

January 28, 2005

***Via FedEx No. 8473 1889 7200***

Cathy Catterson  
Clerk of the Court  
U.S. Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103-1526

**RE: *Joseph A. Pakootas v. Teck Cominco Metals, Ltd.*, No. 04-80091**

To the Honorable Chief Judge and Circuit Judges:

The National Mining Association (NMA), the Mining Association of Canada (MAC) and the Canadian Chamber of Commerce (Canadian Chamber) jointly, and the Chamber of Commerce for the United States (U.S. Chamber) have each recently submitted "letters of support" to the Court in *Joseph A. Pakootas v. Teck Cominco Metals, Ltd.*, No. 04-80091, characterizing themselves as amicus curiae and presenting argument in support of Petitioner Teck Cominco Metals, Ltd.'s (TCM) petition for interlocutory review.<sup>1</sup> For the reasons stated below, Respondents the State of Washington, Joseph A. Pakootas and Donald L. Michel (Respondents) respectfully ask the Court to disregard these letters as inappropriate submissions that violate Federal Rule of Appellate Procedure (FRAP) 29 governing amicus participation.

The U.S. Chamber cites the Ninth Circuit Advisory Committee Note to Circuit Rule 29-1 and suggests it allows them to participate as amicus, without prior consent of the court or the parties, by filing a letter containing legal argument instead of a brief. See Letter from Carter G. Phillips and Marinn F. Carlson to Cathy Catterson, Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit at 1, January 7, 2005 (U.S. Chamber Letter). Yet the U.S. Chamber misconstrues the Circuit's Advisory Committee Note, which properly construed merely allows amicus to submit a letter joining in a party's brief "in lieu of" submitting different or additional legal argument in a separate amicus brief. See Circuit Advisory Committee Note to Rule 29-1 (West 2005). Nowhere in FRAP 29 or Circuit Rule 29-1 is a would-be amicus allowed to incorporate legal argument into a letter instead of a brief, and then file that letter at will without the consent of the court or the parties.

Instead, FRAP 29 requires that a nonparty wishing to participate as amicus file a motion seeking leave of the court or, in the alternative, obtain the consent of all parties. Respondents

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<sup>1</sup> On November 22, 2004, TCM timely petitioned for permission to appeal the trial court's ruling under 28 U.S.C. § 1292(b). On December 6, 2004, Pakootas and Michel timely answered that petition for review and urged that it be denied. After the parties completed their submissions on the subject of review by the United States Court of Appeals, the purported amici submitted these additional letters. First, on December 22, 2004, the NMA submitted a letter offered as amicus curiae and supporting TCM's position. Then on January 7, 2005, the U.S. Chamber submitted its letter as amicus curiae supporting TCM's position. Finally, on January 17, 2004, the MAC and the Canadian Chamber submitted their joint amici letter supporting TCM's position.

certainly have not consented to any amicus participation here. The purported amici have also failed to file any motion seeking leave of the Court, thereby denying Respondents the opportunity to oppose such participation. In addition, amicus briefs when submitted are required to follow brief format per FRAP 32, as well as additional requirements for form and content that apply specifically to amicus briefs.<sup>2</sup> See FRAP 29(c).

Importantly, submission of amicus briefs at this point would be inappropriate procedurally, as it is premature at best. The Federal Rules of Appellate Procedure lack any provision allowing for amicus participation on a petition for review, prior to the Court even accepting review and setting a briefing schedule. FRAP 29 provides a 7-day timeline for filing an amicus brief centered on the filing of a "principal brief." See FRAP 29(e). The Advisory Committee Notes to FRAP 29 make clear that a "principal brief" is produced on the briefing schedule set by the Court. See Advisory Committee Notes to Rule 29 at 1998 amendments, subdivision (e) (West 2004 rev. ed.) (noting that the 7-day period was chosen because it "is short enough that no adjustment need be made in the opposing party's briefing schedule" and that this affords the opposing party "sufficient time to review arguments made by the amicus and address them in the party's responsive pleading"). Although the Advisory Committee Notes make allowance for an amicus brief in a situation where a "principal brief" is not filed, the example referenced is on petition for rehearing and not on petition for review, and it is further made clear that "[i]n such instances the Court will establish the filing time for the amicus." *Id.* Purported amici have here skipped right past this required procedure.

Also, by their own concession, purported amici represent business interests with a stake in the outcome of this litigation,<sup>3</sup> and consequently their participation would abuse the traditional role of amicus curiae. See *Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry, State of Mont.*, 694 F.2d 203, 204 (9<sup>th</sup> Cir. 1982) (citing the classic role of amici as "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration"). See also, *Sciotto v. Marple Newtown School Dist.*, 70 F. Supp. 2d 553, 555 (E.D. Penn. 1999) (noting amicus should be impartial and that "amicus participation is not appropriate" when amici represent business interests that will ultimately and directly be affected by the court's ruling).

Respondents would also oppose the scope of the purported amici participation here. The U.S. Chamber makes factual assertions not contained in the record, with no support save citation to a law review article. See U.S. Chamber Letter at 4. It would be inappropriate for the

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<sup>2</sup> FRAP 29 imposes specific requirements on the filing of amicus briefs. Among other things, amicus briefs must state "the reason why an amicus brief is desirable" and must contain a "concise statement of . . . the source of its authority to file." See *FRAP 29(b)(2) & (c)(3)*.

<sup>3</sup> See, e.g., the U.S. Chamber Letter at 2, where the U.S. Chamber characterizes itself as "the world's largest business federation" and states its members are "likely to suffer from" the district court decision being appealed. See also Letter from Harold P. Quinn, Senior VP & General Counsel to NMA, to Cathy Catterson, Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit at 1 (NMA Letter), where the NMA describes itself as a national trade association representing manufacturers, transporters and other business interests that own or operate facilities near the U.S.-Canadian border, and explains that the district court ruling at issue could set a precedent triggering lawsuits that could have a "devastating impact" on its members.

Chamber to provide new evidence even if granted amicus status - assuming such a party prerogative requires intervention. *See Miller-Wohl*, 694 F.2d at 204. Moreover, the Chamber itself acknowledges that this matter is at such an early stage in the litigation that the factual record has not yet been compiled by the district court. *See U.S. Chamber Letter* at 2. The Chamber's need to rely on facts outside the record suggests that review of the trial court's decision is premature. Prior to the Court allowing amici to participate then, Respondents should have the opportunity to make such arguments in opposition. In exercising its discretion, the Court should also decline hearing motions that seek amicus status until the Court first makes a decision on whether it will grant interlocutory review.

Allowing amicus to appoint themselves and to file "letters of support" in whatever format they choose frustrates the very purpose of FRAP 29, and puts party opponents at a severe disadvantage by cutting out any opportunity for response. Respondents therefore respectfully request that the Court disregard the letters submitted and further inform the U.S. and Canadian Chambers of Commerce, the NMA, and the MAC of the applicable rules limiting amicus curiae participation.

We thank the Court for its prompt attention to this matter.

Respectfully Submitted,

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