**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**

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| DEBORAH LOCASCIO and DAVID SUMMERS, Individually and as a representatives of a class of similarly situated persons, on behalf of the FLUOR CORPORATION EMPLOYEES' SAVINGS INVESTMENT PLAN,<br><br>*Plaintiffs,*<br><br>v.<br><br>FLUOR CORPORATION, THE FLUOR CORPORATION BENEFITS ADMINISTRATIVE COMMITTEE, THE FLUOR CORPORATION RETIREMENT PLAN INVESTMENT COMMITTEE, and MERCER INVESTMENTS, LLC a/k/a MERCER INVESTMENT MANAGEMENT,<br><br>*Defendants.* | Case No. 3:22-cv-00154-X |

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA**

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District courts have broad discretion to permit the filing of *amicus* briefs that are "timely and useful," including "when the *amicus* has unique information or perspective that can help the court." *United States ex rel. Long v. GSD & M Idea City LLC*, 2014 WL 11321670, at *4 (N.D. Tex. Aug. 8, 2014) (quotations omitted). The proposed *amicus* brief offers the unique perspective of the Chamber of Commerce of the United States of America (the "Chamber") on the practical concerns that properly inform the Court's application of ERISA's context-specific, process-based prudence standard. The Chamber's perspective is informed by the Chamber's decades of involvement in the development of law and policy regarding retirement plans. But it is also rooted in the first-hand, broad-based experience of the Chamber's many members that sponsor ERISA plans or provide services to them. The Chamber's members' collective experience goes well beyond that of any individual defendant in any individual case, and can elucidate how inflexible litigation-driven imperatives imperil sound fiduciary decision-making. In short, the Chamber's proposed *amicus* brief would serve a proper and useful function.

Plaintiffs' arguments in opposition to the Chamber's motion for leave to file are misguided.

1. Plaintiffs first raise a procedural objection to the Chamber's motion, proposing that it "may be considered untimely" because Federal Rule of Appellate Procedure 29 requires *amicus* briefs to be filed "no later than 7 days after the principal brief of the party being supported." Pls.' Opp. to Mot. for Leave to File Brief of *Amicus Curiae*, ECF No. 50 ("Opp.") 3 n.3 (quoting Fed. R. App. P. 29). The Chamber's motion was timely under that standard, even if one assumes it applies in this district court proceeding. Plaintiffs overlook that the date on which they contend the Chamber's motion should have been filed—Monday, June 20, 2022—was a federal holiday, pushing any deadline that would otherwise fall on that day to Tuesday, June 21, 2022.

*See* Fed. R. Civ. P. 6(a)(1)(C); Court Information, Federal Holidays, U.S. District Court for the N.D. of Tex., https://www.txnd.uscourts.gov/court-holidays. The Chamber filed its motion for leave on June 21, 2022.[1]

2. Plaintiffs next take aim at the content of the Chamber's brief, arguing that the Chamber's arguments are at once "entirely duplicative" of defendants' (Opp. 5-6) and entirely "irrelevant" (*id.* at 4).[2] Neither claim is true. The Chamber's brief strikes what courts have recognized is an appropriate balance for an *amicus* filing: the Chamber properly addresses the issues in dispute, as the parties do, but makes a distinct contribution by providing a "unique perspective" on those matters. *High Country Conservation Advocates v. United States Forest Serv.*, 333 F. Supp. 3d 1107, 1116-17 (D. Colo. 2018) (granting leave to file *amicus* brief over objection that arguments were "duplicative"), *vacated and remanded on other grounds*, 951 F.3d 1217 (10th Cir. 2020).

More specifically, the Chamber's brief engages with a core question before the Court—how the plausibility standard described in *Iqbal* and *Twombly* applies to circumstantial allegations of imprudence based on the performance of 401(k) plan investment options. The Chamber's broad experience with retirement-plan administration, ERISA litigation, and related

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[1] Plaintiffs also assert that the length of the Chamber's brief "exceeds what it would be permitted … if granted leave to participate by … a federal appeals court" because the appellate rules limit *amicus* briefs to half the length authorized for a party's principal brief. Opp. 2 n.2. But the Federal Rules of Appellate Procedure do not govern the form of filings in district court, and the Chamber's brief is well within the 25-page limit for briefs set by Local Rule 7.2(c). The Chamber's brief also contains fewer than the 6,500 words commonly allowed for *amicus* briefs in the federal courts of appeals. *See* Fed. R. App. P. 29, 32(a)(7)(B)(i).

[2] Plaintiffs note in passing that the parties are adequately represented (Opp. 5), but as even plaintiffs recognize, that is not a basis to prohibit *amicus* participation if the proposed brief makes a distinct contribution. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also, e.g.*, *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) ("Even when a party is very well represented, an amicus may provide important assistance to the court.").

policy issues gives it a unique perspective on the "difficult tradeoffs" faced by plan fiduciaries and "the range of reasonable judgments" available to them—matters that the Supreme Court has instructed properly feature in the plausibility analysis. *Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022) (explaining that courts must "give due regard" to these factors when evaluating motions to dismiss in ERISA cases). The Chamber's brief adds to the defendants' presentations by providing additional context about the complex realities of retirement plan management and fiduciary decision-making and how ERISA's process-driven prudence standard accommodates those concerns. The Chamber's brief also offers a broader perspective on the serious practical consequences of permitting hindsight-based fiduciary breach suits to proceed past the pleading stage. Courts have recognized that these factors, too, are relevant when assessing whether a plaintiff has alleged enough to warrant discovery. *See, e.g.*, *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). Plaintiffs' concerns about the "potential for abuse" (Opp. 6-7) are not implicated here, where the *amicus* brief offers a unique perspective on issues relevant to the Court's decision.[3]

As one court recently explained in denying a motion for reconsideration of its decision to permit the Chamber to file an *amicus* brief at the motion to dismiss stage, "the proposed amicus brief could provide the Court … a broader view of the impact of the issues raised in this case," which is "an appropriate basis to allow amicus participation." *Baumeister v. Exelon Corp.*, No. 21-6505, ECF No. 44 (N.D. Ill. Mar. 11, 2022); *see also, e.g.*, *Neonatology Assocs.*, 293 F.3d at 132 (*amicus* briefs may assist the court by "explain[ing] the impact a potential holding might have on an industry or other group"). The Chamber's brief in this case serves the same function.

[3] The unremarkable fact that the Chamber's counsel in this case has represented different clients in unrelated matters does not, contrary to plaintiffs' suggestion (Opp. 7 n.6), impugn the propriety of the Chamber's submission.

3. Nor is there any merit to plaintiffs' objection that the Chamber lacks any "legitimate" interest in this case (Opp. 7-8). As explained in the Chamber's motion for leave, the Chamber directly represents approximately 300,000 member businesses and professional organizations, many of which sponsor or provide services to retirement plans. *See* Mot. for Leave to File Brief of *Amicus Curiae*, ECF No. 48 at 1. The development of ERISA case law, including case law addressing the pleading standard for claims alleging breaches of fiduciary duty, is thus an area of great importance to the Chamber and its members. *Id.* Courts have recognized such an interest as a valid one. *See, e.g.*, *Full Circle of Living & Dying v. Sanchez*, 2022 WL 348166, at *2 (E.D. Cal. Feb. 4, 2022) ("District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved." (quotation omitted)).

For their part, plaintiffs cite no authority endorsing their restrictive view of what qualifies as a "legitimate" interest for purposes of *amicus* participation, and courts including the Fifth Circuit have rejected efforts to narrowly limit the types of interests that may be recognized. *See Lefebure v. D'Aquilla*, 15 F.4th 670, 673, 676 (5th Cir. 2021) (noting that Rule 29 "only requires amici to state their 'interest' in the case," and concluding that courts "would be 'well advised to grant motions for leave … unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted'" (quoting *Neonatology Assocs.*, 293 F.3d at 133)). Plaintiffs similarly offer no support for the proposition that only appeals (Opp. 7-8) or "cases that … implicate administrative authority" (*id.* at 9) may involve "questions of law" with a potentially significant impact beyond the immediate parties to the dispute (*id*. at 7). The frequency with which courts grant permission to file *amicus* briefs in litigation between private parties demonstrates that that is not the case. *See, e.g.*, *infra* at 6 (citing cases granting the Chamber

leave to file in private ERISA actions). The cases on which plaintiffs themselves rely (Opp. 3, 8) recognize that while an "amicus brief should normally be allowed when … the amicus has an interest in some other case that may be affected by the decision in the present case," that is far from the only circumstance in which *amicus* participation is appropriate. *Ryan*, 125 F.3d at 1063 (explaining that *amicus* participation also "should normally be allowed" when, for example, "the amicus has unique information or perspective that can help the court"); *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (same).[4] The Chamber's members *are* in any event affected by the application of pleading standards in cases such as this one, which follows the playbook used to sue plan sponsors and service providers nationwide.

Courts have also declined to endorse plaintiffs' view that an *amicus* must be entirely "objective" (Opp. 8) for its brief to provide anything of value. "[T]here is no requirement 'that amici must be totally disinterested.'" *California v. U.S. Dep't of Lab.*, 2014 WL 12691095, at *1 (E.D. Cal. Jan. 14, 2014) (quotation omitted); *see also, e.g.*, *United States v. Alkaabi*, 223 F. Supp. 2d 583, 592 (D.N.J. 2002) ("Parties with pecuniary and policy interests have been regularly allowed to appear as *amici* in our courts."); *Onondaga Indian Nation v. State*, 1997 WL 369389, at *3 (N.D.N.Y. June 25, 1997) ("The fact that the [proposed *amicus*] is not a completely neutral entity with respect to the issues raised by this lawsuit is not a sufficient reason" to deny a motion for leave.). Even *amici* that are "interested in a particular outcome can contribute in clear and distinct ways"—for example, by "[e]xplaining the broader regulatory or commercial context in which a question comes to the court" or "[p]roviding practical

[4] District courts commonly cite the same standard when evaluating motions for leave to participate as an *amicus* in their proceedings. *See, e.g.*, *Hernandez v. Stewart*, 2021 WL 6274446, at *1 (E.D. Wash. Feb. 8, 2021); *Mashpee Wampanoag Tribe v. Bernhardt*, 2020 WL 2615523, at *1 (D.D.C. May 22, 2020); *C & A Carbone, Inc. v. Cnty. of Rockland,* 2014 WL 1202699, at *4 (S.D.N.Y. Mar. 24, 2014).

perspectives on the consequences of potential outcomes." *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020). The guiding principle is simply "that an amicus curiae brief should be additive." *Id.* As explained, the Chamber's proposed brief in this case satisfies this standard.

4. Finally, it bears noting that despite plaintiffs' insistence that the Chamber's brief will not be "useful" (Opp. 3), a number of courts have permitted the Chamber to file *amicus* briefs at the dismissal stage in ERISA class actions—including over objections virtually identical to those voiced by plaintiffs here. *See Singh v. Deloitte*, No. 21-8458, ECF No. 41 (S.D.N.Y. Apr. 14, 2022) (granting motion for leave over opposition); *Baumeister*, No. 21-6505, ECF No. 44 (denying motion for reconsideration of decision to grant leave to file); *see also Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366, ECF No. 38 (N.D. Ill. Apr. 4, 2022); *Clark v. Beth Israel Deaconess Med. Ctr.*, No. 22-10068, ECF No. 41 (D. Mass. May 24, 2022); *Carrigan v. Xerox Corp.*, No. 21-1085, ECF Nos. 54, 55 (D. Conn. Nov. 10, 2021).[5] Plaintiffs argue that these cases "fail to support that district courts routinely accept [the Chamber's] *amicus* briefs." Opp. 10. This claim makes no sense—each of these courts *did* accept an *amicus* brief from the Chamber. And while plaintiffs dismiss these decisions as "meaningless" (*id.* at 9) because they are "summary docket entries or other orders that do not provide reasoning or analysis" (*id.* at 10), that only demonstrates the routine nature of the rulings. It does not alter the fact that in each instance the court exercised its broad discretion to permit the Chamber's participation as *amicus*, as the Chamber asks the Court to do here.

For these reasons and those in the Chamber's motion, the Chamber respectfully requests

[5] Plaintiffs cite (Opp. 5, 8) two cases in which courts have come out the other way and denied requests by the Chamber to participate as *amicus*. Those decisions are in the minority, and they in no way constrain this Court's discretion to allow the Chamber's distinct submission here.

that the Court grant it leave to participate as *amicus* and accept the Chamber's proposed *amicus* brief for filing.

Dated: July 13, 2022

Respectfully submitted,

*/s/ Timothy S. Durst*

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2022, I caused the foregoing to be filed electronically with the Clerk of Court for the U.S. District Court for the Northern District of Texas using the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the court's CM/ECF system.

Dated: July 13, 2022

*/s/ Timothy S. Durst*
Timothy S. Durst