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. 5:16-cv-04083-DDC-KGS

PLAINTIFF'S OMNIBUS OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

INTRODUCTION

In a barrage of filings, various nonparties have sought to file amicus briefs in connection with Market Synergy's Motion for Preliminary Injunction.[1] The proposed briefs, however, are not aimed at addressing the narrow legal or factual issues presented in the Motion, nor are they helpful to determine it. Rather, they rehash many of the same points the Department addressed in its Opposition Brief to Market Synergy's Motion. 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.

The proposed amici fail to establish any of the required showings to permit them to file amicus briefs in connection with the Motion, nor can they. The Department is competently represented. The proposed amici are not party to another case which may be affected by this action. And the proposed amici offer no unique information or perspective beyond what the parties' lawyers themselves provide.

If permitted, the amicus briefs will only serve to delay the expedited review of Market Synergy's requested relief by adding layers of additional information and briefing ultimately unnecessary to the Court's adjudication. Such delay is avoidable, given that these nonparties may also seek to submit amicus briefs on the merits later.

The Court is well within its discretion to deny the Motions for Leave to File Amicus Briefs. Should the Court grant leave, however, Market Synergy requests that the Court allow it to file a separate omnibus opposition to the amicus briefs.

[1] The amici are: AARP and AARP Foundation ("AARP"), ECF Nos. 27, 27-1; Public Investors Arbitration Bar Association ("PIAB"), ECF Nos. 30, 30-1; Better Markets, Inc., Consumer Federation of America, and Americans for Financial Reform ("Better Markets"), ECF Nos. 33, 33-1.

STATEMENT OF FACTS

I. Market Synergy's Motion for Preliminary Injunction.

Days after filing its initiating complaint on June 8, 2016, Market Synergy filed its Motion for Preliminary Injunction, seeking to preliminarily halt the Department's implementation of its amendment and partial revocation of Prohibited Transaction Exemption ("PTE") 84-24, which is set to take effect in April 2017. The four underlying issues addressed in Market Synergy's Motion are that: (i) the Department's notice of the proposed rulemaking was insufficient since there was no indication that the Department would exclude fixed indexed annuities from PTE 84-24 and include it under the Best Interest Contract Exemption ("BICE"); (ii) the Department's decision was arbitrary since other fixed annuities that qualify for PTE 84-24 are not meaningfully different than fixed indexed annuities; (iii) the Department failed to consider how its action leaves those in the independent agent distribution channel without a workable exemption; and (iv) the Department exceeded its authority since the result is altering the financial product market, not merely regulating fiduciary conduct.

In deciding the Motion, the Court is only to determine the narrow issue of whether Market Synergy is entitled to a *preliminary injunction*, not make a dispositive ruling on the merits. The Court will consider the likelihood of success on the merits; the likelihood that Market Synergy and others will suffer irreparable harm without preliminary relief; if the balance of equities tips in Market Synergy's favor; and if an injunction is in the public interest.

II. The Proposed Amicus Briefs.

Three nonparty factions seek leave to file amicus briefs which provide partisan, irrelevant, or redundant argument: AARP, PIAB, and Better Markets.

AARP's proposed brief merely elaborates on what the Department already addressed in three pages of its Opposition Brief—information on "conflicts of interest that increasingly threaten retirement savings." ECF No. 25 at 10-13. The proposed brief discusses: (i) how conflicted investment advice has the potential for significant negative impact on individuals' retirement security; and (ii) the importance of ensuring that rollover decisions are protected from the negative impact of conflicted investment advice. *See* ECF No. 27-1 at 4-11. Such information is not novel or insightful to the Motion. Further, AARP's proposed brief has no bearing on what the Court *will determine* on the Motion, *e.g.*, Market Synergy's likelihood of success on the merits of its action or likelihood that it will suffer irreparable harm in the absence of preliminary relief. Market Synergy's Motion does not question or challenge the problems with or protections against conflicted investment advice, AARP's central thesis.

PIAB purports to speak on behalf of plaintiffs' attorneys who "represent investors in disputes with the securities industry," ECF No. 22-1 at 1, who stand to benefit from the private litigation that the Department intends to permit under the BICE. PIAB's proposed brief explains how that the Department has the general "authority to issue the Conflict of Interest Rule and the related exemptions." ECF No. 30-1 at 11, 12-16. This topic overlaps with what the Department already addressed in its Opposition—that it has the authority "to grant conditional exemptions when it granted the BIC exemption and amended PTE 84-24." ECF No. 25 at 51-54. PIAB's proposed brief also lacks any bearing on the true issues to be decided on Market Synergy's Motion since Market Synergy does not challenge the Department's authority to issue a conflict of interest rule. Market Synergy challenges the Department's *exercise* of its "exemptive authority" with respect to the amendment and partial revocation of PTE 84-24.

Better Markets's proposed brief argues the very same points the Department addressed, *e.g.*, that "plaintiff cannot succeed on the merits" since the Department's decision "was the product of reasoned decisionmaking"; that "DOL gave fair notice that it was considering including FIAs under the BIC"; and that "DOL fulfilled its duty to evaluate the economic impact of the Rule." *Compare* ECF No. 33-1 at 21 *with* ECF No. 25 at 32-48 (addressing the Department's decisionmaking, notice given, its consideration of the impact of its actions, and cost-benefit analysis). The proposed brief is just another opposition to the Motion. Better Markets's partiality towards the Department is also obvious. *See* ECF No. 33-1 at 3 (noting that Amici "seek to defend the [Department's] Rule," "have an interest in ensuring that the plaintiff's profound misinterpretations of ERISA are firmly rejected," and "have an interest in defending the DOL's rulemaking process against the plaintiff's attacks").

ARGUMENT

I. Information Offered By Amici is Neither Useful Nor Necessary for Administration of Justice Addressed in the Motion.

"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." *Hammond v. City of Junction City*, 2001 WL 1665374, at *1 (D. Kan. Dec. 17, 2001); *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 2008 WL 1994914, at *1 (N.D. Okla. 2008). As courts explain this standard:

> An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the

> parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.

Oklahoma, 2008 WL 1994914 at *1 (citing *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997)); *Hammond*, 2001 WL 1665374 at *1.

When nonparties seeking leave to file amicus curiae briefs fail to show that the above criteria are met, courts deny leave. *See, e.g.*, *Oklahoma*, 2008 WL 1994914 at *1-2 (finding defendants to be "represented competently by lawyers who have thoroughly and extensively briefed the relevant issue," that proposed amici "do not contend they presently have interests in other pending cases that may be affected by the decision here," and that proposed amici do not "have such unique information or perspective that can help the Court"). "Moreover, courts also have observed that 'at the trial level, where issues of fact as well as law predominate, the aid of amicus curiae may be less appropriate than at the appellate level where such participation has become standard procedure.'" *Wildearth Guardians v. Lane*, 2012 WL 10028647, at *3 (D.N.M. June 20, 2012) (quoting *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985)).

As no proposed amici made the necessary showings, it is well "within the sound discretion of the court" to deny leave to these "nonpart[ies] to submit a brief, as amicus curiae." *Hammond*, 2001 WL 1665374 at *1 (citations omitted).

A. The amicus briefs are not needed since the Department has adequately presented all relevant arguments.

It is well understood that "if there is no indication that the parties to the law suit and those parties who have been granted leave to file a brief amicus curiae will not adequately present all relevant legal arguments, there is no persuasive reason to grant [a] motion [for leave to file an amicus brief]." *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983). Thus, "[a]n amicus brief should normally be allowed when a party is not ...

represented competently or is not represented at all" or, conversely, denied if the parties are competently represented. *Ryan*, 125 F.3d 1062 at 1063.

AARP, PIAB, and Better Markets have failed to argue or even attempt to show that the Department cannot adequately present all relevant legal arguments. Such argument would be in vain. First, the Department is represented by experienced trial attorneys from the United States Department of Justice, and also is represented by attorneys from the United States Department of Labor, Office of the Solicitor. The Department, moreover, has submitted extensive briefing in connection with the subject Motion. For example, the Department's Opposition Brief is 61 pages long, covering the background to retirement savings, annuities, conflicts of interest and the Department's challenged action, and provides over 30 pages of comprehensive legal argument.

Second, the reality is the parties are in the best position to address the specific questions to be decided in the Motion, *e.g.*, likelihood of success on the merits and Market Synergy's irreparable harm. The Department has *first-hand knowledge* of its own challenged rulemaking process and of the implementation of its amendment and partial revocation of PTE 84-24. The proposed amicus briefs are simply unnecessary. *See Oklahoma*, 2008 WL 1994914 at *1; *Wildearth Guardians*, 2012 WL 10028647, at *4; *JPMorgan Chase Bank, N.A. v. Fletcher*, 2008 WL 73233, at *2 (N.D. Okla. Jan. 7, 2008).

B. The amicus briefs show no interest in another case that may be affected by the Court's decision on the Motion.

Completely absent from the Motions for Leave is any indication that the "amicus has an interest in some other case that may be affected by the decision in the present case" to merit the Court granting the nonparties leave to file amicus briefs. *See, e.g.*, *Oklahoma*, 2008 WL 1994914 at *1; *Hammond*, 2001 WL 1665374 at *1. Although some of the amici have filed

amicus briefs in other litigation challenging the Department's final actions, they are themselves not parties to the litigation and cannot obtain an "interest" simply by acting as legal gadflies.

C. The amicus briefs are neither useful nor necessary since their arguments overlap almost entirely with the Department's.

As discussed above, AARP's, PIAB's, and Better Markets's proposed briefs each overlap with the Department's Opposition. Like that Opposition, AARP's proposed brief discusses the protections needed for conflicts of interest generally; PIAB's proposed brief argues that the Department has the "authority to issue the Conflict of Interest Rule and the related exemptions"; and Better Markets's proposed brief argues 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. The proposed briefs provide no novel or unique perspective "that can help the court beyond the help that the lawyers for the parties are able to provide." *Oklahoma*, 2008 WL 1994914 at *1; *Hammond*, 2001 WL 1665374 at *1.

The proposed briefs impermissibly extend the Department's Opposition:

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party. *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991).

Ryan, 125 F.3d 1062 at 1063; *Oklahoma*, 2008 WL 1994914 at *1 (citing *Ryan*, 125 F.3d 1062 at 1063); *JPMorgan*, 2008 WL 73233, at *1 ("the proposed amicus brief is not timely, useful or helpful to the Court beyond the help the lawyers for the parties are able to provide" because, among other things, the amicus arguments "essentially duplicate arguments made by defendant's counsel"). Better Markets especially revels in its partisan duplication of the Department's own briefing. It states that amici:

> "seek to defend the [Department's] Rule and thereby ensure that Americans ... are better protected from advisors' conflicts of interest";
>
> "have an interest in ensuring that the plaintiff's profound misinterpretations of ERISA are firmly rejected"; and
>
> "have an interest in defending the DOL's rulemaking process against the plaintiff's attacks predicated on the Administrative Procedure Act ... and general principles of administrative law."

ECF No. 33-1 at 3. This is an inappropriate attempt to inject interest group politics into the judicial decisionmaking process. *See Wildearth Guardians v. Lane*, 2012 WL 10028647, at *3. On this basis too, the Court is well within its discretion to deny the amici leave to file their briefs. *Ryan*, 125 F.3d 1062 at 1063.

II. Amici Participation is Inappropriate for a Motion for Preliminary Injunction.

A. Amicus filings will hamper a speedy decision on the preliminary injunction.

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction offers a *speedy* remedy to ensure the status quo. *See id.* (recognizing the "haste that is often necessary" for a determination to ensure parties' positions). Preliminary injunction proceedings are also marked by informality in presenting evidence. A party "is not required to prove his case in full at a preliminary-injunction hearing," and "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id.*

The filing of three lengthy amicus briefs would substantially delay Market Synergy's ability to obtain the speedy relief it seeks. Specifically, if the Court permits the amicus briefs to be filed, a decision on the Motion will be delayed given the time required for the Court to review

not just the parties' submissions, but the three amici submissions as well. Moreover, Market Synergy will also seek the opportunity to respond to the amicus briefs if the Court allows them to be filed. If permitted, Market Synergy will need time to respond to the amicus briefs and the Court will need more time to review all submissions prior to ruling. The case is complicated enough as it is, and imposes an unusually heavy reading and research burden.

B. If the Court is inclined, proposed amici may submit briefs at the merits stage.

The amici filers jump the gun in seeking to join briefing on the Motion when the Court is only to determine whether to grant *preliminary* injunctive relief. The more appropriate stage to seek leave would be when the Court is prepared to resolve the case on the merits and decides whether to grant *permanent* injunctive relief.

Furthermore, the amici do not address the fundamental issue in submitting their proposed briefs so early in the action—they fail to show that the evidence submitted with their briefs was part of the administrative record such that the Court may properly consider it in this action. Indeed, they could not have made this showing since the administrative record was just filed on August 1, 2016, ECF No. 35, *after* amici submitted their proposed briefs. The "focal point" for judicial review of agency action, however, "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).

III. Market Synergy should be permitted to separately respond to the amicus briefs if they are allowed to be filed.

Given the partisan nature of the amicus briefs in favor of the Department's positions, Market Synergy requests that if the Court allows the briefs to be filed, it should likewise be permitted to file an omnibus response to them to address the issues raised. Courts counsel that

such response be permitted given the circumstance. *See, e.g.*, *Abu-Jamal v. Horn*, 2000 WL 1100784, at *4 n.8 (E.D. Pa. Aug. 7, 2000) ("District courts have denied leave to file amicus briefs when the amicus clearly was partisan…. Without taking a position on the weight of this consideration, I conclude that the filing of a partisan brief would be fair only if the other party was afforded an opportunity to respond.").

CONCLUSION

For all the foregoing reasons, Market Synergy respectfully requests that the Court deny AARP's, PIAB's, and Better Market's Motions for Leave to File Amicus Briefs. Should the Court grant any one or all, however, Market Synergy respectfully requests that it be permitted to file an omnibus response to the amicus briefs filed.

Dated: August 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of August, 2016, I electronically filed the above and foregoing document with the Clerk of the Court using the Court's ECF system, which will send notification of said filing to all counsel of record, if any.

/s/ *J. Michael Vaughan*