



Nicholas J. Nelson
Partner
p. 612.429.8100
nicholas.nelson@crosscastle.com

333 Washington Ave N.
Ste 300-9078
Minneapolis, MN 55401

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The Hon. Patrick J. Schiltz
Chief U.S. District Judge, District of Minnesota
United States District Court
300 South Fourth Street
Minneapolis, MN 55415

Via CM/ECF Only

Re: Request for leave to file a brief amicus curiae in *Yasmin v. General Mills, Inc.*,
No. 22-cv-2572.

Dear Chief Judge Schiltz:

The Chamber of Commerce of the United States of America respectfully submits this letter, per the Court's instruction, to request leave to file a brief as amicus curiae in the above-captioned case in support of Defendants' motion to dismiss.

This case is one of many nationwide that challenge ERISA plan fiduciaries' decisions regarding investment options and service providers, based on circumstantial evidence and comparisons with other options available in the investment marketplace. The Supreme Court's decision last Term in *Hughes v. Northwestern*, 142 S.Ct. 737, 742 (2022), reiterated that ERISA cases are subject to the pleading standard articulated in *Twombly* and *Iqbal*. Particularly in light of the proliferation of litigation in this area, there have been inconsistencies and confusion among courts attempting to apply the principles from *Hughes*. The Chamber is a nationwide organization, with members whose interests are implicated by a broad array of ERISA cases. The Chamber therefore proposes to file an amicus brief that provides context regarding the recent surge in ERISA litigation, describes similarities among these cases that help to shed light on Plaintiff's allegations here, and provides context for how to evaluate these types of allegations in light of the pleading standard set forth by the Supreme Court in *Twombly* and *Iqbal*.

Since the Supreme Court's decision in *Hughes v. Northwestern*, 142 S. Ct. 737 (2022), nearly a year ago, district courts across the country have been attempting to apply the Court's holding when faced with circumstantial allegations in ERISA class-action complaints that challenge the investment and service-provider decisions made by plan fiduciaries. The Supreme Court instructed lower courts to undertake a "context-sensitive inquiry" of allegations in this type of complaint, while "giv[ing] due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.* at 740, 742. Here, the Chamber's amicus brief will aim to provide additional context and a broader perspective on retirement plan management,

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service provider arrangements, and the litigation landscape to assist the Court as it undertakes this inquiry alongside dozens of other courts across the country facing similar claims and allegations.

In particular, the Chamber's proposed brief marshals examples from many of the dozens of recently filed cases to contextualize the issues presented in this litigation, and to illustrate the potential inconsistencies that courts may wish to avoid in determining how to apply the principles from *Hughes*. As shown by the paragraph below, excerpted from the Chamber's brief, these cases largely touch on issues that are relevant to but broader than the specific issues presented here, and therefore in many instances may not have been cited or discussed by the parties:

Nationwide, the complaints filed in cases like this one reflect a range of assessments, as one complaint's supposedly imprudent choice is often another complaint's prudent exemplar. Last year, Henry Ford Health System was hit with an ERISA class action alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157-167, *Hundley v. Henry Ford Health System*, No. 21-11023 (E.D. Mich.), ECF No. 1. But another complaint holds up that exact plan as an example of "prudent and loyal" fiduciary decisionmaking with respect to recordkeeping fees. *See* Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn.), ECF No. 1. Likewise, the plaintiff in *Sigetich v. The Kroger Co.*, No. 21-697 (S.D. Ohio) identified the Sutter Health 403(b) Savings Plan as an exemplar for reasonable recordkeeping fees, ECF No. 35 (Am. Compl.) ¶ 75, but Sutter Health was itself sued for supposedly excessive recordkeeping fees. *See* Compl. ¶ 122, *Sargony v. Sutter Health*, No. 20-1007 (E.D. Cal.), ECF No. 1.

In that sense, the Chamber's proposed brief strikes an appropriate balance: 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). Thus, in specific response to the Court's inquiry, the Chamber's brief neither duplicates either side's arguments nor improperly addresses an issue that was not raised by the parties.

The Chamber is able to offer its perspective based on its decades of involvement in the development of the statute, in the promulgation of DOL regulations and guidance, and in ERISA litigation at all levels of the federal court system—as well as the experience of thousands of its members who sponsor and manage retirement plans for employees. As a result of this experience, the Chamber regularly participates as amicus curiae in cases involving employee-benefit design or administration. *See, e.g., Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022) (standard for pleading fiduciary-breach claim involving challenges to defined-contribution plan line-ups and service-provider arrangements); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (standard for pleading fiduciary-breach claim involving employer stock); *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022) (standard for pleading fiduciary-breach claim involving 401(k) plan fees and investment line-up); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019) (same); *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018) (same). The Chamber therefore is able to offer a 30,000-foot view of the litigation landscape and the types of claims and allegations common in these cases that no single party to an individual case would be able to offer.

In particular, this broader perspective will help contextualize the key threshold issue that this case shares with many other ERISA cases: determining when circumstantial allegations of a violation of ERISA are plausible in the context of plan-management decisionmaking. As the Supreme Court has instructed, that context is key—courts are supposed to undertake a “careful, context-sensitive scrutiny of [the] complaint’s allegations,” *Fifth Third*, 573 U.S. at 425, just as they are supposed to consider “context” in evaluating plausibility in all civil cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *see also Hughes*, 142 S. Ct. at 742. Given its unique perspective, the Chamber’s brief will “contribute in clear and distinct ways” to this analysis. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 76 F.3d 761, 764 (7th Cir. 2020) (granting the Chamber’s motion for leave to file); *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”) (quotation marks omitted). Indeed, even where a motion is “ably presented by” defense counsel, an amicus brief can be “quite helpful in putting the immediate controversy in its larger context.” *Gallo v. Essex Cnty. Sheriff’s Dep’t*, 2011 WL 1155385, at *6 n.7 (D. Mass. Mar. 24, 2011); *see also Neonatology Assocs.*, 293 F.3d at 132 (“Even when a party is very well represented, an amicus may provide important assistance to the court.”).

District courts in a string of recent cases have exercised their discretion to permit the Chamber to participate as an amicus at the motion-to-dismiss stage. As one court explained, “given the Chamber’s experience with both retirement plan management and ERISA litigation, the Chamber can offer a valuable perspective on the issues presented in this matter.” *Sigetich v. The Kroger Co.*, No. 21-697 (S.D. Ohio July 22, 2022), ECF No. 47 (granting the Chamber’s motion for leave to file over plaintiffs’ opposition); *see also Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF No. 44 (explaining that the Chamber’s “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”); *Locascio v. Fluor Corp.*, No. 22-154 (N.D. Tex. Oct. 20, 2022), ECF No. 63 (granting the Chamber’s motion for leave to file over the plaintiffs’ opposition); *Singh v. Deloitte LLP*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41 (same); *Barcnas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4, 2022), ECF No. 38 (same).

For these reasons, the Chamber respectfully requests that the Court grant it leave to participate as amicus curiae. In the alternative, the Chamber respectfully requests that the Court grant the Chamber permission to file a motion for leave to file an amicus brief that elaborates on the points touched on in this letter.

Very truly yours,

CROSSCASTLE PLLC



Nicholas J. Nelson (MN Bar # 039184)
CrossCastle PLLC

A handwritten signature in blue ink that reads "Jaime A. Santos". The signature is written in a cursive style with a large, looped initial "J".

Jaime A. Santos*
Goodwin Procter LLP

* If the Court grants leave to file, we will promptly move for Ms. Santos's admission *pro hac vice*.