UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PORTLAND PIPE LINE CORPORATION, ET AL.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2:15-cv-00054-JAW
CITY OF SOUTH PORTLAND, MAINE, ET AL.,	)	
Defendants.	)	

DEFENDANTS' CONSOLIDATED OPPOSITIONS TO THE MOTIONS OF THE U.S. CHAMBER OF COMMERCE AND ASSOCIATED GENERAL CONTRACTORS OF MAINE, *ET. ALS.*, FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

Defendants City of South Portland and Patricia Doucette oppose the Motions for Leave to File Briefs *Amicus Curiae* of both Associated General Contractors, *et. als.*, ("ACF *amici*") (ECF # 100) and the United States Chamber of Commerce (ECF # 105).[1] As the First Circuit has explained, "an amicus who argues facts should rarely be welcomed." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Unlike appellate procedure, it is the longstanding rule in this Circuit that "a district court lacking joint consent of the parties should go slow in accepting . . . an amicus brief . . . ." *Id*. The rule is particularly applicable here where both proposed *amicus* briefs are replete with expert opinion, new purported facts, and unsworn testimony that were not disclosed to Defendants in discovery. Proposed *amici* introduce pages of economic "evidence" that are drawn directly from an expert report (the "Lawton Report") written by Dr. Charles Lawton, an economist at the for-profit private consulting firm, Planning Decisions, Inc., which

[1] Defendants do not believe the proposed *amicus* brief of Conservation Law Foundation (ECF # 101-1) suffers from the same infirmities set forth in this Opposition as it propounds a purely legal argument, not new expert opinion, facts, or unsworn testimony. However, if the Court denied leave to all proposed *amici*, that outcome would comport with the First Circuit standard controlling filing of briefs *amicus curiae* in the District Court far more than the alternative of granting leave for all proposed *amici.*

was commissioned and paid for, in part, by Plaintiff Portland Pipe Line Corporation ("PPLC"), in addition to other unattributed facts, hearsay quotations, and unsworn opinion testimony. *See, e.g.*, ECF # 100-1 at pp. 6-23; (ECF # 105-1 at pp. 13-17. Moreover, the Lawton Report addressed the failed citizen-initiated Waterfront Protection Ordinance ("WPO"), which would have regulated all marine terminals in South Portland, not the City Council's Clear Skies Ordinance (the "Ordinance") at issue in this case. By contrast, the Ordinance narrowly makes bulk loading of crude oil and its accompanying construction a prohibited activity in three zoning districts.[2]

Defendants have had no opportunity through deposition or other discovery techniques to test the veracity and reliability of these expert opinions on the WPO's purported impact, other heretofore undisclosed economic statistics (which Defendants suspect are misleading, incomplete, and inaccurate), and hearsay testimony from witnesses. During discovery, Plaintiffs repeatedly disavowed the need for expert testimony and did not designate expert witnesses pursuant to Rule 26(a)(2).[3] Thus, these impermissible assertions of unsworn expert testimony from *amici* are all the more troubling because they pry open a back door to otherwise inadmissible expert evidence. *See, e.g., Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1049 (5th Cir. 1993) ("*[A]micus curiae* generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal"); Committee Notes Fed. R. Evid. 701(c) ("there is no good reason to allow what is essentially surprise expert testimony"). *See* ECF # 100-1 at pp. 21-23; ECF # 105-1 at pp. 13-17.

[2] For instance, at one point, Dr. Lawton makes the assumption that the WPO would eliminate all tanker vessel traffic (including for refined oil and other products) in Portland Harbor to reach certain conclusions. *See, infra*, n.6 and Exhibit 2.

[3] Plaintiffs only designated a single rebuttal expert, whose opinions are not the subject of any of the proposed amicus briefs.

In addition to being irrelevant analysis of a different, non-existent regulation, the inclusion of the Lawton Report's expert opinions on the WPO in the record in this case would sanction impermissible evidentiary coordination by Plaintiffs with partisan *amici* and would sidestep discovery obligations and page limits set for Plaintiffs' briefing of its case in chief.[4] *See Banerjee v. Bd. of Trs.*, 648 F.2d 61, 65 n.9 (1st Cir. 1981) (*amicus* prohibited "in assisting [a] party with its evidentiary claims").

I. THE *AMICUS CURIAE* BRIEFS SHOULD BE REJECTED BECAUSE THEY IMPROPERLY ATTEMPT TO INTRODUCE EXPERT TESTIMONY.

A. Plaintiffs cannot rely upon expert testimony in their case in chief.

At every juncture in this case, Plaintiffs disclaimed the need for expert testimony. *See* ECF # 31; ECF # 35; ECF # 46; ECF # 53. First, in an effort to circumscribe Defendants' attempt to obtain discovery and an orderly schedule, Plaintiffs argued that "this is a legal dispute based on uncontrovertible facts, requiring no expert testimony." ECF # 35 at p. 7. They also represented to the Magistrate Judge at a telephonic conference on April 27, 2016 that "the plaintiffs will not designate expert(s)," ECF #46 at p. 3, while reserving the right to designate rebuttal experts. There was a later "reaffirmation of the plaintiffs' pledge, made . . . on April 27, 2016, that the plaintiffs do not intend to designate experts in their case-in-chief." ECF #53 at p. 2. The Magistrate Judge has stressed multiple times that the Court would closely police the boundaries of rebuttal expert designation for fear that Plaintiffs were attempting to disguise rebuttal experts as experts in support of their case in chief. For instance, in an Order on June 9, 2016, the Magistrate emphasized:

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[4] Although the Lawton Report was in PPLC's possession and produced to Defendants in discovery, PPLC never designated Dr. Lawton as an expert witness pursuant to Rule 26(a)(2) and never identified Dr. Lawton as a person with relevant information in their Initial Disclosures to Defendants. Exhibit 1, Excerpts of Plaintiffs Rule 26(a) Initial Disclosures.

> the cabined role of rebuttal experts, *see, e.g.*, Fed. R. Civ. P. 26(a)(2)(D)(ii) (permitting rebuttal expert testimony when it 'is intended solely to contradict or rebut evidence on the same subject matter identified by another party'); *Faigin v. Kelly*, 184 F.3d 67, 85 (1st Cir. 1999) ('The principal objective of rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other side's case.').

ECF #59 (citations and quotations in original). The Magistrate Judge later noted that "the plaintiffs had disavowed a need to designate experts, a situation that inherently raises a concern that 'rebuttal experts' not be de facto experts." ECF #70 at p. 1.

Plaintiffs' disclosures pursuant to Rule 26(a) did not list Dr. Lawton or any of the other persons through whom *amici* attempt to introduce opinion testimony, new factual evidence, nor the categories of information now sought to be introduced through the back door of briefs *amicus curiae*. *See* Exhibit 1, Excerpts of Plaintiffs Rule 26(a) Initial Disclosures. Plaintiffs' disclosures stated that only six people other than City officials had relevant information about their case: three PPLC employees, an AWO employee, and the principals of two vessel towing companies. *Id.* Plaintiffs have submitted affidavits from four of these disclosed individuals in support of their Motion for Summary Judgment. *See* ECF # 89. The Court's consideration of the *amici's* undisclosed opinion evidence would allow Plaintiffs to circumvent the applicable discovery and evidentiary rules. *See* Committee Notes Fed. R. Evid. 701(c) (noting that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process") (internal citation omitted).

B. The proposed Amicus Curiae briefs impermissibly attempt to introduce unsworn expert testimony and factual evidence.

The proposed *amicus curiae* briefs are replete with unsworn expert testimony supported by purported facts and hearsay witnesses never before disclosed to Defendants in discovery nor offered by Plaintiffs in support of their Rule 56 Motion. *See* ECF # 87, 89. On this basis alone, the proposed *amicus* briefs should be rejected.

1. Expert testimony on economic impact of undefined reversal scenario and harbor safety.

For example, the AGC *amici* interpose a 17-page "Argument" without citation to a single opinion of a court of law. ECF # 100-1 at pp. 6-23. This contravenes the First Circuit's recognized purpose of briefs *amicus curiae* – to "assist the court on matters of law." *Banerjee*, 648 F.2d at 65 n.9 ("At the same time we remark that the prime, if not sole purpose of an amicus curiae brief is what the name implies, namely, to assist the court on matters of law."). Rather, the proposed briefs both offer an extended – and misleading – expert testimonial on how the Ordinance "adversely impacts" the local economy. This discussion offers no legal argument to assist the Court. Proposed *amici* support their expert testimony on economic impacts with dozens of misleading and inaccurate statistics about vessel traffic projected under a pipeline reversal scenario (the size, volume, and other factors of which are completely undefined), cargo types carried, taxes paid, and estimated workforce participation. *Id.* at pp. 6-12. The fact witnesses through whom this testimony would theoretically be introduced and the expert opinions drawn therefrom were never disclosed to Defendants during discovery. Indeed, Defendants argued to this Court in their first Motion to Dismiss that without a concrete project in hand, Plaintiffs could not adduce facts necessary to adjudicate several of their claims, including the Dormant Commerce Clause claim (*See* ECF # 29 at p. 40). The Court should not countenance the introduction of undisclosed and irrelevant economic evidence in an attempt to support those claims through the back door of *amicus* briefs.

Proposed ACG *amici* further provide opinion testimony on purported threats to safety in Portland Harbor by discussing certain specific safety vessels in Portland Harbor and offering technical opinion testimony on the Ordinance's purported effect on the future usage of these vessels. ECF # 100-1 at pp. 15-18. This proffered expert testimony is introduced through,

among other means, at least three quotations from "witnesses" never before disclosed to Defendants. *Id.* at 16-17. As if drawn from a "man on the street" interview on the evening news or a newspaper article, these unsworn, unsubstantiated, hearsay quotations are clearly inappropriate to be included in the record. *See id.*

2. The Expert Report of Dr. Charles Lawton.

Similarly, both proposed *amicus* briefs rely heavily on the Lawton Report. *See* ECF # 100-1 at pp. 6-23; ECF # 105-1 at pp. 13-17.[5] The Lawton Report clearly amounts to specialized expert testimony based on academic and technical expertise never disclosed to Defendants pursuant to Rule 26(a)(2), and which Defendants never had the opportunity to test and rebut through the discovery process. Had Plaintiffs designated Dr. Lawton as an expert and provided his credentials and the factual bases for his testimony to Defendants in discovery, Defendants would have had an opportunity to depose him. Only then could his opinions permissibly appear in the record in this case, and, even still, only through Plaintiffs' case in chief. *Banerjee*, 648 F.2d at 65 n.9 (*amicus* prohibited "in assisting that party with its evidentiary claims"). *See United States v. Wahchumwah*, 710 F.3d 862, 868 n.2 (9th Cir. 2013) ("Generally, arguments not raised in a party's opening brief are deemed waived, and the court will not consider arguments raised only in *amicus* briefs.") (internal citation omitted); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997) ("Our review of the relevant case law demonstrates that it is truly the exceptional case when an appellate court will reach out to decide issues advanced not by the parties but instead by *amicus*."); *Resident Council of Allen Parkway Vill.*, 980 F.2d at 1049; *Nat'l. Com. on Egg Nutrition v. FTC*, 570 F.2d 157, 160 n.3 (7th Cir. 1977) (facts and argument

[5]In addition to quoting directly therefrom, the brief of ACG *amici* lifts language verbatim from this expert report without quotation or attribution. *Compare* ECF # 100-1 at p. 8 with Exhibit 2, Excerpt of Economic Impact Report (identical language about impact to size of port).

not within Plaintiffs' primary brief may not be considered when presented by *amici*); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 774 (S.D.N.Y. 2012) (Court must "disregard any factual material that had not been subject to discovery or, alternatively, [] give [opposing party] permission to move to take limited discovery" on *amicus* brief); *McCarthy v. Fuller*, No. 1:08-cv-994-WTL-DML, 2012 U.S. Dist. LEXIS 43701 at *1, *5 (S.D. Ind. Mar. 29, 2012) (denying leave to file *amicus* brief that proposed to offer "the type of contribution a fact or expert witness would offer" because "witnesses must be subject to discovery"); *F.V. Steel & Wire Co. v. Houlihan Lokey Howard & Zukin Capital, L.P.*, No. 05C1297, 2006 U.S. Dist. LEXIS 53297 at *1, *2-3 (E.D. Wis. July 31, 2006) (Court only considers "analysis of facts already in the record" in an *amicus* brief); *Waste Mgmt., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995) ("An *amicus* cannot initiate, create, extend, or enlarge issues.").

The First Circuit has held that "a district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an *amicus* brief unless, as a party, although **short of a right to intervene**, the *amicus* has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance." *Strasser*, 432 F.2d at 569 (emphasis supplied). Neither of the First Circuit's criteria for acceptance of *amicus* briefs at the District Court level is applicable here. Plaintiffs are being vigorously represented, and the ACF *amici* and United States Chamber of Commerce all claim direct financial injuries to their operations and members' operations that they allege are caused proximately by the Ordinance.[6] *See* ECF # 100-1 at 6-21. Yet, unlike Plaintiff American Waterway Operators, an association that similarly claims financial impact to its members' operations in Portland Harbor,

[6] Because they rely so heavily on facts drawn from analysis of the WPO, it is not always clear from their proposed briefs if *amici* are claiming injury from the failed WPO or from the Ordinance at issue in this case.

proposed *amici* did not intervene. They may not now intervene *de facto* as *amici*. This would circumvent the First Circuit's clear standards that govern the rare occasions when *amici* are appropriate in District Court proceedings. *Strasser*, 432 F.2d at 569.

Lastly, the extensive reliance on the Lawton Report in the briefs of both proposed *amici* (*see* ECF # 100-1 at pp. 6-23; ECF # 105-1 at pp. 13-17) renders the purported "argument" irrelevant because the Lawton Report's conclusions are based on study of the WPO, not the Ordinance at issue in this case. The WPO was a markedly different piece of legislation that regulated more activity and land area, and was formally opposed by the City Council. *Compare* ECF # 1 at Ex. A with ECF # 1 Ex. E. For instance, Dr. Lawton considers a scenario where all tanker traffic is eliminated from Portland Harbor – something that has not occurred under the Ordinance's limited restriction on bulk loading of crude oil. *See* Exhibit 1. Therefore, in addition to being inadmissible and improper, *amici's* proffer of Dr. Lawton's testimony is irrelevant. Allowing this undisclosed, hearsay evidence into the record in this matter would be a grave error of law under First Circuit jurisprudence. *Strasser*, 432 F.2d at 569; *Banerjee*, 648 F.2d at 65 n.9. *See Wahchumwah*, 710 F.3d at 868 n.2; *Tyler*, 118 F.3d at 1404; *Resident Council of Allen Parkway Vill.*, 980 F.2d at 1049; *Nat'l. Com. on Egg Nutrition*, 570 F.2d at 160 n.3; *Lantheus*, 841 F. Supp. 2d at 774; *McCarthy*, 2012 U.S. Dist. LEXIS 43701 at *5.

II. THE BRIEFS *AMICUS CURIAE* AMOUNT TO IMPROPER EVIDENTIARY COORDINATION AND PAGE LIMIT EVASION BECAUSE PLAINTIFF PORTLAND PIPE LINE CORPORATION COMMISSIONED AND PAID IN PART FOR THE LAWTON REPORT.

It is axiomatic that an *amicus curiae* must bring to the Court its own viewpoint and not merely parrot that of a party. In other words, a party is not permitted to sidestep discovery obligations and page limitations by presenting its own arguments under the guise of an *amicus*

curiae. But that is precisely what Plaintiffs and *amici* attempt to do. The Lawton Report was prepared on behalf of and paid for, in part, by PPLC. Its consideration is utterly improper.

In 2013, one of the proposed parties to ACG *amici*'s proposed brief, the Maine Energy Marketers Association, coordinated with PPLC to oppose the WPO through the creation of the "Maine Energy Marketers BQC" Political Action Committee ("PAC"). Exhibit 3, Excerpts of MEMA BQC 2013 Campaign Finance Reports. PPLC financial officer, Dave Cyr, served as PAC Treasurer, and PPLC President Larry Wilson served as one of three PAC Directors, along with the named representative of MEMA on this proposed *amicus* brief, Jamie Py. *Id*. at pp. 1-2. Both PPLC and MEMA contributed tens of thousands of dollars to the PAC, and the two entities exerted majority control over the PAC's operations. *Id*. at pp. 5-6, 8. Campaign Finance Reports also show that the MEMA-PPLC joint PAC paid Dr. Lawton's firm, Planning Decisions, $15,000 to prepare the Lawton Report. *Id*. at pp. 4, 9. (see highlighted expenditures). Thereafter, in 2013, the MEMA-PPLC jointly operated PAC circulated the Lawton Report by mail to City voters and widely advertised its findings in campaign literature and public events.

The inclusion of the Lawson Report in the record would allow impermissible evidentiary coordination by Plaintiffs with partisan *amici*. The First Circuit has prohibited this type of evidentiary coordination. "While, presumably, an *amicus*' position on the legal issues coincides with one of the parties, this does not mean that it is to engage in assisting that party with its evidentiary claims." *Banerjee*, 648 F.2d at 65 n.9. *See Liberty Lincoln Mercury v. Ford Mktg. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) ("When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear *amicus curiae* should be denied."); *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 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 a party . . ..").

Likewise, the evidentiary coordination and duplicative arguments in the briefs of proposed *amici* work an evasion of the page limits that the Court ordered binding on Plaintiffs. Courts have called such attempts an "abuse." *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("The vast majority of amicus curiae briefs are filed by allies of litigations and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse.").

WHEREFORE, Defendants respectfully request that this Court DENY the Motions for Leave to File Briefs *Amicus Curiae* by the ACG *amici* (EFC # 100) and the United States Chamber of Commerce (ECF # 105). In the alternative, if the Court allows either or both of the Motions, Defendants respectfully request that the Court stay the proceedings and provide opportunity for Defendants to take discovery and consider other steps that may be appropriate.

Dated: December 1, 2016

CITY OF SOUTH PORTLAND
and PATRICIA DOUCETTE

By their attorneys,

/s/ *Jonathan M. Ettinger*
Jonathan M. Ettinger (*Admitted Pro Hac Vice*)
jettinger@foleyhoag.com
Jesse H. Alderman (*Admitted Pro Hac Vice*)
jalderman@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210-2600
(617) 832-1000

/s/ *Sally J. Daggett*
Sally J. Daggett
sdaggett@jbgh.com
Mark A. Bower
mbower@jbgh.com
JENSEN BAIRD GARDNER & HENRY
Ten Free Street, P.O. Box 4510
Portland, ME 04112
(207) 775-7271

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Jonathan M. Ettinger*
Jonathan M. Etttinger (*Admitted Pro Hac Vice*)
jettinger@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210-2600
(617) 832-1000