
In the
United States Court of Appeals
For the Eighth Circuit

Francesca Allen, John Sterling Ross and Mary Lou Shank, individually
and on behalf of all other similarly-situated participants in, and
beneficiaries of, the Wells Fargo & Company 401(k) Plan,

Plaintiffs-Appellants,

v.

Wells Fargo & Company, Hope Hardison, Justin Thornton, John
Shrewsberry, Kevin Oden, Patricia Callahan, Stanhope Kelly,
Dawn Martin Harp, Suzanne Ramos, James Steiner, George
Wick, Martin Davis, Thomas Wolfe, Lloyd Dean, John
Chen, Susan Engel, Donald James, and Stephen Sanger,

Defendants-Appellees.

*On Appeal from the United States District Court
for the District of Minnesota
Civil No. 16-cv-03405-PJS-BRT*

**APPELLANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-
APPELLEES AND AFFIRMANCE**

Adam J. Levitt
Daniel R. Ferri
DICELLO LEVITT & CASEY LLC
10 North Dearborn Street
Eleventh Floor
Chicago, Illinois 60602
Telephone: (312) 214-7900
alevitt@dlcfirm.com
dferri@dlcfirm.com

Robert K. Shelquist
Rebecca A. Peterson
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis, Minnesota 55401
Telephone: (612) 339-6900
rkshelquist@locklaw.com
rapeterson@locklaw.com

W. Daniel "Dee" Miles, III
Leslie L. Pescia
**BEASLEY ALLEN CROW METHVIN
PORTIS & MILES, P.C.**
218 Commerce Street
Montgomery, Alabama 36103
Telephone: (334) 269-2343
Dee.Miles@beasleyallen.com
Leslie.Pescia@beasleyallen.com

Samuel E. Bonderoff
ZAMANSKY LLC
50 Broadway, 32nd Floor
New York, New York 10004
Telephone: (212) 742-1414
samuel@zamansky.com

Attorneys for Plaintiffs-Appellants

On November 16, 2018, the American Benefits Council, The ERISA Industry Committee, the Securities Industry and Financial Markets Association, and the United States Chamber Litigation Center (collectively, “*Amici*”) filed a Motion for Leave to File Brief as *Amici Curiae* in Support of Defendants-Appellees. Plaintiffs-Appellants file this Response in Opposition and respectfully request this Court deny *Amici*’s participation in this case.

I. Relevant Considerations

Allowing the participation of *amici curiae* falls within the Court’s discretion. However, there are multiple factors courts consider in determining whether participation is appropriate, including the following: (1) whether the proposed *amicus* is a disinterested entity; (2) whether there is opposition to the entry of the proposed *amicus*; (3) whether counsel is capable of making arguments without the assistance of an *amicus*; (4) the strength of the information and argument presented by the potential *amicus curiae*’s interests; and, perhaps most importantly (5) the usefulness of information and argument presented by the potential *amicus curiae* to the court. *Ass’n of Am. Sch. Paper Suppliers v. United States*, 34 C.I.T. 207, 209 (2010) (citing *Advanced Sys. Tech. Inc. v. United States*, 69 Fed. Cl. 355, 357 (2006)). Courts have also found it appropriate to grant permission to file an *amicus* brief only when “(1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be *amicus* has a direct interest in another case, and the case

in which he seeks permission to file an *amicus curiae* brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the *amicus* has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.” *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

Amici simply repeat the Defendants’ arguments and assertions. *Amici*’s proposed brief contains information, perspectives, and arguments already encompassed in the record and in the Parties’ briefs. Further, *Amici* have purely partisan interests and are clearly aligned with Defendants. When considering the multiple factors often analyzed in determining whether to allow *amicus* participation, *Amici*’s Motion for Leave should be denied.

II. *Amici* Lack Impartiality.

Amici fail to meet the definition of the very term under which they are trying to operate. An *amicus* is a “friend of the court” who is neither a party to the litigation nor a representative of a party. *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). An *amicus* is impartial and not an advocate for one party rather than another. *Leigh v. Engle*, 535 F. Supp. 418, 419-20 (N.D. Ill. 1982); *see also Tiara Corp. v. Ullenberg Corp.*, 1987 U.S. Dist. LEXIS 8102, at *3 (N.D. Ill. 1987) (“[A]n *amicus curiae* is an impartial individual who suggests the interpretation and status of the law . . . and whose

function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another”).

While there is no hard-line rule on partiality, it is certainly a factor to be considered when deciding whether to allow the *amici* to participate in this case. “Indeed, if the proffer comes from an individual with a partisan, rather than impartial view, the motion for leave to file an amicus brief is to be denied, in keeping with the principle that an amicus must be a friend of the court and not a friend of a party to the cause.” *Leigh*, 535 F. Supp. at 420; see also *Liberty Lincoln Mercury v. Ford Mktg. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993); accord *United States v. Gotti*, 755 F. Supp. 1157, 1158-59 (E.D.N.Y. 1991) (the court refused to allow the New York Civil Liberties Union to file an *amicus* brief in part because “[r]ather than seeking to come as a ‘friend of the court’ to provide the court with an ‘objective, dispassionate, neutral discussion of the issues, it is apparent that the NYCLU has come as an advocate for one side....”); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985) (“Where a petitioner’s attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae*.”). Partiality is a “consideration for the court with regard to *amici*’s attendance.” *Smith v. Chrysler Fin. Co.*, 2003 U.S. Dist. LEXIS 1798, at *24 (D.N.J. Jan. 14, 2003).

Rather than impartially advising this Court, *Amici* seek to improperly advocate for Defendants. Defendant Wells Fargo is a member of most, if not all, of

Amici organizations. For example, Wells Fargo is a member of the American Benefits Council, the Securities Industry and Financial Markets Association, and the Chamber of Commerce.¹

“*Amicus curiae* briefs are often attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal.” *Scheidler*, 223 F.3d 617. That is exactly what *Amici* seek to do in this case. Overwhelming partiality is further demonstrated in *Amici*’s proposed brief, which rehashes Defendants’ arguments about pleading duty of loyalty claims and the relation of securities laws to a fiduciary’s non-disclosure *Amici* have the exact same interest as Defendants, which is to effectively weaken ERISA’s fiduciary standards to protect ESOP fiduciaries from liability. While having an aligned interest with a party may not be an absolute bar to *amici* participation, this significant degree of partiality weighs in favor of denying the *amici*’s participation in this case.

III. *Amici* Fail to Facilitate the Court’s Consideration of Issues on Appeal.

Perhaps the most important consideration is whether the court is persuaded that participation by the *amicus* will be independently useful, as contrasted with simply compounding the assertions of one party. *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991). *Amici* fail to present any new arguments, perspectives,

¹ The ERISA Industry Committee does not publicly list its members.

or information that have not already been addressed in the record and in the Parties' briefing.

Rather than aiding the Court in this matter, the *amici* brief reiterates the same arguments already made by Defendants. Although the *Amici* suggest that they present "insights that have not been addressed by Defendants-Appellees" and a "unique perspective," they address issues that were addressed in the lower court *and* in the Parties' briefing before this Court. *Amici's* Motion for Leave states that their arguments about how the securities laws intersect with a fiduciary's non-disclosure were "not addressed" by Defendants, yet Defendants devote a specific section in their brief to addressing the securities laws and how they intersect with the ERISA duty to disclose material information. (Appellees' Br. at 36.) Likewise, Plaintiffs' brief specifically addresses the intersection of the securities laws and a fiduciary's non-disclosure. (Appellants' Br. at 28-33). Further, the issue of whether the duty of loyalty inquiry is objective or subjective was thoroughly addressed by the district court and by Defendants. (Appellees' Br. at 58.)

Amici's proposed brief contains no "unique perspective," provides no new information, and fails to present an argument that Defendants have not already addressed. Thus, *Amici's* proposed brief provides no further assistance to the Court about the issues on appeal, and this factor also weighs in favor of denying *Amici* participation in this case.

IV. All Parties Do Not Consent to *Amici* Participation.

A party's opposition is another factor that militates against *amici* participation. *Ass'n of Am. Sch. Paper Suppliers*, 34 C.I.T. 209. Plaintiffs did not consent to *Amici*'s motion and oppose their participation for the reasons outlined herein. This adds yet another factor weighing in favor of denying the *Amici*'s participation in this case.

IV. Conclusion

Amici have no proper interest or role in this action. They fail to offer any unique or specialized information which would aid this Court's review of the issues before it on appeal. For all the within and foregoing reasons, Plaintiffs respectfully request that the Court deny the American Benefits Council, The ERISA Industry Committee, the Securities Industry and Financial Markets Association, and the United States Chamber Litigation Center's Motion for Leave to File a Brief as *Amici Curiae*.

Dated: November 29, 2018

Respectfully submitted,

/s/Adam J. Levitt

Adam J. Levitt

Daniel R. Ferri

DiCELLO LEVITT & CASEY LLC

10 North Dearborn Street

Eleventh Floor

Chicago, Illinois 60602

Telephone: (312) 214-7900

alevitt@dlcfirm.com

dferr@dlcfirm.com

Robert K. Shelquist
Rebecca A. Peterson
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis, Minnesota 55401
Telephone: (612) 339-6900
rkshelquist@locklaw.com
rapeterson@locklaw.com

W. Daniel "Dee" Miles, III
Leslie L. Pescia
BEASLEY ALLEN CROW
METHVIN PORTIS & MILES, P.C.
218 Commerce Street
Montgomery, Alabama 36103
Telephone: (334) 269-2343
Dee.Miles@beasleyallen.com
Leslie.Pescia@beasleyallen.com

Samuel E. Bonderoff
ZAMANSKY LLC
50 Broadway, 32nd Floor
New York, New York 10004
Telephone: (212) 742-1414
samuel@zamansky.com

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the motion contains 1,361 words;
2. This response complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Office Word in a 14-point Times New Roman font; and
3. The undersigned also certifies that this response has been scanned for viruses and is virus free.

Dated: November 29, 2018

/s/ Daniel R. Ferri
Daniel R. Ferri

Counsel for Appellants

CERTIFICATE OF SERVICE

I, Daniel R. Ferri, hereby certify that on this 29th day of November, 2018, a true and correct copy of the foregoing Opposition to Motion for Leave to File Brief as *Amici Curiae* in Support of Defendants-Appellees and Affirmance was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel who are CM/ECF users. All attorneys in this case are CM/ECF users.

/s/ Daniel R. Ferri
Daniel R. Ferri

Counsel for Appellants