UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RUTH WILLIAMS and LISA MAULE, individually and on behalf of all others similarly situated, Plaintiffs, v. CENTENE CORPORATION, THE BOARD OF DIRECTORS OF CENTENE CORPORATION, THE CENTENE CORPORATION RETIREMENT PLAN INVESTMENT COMMITTEE, and JOHN DOES 1-30, Defendants.	Case No. 4:22-CV-00216-SEP

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

Plaintiffs oppose the Chamber's motion for leave to file based on what appears to be a general hostility toward the concept of *amicus* briefs. This argument is both misguided and inconsistent with the practice of district courts across the country, which routinely allow *amicus* participation in conjunction with dispositive motions practice. 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—context about ERISA's text, history, and structure, as well as context about the realities of plan management. And, 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).[1] Plaintiffs' laundry list of reasons why the Court should refuse even to consider this context is not persuasive.

Plaintiffs first attempt to position *all* district-court *amicus* briefs as improper. That is a nonstarter: It is well established that "District Courts have broad discretion in deciding whether to accept amicus briefs." *Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 2011 WL 13285400, at *5 (S.D. Iowa Feb. 18, 2011) (citation omitted). Countless district courts, including this one, have welcomed *amicus* participation.[2] Plaintiffs' suggestion that *amicus* participation should be reserved for appellate cases (to the extent it is permitted at all) cannot be squared with this well-established practice. *See* Opp. 1-2, 5-6 (ECF No. 39). Nor do Plaintiffs explain why the "unique perspective," "expertise," and "helpful information" offered by *amicus* briefs is somehow less useful to district courts. *North Dakota v. Heydinger*, 2013 WL 593898, at *7 (D. Minn. Feb. 15, 2013).

Plaintiffs' efforts to portray the posture of *this* case as inappropriate for *amicus*

---

[1] Plaintiffs claim that the Supreme Court "rejected" the Chamber's position in its *amicus* filing in *Hughes*. Opp. 9. To the contrary, the Court *embraced* the standards advocated by the Chamber in its *amicus* brief. The Chamber explained that there is no "ERISA exception to Rule 8(a)'s plausibility pleading as articulated in *Twombly* and *Iqbal*," and further that "[u]nder ERISA as elsewhere, circumstantial allegations should be rigorously analyzed, *in context*." *Hughes v. Northwestern Univ.*, No. 19-1401, Br. *Amici Curiae* Chamber of Commerce of the United States of America, *et al.* (Oct. 28, 2021), at 3-4. That is precisely what the Supreme Court said in its opinion, which directed courts to "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*, and reiterated that "the appropriate inquiry will necessarily be context specific." 142 S. Ct. at 742.

[2] *E.g.*, *Mo. Ins. Coal. v. Huff*, 947 F. Supp. 2d 1014, 1018-19 (E.D. Mo. 2013); *In re Aurora Diary Corp. Organic Milk Mktg. & Sales Pracs. Litig.*, 2008 WL 901849, at *1-2 (E.D. Mo. Apr. 3, 2008); *Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*, 685 F. Supp. 1108, 1112 (E.D. Mo. 1988).

participation fare no better. *Amicus* briefs are routinely accepted at the motion-to-dismiss stage,[3] including from the Chamber itself.[4] *Amicus* briefs are also routinely accepted over a party's objection.[5] In fact, seven different courts have granted the Chamber's motion for leave in analogous ERISA class actions—five over an opposition. *E.g.*, *Rodriguez v. Hy-Vee, Inc.*, No. 22-72 (S.D. Iowa June 15, 2022), ECF No. 28; *see also* Mot. 2-3. As a district court in the Northern District of Illinois explained in granting the Chamber's motion for leave to file and denying the plaintiffs' motion for reconsideration of that decision, "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.

Plaintiffs point (at 3) to a few decisions in which courts denied leave for *amicus* participation, but Plaintiffs do not 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 seven other courts have done. Moreover, these decisions 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

---

[3] *E.g.*, *United States v. U.S. Steel Corp.*, 2021 WL 860941, at *6 (N.D. Ind. Mar. 8, 2021); *Fed. Energy Regul. Comm'n v. Vitol, Inc.*, 2020 WL 4586363, at *2 (E.D. Cal. Aug. 10, 2020).

[4] *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.

[5] *E.g.*, *Pavek v. Simon*, 2020 WL 1467008, at *1 (D. Minn. Mar. 26, 2020); *Safari Club Int'l v. Harris*, 2015 WL 1255491, at *1 (E.D. Cal. Jan. 14, 2015); *United States v. Health All. of Greater Cincinnati*, 2009 WL 485501, at *6 (S.D. Ohio Feb. 26, 2009); *Oberer Land Devs., Ltd. v. Beavercreek Twp., 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).

important assistance to the court." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.); *see also Gallo v. Essex Cnty. Sheriff's Dep't*, 2011 WL 1155385, at *6 n. 7 (D. Mass. Mar. 24, 2011) (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"). 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. Indeed, organizations like the AARP that frequently support plaintiffs in ERISA litigation have filed briefs in a variety of cases pending in federal district court supporting plaintiffs that were more than adequately represented. *See, e.g.*, *Opiotennione v. Bozzuto Mgmt. Co.*, No. 20-1956 (D. Md. Apr. 26, 2021), ECF No. 80; *Org. for Black Struggle v. Ashcroft*, 20-4184 (W.D. Mo. Oct. 2, 2020), ECF No. 54.

Plaintiffs' hyperbolic objections to the Chamber as supposedly engaging in "patently partisan" advocacy, advancing an "extreme pro-corporate agenda," and turning the motion into a "political battleground," Opp. 5, 8, boil down to a complaint that the Chamber supports Defendants. But Plaintiffs' cited cases recognize that *amici* are frequently "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). Plaintiffs' argument to the contrary is not only misguided, 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.*, 293 F.3d at 131. "[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. 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. And here, the Chamber's proposed *amicus* brief discusses the fundamental question of when circumstantial allegations of an ERISA violation are sufficient to survive a motion to dismiss—an issue that, given the surge of recent filings (*see* Opp. 8 n.4), is relevant to every retirement-plan sponsor in the country.

Rather than engage with the merits of the Chamber's arguments, Plaintiffs focus almost entirely on attacking the Chamber's motivations. Indeed, it is not until item *nine* (of ten) on Plaintiffs' laundry list that Plaintiffs even purport to address the merits of the Chamber's arguments—and even then, Plaintiffs mischaracterize the Chamber's position. Plaintiffs suggest 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 cases involving employee stock ownership plans. Opp. 9. Nowhere does the Chamber's proposed brief suggest applying a presumption of this kind. Rather, it advocates adherence to 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; Proposed *Amicus* Br. (ECF No. 38-1) at 3-6, 8, 11-12. 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.

Finally, Plaintiffs argue that the Chamber's brief duplicates Defendants' arguments. Opp. 4-5, 7-8. Not so. While the brief "addresses the same issues as the parties" (as it should, as

non-jurisdictional issues raised *only* by an *amicus* are often deemed forfeited), it also 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, 1116-17 (D. Colo. 2018), *vacated and remanded on other grounds by* 951 F.3d 1217 (10th Cir. 2020). The Chamber's 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. In particular, the brief highlights examples from dozens of other similar cases to contextualize the issues presented in this litigation. These examples are directly relevant to the issue presented by this motion—how to evaluate the plausibility of allegations of imprudence in an ERISA class action—but are largely not cited or discussed by the parties themselves.[6]

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.

[6] Plaintiffs separately suggest that the brief "argues facts." Opp. 6. Plaintiffs confuse 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 Network*, 976 F.3d at 763. Here, the Chamber's brief provides contextual information bearing on whether the assertions in Plaintiffs' complaint are plausible and non-conclusory. Plaintiffs' cited decisions are thus inapplicable.

Dated: July 18, 2022

Respectfully submitted,

/s/ W. Perry Brandt
W. Perry Brandt
BRYAN CAVE LEIGHTON PAISNER LLP
One Kansas City Place
1200 Main Street, Suite 3800
Kansas City, MO 64105
(816) 374-3206

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

Jaime A. Santos (*pro hac vice*)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

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 Eastern District of Missouri by using the court's CM/ECF system on July 18, 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.

Dated: July 18, 2022

/s/ W. Perry Brandt

W. Perry Brandt
BRYAN CAVE LEIGHTON PAISNER LLP
One Kansas City Place
1200 Main Street, Suite 3800
Kansas City, MO 64105
(816) 374-3206

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America