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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' PETITION FOR INTERLOCUTORY APPEAL

INTRODUCTION

Non-parties, the Chamber of Commerce of the United States of America ("Chamber") and Pharmaceutical Research and Manufacturers of America ("PhRMA") impermissibly seek 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 patently partisan bystanders to the litigation.

The Chamber and PhRMA 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. They have

failed to identify a pending case in which they are involved that will be affected by this decision in this case. Further, the Chamber and PhRMA cannot establish that any interest they may have in the subject matter of the action is somehow inadequately protected. Finally, their amicus offers no more than repetition of law and arguments already presented by Defendants. Accordingly, the Chamber and PhRMA have 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 the Chamber and PhRMA and deny the Motion for Leave.

ARGUMENT & AUTHORITIES

I. Relevant Cases Demonstrate that a Partisan "*Amici*" Brief by the Chamber and PhRMA 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). The United States Supreme Court has also made clear that if "[i]t does not appear that applicant[s] [are] interested in any other case which will be affected by the decision of [the instant] case," and "the parties are represented by competent counsel, [then] *the need of*

assistance cannot be assumed." *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903) (emphasis added); *accord Am. College of Obstetrics & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (per curiam).

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.*, 191 U.S. at 556).

II. The Chamber and PhRMA Cannot Satisfy the Particularized Standards for Appearing as "*Amici*" Here.

Turning to the joint request of the Chamber and PhRMA 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*, the Chamber and PhRMA's brief "falls into the forbidden category." *Ryan*, 125 F.3d at 1063.

First, the Chamber and PhRMA are 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, the Chamber and PhRMA admit they simply seek to curtail—as a general matter—"private contingent-fee lawyers prosecuting civil-penalty and other enforcement actions." (Mot. for Leave Br. at 3.) As promoters of the business-side of the prescription drug industry, the Chamber and PhRMA "*amici*" arguments are blatantly financially-driven and quintessentially partisan. For this reason alone, therefore, the Court should deny the Chamber-PhRMA Motion.

Moreover, the Chamber-PhRMA submission should be rejected since it merely duplicates arguments made and authority cited in Defendants' Motion, *see Ryan*, 125 F.3d at 1063, thus failing to provide the 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* Proposed *Amici Curiae* Br. at 3-11, *with* Defs.' Pet. For Interlocutory Appeal at 9-12.) Indeed, contrary to the Chamber and PhRMA's contention that they will aid the Court in interpreting this area of "unsettled" law (Mot. for Leave Br. at 4), the proposed Brief exhibits the same fundamental misunderstandings of relevant Mississippi policy and governing law as Defendants' Petition and, like the Defendants' Petition, focuses on recasting the State's consumer protection civil action as "quasi-criminal." (*Compare* Applicants' Proposed *Amici Curiae* Br. at 2-8, *with* Defs.' Pet. For

Interlocutory Appeal at 8-14.) It provides no significant insights not already offered by defense counsel and fills no analytical gaps. Further, neither the Chamber nor PhRMA have argued that Defendants are not already adequately represented by competent counsel, or that defense counsel cannot capably brief the relevant issues. Thus, additional input by the Chamber and PhRMA will not aid in consideration of the underlying issues, particularly those involving interpretation of Mississippi's Consumer Protection Act and other State law. *See Northern Sec. Co.*, 191 U.S. at 556; *Am. College of Obstetrics & Gynecologists*, 699 F.2d at 645. It not only presents a burden on the court's time and on the resources of the litigants who must review and respond to them, but is also an improper attempt to inject interest group politics into the appeals process. *See Kinkel v. Cingular Wireless, LLC*, No. 100925 (Ill. Jan. 11, 2006) (order from the Supreme Court of Illinois rejecting the Chamber's request to file a brief as amicus curiae) (attached as Ex. A hereto).

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

CONCLUSION

For all the foregoing reasons, the Motions by the Chamber of Commerce and Pharmaceutical Research and Manufacturers for Leave to File a Brief as *Amici Curiae* in Support of Defendants' Petition for Interlocutory Appeal should be denied.

Dated: October 30, 2015

Respectfully submitted,

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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:

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This the 30th day of October, 2015

By: /s/ S. Martin Millette, III