just defense. Arizona's rules allow and
12 encourage parties to bring their claims for indemnity in one action to allow restitution in one
13 proceeding of all issues arising out of a particular dispute. *Ewing v. Goettl's Metal Products, Co.*,
14 116 Ariz. 484, 569 P.2d 1382 (App.Div.1, 1977).

15 Further, Defendants were required to pursue claims against Third-Party Defendants under
16 statutory requirements of A.R.S. § 12-1362(D).

17 **XI. FEES WERE INCURRED AND ARE RECOVERABLE**

18 Plaintiff has argued that there is not sufficient evidence that fees were incurred. Dennis
19 Wilenchik provided an affidavit regarding the amount of fees invoiced and incurred in services
20 provided by Wilenchik & Bartness, P.C., with each entry identified in the exhibit. The affidavit
21 provides all necessary evidence to show the amount of fees incurred and specific tasks for each
22 entry. Louis Horowitz provided an affidavit with the amount of fees incurred and invoiced for
23 work by Lorber, Greenfield & Polito, LLP. The fact that fees were paid by an insurer does not
24 mean that fees were not incurred and are not recoverable. Plaintiff has not cited any Arizona law
25 in support of its claim that fees paid by an insurer are not recoverable.

26 **XII. STATEMENT OF COST ITEMS**

27 Defendant agrees that the costs related to depositions of Liberty Constructors, LLC's expert
28 Alan Shelton and representative Todd Sarager should be removed from the Statement of Costs.

1 These include the following items:

- 2 • Shelton Consulting - Deposition fee of Alan Shelton - \$910.00
- 3 • Esquire – Deposition of Alan Shelton \$915.40
- 4 • Esquire – Deposition – Sarager \$560.80 of costs included in 09/01/22 invoice for depositions of Sarager, Jones & Thorton.

5 Per the Esquire Litigation Services, LLC invoice dated 09/01/22, costs attributable to
6 the deposition of Mr. Sarager are itemized. See Exhibit D hereto, Invoice 2296886. The
7 deposition of Mr. Sarager went from 9:00 AM to 10:30 AM.

- 8 ○ 1.5 hours - \$90.00 (\$60/hour)
- 9 ○ Transcript - \$350.00
- 10 ○ Exhibit - \$45.80
- 11 ○ Condensed - \$25.00
- 12 ○ Processing and Compliance - \$50.00

13 Plaintiff has requested that mediation fees be cut by 50% but this is not warranted as the
14 time spent on mediation of claims with subcontractors involved in civil improvements did not take
15 up 50% of the mediation time or cause additional mediation fees to be incurred.

14 **XIII. CONCLUSION**

15 For the reasons stated in the motion and herein, the request for attorney’s fees, taxable
16 costs, and other costs should be granted. Reductions to total claims to reflect the parties’
17 agreement to bear fees and costs regarding dismissal of two defendants are appropriate, as are
18 reductions to reflect the parties’ agreement to bear fees and costs regarding civil improvement
19 claims, in the amount of \$2,422 and \$6245.75 based on the items in Exhibit A and B. Other
20 reductions claimed are not supported and not proportionate to the work at issue for the items.

21
22 Dated: March 22, 2023

LORBER, GREENFIELD & POLITO, LLP

23
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1 Original of the foregoing e-filed
2 this 22nd day of March, 2023 with:

3 Clerk of the Court
4 Maricopa County Superior Court
5 101 W. Jefferson
6 Phoenix, AZ 85003

7 COPY of the foregoing emailed this
8 22nd day of March, 2023 to:

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