

# **EXHIBIT A**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

DAVID DAGGETT, individually, and as a  
representative of a Class of Participants and  
Beneficiaries of the Waters Employee  
Investment Plan,

Plaintiff,

v.

WATERS CORPORATION, WATERS  
TECHNOLOGIES CORPORATION, BOARD  
OF DIRECTORS OF WATERS  
TECHNOLOGIES CORPORATION, and  
EMPLOYEE BENEFITS  
ADMINISTRATION COMMITTEE OF  
WATERS TECHNOLOGIES  
CORPORATION,

Defendants.

Civil Action No. 1:23-cv-11527-JGD

**REPLY IN SUPPORT OF MOTION OF THE CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA TO PARTICIPATE AS *AMICUS CURIAE***

OF COUNSEL:

Jordan L. Von Bokern  
Maria C. Monaghan  
U.S. CHAMBER LITIGATION CENTER  
1615 H Street, N.W.  
Washington, D.C. 20062

Deanna M. Rice (*pro hac vice*)  
Gregory J. Comeau (BBO# 661505)  
O'MELVENY & MYERS LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 383-5300  
Facsimile: (202) 383-5414  
Email: derice@omm.com  
gcomeau@omm.com

*Counsel for Amicus Curiae the Chamber of  
Commerce of the United States of America*

The Chamber’s proposed *amicus* brief offers a unique perspective on the practical realities and tradeoffs ERISA fiduciaries face when selecting plan investment options and service provider arrangements from the vast array of choices available in the market—information that may assist the Court “in putting the immediate controversy in its larger context.” *Gallo v. Essex County Sheriff’s Dept.*, No. 1:10-cv-10260-DPW, 2011 WL 1155385, at \*6 n.7 (D. Mass. Mar. 24, 2011). This context, including the “range of reasonable judgments a fiduciary may make based on her experience and expertise,” is exactly the type of information the Supreme Court has directed lower courts to take into account when evaluating motions to dismiss fiduciary-breach claims under ERISA. *Hughes v. Nw. Univ.*, 595 U.S. 170, 173, 177 (2022). As explained in the Chamber’s motion to participate as *amicus curiae* (ECF No. 29, or “Mot.”), the Chamber’s distinct viewpoint on these issues is informed by decades of involvement in the development of law and policy regarding retirement plans. It is also rooted in the experience of the Chamber’s many members that maintain or provide services to ERISA-governed employee benefit plans—some of whom have had to fend off similar lawsuits questioning the prudence of their choices based on cherry-picked performance and fee comparisons. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, 50 (D. Mass. 2015) (permitting *amicus* filing where group’s “experiences and viewpoints may be enlightening” to the court). The Court should exercise its “inherent authority and discretion” to permit the Chamber to file its proposed *amicus* brief. *Bos. Gas. Co. v. Century Indem. Co.*, No. 1:02-cv-12062-RWZ, 2006 WL 1738312, at \*1 n.1 (D. Mass. June 21, 2006).

Plaintiff presents a laundry list of arguments in opposition to the Chamber’s motion to participate as *amicus*, but none is persuasive.

1. Plaintiff first argues that district courts should be reluctant to allow *amicus* briefs at the motion to dismiss stage, at least absent an express invitation from the court or the joint consent of the parties. *See* Opp. 2, 4. But as demonstrated in the Chamber’s motion, those are far from the only circumstances in which district courts have welcomed *amicus* participation, and the Chamber cited more than a “few cases” (Opp. 4) where courts have accepted *amicus* briefs at the motion to dismiss stage. *See* Mot. 5–6 & n.7 (citing nine dismissal-stage ERISA fiduciary-breach cases where the Chamber has been permitted to file *amicus* briefs, as well as additional cases where *amicus* briefs have been permitted at the motion to dismiss stage). And while plaintiff contends that the Court should deny the Chamber’s motion for leave simply because plaintiff opposes it, *see* Opp. 6, district courts frequently grant motions for leave to file *amicus* briefs over a party’s opposition—and have done so in many cases involving submissions from the Chamber. *See, e.g., Baker v. The Univ. of Vermont Med. Ctr.*, No. 2:23-cv-00087-GWC, ECF No. 26 (D. Vt. Sept. 12, 2023); *Bracalente v. Cisco Sys., Inc.*, No. 5:22-cv-04417-EJD, ECF No. 67 (N.D. Cal. May 3, 2023); *Sigetich v. Kroger Co.*, No. 1:21-cv-697, 2022 WL 2900766, at \*2–3 (S.D. Ohio July 22, 2022); *Baumeister v. Exelon Corp.*, No. 1:21-cv-6505, ECF No. 44 (N.D. Ill. Mar. 11, 2022).<sup>1</sup> The First Circuit’s decision in *Strasser v. Doorley*, 432 F.2d 567 (1st Cir. 1970), does not establish a different standard in this Circuit. *See, e.g., Portland Pipe Line Corp. v. City of S. Portland*, No. 2:15-CV-00054-JAW, 2017 WL 79948, at \*5–6 (D. Me. Jan. 9, 2017) (noting *Strasser*’s instruction that courts “go slow” in accepting *amicus* briefs absent the

---

<sup>1</sup> Plaintiff cites—and urges the Court to follow—one case in which a court came out the other way and denied a request by the Chamber to participate as *amicus*. *See* Opp. 1–2 & Ex. 1. That decision is in the minority, and it in no way constrains the Court’s discretion to allow the Chamber’s distinct *amicus* submission here. As explained in the Chamber’s motion to participate as *amicus* and further discussed herein, the Chamber’s proposed *amicus* brief in this case provides a broader perspective on the issues before the Court and is not merely duplicative of defendants’ briefing. *See infra* at 4–6.

parties' joint consent but nonetheless granting motions for leave to file *amicus* briefs over opposition and looking to Federal Rule of Appellate Procedure 29 for guidance in doing so).

2. Plaintiff's various attacks on the substance of the Chamber's proposed *amicus* brief are also meritless. Plaintiff argues that the Court should refuse to consider the Chamber's brief because the Chamber is not sufficiently "impartial" to serve as an *amicus*. Opp. 5; *see id.* at 7 (arguing that the Chamber's *amicus* brief is "partisan"). As plaintiff's own cases acknowledge, *amici* are often "interested in a particular outcome," but that does not mean they cannot "contribute in clear and distinct ways" to the court's consideration of the issues—for example, by "[e]xplaining the broader regulatory or commercial context in which a question comes to the court" or "[p]roviding practical perspectives on the consequences of potential outcomes." *Prairie Rivers Network v. Dynegy Midwest Generation*, 976 F.3d 761, 763 (7th Cir. 2020) (granting Chamber's motion for leave to file); *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.) ("an *amicus* who makes a strong but responsible presentation in support of a party can truly serve as the court's friend"); *Trustees of Bos. Univ. v. Vyrian, Inc.*, Civil Action No. 13-11963-PBS, 2013 WL 12129604, at \*4 (D. Mass. Oct. 29, 2013) (citing *Neonatology Associates* and rejecting argument that an *amicus* must be "impartial"). The guiding principle is simply "that an *amicus curiae* brief should be additive" and useful to the court. *Prairie Rivers Network*, 976 F.3d at 763; *see Kadel v. Folwell*, No. 1:19CV272, 2022 WL 1046313, at \*1 (M.D.N.C. Apr. 7, 2022) ("Ultimately, the question is one of utility."). As further discussed below, the Chamber's proposed brief in this case satisfies this standard.<sup>2</sup>

---

<sup>2</sup> Plaintiff suggests that *amici* are held to a higher standard of neutrality in the district court, *see* Opp. 6, but district courts, like courts of appeals, regularly accept *amicus* briefs filed in support of "one side or the other" (*id.*). *See* Mot. 5–6; *supra* at 2. And many district courts have

Plaintiff next argues that the Chamber’s proposed *amicus* brief “adds nothing of value” because defendants purportedly “already assert the key arguments repeated by the Chamber.” Opp. 7–8; *see id.* at 5 (arguing that the Chamber’s arguments are “duplicative”). But the mere fact that the Chamber’s brief addresses the same general issues covered in defendants’ briefing—*i.e.*, plaintiff’s allegations regarding the Fidelity Freedom Funds and plan recordkeeping and administrative fees (*see* Opp. 5)—does not make it duplicative. Indeed, courts often refuse to consider *amicus* briefs that stray too far from the parties’ contentions. *See, e.g., United States v. Richmond Joseph*, No. 19-CR-10141-LTS, 2020 WL 4288425, at \*2 n.2 (D. Mass. July 27, 2020) (observing that “amici may not introduce new grounds for dismissal”).

The Chamber’s brief strikes the proper balance for an *amicus* filing: it addresses the core issues in dispute, but makes a distinct contribution by providing a “unique perspective” rooted in the Chamber’s broad experience with retirement-plan administration, ERISA litigation, and related policy issues. *See, e.g., High Country Conservation Advocates v. U.S. Forest Serv.*, 333 F. Supp. 3d 1107, 1116-17 (D. Colo. 2018) (granting leave to file *amicus* brief where group’s “unique perspective” is “helpful in understanding and analyzing the issues presented”), *vacated and remanded on other grounds*, 951 F.3d 1217 (10th Cir. 2020). More specifically, the Chamber’s brief adds to defendants’ arguments by providing additional context about the complex realities of retirement plan management and fiduciary decision-making and how ERISA’s prudence standard accommodates those concerns. As one district court explained in granting the Chamber’s motion for leave to file an *amicus* brief at the motion to dismiss stage, “given the Chamber’s experience with both retirement plan management and ERISA litigation,

---

directly rejected any requirement “that amici must be totally disinterested.” *California v. U.S. Dep’t of Lab.*, 2014 WL 12691095, at \*1 (E.D. Cal. Jan. 14, 2014) (quotation omitted); *see also, e.g., Trustees of Bos. Univ.*, 2013 WL 12129604, at \*4.

the Chamber can offer a valuable perspective on the issues presented.” *Sigetich*, 2022 WL 2900766, at \*3; see *Baumeister v. Exelon Corp.*, No. 1:21-cv-6505, ECF No. 44 (N.D. Ill. Mar. 11, 2022) (concluding that the Chamber’s “proposed amicus brief could provide the Court wi[th] a broader view of the impact of the issues raised in the case”). The same is true in this case.

Plaintiff also contends that the Chamber’s brief “impermissibly argues facts” rather than properly focusing on issues of law. Opp. 6. But the Chamber’s brief does not contest any well-pled, non-conclusory facts alleged in plaintiff’s complaint. Rather, the Chamber’s brief provides additional factual *context* bearing on the plausibility of plaintiff’s allegations under the governing legal standard—a common and appropriate function of *amicus* briefs that district courts have welcomed. See *Gallo*, 2011 WL 1155385, at \*6 n.7 (recognizing role of “very thoughtful *amicus* submissions” that the court had invited in contextualizing controversy); see also, e.g., *Prairie Rivers*, 976 F.3d at 763 (*amicus* brief may assist the court by, for example, highlighting factual nuances, providing practical perspectives on the consequences of potential outcomes, and supplying empirical data relevant to the issues before the court).

3. Plaintiff’s professed concerns about the “potential for abuse” when it comes to *amicus* filings (Opp. 5) are not implicated here, because the Chamber’s brief offers a unique perspective on issues relevant to the Court’s decision. Nor is the fact that defendants are represented by experienced counsel (Opp. 7) a basis to prohibit *amicus* participation where, as here, the proposed *amicus* brief makes a distinct contribution. “Even when a party is very well represented, an *amicus* may provide important assistance to the court”—particularly where, for example, the *amicus* can “explain the impact a potential holding might have on an industry or other group.” *Neonatology Assocs.*, 293 F.3d at 132; see *Arkansas Tchr. Ret. Sys. v. State St. Bank & Tr. Co.*, 523 F. Supp. 3d 181, 193 (D. Mass. 2018) (“District courts frequently welcome

amicus briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved or if 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.” (quoting *Conservation Cong. v. U.S. Forest Serv.*, No. 2:14-CV-2228-GEB-AC, 2015 WL 300754, at \*1 (E.D. Cal. 2015)); *Gallo*, 2011 WL 1155385, at \*6 n.7 (noting that although the relevant motion “was ably presented by” party counsel, the “*amicus* submissions were quite helpful in putting the immediate controversy in its larger context”).

For the foregoing reasons and those stated in the Chamber’s motion to participate as *amicus curiae*, the Chamber respectfully requests that the Court grant it leave to file the proposed *amicus* brief.

DATED: December 7, 2023

Respectfully submitted,

OF COUNSEL:

Jordan L. Von Bokern  
Maria C. Monaghan  
U.S. CHAMBER LITIGATION CENTER  
1615 H Street, N.W.  
Washington, D.C. 20062

/s/ Deanna M. Rice  
Deanna M. Rice (*pro hac vice*)  
Gregory J. Comeau (BBO# 661505)  
O’MELVENY & MYERS LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 383-5300  
Facsimile: (202) 383-5414  
Email: derice@omm.com  
gcomeau@omm.com

*Counsel for Amicus Curiae the Chamber of  
Commerce of the United States of America*



**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2023, I caused the foregoing to be filed with the Clerk of the Court for the United States District Court for the District of Massachusetts by using the court's CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Deanna M. Rice  
Deanna M. Rice