IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARKET SYNERGY GROUP, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor, and PHYLLIS C. BORZI, in her official capacity as Assistant Secretary of the United States Department of Labor, Defendants.	Civil Action No. 16-cv-4083

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION OF BETTER MARKETS, INC., CONSUMER FEDERATION OF AMERICA, AND AMERICANS FOR FINANCIAL REFORM FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF THE DEFENDANTS

Pursuant to Rule 6.1(d)(1) of the Rules of Practice of United States District Court for the District of Kansas, Better Markets, Inc. ("Better Markets"), Consumer Federation of America ("CFA"), and Americans for Financial Reform ("AFR") hereby submit this reply memorandum of law in further support of their motion for leave to file a brief *amici curiae* in support of the defendants, the United States Department of Labor ("DOL") and two of its officials, Secretary Thomas E. Perez and Assistant Secretary Phyllis C. Borzi. *See* Mot., ECF No. 33 (July 29, 2016); Mem. of Law in Supp. of Mot., ECF No. 34 (July 29, 2016). The plaintiff in this action, Market Synergy Group, Inc., filed an omnibus opposition to this motion (as well as to those of AARP and AARP Foundation and of the Public Investors Arbitration Bar Association). *See* Pl.'s Opp'n, ECF No. 37 (Aug. 5, 2016).

ARGUMENT

The plaintiff's fervent opposition to this Court's consideration of the proposed brief *amici curiae* lacks merit under the principles that govern *amicus* filings in federal courts and features a whirlwind of contradictions. The proposed brief adds nothing at all, contends the plaintiff, before stating that a new, separate filing is needed to thoroughly respond to the alleged nullity. Reading the proposed brief (perhaps an hour's effort) will cause the Court to delay ruling, the plaintiff speculates, before requesting a delay of unknown duration to file a separate response. Preliminary injunctions are about informal evidence and speedy resolution, the plaintiff reasons, before suggesting that the *amici* were too hasty in filing before the formal administrative record was docketed. From this muddled opposition, one clear truth emerges: The plaintiff wants to keep the proposed brief away from this Court because it does exactly what any good *amicus* brief should—it contributes new information and a unique perspective about the legal and factual disputes the Court confronts.

None of the grounds for denying leave to file urged by the plaintiff has merit. As further elaborated below, (1) the proposed brief *amici curiae* is not a copy-and-paste duplication of the defendants' brief, but offers a unique public-interest perspective and relevant information not presented in previous filings; (2) contrary to the antiquated views of the plaintiff, *amici* fulfill the terms of their friendship with a court not by hiding their views but by airing them; (3) a motion for preliminary injunction is an ideal time for a court to hear from the *amici*, who offer a perspective not only as to the merits but also as to the public interest and balance of equities; and (4) this Court can easily accommodate the plaintiff without denying leave to file.

I. The proposed brief *amici curiae* will prove useful to the Court.

As *amici* argued in their opening memorandum, and the plaintiff does not dispute,

"[w]hether to permit a nonparty to submit a brief, as amicus curiae, is a matter within the sound discretion of the court." *Hammond v. City of Junction City, Kan.*, No. 00-2146-JWL, 2001 WL 1665374, *1 (D. Kan. Dec. 17, 2001). This Court is respectfully urged to exercise its discretion in granting the *amici* leave to file because the proposed brief will prove useful. "Generally, courts permit participation as an amicus to brief and argue as a friend of the court upon a finding that the proffered information of amicus is useful or otherwise necessary to the administration of justice." *Id.*[1] "[T]o the extent [that a prospective *amicus*] is able to provide *any useful information or a unique perspective* regarding the [relevant] issue, the court welcomes such assistance." *Id.* at *2 (emphasis added). Either "any useful information" *or* "a unique perspective" is a basis for leave to file; here, the *amici* satisfy both bases.

First, the *amici* offer ample useful information not found elsewhere in the briefing, contrary to the plaintiff's contention that they offer "no unique information." Pl.'s Opp'n 1; *see also id.* at 7 ("Better Markets'[] proposed brief argued the very same points the Department addressed in opposing Market Synergy's Motion, *viz.*, the Department's decisionmaking, notice, consideration of the impact of its actions, and its cost-benefit analysis."). This contention rests uncomfortably alongside the plaintiff's simultaneous argument that the proposed brief is "not aimed at addressing the narrow legal or factual issues presented in the Motion." *Id.* at 1. The proposed brief both aims directly at the relevant issues and helpfully supplements, instead of merely replicating, the defendants' brief.

[1] The *amici* did not and do not contend that they should be permitted leave to file because the defendants are not competently represented or that they are parties to another case that may be affected by this action. *See* Pl.'s Opp'n 5–7. Instead, the *amici* rely only on the most common basis for participation by nonparties, which is that they offer "unique information or perspective beyond what the parties' lawyers themselves provide." *Id.* at 1.

The proposed brief does cover some of the same ground as the defendants'—it is the same case, after all, and the parties' arguments frame the essential issues in the litigation. Still, the *amici* took pains not to duplicate the points made by the defendants, so new and useful information abounds in the proposed brief, as shown quantitatively and qualitatively. Consider the Table of Authorities in the proposed brief: Six of the thirteen cases cited and two of the five statutes cited do not appear in the defendants' brief. *See* Proposed Br. *Amicus Curiae* iii ("Proposed Br."), ECF No. 33, Attach. 1 (July 29, 2016).[2] The *amici* also cite a wealth of recent news media that belie the plaintiff's claim of irreparable harm: They show that the plaintiff's own members are confidently predicting that they can operate under the Rule and its exemptions without sacrificing the commission-based compensation model on which they have depended. Although these documents are not "part of the administrative record," Pl.'s Opp'n 9, which was formed prior to the promulgation of the final Rule, they are subject to judicial notice, *see* Fed. R. Evid. 201. And the plaintiff's claims of irreparable harm, unlike its merits claims that the defendants violated the Administrative Procedure Act and the like, are unlikely to be addressed only by the administrative record. To be sure, the *amici* have brought to the Court's attention a number of new and important authorities to be considered in resolving the arguments made by the parties.

Qualitatively, the proposed brief provides important facts about the rulemaking process and helpful analysis of the relevant case law that supplements rather than duplicates the defendants' briefing. Specifically, in the proposed brief, the *amici*:

- detail the especially powerful conflicts of interest and resulting harms that fixed-indexed annuities ("FIAs")—and those marketing and distributing FIAs, including independent marketing organizations ("IMOs")—can have on retirement savers, *see* Proposed Br. 9–11;

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[2] The defendants' brief does not contain a Table of Authorities for easy comparison, but it is text-searchable as it appears on ECF.

- chronicle conflicts within the IMO business model and within the plaintiff's own membership to demonstrate how it is unlikely that the plaintiff's members and those with similar business models are currently serving their clients' best interest, and why the rule is thus necessary to ensure that retirement savers are protected from such conflicts of interest, *see* Proposed Br. 11–13;

- provide concrete examples of FIAs' disadvantageous features, including their hefty surrender charges and lengthy surrender periods, that can harm retirement savers—and draw connections between those product characteristics and distributors' perverse incentives to sell those products, *see* Proposed Br. 13–15;

- highlight recent abuses within the FIA market, specifically citing to concerns expressed by state insurance regulators, including the Kansas Insurance Department, which has cautioned that IMOs disseminate "misleading, deceptive, and/or incomplete information intended for the general public in what appear to be bait and switch sales tactics," *see* Proposed Br. 16;

- show how investing in FIAs can result in extraordinary opportunity costs by providing evidence that compares FIAs' effective returns with what an investor could have gotten elsewhere with comparable if not considerably lower risk, *see* Proposed Br. 17–18; and

- canvass comments submitted by industry participants that clearly demonstrate that the inclusion of FIAs within the Best Interest Contract Exemption was a possibility of which they were distinctly aware from the Notice of Proposed Rulemaking, *see* Proposed Br. 19–21.

These facts and arguments are not mere repetitions of what the government provided in its brief but instead provide additional authorities and a more complete factual picture that will prove useful to the Court. In addition, the *amici* provide important arguments that refute the plaintiff's contention that the defendants failed to engage in reasoned decisionmaking, failed to ensure that the Rule is workable, and failed to assess the costs and benefits of the Rule, especially in light of the Supreme Court's decision in *Michigan v. U.S. EPA*, 135 S. Ct. 2699, 2707 (2015). *See* Proposed Br. 21–27. The *amici* also make the case that the balance-of-equities and public-interest prongs militate against the granting of a preliminary injunction because industry participants are already adapting to the Rule while Americans continue to face a grave retirement crisis. *See* Proposed Br. 27–30.

Second, the proposed brief also provides this Court with a unique perspective—that of the public interest. The public interest and the interest of the defendants are related but distinct: If the government were the sole representative of the public interest, of course, one of the four factors of the preliminary-injunction test would always favor the government, which no authority holds let alone suggests. Hearing the unique perspective of three broad-based, nonprofit, nonpartisan public-interest organizations with a long history of work to improve the financial advice received by retirement savers will enrich the Court's understanding of the equities at stake.

An *amicus* that provides either "any useful information or a unique perspective" has grounds for leave to file. *Hammond*, 2001 WL 1665374 at *2. Here, the *amici* have provided both.

II. An *amicus* can be a friend of the Court while supporting one party's position.

The plaintiff's opposition is suffused with the outdated notion that an *amicus* can be a friend of the court only by hiding rather than by airing its views. *See* Pl.'s Opp'n 1 ("Worse, the proposed briefs run contrary to the spirit of amici filings—their bias against the Motion is apparent. Proposed amici do not wish to serve as the Court's 'friends'; they wish to serve as the Department's partisan advocates."); *id.* at 4 ("Better Markets'[] partiality towards the Department is also obvious."); *id.* at 7 ("Better Markets especially revels in its partisan duplication of the Department's own briefing."); *id.* at 9 (lamenting "the partisan nature of the amicus briefs in favor of the Department's positions").

The Federal Rules of Appellate Procedure expressly contemplate that an *amicus* may be, in the plaintiff's phrasing, "partisan," in that it supports the position of one party or another, just as it is possible to support neither party. *See* Fed. R. App. P. 29(e) ("An amicus curiae must file its brief . . . no later than 7 days after the principal brief *of the party being supported* is filed. An amicus curiae *that does not support either party* must file its brief no later than 7 days after the

appellant's or petitioner's principal brief is filed." (emphases added)). Moreover, an "interest in the case" is a required showing for leave to file. Fed. R. App. P. 29(c)(4). The plain language of the modern Rules vitiates the plaintiff's quaint notion of an idealized *amicus* as a "nonpartisan" with no interest in the outcome. The plaintiff's "description of the role of an amicus was once accurate and still appears in certain sources, but this description became outdated long ago." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.).

Indeed, an *amicus* that concealed its true views from a court could hardly be considered a good friend. The suggestion that "a strong advocate cannot truly be the court's friend . . . is contrary to the fundamental assumption . . . [that hearing] opposing views promotes sound decision making. Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Id.* Accordingly, the *amici*, who responsibly disclosed their direct interests in this case when moving for leave to file, can be true friends to this Court even while making plain their strong desire to see the motion for a preliminary injunction denied.

III. An *amicus* submission in opposition to a preliminary injunction is appropriate.

The plaintiff suggests that it would be open to *amicus* filings later in this case, when the Court considers a permanent rather than a preliminary injunction. *See* Pl.'s Opp'n 8–9 ("The amici filers jump the gun . . . . The more appropriate stage to seek leave would be when the court is prepared to resolve the case on the merits . . . ."). The implication of this suggestion is that a preliminary injunction turns on factors other than the merits. But of course the "likelihood of success on the merits" is a primary consideration in the test for issuing a preliminary injunction. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). And just as the proposed brief is useful in assessing the likelihood of the plaintiff's ultimate success on the merits, so too is it useful in

assessing the other factors for issuing a preliminary injunction: whether the plaintiff faces irreparable harm and especially where the balance of equities and the public interest lie. *See id.*

No authority cited by the plaintiff's opposition supports the proposition that an *amicus* brief is inappropriate in considering a motion for a preliminary injunction. *See* Pl.'s Opp'n 8–9 (citing authority only for the general proposition that a preliminary injunction is different from a permanent injunction). A motion for a preliminary injunction of a federal regulation is not a picayune discovery dispute or ancillary matter of little interest to the public. If this Court were to enjoin the DOL's Rule, millions of retirement savers would be left without its protections from conflicted advice. The views of interested nonparties should not be sidelined until a later stage when the question is whether those retirement savers who are left unprotected should remain so forever.

For these reasons, courts routinely grant leave to file *amicus* briefs at the preliminary-injunction stage. *See, e.g., Tafas v. Dudas*, 511 F. Supp. 2d 652, 660–61 (E.D. Va. 2007); *Supra Telecomm. & Info. Sys., Inc. v. BellSouth Telecomm., Inc.*, No. 4:05CV132-SPM/AK, 2005 WL 946892, *1 (N.D. Fla. Apr. 18, 2005); *Abu-Jamal v. Price*, Civ. A. No. 95-618, 1995 WL 722518, *1–2 (W.D. Pa. Aug. 25, 1995); *cf. Selfridge v. Carey*, 660 F.2d 516, 516 (2d Cir. 1981) (per curiam) ("Upon consideration of the briefs submitted by counsel and by amici curiae and after hearing oral argument, the motion of defendants-appellants for a stay of the preliminary injunction entered by the District Court is denied."); *Horphag Research Ltd. v. Garcia*, 215 F.3d 1333, 1333 & n.3 (9th Cir. 2000) (unpublished opinion).

IV. The Court may accommodate the plaintiff without denying leave to file.

A denial of leave to file is not necessary to accommodate the plaintiff, which does not even state in its opposition that the granting of leave to file will cause it any prejudice. Still, it suggests

that it will "seek the opportunity to respond to the amicus briefs if the Court allows them to be filed." Pl.'s Opp'n 9. The Court would be well within its discretion to permit the plaintiff an opportunity to respond (notwithstanding the plaintiff's repeated contention that the proposed brief adds nothing new). Still, the plaintiff, as the moving party, has already filed one-and-a-half times as many pages of argument as the defendants.

Whatever decision the Court makes about further submissions is well within its discretion, but denial of leave to file serves no identified objective other than to keep this Court from considering a useful brief from the unique perspective of public-interest organizations that are intimately familiar with the subject matter of this case. For this reason, the Court is respectfully urged to grant the motion for leave to file the brief *amici curiae*.

DATED: August 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2016, I filed and served the foregoing Reply Memorandum of Law in Further Support of Motion for Leave to File a Brief *Amici Curiae* with the Clerk of the Court by causing a copy to be electronically filed via the CM/ECF system. In accordance with Rule 5.4.9(a) of the United States District Court for the District of Kansas, electronically filing a document operates to effect service of the document on all counsel who have consented to electronic service, as all counsel have in this case.

DATED: August 9, 2016

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