UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES CINA, individually and on behalf of the CEMEX, Inc. Savings Plan,

Plaintiff,

v.

CEMEX, Inc.,

Defendant.

Case No. 4:23-cv-00117

REPLY IN SUPPORT OF THE MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

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Plaintiff's opposition to the Chamber's motion for leave to file is long on rhetoric but short on substance. Rather than mount a serious objection to the Chamber's motion for leave, Plaintiff denigrates the Chamber and its efforts to facilitate a fulsome debate on the critical issues at play. These arguments are misguided. As the Chamber's motion explains, the Chamber's distinct vantage point, informed by its role representing thousands of members that maintain or provide services to ERISA-governed retirement plans, allows it to offer valuable context to the Court. And, critically, "context" is precisely what the Supreme Court has instructed courts to consider when evaluating whether plaintiffs' allegations satisfy Rule 8(a). *See Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022). This Court should permit the Chamber to file its proposed amicus brief.

1. Plaintiff's overwrought objections largely boil down to a complaint that the Chamber supports Defendant. But amici are frequently—indeed, typically—"interested in a particular outcome." *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (granting the Chamber's motion for leave to file). Indeed, "there is no rule that amici must be totally disinterested." *Funbus Sys., Inc. v. Cal. Public Util. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986). Contrary to Plaintiff's off-base view, "the mere fact that a non-party seeks to put forth an opinion in the case does not disqualify it as an amicus." *Tafas v. Dudas*, 511 F. Supp. 2d 652, 661 (E.D. Va. 2007). Rather, "by the nature of things an amicus is not normally impartial … and there is no rule … that amici must be totally disinterested." *Id.* (internal quotation marks omitted).

Plaintiff's argument to the contrary is not only ill-considered, but "contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf

of opposing views promotes sound decision making." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.). "[A]n amicus who makes a strong but responsible presentation *in support of a party* can truly serve as the court's friend." *Id.* (emphasis added). Indeed, the Chamber's explanation of "the impact a potential holding might have on an industry or other group" is a reason to *grant* the motion for leave to file—not deny it. *Id.* at 132. At bottom, the relevant question is not whether an amicus supports a particular outcome, but rather whether the brief will "contribute in clear and distinct ways" to the court's analysis. *Prairie Rivers Network*, 976 F.3d at 763. In fulfilling that role, it is "perfectly permissible" for an amicus to "take a legal position and present legal arguments in support of it." *Funbus Sys.*, 801 F.2d at 1125.

That is exactly what the Chamber does here, by addressing when circumstantial allegations of an ERISA violation are sufficient to survive a motion to dismiss. Courts have repeatedly recognized as much. As one district court explained when granting the Chamber's recent motion for leave to file an amicus brief likewise addressing the proper pleading standard, the Chamber has a "unique perspective[] that may help the court decide the legal questions at issue in Defendants' motion to dismiss." *See Beldock v. Microsoft Corp.*, No. 22-1082 (W.D. Wash. Dec. 9, 2022), ECF No. 50 at 2. In fact, twelve courts have granted the Chamber's motion for leave in analogous ERISA class actions—ten over an opposition.[1] These briefs addressed the same ERISA pleading-standard issues

[1] *See Bracalente v. Cisco Sys., Inc.*, No. 22-4417 (N.D. Cal. May 3, 2023), ECF No. 67; *Williams v. Centene Corp.*, No. 22-216 (E.D. Mo. Mar. 31, 2023), ECF No. 68; *Beldock v. Microsoft Corp.*, No. 22-1082 (W.D. Wash. Dec. 9, 2022), ECF No. 50; *Locascio v. Fluor*

addressed by the Chamber's brief here, and "offer[ed] a valuable perspective on the issues presented in this matter" given "the Chamber's experience with both retirement plan management and ERISA litigation." *Sigetich v. Kroger Co.*, No. 21-697 (S.D. Ohio July 22, 2022), ECF No. 47 (granting leave to file over an opposition). Thus, courts recognized that the Chamber's brief is designed to assist the court and facilitate a dialogue on these issues. As a judge in the Northern District of Texas opined when granting the Chamber's motion for leave to file in one of these twelve cases, "[s]peech is a beautiful thing." *Locascio v. Fluor Corp.*, No. 3:22-cv-00154, ECF No. 63 (N.D. Tex. Oct. 20, 2022).

Plaintiff repeatedly invokes (at 3-4, 6-8, 11, and 14) the perspective of a single retired Seventh Circuit judge, who subscribed to the view that amicus briefs "may be used to make an end run around court-imposed" page limits or "to inject interest group politics" into a case. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., in chambers). If the entire judiciary took that view, it would be rare for a court—at any level—to permit amicus participation. The robust amicus practice at all levels of the federal-court system demonstrates that judges have overwhelmingly declined this invitation to limit debate. Indeed, as reflected by *Prairie Rivers Network*, *see supra*, pp. 1-2, the Seventh Circuit itself does not share now-retired Judge Posner's hostility to

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Corp., No. 22-154 (N.D. Tex. Oct. 20, 2022), ECF No. 63; *Sigetich v. The Kroger Co.*, No. 21-697 (S.D. Ohio July 22, 2022), ECF No. 47; *Rodriguez v. Hy-Vee, Inc.*, No. 22-72 (S.D. Iowa June 15, 2022), ECF No. 28; *Clark v. Beth Israel Deaconess Med. Ctr.*, No. 22-10068 (D. Mass. May 24, 2022), ECF No. 41; *Singh v. Deloitte LLP*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41; *Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4, 2022), ECF No. 38; *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF No. 44; *Ravarino v. Voya Fin., Inc.*, No. 21-1658 (D. Conn. Mar. 8, 2022), ECF No. 28; *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn. Nov. 10, 2021), ECF No. 55.

amicus participation. 976 F.3d at 763. In fact, the Seventh Circuit recently permitted amicus participation by the Chamber (over the plaintiffs' opposition) on the precise ERISA pleading-standard issues addressed by the Chamber's brief here. *See Divane v. Nw. Univ.*, No. 18-2569 (7th Cir. Apr. 4, 2022), ECF No. 92. And even if it were the case that "the Seventh Circuit disfavors amicus briefs," "this Court is within the Fifth Circuit, which still views amici as friends." *Locascio v. Fluor Corp.*, No. 3:22-cv-00154, ECF No. 63 (N.D. Tex. Oct. 20, 2022).

Finally, while Plaintiff points (at 3-4 and 6) to scattered decisions in which courts denied the Chamber leave for amicus participation, Plaintiff fails to explain how those courts' exercise of discretion should in any way cabin *this Court's* discretion to permit the filing of the Chamber's brief, as many other courts have done. Moreover, where courts have denied the Chamber leave to file, the decisions have largely turned on the existence of competent counsel representing defendants. The Chamber respectfully disagrees with this rationale for denying amicus participation. "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132. The context and insights amici can offer are no less important or persuasive when the parties are adequately represented, as demonstrated by the countless cases in the U.S. Supreme Court, federal appellate courts, and federal district courts that have benefitted from amicus participation despite the parties' representation by the nation's top lawyers—including the Solicitor General of the United States. Courts have routinely recognized as much. *See, e.g.*, *Skokomish Indian Tribe v. Goldmark*, 2013 WL 5720053, at *2 (W.D. Wash. Oct. 21, 2013) (amicus participation appropriate even with "well-

represented" parties where the amicus's "input would be helpful in considering [the] motions to dismiss"); *Gallo v. Essex Cnty. Sheriff's Dep't*, 2011 WL 1155385, at *6 n.7 (D. Mass. Mar. 24, 2011) (even when a motion is "ably presented by" defense counsel, an amicus brief can be "quite helpful in putting the immediate controversy in its larger context"); *Am. Steamship Owners Mut. Protect. & Indem. Ass'n, Inc. v. Alcoa Steamship Co.*, 2005 WL 427593, at *11 (S.D.N.Y. Feb. 22, 2005) (allowing amicus participation where movants "and their counsel [were] extremely knowledgeable about many of the issues that the Court [would] be asked to consider").[2]

2. Putting aside his broader hostility to amicus participation, Plaintiff identifies various reasons why he believes *this case* is inappropriate for amicus participation. None is persuasive. To start, while Plaintiff takes a dim view of discourse in district-court proceedings, Opp. 1-2, 5, amicus briefs are routinely accepted at the motion-to-dismiss stage, and it is well-established that district courts have broad discretion to permit amicus participation. *Does 1-7 v. Round Rock Ind. Sch. Dist.*, 540 F. Supp. 2d 735, 739 n.2 (W.D. Tex. 2007). Plaintiff fails to explain why "practical perspectives" and a discussion of the

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[2] Plaintiff also argues that both the Chamber's counsel and Plaintiff's counsel have conflicts of interest—the Chamber's counsel solely because she has represented Fidelity (a non-party here) in prior, unrelated actions, and Plaintiff's counsel solely because they have represented the Chamber in prior, unrelated actions. Opp. 2-3. Under Plaintiff's approach, an attorney who once represented the Chamber, the world's largest business federation, would be forever barred from having the Chamber appear as a supporting amicus in a subsequent case. And an attorney who once represented any of the country's largest retirement plan service providers would forever be barred from serving as amicus counsel in every unrelated case involving a plan for which one of those companies acted as a service provider. There is no such rule, and Plaintiff cites no case (let alone any authority) forbidding an attorney from using her expertise and experience to represent different clients in unrelated actions.

"broader regulatory or commercial context" are somehow less helpful to district courts. *Prairie Rivers Network*, 976 F.3d at 763. If anything, this case is particularly appropriate for amicus participation, because the Chamber's brief focuses on the pleading standard *district courts* should apply when evaluating analogous motions to dismiss. It makes sense for the relevant decisionmakers—district courts responsible for applying this standard in light of the Supreme Court's guidance and the relevant context—to have the opportunity to consider the Chamber's arguments, rather than waiting for appellate review.

Finally, Plaintiff objects that the Chamber's brief duplicates Defendant's motion (Opp. 8-9)—and paradoxically contends later that the Chamber's brief is "unrelated to" the issues at hand (Opp. 15-16). Plaintiff's dueling theories show that the Chamber's proposed brief strikes a balance that will be useful to the Court: It "addresses the same issues as the parties," but provides a "unique perspective" that will be "helpful" to the court. *High Country Conservation Advocs. v. United States Forest Serv.*, 333 F. Supp. 3d 1107, 1116-1117 (D. Colo. 2018), *vacated and remanded on other grounds by* 951 F.3d 1217 (10th Cir. 2020).[3] In particular, the brief highlights dozens of examples to contextualize the issues presented, including relevant fiduciary-management principles and practices.

Plaintiff's remaining arguments rest on objections to the Chamber's arguments,

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[3] Moreover, Plaintiff is mistaken to the extent he suggests there cannot be any meaningful overlap between an amicus's arguments and a party's arguments. Indeed, when an amicus raises an issue that does *not* overlap with the arguments of a party, courts often refuse to consider it. *See, e.g.*, *Fed. Energy Regul. Comm'n v. Powhatan Energy Fund*, 2017 WL 11682615, at *1 (E.D. Va. Mar. 15, 2017). Plaintiff effectively attempts to sharpen that sword's other edge, asking this Court to *also* forbid amici from weighing in on issues that the parties *have* properly raised. That is not the law.

rather than its participation in this case. Opp. 15-16. Plaintiff argues that the Supreme Court "already" decided the applicable pleading standard in *Hughes*, and that *Hughes* is inconsistent with the Chamber's position here. That is incorrect. *Hughes* is entirely consistent with the arguments the Chamber raised in its amicus brief in that case, and applies in its amicus brief in this case. The Chamber advocated, both then and now, that *Twombly* and *Iqbal* provide the governing pleading standard, that context is critical for assessing plaintiffs' allegations of a breach of fiduciary duty, and that there are a range of reasonable decisions a fiduciary can make. *See* Chamber Amicus Br. 12-15, *Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022) (No. 19-1401). Those are the precise principles the Supreme Court laid out in its decision in *Hughes*. *See* 142 S. Ct. at 742. But even if the Court had not embraced the principles discussed in the Chamber's brief, all that would mean is that—contra Plaintiff's fear-mongering—courts can appropriately evaluate the arguments made by an amicus to the extent they find those arguments persuasive. That is, after all, the point of amicus participation.

In short, the Chamber's brief is intended to further the dialogue surrounding the proper pleading standard, an issue that courts across the country have been working to resolve since *Hughes*. This dialogue is a hallmark of the adversary process, not a reason to disallow amicus participation. It is in this Court's hands to decide who has the better argument, but it is an argument worth having—fully and without unduly restricting the points the Court is able to consider.

Dated: May 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Southern District of Texas by using the court's CM/ECF system on May 15, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

Dated: May 15, 2023

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