UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES KISTLER and LISA LANG, individually and as representatives of a class of similarly situated persons, on behalf of the STANLEY BLACK & DECKER RETIREMENT ACCOUNT PLAN, Plaintiffs, v. STANLEY BLACK & DECKER, INC., Defendant.	No. 3:22-cv-00966-SRU December 16, 2022

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

OF COUNSEL:

Paul Lettow
Tara S. Morrissey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Jordan Bock
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

Jaime A. Santos (ct31237)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

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

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, "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). 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, a district court in the Western District of Washington recently granted the Chamber's motion for leave to file in another of the eleven nearly identical cases challenging the BlackRock LifePath Index Funds. *See Beldock v. Microsoft Corp.*, No. 22-1082 (W.D. Wash. Dec. 9, 2022), ECF No. 50. As the court explained, the Chamber has a "unique perspective[] that may help the court decide the legal questions at issue in Defendants' motion to dismiss." *Id.* at 2. In total, ten different courts have granted the Chamber's motion for leave in analogous ERISA class actions—eight over an opposition.[1] These briefs addressed the same ERISA pleading-standard issues addressed by the Chamber's brief here,

[1] *See Beldock v. Microsoft Corp.*, No. 22-1082 (W.D. Wash. Dec. 9, 2022); *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.

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). As these courts recognized, the Chamber's brief is designed 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 ten 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).[2]

While Plaintiffs point (at 5 and 8-9) 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 5-6 & n.3) that the Chamber's motion

[2] Plaintiffs point (at 3) to the perspective of a single retired Seventh Circuit judge, who ascribed to the view that amicus briefs "may be used to make an end run around court-imposed" page limits or "to inject interest group politics" into a case. *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (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, judges have overwhelmingly declined this invitation to limit debate. Indeed, as reflected by *Prairie Rivers Network*, *see supra*, pp. 1-2, 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.

[3] Plaintiffs misleadingly assert (at 13) 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. That is incorrect, *see infra*, p. 4, but, regardless, Plaintiffs entirely ignore the *ten* district courts that have welcomed the Chamber's participation under precisely the same circumstances. Plaintiffs also assert (at 13) that "*none*" of the cited appellate cases "discuss a party's opposition to the Chamber's participation." That too is wrong—as Plaintiffs themselves acknowledge in that same paragraph. In *Sweda v. University*

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 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"); *Am. Steamship Owners Mut. Protect. & Indem. Ass'n, Inc. v. Alcoa Steamship Co.*, 2005 WL 427593, at *11 (S.D.N.Y. Feb. 22, 2005) (allowing amicus participation where movants "and their counsel [were] extremely knowledgeable about many of the issues that the Court [would] be asked to consider"). "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

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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. Plaintiffs attempt to dismiss this example on the basis that the court did not adopt the Chamber's position, but the standard for amicus participation is not whether the court ultimately agrees with the amicus's proposed position. If anything, this example shows—contra Plaintiffs' fear-mongering—that courts can appropriately evaluate the arguments made by an amicus to the extent they find those arguments persuasive, which is, of course, the point of amicus participation.

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, 12, 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. Indeed, Plaintiffs themselves recognize that "appellate cases" have "postures far removed from the pleadings stage of the district court." Opp. 13. 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 "far removed" from this posture 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. 4.[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 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 12) 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 Defendant's motion. *See* Opp. 8-10. But this contention cannot be squared with Plaintiffs' *other* argument (at 4-6) 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

[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. 4.

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 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. 11. 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.

Dated: December 16, 2022

Respectfully submitted,

/s/ *Jaime A. Santos*

Jaime A. Santos (ct31237)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

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

OF COUNSEL:

Paul Lettow
Tara S. Morrissey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Jordan Bock
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

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 Connecticut by using the court's CM/ECF system on December 16, 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: December 16, 2022

/s/ Jaime A. Santos

Jaime A. Santos (ct31237)
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

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