

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SIGNATURE SOTHEBY'S
INTERNATIONAL REALTY, INC.,
EXECUTIVE PROPERTY
MAINTENANCE, INC.,
INTRACO CORPORATION, INC.,
CASITE INTRACO, LLC,
BAHASH & COMPANY, LLC, d/b/a
HILLSDALE JEWELERS,
WILLIAM A. SHORTT, D.D.S. &
THERESE F. SHORTT, D.D.S, P.C.,
d/b/a SHORTT DENTAL, and
MIDWEST CARWASH
ASSOCIATION,

Plaintiffs,

v.

GRETCHEN E. WHITMER, and
ROBERT GORDON,

Defendants.

Civil No. 20-00360

HON. PAUL L. MALONEY
MAG. PHILLIP J. GREEN

**PLAINTIFFS' OPPOSITION TO
AMICI'S MOTION FOR LEAVE
TO FILE AMICUS BRIEF**

In the midst of a constitutional crisis, and in the context of the Government's motion to dismiss under Rules 12(b)(1) and 12(b)(6), a group comprised mostly of university professors retained the New York law firm of Kaplan, Hecker & Fink, LLP ("**Kaplan**") to submit what they assert is a non-partisan "amicus curiae" brief. None of the listed amicus group members have provided any affidavit or declaration demonstrating any personal work with the coronavirus or the disease that it can cause, COVID-19. The proposed brief likewise contains no discussion or legal analysis of the

standards that govern motions to dismiss. For the reasons that follow, Plaintiffs respectfully object to the Kaplan filing, especially because at least two of the university professors listed are material fact witnesses in this matter.

1. Kaplan did not comply with the letter or spirit of Local Civil Rule 7.1(d).

On June 10, 2020, just days after the Government filed its motion to dismiss, Kaplan emailed Plaintiffs' counsel asking for concurrence to file an amicus brief on behalf of "epidemiologists and public health scholars" in support of the Government's motion, without identifying its amicus clients. Exhibit 1, Taufique Email (Jun. 10, 2020). Without knowing their identities, Plaintiffs had no basis to grant consent. Plaintiffs' counsel responded as follows:

Dear Ms. Taufique,

We appreciate your interest in seeking our consent to file *Amici Curiae* briefs in these cases, but we must respectfully decline. As you know, the Defendants have sought dismissal only under Fed. R. Civ. P. 12(b)(1) and (6). Under this limited pleading standard, we don't see any basis, factual or legal, for outside *Amici* interest, especially at this early stage of the proceedings.

Moreover, you have not identified your group of clients, nor have you identified the legal issues that they supposedly support on behalf of the Defendants. We have, therefore, no basis to discern whether your clients have any present or past connection or relationship with the named Defendants.

Should you wish to discuss these issues further, we'd be happy to schedule a time to discuss.

Sincerely,

Dan McCarthy and Joseph Richotte

Exhibit 1, McCarthy Email (Jun. 11, 2020).

Kaplan never sought to discuss or resolve Plaintiffs' concerns. Instead, it proceeded to file the motion. The Court then promptly held the Kaplan filing in abeyance

for not filing the required Local Rule 7.1(d) certificate. ECF 20, PageID.564. Instead of contacting Plaintiffs' counsel, Kaplan filed a certificate of compliance with the Local Rule. ECF 21, PageID.565.

Plaintiffs respectfully submit that Kaplan did not comply with Local Rule 7.1(d), which provides:

Attempt to obtain concurrence. With respect to all motions, the moving party shall ascertain whether the motion will be opposed. In addition, in the case of all nondispositive motions, counsel or pro se parties involved in the dispute shall confer in a good-faith effort **to resolve the dispute**. All nondispositive motions shall be accompanied by a separately filed certificate **setting forth in detail the efforts of the moving party to comply with the obligation created by this rule**.

Rule 7.1(d) (WD Mich. 2019) (emphases added).

Again, Kaplan never disclosed to Plaintiffs the identity of its proposed amicus clients when it first sought concurrence. Even after counsel for Plaintiffs brought this omission to Kaplan's attention, it took no steps to "confer in a good faith effort to resolve the dispute." Instead, Kaplan filed its certificate, stating that Plaintiffs "advised that they appreciated amici's interest in seeking Plaintiffs' consent but did not consent to amici's motion." ECF 21, PageID.565. With all due respect, Kaplan's "certificate" left out some important details regarding Plaintiffs' dispute—namely Kaplan's failure to identify the referenced amicus group.

Plaintiffs did not learn the true identity of Kaplan's amicus until after the motion for leave was filed. In an Appendix, Kaplan listed 15 amici, mostly professors from the University of Michigan and Michigan State University. ECF 19-1, PageID.560–562. Critically, two of the professors from the University of Michigan—Emily Martin, PhD, MPH, and Marisa Eisenberg, PhD, MS—are material fact witnesses. They have been reputedly and actively working with the Government in developing the very policies, methodologies, and lockdown orders at issue in this litigation.

On about May 26, 2020, the Governor announced that Emily Martin, PhD, MPH, Associate Professor of Epidemiology at the University of Michigan, had “joined” Governor Whitmer in constructing the “Coronavirus Dashboard,” another alleged modeling tool to predict certain COVID-19 trends in various Michigan regions. See Michigan Pub. Health News Ctr., *Michigan public health professor joins Michigan governor to announce new coronavirus dashboard*, Mich. Sch. of Pub. Health (May 27, 2020), <https://perma.cc/XW3C-5DUK>.

Likewise, Marisa Eisenberg, PhD, MS, Associate Professor of Epidemiology at the University of Michigan has been working with the Government on certain coronavirus prediction models and appeared at the Governor’s press conference on April 22, 2020. See Center for the Study of Complex Sys., *Marisa Eisenberg modelling COVID-19 scenarios for state health department*, Mich. Coll. of Lit., Sci., and the Arts (Mar. 30, 2020), <https://perma.cc/X9WS-FDHK>.

Thus, although Kaplan asserts that proposed amici “do not seek to advance any partisan agenda,” ECF 19, PageID.566, it failed to disclose that at least two of the proposed amici have been working directly with the Government and are material witnesses in this litigation.

Kaplan will probably argue that the Court should still accept and consider the proposed amicus brief, even if the Court discounts Professors Eisenberg and Martin’s participation in the amicus group. But their inclusion in the group, and Kaplan’s failure to disclose their active affiliation with the Government on matters related to the Lockdown Orders betrays the amicus filing as a partisan maneuver. And, as will be further explained, the proposed Kaplan brief, which merely cites to various medical journals and articles authored by others not part of the proposed amicus group, does nothing to assist this Court.

2. The proposed amicus brief is not useful in addressing the motion to dismiss.

Plaintiffs acknowledge that the “decision to grant amicus status is within the sound discretion of the court and depends upon ‘a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice.’” *United States v. Michigan Dept. of Cmty. Health*, No. 1:10-mc-109, 2011 WL 2412602, at *9 (WD Mich. Jun. 3, 2011) (quoting *United States v. Michigan*, 940 F.2d 143, 165 (CA6 1991) (denying motion for leave to file amicus briefs that “contain[ed] little information that is useful or otherwise necessary to resolve the immediate petition before the court”)).

“The orthodox view of amicus curiae was, and is, that of an impartial friend of the court—not an adversary party in interest in the litigation[—]however, over the years, some courts have departed from the orthodoxy of amicus curiae as an impartial friend of the court and have recognized a *very limited* adversary support of given issues through brief and/or oral argument.” *Michigan Dept. of Cmty. Health*, 2011 WL 2412602, at *9 (cleaned up) (emphasis in original).

In *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (CA7 2003), the Seventh Circuit briefly outlined the factors considered with respect to a proposed amicus filing:

No matter who a would-be amicus curiae is ... the criterion for deciding whether to permit the filing of an amicus brief should be the same: whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs. The criterion is more likely to be satisfied in a case in which a party is inadequately represented; or in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide.

Ibid. (citations omitted).

Interestingly, the proposed amici cite this Court’s decision in *Kollaritsch v. Michigan State University Board of Trustees*, No. 1:15-cv-1191; 2017 WL 11454764, at *1

(WD Mich. Oct. 30, 2017) (Maloney, J.), where the Court applied similar factors and *denied* a motion to file an amicus brief because it was both untimely and not useful; the proposed brief did not address the legal issues facing the court.

The proposed amicus brief should be viewed similarly, as it is not useful. The Government filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6). The same standard of review applies to both components of the motion. See, e.g., *United States v. Ritchie*, 15 F.3d 592, 598 (CA6 1994) (on a facial attack under Rule 12(b)(1), the court applied the same standard as Rule 12(b)(6), taking the petitioner's material allegations as true and construing them in the light most favorable to the nonmoving party). The proposed amicus brief does not speak to these standards. Instead, the proposed amici argue that COVID-19 is deadly and highly infectious (while admitting that only a small proportion of people who are infected will experience serious illness, hospitalization or death), and that the Lockdown Orders are good public policy to combat the spread of the coronavirus (while admitting there is no way to predict exposure, infection, or the severity of the illness if infected). ECF 19-1, PageID.542-543. None of this is relevant to the legal questions before the Court under Rule 12(b)(1) or Rule 12(b)(6).¹ Such matters are, at best, potential fact issues to be resolved at trial, not on a motion to dismiss.

Plaintiffs also note that the proposed amicus brief relies heavily on epidemiological studies. In support of their arguments, the proposed amici weave a tapestry of medical articles and journals that are based on questionable assumptions and raise more questions than answers. As another court observed in *In re Welding Fume Products Liability Litigation*, No. 1:03-cv-17000; 2005 WL 1868046, at *33 (ND Ohio Aug. 8, 2005), epidemiological studies “have flaws” and as such, they are subject to cross-examination:

¹ In this opposition brief, Plaintiffs limit themselves to the procedural defects that should cause the Court to deny leave to file the proposed amicus brief. If the Court grants the motion, Plaintiffs will address the substance of the proposed brief in their opposition to the Government's motion to dismiss.

As the Federal Judicial Center’s *Reference Manual on Scientific Evidence* makes clear, it is important to emphasize that most [epidemiological] studies have flaws. Some flaws are inevitable given the limits of technology and resources. In evaluating epidemiologic evidence, the key questions, then, are the extent to which a study’s flaws compromise its findings and whether the effect of the flaws can be assessed and taken into account in making inferences. Given that no epidemiological study is flawless, in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility. Vigorous cross-examination of a study’s inadequacies allows the jury to appropriately weigh the alleged defects and reduces the possibility of prejudice.”

Ibid. (citations and quotation marks omitted). Indeed, to the extent that this Court considers the cited epidemiological articles, Plaintiffs respectfully submit that they should have an opportunity to cross-examine the cited sources, including the proposed amici, should they in the future be admitted as expert witnesses in this matter.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny Kaplan’s Motion for Leave to File Brief of Amici Curiae Michigan Epidemiologists in Support of Defendants’ Motion to Dismiss.

Respectfully submitted,

BUTZEL LONG, P.C.

DANIEL J. MCCARTHY P59457

Dated: June 30, 2020

DANIEL J. MCCARTHY (P59457)

JOSEPH E. RICHOTTE (P70902)

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Counsel for Plaintiffs

BH2943090.2

CERTIFICATE OF COMPLIANCE

Under Local Civil Rule 7.2(b)(ii), I certify that this brief complies with the word limit for dispositive briefs. This brief contains 1,853 words, excluding the items to which the word count does not apply. This brief was prepared using Microsoft Word 2013, which generated the word count.

Respectfully submitted,

BUTZEL LONG, P.C.

DANIEL J. MCCARTHY P59457

Dated: June 30, 2020

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Counsel for Plaintiffs

BH2943090.2

EXHIBIT 1

Richotte, Joseph E.

From: McCarthy, Daniel J.
Sent: Tuesday, June 30, 2020 9:07 PM
To: Richotte, Joseph E.
Subject: Fwd: [EXTERNAL] Re: Consent to File Briefs of Amici Curiae in Sotheby's v. Whitmer and Mitchell v. Whitmer

Sent from my iPhone

Begin forwarded message:

From: Joshua Matz <jmatz@kaplanhecker.com>
Date: June 11, 2020 at 10:58:20 AM EDT
To: "McCarthy, Daniel J." <mccarthyd@butzel.com>, Mahrah Taufique <mtaufique@kaplanhecker.com>, "Richotte, Joseph E." <richotte@butzel.com>, "allenc28@michigan.gov" <allenc28@michigan.gov>, "fowlerdf@michigan.gov" <fowlerdf@michigan.gov>, "fedynskyj@michigan.gov" <fedynskyj@michigan.gov>, "froehlichj1@michigan.gov" <froehlichj1@michigan.gov>, "Boothj2@michigan.gov" <Boothj2@michigan.gov>, "barrancok@michigan.gov" <barrancok@michigan.gov>
Cc: "Raymond P. Tolentino" <rtolentino@kaplanhecker.com>, "Jonathan R. Kay" <jkay@kaplanhecker.com>, Jennifer McManus <jmcmamus@faganlawpc.com>, "Guardiola, Michelle" <guardiola@butzel.com>
Subject: [EXTERNAL] Re: Consent to File Briefs of Amici Curiae in Sotheby's v. Whitmer and Mitchell v. Whitmer

Dear Mr. McCarthy,

We appreciate this response and understand your position.

All my best
Joshua Matz

From: McCarthy, Daniel J. <mccarthyd@butzel.com>
Sent: Thursday, June 11, 2020 10:55 AM
To: Mahrah Taufique <mtaufique@kaplanhecker.com>; Richotte, Joseph E. <richotte@butzel.com>; allenc28@michigan.gov <allenc28@michigan.gov>; fowlerdf@michigan.gov <fowlerdf@michigan.gov>; fedynskyj@michigan.gov <fedynskyj@michigan.gov>; froehlichj1@michigan.gov <froehlichj1@michigan.gov>; Boothj2@michigan.gov <Boothj2@michigan.gov>; barrancok@michigan.gov <barrancok@michigan.gov>
Cc: Raymond P. Tolentino <rtolentino@kaplanhecker.com>; Jonathan R. Kay <jkay@kaplanhecker.com>; Jennifer McManus <jmcmamus@faganlawpc.com>; Joshua Matz <jmatz@kaplanhecker.com>; Guardiola, Michelle <guardiola@butzel.com>
Subject: RE: Consent to File Briefs of Amici Curiae in Sotheby's v. Whitmer and Mitchell v. Whitmer

Dear Ms. Taufique,

We appreciate your interest in seeking our consent to file *Amici Curiae* briefs in these cases, but we must respectfully decline. As you know, the Defendants have sought dismissal only under Fed. R. Civ. P. 12(b)(1) and (6). Under this limited pleading standard, we don't see any basis, factual or legal, for outside *Amici* interest, especially at this early stage of the proceedings.

Moreover, you have not identified your group of clients, nor have you identified the legal issues that they supposedly support on behalf of the Defendants. We have, therefore, no basis to discern whether your clients have any present or past connection or relationship with the named Defendants.

Should you wish to discuss these issues further, we'd be happy to schedule a time to discuss.

Sincerely,

Dan McCarthy and Joseph Richotte

Daniel J. McCarthy

Shareholder

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A LexMundi Member

From: Mahrah Taufique [mailto:mtaufique@kaplanhecker.com]

Sent: Wednesday, June 10, 2020 8:26 PM

To: Richotte, Joseph E. <richotte@butzel.com>; McCarthy, Daniel J. <mccarthyd@butzel.com>; allenc28@michigan.gov; fowlerdf@michigan.gov; fedynskyj@michigan.gov; froehlichj1@michigan.gov; Boothj2@michigan.gov; barrancok@michigan.gov

Cc: Raymond P. Tolentino <rtolentino@kaplanhecker.com>; Jonathan R. Kay <jkay@kaplanhecker.com>; Mahrah Taufique <mtaufique@kaplanhecker.com>; Jennifer McManus <jmcmamus@faganlawpc.com>; Joshua Matz <jmatz@kaplanhecker.com>

Subject: [EXTERNAL] Consent to File Briefs of *Amici Curiae* in *Sotheby's v. Whitmer and Mitchell v. Whitmer*

Good afternoon,

I write on behalf of epidemiologists and public health scholars with professional expertise on the transmission of infectious diseases in Michigan. We intend to submit briefs of *amici curiae* in the cases

Signature Sothbeys International Realty, Inc. et al. v. Whitmer et al., No. 20-cv-00360 (W.D.Mich filed Apr. 28, 2020) and *Mitchell v. Whitmer et al.*, No. 20-cv-00384 (W.D.Mich filed May 4, 2020).

We respectfully request your consent to file a Motion For Leave To File as *Amici Curiae* in Support of Defendants' Motion to Dismiss in each of these cases.

Regards,

Mahrah Taufique

Mahrah Taufique | Kaplan Hecker & Fink LLP

Associate

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