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11 **IN THE COURT OF APPEALS**

12 **STATE OF ARIZONA**

13 **DIVISION ONE**

14 ROBERT R. HAWK and CECILIA J.
15 HAWK,

16 Plaintiffs/Appellees,

17 vs.

18 PC VILLAGE ASSOCIATION, INC.,

19 Defendant/Appellant.

No. 1 CA-CV 12-0362

No. CV2911-00776

Coconino County Superior Court

**APPELLANT'S RESPONSE IN
OPPOSITION TO MOTION
FOR LEAVE TO FILE AMICUS
CURIAE BRIEF**

20 Defendant/Appellant PC Village Association, Inc., opposes the Arizona
21 Association of REALTORS' (AAR's) Motion for Leave to File the Amicus Brief it
22 submitted for this Court's consideration. Although a proper amicus brief can assist
23 the Court, the proposed brief submitted by AAR merely duplicates the arguments
24 made by Plaintiffs/Appellees in their Answering Brief, which is fundamentally
25 contrary to the purpose for which amicus briefing is allowed. For the reasons that
26 follow, Appellant respectfully requests the Court to deny AAR's Motion for Leave
27 to File its Amicus Brief.
28

1 **I. LAW AND ARGUMENT.**

2 The Comment to Rule 16, ARCAP,¹ admonishes the Court to not permit
3 amicus briefs that simply advocate a particular litigant’s case and/or duplicate or
4 extend the length of that party’s brief. The Comment provides in pertinent part:

5 [A]micus curiae should keep in mind the purpose of an amicus
6 brief. As the name implies, an amicus curiae brief should assist
7 the Court, **not advocate a particular litigant’s case. Ideally, it
8 should not duplicate the briefs of the parties, nor merely
9 extend the length of a litigant’s brief. Rather, it should
10 provide a broader, more abstract presentation of the law
11 that is not narrowly tied to the facts of the case.** It should
12 provide background and context for the Court’s decision.

13 (Emphasis added).² Likewise, Chief Judge Posner, of the Seventh Circuit, has
14 highlighted the proper role of an amicus, noting that “The vast majority of amicus
15 curiae briefs are filed by allies of litigants and duplicate the arguments made in the
16 litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such
17 amicus briefs should not be allowed. They are an abuse. The term ‘amicus curiae’
18 means friend of the court, not friend of a party.” *Ryan v. Commodity Futures*
19 *Trading Commission*, 125 F.3d 1062, 1063 (7th Cir.1997); *see also Long v. Coast*
20 *Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999). As shown below, AAR’s
21 proposed amicus brief contravenes the purpose of an amicus brief in every respect.

22 **A. AAR’s Proposed Brief Duplicates Appellees’ Arguments.**

23 A comparison of the two briefs illustrates that the arguments raised in the
24 two briefs are virtually identical and duplicative. AAR’s arguments (in CAPS)

25 ¹ The 1998 amendments to Rule 16 permitted amicus briefs to be filed either
26 by leave of court *or* with consent of all parties. The Comment makes clear that
27 even where all parties consent, the Court should not allow an amicus brief that does
28 not advance the purposes for which amici are permitted to appear. The
amendments also imposed a length limitation of 35 pages for a monospaced
typeface or 12,000 words for a proportionately spaced typeface. It is not clear
whether AAR’s proposed brief meets the length limitation of Rule 16(a), because it
does not contain a certificate of compliance indicating which typeface is used and
whether it complies with the rule.

² The Comment notes that another legitimate ground for permitting an
amicus brief is where one of the parties is not competently represented. Here,
Appellees are represented by competent counsel, yet they would receive the benefit
of a second set of attorneys to advocate for them if the Court grants AAR’s motion.

1 compared with Appellees’ arguments (Title Case) are as follows:

2 **AAR’s’ First Argument:**

3 I. A.R.S. § 33-1808 OPERATES PROSPECTIVELY, NOT
4 RETROACTIVELY, TO EVENTS THAT AROSE AFTER ITS ENACTMENT.

5 **Appellees’ First Argument:**

6 II. A.R.S. § 33-1808 Was Not Retroactively Applied. Rather It Was
7 Prospectively Applied with the Operative Events Occurring Four Years After the
8 Legislation Was Enacted.

9 **AAR’s Second Argument:**

10 II. A.R.S. § 33-441 APPLIES TO THE CC&R’S OF PC VILLAGE.

11 **Appellees’ Second Argument:**

12 III. A.R.S. § 33-441 Applies to Any Instrument Affecting The Transfer Or
13 Sale of Any Interest in Real Property and the CC&R’s are Properly Included.

14 **AAR’s Third Argument:**

15 III. NEITHER A.R.S. § 33-1808 NOR A.R.S. § 33-441 CONSTITUTES
16 AN UNCONSTITUTIONAL IMPAIRMENT OF A CONTRACTUAL
17 RELATIONSHIP.

18 **Appellees’ Third Argument:**

19 IV. Neither A.R.S. § 33-1808 NOR A.R.S. § 33-441 Constitute an
20 Unconstitutional Impairment of a Contractual Relationship.

21 In addition to making the same three central arguments as Appellees,
22 virtually all of the sub-arguments (A, B, etc.) are the same in both briefs. Most
23 importantly, the *content* of the arguments is virtually the same. Thus, AAR’s
24 proposed brief improperly duplicates Appellees’ Answering Brief.

25 **B. AAR’s Proposed Amicus Brief Merely Extends The Length Of**
26 **Appellees’ Brief.**

27 In addition to the fact that duplicating arguments necessarily “extends the
28 length” of Appellees’ brief, almost all of the same cases and statutory provisions
are relied upon in the two briefs. The only difference is that AAR’s proposed brief
adds a few cases and secondary authorities. Thus, the proposed amicus brief, if
accepted, would do exactly what amicus briefs are prohibited from doing – it would

1 give Appellees a “second bite at the apple” by allowing them nearly twice the
2 amount of space for argument and the opportunity to be heard two times. At the
3 same time, it would require Appellant to expend substantially more time and
4 resources to address what are, in effect, two Answering Briefs.

5 C. **AAR’s Proposed Amicus Brief Is Narrowly Tied to the Facts of This**
6 **Case and Expressly Advocates Appellees’ Position.**

7 Aside from a couple of paragraphs providing statistics,³ AAR’s proposed
8 brief specifically advocates for Appellees’ position and is tied completely to the
9 facts of this particular case. It in no way provides the “broader, more abstract
10 presentation of the law” for which amicus briefs are generally recognized. Thus,
11 the proposed brief fails to advance the purpose of amici in this regard as well.

12 **II. CONCLUSION.**

13 In sum, AAR’s Proposed Amicus Brief advances *none* of the purposes for
14 which amicus briefs are permitted. It specifically advocates for Appellees’
15 position, narrowly ties its analysis to the facts of this case, and duplicates all of the
16 arguments made by Appellees, which improperly extends the length of Appellees’
17 Answering Brief and gives them “two bites at the apple.” For these reasons,
18 Appellant respectfully requests the Court to deny AAR’s Motion for Leave to File
19 its Amicus Curiae Brief.

20 DATED this 22nd day of October, 2012.

21 JONES, SKELTON & HOCHULI, P.L.C.

22 By /s/ Lori L. Voepel

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3 See pages 19 and 23 of proposed brief.