

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

FRANCESCA ALLEN, ET AL.,

Plaintiffs-Appellants,

v.

WELLS FARGO & COMPANY, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Minnesota, No. 0:16-cv-03405-PJS

**REPLY IN FURTHER SUPPORT OF MOTION FOR LEAVE TO FILE
BRIEF FOR THE AMERICAN BENEFITS COUNCIL, THE CHAMBER
OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA
INDUSTRY COMMITTEE, AND THE SECURITIES INDUSTRY AND
FINANCIAL MARKETS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT
OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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Federal Rule of Appellate Procedure 29(a)(3) sets forth the criteria for an *amici curiae* brief: (1) *amici* must have an adequate “interest” in the case; (2) their brief must be “desirable”; and (3) the brief must discuss matters that are “relevant to the disposition of the case.” As the American Benefits Council, the Chamber of Commerce of the United States of America, The ERISA Industry Committee, and the Securities Industry and Financial Markets Association (collectively, “*amici*”) already explained in their motion filed on November 16, 2018, all of these criteria are met, and the motion should be granted. *See, e.g., Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (“[O]ur court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted.”).

Appellants’ principal ground for opposing submission of the *amici* brief is that the brief repeats certain arguments made by Defendants-Appellees. Appellants’ Opp’n to Mot. for Leave to File Brief as *Amici Curiae* in Support of Defs.-Appellees and Affirmance at 2, 5. But the reply brief Appellants filed one day earlier devotes an *entire section* to the arguments and insights made by *amici* that were not addressed by Defendants-Appellees. *See* Reply Br. of Pls.-Appellants at 10-12. Appellants’ decision to respond to *amici*’s arguments separately demonstrates those arguments are not repetitive.

Appellants also complain (Opp'n at 2-4) that *amici* support Defendants-Appellees. But "Rule 29 requires that an amicus have an 'interest' in the case, and the [A]ppellants' argument that an amicus must be 'impartial' is difficult to square with this requirement." *Neonatology Assocs.*, 293 F.3d at 131 (internal citations omitted); *see also* Internal Operating Procedures, U.S. Court of Appeals for the Eighth Circuit, at III.J.3 (contemplating that *amici* will support a party). *Amici* "who make[] a strong but responsible presentation in support of a party can truly serve as the court's friend." *Neonatology Assocs.*, 293 F.3d at 131. That is just what *amici* have done here.

Nor is there anything untoward about the fact that Wells Fargo is a member of some of the *amicus* organizations. *See* Opp'n at 3-4. Notably absent from Federal Rule of Appellate Procedure 29 is anything stating that a party cannot be a member of an *amicus* organization. What matters is whether Wells Fargo made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E)(ii). It did not.

CONCLUSION

Amici respectfully submit that their brief satisfies the requirements of Rule 29, and thus the motion for leave to file should be granted.

Dated: December 3, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This reply complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the reply contains 441 words; and

2. This reply complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the tpestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this reply has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

Dated: December 3, 2018

/s/ Mark A. Perry
Mark A. Perry

Counsel of Record for Amici Curiae

CIRCUIT RULE 28A(h) CERTIFICATION

Pursuant to Circuit Rule 28A(h)(2), I hereby certify that the reply has been scanned for viruses and is virus-free.

Dated: December 3, 2018

/s/ Mark A. Perry
Mark A. Perry

Counsel of Record for Amici Curiae

CERTIFICATE OF SERVICE

I, Mark A. Perry, hereby certify that on this 3rd day of December, 2018, a true and correct copy of the foregoing Reply in Further Support of Motion for Leave to File Brief for the American Benefits Council, the Chamber of Commerce of the United States of America, The ERISA Industry Committee, and the Securities Industry and Financial Markets Association 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/ Mark A. Perry
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