IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

SUSAN S. DANIELSON (f/k/a EVANS),	)	**No. 2 CA CV 00-0184**
	)	
Appellee,	)	**Pima County Superior Court**
	)	**Cause No. D-106465**
vs.	)	
	)	
DONALD W. EVANS,	)	
	)	
Appellant.	)	
	)	

AMICUS CURIAE BRIEF OF EX-POSE

Marshal S. Willick, Esq.
Nevada Bar No. 002515
LAW OFFICE OF MARSHAL S. WILLICK, P.C.
3551 E. Bonanza Rd., Suite 101
Las Vegas, Nevada 89110-2198
(702) 438-4100

Attorney for EX-POSE

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I. STATEMENT OF THE CASE, THE FACTS, AND ISSUES PRESENTED FOR REVIEW

EX-POSE adopts the statement of the case and of the facts, and listing of issues presented for review, submitted by Appellee Susan S. Danielson. The single fact set out in that recitation, for purposes of addressing the legal issues presented in this appeal, is that on the date of divorce, there was no disability award in existence for the trial court to note, or to weigh in determining the appropriate division of property and whether and how much alimony to award.

II. ARGUMENT

A. The Law in this Division

Before beginning a general analysis, counsel is bound to point out that this Court has already spoken to the question now on appeal. In *Crawford v. Crawford*, 180 Ariz. 324, 884 P.2d 210 (App. 1994), this Court was called upon to address the question of whether a former spouse should be compensated when the member elected to forego receiving military retired pay in order to receive SSB benefits.

This Court held that any portion of a plan earned during marriage is community property subject to equitable division at dissolution, and enforcing that order in the face of a post-decree recharacterization by the member did not violate

federal law. In reaching its conclusion, this Court noted its prior holding, directly on point here:

> [A] community interest in military retirement benefits cannot be transformed into separate property by one spouse's electing to forego a portion of retirement pay in exchange for disability benefits. *Perras v. Perras*, 151 Ariz. 201, 726 P.2d 617 (App. 1986). *See also In re Marriage of Stenquist*, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978) (one spouse may not by unilateral election of a military disability pension transmute community property into his own separate property).

The same holding, and reasoning, has been applied by other courts. *See*, *e.g.*, *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995).

Neither Appellant/Husband, nor the ARA, have cited or discussed the prior holdings of this Court, or why the doctrine of *stare decisis* should not be followed here, since the point has already been raised, and ruled upon.

Similarly, while Appellant/Husband tries to find a (non-existent) distinction between the legal issue presented here from that set out in *In Re Marriage of Harris*, 195 Ariz. 559, 991 P.2d 262 (App. 1999), the ARA brief quietly concedes that the issues are the same, and asks this Court to disapprove it, and *In re Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (App. 1997), without citation to ***any authority whatsoever***. *See* Opening Brief at 31; ARA Brief at 17-21.

B. Background of Disability Awards to Members

There are two forms of disability awards, under chapters 38 and 61 of the United States Code, distinguishable by whether they are granted at or after retirement, by whether or not the Department of Veteran's Affairs ("VA") is involved, and whether the benefits are taxable. The same percentage rating has different dollar values from one to the other.

Retired pay, including retired pay payable by reason of a disability discharge, is taxable. If, upon evaluation from the VA, a disability rating for a service-connected disability is given, the member is entitled to claim a tax-free monthly sum corresponding to the percentage of disability. To do so, the member must waive a portion of retired pay equal to the sum paid by the VA.

Both military retired pay received for disability, and military retired pay waived in favor of VA benefits are outside the definition of "disposable" pay that may be split with a former spouse in accordance with a court order under 10 U.S.C. § 1408(a)(4). Ultimately, any disability claim increases the money flowing to the retiree at the expense of the former spouse, even to the point of eliminating the spousal share entirely. *See Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

After *Mansell*, some thought that any disability award **existing on the date of divorce** simply could not be considered by a divorce court, but this is not entirely true. Military disability pay may be considered as a factor in awarding to the former spouse a disproportionate amount of marital property, or otherwise as a factor relating to the future income, and thus the "economic circumstances" of parties, in property and alimony analyses under state law. *In re Kraft*, 119 Wash. 2d 438, 832 P.2d 871 (Wash. 1992) (citing many other cases); *In re Brown*, 892 P.2d 572 (Mont. 1995). Courts have enforced parties' agreements to divide pay attributable to known disabilities. *Hisgen v. Hisgen*, 1996 S.D. 122, 554 N.W.2d 494 (S.D. 1996).

This case concerns the situation in which the disability is claimed **after the divorce**. Courts have gone to considerable lengths to protect former spouses from such post-divorce status changes by members that partially or completely divested the spouses. On remand in *Mansell* itself, the court refused to allow the appellate ruling to affect the pre-existing division of dollars between the parties.[1] *In re Marriage of*

[1] This Court should note that neither Appellant/Husband nor the ARA have noted what ***actually happened*** in the *Mansell* case, or even that the trial court upon remand had, and exercised, the power to produce an equitable result. *See* ARA brief at 11-12 & 16-17. They likewise ignore the large number of authorities, from around the country, that have rejected their position to read into the definition of disposable pay an implied federal pre-emption of the power of state courts to do equity. *See, e.g.*, *Vitko v. Vitko*, 524 N.W.2d 102 (N.D. 1994) (*Mansell* is to be "construed narrowly to allow trial courts to consider parties' ultimate economic circumstances in dividing their marital property").

Mansell, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from*, 490 U.S. 581, 109 S. Ct. 2023 (1989). This logic was followed by other courts examining pre-*Mansell* divorces. *See Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990).

The parties to this case, however, were divorced in 1993, several years after *Mansell*. In post-*Mansell* divorces, the same result has sometimes resulted from different logic. "Safeguard" clauses and "indemnification for reduction" clauses are permissible, and have the result of protecting spouses from the members' unilateral recharacterization of benefits. The theory is essentially that of constructive trust; once the divorce goes through, the retirement money is considered no longer the member's property to convert. *See In Re Marriage of Harris*, 195 Ariz. 559, 991 P.2d 262 (App. 1999); *In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *see also Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992); *Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171 (Md. App. 1995); *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d (Idaho Ct. App. 1993).

C. Application of the Law to this Case

In this case, the trial court went to significant lengths to express a desire to reserve jurisdiction to preserve the spousal interest, so stating in the original *Decree* incorporating the Master's Findings, in the formal Stipulated Court Order dated May 14, 1996, ROA 90, Exhibit E, ¶ 14; HE 8, ¶ 14, and (most clearly) in the June 1, 1995, Master's Clarification and Orders. ROA 90, Exhibit C, ¶ 7; HE 4, ¶ 7.

Reading the documents entered by the trial court together, it is clear that the court attempted, however inartfully, to provide a mechanism for enforcing the distribution made at divorce, by way of follow up orders, or by imposition of additional alimony if other means proved insufficient. If this Court reaches the same conclusion, it should also conclude, with the reviewing courts cited above, that the trial court was within its bounds to protect its ruling by providing for continuing jurisdiction to order the member to indemnify the former spouse for any action he might take in the future that re-directed money from her possession to his.

Even where divorce courts have not specified mechanisms for rectifying post-divorce property recharacterizations by members, they have found ways to compensate the former spouses. Some courts have simply redistributed other property. In *Torwich (Abrom) v. Torwich*, 660 A.2d 1214 (N.J. Super. Ct. App. Div.

1995), the court found the reduction of payments to the spouse to be an "exceptional and compelling circumstance" allowing redistribution of property four years after the divorce. This case has been relied upon, for the proposition that *Mansell* permits "other adjustments to be made" to take into account the reduction in a spousal share from the disability claim of a member. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So. 2d 976 (Florida Ct. App. 1990).

D. There is no Legal Bar to the Order Entered Below

The ARA brief asserts that the "plain language" of 10 U.S.C. § 1408 prevents the courts from making a former spouse whole when a member recharacterizes as his own property already adjudicated as the sole and separate property of his former spouse. That is not the law, and no such provision exists in the act. To reach the result they assert, it is necessary to apply some pre-emptive corollary of *inclusio unis est exclusio alterias*,[2] and find that states have no power to protect their divorce decrees except where a federal law says so.

[2] Literally, "The inclusion of one implies the exclusion of the other." *See* Black's Law Dictionary 906 (4th ed. 1968).

The argument as framed by the ARA asks the wrong question. The issue is actually whether there is a direct federal enactment which clearly ***prohibits*** the lower court from ordering Appellant/Husband to make up for the property he has taken from Appellee/Wife. The answer is "no."

Conventional conflict pre-emption principles require pre-emption only "where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. National Solid Wastes Management Assn.*, 112 S. Ct. 2374, 505 U.S. 88, 98 (1992) (internal quotation marks and citation omitted). Here, Appellant/Husband was free to apply for tax-free disability benefits, and to waive payment of the already-divided retirement benefits to get them. And the trial court, once the Appellant/Husband invaded the Appellee/Wife's property, was free to order him to indemnify her for what he had taken.

In *Crawford*, *supra*, the federal law provided no mechanism for protecting a spousal interest in retirement benefits which were foregone by a member in favor of SSB benefits received by him exclusively. This Court granted its approval to both preservation of the spousal interest, and the trial court's enforcement of that interest

by the application of a lien against the member's sole and separate property residence.[3]

The situation here is not appreciably different. Appellant/Husband has converted Appellee/Wife's share of the benefit stream into payments going directly to him, and the lower court has ordered him to reimburse her out of that benefit stream, to the extent that it is made up of her funds.

The Texas Court of Appeals has recently had the opportunity to examine a case in which the husband waived a portion of retired pay already granted to the former spouse, thus transferring the money from her receipt to his, just as in this case. The husband claimed that he was "exempt" from contempt sanction by reason of his waiver of retired pay in favor of disability benefits. *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995). In that case, the wife was ultimately allowed to collect from the husband all sums called for by the decree but which he had sought to recharacterize as disability.

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[3] It is by analogous reasoning that this Court, upon remand, should consider vacating that portion of the decision below indicating that spousal support is not an "appropriate" mechanism for enforcing the underlying property division. As this Court noted in *Crawford*, the trial court should use the means at its disposal to carry into effect the division of benefits set out in the underlying divorce decree.

The Texas court sided with the clear majority of courts in so holding, specifically including those of this state. *See In re Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (App. 1997), where the court held that waivers in military pay benefitting the member only bar compensation to the spouse if those waivers in retired pay were made ***before the award to the former spouse was made***.[4]

The court saw the proscription of *Mansell* – that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans' disability payments" – as a call to essentially take a snapshot when the award to the spouse is made. If sums of disposable retired pay had been waived up to that point, they were not divisible. Where a member sought a ***post***-divorce reduction in retired pay, however (as in this case), his efforts at re-characterization were seen as attempting a "de facto modification" of a final property award, which state law did not permit.

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[4] The ARA brief notes that *Gaddis* was concerned with a Civil Service dual compensation waiver, not a disability waiver. ARA Brief at 18. The ARA does not acknowledge that their *Inclusio unis* argument (that the "plain language" of the USFSPA prohibits the courts from protecting former spouses) would apply equally to any kind of waiver creating a flow of benefits to the member by reducing "disposable pay." They also take the wrong lesson from the congressional enactment requiring members to indemnify spouses when they waive military retired pay in favor of civil service benefits. *See* Pub. L. 104-201, Div. A, Title VI, Subtitle D, § 637, 110 Stat. 2579 (Sept. 23, 1996). The fact that Congress has explicitly prohibited ***one*** means by which a member can seek unjust enrichment at the expense of his former spouse does not imply a lack of power of state courts to remedy ***other*** means by which members attempt to accomplish the same end.

The result is perhaps made most clear in comparing this case to the several related areas where the federal statute does not explicitly provide for payment to former spouses, and members have acted in ways that, if uncorrected, would have worked to divest those former spouses of awards of retired pay. Courts have, with great uniformity, acted to protect the spousal interest from being gutted by the members' actions.

The underlying legal theory has probably been expressed most succinctly by those courts (including ***this*** Court) examining cases in which the military member took an early retirement[5] in an effort to divest the former spouse. Generally, the benefits have generally been held to be as divisible as the retirements that were given up to receive those "early out" benefits, ***despite*** the lack (for SSB and VSI) of any federal mechanism for direct payment to the former spouse. *In re McElroy*, 905 P.2d 1016 (Colo. Ct. App. 1995) (SSB); *In re Shevlin*, 903 P.2d 1227 (Colo. Ct. App. 1995) (VSI); *In re Heupel*, 936 P.2d 561 (Colo. 1997). Other courts throughout the

[5] The Variable Separation Incentive (VSI) or Special Separation Benefit (SSB) or the early (15-19 year) retirement program known as the "Temporary Early Retirement Authority" (TERA). The first two programs were offered to members in "selected job specialties" who had accrued between six and twenty years of service. The third was for members with more than 15 but fewer than 20 years of service. All three of these programs have been repeatedly re-authorized by Congress, although they were supposed to expire after the military "draw-down" of the 1990s.

country have used similar language or reasoning to reach the same results regarding both programs. *See Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995) (SSB divisible in place of military retirement divided in divorce, refusing to "allow[] one party to retain all the compensation for unilaterally altering a retirement plan asset in which the other party has a court-decreed interest"); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996); *Abernathy v. Fishkin*, 638 So. 2d 160 (Fla. Ct. App. 1994) (VSI); *Blair v. Blair*, 271 Mont. 196, 894 P.2d 958 (Mont. 1995); *Fisher v. Fisher*, 319 S.C. 500, 462 S.E.2d 303 (S.C. Ct. App. 1995) (VSI); *Lykins v. Lykins*, 34 S.W.3d 816 (Ky. Ct. App. 2000); *Crawford v. Crawford*, *supra*, 180 Ariz. 324, 884 P.2d 210 (App. 1994).[6]

The "bottom line" to these cases nationally – with which the decisions of this Court and the Arizona courts generally are in full accord – is that in post-decree enforcement of a division of retired pay as property, the spouse is to be compensated for any action taken by the member that lowered the sums payable to the spouse.

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[6] A few courts have reached the opposite result. *See McLure v. McLure*, 647 N.E.2d 832 (Ohio Ct. App. 1994). Others have reached the opposite result, just to be reversed on appeal or upon narrow findings of special circumstances. *See Kelson v. Kelson*, 647 So. 2d 959 (Fla. Ct. App. 1994) (VSI held not divisible in split opinion); *overruled*, 675 So. 2d 1370 (Fla. 1996); *Baer v. Baer*, 657 So. 2d 899 (Fla. Ct. App. 1995) (where service member given ultimatum to accept VSI or be immediately involuntarily terminated, VSI payments were severance pay rather than retirement pay, and not divisible); *In re Kuzmiak*, 222 Cal. Rptr. 644 (Ct. App. 1986) (pre-SSB/VSI case; separation pay received upon involuntary discharge pre-empted state court division).

E. Public Policy Supports the Actions of the Trial Court

This area has been of interest to the ABA for some years. Two formal resolutions have issued from the House of Delegates (which sets formal policy), in 1979 and 1982.

The ABA position, consistent with existing ABA resolutions, is to recommend that military retirement benefits be treated by courts in everyday litigation in a manner that is consistent with the property distribution laws of the states, which are designed to achieve equity in marital dissolutions.

In 1979, the American Bar Association formally adopted a policy resolution recommending the enactment of legislation requiring the Secretaries of the Armed Forces to recognize state court decrees of divorce dividing retired or retainer pay. The 1982 resolution, in the wake of *McCarty*,[7] urged Congress to enact legislation making **all** deferred compensation derived from federal employment subject to state property and divorce laws, except where specifically exempted by explicit federal legislation.[8]

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[7] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

[8] *See* 1993-1994 ABA Policy and Procedures Handbook at 202 (ABA 1993), noting 1979 and 1982 resolutions approved by the House of Delegates of the ABA.

Since then, the consistent ABA position has been to allow state divorce law to apply to military members and their spouses, as it does to everyone else, with the goal of avoiding any "special classes" of persons who would be wrongly deprived of, or unjustly enriched with, the fruits of a marriage.

All of the states have taken the view that marriage is, among other things, an economic partnership in which both parties contribute toward the common good, although sometimes in different ways. The states recognize that partnership by considering both parties to a marriage to be owners of that property which is acquired during the marriage, including pension and retirement benefits.

Today, all 50 states have recognized military retirement benefits as property, belonging to both parties to the extent earned during the marriage. This is in keeping with the treatment by the states of all other federal, state, and private retirement and pension plans. In ***most*** military marriages, the military retirement benefits are more valuable than ***all*** the other property accumulated during the marriage. In other words, if this one asset is inequitably divided, it is usually impossible to make a military divorce fair to both parties.

In 1990, the ABA noted that it

> recognizes the power of Congress to pre-empt state law in this field, but has uniformly held the position that no pre-emption of state law should be *implied* by the courts, and that Congress should be circumspect in determining that state law should be pre-empted at all. Where federal pre-emption is determined to be necessary, the scope of that pre-emption should be carefully defined so as to avoid wrecking havoc upon the balance of interests involved in state court divisions of marital property.[9]

ABA policy has not changed on this topic since that time.

The most recent expression of that policy came in the form of a report to Francis M. Rush, Jr., Acting Assistant Secretary of Defense, in response to Mr. Rush's request for comments relating to the review of former spouse protection laws as part of the National Defense Authorization Act for 1998 § 643 (March 14, 1999).[10]

One section of the report addressed the problems attendant upon the waiver of retired pay for disability pay. After describing the problem, the report weighed the equities and came down in favor of amending the law to prohibit the waiver of any

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[9] *Proposed Amendments to the Uniformed Services Former Spouses Protection Act, 1990: Hearings on H.R. 3776, H.R. 2277, H.R. 2300, and H.R. 572 Before the Subcomm. on Military Personnel and Compensation of the House Comm. on Armed Services*, 101st Cong., 2nd Sess. (1990) (Statement of Marshal S. Willick, Chairman of Subcommittee on Federal and Military Pension Legislation, Committee on Federal Legislation and Procedures, Section of Family Law, on Behalf of the American Bar Association, April 4, 1990), at 5.

[10] Undersigned counsel authored the report on behalf of the ABA; no action has yet resulted from it.

sum of retired pay that has already been adjudged to be the property of a former spouse:

> This contentious issue has a simple solution which will cost money, or a less-satisfactory solution which will cost the government nothing, but can only strike a balance among the various competing public policies, rather than fully satisfying any of them.
>
> The "simple" solution is to eliminate the provisions requiring waiver of regular retired pay upon receipt of disability pay. If retired pay is properly seen as a deferred reward for service, and disability compensation is government compensation for future lost wages and opportunities because of disabilities suffered in government service, then they are and should be separately payable to the same individual to the extent deserved. Thus, a claim of disability will have no impact on a longevity retirement; the former spouse has no interest in the disability award, and both the members and the former spouses would be fully satisfied. The government, however, would have to pay disability compensation in addition to the longevity retirement earned by those eligible to receive it.
>
> To the degree that this is considered fiscally impossible, there seems no choice but to weigh the interest of disabled veterans in receipt of full compensation against the interest of former spouses to receive their accrued and adjudicated separate property rights.
>
> A review of cases around the country and over the years indicate that many courts have struck the balance by stating that any ***pre-divorce*** disability creates a separate property interest of the member that is not divisible upon divorce, while a ***post-divorce*** disability application is not allowed to divest a former spouse of any interest that she has already been awarded. In *Mansell* itself, the court upon remand refused to allow the ruling in that case to affect the pre-existing division of dollars

between the parties. This logic was followed by other courts examining pre-*Mansell* divorces.

There has, however, been much uncertainty, as each court felt its way through the equities, and the results have been uncertain and resulted in much litigation.

Some courts have focused on alimony. Other courts looked to the details of the decrees in question, "saving" the spousal interest when they found safeguard clauses and indemnification for reduction clauses, under a theory appears of "constructive trust" (i.e., once the divorce goes through, the retirement money is considered no longer the member's property to convert).

The problem is probably self-evident from the case summaries noted, however. There is a lack of predictability and uniformity to the results, and similarly-situated people are treated differently because of trivial differences between their divorce decrees, or on the perceptions of individual judges. A clear rule prohibiting the divestment of spousal interests that have already been ordered, would save much litigation.

> **Recommendation:** Ideally, disability awards should be in addition to, and not require waiver of, longevity retired pay. If this cannot be done, the federal law governing application for VA disability should be modified to include a provision prohibiting the conversion to disability pay of any portion of disposable retired pay that has been awarded to a former spouse as the separate property of that former spouse.

Report of March 14, 1999, at 15-17 (citations deleted). Until and unless Congress acts to either eliminate the need to waive retired pay in order to obtain disability

pay,[11] or prohibits waiver of retired pay already adjudicated to be the property of a former spouse, it will be up to the courts to safeguard the division of property between spouses, irrespective of the efforts by the military spouse to recharacterize property belonging to the former spouse as his own.

CONCLUSION

In *Crawford*, *supra*, this Court quickly summarized the essence of cases of this kind:

> More importantly, Michael concedes that he gave up his accrued retirement benefits in order to receive SSB. Whether the SSB payment represented proceeds from Michael's retirement or was payment in lieu of retirement benefits, clearly some portion of it was attributable to retirement funds.

884 P.2d at 212. The same thing occurred here, the only distinction being that the retirement benefits were given up in this case in order to receive disability payments.

We note that the ARA, at least, admits that the end they seek is unjust. ARA Brief at 23. Neither Appellant/Husband nor the ARA has set forth any valid, binding

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[11] Various members of Congress have pursued that goal for years. For example, H.R. 65 is the most recent bill to completely eliminate concurrent receipt limitations. It was introduced by Rep. Michael Bilirakis, R-Fla., and is currently pending in the 107th Congress. All prior efforts have been halted by concerns about the increased cost to the government of paying both disability and retirement benefits.

authority requiring this Court to overrule its prior holdings, ignore community property principles, and give its blessing to unjust enrichment in defiance of the stated intent of the divorce court.

In the absence of authority requiring this Court to be a party to such an abhorrent result, this Court should do no such thing. The decision of the trial court should be affirmed.

Respectfully submitted on March _____, 2001.

LAW OFFICE OF MARSHAL S. WILLICK, P.C.

By:_____

Marshal S. Willick, Esq.
Nevada Bar No. 002515
3551 E. Bonanza Rd., Suite 101
Las Vegas, Nevada 89110-2198
(702) 438-4100
Counsel for *Amicus Curiae* EX-POSE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14 of the Arizona Rules of Civil Appellate Procedure, I certify that the attached brief uses proportionately spaced type of 14 points of more, is double spaced using a roman font, and contains **4860** words.

DATED this _____ day of March, 2001.

_____

Marshal S. Willick, Esq.
Attorney for *Amicus Curiae* EX-POSE
Nevada Bar No. 002515

CERTIFICATE OF SERVICE

I hereby certify that two copies of the brief *Amicus Curiae* have been mailed by first class mail this date to all counsel, listed below, in this action.

DATED this _____ day of March, 2001.

Ethan Steele, Esq.
6373 E. Tanque Verde
Suite 150
Tuscon, AZ 85715

Leonard Karp, Esq.
Karp, Heurlin & Weiss, P.C.
3060 N. Swan Road
Tucson, AZ 85712

James A. Noone, Esq.
Karalekas & Noone
1211 Connecticut Ave., N.W.
Washington, DC 20036

_____

Marshal S. Willick
Attorney for *Amicus Curiae* EXPOSE
Nevada Bar No. 002515

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