UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ANDRE HALL AND JERMAINE MINITEE, Plaintiffs, v. CAPITAL ONE FINANCIAL CORP., *et al.*, Defendants.	Case No. 1:22-cv-857-PTG-JFA

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

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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). 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. 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, particularly given the surge of recent filings, is relevant to every retirement-plan sponsor in the country.

Plaintiffs rely heavily on the perspective of a single retired Seventh Circuit judge, who ascribed to the view that it was "rare for an amicus curiae brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003). If the entire judiciary took that view, it would be "rare" for a court—at any level—to permit amicus participation. As revealed by the robust amicus practice at all levels of the federal-court system, though, judges have overwhelmingly declined this invitation to limit debate. Indeed, as reflected by *Prairie Rivers Network*, the Seventh Circuit itself does not share now-retired Judge Posner's hostility to amicus participation. 976 F.3d at 763. In fact, the Seventh Circuit recently permitted amicus participation by the Chamber (over the plaintiffs' opposition) on the precise ERISA pleading-standard issues addressed by the Chamber's brief here. *See Divane v. Northwestern Univ.*, No. 18-2569 (7th Cir.), ECF No. 92. As a judge in the Northern District of Texas recently opined when granting the Chamber's motion for leave to file in an analogous ERISA class action, "[s]peech is a beautiful thing." *Locascio v. Fluor Corp.*, No. 3:22-cv-00154, ECF No. 63 (N.D. Tex. Oct. 20, 2022).

The same is true here. As courts in this district have recognized, "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). To the contrary, "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 Fed. Energy Regul. Comm'n v. Powhatan Energy*

Fund, LLC, 2017 WL 11682615, at *2 (E.D. Va. Mar. 15, 2017) (allowing amicus participation where the amicus brief was "helpful and the information timely and useful"). In fact, nine different courts have granted the Chamber's motion for leave in analogous ERISA class actions—seven over an opposition.[1]

While Plaintiffs point (at 6 & n.5) 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.[2] Instead, Plaintiffs primarily object (at 5) 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. "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)

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[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.

[2] Plaintiffs misleadingly assert (at 6 n.5) that the "Chamber exaggerates the breadth of its participation in ERISA actions," suggesting that its cited appellate cases are inapplicable because "the circumstances are far different in a district court." That is incorrect, *see supra*, p. 4, but, regardless, Plaintiffs entirely ignore the *nine* district courts that have welcomed the Chamber's participation under precisely the same circumstances.

(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. 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. 4, 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. *Tafas*, 511 F. Supp. 2d at 659. 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. 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 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 4) that amicus participation should be permitted only in "public" disputes involving the government, 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. 3 n.1.

3. Plaintiffs eventually turn their focus to the content of the Chamber's brief, objecting that it duplicates Defendants' motion. *See* Opp. 4. As an initial matter, 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 Powhatan Energy Fund*, 2017 WL 11682615, at *1; *see also Tafas*, 511 F. Supp. 2d at 660. Plaintiffs 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. The Chamber's proposed brief appropriately strikes a balance that will be useful to the Court: It addresses issues similar to those raised by 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, 1116-17 (D. Colo. 2018), *vacated*

and remanded on other grounds by 951 F.3d 1217 (10th Cir. 2020). 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 effort to "hyperbolically suggest" that these lawsuits harm plan participants, offering contrary arguments about the ways in which they believe that ERISA litigation has been helpful. Opp. 6.[3] 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.

[3] Plaintiffs criticize the Chamber for citing articles written by an employee of a fiduciary insurance carrier, who they assert, "on information and belief," is insuring the risk in several of the litigations described in the Chamber's brief." Opp. 2 n.2. As an initial matter, Plaintiffs do not suggest that he is involved in *this* litigation. Even putting that aside, it is in no sense improper for the Chamber to invoke the perspective of fiduciary insurance carriers when discussing the effect these lawsuits have on the fiduciary insurance industry.

Dated: November 14, 2022

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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 Eastern District of Virginia by using the court's CM/ECF system on November 14, 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: November 14, 2022

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