**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**NO. 10-3352**

**ARTHUR ALAN WOLK, ESQUIRE**

**Appellant,**

**v.**

**WALTER K. OLSON, ESQUIRE, THEODORE H. FRANK, ESQUIRE, DAVID M. NIEPORENT, ESQUIRE, THE OVERLAWYERED GROUP AND OVERLAWYERED.COM**

**Appellees.**

On Appeal from the United States District Court
for the Eastern District of Pennsylvania, No. 2:09-CV-4001

# PLAINTIFF'S RESPONSE IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* EUGENE VOLOKH, GLENN REYNOLDS, MARC RANDAZZA, AND EDWARD WHELEN

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Appellant, Plaintiff below (hereafter Wolk), opposes the Motion of Eugene Volokh, Glenn Reynolds, Marc J. Randazza, and Edward Whelen (hereafter "amicus bloggers") for leave to file an Amicus Curiae brief in support of Appellees, Defendants below (hereafter Overlawyered), because it does not present proper argument from the perspective of a purported amicus. Furthermore, the proposed brief seeks to raise issues Overlawyered waived and duplicates the Overlawyered Defendants' appellate arguments.

## I. SUMMARY OF ARGUMENT

The amicus bloggers improperly raise a brand new argument which Overlawyered never argued below; that Wolk's complaint fails to plead actual malice. It is entirely improper for an amicus to circumvent the appellate rules by slipping in new arguments which the party it supports has waived. Nonetheless, the amicus bloggers ignore the averments of Wolk's complaint which specifically plead actual malice. When purported journalists knowingly publish a false accusation with the intent to harm, and then in the face of incontrovertible proof that they were wrong, refuse to remove it, actual malice is established. Furthermore, every day Overlawyered consciously refuses to delete the blog and endeavors to bring worldwide attention to it through an internet smear campaign such that its removal may be impossible. Wolk's complaint indeed pleads actual malice.

The remainder of the amicus bloggers' brief should be disallowed because it merely duplicates Overlawyered's arguments and provides no assistance to the Court. As Wolk's Reply to Overlawyered's Brief points out, the Frank Blog conveys a defamatory message; and that message is that Wolk sold out clients to protect his own interests. That message is false and defamatory *per se* as it strikes at the foundation of the honor inherent in the practice of law.

Furthermore, there is another reason to deny the amicus bloggers leave to file an amicus brief. They are no friends of the Court. They are affiliates of the defendants Wolk recently sued for waging an internet smear campaign against him following the August 2, 2010 dismissal of his case at issue in this appeal. Their intentions are not to educate the Court on a disputed area of law, but to defend the action in equity Wolk brought in the Court of Common Pleas of Philadelphia to force removal of the false and defamatory blogs. That action was brought against the amicus bloggers' regular blog forum host, The Reason Foundation. A copy of Wolk's Equity Complaint is attached as Exhibit 1. This ulterior motive is revealed by reviewing the amicus bloggers' proposed brief, which seeks to exonerate the Frank Blog on the facts of this case, not any overarching principle of law. Thus, the amicus bloggers' arguments will have no effect beyond the interests of the parties to this appeal.

The prime, if not sole, purpose of an amicus curiae brief is to assist the court on matters of law. It is utterly improper for amicus to assist a party with its evidentiary claims. Further, the amicus bloggers cannot be permitted to interject evidence in this case because the dismissal of Wolk's claims (which Overlawyered procured by a fraud on the District Court below) was on the pleadings alone. Thus, the amicus bloggers' attempted commentary on the evidence is unavailing since there was no evidence.

Because the amicus bloggers seek to appear in this case as surrogate litigants on behalf of The Reason Foundation who is a current defendant in a pending equity action, their motion for leave should be denied.

## II. STATEMENT OF FACTS

### A. The Frank Blog is Defamatory

The source of defamation in this appeal is a scandalous internet blog authored by Defendant Frank and posted on Defendant Olson's website Overlawyered.com (hereafter the "Frank Blog"). The Frank Blog criticizes a federal district judge, Julie E. Carnes of the Northern District of Georgia who presided over the case of Taylor v. Teledyne Technologies, Inc., and alleges she failed to protect Wolk's client from a conflict of interest.

> Judge writes scathing opinion about attorney; opponent attorney mails opinion to client; losing attorney sues other attorney for defamation.

> No dice, but even this ludicrous suit does not result in sanctions. [Beck/Herrmann]
>
> Beck and Herrmann miss, however, an especially interesting subplot. Wolk settled the underlying case, Taylor v. Teledyne, No. CIV.A.1:00-CV-1741-J (N.D. Ga.), on the condition that the order criticizing him be vacated. Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in other litigation? (The discovery violation complained about was apparently a repeat occurrence.) The district court permitted a settlement that vacated the order, but its only reported inquiry into whether Wolk did not suffer from a conflict of interest and was adequately protecting his client's rights was Wolk's representation to the court that the client was alright with the size of the settlement. That begs the question whether the client was fully aware of the conflict of interest; if, as seems to be the case, the N.D. Ga. failed to do so, one really wishes courts would do more to protect fiduciaries of plaintiffs' attorneys before signing off on settlements. 338 F.Supp.2d 1323, 1327 (N.D. Ga. 2004), aff'd in unpublished summary per curiam opinion (11th Cir., Jun. 17, 2005).

While Overlawyered and the amicus bloggers contend the Frank Blog is only critical of Judge Carnes, not Wolk, they miss the important fact that the Frank Blog criticizes the federal judge based upon the factual assertion that Wolk was allowed to proceed despite his conflict of interest -- as if Wolk's conflict were a truthful fact- **which it is not**.

The Frank Blog poses the question, "[d]id Wolk's client suffer from a reduced settlement" so Wolk could obtain the vacating of the critical order, and then answers the question, "[t]hat begs the question whether the client was fully aware of the conflict of interest; if, as seems to be the case, the N.D. Ga. failed to

do so, one really wishes.…" To compound the harm, the Frank Blog reports that Wolk made a "representation" to the federal court that he had no conflict of interest when the article is based on the claim he did. Thus, not only does the Frank Blog accuse Wolk of having a conflict of interest, but it accuses him of making a misrepresentation to a federal court. Both Overlawyered and the amicus bloggers never address how the Frank Blog presupposes a conflict of interest or accuses Wolk of being a liar, and instead both act aloof of the paramount importance of these issues in this case.

Furthermore, the amicus bloggers ignore the undisputed fact that neither Frank nor Olsen attempted to verify anything before they published the blog, and then once shown that it was utterly false, not only did they refuse to issue a retraction, but they actually enhanced its circulation on the internet. What is even more unprofessional, Overlawyered, through Olsen and Frank, criticized Wolk's claims in Wolk v. Teledyne, which, contrary to Overlawyered's criticism, was not simply based on lawyers sending the critical order in Taylor to their own clients and other lawyers. Rather, Wolk's claims in Wolk v. Teledyne were based on the fact that Teledyne's lawyers knew Wolk was totally uninvolved in discovery in Taylor, yet the lawyers sent the mistakenly critical order to other defense lawyers not even involved in the Taylor case. That conduct was clearly actionable under Pennsylvania law when the lawsuit was filed. Bochetto v. Gibson, 860 A.2d 67

(Pa. 2004)(sending a defamatory pleading to someone not involved in the litigation is actionable defamation). Olsen and Frank never bothered to check their facts and obviously never read the complaint upon which they commented.

Rather than addressing these issues head on, the amicus bloggers' brief is premised on a straw man argument which mischaracterizes Wolk's defamation claim. They contend "[a]t bottom, Mr. Wolk complains that Defendants defamed him by publicly implying that he did not represent his clients zealously in the settlement of the Taylor case to their detriment." (Amicus bloggers brief at pg. 9.) Having set this false straw man up -- as this case is about accusing Wolk of having an unethical conflict of interest and not ineffective advocacy -- they easily knock it down with case law exonerating speech critical of attorney performance. However, the amicus blogger's brief is plagued by the same defamatory innuendo of the Frank Blog. Just like Overlawyered, the amicus bloggers make arguments presupposing a conflict of interest existed in the Taylor action: "[i]f Defendants failed to make inquiry, they could not have known that the settlement was unaffected by Mr. Wolk's conflict of interest with his client." (Amicus bloggers brief at pg. 12.)

The amicus bloggers claim to be law professors and lawyers, but by placing false and scandalous accusations, clearly un-researched and fact checked in their brief, they have sunk to the low level of Overlawyered and its counsel who have

already engaged in an appellate character assassination of Wolk. (See Motion for Sanctions pending.) How can the amicus bloggers claim to have a legitimate interest in this case when their proposed brief unfairly lambasts Wolk (who they do not know and never litigated against) based on an incomplete understanding of the facts in this case? How can these putative scholars accuse Wolk of having a conflict of interest when they do not even know that Wolk removed himself from settlement negotiations entirely? Amicus who do not educate themselves of the facts so they can argue the law have no place here.

The truth is the amicus bloggers got the facts wrong, just like Overlawyered, and they are now attempting to create another false record upon which "bloggers everywhere" can refer to and write about with impunity just because it is on a court's docket. This Court is requested not to facilitate this devious conduct and to prevent these "bloggers" from manipulating court records with libelous statements from which they believe their bloggers may repeat with impunity simply because it is contained in a docket.

### B. Wolk Never Jeopardized his Clients' Rights through a Conflict of Interest

As a lawyer, and one who has appeared before this Honorable Court on many occasions, Wolk must impress that no conflict of interest existed in Taylor and that had he been able to move past the 12(b)(6) stage below he would have been able to prove it. The amicus bloggers have no right to accuse him of having a

conflict of interest because they, through Overlawyered, know their accusations are false and libelous.

Teledyne Continental Motors, the defendant in the Taylor case before Judge Carnes, contacted Overlawyered and informed them that they "do not agree that the Taylor Decisions or Mr. Wolk's actions in the Taylor case would support a basis for disqualification of negative action against Mr. Wolk in response to such claims or challenges of unprofessional conduct; …." (Ex. 2.) (See also Aff. of Deforest attached at Ex.3.) Wolk previously presented such evidence to Overlawyered, but despite this disclosure, Overlawyered did not remove the scandalous Frank Blog. (Now, the amicus bloggers are also turning a blind eye to the truth.)

Thereafter, Wolk provided Overlawyered with letters from **the independent counsel who represented the Taylor clients during the alleged time period of Wolk's "conflict of interest**." (Ex. 4, 5.) While the fact that the Taylor clients were independently represented negates any conflict of interest, the letters themselves confirmed the same:

Attorney Griffin wrote:

> I represented Ann Mauvais in the case of *Taylor, et al v. Teledyne, et al*. My law firm in Pensacola, Florida was the original firm representing her. The firm of Wolk and Genter assumed the representation of Ms. Mauvais during the *Taylor* proceedings, which I monitored. The discovery in the case was handled by Philip Ford and

Catherine Slavin, not Mr. Wolk. I was aware of the discovery order critical of Mr. Wolk individually by name.

Settlement negotiations in the case were handled for us by Richard Genter, not Arthur Wolk, and since the defendants' recommended a settlement figure that was too low Richard Genter rejected it for us and pushed for and obtained a settlement figure hundreds of thousands of dollars more than the settlement number originally recommended. My client was totally satisfied with the settlement figure obtained by Richard Genter and the overall pursuit of her claim against Teledyne et al.

There was a delay in receiving the settlement funds because Teledyne delayed in furnishing us a proposed release for signature. In the meantime Mr. Wolk contacted us and requested a few days to address vacating the discovery order identifying him individually. I conferred with my client and she agreed to the brief extension of time. So the point I'm conveying to you is the very satisfactory settlement figure obtained by Richard Genter for my client had already been agreed upon and the delay in receiving the actual funds was the result of a delay in receiving the proposed release from the Teledyne defendants.

In the interim, between the negotiated settlement where the settlement figure had already been reached and the time for receiving the proposed release from Teledyne for review and signature, the Court agreed to vacate its discovery order. There was never consideration given or a quid pro quo, as implied in your clients' article, offered for vacating the order. Had your clients contacted me before publishing I would have told them what I am telling you, I would not have allowed such a thing to occur as they have stated and implied in the article. I would have warned them not to publish it because it was false.

(Ex. 4.)

Attorney Schneider wrote:

Arthur Wolk sent me your clients' article claiming that the Taylor clients' claims were compromised so Mr. Wolk could get a

> critical discovery order vacated. That article and its implications are entirely false.
>
> I attended the mediation along with Richard Genter. Mr. Wolk was not present or consulted by phone during the mediation. Nor was he involved in discovery in that case to my knowledge except for a conference call with the court regarding a discovery dispute between the parties.
>
> A settlement was reached and concluded with a release and the clients never indicated to me they were dissatisfied with the outcome. It was only after the settlement had been agreed to, that Mr. Wolk asked for a one week delay to ask the court to vacate the order. There is no question in my mind that the settlements reached were completely separate from any request to vacate the discovery order. The settlements reached were also well in excess of any sums offered at the mediation. T herefore, to say "it appears" that the clients' interests were somehow compromised to get the discovery order vacated is wrong.
>
> Arthur asked me to write this letter to put you and your clients on notice that what they said is false and it continues to be false on the Overlawyered website. What your clients' article means is I allowed this to happen, and I can assure you and your clients that they are wrong.
>
> My name was on that docket and all they had to do was call me and I could have dispelled their notion before it ever made it to print. They, to this day, have never contacted me to get the facts straight.

(Ex. 5.) Again, despite these disclosures, Overlawyered did not remove the scandalous Frank Blog, and now, the amicus bloggers are also ignoring these facts.

True journalists who write with honor and integrity would have removed or corrected the Frank Blog in the face of these disclosures. There is no shame in admitting the facts were unknown and doing the right thing by correcting a wrong;

however, to be disdainful of the truth and to viciously stalk someone's life on the internet is reprehensible. The amicus bloggers have no cognizable interest in this case as a finding on whether the Frank Blog is defamatory will have no effect on their endeavors as bloggers. As seen in the amicus bloggers brief, they are only applying facts to pre-existing law and not advocating new law, policy, or wrestling with a difficult interpretation of law. The amicus bloggers are simply perpetuating the harm against someone they picked a fight with and has now sued their blogging forum hosts in an equity action pending before the same federal district judge whose opinion is at issue in this case.

While purporting to stand for justice, the amicus bloggers have aligned themselves with Overlawyered who procured Wolk's dismissal by fraudulently concealing the truth from the District Court and misrepresenting the date of publication of the Frank Blog. (See Motion to Enlarge Record and Rule 60 motion before pending before the District Court for a full explanation of how Overlawyered falsely represented the date of publication of the Frank Blog and how Wolk's forensic investigation of Overlawyered.com proved the publication date was less than a year before his lawsuit was filed). Worse, by knowing of Overlawyered's fraud by virtue of the filings in this case, the amicus bloggers endorse it by joining in their plea to this Court to affirm the dismissal. They say nothing about the stunning discovery that Overlawyered deleted the original Frank

Blog and then republished it having maliciously altered its searchability and thrust it into every search engine only after the one year statute of limitations ran. By engaging in a factual assessment of this case, and then ignoring the truth, the amicus bloggers have shown they are no friend of the Court.

No conflict of interest ever existed in Taylor, Wolk did not sell out, and has never sold out, any of his clients. He respectfully requests the opportunity to clear his name of these professionally devastating false accusations.

### C. The Amicus Bloggers are Appearing on Behalf of their Blog Forum Hosts Whom Wolk has Sued for the Heinous Defamatory [and False -EV] Accusations of Child Molestation and Bestiality They I Incited Against Him

Since the August 2, 2010 dismissal, Overlawyered and another entity, The Reason Foundation (a.k.a Reason.com), have waged an internet smear campaign against Wolk, which has given rise to a separate lawsuit in equity. It is no coincidence that the amicus bloggers are members of and bloggers for the blogging forum Reason.com against whom Wolk has filed a lawsuit in equity seeking to compel Reason.com to remove defamatory accusations against him from their website [falsely -EV] accusing him of child molestation and bestiality. (Compare Ex. 1 naming Reason.com and the Reason Foundation with Ex. 6 showing amicus blogging for Reason.com). In an unbelievable display of malice, the Reason.com blogging forum has fostered a vicious and unprovoked internet smear campaign against

Wolk and incited their readership into a feeding frenzy of outrageously defamatory statements, such as: [At this point, the opposition quoted the insults, which had nothing to do with incest. -EV]

(Ex. 7 filed under seal.) (See also Appellants' Motion to Enlarge Appellate Record with Evidence Concealed from the District Court.) Wolk is also seeking the identities of these unknown bloggers who have [falsely -EV] charged him with child molestatio and bestiality. It is of stunning coincidence that amicus blogger **Volokh here, the day before filing this motion for leave, authored a ridiculous treatise seeking to legalize parent/child, grandparent/grandchild, and sibling incest**. (Ex. 8.) Wolk thus has more than a reasonable basis to question whether at least one of the amicus bloggers seeking this Court's audience, one of whom apparently has a penchant for discussing sexual misconduct, may be responsible for the horrible [false -EV] accusations of sexual misconduct against Wolk on Reason.com.

After the District Court dismissed Wolk's damages claim on statute of limitations grounds, the Overlawyered Defendants immediately initiated a feeding frenzy of internet blogging chatter further defaming Wolk, which included enlisting the participation of various co-partnering blogging sites, like

www.reason.com, www.popehat.com, and www.law.com.[1] Each of these websites appear to monitor and promote the other, forming a type of co-partnering relationship with Overlawyered, whereby blogs and comments published on one website trigger the others to re-publish the same comments and make other comments, thereby creating a swell of defamatory statements compounding the impact of the initial defamation.

In this regard, on August 6, 2010, a few days after the District Court's decision, Frank, the author of the initial April 8, 2007 Overlawyered blog, posted another defamatory blog on www.PointofLaw.com, a partnership website affiliated with Overlawyered. A true and correct copy of Frank's August 6, 2010 blog on PointofLaw is attached hereto as Exhibit 8. Frank's PointofLaw blog addressed the District Court's decision in Wolk v. Olson as a victory for "bloggers everywhere." Frank, however, also summarized Wolk's arguments in the District Court, stating Wolk "argued that the statute shouldn't start to run until the plaintiff reads (***or, de facto, claims to have read***) the blog post." See Id. By characterizing Wolk's allegations in the District Court as "de facto claims," Frank was once again defaming Wolk by directly implying that Wolk lied in his court filings as to the timing of when he read the first defamatory Overlawyered blog.

[1] To their credit, Popehat.com and Law.com removed their republications and comments when the same information Wolk supplied to Overlawyered was supplied to them.

In an effort to further incite even more defamatory internet blogging, Frank, on his PointofLaw blog, referred to other co-partnership blog websites such as www.reason.com and www.popehat.com, which contained additional false and defamatory statements about Wolk. (Ex. 10.) For example, the blog on www.reason.com to which Frank referred was posted on August 6, 2010, and it was entitled "Lawyer trying to protect his reputation as an Effective Advocate Misses Deadline for His Libel Suit." A true and correct copy of Reason.com's August 6, 2010 blog is attached hereto as Exhibit 10.

The title of the August 6, 2010 Reason blog was clearly defamatory in that it intended to and did falsely imply that Wolk was an incompetent lawyer because he missed the deadline for his own lawsuit when the defendants knew they had concealed the truth from the District Court and procured the dismissal by fraud. Further, the August 6, 2010 Reason blog implied that Wolk was lying in the District Court about not Googling himself until April 2009, and further implied that Wolk was guilty of filing a previous frivolous lawsuit by "bully[ing] an aviation news website into a thoroughly abject capitulation and apology." See Id.

Most significantly, the August 6, 2010 Reason blog republished almost the entirety of the utterly false and defamatory April 8, 2007 Overlawyered blog, and thus again accused Wolk of breaching his ethical and fiduciary duties by selling out his client's interest in the Taylor case. See Id. Not to be outdone, on August

9, 2010, three days after the defamatory PointofLaw and Reason blogs, Overlawyered, through Defendant Olson, published another blog concerning the District Court's decision in Wolk v. Olson, which again touted the decision as a victory for free speech. Significantly, Olson's blog referred readers back to Frank's defamatory August 6, 2010 blog posted on PointofLaw.com. A true and correct copy of Olson's August 9, 2010 blog posted on Overlawyered.com is attached as Exhibit 11.

An affiliated website of Overlawyered, Reason.com, published a second blog entitled "Who You Calling Touchy?," in which Reason published a portion of Wolk's demand letter for the sole purpose of inciting additional defamatory comments from Reason's bloggers. (Ex. 12.) As a result, a thread of comments from Reason's anonymous bloggers ensued accusing Wolk of the most heinous of crimes such as: [At this point, the opposition quoted the insults, which had nothing to do with incest. -EV] (Ex. 7
filed under seal). These "journalists" knew exactly what they were inciting in publishing their blog "Who You Calling Touchy?," and intended to incite the defamatory feeding frenzy that ensued, knowing that it would be picked up by Google and other internet search engines.

As a result, Wolk, a respected lawyer of 42 years, father of two and grandfather has been shamelessly and falsely accused of the most heinous crimes

imaginable. He has attempted to clear his name, but Overlawyered is stalking his efforts by interfering with positive reporting (Ex. 13) and creating cyber-memorials to the dismissal they procured by fraud. (Ex. 14.) Wolk has sued Overlawyered, Reason.com and its local trustees in a suit in equity seeking to compel them to remove the defamatory posts. (Ex. 1.)

It is no coincidence that the amicus bloggers are affiliates of Reason.com and members of their blogging community which espouses no rule of law, no Government regulation of business or banking, no court decisions against the interests of business and finance and have the penchant to blog about legalizing sexually deviate conduct such as incest. (Ex. 7.)

## III. LEGAL ARGUMENT

Whether to allow the filing of an amicus curiae brief is a matter of "judicial grace" and not a matter of routine acceptance. National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000). The following considerations weigh against allowing amicus participation: (1) the burden on the court system imposed by additional briefing by a non-party, (2) amicus curiae briefs are more often than not encouraged by one of the parties and may circumvent page limitations, and (3) the interest group politics of amicus curiae are motivated to flaunt the interests of a particular trade. Scheidler, 223 F.3d at 616.

In addition, Federal Rule of Appellate Procedure 29(b) requires a proposed amicus curiae to have an interest in the appellate issue and to establish why the matters asserted in the proposed amicus brief are relevant to the disposition of the case. A Panel of the Third Circuit has ruled that the proffered amicus curiae must have a "legally cognizable interest" in the subject matter of the case. American College of Obstetricians and Gynecologists Pennsylvania Section v. Thornburgh, 699 F.2d 644, 645 (3d Cir. 1983). Simply being concerned about the manner in which an appellate court may interpret the law is insufficient to justify the acceptance of amicus curiae. Id.

The amicus bloggers do not have a "legally cognizable interest" in the factual assessment of the Frank Blog as being defamatory. Rather than argue law, the amicus bloggers improperly argue evidentiary issues and raise an entirely new argument which Overlawyered utterly failed to raise below. Aside from addressing issues Appellees waived, the amicus bloggers add nothing to the legal arguments as they merely duplicate the arguments already asserted by Overlawyered. Furthermore, the amicus bloggers actually appear to seek intervention on behalf of non-party Reason.com, who Wolk has separately sued for [falsely -EV] accusing him of being a child molester and engaging in bestiality. The amicu bloggers' interference in this appeal makes a mockery of the amicus curiae process and should not be permitted.

### A. The Amicus Bloggers Brief Should Not be Allowed Because it Raises New Arguments

Amicus curiae are undoubtedly prohibited from raising new arguments not presented to the District Court. Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt., 589 F.3d 458, 467 (1st Cir.2009); Solis v. Summit Contractors, Inc., 558 F.3d 815, 827 (8th Cir.2009) (declining to consider argument "because it was raised to this court by the amici and not by the parties"); Wiggins Brothers, Inc. v. Dept. of Energy, 667 F.2d 77 (Em. App. 1981) (citing Knetsch v. U.S. 364 U.S. 361, 81 S.Ct. 132, 5 L.Ed.2d 128 (1960); National Commission on Egg Nutrition v. FTC, 570 F.2d 157, 160 (7th Cir. 1977).

Not once did the Overlawyered Defendants below urge the District Court to dismiss Wolk's Complaint for not pleading facts showing actual malice. Having failed to raise it to the District Court, Appellees are (or would be) prohibited from raising it here for the first time on appeal. See Harris v. City of Phila., 35 F.3d 840, 845 (3d Cir.1994) (observing that "[t]his court has consistently held that it will not consider issues that are raised for the first time on appeal"). Defendants may not circumvent this time honored rule through an amicus curiae brief which raises new arguments. Wiggins Brothers, 667 F.2d at 83: National Commission, 570 F.2d at 160 n.3. However, the amicus bloggers raise this brand new argument at pgs. 11 through 14 of their proposed brief.

The facts of National Commission are helpful to assess the issue presented here. In that case, the FTC ordered the appellants to cease false and misleading advertising and the appeal addressed commercial speech under the First Amendment. Id. at 158. The proposed amicus brief, however, sought to argue that the FTC's hearing procedures violated the First Amendment. Id. at 160 n.3. The court disallowed the argument holding "this argument was not made before the FTC or even by petitioners themselves in this court and is therefore not properly before us." Id.

Here, Defendants below did not challenge the sufficiency of Wolk's complaint; they merely argued that the Frank Blog was incapable of a defamatory meaning. The amicus bloggers should not be permitted to thrust these new, never before raised issues into this appeal that are otherwise waived. In any event, they are wrong and focus on the wrong allegations of the Complaint. Actual malice was pled in Wolk's Complaint:

> 44. When the Frank Article was disseminated, Frank, Olson, Nieporent and Overlawyered.com knew that it was false, knew that they had no basis to assert that Wolk "sold out" his client for his own personal and professional gain, and knew that the settlement that was achieved in the Taylor case was a remarkably good settlement which exceeded the value of the case placed upon it by a mediator. Notwithstanding, due to their personal animosity and ill-will towards Wolk, with actual malice, and with actual knowledge that their statements in the Frank Article were false, the Defendants disseminated the Frank Article.

> 68. Further, the false Frank Article was made by the Defendants with actual malice, because the Defendants had actual knowledge of the falsity of the Frank Article when it was made, and/or a reckless disregard for the falsity of the Frank Article when it was made. Indeed, the Defendants entertained serious doubts as to the truth of the Frank Article at the time it was disseminated. Further, when disseminating the false Frank Article, the Defendants were motivated by ill-will and personal animus towards the Plaintiff, and published the Frank Article with the intent to harm the Plaintiff and destroy his reputation.

Such allegations are more than enough to establish "actual malice."

### B. The Remainder of the Proposed Amici Brief Merely Duplicates the Arguments Advanced by Appellees and Should Not Be Allowed

Amicus Curiae status should routinely be denied where the proposed brief merely duplicates the brief of one of the parties. Voices for Choices v. Illinois Bell Telephone Co., 339 F.3d 542 (7th Cir. 2003).

Subsection A of the argument section of the amicus bloggers' brief (pgs. 6 through 8) merely parrots the arguments already advanced by Appellees. Both Overlawyered and the amicus bloggers recite the same case law and make the same argument that merely posing a question is not actionable defamation:

- Compare Appellees' brief at pg. 37-44 with proposed amicus brief at pg. 6-8 addressing whether phrasing a statement in the form of a question could be defamatory;

- Compare Appellees' brief at pgs. 43-45 with proposed amicus brief at pg. 9-10 addressing whether the Frank Blog is capable of being proven false.

An amicus brief which merely duplicates one litigant's arguments is no friend of the Court. The amicus bloggers here are nothing but surrogate advocates who have not brought any independent analysis unique to the special interest group they purport to represent. Amicus status should not be given when the proposed brief parrots the parties' arguments. See Scheidler, 223 F.3d at 616; (The policy of this court is, therefore, not to grant rote permission to file an amicus curiae brief; **never to grant permission** to file an amicus curiae brief that merely duplicates the brief of one of the parties.")

As for the merits of the amicus bloggers' First Amendment arguments there are none, and rather than rehash the extensive briefing here, Wolk rests upon his reply brief to the Overlawyered Defendants' main appellate brief.

### C.. The Amicus Bloggers' Brief Should Not Be Allowed Because they are Appearing as Litigants Who Have No Legitimate Interest in this Appeal

The amicus bloggers are appearing as litigants seeking to exonerate the Frank Blog, not through a legal argument, but by endorsing Overlawyered's imaginary facts**.** Here, not only do the amicus bloggers show no trepidation in flat out accusing Wolk of having a conflict of interest in Taylor, but they are members of the blogging forum (and possibly the anonymous bloggers) which have [falsely -EV] accused Wolk of child molestation and bestiality. T heir interest in this case is not to

advance the law, but to exonerate the Frank Blog and excoriate Wolk so they may defend the pending equity lawsuit against their blogging host and trustees.

By arguing the facts of this case and seeking a ruling that would only benefit and exonerate Overlawyered, the amicus bloggers have corrupted the amicus curiae process. The purpose of amicus curiae is to assist the court on the law, not to advocate the facts of a case.

> At the same time we remark that the prime, if not sole, purpose of an amicus curiae brief is what its name implies, namely, to a ssist the court on matters of law. While, presumably, an amicus' position on the legal issues coincides with one of the parties, this does not mean that it is to engage in assisting that party with its evidentiary claims.

See e.g. Banarjee v. Board of Trustees of Smith College, 648 F.2d 61, n.9 (1st Cir. 1981). The Banarjee court found amicus curiae's advocating a parties' position on the evidentiary merits of a case to be improper. See also New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979)(chastising amicus for giving a partisan presentation of facts). The purpose of amicus participation is not served by allowing the duplication of factual arguments from a disguised amicus who are actually members of the scorned blogging community against whom Wolk has filed a lawsuit.

The improper abuse of the amicus procedure seen here is as egregious as the instance faced in Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062 (7th Cir. 1997). In Ryan, the Chicago Board of Trade sought leave to file an amicus

brief in an appeal of a disciplinary order rendered against a commodities trader. The court began its explanation of its denial with the following introduction:

> The tendency of many judges of this court, including myself, has been to grant motions for leave to file amicus curiae briefs without careful consideration of "the reasons why a brief of an amicus curiae is desirable," although the rule makes this a required part of the motion. After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion.

Id. at 1063. Under this scrutiny, the Court instructed:

> 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.
> …
> 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 in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.

Id. (Citations omitted.) Turning to the substance of the proposed amicus brief the court found it patently improper because it argued facts such as the petitioner had been "rehabilitated" and no longer posed a threat. The court denied the petitioner leave to file an amicus brief because it was not helped by the presentation of evidentiary arguments and added nothing to the appeal that was not already addressed. Id. at 1064.

This Court does not need the assistance of self-proclaimed "prominent" members of the blogging community to attempt to influence the outcome of this appeal. "Prominent" or not, there are millions of internet bloggers and the keys to the appellate gates should not be handed over simply because they fear they too might be sued if they slander someone. Does every driver of a vehicle possess amicus curiae potential simply because a case may address an issue which may affect the consequences of careless driving? Is amicus status more appropriate if the driver is a "prominent" driver? The answer, wholly applicable here, is, no.

A compelling reason why the amicus bloggers have no cognizable interest in this case is that they have not shown that a ruling in Overlawyered's favor or *vice versa* would affect them. They merely seek a ruling that they can use, in the event, they are ever sued for defamation. They claim to be legitimate "bloggers" who do not slander people, but only properly comment on important social issues. Therefore, the outcome of this case will have no effect on them unless they begin falsely accusing attorneys of misconduct. The amicus bloggers merely argue the facts of this case do not meet a certain legal standard. They do not intellectually challenge the standard, suggest a new one, or otherwise help the Court with a difficult legal issue. Just like the situation in the Ryan case, the proposed amicus are coming to the aid of an individual colleague by arguing facts why that individual should be exonerated.

Wolk respectfully requests the same result as in Ryan; the denial of their motion for leave to file an amicus brief because it is antithetical to the appellate process.

## IV. CONCLUSION

There is no compelling interest to allow an amicus filing by people who espouse the view that there should be no courts in which to seek redress for the harm of defamation, no laws to restrict defamation, no regulation and no impediments to incest. If they are such "prominent bloggers" who deserve journalistic status to be heard, they should have offered some understanding of what the facts were and proffered some law or interpretation of it rather than demonstrating that they are helping their fellow bloggers defeat a defamation claim and their blogging forum host defeat a separate lawsuit pending in the federal district court.

To accomplish this, they falsely paint Wolk as someone who sues everyone for any reason. This is not the truth. By performing even a minimal search the amicus bloggers would have easily learned that Wolk has strived to pr otect lawyers, judges and himself from bullies, whether lawyers or not, who believe that false accusations are a substitute for a legal and factual defense in an airplane crash case. Because of his well deserved prominence in the air crash litigation field, Wolk has made it a point to remove character assassination from the quiver of

defense *du jours* of aircraft manufacturers. Had anyone looked at the discovery provided by The Wolk Law Firm in the Taylor case they would have concluded (as so many others have) that it was not The Wolk Law Firm that failed to make discovery in that case and that is the clear reason Judge Carnes vacated the order. It is still vacated.

An amicus curie brief is not a means to circumvent the Rules of Appellate Procedure to present waived arguments under the guise of amicus assistance. Nor, should an amicus brief be a method to bolster one party's brief by repeating the arguments alleged therein. The proposed Amici here resemble nothing of a true friend of the court, but a surrogate advocate for Appellees. Their proposed Brief raises new arguments and clearly is a means to extend the page limitation of the Overlawyered brief. The amicus bloggers certainly do not support a bona fide interest in the outcome of this appeal. Indeed, their blogs reveal a bizarre and warped view of the law of incest, not to mention their anarchist views of the role of Government, Courts and the Law as it affects society as a whole.

Instead of striving to enhance the law by cleaning up the internet of defamers, stalkers and bullies that their surrogates have proved themselves to be, the amicus bloggers instead try to justify the unjustifiable. The Motion for Leave to File an Amici Curiae Brief should be denied.

Respectfully Submitted:

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Date: December 27, 2010

## CERTIFICATE OF SERVICE

I, David P. Heim, Esquire, hereby certify that on **December 27, 2010**, a copy of the foregoing Plaintiff's Response In Opposition To The Motion For Leave To File Brief Of Amici Curiae Eugene Volokh, Glenn Reynolds, Marc Randazza, And Edward Whelan was served upon the following counsel via electronic filing:

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On the same date, an electronic copy of the Plaintiff's Response In Opposition To The Motion For Leave To File Brief Of Amici Curiae Eugene Volokh, Glenn Reynolds, Marc Randazza, And Edward Whelan was

electronically transmitted to the Clerk of the United States Court of Appeals for the Third Circuit.

Date: December 27, 2010 By: /s/ David P. Heim