

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

LISA A. SIGETICH,

Plaintiff,

v.

THE KROGER CO., THE BOARD OF
DIRECTORS OF THE KROGER CO., and
JOHN DOES 1-30,

Defendants.

Case No. 1:21-cv-00697-SJD (SKB)

Judge Timothy S. Black

Magistrate Judge Stephanie K. Bowman

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

The Chamber’s proposed amicus brief will make a “clear and distinct” contribution to the issues before this Court. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers). As the Chamber’s motion explained, 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—context about ERISA’s text, history, and structure and context about the realities of plan management. Critically, “context” is precisely what the Supreme Court has instructed lower courts to carefully consider when ruling on motions to dismiss in ERISA cases. *Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022). Plaintiff’s laundry list of reasons for why the Court should refuse to even consider this context is not persuasive.

Plaintiff first attempts to position *all* district-court amicus briefs as improper. That is a nonstarter: It is well established that district courts “have broad discretion” to accept amicus briefs. *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. and N.J.*, 2011 WL 5865296, at *1 (S.D.N.Y. Nov.

22, 2011); *see also United States ex rel. Fry v. Health Alliance of Greater Cincinnati*, 2009 WL 485501, at *6 (S.D. Ohio Feb. 26, 2009) (recognizing that amicus participation is within “the sound discretion of the courts”).¹ Countless district courts, including this one, have welcomed amicus participation. *E.g., Health Alliance of Greater Cincinnati*, 2009 WL 485501, at *6; *United States v. Columbus*, 2000 WL 1745293, at *1 (S.D. Ohio Nov. 20, 2000); *United States ex rel. Roby v. Boeing Co.*, 73 F. Supp. 2d 897, 901 (S.D. Ohio 1999).

Plaintiff’s efforts to portray the posture of this case as inappropriate for amicus participation fare no better. Amicus briefs are routinely accepted at the motion-to-dismiss stage, *see, e.g., United States v. U.S. Steel Corp.*, 2021 WL 860941, at *6 (N.D. Ind. Mar. 8, 2021); *Fed. Energy Regulatory Comm’n v. Vitol, Inc.*, 2020 WL 4586363, at *2 (E.D. Cal. Aug. 10, 2020), including from the Chamber itself, *see, e.g., United States v. DaVita Inc.*, No. 21-229 (D. Colo. Oct. 20, 2021), ECF No. 68; *United States v. Walgreen Co.*, No. 21-32 (W.D. Va. Sept. 9, 2021), ECF No. 22; *New York v. U.S. Dep’t of Labor*, No. 18-1747 (D.D.C. Nov. 9, 2018) (minute order); *Facebook, Inc. v. IRS*, No. 17-6490 (N.D. Cal. Mar. 12, 2018), ECF No. 25. Moreover, amicus briefs are routinely accepted over a party’s objection, including in this Court. *See, e.g., Health Alliance of Greater Cincinnati*, 2009 WL 485501, at *6; *Columbus*, 2000 WL 1745293, at *1; *see also Pavsek v. Simon*, 2020 WL 1467008, at *1 (D. Minn. Mar. 26, 2020); *Safari Club Int’l v.*

¹ Plaintiff asks the Court to disregard the Chamber’s citation to *United States v. Columbus*, 2000 WL 1745293, on the basis that it (1) was decided in 2000, and (2) relied on appellate decisions in observing that district courts have discretion to allow amicus participation. Opp. 7. Plaintiff has not cited any authority undermining (let alone overruling) *Columbus*, and courts in this district have since cited it for precisely the same standard. *See, e.g., Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 860 n.1 (S.D. Ohio 2016) (granting leave to file after considering whether the *amici* had “an important interest and a valuable perspective on the issues presented”). In any event, *Columbus* cited appellate decisions in the context of explaining why amicus participation was appropriate *in the district court*.

Harris, 2015 WL 1255491, at *1 (D.D.C. Jan. 14, 2015); *Oberer Land Developers, Ltd. v. Beavercreek Township, Ohio*, 2006 WL 8442896, at *1 (W.D. Ohio Apr. 19, 2006); *Caremark, Inc. v. Goetz*, 395 F. Supp. 2d 683, 684 (M.D. Tenn. 2005).²

Plaintiff's hyperbolic objections to the Chamber as supposedly engaging in "patently partisan" advocacy, advancing an "extreme pro-corporate agenda," and functioning as "corporate mercenaries," Opp. 8, 11, 12 (ECF No. 36), boil down to a complaint that the Chamber supports Defendants. But as Plaintiff's cited cases recognize, amici are frequently "interested in a particular outcome." *Prairie Rivers Network*, 976 F.3d at 763 (granting the Chamber's motion for leave to file). The relevant question is not whether the amicus supports a particular outcome, but rather whether the brief will "contribute in clear and distinct ways" to the Court's analysis. *Id.*; *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (an amicus brief may assist the court by "explain[ing] the impact a potential holding might have on an industry or other group") (internal quotation marks omitted). As a court in the Northern District of Illinois recently explained in permitting the Chamber to file an amicus brief and denying the plaintiffs' motion for reconsideration of that decision in an excessive-fee case similar to this one, "the proposed amicus brief could provide the Court wi[th] a broader view of the impact of the issues raised in the case"—"an appropriate basis to allow amicus participation." *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF No. 44; *see also Singh v. Deloitte*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41 (granting the Chamber's motion for leave to file over the plaintiffs' opposition); *Barcnas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4,

² Plaintiff objects (at 7 n.2) that the Chamber cites cases where the court granted leave with "paperless docket entries or one-page orders that lack reasoning or analysis for granting leave." But the fact that courts grant leave in summary orders merely shows the routine nature of these motions.

2022), ECF No. 38 (same).³

On that core question, Plaintiff offers no response. Indeed, it is not until the eighth item on Plaintiff's list that Plaintiff suggests the Chamber's proposed brief would not assist the Court in resolving the pending motion to dismiss, and even then Plaintiff fails to engage with the content of the brief. *See* Opp. 12-13. As the Chamber explained, its proposed brief serves several functions courts have identified as useful: It "explain[s] the broader regulatory or commercial context" in which this case arises; "suppl[ies] empirical data informing" the issue on appeal; and "provid[es] practical perspectives on the consequences of particular outcomes." *Prairie Rivers Network*, 976 F.3d at 763.⁴ The brief does all of this in service of contextualizing Plaintiff's allegations—as the Supreme Court has instructed courts to do under the pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). And while Kroger has its own representation, "[e]ven when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132.

³ Plaintiff points (at 4-5) to two recent decisions that she believes "make clear that the Chamber's motion for leave should be denied." To start, the court *granted* the Chamber's motion for leave to file in one of the two decisions. *See* ECF No. 55, *Carrigan v. Xerox Corp.*, No. 21-1085-SVN (D. Conn. Nov. 10, 2021). While the court ultimately chose not to address the Chamber's brief when ruling on the motion to dismiss, that in no way suggests the court was wrong to grant the motion in the first place. In any event, Plaintiff does not explain how two courts' exercise of their discretion to deny a motion for leave in any way should cabin *this Court's* discretion to permit the filing of the Chamber's brief, as four other courts have done. Moreover, currently pending before the Sixth Circuit are two separate cases involving the issue at the core of the Chamber's brief—the standard for evaluating allegations of imprudence in an ERISA class action—and in both cases, the court has the benefit of the Chamber's experience and views on the issue. *See Smith v. CommonSpirit Health*, No. 21-5964 (amicus brief filed February 18, 2022); *Forman v. TriHealth, Inc.*, No. 21-3977 (amicus brief filed April 15, 2022). There is no reason why this Court should decline to consider the same information here.

⁴ Moreover, while Plaintiff argues (at 3, 6) that amicus participation should be reserved for appellate cases, the brief does not explain why "practical perspective[]" and a discussion of the "broader regulatory or commercial context" is somehow less helpful to district courts.

Plaintiff's sole response is that the brief "argues facts." Opp. 10. Not so. Plaintiff confuses providing factual *context* with litigating the veracity of the facts *of this particular case* as pleaded. A primary function of an amicus is to provide the Court with additional industry context or other empirical or factual information that the parties could not themselves provide. *See Prairie Rivers*, 976 F.3d at 763. Here, the Chamber's brief provides contextual information bearing on whether the assertions in Plaintiff's complaint are plausible and non-conclusory. That is why Plaintiff's cited decisions are inapplicable.

The only time Plaintiff's brief engages with the content of the Chamber's argument, Plaintiff mischaracterizes the Chamber's position. Plaintiff suggests that the Supreme Court rejected the Chamber's argument regarding the burdens of inappropriate ERISA litigation when it chose not to endorse a presumption of prudence in ESOP cases. Opp. 13. Nowhere does the Chamber's proposed brief suggest applying a presumption of this kind. Rather, it follows the precise test the Supreme Court announced—namely, that courts should undertake a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014); *see also Hughes*, 142 S. Ct. at 742; *see Proposed Amicus Br. (ECF No. 41-1)* at 4-5, 7, 10. And given the Chamber's extensive and varied experience with both retirement-plan management and ERISA litigation, the Chamber can offer a unique perspective on the shape that scrutiny should take here.

For these reasons and those stated in the motion for leave to file, the Chamber respectfully requests that the Court grant it leave to file the proposed amicus brief.

Dated: April 29, 2022

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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 Ohio by using the court's CM/ECF system on April 29, 2022.

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.

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