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pro se

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**

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|--------------------------|---|------------------------------------|
| LUIS SANCHO, et al., |) | Civil No. CV08-00136 HG |
| |) | |
| Plaintiffs, |) | OPPOSITION TO “MOTION |
| |) | FOR LEAVE TO FILE AMENDED |
| vs. |) | BRIEF <i>AMICUS CURIAE</i>” |
| |) | |
| US DEPARTMENT OF ENERGY, |) | |
| et al., |) | |
| |) | Date: September 2, 2008 |
| Defendants. |) | Time: 10:00 A.M. |
| _____ |) | Court: Hon. Helen Gillmor |

**OPPOSITION TO “MOTION FOR LEAVE TO FILE
AMENDED BRIEF *AMICUS CURIAE*”**

Plaintiff Walter L. Wagner has no opposition to Mr. Martin S. Kaufmann, Esq., or Atlantic Legal Foundation, appearing *Pro Hac Vice* to argue whether leave should be granted to allow his clients opportunity to file their “Amended Brief *Amicus Curiae*”, in light of Mr. Kaufmann’s extensive bar admission record on the U.S. east coast.

Plaintiffs oppose the filing of the “Amended Brief *Amicus Curiae*” as follows:

1. Amended Brief Not Timely Filed

The Amended Brief, while interesting in light of the fact that it makes factual allegations which could well be supportive of plaintiffs’ position, was not filed until August 21, 2008, only 12 days prior to the hearing date. In that service was by mail, an additional 3 days would be added to the service requirement, making the filing only 9 days in advance of the hearing date of September 2, 2008.

If instead the court were to consider the original submission date of the original Brief, [August 12, 2008 as per the certificate of service which accompanies it], not the Amended Brief, less the 3 days for service by mail, such original submission was therefore 18 days prior to the hearing date.

Local Rule 7.2(a), which applies to all motions save a motion for summary judgment [which is instead covered specifically by Local Rule

56.1 [Motions for Summary Judgment], would therefore be applicable as to the instant motion for leave to file and brief as *Amicus Curiae*, and sets a 28 day filing period for hearing of a motion after filing, plus 3 additional days if service by mail. Accordingly, neither the second submission, nor original submission, was timely filed.

Further, Local Rule 7.2(b) specifically allows for an order shortening time if a party provides good evidence as to why such order is necessary. No such application was made herein, nor does there appear to be any good reason for the late filing. Still further, the motion does not fall under any of the exemptions for the filing period allowable under Local Rule 7.2(c). The complaint itself was filed some five months earlier, and the alleged *amici* are closely associated with the defendants and have likely known of the instant complaint almost since the day it was filed. Accordingly, having slept on their rights, they may not now come into court at the last minute for the purposes of arguing the instant summary judgment motion, as sought in their “Motion for Leave to File Amended Brief *Amicus Curiae*”.

Neither the original submission, nor the subsequent submission was timely and they should both accordingly be dismissed without filing.

2. Local Rule 7.2(f) Requires a Memorandum of Law

Local Rule 7.2(f) requires that a motion be accompanied by declarations or affidavits, when appropriate, and in all instances by a Memorandum of Law supportive of the motion. The Memorandum of Law need not be a separate document, and may be attached to the Motion itself.

No such Memorandum of Law is evident in the motion for leave to file, which consists of a mere 3 paragraphs. The first paragraph details that it is a motion for leave to file; the second paragraph is an explanation as to why Mr. Kaufman did not first seek *Pro Hac Vice* status; and the third paragraph is an indication of corrections of the factual errors plaintiff Dr. Wagner noted in the original submission.

Nowhere is there any indication of any form of a memorandum of law that would be supportive of why the alleged amici should be granted leave to file. There are no points, or authorities, or cases, or statutes, or rules, or any of the other ingredients normally found in a Memorandum of Law, whether attached as a separate document, or included in the body of the Motion.

Accordingly, the motion should be denied for failing to comply with Local Rule 7.2(f)

3. Local Rule 7.2(f) Would Require Affidavits

It is plain and obvious that the alleged *amici*, Messrs. Sheldon Glashow, Frank Wilczek and Richard Wilson are seeking to inject their factual knowledge by attempting to argue facts. The proper way to do so, and particularly if seeking to oppose factual affidavits filed by plaintiffs' many affiants, would be by way of sworn affidavit, or at a minimum declarations given under penalty of law.

No factual affidavits, or declarations, of any sort accompanied the instant motion for leave to file. Rather, the proposed Amended Brief *Amicus Curiae* is a mere naked allegation of fact disguised as a legal argument.

While Local Rule 7.2(f) does not necessarily require factual affidavits to support each motion filed before a court, it requires such "when appropriate". Plaintiff Dr. Wagner submits that it is appropriate that such affidavits be filed when seeking to support a summary judgment motion, or at a minimum, to at least refer to the existing affidavits already filed by the original moving party [government defendants herein]. No such affidavits by the alleged *amici* accompany the instant motion, and no such reference

to the already filed affidavits exists within the body of the “Amended Brief *Amicus Curiae*” that is proposed to be filed.

Accordingly, plaintiff Dr. Wagner submits that the pending motion for leave to file does not comport with the requirements of Local Rule 7.2(f) and should be denied.

4. Amended Brief Fails to Address Issues

The proposed “Amended Brief *Amicus Curiae*” is a curious mixture of allegations of fact, guised as argument of fact, which seeks to address the factual affidavits filed by plaintiffs and their many affiants, while at the same time ignoring the factual affidavits of the defendants and the legal issues surrounding those questions of fact.

A. Amended Brief Incorrectly Argues Facts

Instead, the Amended Brief seeks to argue facts not properly brought before the Court by way of Affidavit of the alleged *amici*. Their argument of fact, as well as not being supported by factual affidavit or any actual facts properly before the Court, is also illogical.

For example, in the Amended Brief, page 11, bottom of the page, it poses that strangelets might conceivably exist.¹ It then sets forth a series of three additional ‘requirements’ the alleged *amici* believe are necessary to make such strangelets disastrous. It refers to each of those requirements as being “unlikely” without giving any quantification as to how they reach that conclusion, or how “unlikely” such requirement would be. While plaintiffs dispute all three of those requirements as being necessary to make a strangelet disastrous, as an instructive aid it will instead be assumed *arguendo* that such ‘requirements’ are necessary. The strong implication of the alleged *amici*, then, is that a series of three “unlikely” conditions or requirements makes for a “very unlikely” disaster scenario, without ever discussing the probabilities or likelihoods.

To give an example: If one were to have a coin that was defective, and when tossed, on average, produced heads at 55% and tails at 45% of the tosses [instead of the normal 50%/50% chances], then on a single toss, it would be *unlikely* to obtain a tail, and *likely* instead to obtain a head. Likewise, it would be more unlikely to obtain 3 tails in a row compared to a normal coin, and the probability of that occurring would be $.45 \times .45 \times .45 =$

¹ “...if strangelets exist (which is conceivable)”

.091125 [about 1/11] chance of having three tails in a row [compared to a normal coin which chance would be .125, or 1/8].

The alleged *amici* would assert that that 1/11 chance is “very unlikely”. Plaintiffs assert that a 1/11 chance of planetary destruction is not sufficiently unlikely that it is worth taking the risk. As per plaintiffs’ affidavits, a sufficiently unlikely risk that would be acceptable should be well below 1 in several trillion, and even then it would be required to be debated via NEPA hearings.

They are, in essence, playing a semantic game without providing any evidence for what they mean by “unlikely”. Moreover, plaintiffs have disputed, by way of their sworn affidavits, that those conditions or requirements speculated by the alleged *amici* to produce a disastrous strangelet even exist or are required for disaster.

That is, it is shown that not only negative strangelets would be potentially disastrous, but that positive or neutral ones as well. The likelihood that a strangelet would be positive, neutral, or negative is, of course, 100%.

Further, plaintiffs have shown that even highly unstable lumps of strange matter would potentially be disastrous, because they could quickly grow when presented with an easy growing medium such as liquid Helium.

Even strangelets with a radioactive half-life of $1/000^{\text{th}}$ of a second [highly unstable] would be extremely dangerous, because that would be sufficient time to reach the liquid Helium [in great abundance at the LHC] and start growing before they disintegrate. And once they start growing, their stability increases until they are no longer radioactive.

Finally, the alleged *amici* believe that if the RHIC could not make strangelets, then it is likely the LHC cannot either. This is purely speculative conjecture on their part, and not supported by indisputable evidence of any form.

Thus, all three of the “unlikely” conditions are likely not even present!

B. Amended Brief Fails to Address Issues

The substantive issues before this Court are framed in the government defendants’ motion for summary judgment and to dismiss, and the plaintiffs’ opposition thereto.

The instant Amended Brief fails to address those substantive issues, or present any erudition or elucidation thereon, and instead simply seeks to argue facts not before the Court. Accordingly, the Amended Brief should not be filed due to its failure to address the issues of the requirement of a NEPA hearing, or the other issues raised by the government defendants pertaining to plaintiffs’ alleged lack of standing, timeliness, mootness, etc.

5. Conclusion

The alleged *amici* have sought to file an Amended Brief *Amicus Curiae*, but do so in an untimely manner without complying with the Local Rules, both as to their original submission and as to their amended submission.

They fail to include affidavits, declarations, or a Memorandum of Law in support of their filing.

Still further, the proposed Amended Brief fails to address the issues fairly framed by the defendants' motion and the plaintiffs' opposition thereto. Instead, it presents an attempt to argue facts not presented to the court properly by way of affidavit, and the argument presented thereon is illogical and simply presents speculative conjecture on the part of the alleged *amici*.

Accordingly, it is respectfully requested that the Amended Brief *Amicus Curiae* not be filed for consideration by the Court with respect to the pending government defendants' motion. This does not preclude the alleged *amici* from filing affidavits on behalf of any party in the future [if requested by that party], or appearing at trial as witnesses, nor does it preclude them from seeking *Amici* status for any future motion that might

be presented, if done so in accordance with the Local Rules, the Federal Rules of Civil Procedure, etc.

Dated: August 26, 2008

Walter L. Wagner

Luis Sancho