IN THE SUPREME COURT OF THE STATE OF NEVADA

ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC., also known as ELK POINT COUNTRY CLUB, INC., a Nevada non-profit, non-stock corporation,

Appellant,

vs.

K.J. BROWN, L.L.C., a Nevada limited liability company; and TIMOTHY D. GILBERT and NANCY AVANZINO GILBERT, as trustees of the TIMOTHY D. GILBERT AND NANCY AVANZINO GILBERT REVOCABLE FAMILY TRUST DATED DECEMBER 27, 2013,

Respondents.

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Elizabeth A. Brown
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Supreme Court Case No. 82484

District Court Case No. 2020-CV-00124

APPEAL
From the Ninth Judicial District Court
The Honorable Nathan Tod Young

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS BRIEF

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I. The Amicus Brief Fully Complied with NRAP 29.

Respondents erroneously argue that the Amicus Brief "egregiously violates NRAP 29(e) because it exceeds the 15-page limit described in that rule." That argument is based on a misunderstanding of the Rules.[1] NRAP 29(e) provides that "an amicus brief may be no more than one-half the maximum length authorized by these Rules for a party's brief." NRAP 32(a)(7)(A) in turn provides two alternative length limitations for a party's brief: (i) a page limit of 30 pages; or (ii) a type-volume limitation of 14,000 words. As the Brief's Certificate of Compliance stated, it contains 6,055 words, well within NRAP 29(e)'s 7,000-word limit.

II. Proposed Amici Have an Appropriate Interest in the Litigation and their Brief Is Helpful.

Citing foreign authority, Respondents argue that the Court should deny the Motion because Proposed Amici are not disinterested. That is not the standard and no cause to deny the Motion.

A. Interested Individuals May Properly Participate as Amici Curiae.

A court has broad discretion to grant or refuse a prospective amicus participation. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995). Amici may be "***either***

[1] Propose amici and their counsel take exception to the uncivil accusations of "blatant" violations of this rule and "bad faith litigation tactics," as well as other *ad hominem* attacks, which are notably based on their misunderstanding of the Rules.

impartial individuals or interested parties." *See Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986). Courts should consider whether the briefing "supplement[s] the efforts of counsel, and draw[s] the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus. Mont*., 694 F.2d 203, 204 (9th Cir. 1982). This Court has endorsed the view that a third party can usually contribute most effectively and expeditiously by an amicus brief, and is favored as an alternative to intervention on appeal. *Hairr v. First Jud. Dist. Ct.*, 132 Nev. 180, 188, 368 P.3d 1198, 1203 (2016).

The authority Respondents cite in support of their position is foreign, inaccurately presented, and inapposite. For example, they quote *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) but **omit the holding**, which actually contradicts their quoted passage. They quote:

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party.

But Respondents omit the following passage, which provides the Seventh Circuit's actual holding, pivots and states: "We are beyond the original meaning now; ***an adversary role of an amicus curiae has become accepted***.… An ***amicus brief should normally be allowed*** when a party is not represented competently or is not represented at all, when the amicus has an interest … that may be affected by the

decision in the present case…." *Id.* (citing *Miller-Wohl Co. v. Comm'r of Labor & Industry*, 694 F.2d 203 (9th Cir.1982) (per curiam)).

Respondents likewise cite a New Jersey trial court decision for the proposition that where the proposed amicus is "an interested party or to be an advocate of one of the parties to the litigation, leave to appear amicus curiae should be denied." Opp'n at 3 (citing *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993)). But that court was specifically considering amicus participation at the "trial level, where issues of fact as well as law predominate, [and] the aid of amicus curiae may be less appropriate than ***at the appellate level where such participation has become standard procedure***." *Id.* (emphasis added). That Proposed Amici have an interest in the outcome of the litigation is no cause to deny the Motion, as the standard Respondents urge is not the law.

B. Proposed Amici Have a Sufficient, Appropriate Interest.

Notably, Plaintiffs-Respondents, like Proposed Amici,[2] are Property Owners. Yet, though Respondents are prosecuting this case, they seek to prevent Proposed Amici from having any voice in the action. The length limitations of the Reply do not permit a response to all of Respondents' straw-man arguments about Prospective Amici's interests, which are largely merits-based and circular – arguing that

[2] Val Licon has sold his property during the pendency of this litigation and is no longer a Proposed Amicus Curiae. Jim and Cathy Peck have also withdrawn their participation.

Proposed Amici lack certain rights, *if* the Court adopts Respondents' position on appeal.[3] The challenged injunction restricts Proposed Amici's ability to rent their properties and caused the denial of their rental renewal applications. Though they share Appellants' position, they have distinct interests and are not represented.

Finally, Respondents' allegations that Proposed Amici have not be "truthful" about their interest are unfounded and based exclusively on the problematic declaration of Nancy Gilbert, which improperly adds eleven pages of factual claims and non-attorney legal analysis to the Opposition. In it, she concludes that various Proposed Amici lack a protectable interest, including spouses of title record owners, or owners, such as the Dantes (comprising three Proposed Amici) and the Harts and Potts (comprising four Proposed Amici – Brooke Hart, Roianne Hart, Brooke Hart, Roianne Hart (her mother), Eleanor Pott (Roianne's sister), and Andrea Pott (Eleanor's daughter)) who own their properties through an entity. There is no legal basis to discount these Amici, let alone level accusations of dishonesty. Regardless, even Respondents' flawed analysis concedes that at least eight Proposed Amici have a protectible interest. As such, and at a minimum, the Court should accept the Brief on behalf of those eight – it is no cause to the deny the Motion altogether.

[3] For example, Respondents argue that Proposed Amici have not been damaged because the appealed-from injunction is stayed. That, of course, completely ignores the obvious interest in urging the Court to vacate the stayed injunction on appeal and that they will be seriously harmed if the injunction goes into effect.

B. The Brief Is Helpful to the Court.

Respondents argue that the Court should deny the Motion because they disagree with Proposed Amici's position on the merits. *See* Opp'n at 3-6. Whether Respondents agree with the merits is irrelevant, however, to whether the Court should allow the Brief. The Court should consider whether the Brief "supplement[s] the efforts of counsel, and draw[s] the court's attention to law that escaped consideration." It does. The Brief is not simply a joinder to the Opening Brief, but rather explores several relevant issues, including that the Corporation is not an HOA but rather a nonprofit corporation, and further analysis of the governing law and Bylaws at issue. It should be permitted for the Court's consideration.

III. The Denial of Proposed Amici's Motion to Intervene Is Irrelevant.

This Court denied Proposed Amici's earlier motion to intervene because the rule and statute governing intervention do not provide for intervention during an appeal. *See* May 6, 2021 Order. In contrast to intervention, however, the Rules specifically provide for the participation of amici and the filing of amicus briefs on appeal. The denial of the motion to intervene is irrelevant to the current Motion.

DATED: December 6, 2021

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On December 6, 2021, I caused to be served a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO INTERVENE** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Kelly H. Dove
An Employee of SNELL & WILMER L.L.P.

4861-7558-4773