

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

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| THOMAS SAXTON, IDA SAXTON, |) | |
| BRADLEY PAYNTER, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | No. 1:15-cv-00047 |
| |) | |
| FEDERAL HOUSING FINANCE AGENCY, |) | |
| <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

**DEFENDANTS’ RESISTANCE TO MOTION BY INVESTORS UNITE
FOR LEAVE TO FILE AMICUS BRIEF**

The Federal Housing Finance Agency (“FHFA”), Melvin L. Watt, and the United States Department of the Treasury (“Treasury,” and collectively, “Defendants”) hereby submit this resistance to the motion for leave by Investors Unite to file an amicus curiae brief in support of Plaintiffs’ resistance to Defendants’ motions to dismiss. (Investors Unite Mot., ECF No. 40). Over four months after the Court established a briefing schedule for dispositive motions, and over six months after the complaint was filed, Investors Unite belatedly, without any explanation for the delay, announced its intention to insert itself into this case. But, it has offered no valid reason for its participation, let alone for requesting permission to file a brief only after a briefing schedule was established. More importantly, Investors Unite improperly seeks to raise issues and claims that are irrelevant to the pending motions to dismiss. Its participation as amicus curiae would thus delay resolution of the dispositive issues in this case and cause prejudice to Defendants without providing further benefit to the Court. Therefore, the motion should be denied because the proposed submission is not “timely, useful, or otherwise” necessary to the

administration of justice. *Mausolf v. Babbitt*, 158 F.R.D. 143, 148 (D. Minn. 1994), *rev'd on other grounds*, 85 F.3d 1295 (8th Cir. 1996) (quoting *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982)). There is no inherent right of a nonparty to file a brief as an amicus curiae, *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999), and “[n]o statute, rule, or controlling case defines a federal district court’s power to grant or deny leave to file an amicus brief.” *United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927–28 (S.D. Tex. 2007); *United States v. Michigan*, 116 F.R.D. 655, 660 (W.D. Mich. 1987). Because the role of an amicus submission is to assist the Court, the decision to accept participation by an amicus is committed to the sound discretion of the Court. *Mausolf*, 158 F.R.D. at 148.

First, Investors Unite’s proposed brief would not be useful to the Court. The Court need not grant amicus status so that Investors Unite can use this litigation to press the viewpoint of “private investors” with “shareholder rights” in Fannie Mae and Freddie Mac, Investors Unite Mot. ¶ 1, because the interests of shareholders of the Enterprises are already represented by Plaintiffs here. Investors Unite offers no reason to suppose that Plaintiffs are incapable of providing briefing regarding “protections HERA gives private stakeholders” during conservatorship, *id.*, or of providing the Court “with important background concerning the development and text of HERA,” *id.* See *Deloitte Consulting LLP*, 512 F. Supp. 2d at 927-28 (denying amicus status where it was “not argued that [] counsel has inadequately argued the issues raised”).

Investors Unite, in fact, “agrees with the points raised in Plaintiffs’ Opposition to Defendants’ Motions to Dismiss,” *id.* ¶ 5, and seeks to make a number of duplicative arguments in Plaintiffs’ favor regarding “specific conservatorship duties imposed on FHFA,” Investors Unite Mot. ¶ 5, and the “practices of the Federal Deposit Insurance Corporation (“FDIC”),” *id.*

The Court already has the benefit of an 80-page brief, submitted by Plaintiffs, containing an extensive discussion of the specific conservatorship duties purportedly imposed on FHFA by HERA. (ECF No. 35, at 43-51). Courts routinely hold that amicus status should not be granted in a situation like this one, where the movant is merely hoping to pile on as an advocate for one of the parties. *See Leigh*, 535 F. Supp. at 422 (stating that the “shift in traditional amicus curiae practice” towards partisan advocacy may be appropriate for appellate practice, but “it is not proper in a trial court”); *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (denying amicus status to party that merely wished to weigh in as partisan advocate for petitioner) (citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991)); *Liberty Lincoln Mercury v. Ford Mkt. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) (“When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear as amicus curiae should be denied.”) (collecting authorities); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff’d*, 782 F.2d 1033 (3d Cir.), *cert denied*, 476 U.S. 1141 (1986) (“Where a petitioner’s attitude toward the litigation is patently partisan, he should not be allowed to appear as amicus curiae.”) (citation omitted); *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996) (denying motion for leave to file an amicus brief where the litigants were “adequately represented by counsel and interested in the issue which is of concern to the movants,” and the proposed amici brief was “decidedly partisan”).

Second, where it does not merely rehash Plaintiffs’ arguments, Investors Unite’s proposed brief contains discussion on a number of issues that play no role in the resolution of the pending motions to dismiss, including, for example, the international community’s purported “principles of effective resolution regimes governing state interventions in privately held institutions,” (ECF No. 40-2, at 17-20), speculation concerning the Third Amendment’s impact

on the economy, Investors Unite’s position concerning “accountability over how funds are spent” by the government, (ECF No. 40-2, at 19-20), and its view that “FHFA should place the Companies into receivership,” Investors Unite Mot. ¶ 4. Courts should not “grant rote permission” to file such a brief containing such duplicative or irrelevant arguments, as “the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation.” *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003). This is particularly true in trial courts, where “the aid of amicus curiae may be less appropriate than at the appellate level where such participation has become standard procedure.” *Yip*, 606 F. Supp. at 1568.¹

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Investors Unite’s motion seeking leave to file a brief as amicus curiae in support of Plaintiff’s opposition to Defendants’ motions to dismiss.

¹ Defendants did consent to Investors Unite’s motion to file a similar amicus brief in the Court of Appeals for the District of Columbia Circuit in *Perry Capital LLC v. Jacob Lew, et al.*, No. 14-5243. However, in the present case Investors Unite announced its intention to participate as an amicus curiae four months after a briefing schedule on dispositive motions was established, and without giving the Defendants the opportunity to request deadlines and page limits that accounted for Investors Unite’s partisan amicus filing. Further, as noted above, there are “differences between the trial and appellate court forums in determining whether it is appropriate to allow an *amicus curiae* to participate.” *Club v. Fed. Emergency Mgmt. Agency*, No. CIV.A. H-07-0608, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007). For the reasons explained above, this is particularly true where the interests of the proposed amicus are duplicative of the interests of one of the parties.

Dated: November 19, 2015

Respectfully submitted,

/s/Matthew C. McDermott (by permission)

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Certificate of Service

I hereby certify that on November 19, 2015, I electronically filed the foregoing with the Clerk of the Court using the ECF system. To my knowledge, a copy of this document will be served on the parties or attorneys of record through the ECF system.

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