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IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR WASATCH COUNTY, STATE OF UTAH

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UTAH STREAM ACCESS COALITION, a Utah  
non-profit corporation,

Plaintiff,

vs.

ATC REALTY SIXTEEN, INC., a California  
corporation; et al.

Defendants.

**MEMORANDUM IN SUPPORT OF  
UTAH STREAM ACCESS  
COALITION'S MOTION TO STRIKE  
AMICUS CURIAE UTAH ALLIANCE  
TO PROTECT PROPERTY RIGHTS'  
SUPPLEMENTAL BRIEF IN  
SUPPORT OF HB 141**

Civil No. 100500558

Hon. Derek Pullan

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Plaintiff Utah Stream Access Coalition (“the Coalition”), by and through its counsel of record, submits this Memorandum in Support of its Motion to Strike Amicus Curiae Utah Amicus to Protect Property Rights’ (“Amicus”) Supplemental Brief in Support of H.B. 141.

**ARGUMENT**

Rule 12(f) of the Utah Rules of Civil Procedure provides: “Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order

stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Utah R. Civ. P. 12(f). This Court should strike Amicus’s Supplemental Brief because Amicus was not asked to brief the issues before the court, Amicus raises points not argued by the parties, and Amicus’s brief otherwise merely repeats Defendants ATC and the State’s arguments and is therefore superfluous, unnecessary, and overly burdensome to the USAC.

### **I. The Court Requested Supplemental Briefing from the Parties, not Amicus.**

In its May 21, 2010, *Ruling and Order on Cross Motions for Summary Judgment* (“*Ruling*”), the Court asked “the parties” to provide supplemental briefing on five (5) issues regarding Utah’s public trust doctrine. *Id.* at p.37. It did not ask Amicus to file a supplemental brief. Further, while the Utah Rules of Civil Procedure are silent on participation of amicus curiae, Rule 25 of the Utah Rules of Appellate Procedure, allows amicus curiae to participate only if and as permitted by the court. As Amicus was not asked to file a supplemental memorandum and has neither sought nor been granted leave of court to do so, its *Supplemental Brief in Support of H.B. 141* is not authorized and should be stricken.

### **II. Amicus Raises Points Not Argued By The Parties**

Amicus’s Supplemental Brief should also be stricken because Amicus raises arguments that have not been raised or argued by the parties. In particular, Amicus argues that the USAC does not have standing to enforce the public trust doctrine in this suit. It is a well-settled rule in Utah that “an amicus brief cannot extend or enlarge the issues ... [courts] only consider those portions of the amicus brief that bear on the issues pursued by the parties.” *Draughon v. Dep’t of Fin. Institutions, State of Utah*, 1999 UT App 42, 975 P.2d 935, 936 n. 1; *Madsen v. Borthick*, 658

P.2d 627, 629 n. 3 (Utah 1983). “[Courts] review only those points raised by the litigants on appeal and not those urged by strangers thereto.” *In re State in Interest of Woodward*, 14 Utah 2d 336, 384 P.2d 110, 111 (1963). The Tenth Circuit does not address arguments that are only raised by amicus curiae, because those arguments “attempt to frame the issues on appeal, a prerogative more appropriately restricted to the litigants.” *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997).

Amicus’s challenge to USAC’s standing ignores the parties’ stipulation that, for purposes of dispositive motions, the USAC has standing; an agreement that ATC and the State have honored. Amicus also disputes the Court’s ruling that the USAC has standing, which again neither ATC nor the State do. *See* Amicus Supplemental Brief, pages 3, 5. (“[T]he Court concludes that any member of the public as a beneficiary of the trust could seek to overturn a regulation in violation of trust purposes.’ (Ruling & Order at 38). The Alliance respectfully disagrees.”). Because Amicus itself effectively lacks standing to extend or enlarge the issues framed by the parties and resolved by the Court, its Supplement Brief should be stricken.

### **III. Amicus’s Supplemental Brief is Superfluous, Unnecessary, and Overly Burdensome to the Coalition.**

Aside from Amicus’s impermissible standing challenge, Amicus largely parrots, albeit in a different sequence, the arguments of ATC and the State with no new logic or reasoning. In short, it is superfluous and unnecessary to the Court’s disposition of the issues presented. Amicus even goes so far as to use the exact same illustrations as ATC to support their arguments. *See* Amicus Supplemental Brief, page 13 (“Like land use regulations enacted by municipalities pursuant to the Utah Municipal Code, legislative regulations of public trust property should be presumed



valid.”); *see* ATC Supplemental Memorandum, page 11 (“Similarly instructive, the legislature and the legislative bodies of municipalities are afforded great deference when limiting landowners’ property under the label of “zoning.”). Amicus already submitted a Brief in Support of H.B. 141 and had the unique opportunity of participating in oral argument before the Court. Its Supplemental Brief does not enlighten the court with any new issues or arguments.

Amicus’s Supplemental Brief is also overly burdensome to the USAC, as it would require USAC counsel to respond to three briefs rather than two. USAC, being a public interest organization funded entirely by donations and staffed entirely by volunteers (including counsel), already bears a disproportionate burden in opposing two well-funded parties. It should not be made to respond to a third supplemental brief when that brief was neither solicited nor authorized by the Court.

### **CONCLUSION**

Because the Amicus’s Supplemental Brief was not requested by the Court, contains impermissible arguments, and is otherwise unnecessary and overly burdensome, this Court should exercise its discretion to strike the Amicus’s Supplemental Brief from the record.

DATED this 12 day of November, 2012.

RICHARDS BRANDT MILLER NELSON



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12 day of November, 2012, I served the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UTAH STREAM ACCESS COALITION'S MOTION TO STRIKE AMICUS CURIAE UTAH AMICUS TO PROTECT PROPERTY RIGHTS' SUPPLEMENTAL BRIEF IN SUPPORT OF HB 141** on the persons indicated below and in the manner indicated below:

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