HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JUSTIN BELDOCK, GORDON BROWARD and SHAADI NEZAMI, individually and as representatives of a class of similarly situated persons, on behalf of the MICROSOFT CORPORATION SAVINGS PLUS 401(K) PLAN,,

Plaintiffs,

v.

MICROSOFT CORPORATION; THE BOARD OF TRUSTEES OF MICROSOFT CORPORATION; THE 401(K) ADMINISTRATIVE COMMITTEE OF THE MICROSOFT CORPORATION SAVINGS PLUS 401(K) PLAN; and DOES NO. 1-20, Whose Names Are Currently Unknown,,

Defendants.

Case No. 2:22-cv-01082-JLR

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

NOTE ON MOTION CALENDAR:
NOVEMBER 25, 2022

Plaintiffs' 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, Plaintiffs denigrate the Chamber and its efforts to facilitate a fulsome debate on the critical issues at play. Indeed, Plaintiffs accuse the Chamber of attempting to stifle Plaintiffs' ability to assert their rights while themselves attempting to shut down reasonable debate in this judicial forum. 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. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022). This Court should permit the Chamber to file its proposed amicus brief.

1. Plaintiffs' overwrought objections largely boil down to a complaint that the Chamber supports Defendants. 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, the Ninth Circuit has repeatedly held that "there is no rule that amici must be totally disinterested." *Funbus Sys., Inc. v. State of Cal. Public Utilities Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986); *see also Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (same). Contrary to Plaintiffs' off-base view of amicus participation, "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).

Plaintiffs' 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. 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. Indeed, nine different courts have granted the Chamber's motion for leave in analogous ERISA class actions—seven over an opposition.[1] These briefs addressed the same ERISA pleading-standard issues addressed by the Chamber's brief here, and "offer[ed] a valuable perspective on the issues presented in this mater" given "the Chamber's experience with both retirement plan management and ERISA litigation." *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). Thus, courts recognized that the Chamber's brief is intended to assist the court and facilitate a dialogue on these issues—not, as Plaintiffs suggest (at 1), to "prevent ERISA plaintiffs from public participation." As a judge in the Northern District of Texas recently opined when granting the Chamber's motion for leave to file in one of these nine 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).

While Plaintiffs point (at 4 and 7-8) to scattered decisions in which courts denied leave for amicus participation, Plaintiffs fail 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

[1] *See Locascio v. Fluor 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.

courts have done.[2] Instead, Plaintiffs primarily object (at 4 & n.4) that the Chamber's motion for leave to file in other similar cases included comparable language to its motion for leave to file here. But it is not at all surprising that the Chamber would raise the same interests and themes in two motions seeking amicus participation in highly similar cases involving the same subject matter.

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—as has this Court. *See Skokomish Indian Tribe v. Goldmark*, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013) (Robart, J.) (amicus participation appropriate despite the parties' being "well-represented by counsel," because the moving parties' "input would be helpful in considering [the] motions to dismiss"). "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132; *see also Gallo v. Essex Cnty. Sheriff's Dep't*, 2011 WL 1155385, at *6 n.7 (D. Mass. Mar. 24, 2011) (regardless of whether 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.

[2] Plaintiffs misleadingly assert (at 10) that the Chamber "exaggerates the breadth of its participation in ERISA cases addressing the pleading standard for fiduciary breach cases," suggesting that its cited appellate cases are inapplicable because "the circumstances are far different in a district court." That is incorrect, *see infra*, p. 4, but, regardless, Plaintiffs entirely ignore the *nine* district courts that have welcomed the Chamber's participation under precisely the same circumstances. Plaintiffs also assert (at 10) that "*none*" of the cited appellate cases "discuss a party's opposition to the Chamber's participation." That too is wrong. In *Sweda v. University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019), the Chamber's motion for leave to file an amicus brief was granted over the plaintiffs' opposition—as the Chamber specifically noted in its motion for leave in this case. *See* ECF No. 39 at 3 n.7.

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 ERISA plaintiffs in the Supreme Court and federal appellate courts 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.

2. Putting aside their broader hostility to amicus participation, Plaintiffs identify a laundry list of reasons why they believe *this case* is inappropriate for amicus participation. None is persuasive. To start, while Plaintiffs take a dim view of discourse in district-court proceedings, Opp. 3, 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. *Skokomish Indian Tribe*, 2013 WL 5720053, at *1.[3] Plaintiffs also fail to explain why "practical perspectives" and a discussion of the "broader regulatory or commercial context" are somehow less helpful to district courts. *Prairie Rivers Network*, 976 F.3d at 763. Plaintiffs next raise the contradictory point that the Chamber's view is irrelevant because its "generic interest" extends beyond the case at hand. Opp. 3.[4] Under Plaintiffs' view, for amicus participation to be appropriate, the Chamber must have a particularized interest in the dispute between *these* Plaintiffs and *these* Defendants. While that may be true for intervenors, it is not true for amici. To the contrary, courts consider

[3] Nowhere does this decision hold, as Plaintiffs assert (at 2), that amicus participation is "generally unwarranted."

[4] Plaintiffs briefly assert that the "Chamber's Motion makes no attempt to articulate an interest in this case," immediately before pivoting to discuss the Chamber's asserted interest in the case. Opp. 3.

whether an amicus brief will "contribute in clear and distinct ways" to the analysis—thus focusing on the court's reasoning and ultimate holding, not just the prevailing party in a particular motion. *Prairie Rivers Network*, 976 F.3d at 763.

Finally, to the extent Plaintiffs intend to suggest (at 10) that amicus participation should be permitted only in "public" disputes "implicat[ing] administrative authority," that is a nonstarter: District courts consistently welcome amicus participation in cases between private litigants. *See, e.g.*, *Dist. Lodge 26 of the Int'l Ass'n of Machinists & Aerospace Workers v. United Techs. Corp.*, 2009 WL 3571624, at *1 (D. Conn. Oct. 23, 2009); *Boston Gas Co. v. Century Indem. Co.*, 2006 WL 1738312, at *1 n.1 (D. Mass. June 21, 2006); *Chamberlain Grp., Inc. v. Interlogix, Inc.*, 2004 WL 1197258, at *1 (N.D. Ill. May 28, 2004). That includes the numerous district courts that have granted the Chamber leave to file amicus briefs in ERISA cases at the motion-to-dismiss stage. *See supra*, p. 2 n.1.

3. Plaintiffs eventually turn their focus to the content of the Chamber's brief, objecting that it duplicates Defendants' motion. *See* Opp. 7-8. But this contention cannot be squared with Plaintiffs' *other* argument (at 3-4) that the Chamber's brief is improper because it is "irrelevant" to the question at hand. According to Plaintiffs, the Chamber's brief is improper because it both hews too closely and strays too far from the issues in the case. At bottom, Plaintiffs' 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).[5] As the Chamber explained in its motion, the brief highlights examples

[5] Moreover, Plaintiffs are mistaken to the extent they suggest there cannot be any meaningful overlap between an amicus's arguments and a party's arguments. Indeed, when an amicus raises

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 may not be cited or discussed by the parties themselves.

Plaintiffs' remaining arguments rest on objections to the Chamber's arguments—not to their participation in this case. Plaintiffs object, for example, to the Chamber's purported "hyperbolic policy position" that these lawsuits harm plan participants, offering contrary arguments about the ways in which they believe that ERISA litigation has been helpful. Opp. 5-6. 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.

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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). Plaintiffs effectively attempt 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.

Respectfully submitted,

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