UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:22-cv-00167-CMA-STV

LAQUITA JONES, *et al.*, Individually and as representatives of a class of similarly situated persons, on behalf of the DISH NETWORK CORPORATION 401(K) PLAN,

Plaintiffs,

v.

DISH NETWORK CORPORATION, *et al.*,

Defendants

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

Plaintiffs' opposition to the Chamber's motion for leave to file is rife with contradictions. Plaintiffs argue that the Chamber has not asserted a sufficient interest in this case, but criticize the Chamber for its support of a particular outcome. Plaintiffs maintain that the Chamber's discussion is untethered from the case at hand, while labeling the Chamber's arguments as duplicative of Defendants' motion. Plaintiffs contend that the Chamber advances a "hyperbolic policy position" rather than "a legal argument," but object to the Chamber's focus on the appropriate pleading standard for ERISA class actions. And Plaintiffs accuse the Chamber of attempting to stifle Plaintiffs' ability to assert their rights while themselves attempting to shut down reasonable debate on the important issues at hand.

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—context about ERISA's text, history, and structure, and context about the realities of plan management. And, critically, "context" is precisely what the Supreme Court has instructed courts to consider when evaluating whether plaintiffs' allegations satisfy Rule 8. *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 first suggest (at 3-4) that the Chamber failed to articulate an interest in this case. Not so. As Plaintiffs' opposition recognizes, the Chamber explained that it represents 300,000 businesses and professional organizations, many of which maintain

or provide services to retirement plans. Among these organizations are representatives from all corners of the private-sector retirement system, including plan sponsors, asset managers, recordkeepers, consultants, and other service providers. The development of ERISA caselaw—and, in particular, the interpretation of ERISA's fiduciary duties and the appropriate pleading standard in ERISA litigation—is thus an area of great interest to the Chamber's members.[1]

According to Plaintiffs (at 4), the Chamber's extensive involvement in this area is "irrelevant" to the case at hand because the Chamber's "generic interests" extend beyond the outcome of this case. 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*. And Plaintiffs' cited case (*Center for Biological Diversity v. Jewell*) says precisely the opposite. There, this Court explained that a potential *amicus*'s "asserted interest … is not especially compelling" when it is cabined to "the outcome of the case" at hand. 2017 WL 4334071, at *2 (D. Colo. May 16, 2017). While the *amicus* in that case was "focused on th[e] case's outcome, the Court [was] not—it [was] focused on" the broader legal question at issue in the case. *Id.* Because the *amicus* had "offered nothing that [was] not apparent in the record, or which [could not] be addressed by the parties to the action," the Court

[1] Plaintiffs separately argue that the Chamber failed to identify any interest at all, on the theory that the Chamber's statement of interest appears in its proposed *amicus* brief rather than in its motion for leave. Opp. at 3 nn.2-3. That is incorrect, as Plaintiffs' opposition makes clear. The very next paragraph of Plaintiffs' opposition quotes a portion of the Chamber's statement of interest from its motion for leave. Opp. at 3 (quoting Mot. at 1).

determined its brief would not contribute to the discussion. *Id.* By contrast, the Chamber's brief will "contribute in clear and distinct ways" to the Court's analysis, as it focuses on the Court's reasoning and ultimate holding—not just the prevailing party in this motion. *See 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") (internal quotation marks omitted).

To the extent Plaintiffs intend to suggest (at 3, 8) that *amicus* participation is appropriate only in "public" disputes involving the government, that is a nonstarter: Courts at all levels 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 infra*, pp. 5-6. Nor can Plaintiffs rely (at 3-4) on the fact that this case presents a concrete dispute between two parties. That is always the case—as Article III's case or controversy requirement demands. Plaintiffs' apparent view that *amicus* participation is appropriate only in far-reaching policy disputes fundamentally misunderstands the nature of *amicus* practice.

2. Plaintiffs are also wrong that the Chamber's brief is "irrelevant" to the Court's analysis on the motion to dismiss. As the Chamber explained in its motion, its 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 issues on appeal; and "provid[es] practical perspectives on the consequences of particular outcomes." *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). The brief does all of this in service of contextualizing Plaintiffs' allegations regarding the proper pleading standard under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Plaintiffs respond (at 4) that the Chamber's brief is improper because it provides "context" rather than focusing on the "sufficiency of the complaint's allegations." But the Chamber's brief provides context bearing on whether the assertions in Plaintiffs' complaint are plausible and non-conclusory. The Chamber can provide useful insight on the proper application of the pleading standard while also shedding light on how this case sits in the broader landscape of ERISA litigation and the realities of plan management and fiduciary decisionmaking. Indeed, Plaintiffs themselves describe the "Chamber's central arguments" as relating to Plaintiffs' use of inaccurate or misleading data to attempt to barrel past the pleading stage, undermining any suggestion that the Chamber's arguments have strayed too far from the issues at hand. Opp. 6.

As a court in the Northern District of Illinois recently explained in granting the Chamber leave to file an *amicus* brief and denying the plaintiffs' motion for reconsideration of that decision in an excessive-fee case similar to this one, "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; *see also Clark v. Beth Israel Deaconess Med. Ctr.*, No. 22-10068 (D. Mass. May 24, 2022), ECF No. 41 (granting the Chamber's motion for leave to file over the plaintiffs' opposition); *Singh v. Deloitte*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41 (same); *Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4, 2022), ECF No. 38 (same). In fact, six courts have now granted the Chamber's motion for leave to file in recent ERISA class actions.[2] Plaintiffs object (at 10) that these decisions "are nothing more than summary docket entries or other orders that do not provide reasoning or analysis for granting leave." But that supports the *Chamber*: the fact that courts grant leave in summary orders merely shows the routine nature of these requests.

3. Finally, Plaintiffs argue that the Chamber's "perspective is not desirable or helpful." Opp. 5. Here, too, Plaintiffs miss the mark. Plaintiffs start by noting that the parties in this case are adequately represented. But as the Chamber's motion explained, "[e]ven 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) (noting that, "[w]hile the motion was ably presented by" defendant's counsel, the *amicus* briefs "were quite helpful in putting the immediate controversy in its larger context").

[2] Plaintiffs point (at 6) to a pair of recent decisions in which the court denied the Chamber's motion for leave, but Plaintiffs do not explain how those courts' exercise of discretion to deny a motion for leave in any way should cabin *this Court's* discretion to permit the filing of the Chamber's brief, as six other courts have done.

Plaintiffs next suggest that the Chamber's arguments are duplicative of Defendants' arguments. Opp. 5-7. Like many of Plaintiffs' points, this contention cannot be squared with Plaintiffs' *other* argument that the Chamber's brief is improper because it is "irrelevant" to the question at hand. *See supra*, pp. 4-6. 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, 1116-17 (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.[3]

Plaintiffs' overwrought objections boil down to a complaint that the Chamber supports Defendants. But *amici* are frequently "interested in a particular outcome."

[3] Plaintiffs also suggest (at 2 n.1) that the Chamber's brief would exceed the page limit under Federal Rule of Appellate Procedure 29. That argument is misguided, as amicus briefs filed in appellate courts are frequently up to 6,500 words—or about 25-30 pages, double the length of the Chamber's brief here. In any event, as Plaintiffs recognize, the acceptance of amicus briefs by district courts is not governed by Rule 29. Rather, it falls within the discretion of the district court, and Plaintiffs do not dispute that the Chamber has complied with this Court's page-limit requirement for briefs. *See* CMA Civ. Practice Standard 10.1(d)(1).

Prairie Rivers Network, 976 F.3d at 763.[4] The relevant question is not whether the *amicus* supports a particular outcome, but rather whether the brief will "contribute in clear and distinct ways" to the Court's analysis. *Id.* Here, the Chamber's brief enhances the discussion of these important issues by providing additional context and legal analysis. Plaintiffs efforts to cut off this discussion run counter to the well-established practice in this district of permitting *amicus* participation for precisely this purpose. *See, e.g.*, *Vigil v. Am. Tel. & Tel. Co.*, 1969 WL 118, at *1 (D. Colo. Sept. 9, 1969).

For these reasons and those stated in the motion for leave to file, the Chamber respectfully respects that the Court grant it leave to file the proposed *amicus* brief.

Dated: May 25, 2022

Respectfully submitted,

/s/ Jaime A. Santos

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[4] Notably, Plaintiffs otherwise criticize the Chamber for *not* being interested in a particular outcome in this case. *See supra*, pp. 2-4.

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 District of Colorado by using the court's CM/ECF system on May 25, 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: May 25, 2022

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