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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ROBERT BRACALENTE and BORIS GDALEVICH, individually and as representatives of a class of similarly situated persons, on behalf of the CISCO SYSTEMS, INC. 401(K) PLAN,

Plaintiffs,

v.

CISCO SYSTEMS, INC.; THE BOARD OF TRUSTEES OF CISCO SYSTEMS, INC.; THE ADMINISTRATIVE COMMITTEE OF THE CISCO SYSTEMS, INC. 401(K) PLAN; and DOES No. 1-20, Whose Names Are Currently Unknown,

Defendants.

Case No. 5:22-cv-04417-EJD

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

Date: March 23, 2023
Time: 9:00 a.m.
Crtm: Room 4, 5th Floor
Judge: Hon. Edward J. Davila

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 trying 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 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, 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); *see also NGV Gaming, Ltd.*

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v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1068 (N.D. Cal. 2005) (granting leave and noting that the participation of interested amici is "now quite common").[1]

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.[2] These briefs addressed the same ERISA pleading-standard issues addressed by the

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

[2] *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.

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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 7-9) 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 courts have done.[3] Instead, Plaintiffs primarily object (at 3-4 & n.4) that the Chamber's motion for

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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.

[3] 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

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 have a series of courts. *See, e.g.*, *Skokomish Indian Tribe v. Goldmark*, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013) (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"); *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"). "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. 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

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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. 48 at 4 n.7.

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. *Oakley v. Devos*, 2020 WL 3268661, at *13 n.23 (N.D. Cal. June 17, 2020). Plaintiffs 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. If anything, this case is particularly appropriate for amicus participation at the district-court level, because the Chamber's brief focuses on the pleading standard *district courts* should apply when evaluating analogous motions to dismiss—an issue district courts across the country are currently considering. It makes sense that the relevant decisionmakers (i.e., district courts) should have the opportunity to consider the Chamber's arguments, rather than waiting until the case is on appeal.

Plaintiffs next raise the contradictory point that the Chamber's view is irrelevant because its "generic interests" extend 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 *this* Defendant. While that may be true for intervenors, it is not true

[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.

for amici. To the contrary, courts consider 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 9) 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.2.

3. Plaintiffs eventually turn their focus to the content of the Chamber's brief, objecting that it duplicates Defendant's 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

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Cir. 2020).[5] As the Chamber explained in its motion, 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 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.

[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 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,

Dated: November 28, 2022

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