ARIZONA COURT OF APPEALS
DIVISION ONE

GALLERY COMMUNITY ASSOCIATION, an Arizona non-profit corporation, Plaintiff/Appellant, v. K. HOVNANIAN AT GALLERY, LLC, et al., Defendants/Appellees.	No. 1 CA-CV 23-0375 Maricopa County Superior Court No. CV2020-008714

APPENDIX TO APPELLEES' ANSWERING BRIEF

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Dated: December 1, 2023 LORBER, GREENFIELD & POLITO, LLP

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

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

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

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

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

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

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

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

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

10. Upon information and believe, Defendant K. Hovnanian Arizona Operations, LLC was the general contractor responsible for the construction of The Gallery.

11. Defendant K. Hovnanian Developments of Arizona, Inc. is and was, at all relevant times herein, a member of Defendants K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona Operations, LLC.

12. Upon information and belief, Plaintiff alleges that Defendant K. Hovnanian Companies of Arizona, LLC was involved in the development, design, construction, and/or sale of The Gallery and the units.

13. JOHN DOES I-X and JANE DOES I-X and their spouses, WHITE CORPORATIONS I-X, BLACK PARTNERSHIPS I-X, AND GRAY LIMITED LIABILITY COMPANIES I-X are unknown persons/entities which may bear some responsibility or liability related to the allegations and claims made herein, potentially including but not limited to any and all subcontractors employed in the work at The Gallery. The Association reserves the right to amend this complaint to add such person(s) / entity(ies) as additional defendants.

14. All of the acts alleged in this Complaint occurred in Maricopa County, Arizona. This court has jurisdiction over this matter. Venue is proper before this court.

FIRST CAUSE OF ACTION

(Negligence – Against All Defendants)

15. The Association incorporates herein by reference all allegations included in paragraphs 1-14.

16. Defendants owed the Association a duty to design and construct the subject property, and govern the Association, in accordance with the requirements of the plans, specifications, building codes, industry standards, governing documents, and applicable laws and codes.

17. Defendants violated that duty by performing their work negligently, not in a

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

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

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

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

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

22. The Association is entitled to punitive damages.

SECOND CAUSE OF ACTION

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

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

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

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

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

27. The defendants' work was not done correctly.

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

29. The defendants have refused to correct the deficiencies.

30. Defendants K. Hovnanian at Gallery, LLC, K. Hovnanian Developments of Arizona, Inc., and K. Hovnanian Companies of Arizona, LLC have deprived the Association of the benefit of the bargain of their contract.

31. Defendants K. Hovnanian at Gallery, LLC, K. Hovnanian Developments of Arizona, Inc., and K. Hovnanian Companies of Arizona, LLC's breach of the implied covenant of good faith and fair dealing caused the Association and its members to suffer damages in an amount to be shown at trial.

THIRD CAUSE OF ACTION

(Breach of Implied Warranty of Workmanship and Habitability – Against All Defendants)

32. The Association incorporates herein by reference all allegations included in paragraphs 1-31.

33. In designing and performing their work at The Gallery, the defendants impliedly warranted that they would perform their work in a workmanlike manner.

34. The defendants did not perform their work at The Gallery in a workmanlike manner.

35. By failing to perform their work in a workmanlike manner, the defendants breached the implied warranty of workmanship and habitability.

36. The defendants' breaches of the implied warranty damaged the Association and its members in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

(Breach of Contract - Against Defendants K. Hovnanian at Gallery, LLC, K. Hovnanian Developments of Arizona, Inc., and K. Hovnanian Companies of Arizona, LLC)

37. The Association incorporates herein by reference all allegations included in paragraphs 1-36.

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

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

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

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

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

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

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

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

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

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

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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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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, v. 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 **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)
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,	

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LLC, an Arizona limited liability company;

Third-Party Plaintiffs,

v.

CHAS ROBERTS AIR CONDITIONING, INC., an Arizona corporation; DESERT VISTA, INC., an Arizona corporation; GOTHIC LANDSCAPING, INC., a California corporation; HOME BUILDERS SITE SERVICES OF ARIZONA, LLC, an Arizona limited liability company; LEBLANC BUILDING CO., INC., an Arizona corporation; LIBERTY CONSTRUCTORS, LLC, an Arizona limited liability company, dba LIBERTY ARIZONA; RENCO LLC, an Arizona limited liability company, dba RENCO ROOFING; R/S SERVICE & SUPPLY, INC., an Arizona corporation; SARGON MASONRY CONSTRUCTION, LLC, an Arizona limited liability company; and DOES 1-50.

Third-Party Defendants,

COME NOW Defendants K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona Operations, LLC, by and through undersigned counsel, pursuant to Ariz.R.Civ.P. 56 do hereby submit their Statement of Facts in Support of Defendants' Motion For Summary Judgment Regarding Plaintiff's Causes Of Action.

1. Plaintiff is the Homeowner's Association formed to maintain common areas, collect assessments, and enforce terms of the Declaration of Covenants, Conditions, Restrictions, and Easements for Gallery. Exhibit A, Declaration of Covenants, Conditions, Restrictions, and Easements for Gallery, Exhibit A hereto, GALLERY_000163-000206 at page GALLERY_000168.)

2. The Declarant who formed the Association is K. Hovnanian at Gallery, LLC. (Exhibit A, at page GALLERY_000168 and at § 1.15 / p GALLERY_000170.)

3. The Declaration/CC&Rs do not include any agreement to perform construction or any warranty regarding the construction of improvements at the property. (Exhibit A.)

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4. The Declaration/CC&Rs mainly concerns agreements between the individual lot owners and the Association, for the benefit of owners and other interest holders in the subject lots and common areas. (*Id.* generally and at Recitals A-D, page GALLERY_000168.

5. Sales agreements were entered between K. Hovnanian at Gallery, LLC and purchasers of homes at The Gallery. (Sale Agreement, Exhibit B, GALLERY-JONES_3104-0000218-252.)

6. Terms of the purchase agreements include limited warranties to the homebuyers. (Exhibit B, at Section E. Warranties p. 9-10/ GALLERY-JONES_3014-000226-227, and Home Builder's Limited Warranty Agreement, Exhibit C hereto, KHOV00000052-66.)

7. The warranties include specific provisions for raising claims and for arbitration of all disputes. (Exhibit C, at page KHOV00000053.)

8. Plaintiff has had professional management including throughout the turnover process. (Deposition of R. Vander Waal, excerpts attached hereto as Exhibit E, at pp. 47: 16-22.)

9. Plaintiff accepted responsibility for all common area improvements in 2018 and acknowledged at that time that requested punch list repairs had been completed. (Exhibit D, pp. 41:9-47:15, and Common Area, Landscape and Financial Acceptance by Gallery Community Association, Exhibit E hereto, EX 20 to deposition Defendants' 30(b)(6) representative James Harvey/KHOV00000046-51.)

10. Plaintiff, through its counsel, gave notice of claims by correspondence purporting to be a Notice of Claim under A.R.S. § 12-1363. (Exhibit F).

11. Plaintiff's counsel stated in correspondence regarding its pre-litigation Notice of Claim under A.R.S. § 12-1361 et seq. and 33-2002 et seq. that "The Notice was on behalf of the Association only and for issues that are within the Association's responsibility to maintain and repair under the Declaration of Covenants, Conditions, Restrictions and Easements for Gallery [and] The Association is not bringing claims on behalf of one or more individual unit owners for issues that the owners are solely responsible to maintain and repair." Plaintiff's counsel confirmed in related correspondence that its claims was not based on rights of individual homeowners. (Letter dated February 21, 2020, Exhibit G hereto.)

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12. Plaintiff has identified in its Disclosures a number of provisions of the Declaration that reference the Declarant. (Exhibit H, excerpts from Plaintiff's 19th Supplemental Disclosure at pp. 4-5.)

Dated: September 30, 2022

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Original of the foregoing e-filed this 30th day of September, 2022 with:

Clerk of the Court
Maricopa County Superior Court
101 W. Jefferson
Phoenix, AZ 85003

COPY of the foregoing emailed this 30th day of September, 2022 to:

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Exhibit A

New Land Title Agency, LLC

AX
sa

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.

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 fee, leasehold 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"* sha ıy 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.

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 all perty, 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 Decl**"* 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.

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 of 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 Arti 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.

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 Owner 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.

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 that 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 ereto, 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 (½) 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 ($1/6^{th}$) 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 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 ($1/6^{th}$) 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 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 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.

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 of 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 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.

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.

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, 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.

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 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 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. HOVNANIAN 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. Hovnanian at Gallery, LLC, an Arizona limited liability company, on behalf of the company.

_____
Notary Public

My Commission Expires:
2/10/19

PAUL LOVATO
Notary Public
Maricopa County, Arizona
My Comm. Expires 02-10-19

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.

Exhibit E

K Hovnanian Homes

COMMON AREA, LANDSCAPE AND FINANCIAL ACCEPTANCE BY GALLERY COMMUNITY ASSOCIATION

K. Hovnanian Great Western Homes, LLC, including its affiliates (collectively, "*K. Hovnanian Homes*"), and Gallery Community Association ("*HOA*") have inspected the project designated below for the purposes of transferring to the HOA all repair, replacement, maintenance and all other obligations pertaining to the project's common areas, including utility fees and costs. The transfer will occur when K. Hovnanian Homes and the HOA completes the bottom portion of this Acceptance. Based on the inspection of the HOA, the HOA accepts the transfer as outlined above from and after the date set forth in the Date of Acceptance column.

Project Name: Gallery Community Association
Date of Inspection: February 21, 2017
K. Hovnanian Homes Representative: Brandon Parkinson, Director of Land Development
John Shikany, Land Development Manager
HOA Representatives: Chris Stavroll (HOA Board Member)
Mike Line (~~Trestle Management Group~~) HOA BOARD MEMBER
Rhonda Harding (Trestle Management Group)
Marc Vasquez (Trestle Management Group)

Punch List:

1. K. Hovnanian Homes agrees to contribute **$1,704.35** directly to the Association Reserve Account. **** See Exhibit A for further details ****
2. K. Hovnanian Homes performed a significant number of repairs and replacement of the concrete components throughout the community, installation of granite throughout common areas, as well various miscellaneous repairs throughout common areas. **** See Exhibit B for further details ****

K. Hovnanian Homes Representative: JIM HARVEY, V.P. FINANCE
Print Name and Title

Signature

8-8-2018
Date

HOA Representative: Michael Line President
Print Name and Title

Signature

8/23/18
Date

Date of Acceptance: 8/23/18
Date

EXHIBIT
20

EXHIBIT A - FINANCIAL ANALYSIS

GALLERY COMMUNITY ASSOCIATION

Transition Date: 12/14/2017

Operating Account Reconciliation

29,738.29	Balance as of 12/31/2017
(1,035.36)	Prepaid Assessments as of 11/30/2017
28,702.93	
28,702.93	**TOTAL Operating surplus left to HOA from KHOV**

Reserve Account Reconciliation

17,693.00	Fully Funded Reserves per **RDA 2015 Study as of 12/31/2017**
-	2017 Project Not Completed - None
17,693.00	Fully Funded Reserves per **RDA 2015 Study as of 12/31/2017**
11,565.40	Actual Reserve Balance as of 12/31/2017
13,269.75	75% of Fully Funded Reserves (75% of $17,693)
(1,704.35)	Difference between Actual and 75% Fully Funded
(1,704.35)	**TOTAL Reserve shortfall due from KHOV to HOA**

(1,704.35) TOTAL Operating and Reserve Reconciliation

Gallery Community Association

Balance Sheet
As of 12/31/17

ASSETS

Mutual of Omaha Operating	$ 29,738.29	
Reserve Money Market Account	11,565.40	
Deposit - SWG 1/19	750.00	
TOTAL ASSETS		$ 42,053.69

LIABILITIES & EQUITY

CURRENT LIABILITIES:		
Subtotal Current Liab.	$ .00	
RESERVES:		
General Reserve Funds	$ 11,565.40	
Subtotal Reserves	$ 11,565.40	
EQUITY:		
Retained Earnings - Operating	$ 3,659.37	
Current Year Net Income/(Loss)	26,828.92	
Subtotal Equity	$ 30,488.29	
TOTAL LIABILITIES & EQUITY		$ 42,053.69

The Gallery
Cash Flow Specific Projections

REPORT DATE: July 14, 2016
VERSION: 001
ACCOUNT NUMBER: 4106

Beginning Accumulated Reserves: $0

YEAR	CURRENT REPLACEMENT COST	ANNUAL CONTRBTN	ANNUAL INTEREST CONTRBTN	ANNUAL EXPENDTRS	PROJECTED ENDING RESERVES	FULLY FUNDED RESERVES	PERCENT FULLY FUNDED
'17	174,431	19,284	13	0	19,297	17,693	109%
'18	179,089	19,799	43	0	39,139	36,331	108%
'19	183,870	20,328	70	1,845	57,692	53,585	108%
'20	188,780	20,870	101	0	78,663	73,678	107%
'21	193,820	21,427	133	0	100,223	94,806	106%
'22	198,995	22,000	161	2,852	119,532	114,082	105%
'23	204,308	22,587	179	10,401	131,897	126,647	104%
'24	209,763	23,190	214	0	155,301	150,765	103%
'25	215,364	23,809	112	91,365	87,858	82,277	107%
'26	221,114	24,445	149	0	112,451	106,333	106%
'27	227,018	25,098	126	40,124	97,550	90,419	108%
'28	233,079	25,768	75% of fully funded balance = $13,269.75		123,482	115,875	107%
'29	239,302	26,456			132,832	124,882	106%
'30	245,692	27,162			160,213	152,505	105%
'31	252,252	27,887	256	2,531	185,825	178,916	104%
'32	258,987	28,632	271	18,686	196,041	190,111	103%
'33	265,902	29,396	145	112,805	112,778	105,656	107%
'34	273,001	30,181	190	0	143,149	135,466	106%
'35	280,290	30,987	212	16,197	158,150	150,163	105%
'36	287,774	31,814	259	0	190,224	182,621	104%
'37	295,458	32,664	229	52,306	170,812	163,004	105%
'38	303,346	33,536	279	0	204,627	197,344	104%
'39	311,446	34,431	326	3,125	236,260	230,195	103%
'40	319,761	35,351	379	0	271,990	267,952	102%
'41	328,299	36,295	189	162,987	145,486	140,223	104%
'42	337,065	37,264	231	8,664	174,317	168,630	103%
'43	346,064	38,259	283	3,472	209,387	204,022	103%
'44	355,304	39,280	341	0	249,008	244,843	102%
'45	364,791	40,329	402	0	289,738	287,699	101%
'46	374,531	41,406	463	0	331,608	332,668	100%
'47	384,531	42,511	229	198,359	175,990	176,180	100%

1. R&R 3105 curb 2 sections will affect driveway - **TRU** COMPLETED
2. R&R 3104 6 panels 1 curb will affect driveway – **TRU** COMPLETED
3. R&R 3106 2 panels will affect driveway – **TRU** COMPLETED
4. R&R 3109 curb - **TRU** COMPLETED
5. R&R 3116 curb will affect driveway – **TRU** COMPLETED
6. R&R 3117 2 curb will affect driveway - **TRU** COMPLETED
7. R&R 3121 curb – **TRU** COMPLETED
8. Shoot curb for flow / possibly grind curb if needed – **TRU** COMPLETED
9. R&R by mailboxes curb – **TRU** COMPLETED
10. R&R 3124 curb – **TRU** COMPLETED
11. Repair stamped asphalt by entry keypad – **Creative Paving** COMPLETED

Paint Northeast wall white to match others (work around staircase) – **TRU** COMPLETED
Paint inside of pool equipment room - **TRU** COMPLETED
Grout and repair wall by lifeguard sign – **TRU** COMPLETED
Repair drywall under soffit by pool area - **TRU** COMPLETED
Repair fireplace – **HOA**
Broken cover on skimmer at south end of pool – **HOA**
Add ¾ minus express brown granite by pool area, southeast retention area, along south wall, and front area basins - **HOA**
Paint top of bouncary walls – **TRU** COMPLETED
Maintenance on front gate - **HOA**
Adjust key pad at entry – **TRU** COMPLETED
Repaint stamped asphalt and repair dip by keypad – **Creative Paving** COMPLETED

KHOV00063050

KHovnanian Companies
5700 Tennyson Parkway, STE 140
Plano TX 75024

K. Hovnanian Companies, LLC - Phoenix Group

GALLERY COMMUNITY ASSOCIATION
4025 S MCCLINTOCK DRIVE #208
TEMPE AZ 85282

INVOICE #	DATE	PO#/REFERENCE/JOB COST CODE	GROSS AMOUNT	DISCOUNT	NET AMOUNT
FINAL HOA CLOSEOUT	08/13/18	FINAL HOA CLOSEOUT	1,704.35		1,704.35

CHECK NUMBER	DATE	NAME	VENDOR NO.	TOTAL AMOUNT
58213	8/21/18	Gallery Community Association	285987	$1,704.35

THE FACE OF THIS DOCUMENT HAS A BLUE AND WHITE BACKGROUND WITH A STEP AND REPEAT PATTERN. A TRUE WATERMARK. HOLD TO LIGHT TO VIEW.

KHovnanian Companies
5700 Tennyson Parkway, STE 140
Plano TX 75024

K. Hovnanian Companies, LLC - Phoenix Group

CHECK NO.
00058213
74-478/724

DATE OF CHECK
08/21/18

PAY: ONE THOUSAND SEVEN HUNDRED FOUR AND 35/100 DOLLARS

CHECK AMOUNT
$1,704.35

TO THE ORDER OF GALLERY COMMUNITY ASSOCIATION
4025 S MCCLINTOCK DRIVE #208
TEMPE AZ 85282

Authorized Signature

Comerica Bank
& Trust, N.A.
Ann Arbor, MI

⑈00058213⑈ ⑆072404786⑆ 2176959746⑈

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.
March 29, 21 LD for "3rd-Pty D" to File/Srv Resp to 3rd-Pty P MSJ

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,

v.

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.

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;

Third-Party Plaintiffs,

v.

Case No. CV2020-008714

DEFENDANTS'/ THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Assigned to the Hon. Michael Kemp)

(Oral Argument Requested)

ARTISTIC STAIRS, LTD., an Arizona limited liability company; CHAS ROBERTS AIR CONDITIONING, INC., an Arizona corporation; DESERT VISTA, INC. an Arizona corporation; HOME BUILDERS SITE SERVICES OF ARIZONA, LLC an Arizona limited liability company; IDG INNOVATIVE DEVELOPMENT, GROUP, LLC, an Arizona limited liability company, dba DESERT SERVICES SWPPP SOLUTIONS; INTERIOR LOGIC HOLDINGS, LLC, a Delaware limited liability company; LEBLANC BUILDING CO., INC., an Arizona corporation; LIBERTY CONSTRUCTORS, LLC, an Arizona limited liability company, DBA LIBERTY ARIZONA; PAUL JOHNSON DRYWALL, INC., an Arizona corporation; RENCO LLC, an Arizona limited liability company, dba RENCO ROOFING; R/S SERVICE & SUPPLY, INC., an Arizona corporation; SARGON MASONRY CONSTRUCTION, LLC, an Arizona limited liability company; AND DOES 1-50,

Third-Party Defendants.

COMES NOW Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC, K. Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc., and K. Hovnanian Companies of Arizona, LLC (collectively, "Defendants"), who hereby move for dismissal pursuant to Ariz. R. Civ. P. 56, for reasons more fully set forth in the accompanying Memorandum of Points and Authorities and accompanying Statement of Facts (DSOF). Defendants seek their attorney fees and court costs pursuant to A.R.S. §12-341.01(A) and 12-341 and 12-341.01 (C) and 12-349.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff is an Arizona nonprofit corporation that acts as the property owner's association (the "Association" or "HOA") for the common areas of the property known as The Gallery in

Scottsdale, Arizona. (DSOF at ¶ 1), a townhouse community alleged to have been built by K Hovnanian Defendants. Plaintiff admits it is governed by the recorded Declaration of Covenants, Conditions, Restrictions and Easements (CC&R's) for Gallery. (DSOF at ¶ 2). However, those CC&R's require the Association, after the turnover from the Declarant occurred to the HOA, and not any of these Defendants, to repair and maintain the common elements on the Association Property and Common Areas thereafter, as defined therein, as well as the common exterior walls, stucco, façade, roofs, or other surfaces of the Dwelling Units. (DSOF at ¶ 3). There is no known express or implied warranty running to the HOA after acceptance of the Declarant rights to the Property conveyed. That acceptance occurred after inspection and no limitation was placed on the conveyance by the HOA at that time. (DSOF at ¶ 4)

In the "Quit Claim Deed" dated October 6, 2016 that was publicly recorded, only Defendant K Hovnanian at Gallery, LLC, ("KHov Gallery") who had developed the project and was the Declarant under the CC&R's, conveyed the common areas to the Association. (DSOF at ¶ 5). There is no privity of contract anywhere alleged in the Complaint as to any contract the Association has with any of the other Defendants, or even with KHov Gallery either, or with the actual builder, K Hovnanian Arizona Operations, LLC ("KHov Operations"). (DSOF at ¶ 6). Moreover, there is no stated basis for why K Hovnanian Developments of Arizona, Inc., alleged to be a "member" of KHov Gallery or KHov Operations, has any possible liability to Plaintiff. (DSOF at ¶ 7).

Further, Defendant K Hovnanian Companies of Arizona, LLC is simply alleged to be somehow "involved in the development, design, construction, and/or sale of The Gallery and the units in the Complaint and nothing more. (DSOF at ¶ 8). How this relates to any liability it could have here, other than any other innocent bystander, is unknown. The Complaint, as to the other entities is woefully deficient even for notice purposes, and states no claim at all, even under Rule 12 (b) (6) Ariz. R. Civ. Proc. let alone under a summary judgment standard.[1] (DSOF at ¶ 9)

[1] The Complaint originally stated a claim for negligence (Count One) for failure of "Defendants" to design and construct the common areas and elements of The Gallery in a non-negligent and workmanlike manner, which has since been voluntarily removed upon K Hovnanian showing it is not a viable cause of action in Arizona.

This Motion for Summary Judgment addresses the remaining breach of contract and breach of implied warranty claims that have no basis in law or fact.

II. LAW AND ARGUMENT

Plaintiff's Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing claims fail as they are both contractually based claims, that have no contract, to be simple. Plaintiff is not in privity of contract with any of the Defendants, nor is it a third-party beneficiary even were that alleged, which it is not. Plaintiff's Breach of Implied Warranty of Workmanship and Habitability similarly fails because only homeowners themselves, or subsequent purchasers from others without notice can bring any contractually based claims including implied warranty claims. There is no allegation of any warranty claim, or compliance with A.R.S. 12-1361 et seq. by any owner, nor is any owner a Plaintiff concerning construction defects in their units. The claim here is solely made by an HOA, for construction defects in common areas (DSOF at ¶ 10), given acceptance of the common areas after inspection in the patent condition they were in, or the opportunity to fully inspect, without any express or implied warranty given to the HOA.

A. Plaintiff's Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing claims must fail because there is no contract with Defendants.

Plaintiff's Count Two, Breach of Implied Covenant of Good Faith and Fair Dealing, and Count Four, Breach of Contract Claim, must be adjudicated in Defendants' favor, because these are contract claims (DSOF at ¶ 11), and the Plaintiff is not in privity of contract with any of the Defendants, and has no contract with them at all. The "duty of good faith and fair dealing arises by virtue of that contractual relationship," *See, Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *see also, Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466, 967 P.2d 607 (App. 1998) ("[I]mplied covenants of good faith and fair dealing presume the existence of a valid contract"), which cannot exist here either, without such a contractual relationship. The purported "contract" that Plaintiff mistakenly bases its claims on can only be the Declaration of Covenants, Conditions, & Restrictions for Gallery. (DSOF at ¶ 12). It is well established under Arizona law that CC&Rs only "constitute a contract between the property owners as a whole and the individual lot owners." *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 31, 57 P.3d 1168, 1177

(App. 2011); *see also, College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 241 P.3d 897 (App. 2010) (holding that "restrictive covenants are a contract between the subdivision's property owners as a whole and individual lot owners."). That means these cases clearly demonstrate that the CC&Rs create a contract only between the HOA and its homeowners, and has nothing to do with the Declarant having any contractual duty to the HOA except as may otherwise be assumed expressly therein. There is no assumption of any such warranty duty to the HOA therein by the Declarant, or under established Arizona law either.

Because it is well established that breach of contract and breach of implied covenant of good faith and fair dealing claims must be based on a valid contract between the parties, and the Plaintiff is not in privity of contract with any of the Defendants, and assumed no such obligations to the HOA, the Plaintiff's breach of contract and breach of implied covenant of good faith and fair dealing claims must be adjudicated by summary judgment. *See e.g., Thomas v. Montelucia Villas*, LLC, 232 Ariz. 92, 302 P.3d 617 (2013) ("[t]o bring an action for the breach of the contract, the plaintiff has the burden of proving the existence of the contract…"); *Norman v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 196, 33 P.3d 530 (App. 2001) ("[t]here is no breach of the implied covenant of good faith in a contract if there is no contract.").

Furthermore, there is no breach of contract or breach of the duty of good faith and fair dealing where there is no loss of the benefit of the bargain expected by the Plaintiff. There is no such "bargain" here at all with the HOA, and no consideration was even alleged with respect to the purported conclusory "contract" all claims are based on here. There could be no loss of expectation of any benefit of the bargain where there is no bargain at all. Here, the Declaration, which is not a contract between the Plaintiff and Defendants as discussed above, contains absolutely no duty to the HOA that is involved here, let alone assumed or breached, and the Declaration is not even a "contract" insofar as the Declarant is concerned at all vis a vis the HOA as to any warranty assumed. Other than to issue the Quit Claim Deed, if the HOA accepts the common area as is, there is no other bargain involved. We understand the principle that a breach of an express covenant in a contract is not a necessary prerequisite to an action for bad faith, and understand also that a Plaintiff may simultaneously bring an action both for breach of contract and

for bad faith, and need not prevail on the contract claim in order to prevail on the bad faith claim, but that is **only** provided that the Plaintiff proves a contract exists to base the bad faith claim on. *Id*. Neither a contract, and thus, a claim for breach of contract, or a bad faith claim based on one, exists here. The grant of the common area by the Declarant was not a contract at all, and thus not able to be "manipulated" or carried out in bad faith, since, again, there was nothing required of the Declarant at all other than the grant itself, which is not at issue here, nor was there consideration for any contract claim, and no representations or warranties made that could be carried out in bad faith.

i. Plaintiff fails to even allege that Defendants K. Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc, and K. Hovnanian Companies of Arizona, are in privity of the alleged contract.

Furthermore, these claims must be dismissed against Defendants K. Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc, and K. Hovnanian Companies of Arizona, as Plaintiff does not even allege these Defendants were in privity of any contract whatsoever. (DSOF at ¶ 13) Plaintiff itself clearly alleged, albeit wrongfully, that "The Association and defendant K. Hovnanian at Gallery, LLC entered into a contract," with no mention of any other entity named in the underlying Complaint. *See* (DSOF at ¶ 14).

As such, Plaintiff unnecessarily brought suit against numerous entities that could not possibly be responsible for these alleged contracts claims, as Plaintiff itself acknowledges these Defendants were not involved in the alleged contract in any way. Therefore, the claims against these entities must be dismissed as such for this reason alone. *See e.g.*, *Thomas v. Montelucia Villas*, LLC, 232 Ariz. 92, 302 P.3d 617 (2013) ("to bring an action for the breach of the contract, the plaintiff has the burden of proving the existence of the contract…"); *Norman v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 196, 33 P.3d 530 (App. 2001) ("there is no breach of the implied covenant of good faith in a contract if there is no contract.").

. . .

. . .

B. Plaintiff's Breach of Implied Warranty of Workmanship and Habitability claim also fails because Arizona has never directly found such an implied contract.

No Arizona case has directly dealt with this issue raised herein. While it may simply be presumed, there is no actual basis for such a finding in a case like this. The Implied Warranty at Law for construction has been established to protect innocent purchasers from fly by night developers, a situation not presented here. Here, we are dealing with a sophisticated group of owners and managers dealing in an Association who were under no compulsion to accept any of the common area, particularly without limitation if they chose not to accept this gift. No consideration was paid. No purchase of any dwelling. And, just as our Supreme Court en banc has affirmed that a subsequent purchaser may be deprived of the implied warranty if they have the ability to investigate and thus have knowledge or notice of a defect, and can thus negotiate the purchase based on it (See, e.g., *Richards v. Powercraft*, 139 Ariz. 242 (1984)) here, the Plaintiff could be said to have clearly done the same, and thus has no basis to claim an implied warranty at all either. In Plaintiff's Breach of Implied Warranty of Workmanship and Habitability Claim, Plaintiff conclusively alleges that "Defendants" impliedly warranted that "they" would perform their work in a "workmanlike manner." (DSOF at ¶ 15). Who exactly "they" is, of course, never explained. No such implied warranty exists as to any of the Defendants other than arguably the Declarant here for reasons already stated, and there is no known appellate case in Arizona squarely addressing the issue presented, of whether such a warranty runs as a matter of law. In the absence of such specific authority, as stated, there is no basis to find one. Such a warranty has only been found as to homeowner claims against builder/vendors in Arizona. There is no notice or specific pleading as to how all Defendants somehow made any such implied promise, or why they would ever do so, or be found to have done so as a matter of law. Assuming, solely for the sake of argument, that the contractor was KHov Operations, as is alleged in ¶ 10 of the Complaint, it is entirely unclear what contract this entity had with the Plaintiff, if any, or how it impliedly warranted anything to Plaintiff, as opposed to the individual homeowners. As for any other Defendant, the Complaint and disclosures are entirely devoid of any basis at all to simply lump all these Defendants into the case, or to find a warranty existing.

The implied warranty of habitability and fitness has been recognized in Arizona, but only as to specified circumstances, as to homeowners specifically. *See, Richards v. Powercraft Homes, Inc. supra*. The "purpose of implied warranty of workmanship and habitability is to protect innocent purchasers and hold home builders accountable for their work." There is no evidence presented here of any work by the Declarant at all, nor any agreement to perform work for the HOA at all. In fact, to the extent any work was performed as to the common areas, it would have been for the benefit of the Declarant, and not any homeowner or HOA at the time. No case has expressly addressed, discussed or distinguished the issue, as directly presented here in Arizona. Plaintiff is not alleged to be a homeowner, but rather the recipient of a grant of property by the Declarant, and in fact, with no warranties provided. Any construction contract for the common area elements of the subdivision is not shown to be for the HOA or with it. So, beyond the conclusory allegations in the Complaint as to implied warranties, none is known to exist. Again, nothing was purchased by the HOA, and certainly nothing known to be purchased from the Declarant. And, more importantly, such an implied warranty would not extend to the HOA, that was not in privity with any of the Defendants, and where the HOA did not purchase from anyone that was in privity with the Builder, let alone the Declarant, as is the case where an implied warranty at law has been found. Rather, and significantly, any construction would have been expressly performed for the Declarant, KHov Gallery, and not for the HOA. The HOA could not make express, intended third-party beneficiary claims and has not done so, nor has it cited to anything establishing such a basis for a claim in the Declaration anywhere so far.

Typically, Declarations and Declarants do not grant warranties on turnover to the HOA upon the pre-determined time when they exit and turn over Common Areas to an HOA, and nothing is claimed or cited to in the Complaint to the contrary that was intended here. That is why they simply "quit claim" the property with no warranties, as the Plaintiff recognizes here. The HOA is under no compulsion to accept, and certainly not unconditionally as here. Thus, even were the law of implied warranty even assumed to apply here, there is nothing alleged in the Quit Claim Deed which would establish any liability under the Declaration or any expectation of any standard

of construction for Plaintiff's benefit. Plaintiff, frankly, had a duty to inspect the premises when it accepted the quit claim deed, or it could have rejected it. It did neither apparently.

The law of implied warranty has only been extended, as said, to original homeowners and subsequent owners under specific conditions, as a matter of public policy, to deter shoddy workmanship of fly by night builders serving the public, and has not been extended beyond that limited sphere in Arizona to any commercial type work for this reason. *See, e.g., Yanni v. Tucker Plumbing, Inc.*, 233 Ariz. 364, 312 P.3d 1130 (App. 2013) (holding "that lack of contractual privity precluded homeowners from asserting claims against subcontractors for breach of warranty of workmanship and habitability."); *Richards v. Powercraft Homes, Inc*., 139 Ariz. 264, 266–67, 678 P.2d 449, 451–52 (Ct. App. 1983), *approved in part, vacated in part, on other grounds*, 139 Ariz. 242, 678 P.2d 427 (1984). The same reasoning should apply here, where this is not a typical consumer transaction. Subsequent homeowners may bring claims for implied warranties, as stated above, with the limitation excepting those who have notice of, or reason to know of, alleged defects when taking title after inspection.

Even if such an implied warranty did exist here, which we contend it does not, Plaintiff would be analogous to a subsequent owner with notice, since the original "owner" would be KHov Gallery as Declarant, and the contractor would be KHov Operations. Plaintiff claims that KHov Gallery DID have notice of the shoddy workmanship alleged when it took title. *See e.g., Maycock v. Asilomar Dev., Inc*., 207 Ariz. 495, 88 P.3d 565 (App. 2004) ("prior homeowner's knowledge of a construction defect was imputed to subsequent owners for purposes of the statute of repose governing claims against builders."). This reasoning should apply here too. Thus, it has long been the law of this State that a subsequent owner having the ability to fully investigate, *i.e*., with notice, does not have the benefit of claiming the implied warranty extending to an original purchaser, even where one exists. *See, e.g., Richards v. Powercraft Homes, supra*.

III. CONCLUSION

For the foregoing reasons, summary judgment is appropriate as there is no contract, and thus no breach either, of any provision of any contract shown, and there can thus also be no breach of any implied warranty attendant to any contract or breach of any duty of good faith and fair

dealing shown. Defendants request dismissal of any claims and an award of their reasonable attorneys' fees and costs under A.R.S. §12-341.01(A), 12-341 for Defendants having to disprove the existence of any contract.

RESPECTFULLY SUBMITTED this 19th day of February, 2021.

WILENCHIK & BARTNESS, P.C.

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.
April 12, 21 LD for D/3rd-Pty P to File/Srv Reply ISO their MSJ

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; et al.
Defendants.

K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; et al.
Third-Party Plaintiffs,
v.

ARTISTIC STAIRS, LTD., an Arizona limited liability company; et al.

Third-Party Defendants.

Case No. CV2020-008714

Assigned to Hon. Michael Kemp

PLAINTIFF'S RESPONSE TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARUY JUDGMENT

(Oral Argument Requested)

Plaintiff, Gallery Community Association ("Plaintiff" or "Association"), by and through undersigned counsel, objects and responds as follows to Defendants' Motion for Summary Judgment ("*Motion*"). The Association's Response is supported by the following Memorandum of Points and Authorities, Plaintiff's Response and Opposition to Defendants' Separate Statement of Facts ("Defendants' SOF"), and Plaintiff's Controverting Statement of Facts in Opposition to Defendants' *Motion* ("Assoc. SOF").

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

This case is not at issue and the parties have not engaged in any formal discovery. See Manship Affidavit in support of Plaintiff's Request for Rule 56(d) Relief and Expedited Hearing filed contemporaneously herewith, ¶ 4. The parties previously agreed to exchange initial disclosures after the case is at issue. *Id.*

The evidence obtained to date establishes, at a minimum, Defendants involvement in the development, design, construction and/or sale of The Gallery and units included:

- K. Hovnanian at Gallery, LLC ("KHov Gallery") owned the property, "developed the project," "conveyed the common elements of the project to the Association in a quit claim deed dated October 6, 2016," and "acted as the vendor by selling individual unit owners their units at The Gallery." (Assoc. SOF ¶ A).
- K. Hovnanian Arizona Operations, LLC ("KHOV Operations") was "the general contractor responsible for the construction of The Gallery." (Assoc. SOF ¶ B).
- K. Hovnanian Companies of Arizona, LLC ("KHov Companies") was involved in the development, design, construction, and/or sale of The Gallery and the units. (Assoc. SOF ¶ C).
- K. Hovnanian Developments of Arizona, Inc. ("KHov Developments") was a member of KHov Gallery and KHov Operations. (Assoc. SOF ¶ D). Defendants present no evidence that KHov Developments was not involved in the development, design, construction and/or sale of The Gallery and units.

The Declaration of Covenants, Conditions, Restrictions and Easements for Gallery ("Declaration" or "CC&R's") was recorded on May 10, 2016, and identifies KHov Gallery as the Declarant and the "owner and developer" of the property subject to the Declaration. (Assoc. SOF ¶ E).

The Association was formed as a nonprofit corporation under A.R.S. § 10-3101, et seq., *i.e.*, the Arizona Nonprofit Corporation Act, through the Articles of Incorporation of Gallery Community Association ("Articles"). (Assoc. SOF ¶ F). The Articles state that the Association's "Character of Affairs" is to "manage, maintain and administer the Common Area and common facilities, … and to administer and enforce, the Declaration of Covenants, Conditions, Restrictions and Easements for Gallery …." (Assoc. SOF ¶ G).

The Declaration defines "Declarant" to include not only KHov Gallery, but also "its successors and assigns, or any person or entity to whom all of Declarant's rights reserved to the Declarant hereunder are assigned." (Assoc. SOF ¶ H). The Declaration

also defines "Homebuilder" as "any homebuilder in the business of constructing residential improvements on Lots and buys Lots from Declarant." (Assoc. SOF ¶ I). The Declarant is also an "Owner," as that term is defined in the Declaration, "so long as Declarant or a Related Entity owns or has a Recorded option to purchase any Lot within the Property." (Assoc. SOF ¶ K). Because discovery has not commenced, it is unknown at this time, whether KHov Gallery assigned any Declarant's rights to another Defendant, whether any Defendant is a "Related Entity," and whether any Defendant is a "Homebuilder" as defined in the Declaration. Record evidence establishing disputed issues of material fact regarding any Defendant's status as a Declarant, Related Entity or Homebuilder would require denial of the *Motion*, as explained in more detail below.

The Association was formed by Declarant "for the purpose of the efficient preservation of the values and amenities of the Property" and was given "powers of administering and maintaining the Common Area [and] enforcing this Declaration." (Assoc. SOF ¶ L). The Declaration was made to establish "**mutually beneficial** covenants, conditions, restrictions, easements and obligations with respect to the proper development, use and maintenance of the Property" for **Declarant's "own benefit"** and the "mutual **benefits of all future Owners, or other holders of interests** in any portion of the Property" (Assoc. SOF ¶ M). (emphasis added). The Declaration was "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." (Assoc. SOF ¶ N). The Declaration provides that it "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**." (Assoc. SOF ¶ N). (emphasis added).

The Declaration granted rights and duties to Declarant, KHov Gallery, and/or any "Related Entity," which is defined as "any entity related to Declarant or Homebuilder." (Assoc. SOF ¶ O). The Declaration further states that it "grants to or confers upon the Declarant or upon any affiliates of Declarant" "rights, privileges, easements, benefits, or

exemptions." (Assoc. SOF ¶ P). Those rights and duties include, but are not limited to:

- The right of "Declarant or a Related Entity" to "withdraw property from the Property without the consent of any other Owner …." (Assoc. SOF ¶ Q, Section 2.3).
- The duty to convey fee simple title to the Common Area to the Association, which "shall automatically be deemed accepted by the Association." (Assoc. SOF ¶ Q, Section 1.8 and Section 3.5).
- The right of "Declarant, or its successors or assigns" to have at least one (1) position on the Board of Directors for ten (10) years after the period of Declarant control ceases …." (Assoc. SOF ¶ Q, Section 4.3.1).
- The right to "maintain an 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 …." (Assoc. SOF ¶ Q, Section 5.3).
- The right of "Declarant, Homebuilder or any entity related to Declarant or Homebuilder (a 'Related Entity') … 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 …" (Assoc. SOF ¶ Q, Section 8.1.1).
- The right to construct all Dwelling Units on the Property "as long as Declarant or a Related Entity owns or has a Recorded option to purchase one or more Lots." (Assoc. SOF ¶ Q, Section 8.1.30).
- The right to consent to or withhold consent as to any modification, amendment, or revocation of any provision of the "Declaration which grants to or confers upon the Declarant or upon any affiliates of Declarant any rights, privileges, easements, benefits or exemptions …." (Assoc. SOF ¶ Q, Section 10.l8).

The Declaration also grants rights and duties to Association, including but not limited to:

- The duty to maintain "Association Property" for the benefit of all the Owners. (Assoc. SOF ¶ R, Section 1.8).
- "[S]uch rights, duties and powers as set forth [in the Declaration] and in the Articles and Bylaws." (Assoc. SOF ¶ R, Section 4.4).
- "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." (Assoc. SOF ¶ R, Section 8.1.7).
- "[T]he right, in its sole and absolute discretion, as to the Common Area … or as to any other area placed under its jurisdiction: . . . [to r]econstruct, repair, replace or refinish any improvement or portion thereof upon the Common Area or any other area placed under its jurisdiction …." (Assoc. SOF ¶ R, Section 8.2.3 and 8.2.3.2).
- These maintenance and repair obligations under the Declaration are admitted by Defendants. (Assoc. SOF ¶ R).

Finally, the Declaration grants rights and duties to Owners, which, by definition includes the Declarant:

- "[E]ach Owner, … binds itself … to restrictions, covenants, conditions, rules and regulations now or hereafter imposed by this Declaration and any amendments thereof to the extent permitted by law." (Assoc. SOF ¶ S, § 10.1).
- "If any Common Area is damaged or destroyed by an Owner … 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 …. The amount

necessary for such repairs shall be paid by such Owner, to the Association, ….” (Assoc. SOF ¶ S, § 8.2.4).

- “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 … 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. . . .” (Assoc. SOF ¶ S, § 10.2).

The Bylaws of Gallery Community Association (“Bylaws”) were adopted on July 21, 2016. (Assoc. SOF ¶ T). According to the Bylaws, “[i]t is the desire of Declarant to retain control of the Association and its activities through the Board during the anticipated period of planning and development of the Property until Declarant has sold one hundred percent (100%) of the total Lots within the Property to Owners.” (Assoc. SOF ¶ U). Defendants in fact retained 100% control of the Association by appointing all board members until December 17, 2016, when board control transitioned from the Declarant to the other owners. (Assoc. SOF ¶ V).

On October 7, 2016, prior to the transition to a homeowner elected board, Defendant KHov Gallery for “$10.00 and other valuable considerations,” quit-claimed Tracts A through F of the Final Plat of The Gallery to the Association. (Assoc. SOF ¶ W). Pursuant to the Declaration, and as explained above, Declarant was required 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.” (Assoc. SOF ¶ Q, Decl. § 3.5). Therefore, Defendants controlled the Association board when this conveyance occurred.

The homeowner-elected board members are solely volunteer homeowners and have no experience or knowledge relating to construction or engineering. (Assoc. SOF ¶ X).

II. ARGUMENT SUMMARY

Defendants failed to meet their summary judgment burden because they submit no evidence in support thereof, and the Court should deny the *Motion* outright for this reason

alone.[1] Defendants' *Motion* also blatantly misrepresents both the facts and applicable law.

Based upon the evidence in the Association's possession, thus far, and presented in this Response, the *Motion* should be denied. Defendants that Defendants KHov Gallery, KHov Operations, and KHov Companies were involved with the development, design, construction and/or sale of The Gallery and the units. With respect to Defendant KHov Developments, Defendants fail to present any evidence that it was not involved in the development, design, construction and/or sale of The Gallery and the units. A homeowners association may properly assert a breach of implied warranty claim against a builder-vendor or builder, despite the lack of privity of contract. *See Lofts at Fillmore Condo. Ass'n v. Reliance Commerc. Constr*., 218 Ariz. 574, 190 P.3d 73 (2008); *Richards v. Powercraft*, 139 Ariz. 242, 678 P.2d 427 (1984).

With respect to the Association's claims for breach of contract and breach of the implied covenant of good faith and fair dealing, the Association's evidence establishes the existence of contracts between the Association and Defendants in the form of the Declaration and the Quit Claim Deed conveying the Common Area to the Association.

III. LEGAL STANDARD

The party moving for summary judgment bears the "burden of persuasion." Ariz. R. Civ. P., Rule 56(c); *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, 292 P.3d 195, 199 (App. 2012) (citing *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 15, 180 P.3d 977, 980 (App. 2008). "The moving party's burden is a 'heavy' one" and "[t]his burden of persuasion never shifts to the non-moving party." *Id*. (internal citations omitted). In ruling on a motion for summary judgment, the question for the court is not whether the responding party succeeded in presenting genuine disputes of material fact, rather it is whether the moving party "presented **sufficient undisputed admissible evidence** to establish its entitlement to judgment." *Id.* (emphasis added).

[1] Alternatively, if the Court is inclined to consider the merits of the Motion's merits, the Association is contemporaneously filing a Request for Rule 56(d) Relief seeking additional time to conduct discovery regarding Defendants' corporate structure and the roles, responsibilities and respective involvement in the Project's development, design, construction, and sale.

The party seeking summary judgment has the "burden of showing that no genuine issue of material fact exists." *Schwab v. Ames Constr.*, 207 Ariz. 56, 59-60 ¶ 15, 83 P.3d 56 (App. 2004) (citing *Chanay v. Chittenden*, 115 Ariz. 32, 38, 563 P.2d 287, 293 (1977)). Only when the moving party makes a prima facie showing that no genuine issue of material fact exists does the burden shift to the party opposing summary judgment "to produce sufficient competent evidence to show that there is an issue." *GM Dev. Corp. v. Community Am. Mortgage Corp*., 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990).

"As a general rule, an unsworn and unproven assertion is not a fact that a trial court can consider in ruling on a motion for summary judgment." *Id.* Moreover, "[a] party asserting a fact has the burden of proving that fact." *Id*. (citing *Yeazell v. Copins*, 98 Ariz. 109, 116, 402 P.2d 541, 546 (1965); *Prairie State Bank v. Internal Revenue Service*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987).

A motion for summary judgment must be denied unless no genuine disputes of material fact exist and the moving party is entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56. In considering a motion for summary judgment, the facts and their reasonable inferences must be viewed in the light most favorable to the non-moving party. *See Doe v. Roe*, 191 Ariz. 313, 314, 955 P.2d 951, 962 (1998).

IV. ANALYSIS

A. Defendants Failed to Satisfy Their Initial Summary Judgment Burden

Defendants' *Motion* is entirely void of any facts or evidence. Defendants' Separate Statement of Facts cites only Association's Complaint. As explained in the legal standard discussion, above, Defendants cannot carry their summary judgment burden by citing only a complaint's allegations. Moreover, Before the burden shifts to Plaintiff, Defendants, as the moving party, must make a prima facie showing that no genuine issue of material fact exists. To carry this burden, Defendants must "'point out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the claim.'" *Hydroculture v. Coopers & Lybrand*, 174 Ariz. 277, 283, 848 P.2d 856, 862 (App. 1992) (quoting *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990)). If

Defendants fail to adequately challenge Plaintiff's ability to present a prima facie case, then responding Plaintiff need not do so. *Id*. Defendants cite no admissible record evidence to support their *Motion.* The *Motion* should be denied outright for this reason alone. Alternatively, the *Motion* should be denied for each of the reasons stated below.

B. Defendants Cannot Carry Their Burden to Prove Association's Breach of Implied Warranty of Workmanship and Habitability Claim Fails

1. Well-settled Arizona law establishes that developers and builders like Defendants are liable for the breach of implied warranty

Contrary to the *Motion's* arguments, an implied warranty of workmanship and habitability arises from residential construction, including condominium construction, and both a builder-vendor and a builder who is not a vendor are accountable for the implied warranty. *Lofts at Fillmore Condo. Ass'n ,* 218 Ariz. at 577 ¶ 13, 190 P.3d at 736 (citing *Moxley v. Laramie Builders, Inc*., 600 P.2d 733, 735 (Wyo. 1979) ("We can see no difference between a builder or contractor who undertakes construction of a home and a builder-developer. … Those who hold themselves out as builders must be just as accountable for the workmanship that goes into a home … as are builder-developers.")).

The Gallery's developer (seller) and builder provided implied warranties with The Gallery's sale and/or construction. Here, the following admissions in Defendants' Answer and Separate Statement of Facts conclusively establish that Defendants KHov Gallery, KHOV Operations, and KHov Companies served as Project's Declarant, developer, general contractor and/or were otherwise involved in the Project's development. *See Schwartz v. Schwerin*, 85 Ariz. 242, 249, 336 P.2d 144, 148 (1959) ("The law is well settled that an admission in an answer is binding on the party making it, and is conclusive as to the admitted fact. No evidence may be shown to contradict the admitted fact, and a finding contrary thereto is erroneous.") (internal citations omitted).:

- "Defendant K. Hovnanian at Gallery, LLC conveyed the common elements of the project to the Association in a quit claim deed dated October 6, 2016," and "also acted as the vendor by selling individual unit owners their units at The Gallery." (Assoc. SOF ¶ A).
- "Defendant K. Hovnanian Arizona Operations, LLC was the general contractor responsible for the construction of The Gallery." (Assoc. SOF ¶ B).
- "Defendant K. Hovnanian Companies of Arizona, LLC was involved in the

development, design, construction, and/or sale of The Gallery and the units. (Assoc. SOF ¶ C).

- KHov Gallery "developed the project." (Defendants' SOF, ¶ 5).

Significantly, Defendants presented no evidence disputing their involvement in the Project's development, construction and/or sale.[2] Through their admissions or their failure to present any undisputed evidence on their roles at the Project, Defendants cannot carry their heavy summary judgment burden to prove that they did not provide implied warranties under the circumstances here.

2. Privity is not required for breach of implied warranty

Privity of contract is not required to support a breach of implied warranty of workmanship and habitability claim against a seller or a builder. *Richards*, 139 Ariz. 242, 678 P.2d 427; *Lofts at Fillmore,* 218 Ariz. 574, 190 P.3d 73. Moreover, a homeowners association may assert a breach of implied warranty claim directly against the seller and/or builder. *See Lofts at Fillmore,* 218 Ariz. 574, 190 P.3d 73.

The Arizona Supreme Court ruled more than ten years ago that a homeowners association may assert a claim for breach of the implied warranty of workmanship and habitability against a builder, despite a lack of privity between the association or the homeowners and the builder. *Lofts at Fillmore,* 218 Ariz. at 575, 190 P.3d at 734.

In *Lofts at Fillmore*, the association, formed by the individual unit owners *after* sale of the units by the developer, sued the developer and the builder for breach of the implied warranty of workmanship and habitability. *Id*. at 575.[3] Significantly, the developer hired the multifamily residential project's builder; the builder had no contractual relationship with the owners or the association. *Id.* Holding that the association could sue the non-vendor builder directly for breach of the implied warranty, despite a lack of privity, the Arizona Supreme Court noted that a rule requiring privity

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[2] The Association's contemporaneously-filed Request for Rule 56(d) Relief explains, without access to Defendants' initial disclosures or any other discovery, Association does not have access to highly relevant information about Defendants' corporate structure and their respective involvement in the Project's development, construction and sale, and needs to complete additional discovery to provide the Court with a complete record on these issues.

[3] Neither party in the case disputed that the association could properly bring an implied warranty claim against the developer. *Id*. at 576, n.2.

"'might encourage sham first sales to insulate builders from liability.'" *Id*. at 577 (quoting *Richards,* 139 Ariz. at 245, 678 P.2d at 430). Notably, here, Defendants assert the "sham first sales" argument that the rule eliminating the privity requirement precludes when they argue that Defendant KHov Gallery was the original owner, and the Association is analogous to a subsequent owner. *See*, *Motion* at 9, 15-24. Their argument fails pursuant to *Loft at Fillmore*, which Defendants inexcusably fail to cite.

In its opinion, the Court also emphasized the evolving commercial relationships between entities involved in residential construction and sale:

> In today's marketplace, as this case illustrates, there has been some shift from the traditional builder-vendor model to arrangements under which a construction entity builds the homes and a sales entity markets them to the public. In some cases, the builder may be related to the vendor; in other cases, the vendor and the builder may be unrelated. But whatever the commercial utility of such contractual arrangements, they should not affect the homebuyer's ability to enforce the implied warranty against the builder. Innocent buyers of defectively constructed homes should not be denied redress on the implied warranty simply because of the form of the business deal chosen by the builder and vendor.

Lofts at Fillmore, 218 Ariz. at 577, 190 P.3d at 736. Defendants cannot be insulated from liability for breach of implied warranty due to lack of privity. *Id*. at 578 (Builder "may not rely upon an agreement it has with the Developer respecting allocation of eventual responsibility for defective construction to escape its obligations to the Association on the implied warranty. … For the foregoing reasons, we hold that the superior court erred in dismissing the Association's implied warranty claim for lack of privity.")

Defendants admit their involvement in the Project's development, design, construction, and/or sale, and/or failed to present any undisputed evidence establishing that they are not the Project's sellers or builders.

3. The public policy behind not requiring privity extends to the Association in this case

Affirming an association's breach of implied warranty claim against a community's builder, the Arizona Supreme Court in *Lofts at Fillmore*, quoted its prior opinion in *Richards v. Powercraft* and explained that "given the policies behind the implied warranty -- to protect innocent buyers and hold builders responsible for their work

-- 'any reasoning which would arbitrarily interpose a first buyer as an obstruction **to someone equally deserving of recovery** is incomprehensible.'" *Id*. at 577 (quoting *Richards, supra,* 139 Ariz. at 245, 678 P.2d at 430). (Emphasis added). The rule eliminating the privity requirement also considered that the builder-vendor is better able to prevent construction defects and should, therefore, bear the costs of poor workmanship. *Richards, supra* 139 Ariz. at 245; 678 P.2d at 430 ("Because the builder-vendor is in a better position than a subsequent owner to prevent occurrence of major problems, the costs of poor workmanship should be his to bear."). *See also, Nastri v. Wood Bros. Homes*, 142 Ariz. 439, 443, 690 P.2d 162 (App. 1984), overruled in part on other grounds, *Flagstaff Affordable Housing Limited Partnership v. Design Alliance, Inc*., 223 P.3d 664 (Ariz. 2010) ("The warranty of habitability is a creature of public policy. … Privity of contract is not required. … If construction of a new house is defective, its repair costs should be borne by the responsible builder-vendor who created the latent defect.")

Pursuant to the Arizona Nonprofit Corporation Act, the Association's Articles of Incorporation, the Declaration, and the Quit Claim Deed transferring common element ownership from Defendants to the Association, the Association holds legal interests in the Common Area and bears the legal responsibility for maintaining and repairing the Common Area and the exterior walls, stucco, façade, roofs or other surfaces of the Dwelling Units. (Assoc. SOF ¶¶ F-G, R, W). The Association's obligation for this maintenance and repair under the Declaration is admitted by Defendants. (Assoc. SOF ¶ R). Therefore, the Association, as the entity responsible to maintain and repair the alleged defects at The Gallery, is "someone equally deserving of recovery" for Defendants' breach of the implied warranty as expressed by the Arizona Supreme Court in *Lofts at Fillmore*. Based upon the Arizona Supreme Court's holding in *Lofts at Fillmore*, the Association in this case may properly bring a claim for breach of implied warranty against Defendants who are builder-vendors and/or builders of The Gallery.

Moreover, that implied warranties arising from common area and unit construction benefit homeowner associations who may bring such claims directly against builder-

vendors and builders is widely-accepted by other states' appellate courts. *See Windham at Carmel Mountain Ranch Ass'n v. Superior Ct.*, 135 Cal.Rptr.2d 834 (Cal. App. 2003) (recognizing common element implied warranties, and stating that since "associations generally are required to manage, maintain and repair a project's common areas, *it would be illogical to deprive associations of the ability to sue to recover for damage to common areas they are obligated to repair*"); *Berish v. Bornstein*, 770 N.E.2d 961, 973-74 (Mass. 2002) *Berish v. Bornstein*, 2006 Mass. Super. LEXIS 330, *1, 21 Mass. L. Rep. 530 (implied warranties arise with regard to "improper design, material, or workmanship [that] is responsible for a defect in a common area"); *Meadowbrook Condo. Ass'n v. South Burlington Realty Corp.*, 565 A.2d 238, 240-11 (Vt. 1989) (implied warranties arise from construction and sale of common interest communities, relying on principles described in, and citing to, *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964)); *Starfish Condominium Ass'n v. Yorkridge Service Corp., Inc.*, 458 A.2d 805, 811 (Md. App. 1983) (plaintiff association had right to sue for implied warranty in its own right); *Herlihy v. Dunbar Builders Corp.*, 415 N.E.2d 1224, 1227-29 (Ill. App. 1980) (implied warranties arise from common element defects in condominium community); *Gable v. Silver*, 258 So.2d 11, 18 (Fla. App. 1972) (recognizing common element implied warranties); *Point E. Condo. Owners' Ass'n v. Cedar House Assocs. Co.*, 663 N.E.2d 343, 356-57 (Ohio Ct. App. 1995) (condominium association could assert implied warranty claims against developer and general contractor); *Riverfront Lofts Condo. Owners Ass'n v. Milwaukee/Riverfront Props. Ltd. P'ship*, 236 F.Supp.2d 918, 928 (E.D. Wis. 2002) (conveyance of units to unit owners coupled with transfer of control of common areas to HOA gives rise to implied warranties).

4. Defendants fail to address *Lofts at Fillmore* in their *Motion*

Defendants did not merely fail to mention *Lofts at Fillmore* in their *Motion*, but falsely stated that, as to the breach of implied warranty of workmanship and habitability, "[n]o such implied warranty exists as to any of the Defendants other than arguably the Declarant …, and there is no known appellate case in Arizona squarely addressing the issue presented, of whether such a warranty runs as a matter of law," and "such a warranty

has only been found as to homeowner claims against builder/vendors in Arizona." *See Motion* p. 7, 18-22. Defendants' *Motion* completely ignores and fails to address the Arizona Supreme Court's ruling in *Lofts at Fillmore*, which is directly on point and holds that a homeowners association may bring a claim for breach of implied warranty against a builder with which it has no privity of contract.

C. The Association May Properly Maintain Claims for Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing

Defendants have failed to provide any evidence to support their argument that the Association's breach of contract claim fails as a matter of law. Alternatively, the Court should deny the *Motion* for the reasons stated below or should grant the Association leave to conduct additional discovery relevant to its breach of contract claim, as explained in its concurrently-filed Rule 56(d) Motion.

1. The Declaration is a contract between the Association and Defendants

The Declaration is a contract that granted rights to, and imposed duties and obligations on, the Declarant. (Assoc. SOF ¶¶ M-Q) *See, e.g.*, Declaration, Page 1, Recitals § C ("Declarant desires to establish for its own benefit . . . certain **mutually beneficial** covenants, conditions, restrictions, easements and obligations with respect to the proper development, use and maintenance of the Property") (Emphasis added). Moreover, when the Declarant controlled the Association from June 27, 2016 through turnover on December 14, 2017 and was the Owner of multiple units, the Declarant was a party to the Declaration as an Owner. (Assoc. SOF ¶¶ K, V). When the Declarant controlled the Association, the Declarant breached its obligations under the Declaration to properly maintain and repair the Project's common elements and the building exteriors in accordance with applicable laws and building codes. (Assoc. SOF ¶¶ L-Q, S).

No Arizona case has held that the CC&Rs cannot support a breach of contract claim against a declarant. To the contrary, "CC&Rs must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein." *See Powell v. Washburn*, 211 Ariz. 553, 557, 125 P.3d 373, 377 (2006). Indeed,

other courts have held and affirmed that the declarant is a party to a declaration. *See e.g., Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC,* 55 Cal.4th 223 (2012) (citing *Villa Milano Homeowners Assn. v. IL Davorge*, 84 Cal.App.4th 819 (2000), for proposition that CC&R's are a contract between the developer and homeowners association); *Solowicz v. Forward Geneva Nat'l, LLC*, 780 N.W. 2d 111, 125 (Wis. 2010) ("The Community Declaration is a contract or agreement between the Developer and those who choose to purchase property.") *Maples v. Contorakes*, No. BCD-CV-18-02, 2019 Me. Bus. & Consumer LEXIS 26, * 33 (2019) ("the Declaration and Bylaws are contracts between the Declarant and the Association, on the one hand, and the unit owners . . . on the other).

Defendants incorrectly assert that "[i]t is well established under Arizona law that CC&Rs only 'constitute a contract between the property owners as a whole and the individual lot owners.'" *Motion* at 4, lines 27-28 (quoting *Cypress on Sundland Homeowners Ass'n v. Orlandi*, 227 Ariz. 288, ¶ 31, 57 P.3d 1168, 1177 (App. 2011)); see also*, College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 241 P.3d 897 (App. 2010)). Neither cited case involved a declarant or held that a declaration is a contract between only property owners/an HOA and individual owners.

Sunland Homeowners Ass'n involved a dispute over lien priority that arose after a homeowner failed to pay an assessment owed to the HOA. The Court noted that the "CC&Rs constitute a contract between property owners as a whole and individual lot owners . . . ." and held that "the first deed of trust on the property has priority over and is senior to the HOA assessment lien." *Id*. at ¶¶ 31 & 38. The case did not involve a declarant and did not hold that a community's CC&Rs bind only a homeowner and an HOA. See generally *id. College Book Centers, Inc*. involved a dispute between a homeowner and an HOA regarding a declaration provision's application. Noting that the CC&Rs constitute a contract between the parties, *id*. at ¶ 11, the Court construed the disputed provision. The case did not involve a declarant and did not hold that a community's CC& Rs bind only a homeowner and an HOA. See generally *id*.

Accordingly, Defendants' argument that the Association's breach of contract claim is not supported by a contract fails.

2. The grant of the common area from Defendants to the Association constitutes a contract

The *Motion* severely misrepresents the grant of the common area transaction, and Defendants' argument that the grant of the common area was not a contract/bargain fails.

Contrary to Defendants' statement that there was no consideration for the grant of the common area, the Quit Claim Deed, which they failed to present as evidence, specifically states that it was supported by consideration:

> "FOR THE **CONSIDERATION of Ten Dollars ($10.00) and other valuable considerations**, K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company ("Grantor"), hereby quit-claims to GALLERY COMMUNITY ASSOCIATION, an Arizona nonprofit corporation ("Grantee"), all right, title and interest in the following real property (the "Property") situated in Maricopa County, Arizona . . . ."

(Assoc. SOF ¶ W, Exh. C, Certified Copy Quit Claim Deed). (emphasis added).

Defendants further argue that the only bargain between the parties involved the Quit Claim Deed in exchange for the Association accepting the common areas "as is." *Motion* at 5, 25-26. First, this contradicts Defendants' later argument that the Association could have negotiated the bargain based on an inspection. *Motion* at 7, 10-15. Second, the Declaration provides: "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." (Assoc. SOF ¶ Q, Decl. § 3.5). The Declaration provides that when the Declarant conveys property to the Association, "such property shall **automatically be deemed accepted** by the Association." (Assoc. SOF ¶ Q, Decl. § 1.8) (emphasis added).

Therefore, the Declaration contract required that Declarant convey fee simple title to the Association, free of encumbrances, for the consideration the Quit Claim Deed describes. The Association was required to accept the conveyance and there was no opportunity for inspection by the Association.

Moreover, the conveyance of the common area occurred upon the recording of the Quit Claim Deed on October 6, 2016. (Assoc. SOF ¶ W). However, as of that date, the Declarant was in control of the Association through the Board of Directors because transition to homeowner control did not occur until December 2017. (Assoc. SOF ¶ V). Therefore, assuming, *arguendo*, that Defendants are correct that the Association had the opportunity to inspect the common area before accepting the conveyance, it is Defendants who should have inspected as the members of the Board of Directors of the Association and failed to do so. Such conduct could give rise to a claim for breach of fiduciary duty by the Association against Defendants and their appointed board members. *See Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co*., 114 Cal. App. 3d 783, 800, 171 Cal. Rptr. 334, 344 (1981) ("[T]he failure of the initial Association directors to exercise supervision which permits mismanagement or nonmanagement is an independent ground for the breach of fiduciary duty by the Developer during the initial period of the Association, when the Developer and its employees controlled the Association.").

3. The Association established the existence of a contract upon which a claim for breach of good faith and fair dealing may rest

With respect to Plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing, Defendants only argument is that there can be no bad faith claim where there is no contract between the Association and Defendants. As set forth in detail above, both the Declaration and the grant of the common area to the Association, constitute contracts between the Association and Defendants. Therefore, Defendants' argument fails and summary judgment should be denied.

4. Defendants present no evidence that the Association did not lose a benefit of the bargain

Without citation to any legal authority, Defendants argue that "there is no breach of contract or breach of the duty of good faith and fair dealing where there is no loss of the benefit of the bargain expected by the Plaintiff." *Motion* at 5, 17-18. They also argue without presenting any evidence that "[t]here is no bargain and no consideration was alleged" and "[t]here is no loss of expectation." *Motion* at 5, 18-21. However, as

explained at length above, there was a bargain and consideration.

Although it is difficult to determine what Defendants' argument is relative to the "benefit of the bargain" as related to the Association's breach of contract claim, perhaps Defendants are arguing that the Association has not suffered any damage because the loss of the "benefit of the bargain" is a contractual remedy. *See Arrow Leasing Corp. v. Cummins Ariz. Diesel*, 136 Ariz. 444, 447, 666 P.2d 544, 547 (App. 1983) ("…traditional contract remedies are designed to redress loss of the benefit of the bargain…."); *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.,* 223 Ariz. 320, 327, 223 P.3d 664, 671 (2010) ("The principal function of the economic loss doctrine, in our view, is to encourage private ordering of economic relationships and to uphold the expectations of the parties by limiting a plaintiff to contractual remedies for loss of the benefit of the bargain."). Defendants fail to present any evidence that the Association has not suffered any damage.

Alternatively, perhaps Defendants are addressing the covenant of good faith and fair dealing which is defined as follows: "The essence of [the duty imposed by a covenant of good faith and fair dealing] is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986). A party breaches the implied covenant of good faith and fair dealing either by "exercising express discretion in a way inconsistent with a party's reasonable expectations" or by "acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain." *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 424, 46 P.3d 431, 435 (App. 2002) (citing *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474 at P67 (2002). Again, Defendants fail to present any evidence that the Association received the benefits of the contract. Defendants have not met their burden on summary judgment and the *Motion* should be denied.

V. CONCLUSION

For the reasons described above, the Motion should be denied.

RESPECTFULLY SUBMITTED this 22ND day of March, 2021.

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

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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,

v.

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.

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,

Case No. CV2020-008714

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION

(Oral Argument Requested)

(Assigned to the Honorable Katherine Cooper)

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LLC, an Arizona limited liability company;

Third-Party Plaintiffs,

v.

CHAS ROBERTS AIR CONDITIONING, INC., an Arizona corporation; DESERT VISTA, INC., an Arizona corporation; GOTHIC LANDSCAPING, INC., a California corporation; HOME BUILDERS SITE SERVICES OF ARIZONA, LLC, an Arizona limited liability company; LEBLANC BUILDING CO., INC., an Arizona corporation; LIBERTY CONSTRUCTORS, LLC, an Arizona limited liability company, dba LIBERTY ARIZONA; RENCO LLC, an Arizona limited liability company, dba RENCO ROOFING; R/S SERVICE & SUPPLY, INC., an Arizona corporation; SARGON MASONRY CONSTRUCTION, LLC, an Arizona limited liability company; and DOES 1-50.

Third-Party Defendants,

COME NOW Defendants K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona Operations, LLC, by and through undersigned counsel, and hereby move for Summary Judgment pursuant to Ariz.R.Civ.P. 56 on each of Plaintiff Gallery Community Association's causes of action. Plaintiff is a homeowner's association making claims in its own name. Plaintiff's causes of action each fail as a matter of law and based on the uncontested facts. The claims actually available to Plaintiff are not as broad as Plaintiff presumes. Plaintiff has raised various causes of action arising from alleged obligations to construct. It simply does not have valid rights to recover on the claims and bases alleged. Summary Judgment should be entered in favor of both remaining Defendants on all three remaining Causes of Action, reasons set forth more fully in the following Memorandum of Points and Authorities, incorporated herein by reference. Undersigned counsel has consulted with Plaintiff's counsel regarding the motion and confirmed that it is opposed.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves causes of action which are not available to the Plaintiff. Plaintiff is a homeowner's association. It is bringing its own claims and is not pursuing claims on behalf of its individual members. Plaintiff is not a condominium association and does not have any power to do so under Arizona law. Plaintiff's own rights and agreements govern its potential recovery.

Plaintiff's causes of action must have some origin and basis in Arizona law and the factual record. Plaintiff's claims partly rely on legal definitions of claims that individual homebuyers might bring under the judicially created Implied Warranty remedy or per the express terms of their sale contracts. Those claims as raised by this Plaintiff lack legal sufficiency when evaluated in their proper context. Other claims alleged by Plaintiff are inconsistent with Arizona law and would not support recovery by homebuyers or anyone. Plaintiff's own rights do not support the claims it has alleged and pursued.

Cause of Action 1 – Negligence - This claim is not recognized in Arizona as a basis for damages for cost to repair of structures. Plaintiff voluntarily dismissed the claim. (See Notice of Voluntary Dismissal Of Negligence Cause Of Action Only, dated August 25, 2020.) Note that Plaintiff has requested punitive damages, but has dismissed the only non-contractual claim it raised.

Cause of Action 2 - Breach of Implied Covenant of Good Faith and Fair Dealing – This claim is based on alleged assurances and warranties, and not based on any identified interference with expected benefits of any contract.

Cause of Action 3 - Implied Warranty of Workmanship and Habitability – This claim is a judicially-created remedy which is not available to Plaintiff because it is not a homebuyer, is not pursuing claims of homebuyers, and is not empowered to bring any homebuyer's claims in its own name.

Cause of Action 4- Breach of Contract (Declaration) – Plaintiff's allegations are based on alleged failure to construct, not based on any actual term from the Declaration of Conditions

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Covenants and Restrictions for The Gallery (the "Declaration" or "CC&Rs.") No term of any agreement involving Plaintiff has been breached.

II. RELEVANT FACTUAL BACKGROUND

The claims at issue involve allegations of construction defects and related damages at a townhome community known as The Gallery in Scottsdale, Arizona.

Plaintiff is the Homeowner's Association formed to maintain common areas, collect assessments, and enforce terms of the Declaration of Covenants, Conditions, Restrictions, and Easements for Gallery. (See STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION, herein "SOF," at ¶ 1.) Plaintiff is not a condominium association.

The Declarant who formed the Association is K. Hovnanian at Gallery, LLC. (SOF 2.)

The Declaration/CC&Rs do not include any agreement to perform construction or any warranty regarding the construction of improvements at the property. (SOF 3, 4.)

Sales agreements were entered between K. Hovnanian at Gallery, LLC and purchasers of homes at The Gallery. (SOF 5.)

Terms of the purchase agreements include limited warranties to the homebuyers. The warranties include specific provisions for raising claims and for arbitration of all disputes. (SOF 6, 7.)

Plaintiff has had professional management including during the process of turnover of common areas. (SOF 8.)

Plaintiff accepted responsibility for all common area improvements in 2018 and acknowledged at that time that requested punch list repairs had been completed. (SOF 9.)

Plaintiff, through its counsel, gave notice of claims by correspondence purporting to be a Notice of Claim under A.R.S. § 12-1363. (SOF 10). Plaintiff's counsel confirmed in related correspondence that its claims were not based on rights of individual homeowners. (SOF 11).

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III. EACH OF PLAINTIFF'S CLAIMS FAIL

A. Implied Warranty of Workmanship and Habitability

The Implied Warranty of Workmanship and Habitability is a special right of action available to individual purchasers of single-family homes. The Court first recognized it in *Columbia Western Corp. v. Vela*, 122 Ariz. 28, 592 P.2d 1294 (App. 1979), and defined it further in *Richards v. Powercraft Homes*, 139 Ariz. 242, 678 P.2d 427 (1984). The claim arises from the agreement for purchase of a home. It is enforceable by subsequent purchasers of the home. *Richards v. Powercraft Homes*, 139 Ariz. at 245, 678 P.2d at 430. The claim gives a contract-based cause of action for claims of latent defect that manifested after the owner's purchase, resultant damages, and proof that the defect had its origin and cause with the builder-vendor. *Id.* and *Dillig v. Fisher*, 142 Ariz. 47, 50-51, 688 P.2d 693, 696-697 (Ariz. App. 1984).

Plaintiff is not a homeowner. Plaintiff is a non-profit corporation created with certain powers to manage common areas and to enforce the covenants, conditions, and restrictions for the Gallery. (SOF 1)

Plaintiff is not pursuing claims on behalf of individual homebuyers at the property. No facts have been alleged or identified to suggest that Plaintiff has a right to bring claims belonging to any unit owner. Plaintiff does have such a right under any statute, law, or assignment. Plaintiff expressly confirmed in correspondence from counsel regarding its pre-litigation Notice of Claim under A.R.S. § 12-1361 et seq. and 33-2002 et seq. that "The Notice was on behalf of the Association only and for issues that are within the Association's responsibility to maintain and repair under the Declaration of Covenants, Conditions, Restrictions and Easements for Gallery [and] The Association is not bringing claims on behalf of one or more individual unit owners for issues that the owners are solely responsible to maintain and repair." (SOF 11).

Notably, the Plaintiff is not a condominium association and would not have any right to pursue claims on behalf of the rights of individual owners in its own name. (Compare A.R.S. § 33-1801 et seq. with condominium statutes A.R.S. § 33-1201 et seq. and in particular A.R.S. § 33-1242 defining powers of a condominium.)

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This Plaintiff does not have a right to pursue claims arising from the Implied Warranty of Habitability and Workmanship. This Plaintiff does not have the power or right to pursue other parties' claims that may arise under the Implied Warranty of Habitability and Workmanship.

B. Breach of Covenant of Good Faith and Fair Dealing

Plaintiff's Count Two alleges Breach of Implied Covenant of Good Faith and Fair Dealing.

Plaintiff alleges that Defendant K. Hovnanian at Gallery, LLC and Plaintiff entered into a contract in the form of the Declaration/CC&Rs "the contract made assurances that the work would be or had been done correctly." (Complaint at ¶¶ 25-26.) Plaintiff alleges that Defendant K. Hovnanian at Gallery, LLC breached the contract by "not performing work in compliance with the terms of that contract and by building a project that does not comply with applicable laws and building codes." (*Id.,* ¶ 39.) The Cause of Action is directed against 3 of the 4 original named defendants but not against K. Hovnanian Arizona Operations, LLC.

This claim must be based upon an actual contract, and the "duty of good faith and fair dealing arises by virtue of that contractual relationship," *See, Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *see also*, *Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466, 967 P.2d 607 (App. 1998) ("[I]mplied covenants of good faith and fair dealing presume the existence of a valid contract").

Here, Plaintiff has alleged and presumed that the contract includes an obligation to perform 'work' or construct, and an obligation to warrant the work. The Declaration/CC&Rs do not contain terms regarding any agreement to perform 'work.' The Declaration/CC&Rs mainly concerns agreements between the individual lot owners and the Association, for the benefit of owners and other interest holders in the subject lots and common areas. (SOF 4.)

Plaintiff's Complaint describes "assurances" and breaches of contractual terms. The allegations fail to describe any terms which can be located within the actual document described and further the allegations fail to identify claims which can support a claim for Breach of the Covenant of Good Faith and Fair Dealing.

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Few terms of the Declaration that involve any promises or agreements concerning the Declarant, and those do not relate to the claims at issue. Plaintiff has not cited to or identified any term which includes an agreement to construct for Plaintiff, perform other 'work' for Plaintiff, or to guarantee or warranty to Plaintiff the sufficiency of any construction at the Lots or Common Areas which make up The Gallery.

Plaintiff has identified in its Disclosures a number of provisions of the Declaration that reference the Declarant. (SOF 12.) Plaintiff has not identified any provision where the Declarant made promises to the Association to warrant the sufficiency of construction. Nor has Plaintiff identified any expected benefits which were impaired by any alleged deficiency.

Plaintiff's allegation directing this claim to Defendant K. Hovnanian at Gallery, LLC appears to be an attempt to extend the special remedy of the Implied Warranty of Habitability and Workmanship to this Defendant. The allegation goes further than Arizona law provides for this remedy, as already discussed.

C. Breach of Contract

This claim is also directed against Defendant K. Hovnanian at Gallery, LLC and against two dismissed Defendants, not against Defendant K. Hovnanian Arizona Operations, LLC.

Plaintiff's breach of contract claim alleges that Defendants breached terms of a contract "by building a contract that does not comply with applicable laws and building codes." Plaintiff never entered any contract with Defendants to perform construction.

The claim does not identify any particular terms of any agreement between Defendant K. Hovnanian at Gallery, LLC and Plaintiff. The claim incorporates the previous allegations and presumably refers again to the same provisions of the Declaration/CC&Rs cited to in the claim for Breach of the Covenant of Good Faith and Fair Dealing. The Complaint does not identify any terms of the Declaration/CC&Rs that concern an agreement to perform construction for the Plaintiff or to warrant any construction or improvements to property. Plaintiff has not identified any actual term of the Declaration/CC&Rs which relates in any way to its claims of construction defects and related damages.

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IV. FACTS DO NOT SUPPORT EXPANSION OF THE ASSOCIATION'S RIGHTS

The law and applicable facts do not support claims by Plaintiff for the remedies it has sought. Defendant expects Plaintiff to take the position that the legal claims should be extended to allow it to pursue claims like a homebuyer under the *Powercraft* warranty. Modification of the law is not warranted and strict enforcement of the actual law is appropriate.

The parties' interactions show clearly that the interests of the Association were protected and preserved throughout the process. Plaintiff is a professionally managed non-profit association. Its management was involved throughout its existence including through the turnover process where Plaintiff accepted transfer of the common area property. (SOF 8, 9).

Each purchaser of units received a Home Builder's Limited Warranty Agreement with an agreed method for requesting repairs and determining whether any condition was a defect covered by the warranty. (SOF 5, 6.) The agreement included an agreement to arbitrate any disputes under the warranty. (SOF 7.) Each owner had an agreed remedy and procedure including arbitration requirements. To the extent any purchaser had claims, they would be subject to the agreement. The individual homebuyers are not party to the case and their claims are not at issue. Any rights or claims belonging to them can be raised by them through appropriate procedures. Plaintiff cannot be permitted to raise claims belonging to the individual homebuyers at Gallery without any basis to do so or to somehow rewrite the contractual agreement between the seller and those non-party homebuyers.

V. CONCLUSION

The claims alleged and pursued by Plaintiff are not supported by law. The facts as relevant to the parties and claims cannot support claims for the Implied Warranty of Workmanship and Habitability by this Plaintiff, which is not empowered to pursue this judicially-created remedy against either Defendant. The facts as relevant to the claims asserted by Plaintiff against Defendant K. Hovnanian at Gallery, LLC, do not support either breach of contract or breach of the Covenant of Good Faith and Fair Dealing. Plaintiff has not asserted this claim against Defendant K. Hovnanian Arizona Operations, LLC, and would not have any basis to do so.

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Dated: September 30, 2022

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Clerk of the Superior Court
*** Electronically Filed ***
02/13/2023 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008714 02/08/2023

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

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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008714 02/08/2023

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.

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 Warrant 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).

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.

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

- 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.

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.

Clerk of the Superior Court
*** Electronically Filed ***
04/27/2023 8:00 AM

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).

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.

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 is 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.

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

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.

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.

Clerk of the Superior Court
*** Filed ***
04/27/2023 8:00 AM

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.

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

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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,

v.

K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; et al.

Defendants.

K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; et al.

Third-Party Plaintiffs,

v.

ARTISTIC STAIRS, LTD., an Arizona limited liability company; et al.

Third-Party Defendants.

Case No. CV2020-008714

Assigned to Hon. Michael Kemp

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING EACH OF PLAINTIFF'S CAUSES OF ACTION

(Oral Argument Requested)

Plaintiff, Gallery Community Association ("Plaintiff" or "Association"), by and through undersigned counsel, objects and responds as follows to Defendants' *Motion for*

Summary Judgment Regarding Each of Plaintiff's Causes of Action ("*Motion*"). This response is supported by the following *Memorandum of Points and Authorities* and *Plaintiff's Response to Defendants' Separate Statement of Facts* ("Defendants' SOF").

MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT SUMMARY

K. Hovnanian at Gallery, LLC ("KHov Gallery") and K Hovnanian Arizona Operations, LLC ("KHov Arizona") (collectively, "Defendants") argue that the Court should dismiss all of the Plaintiff's claims against them because (1) Arizona law does not permit a homeowners association such as the Plaintiff here to assert breach of implied warranty claims, *Motion* at 5-6; and (2) the contractual provisions Plaintiff relies on for its contract-based claims do not require KHov Gallery to "perform construction" or "warrant the work." *Motion* at 6, 7. Defendants' arguments are both legally and factually incorrect, and the *Motion* should be denied for all of the following reasons:

First, well-settled and controlling Arizona law, which Defendants fail to cite, permits homeowner associations to assert breach of implied warranty claims against developers and builders such as Defendants for latent defects in multifamily residential developments. Arizona public policy articulated in both *Richards v. Powercraft*, 139 Ariz. 242, 678 P.2d 427 (1984) and *Lofts at Fillmore Condo. Ass'n v. Reliance Commerc. Constr.*, 218 Ariz. 574, 190 P.3d 733 (2008) applies equally to homeowner associations for townhome developments as to homeowner associations for condominium developments and individual homeowners, because in all such cases the developer and builder are "in a better position than a subsequent owner to prevent occurrence of major problems," thus, "the costs of poor workmanship should be [theirs] to bear." *Richards*, 139 Ariz. at 245; 678 P.2d at 430.

Second, with respect to the Association's claims for breach of contract and breach of the implied covenant of good faith and fair dealing, KHov Gallery argues that Plaintiff's breach of covenant of good faith and fair dealing and breach of contract claims must fail because no contract between KHov at Gallery and the Association required this Defendant to "perform construction" or "warrant the work." *Motion* at 6, 7. However, as shown below,

Defendants mischaracterize Plaintiff's contract-based claims and ignore the contractual obligations imposed on KHov Gallery by the Declaration. Because KHov Gallery does not challenge with record evidence the Association's allegations that KHov Gallery breached these contractual obligations, KHov Gallery has failed to satisfy its summary judgment burden as to the contract-based claims.

II. FACTUAL SUMMARY

The undisputed allegations and record evidence show that in addition to being the Project's Declarant, KHov Gallery owned and "developed the project," "conveyed the common elements of the project to the Association in a quit claim deed dated October 6, 2016," and "acted as the vendor by selling individual unit owners their units at The Gallery." Assoc. SOF ¶ A. Defendant K. Hovnanian Arizona Operations, LLC ("KHov Arizona") was the Project's general contractor. *Id.* at ¶ B.

The Gallery Community Association was formed as a nonprofit corporation under A.R.S. § 10-3101, et seq., *i.e.*, the Arizona Nonprofit Corporation Act, through the Articles of Incorporation of Gallery Community Association ("Articles"). *Id.* at ¶ C. The Articles state that the "Character of Affairs" of the Association is to "manage, maintain and administer the Common Area and common facilities, … and to administer and enforce, the Declaration of Covenants, Conditions, Restrictions and Easements for Gallery…." *Id.* at ¶ D.

The Declaration of Covenants, Conditions, Restrictions and Easements for Gallery ("Declaration" or "CC&R's") defines "Owner" to "include Declarant so long as Declarant or a Related Entity owns or has a Recorded option to purchase any Lot within the Property." *Id.* at ¶ E. The Declaration states that the Declarant formed the Association "for the purpose of the efficient preservation of the values and amenities of the Property" and the Declaration gives the Association "powers of administering and maintaining the Common Area [and] enforcing this Declaration." *Id.* at ¶ F.

The Declaration was made to establish "**mutually beneficial** covenants, conditions, restrictions, easements and obligations with respect to the proper **development**, use and

maintenance of the Property" for **Declarant's "own benefit"** and the "mutual **benefits of all future Owners, or other holders of interests** in any portion of the Property." *Id.* at ¶ G (emphasis added).

The Declaration was "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." *Id.* at ¶ H. The Declaration provides that it "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**." *Id.* (emphasis added).

The Declaration granted rights and duties to Declarant, KHov Gallery, and/or any "Related Entity," which is defined as "any entity related to Declarant or Homebuilder." *Id.* at ¶ I. The rights and duties granted to Declarant, its affiliates and Related Entities, include but are not limited to:

- The duty to convey fee simple title to the Common Area to the Association, which "shall automatically be deemed accepted by the Association." ("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 right of "Declarant, or its successors or assigns" to have at least one (1) position on the Board of Directors for ten (10) years after the period of Declarant control ceases …."
- The right to "maintain an 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 …."
- The right of "Declarant, Homebuilder or any entity related to Declarant or Homebuilder (a 'Related Entity') … 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 …"
- The right to construct all Dwelling Units on the Property "as long as Declarant or a Related Entity owns or has a Recorded option to purchase one or more Lots."

Id. at ¶ J.

The Declaration further states: "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.…" (Emphasis added.)

The Declaration also granted the Association certain rights and duties, including but not limited to:

- The duty to maintain "Association Property" for the benefit of all the Owners.
- "[S]uch rights, duties and powers as set forth [in the Declaration] and in the Articles and Bylaws."
- "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, facade, roofs or other surfaces."
- "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: . . . Reconstruct, repair, replace or refinish any improvement or portion thereof upon the Common Area or any other area placed under its jurisdiction …."

Id. at ¶ K. Defendants admit that the Declaration creates the Association's repair and maintenance obligation. *Id.*

A. Finally, the Declaration also grants the Owners, which by definition includes Declarant, rights and obligations:

- "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."
- "**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."
- "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...."

Id. at ¶ M (emphasis added).

KHov Gallery retained 100% control of the Association by appointing all board members until the transition to homeowner control on December 17, 2016. *Id.* at ¶ N.

III. LEGAL STANDARD

A motion for summary judgment must be denied unless no genuine disputes of

material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56. In considering a motion for summary judgment, the facts and their reasonable inferences must be viewed in the light most favorable to the non-moving party. *See Doe v. Roe*, 191 Ariz. 313, 314, 955 P.2d 951, 962 (1998). The party seeking summary judgment has the "burden of showing that no genuine issue of material fact exists." *Schwab v. Ames Constr.*, 207 Ariz. 56, 59-60 ¶ 15, 83 P.3d 56 (App. 2004) (citing *Chanay v. Chittenden*, 115 Ariz. 32, 38, 563 P.2d 287, 293 (1977)). "As a general rule, an unsworn and unproven assertion is not a fact that a trial court can consider in ruling on a motion for summary judgment." *GM Dev. Corp. v. Community Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990).

IV. ARGUMENT

A. Arizona law entitles the Association to assert its breach of implied warranty of workmanship and habitability claims.

1. Well-settled Arizona law establishes that developers and builders like Defendants are liable for the breach of implied warranty.

An implied warranty of workmanship and habitability arises from residential construction, including condominium construction, and both a builder-vendor and a builder who is not a vendor are accountable for the implied warranty. *Lofts at Fillmore Condo. Ass'n ,* 218 Ariz. at 577 ¶ 13, 190 P.3d at 736 (citing *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979) ("We can see no difference between a builder or contractor who undertakes construction of a home and a builder-developer.… Those who hold themselves out as builders must be just as accountable for the workmanship that goes into a home … as are builder-developers.")). Defendants have admitted that they are the Project's developer (seller) and builder, respectively. Assoc. SOF ¶ A-B.

2. Privity of contract is not required to prove breach of implied warranty.

Privity of contract is not required to support a breach of implied warranty of workmanship and habitability claim against a seller or a builder. *Richards*, 139 Ariz. 242, 678 P.2d 427; *Lofts at Fillmore,* 218 Ariz. 574, 190 P.3d 73. The Arizona Supreme Court

ruled more than ten years ago that a homeowners association may assert a claim for breach of the implied warranty of workmanship and habitability against a builder, despite a lack of privity between the association or the homeowners and the builder. *Lofts at Fillmore*, 218 Ariz. at 575, 190 P.3d at 734.

The homeowners association in *Lofts at Fillmore*, formed by the individual unit owners *after* sale of the units by the developer, sued the developer and the builder for breach of the implied warranty of workmanship and habitability. *Id*. at 575. There, the developer hired the multifamily residential project's builder; the builder had no contractual relationship with the owners or the association. *Id*. Holding that the association could sue the non-vendor builder directly for breach of the implied warranty, despite a lack of privity, the Arizona Supreme Court noted that a rule requiring privity "'might encourage sham first sales to insulate builders from liability.'" *Id*. at 577 (quoting *Richards*, 139 Ariz. at 245, 678 P.2d at 430).

3. Arizona's implied warranties apply equally to protect "condominium" associations and the Plaintiff homeowners association.

Affirming a homeowner association's breach of implied warranty claim against a multifamily residential community's builder, the Arizona Supreme Court in *Lofts at Fillmore* quoted its prior opinion in *Richards v. Powercraft*, and explained that "given the policies behind the implied warranty – to protect innocent buyers and hold builders responsible for their work – 'any reasoning which would arbitrarily interpose a first buyer as an obstruction **to someone equally deserving of recovery is incomprehensible**.'" *Id*. at 577 (quoting *Richards v. Powercraft*, 139 Ariz. at 245, 678 P.2d at 430) (emphasis added).

Richards v. Powercraft also held that the builder-vendor is better able to prevent construction defects and should, therefore, as a matter of public policy, bear the costs of poor workmanship in multi-family construction. *Richards*, 139 Ariz. at 245; 678 P.2d at 430 ("**Because the builder-vendor is in a better position than a subsequent owner to prevent occurrence of major problems, the costs of poor workmanship should be his to bear**.") (emphasis added). *See also Nastri v. Wood Bros. Homes*, 142 Ariz. 439, 443, 690

P.2d 162 (App. 1984) ("The warranty of habitability is a creature of public policy.… If construction of a new house is defective, its **repair costs should be borne by the responsible builder-vendor who created the latent defect**.") (emphasis added), overruled in part on other grounds, *Flagstaff Affordable Housing Limited Partnership v. Design Alliance, Inc*., 223 P.3d 664 (Ariz. 2010).

Moreover, in *Lofts at Fillmore*, the Arizona Supreme Court discussed the evolving commercial relationships between entities involved in residential construction and sale, and held that the *form of the business deals developers and builders choose cannot insulate them from liability*:

> In today's marketplace, as this case illustrates, there has been some shift from the traditional builder-vendor model to arrangements under which a construction entity builds the homes and a sales entity markets them to the public. In some cases, the builder may be related to the vendor; in other cases, the vendor and the builder may be unrelated. But whatever the commercial utility of such contractual arrangements, they should not affect the homebuyer's ability to enforce the implied warranty against the builder. **Innocent buyers of defectively constructed homes should not be denied redress on the implied warranty simply <u>because of the form of the business deal</u> chosen by the builder and vendor**.

Lofts at Fillmore, 218 Ariz. at 577, 190 P.3d at 736 (emphasis added).

Other states' appellate courts also widely hold that homeowner associations may sue for implied warranties arising from common area and unit construction they are responsible to repair and maintain. *See Windham at Carmel Mountain Ranch Ass'n v. Super. Ct.*, 135 Cal.Rptr.2d 834 (Cal. App. 2003) (recognizing common element implied warranties, and stating that since "associations generally are required to manage, maintain and repair a project's common areas, *it would be illogical to deprive associations of the ability to sue to recover for damage to common areas they are obligated to repair*"); *Berish v. Bornstein*, 770 N.E.2d 961, 973-74 (Mass. 2002) *Berish v. Bornstein*, 2006 Mass. Super. LEXIS 330, *1, 21 Mass. L. Rep. 530 (implied warranties arise with regard to "improper design, material, or workmanship [that] is responsible for a defect in a common area"); *Meadowbrook Condo. Ass'n v. South Burlington Realty Corp.*, 565 A.2d 238, 240-11 (Vt. 1989) (implied warranties arise from construction and sale of common interest

communities, relying on principles described in, and citing to, *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964)); *Starfish Condo. Ass'n v. Yorkridge Serv. Corp., Inc.*, 458 A.2d 805, 811 (Md. App. 1983) (plaintiff association had right to sue for implied warranty in its own right); *Herlihy v. Dunbar Builders Corp.*, 415 N.E.2d 1224, 1227-29 (Ill. App. 1980) (implied warranties arise from common element defects in condominium community); *Gable v. Silver*, 258 So.2d 11, 18 (Fla. App. 1972) (recognizing common element implied warranties); *Point E. Condo. Owners' Ass'n v. Cedar House Assocs. Co.*, 663 N.E.2d 343, 356-57 (Ohio Ct. App. 1995) (condominium association could assert implied warranty claims against developer and general contractor); *Riverfront Lofts Condo. Owners Ass'n v. Milwaukee/Riverfront Props. Ltd. P'ship*, 236 F.Supp.2d 918, 928 (E.D. Wis. 2002) (conveyance of units to unit owners coupled with transfer of control of common areas to HOA gives rise to implied warranties).

Pursuant to Arizona's Nonprofit Corporation Act, the Association's Articles of Incorporation, the Declaration, and the Quit Claim Deed transferring common element ownership from Defendants to the Association, the Association holds legal interests in the Common Area and bears the legal responsibility for maintaining and repairing the Common Area and the exterior walls, stucco, façade, roofs or other surfaces of the Dwelling Units. Assoc. SOF ¶¶ A, C-D, K-L. Defendants have admitted the Association's obligation for this maintenance and repair under the Declaration. Assoc. SOF ¶ L. Therefore, the Association, as the entity responsible to maintain and repair the alleged defects at the Gallery, is "someone equally deserving of recovery" for Defendants' breach of implied warranties under *Lofts at Fillmore*, and the Association may properly assert these claims.

Defendants argue, without citing evidentiary support, that "[t]he parties' interactions show clearly that the interests of the Association were protected and preserved throughout the process," *Motion* at 8, but then argue that the Association, which owns the Common Area and bears responsibility for maintaining and repair it, has no legal remedy under Arizona law for latent construction defects. Defendants' position contravenes Arizona law and public policy, and the *Motion* should be denied as to the Association's breach of implied

warranty claims.

B. KHov at Gallery LLC has failed to satisfy its summary judgment burden to demonstrate record evidence that it satisfied its contractual obligations to the Association.

Defendants argue that Plaintiff's breach of covenant of good faith and fair dealing and breach of contract claims must fail because no contract between KHov at Gallery and the Association required this Defendant to "perform construction" or "warrant the work." *Motion* at 6, 7. However, as shown below, Defendants mischaracterize Plaintiff's contract-based claims and ignore the contractual obligations imposed on KHov Gallery by the Declaration, and the *Motion* should be denied as to these claims.

"The essence of [the duty imposed by a covenant of good faith and fair dealing] is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986). A party breaches the implied covenant of good faith and fair dealing either by "exercising express discretion in a way inconsistent with a party's reasonable expectations" or by "acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain." *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 424, 46 P.3d 431, 435 (App. 2002) (citing *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474 at P67 (2002).

A Declaration is a legally enforceable contract. No Arizona case has held that declarations cannot support a breach of contract claim against a declarant. To the contrary, "CC&Rs must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein." *Powell v. Washburn*, 211 Ariz. 553, 557, 125 P.3d 373, 377 (2006). Other states have also held that the declarant is a party to a declaration, which is a contract. *See e.g., Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal.4th 223 (2012) (citing *Villa Milano Homeowners Assn. v. IL Davorge*, 84 Cal.App.4th 819 (2000), for proposition that CC&R's are a contract between the developer and homeowners association); *Solowicz v. Forward Geneva Nat'l,*

LLC, 780 N.W. 2d 111, 125 (Wis. 2010) ("The Community Declaration is a contract or agreement between the Developer and those who choose to purchase property."); *Maples v. Contorakes*, No. BCD-CV-18-02, 2019 Me. Bus. & Consumer LEXIS 26, * 33 (2019) ("the Declaration and Bylaws are contracts between the Declarant and the Association, on the one hand, and the unit owners ... on the other).

Here, the Declaration is a contract that by its express terms granted rights to, and imposed duties and obligations on, the Declarant, KHov at Gallery. Assoc. SOF ¶¶ F-J, M; *see, e.g.*, Declaration, Page 1, Recitals § C ("Declarant desires to establish for its own benefit ... certain **mutually beneficial** covenants, conditions, restrictions, easements and obligations with respect to the proper development, use and maintenance of the Property") (emphasis added). Moreover, when the Declarant controlled the Association from June 27, 2016, through turnover on December 14, 2017, and was the Owner of multiple units, the Declarant was a party to the Declaration as an Owner, Assoc. SOF ¶¶ E, N, and the Declaration also imposes duties on Project "Owners," including the duty to **pay the Association to repair any Common Area the Owner or its guests damages**, *id.* at ¶ M.

The *Motion* does not challenge the Association's allegations that when the Declarant controlled the Association, the Declarant breached its obligations under the Declaration to properly maintain and repair the Project's common elements and the building exteriors in accordance with applicable laws and building codes. Instead, KHov Gallery argues that the Declaration's "promises or agreements concerning the Declarant" "do not relate to the claims at issue" because the terms purportedly do not "include[] an agreement to perform work." *Motion* at 7. As shown in the Factual Summary, above, and in the Association's separate Statement of Facts, this is simply not the case. The Declaration did impose performance obligations on KHov Gallery, and KHov Gallery has not disputed the Association's allegations that KHov failed to perform these obligations. Therefore, KHov Gallery has failed to satisfy its summary judgment burden to prove that the Association's contract-based claims fail as a matter of law, and the *Motion* should be denied as to these claims.

I. CONCLUSION

For all of the above-stated reasons, the *Motion* should be denied in its entirety.

Respectfully submitted this 9th day of November 2022,

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

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ATTACHMENT COVER PAGE

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CASE NAME: **GALLERY v. K HOVNANIAN, et al.**

CASE NUMBER: CV-23-0375

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

GALLERY COMMUNITY ASSOCIATION, Plaintiff, vs. K. HOVNANIAN 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.

JOANNA SARGENT

I N D E X

January 13, 2023

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

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

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

THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

nature.

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

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

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

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

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

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

MR. WILENCHIK: I will, Your Honor.

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

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

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

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

fine.

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

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

Now, everything that she's arguing here is her

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right. Thank you.

Counsel, back to you.

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

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

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

MS. RAI: Oh, that's --

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

MS. RAI: That's okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay, okay.

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

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

MS. RAI: Okay.

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

MS. RAI: Sure.

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

MR. WILENCHIK: Okay.

THE COURT: -- do it.

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

THE COURT: Sure.

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

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

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

THE COURT: Okay.

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

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

MR. WILENCHIK: What's that?

THE COURT: What it on a motion to dismiss?

MR. WILENCHIK: Yeah.

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

MR. WILENCHIK: Yeah.

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

MR. WILENCHIK: Yes.

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

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

THE COURT: Okay.

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

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

THE COURT: Okay.

MR. WILENCHIK: -- neither here nor there.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Okay, thank you.

Counsel?

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

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

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

discovery had been provided on yet, and --

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

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

THE COURT: Okay.

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

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

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

THE COURT: Okay.

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

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

that.

MS. MANSHIP: Okay.

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

THE COURT: It's fine.

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

THE COURT: I'm not going to --

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

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

MS. MANSHIP: No, no.

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

MS. MANSHIP: No.

THE COURT: It has not been ruled on.

MR. WILENCHIK: Was never ruled on.

THE COURT: That's all I care about.

MS. MANSHIP: Correct.

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

THE COURT: Okay.

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

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

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

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

MS. MANSHIP: So our --

THE COURT: (Indiscernible) apply.

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

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

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

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

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

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

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

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

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

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

distinct and palpable injury.

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

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

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

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

THE COURT: Go ahead.

MS. MANSHIP: -- the issue.

THE COURT: No, go ahead.

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

association has been as well.

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

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

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

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

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

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

THE COURT: Right, but they --

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

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

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

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

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

THE COURT: No, that's okay.

MS. MANSHIP: Okay.

THE COURT: That's okay.

MS. MANSHIP: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: No, no.

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

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

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

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

THE COURT: Okay. Very briefly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge, look, I'll end it with this. Not one thing she said persuades or should persuade this Court in any way, shape, or form that doesn't apply to our breach of contract or any obligation by any defendant here whatsoever. The fact that K. Hovnanian is listed as the builder of the units, the dwelling units -- which has nothing generally to do with an HOA which deals with common area -- what does that have to do with this case? Because K. Hovnanian builds dwelling units, somehow that gives the HOA a right to sue them? Under what theory would that be? It's outrageous.

That's why I brought this at the beginning of this case. I was disappointed, I repeat, that the Court, you know, shuffled it off. They brought their argument that they needed discovery. Well, you know what's really also appalling? What discovery that they claimed in good faith they need to put off my motion, what discovery do we hear here today that they did that in any way is relevant to defending this argument that I made at the beginning of the case and I repeat at the end?

Nothing. There's not one piece of discovery that was relevant. They put it off hoping it would go away.

And Your Honor, I know there's a trial set, and I know there's a temptation because of that to say, well, there's a trial, and therefore, it has to go. But there is no cause here that can be heard. And therefore, as I said, it moots any argument between Rina Rai and I as to our particular differences on issues relating to the subcontractors because we never get there. This moots it because the case is over or should be over. And frankly, if they want to appeal that, it would be a matter of first impression for the Court to deal with.

And I believe based on what I've seen because this isn't the first rodeo that the court upstairs is not going to find an HOA has a right in its own name to bring claims on behalf of owners willy-nilly or tear asunder the whole scheme of what's gone on all these years. Homeowners bring those claims. They have that right, not an HOA. That's it. I'll be glad to answer any, but there's nothing further to it. Case needs to be dismissed.

THE COURT: All right. Thank you.

MR. WILENCHIK: Thank you.

THE COURT: Hey, you get to follow that.

MR. HOROWITZ: I've been sitting for a while. I'm going to move over to the podium just to get my blood moving,

get a little less cozy, and mix things up a little. You know, this issue may be potentially moot, but if any part of this case goes ahead, it could be a potentially serious issue. I'm addressing K. Hovnanian's motion for partial summary judgment regarding unobserved defects.

And Your Honor, you've probably heard similar motions brought regarding defects that were extrapolated or projected where there are arguments regarding the evidence of statistical sampling, statistical extrapolation, or projection. Here, it's a little bit of that, but really, it is about defects that Plaintiff's expert says are generally persistent throughout the property where there are one -- where the expert actually contends to have observed one instance of this defect or a handful of instances of the defect. And --

THE COURT: Let me just --

MR. HOROWITZ: Sure.

THE COURT: -- kind of set the table a little. When I read your motion, it kind of struck me as more of a Daubert motion aimed at a criticism of the Plaintiff's expert's methodology. I mean, we've had this discussion around here with my colleagues on some of these motions for summary judgment that we get that turn on the admissibility of an expert. It's kind of six of one, half dozen of the other. So that's how I'm looking at this --

MR. HOROWITZ: Well --

THE COURT: -- in large part. You'll have to tell me if --

MR. HOROWITZ: Well, that is --

THE COURT: -- there's more to it.

MR. HOROWITZ: There is more to it. And often these are very closely intertwined with Daubert. I wasn't going to -- I was going to try to break the trend and not talk about my own experiences, but I've been arguing similar motions under the old rules and under new rule 702. But this is a case where -- this is not a case where Plaintiff's experts have employed statistical sampling. They have acknowledged that they have not. The issue is there are things you need to cut open the building to look at and see and observe and count.

Plaintiff's expert is saying in his claims on three keys issues -- he's saying that there are these issues, that they exist, they're persistent. He's saying I have seen them in one location. And for two issues, I'd say two locations. Plaintiffs say four or five. For sake of argument, we're talking about one location for issue number 1, five locations each for issue number 2 and number 3.

Plaintiff is not saying I am statistically projecting this throughout the property. Plaintiff is saying generally I didn't see it ever done right. Plaintiff is generalizing that these conditions that you can't see without opening up the building are done wrong everywhere. These are major issues

because the repair that results is Plaintiff saying there's a whole layer of the building underneath the building that you can't see, and it's bad, and it's bad because I am saying I just didn't ever see it right anywhere.

And the facts that this expert has actually presented, the evidence that this expert has actually presented, if you look at what he gave us, it really doesn't -- there is no support for that. And it is so dangerous to allow to the jury to say you can't see how they did it wrong every single place, but they did it wrong every single place. And I'm an expert. I'm a scientist. I wear a white coat. I know how things are. It's a little bit of Daubert, but here there is not somebody saying he is -- this expert is speculating that it's bad everywhere. He is not saying I've done a survey. My statistician told me how to do the sampling. K. Hovnanian can have their statistician quibble with it, and we can come to the judge and -- you know, and it'll be a combat all the experts. It'll be a question of fact.

We're not doing that. We have somebody who says, I saw the structural sheathing bad in one location. This is Ed Fronapfel, Plaintiff's expert. I have, you know, had the privilege of deposing him and getting to be familiar with the way that he presents his cases and the way he puts together his reports that get shared with the defendants.

So in this case, I asked him specifically, I know

that you do not provide me as a defendant in a Ed Fronapfel case -- I don't get from you a list of all the locations where you found the issue that you say is defective, and he agreed with that. And I said, I know that I'm going to get from you instead what you call your observations drawings. He will take floorplans, and he will have -- him and his staff will write down everywhere where they saw these issues.

You may have -- it doesn't matter how the expert puts it together. I'm not going to compare him to how experts do it. I'm saying he told us that I cannot look at his report to find a count of issues that are defective. But I'm going to see examples in his report. And if I wanted to count everywhere where he found a problem with the lateral force resistive system, I could go through his observation drawings, I could count everywhere he's got a problem, and that is going to tell me everywhere where he's got an issue.

THE COURT: Well, let me ask you this.

MR. HOROWITZ: Yeah.

THE COURT: If the records -- if it's in the record that -- let's say the particular sub that it slides a foam board --

MR. HOROWITZ: Um-hum.

THE COURT: -- okay, said, this is how I always do it. This is how I did it. This is how I did it in all the buildings. And then Plaintiff's expert says, well, way it was

done here is not right, and that's what the problem is. Why isn't it up to the jury then to take from that collective evidence a reasonable inference that if it was applied the same way throughout, there could be -- there's a defect throughout?

MR. HOROWITZ: Well, in a case where the evidence was -- in a case where the evidence was the subcontractor said this is the way I did it throughout, that would be the case. This is a case, however, where the expert says, generally, it was done wrong. The report he gives us, the evidence he gives us says -- you look at it and say, gee, you only have one location where you saw it done wrong. And nobody has said, I installed the structural sheathing wrong throughout the property.

THE COURT: But isn't there some testimony that says, I installed it this way throughout the property?

MR. HOROWITZ: There isn't for any of these three issues that I'm asking you about, Your Honor. There's evidence that it's the same person. You know, arguably, there's evidence that it's the same person for one aspect of it, ordering this board. But for everything else -- you know, please bear me -- bear with me and consider the evidence -- is not that there's a method. The method is bad. And if we see it's bad in enough places, we know it's going to be bad in most or all the places.

THE COURT: Is there testimony by the people who did

the work as to their method?

MR. HOROWITZ: There isn't. There isn't testimony. And the issue is -- for example, second issue I'm asking about is the weather resistive barrier. And Plaintiff says you're supposed to have two layers of building paper, two layers of the WRB, the weather resistant barrier, over sheathing. Ed Fronapfel says generally -- his conclusion is, generally, I didn't see the right number of layers, and this whole component of the structure needs to be replaced.

His evidence shows over and over he's observing this correct. He's observing everywhere -- everything that he gave us -- the documents that we got in his report, the documents that came with his report, the documents that he explained and confirmed at -- when we deposed him all say, look, this is -- we went through the exercise of what he said you needed to do to find out everywhere where he actually saw the problem.

There's two places where he says that it's not the right number of layers. There's no testimony from the stucco subcontractor that says, yeah, we screwed up, and we put in one layer instead of two layers consistently throughout. This is a different kind of animal than the case where there's a specific method and it's bad, and you know, if I look at enough to see that it's generally bad, I've got it.

Here's a guy that says, I'm poking holes in a lot of different places, and generally it's bad. But that's not the

data or the evidence he gave us. He gave us two photographs of an area where it's bad. Or he gave us, you know, his observation drawings that identify two locations where his staff doesn't think there are the right number of layers, dozens of locations where his staff documented that it's done right. And he's going to bring to the jury a claim that somehow I can generalize that it's done wrong everywhere.

If this was a kind of issue where the -- if this was the kind of issue where he could say, you know what, this is just systematically bad because of testimony that we have that it was always done this way, we would be in a different kind of situation, but it's not. This first issue, his structural issue, is -- you know, is a really, really glaring problem because Plaintiff acknowledged -- and there's no doubt there is one location on the entire project where he identified an area where he said there should be structural sheathing and it's missing.

And he said in this same location, there's a bent metal strap. And his instruction to his cost guy is to say you are going to need to assume that this issue will be uncovered in other locations throughout the property. He's not saying I've seen enough to know that it's always done bad. He's just saying you should speculate that there are more instances of this.

He is saying you should cost out an amount equal to

ten percent of the cost of all of the stucco work in order to replace this issue that we anticipate you're going to come across somewhere else. That's speculation. That's not anywhere near the kind of issue where we have a claim where someone says this method is wrong. The evidence shows that the method was followed consistently. You know, here we go.

For these other two issues, Plaintiff is going to give conclusions. The Plaintiff is going to give repair recommendations to take off all of the stucco on all parts of the residential buildings and replace them based on these claims not that something is systematically and, you know, methodologically done wrong, but based on these claims of, you know, I saw it bad in a few places. Generally, it's just not done right anywhere, even though the evidence that I presented to you shows that I saw it bad in two locations and good in many locations.

And that really isn't supported. It's not exercise of statistics. It's just a claim that has no support besides speculation of the expert. And you know, the law on whether speculative evidence comes in, you know, I cover age page 6 of the motion. I don't need to rehash it there. You have to prove these defects. You have to prove that there's something more than speculation. He wants to say -- he wants to be able -- Plaintiff wants to be able to bring in a case -- the Plaintiff wants to be able to say that this is problematic or

that this entire system needs to be replaced due to the specific issues. He should not be able to say that there is a systematic problem with layers of the weather resistant barrier, because there is no evidence to support that.

I have not gone into specifically the amount of dollars at issue for this, but both of these issue are -- you know, the repair that Ed Fronapfel recommends for both of these specific issues is -- both of these things you have to take off all the stucco, fix this layer behind the stucco, put it back on. You've got the knowledge cost of repair on the records. For context, we are talking about a repair that is 1.6 million dollars before their markup. It's over two million dollars with their markup. This is most of the dollars in the case. Everything else is $3,000, $50,000.

These are issues -- and these are issues where Plaintiff is going to say not I observed, I walked around the building, I counted the areas where I thought there should be controlled joints and there weren't. We have the evidence because everybody can see the whole building, and everybody's photographed all the different sides of the building. We can see the control joints. We can see -- you know, we can see whether there's exterior -- you know, exterior weeps and flashing over window heads.

But for them to say there's a issue, it's behind the skin, you can't see it, I saw it in two places, I get to tell

you that generally it's bad everywhere -- that's not supported by the evidence, and that's what I'm asking for in this motion.

THE COURT: Okay. Thank you.

Counsel?

MS. MANSHIP: Your Honor, you brought up from the get-go the exact point that I was going to raise is that this is really a Daubert motion about the adequacy of the Plaintiff experts testing and their opinions based on inferences from that investigation.

I don't know the ability of the Court to turn a motion for summary judgment into a Daubert motion, but if the Court is inclined to decide whether or not our expert is able to give opinions, that to me -- exclusion of that kind of evidence is a Daubert motion. Judgment can't really be entered that's excluding evidence.

So I would ask that we have -- we continue this hearing and my expert be allowed to testify in person, be cross-examined. I would ask that their expert come and testify about the investigation. They have not offered any opinion saying that the investigation was not adequate by any of their experts. Their experts attended all of the testing. They've had Mr. Fronapfel's reports dated June of 2021. They had Mr. Fronapfel's deposition. There's no evidence that they've submitted saying that it was insufficient.

THE COURT: Well, what was his methodology?

MS. MANSHIP: Well, there's only four buildings and only 18 units in this complex. There's not really a statistical sampling that you can do.

THE COURT: So they didn't do that?

MS. MANSHIP: They didn't do statistical, because then you could end up randomly picking all one building. You know, there's only four buildings. Their methodology was we're going to test each and every building, which they did. They picked cuts that cover all the units. There were 44 intrusive openings that took place at this complex. And based on their experience with methodologies of construction, they picked locations where they would open up areas of concern. And then from their experience with construction, they surmised that the way that construction is done, WRB paper, you know, is rolled out, you know. And so if you're finding one sheet here and you're finding one sheet there, that roll is probably consistent.

Or the fact that at each building at this particular type of location we found that 100 percent of the locations there wasn't -- for example, the EPS foam board didn't have the tongue in groove. They found no locations of that. They found no adequate groove. The EPS foam board was inadequate with respect to the groove that are necessary where any sheathing or framing is. So it was, I think, 26 locations that they did at OSB sheathing or framing areas that have particular types of

defects. And at 26 of the locations, 100 percent of them had the EPS foam board problem or some problem with the EPS foam board. And then 20 out of those 26 had problems with the WRB.

This is a triable issue of fact. Or the Court can have a Daubert hearing where the experts explain that -- we submitted Mr. Felderman's (phonetic) affidavit where he showed the Court where you can look at the observation drawings, the photographs that are referenced in those observation drawings to see these conditions. And he highlighted in Exhibit 1D the locations. They're highlighted on these drawings. They attached some example photographs that refer to this defective condition and showed how he came up with the numbers of locations.

There's just simply a difference in the way that the stucco experts did it in his depo where he (indiscernible) only a couple. They make an argument that Mr. Fronapfel testified you just have to read the observation drawings, and you'll find the defect locations.

If you read the deposition of Mr. Fronapfel, which was Exhibit B of their -- to their motion, specifically on page 46, the question was, if I look at page 4459, which is part of your observation drawing set, I will see notes that have photo references and a description of defect conditions or damages that you found during your observation. That's what you're saying? Meaning that's what you're saying is what you have to

look at for determining locations. And Mr. Fronapfel's answer was yes. And then the next question was, there isn't anywhere besides the observation matrices that I can look to get a comprehensive summary of either the intrusive testing or the observation, correct? Answer: Outside of reading the report in full, no.

So there's also the report that you have to look at. They're relying only on another expert's interpretation of what the observation drawings say. Again, Mr. Fronapfel says that you have to look at the photo references. That was his answer to the question about photo references. And if you look at the photo references, as Mr. Felderman went through for the Court, you can see all the highlighted areas where they found issues. And again, he counted those up. 44 intrusive openings, all with various defects. 100 percent of the buildings have defects related to the stucco. 26 locations where they were testing over this sheathing where 100 percent of those 26 had EPS foam problems and 20 out of the 26 had WRB problems.

And it's from that information -- again, we're only talking about 18 units, yet here's 26 openings that they found 100 percent problems with the foam. They have surmised based on their experience in construction that you're likely to find this throughout the project. The defense admits that you can't expect a -- an association, a plaintiff in one of these cases to completely skim the building to look to see where every

defect is. So they presented nothing saying that the number of locations here is insufficient to reach these inferences. So again, I -- oh, I'm not done.

MR. HOROWITZ: Yeah, I realized, and -- I realized and started returning. I apologize.

MS. MANSHIP: Yeah. So again, this all goes to, you know, the sufficiency of the evidence. The Defense would have a chance to cross-examine Mr. Fronapfel in the trial. The jury could decide if they believed Mr. Fronapfel's testimony that all of these locations had these problem or if these, you know, things were defects. But if the Court wants to decide whether or not some information should be excluded, again, I ask that Mr. Fronapfel be here to testify. I ask that their expert be here to testify as to why he thinks that there was not enough of an investigation.

So this really comes down to, you know, their argument that there's just a few locations. Even if you accept that, you can't enter judgment that the homeowners' association is entitled to no cost of repair for the WRB issue. They admit there's at least a few locations. So what portion of that cost of repair will judgment be entered as to? There's just no way. And again, there's a triable issue as to how many locations are there.

If you look at their motion, what they initially requested was judgment that the Association cannot get any cost

of repair for WRB LFRS or the foam -- any cost of repair. Well, again, they admit that there are at least a few locations where --

THE COURT: But there's no opinion as to the cost of repairing a particular spot.

MS. MANSHIP: They have not --

THE COURT: (Indiscernible) a particular roll of, as you were saying, where the defects might be due to just a particular way -- a particular roll where the sheathing was laid. We don't even have -- we don't have an opinion that breaks it down like that, right?

MS. MANSHIP: And they have not suggested that they have a method for determining that either, though. You know, our -- there's just this triable issue of fact of how many locations. So the Association, if our expert is to be believed, as -- in his opinion about the numbers of locations, the cost estimator has provided a cost of repair estimate that basically says we have to fix all the stucco for a variety of reasons. And so that is the way that the cost of repair is set up.

A jury can decide, well, I don't think that, you know, the WRB is as bad; therefore, they don't deserve all of this cost of repair for the stucco on the WRB, but they deserve it for this other thing. Or say, the jury doesn't believe any of the other defects and only believes the WRB, but it's only a

portion of them, that's for the jury to decide how much of that cost of repair the Association is entitled to get.

We don't have to provide a cost of repair that says, well, jury, if you only believe, you know, three locations or you only believe half, you know, then this is the cost of repair for that. You know, our expert's opinion is that it is widespread. It all needs to be replaced. If the jury believe it's only 26, the jury then has information that's in the cost of repair about what it cost to fix stucco, and they can determine what the appropriate cost of that is. So it should not be --

THE COURT: Not sure how, but --

MS. MANSHIP: Okay.

THE COURT: I'm not sure how.

MS. MANSHIP: You know, based on the expert's testimony at the trial, you know, they can determine if they can do that or not. But again, this is not --

THE COURT: I'm just going to have you wrap it up because --

MS. MANSHIP: Okay, okay.

THE COURT: -- I need to finish.

MS. MANSHIP: Okay, I understand. I understand. Let me just go through my notes because I kind of got off track of where I was going. With respect to the LFRS issue, we acknowledge there was a mistake in the cost estimate and in the

report as far as adding an additional ten percent contingency. The existence of the one location where the LFRS system was found to be detective, while Mr. Fronapfel does have the opinion that you may find that in other locations, it should have just been covered under what are typical contingencies.

THE COURT: Okay.

MS. MANSHIP: So we are not making an argument for -- we are making an argument there that defect exists and may be found in other locations, but we're not asking for any additional money over and apart from a normal contingency.

THE COURT: Okay. Counsel, briefly.

MR. HOROWITZ: Very briefly. For this last issue, that is my concern is that Plaintiff saw an issue in one location. The issue is he wants to say this is an issue they should be compensated for because it is going. You're going to find more of it when you open up more. This issue is not supported.

It's not accurate that they're not asking for money for this and that it's only in contingency. They're asking for $200,000 for this issue before markups, before contingency, before everything else. And that's not an error. That's exactly what Ed Fronapfel said to do. He said ten percent of stucco costs. The expert who did the costs came up with $160,000. I don't know why they tweaked it up. There's testimony that they decided that -- they decided to change the

formula and make that 200,000 instead of -- you know, instead of 160.

But this is -- you know, this is an issue which was -- an issue just that they want a finding that they should recover for something that project-wise that they haven't even complained to have seen project-wise. There is not a cost of repair provided to repair the instance where they identified or where they claim to have identified a structural framing deficiency in the one location. They don't cost it out. They just say -- assume that you're going to repair this project-wise.

For these other issues, Mr. Felderman, who gave the affidavit, is not a designated expert. He hasn't been disclosed. He is a partner of Mr. Ed Fronapfel, or he's someone else at Mr. Fronapfel's firm or his former firm. I think he is (indiscernible) relevant here.

Mr. Felderman is coming in and saying, you know, I believe that if you were to look at every single photograph in the pile, you could find some things that SPSA firm -- you know, that you would find something that we would quibble with. If I looked at every photograph in the pile, I'm going to find some areas that -- find some areas that Plaintiff's expert would like to say looks like it might be three-eighths of an inch of foam here instead of half an inch. Looks like we're going to have a quibble with this area.

What Mr. Fronapfel testified to clearly is he likes to hide the ball. He doesn't give me a list of quantifies. He gives me or any other defendant who faces him two or three examples in his report or sometimes one of a condition he doesn't like, and he gives observation drawings. And he says if you want to see everywhere where I find it to be problematic, everything I'm going to claim at trial is wrong, every instance I'm going to claim at trial we have the wrong number of layers of building paper, you can look at my observation matrix and find that.

THE COURT: Okay.

MR. HOROWITZ: The affidavit from his partner or his associate that says you could maybe look at all my -- you could maybe look at all the photographs that I really took and find some more areas where there's a problem, that doesn't change Mr. Fronapfel's testimony. Fronapfel's the expert here, not Jeff Felderman.

There's a reference by Plaintiff's counsel to a matrix that shows an X at four buildings. I don't care if they made an X at four buildings. They are talking about -- they are talking about issues that they say occur in numerous locations. If Jeff Felderman wants to say or if Ed Fronapfel wants to say, actually, I gave you evidence that I found this issue to be deficient in five locations, great, we would deal with that. But as you've pointed out already, I had to bring

this motion because I didn't have a cost to repair for two locations, three locations, or five locations where the weather resistant barrier didn't have enough layers or where the EPS foam board wasn't the right thickness.

I have only one recommended repair. So one recommended repair for those specific issues is to repair and replace the entire stucco envelope on the building. And that is just a completely unsupported position, and it's not based on methodology. You've heard it's not based on statistics at all. It's based on Ed wanting to say -- Ed Fronapfel wants to say, well, generally, it's bad. You have evidence to support that? The evidence to support that is, as you heard today, we opened the areas of concern. We found somewhere between two and five locations that we found to be problematic. We want to do $2 million-plus worth of stucco repairs.

That's why I have to bring the motion. I don't have a cost to repair two locations, four locations, five locations and get the opportunity to say, well, this is one that's documented. This is one that's maybe not documented, but we (indiscernible) it. Frankly, if we were looking at an issue where we're repairing weather resistant barrier in five locations or five units, we could live with that, and I wouldn't have to say, hey, please knock out this claim where I have a $2 million repair for two locations, four locations, five locations. Give them 26, which there aren't, where there

is -- you know, where there's an issue where we need to go underneath the stucco and we need to fix this bottom layer of the stucco. That's really all there is to this motion.

THE COURT: Okay. All right. Well, obviously, I'm going to take these under advisement. Let's talk about your all's schedule and my schedule. So we got a -- right now the final trial management conference is set for February 10th, and trial's set for March --

UNIDENTIFIED SPEAKER: 13th.

UNIDENTIFIED SPEAKER: 13th.

THE COURT: The 13th, okay. Trial's not moving. Trial's staying put. But I'm inclined to consider moving that TMC back a little bit because it'll make the date of your joint pretrial statement due a little bit -- it'll give you a little breathing room on that, and it'll give me a little breathing room on these rulings. I'm good, but I'm not sure I'm that good as far as getting you a ruling before you all even gear up for trial, which I think's going to happen way before the (indiscernible) case. About the time the joint pretrial statement's due. I'm open to that. Do you want me to keep the date on right now for the 10th for the final trial management conference? That's fine with me. Anybody have any thoughts?

MS. MANSHIP: I'm not in the same room with Mr. Nuss, so I don't know his schedule. I'm fine with it.

Craig?

MR. NUSS: Yes, Your Honor. We can move it to a later date if they -- if it's good for the Court.

THE COURT: I'm not even sure what I have. What would we have the following --

THE CLERK: February (indiscernible).

THE COURT: That's a week, two weeks, three weeks. February (indiscernible).

MR. HOROWITZ: Your Honor, that is problematic for me. I anticipate I am going to be in -- I'm probably going to be out of states for -- out of state for some depositions on the 23rd and 24th that were pretty difficult to put together and would not be able to be in person for that.

THE COURT: Okay. Let's just keep it on the way it is for right now. And if you all -- I mean, I'll do the best I can, but you may not get the ruling before you need to file what you need to file for the TMC. That's my point. So let me do what I can do. I know what's ahead of me, and I -- you know, most of you know I don't usually just do a sentence or two. And I think these motions are obviously very -- they're very important to all the parties who are involved. So let me get my hands around this, and I'll get you a ruling just as quick as I can. All right? Y'all have a good weekend.

MS. RAI: Thank you, Your Honor.

MR. NUSS: Thank you, Your Honor.

(Proceedings concluded at 10:53 a.m.)

CERTIFICATE

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/s/
_____

JOANNA SARGENT, March 21, 2023
Transcriber

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Attorneys for Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona Operations, LLC

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,

v.

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.

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,

Case No. CV2020-008714

DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES

(Assigned to the Honorable Katherine Cooper)

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LLC, an Arizona limited liability company;

Third-Party Plaintiffs,

v.

CHAS ROBERTS AIR CONDITIONING, INC., an Arizona corporation; DESERT VISTA, INC., an Arizona corporation; GOTHIC LANDSCAPING, INC., a California corporation; HOME BUILDERS SITE SERVICES OF ARIZONA, LLC, an Arizona limited liability company; LEBLANC BUILDING CO., INC., an Arizona corporation; LIBERTY CONSTRUCTORS, LLC, an Arizona limited liability company, dba LIBERTY ARIZONA; RENCO LLC, an Arizona limited liability company, dba RENCO ROOFING; R/S SERVICE & SUPPLY, INC., an Arizona corporation; SARGON MASONRY CONSTRUCTION, LLC, an Arizona limited liability company; and DOES 1-50.

Third-Party Defendants,

COME NOW Defendants K. Hovnanian at Gallery, LLC and K. Hovnanian Operations, LLC, ("Hovnanian"), by and through undersigned counsel, and, pursuant to Ariz.R.Civ.P. 54 and A.R.S. 12-341.01(A) and 12-1364, hereby move for an award of attorney's fees as successful and prevailing parties against Plaintiff Gallery Community Association.

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

I. BASES FOR FEE AWARD

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

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

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

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

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

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

II. PERMISSIVE FEE FACTORS

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

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

A. "The merits of the claim or defense presented by the unsuccessful party."

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

B. "The litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result."

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

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

C. "Assessing fees against the unsuccessful party would cause an extreme hardship."

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

D. "The successful party did not prevail with respect to all relief sought."

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

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

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

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

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

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

III. DESCRIPTION AND SPECIFICITY OF FEES

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

IV. CONCLUSION

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

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Dated: February 24, 2023

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

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

GALLERY COMMUNITY ASSOCIATION, Plaintiff, **v.** **K HOVNANIAN AT GALLERY LLC, and K HOVANANIAN OPERATIONS, LLC,** **Defendants.**	**Case No. CV2020-008714** **DECLARATION OF DENNIS I. WILENCHIK IN SUPPORT OF ATTORNEYS FEES AND COSTS** **(Assigned to the Honorable Katherine Cooper)**

Dennis I. Wilenchik, Esq, being first duly sworn upon his oath, deposes and states under penalty of perjury as follows:

1. I am the managing partner of Wilenchik & Bartness, P.C. ("W&B"). I am lead counsel for Defendant K Hovnanian at Gallery LLC, and K Hovananian Operations, LLC ("Defendant") in this litigation. I am authorized to make this Declaration, which I make of my own personal knowledge

2. Defendant retained W&B and agreed to pay fees on an hourly basis, along with costs.

3. The parties agreed that W&B paralegals, under the supervision of attorneys, would work on this case.

4. I set the hourly charges for each attorney or paralegal who worked on this and all

matters at the firm.

1. Defendant was billed at $400.00 and then increased to $450 per hour for my time. My practice focuses on civil litigation with an emphasis on real estate and business. I am rated AV® Preeminent™ from Martindale-Hubbell®. I am a member of the Maricopa County Bar Association and the American Bar Association. I have been a nationally certified civil trial advocate by the National Board of Trial Advocacy for over 15 years. I am licensed to practice before all state and federal courts in Arizona, Texas, New York State, the District of Columbia, the Ninth Circuit Court of Appeals and the United States Supreme Court.

5. W & B used attorneys to work on this case as follows:

- John D. "Jack" Wilenchik was billed at $200.00 per hour for his time. He is a litigation and trial lawyer who handles cases in areas including business and employment law, real estate, civil rights, law enforcement, and victim's rights mattes. He is licensed to practice in state and federal court in Arizona, the 9th Circuit, the 10th Circuit, the U.S. Supreme Court and the U.S. Tax Court. He has been named to the national Superlawyers list of "Top Rated Attorneys" by Thomas Reuters.
- Janis G. Pelletier is an Associate Attorney at W&B and her billable hourly rate is $370.00 per hour. She received her Juris Doctor degree from Arizona State University and has been licensed to practice in Arizona since 1998. She is a commercial litigator with an emphasis on real estate and construction law.
- Former Associate Attorney Christopher J. Feasel is an experienced litigator who has tried more than 70 cases since first becoming licensed in California in 2003. He was admitted to the State Bar of Arizona in 2016 and is licensed to practice in all state and federal courts in Arizona. His billable rate while working on this case was $250.00 and then increased to $275.00.
- Former Associate Attorney Lawrence J. Felder was a Senior Attorney is retired. He routinely billed at $255.00 per hour. He received his Juris Doctor from Arizona State University's Sandra Day O'Connor College of Law in 1988. He

was admitted to the State Bar of Arizona in 1999 and before that, practiced in Massachusetts and Rhode Island. His areas of practice included Complex Commercial Litigation, Commercial Arbitration, Commercial Bad Faith, Commercial Mediation, Commercial Torts, Commercial Transactions, Commercial Litigation, Commercial Fraud and Commercial Liability.

- Former Associate Attorney Robert J. Dilk received his Juris Doctor from Arizona State University's Sandra Day O'Connor College of Law in 2015. He was admitted to the State Bar of Arizona in 2015. His areas of practice include construction law, and patent and trademark law. His billable hourly rate was $150.00 per hour.
- Former Associate Attorney Barbara J. Stansil received her Juris Doctor from William and Mary Law School in 2014. She was admitted to the State Bar of Arizona in 2018. Her areas of practice include construction law and criminal law. Her billable hourly rate was $175.00 and was increased to $200.00.
- Former Associate Attorney Matthew Moosbrugger received his Juris Doctor from Arizona State University. He was admitted to the State Bar of Arizona in 2019. His areas of practice include labor and employment. His billable hourly rate was $175.00 per hour.

6. W&B used paralegals to work on this case, which added value, reduced costs to the client and their projects on this case were not ministerial in nature.

- Victoria M. Stevens, Senior Paralegal, has been in the legal profession for more than 30 years. She received her Juris Doctor from Arizona State University's Sandra Day O'Connor College of Law in 1991 and works in the areas of e-discovery, commercial litigation, bankruptcy, appeals and collections. She has been at the firm since 2009. Her billable hourly rate while working on this case was $175.00 and then increased to $200.00.
- Tammy S. Spears, Paralegal, has been in the legal profession for more than 30 years. She received her Associates' Degree in Paralegal

Studies from Kaplan University. She has worked for more than a decade with the Coconino County Attorney's Office on several high-profile felony cases and works with construction defect, criminal law, commercial litigation, bankruptcy, appeals, and collections. She has been at the firm since 2021. Her billable hourly rate while working on this case was $150.00.

- Brian B. Bush is a Law Clerk at W&B and his billable hourly rate is $200.00 per hour. He received his Juris Doctor degree from Missouri Saint Louis University School of Law and was licensed to practice in Florida in 2006. His areas of practice include construction defect and criminal defense.
- Docketing Paralegal Toni G. Boragina has been with W&B for more than 5 years. She has been a docketing paralegal for more than 20 years. Her billable hourly rate is $125.00 per hour.
- Former Paralegal Mario A. Compos worked on this case and is no longer with the firm. He has been a paralegal for more than 34 years and received his Juris Doctorate degree from Santa Clara University School of Law in 1980 and works in the areas of commercial law, civil litigation, and employment law. His billable hourly rate while working on this case was $175.00.
- Former Paralegal Jennifer R. Alvarez worked on this case and is no longer with the firm. She has been a paralegal for more than 10 years. She has worked and/or continues to work in the area of commercial litigation, with an emphasis in real estate law, construction defect, contract law and employment law, among others. Her billable hourly rate was $150.00 per hour.
- Former Paralegal Jane Eiben worked on this case. She is no longer with the firm. She received her Juris Doctor from Summit Law School. Her billable hourly rate was $175.00 per hour.

- Former Paralegal Shelly N. Witgen worked on this case and has been in the legal profession for approximately 15 years. She received her Associates Degree in Paralegal Studies from Phoenix College in 2015 and her national "Certified Paralegal" designation through NALA in 2016. Shelly has worked in the areas of personal injury / civil litigation. Her billable hourly rate was $150.00.

7. Westlaw is being included as attorneys' fees, which is allowed as recoverable as an element of an award of attorneys' fees, rather than as an overhead expense. *Ahwatukee Custom Ests. Mgmt. Ass'n, Inc. v. Bach*, 193 Ariz. 401, 403–04, 973 P.2d 106, 108–09 (1999). These fees were necessary and reasonable for the research done in this case.

8. The statement of attorneys' fees incurred by W&B are attached to this Declaration as **Exhibit 1**. The statement reflects the specific charges, dates incurred and responsible attorney and paralegal time involved related to this issue presented to the court. These are all self-explanatory, were reasonable and necessary to obtain the final result.

9. The detailed breakdown of the costs associated with this case are included in Exhibit 1 and were necessary to further the resolution of this matter.

10. The total hours expended on this matter by Wilenchik & Bartness were 785.15. The total fees for Wilenchik & Bartness were **$159,311.22**. Total costs incurred in this matter were **$86,360.20.**

11. Based upon the foregoing, Defendant is requesting that the total amount of fees and costs expended to complete this matter be awarded.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED: February 23, 2023.

/s/ Dennis I. Wilenchik
Dennis I. Wilenchik, Esq.

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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,

v.

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.

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,

Case No. CV2020-008714

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES

(Assigned to the Honorable Katherine Cooper)

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LLC, an Arizona limited liability company;

Third-Party Plaintiffs,

v.

CHAS ROBERTS AIR CONDITIONING, INC., an Arizona corporation; DESERT VISTA, INC., an Arizona corporation; GOTHIC LANDSCAPING, INC., a California corporation; HOME BUILDERS SITE SERVICES OF ARIZONA, LLC, an Arizona limited liability company; LEBLANC BUILDING CO., INC., an Arizona corporation; LIBERTY CONSTRUCTORS, LLC, an Arizona limited liability company, dba LIBERTY ARIZONA; RENCO LLC, an Arizona limited liability company, dba RENCO ROOFING; R/S SERVICE & SUPPLY, INC., an Arizona corporation; SARGON MASONRY CONSTRUCTION, LLC, an Arizona limited liability company; and DOES 1-50.

Third-Party Defendants,

COME NOW Defendants K. Hovnanian at Gallery, LLC, and K. Hovnanian Operations, LLC ("Defendants"), by and through undersigned counsel, and submit the following as their Reply in Support of their Motion for Attorney's fees. Defendants are entitled to an award of attorney's fees for the reasons set forth in the Motion and herein.

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

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

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

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

II. MERITS OF THE CLAIMS

Plaintiff has argued in its response that there was not ruling "on the merits" since the summary judgment was largely based on Plaintiff's lack of authority to pursue Implied Warranty of Workmanship and Habitability claims. Plaintiff argued that the Court's ruling was based on standing and not the "merits" of the case.

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

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

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

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

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

III. WHETHER EFFORTS WERE SUPERFLUOUS

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

IV. WHETHER AN AWARD WOULD CONSTITUTE AN EXTREME HARDSHIP

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

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

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

V. TOTAL RELIEF

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

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

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

VI. NOVEL LEGAL QUESTION

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

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

VII. DISCOURAGING PURSUIT OF LEGITIMATE CLAIMS

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

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

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

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

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

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

IX. REASONABLENESS OF FEES

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

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

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of reasonableness has been identified.

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

X. COSTS RELATED TO MOTION TO PRECLUDE EXPERT REPORTS

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

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

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

XI. FEES WERE INCURRED AND ARE RECOVERABLE

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

XII. STATEMENT OF COST ITEMS

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

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These include the following items:

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

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

  - 1.5 hours - $90.00 ($60/hour)
  - Transcript - $350.00
  - Exhibit - $45.80
  - Condensed - $25.00
  - Processing and Compliance - $50.00

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

XIII. CONCLUSION

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

Dated: March 22, 2023

LORBER, GREENFIELD & POLITO, LLP

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Original of the foregoing e-filed
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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;

v.

KHOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; KHOVNANIAN ARIZONA OPERATIONS, LLC, an Arizona limited liability company; KHOVNANIAN DEVELOPMENTS OF ARIZONA, INC., an Arizona corporation; KHOVNANIAN COMPANIES OF ARIZONA, LLC, an Arizona limited liability company; JOHN DOES I-X AND JANE DOES I-X, WHITE COPRPORATIONS I-X ; BLACK PARTNERSHIPS I-X; AND GRAY LIMITED LIABILITY COMPANIES I-X,

Defendants.

KHOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; KHOVNANIAN ARIZONA OPERATIONS, LLC, an Arizona limited liability company; KHOVNANIAN

NO. CV2020-008714

THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S STATEMENT OF COSTS

(Assigned to the Honorable Katherine Cooper)

DEVELOPMENTS OF ARIZONA, INC., an Arizona corporation; KHOVNANIAN COMPANIES OF ARIZONA, LLC, an Arizona limited liability company;

Third-Party Plaintiffs

v.

CHAS ROBERTS AIR CONDITIONING, INC., an Arizona corporation; DESERT VISTA, INC., an Arizona corporation; GOTHIC LANDSCAPING, INC., a California corporation; HOME BUILDERS SITE SERVICES OF ARIZONA, LLC an Arizona limited liability company; LEBLANC BUILDING CO., INC., an Arizona corporation; LIBERTY CONSTRUCTORS, LLC, an Arizona limited liability company DBA LIBERTY ARIZONA; RENCO LLC, an Arizona limited liability company; dba RENCO ROOFING; R/S SERVICE & SUPPLY, INC., an Arizona corporation; SARGON MASONRY CONSTRUCTION, LLC, an Arizona limited liability company; and DOES 1-50.

Third-Party Defendants.

COMES NOW, Third-Party Defendants Renco LLC dba Renco Roofing and Desert Vista, Inc.'s ("Third-Party Defendants"), by and through undersigned counsel, respectfully submit this Statement of Taxable Costs in conjunction with Third-Party Defendants' Joint Application for Attorneys' Fees, Expert Fees, and Costs.

1. The undersigned is the attorney for the party in whose favor Judgment in this action has been rendered and has personal knowledge of the following itemized costs, which were

reasonable and necessarily incurred by or on behalf of Third-Party Defendants in preparing to defend claims against them.

Filing or appearance fee	$396.96
Deposition Fees	$5,946.55
Mediation Fees	$2,708.32
TOTAL RECOVERABLE TAXABLE FEES:	$9,051.83

2. All the witnesses to whom fees were paid were necessary and material witnesses.

3. The costs set forth above are correct based on review of Third-Party Defendants' litigation invoices and billing records obtained from the firms' financial records kept in the ordinary course of its business. These costs were reasonably and necessarily incurred.

4. Third-Party Defendants incurred costs and are properly taxable pursuant to Rule 54(f) of the Arizona Revised Statutes, A.R.S. § 12-332 to 12-341.

DATED this 24th day of February, 2023.

RAI DUER P.C.

By: */s/ Rina Rai*
Rina Rai
Mohamad H. Tokko
Attorneys for Renco Roofing and Desert Vista, Inc.

ORIGINAL of the foregoing e-filed
This 24th day of February, 2023, with:

Clerk of the Court
Maricopa County Superior Court
201 W. Jefferson
Phoenix, Arizona 85003

COPY of the foregoing e-delivered
This 24th day of February, 2023, to:

The Honorable Katherine Cooper
Maricopa County Superior Court
East Court Building – 711
101 W Jefferson
Phoenix, AZ 85003

COPIES of the foregoing e-mailed
This 24th day of February, 2023, to:

(See Attached Service List)

By: *<u>/s/ Tracy L. O'Brien</u>*

Service List

Gallery Community Association v. K. Hovnanian at Gallery, LLC

CV2020-008714

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