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Gallery Community Association

COURT OF APPEALS, DIVISION ONE

STATE OF ARIZONA

GALLERY COMMUNITY
ASSOCIATION, an Arizona non-profit
corporation,

Plaintiff/Appellant,

v.

K. HOVNANIAN AT GALLERY, LLC, et
al.

Defendants/Appellees,

Case No. 1 CA-CV 23-0375
Maricopa County
Superior Court
No. CV2020-008714

APPENDIX TO OPENING BRIEF

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328	Notice of Appeal	APP000003- APP000007
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1	Complaint and Jury Demand	APP000034- APP000041
187-193	Declaration of Covenants, Conditions, Restrictions, and Easements of Gallery, Exhibit A to Statement of Facts in Support of Defendants' Motion for Summary Judgment Regarding Each of Plaintiff's Causes of Action	APP000042- APP000087
290	Minute Entry: Rulings re Motions for Summary Judgment	APP000088- App000094
325	Minute Entry: Rulings re KHOV and Renco/Desert Vista Applications for Attorneys' Fees/Costs	APP000095- APP000100
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	Transcript of Proceeding of April 27, 2021 Status Conference	APP000111- APP000136

¹ The Appendix page number matches the electronic PDF page number. This Appendix complies with the bookmarking requirements of ARCAP 13(d)(3).

Record No.	Description	App. Page No.¹
	Transcript of Proceeding of January 13, 2023 Motion Hearing	APP000137-APP000215
	Minute Entry: Under Advisement Ruling on Defendants' Motion to Dismiss and Plaintiff's Motion for Leave to File First Amended Complaint, Maricopa County Superior Court Case No. CV2022-008601	APP000216-SPP000223-
	Minute Entry: Ruling on Defendants' Motion for Reconsideration of March 27, 2023 Order at Footnote #3, Maricopa County Superior Court Case No. CV2022-008601	APP000224-APP000227
	Minute Entry: Under Advisement Ruling on Defendants' Motion to Dismiss First Amended Complaint, Maricopa County Superior Court Case No. CV2022-008601	APP000228-APP000233
	Minute Entry: re Receipt of Plaintiff's September 8, 2023 Motion for Reconsideration re: Court's March 27 And August 8, 2023 Ruling, Maricopa County Superior Court Case No. CV2022-008601	APP000234-APP000235
	Minute Entry: Ruling on Defendants' Motion for Summary Judgment, Maricopa County Superior Court Case No. CV2022-009451	APP000236-APP000245
	Minute Entry: Minute Entry re Receipt of Plaintiff's August 31, 2023 Motion for Reconsideration, Maricopa County Superior Court Case No. CV2022-009451	APP000246-APP000247

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008714

04/26/2023

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
C. Ladden
Deputy

GALLERY COMMUNITY ASSOCIATION

PENNY JANE MANSHIP

v.

K HOVNANIAN AT GALLERY L L C, et al.

LOUIS W HOROWITZ

JASON J BOBLICK
LEONARD T FINK
SHANNON G HUFF
MICHAEL A LUDWIG
RINA K RAI
AMY WILKENS
DENNIS I WILENCHIK
DOCKET CV TX
JUDGE COOPER

FINAL JUDGMENT

On February 8, 2023, the Court granted Defendants K. Hovnanian at Gallery, LLC, and K. Hovnanian Arizona Operations, LLC summary judgment and dismissed the Complaint against them. Accordingly, **IT IS ORDERED** entering Judgment in favor of Defendants K. Hovnanian at Gallery, LLC, and K. Hovnanian Arizona Operations, LLC, and against Plaintiff Gallery Community Association.

The February 8, 2023 Ruling in favor of Defendants Hovnanian also resolved the Third-Party Complaint against Third-Party Defendants Renco, LLC dba Renco Roofing and Desert Vista, Inc. as moot.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008714

04/26/2023

IT IS FURTHER ORDERED entering Judgment against Plaintiff Gallery Community Association as follows:

1. Defendants K. Hovnanian at Gallery, LLC, and K. Hovnanian Arizona Operations, LLC, are awarded attorneys' fees of \$147,643.47 and taxable costs of \$20,589.06, for a total of **\$168,232.53**, plus interest at the legal rate of 9.0% accruing from the date that this Judgment is entered until paid pursuant to A.R.S. § 44-1201(B).
2. Third-Party Defendant Renco LLC dba Renco Roofing is awarded attorneys' fees of \$115,209 and taxable costs of \$4,525.91, for a total of **\$119,734.91**, plus interest at the legal rate of 9.0% accruing from the date that this Judgment is entered until paid pursuant to A.R.S. § 44-1201(B).
3. Third-Party Defendant Desert Vista, Inc. is awarded attorneys' fees of \$86,715.50 and taxable costs of \$4,525.92, for a total of **\$91,241.42**, plus interest at the legal rate of 9.0% accruing from the date that this Judgment is entered until paid pursuant to A.R.S. § 44-1201(B).

There are no further claims or issues pending in this matter. This Judgment fully resolves the Complaint and Third-Party Complaint and is entered pursuant to Rule 54(c).

Dated this 26th day of April, 2023.

/ s / KATHERINE COOPER

KATHERINE COOPER
JUDGE OF THE SUPERIOR COURT

1 **BURG SIMPSON ELDREDGE**
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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. HOVNIANIAN AT GALLERY, LLC, an
21 Arizona limited liability company; K.
22 HOVNIANIAN ARIZONA OPERATIONS,
23 LLC, an Arizona limited liability company; K.
24 HOVNIANIAN DEVELOPMENTS OF
25 ARIZONA, INC., an Arizona corporation; K.
26 HOVNIANIAN 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.

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

Case No. CV2020-008714

Assigned to Hon. Katherine Cooper

NOTICE OF APPEAL

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 NOTICE IS HEREBY GIVEN that Plaintiff, by and through undersigned counsel,
24 and pursuant to Ariz. R. Civ. App. 8 and 9 appeals to the Arizona Court of Appeals from
25 the final rulings and judgment entered and filed in this case by Maricopa County Superior
26 Court Judge Cooper as listed below:

- 27 • On February 13, 2023: final ruling granting Defendants' motion for summary
28 judgment regarding each of Plaintiff's causes of action, and denying Defendants'
29 motion for partial summary judgment as moot and denying Third-Party
30 Defendants Desert Vista, Inc. and Renco, LLC's joint motion for summary
31 judgment as moot in the *Rulings re Motions for Summary Judgment*;
- 32 • On April 25, 2023: final ruling granting Defendants' and Third-Party
33 Defendants' motions for attorneys' fees and costs, awarding fees and costs

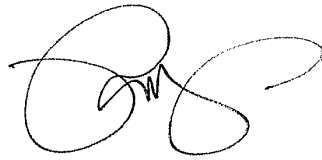
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against Plaintiff in the *Rulings Re Khov and Renco/Desert Vista Applications for Attorneys' Fees/Costs*; and

- On April 26, 2023: Judgment entered in favor of Defendants K. Hovnanian at Gallery, LLC, and K. Hovnanian Arizona Operations, LLC, and against Plaintiff Gallery Community Association and resolving the Third-Party Complaint against Third-Party Defendants Renco, LLC dba Renco Roofing and Desert Vista, Inc. as moot.

RESPECTFULLY SUBMITTED this 26th day of May, 2023.

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC



By: _____

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1 Certificate of Service

2 A copy of the foregoing E-FILED and E-
3 MAILED via Turbo court electronic mailing
4 system this 26th day of May 2023 to:

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15 *Arizona Operations, LLC; K. Hovnanian*
16 *Developments of Arizona, Inc.; K. Hovnanian*
17 *Companies of Arizona, LLC*

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26 *Developments of Arizona, Inc.; K. Hovnanian*
27 *Companies of Arizona, LLC*

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26 *MASONRY CONSTRUCTION, LLC*

27 /s/ Laura Sherman _____
28 Laura Sherman

Clerk of the Superior Court
Customer Services Division
Appeals Section / SCT-AP
Phone: (602)37-CLERK (25375)

CLERK OF THE SUPERIOR COURT
FILED
MAY 31 2023 9:58 AM
K. Kudabeh Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

GALLERY COMMUNITY
ASSOCIATION ET AL

CV2020-008714

VS.

NOTICE OF FILING
NOTICE OF APPEAL

K. HOVNANIAN AT
GALLERY LLC ET AL

Attached is a copy of the Notice of Appeal filed in the Superior Court in the above captioned cause on: **05/26/2023**.

Pursuant to Rule 8 (h), Rules of Civil Appellate Procedure, you are hereby notified that a Notice of Appeal has been filed on the above-entitled record.

Clerk of the Superior Court



Deputy Clerk

A copy of the foregoing Notification and attachments was mailed **05/31/2023** to:

PENNY JANE MANSHIP
AMY WILKENS
LOUIS W HOROWITZ
RINA K RAI
JASON J BOBLICK
LEONARD T FINK
MICHAEL A LUDWIG

Docket Code:
NOF

APP000008

**Electronic Index of Record
MAR Case # CV2020-008714**

No.	Document Name	Filed Date
1.	COMPLAINT AND JURY DEMAND	Jul. 27, 2020
2.	CERTIFICATE OF COMPULSORY ARBITRATION	Jul. 27, 2020
3.	CIVIL COVERSHEET	Jul. 27, 2020
4.	NOTICE REGARDING EXPERT TESTIMONY	Jul. 27, 2020
5.	AFFIDAVIT OF SERVICE OF PROCESS	Jul. 30, 2020
6.	AFFIDAVIT OF SERVICE OF PROCESS	Jul. 30, 2020
7.	AFFIDAVIT OF SERVICE OF PROCESS	Jul. 30, 2020
8.	AFFIDAVIT OF SERVICE OF PROCESS	Jul. 30, 2020
9.	SUMMONS	Jul. 30, 2020
10.	SUMMONS	Jul. 30, 2020
11.	SUMMONS	Jul. 30, 2020
12.	SUMMONS	Jul. 30, 2020
13.	MOTION TO DISMISS	Aug. 20, 2020
14.	CREDIT MEMO	Aug. 21, 2020
15.	ME: DISQUALIFICATION [08/21/2020]	Aug. 24, 2020
16.	NOTICE OF VOLUNTARY DISMISSAL OF NEGLIGENCE CAUSE OF ACTION ONLY	Aug. 25, 2020
17.	ME: CASE REASSIGNED [09/01/2020]	Sep. 2, 2020
18.	JOINT NOTICE RE OUSTANDING(SIC) MOTIONS	Sep. 8, 2020
19.	DEFENDANTS' CERTIFICATE OF AGREEMENT	Sep. 22, 2020
20.	DEFENDANTS' ANSWER TO COMPLAINT	Sep. 22, 2020
21.	THIRD-PARTY COMPLAINT	Oct. 6, 2020
22.	AFFIDAVIT OF SERVICE	Oct. 15, 2020
23.	AFFIDAVIT OF SERVICE	Oct. 15, 2020

**Electronic Index of Record
MAR Case # CV2020-008714**

No.	Document Name	Filed Date
24.	AFFIDAVIT OF SERVICE	Oct. 15, 2020
25.	AFFIDAVIT OF SERVICE	Oct. 15, 2020
26.	AFFIDAVIT OF SERVICE	Oct. 15, 2020
27.	AFFIDAVIT OF SERVICE	Oct. 15, 2020
28.	AFFIDAVIT OF SERVICE	Oct. 15, 2020
29.	AFFIDAVIT OF SERVICE	Oct. 15, 2020
30.	AFFIDAVIT OF SERVICE	Oct. 15, 2020
31.	SUMMONS	Oct. 15, 2020
32.	SUMMONS	Oct. 15, 2020
33.	SUMMONS	Oct. 15, 2020
34.	SUMMONS	Oct. 15, 2020
35.	SUMMONS	Oct. 15, 2020
36.	SUMMONS	Oct. 15, 2020
37.	SUMMONS	Oct. 15, 2020
38.	SUMMONS	Oct. 15, 2020
39.	SUMMONS	Oct. 15, 2020
40.	THIRD PARTY DEFENDANT CHAS ROBERTS AIR CONDITIONING INC.'S ANSWER TO THIRD PARTY COMPLAINT	Nov. 10, 2020
41.	THIRD PARTY DEFENDANT CHAS ROBERTS AIR CONDITIONING, INC.'S CERTIFICATE REGARDING COMPULSORY ARBITRATION	Nov. 10, 2020
42.	THIRD PARTY DEFENDANT CHAS ROBERTS AIR CONDITIONING, INC.'S CERTIFICATE REGARDING EXPERT TESTIMONY	Nov. 10, 2020
43.	THIRD PARTY DEFENDANT CHAS ROBERTS AIR CONDITIONING, INC.'S DEMAND FOR JURY TRIAL	Nov. 10, 2020

**Electronic Index of Record
MAR Case # CV2020-008714**

No.	Document Name	Filed Date
44.	THIRD-PARTY DEFENDANT SARGON MASONRY CONSTRUCTION, LLC'S ANSWER TO DEFENDANTS/THIRD-PARTY PLAINTIFFS K. HOVNIANIAN AT GALLERY, LLC; K. HOVNIANIAN ARIZONA OPERATIONS, LLC; K. HOVNIANIAN DEVELOPMENTS OF ARIZONA, INC.; AND K. HOVNIANIAN COMPANIES OF...	Nov. 23, 2020
45.	THIRD-PARTY DEFENDANT SARGON MASONRY CONSTRUCTION, LLC'S CERTIFICATE RE: COMPULSORY ARBITRATION	Nov. 23, 2020
46.	THIRD-PARTY DEFENDANT SARGON MASONRY CONSTRUCTION, LLC'S DEMAND FOR JURY TRIAL	Nov. 23, 2020
47.	GOTHIC LANDSCAPING, INC.'S ANSWER TO THIRD-PARTY COMPLAINT	Dec. 8, 2020
48.	GOTHIC LANDSCAPING, INC.'S CERTIFICATE RE: EXPERT TESTIMONY	Dec. 8, 2020
49.	GOTHIC LANDSCAPING, INC.'S CERTIFICATE RE: COMPULSORY ARBITRATION	Dec. 8, 2020
50.	GOTHIC LANDSCAPING, INC.'S DEMAND FOR JURY TRIAL	Dec. 8, 2020
51.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO., INC.'S ANSWER TO THIRD-PARTY COMPLAINT	Jan. 25, 2021
52.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO., INC.'S CERTIFICATE OF COMPULSORY ARBITRATION	Jan. 25, 2021
53.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO., INC.'S CERTIFICATE REGARDING EXPERT TESTIMONY	Jan. 25, 2021
54.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO., INC.'S DEMAND FOR JURY TRIAL	Jan. 25, 2021
55.	DEFENDANTS'/THIRD-PARTY PLAINTIFFS' SEPARATE STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	Feb. 19, 2021
56.	DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	Feb. 19, 2021
57.	THIRD PARTY DEFENDANT LIBERTY CONSTRUCTORS, LLC'S ANSWER TO THE THIRD-PARTY COMPLAINT	Mar. 18, 2021
58.	THIRD PARTY DEFENDANT LIBERTY CONSTRUCTORS, LLC'S CERTIFICATE REGARDING EXPERT WITNESS OPINION	Mar. 18, 2021

**Electronic Index of Record
MAR Case # CV2020-008714**

No.	Document Name	Filed Date
59.	[PART 1 OF 3] PLAINTIFF'S REQUEST FOR RULE 56(D) RELIEF AND EXPEDITED HEARING; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF	Mar. 22, 2021
60.	[PART 2 OF 3] PLAINTIFF'S REQUEST FOR RULE 56(D) RELIEF AND EXPEDITED HEARING; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF	Mar. 22, 2021
61.	[PART 3 OF 3] PLAINTIFF'S REQUEST FOR RULE 56(D) RELIEF AND EXPEDITED HEARING; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF	Mar. 22, 2021
62.	[PART 1 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
63.	[PART 2 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
64.	[PART 3 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
65.	[PART 4 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
66.	[PART 5 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
67.	[PART 6 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
68.	[PART 7 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
69.	[PART 8 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
70.	[PART 9 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021

**Electronic Index of Record
MAR Case # CV2020-008714**

No.	Document Name	Filed Date
71.	[PART 10 OF 10] PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY(SIC) JUDGMENT	Mar. 22, 2021
72.	JOINT STIPULATION TO EXTEND TIME FOR DEFENDANTS'/THIRD-PARTY PLAINTIFFS TO RESPOND TO PLAINTIFF'S(SIC) REQUEST FOR RULE 56 (D) RELIEF AND EXPEDITED HEARING; AND REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR...	Apr. 2, 2021
73.	THIRD-PARTY DEFENDANT RENCO ROOFING'S ANSWSER(SIC) TO THIRD-PARTY COMPLAINT	Apr. 5, 2021
74.	THIRD-PARTY DEFENDANT RENCO ROOFING'S DEMAND FOR JURY TRIAL	Apr. 6, 2021
75.	THIRD-PARTY DEFENDANT RENCO ROOFING'S CERTIFICATE OF EXPERT TESTIMONY	Apr. 6, 2021
76.	THIRD-PARTY DEFENDANT RENCO ROOFING'S CERTIFICATE REGARDING COMPULSORY ARBITRATION	Apr. 6, 2021
77.	ORDER GRANTING JOINT STIPULATION TO EXTEND TIME FOR DEFENDANTS'/THIRD-PARTY PLAINTIFFS TO RESPOND TO PLAINTIFF'S(SIC) REQUEST FOR RULE 56 (D) RELIEF AND EXPEDITED HEARING; AND REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS'...	Apr. 7, 2021
78.	DEFENDANTS'/THIRD-PARTY PLAINTIFF'S RESPONSE TO PLAINTIFF'S REQUEST FOR RULE 56(D) RELIEF	Apr. 16, 2021
79.	DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT	Apr. 16, 2021
80.	ME: STATUS CONFERENCE SET [04/22/2021]	Apr. 23, 2021
81.	ME: STATUS CONFERENCE [04/27/2021]	May. 4, 2021
82.	JOINT REPORT	May. 20, 2021
83.	SCHEDULING ORDER	May. 27, 2021
84.	STIPULATION TO EXTEND MEDIATION DEADLINE AND DEADLINE FOR THIRD PARTY DEFENDANT EXPERT DISCLOSURES	Aug. 9, 2021
85.	ANSWER BY THIRD-PARTY DEFENDANT CUSTOM LEASING, INC.	Aug. 12, 2021

**Electronic Index of Record
MAR Case # CV2020-008714**

No.	Document Name	Filed Date
86.	THIRD PARTY DEFENDANT LIBERTY CONSTRUCTORS, LLC'S NOTICE OF NON-PARTIES AT FAULT	Aug. 16, 2021
87.	ORDER RE: STIPULATION TO EXTEND MEDIATION DEADLINE AND DEADLINE FOR THIRD PARTY DEFENDANT EXPERT DISCLOSURES	Aug. 17, 2021
88.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO., INC.'S JOINDER IN THIRD-PARTY DEFENDANT LIBERTY CONSTRUCTORS, LLC'S NOTICE OF NON-PARTIES AT FAULT	Aug. 17, 2021
89.	THIRD-PARTY DEFENDANT RENCO LLC D/B/A RENCO ROOFING'S NOTICE OF NON-PARTIES AT FAULT	Aug. 17, 2021
90.	DEFENDANTS/ THIRD PARTY PLAINTIFFS' JOINDER IN THIRD PARTY DEFENDANT RENCO ROOFING LLC'S NOTICE OF NON-PARTIES AT FAULT	Aug. 18, 2021
91.	THIRD-PARTY DEFENDANT RENCO LLC D/B/A RENCO ROOFING'S FIRST SUPPLEMENTAL NOTICE OF NON-PARTIES AT FAULT	Aug. 20, 2021
92.	NOTICE OF SUBSTITUTION OF COUNSEL WITHIN FIRM	Aug. 30, 2021
93.	NOTICE OF ASSOCIATION OF COUNSEL FOR DEFENDANTS/THIRD-PARTY PLAINTIFFS K. HOVNIANIAN AT GALLERY, LLC, K. HOVNIANIAN ARIZONA OPERATIONS, LLC, K. HOVNIANIAN DEVELOPMENTS OF ARIZONA, INC., AND K. HOVNIANIAN COMPANIES OF ARIZONA, LLC	Sep. 3, 2021
94.	STIPULATION TO EXTEND DEADLINE FOR PLAINTIFF'S AMENDED RESPONSE TO THE DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT(SIC)	Sep. 7, 2021
95.	ORDER GRANTING STIPULATION TO EXTEND DEADLINE FOR PLAINTIFF'S AMENDED RESPONSE TO THE DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	Sep. 13, 2021
96.	NOTICE OF ERRATA TO DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT	Sep. 23, 2021
97.	STIPULATION FOR SECOND EXTENSION OF DEADLINE FOR PLAINTIFF'S AMENDED RESPONSE TO THE DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT(SIC)	Oct. 4, 2021

**Electronic Index of Record
MAR Case # CV2020-008714**

No.	Document Name	Filed Date
98.	ORDER GRANTING STIPULATION FOR SECOND EXTENSION OF DEADLINE FOR PLAINTIFF'S AMENDED RESPONSE TO THE DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	Oct. 8, 2021
99.	THIRD-PARTY DEFENDANT DESERT VISTA, INC.'S CERTIFICATE REGARDING COMPULSORY ARBITRATION	Oct. 25, 2021
100.	THIRD-PARTY DEFENDANT DESERT VISTA, INC.'S ANSWER TO THIRD-PARTY COMPLAINT	Oct. 25, 2021
101.	THIRD-PARTY DEFENDANT DESERT VISTA, INC.'S CERTIFICATE REGARDING EXPERT TESTIMONY PURSUANT TO A.R.S. 12-2602(A)	Oct. 25, 2021
102.	STIPULATION TO AMEND SCHEDULING ORDER	Nov. 18, 2021
103.	ME: CONFERENCE RESET/CONTINUED [11/23/2021]	Nov. 24, 2021
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247.	[PART 6 OF 6] PLAINTIFF'S RESPONSE IN OPPOTION(SIC) TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING CLAIMS OF UNSUPPORTED DEFECTS	Nov. 7, 2022
248.	DEFENDANTS/THIRD-PARTY PLAINTIFFS' RESPONSE TO THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO LLC DBA RENCO ROOFING'S JOINT MOTION FOR SUMMARY JUDGMENT	Nov. 7, 2022
249.	[PART 1 OF 2] DEFENDANTS'/THIRD-PARTY PLAINTIFFS' CONTROVERTING STATEMENT OF FACTS TO THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO LLC DBA RENCO ROOFING'S SEPARATE STATEMENT OF FACTS IN IN SUPPORT OF THEIR JOINT MOTION FOR SUMMARY JUDGMENT	Nov. 7, 2022
250.	[PART 2 OF 2] DEFENDANTS'/THIRD-PARTY PLAINTIFFS' CONTROVERTING STATEMENT OF FACTS TO THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO LLC DBA RENCO ROOFING'S SEPARATE STATEMENT OF FACTS IN IN SUPPORT OF THEIR JOINT MOTION FOR SUMMARY JUDGMENT	Nov. 7, 2022
251.	STIPULATION TO EXTEND DEADLINE FOR PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION	Nov. 8, 2022
252.	[PART 1 OF 2] PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION	Nov. 9, 2022
253.	[PART 2 OF 2] PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION	Nov. 9, 2022
254.	ORDER GRANTING STIPULATION TO EXTEND DEADLINE FOR PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION	Nov. 14, 2022
255.	NOTICE OF SUBSTITUTION OF COUNSEL WITHIN FIRM	Nov. 22, 2022
256.	[PART 1 OF 2] THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO, LLC DBA RENCO ROOFING'S REPLY IN SUPPORT OF JOINT MOTION FOR SUMMARY JUDGMENT	Nov. 22, 2022
257.	[PART 2 OF 2] THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO, LLC DBA RENCO ROOFING'S REPLY IN SUPPORT OF JOINT MOTION FOR SUMMARY JUDGMENT	Nov. 22, 2022

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No.	Document Name	Filed Date
258.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO. INC.'S REPLY IN SUPPORT OF JOINDER IN THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO, LLC'S JOINT MOTION FOR SUMMARY JUDGMENT	Nov. 28, 2022
259.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO., INC.'S CONTROVERTING STATEMENT OF FACTS IN SUPPORT OF ITS REPLY OF JOINDER IN THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO, LLC'S JOINT MOTION FOR SUMMARY JUDGMENT	Nov. 28, 2022
260.	DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING CLAIMS OF UNSUPPORTED DEFECTS	Dec. 5, 2022
261.	DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION	Dec. 7, 2022
262.	THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO, LLC DBA RENCO ROOFING'S JOINDER IN DEFENDANT KHOV'S MOTIONS FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION AND CLAIMS OF UNSUPPORTED DEFECTS	Dec. 13, 2022
263.	ME: ORAL ARGUMENT SET [12/13/2022]	Dec. 14, 2022
264.	PLAINTIFF'S RESPONSE AND OBJECTION TO THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO, LLC DBA RENCO ROOFING'S JOINDER IN DEFENDANT KHOV'S MOTIONS FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION AND CLAIMS OF UNSUPPORTED...	Dec. 30, 2022
265.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO., INC.'S NOTICE OF WITHDRAWAL OF JOINDER IN THIRD-PARTY DEFENDANTS DESERT VISTA, INC. AND RENCO LL'S(SIC) JOINT MOTION FOR SUMMARY JUDGMENT	Jan. 11, 2023
266.	THIRD-PARTY DEFENDANT LIBERTY CONSTRUCTORS' NOTICE OF SETTLEMENT AND WITHDRAWAL OF MOTION FOR SUMMARY JUDGMENT	Jan. 11, 2023
267.	THIRD-PARTY DEFENDANT LEBLANC BUILDING CO., INC.'S NOTICE OF SETTLEMENT	Jan. 11, 2023
268.	ME: MATTER UNDER ADVISEMENT [01/13/2023]	Jan. 17, 2023
269.	[PART 1 OF 2] PLAINTIFF'S MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE RELATING TO PLAINTIFF'S ALLEGED "ACCEPTANCE" OF COMMON AREAS	Jan. 20, 2023

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No.	Document Name	Filed Date
270.	[PART 2 OF 2] PLAINTIFF'S MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE RELATING TO PLAINTIFF'S ALLEGED "ACCEPTANCE" OF COMMON AREAS	Jan. 20, 2023
271.	[PART 1 OF 2] PLAINTIFF'S MOTION IN LIMINE NO. 2 TO EXCLUDE EVIDENCE THAT THE BUILDING DEPARTMENT INSPECTED AND APPROVED THE DESIGN OR CONSTRUCTION OF THE GALLERY	Jan. 20, 2023
272.	[PART 2 OF 2] PLAINTIFF'S MOTION IN LIMINE NO. 2 TO EXCLUDE EVIDENCE THAT THE BUILDING DEPARTMENT INSPECTED AND APPROVED THE DESIGN OR CONSTRUCTION OF THE GALLERY	Jan. 20, 2023
273.	[PART 1 OF 3] MOTION IN LIMINE #1 REGARDING PLAINTIFF'S UNTIMELY SUPPLEMENTAL DEFECT AND REPAIR OPINIONS	Jan. 20, 2023
274.	[PART 2 OF 3] MOTION IN LIMINE #1 REGARDING PLAINTIFF'S UNTIMELY SUPPLEMENTAL DEFECT AND REPAIR OPINIONS	Jan. 20, 2023
275.	[PART 3 OF 3] MOTION IN LIMINE #1 REGARDING PLAINTIFF'S UNTIMELY SUPPLEMENTAL DEFECT AND REPAIR OPINIONS	Jan. 20, 2023
276.	RULE 7.2 CERTIFICATION FOR DEFENDANTS K. HOVNIANIAN AT GALLERY, LLC AND K. HOVNIANIAN ARIZONA OPERATIONS, LLC'S MOTION IN LIMINE #1 REGARDING PLAINTIFF'S UNTIMELY SUPPLEMENTAL DEFECT AND REPAIR OPINIONS	Jan. 20, 2023
277.	[PART 1 OF 3] THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT MOTIONS IN LIMINE #1 AND #2	Jan. 20, 2023
278.	[PART 2 OF 3] THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT MOTIONS IN LIMINE #1 AND #2	Jan. 20, 2023
279.	[PART 3 OF 3] THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT MOTIONS IN LIMINE #1 AND #2	Jan. 20, 2023
280.	THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINDER IN DEFENDANTS/THIRD-PARTY PLAINTIFFS' MOTION IN LIMINE #1 REGARDING PLAINTIFF'S UNTIMELY SUPPLEMENTAL DEFECT AND REPAIR OPINIONS	Jan. 20, 2023
281.	PLAINTIFF'S RESPONSE TO K. HOVNIANIAN'S MOTION IN LIMINE NO. 1 AND THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINDER THEREIN	Jan. 30, 2023

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No.	Document Name	Filed Date
282.	PLAINTIFF'S RESPONSE TO THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT MOTIONS IN LIMINE NOS. 1 AND 2	Jan. 30, 2023
283.	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION IN LIMINE NO. 2 TO EXCLUDE EVIDENCE THAT THE BUILDING DEPARTMENT INSPECTED AND APPROVED THE DESIGN OR CONSTRUCTION OF THE GALLERY	Jan. 30, 2023
284.	DEFENDANTS' RESPONSE TO THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT MOTIONS IN LIMINE #1 AND #2	Jan. 30, 2023
285.	[PART 1 OF 3] DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE RELATING TO PLAINTIFF'S ALLEGED "ACCEPTANCE" OF COMMON AREAS	Jan. 30, 2023
286.	[PART 2 OF 3] DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE RELATING TO PLAINTIFF'S ALLEGED "ACCEPTANCE" OF COMMON AREAS	Jan. 30, 2023
287.	[PART 3 OF 3] DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE RELATING TO PLAINTIFF'S ALLEGED "ACCEPTANCE" OF COMMON AREAS	Jan. 30, 2023
288.	THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT RESPONSE TO PLAINTIFF'S MOTIONS IN LIMINE #1 AND #2	Jan. 30, 2023
289.	ME: CONFERENCE RESET/CONTINUED [02/02/2023]	Feb. 6, 2023
290.	ME: UNDER ADVISEMENT RULING [02/08/2023]	Feb. 13, 2023
291.	NOTICE OF DISASSOCIATION OF COUNSEL	Feb. 17, 2023
292.	NOTICE OF LODGING OF PROPOSED FORM OF JUDGMENT	Feb. 24, 2023
293.	[PART 1 OF 3] THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023
294.	[PART 2 OF 3] THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023
295.	[PART 3 OF 3] THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023

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No.	Document Name	Filed Date
296.	[PART 1 OF 2] DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES	Feb. 24, 2023
297.	[PART 2 OF 2] DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES	Feb. 24, 2023
298.	DEFENDANTS' STATEMENT OF TAXABLE COSTS	Feb. 24, 2023
299.	THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S STATEMENT OF COSTS	Feb. 24, 2023
300.	NOTICE OF LODGING OF PROPOSED FORM OF JUDGMENT	Feb. 24, 2023
301.	[PART 1 OF 6] DECLARATION IN SUPPORT OF THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023
302.	[PART 2 OF 6] DECLARATION IN SUPPORT OF THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023
303.	[PART 3 OF 6] DECLARATION IN SUPPORT OF THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023
304.	[PART 4 OF 6] DECLARATION IN SUPPORT OF THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023
305.	[PART 5 OF 6] DECLARATION IN SUPPORT OF THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023
306.	[PART 6 OF 6] DECLARATION IN SUPPORT OF THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Feb. 24, 2023
307.	STIPULATION FOR EXTENSION OF DEADLINE FOR PLAINTIFF'S RESPONSES TO DEFENDANTS' AND THIRD-PARTY DEFENDANTS' MOTIONS FOR ATTORNEYS' FEES AND COSTS	Mar. 2, 2023

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No.	Document Name	Filed Date
308.	[PROPOSED] ORDER GRANTING STIPULATION FOR EXTENSION OF DEADLINE FOR PLAINTIFF'S RESPONSES TO DEFENDANTS' AND THIRD-PARTY DEFENDANTS' MOTIONS FOR ATTORNEYS' FEES AND COSTS	Mar. 9, 2023
309.	[PART 1 OF 4] PLAINTIFF'S RESPONSE AND OBJECTION TO THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS AND EXPERT FEES AND STATEMENT OF COSTS	Mar. 10, 2023
310.	[PART 2 OF 4] PLAINTIFF'S RESPONSE AND OBJECTION TO THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS AND EXPERT FEES AND STATEMENT OF COSTS	Mar. 10, 2023
311.	[PART 3 OF 4] PLAINTIFF'S RESPONSE AND OBJECTION TO THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS AND EXPERT FEES AND STATEMENT OF COSTS	Mar. 10, 2023
312.	[PART 4 OF 4] PLAINTIFF'S RESPONSE AND OBJECTION TO THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT APPLICATION FOR ATTORNEYS' FEES, COSTS AND EXPERT FEES AND STATEMENT OF COSTS	Mar. 10, 2023
313.	[PART 1 OF 4] PLAINTIFF'S RESPONSE AND OBJECTION TO DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES AND STATEMENT OF TAXABLE COSTS	Mar. 10, 2023
314.	[PART 2 OF 4] PLAINTIFF'S RESPONSE AND OBJECTION TO DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES AND STATEMENT OF TAXABLE COSTS	Mar. 10, 2023
315.	[PART 3 OF 4] PLAINTIFF'S RESPONSE AND OBJECTION TO DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES AND STATEMENT OF TAXABLE COSTS	Mar. 10, 2023
316.	[PART 4 OF 4] PLAINTIFF'S RESPONSE AND OBJECTION TO DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES AND STATEMENT OF TAXABLE COSTS	Mar. 10, 2023
317.	NOTICE OF APPEAL	Mar. 14, 2023
318.	THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT REPLY IN SUPPORT OF THEIR APPLICATION FOR ATTORNEYS' FEES, COSTS, & EXPERT FEES	Mar. 16, 2023
319.	NOTICE OF FILING NOTICE OF APPEAL	Mar. 22, 2023



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Table with 3 columns: No., Document Name, Filed Date. Rows 320-332 containing case details such as 'DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES', 'COURT OF APPEALS APPELLATE CLERK NOTICE', etc.

APPEAL COUNT: 2

RE: CASE: UNKNOWN

DUE DATE: 06/23/2023

CAPTION: GALLERY COMM ASSOC ET AL VS K. HOVNIANIAN ET AL



**Electronic Index of Record
MAR Case # CV2020-008714**

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: Karee.Kudebeh on June 23, 2023; [2.5-17026.63]
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CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

Gallery
CP

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JUL 27 2020



CLERK OF THE SUPERIOR COURT
V. GARCIA
DEPUTY CLERK

**BURG SIMPSON ELDREDGE
HERSH & JARDINE P.C.**

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Attorneys for the Plaintiff

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

GALLERY COMMUNITY
ASSOCIATION, an Arizona non-profit
corporation,

Plaintiff,

vs.

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

Case No. CV2020-008714

COMPLAINT AND JURY DEMAND

The plaintiff, by and through undersigned counsel, hereby complains against the
defendants as follows:

1 1. The plaintiff is Gallery Community Association (“Association”), an Arizona
2 nonprofit corporation that acts as the property owners association for the property known
3 as The Gallery, located in Scottsdale, Arizona with authority and capacity to institute and
4 prosecute this action in the State of Arizona.

5 2. Pursuant to the Articles of Incorporation of Gallery Community Association
6 (the “Articles”), the plaintiff was incorporated under the laws of the State of Arizona,
7 including A.R.S. Section 10-3101, et seq., dealing with nonprofit corporations, as
8 amended from time to time (the “Nonprofit Corporation Act”).

9 3. Pursuant to the Articles, the plaintiff’s purpose is “to act as a property
10 owners association and to perform all things and exercise all the power and rights of a
11 corporation that are lawful and consistent with the foregoing purposes”

12 4. The plaintiff is governed by the Declaration of Covenants, Conditions,
13 Restrictions, and Easements for Gallery recorded at Maricopa County Recorder’s Office
14 at instrument 2016-0317923 on May 10, 2016 (“Declaration”), as amended.

15 5. The Declaration requires the Association to repair and maintain the common
16 elements including, but not limited to, the “Association Property” and “Common Area” as
17 those terms are defined in the Declaration and the exterior walls, stucco, façade, roofs or
18 other surfaces of the “Dwelling Units” as defined in the Declaration.

19 6. The Association brings this action pursuant to A.R.S. § 12-1361, et seq. and
20 § 33-2001, et seq.

21 7. Pursuant to A.R.S. § 12-1363(N), the Affidavit of Bob Vander Waal,
22 President of the Board of Directors of the Association, is attached hereto as Exhibit A.

23 8. Defendant K. Hovnanian at Gallery, LLC developed the project, was the
24 declarant for the project, and conveyed the common elements of the project to the
25 Association’s name in a quit claim deed dated October 6, 2016, recorded at document
26 2016-0736922 in the Maricopa County Recorder’s Office.

27 9. Defendant K. Hovnanian at Gallery, LLC also acted as the vendor by selling
28 individual unit owners their units at The Gallery.

1 workmanlike manner, and by providing a product that violates applicable building codes,
2 product manufacturer installation instructions, and is not suitable for its intended use.

3 18. Defendants' defective work has caused resultant damage at The Gallery.

4 19. Through their negligence, defendants damaged the Association and its
5 members in an amount to be shown at trial.

6 20. Defendants acted to serve their own interests, and had reason to know and
7 consciously disregarded a substantial risk that their conduct might significantly injure the
8 rights of the Association and its members.

9 21. Defendants consciously pursued a course of conduct knowing that it created
10 a substantial risk of significant harm to others, including the Association and its members.

11 22. The Association is entitled to punitive damages.

12

13 SECOND CAUSE OF ACTION

14 **(Breach of Implied Covenant of Good Faith and Fair Dealing - Against Defendants**
15 **K. Hovnanian at Gallery, LLC, K. Hovnanian Developments of Arizona, Inc., and K.**
16 **Hovnanian Companies of Arizona, LLC)**

17 23. The Association incorporates herein by reference all allegations included in
18 paragraphs 1-22.

19 24. Arizona law implies a covenant of good faith and fair dealing in every
20 contract.

21 25. The Association and defendant K. Hovnanian at Gallery, LLC entered into a
22 contract in the form of the Declaration.

23 26. The contract made assurances that the work would be or had been done
24 correctly.

25 27. The defendants' work was not done correctly.

26 28. The Association had justified expectations that the work would be
27 completed correctly, and if not, that the defendants would correct any deficiencies.

28 29. The defendants have refused to correct the deficiencies.

1 38. The Association is in privity of contract with defendant K. Hovnanian at
2 Gallery, LLC in the Declaration.

3 39. Defendant K. Hovnanian at Gallery, LLC breached the Declaration by not
4 performing its work in compliance with the terms of that contract and by building a
5 project that does not comply with applicable laws and building codes.

6 40. The defendants' breaches of their contracts damaged the Association and its
7 members in an amount to be proven at trial.

8

9 WHEREFORE, the Association prays for judgment against the defendants as
10 follows:

11 a. For compensatory damages in an amount to be shown at trial,
12 including but not limited to the cost of repairing all defective work and resultant
13 damage, as well as the cost of the Association's expert investigation required to
14 prove the existence, nature, and cause of every defect, as well as the appropriate
15 repair methodology, and the cost of performing those repairs;

16 b. For punitive damages in an amount sufficient to punish the
17 defendants and/or to deter the defendants and others from similar misconduct in the
18 future;

19 c. For its reasonable attorneys' fees pursuant to the parties' contracts as
20 appropriate and pursuant to A.R.S. § 12-341.01 and § 12-1364 as determined upon
21 application to the Court;

22 d. For its court costs pursuant to the parties' contracts as appropriate
23 and pursuant to A.R.S. § 12-341;

24 e. For pre- and post-judgment interest on all sums awarded; and

25 f. For such other and further relief as the Court deems just and proper.

26 ///

27 ///

28 ///

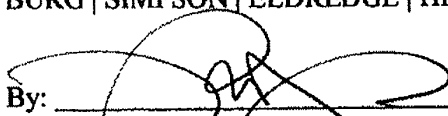
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THE ASSOCIATION HEREBY DEMANDS TRIAL BY A JURY OF ALL ISSUES

SO TRIABLE

RESPECTFULLY SUBMITTED this 24th day of July, 2020.

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

By: 

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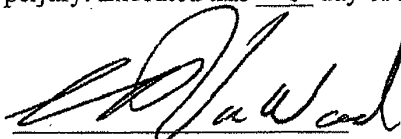
AFFIDAVIT OF BOB VANDER WAAL

STATE OF ARIZONA)
)
County of Maricopa)

I, Bob Vander Waal, representing the Board of Directors of Gallery Community Association hereby affirm as follows:

1. I am the President of the Board of Directors of Gallery Community Association (the "Association").
2. I have read the entire Complaint accompanying this Affidavit and prepared on behalf of the Association.
3. On behalf of the Association, I agree with all of the allegations and facts contained in the Complaint.
4. The Association and its Board of Directors are not receiving and have not been promised anything of value in exchange for filing the Complaint.

This affidavit is signed under the penalty of perjury. Executed this 22nd day of July, 2020


Signature

LORBER, GREENFIELD & POLITO, LLP
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8

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

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

(Assigned to the Honorable Katherine
Cooper)

Exhibit A

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New Land Title Agency, LLC

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WHEN RECORDED, RETURN TO:

K. Hovnanian at Gallery, LLC
20830 N. Tatum Boulevard, Suite 250
Phoenix, Arizona 85050
Attention: Chad Fuller

**Courtesy Recording
No Title Liability**

**DECLARATION OF COVENANTS, CONDITIONS,
RESTRICTIONS AND EASEMENTS
FOR
GALLERY**

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**DECLARATION OF COVENANTS, CONDITIONS,
RESTRICTIONS AND EASEMENTS
FOR
GALLERY**

This Declaration of Covenants, Conditions, Restrictions and Easements for Gallery (this "*Declaration*") is made as of MAY 10 , 2016 by K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company ("*Declarant*").

RECITALS:

A. Declarant is the owner and developer of certain real property in the City of Scottsdale, Maricopa County, Arizona, which is more particularly described in Exhibit A attached hereto and by reference incorporated herein (the "*Property*").

B. Declarant has formed, or intends to form, Gallery Community Association as an Arizona nonprofit corporation, for the purpose of the efficient preservation of the values and amenities of the Property and to which shall be delegated certain powers of administering and maintaining the Common Area, enforcing this Declaration, and collecting and disbursing the Assessments created herein.

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C. Declarant desires to establish for its own benefit and for the mutual benefit of all future Owners, or other holders of interests in any portion of the Property, certain mutually beneficial covenants, conditions, restrictions, easements and obligations with respect to the proper development, use and maintenance of the Property.

D. Declarant desires and intends that the Owners, Mortgagees, trustees and other persons who may acquire any interest in the Property, shall at all times enjoy the benefits of, and shall hold their interest subject to the rights, privileges, easements, covenants, conditions, restrictions, easements and obligations set forth in this Declaration, all of which are declared to be in furtherance of a plan to promote and protect the value, desirability and attractiveness of the Property.

NOW, THEREFORE, DECLARANT hereby declares, covenants and agrees as follows:

DECLARATION:

1. Definitions.

1.1 "*Additional Property*" shall mean any real property located adjacent to or near the Property.

1.2 "*Annual Assessment*" shall mean the annual charge levied and assessed against each Lot, Dwelling Unit and Owner pursuant to Section 6 of this Declaration.

1.3 "Architectural Committee" shall mean the committee created pursuant to Section 7 hereof.

1.4 "Architectural and Landscape Design Guidelines" shall mean the guidelines and rules adopted by the Board, within the Community Rules and Regulations, as defined in Section 7.5 hereof.

1.5 "Articles" shall mean the Articles of Incorporation of the Association, as such may be amended from time to time.

1.6 "Assessment" shall mean Annual Assessments, Special Assessments, Enforcement Assessments, Maintenance Charges, Special Use Fees, security fees or any other assessments, fees, fines or charges assessed hereunder.

1.7 "Association" shall mean and refer to GALLERY COMMUNITY ASSOCIATION, an Arizona nonprofit corporation, its successors and assigns.

1.8 "Association Property" shall mean the Common Area, along with any other part or parts of the Property, together with any buildings, structures, streets, gates and improvements thereon, and other real property, held by Declarant or by a trustee, for conveyance to the Association as may be provided for herein, or that the Association now or hereafter owns in fee or in which the Association now or hereafter has a leasehold or easement interest, for as long as the Association is the owner of the ^{Unofficial Document} old or easement interest, or such property is so held by Declarant for conveyance to the Association. Except as otherwise provided in this Declaration, all Association Property shall be maintained by the Association for the benefit of all the Owners. From time to time Declarant may convey easements, leaseholds or other property within the Property to the Association and such property shall automatically be deemed accepted by the Association.

1.9 "Board" shall mean the Board of Directors of the Association.

1.10 "Bylaws" shall mean the Bylaws of the Association, as such may be amended from time to time.

1.11 "Collection Costs" shall mean all costs, fees, charges and expenditures including, without limitation, attorneys' fees (whether a legal action is filed), court costs, filing fees and recording fees incurred by the Association in collecting and/or enforcing payment of Assessments, monetary penalties, late fees, demand fees, interest or other amounts payable to the Association pursuant to this Declaration.

1.12 "Common Area" shall mean all areas (including the improvements thereon) owned, or to be owned, by the Association for the common use and enjoyment of the Owners and/or Residents of the Property, and any other areas that the Association is required to maintain, either by this Declaration or the recorded subdivision plat, other than those areas located on the Lots.

1.13 “Community Rules and Regulations” shall mean the Association Rules, including the Architectural and Landscape Design Guidelines, as defined in Section 1.4, to be adopted by the Board as defined in Section 7.5.

1.14 “Covenants” shall mean the covenants, conditions, restrictions, easements, obligations, assessments, charges, servitudes, liens and reservations set forth herein.

1.15 “Declarant” shall mean and refer to the entity that is the developer of the Property, and shall be K. Hovnanian at Gallery LLC, an Arizona limited liability company, its successors and assigns, or any person or entity to whom all of Declarant’s rights reserved to the Declarant hereunder are assigned in accordance with the provisions hereof. The Declarant’s rights shall only be assigned by a written, Recorded instrument expressly assigning those rights.

1.16 “Declaration” shall mean this document and the covenants, conditions, restrictions, easements and obligations set forth in this document, as such may be amended from time to time.

1.17 “Detached Structure” shall mean a detached garage, gazebo, guest quarters or similar structures approved in writing by the Architectural Committee in compliance with the guidelines established for such structures either in this Declaration or in any Rules established by the Board, as further defined in Section 8.1.1 below.

1.18 “Dwelling Unit” shall mean any building or portion of a building situated upon a Lot, which building or portion of a building is designed and intended for use and occupancy as a residence.

1.19 “Enforcement Assessment” shall mean an assessment levied pursuant to Section 6.5 of this Declaration.

1.20 “Enforcement Costs” shall mean the costs incurred by the Association in enforcing compliance or specific performance of the terms and conditions of this Declaration, or for any other purpose in connection with the breach of this Declaration, Articles of Incorporation, Bylaws, or any Rules and Regulations of the Association, whether or not a lawsuit is filed, including, but not limited to, reasonable attorney’s fees and costs, and all other expenses incurred by the Association.

1.21 “Exempt Property” shall mean the following parts of the Property:

1.21.1 All land and improvements owned by, or dedicated to and accepted by, the United States, the State of Arizona, Maricopa County, the City of Scottsdale or any other municipality or political subdivision thereof, for as long as any such governmental entity or political subdivision is the owner thereof, or for so long as such dedication remains effective; provided, however, that any such land shall be Exempt Property only while it is being used by such governmental entity owner for governmental or public purposes;

1.21.2 All Association Property, for as long as the Association is the owner thereof (or of the interest therein that makes such land Association Property); and

1.21.3 Each portion of any and all residential areas designated in a recorded subdivision plat, deed, tract declaration or other declaration as an area to be used in common by the Owners and Residents.

All Exempt Property shall be exempted from Assessments and Membership in the Association and its associated privileges and responsibilities, but shall nevertheless be subject to all other provisions of this Declaration. The Board may restrict or prohibit the use of the Common Area (except any easements, rights-of-way, utility improvements and landscaping, drainage and flood control areas) by the Owners of Exempt Property, except for Declarant, its affiliates, subcontractors, employees, agents, guests and invitees. This subsection may not be amended without the approval of any and all Owners of Exempt Property affected by the amendment.

1.22 "First Conveyance" shall mean the first Lot sold and conveyed by the Recording of a deed, from Declarant or Homebuilder to a Purchaser.

1.23 "First Mortgage" shall mean a Mortgage Recorded against a Lot that has priority over all other Mortgages Recorded against that Lot.

1.24 "First Mortgagee" shall mean such a beneficiary or mortgagee under a First Mortgage.

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1.25 "Lot" shall mean any numbered parcel of real property shown upon any recorded plat of the Property together with any improvements constructed thereon, with the exception of the areas designated as lettered tracts and areas dedicated to the public.

1.26 "Homebuilder" shall mean any homebuilder in the business of constructing residential improvements on Lots and who buys Lots from Declarant.

1.27 "Maintenance Charge" shall mean any and all costs assessed pursuant to Section 6 of this Declaration.

1.28 "Maximum Annual Assessment" shall have the meaning given that term in Section 6.3 of this Declaration.

1.29 "Member" shall mean any Person who is a member of the Association as provided in Section 5.1.

1.30 "Membership" shall mean a membership in the Association.

1.31 "Mortgage" shall mean a deed of trust or a mortgage Recorded against a Lot.

1.32 "Mortgagee" shall mean a beneficiary under a deed of trust, or a mortgagee under a mortgage, Recorded against a Lot.

1.33 "Occupant" shall mean any Person in actual legal possession of any Lot.

1.34 "Owner" shall mean the record owner, whether one or more Persons, of equitable or beneficial title in fee simple (or legal title if same have merged) of any Lot, and shall include the Purchaser under a Recorded deed pursuant to a contract for sale of any Lot. The foregoing does not include a Person who holds an interest in any Lot merely as security for the performance of an obligation. Except as stated otherwise herein, Owner(s) shall not include a lessee or tenant of a Lot. Owners shall include Declarant so long as Declarant or a Related Entity owns or has a Recorded option to purchase any Lot within the Property.

1.35 "Party Walls and/or Fences" shall mean a wall and/or fence constructed on or immediately adjacent to the common boundary of Lots, the Common Area or other areas in the Property.

1.36 "Person" shall mean a natural person, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture, governmental entity, governmental subdivision or agency, or other legal or commercial entity.

1.37 "Property" shall mean the real property described on Exhibit A, together with all improvements located thereon, and ^{an Unofficial Document} party, together with all improvements located thereon, which is annexed and subjected to this Declaration pursuant to Section 2.2, but excluding any real property, together with all improvements thereon, which is withdrawn pursuant to Section 2.3.

1.38 "Purchaser" shall mean any Person, other than the Declarant, who by means of a voluntary transfer becomes the Owner of a Lot, except for: (a) any Person who purchases a Lot and then leases it to the Declarant for use as a model in connection with the sale or lease of other Lots; or (b) any Person who, in addition to purchasing a Lot, is assigned or has acquired any or all of the Declarant's rights under this Declaration.

1.39 "Record," "Recordation" and/or "Recording" shall mean placing or the placement of an instrument of public record in the office of the County Recorder of Maricopa County, Arizona, as applicable.

1.40 "Resident" shall mean:

1.40.1 Each buyer under a Recorded deed pursuant to a contract (as defined in Arizona Revised Statutes Section 33-741) covering any part of the Property, and each Owner, tenant or lessee on any part of the Property;

1.40.2 Members of the immediate family of each Owner, lessee, tenant, or buyer referred to in Section 1.40.1 actually living in the same household with such Owner, lessee, tenant or buyer on any part of the Property; and

1.40.3 Subject to the Rules as the Association may hereafter specify (including the imposition of special nonresident fees for the use of Association Property if the Association shall so direct), the onsite employees, guests or invitees of any Owner, lessee, tenant or buyer, if and to the extent the Board so directs, in its absolute discretion, by resolution.

1.41 "Rules" and/or "Association Rules" shall mean the rules and regulations adopted by the Board, if any, as such may be amended from time to time, as further described in Section 4.5, which shall be part of the Community Rules and Regulations.

1.42 "Special Assessment" shall mean any assessment levied and assessed pursuant to Section 6.4.

1.43 "Special Use Fees" shall mean special fees authorized by this Declaration which an Owner, Resident or any other person is obligated to pay to the Association over, above and in addition to any Assessments imposed or payable hereunder. The amount of any Special Use Fees shall be determined by the Board, in its absolute discretion, provided all such fees must be fair and reasonable.

1.44 "Supplemental Declaration" shall mean any declaration of additional covenants or provisions applicable to the Property which are consistent with this Declaration and which have been approved in writing by Declarant.

1.45 "Transition Date" shall mean the day on which occurs the earlier of: (a) when one hundred percent (100%) of the Lots are owned by Members other than the Declarant ; (b) when Declarant notifies the Association in writing that Declarant relinquishes its Class B Membership; or (c) December 31, 2031.

1.46 "Visible from Neighboring Property" shall mean, with respect to any given object, visible to a person six (6) feet tall, standing on any part of neighboring property at an elevation no greater than ground level where the object is located (assuming the ground level where the person is standing is at the same height as the ground level where the object is located).

2. Property Subject to this Declaration.

2.1 General Declaration. Declarant hereby declares that the Property is and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred, in whole or in part, subject to this Declaration, as amended from time to time; provided, however, Property which is not part of a Lot and which is dedicated or transferred to a public authority or utility pursuant to Section 4.8 shall not be subject to this Declaration while owned by the public authority or utility. This Declaration is declared and

agreed to be in furtherance of Declarant's general plan for, and improvement and sale of, the Property and is established for the purpose of enhancing and perfecting the value, desirability and attractiveness of the Property. This Declaration shall run with all of the Property for all purposes and shall be binding upon and inure to the benefit of Declarant, the Association, all Owners, Members and their respective successors in interest. Nothing in this Declaration shall be construed to prevent Declarant from modifying Declarant's general plan or development plan for the Property, or any portions thereof, provided Declarant obtains the consent of the Owner of the property that is the subject of the modification.

2.2 Annexation of Additional Property. Declarant may, without obligation to do so, annex Additional Property into the Property and subject such Additional Property to the terms and conditions of this Declaration, by Recording one or more Supplemental Declarations which may incorporate this Declaration and establish such additional covenants, conditions, restriction, Assessments, charges, servitudes, liens, reservations and easements with respect to such real property as Declarant may from time to time deem appropriate.

2.3 Withdrawal of Property. At any time that Declarant or a Related Entity owns or has a Recorded option to purchase any portion of the Property, Declarant has the right to withdraw property from the Property without the consent of any other Owner or Person (other than the Owner of such property, if other than the Declarant). The withdrawal of all or any portion of the Property shall be effected by the Declarant Recording a written instrument setting forth the legal description of the property being withdrawn. Upon the withdrawal of any property from the Property pursuant to this Section 2.3, such property shall no longer be subject to any of the covenants, conditions and restrictions set forth in this Declaration.

3. Property Rights.

3.1 Owners' Easements of Enjoyment. Every Owner shall have a non-exclusive right and easement of enjoyment in and to the Common Area, which shall be appurtenant to and shall pass with the title to every Lot, subject to the following provisions:

3.1.1 The right of the Association to charge reasonable admission and other fees for the use of any recreational or storage facilities or areas situated upon the Common Area;

3.1.2 The right of the Association to suspend the voting rights and the right to use the Common Area by an Owner for any period during which any Assessments against the Owner's Lot remains unpaid;

3.1.3 The right of the Board to impose a monetary penalty (in such amount as the Board may determine in its sole discretion) against a Member for any infraction or violation of this Declaration, the Bylaws or the Rules after notice to such Member and an opportunity to be heard. The Board may also impose a late fee on any monetary penalty not paid within fifteen (15) days after its due date, such late fee not to exceed the maximum amount

allowed under ARS Section 33-1803. Charges for penalties are enforceable in the manner allowed by law.

3.1.4 The right of the Association to suspend the right to use the Common Area for a period initially not to exceed sixty (60) days for any infraction of the Association Rules, and then additional consecutive thirty (30) day periods for so long as the infraction continues;

3.1.5 The right of the Association to limit the number of guests of Members using the Common Area;

3.1.6 The right of the Association to change and regulate the use of the Common Area in accordance with Section 4.7;

3.1.7 The right of the Association to change the size, shape or location of the Common Area, and to exchange the Common Area for other property or interests which become Common Area in accordance with Section 4.8 hereof; and

3.1.8 The right of the Association, in accordance with its Articles and Bylaws, to borrow money for the purpose of improving the Common Area and facilities, and in aid thereof, to mortgage said Property, and pledge future assessments, in accordance with Section 8.2.5 hereof. The rights of such mortgagee in said Property shall be subordinate to the rights of the Owners hereunder.

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3.2 Easements and Encroachments. Each Lot, the Common Area and all other areas in the Property shall be subject to an easement of not more than five (5) feet for encroachments of walls, ledges, roofs, air conditioners and other structures created by construction, settling and overhangs as originally or subsequently designed and constructed by Declarant or its affiliates and contractors. If any such improvement on the Common Area encroaches upon any Lot or other area, or if any such improvement on any Lot or other area encroaches upon any portion of the Common Area, or if any such improvement on any Lot or other area encroaches upon another Lot or other area, a valid easement for said encroachment and for the maintenance thereof shall exist. In the event any structure on any Lot, the Common Area or other area is repaired, altered or reconstructed in accordance with the original plans and specifications or subsequent plans and specifications of Declarant or its affiliates, similar encroachments shall be permitted and a valid easement for said encroachments and for the maintenance thereof shall exist.

3.3 Rights of Ingress and Egress. Every Owner shall have an unrestricted right of ingress and egress to its Lot which right shall be perpetual, shall be appurtenant to and shall pass with title to such Lot. There are hereby created easements for ingress and egress for pedestrian traffic over, through and across sidewalks, paths, walks and lanes that from time to time may exist upon the Common Area. There is also created an easement for ingress and egress for pedestrian and vehicular traffic over, through and across all streets, driveways and parking areas as from time to time may be paved and intended for such purposes. Such easements shall

run in favor of and be for the benefit of the Owners. Any Owner may, in accordance with and subject to this Declaration, the Rules and the limitations contained therein, delegate its right of ingress and egress to the members of its family, its guests and its tenants (including its tenant's family and guests). There is also created an easement upon, across and over the Common Area and, to the extent there are any, all private streets, private roadways, private driveways and private parking areas within the Property for pedestrian and vehicular ingress and egress, including, without limitation, for police, fire, medical and other emergency vehicles and personnel.

3.4 Delegation of Use. Any Owner may delegate, in accordance with and subject to any restrictions contained in the Bylaws, the Owner's right of enjoyment to the Common Area and improvements thereon to the Owner's tenants, Occupants or guests.

3.5 Title to Common Area. Declarant covenants that it shall convey fee simple title to the Common Area to the Association, free of all encumbrances except current real and personal property taxes and other easements, conditions, reservations and restrictions then of record. The conveyance shall be made to the Association prior to the First Conveyance.

3.6 Further Restrictions and Rights and Duties of Owners. The rights and duties of Owners shall be as follows:

3.6.1 Each Owner shall obtain and maintain in full force and effect, at such Owner's expense, a policy or policies Unofficial Document insurance issued by insurers authorized to provide such insurance in the State of Arizona, in forms and amounts commonly obtained and maintained by homeowners for similar properties in the greater Scottsdale, Arizona metropolitan area, which provides liability coverage with respect to the acts and negligence of such Owner and the members of such Owner's household on or about such Owner's Lot, and shall also add incidental workers' compensation coverage to protect against claims by workers injured on or about such Owner's Lot.

3.6.2 No Owner or other Person shall erect, construct, maintain, permit or allow any fence, landscaping or other improvement or other obstruction or alteration of grading (a) which would interrupt the normal drainage of a Lot from its natural or improved state existing on the date that Lot was first conveyed by the Declarant to another Owner, or (b) within any area designated on the plat described in Section 1.12 above as a "Drainage Easement" (or similar designation).

3.6.3 No Owner or other Person shall erect, construct, maintain, permit or allow any fence, landscaping or other improvement or other obstruction or alteration of grading which would interrupt any physical or chemical termite "barrier" of the Lot in the improved state existing on the date the Lot was first conveyed by the Declarant to another Owner.

3.7 Maintenance of Lots. Each Owner of a Lot is responsible for maintaining, repairing or replacing its Lot, and the Dwelling Unit, landscaping and other improvements situated thereon.

3.8 Site Disclosure. Notice is hereby given that property located adjacent to the Property and not owned by or within the control of Declarant is being or may be used for commercial or industrial purposes that generate noise, dust or odors that may not and should not be considered to be an actionable or detrimental nuisance unless the same violate the then current Scottsdale City Code.

4. The Association.

4.1 Association Bound. Upon acceptance by the Arizona Corporation Commission of the Articles of Incorporation of the Association and upon the Recordation of this Declaration, this Declaration shall be binding upon and shall benefit the Association.

4.2 The Association. The Association is an Arizona nonprofit corporation charged with the duties and invested with the powers prescribed by law and set forth in the Articles, Bylaws and this Declaration. Neither the Articles nor Bylaws shall, for any reason, be amended or otherwise modified or interpreted so as to be inconsistent with this Declaration.

4.3 The Board of Directors and Officers. A Board of Directors and such officers as are provided for in the ^{Unofficial Document}Articles of Incorporation and Bylaws shall conduct the affairs of the Association as the Board may elect or appoint, in accordance with the Articles and Bylaws.

4.3.1. Declarant, or its successors or assigns, shall be entitled to at least one (1) position on the Board of Directors for ten (10) years after the period of Declarant control ceases, as provided in Section 5.3 below. The number of positions shall be determined by Declarant, in its discretion, so long as the number does not create a majority of the Board after the period of Declarant control. This provision may not be amended without the express written consent of the Declarant as provided in Section 10.18 below.

4.4 Powers and Duties of the Association. The Association shall have such rights, duties and powers as set forth herein and in the Articles and Bylaws.

4.5 Community Rules and Regulations. By action of the Board, the Association may, from time to time and subject to the provisions of this Declaration, adopt, amend and repeal Rules governing any portion of the Property. Such Rules may govern, but are not limited to pertaining to: (a) the management, operation and use of the Common Area including, without limitation, any recreational facilities situated on the Common Area; (b) traffic and parking restrictions including, without limitation, speed limits on private streets within the Property; (c) minimum standards for any maintenance of Common Area and the Lots; (d) uses of the Lots; (e) any other matters deemed to be in the best interest of the Association; or (f) any other aspects of the Association's rights, activities and duties. The Rules shall restrict and govern the use of the Property provided, however, that the Rules shall not discriminate among

Owners and shall not be inconsistent with this Declaration, the Articles, the Bylaws or the laws of the State of Arizona. A copy of the Rules, as they may from time to time be adopted, amended or repealed, shall be mailed or otherwise delivered to each Owner. The Rules shall have the same force and effect as if they were set forth herein and were a part of this Declaration.

4.6 Personal Liability. The liability of the members of the Board of Directors of the Association shall be limited to the greatest extent allowed by law.

4.7 Procedure for Change of Use of Common Area. Upon: (a) the adoption of a resolution by the Board stating that the then current use of a specified part of the Common Area is no longer in the best interests of the Owners and Members, and (b) the approval of such resolution by Members casting a majority of the votes entitled to be cast by Class A Members who are present in person or by absentee ballot at a meeting duly called for such purpose and who are entitled to use such Common Area under the terms of this Declaration, the Board shall have the power and right to change the use thereof (and in connection therewith to take whatever actions are required to accommodate the new use), provided such new use: (i) also shall be for the common benefit of the Owners and Members, and (ii) shall be consistent with any recorded tract declaration, deed restrictions or zoning regulations. Alternatively, the Board, upon satisfaction of Section 4.7 (a) above, may in lieu of calling a meeting notify in writing all Members of the proposed transaction and of their right to object thereto, and if no more than ten percent (10%) of the Class A Membership eligible to vote object in writing within thirty (30) days after receipt of such notice, the proposed transaction shall be deemed approved by the Members and a meeting of the Members shall not be necessary.

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4.8 Procedure for Transfers of Common Area. The Association shall have the right to dedicate or transfer all or any part of the Common Area: (a) if the transfer or dedication does not have a substantial adverse effect on the enjoyment of the Common Area by the Owners and Members, or (b) if required by a recorded subdivision plat, a zoning stipulation or an agreement with the City of Scottsdale effective prior to the date hereof. Except as authorized in (a) or (b) above, no such dedication or transfer shall be effective without the approval of the Owners representing two-thirds (2/3) of the votes in each class of Members. Notwithstanding the preceding sentence or any other provision of this Declaration to the contrary, the Association has the right, without the consent of the Owners or any other Person (except Declarant, whose consent shall be required so long as Declarant or a Related Entity owns or has a Recorded option to purchase any part of the Property or of the Additional Property), to dedicate portions of the Common Area to the public, or grant easements over, under or through portions of the Common Area to the public, to any municipal or other governmental agency or entity, or to any public, quasi-public or private utility company, for use as right-of-way, for utilities, for public landscape purposes and the like, as may be required or requested by the City of Scottsdale or any municipal or other governmental agency or entity having jurisdiction, or by a public, quasi-public or private utility company, in connection with or at the time of the development of portions of the Property or of portions of the Additional Property.

4.9 Procedure For Other Changes to Common Area. The Association shall have the right to change the size, shape or location of the Common Area or to exchange the Common Area for other property or interests which become Common Area upon: (a) the adoption of a resolution by the Board stating that ownership and/or use of the relevant Common Area is no longer in the best interests of the Owners and Members, and that the change desired shall be for their benefit and shall not substantially adversely affect them, and (b) the approval of such resolution by Members casting a majority of the votes entitled to be cast by Members who are present in person or by absentee ballot at a meeting called for such purpose. Alternatively, the Board, upon satisfaction of Subsection (a) above, may notify in writing all Members of the proposed transaction and of their right to object thereto and, if no more than ten percent (10%) of the Members eligible to vote object in writing within thirty (30) days after receipt of such notice, the proposed transaction shall be deemed approved by the Members and a meeting of the Members shall not be necessary.

4.10 Easements. In addition to the easements specifically granted or reserved herein, the Association is authorized and empowered to grant upon, across or under the Association Property such permits, licenses, easements and rights-of-way for sewer lines, water lines, underground conduits, storm drains, television cable security lines, roadways and other similar public or private purposes, as may be reasonably necessary and appropriate, as determined by the Board.

5. Membership and Voting Rights.

5.1 Membership. Every ^{Unofficial Document} of a Lot shall be a Member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot.

5.2 Voting Rights. The Association shall have two (2) classes of voting Membership:

5.2.1 Class A. "Class A" Members shall be all Owners and Homebuilder, with the exception of the Declarant. Each Owner shall be entitled to one (1) vote for each Lot owned. When more than one (1) Person holds an interest in any Lot, all such Persons shall be Members. The vote for such Lot shall be exercised as the Owners of such Lot determine among themselves, but in no event shall more than one (1) vote be cast with respect to any Lot.

5.2.2 Class B. The "Class B" Member shall be the Declarant, who shall be entitled to three (3) votes for each Lot owned. The Class B Membership shall cease and be converted to Class A on the Transition Date.

5.3 Declarant's Control of Association. Notwithstanding anything in this Declaration to the contrary, Declarant shall maintain absolute control over the Association, including appointment and removal of the President, the members of the Board, and the members of the Architectural Committee, until the Transition Date. Declarant voluntarily may (but shall not be required to) permit the Owners to assume control of the Association at any time by

notifying the Association in writing. Declarant may relinquish partial control without relinquishing full control at any time, in its sole and absolute discretion.

6. Covenant for Maintenance Assessments.

6.1 Creation of Lien and Personal Obligation of Assessments. The Declarant, for each Lot, hereby covenants and agrees, and each Owner, other than the Declarant, by becoming the Owner of a Lot, is deemed to covenant and agree, to pay Assessments to the Association in accordance with this Declaration. A Lot owned by the Association shall not be subject to Assessments. All Assessments, together with interest and all costs, including, without limitation, reasonable attorneys' fees, incurred by the Association in collecting or attempting to collect delinquent Assessments, whether suit is filed, shall be a charge on the Lot and shall be a continuing lien thereon as well as the personal obligation of the Person who was the Owner of the Lot at the time when the Assessments fell due. The personal obligation for delinquent Assessments shall not pass to any such Owner's successors in title, unless expressly assumed.

6.2 Annual Assessments. To provide for the operation and management of the Association and to provide funds for the Association to pay for the improvement, maintenance and replacement of the Common Area, and to perform the Association's duties and obligations under this Declaration, the Articles and the Bylaws, including, without limitation, the establishment of reasonable reserves for replacements, maintenance and contingencies, the Board, for each fiscal year, shall assess an Annual Assessment against each Lot (except for Exempt Property), which shall be determined in accordance with Section 6.3. Unofficial Document

6.3 Maximum Annual Assessment. The Annual Assessments provided for herein shall not at any time exceed the Maximum Annual Assessment, as determined in accordance with this Section 6.3. The "*Maximum Annual Assessment*" for each fiscal year of the Association shall be as follows:

6.3.1 Prior to the fiscal year ending December 31, 2016, an Annual Assessment shall be established, and shall be payable in monthly installments.

6.3.2 Following the fiscal year ending December 31, 2016, the Maximum Annual Assessment for any fiscal year shall be equal to the Maximum Annual Assessment for the immediately preceding fiscal year increased at a rate equal to the greater of: (a) the percentage increase for the applicable fiscal year over the immediately preceding fiscal year in the Consumer Price Index -- All Urban Consumers -- All Items (1982-1984 Average = 100 Base) published by the Bureau of Labor Statistics of the U.S. Department of Labor (or its successor governmental agency), or, if such index is no longer published by said Bureau or successor agency, in the index most similar in composition to such index; or (b) ten percent (10%). The foregoing notwithstanding, the Board has no obligation to increase the Annual Assessment to the amount of the Maximum Annual Assessment.

6.3.3 In addition to Section 6.3.2 above, the Maximum Annual Assessment during each fiscal year of the Association shall be automatically increased by the amounts of any increases in water or other utility charges or any increases to insurance rates charged to the Association;

6.3.4 From and after January 1, 2017, the Maximum Annual Assessment may be increased above the amount indicated in Sections 6.3.2 and 6.3.3 above by the approval of Members casting a majority of the votes entitled to be cast by Members who are present in person, by absentee ballot, or in any other manner allowed by law, at a meeting duly called for such purpose;

6.3.5 The Board of Directors may fix the rate at an amount not in excess of the maximum rate set forth in this Section; and

6.3.6 In no event shall the Annual Assessment be increased by an amount that is more than twenty percent (20%) greater than the immediately prior year's Annual Assessment without the approval of the majority of the Members of the Association.

6.4 Special Assessments for Capital Improvements. In addition to the Annual Assessments authorized above, the Association may levy, in any Assessment year, a Special Assessment for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Common Area, including fixtures and personal property Unofficial Document thereon, or for any other valid Association purpose; provided, however, that any such Special Assessment must be approved at a meeting duly called for such purpose by at least two-thirds (2/3) of the votes of each class of Members who are represented at that meeting, in person, by absentee ballot, or any other manner allowed by law.

6.5 Enforcement Assessment. The Association may impose against an Owner as an Enforcement Assessment the following expenses: (a) any Collection Costs incurred by the Association in attempting to collect Assessments or other amounts payable to the Association by the Owner; and (b) any Enforcement Costs. The Enforcement Assessment shall be automatically imposed against an Owner at such time as the Collection Costs or Enforcement Costs or other amounts are incurred by the Association or, in the case of a monetary penalty, the date the monetary penalty is imposed on the Owner by the Board. All Collection Costs and Enforcement Costs shall be collectible in the same manner as Annual Assessments.

6.6 Notice and Quorum for an Action Authorized Under Sections 6.3 and 6.4. Written notice of any meeting called for the purpose of taking any action authorized under Sections 6.3 and 6.4 above, shall be sent to all Members not fewer than fifteen (15) days nor more than sixty (60) days in advance of the meeting. At the first such meeting called, the presence of Members (whether in person, by absentee ballot, or any other manner allowed by law) entitled to cast a majority of the votes of each class of Members shall constitute a quorum. If the required quorum is not present, another meeting may be called subject to the same notice requirement, and the required quorum at the subsequent meeting shall be one half (1/2) of the

required quorum at the preceding meeting. No such subsequent meeting shall be held more than sixty (60) days following the preceding meeting.

6.7 Assessments.

6.7.1 Regular Assessments. Except as provided herein, the Annual Assessment must be fixed at a uniform rate for all Lots and may be collected on a monthly basis, or other basis as designated by the Board. Anything in this Declaration to the contrary notwithstanding, Declarant shall pay twenty-five percent (25%) of the Assessment for each Lot that Declarant owns in equal monthly installments in the same manner established for payment of the amount by other Lot Owners, except that Declarant shall pay and be liable for the full Assessment amount for any Lots owned by Declarant that are being used by Declarant as model homes or otherwise being used and occupied for residential purposes, but not sooner than the First Conveyance. Notwithstanding the above, any Homebuilder shall pay one hundred percent (100%) of the Assessment for each Lot such builder owns or leases.

6.7.2 Deficits. In the event that the Assessments set forth herein are insufficient to meet the operating and business expenses of the Association, the Association shall give notice to the Declarant of such insufficiency and the Declarant shall subsidize the difference; provided, however, that Declarant's subsidy obligation set forth herein shall automatically terminate on the Transition Date. Notwithstanding any other provision of this Section, in no event shall the subsidy and Assessments paid by Declarant per year exceed the total amount of Annual Assessments that Declarant would have paid had Declarant been required to pay the full Annual Assessment set forth in Section 6.7.1.

6.8 Date of Commencement of Annual Assessment(s): Due Date. The Annual Assessments provided for herein shall commence as of the date of the First Conveyance. The first Annual Assessment shall be adjusted according to the number of months remaining in the calendar year. The Board of Directors shall fix the amount of the Annual Assessment against each Lot at least thirty (30) days in advance of each Assessment period. The Board of Directors shall give written notice of the Annual Assessment. The Association shall, upon demand, and for a reasonable charge, furnish a certificate signed by an officer of the Association setting forth whether the Assessments on a specified Lot have been paid. A properly executed certificate from the Association as to the status of any Assessment on a Lot is binding upon the Association as to the matters described therein.

6.9 Reserve Fund Contribution. In addition to all other Assessments set forth herein, each Owner (other than Declarant or any Related Entity) shall pay a Reserve Fund Contribution equal to one-sixth (1/6th) of the Annual Assessment (the "*Reserve Fund Contribution*") to the Association at the time of purchasing a Lot. The Reserve Fund Contribution shall be collectible at the close of escrow and shall be subject to the same lien rights as the Annual Assessments. The Reserve Fund Contribution shall be used to contribute to funding the reserve fund to pay for repairs, replacement and capital improvements to the Common Area of the Association. Furthermore, any funds collected through the Reserve Fund

Contribution shall not be used until after the period of Declarant control. Payments made pursuant to this Section shall be non-refundable and shall not be considered as an advance payment of any Assessments. Payments made pursuant to this Section shall be deemed a contribution to the reserves of the Association.

6.10 Effect of Non-Payment of Assessments: Remedies of the Association.

Any Assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of ten percent (10%) per annum or such higher rate that is equivalent to the maximum rate allowed by law. In addition, to the extent permitted by applicable law, the Board may establish a late fee to be charged to any Owner who has not paid any Assessment, or any installment of an Assessment, within thirty (30) days after such payment was due. No Owner may waive or otherwise escape liability for the Assessment provided for herein by non-use of the Common Area or abandonment of such Owner's Lot. The Association may exercise any and all remedies allowed by law for collection of assessments, and the exercise of the Association of one or more remedies shall not prevent the Association from exercising any other available remedies.

6.10.1 Enforcement by Suit. In accordance with applicable law, the Board may cause a suit at law to be commenced and maintained in the name of the Association against an Owner to enforce each such Assessment obligation. Any judgment rendered in any such action shall include the amount of the delinquency together with interest thereon at the rate of ten percent (10%) per annum or such higher rate that is equivalent to the maximum rate allowed by law, from the date of delinquency, court costs, and reasonable attorneys' fees in such amount as the court may adjudge against the delinquent ^{Unofficial Document} Owner, and all other Collection Costs.

6.10.2 Enforcement by Lien. In accordance with applicable law, the Association shall have a lien on each Lot for all Assessments levied against the Lot and for all other fees and charges payable to the Association by the Owner of the Lot pursuant to this Declaration. Recording of this Declaration constitutes record notice and perfection of the Assessment Lien. The Association may, at its option, Record a notice of lien setting forth the name of the delinquent Owner as shown in the records of the Association, the legal description or street address of the Lot against which the notice of lien is Recorded and the amount claimed to be past due as of the date of the Recording of the notice, including interest, lien recording fees and reasonable attorneys' fees. The Assessment Lien shall have priority over all liens or claims except for: (a) tax liens for real property taxes; (b) assessments in favor of any municipal or other governmental body; and (c) the lien of any First Mortgage. The Association shall not be obligated to release any Recorded notice of lien until all delinquent Assessments, interest, lien fees, Collection Costs and all other sums payable to the Association by the Owner of the Lot have been paid in full.

To the extent permitted by applicable law, any such lien may be foreclosed by appropriate action in court in the manner provided by law for the foreclosure of a realty mortgage, as set forth by the laws of the State of Arizona, as the same may be changed or amended. The lien provided for herein shall be in favor of the Association and shall be for the benefit of all Owners except for the defaulting Owner. The Association shall have the power to bid at any foreclosure or trustee's sale and to purchase, acquire, hold, lease, mortgage and convey any such Lot. In the event of

such foreclosure or trustee's sale, reasonable attorneys' fees, court costs, trustee's fees, title search fees, interest and all other Collection Costs shall be allowed to the extent permitted by law. Each Owner, by becoming an Owner of a Lot, hereby expressly waives any objection to the enforcement and foreclosure of any such lien in this manner.

6.11 Subordination of the Lien to First Mortgages. The lien of the Assessments provided for herein shall be subordinate to the lien of any First Mortgage. Sale or transfer of any Lot shall not affect the Assessment Lien. However, the sale or transfer of any Lot due to the foreclosure of a First Mortgage, or trustee's sale of a First Mortgage, or any proceeding in lieu thereof, shall extinguish the lien of such Assessment as to payments that become due prior to such sale or transfer. No such sale or transfer of a Lot shall relieve the subsequent Owner of the Lot from liability for any Assessments thereafter becoming due or from the lien thereof.

6.12 Working Capital Contribution. In addition to all other Assessments set forth herein, each Owner (other than Declarant or any Related Entity) shall pay a Working Capital Contribution equal to one-sixth (1/6th) of the Annual Assessment (the "*Working Capital Contribution*") to the Association at the time of purchasing a Lot. The Working Capital Contribution shall be collectible at the close of escrow and shall be subject to the same lien rights as the Annual Assessments. The Working Capital Contribution shall be used to pay operating expenses of the Association, or any other purpose permitted under this Declaration, the Bylaws or the Articles. Payments made pursuant to this Section shall be non-refundable and shall not be considered as an advance payment of any Assessments. Payments made pursuant to this Section shall be deemed a contribution to the capital of the Association.

6.13 Transfer Fee. In addition to all other Assessments set forth herein, each Owner (other than Declarant or any Related Entity) shall pay a Transfer Fee to the Association in such amount as is established from time to time by the Board (the "*Transfer Fee*") to defray administrative costs associated with transfer of ownership of a Lot, changing the Association's (and any association manager's) records and the like. The Transfer Fee is not intended to compensate the Association for the costs incurred in the preparation of the statement which the Association is required to mail or deliver to a purchaser under A.R.S. § 33-1806A and, therefore, the Transfer Fee shall be in addition to the fee which the Association is entitled to charge pursuant to A.R.S. § 33-1806C.

7. Architectural Committee. The Board may establish an Architectural Committee which, if established, shall consist of at least three (3) persons, none of whom shall be required to be an architect, officer or Director of the Association or to meet any other particular qualifications other than as provided in Section 7.1 below. If the Board does not establish an Architectural Committee or eliminates the Architectural Committee, the rights and duties of the Architectural Committee shall remain with the Board.

7.1 Membership. Declarant shall appoint all of the original members of the Architectural Committee, if established, and all replacements thereof until the first anniversary of the First Conveyance. Thereafter, Declarant shall have the right to appoint the members of the

Architectural Committee until the Transition Date. Thereafter, the Board shall have the power to appoint all the members of the Architectural Committee. Members appointed to the Architectural Committee need not be Members of the Association.

7.2 Duties of Architectural Committee. Subject to Board approval, as provided in Section 7.8 below, it shall be the duty of the Architectural Committee to consider and act upon any and all architectural and landscape proposals or plans submitted pursuant to the terms of the Declaration, to ensure that all improvements constructed on the Property by anyone other than Declarant (or any Related Entity) conform to plans approved by the Architectural Committee, and to perform other duties imposed upon it by the Board.

7.3 Meetings. The Architectural Committee, once established, shall meet from time to time as necessary to perform its duties hereunder. Subject to the approval of the Board, the vote or written consent of a majority of the members of the Architectural Committee, at a meeting or otherwise, shall constitute the act of the Architectural Committee unless the unanimous decision of the Architectural Committee is required by any other provision of the Declaration. The Architectural Committee shall keep and maintain a written record of all actions taken by it at such meetings or otherwise. Members of the Architectural Committee shall not receive any compensation for services rendered.

7.4 Assignment of Rights. The Architectural Committee, may, from time to time and in its sole discretion, assign its rights and duties under this section to a third party, or hire an independent professional to review ^{Unofficial Document} plans submitted by an Owner. If the Architectural Committee opts to assign its rights and duties to a third party, or hires an independent professional to review plans, as provided herein, the Architectural Committee may charge the costs of such assignment to the Owner who submitted the architectural and/or landscape proposals or plans for review. Such charges may be established in the Architectural and Landscape Design Guidelines. Any plans submitted by an Owner will not be considered complete until any charges imposed by the Architectural Committee are paid to the Association.

7.5 Architectural and Landscape Design Guidelines. The Board may, from time to time, adopt, amend and repeal rules and regulations to be known as "*Architectural and Landscape Design Guidelines*." The Architectural and Landscape Design Guidelines shall interpret and implement the Declaration by setting forth the standards and procedures for Architectural Committee review, the guidelines for design and placement of improvements, as well as all other duties of the Architectural Committee as particularly set forth in Section 7.2 above.

7.6 Waiver. The approval by the Architectural Committee, or a third party hired by the Architectural Committee, of any plans, drawings or specifications for any work done or proposed, or for any other matter requiring the approval of the Architectural Committee, shall not be deemed to constitute a waiver of any right to withhold approval of any similar plan, drawing, specification or matter subsequently submitted for approval.

7.7 Liability. Neither the Architectural Committee nor any member thereof, nor any third party hired by the Architectural Committee, shall be liable to the Association, any Owner or to any other party, for any damage, loss or prejudice suffered or claimed on account of: (a) the approval or disapproval of any plans, drawings or specifications; or (b) the construction or performance of any work, whether pursuant to approved plans, drawings and specifications.

7.8 Board Approval. All decisions of the Architectural Committee shall be subject to final approval by the Board of Directors. Upon rendering a decision with regards to an architectural and/or landscape submission, the Architectural Committee shall submit its decision to the Board of Directors for approval. The Board shall then inform the submitting party of the final decision. If the Board does not provide the Owner with a written response within sixty (60) days from the Association's receipt of a complete submittal, which includes all costs owed by the Owner to the Association relating to such submittal, the request will be deemed approved. As provided in Section 7.2 above, the Declarant shall be exempt from obtaining approval of the Architectural Committee or the Board of Directors for any improvements made by the Declarant (or any Related Entity).

7.9 Appeal. In the event plans and specifications submitted to the Architectural Committee are disapproved, the party or parties making such submission may appeal in writing to the Board within thirty (30) days following the issuance of the notice sent to the Owner of the final decision. The Board shall consult with the Architectural Committee regarding its decision, whose recommendations shall be submitted to the Board. Within forty-five (45) days following the Board's receipt of the request for appeal, the Board shall render its written decision, which decision shall be final. Failure of the Board to render a decision within said forty-five (45) day period shall be deemed approval of the submission.

8. Use Restrictions.

8.1 Permitted Uses and Restrictions - Residential. The permitted uses, easements and restrictions for all Property covered by this Declaration shall be as follows:

8.1.1 Single Family Residential Use. All Lots shall be used, improved and devoted exclusively to single family residential use. No gainful occupation, profession, trade or other non-residential use shall be conducted thereon excepted as provided for in Section 8.1.2 below. Nothing herein shall be deemed to prevent the leasing of any Lot with the improvements thereon to a single family from time to time by the Owner thereof, subject to all of the provisions of this Declaration. No structure whatsoever shall be erected, placed or permitted to remain on any Lot without the expressed written approval of the Architectural Committee. The Architectural Committee shall consider requests for construction of a Detached Structure. Written approval by the Architectural Committee of any Detached Structure must be obtained prior to the construction of any Detached Structure. All Detached Structures, if permitted by the Architectural Committee, must comply with all guidelines established for Detached Structures, whether contained in this Declaration or in any rules established by the Architectural Committee and/or the City of Scottsdale. Anything in this Declaration to the contrary notwithstanding,

Declarant, Homebuilder or any entity related to Declarant or Homebuilder (a "Related Entity") shall have the right to use any Lot owned or leased by Declarant, Homebuilder or a Related Entity for purposes related to the development and marketing of the Property and/or other property owned by Declarant, Homebuilder or a Related Entity, and the sale of Lots and/or Dwelling Units on the Property or other property owned by Declarant, Homebuilder or a Related Entity, including, without limitation, the right to place a temporary structure (e.g., a temporary sales or construction trailer), store construction materials and construct and use model homes on any such Lots.

8.1.2 Trade or Business. No trade or business may be conducted on any Lot or in or from any Dwelling Unit, except that an Owner or Resident may conduct a business activity in a Dwelling Unit so long as: (a) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Dwelling Unit; (b) the business activity is a legal activity and conforms to all applicable zoning ordinances or requirements for the Property; (c) the business activity does not involve persons, clients or customers coming to the Lot or Dwelling Unit or the door-to-door solicitation of Owners or other Residents at the Property; (d) the use of the Dwelling Unit for trade or business in no way destroys or is incompatible with the residential character of the Dwelling Unit or the Property; (e) the trade or business must be conducted only inside the Dwelling Unit and may not involve the viewing, purchasing or taking delivery of goods or merchandise at, to, from or in any Dwelling Unit; (f) the trade or business shall be conducted by a Resident or Residents of the Dwelling Unit; (g) no more than twenty percent (20%) of the total floor area of the Dwelling Unit may be used for trade or business; (h) the Dwelling Unit used for trade or business shall not be used as a storage facility for a business conducted elsewhere; (i) a trade or business must not utilize flammable liquids or hazardous materials in quantities not customary to a residential use; (j) a trade or business must not utilize large vehicles not customary to a residential use; and (k) the use of the Dwelling Unit for a trade or business must not violate any other provision of the Declaration, the Articles, the Bylaws or the Rules. The terms "business" and "trade" as used in this Section 8.1.2 shall be construed to have ordinary, generally accepted meanings, and shall include, without limitation, any occupation, work or activity undertaken on an ongoing basis which involves the provision of goods or services to persons other than the provider's family and for which the provider receives a fee, compensation or other form of consideration, regardless of whether: (x) such activity is engaged in full or part time; (y) such activity is intended to or does generate a profit; or (z) a license is required for such activity. The leasing of a Dwelling Unit by the Owner thereof shall not be considered a trade or business within the meaning of this Section 8.1.2. Nothing in this Section 8.1.2 or this Declaration shall be construed as preventing Declarant or Homebuilder from using any Lot owned or leased by Declarant, Homebuilder or any Related Entity for any purpose associated with or related to the development of the Property, the construction of Dwelling Units and other improvements on the Property, marketing and sales activities associated with homebuilding and sales operations, or for the purposes set forth in this Declaration, the Articles or the Bylaws.

8.1.3 Antennas. Unless governed by 47 C.F.R. § 1.400 (Over-the-Air Reception Devices Rule), as amended, repealed, or recodified, no antenna or other device for the

transmission or reception of television, internet or radio signals or any other form of electromagnetic radiation or any associated equipment shall be erected, used or maintained outdoors on any Lot or Parcel or Common Area, whether attached to a building or structure or otherwise, so as to be Visible From Neighboring Property or the street, unless approved in writing by the Architectural Committee. Any device governed by 47 C.F.R. § 1.400 (Over-the-Air Reception Devices Rule), as amended, repealed, or recodified, shall comply with the applicable antenna installation rules of the Association and shall be mounted, to the extent reasonably possible, so as to not be Visible From Neighboring Property or the street.

8.1.4 Utility Service. All lines, wires or other devices for the communication or transmission of electric current or power, including, without limitation, telephone, television and radio signals, shall be contained in conduits or cables installed and maintained underground or concealed in, under or on buildings or other structures approved by the Architectural Committee. Temporary power or telephone structures incident to construction activities approved by the Architectural Committee are permitted. Solar panels and other solar energy devices will not be effectively prohibited by the Association. Rather, solar panels and other solar energy devices will be allowed, subject to prior written approval from the Architectural Committee. All such solar energy devices must be in conformance with the Architectural and Landscape Design Guidelines.

8.1.5 Improvements and Alterations. No improvement, alteration, landscaping, repair, excavation or other work which in any way alters the exterior appearance of the Property or the improvements located thereon from its natural or improved state existing on the date such Property was first conveyed by Declarant to a home buyer shall be made without the prior approval of the Architectural Committee, except as otherwise expressly provided in this Declaration, and except in emergency circumstances. Emergency circumstances shall include any circumstance in which personal injury or extensive damage to the Owner's property, neighboring property or the Common Area is likely to occur if alteration, improvement, repair, excavation or other work is not undertaken immediately. No building, fence, wall or other structure shall be erected, maintained, improved, altered, made or done (including choice of exterior color scheme and building materials) without the prior written approval of the Architectural Committee or any subcommittee thereof, except in emergency circumstances as provided above. Pursuant to its rule making power, the Architectural Committee shall establish a procedure for the preparation, submission and determination of applications for any such alteration or improvement. The Architectural Committee shall have the right, in its sole discretion, to refuse to approve any plans, specifications or grading plans, which are not suitable or desirable, for aesthetic or other reasons, and in so passing upon such plans, specifications and grading plans, and without any limitation of the foregoing, it shall have the right to take into consideration the suitability of the proposed building or other structure, the building materials used and the site upon which it is proposed to be erected, and the harmony thereof with the surroundings and the effect of the building or other structure as planned, and the appearance thereof from adjacent or neighboring Property. No changes or deviation in or from such plans and specifications once approved shall be made without the prior written approval of the Architectural Committee.

8.1.6 Installation and Maintenance of Lawns and Plantings. Declarant or Homebuilder may install the front yard landscaping on a Lot when a Dwelling Unit is constructed by Declarant, Homebuilder or a Related Entity on such Lot. Except as provided in the immediately preceding sentence, each Owner shall install, at its own expense, all other landscaping on a Lot (including, without limitation, front yard, if not installed by Declarant, side yard and backyard landscaping) within ninety (90) days after becoming an "Owner" under this Declaration. Each Owner shall maintain diligently, at its own expense, the landscaping on its Lot, keeping it free of weeds and debris. Lawns shall be neatly mowed and trimmed. Other vegetation, including, without limitation, trees, bushes and flowers, shall be neatly trimmed, and all dead vegetation shall be removed and replaced.

8.1.7 Repair of Buildings. No Dwelling Unit or any other improvement upon any Property shall be permitted to fall into disrepair, and each such Dwelling Unit or improvement shall at all times be kept in good condition and repair and adequately painted or otherwise finished. Notwithstanding the foregoing to the contrary, in no event shall an Owner apply any paint to the exterior of its Dwelling Unit, including, without limitation, window or other trim, doors, eaves, roof deck, fences or other exterior features or replace the exterior masonry or other surface installed by Declarant. In order to insure a uniform appearance of the Property, the Association will, from time to time, as it may determine appropriate, paint the exterior of the Dwelling Units and repair, maintain and replace the exterior walls, stucco, façade, roofs or other surfaces. In order for the Association to do so, it may be necessary for Declarant to have access to, in and through an Owner's Dwelling Unit. Any such access shall be coordinated with the Owner thereof, upon reasonable prior notice and only at reasonable times, except in an emergency where there is imminent danger to person or property. The Association shall promptly repair or replace any damage or destruction to the Dwelling Unit or contents thereof caused by such entry or work.

8.1.8 Trash Containers and Collection. No rubbish, trash or garbage shall be placed or kept on any Property except in covered sanitary containers, not Visible from Neighboring Property, and shall not be set out for collection except in community rubbish, trash or garbage containers (e.g., dumpsters) authorized by the Association. All rubbish, trash and garbage shall be removed from each Lot and shall not be allowed to accumulate thereon. No incinerators shall be kept or maintained on any Lot.

8.1.9 Overhangs. No tree, shrub or planting of any kind on any Property shall be allowed to overhang or otherwise to encroach upon any Common Area, sidewalk, or street, from ground level to a height of twelve (12) feet, without the prior approval of the Architectural Committee.

8.1.10 Machinery and Equipment. No machinery or equipment of any kind shall be placed, operated or maintained upon the Property except usual and customary equipment and machinery used in connection with the use, maintenance or construction of

permitted improvements, and except that which Declarant or the Association may require for the operation and maintenance of the Common Area. Outdoor decks, gazebos and other such equipment or structures shall be allowed provided they are approved by the Architectural Committee. Slides, playground equipment, basketball poles and hoops and other play equipment must first be approved by the Architectural Committee if the equipment protrudes over the fence line.

8.1.11 Restriction on Further Subdivision. No Lot shall be further subdivided or separated into smaller Lots or parcels by any Owner, and no portion less than all of any such Lot, shall be conveyed or transferred by any Owner, without the prior written approval of the Board. No Lot may be converted into a condominium or cooperative or other similar type of entity without the prior written approval of the Board. No further covenants, conditions, restrictions or easements shall be Recorded against any Lot without the written consent of the Board being evidenced on the Recorded instrument containing such restrictions, and without such approval such restrictions shall be null and void. No application for rezoning, variances or use permits shall be filed without the written approval of the Board and then only if such proposed use is in compliance with this Declaration. Notwithstanding anything to the contrary in this Declaration, none of the restrictions or prohibitions in this Section shall apply to Declarant.

8.1.12 Signs. For a period of one (1) year after the last Dwelling Unit in the Property is sold and has closed escrow, or, until January 1, 2018, whichever occurs earlier, no sign, banner, or any other type of advertising, including signs stating "For Rent", "For Lease", "For Lease to Own", or "For Sale" (other than a name address sign, not exceeding 9"x30" in size) shall be permitted on any Lot or on the exterior of any Dwelling Unit. Notwithstanding the foregoing portion of this Section 8.1.12, to the extent permitted by law, Members may display political signs but not earlier than forty-five (45) days prior to the applicable election or seven (7) days following such election. The Association may regulate the number and size of political signs in accordance with applicable law, including without limitation, Arizona Revised Statute Section 33-1808. The Declarant or Homebuilder or its designee or assignee may erect any signs during construction. These restrictions shall not apply to the Association in furtherance of its powers and purposes herein set forth.

8.1.13 Utility Easements. There is hereby created a blanket easement upon, across, over and under the Common Area for ingress, egress, installation, replacing, repairing and maintaining all utility and service lines and systems, including, without limitation, water, sewer, gas, telephone, electricity, television cable or communication lines and systems, and similar utility facilities. By virtue of this easement, it shall be expressly permissible for the providing utility or service company to install and maintain facilities and equipment, and to affix and maintain wires, circuits and conduits on, in and under roofs and exterior walls. Notwithstanding anything to the contrary contained in this paragraph, no sewers, electrical lines, water lines or other utilities or service lines may be installed or relocated except as initially developed and approved by the Declarant or thereafter approved by the Board. This easement shall in no way affect any other recorded easements. This easement shall be limited to improvements as originally constructed, and no common utility shall be permitted to pass over

any improvements on the Lots, and no connection line shall be permitted to pass over any improvement on the Lot other than the one it serves.

8.1.14 Animals. No animal, bird, fowl, poultry or livestock, other than a reasonable number of generally recognized house or yard pets, shall be maintained on any Lot or parcel and then only if they are kept or raised thereon solely as domestic pets and not for commercial purposes. No house or yard pet kept on the Lot shall be allowed to make an unreasonable amount of noise or to become a nuisance. No structure for the care, housing or confinement of any house or yard pet shall be maintained so as to be Visible From Neighboring Property. Upon the written request of any Member or Resident, the Board shall conclusively determine, in its sole and absolute discretion, whether, for purposes of this Section, a particular animal, bird, fowl, poultry or livestock is a generally recognized house or yard pet, whether such pet is a nuisance, or whether the number of such pets on any such Lot is unreasonable. Any such decision by the Board shall be enforceable in the same manner as any other restrictions contained herein. The Board may adopt reasonable rules and regulations as part of the Community Rules and Regulations regarding the number, size and types of pets allowed within the Property and on any Lot.

8.1.15 Temporary Occupancy. No temporary building, structure or vehicle of any kind shall be used as a residence, either temporary or permanent. Temporary buildings or structures used during construction periods shall be removed immediately after completion of such construction. The provisions of this Section shall not apply to Declarant or Homebuilder.

8.1.16 Trailers, Boats, Aircraft, and Motor Vehicles. Except as otherwise provided by law, no motor vehicle classified by manufacturer rating as exceeding one (1) ton, mobile home, trailer, camper shell, boat, boat trailer, hang glider or other similar equipment or vehicle may be parked, stored, maintained, constructed, reconstructed or repaired on any Lot, street or Common Area within the Property so as to be Visible from Neighboring Property; provided, however, the provisions of this Section 8.1.16 do not preclude the parking in garages of (a) vehicles or pickup trucks (with or without camper shells) providing the height of such vehicle or pickup truck and camper shall not exceed seven (7) feet, or (b) mini motor homes or other recreation vehicles which do not exceed seven (7) feet in height or eighteen (18) feet in length, if those vehicles described in (a) and (b) are used on a regular and recurring basis for basic transportation and are not Commercial Vehicles. Commercial Vehicles shall be defined as any vehicle that meets any one or more of the following criteria: any type of signage, design or lettering for advertising exceed three (3) square feet, vehicle classed by manufacturer's rating as exceeding one-ton, commercial racks located on the vehicle, or work equipment stored on the vehicle that is visible from outside of the vehicle. No automobile, motorcycle, motor bike, motorized hang glider or other motor vehicle shall be constructed, reconstructed or repaired on any Lot, street or Common Area within the Property and no inoperable vehicle may be stored or parked so as to be Visible from Neighboring Property, except on a temporary basis in the event of an emergency. For purposes of this section, an "inoperable vehicle" shall be defined as any

vehicle without current required license plates and tags, or that is unused, stripped, scrapped, junked, discarded, dismantled, on blocks or similar devices, or vehicles with deflated tires.

8.1.17 Nuisances/Construction Activities. No rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to a Lot, and no odors or loud noises shall be permitted to arise or emit therefrom, so as to create a nuisance, render any such Property or any portion thereof or activity thereon unsanitary, unsightly, offensive or detrimental to the Lot or person in the vicinity thereof. Without limiting the generality of any of the foregoing provisions, no speakers, horns, whistles, bells or other sound devices, except security devices used exclusively for security purposes, shall be located, used or placed on any such Property. No motorcycles or motor driven vehicles (except lawn maintenance equipment) shall be operated on any walkways or sidewalks within the Property. The Board in its sole discretion shall have the right to determine the existence of any violation of this Section 8.1.17 and its determination shall be final and enforceable as provided herein. Normal construction activities shall not be considered a nuisance or otherwise prohibited by this Declaration, but Lots shall be kept in a neat and tidy condition during construction periods. Supplies or building materials and construction equipment shall be stored only in such areas and in such manner as may be approved by the Architectural Committee or the Declarant. The provisions of this Section shall not apply to Declarant or Homebuilder.

8.1.18 Clothes Drying Facilities. Outside clotheslines or other outside facilities for drying or airing clothes shall not be erected, placed or maintained on any Property unless they are erected, placed or maintained ^{Unofficial Document} exclusively within a fenced service yard and are not Visible from Neighboring Property.

8.1.19 Mineral Exploration. No Property shall be used in any manner to explore for or to remove any water, oil or other hydrocarbons, minerals of any kind, gravel, earth or any earth substance of any kind.

8.1.20 Diseases and Insects. No Owner or Resident shall permit anything or condition to exist upon the Property that shall induce, breed or harbor infectious plant diseases or noxious insects.

8.1.21 Party Walls and/or Fences. Subject to the provisions of Section 3.6 above, the rights and duties of each Owner with respect to Party Walls and/or Fences shall be as follows:

8.1.21.1 Owners of contiguous Lots who have a Party Wall and/or Fence shall both equally have the right to use such wall or fence, provided that such use does not interfere with the use and enjoyment thereof by the other Owner.

8.1.21.2 If any Party Wall and/or Fence is damaged or destroyed through the act of an Owner, its agents, guests or family members, it shall be the obligation of such Owner to rebuild and repair the Party Wall and/or Fence without cost to the

other adjoining Owner or Owners. Any dispute over an Owner's liability shall be resolved as provided in Section 8.1.21.5 below.

8.1.21.3 If any Party Wall and/or Fence is destroyed or damaged (including deterioration from ordinary wear and tear and lapse of time), other than by the act of an adjoining Owner, its agents, guests or family members, it shall be the joint obligation of all Owners whose Lots adjoin such wall or fence to rebuild and repair such wall or fence, such expense to be divided among the Owners on a pro rata basis in accordance with the length of the frontage of their respective Lots on the Party Wall and/or Fence.

8.1.21.4 Notwithstanding anything to the contrary herein contained, there shall be no impairment of the structural integrity of any Party Wall and/or Fence without the prior written consent of the Board.

8.1.21.5 If a dispute arises between Owners about the construction, repair or rebuilding of a Party Wall and/or Fence or the sharing of the cost thereof, such adjoining Owners shall submit the dispute to the Board, the decision of which shall be final and enforceable.

8.1.21.6 Each Owner shall permit the Owners of adjoining Lots or their representatives, when reasonably required to enter its Lot for the purpose of repairing or maintaining a Party Wall and/or Fence or for the purpose of performing installation, alterations or repairs to the Property of such adjoining Owners, provided that requests for entry are made in advance and that such entry is at a time reasonably convenient to the Owner. In case of an emergency, such right of entry shall be immediate. An adjoining Owner making entry pursuant to the terms of this subsection shall not be deemed guilty of trespass by reason of such entry.

8.1.21.7 Surfaces of Party Walls and/or Fences that are generally accessible or viewable from only the adjoining Property, may be planted against, painted, maintained and used by the adjoining Owners, so long as such use does not damage the Party Wall and/or Fence. If such surfaces are viewable from public streets or the Common Area, the color scheme shall not be changed without the written consent of the Architectural Committee.

8.1.21.8 The Owner of a Lot having a wall or fence adjacent to the Common Area that separates the Lot from the Common Area, shall be considered to have a Party Wall and/or Fence with the Association and the provisions of this Section 8.1.21 shall apply as though the Common Area were an adjacent Lot.

8.1.21.9 The Owners with a wall adjacent to a street, or adjoining property, other than Lots or Common Area within the Property, shall be solely responsible for repair and maintenance of such wall, and if repair is necessary, the repaired wall must match the size, color and texture of the existing adjacent walls within the Property.

8.1.22 Drainage Easement. There is hereby created a blanket easement for drainage of groundwater on, over and across the Common Area and the Lots. No Owner or other Person shall erect, construct, maintain, permit or allow any fence, landscaping or other improvement or other obstruction, diversion of water or alteration of grading which would interrupt the normal drainage (a) of a Lot from its natural or improved state existing on the date that Lot was first conveyed by the Declarant to an Owner, (b) of a Common Area, or (c) within any area designated on the plat described in Section 1.12 above as a "Drainage Easement" (or similar designation). Each Owner shall, at its own expense, maintain the drainage ways and channels on its Lot in proper condition free from obstruction. Notwithstanding the foregoing, in emergency circumstances, the Association may, but has no obligation to, maintain the drainage ways and channels on each Owner's Lot. Emergency circumstances shall include any circumstance in which personal injury or extensive damage to the Owner's property, neighboring property or the Common Area is likely to occur if maintenance, improvement, repair or other work is not undertaken immediately.

8.1.23 Parking. To the extent permitted by law, it is the intent of the Declarant to prohibit on street parking within the Property (other than for emergency or utility vehicles pursuant to separate and specific easement rights or legal entitlement). Vehicles of all Owners, Residents, guests and invitees are to be kept in garages. On-street parking within the Property is not allowed. On-street parking outside the Property may be available. Enforcement of parking and access and all Rules relating to parking and access shall be the responsibility of the Association.

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8.1.24 Right of Entry. During reasonable hours and upon reasonable notice to the Owner or Resident of a Lot, any Member or authorized representative of the Architectural Committee or the Board shall have the right to enter upon and inspect any Lot or improvements thereon, except for the interior portions of any completed improvements, to determine if the improvements are in compliance with this Declaration. Any such persons shall not be deemed guilty of trespass by reason of such entry.

8.1.25 Health, Safety and Welfare. If uses, activities and facilities are deemed by the Board to be a nuisance or to affect adversely the health, safety or welfare of Owners or Residents, the Board may make rules restricting or regulating their presence as part of the Community Rules and Regulations or may direct the Architectural Committee to make rules governing their presence on Lots as part of the Architectural and Landscape Design Guidelines.

The Association shall strive to maintain the residential areas of the Property as a safe residential environment. HOWEVER, NEITHER THE BOARD, THE ASSOCIATION NOR DECLARANT SHALL BE HELD LIABLE FOR ANY LOSS OR DAMAGE BY REASON OF FAILURE TO PROVIDE ADEQUATE SECURITY OR FOR INEFFECTIVENESS OF SECURITY MEASURES UNDERTAKEN. ALL OWNERS, RESIDENTS, TENANTS, AND THEIR GUESTS AND INVITEES, AS APPLICABLE, ACKNOWLEDGE THAT THE BOARD, THE ASSOCIATION AND DECLARANT, AND COMMITTEES ESTABLISHED BY ANY OF THE FOREGOING ENTITIES, ARE NOT INSURERS AND THAT EACH

OWNER, RESIDENT, TENANT, GUEST AND INVITEE ASSUMES ALL RISK OF LOSS OR DAMAGE TO PERSONS, TO PROPERTY, TO LOTS, TO RESIDENCES AND TO THE CONTENTS OF LOTS AND RESIDENCES AND FURTHER ACKNOWLEDGES THAT DECLARANT HAS MADE NO REPRESENTATIONS OR WARRANTIES NOR HAS ANY OWNER, RESIDENT, TENANT, GUEST OR INVITEE RELIED UPON ANY REPRESENTATION OR WARRANTY, EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, RELATIVE TO ANY SECURITY MEASURES THAT MAY BE RECOMMENDED OR TAKEN.

8.1.26 Declarant's Exemption. Nothing contained in this Declaration shall be construed to prevent the erection or maintenance by Declarant or Homebuilder, or their duly authorized agents, of improvements or signs necessary or convenient to the development or sale of Lots within the Property.

8.1.27 Storage Sheds. Storage sheds shall not exceed six (6) feet in height and shall not be Visible from Neighboring Property or the street. The color of the storage shed shall match the color of the house body or be a neutral beige or eggshell color, and the color and composition of the roofing material of the storage shed shall match the color and composition of the roofing material of the house.

8.1.28 Model Homes. The provisions of this Declaration which prohibit nonresidential use of Lots and regulate parking ^{Unofficial Document} or vehicles shall not prohibit the construction and maintenance of model homes, sales offices, administrative offices and parking areas incidental thereto by Declarant or Homebuilder and their designees engaged in the construction or marketing of Dwelling Units in the Property.

8.1.29 Leases and Non-Owner Occupants. Any agreement for the lease of a Lot must be in writing and must be expressly subject to this Declaration. Any violation of this Declaration shall be deemed a default under the lease. All leases shall be required to be in writing and shall be for a term of one (1) year or more. Prior to the commencement of any lease for the entire Lot, the Owner shall notify the Association regarding the existence of the lease, and shall submit a "rental registration form" to the Association for each new tenant and each new lease, including lease renewals, in a form prepared for the Association by the Board of Directors. Instructions regarding obtaining this form can be found in the Community Rules and Regulations. If the lease is only for part of the Lot, and the Owner will also continue to occupy the Lot, the Owner need not submit the rental registration form. The Owner shall notify the Association upon the termination of any lease. No more than twenty percent (20%) of the Lots in the Property shall be leased in their entirety or entirely occupied by a non-Owner occupant at any given time. The Board of Directors shall have the power to deny the lease of any Owner if twenty percent (20%) of the Lots in the Property are leased in their entirety at the time such Owner submits a rental registration form. Any lease for only a portion of a Lot shall not count toward the twenty percent (20%) cap so long as the Owner continues to reside within the Lot and the lease does not violate any laws or ordinances. Any Owner who leases or allows a non-owner

to occupy all or part of their Lot shall remain liable for compliance with the Declaration, the Articles, the Bylaws and any other set of Rules, regulations and guidelines regarding the Property and shall be responsible for any violations thereof by its tenant or its tenant's family, guests and invitees.

8.1.30 Construction. As long as Declarant or a Related Entity owns or has a Recorded option to purchase one or more Lots, all Dwelling Units on the Property must be constructed by Declarant or its designees. Notwithstanding anything to the contrary in this Declaration, this Section 8.1.30 can be amended, changed, waived or terminated only by Declarant by executing an instrument in recordable form that is Recorded.

8.1.31 Rooftop Equipment. No air conditioning units, heating units, or evaporative coolers shall be mounted on any roof unless originally installed by Declarant.

8.1.32 No Modification by Private Agreement. No private agreement of any Owner(s) shall modify or abrogate any of these Covenants or the obligations, rights and duties of the Owners hereunder.

8.1.33 Gates. If so elected by Declarant, the Property may be equipped with entry gates. As long as Declarant, Homebuilder or a Related Entity owns or has a Recorded option to purchase one or more Lots, the entry gates will be opened and closed at the times determined by Declarant and Homebuilder in their sole discretion, and Declarant and Homebuilder shall have exclusive control ^{Unofficial Document} of the entry gates; provided, however, that maintenance, repair and replacement of the entry gates shall be the responsibility of the Association. The entry gates are not intended to provide security for the Property and no additional security should be implied by the fact that there is gated access to the Property. The entry gates at the Property are only designed to attempt to limit vehicular and pedestrian access; they are not designed to prohibit access or to provide security of any kind. Conversely, the entry gates at the Property may prohibit, impede response time and/or limit access to the Property by emergency vehicles.

8.1.34 Restrictions of Record. Each Owner, by accepting a deed or other conveyance of title, shall be deemed to have acknowledged on Owner's own behalf and on behalf of any occupants of Owner's Lot, that the Lot is subject to various easements, limitations and restrictions of record (collectively, "*Restrictions of Record*"), including but not limited to utility and other easements that may be located along or adjacent to Lot borders or internally on the Lot, and that Owner has the responsibility to and shall fully and independently investigate all Restrictions of Record, including but not limited to the exact locations of, uses of, and restrictions on interference with such Restrictions of Record, and shall not use or do, cause or permit anything to be done on the Lot that would violate any prohibitions or requirements expressly contained in the Restrictions of Record or that would in any manner prohibit, damage, jeopardize, conflict with or interfere with the Restrictions of Record or the facilities or uses (including maintenance and replacement) contemplated or permitted therein, including but not limited to digging, excavating, planting, or constructing or maintaining improvements or

landscaping, except to the extent expressly permitted in the applicable Restrictions of Record. Each Owner may consider obtaining and reviewing title insurance for the Lot and contacting the holders of Restrictions of Record to obtain assistance with the foregoing.

8.2 Permitted Uses and Restrictions - Common Area. The permitted uses and restrictions for the Common Area shall be as follows:

8.2.1 Permitted Uses. Except as otherwise provided herein, the Common Area shall be used in general for the exclusive benefit of the Owners, for the furnishing of services and facilities for which the same are reasonably intended and for the enjoyment to be derived from such reasonable and proper use, without hindering the exercise of or encroaching upon the right of any other Owner to utilize the Common Area, provided that no unlawful use shall be permitted.

8.2.2 Restricted Uses.

8.2.2.1 The Common Area shall not be used by Owners for storage of supplies, material or personal property of any kind; and

8.2.2.2 Except as otherwise provided herein, no activity shall be carried on nor condition maintained by any Owner upon the Common Area that spoils the appearance of the Property or hinders or encroaches upon the right of any other Owner to utilize the Common Area as reasonably intended. Unofficial Document

8.2.3 Maintenance by Association. Except as may otherwise be provided herein, the Association, or its duly delegated representative, shall maintain and otherwise manage all Common Areas in a manner deemed appropriate by the Board, in its sole and absolute discretion. Without the Owners' approval, the Association shall have the right, in its sole and absolute discretion, as to the Common Area conveyed, leased or transferred to it or as to any other area placed under its jurisdiction:

8.2.3.1 Maintain the planting. For this purpose, Declarant and the Association shall have the right, at any time, to plant, replace, maintain and cultivate landscaping, shrubs, trees and plantings on any Common Area and on any area placed under its jurisdiction. No Owner shall remove, alter, injure or interfere in any way with any landscaping, shrubs, trees, grass or plantings placed upon any Common Area or upon any area placed under the jurisdiction of the Association without the prior written consent of Declarant or the Association. Declarant and the Association shall have the right to enter upon or cross over any Lot, at any reasonable time, for the purpose of planting, replacing, maintaining or cultivating such landscaping, shrubs, trees, grass or plantings and shall not be liable for trespass for so doing;

8.2.3.2 Reconstruct, repair, replace or refinish any improvement or portion thereof upon the Common Area or any other area placed under its

jurisdiction (to the extent that such work is not the responsibility of any governmental entity or public utility);

8.2.3.3 Do all such other and further acts that the Board deems necessary to preserve and protect the Common Area and the beauty thereof, in accordance with the general purposes specified in this Declaration; and

8.2.3.4 Be the sole judge as to the appropriate maintenance within the Common Area and individual front yards.

Nothing herein shall be construed so as to preclude the Association from delegating its powers set forth above to a project manager or agent or to other persons, firms or corporations.

8.2.4 Damage or Destruction of Common Area by Owners. If any Common Area is damaged or destroyed by an Owner or any of its guests, tenants, licensees or agents, such Owner does hereby authorize the Association to repair such damaged area, and the Association shall so repair such damaged area in a good workmanlike manner in conformity with the original plans and specifications of the area involved, or as the area may have been modified or altered subsequently by the Association, in the discretion of the Association. The amount necessary for such repairs shall be paid by such Owner, to the Association, and the Association may enforce collection of such amounts in the same manner as provided elsewhere in this Declaration for collection and enforcement of Assessments.

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8.2.5 Mortgage or Conveyance of Common Area. The Common Area shall not be mortgaged or conveyed, nor shall future assessments be pledged to pay for such mortgage, without the prior consent of two-thirds (2/3) of the votes in each class of Members, following the First Conveyance.

9. Insurance.

9.1 Scope of Coverage. Commencing not later than the time of the First Conveyance, the Association shall maintain adequate insurance for the Common Area, including liability in an amount no less than One Million Dollars (\$1,000,000), as well as directors' and officers' liability. Each Owner shall be responsible for coverage on its Lot and any improvement thereon, including, without limitation, the Dwelling Unit.

9.2 Certificate of Insurance. An insurer that has issued an insurance policy under this Section 9 shall issue certificates or memoranda of insurance to the Association and, upon request, to any Owner or Mortgagee. Any insurance obtained pursuant to this Section 9 shall not be canceled until thirty (30) days after notice of the proposed cancellation has been mailed to the Association, and each Owner and each Mortgagee under a deed of trust to whom certificates or memoranda of insurance have been issued.

9.3 Repair and Replacement of Damaged or Destroyed Property. Any portion of the Common Area damaged or destroyed shall be repaired or replaced promptly by the

Association unless (a) repair or replacement would be illegal under any state or local health or safety statute or ordinance or (b) Owners owning at least eighty percent (80%) of the Lots vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves shall be paid by the Association. If the proceeds attributable to the damaged Common Area shall be used to restore the damaged area to a condition that is not in violation of any state or local health or safety statute or ordinance, then any such proceeds in excess of the amount used to restore such damage may, at the Board's discretion, be kept by the Association to help fund the expenses of the Association, or be distributed to the Owners on the basis of an equal share for each Lot.

10. General Provisions.

10.1 The Declaration. By acceptance of a deed or by acquiring any ownership interest in any portion of the Property, each Owner, its heirs, representatives, successors, transferees and assigns, binds itself, its heirs, representatives, successors, transferees and assigns, to restrictions, covenants, conditions, rules and regulations now or hereafter imposed by this Declaration and any amendments thereof to the extent permitted by law. In addition, each Owner by so doing hereby acknowledges that this Declaration sets forth a general scheme for the improvement and development of the Property and thereby evidences its interest that all the restrictions, conditions, covenants, rules and regulations contained herein shall run with the land and be binding on all subsequent and future Owners, grantees, purchasers, transferees and assignees thereof. Furthermore, each such Owner fully understands and acknowledges that this Declaration shall be mutually beneficial, ^{Unofficial Document} prohibitive and enforceable by the various future Owners.

10.2 Enforcement. The Association, or any Owner, shall have the right, but not the duty, to enforce, by any proceeding at law or in equity, the provisions of this Declaration. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter. If any portion of any Lot is maintained so as to: (a) present a public or private nuisance, (b) substantially detract from or affect the appearance or quality of any surrounding Lot or the Property, or (c) is used in a manner which violates this Declaration, or if the Owner or Resident of any Lot fails to perform its obligation under this Declaration or the Community Rules and Regulations, the Association or any Owner may give notice to the violating Owner that corrective action must be completed within fourteen (14) days of the receipt of such notice. If the violating Owner fails to take corrective action within said period of time, the Association, or the notifying Owner, may take, at the violating Owner's cost, appropriate corrective action to remedy such nuisance, detraction, violation or failure of performance including, without limitation, appropriate legal action. Charges incurred by the Association or the notifying Owner, as applicable, shall be paid by the violating Owner on demand together with interest at the rate of ten percent (10%) per annum or such higher rate that is equivalent to the maximum rate allowed by law accruing from the date said charges are incurred until paid in full. Furthermore, if the Association hires an attorney or attorneys to enforce compliance with or specific performance of the terms and conditions of this Declaration, or for any other purpose in connection with the breach of this Declaration, Articles

of Incorporation, Bylaws, or any Rules and Regulations of the Association, whether or not a lawsuit is filed, the defaulting Owner shall pay all costs incurred by the Association in relation to such matter, including, but not limited to, reasonable attorney's fees and costs, and all other expenses incurred by the Association ("*Enforcement Costs*"). Any sum not paid hereunder by the violating Owner to the Association shall be treated as an Assessment and collected in accordance with the procedures provided in Section 6.

10.3 Severability. Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions, all of which shall remain in full force and effect.

10.4 Term; Method of Termination. Unless terminated in accordance with this Section 10.4, this Declaration (as amended from time to time) shall continue in full force and effect for a term of thirty (30) years from the date this Declaration is Recorded, after which time this Declaration shall be automatically extended for successive periods of ten (10) years each. This Declaration may be terminated at any time if such termination is approved by the affirmative vote or written consent, or any combination thereof, of Members holding ninety percent (90%) or more of the votes in the Association. If the necessary votes and consents are obtained, the Board shall cause to be Recorded a certificate of termination, duly signed by the president or vice president and attested by the secretary of the Association, with their signatures acknowledged. Thereupon this Declaration shall have no further force and effect, and the Association shall be dissolved pursuant to applicable law.

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10.5 Amendments.

10.5.1 This Declaration may be amended at any time and from time to time during the original term of this Declaration or any extensions thereof, but, except for amendments made pursuant to Sections 10.5.2 or 10.5.3 of this Declaration, this Declaration may only be amended by the written approval or the affirmative vote, or any combination thereof, of Members owning not fewer than two-thirds (2/3) of the Lots in the Property.

10.5.2 Either the Board or the Declarant may amend this Declaration, without obtaining the approval or consent of any Owner, Mortgagee or other Person, to conform this Declaration to the requirements or guidelines of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, the Veterans Administration or any federal, state or local governmental agency whose approval of the Property or the Declaration, the Articles or the Bylaws is required by law or requested by the Declarant. Furthermore, either the Board or the Declarant may amend this Declaration, without obtaining the approval or consent of any Owner, Mortgagee or other Person, to comply with changes in the law.

10.5.3 Prior to the Transition Date, the Declarant may amend this Declaration without the consent or approval of any other Owner or other Person.

10.5.4 As long as Declarant or a Related Entity owns or has a Recorded option to purchase one or more Lots, no amendment to this Declaration shall be effective unless approved in writing by the Declarant (or unless the Declarant expressly waives in writing its right to approve such amendments).

10.5.5 Any amendment approved pursuant to Section 10.5.1 of this Declaration or by the Board pursuant to Section 10.5.2 of this Declaration must be signed by the president or vice president of the Association and must be Recorded. Any such amendment must certify that the amendment has been approved as required by this Section. Any amendment made by the Declarant pursuant to Sections 10.5.2 or 10.5.3 of this Declaration must be executed by the Declarant and must be Recorded.

10.6 Notices. Notices provided for in this Declaration shall be in writing and shall be addressed to the last known address of each Owner in the files of the Association. Notices shall be deemed delivered when mailed by United States First Class, Registered or Certified Mail, addressed to the Owner at such address or when delivered in person to such Owner.

10.7 Condemnation. The Association, upon receipt of notice of intention or notice of proceedings whereby all or any part of the Property is to be taken by any governmental body by exercise of the power of condemnation or eminent domain, shall immediately notify all Owners and First Mortgagees who have provided the Association with their names and addresses and a request to be notified if this situation ^{Unofficial Document} were to occur. The Association shall represent the Owners in any condemnation or eminent domain proceeding for the acquisition of any part of the Common Area, and every Owner appoints the Association its attorney-in-fact for this purpose. The entire award made as compensation for such taking of Common Area, including, without limitation, any amount awarded as severance damages, or the entire amount received and paid in anticipation and settlement for such taking, after deducting from such award, in each case, reasonable and necessary costs and expenses, including, without limitation, attorneys' fees, appraisers' fees and court costs (which net amount shall hereinafter be referred to as the "Award"), shall be paid to the Association as trustee for the use and benefit of any Owners and their First Mortgagees as their interests may appear. The Association shall, as it is practicable, cause the Award to be utilized for the purpose of repairing and restoring the Property, including, if the Association deems it necessary or desirable, the replacement of any improvements so taken or conveyed.

If any Lot or portion thereof is taken by condemnation or eminent domain, the Owner of such Lot shall be entitled to receive the award for such taking, and after acceptance thereof said Owner and all of said Owner's Mortgagees shall be divested of all interest in the Property if such Owner shall be required to vacate the Lot as a result of such taking. The remaining Owners shall decide by vote of a majority of the Owners voting on the matter whether to rebuild or repair the Property or take other action. The remaining portion of the Property shall be resurveyed, if necessary, and the Declaration shall be amended to reflect such taking. If more than one Lot is taken at the same time, the Association shall participate in the negotiations and shall propose the

method of division of the proceeds of condemnation if the Lots are not valued separately by the condemning authority or by the court. Condemnation proceeds received for the Common Area that are not used for the purpose of repairing and restoring the property or replacement of improvements may, at the discretion of the Board, be kept by the Association to pay expenses of the Association, or be apportioned among the Owners in a fair and equitable manner as determined by the Association. If any Owner disagrees with the proposed allocation, such Owner may have the matter submitted to arbitration under the rules of the American Arbitration Association.

10.8 Waiver; Remedies Cumulative. No failure or delay on the part of any person in exercising any right, power or privilege hereunder and no course of dealing between or among the persons subject hereto shall operate as a waiver of any provision hereof, nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other right, power or privilege. The rights and remedies herein expressly provided are cumulative and not exclusive of any rights or remedies which any person subject hereto would otherwise have. No notice to or demand upon any person in any case shall entitle such person to any other or further notice or demand in similar or other circumstances or constitute a waiver of rights to any other or further action in any circumstances.

10.9 Interpretation. Except for judicial construction, the Association has the exclusive right to construe and interpret the provisions of this Declaration. In the absence of any adjudication to the contrary by a court of competent jurisdiction, the Association's construction or interpretation of the provisions hereof shall be final, conclusive and binding as to all Persons and Property benefited or bound by this Declaration.

10.10 Change of Circumstances. Except as otherwise expressly provided in this Declaration, no change of conditions or circumstances shall operate to extinguish, terminate or modify any of the provisions of this Declaration.

10.11 Laws, Ordinances and Regulations.

10.11.1 The covenants, conditions and restrictions set forth in this Declaration and the provisions requiring Owners and other Persons to obtain the approval of the Board or the Architectural Committee with respect to certain actions are independent of the obligation of the Owners and other Persons to comply with all applicable laws, ordinances and regulations, and compliance with this Declaration shall not relieve an Owner or any other Person from the obligation also to comply with all applicable laws, ordinances and regulations.

10.11.2 Any violation of any state, municipal or local law, ordinance or regulation pertaining to the ownership, occupation or use of any property within the Property is hereby declared to be in violation of this Declaration and subject to any or all of the enforcement proceedings set forth herein.

10.12 References to this Declaration in Deeds. Deeds to and instruments affecting any Lot or any other part of the Property may contain the covenants, conditions and

restrictions herein set forth by reference to this Declaration, but whether any such reference is made in any deed or instrument, each and all of the provisions of this Declaration are and shall be binding upon the grantee-Owner or other Person claiming through any instrument and its heirs, executors, administrators, successors and assigns.

10.13 Gender and Number. Wherever the context of this Declaration so requires, any word used in the masculine, feminine or neuter genders includes each of the other genders, words in the singular include the plural, and words in the plural include the singular.

10.14 Captions and Title; Section References; Exhibits. All captions, titles or headings of the articles and sections in this Declaration are for the purpose of reference and convenience only and are not to be deemed to limit, modify or otherwise affect any of the provisions hereof or to be used in determining the meaning or intent thereof. References in this Declaration to numbered articles, sections or subsections, or to lettered exhibits, shall be deemed to be references to those paragraphs or exhibits so numbered or lettered in this Declaration, unless the context otherwise requires. Any exhibits referred to in this Declaration are hereby incorporated herein by reference and fully made a part hereof.

10.15 Indemnification. The Association shall indemnify each and every officer and director of the Association, each and every member of the Architectural Committee, and each and every member of any committee appointed by the Board (including, for purposes of this Section 10.15, former officers and directors of the Association, former members of the Architectural Committee, and former ^{Unofficial Document} members of committees appointed by the Board) (collectively, "*Association Officials*" and individually an "*Association Official*") against any and all expenses, including, without limitation, attorneys' fees, reasonably incurred by or imposed upon an Association Official in connection with any action, suit or other proceeding (including settlement of any suit or proceeding, if approved by the Board serving at the time of such settlement) to which he or she may be a party by reason of being or having been an Association Official, except for his or her own individual willful misfeasance, malfeasance, misconduct or bad faith. No Association Official shall have any personal liability with respect to any contract or other commitment made by them or action taken by them, in good faith, on behalf of the Association (except indirectly to the extent that such Association Official may also be a Member of the Association and therefore subject to Assessments hereunder to fund a liability of the Association), and the Association shall indemnify and forever hold each such Association Official free and harmless from and against any and all liability to others on account of any such contract, commitment or action. Any right to indemnification provided for herein is not exclusive of any other rights to which any Association Official may be entitled. If the Board deems it appropriate, in its sole discretion, the Association may advance funds to or for the benefit of any Association Official who may be entitled to indemnification hereunder to enable such Association Official to meet on-going costs and expenses of defending himself or herself in any action or proceeding brought against such Association Official by reason of his or her being, or having been, an Association Official. In the event it is ultimately determined that an Association Official to whom, or for whose benefit, funds were advanced pursuant to the preceding sentence does not qualify for indemnification pursuant to this Section or otherwise

under the Articles, Bylaws or applicable law, such Association Official must promptly upon demand repay to the Association the total of such funds advanced by the Association to him or her, or for his or her benefit, with interest (should the Board so elect) at a rate not to exceed ten percent (10%) per annum from the date(s) advanced until paid.

10.16 Number of Days. In computing the number of days for purposes of any provision of this Declaration or the Articles or Bylaws, all days shall be counted including Saturdays, Sundays and holidays, but if the final day of any time period falls on a Saturday, Sunday or legal holiday, then the final day shall be deemed to be the next day which is not a Saturday, Sunday or legal holiday.


10.17 Disclaimer of Representations. Notwithstanding anything to the contrary herein, neither the Declarant nor any affiliate of Declarant makes any warranties or representations whatsoever that the plans presently envisioned for the complete development of the Property can or shall be carried out, or that any real property now owned or hereafter acquired by the Declarant or by any affiliate of Declarant is or shall be subjected to this Declaration, or that any such real property (whether it has been subjected to this Declaration) is or shall be committed to or developed for a particular (or any) use, or that if such real property is once used for a particular use, such use shall continue in effect. While neither the Declarant nor any affiliate of Declarant believes that any of the restrictive covenants contained in this Declaration is or may be invalid or unenforceable for any reason or to any extent, neither the Declarant nor any affiliate of Declarant makes any warranty or representation about the present or future validity or enforceability of any such restrictive covenant. Any Owner acquiring a Lot in reliance on one or more of such restrictive covenants assumes all risks of the validity and enforceability thereof and by accepting a deed to the Lot agrees to hold the Declarant and all affiliates of Declarant harmless therefrom.

10.18 Amendments Affecting Declarant Rights. Notwithstanding any other provision of this Declaration to the contrary, no provision of this Declaration (including but not limited to, this Section) which grants to or confers upon the Declarant or upon any affiliates of Declarant any rights, privileges, easements, benefits or exemptions (except for rights, privileges, easements, benefits or exemptions granted to or conferred upon Owners generally) may be modified, amended or revoked in any way, so long as the Declarant, any affiliate of Declarant or a trustee for the benefit of the Declarant or any affiliate of Declarant owns or has a Recorded option to purchase any portion of the Property, without the express written consent of the Declarant.

[Remainder of page intentionally left blank]

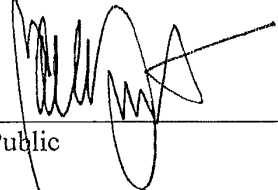
Declarant has executed this Declaration to be effective as of 5/10/2016,
2016.

DECLARANT: K. HOVNIANIAN AT GALLERY, LLC,
an Arizona limited liability company

By: 
Officer

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 10th day of MAY
 , 2016, by Chad Fuller, Officer of K. Hovnianian at Gallery, LLC, an
Arizona limited liability company, on behalf of the company.


Notary Public

My Commission Expires:
2/10/19

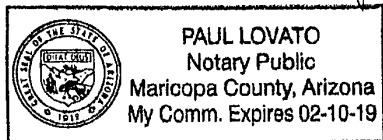


EXHIBIT A**Legal Description of the Property**

The land referred to herein below is situated in the County of Maricopa, State of Arizona and is described as follows:

PARCEL NO. 1:

A portion of the Southeast quarter of the Southeast quarter of Section 27, Township 2 North, Range 4 East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

Commencing at the Northeast corner of said Southeast quarter of the Southeast quarter, a City of Scottsdale brass cap in handhole, from which the Northwest corner thereof a City of Scottsdale brass cap flush, bears South 89 degrees 10 minutes 30 seconds West (basis of bearings) along the monument line of Earll Drive, a distance of 1310.75 feet;

Thence South 89 degrees 10 minutes 30 seconds West along the North line of the Southeast quarter of the Southeast quarter of said Section 27, a distance of 510.07 feet;

Thence leaving said North line, South 00 degrees 02 minutes 06 seconds West, a distance of 20.00 feet, to a point on the Southerly right-of-way line of Earll Drive, also being the point of beginning;

Thence continuing South 00 degrees 02 minutes 06 seconds West, along the West line of the East 121.81 feet of Olene Place as recorded in Book 48 of Maps, Page 5, MCR, a distance of 238.44 feet to the North line of the South 80 feet of said Olene Place;

Thence South 89 degrees 11 minutes 08 seconds West along said North line, a distance of 151.80 feet;

Thence North 00 degrees 02 minutes 06 seconds East leaving said North line, a distance of 228.41 feet to the South right of way line of Earll Drive;

Thence North 89 degrees 10 minutes 30 seconds East along said right of way, a distance 127.63 feet;

Thence North 00 degrees 00 minutes 15 seconds East along said right of way, a distance of 10.00 feet;

Thence North 89 degrees 10 minutes 15 seconds East along said right-of-way line, a distance of 24.18 feet to the point of beginning.

PARCEL NO. 2:

The West 30.00 feet of the South 80.00 feet of OLENE PLACE, according to the plat of record in the County Recorder of Maricopa County, Arizona, recorded as Book 48 of Maps, Page 5.

PARCEL NO. 3:

The South 80.00 feet of OLENE PLACE, according to the plat of record in the County Recorder of Maricopa County, Arizona, recorded as Book 48 of Maps, Page 5 and that portion of Marshall Avenue abandoned by Resolution recorded in Instrument No. 84-0493240, records of Maricopa County, Arizona;

Except the East 121.81 feet of said OLENE PLACE;

Except the West 30.00 feet of said OLENE PLACE.

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HONORABLE KATHERINE COOPER

CLERK OF THE COURT
C. Ladden
Deputy

GALLERY COMMUNITY ASSOCIATION

PENNY JANE MANSHIP

v.

K HOVNANIAN AT GALLERY L L C, et al.

LOUIS W HOROWITZ

STEPHEN BEST
JASON J BOBLICK
LEONARD T FINK
SHANNON G HUFF
RINA K RAI
AMY WILKENS
DENNIS I WILENCHIK
JUDGE COOPER

RULINGS RE MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are the following dispositive motions fully-briefed and argued:

- Defendants' Motion for Summary Judgment Regarding Each of Plaintiff's Causes of Action filed September 30, 2022;
- Defendants' Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects filed September 30, 2022; and
- Third-Party Defendants Desert Vista, Inc. and Renco, LLC dba Renco Roofing's Joint Motion for Summary Judgment filed September 30, 2022.

The Court has reviewed the briefs and considered counsels' oral argument.

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KHOV MOTION FOR SUMMARY JUDGMENT
REGARDING PLAINTIFF'S CAUSES OF ACTION

Defendants K. Hovnanian at Gallery, LLC ("KHov Gallery") and K. Hovnanian Arizona Operations, LLC ("KHov Arizona") move for judgment on the remaining claims against them, Counts 2, 3, and 4.

For the reasons stated, the Court finds that:

1. Plaintiff Gallery Community Association's ("Association"), a homeowners association, cannot assert the claim for breach of the implied warranty of workmanship and habitability. (Count 3)
2. The Association cannot establish that KHov Gallery breached a contract or the implied covenant of good faith and fair dealing because the Declaration of Covenants, Conditions, Restrictions, and Easements for Gallery ("Declaration") does not impose a contractual obligation on KHov Gallery to perform or warrant construction. (Counts 2 and 4)

Summary judgment is granted, and Counts 2, 3, and 4 are dismissed.

Facts

The following facts are undisputed:

The Association is a homeowner's association ("HOA") and non-profit corporation formed under A.R.S. § 10-3010, et. seq. for The Gallery subdivision in Scottsdale.

The Article of Incorporation for the Association state that the Association was formed to maintain the "Common Area," collect assessments, and enforce the Declaration. It also imposes on the Association the duty to maintain the "Association Property" for the benefit of the unit owners. These terms are defined in the Declaration.

KHov Gallery developed The Gallery and sold the units. KHov Gallery is the "Declarant" of the Declaration.

KHov Gallery conveyed fee simple title to the Common Area to the Association by quit claim deed dated October 6, 2016.

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KHov Arizona was the general contractor responsible for constructing the residences.

The Association filed this action on behalf of itself, not the individual homeowners within The Gallery.

Count 3 - Breach of the Implied Warranty of Workmanship and Habitability

Count 3 alleges that KHov Gallery and KHov Arizona breached an implied warranty of workmanship and habitability.

The implied warranty of workmanship and habitability is a right of action available to individual purchasers of single-family homes. In Arizona, the Court of Appeals first recognized the implied warranty in *Columbia Western Corp. v. Vela*, 122 Ariz. 28 (App. 1979). The Supreme Court defined it further in *Richards v. Powercraft Homes*, 139 Ariz. 242 (1984).

The implied warranty arises from the construction of a home. *Lofts at Fillmore Condominium Assoc'n v. Reliance Commercial Construction*, 218 Ariz. 574, 577 (2008) (“*Columbia Western* and *Richards*...make clear that an implied warranty arises from construction of the home...”). It is implied into all contracts between builder-vendors and a home buyer. It is enforceable by the original owner per *Columbia Western* and by subsequent purchasers under *Richards*. A claim based on the implied warranty is a cause of action for damages caused by latent construction defect(s) that manifest after an owner buys a home and are not detectable with a reasonable pre-purchase inspection. The owner must prove that the builder-vendor caused the defect. *Columbia Western*, 122 Ariz. at 32; *Richards*, 139 Ariz. at 245. The implied warranty is enforceable against the builder even if the builder (who constructs the home) and the vendor (who sells the home) are separate entities. *Lofts*, 218 Ariz. 574, 577 (2008).

The cases hold that the right of implied warrant belongs to the homeowner and applies to homes. It serves “to protect innocent purchasers and hold builders accountable for their work.” *Richards*, 139 Ariz. at 245. *Richards* extended this protection to subsequent purchasers based on the same policy considerations underlying an original owner’s right to an implied warranty. *Id.* as a warranty of habitability, the warranty applies to structures built for living purposes. As stated in *Zambrano v. M & RC II, LLC*, 254 Ariz. 53, 59 (2022), “Under this implied warranty, the builder-vendor guarantees it built the home in a workmanlike manner *and that it is habitable*.” (emphasis added.) The public policy behind the implied warranty is “to protect buyers of newly built *homes* and successive owners against latent construction defects that were not reasonably discoverable when the *home* was initially sold.” *Id.* (internal citations omitted) (emphasis added).

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In this case, the Association holds no implied warranty. It does not own the residences. It owns the Common Area that KHov Gallery conveyed to it in the quit claim deed and as defined in the Declaration. The Common Area is exactly that -- areas such as the parking lot, pool, and cabana intended for “for the common use and enjoyment” of the homeowners, not the residences. The Declaration defines Common Area as “all areas (including the improvements thereon) owned, or to be owned, by the Association for the common use and enjoyment of the Owners and/or Residents of the Property, and any other areas that the association is required to maintain, either by this Declaration or the recorded subdivision plat, other than those areas located on the Lots.” Decl. § 1.12

The Association’s responsibility to maintain common aspects of the residences, such as exterior walls and roofs, cannot create an implied warranty. The Association did not purchase the homes; it assumed a duty to help maintain their exteriors. The homes – and the implied warranty – belongs to the homeowners.

Finally, the Association relies on *Lofts* for the proposition that the Association can assert an implied warranty claim. In fact, the Lofts Association brought an action against the builder *on behalf of the unit owners* and was statutorily authorized to do so. *Id.* at 577 (issue was whether “suit on this warranty can be brought by residential homebuyers like those in the Association,”); (A.R.S. § 33-1242(A)(4). Here, the Association filed this lawsuit on behalf of the Association only and has no authority to bring an action for the affected homeowners. *Lofts* is consistent with *Columbia Western* and *Richards* and does not support the Association’s position. Count 3 is dismissed.

Counts 2 and 4 -- Breach of Contract Claims

Counts 2 and 4 allege Breach of the Implied Covenant of Good Faith and Fair Dealing and Breach of Contract, respectively, against KHov Gallery only.¹ The Association claims that, under the Declaration, KHov Gallery owed the Association a contractual duty to perform, construct, and warrant “work.” It claims KHov Gallery breached that duty and the implied covenant of good faith and fair dealing.

To prove that KHov Gallery breached a contract, the Association must prove the terms of the contract, that KHov Gallery breached a term of the contract, and that the Association incurred damages as a result of that breach. Revised Arizona Jury Instructions (Civil) 6th – Contract 2; *Holmes v. Graves*, 83 Ariz. 174, 177 (1957).

¹ Counts 2 and 4 are not alleged as to KHov Arizona. The Defendants who were named with KHov Gallery have been dismissed.

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To prove breach of the duty of good faith and fair dealing, the Association must prove the existence of a valid contract and that KHov Gallery deprived the Association from receiving the benefit of the contract. *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, ¶ 14 (1998) (citing *Rawlings v. Apodaca*, 151 Ariz. 149, (1986); *Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466 (App. 1998).

The Complaint does not identify the “terms” of the Declaration that KHov Gallery allegedly violated. Nor does the Association’s Response. In fact, there is no provision in the Declaration that states that KHov Gallery agreed to “build[ing] a project” that conformed to “applicable laws and building codes” or that KHov Gallery promised that the work would be or had been done correctly.” Complaint, ¶¶ 25-26, 39.

Alternatively, the Association contends that KHov Gallery’s contractual obligation to construct and warrant work is derived from the “duties and obligations” imposed on KHov Gallery in the Declaration. Response, 11:7. The Association relies on Arizona cases that hold that a declaration (also referred to as the Covenants, Conditions, and Restrictions or CC&Rs) is a contract between and among lot owners and cases from other jurisdictions that also find a contract between owners and the declarant. *See Powell v. Washburn*, 211 Ariz. 553, 557 (2006) citing *Ahwatukee Custom Estates Management Ass’n Inc. v. Turner*, 196 Ariz. 631 634 (App. 2000); *Villa Milano Homeowners Assn. v. IL Davorge*, 84 Cal. App. 4th 819 (2000); *Solowicz v. Forward Geneva Nat’l, LLC*, 780 N.W.2d 111, 125 (Wis. 2010).

The cases cited by the Association rely on widely recognized principles of contract interpretation. Courts construe contract language to give effect to the intent of the parties. Courts look to the language to ascertain the scope and purpose of the document, meaning of the words as well as the surrounding circumstances. *Powell*, 211 Ariz. at 376 (citing *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153 (1993) (“When interpreting a contract ... it is fundamental that a court attempt to ‘ascertain and give effect to the intention of the parties at the time the contract was made if at all possible.’”)

In this case, the language shows that KHov Gallery prepared the Declaration to promote the orderly preservation and use of The Gallery by establishing permitted uses and restrictions for the property and an Association to enforce the restrictions, collect assessments, and maintain the Common Area. (Recitals B, C, D). The Declaration imposed minimal requirements on KHov Gallery. Under the Declaration, KHov Gallery is required:

- to convey fee simple title to the Common Area to the Association, § 3.5
- to control the make-up of the Association, including the Board and Architectural Committee until control transferred to the Owners, and then to keep one seat on the Board post-transition §§ 5.3, 7.1, 4.3.1

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- as an Owner of a unit (if any), to pay for repairs in the Common Area caused by Owner or Owner's guest, § 8.2.4

(Declaration, Exh. A to Defendants' SOF). None of these duties are at issue. This case is about alleged defective original construction.

Further, the Declaration provisions related to construction appear as restrictive covenants under Section 8 regarding "Use Restrictions." For example, Section 8.1.1 restricts development to single family residences that are subject to Architectural Committee approval. Section 8.1.30 limits an owner's choice of contractor to KHov Gallery or its designee as long as KHov Gallery owns or has an option to purchase a lot.

These provisions state limitations on the use of the lots; they do not impose a contractual obligation on KHov Gallery. The restrictions refer specifically to the property: § 8.1.1.1 -- "All lots shall be used [for]...single family residential use;" 8.1.30 -- "Dwelling Units on the Property must be constructed by Declarant or its designees." By contrast, where KHov Gallery is required to act, the Declaration states that it "shall" act: § 3.5 -- "Declarant covenants that it shall convey fee simple title to the Common Area to the Association." 5.3 -- "Declarant shall maintain absolute control over the Association...until the Transition Date;" § 7.1 -- Declarant shall appoint all of the original member of the Architectural Committee; § 8.2.4 -- repairs caused by an Owner to the Common Area "shall be paid by such Owner." Had KHov Gallery intended to require it to perform and warrant construction for the Association, it would have stated that requirement -- as it did for the duties listed above.

Accordingly, in considering the language of the Declaration and the purpose behind it, no contractual duty to perform or warrant construction for the Association can be derived from this document. As a result, KHov Gallery cannot be held liable for breaching a contract or the implied covenant of good faith within a contract. There are no disputed issues of fact, as the Association relies solely on the Declaration in alleging a contractual duty. Summary judgment is granted on Counts 2 and 4.

Conclusion

The ruling granting Defendants' Motion on Plaintiff's Causes of Action disposes of the Complaint and, therefore, Defendants' Third-Party Complaint for indemnity. The Court need not reach Defendants' Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects and Third-Party Defendants Desert Vista, Inc. and Renco, LLC's Joint Motion for Summary Judgment. Had the Court reached those motions, material issues of fact would have precluded summary judgment as to both motions.

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02/08/2023

IT IS ORDERED:

1. Granting Defendant's Motion for Summary Judgment Regarding Each of Plaintiff's Causes of Action,
2. Denying as moot Defendant's Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects, and
3. Denying as moot Third-Party Defendants Desert Vista, Inc. and Renco, LLC's Joint Motion for Summary Judgment.

IT IS FURTHER ORDERED Defendants shall submit a proposed Judgment and Statement of Costs by **February 24, 2023**.

IT IS FURTHER ORDERED vacating the Final Trial Management Conference set on February 24, 2023 at 2:00 p.m. and the Jury Trial set to begin on March 13, 2023 at 9:00 a.m. in this division.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008714

04/25/2023

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
C. Ladden
Deputy

GALLERY COMMUNITY ASSOCIATION

PENNY JANE MANSHIP

v.

K HOVNANIAN AT GALLERY L L C, et al.

LOUIS W HOROWITZ

JASON J BOBLICK
LEONARD T FINK
SHANNON G HUFF
MICHAEL A LUDWIG
RINA K RAI
AMY WILKENS
DENNIS I WILENCHIK
JUDGE COOPER

RULINGS RE KHOV AND RENCO/DESERT VISTA
APPLICATIONS FOR ATTORNEYS' FEES/COSTS

Pending before the Court are the fully-briefed KHov Defendants' Motion for Award of Attorneys' Fees filed February 24, 2023; and Third-Party Defendants Renco, LLC DBA Renco Roofing ("RR") and Desert Vista, Inc.'s ("DV") Joint Application for Attorneys' Fees, Costs & Expert Fees filed February 24, 2023. The Court has reviewed the motions and supporting documentation, Responses, Replies, and Statements of Cost.

KHOV APPLICATION

KHov seeks \$156,311.22 for attorneys' fees pursuant to A.R.S. §§ 12-341.01 (contract actions) and 12-1364 (dwelling actions).

Docket Code 023

Form V000A

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SUPERIOR COURT OF ARIZONA
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A.R.S. § 12-341.01 Claim

A.R.S. § 12-341.01 gives the Court discretion to award attorneys' fees to the "successful party" in a "contested action arising out of a contract" to "mitigate the burden of the expense of litigation to establish a just claim or a just defense." *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9 (App. 2007) (citing A.R.S. § 12-341.01(A), (B)).

Gallery's claims against the KHov Defendants were based on a contract, specifically, the Declaration of Covenants, Conditions Restrictions and Easements for Gallery ("Declaration"). KHov is the successful party because it prevailed on all counts. Gallery stipulated to the dismissal of all but three claims which the Court dismissed by summary judgment. Ruling, February 8, 2023.

In evaluating KHov's Application, the Court considers the factors identified in *Associated Indemnity. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). The Court finds as follows:

1. Whether the unsuccessful party's claims or defenses had merit.

No. Gallery sued KHov entities that should not have been sued, asserted claims that had no legal basis (negligence), and pursued claims based non-existent contractual obligations.

2. Whether litigation could have been avoided or settled.

Yes, the parties participated in a pre-litigation repair and offer process pursuant to the Purchaser Dwelling Act; two formal mediations before Hon. Lawrence Fleischman, Ret.; and exchanged multiple settlement offers. (Motion, p. 4).

In addition, KHov raised the issues dispositive to Counts 2, 3, and 4 early in a Motion for Summary Judgment (filed February 1, 2021). These were the same issues on which the Court granted summary judgment two years later. (Ruling, February 8, 2023) These were legal issues related to the Declaration and ultimately resolved as a matter of law. Nevertheless, Gallery opposed the 2021 Motion claiming discovery was necessary. (Request for Rule 56(d) Relief filed March 22, 2021). Had the 2021 Motion been addressed when filed, further litigation would have been avoided.

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MARICOPA COUNTY

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3. Whether assessing fees against the unsuccessful party would pose an unreasonable or undue hardship.

Gallery contends that imposing fees on the Association would cause extreme hardship to the Association and its members. In support of this argument, Gallery provides the Declaration of Matthew Jones, the Association's President. He states that the Association cannot pay because its \$191,800 in assets is for capital improvements.

The declaration is conclusory and fails to provide sufficient information to establish unreasonable, undue hardship to the Association or its members. Gallery's members authorized the filing of this lawsuit and would have received the financial benefit of it had Gallery prevailed. It is not uncommon for HOA members to pay assessments for specific purposes. Gallery offers no information as to why a special assessment could not be imposed, perhaps over a period of time, to pay KHov's (or Renco/Desert Vista's) attorneys' fees. There is no information presented as the number of households/members and, therefore, an estimated cost per member. As to the Association's current assets, there is no information provided regarding the nature of the purported long term capital projects, the date(s) for undertaking these projects, or their estimated cost. Gallery does not provide any factual basis for a determination of unreasonable or undue hardship.

4. Whether the successful party prevailed as to all relief sought.

Yes.

5. Whether the claims involved complex or novel legal issues.

No. The dispositive legal issues had been addressed by the Arizona Supreme Court and Court of Appeals. See Ruling, February 8, 2023.

6. Whether the claims or defenses at issue have been previously adjudicated in this jurisdiction.

Construction defect cases are common. There is no information as to whether the specific issues in this case have been previously adjudicated.

7. Whether a fees award would unreasonably discourage litigants from pursuing or defending valid claims or defenses.

No, an award of reasonable fees in this matter will not discourage litigants with legitimate claims or defenses.

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Reasonableness of Fees

The Court has considered the Rule 80(c) declarations and fee summaries. Requests for an award of fees must be supported by proof of their reasonableness. *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 187 (App. 1983). The Court determines the billing rate charged by counsel, relying on the rate charged by the lawyer to the client “as the best indication of what is reasonable under the circumstances of a particular case.” *Id.* at 187. The Court must also decide whether the lawyer billed a reasonable number of hours for proper tasks. *Id.* at 188. A fee application must describe the type of legal services provided, the date the service was provided, the attorney providing the service, and the time spent in providing the service. *Id.* The description of the tasks performed should include enough detail to “allow the court to determine whether the hours claimed are justified.” *Orfaly v. Tucson Symphony Soc’y*, 209 Ariz. 260, 266 ¶ 23 (App. 2004).

Regarding Gallery’s objection to KHov’s representation by two law firms, the Court does not find such representation to be unreasonable given the substantial exposure KHov faced with Gallery’s \$3 million damages claim.

KHov does not seek fees related to the dismissal of K. Hovnanian Companies of Arizona, LLC and K. Hovnanian Developments of Arizona, Inc. and all claims related to the claims related to civil grading, drainage, and concrete issues that resolved by settlement. These fees for the dismissed parties total \$2,422. The fees related to the civil grading/drainage/concrete issues total \$6,245.75.

KHov was required to file its indemnity claims against Third- Party Defendants. These claims were integral to the defense of Gallery’s claims. The fees and costs related to litigating the indemnity claims were necessary to KHov’s overall defense against Gallery’s lawsuit.

As to the time entries, the Court reviewed them and finds that they are sufficiently detailed to determine their reasonableness and that they are all, in fact, reasonable. The Court considers the nature of the tasks described, the relationship (if any) of the tasks to each other, the description of other work by the time-keeper, and the time entered. Gallery has not identified fee entries showing the time billed to be excessive, duplicative, or otherwise unreasonable. The time entries meet the *China Doll* standard.

Statement of Costs

KHov is entitled to its taxable costs pursuant to A.R.S. § 12-332(A)(6). The Court has reviewed the Statement of Costs, seeking \$23,536.06. KHov agrees that the costs related to the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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deposition of Liberty Constructors, LLC's expert and representative should be removed and not included in the award of costs. Those costs total \$5,706.68, reducing the costs awarded to \$20,589.06.

RENCO ROOFING and DESERT VISTA'S JOINT APPLICATION

RR and DV also seek fees from Gallery -- \$115,209 for RR; \$86,715.50 for DV. Like KHov, RR and DV are entitled to recover their fees under Section §§ 12-341.01.

In determining whether RR/DV are the successful parties under § 12-341.01, the Court finds that RR/DV are the successful parties in the contested action arising from the Declaration and the Master Subcontract Agreement between KHov and RR and DV. KHov filed a Third-Party Complaint against RR/DV seeking indemnity for Gallery's claims against KHov caused by RR/DV's alleged negligence. KHov's derivative claims for indemnity would not have existed but for Gallery's lawsuit against KHov. As a result, both KHov and RR/DV were adverse to Gallery. *See Nationwide Res. Corp. v. Ngai*, 129 Ariz. 226, 232 (App. 1981) (third-party defendants were in an adverse position to the counterclaim plaintiff asserting a claim for which the third-party defendants may be ultimately responsible). For the reasons stated above, Gallery's claims against KHov lacked merit. The dismissal of those claims made RR/DV prevailing parties as well as RR/DV. A subcontractor (third-party defendant) is the prevailing party for the purposes of attorneys' fees when the initial complaint against the defendant/third-party plaintiff is dismissed. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566 (App. 2007).

As to factors 2, 3, 4, 5, 6, and 7 discussed above the same findings apply to RR/DV.

Reasonableness of Fees

The Court has reviewed the billing statements for RR/ DV's representation. Gallery does not object to any individual time entries or billing rates. Its sole objection is to the fees related to RR/DV's Joint Objection and Motion to Preclude Defendant/Third-Party Plaintiff's [KHov] Untimely and New Expert Reports and Opinions filed March 29, 2022. This motion concerned the disclosure of KHov's supplemental expert reports regarding RR/DV's stucco work.

Gallery has the burden of showing that any fees challenged are unreasonable or improper. *Assyia v. State Farm Mutual Auto. Ins. Co.*, 229 Ariz. 216, 223, ¶ 29 (App. 2012). Objections must be specific. A party opposing a fee application cannot merely complain that the lawyers spent "too much time," or that "the work was not necessary." *Rudinsky v. Harris*, 231 Ariz. 95, 102 (App. 2012). However, RR/DV fail to show specifically the amount of the fees related to this motion and, therefore, the objection is overruled.

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Statement of Costs

RR/DV submit a joint Statement of Costs totaling \$9,051.83. There is no breakdown of the costs related specifically to RR and DV individually. Therefore, the Court divides the award of costs to RR and DV as equally as possible.

A.R.S. § 12-1364 Claims

Fees are not awarded to KHov or RR/DV under § 12-1364. To award fees under this statute, the Court must consider specific statutory factors. A.R.S. § 12-1364(B) requires that, in determining the reasonableness of attorney fees, the Court “shall consider all of the following” factors, including “the repairs, replacements or offers made by the seller, if any, before the purchaser filed the dwelling action pursuant to section 12-1363” and “the purchaser’s response to the seller’s repairs, replacements or offers made or proposed, if any, before the purchaser filed the dwelling action.” Neither application provides sufficient facts for the Court to conduct this analysis.

CONCLUSION

For the reasons stated, **IT IS ORDERED:**

Awarding KHov and RR/DV their respective attorneys’ fees pursuant to § 12-341.01 as follows:

KHov: \$156,311.22 less \$8,667.75 for a total of \$147,643.47

RR: \$115,209

DV: \$86,715.50

IT IS FURTHER ORDERED awarding KHov and RR/DV their taxable costs pursuant to A.R.S. § 12-332 as follows:

KHov: \$23,536.06 less \$2,947 for a total of \$20,589.06.

RR: \$4,525.91

DV: \$4,525.92

A Final Judgment will be entered separately.

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10/11/2022

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
C. Ladden
Deputy

GALLERY COMMUNITY ASSOCIATION

PENNY JANE MANSHIP

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AMY WILKENS
DENNIS I WILENCHIK
JUDGE COOPER

JURY TRIAL SET

East Court Building – Courtroom 711

9:01 a.m. This is the time set for a Trial Setting Conference.

The following parties/counsel are present and appear virtually via the Court Connect platform:

- Plaintiff is represented by counsel, Craig S. Nuss and Penny Jane Manship.
- Defendants/Third Party Plaintiffs K Hovnanian at Gallery, LLC and K Hovnanian Arizona Operations, LLC are represented by counsel, Louis W. Horowitz.

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- Third Party Defendants Desert Vista, Inc. and Renco, LLC are represented by counsel, Marcus McGillivray, appearing on behalf of Rina K. Rai.
- Third Party Defendant Leblanc Building, Co., Inc is represented by counsel, Michael Ludwig, appearing on behalf of Stephen Best.
- Third Party Defendant Liberty Constructors, LLC is represented by counsel, Jason J. Boblick.
- Third Party Defendant Sargon Masonry Construction, LLC is not represented.

A record of the proceedings is made digitally in lieu of a court reporter.

Discussion is held regarding the case status of Defendant Sargon Masonry Construction, LLC. Mr. Horowitz informs the Court that a settlement was reached with the aforementioned Defendant in December 2021 and the parties need to finalize and pay the agreed upon settlement. Counsel intends to file a Notice of Settlement.

Discussion is held regarding setting trial in this matter.

IT IS ORDERED setting this matter for a **15-day** Jury Trial on **March 13-16; 20-23; 27-30; and April 3-5, 2023 at 9:30 a.m.** in this division before:

**The Honorable Katherine Cooper
Maricopa County Superior Court
East Court Building
101 W. Jefferson
7th Floor, Courtroom 711
Phoenix, AZ 85003
Phone: 602-506-8311**

Trial hours and days are normally 9:30 a.m. to 4:30 p.m. (with a lunch recess from noon to 1:30 p.m. and two 15-minute recesses, daily), Monday through Thursday.

IT IS FURTHER ORDERED setting a Final Trial Management Conference for **February 10, 2023 at 1:30 p.m. (time allotted: 1 hour)** in this division. All counsel and self-represented parties shall appear **in-person or via Court Connect**.

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Court Connect is the Superior Court in Maricopa County's new video court hearing platform. For more information about Court Connect, please visit:
<https://superiorcourt.maricopa.gov/court-connect>.

Join on your computer or mobile app

[Click here to join the meeting](#)

Or call in (audio only)

+1 917-781-4590, 860084431# United States, New York City

Phone Conference ID: 860 084 431#

All persons are strongly urged to appear by video instead of audio alone. For questions, please call Judge Cooper's division at 602.506.8311, or email this division's Courtroom Assistant Brandon Powell at Brandon.Powell@jbazmc.maricopa.gov or Judicial Assistant Avery Vaughn at Avery.Vaughn@jbazmc.maricopa.gov.

Discussion is held regarding pending Motions for Summary Judgment. A Joint Motion for Summary Judgement was filed by Third Party Defendants Renco, LLC and Desert Vista, Inc. on September 30, 2022. The Response is due November 4, 2022 and Reply will be due in the normal course. The Court will review the Motion and Response and determine if Oral Argument will be needed.

Discussion is held regarding settlement efforts.

Discussion is held regarding time allocation for Jury Selection, Opening Statements, witness examinations, and Closing Argument. You should assume **5 hours** of trial time per day, starting at 9:30am to 4:30 pm with 1.5 hours for lunch and two 15-minute breaks. Closing arguments shall be completed and the case submitted to the jury no later than **2pm** on the last day of trial.

9:15 a.m. Matter concludes.

NOTE: If/when a party files a pleading within **5 days or less** of a scheduled event, the party should also e-mail same this division's Courtroom Assistant Brandon Powell at Brandon.Powell@jbazmc.maricopa.gov or Judicial Assistant Avery Vaughn at Avery.Vaughn@jbazmc.maricopa.gov.

NOTE: All Court proceedings are recorded digitally and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to

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MARICOPA COUNTY

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the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.

Should you want an unofficial copy (CD) of the proceedings, please email Electronic Records Services at ERS@superiorcourt.maricopa.gov or call **(602) 506-7100**. Please note that there is a \$30.00 fee. To obtain a copy of a hearing on the day it is conducted, you must first fill out a "Request for Daily Copy" form and pay the fee at the Court's Law Library Resource Center. Forms are available at the Law Library Resource Center. To order transcripts of digitally recorded court proceedings, call Electronic Records Services for instructions.

Based on the trial setting, the Court sets the following deadlines and makes the following orders. The dates set forth in this order are firm dates and will not be extended or modified by this Court absent good cause. Lack of preparation will not ordinarily be considered good cause.

DUTIES BEFORE THE FINAL TRIAL MANAGEMENT CONFERENCE

MOTIONS IN LIMINE. All motions *in limine* shall be filed **no later than 5:00 p.m. on January 20, 2023.** Written responses to motions *in limine* may be filed no later than 10 calendar days after service of the motion. No replies shall be filed. The Court may hear argument at the final trial management conference or may rule without oral argument. The parties must comply with Ariz. R. Civ. P. Rule 7.2(a) before filing any motion *in limine*. Each side will be limited to filing no more than 5 motions *in limine*. However, either side may file a brief of unlimited length addressing evidentiary issues anticipated to arise at trial.

JOINT PRETRIAL STATEMENT. The parties shall file with the Court **no later than 5:00 p.m. on February 3, 2023,** a **Joint Pretrial Statement,** signed by all counsel (and any self-represented party) and containing the following. **This order modifies the requirements of Ariz. R. Civ. P. 16(f).**

1. **List of Claims.** The Joint Pretrial Statement must contain a list of all claims or causes of action on which a verdict is sought by any party. Such list shall specify (1) the cause of action (e.g., breach of contract, negligence, etc.), (2) each party asserting that cause of action, and (3) each party against whom that cause of action is asserted.
2. **No List of Issues.** The requirements of Ariz. R. Civ. P. 16(f)(2)(A), (B) and (C) are waived. The parties need not prepare a list of stipulations, agreed contested issues or other issues considered material. Disputes over what issues are properly in the case will be decided under Rule 26.1. The parties may, if they wish, submit one or more separate stipulations regarding facts, evidence or other matters.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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3. **Summary of the Case for Jury Selection.** The Joint Pretrial Statement must include an agreed-upon brief (generally less than 200 words) summary of the case for jury selection purposes. If the parties cannot agree, they must submit separate proposed summaries.
4. **Final Trial Witnesses.** The Joint Pretrial Statement must include an exhibit entitled Final Trial Witness List (see attached), which must list each witness a party expects to call at trial (in person or by deposition), the estimated time needed for direct, cross, and redirect, and the day on which they expect to call that witness. If the court finds that a party unreasonably included witnesses not likely to be called at trial, it may consider appropriate sanctions.
5. **Trial Exhibits.** As required by Rule 16(f)(E), all trial exhibits must be listed in the Joint Pretrial Statement along with objections. The Court typically resolves objections to exhibits at trial, but objections must be listed in the Joint Pretrial Statement to be preserved. If the Court finds that a party unreasonably included exhibits not likely to be used at trial, it may consider appropriate sanctions.
6. **Deposition Designations.** Deposition designations and objections should not be included in the Joint Pretrial Statement, but must be submitted to the Court three judicial days before the start of trial. The Court will resolve deposition designations as follows: By 4:00 p.m. the day before a party plans to read deposition testimony, that party must provide the Court a hard copy of the deposition transcript with (1) the portions to be read highlighted, (2) any counter-designations highlighted in a different color, and (3) any objections written in the margin. The Court will rule on any objections by the next day. If the party plans to play a video deposition, the transcript must be provided by 4:00 p.m. two days before the deposition will be played.
7. **Other Matters.** The Joint Pretrial Statement must include the matters in Ariz. R. Civ. P. 16(f)(2)(H), (I), (J) and (K).

JURY INSTRUCTIONS; VOIR DIRE. The parties shall meet and agree on as many proposed jury instructions as possible. The parties shall file with the Court, with their Joint Pretrial Statement, copies of:

1. Proposed voir dire questions.
2. Agreed-upon preliminary and final jury instructions and proposed forms of verdicts.

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MARICOPA COUNTY

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3. Separate sets of requested instructions that have not been agreed upon. Recommended Arizona Jury Instructions ("RAJI") may be referred to by name without reprinting, but if the RAJI contains options for the Court the party should indicate which options it is requesting.

Jury instructions not requested by the final trial management conference will be deemed waived unless good cause exists for the untimely request.

SETTLEMENT. The parties are reminded to promptly notify the Court of any settlement pursuant to Ariz. R. Civ. P. 5.3(d). One day's jury fees will be assessed unless the Court is notified of settlement before 2:00 p.m. on the judicial day before the trial.

DUTIES AT TRIAL MANAGEMENT CONFERENCE

At the final trial management conference, the parties shall be prepared to discuss:

1. The claims and parties as to which a verdict is sought.
2. The length of the trial and any time limits to complete the trial in the allotted time.
3. Any scheduling or equipment issues.
4. Voir dire.
5. Any special issues regarding exhibits or deposition designations.
6. Preliminary jury instructions.
7. The case summary for jury selection purposes.
8. Motions in limine.
9. The potential for settlement before trial.

TRIAL EXHIBITS

Counsel (and any self-represented party) shall deliver all trial exhibits to the Clerk of the Court **no later than 3:00 p.m. on February 20, 2023.**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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****PLEASE NOTE: FOR JURY TRIALS, ONLY PAPER EXHIBITS SHALL BE
SUBMITTED****

For in-person exhibit submission, please visit, <https://www.clerkofcourt.maricopa.gov/services/exhibits-submission>. The webpage will provide instructions and guidance for locations for in-person submission of exhibits.

For filing paper exhibits, please adhere to the following guidelines:

1. Exhibits will be marked consecutively. *The clerk cannot reserve numbers for exhibits that will be provided at a later date.* Any missing exhibits will not be considered and the numbers of all following exhibits will be moved up. If Defendant's exhibits are received prior to Plaintiff's exhibits, the clerk may mark them first with Plaintiff's exhibits following.
2. Do not place exhibits in a notebook when submitting them to the clerk for marking and do not provide the clerk with stacks of loose paper. **Individual exhibits consisting of multiple pages shall be BOUND BY STAPLES OR TWO-PRONG FASTENERS. DO NOT use paper clips, rubber bands, binder clips or submit loose sheets of paper.**
3. Original Depositions will not be marked as an exhibit. **Original** depositions to be used for impeachment purposes shall be provided to the clerk on the first day of trial to be hand-filed.
4. Do not submit duplicate exhibits, **it is essential that the parties confer to avoid submitting duplicate exhibits.**
5. If large charts or blow-ups are anticipated to be used, please include a small version (or photo) which can be marked as the exhibit. The charts and blow-ups are used for demonstrative purpose only, are not marked as the exhibits, and are returned.
6. Do not put numbers on the exhibits themselves; instead, **use a COLORED sheet with the exhibit number on it.** Place the colored sheet in front of each exhibit, however, **DO NOT staple or paper-clip it to the exhibit itself** (this should be the only loose sheet).
7. The parties are to provide a workable list of exhibits. The list should include a title or description of each exhibit. (See blank sample of the following table as a reference).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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8. If media files or video-recordings are anticipated to be submitted for marking, please submit them on **thumb-drives**, not on a CD, and deliver them to the division for marking.

Exhibit No.	Identified By	Description <i>Should be verifiable when viewing the first page of the exhibit</i>	Stipulated in Evidence/Objection

PLEASE NOTE: Each party shall provide a binder of exhibits for the Court's use. Each exhibit shall be separated by numbered divider tabs.

For additional assistance in preparation of exhibits contact the courtroom clerk at:
Cammille.Ladden@maricopa.gov.

NOTICE: Exhibits Marked But Not Offered

Exhibits submitted to the Court for a hearing/trial, whether through hard copy or submitted electronically, that are marked as exhibits but are not offered into evidence at the hearing/trial will be destroyed following the hearing/trial, unless a party requests that the evidence be returned at the conclusion of the hearing/trial. Such requests must be filed with the Court and served on all parties in advance of the hearing/trial or by no later than the conclusion of the hearing/trial.

WITNESS INFORMATION FORM

Allocation time for Jury Selection, Opening Statements, witness examinations, and Closing Argument. You should assume **5 hours** of trial time per day, starting at 9:30am to 4:30 pm with 1.5 hours for lunch and two 15-minute breaks. Closing arguments shall be completed and the case submitted to the jury no later than **2pm** on the last day of trial.

TOTAL ESTIMATED TRIAL TIME: 15 days.

VOIR DIRE EXAMINATION

TIME ESTIMATE FOR:	
PLAINTIFF(S) VOIR DIRE	
DEFENDANT(S) VOIR DIRE	

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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10/11/2022

WITNESSES FOR PLAINTIFF(S)

	WITNESS NAME	DIRECT & RE-DIRECT	CROSS
1			
2			
3			
4			
5			
6			

DIRECT, RE-DIRECT & CROSS TOTAL: _____

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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WITNESSES FOR DEFENDANT(S)

	WITNESS NAME	DIRECT & RE-DIRECT	CROSS
1			
2			
3			
4			
5			
6			

DIRECT, RE-DIRECT & CROSS TOTAL: _____

TOTAL WITNESS TIME ESTIMATE: _____

TIME ESTIMATE FOR:	PLAINTIFF		DEFENDANT
OPENING STATEMENT			
CLOSING ARGUMENT	1 st :	2 nd :	

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

GALLERY COMMUNITY ASSOCIATION,

Plaintiff,

vs.

K. HOVNIANIAN AT GALLERY, LLC,
ET AL.,

Defendants.

No. CV2020-008714

Phoenix, Arizona

April 27, 2021

10:25 a.m.

BEFORE THE HONORABLE MICHAEL W. KEMP

TRANSCRIPT OF PROCEEDINGS

Status Conference

Proceedings recorded by electronic sound recording; transcript produced by eScribers, LLC.

CATHY L. KLEINBART

Transcriptionist



www.escribers.net | 800-257-0885

I N D E X

April 27, 2021

PLAINTIFF'S WITNESSES DIRECT CROSS REDIRECT RECROSS VD

None

DEFENDANTS' WITNESSES DIRECT CROSS REDIRECT RECROSS VD

None

M I S C E L L A N E O U S

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APPEARANCES

(All present by video or telephone)

April 27, 2021

Judge: Michael W. Kemp

For the Plaintiff:

Penny J. Manship

Witnesses:

None

For the Defendants, K. Hovnanian at Gallery, LLC; K. Hovnanian Arizona Operations, LLC; K. Hovnanian Developments of Arizona, Inc.; and K. Hovnanian Companies of Arizona, LLC:

Dennis I. Wilenchik

Witnesses:

None

For the Defendant, Sargon Masonry Construction, LLC:

David S. Schopick

Witnesses:

None

For the Defendant, Liberty Construction:

Thomas Shorall, Jr.

Witnesses:

None



APPEARANCES (CONTINUED)

For the Defendant, Gothic Landscaping, Inc.:

Amanda R. Hough

Witnesses:

None

For the Defendant, Chas Roberts Air Conditioning,

Inc.:

Teresa Hayashi Wales

Witness:

None

For the Defendants, Renco Roofing:

Shannon Huff

Witnesses:

None



Phoenix, Arizona

April 27, 2021

(The Honorable Michael W. Kemp Presiding)

STATUS CONFERENCE:

THE COURT: All right. Good morning. I apologize for the delay. My 10 o'clock ran over. We had some complications. So this is the time set for a status conference, Gallery Community Association v. K. Hovnanian Art Gallery, LLC, 2020-008714. You've already announced. For the record, this hearing is just to address the 56(d) motion that was filed by the Plaintiff and the response from Mr. Wilenchik on behalf of the Hovnanian Defendants.

So let me start with you, Ms. Childs (phonetic), it is your motion. I guess, my first question is you did fully respond to the motion for summary judgment, but now you want more time to file an amended response evidently; is that right?

MS. MANSHIP: Your Honor, this is Penny Manship for Plaintiffs. We did respond out of an abundance of caution in the case our request for relief was not granted. We do feel that we could win the motion based on the Defendant's, K. Hovnanians, lack of providing evidence to support its motion, but again, if the Court is inclined to consider the merits, we would like the opportunity to have discovery. No discovery has been conducted thus far in the case. We had agreed to wait on the exchanging initial disclosures until the case was at issue.

1 I know Mr. Wilenchik takes some issue with what that
2 term means, but my understanding was it was when all third
3 parties had appeared in the case, and which I believe there are
4 still a couple of third parties that have not appeared in the
5 case yet. So we have an early meeting scheduled for next week
6 to talk about discovery in this case and to come up with a
7 scheduling order.

8 So yes. If the Court is inclined to consider the
9 merits of the case, we think that discovery should be allowed
10 to proceed, and we should be able to learn what each
11 Defendant's involvement in the construction and in the sale of
12 the units at Gallery and the common elements was?

13 THE COURT: The rule talks about essential discovery.
14 What is it that you need? Mr. Wilenchik argues that the issues
15 that are raised are legal issues, one, is there a duty under
16 the CC&Rs, does the Defendant have a duty, and whether there
17 was an express warranty to the quitclaim deed?

18 MS. MANSHIP: Yes. And we feel that we win on the
19 law that there are implied warranties that are imposed upon
20 builder vendors and builders. There are some of the parties
21 that they admit had those roles. There is a party that we know
22 was a member of the vendor and a member of the LLC general
23 contractor, but we don't know the extent of what their personal
24 involvement was. Did they employ any people that worked on the
25 project? Did they directly participate in the obtaining of

1 permits, hiring of any subcontractors, or getting the plans
2 made? All of the documents that we've seen so far are plans
3 and permits that just say generally say, K. Hovs or Hovnanian
4 on them. They don't specify which K. Hovnanian party that is.

5 With respect to the contract, we're relying on the
6 declaration, which that talks about K. Hovnanian at Gallery,
7 who is the declarant, and related entities having certain
8 rights and responsibilities under the declaration. Who those
9 other related entities are is what we feel is relevant for who
10 may be responsible under the declaration for breach of
11 contract.

12 THE COURT: And my understanding is there's really
13 not been any formal discovery. There have been no depositions
14 taken?

15 MS. MANSHIP: No, no. There haven't even been formal
16 exchanges, initial disclosures, or documents yet, correct.

17 THE COURT: All right. Mr. --

18 MS. MANSHIP: I will --

19 THE COURT: Go ahead.

20 MS. MANSHIP: I was just going to mention that we,
21 our engineers, they recently do their invasive testing in
22 March, and so I expect that they will have their reports ready.
23 This is one of the deadlines we hope to talk about next week
24 during our early meeting, but hopefully within the next 30 to
25 60 days, they can have their reports ready.

1 I do feel that in order to take the depositions --
2 I'm only allowed to take their depositions once -- and so one
3 of the things is wanting to know what all of the defects are in
4 the case so that I can ask the same individuals about those
5 defects and the actual construction of the work. So
6 unfortunately, there's the expert reports that also would have
7 to happen before the depositions come into play.

8 THE COURT: All right. Mr. Wilenchik, it does seem
9 kind of early in the game for summary judgment, but I know
10 you're a guy who doesn't sit around and drink coffee all day.
11 So what's the prejudice to your clients if I grant them the six
12 months that they want?

13 MR. WILENCHIK: Well, thanks, Judge. First of all,
14 let me clarify a few points that are necessary. The last point
15 really has nothing to do with anything that Ms. Manship brought
16 up, which has to do with expert reports and things of that
17 nature. And those are all issues going to the actual substance
18 of whether or not there's even a defect. And I do agree on
19 that level, of course I agree, that that is going to take some
20 time, if the case proceeds, and the case will proceed in some
21 form against probably the builder, who we've admitted was the
22 builder, they've alleged was the builder, and we've admitted.

23 The problem we've got here today is this motion has
24 nothing to do with any of that. This motion, as the Court
25 correctly pointed out, has to do with a couple of basic issues,

1 one, as you pointed out, is there an express warranty? I think
2 the answer is clearly no. Second, does the declarant, as a
3 matter of law, have any responsibility under a quitclaim deed
4 and under the declaration, itself, and under the acceptance by
5 the HOA to have any implied warranty? Is it a builder? Is it
6 a vendor? The answer is no to both of those.

7 So to be blunt, this motion has nothing to do with
8 anything she just talked about. Second, the only other issue
9 that we really raised at this point is the issue of who are the
10 proper parties? And in that regard, I don't need to lecture
11 anybody or tell the Court obviously something it already knows,
12 but the fact is Rule 11 is very clear that they had time before
13 filing a complaint to do whatever research they wanted or ask
14 questions or whatever they chose to want to do to clarify who
15 the parties were. They did none of that. They just shotgun
16 this thing and sued everybody in captivity in terms of any K.
17 Hovnanian related entity that has nothing to do with being the
18 declarant.

19 And including, as she just said, members of LLCs,
20 which as the Court well knows is not a basis to sue anybody.
21 And so we pointed this out and said, look, we don't have a
22 problem with you suing the builder right now. There may be
23 other issues that we raise in summary judgment in the future on
24 that, but of course, I understand that their claim against the
25 builder may proceed, at least to a certain extent, but that's a

1 separate issue, and we haven't even raised that issue.

2 The issue we've raised is whether the declarant has
3 duties and responsibilities as declarant. And the case they
4 cite is not on point. I was actually involved in that case at
5 the beginning of it. It's not a case on point at all. There
6 is no law in the state that's really on point. We believe by
7 analogy to other cases that we cited that there clearly is no
8 such duty and that the law has been limited in terms of who
9 implied warranties run from. And so that's as simple as I can
10 say it, Judge, and therefore, there is no basis.

11 I'm very familiar with the rule on continuances.
12 I've litigated them in the Court of Appeals. You can't just
13 ask for continuances for the sake of them. You have to show
14 that there's a specific fact that you were unable to obtain
15 under Rule 11 or any duty of inquiry under it, that you are
16 unable to obtain, and you have to be specific about what that
17 is and how are you going to obtain it? You just don't shotgun
18 again every defendant you can think of, and then later say,
19 well, I need assistance under Rule 56(d) to fish around and
20 hope that maybe I find something.

21 That's not what Rule 56(d) -- that's not what the
22 continuance rule is about. Never has been. They changed the
23 number of it, but it never has been about that. It's about
24 specifically knowing and advising the Court of what, in
25 particular, you need to respond to this motion that you don't

1 already have or couldn't have. And I don't know of anything
2 that's been stated anywhere to that effect, and that's why we
3 oppose it. So that's basically a summary, as much as I can,
4 Your Honor, quickly, of our position on this, unless you have
5 some questions.

6 THE COURT: All right. Well, let me ask, Ms.
7 Manship, what specifically do you need to respond to this
8 motion? I think Mr. Wilenchik is right about that. I think
9 you have to do a showing under the rule of exactly what you
10 need that you don't have now.

11 MS. MANSHIP: I need to know what the involvement of
12 the K. Hovnanian Developments entity was. One thing he said,
13 I'm struck by -- I apologize. I'm not in my office. I don't
14 have his motion for summary judgment directly in front of me.
15 But my understanding was that he was arguing that none of the
16 Defendants have any responsibilities under the cause of action
17 that we've alleged in this case, including the builder. So I
18 was a little surprised that he said that the case would proceed
19 in some form against every builder, which is K. Hov Operations.

20 So yes. I would need the information regarding K.
21 Hovnanian Development and what their direct involvement may
22 have been. They signed the declaration, which is the basis of
23 our contract claim. So from that standpoint, what they're
24 involvement again in preparing the declaration and the
25 executing of the response, rights, and responsibilities under

1 the declaration would be the information that we would need in
2 discovery.

3 If Mr. Wilenchik is trying to frame this as a motion
4 for judgment on the pleadings as opposed to an evidentiary
5 motion, then I could understand the Court considering it now,
6 but again, I just -- I think given the status of discovery that
7 it is very early to be doing a motion for summary judgment at
8 this point.

9 THE COURT: All right. I guess, your point, Mr.
10 Wilenchik, is that the issues raised in your motion for summary
11 judgment are purely legal issues, and there's really no dispute
12 about the facts on these legal issues; is that your position?

13 MR. WILENCHIK: Yeah. In terms of -- exactly. In
14 terms of who the builder is, there's no dispute. Again, I want
15 to be clear in what I'm saying. This is a very complicated
16 area of law because it's not really well fleshed out in some
17 manners. So candidly, it's difficult to deal with these
18 issues.

19 But I am saying that at the end of the day, there
20 probably -- the Court probably will hesitate to grant summary
21 judgment against a builder with respect to the HOA. I
22 understand that, and that's why I haven't pushed that issue
23 now. But with respect to the other parties, there's just no
24 basis, legally or otherwise, to have them as parties. And
25 secondly -- except maybe for the declarant, which is the issue

1 that's on the table, and that issue we believe should be ruled
2 in our favor as a matter of law. That's something we'll argue
3 at the appropriate time.

4 But we want to clean up the complaint. We want to
5 get rid of unnecessary parties, and just with all due respect
6 to Ms. Manship saying, well, we want to know more information
7 about this and that, it's interesting, but it has nothing to do
8 legally in the end with who is a proper party. And that's why
9 I said, it's really just fishing around for information that
10 has no relevance at the end of the day to anything. It's just
11 really trying to expand litigation to be a hassle to everybody.

12 At the end of the day with respect to the parties
13 that are also on the line, we need to know what exactly the
14 issues are that they're suing on -- I get all that -- so that
15 we can rifleshot who should be proper parties in the end in
16 terms of subcontractors. We just bring in everybody that they
17 complain about, and if those become issues, well, you should
18 pare that down as well, I'll just say, but we need to pare down
19 what the complaint is in the first instance and who the proper
20 parties are and who we should be bringing in as third parties
21 from those parties.

22 And it's really very simple at this point, the
23 builder, we're not making a real issue of at this right now.
24 We may later. The declarant is the real issue, and the other
25 parties have absolutely no involvement that's been stated,

1 except being members of companies or people that are members of
2 companies or whatever. There's no cause of action even stated.
3 So on that basis, it is sort of a judgment on the pleadings
4 motion.

5 In abundance of caution, I filed it as a summary
6 judgment, but terminology aside, there's no basis for suing
7 anybody else that they've stated anywhere, and that's why we
8 raised the issue in summary judgment. They haven't come back
9 with any evidence on any of that. Instead, they want to take
10 six month, basically fish around with a bunch of people that
11 have no business being in this lawsuit, and so that's the
12 issue, and I don't understand with all due respect to anybody
13 how that requires any discovery that wasn't available to them
14 to find out who the builder is. They know who the declarant
15 is. That's the issue in contention.

16 And the rest of these people, if you look at the
17 complaint, Judge, there's just nothing stated that's in my 43
18 years any relevance, at all, to being a party in this lawsuit.

19 THE COURT: All right. If I grant the extension,
20 what, if any, prejudice is there to your client?

21 MR. WILENCHIK: Oh, there's prejudice in that we have
22 a bunch of parties who are being involved in a lawsuit that
23 she's told us she's going to send a bunch of irrelevant
24 discovery to and waste everybody's time when there's no basis
25 for it at all, and they haven't stated any basis. And they

1 haven't even come back in the 56(d) affidavit and stated
2 exactly why those parties should be involved.

3 They do respond in substance in their summary
4 judgment response as to why they believe those parties should
5 be involved, and you can review that and if you think there's
6 even a scintilla of propriety stated in that as to why those
7 parties should be in this case, then of course, I would agree
8 that at that point, they can do discovery on it, but there
9 isn't any, and I think we're putting the cart before the horse.

10 And she wants to just do a bunch of wasteful
11 discovery, and that's not how it works. You have to state a
12 claim, and you have to state one with specificity as to why
13 parties are being sued, and if you can't articulate at this
14 point why you've sued them and you're just saying, well, Judge,
15 give me more time so I maybe can figure it out, that, I repeat
16 is what the law. Wells Fargo v. Smith, other cases are very
17 clear on this that that is not what the rule is about.

18 THE COURT: Okay. Ms. Manship, I'll give you the
19 last word.

20 MS. MANSHIP: Your Honor, I just want to stress again
21 that we did do our due diligence. We requested documents from
22 the building department. We saw documents from our clients
23 with some plans. They all just said K. Hovnanian on them.
24 They don't state K. Hovnanian Gallery, they don't state K.
25 Hovnanian Operations. And so from that standpoint, we were

1 able to obtain certain information, publicly available
2 information, and from our clients, and that was the basis for
3 the parties that we included in this.

4 We allege in the complaint that the fourth entity, K.
5 Hovnanian Companies was involved in the development, design,
6 construction, and sale of Gallery. They admit that in their
7 answer. So they, themselves, K. Hovnanian, admits that that
8 entity, K. Hovnanian Company, was involved in development,
9 design, construction, and sale. Similar to K. Hovnanian
10 Gallery and K. Hovnanian Operations.

11 And so again, the only entity that we were seeking
12 privileged discovery from regarding was K. Hovnanian
13 Developments, which signs the declaration as member and
14 fleshing that out and seeing whether or not they were involved
15 in any of this directly.

16 If the Court does not grant the extension, we do feel
17 that the extension is warranted. If the Court is going to
18 consider evidence on the matter, if the Court wants to consider
19 it as a motion for judgment on the pleadings, we can entertain
20 that. I would also be willing to talk to Mr. Wilenchik in a
21 meet-and-confer about, perhaps if we're only talking about K.
22 Hovnanian Development, perhaps dismissing them without
23 prejudice, so that we can conduct discovery, and then we can
24 deal with that issue later. But again, my reading of his
25 motion for summary judgment is that he was arguing that there

1 were no claims against any of these entities.

2 THE COURT: All right. Well, it's early on in this
3 litigation. I've reviewed the motion for summary judgment. I
4 don't have a draft ruling or anything. I didn't review it in
5 that depth. I do think that primarily what is raised are legal
6 issues. Could subsequent discovery and factual discovering
7 things that are factually relevant, could that affect the
8 motion for summary judgment? Maybe. I don't know. It's hard
9 for me to tell.

10 But the fact that there hasn't been any discovery
11 done to this point or any meaningful discovery and there hasn't
12 been any depositions, my inclination, out of an abundance of
13 caution, is to grant the extension. I really don't think
14 there's any prejudice to the Defendants who oppose this
15 extension. There are a number of third parties who have just
16 gotten involved or are not involved yet. We're really at the
17 early stage of this whole thing.

18 So my inclination, out of an abundance of caution, is
19 to grant the 56(d) motion. It was filed March 22nd. So you
20 can file an amended response, Ms. Manship, no later than
21 September 24th, which is about six months from the filing of
22 your motion to extend. I think that's sufficient.

23 Then, Mr. Wilenchik, you would have the normal time
24 to reply, to file an amended reply, if you deem that
25 appropriate. But I'm just not in a position now where I

1 think -- I think that an extension is appropriate, and I don't
2 think that there's really any prejudice to the Defendant. So I
3 am going to grant the 56(d) motion with the deadlines that I
4 just outlines.

5 MR. WILENCHIK: May I ask a question, Judge?

6 THE COURT: Sure.

7 MR. WILENCHIK: Thanks. I think I understand your
8 ruling -- whether I agree with it or not, it's irrelevant --
9 with respect to the party issues, but with respect to the issue
10 that's teed up on whether a declarant owes any duties as a
11 matter of law, is there any reason the Court can think of --
12 because I can't -- as to why that should be put off for six
13 months? That's a straight legal issue, and it has nothing to
14 do with the party issue that I just addressed and spoke about,
15 which is what I think she needed the time allegedly for?

16 I don't see why that needs to be continued. It's a
17 straight issue of law as you've pointed out, and I agree, and
18 there either is a duty or there isn't. If there is one, then
19 we'll proceed, or if the Court finds there is one, depending on
20 whether we special action it or whatever we choose to do,
21 obviously, but I don't see any reason, candidly, why that would
22 be put off.

23 THE COURT: So you want me to parse that out of the
24 summary judgment motion, and just rule on that?

25 MR. WILENCHIK: Yeah. Yeah. Because we combined

1 those two issues. Maybe that was a mistake, but we combined it
2 into one motion, whether or not these ancillary parties have
3 any business being in the suit, which I understand your ruling
4 would probably apply to see if there's anything there, but I
5 don't know what or why the ruling would apply to the straight
6 issue which she's fully briefed on the legal duty of the
7 declarant, if any, to an HOA.

8 THE COURT: What about the position --

9 MS. MANSHIP: Your Honor --

10 THE COURT: What about the positions of the other
11 third parties?

12 MR. WILENCHIK: They're not really relevant to that
13 issue. It's a straight issue as to whether the declarant is a
14 proper party.

15 THE COURT: All right. Ms. Manship?

16 MS. MANSHIP: Your Honor, the declarant was also the
17 vendor who sold the units and the common area to the
18 association. So I don't see how any party would be eliminated,
19 and our basis for the declarant's duties is a breach of
20 contract claim. I guess, I'm not sure what part of the motion
21 for summary judgment he's talking about. They claimed there's
22 no basis for our breach of contract action against anybody, one
23 of those people is the declarant, and we cite lots of parts of
24 the declaration that put duties and responsibilities on the
25 declarant.

1 And then there's the implied warranty, the breach of
2 the implied warranty claim is based on the declarant's position
3 as a vendor, not just because it's the declarant. So I'm guess
4 I'm not sure exactly what part of his motion for summary
5 judgment. Perhaps, he could file a different motion for like a
6 determination of question of law or something like that so that
7 we could be clear on what that part is?

8 THE COURT: Or a motion to dismiss --

9 MR. WILENCHIK: May I be heard, Your Honor?

10 THE COURT: Sure.

11 MR. WILENCHIK: Yeah. Well, regardless of whether
12 it's a motion to dismiss or a motion of summary judgment, not
13 worthy of our time really. The bottom line is I'm not sure
14 what she's confused about. It's really very simple. The issue
15 is whether, under any law, including Arizona law, that there's
16 a duty of a declarant to an HOA that was formed when it was
17 formed. And we didn't sell the declarant anything to the HOA.
18 So I don't know what she's talking about in terms of a vendor
19 relationship.

20 In terms of a breach of contract claim, the issue
21 teed up is there is no breach of contract because there's no
22 contract. There's a unilateral tender by a declarant accepted
23 by the HOA. They can inspect. They can do whatever they want
24 before they take it over, and there is no contract. There's no
25 promise to do anything. So the question is, there's no vendor

1 relationship, no contract relationship. That is teed up
2 completely in our motion.

3 And the issue is whether or not any case -- and she
4 cites one case, which I'm very familiar with, I said, the Lofts
5 of Fillmore, which I won't go into length here, but we have
6 distinguished as not being relevant, and the issue was never
7 raised in the Lofts of Fillmore case that I've teed up. That's
8 it. So I don't know what she's confused about. She spent 17
9 pages discussing it. So there's no confusion here. There's
10 just an attempt to try to put this off, and there's no reason
11 to put it off.

12 If the Court finds there is a duty, then as I said,
13 we'll either special action it because I think it's an issue of
14 first impression, and if the Court finds there clearly isn't
15 any case law that she has that's right on point that supports
16 it, then we'll be gone, or at least that party will be gone.
17 And then, as I said, the question of who the builder was, we
18 haven't even contested. So that's where we are on this, and
19 the only confusion is the one she's created. There's no
20 confusion in the motion.

21 THE COURT: All right. Ms. --

22 MR. WILENCHIK: We've fully briefed it.

23 THE COURT: Ms. Manship? Ms. Manship?

24 MS. MANSHIP: Your Honor, this is -- yeah. Again, I
25 just want to make sure, so he wants the Court to decide if

1 there are any claims against K. Hovnanian at Gallery, who was
2 the declarant and was also the vendor and quitclaim deed,
3 deeded the common elements to the association. Is that --

4 MR. WILENCHIK: There is no vendor there.

5 MS. MANSHIP: Well, K. Hovnanian Gallery sold the
6 units to the owners --

7 MR. WILENCHIK: You're not the owner --

8 MS. MANSHIP: -- so the vendor. I'm just -- I'm
9 not -- I'm just saying, K. Hovnanian Gallery sold the units to
10 the homeowners, and it quitclaim deeded the common elements to
11 the association under the terms of the quitclaim deed. So
12 you're trying to have the Court decide if there are causes of
13 action that the association can assert against K. Hovnanian
14 Gallery; is that correct?

15 MR. WILENCHIK: That's what you responded to in your
16 motion. Of course, it's correct.

17 MS. MANSHIP: Yeah. I just want to make sure I'm
18 correct in what you're asking the Court to decide; is that what
19 you're asking the Court to decide?

20 MR. WILENCHIK: I don't think there's any confusion
21 anywhere along the line.

22 MS. MANSHIP: Is that a yes? I just want to make
23 sure that's a yes.

24 THE COURT: I think that's a yes. Well --

25 MS. MANSHIP: Okay --

1 MR. WILENCHIK: I don't know what she's doing, Your
2 Honor. So I apologize. Is she putting me under oath, or what
3 is she doing?

4 THE COURT: No, no.

5 MR. WILENCHIK: The motion is very clear. I stated
6 very clearly what the motion is. She knows what the motion is
7 because she responded to it in full. Now, she's sort of
8 dancing around it. There is no vendor relationship. There is
9 no contractual relationship, other than a quitclaim deed. So
10 that's it, and that's the issue, whether there's any duty from
11 the declarant to the HOA, and I haven't found anything on point
12 that relates to the facts of this case as I just said.

13 The Lofts case is something, but the issue was never
14 raised there. I know it wasn't raised because as I said, I was
15 involved originally in the case, and the case doesn't even
16 discuss that issue, so and that's the issue.

17 And I don't see what discovery -- getting back to the
18 point -- is needed at all. I understand discovery, she said as
19 to the parties and what their involvement was. I don't agree
20 with any of that. But the Court has ruled, and I'm not going
21 to quibble with it, but I don't understand why this aspect of
22 the case can't proceed clearly. There's nothing to be
23 discovered.

24 We admitted who the declarant was. We all know who
25 it was. We all know what the operative documents are. She

1 cited them at length in her response. The issue is whether in
2 any of that pile of whatever, there's any nugget of law or fact
3 that would bind a declarant to a contractual obligation or to
4 an implied warranty, and I haven't found anything on point.

5 And I think based on the analogies I've made to the
6 Richards (phonetic) case and so forth, that clearly, given the
7 facts of this case, the Court would be hard-pressed to find any
8 such implied warranty to the HOA. Whether or not there's an
9 implied warranty to homeowners is irrelevant to the motion and
10 irrelevant to our discussion. Whether a builder vendor owes
11 duties to homeowners is not on the table. They're not the
12 homeowners. They're an HOA with respect to common areas that
13 were quitclaimed to them that they accepted, and that's it.
14 It's not really rocket science. The only issue is I don't
15 think any Arizona case has directly dealt with the issue that
16 are raised.

17 THE COURT: All right. I'm going to go back to my
18 initial ruling. I'm going to grant the 56(d) motion. I'm not
19 going to try to parse out any rulings from this at this time.
20 The Plaintiff has until September 29th to file an amended
21 response after discovery, at least some discovery has been
22 undertaken.

23 MS. MANSHIP: Your Honor, I think you just -- Your
24 Honor, I apologize. This is Manship. I think you just said
25 September 29th. I had written September 24th previously in my

1 notes. Is it the 24th or the 29th?

2 THE COURT: 29th?

3 MS. MANSHIP: 29th.

4 THE CLERK: You said the --

5 THE COURT: Oh, I'm sorry. It is the 24th.

6 MS. MANSHIP: Okay.

7 THE COURT: You're right. September 24th.

8 MS. MANSHIP: I just loss five days.

9 THE COURT: Okay.

10 MS. MANSHIP: Okay. Thank you, Your Honor.

11 THE COURT: All right. Thank you.

12 (Proceedings concluded at 10:55 a.m.)

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/s/

CATHY L. KLEINBART,
Transcriber

March 26, 2023



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

GALLERY COMMUNITY ASSOCIATION,

Plaintiff,

vs.

K. HOVNIANIAN AT GALLERY LLC,
ET AL.,

Defendant.

No. CV2020-008714

Phoenix, Arizona

January 13, 2023

9:01 a.m.

BEFORE THE HONORABLE KATHERINE COOPER

TRANSCRIPT OF PROCEEDINGS

Motion Hearing

Proceedings recorded by electronic sound recording; transcript produced by eScribers, LLC.

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January 13, 2023

PLAINTIFF'S WITNESSES DIRECT CROSS REDIRECT RECROSS VD

None

DEFENDANT'S WITNESSES DIRECT CROSS REDIRECT RECROSS VD

None

M I S C E L L A N E O U S

PAGE

Matter Taken Under Advisement

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APPEARANCES

January 13, 2023

Judge: Katherine Cooper

For the Plaintiff:

Penny Jane Manship

Craig Nuss

Witnesses:

None

For the Defendant Hovnanian:

Louis Horowitz

Dennis Wilenchik

Witnesses:

None

For the Defendants Desert Vista and Renco:

Rina Rai

Witnesses:

None



Phoenix, Arizona

January 13, 2023

(The Honorable Katherine Cooper Presiding)

MOTION HEARING:

THE COURT: -- a motion's set at that time. So given what we got to work with, I think that's going to give us a sufficient amount of time. I've read everything. I'm obviously familiar with the case already. I know you're on -- practically on the eve of a trial date here. So got to get these rulings out to you as quick as I can. Obviously, I think you need, hopefully, that direction in terms of whether or not we're going to trial.

So let's do this. Let me start with -- I want to start with Desert Vista and Renco's motion for summary judgment. I want to take that one up first, and then we'll do the Plaintiff's motion. Okay.

Okay. So Counsel, I'd ask that you really -- I mean, the way I see this issue teed up is whether or not there is sufficient evidence to go to a jury on causation with respect to claims against Desert Vista and Renco. I want you to focus on what was disclosed and what the evidence will show, not including the new opinions and reports that the Court excluded in July. Okay.

You make an alternative argument in your motion that even if those were -- those opinions and reports were



1 admissible, blah, blah, blah. They are not. So we are really
2 focusing on whether or not there is sufficient evidence of
3 causation without those reports and opinions. So if you could
4 just go that direction, that would be helpful to me.

5 MS. RAI: Okay. And Your Honor, there's obviously
6 the breach of contract claim and the breach for failure to name
7 as an additional insured. Did you want me to touch on that
8 briefly? I think that will only take a minute or two.

9 THE COURT: Yes.

10 MS. RAI: Okay. Relative to the breach of contract
11 there really is no independent breach of contract claim pled
12 here by K. Hov. This is an indemnity case. K. Hov's response
13 admits that. This is a derivative liability case derivative of
14 whatever claims and damages is established by the Plaintiff.
15 It is not an independent breach of contract claim, i.e. you
16 breached your -- the terms of your contract and caused direct
17 damages to K. Hov, except for the failure to name K. Hov as an
18 additional insured on the policies of insurance general
19 liability coverage provided by K -- I'm sorry, Desert Vista and
20 Renco.

21 Relative to that issue, Judge, as you know, the
22 contract required that my clients name K. Hov as additional
23 insured on their policies of insurance. That was, in fact,
24 done. What happens next in these cases is K. Hov then asked
25 the carrier directly for a defense. That also occurred.



1 Neither Renco or Desert Vista are privy to those conversations.
2 That is a direct communication between K. Hov and the carrier.

3 The carrier in this case accepted the obligation and
4 has been funding on behalf of Renco and Desert Vista the
5 defense of K. Hov. Subcontractors can't really afford to pay
6 for the full defense of big builders in this country. And so
7 they obtain policies of insurance on their behalf in order to
8 satisfy that obligation. So the only breach of contract claim
9 viable in the case is breached for failure to name as an AI.

10 Now, we wouldn't know whether or not the AI was
11 accepted or not. That's something that K. Hov would have
12 known. The fact that that the tenders were made and the
13 requests for defense were made and accepted by the carrier were
14 not known to Desert Vista or Renco until it did its
15 investigation to file the subject motion.

16 Given that K. Hov filed a claim for breach of
17 contract for failure to name as an AI, we would have expected a
18 disclosure that, in fact, we did meet that contractual
19 obligation. The claim would -- should have been withdrawn, and
20 we should have further been provided with information that
21 Renco and Desert Vista were, in fact, satisfying their
22 obligation to defend K. Hov vis-a-vis the policy of insurance.
23 So I think that that additional claim goes away.

24 K. Hov has acknowledged the contribution claim and
25 negligence claims are gone, so we can focus now on the



1 indemnity case and the causation issue that you've wanted us
2 to solely focus on.

3 In this case, the Court has already acknowledged the
4 necessity of competent expert testimony to establish causation
5 for defects in this case. Plaintiff's obligation in this case
6 is limited to identifying those defects and proving that those
7 defects stem from the construction activities, which were the
8 responsibility of K. Hov. Plaintiff has provided expert
9 reports to that extent.

10 K. Hov's obligation then is to defend those claims,
11 you know, to the extent that they can, but then to also
12 identify those subcontractors that they think are responsible
13 for those deficiencies. The causation requirement is
14 problematic here because, as the Court may well know from other
15 construction defect cases, there are many different causes for
16 a particularized defect.

17 It could be a design deficiency. It could be an
18 engineering deficiency. It could be a field change. It could
19 be the work of other subcontractors. It could be partially the
20 fault of one subcontractor and partially the fault of another
21 subcontractor. It could be, as in this case, the subcontractor
22 following K. Hov's standard specifications that are different
23 from the plans and specifications.

24 I believe on Exhibit 1, paragraph 9 of the
25 subcontract agreements essentially say that if you cover



1 another -- a subcontractor's work that's deficient, you buy
2 that. My client, for example, Desert Vista, covered the
3 stucco -- covered the framing with their stucco. Will I be at
4 trial with an argument that that Desert Vista's responsible for
5 framing deficiencies? I don't know, because, as the Court was
6 homing in on, none of that type of information or opinion
7 testimony has been disclosed.

8 Prior to the supplemental report that were precluded
9 by the Court, I had a conversation with K. Hov's attorney, then
10 Holly Davies. And she had just come into the case and had
11 indicated that there were problems with the extra reports that
12 needed to be addressed. By that time, as the Court well knows,
13 all of the expert discovery and investigation by the
14 subcontractors were completed, and therefore the subcontractors
15 would be prejudiced.

16 So K. Hov itself in trying to supplement those
17 reports implicitly acknowledged the fact that that testimony
18 was necessary. When you ask, Judge, what is disclosed in this
19 case, I'll tell you. Plaintiff has disclosed a laundry list
20 supported by expert testimony of deficiencies that they claim
21 exist at the project. They go from the ground up. It's soil
22 related. There are framing issues. There are stucco issues,
23 window issues. There are roofing issues and more.

24 Plaintiffs have also disclosed costs of repair and
25 methods of repair for each of those deficiencies. What K. Hov

1 did is they provided a responsive report to Bert Hal
2 (phonetic), and that responsive report either agreed or
3 disagreed with the existence of those deficiencies. K. Hov's
4 experts also rendered opinions on the method of repairing those
5 deficiencies and the -- and I think it stops there.

6 What we don't have from Bert Hal and associates is
7 which subcontractor might be responsible for any particular
8 defect alleged by the Plaintiffs in this case. And also, Bert
9 Hal has no independent cost of repair. So there's a damage
10 element that's missing, but the issue is really related to
11 causation.

12 As the Court knows also, ARS 11 -- I think it was --
13 or 32-1159.01(a) has come into play, and it subsumes or trumps
14 written indemnification agreements that purport to indemnify
15 the indemnity for their own negligence, which is the case here.
16 So under Arizona's statutory scheme, it is per public policy,
17 the law that my clients could only be responsible to indemnify
18 K. Hov for defects or to the extent that they were negligent.

19 And so the extent of that negligence is necessary.
20 Were there two sub trades that work together to create a
21 deficiency, is it both a design issue and an issue with
22 installation -- those things. What K. Hov has done in their
23 response is said, well, if you look over here at this report,
24 and you look at this expert over here, and then you go to the
25 Plaintiff and you look at their report, and then you go look at

1 the contract and you see this contract document, you look at
2 the scope of work, and then you go back and you look at the
3 cost of repair -- we're there, Judge. And my claim is that's
4 exactly what their experts should have done.

5 They need to explain to the jury how they get there
6 relative to each defect with each subcontractor, and that is
7 devoid and missing from the record in this case in its
8 entirety. After the Court's preclusionary order in this case,
9 the depositions had not been taken. So K. Hov had an
10 additional opportunity to take the depositions of the
11 subcontractors, of the subcontractors' experts. And nothing in
12 those depositions provided any additional support that any
13 particular subcontractor would be responsible.

14 For example, they weren't -- they didn't get anything
15 from our client that said, hey, if this ends up being a defect,
16 we acknowledge that's our fault. None of that is on the record
17 even after K. Hov was aware that their expert reports were
18 precluded.

19 So to answer your question candidly, there is -- what
20 the jury won't hear at the time of the trial based on the
21 court's prior ruling is that the -- I'm going to make it up --
22 that the stucco cracking that occurs at the project for which
23 Plaintiff is claiming, you know, \$100,000 for resulted from the
24 negligence of Desert Vista because they improperly mixed the
25 stucco and they improperly cured the stucco. Something of that

1 nature.

2 They also don't have -- while the stucco cracks
3 aren't the fault of Desert Vista, they're really the result of
4 soil movement. So we're blaming the soils people, the rough
5 graders or the final graders, landscapers, those people for
6 cracks in the stucco.

7 So I'm headed into trial now without any opinion from
8 any K. Hov expert or any expert, frankly, in the case as to
9 whether or not those stucco cracks are my fault, or whether
10 those stucco cracks are the fault of a design issue, or whether
11 they're the fault of the graders, or whether they're the fault
12 of K. Hov for not following soils recommendations.

13 In other words, are they the result of building
14 movement or are they result of faulty installation by the
15 subcontractor at issue? So the long and short of it is there
16 is no such evidence and testimony. And if the Court denies the
17 subject motion for summary judgment, K. Hov -- I'm sorry --
18 Renco and Desert Vista would be placed in the position to sit
19 at trial and constantly trying to enforce the Court's
20 preclusionary motion while simultaneously defending itself and
21 funding K. Hov's defense as well.

22 So it's time to sort of clean up the pleadings. But
23 as the Court well knows, because it was contained in your prior
24 ruling, this expert testimony and these opinions are absolutely
25 necessary to carry K. Hov's burden of proof in this case. They

1 don't have it. The Court's aware that they don't have it.
2 They attempted to get it in. It was precluded. And so there's
3 no just reason for my clients to be at trial when nothing will
4 go to the jury in the way of why or how or even which defects
5 are claimed against Renco or Desert Vista.

6 THE COURT: All right. Thank you very much. Okay.
7 Who's going to speak for --

8 MR. WILENCHIK: I will, Your Honor.

9 THE COURT: (Indiscernible). Okay. All right. You
10 know what? I realized you're, like, involved in all three of
11 these motions, so I will (indiscernible). I can -- go ahead,
12 go ahead. We got plenty of time.

13 MR. WILENCHIK: Your Honor, to be blunt, this is kind
14 of a ridiculous motion. There is not one case anywhere that
15 I've seen, not one piece of authority cited in anywhere says
16 that our client as third-party plaintiff has to have an expert
17 to establish a claim such as this, which is a derivative claim,
18 a pass-through claim.

19 So let me be clear on this. If the plaintiff
20 establishes at trial that there is a defect such as what's
21 claimed here, defective installation -- which is the issue
22 here, more specifically -- it is the plaintiff who has the
23 burden to carry the proof of that defect. Otherwise, okay, if
24 I said I didn't (indiscernible).

25 THE COURT: Yeah. No, no, no, you're fine. You're



1 fine.

2 MR. WILENCHIK: The Plaintiff has to prove that. I
3 want to be clear on this. We're not agreeing with the
4 Plaintiff, as you can well imagine, that there are defects,
5 obviously. But if the Plaintiff establishes that there are
6 defects, like in any of these cases, the Plaintiff has to
7 establish what that defect is and what it emanates from. Okay?
8 And all we have to do as the defendant who's denying those
9 allegations in a derivative type claim such as this is pass
10 through that claim to people like her client and say, look,
11 this falls within the scope of your work. That's all we have
12 to do, period. There is nothing anywhere that says that we
13 need an expert to do that, not one case in this country, let
14 alone the state that supports her position here. And she
15 hasn't cited one.

16 All we have to do is show that the Plaintiff's
17 position and their expert -- and they have produced all that,
18 and it's all in the papers in front of you. Not going to spend
19 all the time going through each and every one. I'll give you
20 couple examples. But it's all there in all of our response the
21 Plaintiff establishes the defect. The Plaintiff says there's
22 faulty stucco installation. We've turned to their subcontract,
23 and we have deposed them, and they have admitted that their
24 work falls within their scope.

25 Now, everything that she's arguing here is her



1 defenses, affirmative defenses to that. For example, telling
2 the Court that we have to prove causation is a complete red
3 herring, misnomer, whatever you want to call it. It's wrong.
4 There's no case saying any of that. That's her saying it. We
5 don't have to prove anything other than it falls within the
6 scope of their work under their subcontract.

7 She can stand up all day long, contrary to what she
8 just told the Court, and defend this case by saying, well, you
9 know what? It isn't our problem. It's somebody else's
10 problem. It's this. It's that. It's K. Hovnanian's fault.
11 Whatever she wants to argue, whatever nonsense she wants to
12 argue she can argue to a jury and try to shift the blame from
13 her client who did that work and is responsible because it's
14 defectively found and argue not our problem, not our fault.

15 That's fine. That's what trials are for. And she
16 can try to do that at trial, although she hasn't done a good
17 job of it yet. But all she's doing is raising a specter of
18 nothing. She's trying to say, well, you know, they need to
19 prove causation because there's lots of different causes, Your
20 Honor. That's irrelevant. The Plaintiff needs to prove the
21 damage. The Plaintiff needs to prove the defect, not us. All
22 we're saying is if that's true, ladies and gentlemen of the
23 jury, these guys, her clients, are the ones that did it,
24 period.

25 Now, she can get up and say, oh, we didn't do it, and

1 it's somebody else, and the rabbit ate this and that, and all
2 the rest of the stuff. It doesn't matter. That's her
3 affirmative claims, her affirmative defenses. There's not one
4 case anywhere that supports that an expert testimony is
5 required for us to derivatively pass through the claim of the
6 Plaintiff and say our subcontractor under their contract did
7 this.

8 And she raises a statute, for example, that has
9 absolutely nothing to do with this, saying that Arizona law is
10 clear that you can only be indemnified -- you know, you can't
11 be indemnified through your own negligence. We don't disagree
12 with that. That's, you know, construction law 101. We get
13 that. I don't know why she even raises it. What does that
14 have to do with anything? That doesn't require an expert.
15 That requires a contract and a scope of work. And if the scope
16 of work fits what the Plaintiff is claiming a defect -- as such
17 is exactly the case is here with the stucco and the roofing --
18 then they got a problem, and they got to deal with that
19 problem, not us. And that's why we have indemnification.

20 Now, let me give you this quickly as an example of
21 what I'm talking about, because there's lot of different
22 possibilities. But for example, let's take the issue regarding
23 allegedly defective WRB. Desert Vista provided it, and Desert
24 Vista installed it. We've established that in the papers we've
25 had. According to Desert Vista's own representative's

1 testimony, contrary to what you just told the Court, that none
2 of these depositions meant anything. That's in K. Hov's
3 statement of fact -- separate statement of facts in paragraph
4 38. Also, the contract which Stevie (phonetic) produced, which
5 is K. Hov's SSOF37.

6 And its expert agrees this is typically done by the
7 plasterer. And that's in Statement of Facts 41. If the
8 Plaintiff -- again, I repeat -- is correct regarding its claims
9 that the WRB was improperly installed, the evidence shows that
10 Desert Vista was the party that installed it. We make a prima
11 facie case. That's all we need to do. That's perfectly
12 sufficient for our jury. We can come back again and argue
13 otherwise, whatever her defenses. I don't care what they are
14 right now. It doesn't matter. She can have 20 of them. It
15 doesn't matter to me as K. Hovnanian passing this claim on to
16 the person who did the work. That's all we have to show, that
17 they did the work, not causation.

18 And we don't have to rule out -- this is a crazy
19 claim that she's making. We don't have to rule out all
20 possibilities that she raises. You know, if she sat here and
21 said it could be this, it could be that, it could be this, it
22 could be that -- great, great. Tell that to the jury, and I'm
23 happy for you.

24 I'm not trying to say you did anything wrong. I'm
25 saying the Plaintiff's claiming this is wrong, and now it's

1 your problem to explain it. So you tell the jury it could be
2 this, this, and the other thing. That's what you're there for
3 as a lawyer. That's why you're at trial, to explain all of
4 that to the jury and to pass off your responsibility on to
5 whomever else you think. But who is that? Who is that? I
6 don't know who that is. She hasn't told me or you. All she
7 says is it could be this, and it could be that, and there's
8 this possibility, and that possibility, and everything else.

9 That's not evidence. If anybody's required to
10 produce evidence, it's her, not me. She hasn't done anything
11 except it could be this and it could be that. Well, great.
12 Those are affirmative defenses. If she can prove that, I'm
13 happy for her, but she hasn't done anything to prove any of
14 that. It's just speculative possibilities and asking me to
15 disprove all of them. That's not our burden to do at all in a
16 derivative claim, and that's all this is. It's not my claim.
17 It's the Plaintiff's claim.

18 And I'm saying, great. I don't really care. I'm a
19 builder. And guess what? All I do is schedule people to do
20 work, subcontractors like her clients. It's their work that's
21 at issue, not ours. She hasn't produced a case saying we
22 improperly supervised anything. And if she even did, that's a
23 fact issue for the jury.

24 Now, another quick example regarding the foam EPS
25 board. These are the big-ticket items. Desert Vista's

1 representative testified that Desert Vista supplied and
2 installed the EPS board -- you know, after listening to her
3 telling us there's no evidence of it. That's in our statement
4 of facts at 38. Desert Vista's expert agrees that he was
5 informed by Desert Vista's principal about the actual work. He
6 was told, the expert, by Desert Vista's principal, her client,
7 that Desert Vista understood what was required, including 12
8 inch on center grooves in the foam and that Desert Vista
9 ordered and installed that product. That's paragraph 19 and
10 paragraph 40 of our SSOF.

11 Now, if Plaintiff can prove again its claim that this
12 EPS board -- just as I brought up on the other example -- was
13 installed improperly -- and they claim they're going to do
14 that -- and it lacked these proper grooves, my client isn't
15 responsible for that. I don't need an expert to further
16 bolster the Plaintiff's claim. The evidence then clearly shows
17 that it fell under Desert Vista's scope and it was the party
18 that supplied that board and installed it. Who else would be
19 responsible? But again, that's a prima facie case.

20 If she wants to defend that case, go to it. I'm
21 happy for her. But has nothing to do with me or my client and
22 has nothing to do with proving causation by excluding all other
23 possibilities. That's her affirmative defense, and those are
24 facts that she needs to produce and establish and argue and
25 present to a jury as her factual disputes and her defenses.

1 I don't know what else I can say about this wasteful
2 motion, quite frankly. What they're trying to do is
3 obviously -- hopefully to you obvious -- capitalize on your
4 ruling, but your ruling doesn't affect us in reality.

5 Now, let me just say this. It would be nice, and we
6 could produce experts. Let's say your ruling didn't exist. We
7 could do that, certainly, and many people do that, to be clear,
8 but we don't have to do that. There's no case that says we're
9 burdened by having to produce an expert, to pass on the
10 Plaintiff's claim, to show that it's under their scope of work.
11 That's all we need to do. That's a prima facie case.

12 What else could we possibly need to produce?
13 Evidence to rebut possible arguments that she's going to raise
14 as affirmative defenses? No. She can raise those. And if
15 she's successful in raising those and I can't rebut them, then
16 more power to her. But it's not a part of my affirmative case
17 to exclude all possibilities of somebody else maybe, maybe
18 speculatively and conjecturally at fault. That's it. It's
19 really that simple. It's a fact issue for the jury, and it's a
20 waste of a motion, frankly, and has no merit whatsoever.

21 THE COURT: All right. Thank you.

22 Counsel, back to you.

23 MS. RAI: Yes, Your Honor. So as far as authority
24 goes, 12-2602 statute requires before you file a claim against
25 a contractor, that you have an affidavit that -- from an

1 engineer or an architect that says that you have proper bases
2 to pursue that claim against that contractor. That's not
3 limited to the Plaintiff --

4 THE COURT: Wasn't that for direct claims? I'm sorry
5 to interrupt you, Counsel. This is always the problem with
6 virtual. I wind up talking --

7 MS. RAI: Oh, that's --

8 THE COURT: -- over people, so I apologize.

9 MS. RAI: That's okay.

10 THE COURT: Isn't that applicable in direct claim
11 situation?

12 MS. RAI: No, it is not. It's applicable in any
13 situation where one party is suing a contractor for deficient
14 work and requesting damages thereby. In addition to that,
15 Judge, 32-1159.01, the new statutory scheme, was -- it came to
16 be to cure the issue that a developer can't simply say, oh,
17 it's stucco. You did the stucco. It's your fault. Oh, you
18 know, because our indemnity agreements in the past and the one
19 that's at issue in the contract here essentially says all we
20 have to do is prove that this defect relates to your work or
21 rises out of your work, not that you necessarily caused the
22 defective condition to exist.

23 And that's the way we had been litigating these cases
24 for years in this town and in other jurisdictions is the
25 developers were saying, like Dennis is now, all that I have to

1 do is show that this rises out of or relates to your work
2 because that's what my contract says. The statute comes in
3 32-1159.01 and says, no, that is patently unfair, and we are
4 going to require that if you're going to ask a subcontractor to
5 repay you for damages that you may owe a plaintiff or owner in
6 a case, that you demonstrate the extent of their negligence.
7 That's causation. That's fault. That's the law in Arizona.

8 Woodward v. Chirco is a longstanding Arizona case
9 that requires expert testimony in order to support a claim, a
10 deficient work of the subcontractor. In this case, for
11 example, Judge, the windows. There's a claim that the windows
12 were not installed per the plans and specifications in the case
13 or the flashing around the windows, which arguably relates to
14 or arises out of my client's work.

15 But in this case, K. Hov has standard specifications
16 they put out as well that tells contractors how to do the work
17 and says it trumps the plans. We performed our work pursuant
18 to the standard specifications. So again, doesn't K. Hov have
19 an obligation to say you were obligated to follow the plans, or
20 you're still responsible for some reason?

21 The other issues -- for example, there's issues with
22 slope, slope issues at parapet walls. Slope can be created in
23 framing. Slope can be created by the stucco itself. Slope can
24 be created by the work of the roofer. On the roofs, the slope
25 can also be created by the framer. So if there's a lack of

1 slope, that's all that Plaintiff has to establish is there --
2 these don't slope -- the roofs don't slop to the drains, and
3 that's a construction deficiency.

4 It is then K. Hov's obligation to say we agree or
5 disagree with that contention, but in the event we agree or in
6 the event a jury agrees, the party that was responsible for
7 creating that slope was the framer. And so we want to be
8 indemnified for that issue from the framer. Conversely, they
9 may say that slope was supposed to be established by the
10 roofing contractor in the foam that it applied. And so if
11 there's a problem with that, then we want to go after the
12 roofer for that. There may be a both you guys did it wrong.
13 There might be a defense that I say, well, wait a minute. I
14 followed the plans and specifications, so I don't think I'm at
15 fault. I think the plans were deficient.

16 And so it is absolutely required that K. Hov have a
17 burden of proof. If there's a statute that says I only have to
18 indemnify you to the extent of my negligence, then you have to
19 come forward with evidence demonstrating what the extent of my
20 negligence is and why. There's 30, 40 subcontractors involved
21 in the production of these types of projects, and so it is the
22 party who's seeking to be indemnified's obligation to identify
23 which of those deficiencies they are seeking indemnity from
24 from a particular subcontractor.

25 Again, as I sit here today, I don't know if I am



1 going to be attempted to be held responsible for framing
2 deficiencies because I covered it up with my work and because I
3 have a contract that says I buy that if I do. And someone has
4 to tell me, did I cover it up and why. So this idea -- I mean,
5 I've been doing this for 27 years and most of it in Arizona,
6 and I can't think of a single case where a developer has taken
7 the position that they don't have a burden of proof to
8 establish fault on the part of a subcontractor. That's even
9 before the new statute came out.

10 So the idea that K. Hov did not need expert testimony
11 to even identify which defects they're claiming against my
12 client is astounding to me, astounding to me. The fact that
13 the dry wall -- the stucco was cracked, then they say they
14 installed the stucco. I've met my burden. But we all know
15 that in case after case after case after case after case -- I
16 mean, every Pulte (phonetic) case in town the claim is that the
17 stucco's cracking because the building is moving because of
18 soils issues, because of framing issues, those types of things.
19 None of that's on the record. If it was, it would've been put
20 in front of you in response to these motions.

21 And so to go to trial and to have K. Hov say all we
22 have to do is show they did the work, that's enough to
23 establish causation for the deficiency and causation for the
24 defect is, I think, a little too rich. There's been testimony
25 in this case that K. Hov (indiscernible) a lot of field

1 changes. Don't do it this way. Do it that way. Well, if I
2 know that they're blaming me for a deficiency, then I would've
3 had the opportunity with my experts to investigate whether that
4 was the result of a field change. So it's not my fault. It's
5 K. Hov's fault. We wouldn't --

6 THE COURT: Okay, okay.

7 MS. RAI: -- have that opportunity if the Court
8 acknowledged that.

9 THE COURT: All right. I think I do -- I think I
10 understand your position on it. Let's do this. Let me move --
11 I want to move on to the Plaintiff's motions, and then we'll
12 see what we have left on time. We need to --

13 MS. RAI: Okay.

14 THE COURT: -- circle back to (indiscernible).

15 MS. RAI: Sure.

16 THE COURT: Okay. So let's talk about
17 (indiscernible) motions, actually. There we go. Yes, K. Hov's
18 motions. Okay. I don't care really what order you want to
19 take them in. Let's just --

20 MR. WILENCHIK: Okay.

21 THE COURT: -- do it.

22 MR. WILENCHIK: Well, I'd like to address the main
23 motion, I would call it. And Mr. Horowitz can address the
24 other one if that suits the Court.

25 THE COURT: Sure.



1 MR. WILENCHIK: Thank you. This is a serious motion
2 that is supported by authority as opposed to what counsel avows
3 and I'll avow.

4 THE COURT: This the one about the unsupported
5 defect? (Indiscernible) the one?

6 MR. WILENCHIK: No. This is the one that says
7 there's no cause of action here at all by the Plaintiff --

8 THE COURT: Okay.

9 MR. WILENCHIK: -- for anything. And let me just
10 start by saying I'm not going to go into my 45 years of
11 experience to argue a summary judgment motion. But I will tell
12 you this. I brought this motion before Judge Kemp right at the
13 start of this case, and I argued it. And Ms. Manship argued
14 her response. The judge at that time, to my great
15 disappointment, basically punted and said that he wanted to
16 hear -- have further discovery or allow them -- because they
17 asked for it -- to have further discover to occur. Originally,
18 I think he said 90 days. I could be wrong.

19 THE COURT: Was it on a motion to dismiss, then?

20 MR. WILENCHIK: What's that?

21 THE COURT: What it on a motion to dismiss?

22 MR. WILENCHIK: Yeah.

23 THE COURT: Okay. Well, that really calms me down a
24 little bit because I was --

25 MR. WILENCHIK: Yeah.

1 THE COURT: -- horrified that this was being brought
2 now.

3 MR. WILENCHIK: Yes.

4 THE COURT: But it wasn't brought -- it's not for the
5 first time being brought now. Okay, got it.

6 MR. WILENCHIK: Right. It was brought right at the
7 outset.

8 THE COURT: Okay.

9 MR. WILENCHIK: It was right at the outset. It was
10 basically saying there are no issues of fact other than the
11 complaint itself and what they're claiming. And that's
12 still -- the reason I bring that up is that's still the case
13 today. That's why I said I was disappointed in the ruling. I
14 thought I was punting it because out of all the respect to
15 Judge Kemp. Had nothing to do with any factual dispute.
16 Nevertheless, they convinced him it did. And now, instead of
17 the 90 days coming back, it got extended and extended and
18 extended because discovery went on and on and on.

19 And now we're here on the eve of trial arguing it
20 again. And I agree with you; it's very disappointing. But
21 having said that, let me just get into the heart of it now and
22 why I believe this case has to be dismissed, which I guess
23 moots the argument we just had which probably I should've
24 interrupted, so we should probably argue this first, but
25 that's --

1 THE COURT: Okay.

2 MR. WILENCHIK: -- neither here nor there.

3 First of all, let's start with the implied warranty
4 of workmanship and habitability. This is an HOA, just a plain
5 vanilla HOA. And it is making claims here to being with,
6 frankly -- I need to say at the outset to be clear -- that
7 don't even involve common area elements. Okay? They don't
8 have ownership of the areas that they're claiming defects in.
9 They're owned by the owners on lots -- and I'll come back to
10 this -- that they don't even own.

11 They can't do that under Arizona law. They don't
12 have any right to be suing to begin with over individual
13 owners' complaints. And they usurped those complaints unto
14 themselves and basically argue that they have a right to argue
15 and to complain about anything they want that has anything to
16 do with anyone on the association or that's a member. That's
17 ridiculous. That's not the law.

18 I'll come back to that, but the point is never
19 anywhere in the history of Arizona am I aware -- having done
20 this for 45 years -- am I aware of any case that has allowed an
21 HOA the right to sue for the implied warranty of habitability
22 and fitness against a declarant -- which is K. Hovnanian at
23 Gallery LLC -- at all.

24 Now, there are other jurisdictions -- and I know
25 counsel, with due respect to counsel, is from another

1 jurisdiction, and maybe that was the problem here. But this is
2 not Colorado. It's not California. It's not other states.
3 It's Arizona. And Arizona is very clear, very clear in the
4 distinction between HOAs. There are condominium association
5 HOAs -- which I want to bring up right at the outset because
6 this is important -- that do have the right to bring claims on
7 behalf of individual owners because, again, there are no lots,
8 per se. There are common laws and so forth in condominiums
9 which make them unique.

10 For example, the only case that they've cited to is a
11 case that I actually was the attorney for the developer
12 originally. So I'm very familiar with it. It's the Lofts at
13 Fillmore case. I can tell you that that was a condominium
14 association down here on Fillmore near downtown that was a
15 conversion from an apartment complex. And in that case, you
16 will not find anything in that case, not one word in that case,
17 I'll avow to you, that in any way, shape, or form gives even
18 that association, a condominium association -- the distinction
19 will become evident in a minute. Even in that case, there's
20 nothing discussing the right of an association to bring an
21 implied warranty claim at all.

22 The only reason plaintiffs like this point to the
23 case is because on its face, it appears to be an HOA suing a
24 builder/vendor. But that case -- I can tell you from personal
25 knowledge -- no one ever raised the issue back then of whether

1 or not an HOA was or had that right. It's not one issue that
2 was ever raised in the case. It's not in the case. There
3 isn't one word in the case that says -- that implied warranty
4 rights. Everybody just assumed it, and here's why.

5 If you look at that case, it's a condominium
6 association. And under the condominium statutes and statutory
7 scheme 33-1201 et seq., you're going to see that it's quite
8 different than the standard HOA that we're talking about here
9 under 33-1801. Two separate statutory schemes. In a
10 condominium association, again, the statute provides the right
11 of the association for reasons I just discussed -- I'm keeping
12 this brief. But for reasons I just discussed, the condominium
13 association by statute and by fact because of the way the
14 regime is set up has that right.

15 And particularly in Lofts, if you'll look at it,
16 there's a specific discussion in there that ends this
17 controversy because it says that the association in that case
18 was formed after -- afterwards. That is when these issues
19 arose. It wasn't like this case where there's an HOA from the
20 outset that is a separate, independent company and upon
21 turnover to the homeowners, at that point, you know, received
22 by quitclaim deed the common area elements.

23 In that case, it specifically says that the HOAs form
24 afterwards, and the owners -- although they don't have to under
25 the condominium statute -- in that case, you'll see

1 specifically essentially signed over their rights individually
2 to the HOA. Now, that's very important, but they didn't
3 discuss that, but it's in the case. The case has absolutely no
4 precedential value as to our discussion here about homeowner
5 association under 12-1801 et seq. as opposed to condominium
6 associations. And furthermore, where individual owners as in
7 Lofts cede over for purposes of filing a lawsuit their
8 individual rights.

9 That didn't happen here. It hasn't happened here.
10 And even under the condominium statute, they're required to
11 notify owners and get their permission and approval before
12 lawsuits are brought under that statutory scheme because they
13 have that right. Although many CCNRs, I'll avow, also now
14 contain a provision where they require owners where lawsuits
15 are brought to approve by, you know, two-thirds majority if the
16 association wants to bring any kind of lawsuit. But it has
17 nothing to do with this case.

18 There's not one other case in Arizona that I'm
19 familiar with and I haven't seen cited that gives the right of
20 implied warranty to this HOA. And the history of the implied
21 warranty -- and again, I won't take all your time here. I'm
22 going to try to keep this brief. But let me just quickly say
23 that the Court first recognized limited right in Colombia
24 Western v. Vela. It proceeded and was defined further in
25 Richards v. Powercraft, which also talked about the right being

1 extended, but only to subsequent homebuyers who did not have
2 notice of the defect.

3 Now, an association, I would argue, under a quitclaim
4 deed does have notice of any defective construction because
5 they are not required to accept that quitclaim deed. They do
6 so voluntarily, and they do so upon inspection, and they do so
7 to cover their own butt with experts looking at all of the
8 conditions before they would accept the quitclaim deed. Why?
9 This quitclaim deed, as you all know, is different than a
10 warranty. It's the exact opposite of a warranty.

11 And so they understand when they take that quitclaim
12 deed from the declarant, the declarant is not necessarily the
13 builder. The declarant has no contact with them. The
14 declarant represents nothing to them in the CCNRs whatsoever
15 about any conditions, except here's a quitclaim deed. You can
16 either take it or not take it. That's it. And if you take it,
17 there's no other consideration involved. It's on you.

18 And here's what's really galling. The Plaintiff in
19 this case actually says -- incredibly says, well, you know
20 what, you guys, K. Hovnanian, have admitted all that, so shame
21 on you. You've admitted that you're responsible. Nonsense,
22 absolute nonsense. And it's galling. They cite to
23 paragraph -- primarily to paragraph 5 of their complaint and
24 answer and also testimony at a deposition. And I want to
25 quickly cover that.

1 If anything, we've admitted just the opposite of what
2 they mislead the Court and contended we've admitted. Because
3 paragraph 5 basically in their complaint says that the
4 declaration requires the Association to repair, replace, or
5 maintain the common elements, including but not limited to
6 their property and the common area as those terms are defined
7 in the declaration. And we said, yes, correct, you are
8 required to do it. You are required to make change and repair,
9 not us. We never admitted anywhere that we're responsible.

10 Similarly, they cite to a deposition of one of our
11 representatives. And I'm going to -- Mr. Harvey (phonetic) at
12 page 108 of this deposition. Now, listen to this.
13 Notwithstanding the question is the foregoing. To the
14 contrary -- they're quoting the same thing -- in no event shall
15 an owner apply from -- they're quoting from the CCNRs. The
16 paragraph, I think it's 1.8, but I could be wrong. Any paint
17 to the exterior of the dwelling unit, including without
18 limitation window or other trim, blah, blah, blah, or other
19 exterior features, or replace the exterior masonry, or other
20 surface installed by declarant.

21 In order to ensure a uniform appearance of the
22 property, the Association will from time to time, as it may
23 determine appropriate -- as it may determine appropriate --
24 paint -- it will paint the exterior and repair, maintain, and
25 replace the exterior walls, stucco, facade, roof, or other

1 surfaces. "Do you see that" was asked of our witness. Yes, I
2 do. Question at line 14: So does this section give the
3 Association the right and obligation to maintain the exterior
4 of the building of the project? Answer: Yes. The Association
5 has that obligation, and somehow they've twisted that --
6 amazingly, to me -- in to saying, well, you guys have agreed
7 with us that you have the obligation.

8 Now, how they did that, I don't know what legerdemain
9 allowed them to do that, but they did it. And I'm here to call
10 it out because it's not true. We didn't admit any such
11 obligation on our part. We admitted only an obligation on
12 their part. Nothing anywhere in the CCNRs -- and I've gone
13 back and double-checked even those provisions -- says anything
14 about that creating an implied warranty or even hints at it
15 creating an implied warranty.

16 And it can't because the right of implied warranty
17 under all those Arizona cases from Colombia through Richards,
18 and even through Zambrano that just came out -- none of those
19 cases have ever extended this warranty right, which is a
20 creature of law created by the Supreme Court originally. It is
21 not a contract claim, per se. It's considered contractual in
22 nature according to the courts for purposes of attorneys' fees,
23 but it's not, the warranty itself, a contract with anyone.

24 Now, they point to the CCNR and say, well, CCNRs are
25 contract. So what? What is it under the CCNRs that gives them

1 a contract right -- because they also brought a breach of
2 contract and a breach of a duty of good faith and fair dealing
3 under a breach of contract right -- where anywhere in the
4 contract have they pointed to any place, even assuming arguendo
5 that the CCNRs are a contract for purposes our discussion here
6 so as to not just waste the Court's time.

7 Where is there any provision that they cited to
8 anywhere that amounts to a contractual obligation of the
9 declarant when they give the quitclaim deed to back it up with
10 an implied warranty right pursuant to the Arizona case law that
11 is limited strictly to homebuyers -- strictly to homebuyers?
12 Never been extended beyond homebuyers that I'm aware of, and
13 certainly hasn't been and it can't be argued to any -- under
14 any case extended to an HOA such as this one.

15 So not only are they making a claim that doesn't even
16 involve common areas under definitions of the CCNRs --
17 including paragraph 1.25, which defines what a lot is. This is
18 all defects on the lots. It is not defects in common areas.
19 They don't own these units. They don't own the lots. They
20 don't own the areas where they claim the major defects exist
21 such as we're fighting between us, between the subcontractor
22 and ourselves here today.

23 It's all moot. All of that is not in the common
24 area. They usurp the claims of owners, which they do in other
25 states. And that's why I think they didn't understand that



1 here. And Arizona is not other states. There are other states
2 that allow for that, but we don't. So I'd like to know what
3 case they rely upon other than Lofts, which I've already talked
4 about. And I can't find any citation to any Arizona case that
5 backs up or supports either an implied warranty right or any
6 provision in the CCNRs that supports any contractual obligation
7 other than their own that they understood undertook by
8 acceptance of quitclaim and by paragraphs I believe 1.8 -- let
9 me double-check that just to be sure. I'm sorry. 8.17 and --
10 is the paragraph. I had it transposed, and I apologized. I
11 thought that.

12 And that's the paragraph that basically says that as
13 they may determine appropriate, they can paint exterior, et
14 cetera, et cetera, and that basically that's their
15 responsibility, as was quoted in the deposition of our client,
16 who agreed with them.

17 That's pretty much our argument here today. There's
18 no other cause of action, really. Let me just make sure I've
19 covered them all. Covering this broad, sweeping argument, the
20 breach of contract, finally, I just argue -- and the duty of
21 good faith and fair dealing, which is -- you know, arises out
22 of a breached contract. You have to have a contract. And
23 there is contract for purposes our argument today; it just
24 doesn't provide that we have to do anything under it by
25 providing any warranties, and it says just the opposite. I did

1 touch on this, but I'll just point out, and I'll save the rest
2 of my remarks for my reply --

3 THE COURT: Okay.

4 MR. WILENCHIK: -- that they accepted these areas,
5 and they weren't tricked or fooled into doing so. They knew it
6 was under a quitclaim deed. Thanks, Judge.

7 THE COURT: Okay, thank you.

8 Counsel?

9 MS. MANSHIP: Your Honor, I want to start by
10 clarifying something. The prior motion that Mr. Wilenchik was
11 referring to was, in fact, a motion for summary judgment, not a
12 motion to dismiss because they had already answered the
13 complaint.

14 MR. WILENCHIK: That may be true, Your Honor. She
15 may be right on that.

16 MS. MANSHIP: And also, the motion for summary
17 judgment itself wasn't argued. I brought a motion to allow
18 additional discovery because, at the beginning of the case,
19 there were two additional defendants in the case, and part of
20 their motion for summary judgment was that these two other
21 entities had nothing at all to do with the sale or construction
22 of the Gallery project. And so the -- part of the basis for my
23 request for discovery was no discovery had happened yet, and
24 you know, whether or not these two entities had anything to do
25 with the construction or sale of the unit was an issue that no

1 discovery had been provided on yet, and --

2 MR. WILENCHIK: We argued all of this, Your Honor.

3 MS. MANSHIP: Yes. But I'm just explaining the
4 actual motion for summary judgment was not argued. The motion
5 where I requested more discovery was what was argued. There
6 may have been some things that were discussed in the summary
7 judgment that came up in that hearing, but that was the basis
8 of why the court had a hearing and allowed additional time for
9 discovery. Depositions happened, you know, and then new
10 counsel came on, and there were some negotiations, and those
11 two parties were dismissed.

12 THE COURT: Okay.

13 MS. MANSHIP: So the motion was withdrawn because
14 that was the agreement. We would dismiss those defendants, and
15 they would withdraw the motion. So that's what happened to
16 that original motion for summary judgment. Okay. And so then
17 they refiled this motion at this time.

18 THE COURT: Okay. This is all prior to your time
19 though, right?

20 MS. MANSHIP: No. Mr. Wilenchik was the only
21 counsel on at the time that the original motion for summary
22 judgment was brought on.

23 THE COURT: Okay.

24 MS. MANSHIP: Mr. Horowitz' firm came on --

25 MR. WILENCHIK: Yeah, I might not agree with all

1 that.

2 MS. MANSHIP: Okay.

3 MR. WILENCHIK: The Court did give them the time and
4 overruled my very same points for summary judgment that I
5 argued then.

6 THE COURT: It's fine.

7 MR. WILENCHIK: Yeah, I'm just saying that --

8 THE COURT: I'm not going to --

9 MR. WILENCHIK: -- this was brought up timely.

10 THE COURT: Nobody's saying I can't hear the motion
11 today --

12 MS. MANSHIP: No, no.

13 THE COURT: -- because it's already been ruled on.

14 MS. MANSHIP: No.

15 THE COURT: It has not been ruled on.

16 MR. WILENCHIK: Was never ruled on.

17 THE COURT: That's all I care about.

18 MS. MANSHIP: Correct.

19 MR. WILENCHIK: Right. I just wanted you to know we
20 did bring up the issue though.

21 THE COURT: Okay.

22 MS. MANSHIP: Okay. I quickly want to touch on
23 something that he said towards the end of his argument was that
24 there's this quitclaim deed, and the Association had the
25 opportunity to do an inspection of the property and decide

1 whether or not to accept common areas. That is actually not
2 the case, and in our response to their separate statement of
3 facts, we indicate in response to statement of fact J -- or
4 sorry, our statement of fact J that it was -- the Association
5 had to do -- it was automatically deemed that the common areas
6 were accepted by the Association. They did not have a choice
7 in whether or not to accept the common areas. So that is not
8 true that the Association had the ability to have an inspection
9 first and decide whether or not there were defects. It was
10 deemed accepted by the Association.

11 And I'm not familiar with the exact dates, but I
12 believe that even happened before homeowners were on the board,
13 and it was while the developer was still in control of the
14 Association. Also, there are no facts that they have regarding
15 their argument that the Association had the ability to decide
16 and have experts investigate that. So again, that's in
17 separate statement J.

18 THE COURT: Well, you moved based on the Powercraft
19 and Lofts case.

20 MS. MANSHIP: So our --

21 THE COURT: (Indiscernible) apply.

22 MS. MANSHIP: Okay. So this is essentially a
23 standing argument in whether or not this type of an association
24 has standing to assert the breach of implied warranty claim.
25 Of course, there is no case that says they cannot. In this

1 instance, the Association is the owner of common areas that
2 have defects that are alleged in the case. In their motion for
3 this -- in this motion, they do not raise the argument or
4 provide any evidence that there are no defects in the common
5 areas. That is not something in their separate statement of
6 facts for this motion.

7 If you go to the other motion, where there is
8 evidence about what are all the defects and the cost of repair,
9 there are repairs for the pool cabana, which the pool cabana is
10 in an area that is the common area. There are defects at the
11 stucco that covers staircases -- staircase walls that are in
12 between the two buildings. There's four buildings total. Each
13 of those two buildings has staircases that have a stucco wall
14 that has a large crack in it that K. Hov tried to repair during
15 the claim process. It's cracked again. That is on Association
16 property in the common area.

17 So there are, in fact, defects. Again, they don't
18 raise that evidence in this motion, but there is evidence of
19 that in the response and in the motion for extrapolation or
20 regarding extrapolation. So clearly, the Association as the
21 owner of common areas that has defects in them are allowed to
22 assert a breach of implied warranty against the builder and the
23 vendor and it's the declarant, K. Hovnanian at Gallery, who
24 conveyed title to the Association for those common areas.

25 Standing is about having a -- a plaintiff has to show

1 that they have a distinct and palpable injury, and that that
2 injury is fairly traceable to the defendant's conduct, and that
3 they're likely to be redressed by the recovery in the case. In
4 this case -- I don't know about other associations for
5 townhomes that may be involved in other cases where they need
6 to get an assignment. But in this case, the Association has
7 the obligation legally under the CCNRs to maintain and repair
8 the building exteriors that are at issue in this case.

9 The homeowners cannot even paint the outsides of
10 these buildings. The Association had the legal obligation to
11 do that. That's our argument in our response. We didn't say
12 that K. Hovnanian had the maintenance and repair responsibility
13 at this time. It is the Association who has that ability or
14 actually that legal obligation.

15 So by the fact that there are defects on these
16 exteriors of the building that the Association is responsible
17 to repair, they have suffered a distinct and palpable injury
18 traceable to the Defendant's conduct of creating those defects.
19 And that injury's likely to be redressed by awarding a cost of
20 repairs to the Association. Again, the entity with the
21 maintenance and repair obligation (indiscernible).

22 THE COURT: How does the maintenance and repair
23 obligation translate to or get you to having the right to bring
24 the lawsuit on behalf of the homeowner who owns that unit?

25 MS. MANSHIP: So standing means you have to suffer a

1 distinct and palpable injury.

2 THE COURT: They didn't really suffer the injury.
3 They have an obligation to fix the injury, the Association
4 does, or to maintain and repair. I get that, but it's not
5 really their injury.

6 MS. MANSHIP: The Association is the one that will
7 have to pay for that. I understand they'll have to increase
8 assessments in order to raise that money, but the Association
9 will have to be the one that pays for those damages.

10 THE COURT: I know, but it's still not theirs. It's
11 not their property that was damaged. They just have an
12 obligation to maintain and repair it, at least what you're
13 saying with respect to those exteriors. I mean, that's what
14 I'm -- that's my understanding of the basic, you know,
15 plaintiff 101.

16 MS. MANSHIP: Your Honor, I would like to -- I have
17 other arguments regarding --

18 THE COURT: Go ahead.

19 MS. MANSHIP: -- the issue.

20 THE COURT: No, go ahead.

21 MS. MANSHIP: I understand Your Honor's position. So
22 with respect to Lofts and Richard v. Powercraft, there's a
23 paragraph which has discussed the public policy reasons behind
24 extending this breach of implied warranty to people that aren't
25 in privity, which is essentially the position that our

1 association has been as well.

2 So in their motion, defendants have argued that the
3 implied warranty arises out of the purchase agreement. Well,
4 that's actually not the case. The implied warranty actually
5 arises out of the construction. So I would like to quote from
6 Lofts. It says the implied warranty arises from the
7 construction of a new home, and the Lofts court actually
8 emphasized the word "construction". And it arises from the
9 construction whether or not the builder is also a vendor of the
10 home.

11 And so in that case, they extended the implied
12 warranty to a builder who is not in privity of contract with
13 any homeowners. And so regardless of the fact that an implied
14 warranty is implied in every purchase agreement, they still
15 made the vendor responsible for that implied warranty as well,
16 an entity who's not a party to that contract. And in addition,
17 Richard v. Powercraft extended the implied warranty to a
18 subsequent purchaser, who again is not a party to the original
19 purchase agreement.

20 There's a recent case called Zambrano which also
21 discussed the public policy reasons behind the breach of
22 implied warranty and acknowledged that these other cases have
23 extended it to a builder who's not a vendor and subsequent
24 purchasers. And Zambrano found that it was a matter of common
25 law, the breach of implied warranty.



1 So going on to the policy reasons that Fillmore --
2 Lofts at Fillmore and Zambrano talked about. It's to protect
3 innocent purchasers and to hold builders accountable. In this
4 case, if you have homeowners who are not allowed to do the
5 repairs themselves; they're not able to protect their
6 interests. The Association is able to protect their interests
7 because the Association has that maintenance responsibility.
8 So allowing the Association to bring this claim for the repairs
9 it has the maintenance responsibility for protects the
10 homeowners, and it holds the builder responsible for their
11 faulty work.

12 THE COURT: But couldn't one of these homeowners have
13 filed this lawsuit against K. Hov?

14 MS. MANSHIP: That homeowner only has the ability to
15 bring their claim for their one unit. There's all 18 --

16 THE COURT: Right, but they --

17 MS. MANSHIP: -- units and all four buildings.

18 THE COURT: -- could have done -- they could have.

19 MS. MANSHIP: One homeowner could have brought a
20 claim for their one unit, but all of the buildings need to be
21 fixed, and that homeowner can't fix their building. They can't
22 fix the outside of their units. The Association is the one
23 that has to do it.

24 So having that -- having one homeowner in the case
25 bring in a claim against K. Hovnanian will not result in that



1 homeowner's building being fixed because the homeowner cannot
2 actually do it. He would have to have all 18 homeowners do it,
3 and then they would have to give the money to their Association
4 to do it. I just want to kind of -- if you have another
5 question --

6 THE COURT: No, that's okay.

7 MS. MANSHIP: Okay.

8 THE COURT: That's okay.

9 MS. MANSHIP: Okay.

10 THE COURT: You were talking about the policy
11 behind --

12 MS. MANSHIP: Yeah. I was just looking in my notes
13 again to see if I'd covered all the ones already. So I'd also
14 like to talk about Zambrano again, who also extensively talked
15 about the public policy reasons. Zambrano was a case where the
16 issue was whether or not in a purchase agreement or at all in a
17 warranty or anywhere could a vendor, seller of new home just
18 claim implied warranties that are implied into their contracts.

19 And after an extensive analysis of the public policy
20 reasons behind enforcing contract versus the public policy
21 reasons for allowing an implied warranty of workmanship
22 inhabitability, the court concluded the public policy reasons
23 for implying that breach of warranty outweigh the public policy
24 reasons for enforcing contract with respect to new home
25 construction.

1 And part of the reason that the Zambrano court gave
2 was they expressed concern that if we allow these waivers of
3 implied warranties, all builders are going to start putting
4 these waivers in their contract, and there basically will be no
5 breach of implied warranty claims anymore. And the court
6 actually said, you're essentially eliminating that implied
7 warranty claim, which would gut a homebuyer's ability to hold a
8 builder responsible for defects, increase the likelihood that
9 homes will remain unrepaired, which is detrimental to
10 homebuyers, their neighbors, and the public generally.

11 And the court in Zambrano also noted that the
12 Purchaser Dwelling Act permits a homebuyer to sue a builder
13 vendor for construction defects provided they follow the claim
14 process. But the Purchaser Dwelling Act does not provide a
15 cause of action for those homeowners, and the -- I'm quoting
16 from Zambrano. Without the ability to enforce implied warranty
17 of workmanship and habitability, there is no legal cause of
18 action to remedy these defects.

19 Now, while Zambrano dealt with individual homeowners
20 and the Purchaser Dwelling Act, there is also a homeowner's
21 association dwelling act that the legislator has also
22 recognized that homeowner associations like our association, a
23 planned community association, can bring construction defect
24 claims against builders. It's codified in Section 33-2001.
25 That's the homeowners' association dwelling action. And it

1 defines a homeowner's association as an association as defined
2 in Section 33-1202, which is the Condominium Act, or 33-1802.
3 33-1802 relates to associations for planned communities, which
4 is what this association is.

5 So the homeowners' association dwelling act
6 specifically says what a association such as Gallery has to do
7 to bring a construction defect claim. It recognizes they have
8 the power to bring a construction defect claim. And we
9 followed that process. You know, both sides engaged in that
10 process prior to doing this lawsuit.

11 So just as the Zambrano court recognized that the
12 Purchaser Dwelling Act does not give a cause of action to
13 homeowners specifically and you need the breach of implied
14 warranty to have a construction defect claim as a homeowner,
15 the homeowners' association dwelling act does not give a
16 specific right of action to a planned community association.
17 But by recognizing that they have the ability to bring such a
18 construction defect case must find that that means they have a
19 breach of implied warranty claim.

20 If you follow Mr. Wilenchik's argument to its
21 conclusion, his opinion or his argument is that a planned
22 community association does not have the ability to bring a
23 breach of implied warranty claim on its own. It doesn't have a
24 breach of contract claim because there never are contracts
25 between the association and the developer. And so you know,

1 negligence claims really are very weak for construction defect
2 cases because you need resulting damage to other property, and
3 that just rarely happens.

4 So basically, following Mr. Wilenchik's argument, an
5 association for a planned community would never be able to
6 bring a construction defect claim, but the legislature has
7 recognized in the homeowners' association dwelling action that,
8 in fact, planned community development associations are able to
9 bring construction defect cases.

10 So just like the court in Zambrano had reason,
11 without being able to assert this breach of implied warranty
12 claim, there really is no construction defect claim in Arizona.
13 And so the Zambrano court protected that for individual
14 homeowners, and this Court should protect that for planned
15 community associations. With respect to the breach of contract
16 claim, CCNRs are a legally enforceable contract. Do you have
17 any questions about the --

18 THE COURT: No, no.

19 MS. MANSHIP: So CCNRs are a legally enforceable
20 contract. There are no Arizona cases that say otherwise. And
21 there are cases such as the Pinnacle Nubian (phonetic) case in
22 California that very explicitly say that a declaration is a
23 contract between a developer and an association. This
24 declaration specifically has language in it creating
25 obligations and duties on both sides. I'm quoting from it. It

1 says there are mutually beneficial covenants, meaning mutually
2 beneficial to the declarant, to the association, to homeowners
3 with respect to the proper development, use, and maintenance of
4 the property. And that's in our statement of facts G that the
5 purpose of the CCNRs is, quote, enhancing and perfect the
6 value, desirability, and attractiveness of the property.
7 That's our statement of fact H.

8 And the CCNR requires that all dwelling units on the
9 property must be constructed by K. Hovnanian or one of its
10 designees. So the CCNRs actually create an obligation on K.
11 Hovnanian to construct the dwelling unit, and that's in CCNR
12 Section 8.1.30. This language creates an obligation on K.
13 Hovnanian to construct the dwelling units in conformance with
14 the CCNRs, which are proper development and enhancing and
15 protecting the value, desirability, and attractiveness of the
16 property. Those are what we're relying on.

17 Whether or not K. Hovnanian failed to properly do
18 that per the terms of the CCNRs is a triable issue of fact,
19 obviously. And then the breach of the implied covenant of good
20 faith and fair dealing claim is essentially based on the fact
21 of, you know, the violation of the contract of the CCNRs.

22 THE COURT: Okay. Very briefly.

23 MR. WILENCHIK: Well, I'd like to just state each
24 point as quickly as I can. First of all, most of that is
25 entirely 100 percent irrelevant, everything she just argued.

1 First of all, they've admitted that they have not brought this
2 claim. Both in the PDA notice as well as in the complaint and
3 elsewhere, they have admitted here that they are not bringing
4 these claims on behalf of the owners.

5 So everything she just told you about statutes and
6 everything else is nothing to do with anything here. They're
7 bringing this claim on behalf of themselves, the HOA, not on
8 behalf of the owners. That's been admitted by them repeatedly.
9 So all that's a bunch irrelevant discussion. Zambrano, as I
10 brought up -- Zambrano had nothing to do with this case
11 whatsoever, period. Zambrano had to do with a limited warranty
12 such as the type of K. Hovnanian issues that's coextensive with
13 an implied warranty.

14 In that case, the developer or builder argued as to
15 an individual homeowner's claim -- not an HOA. Nothing to do
16 with this case. But it has nothing to do with anything anyway
17 because the issue in that case was whether or not the builder's
18 limited warranty could supplant by its terms in the contract
19 with the owner the implied warranty. Okay? It was
20 coextensive.

21 Like, for example, ours was a ten-year warranty,
22 which is longer than the statute of repose. But nevertheless,
23 the court upstairs took the case after Judge Viola dismissed it
24 and took it and said, hey, we're going to keep the implied
25 warranty as to homeowners, and you can't disclaim it, which was

1 an issue that was kind of bouncing around in the courts from
2 time to time, but never really addressed by the Supreme Court.
3 You can't disclaim the implied warranty.

4 That's all that case stands for, period. Has nothing
5 to do with this case whatsoever. It doesn't support anything
6 that they're -- that they brought here. We don't have any
7 issue that homeowners can bring claims. They can. And if they
8 want to bring them as 18 people, it's done all the time, and
9 they can do it. That doesn't give this HOA the right to step
10 in and do it for them under their name and then tell us they're
11 not doing it for them and admit that and then come into court
12 and tell us otherwise. Okay?

13 And secondly, the opportunity -- I want to back up
14 because I'm rushing through this because Court asked me to, but
15 let me just stop for a second. I want to start from the
16 beginning quickly. The issue that was brought up is correct.
17 She is technically correct as I recall now. They filed, you
18 know, a 56 whatever it is now. They changed the number. 56 it
19 was called to seek more time. We filed our motion.

20 I thought it was a dismissal because we filed it
21 right at the outset, but she may be technically correct. I
22 don't remember. It was a summary judgment. I'll accept that.
23 But the issue that's here that's important is, well, we did
24 argue all these issues. I remember distinctly arguing all
25 these issues. And they argued, Judge, we need more time.

1 Okay? So I want to get that clear. This has never been ruled
2 on by the court, okay? It was put off for them to do discovery
3 for reasons unknown to me as to why that's relevant. That's
4 why I said I was disappointed.

5 Let's talk about paragraph J that she brought up.
6 She claimed that this supports her position that -- in terms of
7 the quitclaim deed that they didn't have a right to do an
8 inspection, and it was foisted upon them somehow, and that, you
9 know, they didn't -- they were required to accept the quitclaim
10 deed or something to the effect.

11 Well, I'm looking at J right now on page 6 that she's
12 referring to, and here's what it says -- and it's long, so I'll
13 just summarize. The rights and duties granted to declarants,
14 its affiliates, and related entities include, but are not
15 limited to -- that's what J has to say. And then she goes into
16 one, two, three, four, five areas of rights and duties of the
17 declarant. I can't find -- if she can find it, I'll stand
18 corrected, because I'm looking at it. I cannot find anywhere
19 in here, any to support the statement that she said that an
20 inspection was not allowed to them -- because it doesn't even
21 deal with that -- or that they don't have any right to do an
22 inspection because it doesn't deal with any of that. I don't
23 see one word in here about any of that.

24 So I'll let the Court read it on your own, and you
25 tell me if I've missed it, but I don't think so. So J is

1 nothing to do with this case. We agree that they have the
2 obligation to maintain. Keep saying that. He says basically
3 the Court -- if I can translate, well, because we have this
4 obligation we took on, somehow it's K. Hovnanian's fault.
5 Basically, that's what she's saying. Or we assume from that
6 the next step, which is that somehow you gave us an implied
7 warranty.

8 I'll repeat, contrary to what she just told the
9 court, there's not one word in any of the CCNRs that even imply
10 that right. Now, the fact that they have this obligation she
11 says is causing them standing and damage. Well, you know what?
12 They have a right to assess those same owners to pay for that
13 damage if that's true. If her position is even correct, she
14 had a right, under those same CCNRs she's just admitted, to
15 assess. That's how she gets paid for it. The homeowners pay
16 for it by them assessing. Instead, they chose not to do
17 that -- to maintain their property or to repair it or fix it --
18 but instead go back and claim some implied warranty right.

19 Now, not one case she has talked about here, not one,
20 including Lofts, ever gave an HOA other than arguably a condo
21 association -- and that's not even clear except under the
22 statute -- the right to bring an implied warranty claim at all,
23 period. So that's gone. And as far as the contract claim is
24 concerned or the duty of good faith and fair dealing arising
25 out of the contract, again, have we heard one single, solitary

1 sentence from counsel cited from CCNRs as to where there's an
2 implied warranty given? No.

3 And I beg to differ completely, and I'll challenge
4 the statement. There's not one place in any Arizona case
5 anywhere that gives that right as opposed to jurisdictions
6 elsewhere that she practices in. And I assume she thought that
7 when she filed this. But it doesn't exist except in her head.

8 And if the Court can find any place or any Arizona
9 case that's persuasive, binding, or whatever on this court gave
10 that HOA that right, then I will tell the Court I haven't seen
11 it, okay, and I haven't heard it here in court. So there is no
12 such right, and there is nothing in the CCNRs that gives that
13 right. And there's nothing that gives a right to even sue us
14 because there's no obligation that a declarant took on of any
15 warranty, except to disclaim the warranty by the quitclaim
16 deed, period. That's the reality of this.

17 So if there's a problem with this common area, which
18 is -- this is so silly because they're not making allegations
19 here that relate to the common areas. They're really not. All
20 of these things relate to individual lots and ownership by the
21 owners. And the Court hit it right on the head. Those owners
22 can bring those claims. She says, well, they exist in all the
23 units. Fine. Then all the owners can bring those claims. But
24 it's not her claim to make.

25 And if they want to assign them to the HOA, which I



1 haven't heard here, I suppose they could try to do that, but
2 they haven't, and I haven't heard that. And more importantly,
3 I've heard throughout this litigation just the opposite, that
4 they are not bringing this claim in the name of the owners or
5 based on an assignment, but based on their right to somehow
6 bring this claim under an implied warranty theory or contract
7 theory.

8 Judge, look, I'll end it with this. Not one thing
9 she said persuades or should persuade this Court in any way,
10 shape, or form that doesn't apply to our breach of contract or
11 any obligation by any defendant here whatsoever. The fact that
12 K. Hovnanian is listed as the builder of the units, the
13 dwelling units -- which has nothing generally to do with an HOA
14 which deals with common area -- what does that have to do with
15 this case? Because K. Hovnanian builds dwelling units, somehow
16 that gives the HOA a right to sue them? Under what theory
17 would that be? It's outrageous.

18 That's why I brought this at the beginning of this
19 case. I was disappointed, I repeat, that the Court, you know,
20 shuffled it off. They brought their argument that they needed
21 discovery. Well, you know what's really also appalling? What
22 discovery that they claimed in good faith they need to put off
23 my motion, what discovery do we hear here today that they did
24 that in any way is relevant to defending this argument that I
25 made at the beginning of the case and I repeat at the end?

1 Nothing. There's not one piece of discovery that was relevant.
2 They put it off hoping it would go away.

3 And Your Honor, I know there's a trial set, and I
4 know there's a temptation because of that to say, well, there's
5 a trial, and therefore, it has to go. But there is no cause
6 here that can be heard. And therefore, as I said, it moots any
7 argument between Rina Rai and I as to our particular
8 differences on issues relating to the subcontractors because we
9 never get there. This moots it because the case is over or
10 should be over. And frankly, if they want to appeal that, it
11 would be a matter of first impression for the Court to deal
12 with.

13 And I believe based on what I've seen because this
14 isn't the first rodeo that the court upstairs is not going to
15 find an HOA has a right in its own name to bring claims on
16 behalf of owners willy-nilly or tear asunder the whole scheme
17 of what's gone on all these years. Homeowners bring those
18 claims. They have that right, not an HOA. That's it. I'll be
19 glad to answer any, but there's nothing further to it. Case
20 needs to be dismissed.

21 THE COURT: All right. Thank you.

22 MR. WILENCHIK: Thank you.

23 THE COURT: Hey, you get to follow that.

24 MR. HOROWITZ: I've been sitting for a while. I'm
25 going to move over to the podium just to get my blood moving,

1 get a little less cozy, and mix things up a little. You know,
2 this issue may be potentially moot, but if any part of this
3 case goes ahead, it could be a potentially serious issue. I'm
4 addressing K. Hovnanian's motion for partial summary judgment
5 regarding unobserved defects.

6 And Your Honor, you've probably heard similar motions
7 brought regarding defects that were extrapolated or projected
8 where there are arguments regarding the evidence of statistical
9 sampling, statistical extrapolation, or projection. Here, it's
10 a little bit of that, but really, it is about defects that
11 Plaintiff's expert says are generally persistent throughout the
12 property where there are one -- where the expert actually
13 contends to have observed one instance of this defect or a
14 handful of instances of the defect. And --

15 THE COURT: Let me just --

16 MR. HOROWITZ: Sure.

17 THE COURT: -- kind of set the table a little. When
18 I read your motion, it kind of struck me as more of a Daubert
19 motion aimed at a criticism of the Plaintiff's expert's
20 methodology. I mean, we've had this discussion around here
21 with my colleagues on some of these motions for summary
22 judgment that we get that turn on the admissibility of an
23 expert. It's kind of six of one, half dozen of the other. So
24 that's how I'm looking at this --

25 MR. HOROWITZ: Well --

1 THE COURT: -- in large part. You'll have to tell me
2 if --

3 MR. HOROWITZ: Well, that is --

4 THE COURT: -- there's more to it.

5 MR. HOROWITZ: There is more to it. And often these
6 are very closely intertwined with Daubert. I wasn't going
7 to -- I was going to try to break the trend and not talk about
8 my own experiences, but I've been arguing similar motions under
9 the old rules and under new rule 702. But this is a case
10 where -- this is not a case where Plaintiff's experts have
11 employed statistical sampling. They have acknowledged that
12 they have not. The issue is there are things you need to cut
13 open the building to look at and see and observe and count.

14 Plaintiff's expert is saying in his claims on three
15 keys issues -- he's saying that there are these issues, that
16 they exist, they're persistent. He's saying I have seen them
17 in one location. And for two issues, I'd say two locations.
18 Plaintiffs say four or five. For sake of argument, we're
19 talking about one location for issue number 1, five locations
20 each for issue number 2 and number 3.

21 Plaintiff is not saying I am statistically projecting
22 this throughout the property. Plaintiff is saying generally I
23 didn't see it ever done right. Plaintiff is generalizing that
24 these conditions that you can't see without opening up the
25 building are done wrong everywhere. These are major issues

1 because the repair that results is Plaintiff saying there's a
2 whole layer of the building underneath the building that you
3 can't see, and it's bad, and it's bad because I am saying I
4 just didn't ever see it right anywhere.

5 And the facts that this expert has actually
6 presented, the evidence that this expert has actually
7 presented, if you look at what he gave us, it really doesn't --
8 there is no support for that. And it is so dangerous to allow
9 to the jury to say you can't see how they did it wrong every
10 single place, but they did it wrong every single place. And
11 I'm an expert. I'm a scientist. I wear a white coat. I know
12 how things are. It's a little bit of Daubert, but here there
13 is not somebody saying he is -- this expert is speculating that
14 it's bad everywhere. He is not saying I've done a survey. My
15 statistician told me how to do the sampling. K. Hovnanian can
16 have their statistician quibble with it, and we can come to the
17 judge and -- you know, and it'll be a combat all the experts.
18 It'll be a question of fact.

19 We're not doing that. We have somebody who says, I
20 saw the structural sheathing bad in one location. This is Ed
21 Fronapfel, Plaintiff's expert. I have, you know, had the
22 privilege of deposing him and getting to be familiar with the
23 way that he presents his cases and the way he puts together his
24 reports that get shared with the defendants.

25 So in this case, I asked him specifically, I know



1 that you do not provide me as a defendant in a Ed Fronapfel
2 case -- I don't get from you a list of all the locations where
3 you found the issue that you say is defective, and he agreed
4 with that. And I said, I know that I'm going to get from you
5 instead what you call your observations drawings. He will take
6 floorplans, and he will have -- him and his staff will write
7 down everywhere where they saw these issues.

8 You may have -- it doesn't matter how the expert puts
9 it together. I'm not going to compare him to how experts do
10 it. I'm saying he told us that I cannot look at his report to
11 find a count of issues that are defective. But I'm going to
12 see examples in his report. And if I wanted to count
13 everywhere where he found a problem with the lateral force
14 resistive system, I could go through his observation drawings,
15 I could count everywhere he's got a problem, and that is going
16 to tell me everywhere where he's got an issue.

17 THE COURT: Well, let me ask you this.

18 MR. HOROWITZ: Yeah.

19 THE COURT: If the records -- if it's in the record
20 that -- let's say the particular sub that it slides a foam
21 board --

22 MR. HOROWITZ: Um-hum.

23 THE COURT: -- okay, said, this is how I always do
24 it. This is how I did it. This is how I did it in all the
25 buildings. And then Plaintiff's expert says, well, way it was

1 done here is not right, and that's what the problem is. Why
2 isn't it up to the jury then to take from that collective
3 evidence a reasonable inference that if it was applied the same
4 way throughout, there could be -- there's a defect throughout?

5 MR. HOROWITZ: Well, in a case where the evidence
6 was -- in a case where the evidence was the subcontractor said
7 this is the way I did it throughout, that would be the case.
8 This is a case, however, where the expert says, generally, it
9 was done wrong. The report he gives us, the evidence he gives
10 us says -- you look at it and say, gee, you only have one
11 location where you saw it done wrong. And nobody has said, I
12 installed the structural sheathing wrong throughout the
13 property.

14 THE COURT: But isn't there some testimony that says,
15 I installed it this way throughout the property?

16 MR. HOROWITZ: There isn't for any of these three
17 issues that I'm asking you about, Your Honor. There's evidence
18 that it's the same person. You know, arguably, there's
19 evidence that it's the same person for one aspect of it,
20 ordering this board. But for everything else -- you know,
21 please bear me -- bear with me and consider the evidence -- is
22 not that there's a method. The method is bad. And if we see
23 it's bad in enough places, we know it's going to be bad in most
24 or all the places.

25 THE COURT: Is there testimony by the people who did



1 the work as to their method?

2 MR. HOROWITZ: There isn't. There isn't testimony.
3 And the issue is -- for example, second issue I'm asking about
4 is the weather resistive barrier. And Plaintiff says you're
5 supposed to have two layers of building paper, two layers of
6 the WRB, the weather resistant barrier, over sheathing. Ed
7 Fronapfel says generally -- his conclusion is, generally, I
8 didn't see the right number of layers, and this whole component
9 of the structure needs to be replaced.

10 His evidence shows over and over he's observing this
11 correct. He's observing everywhere -- everything that he gave
12 us -- the documents that we got in his report, the documents
13 that came with his report, the documents that he explained and
14 confirmed at -- when we deposed him all say, look, this is --
15 we went through the exercise of what he said you needed to do
16 to find out everywhere where he actually saw the problem.

17 There's two places where he says that it's not the
18 right number of layers. There's no testimony from the stucco
19 subcontractor that says, yeah, we screwed up, and we put in one
20 layer instead of two layers consistently throughout. This is a
21 different kind of animal than the case where there's a specific
22 method and it's bad, and you know, if I look at enough to see
23 that it's generally bad, I've got it.

24 Here's a guy that says, I'm poking holes in a lot of
25 different places, and generally it's bad. But that's not the



1 data or the evidence he gave us. He gave us two photographs of
2 an area where it's bad. Or he gave us, you know, his
3 observation drawings that identify two locations where his
4 staff doesn't think there are the right number of layers,
5 dozens of locations where his staff documented that it's done
6 right. And he's going to bring to the jury a claim that
7 somehow I can generalize that it's done wrong everywhere.

8 If this was a kind of issue where the -- if this was
9 the kind of issue where he could say, you know what, this is
10 just systematically bad because of testimony that we have that
11 it was always done this way, we would be in a different kind of
12 situation, but it's not. This first issue, his structural
13 issue, is -- you know, is a really, really glaring problem
14 because Plaintiff acknowledged -- and there's no doubt there is
15 one location on the entire project where he identified an area
16 where he said there should be structural sheathing and it's
17 missing.

18 And he said in this same location, there's a bent
19 metal strap. And his instruction to his cost guy is to say you
20 are going to need to assume that this issue will be uncovered
21 in other locations throughout the property. He's not saying
22 I've seen enough to know that it's always done bad. He's just
23 saying you should speculate that there are more instances of
24 this.

25 He is saying you should cost out an amount equal to

1 ten percent of the cost of all of the stucco work in order to
2 replace this issue that we anticipate you're going to come
3 across somewhere else. That's speculation. That's not
4 anywhere near the kind of issue where we have a claim where
5 someone says this method is wrong. The evidence shows that the
6 method was followed consistently. You know, here we go.

7 For these other two issues, Plaintiff is going to
8 give conclusions. The Plaintiff is going to give repair
9 recommendations to take off all of the stucco on all parts of
10 the residential buildings and replace them based on these
11 claims not that something is systematically and, you know,
12 methodologically done wrong, but based on these claims of, you
13 know, I saw it bad in a few places. Generally, it's just not
14 done right anywhere, even though the evidence that I presented
15 to you shows that I saw it bad in two locations and good in
16 many locations.

17 And that really isn't supported. It's not exercise
18 of statistics. It's just a claim that has no support besides
19 speculation of the expert. And you know, the law on whether
20 speculative evidence comes in, you know, I cover age page 6 of
21 the motion. I don't need to rehash it there. You have to
22 prove these defects. You have to prove that there's something
23 more than speculation. He wants to say -- he wants to be
24 able -- Plaintiff wants to be able to bring in a case -- the
25 Plaintiff wants to be able to say that this is problematic or

1 that this entire system needs to be replaced due to the
2 specific issues. He should not be able to say that there is a
3 systematic problem with layers of the weather resistant
4 barrier, because there is no evidence to support that.

5 I have not gone into specifically the amount of
6 dollars at issue for this, but both of these issue are -- you
7 know, the repair that Ed Fronapfel recommends for both of these
8 specific issues is -- both of these things you have to take off
9 all the stucco, fix this layer behind the stucco, put it back
10 on. You've got the knowledge cost of repair on the records.
11 For context, we are talking about a repair that is 1.6 million
12 dollars before their markup. It's over two million dollars
13 with their markup. This is most of the dollars in the case.
14 Everything else is \$3,000, \$50,000.

15 These are issues -- and these are issues where
16 Plaintiff is going to say not I observed, I walked around the
17 building, I counted the areas where I thought there should be
18 controlled joints and there weren't. We have the evidence
19 because everybody can see the whole building, and everybody's
20 photographed all the different sides of the building. We can
21 see the control joints. We can see -- you know, we can see
22 whether there's exterior -- you know, exterior weeps and
23 flashing over window heads.

24 But for them to say there's a issue, it's behind the
25 skin, you can't see it, I saw it in two places, I get to tell



1 you that generally it's bad everywhere -- that's not supported
2 by the evidence, and that's what I'm asking for in this motion.

3 THE COURT: Okay. Thank you.

4 Counsel?

5 MS. MANSHIP: Your Honor, you brought up from the
6 get-go the exact point that I was going to raise is that this
7 is really a Daubert motion about the adequacy of the Plaintiff
8 experts testing and their opinions based on inferences from
9 that investigation.

10 I don't know the ability of the Court to turn a
11 motion for summary judgment into a Daubert motion, but if the
12 Court is inclined to decide whether or not our expert is able
13 to give opinions, that to me -- exclusion of that kind of
14 evidence is a Daubert motion. Judgment can't really be entered
15 that's excluding evidence.

16 So I would ask that we have -- we continue this
17 hearing and my expert be allowed to testify in person, be
18 cross-examined. I would ask that their expert come and testify
19 about the investigation. They have not offered any opinion
20 saying that the investigation was not adequate by any of their
21 experts. Their experts attended all of the testing. They've
22 had Mr. Fronapfel's reports dated June of 2021. They had Mr.
23 Fronapfel's deposition. There's no evidence that they've
24 submitted saying that it was insufficient.

25 THE COURT: Well, what was his methodology?



1 MS. MANSHIP: Well, there's only four buildings and
2 only 18 units in this complex. There's not really a
3 statistical sampling that you can do.

4 THE COURT: So they didn't do that?

5 MS. MANSHIP: They didn't do statistical, because
6 then you could end up randomly picking all one building. You
7 know, there's only four buildings. Their methodology was we're
8 going to test each and every building, which they did. They
9 picked cuts that cover all the units. There were 44 intrusive
10 openings that took place at this complex. And based on their
11 experience with methodologies of construction, they picked
12 locations where they would open up areas of concern. And then
13 from their experience with construction, they surmised that the
14 way that construction is done, WRB paper, you know, is rolled
15 out, you know. And so if you're finding one sheet here and
16 you're finding one sheet there, that roll is probably
17 consistent.

18 Or the fact that at each building at this particular
19 type of location we found that 100 percent of the locations
20 there wasn't -- for example, the EPS foam board didn't have the
21 tongue in groove. They found no locations of that. They found
22 no adequate groove. The EPS foam board was inadequate with
23 respect to the groove that are necessary where any sheathing or
24 framing is. So it was, I think, 26 locations that they did at
25 OSB sheathing or framing areas that have particular types of

1 defects. And at 26 of the locations, 100 percent of them had
2 the EPS foam board problem or some problem with the EPS foam
3 board. And then 20 out of those 26 had problems with the WRB.

4 This is a triable issue of fact. Or the Court can
5 have a Daubert hearing where the experts explain that -- we
6 submitted Mr. Felderman's (phonetic) affidavit where he showed
7 the Court where you can look at the observation drawings, the
8 photographs that are referenced in those observation drawings
9 to see these conditions. And he highlighted in Exhibit 1D the
10 locations. They're highlighted on these drawings. They
11 attached some example photographs that refer to this defective
12 condition and showed how he came up with the numbers of
13 locations.

14 There's just simply a difference in the way that the
15 stucco experts did it in his depo where he (indiscernible)
16 only a couple. They make an argument that Mr. Fronapfel
17 testified you just have to read the observation drawings, and
18 you'll find the defect locations.

19 If you read the deposition of Mr. Fronapfel, which
20 was Exhibit B of their -- to their motion, specifically on page
21 46, the question was, if I look at page 4459, which is part of
22 your observation drawing set, I will see notes that have photo
23 references and a description of defect conditions or damages
24 that you found during your observation. That's what you're
25 saying? Meaning that's what you're saying is what you have to

1 look at for determining locations. And Mr. Fronapfel's answer
2 was yes. And then the next question was, there isn't anywhere
3 besides the observation matrices that I can look to get a
4 comprehensive summary of either the intrusive testing or the
5 observation, correct? Answer: Outside of reading the report
6 in full, no.

7 So there's also the report that you have to look at.
8 They're relying only on another expert's interpretation of what
9 the observation drawings say. Again, Mr. Fronapfel says that
10 you have to look at the photo references. That was his answer
11 to the question about photo references. And if you look at the
12 photo references, as Mr. Felderman went through for the Court,
13 you can see all the highlighted areas where they found issues.
14 And again, he counted those up. 44 intrusive openings, all
15 with various defects. 100 percent of the buildings have
16 defects related to the stucco. 26 locations where they were
17 testing over this sheathing where 100 percent of those 26 had
18 EPS foam problems and 20 out of the 26 had WRB problems.

19 And it's from that information -- again, we're only
20 talking about 18 units, yet here's 26 openings that they found
21 100 percent problems with the foam. They have surmised based
22 on their experience in construction that you're likely to find
23 this throughout the project. The defense admits that you can't
24 expect a -- an association, a plaintiff in one of these cases
25 to completely skim the building to look to see where every

1 defect is. So they presented nothing saying that the number of
2 locations here is insufficient to reach these inferences. So
3 again, I -- oh, I'm not done.

4 MR. HOROWITZ: Yeah, I realized, and -- I realized
5 and started returning. I apologize.

6 MS. MANSHIP: Yeah. So again, this all goes to, you
7 know, the sufficiency of the evidence. The Defense would have
8 a chance to cross-examine Mr. Fronapfel in the trial. The jury
9 could decide if they believed Mr. Fronapfel's testimony that
10 all of these locations had these problem or if these, you know,
11 things were defects. But if the Court wants to decide whether
12 or not some information should be excluded, again, I ask that
13 Mr. Fronapfel be here to testify. I ask that their expert be
14 here to testify as to why he thinks that there was not enough
15 of an investigation.

16 So this really comes down to, you know, their
17 argument that there's just a few locations. Even if you accept
18 that, you can't enter judgment that the homeowners' association
19 is entitled to no cost of repair for the WRB issue. They admit
20 there's at least a few locations. So what portion of that cost
21 of repair will judgment be entered as to? There's just no way.
22 And again, there's a triable issue as to how many locations are
23 there.

24 If you look at their motion, what they initially
25 requested was judgment that the Association cannot get any cost

1 of repair for WRB LFRS or the foam -- any cost of repair.
2 Well, again, they admit that there are at least a few locations
3 where --

4 THE COURT: But there's no opinion as to the cost of
5 repairing a particular spot.

6 MS. MANSHIP: They have not --

7 THE COURT: (Indiscernible) a particular roll of, as
8 you were saying, where the defects might be due to just a
9 particular way -- a particular roll where the sheathing was
10 laid. We don't even have -- we don't have an opinion that
11 breaks it down like that, right?

12 MS. MANSHIP: And they have not suggested that they
13 have a method for determining that either, though. You know,
14 our -- there's just this triable issue of fact of how many
15 locations. So the Association, if our expert is to be
16 believed, as -- in his opinion about the numbers of locations,
17 the cost estimator has provided a cost of repair estimate that
18 basically says we have to fix all the stucco for a variety of
19 reasons. And so that is the way that the cost of repair is set
20 up.

21 A jury can decide, well, I don't think that, you
22 know, the WRB is as bad; therefore, they don't deserve all of
23 this cost of repair for the stucco on the WRB, but they deserve
24 it for this other thing. Or say, the jury doesn't believe any
25 of the other defects and only believes the WRB, but it's only a

1 portion of them, that's for the jury to decide how much of that
2 cost of repair the Association is entitled to get.

3 We don't have to provide a cost of repair that says,
4 well, jury, if you only believe, you know, three locations or
5 you only believe half, you know, then this is the cost of
6 repair for that. You know, our expert's opinion is that it is
7 widespread. It all needs to be replaced. If the jury believe
8 it's only 26, the jury then has information that's in the cost
9 of repair about what it cost to fix stucco, and they can
10 determine what the appropriate cost of that is. So it should
11 not be --

12 THE COURT: Not sure how, but --

13 MS. MANSHIP: Okay.

14 THE COURT: I'm not sure how.

15 MS. MANSHIP: You know, based on the expert's
16 testimony at the trial, you know, they can determine if they
17 can do that or not. But again, this is not --

18 THE COURT: I'm just going to have you wrap it up
19 because --

20 MS. MANSHIP: Okay, okay.

21 THE COURT: -- I need to finish.

22 MS. MANSHIP: Okay, I understand. I understand. Let
23 me just go through my notes because I kind of got off track of
24 where I was going. With respect to the LFRS issue, we
25 acknowledge there was a mistake in the cost estimate and in the

1 report as far as adding an additional ten percent contingency.
2 The existence of the one location where the LFRS system was
3 found to be defective, while Mr. Fronapfel does have the
4 opinion that you may find that in other locations, it should
5 have just been covered under what are typical contingencies.

6 THE COURT: Okay.

7 MS. MANSHIP: So we are not making an argument for --
8 we are making an argument there that defect exists and may be
9 found in other locations, but we're not asking for any
10 additional money over and apart from a normal contingency.

11 THE COURT: Okay. Counsel, briefly.

12 MR. HOROWITZ: Very briefly. For this last issue,
13 that is my concern is that Plaintiff saw an issue in one
14 location. The issue is he wants to say this is an issue they
15 should be compensated for because it is going. You're going to
16 find more of it when you open up more. This issue is not
17 supported.

18 It's not accurate that they're not asking for money
19 for this and that it's only in contingency. They're asking for
20 \$200,000 for this issue before markups, before contingency,
21 before everything else. And that's not an error. That's
22 exactly what Ed Fronapfel said to do. He said ten percent of
23 stucco costs. The expert who did the costs came up with
24 \$160,000. I don't know why they tweaked it up. There's
25 testimony that they decided that -- they decided to change the

1 formula and make that 200,000 instead of -- you know, instead
2 of 160.

3 But this is -- you know, this is an issue which
4 was -- an issue just that they want a finding that they should
5 recover for something that project-wise that they haven't even
6 complained to have seen project-wise. There is not a cost of
7 repair provided to repair the instance where they identified or
8 where they claim to have identified a structural framing
9 deficiency in the one location. They don't cost it out. They
10 just say -- assume that you're going to repair this project-
11 wise.

12 For these other issues, Mr. Felderman, who gave the
13 affidavit, is not a designated expert. He hasn't been
14 disclosed. He is a partner of Mr. Ed Fronapfel, or he's
15 someone else at Mr. Fronapfel's firm or his former firm. I
16 think he is (indiscernible) relevant here.

17 Mr. Felderman is coming in and saying, you know, I
18 believe that if you were to look at every single photograph in
19 the pile, you could find some things that SPSA firm -- you
20 know, that you would find something that we would quibble with.
21 If I looked at every photograph in the pile, I'm going to find
22 some areas that -- find some areas that Plaintiff's expert
23 would like to say looks like it might be three-eighths of an
24 inch of foam here instead of half an inch. Looks like we're
25 going to have a quibble with this area.



1 What Mr. Fronapfel testified to clearly is he likes
2 to hide the ball. He doesn't give me a list of quantifies. He
3 gives me or any other defendant who faces him two or three
4 examples in his report or sometimes one of a condition he
5 doesn't like, and he gives observation drawings. And he says
6 if you want to see everywhere where I find it to be
7 problematic, everything I'm going to claim at trial is wrong,
8 every instance I'm going to claim at trial we have the wrong
9 number of layers of building paper, you can look at my
10 observation matrix and find that.

11 THE COURT: Okay.

12 MR. HOROWITZ: The affidavit from his partner or his
13 associate that says you could maybe look at all my -- you could
14 maybe look at all the photographs that I really took and find
15 some more areas where there's a problem, that doesn't change
16 Mr. Fronapfel's testimony. Fronapfel's the expert here, not
17 Jeff Felderman.

18 There's a reference by Plaintiff's counsel to a
19 matrix that shows an X at four buildings. I don't care if they
20 made an X at four buildings. They are talking about -- they
21 are talking about issues that they say occur in numerous
22 locations. If Jeff Felderman wants to say or if Ed Fronapfel
23 wants to say, actually, I gave you evidence that I found this
24 issue to be deficient in five locations, great, we would deal
25 with that. But as you've pointed out already, I had to bring

1 this motion because I didn't have a cost to repair for two
2 locations, three locations, or five locations where the weather
3 resistant barrier didn't have enough layers or where the EPS
4 foam board wasn't the right thickness.

5 I have only one recommended repair. So one
6 recommended repair for those specific issues is to repair and
7 replace the entire stucco envelope on the building. And that
8 is just a completely unsupported position, and it's not based
9 on methodology. You've heard it's not based on statistics at
10 all. It's based on Ed wanting to say -- Ed Fronapfel wants to
11 say, well, generally, it's bad. You have evidence to support
12 that? The evidence to support that is, as you heard today, we
13 opened the areas of concern. We found somewhere between two
14 and five locations that we found to be problematic. We want to
15 do \$2 million-plus worth of stucco repairs.

16 That's why I have to bring the motion. I don't have
17 a cost to repair two locations, four locations, five locations
18 and get the opportunity to say, well, this is one that's
19 documented. This is one that's maybe not documented, but we
20 (indiscernible) it. Frankly, if we were looking at an issue
21 where we're repairing weather resistant barrier in five
22 locations or five units, we could live with that, and I
23 wouldn't have to say, hey, please knock out this claim where I
24 have a \$2 million repair for two locations, four locations,
25 five locations. Give them 26, which there aren't, where there

1 is -- you know, where there's an issue where we need to go
2 underneath the stucco and we need to fix this bottom layer of
3 the stucco. That's really all there is to this motion.

4 THE COURT: Okay. All right. Well, obviously, I'm
5 going to take these under advisement. Let's talk about your
6 all's schedule and my schedule. So we got a -- right now the
7 final trial management conference is set for February 10th, and
8 trial's set for March --

9 UNIDENTIFIED SPEAKER: 13th.

10 UNIDENTIFIED SPEAKER: 13th.

11 THE COURT: The 13th, okay. Trial's not moving.
12 Trial's staying put. But I'm inclined to consider moving that
13 TMC back a little bit because it'll make the date of your joint
14 pretrial statement due a little bit -- it'll give you a little
15 breathing room on that, and it'll give me a little breathing
16 room on these rulings. I'm good, but I'm not sure I'm that
17 good as far as getting you a ruling before you all even gear up
18 for trial, which I think's going to happen way before the
19 (indiscernible) case. About the time the joint pretrial
20 statement's due. I'm open to that. Do you want me to keep the
21 date on right now for the 10th for the final trial management
22 conference? That's fine with me. Anybody have any thoughts?

23 MS. MANSHIP: I'm not in the same room with Mr. Nuss,
24 so I don't know his schedule. I'm fine with it.

25 Craig?



1 MR. NUSS: Yes, Your Honor. We can move it to a
2 later date if they -- if it's good for the Court.

3 THE COURT: I'm not even sure what I have. What
4 would we have the following --

5 THE CLERK: February (indiscernible).

6 THE COURT: That's a week, two weeks, three weeks.
7 February (indiscernible).

8 MR. HOROWITZ: Your Honor, that is problematic for
9 me. I anticipate I am going to be in -- I'm probably going to
10 be out of states for -- out of state for some depositions on
11 the 23rd and 24th that were pretty difficult to put together
12 and would not be able to be in person for that.

13 THE COURT: Okay. Let's just keep it on the way it
14 is for right now. And if you all -- I mean, I'll do the best I
15 can, but you may not get the ruling before you need to file
16 what you need to file for the TMC. That's my point. So let me
17 do what I can do. I know what's ahead of me, and I -- you
18 know, most of you know I don't usually just do a sentence or
19 two. And I think these motions are obviously very -- they're
20 very important to all the parties who are involved. So let me
21 get my hands around this, and I'll get you a ruling just as
22 quick as I can. All right? Y'all have a good weekend.

23 MS. RAI: Thank you, Your Honor.

24 MR. NUSS: Thank you, Your Honor.

25 (Proceedings concluded at 10:53 a.m.)



CERTIFICATE

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/s/

JOANNA SARGENT,
Transcriber

March 21, 2023



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MARICOPA COUNTY

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03/27/2023

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
J. Eaton
Deputy

AIRE ON MCDOWELL COMMUNITY
ASSOCIATION

JAMES W FLEMING

v.

K HOVNIANIAN AT AIRE ON MCDOWELL L
L C, et al.

DENNIS I WILENCHIK

JUDGE FOX

**UNDER ADVISEMENT RULING ON DEFENDANTS' MOTION TO DISMISS AND
PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

Pending before the Court are (i) "Defendant's [sic] Motion to Dismiss" (the "Motion to Dismiss"), and (ii) "Plaintiff's Motion for Leave to File First Amended Complaint (the "Motion to Amend"). Defendants K. Hovnanian at Aire on McDowell LLC ("KHOV McDowell") and K Hovnanian Phoenix Division, Inc. (collectively, "Defendants") filed the Motion to Dismiss on August 11, 2022. The Motion to Dismiss was fully briefed and set for oral argument on September 23, 2022. On September 21, 2022--two days before oral argument--Plaintiff filed the Motion to Amend.

At the September 23, 2022 oral argument, the parties agreed the Court would defer argument and decision on the Motion to Dismiss until it reviewed and decided how to proceed on the Motion to Amend. The Motion to Amend now is fully briefed. At Defendants' request, the Court heard oral argument on the Motion to Amend and the Motion to Dismiss on January 27, 2023. For the reasons set forth below, after considering all arguments raised by the parties, the Court will grant the Motion to Amend, in part, and deny the Motion to Dismiss as moot.

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Motion to Amend

Plaintiff is the homeowners' association for the Aire on McDowell community in Scottsdale, Arizona (the "Project"). The Project "contains 80 townhomes or single-family residential properties, and common areas, including, without limitation, a pool, landscaping, parking, private roads, and other improvements." (Complaint, ¶ 18). Plaintiff alleges that Defendants planned, designed, constructed and/or sold the Project and common areas with "defects, deficiencies, and failures" in the low-slope roofs, roof decks and balconies, exterior finishes, windows and doors, and drywall. (*Id.*, ¶ 25). Based on the alleged defects, Plaintiff initially asserted against both Defendants a single count of breach of the implied warranty of workmanship and habitability.

In the Motion to Amend, Plaintiff seeks leave to add: (i) K. Hovnanian Great Western Building Company, LLC ("Great Western") as an additional Defendant; (ii) a claim for breach of contract against KHOV McDowell; and (iii) a claim for breach of the covenant of good faith and fair dealing against KHOV McDowell. In support of adding Great Western, Plaintiff contends that it recently discovered that KHOV McDowell assigned the developer's rights pertaining to the Project to Great Western. Plaintiff also alleges, on information and belief, that Great Western participated with the other Defendants in building some or all of the Project's individual units and common areas. Defendants oppose the Motion to Amend, arguing that the proposed amendment would be futile.

Arizona Rule of Civil Procedure 15(a)(2) dictates that "[l]eave to amend must be freely given when justice requires." "Discretionary amendments to pleadings should be liberally granted." *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 520 (App. 1979). "It is an abuse of discretion to deny a motion for leave to amend without reason." *Id.* "[T]rial on the merits of the claim is favored, and amendment will be permitted unless there has been undue delay, dilatory action or undue prejudice." *Owen v. Superior Court*, 133 Ariz. 75, 79 (1982). In *Owen*, the Supreme Court elaborated on this standard:

"Mere delay"--the mere fact that the attempt to amend comes late--is not justification for denial of leave to amend. . . . "Notice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted." . . . To justify denial of the motion, there must be "undue" delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments or undue prejudice to the opposing party. . . . "Prejudice is 'the inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation.'" . . .

Id. (citations omitted).

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Leave to amend also is properly denied when “the court finds . . . futility in the amendment.” *Tumacacori Mission Land Dev., Ltd. v. Union Pac. Railroad Co.*, 231 Ariz. 517, 519 ¶ 4 (App. 2013).

Here, Defendants contend that: (i) Plaintiff’s original Complaint asserted a claim “under an implied warranty at law that does not exist”; and (ii) “[t]he Proposed Amended Complaint . . . adds additional causes of action and an additional party[] that are equally deficient and thus futile.” (Objection at 2:11-16). In this regard, Defendants argue that the implied warranty of workmanship and habitability does not apply where (as here) the homeowners’ association in a townhome community--not a condominium project--is bringing its own claims (not the individual unit owners’ claims) against the Declarant under the Covenants, Conditions and Restrictions (“CC&Rs”). Defendants further contend that: (i) Plaintiff understood no warranties were intended when it fully inspected the common areas it voluntarily accepted under a quit claim deed without any further consideration paid to the Declarant; and (ii) “[t]his Plaintiff does not have a right to pursue claims arising from the Implied Warranty of Habitability and Workmanship under law or based on the CC&R’s and does not have the power or right to pursue other parties’ claims that may arise under the Implied Warranty of Habitability and Workmanship.” (*Id.* at 4:20-23).

The Court must determine the viability of the implied warranty claim.

Implied Warranty of Workmanship and Habitability Claim Against All Defendants

The Arizona Supreme Court recently affirmed that “Arizona [law] implies a warranty of workmanship and habitability in every contract entered into between a builder-vendor and a homebuyer,” which public policy prohibits the builder-vendor and the homebuyer from disclaiming and waiving. *Zambrano v. M & RC II LLC*, 254 Ariz. 53, 56-57 ¶¶ 2-3 (2022). “Under this implied warranty, the builder-vendor guarantees it built the home in a workmanlike manner and that it is habitable.” *Id.* at 59 ¶ 14. “The warranty is limited to latent defects that are undiscoverable by a reasonable pre-purchase inspection and serves ‘to protect innocent purchasers and hold builders accountable for their work.’” *Id.*

“The implied warranty ‘arises from construction of the home’ itself.” *Id.* at 59 ¶ 15. “Consequently, although the warranty is an imputed term of the original purchase agreement, it applies to non-builder-vendors and is enforceable by subsequent purchasers, despite a lack of contractual privity with the builder.” *Id.* Conversely, “a homebuilder who is not also the vendor of the residence can be sued by a buyer for breach of the implied warranty of workmanship and habitability” despite the “absence of contractual privity.” *Lofts at Fillmore Condominium Ass’n v. Reliance Commercial Construction, Inc.*, 218 Ariz. 574, 575 ¶ 1 (2008).

Plaintiff contends that *Lofts at Fillmore* authorizes a homeowner’s association (like Plaintiff) to assert an implied warranty claim against the developer-vendor and the builder for

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breach of the implied warranty concerning common areas at the community. Plaintiff also invokes A.R.S. § 33-1242(A)(4) as a basis to pursue claims on behalf of itself and its members. Defendants counter that Plaintiff is not like an innocent purchaser with no notice, because Plaintiff did a full inspection before accepting the common areas, and *Lofts* simply does not address this issue.

The parties' arguments raise two separate issues: (1) whether the implied warranty applies to alleged defects in the common area; and (2) whether Plaintiff homeowners' association has standing to assert implied warranty claims on behalf of individual unit owners for alleged defects in their individual units. The Court will address each of these issues.

1. *Whether The Implied Warranty Applies To Alleged Defects In The Common Area.*

Despite Plaintiff's contention, *Lofts at Fillmore* does not address application of the implied warranty to defects in the common area. Rather, the issue addressed there was "whether a homebuilder who is not also the vendor of the residence can be sued by a buyer for breach of the implied warranty of workmanship and habitability." *Lofts at Fillmore, supra* at 575 ¶ 1. Indeed, the decision only describes the alleged defects vaguely as "various construction defects" without specifying the location of the defects, and the term "common area" does not appear anywhere in the decision. *Id.* at 575 ¶ 2. Although Plaintiff contends that "the *Lofts* case involved a construction defect action brought by an HOA against the developer-vendor and the builder for breach of the implied warranty based on numerous defects concerning the common areas at the community," Plaintiff failed to cite to a specific portion of the decision to support its contention.¹ (Reply at 7:4-7 (emphasis added)). Plaintiff did not cite any other case that purports to apply the implied warranty to a homeowner's association's common area, and the Court did not locate any such case in its independent research.

Moreover, applying the implied warranty to defects in the common area does not advance the policy behind the implied warranty. In this regard, "the public policy underlying the implied warranty of workmanship and habitability is twofold: (1) protecting buyers of newly built homes and successive owners against latent construction defects that were not reasonably discoverable when the home was initially sold and (2) holding builders accountable for their work." *Zambrano, supra* at 60 ¶ 19 (citing *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 244-45 (1984)). "The implied warranty 'arises from construction of the home' itself." *Id.* at 59 ¶ 15 (citing *Lofts at Fillmore, supra* at 577 ¶ 13)). "The warranty is limited to latent defects that are undiscoverable

¹ The Court raised this issue with Plaintiff's counsel at oral argument. Plaintiff's counsel cited personal familiarity with the case and information gleaned from seminars, but he conceded the opinion does not mention common area defects. The Court declines to consider the information provided by counsel outside the Supreme Court's written opinion.

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by a reasonable pre-purchase inspection and serves ‘to protect innocent purchasers and hold builders accountable for their work.’” *Id.* at 59 ¶ 14 (*citing Richards, supra* at 245)).

Here, Plaintiff acquired the Project’s common areas by two Quit Claim Deeds. (Motion to Dismiss, Exhibits 2 and 3). Plaintiff is not an “innocent purchaser.” Rather, Plaintiff obtained title to the common area pursuant to the Declarant’s covenant in the CC&Rs to “convey fee simple title to the Common Area to the Association, free of all encumbrances except current real and personal property taxes and other easements, conditions, reservations and restrictions then of record,” which “conveyance shall be made to the Association prior to” the first sale of an individual unit to a purchaser. (*Id.*, Exhibit 1 at 9, § 3.5).

Further, as the implied warranty “arises from the construction of the home itself” and no home was constructed on the common area, there is no legal basis to find that the implied warranty applies to alleged defects in the common area. Accordingly, the Court concludes, as a matter of law, the implied warranty does not apply to alleged defects in the common area.

2. *Whether Plaintiff Has Standing To Assert Implied Warranty Claims On Behalf Of Individual Unit Owners For Alleged Defects In Their Individual Units.*

As support for its standing to pursue implied warranty claims on behalf of its members, Plaintiff cites A.R.S. § 33-1242(A)(4) and *Shelby v. Arizona Registrar of Contractors*, 172 Ariz. 95 (1992). A.R.S. § 33-1242(A)(4) provides that “the association may . . . [i]nstitute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.” “‘Association’ . . . means the unit owners’ association organized under § 33-1241.” A.R.S. § 33-1202(4).

Section 33-1242(A)(4) is part of Title 33, Chapter 9, which “applies to all condominiums created within this state without regard to the date the condominium was created.” A.R.S. § 33-1201. For purposes of Title 33, Chapter 9, “[c]ondominium’ means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate portions.” A.R.S. § 33-1202(10). “Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.” *Id.* “‘Common elements’ means all portions of a condominium other than the units.” A.R.S. § 33-1202(7). “‘Unit’ means a portion of the condominium designated for separate ownership or occupancy.” A.R.S. § 33-1202(22).

Here, Plaintiff “is a non-profit corporation created pursuant to the CC&Rs.” (Response to Motion to Dismiss at 11:14). The CC&Rs required the Declarant to “convey fee simple title to the Common Area to the Association [*i.e.*, Plaintiff], free of all encumbrances except current real and personal property taxes and other easements, conditions, reservations and restrictions then of record.” (Motion to Dismiss, Exhibit 1 at 9, § 3.5). As such, title to the Common Area is vested

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in Plaintiff--not the individual unit owners--which means the Project cannot constitute a condominium under Arizona law. *See* A.R.S. § 33-1202(10) (“Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.”). Notably, Plaintiff alleges that it is a “homeowners’ association”--not a condominium association. (Proposed First Amended Complaint at ¶ 1). Accordingly, A.R.S. § 33-1242(A)(4) does not apply here.

Shelby, supra, likewise does not support Plaintiff’s standing to assert the individual unit owners’ claims. There, unlike here, the subject property was a condominium. Moreover, the parties in *Shelby* stipulated to judgment, and the issue addressed by the Supreme Court was whether the individual unit owners’ and the condominium association’s recovery from the Residential Contractors’ Recovery Fund was subject to a statutory cap--which is not an issue here.

Finally, in its Response to the Motion to Dismiss, Plaintiff cites A.R.S. § 12-1366(B) and argues that Arizona’s Purchaser Dwelling Act (“PDA”) “specifically recognizes a homeowners’ association ability to proceed with construction defect claims against the developer and makes the PDA repair process applicable to them.” (Response to Motion to Dismiss at 11:4-6). A.R.S. § 12-1366(B) provides that “[a] dwelling action brought by an association is also subject to title 33, chapter 18”--which is A.R.S. § 33-2001 *et seq.* A.R.S. § 33-2001(5) defines a “[h]omeowners’ association dwelling action” as “any action involving a construction defect as defined in § 12-1361 filed by a homeowners’ association against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling.”² This action constitutes a “homeowners’ association dwelling action.”

A.R.S. § 33-2002 sets forth prerequisites that must be followed, in addition to requirements prescribed in the homeowners’ association’s community documents, before filing a homeowners’ association dwelling action. Section 11 of the CC&Rs sets forth the procedure Plaintiff must follow to commence a construction defect proceeding, including an affirmative vote by 75% of the homeowners to approve legal proceedings. Plaintiff avows that it fully complied with this process. (Response to Motion to Dismiss at 9:27-28). Defendants have not contended otherwise.

The bottom line is this--although Plaintiff does not have standing to assert individual owners’ implied warranty claims under A.R.S. § 33-1242(A)(4) and *Shelby*, Plaintiff has authority

² A.R.S. § 33-2001(4) defines a “[h]omeowners’ association” as “an association as defined in . . . [§] 33-1802.” A.R.S. § 33-1802(1) defines “[a]ssociation” as “a nonprofit corporation or unincorporated association of owners that is created pursuant to a declaration to own and operate portions of a planned community and that has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association’s obligations under the declaration. Although Plaintiff is not a condominium association, Plaintiff appears to fit the definition of “association” under A.R.S. § 33-1802(1).

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under A.R.S. §§ 12-1366(B) and 33-2001 *et seq.* to assert a “homeowners’ association dwelling action . . . arising out of or related to the design, construction, condition or sale of the dwelling.” Such an action may include implied warranty claims on behalf of individual unit owners.³

Claims Against KHOV McDowell for Breach of Contract and
Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff seeks to add a claim against KHOV McDowell for “breach[ing] the CC&Rs by failing to provide the members and the Association with a properly constructed community for the benefit and enjoyment of the membership.” (Motion to Amend at 4:12-14). Similarly, Plaintiff seeks to add a claim against KHOV McDowell for “breach[ing] the duty of good faith and fair dealing by constructing the community with significant construction defects that it left the Association and its members to pay to repair out of their own pockets.” (*Id.* at 5:3-5). Defendants counter that “[n]o undertaking or responsibility is set out on the part of the Declarant or any of its affiliates in the CC&Rs of any kind owed to Plaintiff and certainly none by the homebuilder sought to be added here.” (Objection to Motion to Amend at 6:7-9).

In the proposed First Amended Complaint, Plaintiff alleges:

40. The CC&Rs provide that “This Declaration is declared and agreed to be in furtherance of Declarant’s general plan for, and improvement and sale of, the Property and is established for the purpose of enhancing and perfecting the value, desirability, and attractiveness of the Property. Further, the CC&Rs states that “This Declaration shall run with all of the Property for all purposes and shall be binding upon and inure to the benefit of Declarant, the Association, all Owner, Members and their respective successors in interest.”

41. The Association relied on Defendants’ skills in the approval, development, design, construction, ownership and/or management of the Project and common areas to ensure the structures, appurtenances, and improvements were designed and

³ At oral argument, Defendants argued that nothing authorizes the transfer of implied warranty claims and an implied warranty claim only can be asserted by the original purchaser and subsequent purchasers. Despite what Defendants argue, A.R.S. § 33-2002 allows a homeowners’ association to file a homeowners’ association dwelling action upon compliance with the statutory requirements and any requirements prescribed in the community documents. Moreover, contrary to what Defendants contend, Arizona law does not prohibit the assignment or transfer of the implied warranty. *See Highland Village Partners, L.L.C. v. Bradbury & Stamm Const. Co., Inc.*, 219 Ariz. 147, 150 ¶ 12 (App. 2008) (“[A]lthough the implied warranty of workmanship and habitability does not automatically run to a subsequent purchaser of commercial property, the original purchaser can expressly assign these warranty rights.”).

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constructed in a good and workmanlike manner and reasonably fit for their intended purposes.

42. Defendants breached contract by failing to build the Project as agreed under the CC&Rs and free from construction defects that resulted in substantial damage and tarnished the value, desirability, and attractiveness of the community.

43. As a direct and/or indirect result of Defendants' breach, Plaintiff has suffered damages in that they have incurred and will continue to incur expenses to correct, replace, and reconstruct the common areas and the townhomes within the Project, as well as the damage to property resulting therefrom, and related costs such as relocation, loss of use, and mitigation expenses, at a cost which is presently unknown but believed to exceed the jurisdictional minimum established for this Court.

Plaintiff contends that, in interpreting the CC&Rs, the Court must "give effect to the intention of the parties ascertained from the language used in the instrument, *or the circumstances surrounding creation of the contract, and to carry out the purpose for which it was created.*" (Reply in Support of Motion to Amend at 10:6-8 (emphasis in original) (citation omitted)). The Court has serious doubts as to whether the CC&Rs give rise to claims for breach of contract or breach of the covenant of good faith and fair dealing for the alleged construction defects at issue here. Nevertheless, at this juncture, the Court is not prepared to find that the proposed claims are futile as a matter of law.

Disposition

For the reasons set forth above, the Court will allow Plaintiff to file an amended complaint, with one caveat. The Court concludes, as a matter of law, that Plaintiff does not have an implied warranty claim for the alleged common area defects. Based on the Court's disposition of the Motion to Amend, the Court determines that the Motion to Dismiss is now moot. Accordingly,

IT IS ORDERED granting the Motion to Amend, in part, and allowing Plaintiff to file an amended complaint consistent with this ruling by **April 10, 2023**.

IT IS FURTHER ORDERED denying the Motion to Dismiss as moot.

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MARICOPA COUNTY

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05/08/2023

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
J. Eaton
Deputy

AIRE ON MCDOWELL COMMUNITY
ASSOCIATION

JAMES W FLEMING

v.

K HOVNIANIAN AT AIRE ON MCDOWELL L
L C, et al.

DENNIS I WILENCHIK

JUDGE FOX

**RULING ON DEFENDANTS' MOTION FOR RECONSIDERATION
OF MARCH 27, 2023 ORDER AT FOOTNOTE #3**

Pending before the Court is "Defendants' Motion for Reconsideration of March 27, 2023 Order at Footnote #3" (the "Motion") filed April 10, 2023. The Motion is "submitted without oral argument and without the filing of a responsive or reply memorandum." Ariz.R.Civ.P. 7.1(e)(2). For the reasons set forth below, the Court denies the Motion.

In the March 27, 2023 (filed March 28, 2023) "Under Advisement Ruling on Defendants' Motion to Dismiss and Plaintiff's Motion for Leave to File First Amended Complaint" (the "Ruling"), the Court concluded:

[A]lthough Plaintiff does not have standing to assert individual owners' implied warranty claims under A.R.S. § 33-1242(A)(4) and *Shelby*, Plaintiff has authority under A.R.S. §§ 12-1366(B) and 33-2001 *et seq.* to assert a "homeowners' association dwelling action . . . arising out of or related to the design, construction, condition or sale of the dwelling." Such an action may include implied warranty claims on behalf of individual unit owners.

(Ruling at 6-7). In footnote 3, the Court further explained:
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At oral argument, Defendants argued that nothing authorizes the transfer of implied warranty claims and an implied warranty claim only can be asserted by the original purchaser and subsequent purchasers. Despite what Defendants argue, A.R.S. § 33-2002 allows a homeowners' association to file a homeowners' association dwelling action upon compliance with the statutory requirements and any requirements prescribed in the community documents. Moreover, contrary to what Defendants contend, Arizona law does not prohibit the assignment or transfer of the implied warranty. *See Highland Village Partners, L.L.C. v. Bradbury & Stamm Const. Co., Inc.*, 219 Ariz. 147, 150 ¶ 12 (App. 2008) (“[A]lthough the implied warranty of workmanship and habitability does not automatically run to a subsequent purchaser of commercial property, the original purchaser can expressly assign these warranty rights.”).

(*Id.* at 7 n.3).

In the Motion, Defendants ask the Court to reconsider the above-quoted portions of the Ruling as inconsistent with Arizona law. Defendants are particularly critical of the citation to *Highland Village Partners* because that case addressed commercial real property, and it is not a residential dwelling case involving the implied warranty of habitability. Rather, Defendants contend that *Richards v. Powercraft*, 139 Ariz. 242 (1984) governs the interpretation of the relevant statutes here. Finally, Defendants “request the Court to reconsider its interpretation of A.R.S. §§ 12-1366(B) and 33-2001 as allowing owners to assign or transfer to an HOA under the circumstances presented here.” (Motion at 3:6-8).

First, the Court understands and appreciates that (unlike our case) *Highland Village Partners* involves commercial real property. The Court, however, did not cite *Highland Village Partners* for the purpose of setting out the controlling law applicable to Plaintiff's claims. Rather, the Court cited the case as an example of when Arizona law permits an assignment or transfer of an implied warranty in response to Defendants' argument that nothing authorizes the transfer of implied warranty claims. The Court concedes the citation to *Highland Village Partners* was not helpful--particularly because this is not a case involving an assignment or transfer of the implied warranty. Indeed, the purchasers of the individual dwelling units still own their units and hold the implied warranty. Notably, Plaintiff does not allege that it holds the implied warranty as to the individual units by way of assignment or transfer. To the contrary, Plaintiff alleges that “the Association exercises its authorization to prosecute and brings this action for damages to the building components set forth herein, and/or certain separate interests **on behalf of the homeowners in accordance with A.R.S. §§ 12-1366(B) and 33-2001, et seq.**” (FAC, ¶ 22 (emphasis added)).

Second, although *Richards v. Powercraft* sets forth the law as to whether the implied warranty extends to subsequent buyers of homes, the case does not address the specific issue or

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statutes currently before this Court. In *Richards*, seven individually named plaintiffs sued to enforce the implied warranty. Four of the plaintiffs purchased their homes directly from the defendant, and the other three purchased their homes from the Farmers Home Administration following a foreclosure. On appeal from jury verdicts in favor of the plaintiffs, the Court of Appeals set aside the verdicts as to the three plaintiffs who did not purchase their homes directly from the defendant. The Arizona Supreme Court reversed the Court of Appeals' decision that "there must be privity to maintain an action for breach of the implied warranty of workmanship and habitability." *Richards, supra* at 244. But *Richards* does not address the issue here--whether the Association on behalf of the individual unit owners in accordance with A.R.S. §§ 12-1366(B) and 33-2001, *et seq.* can enforce the individual unit owners' implied warranty.

Finally, the Court is not persuaded by Defendants' argument that "[n]othing in either A.R.S. § 33-2001 *et seq* [sic] nor A.R.S. § 12-1361 *et seq* [sic] grants the HOA the right to represent individual homeowners on implied warranty claims," and "[t]he only possible construction defect right the HOA has, in fact, is for defects in the common areas pursuant to A.R.S. 33-2001 *et. seq.*" (Motion at 4:17-19, 5:9-11). To begin, the Court already accepted Defendants' argument and "conclude[d], as a matter of law, the implied warranty does not apply to alleged defects in the common area." (Ruling at 5).

Moreover, Defendants' argument that A.R.S. §§ 12-1366(B) and 33-2001, *et seq.* only permit Plaintiff to pursue an action for defects in the common area is at odds with the language of the statutes. The same is true of Defendants' argument that "where an HOA holds title in fee to common areas, it may bring a dwelling action but subject to the notice and opportunity to repair requirements under A.R.S. § 12-1361 *et seq.*" (Motion at 4:15-17). As explained in the Ruling, A.R.S. § 12-1366(B) provides that "[a] dwelling action brought by an association is also subject to title 33, chapter 18"--which is A.R.S. § 33-2001 *et seq.* A.R.S. § 33-2001(5) defines a "[h]omeowners' association dwelling action" as "any action involving a construction defect as defined in § 12-1361 filed by a homeowners' association **against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling.**" (emphasis added). As such, Plaintiff's rights under these statutes to maintain a "homeowners' association dwelling action" pertain to a defect of the "dwelling"--not the common area.

Plaintiff alleges that it complied with the prerequisites set forth in A.R.S. § 33-2002 and the CC&Rs before filing this homeowners' association dwelling action. A.R.S. §§ 12-1366(B) and 33-2001, *et seq.* imply that, having satisfied the prerequisites, Plaintiff is authorized to file the homeowners' association dwelling action on behalf of the individual unit owners. Defendants have not cited any authority to persuade the Court otherwise or that this homeowners' association dwelling action cannot include implied warranty claims on behalf of the individual unit owners. Accordingly,

IT IS ORDERED denying the Motion.

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HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
J. Holguin
Deputy

AIRE ON MCDOWELL COMMUNITY
ASSOCIATION

JAMES W FLEMING

v.

K HOVNANIAN AT AIRE ON MCDOWELL L
L C, et al.

DENNIS I WILENCHIK

JUDGE FOX

**UNDER ADVISEMENT RULING ON DEFENDANTS'
MOTION TO DISMISS FIRST AMENDED COMPLAINT**

See Orders set in LATER

Courtroom 412 – East Court Building

1:29 p.m. This is the time set for a virtual Oral Argument on Defendants' Motion to Dismiss First Amended Complaint for Breach of Implied Warranty of Workmanship and Habitability, Breach of Contract, and Breach of the Covenant of Good Faith and Fair Dealing, filed April 26, 2023. Plaintiff Aire on McDowell Community Association is represented by counsel, James W. Fleming. Defendants K Hovnanian at Aire on McDowell, LLC and K Hovnanian Phoenix Division, Inc. are represented by counsel, Dennis I. Wilenchik. No other Parties appear nor are represented.

A record of the proceedings is made digitally in lieu of a court reporter.

Discussion is held regarding the status of the case.

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The Court has received and reviewed Defendants' Motion to Dismiss First Amended Complaint for Breach of Implied Warranty of Workmanship and Habitability, Breach of Contract, and Breach of the Covenant of Good Faith and Fair Dealing, filed April 26, 2023.

Oral argument commences.

For the reasons set forth on the record,

IT IS ORDERED taking this matter under advisement.

2:12 p.m. Matter concludes.

LATER:

On March 27, 2023 (filed March 28, 2023), the Court issued its "Under Advisement Ruling On Defendants' Motion To Dismiss And Plaintiff's Motion For Leave To File First Amended Complaint" (the "March 27 Ruling"). In the March 27 Ruling, the Court analyzed the viability of Plaintiff's claim for breach of the implied warranty of workmanship and habitability and specifically addressed two issues: (1) whether the implied warranty applies to alleged defects in the common area; and (2) whether Plaintiff homeowners' association has standing to assert implied warranty claims on behalf of individual unit owners for alleged defects in their individual units. For the reasons set forth in the March 27 Ruling, the Court concluded that: (i) the implied warranty does not apply to alleged defects in the common area as a matter of law; and (ii) Plaintiff has authority under A.R.S. §§ 12-1366(B) and 33-2001 *et seq.* to assert a "homeowners' association dwelling action . . . arising out of or related to the design, construction, condition or sale of the dwelling," which action may include implied warranty claims on behalf of individual unit owners.

In the March 27 Ruling, the Court also addressed whether Plaintiff's proposed additional claim against Defendant K. Hovnanian at Aire on McDowell, LLC ("KHOV McDowell") for "breach[ing] the CC&Rs by failing to provide the members and the Association with a properly constructed community for the benefit and enjoyment of the membership" was futile. The Court concluded: "The Court has serious doubts as to whether the CC&Rs give rise to claims for breach of contract or breach of the covenant of good faith and fair dealing for the alleged construction defects at issue here. Nevertheless, at this juncture, the Court is not prepared to find that the proposed claims are futile as a matter of law." (March 27 Ruling at 8).

Ultimately, the Court granted Plaintiff's Motion to Amend and authorized Plaintiff to file an amended complaint consistent with the Court's ruling. Plaintiff filed its First Amended Complaint on April 7, 2023. On April 26, 2023, Defendants filed their Motion to Dismiss. On

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May 30, 2023, Defendants also filed “Defendant’s [sic] Motion For Reconsideration Of May 8, 2023 Order On Motion For Reconsideration Regarding Standing Under A.R.S. §§ 12-1366(B) And 33-2001, *et seq.*” (the “Second Motion For Reconsideration”), which addresses issues also addressed in the Motion to Dismiss.¹ On August 8, 2023, after full briefing of the Motion to Dismiss, the Court heard oral argument. For the reasons set forth below, the Court will grant the Motion to Dismiss in part and deny it in part. The Court also will deny the Second Motion for Reconsideration as moot.

The Court’s Prior Rulings

The Court already addressed the issues raised in the Motion to Dismiss in the March 27 Ruling and the May 8 Ruling. Plaintiff contends that the law of the case doctrine bars relitigating the issues addressed in the prior rulings. Defendants disagree.

Law of the case is a rule of procedure rather than substance--*i.e.*, it does not deprive a judge of the power to change his/her own non-final rulings or the non-final rulings of another judge of the same court sitting on the same case simply because the question was ruled on at an earlier stage. *See Hall v. Smith*, 214 Ariz. 309, 317 ¶ 28 (App. 2007); *State v. King*, 180 Ariz. 268, 279 (1994); *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 333, ¶ 26 n.11 (App. 2009); *Dunlap v. City of Phoenix*, 169 Ariz. 63, 66 (App. 1990) (citation omitted) (“[T]he trial judge has jurisdiction to reconsider the motion unless the first decision was a final judgment.”). Law of the case is a “harsh rule” that “should not be strictly applied when it would result in a manifestly unjust decision.” *Dancing Sunshines Lounge v. Indus. Comm’n*, 149 Ariz. 480, 482-83 (1986) (identifying several exceptions).

Here, after carefully considering the parties’ arguments and thoroughly reviewing the statutes at issue, and for the reasons set forth below, the Court concludes that it must revisit its prior conclusion that Plaintiff has authority under A.R.S. §§ 12-1366(B) and 33-2001 *et seq.* to assert a “homeowners’ association dwelling action . . . arising out of or related to the design, construction, condition or sale of the dwelling,” which action may include implied warranty claims on behalf of individual unit owners. The Court is not precluded by the law of the case doctrine from doing so.

¹ Defendants filed their first Motion For Reconsideration on April 10, 2023, which the Court denied in its May 8, 2023 (filed May 12, 2023) “Ruling On Defendants’ Motion For Reconsideration Of March 27, 2023 Order At Footnote #3” (the “May 8 Ruling”).

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Plaintiff's Authority To Maintain A Homeowners' Association Dwelling Action

In the May 8 Ruling, the Court observed that “Plaintiff does not allege that it holds the implied warranty as to the individual units by way of assignment or transfer.”² (May 8 Ruling at 2). Rather, Plaintiff alleges that it “exercises its authorization to prosecute and brings this action for damages to the building components set forth herein, and/or certain separate interests on behalf of the homeowners in accordance with A.R.S. §§ 12-1366(B) and 33-2001, *et seq.*” (FAC, ¶ 22). The Court concluded in the May 8 Ruling that those statutes empowered Plaintiff to assert the implied warranty claims as a “homeowners’ association dwelling action.” (May 8 Ruling at 3). After further analysis of the statutes, the Court determines that its prior conclusion was erroneous.

A.R.S. § 33-2001(5) defines a “[h]omeowners’ association dwelling action” as “any action involving a construction defect as defined in § 12-1361 filed by a homeowners’ association **against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling.**” (emphasis added). In the May 8 Ruling, the Court focused on the common meaning of the term “dwelling.” But A.R.S. § 33-2001(2) defines “dwelling” as “a newly constructed single family or multifamily unit designed for residential use and property and improvements **that are either owned by a homeowners’ association or jointly by all of the members of a homeowners’ association.**” (emphasis added). It is undisputed that the individual units at issue here are not owned by a homeowners’ association (*i.e.*, Plaintiff) or jointly by all of the members of a homeowners’ association. As such, the implied warranty claims cannot constitute a “homeowners’ association dwelling action” under A.R.S. § 33-2001 *et seq.*

Finally, as an independent basis for asserting the individual unit owners’ claims, Plaintiff cites *Armory Park Neighborhood Ass’n v. Episcopal Community Services In Arizona*, 148 Ariz. 1 (1985). *Armory Park* is inapposite. There, a neighborhood association sought an injunction against an organization that served daily free meals to indigent people, which the association alleged created a public nuisance. The Arizona Supreme Court held that the question of an association’s standing to bring an action on behalf of its members depends on “whether, given all the circumstances in the case, the association has a legitimate interest in an actual controversy involving its members and whether judicial economy and administration will be promoted by

² At oral argument, Plaintiff’s counsel asserted for the first time that Plaintiff has obtained assignments of the implied warranty claims from several of the individual unit owners. Plaintiff did not allege in the First Amended Complaint that it is asserting any claim as assignee of the individual unit owners, and Plaintiff did not supplement the written record to include any such assignments prior to oral argument. Defendant asserted in its rebuttal oral argument that, even if such purported assignments exist, Plaintiff still lacks authority to bring the implied warranty claims on behalf of the individual lot owners. The Court declines to rule on the impact of any purported assignments obtained by Plaintiff.

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allowing representational appearance.” *Id.* at 6. In concluding that the association had standing in that case, the Court stated:

Further, **APNA seeks an injunction rather than damages for separate property owners.** Principles of judicial economy are advanced by allowing the issues to be settled in a single action rather than in a multitude of individual actions because **the relief sought is universal to all of its members and requires no individual quantification by the court.** We hold, therefore, that APNA has standing to bring the action as the representative of its members.

Id. (emphasis added).

Here, unlike *Armory Park*, Plaintiff is seeking money damages on behalf of the individual unit owners, not an injunction. As such, unlike *Armory Park*, the relief sought is not universal to all of the individual unit owners, and the individual unit owners’ claims will require individual quantification by the Court. Accordingly, unlike *Armory Park*, principles of judicial economy are not advanced by allowing Plaintiff to assert the claims in a single action on behalf of all individual unit owners.

In short, Plaintiff does not have authority to assert the individual unit owners’ implied warranty claims on their behalf. And the Court previously concluded, as a matter of law, that the implied warranty does not apply to alleged defects in the common area. Accordingly, the Court will dismiss Plaintiff’s implied warranty claim asserted in the First Amended Complaint’s First Cause of Action.

**Plaintiff’s Claims For Breach Of Contract And
Breach Of The Covenant Of Good Faith And Fair Dealing**

Plaintiff’s claims asserted in the Second and Third Causes of Action for breach of contract and breach of the covenant of good faith and fair dealing are based on the CC&Rs. As set forth above, in the March 27 Ruling, the Court expressed serious doubts as to whether the CC&Rs give rise to claims for breach of contract or breach of the covenant of good faith and fair dealing for the alleged construction defects at issue here. Nevertheless, the Court was not prepared to find that the proposed claims are futile as a matter of law. Despite the Court’s doubts that the claims will survive summary judgment, the Court will allow the CC&R-based claims to proceed.³

³ At oral argument, Defendants’ counsel reiterated that Defendant K. Hovnanian Great Western Building Company, LLC (“Great Western Building”) is not a party to the CC&Rs. Plaintiff asserted the CC&R-based claims only against KHOV McDowell--not against Great Western Building. (FAC at 10:12, 11:26).

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Disposition

For the reasons set forth above,

IT IS ORDERED granting the Motion to Dismiss, in part, as to the implied warranty claims asserted in the First Cause of Action.

IT IS FURTHER ORDERED denying the Motion to Dismiss in part as to the breach of contract and breach of the covenant of good faith and fair dealing claims asserted against KHOV McDowell in the Second and Third Causes of Action.

IT IS FURTHER ORDERED denying the Second Motion for Reconsideration as moot.

Clerk of the Superior Court
*** Electronically Filed ***
09/21/2023 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-008601

09/18/2023

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
J. Eaton
Deputy

AIRE ON MCDOWELL COMMUNITY
ASSOCIATION

JAMES W FLEMING

v.

K HOVNIANIAN AT AIRE ON MCDOWELL L
L C, et al.

DENNIS I WILENCHIK

SCOTT A BOOTH
JUDGE FOX

MINUTE ENTRY

The Court is in receipt of Plaintiff's September 8, 2023 Motion for Reconsideration re:
Court's March 27 & August 8, 2023 Ruling.

IT IS ORDERED that Defendants shall file their response to the Motion **no later than
October 10, 2023**. No reply will be permitted.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-009451

08/25/2023

HONORABLE JENNIFER RYAN-TOUHILL

CLERK OF THE COURT
A. Meza
Deputy

POINTE 16 COMMUNITY ASSOCIATION

KYLE A ISRAEL

v.

G T I S-H O V POINTE 16 L L C, et al.

AARON M FINTER

R C C HOLDINGS
NO ADDRESS ON RECORD
OVERHEAD DOOR CORPORATION
NO ADDRESS ON RECORD
JOHN T CROTTY
LEONARD T FINK
ELIZABETH SAVOINI FITCH
GREGORY P GILLIS
KEVIN E HELM
ROSARY HERNANDEZ
SHANNON G HUFF
STRATEGIC HOME IMPROVEMENTS
INC
NO ADDRESS ON RECORD
GOTHIC LANDSCAPE INC
NO ADDRESS ON RECORD
LIBERTY CONSTRUCTORS L L C
NO ADDRESS ON RECORD
RINA K RAI
MOHAMAD TOKKO
KEELY L VERSTEGEN
TERESA HAYASHI WALES
KENNETH W WELSH
JUDGE RYAN-TOUHILL

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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08/25/2023

RULING

Before the Court is Defendants' April 4, 2023, *Motion for Summary Judgment* [MSJ], Plaintiff's May 8, 2023, *Response to MSJ*, and Defendants' June 1, 2023, *Reply*. The parties provided oral argument on the MSJ; the Court considered the filings and arguments presented by the parties. The Court has also considered relevant authority and law, along with the record of the case. The Court specifically considered all facts and reasonable inferences in the light most favorable to the non-moving party. For the reasons provided in this Ruling,

IT IS ORDERED granting Defendants' *Motion for Summary Judgment*.

Summary Judgment Standard

Rule 56(a) requires the court to "grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P.; *Dinsmoor v. City of Phoenix*, 251 Ariz. 370 (2021). The party moving for summary judgment has the burden of establishing the absence of a genuine dispute of fact. *Wells Fargo, N.A., v. Allen*, 231 Ariz. 209, 213 (App. 2012). When the moving party demonstrates no material facts are genuinely in dispute, the non-moving party must then present competent evidence demonstrating a disputed fact exists, which then requires a trial. *See Nat'l Bank of Ariz. v. Thurston*, 218 Ariz. 112, 1156 (App. 2008); *Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, 287 (App. 2000).

When no genuine dispute over material facts exists, summary judgment is warranted. *Orme School v. Reeves*, 166 Ariz. 301 (1990). However, even when facts may be agreed upon, if the parties have a genuine dispute over inferences to draw from those facts, summary judgment is precluded. *Valley Nat. Bank of Arizona v. J.C. Penney Ins. Co.*, 129 Ariz. 108 (Ct. App. Div. 1 1981). When deciding a motion for summary judgment, the court is not free to speculate "that some slight doubt. . . some scintilla of evidence or some dispute over irrelevant or immaterial facts might blossom into a real controversy in the midst of trial." *Orme School v. Reeves*, 166 Ariz. at 311.

A party seeking summary judgment has a heavy burden. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209 (Ct. App. Div. 1 2012). The movant must provide "undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim." *Id.* (citing *Comerica Bank v. Mahmoodi*, 224 Ariz. 289 (Ct. App. Div. 1 2010)).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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08/25/2023

Background

Undisputed Material Facts

1. Defendants are GTIS-HOV (Developer) and K. Hovnanian (K. Hov).
2. Plaintiff is Pointe 16 Community Association (HOA). Plaintiff is not a homeowner.
3. The HOA is a non-profit corporation formed under A.R.S. § 10-3101, for the subdivision.
4. Plaintiff incorrectly named K. Hov but later filed an amended complaint fixing the identity of Defendant K. Hov. (K. Hovnanian Arizona Operations, LLC, f/k/a K. Hovnanian Great Western Building Co., LLC.)¹
5. Developer and K. Hov built 67 residences in Pointe 16, which were then sold to individual homeowners.
6. Defendants and (prospective) homeowners entered into contracts for the sale/purchase of the residences.
7. Developer created the CC&Rs (Declaration) for Pointe 16.
8. The Declaration defines the HOA, HOA's property, and homeowner's property:
 - a. The HOA is the Pointe 16 Community Association, which is a non-profit corporation.
 - b. The HOA's property is:
 - i. Common area;
 - ii. Other part or parts of the Property, along with buildings, structures, streets, gates, and improvements;
 - iii. Other real property held by Declarant (Developer) for conveyance to the Association; and
 - iv. Any area to be used in common by owners and residents.
 - c. Lots, which belong to homeowners, are numbered parcels of real property. The owner is the record owner.
 - d. A dwelling unit is a residence that sits upon a lot.
 - e. Every owner has a non-exclusive right and easement to the common area(s).
 - f. Title to the common area is (will be) held by the Association.
9. On February 15, 2017, conveyed title to the common area to the Association (HOA).
10. Plaintiff has alleged residences and common area in Pointe 16 are defective.
11. On July 22, 2022, Plaintiff filed suit against Defendants.
 - a. Plaintiff claimed the Declarations provided, "expressly and by implication," rights, duties, and power to the HOA, "including the right, duty, and power to retain

¹ The Court declines to address Defendants' MSJ, p. 8, section E, further.
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- counsel and file whatever legal proceedings it deems necessary to enforce said rights. . . .” Complaint, p. 2, ¶ 10.
- b. Plaintiff stated the HOA, “by and through its Board of Directors, is authorized, pursuant to the Association’s Bylaws and Declaration, to bring this action.” Id., ¶ 11.
 - c. Plaintiff claimed Defendants failed to perform construction in a workmanlike manner.
 - d. Plaintiff filed two claims: violation of A.R.S. § 12-1361, Purchaser Dwelling Act, and breach of implied warranties.
12. On October 31, 2022, Defendants filed their Answer, disputing Plaintiff’s claims.
13. In April 2023, the HOA obtained “Homeowner Assignment of Certain Defect Claims to Association” from the majority of the homeowners.
14. Developer and K. Hov have moved for summary judgment; Pointe 16 opposes.

Argument

Standing

Plaintiff does not have standing to bring this cause of action on behalf of the homeowners.

Pointe 16 is not a condominium community. Simply because the HOA contends the community is a condominium does not make it so. The legal definition of condominium “means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.” A.R.S. § 33-1202(10). Here, the common areas are not owned by the owners of Pointe 16. The common areas are owned by the HOA, which is a critical distinction under Arizona law. The owners own the residences built upon the lots; the HOA owns the common areas. Because Pointe 16 is not a condominium community, the HOA has no standing to “institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.” A.R.S. § 33-1242(A)(4). Plaintiff’s argument fails as a matter of law.

The Court is not persuaded by Plaintiff’s argument that each homeowner, by virtue of their use and enjoyment of the common area, now has an ownership interest in those common areas. The owners have no “undivided interests” in common areas beyond enjoyment of use and easement. Certainly, the owners have the right to use the common areas, subject to certain limitations set forth in the CC&Rs. This right, however, does not somehow then transfer ownership of the common areas to the individual homeowners. Ownership of the common areas

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rests with the HOA; Plaintiff has presented no evidence to the contrary. Likewise, the HOA may have a right to file claims against Developer and K. Hov for the common areas; this right would not somehow transfer to individual homeowners simply because a homeowner has the right to egress, use, enjoyment, etc. of the common areas. In other words, a homeowner could not choose to sue a developer for construction defects in a common area. That is the purview of the HOA.

Assignment of claim

The Court disagrees with Plaintiff that a homeowner has an unfettered right to assign their claim to the HOA. A homeowner's association may bring a cause of action on its own behalf for common areas but has no statutory or common law right to make a claim on behalf of the homeowners unless the homeowners are part of a condominium—and, even then, specific circumstances apply. Plaintiff provides no legal authority for the assignment of the homeowners' claims to the HOA; additionally, pursuant to the contract entered between the parties in this case, any assignment is void if the homeowner fails to obtain Developer's consent. Nowhere in Arizona law is a homeowner given the right to transfer a potential claim to an HOA, making the HOA the party in fact. Moreover, nowhere in A.R.S. §§ 12-1366 (Purchaser Dwelling Actions) or 33-2003 (Homeowner's Association Dwelling Actions) does the law provide a right for an HOA to bring implied warranty claims on behalf of homeowners or allow for the transfer of that right from an owner to an HOA.

Plaintiff points to no provision in the CC&Rs that allows a homeowner to transfer their rights to the HOA. A homeowner may bring a cause of action for breach of implied warranty for his or her own residence; Plaintiff cites to no authority that a homeowner can transfer this right to the HOA. Rather, the HOA makes conclusory statements that "the homeowners [] have assigned their claims to the Plaintiff." *Response*, p. 2, ¶ 2. Plaintiff then assumes the assignments "overcome[] the arguments asserted by Defendants, even if they were valid." *Id.* Plaintiff cites to *Highland Village* as support for its position; this is misplaced, as discussed below.

In addition to the reasoning above, the Court briefly explains why homeowners cannot assign their rights to Plaintiff in this case. While courts have recognized a party's right to assignment in various actions, exceptions exist. A party may assign its contractual rights to a third party unless (a) the assignment materially changes the obligor's duty, (b) the assignment is against the law, or (c) the contract prohibits the assignment. *Highland Village Partners, L.L.C. v. Bradbury & Stamm Const. Co., Inc.*, 219 Ariz. 147 (Div. 1 2008), quoting Restatement (Second) of Contracts § 317(2) (1981).

The Court will only address subsection (c)—the action is prohibited by contract. Here, the homeowners entered into contracts with the developer wherein the parties agreed, "this Agreement

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and the rights of Buyer hereunder may not be assigned or transferred by Buyer voluntarily, involuntarily, or by operation of law without first obtaining Seller's written consent, which may be withheld in Seller's sole and absolute discretion." Purchase Agreement and Escrow Instructions, page 9 of 11, ¶ (9)(B). In this case, Plaintiff has presented no argument showing subsection (c) is invalid or unenforceable. Because Plaintiff has not raised this issue or presented argument, the Court finds the contractual terms undisputed and, consequently, binding.

Implied Warranty

Preliminarily, in the complaint, Plaintiff did not allege that it obtained assignment from homeowners to bring this cause of action on behalf of the individual homeowners. Plaintiff obtained "assignment of certain defect claims" after Defendants filed their MSJ; at oral argument, Plaintiff intimated this was a belt-and-suspenders action, as Plaintiff did not need to get the owners' assignments but only did so in response to Defendants' arguments. Problematically, Defendants had no notice of the assignments and, regardless of the late notice, the assignments are vague and provide no legal authority for their execution. It appears the assignments transfer an owner's potential claims for "defects in the units" to the HOA. The law does not allow this.

Arizona law implies a warranty of workmanship and habitability into contracts entered into between a builder (and developer) and a homebuyer. See *Columbia Western Corp. v. Vela*, 1222 Ariz. 28 (App.1979); *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 244 (1984). This implied warranty arises not out of contract but rather common law; while previously the implied warranty only applied to the initial purchaser, *Richards* extended the warranty to subsequent purchasers of property. Now the original homeowner and subsequent purchasers are protected from latent defects in the home that the buyer could not have reasonably discovered when purchasing the home. *Richards* 139 Ariz. at 245.

Recently our Supreme Court decided whether parties could contract to waive an implied warranty. *Zambrano v. M & RC II, LLC*, 254 Ariz. 53 (2022). The Court held "public policy prohibits enforcement of the disclaimer and waiver." *Id.* at ¶ 3. Therefore, even if the contracts entered into between the parties in *this* case contain a provision of waiver (which they do), that portion of the contract is unenforceable. This means homeowners retain the right to assert a breach of implied warranty. The Court will not restate the history of the public policy that led to implied warranty provisions; the parties are familiar with *Zambrano*, which expertly explains the origins of the warranty that protects a homebuyer and holds a builder accountable for construction. *Id.* at ¶¶ 14-19. What this Court finds worth emphasis, however, is *Zambrano's* repeated references to "homebuyers." The Supreme Court, when discussing the history of the common-law action, references the application of the implied warranty. Specifically, the Court stated, "although the warranty is an impute term of the original purchase agreement, it applies to non-builder-vendors

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and is enforceable by subsequent purchases, despite a lack of contractual privity with the builder.” *Zambrano* at ¶ 15 (referencing *Lofts at Fillmore Condo. Ass’n v. Reliance Com. Constr., Inc.*, 218 Ariz. 574, 575 (2008)). The Court further stated,

The implied warranty serves to protect homebuyers and the public at large in multiple ways. First, warranting that a home was built using minimum standards of good workmanship conforms to a homebuyer’s reasonable expectations. Second, the warranty discourages “the unscrupulous, fly-by-night operator and purveyor of shoddy work,” who might otherwise blight our communities. Third, it protects not only the original buyer but also subsequent purchases. Fourth, the warranty shields a purchase that “is usually the most important and expensive purchase of a lifetime,” thus minimizing the risk of catastrophic financial losses for all homebuyers who purchase a home within eight years of construction.

Zambrano at ¶ 25 (all internal citations omitted). The Court found no case or statutory authority that conferred a right of implied warranty to an entity other than a purchaser (homeowner). Specifically, the Court did not find—and Plaintiff did not provide—any legal basis that extends an implied warranty of workmanship to common areas owned by an HOA. In this case, the HOA is not a purchaser, subsequent purchaser without notice of defect upon transfer, or homeowner. Therefore, the HOA has no standing to assert a claim under an implied warranty.

Plaintiff’s reliance on *Highland Village* is misplaced. *Highland Village Partners, L.L.C. v. Bradbury & Stamm Const. Co., Inc.*, 219 Ariz. 147 (Div. 1 2008). In that case, the court noted, “An implied-warranty-of-good-workmanship claim is one grounded in contract and therefore, with exception, can only be asserted by a party to the contract.” 219 Ariz. at ¶ 8. The exception to this privity requirement—a subsequent purchaser of a home—was carved out in *Richards*. This was due to public policy considerations, akin to *Zambrano*. In *Highland*, a subsequent purchaser of commercial property (apartments) entered into a contract with the seller. The contract between the parties contained a provision that the implied warranty held by the seller (obtained, firstly, from the builder) would be transferred to the subsequent purchaser. In other words, the implied warranty did not automatically transfer to the subsequent purchaser (unlike a residence) but, rather, the parties contracted for the transfer. Those are not the facts of this case and, consequently, *Highland Village* is not controlling.

Finally, the Court does not agree that the CC&Rs, which require the HOA to undertake certain responsibilities for maintaining common areas, somehow creates an implied warranty for the HOA’s protection. The implied warranty of workmanship and habitability is available to purchasers of homes (single family, multi-family). This warranty is part of all contracts between a developer/builder and homebuyer and is intended to protect those whose purchase is intended

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for residential purposes. In other words, the implied warranty protects a home. For the reasons explained in this Ruling, common areas and an HOA's obligation to maintain those areas, do not count as a home or otherwise create an implied warranty and, therefore, no implied warranty exists.

Homeowner Association Dwelling Action

The Court concedes some confusion exists in law over applicability of a "Homeowner Association Dwelling Action." A.R.S. § 33-2001 *et seq.* An HOA may bring "any action involving a construction defect as defined in § 12-1361 filed by a homeowner's association against the seller of a dwelling arising out of related to the design, construction, condition, or sale of the dwelling." Dwelling is defined as "a newly constructed single family or multifamily unit designed for residential use and property and improvements that are either owned by a homeowner's association or jointly by all of the members of a homeowners' association. Dwelling includes the systems, other components and improvements that are part of a newly constructed singled family or multifamily unit at the time of construction." A.R.S. § 33-2001(2). The statute references property and improvements—this is in addition to the reference to residences. Therefore, giving latitude to potential claims, an HOA could, for example, file an action alleging defects in improvements made to common areas (e.g., a pool, clubhouse, etc.).

The statute provides a mechanism by which an HOA can sue a builder for defects after first complying with A.R.S. § 12-1362, which allows the builder to inspect and repair the defects. Nothing in the law, however, provides an implied warranty exists under this type of action and nothing in the action allows for transfer of any rights to seek redress for builder defects. The HOA has to bring a dwelling action based in breach of contract (express) or, perhaps, negligence. In this case Plaintiff filed claims under the Purchaser Dwelling Act and breach of implied warranties. Plaintiff did not allege a breach of contract claim or negligence against Defendants and, consequently, the complaint is defective.

Purchaser Dwelling Act

The Court will not belabor why the HOA cannot bring a claim under the Purchaser Dwelling Act. Specifically, such action "means any action involving a construction defect brought by a purchaser against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling. A.R.S. § 12-1361(7).

One, "the Act does not itself provide a legal cause of action for such lawsuits. And without the ability to enforce the implied warranty of workmanship and habitability, there is no legal cause of action to remedy these defects." *Zambrano* 254 Ariz. at ¶ 27. Two, Plaintiff is not a purchaser. Even if Plaintiff was a purchaser, the Act itself is not a basis for a lawsuit.

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Prior Court Action

Plaintiff argues, “No Arizona appeals court has ever even considered a challenge to a homeowners’ association’s implied warranty rights.” *Response*, p. 3, ¶ 4. Plaintiff further states, “It has always been understood to be a valid cause of action.” *Id.* Plaintiff then makes the leap to assert, “Defendants ask the Court to effectively strike the implied warranty rights of certain property owners.” *Id.* at ¶ 5. That is not what Developer and K. Hov argue. Rather, Defendants argue the HOA has no right to bring a cause of action on behalf of the homeowners for those alleged defects in areas not owned by the HOA. The appropriate plaintiffs are the homeowners and nothing Defendants assert in their pleadings changes this fact; Defendants argue the HOA is the wrong Plaintiff and the implied warranty contractual provisions are vested with homeowners, not the non-profit HOA.

Plaintiff supports his assertion that HOAs have long had standing to assert implied warranty claims for common areas by referencing *Lofts, Richards, Hayden Business Center Condominiums*, and *Highland Village*. (Citations omitted.) The Court has already discussed these cases (except *Hayden*) and finds they do not support Plaintiff’s claim that an HOA has the right to bring an implied warranty cause of action for common areas not owned by the homeowners but instead owned by the HOA.

The Court has not concluded an HOA is without a remedy. Rather, an HOA is unable to (1) take the place of a homeowner, (2) assert a claim for implied warranty on behalf of a homeowner, and (3) assert a claim for implied warrant for itself because an HOA is not a purchaser and no case law supports an argument that any implied warranty is transferrable to common areas. The HOA may still bring a cause of action that arises out of a contract (express); because Plaintiff did not make this claim in its complaint, the Court will not analyze it further.

The Court, likewise, has not concluded homeowners have no remedies. The law is clear that homeowners may seek enforcement of their rights pursuant to implied warranty, breach of contract, negligence, etc. In this case no homeowner is a Plaintiff and, therefore, the Court will not analyze it further.

The Court understands a developer or homebuilder could attempt clever terminology in a contract that absolves the developer or homebuilder of *any* liability for *any* defect in a common area. This is similar what happened in *Zambrano*; the developer limited liability in a contract and the Supreme Court struck that down as against public policy. This Court does not know how higher courts would address any prospective lack of remedies between an HOA (for common areas) and a developer or builder. While this Court can hypothesize possible outcomes for both litigants, it remains that this issue is not before this Court and is, therefore, irrelevant. The Court

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only includes this explanation to address the concerns raised by Plaintiff, including the references to legislative action.

Conclusion

Because the Court found Plaintiff has no standing to bring a claim for breach of implied warranty on behalf of homeowners, because the Court found the HOA has no right to claim implied warranty, and because the Purchaser Dwelling Act is not a recognizable cause of action,

IT IS ORDERED granting Defendants' *Motion for Summary Judgment*.

Because Defendants filed suit against various subcontractors, claiming if fault has occurred it is the fault of the subcontractors, because the Court will dismiss the case against Defendants Developer and K. Hov, and because Plaintiff did not file suit against any subcontractor,

IT IS FURTHER ORDERED dismissing this case in its entirety without prejudice.

IT IS FURTHER ORDERED denying all other requests for relief.

/ s / Jennifer Ryan-Touhill
JENNIFER RYAN-TOUHILL
JUDGE OF THE SUPERIOR COURT

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HONORABLE JENNIFER RYAN-TOUHILL

CLERK OF THE COURT
A. Meza
Deputy

POINTE 16 COMMUNITY ASSOCIATION

KYLE A ISRAEL

v.

G T I S - H O V POINTE 16 L L C, et al.

AARON M FINTER

R C C HOLDINGS
NO ADDRESS ON RECORD
OVERHEAD DOOR CORPORATION
NO ADDRESS ON RECORD
JOHN T CROTTY
LEONARD T FINK
ELIZABETH SAVOINI FITCH
GREGORY P GILLIS
KEVIN E HELM
ROSARY HERNANDEZ
SHANNON G HUFF
STRATEGIC HOME IMPROVEMENTS
INC
NO ADDRESS ON RECORD
GOTHIC LANDSCAPE INC
NO ADDRESS ON RECORD
LIBERTY CONSTRUCTORS L L C
NO ADDRESS ON RECORD
RINA K RAI
MOHAMAD TOKKO
KEELY L VERSTEGEN
TERESA HAYASHI WALES
KENNETH W WELSH
JUDGE RYAN-TOUHILL

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MINUTE ENTRY

The Court has received Plaintiff's August 31, 2023, *Motion for Reconsideration*.

IT IS ORDERED Defendant(s) shall file a response to Plaintiff's *Motion* by no later than September 26, 2023.

IT IS FURTHER ORDERED no reply is permitted.