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**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

**APPELLEES' RESPONSE TO
AIRE ON MCDOWELL
COMMUNITY ASSOCIATION'S
MOTION FOR LEAVE TO FILE
AMICUS BRIEF**

COME NOW Appellees K. Hovnanian at Gallery, LLC, and K. Hovnanian
Arizona Operations, LLC ("Appellees") pursuant to Arizona Rule of Civil Appellate

Procedure 16, by and through undersigned counsel, and hereby respond in opposition to Movant Aire on McDowell Community Association's Motion for Leave to File Amicus Brief. Movant acknowledges that its proposed Amicus Brief expands on the arguments set forth in the original briefing.

Brief expands on the arguments set forth by the parties to the case. The Court should not permit this Movant to expand the arguments set forth by these parties.

Arizona's courts have refused to evaluate new and expanded arguments in Amicus Briefs and noted that "[A]micus curiae are not permitted to create, extend, or enlarge the issues." *City of Tempe v. Prudential Ins. Co. of Am.*, 109 Ariz. 429, 432, 510 P.2d 745, 748 (1973); citing *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953); *City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, Inc.*, 99 Ariz. 270, 408 P.2d 818 (1965).

Here Movant has expressly asked the Court to allow it to file an Amicus Brief in order to expand on the arguments set forth by the Appellant. Movant's proposed Amicus Brief attempts to reargue Appellant's position through a major expansion of a statutory argument and another completely new argument.

Movant's proposed brief includes a lengthy argument that the statute regarding requirements for filing a "homeowners association dwelling action" under A.R.S. § 33-2002. The Movant's proposed Amicus Brief includes a discussion from pages 11 through 27 of Movant's argument that acquisition of common area

property conveys a right to a planned community association to bring an Implied Warranty cause of action. Movant's argument is wrong and Movant's argument significantly expands on the arguments set forth by Appellant in its brief. Appellant does make a similar argument in its Amended Opening Brief at pp. 15 through 17, and incorporated again at page 34. However, Appellant does not address this argument at length and relies largely on arguments that it should be permitted to raise claims in a representative capacity. Movant's discussion is a significant expansion of the argument set forth in the Appellant's briefing which makes new claims about the intent and meaning of the statutes. If these expanded arguments are added to the record, Appellees will be forced to incur unnecessary expense to respond with an explanation of the misinterpretation of statutes by Movant.

Movant raises another argument that expands on the original briefing in its proposed Amicus Brief at pages 41 through 53. Here, the Movant makes an argument regarding the association acquiring its own implied warranty right through acquisition of common property. This argument regarding the acquisition of rights is an expansion over the issues raised by Appellant in its brief. Again, a response to the Amicus Brief would require Appellees to incur expense to respond to and rebut this new argument.

Movant's claims were resolved against it by Summary Judgment on January 2, 2024. Movant can raise its new and expanded arguments in that pending action to

the extent they are appropriate. Movant's own prospects for appeal of the Judgment in its own actions are not necessarily impacted by the instant Appeal, as the arguments for allowing Appellee to pursue the claims are different from those advanced by Movant and since this Court may find those arguments were waived.

For these reasons, Appellees respectfully request that this Court deny the Motion for Leave to File Amicus Brief.

Dated: February 7, 2024

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