

IN THE SUPREME COURT OF MISSISSIPPI**No. 2015-M-1543-SCT**

**BRISTOL-MYERS SQUIBB CO., SANOFI-AVENTIS U.S. LLC, SANOFI-AVENTIS
U.S., INC., AND SANOFI-SYNTHELABO, INC.****Petitioners/Defendants****vs.****JIM HOOD, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI EX REL.
STATE OF MISSISSIPPI****Respondents/Plaintiffs**

*In Re Petition to Appeal Interlocutory Order of the Chickasaw County Chancery Court,
Honorable Dorothy Colom, in Jim Hood, Attorney General of The State of Mississippi ex rel.
State of Mississippi v. Bristol-Myers Squibb Co. et al., Cause No. 2014-2124-C*

**STATE'S RESPONSE IN OPPOSITION TO THE MOTION OF FRESENIUS MEDICAL
CARE HOLDINGS, INC. AND FRESENIUS USA, INC. FOR LEAVE TO FILE *AMICI
CURIAE* BRIEF**

INTRODUCTION

Non-parties Fresenius Medical Care Holdings, Inc. and Fresenius USA, Inc. (collectively, “Fresenius”) impermissibly seeks to intervene on behalf of Defendants, despite the right of the State of Mississippi (“State”) to have the Court decide Defendants’ pending interlocutory appeal without interference and influence by openly partisan bystanders to *this* litigation. Indeed, Fresenius claims to be a “victim” because they are a defendant in another statutorily authorized Mississippi Consumer Protection Act (“MCPA”) case pending in another Mississippi court. It is difficult to imagine a more *partisan* “friend” of the court than a litigant with a similar case pending against it in the Mississippi court system.

Fresenius cannot support such a request. They have not argued that Defendants’ lawyers at Butler Snow LLP or Wise Carter Child & Caraway, P.A. are unable counsel or that those lawyers are inadequately representing their clients in this issue. Further, Fresenius cannot establish that the interest—*if any*—that they may have in the subject matter of this action is somehow inadequately protected. Finally, their brief offers no more than repetition of law and arguments already presented by Defendants. Accordingly, Fresenius has failed to show why the Parties’ own submissions are insufficient to allow the Court to make an appropriate ruling on Defendants’ underlying Petition for Interlocutory Appeal (hereinafter, “Petition”).

For those reasons and consistent with all relevant law, as more fully detailed below, the Court should reject the duplicative and partisan arguments by Fresenius and deny the Motion for Leave.

ARGUMENT & AUTHORITIES

I. Relevant Cases Demonstrate that a Partisan “Amici” Brief by Fresenius Is Inappropriate and Unnecessary in this Interlocutory Appeal.

This Court has long recognized that “an *amicus curiae* is one who is a ‘friend of the court’ or a ‘by-stander,’ rather than an advocate or party who assists the court by offering information or otherwise.” *Taylor v. Roberts*, 475 So.2d 150, 151 (Miss. 1985) (citation omitted). Generally, the purpose of an *amicus curiae* brief is “to call the court’s attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration.” *Id.* Further, the Supreme Court of Mississippi has recognized that “where the parties were ‘represented by very able counsel who have filed an excellent and exhaustive brief’ no assistance was needed.” *Id.* at 151-52 (citation omitted) (denying applicants leave to file *amicus curiae* brief).

Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit has emphasized that “[t]he vast majority of *amicus* briefs are filed by allies of litigants and duplicate

the arguments made in the litigants' briefs," and "should not be allowed. They are an abuse. The term '*amicus curiae*' means friend of the court, *not friend of the party.*" *Ryan v. Commodity Futures Trading Comm.*, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991)) (emphasis added); accord *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982) ("Indeed, if the proffer comes from an individual with a partisan, rather than an impartial view, the motion for leave to file an amicus brief is to be denied, in keeping with the principle that an amicus must be a friend of the court and not a friend of the party.").

Additionally, in *Ryan*, Judge Posner considered "the tendency of many judges . . . 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." 125 F.3d at 1063 (internal quotation marks omitted). Judge Posner also considered the adequacy of representation of the parties in determining whether an *amicus curiae* brief by the Chicago Board of Trade was desirable under the circumstances. *Id.* In addition to desirability, Judge Posner evaluated the interest and relevance requirements implicit in Fed. R. App. P. 29(b). He concluded that "leave to file an amicus curiae brief should be denied" except, in the case of inadequate representation, where "the amicus has an interest in some other case that may be affected by the decision in the present case" or "has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Id.* (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)).

II. Fresenius Cannot Satisfy the Particularized Standards for Appearing as "Amici" Here.

Turning to Fresenius's request to participate as *amici* in this case, they do not satisfy the requirements for filing a brief as *amici* in this Court. Indeed, like the brief of the Chicago Board of Trade (attached to its motion for leave) in *Ryan*, Fresenius's brief "falls into the forbidden category." *Ryan*, 125 F.3d at 1063.

First, Fresenius is obviously not “impartial,” as they must be, but are rather indisputably partisan and/or have a pecuniary interest in the outcome of the underlying Motion. *Leigh*, 535 F. Supp. at 420; *see also Ryan*, 125 F.3d at 1063. In particular, Fresenius is a litigant with a separate MCPA case pending, with a counterclaim that involves the same issue of “hiring contingency-fee lawyers to prosecute civil-enforcement actions.” (Mot. For Leave Br. At 2.) As a result, Fresenius has a vested interest, and their “*amici*” arguments are blatantly financially-driven and quintessentially partisan. For this reason alone, therefore, the Court should deny Fresenius’s Motion.

Moreover, the Fresenius submission should be rejected since it merely duplicates the arguments made and authority cited in Defendants’ Petition, *see Ryan*, 125 F.3d at 1063, thus failing to provide requisite “unique information or perspective that [could] help the court beyond the help that the lawyers for the parties are able to provide,” *Id.* (Compare Fresenius’s Proposed *Amici Curiae* Br. at 9-12 with Defs.’ Pet. For Interlocutory Appeal at 11-14.) Fresenius seeks to enjoin the “ongoing due process violation,” (Mot. for Leave Br. at 2), however, Fresenius’s Brief exhibits the same fundamental misunderstandings of relevant Mississippi policy and governing law as Defendants’ Petition and, like the Defendants’ Petition, repeats Defendants’ arguments on the issue of the Attorney General’s “control.” (Compare Fresenius’s Proposed *Amici Curiae* Br. at 2-6, 9, 11, 14 with Defs.’ Pet. For Interlocutory Appeal at 12-14.) Further, Fresenius has not argued that Defendants are not already represented by competent counsel, or that defense counsel cannot capably brief the relevant issues. Thus, additional input by Fresenius will not aid in consideration of the underlying issues, particularly those involving interpretation of the MCPA and other State law. *See Northern Sec. Co.*, 191 U.S. at 556; *Am. College of Obstetrics & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (per curiam).

Given the foregoing, Fresenius's request constitutes "an abuse," and their Motion to File a Brief as *Amicus Curiae* should be denied. *Ryan*, 125 F.3d at 1063.

CONCLUSION

For all the foregoing reasons, the Motions of Fresenius Medical Care Holdings, Inc. and Fresenius USA, Inc. for Leave to File *Amicus Curiae* Brief should be denied.

Dated: October 30, 2015

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI**

By: /s/ S. Martin Millette, III
S. Martin Millette, III, MS Bar # 102416
Special Assistant Attorney General
Geoffrey Morgan, MS Bar # 3474
Special Assistant Attorney General
George W. Neville, MS Bar # 3822
Special Assistant Attorney General
Jacqueline H. Ray, MS Bar # 100169
Special Assistant Attorney General
Office of the Attorney General
Post Office Box 220
550 High Street, Suite 1200
Jackson, MS 39205-0220
Telephone: (601) 359-3680
Facsimile: (601) 359-2003
mamil@ago.state.ms.us
gmorg@ago.state.ms.us
gnevi@ago.state.ms.us
jacra@ago.state.ms.us

OF COUNSEL:

Willie Howard Gunn, MS Bar #5037

W. Howard Gunn & Assoc.

P.O. Box. 157

Aberdeen, MS 39730

Telephone: (662) 369-8533

Facsimile: (662) 369-9844

whgunn@bellsouth.net

Robert W. Cowan, TX Bar #24031976

Admitted *pro hac vice*

Bailey Peavy Bailey PLLC

The Lyric Centre

440 Louisiana St., Suite 2100

Houston, TX 77002

Telephone: (713) 425-7100

Facsimile: (713) 425-7101

rcowan@bpblaw.com

*Attorneys for Jim Hood, Attorney General of the State
of Mississippi, ex rel. the State of Mississippi*

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the forgoing with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

W. Wayne Drinkwater
Roy D. Campbell, III
Margaret Oertling Cupples
Simon Bailey
Bradley Arant Boulton Cummings LLP
One Jackson Place, Suite 400
188 East Capitol Street
Jackson, MS 39215-1789
(601) 948-8000
(601) 948-3000 (fax)

Counsel for Amici Curiae
Fresenius Medical Care Holdings, Inc.
and Fresenius USA, Inc.

Orlando R. Richmond, Sr.
Luther T. Munford
William M. Gage
P. Ryan Beckett
Butler Snow, LLP
1020 Highland Colony Parkway
Suite 1400
Ridgeland, Mississippi 39157
Orlando.richmond@butlersnow.com
Luther.munford@butlersnow.com
William.gage@butlersnow.com
Ryan.beckett@butlersnow.com

*Attorneys for Petitioners Bristol-Myers
Squibb Co., Sanofi-Aventis U.S. LLC
Sanofi-Aventis U.S., Inc. and Sanofi-
Synthelabo, Inc.*

And via United States Mail, first-class
postage prepaid to

Honorable Dorothy Colom
Post Office Box 708
Columbus, MS 39703-0708
Chancery Court of Chickasaw County

This the 30th day of October, 2015

By: /s/ S. Martin Millette, III