

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

DARYA DEARING, JANICE GULLICK,
RICHARD A. HAYNES, NELSON
SIEVERS, and LAUREN BROWN,
individually and as a representatives of a
class of similarly situated persons, on
behalf of IQVIA 401(K) Plan,

Plaintiffs,

vs.

IQVIA INC., THE BOARD OF
DIRECTORS OF IQVIA
HOLDINGS, INC., THE BENEFITS
INVESTMENT COMMITTEE, and
JOHN DOES No. 1-20, Whose
Names Are Currently Unknown,

Defendants.

Case No. 1:20-cv-574-WO-JEP

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

District courts have broad discretion to permit the filing of amicus briefs that are “timely and useful.” *Kadel v. Folwell*, 2022 WL 1046313, at *1 (M.D.N.C. Apr. 7, 2022) (quotation omitted). The proposed amicus brief offers the unique perspective of the Chamber of Commerce of the United States of America (“Chamber”) on issues of fundamental importance in this and many other ERISA cases: what is required to make a prima facie showing of loss resulting from a fiduciary breach, and what practical consequences will likely follow if courts do not rigorously enforce the statutory loss requirement. The Chamber’s perspective on these issues is informed by decades of involvement in the development of law and policy regarding retirement plans. 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 collective experience of the Chamber’s members goes well beyond that of any individual defendant in any individual case and can shed light on how dilution of ERISA’s loss requirement would interfere with sound fiduciary decision-making not only for defendants in this case, but also more broadly. In short, the Chamber’s amicus brief would serve a proper function.

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

1. Plaintiffs begin by suggesting that courts should be skeptical of amicus briefs as a general matter, advocating for a “policy” of “denying or limiting amici status.” Pls.’ Mem. of Law in Opp. to Mot. for the Chamber of Commerce of the United States of America for Leave to Participate as Amicus Curiae (“Opp.”) (ECF No. 95) at 3-4.

Plaintiffs' argument relies in large part on the perspective of a single Seventh Circuit judge, who expressed the view that "it is very 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. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J.). If every judge shared that view, it would be "very rare" for any court to permit amicus participation. The robust amicus practice at all levels of the federal-court system demonstrates that Judge Posner's perspective is far from universal. As a judge in the Northern District of Texas recently stated when granting the Chamber's motion for leave to file over a similar opposition, "[s]peech is a beautiful thing," and many courts "still view[] amici as friends." *Locascio v. Fluor Corp.*, No. 3:22-cv-00154, ECF No. 63 (N.D. Tex. Oct. 20, 2022).

2. There is no more merit to plaintiffs' argument that the Chamber should not be permitted to participate as amicus in this case because the Chamber purportedly lacks any "legitimate" or "cognizable" interest (Opp. 4-5). 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. of the Chamber of Commerce of the United States of America for Leave to Participate as Amicus Curiae ("Mot.") (ECF No. 83) at 1-2. The development of ERISA case law, including case law addressing the statutory loss requirement, is thus an area of great importance to the Chamber and its members. *See id.* District courts have recognized such an interest as a valid one supporting amicus participation. *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)).

While plaintiffs protest that the Chamber’s interest is too “generic” to warrant acceptance of its amicus brief (Opp. 4), numerous courts have disagreed in granting the Chamber leave to file amicus briefs in their proceedings. *See* Mot. 4 (collecting cases); *see also Lalonde v. Mass. Mut. Life Ins. Co.*, No. 3:22-cv-30147, ECF No. 29 (Feb. 8, 2023); *Anderson v. Advance Publ’ns*, No. 1:22-cv-6826, ECF No. 52 (S.D.N.Y. Jan. 18, 2023); *Rodriguez v. Hy-Vee, Inc.*, No. 4:22-72, ECF No. 28 (S.D. Iowa June 15, 2022); *Clark v. Beth Israel Deaconess Med. Ctr.*, No. 1:22-10068, ECF No. 41 (D. Mass. May 24, 2022); *Ravarino v. Voya Fin., Inc.*, No. 3:21-1658, ECF No. 28 (D. Conn Mar. 8, 2022); *Carrigan v. Xerox Corp.*, No. 3:21-1085, ECF No. 55 (D. Conn. Nov. 10, 2021).¹

Courts have also more generally rejected efforts to narrowly limit the types of interests that may be recognized. *See, e.g., Lefebure v. D’Aquila*, 15 F.4th 670, 673 (5th Cir. 2021) (noting that Fed. R. App. P. 29 “only requires amici to state their ‘interest’ in the case” and rejecting argument that amicus must have a “legally cognizable interest” in

¹ Plaintiffs do not address these cases, but cite three decisions in which courts have come out the other way and denied requests by the Chamber to participate as amicus. *See* Opp. 5, 8, 10. Those decisions are in the minority, and they in no way constrain the Court’s discretion to allow the Chamber’s distinct amicus submission here. As explained herein, the Chamber’s proposed amicus brief in this case provides a broader perspective on the issues before the Court and is not merely duplicative of defendants’ briefing. *See infra* at 5-7.

the litigation to satisfy the standard); *see also Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 2020 WL 6589358, at *1 (M.D.N.C. July 8, 2020) (citing Rule 29 standard in granting motion for leave to file amicus brief). Any suggestion that participation is appropriate only where the proposed amicus would be directly affected by the outcome of the litigation fundamentally misunderstands the role of an amicus. By its nature, an amicus does not have a direct interest in a case but seeks to offer a helpful perspective on one or more issues in the case as a “friend of the court.” *Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953) (“An amicus curiae is not a party to the action, but is merely a friend of the court whose sole function is to advise, or make suggestions to, the court.” (quotation omitted)).

Plaintiffs offer no support for their rigid position that only appeals (Opp. 4) or “cases that ... implicate administrative authority” (*id.* at 11) may involve “questions of law” (*id.* at 4) with a potentially significant impact beyond the immediate parties to the dispute. The frequency with which district courts grant permission to file amicus briefs in litigation between private parties demonstrates that is not the case. *See, e.g., 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). This includes numerous district courts that have granted leave for the Chamber to file amicus briefs in private ERISA class actions. *See supra* at 3.

Plaintiffs are also off base in arguing that amicus participation is inappropriate at the summary judgment stage because “summary judgment is an inherently fact-intensive

analysis.” Opp. 9; *see also id.* at 1 n.1, 4-5. Contrary to plaintiffs’ unsupported view, courts routinely consider amicus briefs in connection with motions for summary judgment—including in a case plaintiffs cite to suggest that amicus participation is unwarranted in this context. *See Kadel*, 2022 WL 1046313, at *1-2; *see also, e.g., Ctr. for Biological Diversity v. Regan*, 597 F. Supp. 3d 173, 185 n.3 (D.D.C. 2022); *Portland Pipe Line Corp. v. City of S. Portland*, 2017 WL 79948, at *6 (D. Me. Jan. 9, 2017); *Sec. Indus. & Fin. Markets Ass’n v. C.F.T.C.*, 67 F. Supp. 3d 373, 398 (D.D.C. 2014). More specifically, the Chamber has been granted leave to file an amicus brief at the summary judgment stage in an ERISA fiduciary-breach action. *See Pizarro v. Home Depot, Inc.*, -- F. Supp. 3d --, 2022 WL 4687096, at *1 (N.D. Ga. Sept. 30, 2022) (noting that court considered Chamber amicus brief), *appeal docketed*, No. 22-13643 (11th Cir. Oct. 26, 2022). As these decisions recognize, amici can assist courts at the summary judgment stage by, for example, offering “helpful analysis of the law,” *Kadel*, 2022 WL 1046313, at *1, or “[p]roviding practical perspectives on the consequences of potential outcomes,” *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020)—just as they can in many other contexts.

3. With respect to the content of the Chamber’s proposed amicus brief, plaintiffs argue that the brief is not “helpful” because the Chamber’s arguments are purportedly “duplicative” (Opp. 6-7) of those made by defendants. But the mere fact that the Chamber’s brief addresses some of “the same issues” covered in defendants’ briefing (Opp. 7) does not make it duplicative. Indeed, courts often refuse to consider amicus

briefs that stray too far from the issues addressed by the parties. *See, e.g., Tafas v. Dudas*, 511 F. Supp. 2d 652, 660 (E.D. Va. 2007); *see also Sierra Club v. Va. Elec. & Power Co.*, 2016 WL 5349081, at *3 (E.D. Va. Feb. 4, 2016) (denying motion for leave to file amicus brief that addressed “a significant number of issues and statutes that have no necessary bearing on this case”).

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” rooted in the Chamber’s broad experience with retirement-plan administration, ERISA litigation, and related policy issues. *High Country Conservation Advocates v. U.S. 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). The proposed amicus brief provides important context for ERISA’s standards governing fiduciary liability and marshals those insights to highlight the potential far-reaching consequences of lowering the bar for demonstrating a loss under ERISA. *See* Mot. 5. As one court explained in granting the Chamber’s motion for leave to file an amicus brief, “given the Chamber’s experience with both retirement plan management and ERISA litigation, the Chamber can offer a valuable perspective on the issues presented.” *Sigetich v. Kroger Co.*, No. 1:21-cv-697, ECF No. 47 at 5 (S.D. Ohio July 22, 2022); *see also Baumeister v. Exelon Corp.*, No. 1:21-cv-6505, ECF No. 44 (N.D. Ill. Mar. 11, 2022) (concluding that the Chamber’s “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”). The same is true in this case.

Plaintiffs’ concerns about the “potential for abuse” (Opp. 8-9) are not implicated here, because the proposed amicus brief offers a unique perspective on issues relevant to the Court’s decision. Nor is the fact that defendants are represented by experienced counsel (Opp. 2, 7-8) a basis to prohibit amicus participation where, as here, the proposed amicus brief makes a distinct contribution. *See Ryan v. C.F.T.C.*, 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.”); *Gallo v. Essex Cnty. Sheriff’s Dep’t*, 2011 WL 1155385, at *6 n.7 (D. Mass. Mar. 25, 2011) (noting that although the relevant motion “was ably presented by” party counsel, the “*amicus* submissions were quite helpful in putting the immediate controversy in its larger context”).

4. Many courts have also declined to endorse plaintiffs’ position that an amicus must be entirely “objective” or “impartial” (Opp. 10) 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); *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.”). Rather, courts have recognized that “by the nature of things an amicus is not normally

impartial,” but “the mere fact that a non-party seeks to put forth an opinion in a case does not disqualify it as an amicus.” *Tafas*, 511 F. Supp. 2d at 661 (quotation omitted). 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 perspectives on the consequences of potential outcomes.” *Prairie Rivers Network*, 976 F.3d at 763 (granting Chamber’s motion for leave to file); see *Neonatology Assocs.*, 293 F.3d at 131 (“an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court’s friend”). The guiding principle is simply “that an amicus curiae brief should be additive” and useful to the court. *Prairie Rivers Network*, 976 F.3d at 763; see *Kadel*, 2022 WL 1046313, at *1 (“Ultimately, the question is one of utility.”). As explained, the Chamber’s proposed brief in this case satisfies this standard.

5. Plaintiffs’ remaining arguments reflect only disagreement with the substance of the positions taken in the Chamber’s amicus brief. For example, plaintiffs assert that the Chamber’s legal analysis “misconstrues the relevant standards.” Opp. 2; see *id.* at 11. Plaintiffs similarly object that the Chamber’s brief reflects a “hyperbolic policy position concerning what it perceives to be the negative impact of fiduciary breach litigation,” arguing that such litigation has instead been helpful. See Opp. 10. This type of disagreement on the merits is not a reason to disallow amicus participation. It is simply a reflection of a robust adversary process at work. See *Neonatology Assocs.*, 293 F.3d at 131 (noting “the fundamental assumption of our adversary system that strong (but fair)

advocacy on behalf of opposing views promotes sound decision making”).

For these reasons, the Chamber respectfully requests that the Court grant its motion for leave to participate as amicus curiae.

Dated: February 21, 2023

Respectfully submitted,

/s/Erik R. Zimmerman

Erik R. Zimmerman

N.C. Bar No. 50247

ROBINSON, BRADSHAW & HINSON, P.A.

1450 Raleigh Road, Suite 100

Chapel Hill, NC 27517

Telephone: (919) 328-8800

Facsimile: (919) 328-8790

Email: ezimmerman@robinsonbradshaw.com

Notices of Special Appearance Have Been Filed:

Brian D. Boyle

Deanna M. Rice

O'MELVENY & MYERS LLP

1625 Eye Street, N.W.

Washington, DC 20006

Telephone: (202) 383-5300

Facsimile: (202) 383-5414

Email: bboyle@omm.com

derice@omm.com

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

CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Reply in Support of the Motion of the Chamber of Commerce of the United States of America for Leave to Participate as Amicus Curiae complies with Local Rule 7.3(d) because it contains no more than 3,125 words.

/s/Erik R. Zimmerman

Erik R. Zimmerman

N.C. Bar No. 50247

ROBINSON, BRADSHAW & HINSON, P.A.

1450 Raleigh Road, Suite 100

Chapel Hill, NC 27517

Telephone: (919) 328-8800

Facsimile: (919) 328-8790

Email: ezimmerman@robinsonbradshaw.com

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2023, I caused the foregoing to be filed with the Clerk of the Court for the United States District Court for the Middle District of North Carolina using the CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/Erik R. Zimmerman

Erik R. Zimmerman

N.C. Bar No. 50247

ROBINSON, BRADSHAW & HINSON, P.A.

1450 Raleigh Road, Suite 100

Chapel Hill, NC 27517

Telephone: (919) 328-8800

Facsimile: (919) 328-8790

Email: ezimmerman@robinsonbradshaw.com