

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

ELECTRONICALLY FILED

KENA MOORE, TIMOTHY K. SWEENEY,
RUSSEL A. HOHMAN, SUSAN M. SMITH
and VERONICA CARGILL, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

HUMANA INC., THE BOARD OF
DIRECTORS OF HUMANA INC., THE
HUMANA RETIREMENT PLANS
COMMITTEE and JOHN DOES 1-30,

Defendants.

Civil Action No. 3:21-cv-00232-RGJ

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

The proposed brief of the Chamber of Commerce of the United States of America (“Chamber”) will make a “clear and distinct” contribution to the issues before this Court. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers). As the Chamber explained in its motion for leave to file, 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 “context” is precisely what the Supreme Court has instructed lower courts to carefully consider when ruling on motions to dismiss in ERISA cases. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). In response, Plaintiffs provide a laundry list of nine reasons why they

believe the Court should deny the motion for leave to participate as amicus curiae. None is persuasive.

Plaintiffs first attempt to position *all* district-court amicus briefs as improper. That is a nonstarter: It is well established that district courts “have broad discretion” to accept amicus briefs. *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. and N.J.*, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011). Countless district courts, including this one, have welcomed amicus participation. *E.g.*, *Maryville Baptist Church, Inc. v. Beshear*, 2020 WL 2393359, at *4 (W.D. Ky. May 8, 2020); *Sierra Club v. Louisville Gas & Elec. Co.*, 2015 WL 5105216, at *5 (W.D. Ky. Aug. 31, 2015); *Monticello Banking Co. v. Flener*, 2010 WL 5158989, at *3 (W.D. Ky. Dec. 14, 2010).

Plaintiffs’ efforts to portray the posture of this case as inappropriate for amicus participation fare no better. Amicus briefs are routinely accepted at the motion-to-dismiss stage, *see, e.g.*, *United States v. U.S. Steel Corp.*, 2021 WL 860941, at *6 (N.D. Ind. Mar. 8, 2021); *Fed. Energy Regulatory Comm’n v. Vitol, Inc.*, 2020 WL 4586363, at *2 (E.D. Cal. Aug. 10, 2020), including from the Chamber itself, *see, e.g.*, *United States v. DaVita Inc.*, No. 21-229 (D. Colo. Oct. 20, 2021), ECF No. 68; *United States v. Walgreen Co.*, No. 21-32 (W.D. Va. Sept. 9, 2021), ECF No. 22; *New York v. U.S. Dep’t of Labor*, No. 18-1747 (D.D.C. Nov. 9, 2018) (minute order); *Facebook, Inc. v. IRS*, No. 17-6490 (N.D. Cal. Mar. 12, 2018), ECF No. 25. Moreover, amicus briefs are routinely accepted over a party’s objection. *See, e.g.*, *Pavek v. Simon*, 2020 WL 1467008, at *1 (D. Minn. Mar. 26, 2020); *Safari Club Int’l v. Harris*, 2015 WL 1255491, at *1 (D.D.C. Jan. 14, 2015); *Oberer Land Developers, Ltd. v. Beavercreek Township, Ohio*, 2006 WL 8442896, at *1 (W.D. Ohio Apr. 19, 2006); *Caremark, Inc. v. Goetz*, 395 F. Supp. 2d 683, 684 (M.D. Tenn. 2005).

Plaintiffs’ objections to the Chamber’s supposed “obvious partisan advocacy in support of

Defendants” and “extreme pro-corporate agenda,” Opp. 3, 5 (ECF No. 33), boil down to a complaint that the Chamber supports Defendants. But as Plaintiffs’ cited cases recognize, amici are frequently “interested in a particular outcome.” *Prairie Rivers Network*, 976 F.3d at 763 (granting the Chamber’s motion for leave to file). 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.*; see also *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).

On that core question, Plaintiffs offer no response. Indeed, it is not until Plaintiffs reach the eighth item on their list that they suggest the Chamber’s proposed brief would not assist the Court in resolving the pending motion to dismiss, and even then Plaintiffs fail to engage with the content of the brief. See Opp. 5. As the Chamber explained, 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 issue on appeal; and “provid[es] practical perspectives on the consequences of particular outcomes.” *Prairie Rivers Network*, 976 F.3d at 763. The brief does all of this in service of contextualizing Plaintiffs’ allegations with regards to 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’ sole response is that the brief “argues facts.” Opp. 4. Not so. Plaintiffs confuse providing factual *context* with contesting the facts *of this particular case* as pleaded. A primary function of an amicus is to provide the Court with additional industry context or other empirical or factual information that the parties could not themselves provide. See *Prairie Rivers*, 976 F.3d

at 763. Here, the Chamber’s brief does not challenge any of Plaintiffs’ factual allegations (and, of course, the Court need not resolve any factual issues on a motion to dismiss). That is why Plaintiffs’ cited decisions are inapplicable: Those decisions disapprove of an amicus seeking to “argue[] facts” in dispute that the court needs to “resolve[]” to decide the case. *Flaws v. Akal Security, Inc.*, 2020 WL 3317611, at *1 (W. D. Mo. June 18, 2020).

In the one spot where Plaintiffs engage with the content of the Chamber’s proposed brief, they mischaracterize it. Plaintiffs suggest that the Supreme Court rejected the Chamber’s argument regarding the burdens of inappropriate ERISA litigation when it chose not to create a presumption in favor of defendants at the pleading stage. Opp. 6. Nowhere does the Chamber’s proposed brief suggest applying a presumption of this kind. Rather, the proposed brief follows the precise test the Supreme Court announced, and that Plaintiffs repeat in their Opposition—namely, that courts should undertake a “careful, context-sensitive scrutiny of a complaint’s allegations.” *Fifth Third Bancorp*, 573 U.S. at 425; see Proposed Amicus Br. (ECF No. 24-2) at 3, 12, 17. And given the Chamber’s extensive and varied experience with both retirement-plan management and ERISA litigation, the Chamber believes it can offer a unique perspective on the shape that scrutiny should take here.

For these reasons and those stated in the motion for leave to file, the Chamber respectfully requests that the Court grant it leave to participate as amicus curiae and accept the proposed amicus brief.

Dated: November 8, 2021

Respectfully submitted,

/s/ Cory J. Skolnick _____

Cory J. Skolnick

FROST BROWN TODD LLC

400 West Market Street, 32nd Floor

Louisville, KY 40202

(502) 568-0254

cskolnick@fbtlaw.com

William M. Jay (*admitted pro hac vice*)

Jaime A. Santos (*admitted pro hac vice*)

GOODWIN PROCTER LLP

1900 N Street, NW

Washington, DC 20036

(202) 346-4000

wjay@goodwinlaw.com

jsantos@goodwinlaw.com

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

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States District Court for the Western District of Kentucky by using the Court's CM/ECF system.

/s/ Cory J. Skolnick _____
Cory J. Skolnick
*Counsel for Amicus Curiae the Chamber
of Commerce of the United States of
America*