IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THERESA L. RODRIGUEZ, et al., Plaintiffs, v. HY-VEE, INC., et al., Defendants.	)	No. 4:22-cv-00072-RGE-HCA **REPLY IN SUPPORT OF THE MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE***

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this reply in support of its motion for leave to participate as *amicus curiae* in the above-captioned case.

Plaintiffs oppose the Chamber's motion for leave to file based on what appears to be a general hostility toward the very concept of *amicus* briefs. This argument is both misguided and inconsistent with the practice of district courts across the country, which routinely allow *amicus* participation in conjunction with dispositive motions practice. 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 as well as context about the realities of plan management. And, critically, "context" is precisely what the Supreme Court has instructed lower courts to carefully consider when ruling on motions to dismiss in ERISA cases. *Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022). Plaintiffs' laundry list of reasons why the Court should refuse to even consider this context is not persuasive.

As an initial matter, the Opposition begins with an inaccurate premise. Plaintiffs assert: "Tellingly, the Chamber's Motion fails to cite a single case where a district court has permitted an

amicus brief by the Chamber in support of a Rule 12 motion to dismiss." Opp. 2–3 (ECF No. 24). That is incorrect. The Chamber's Motion cites three cases in which the court granted the Chamber's motion for leave, all over an opposition. Mot. 2–3 (ECF No. 19); *see Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4, 2022), ECF No. 38; *Singh v. Deloitte LLP*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41; *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF No. 44. One more has been granted since the filing of the Chamber's motion. *See Clark v. Beth Israel Deaconess Med. Ctr.*, No. 22-10068 (D. Mass. May 24, 2022), ECF No. 41. And courts have granted two additional unopposed motions for leave. *See 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. As a district court in the Northern District of Illinois explained in granting the Chamber's motion for leave to file and denying the plaintiffs' motion for reconsideration of that decision, "the proposed amicus brief could provide the Court wi[th] a broader view of the impact of the issues raised in th[e] case"—"an appropriate basis to allow amicus participation." *Exelon Corp.*, ECF No. 44.[1]

More broadly, *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 Regul. 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,*

[1] Plaintiffs point (at 3) 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.

Inc. v. IRS, No. 17-6490 (N.D. Cal. Mar. 12, 2018), ECF No. 25. *Amicus* briefs are also 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 (E.D. Cal. Jan. 14, 2015); *United States v. Health All. of Greater Cincinnati*, 2009 WL 485501, at *6 (S.D. Ohio Feb. 26, 2009); *Oberer Land Devs., Ltd. v. Beavercreek Twp., 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).[2]

At bottom, Plaintiffs' opposition appears to reject the very concept of *amicus* support, relying almost entirely on out-of-circuit precedent to suggest that *amicus* participation should be a "rare" exception, particularly in district-court proceedings. Opp. 1–2. This argument is a nonstarter: As shown by the cases cited above, it is well established that "District Courts have broad discretion" to accept *amicus* briefs. *Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 2011 WL 13285400, at *5 (S.D. Iowa Feb. 18, 2011) (citation omitted). Plaintiffs' efforts to portray *this* case as inappropriate for *amicus* participation fare no better. Plaintiffs' hyperbolic objections to the Chamber as supposedly engaging in "patently partisan" advocacy, advancing an "extreme pro-corporate agenda," and turning the motion into a "political battleground," Opp. 5, 7, 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 an *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*

[2] Plaintiffs object (at 3 n.3) that the Chamber cites cases where the court granted leave with "paperless docket entries or one-page orders that lack reasoning or analysis for granting leave." But the fact that courts grant leave in summary orders merely shows the routine nature of these motions.

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 the eighth item on Plaintiffs' list that Plaintiffs 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. 6–7. 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.[3] The brief does all of this in service of contextualizing Plaintiffs' allegations—as the Supreme Court has instructed courts to do under the pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). And while Defendants have their own representation, "[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.

Plaintiffs' sole response is that the brief "argues facts." Opp. 5–6. Not so. Plaintiffs confuse providing factual *context* with litigating the veracity of 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 provides contextual information bearing on

[3] Moreover, while Plaintiffs argue that *amicus* participation, to the extent it is permitted at all, should be reserved for appellate cases (*see, e.g.*, Opp. 1, 5), the brief does not explain why "practical perspective[]" and a discussion of the "broader regulatory or commercial context" is somehow less helpful to district courts.

whether the assertions in Plaintiffs' complaint are plausible and non-conclusory. That is why Plaintiffs' cited decisions are inapplicable.

The only time Plaintiffs' brief engages with the content of the Chamber's argument, Plaintiffs mischaracterize the Chamber's position. Plaintiffs suggest that the Supreme Court rejected the Chamber's argument regarding the burdens of inappropriate ERISA litigation when it chose not to endorse a presumption of prudence in cases involving employee stock ownership plans. Opp. 8. Nowhere does the Chamber's proposed brief suggest applying a presumption of this kind. Rather, it follows the precise test the Supreme Court announced—namely, that courts should undertake a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014); *see also Hughes*, 142 S. Ct. at 742; Proposed *Amicus* Br. (ECF No. 19-1) at 3-5, 8, 11. And given the Chamber's extensive and varied experience with both retirement-plan management and ERISA litigation, the Chamber 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 file the proposed *amicus* brief.

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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 Southern District of Iowa 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

/s/ Mark E. Weinhardt
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