

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,
Plaintiff,

vs.

Assa Abloy AB,
Spectrum Brands Holdings, Inc.,
Defendants.

Civil Action No. 22-cv-2791

**MOTION OF THE AMERICAN ANTITRUST INSTITUTE AND THE HON. WILLIAM
J. BAER FOR LEAVE TO FILE AN AMICUS BRIEF**

The American Antitrust Institute (“AAI”) and the Hon. William J. Baer (collectively, “Proposed *Amici*”) respectfully move for leave to file an *amicus* brief in this case. The proposed brief would address Judge Jackson’s discussions on the proper burden shifting in light of the merging parties’ proposed divestiture in the process of “litigating the fix” that have important implications for the future of merger law and sound antitrust enforcement. During the Court’s December 5, 2022 Status Conference, Judge Jackson specifically requested expedited briefing on this issue. Proposed *Amici* submit that the brief is desirable and, upon leave from the Court, will file their brief by January 13, 2023, which is the date the parties will submit their briefs on this issue. No party will be prejudiced by this timeline as filing will not occur subsequent to the parties’ deadline, and the parties will have 14 days, as required under LCvR 7(o)(2), to explain any opposition this motion prior to the filing deadline. Proposed *Amicus*’s brief will comply with the requirements in LCvR 7(o) and will adhere to the 12-page limit the Court provided the parties in its December 5, 2022 order for their briefing.

STATEMENT OF INTEREST

AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* <http://www.antitrustinstitute.org>.¹

The Hon. William J. Baer is a visiting fellow in Governance Studies at the Brookings Institution. He is the former Director of the Bureau of Competition of the Federal Trade Commission and former Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. He has twice been named by Global Competition Review as the best competition lawyer in the world and twice been recognized by Best Lawyers as the best antitrust lawyer in Washington. He was named by The National Law Journal as one of “The Decade’s Most Influential Lawyers.” In 2015 the Federal Trade Commission honored him with the Miles W. Kirkpatrick Lifetime Achievement Award, and in 2017 AAI presented him with the Alfred E. Kahn Award for Antitrust Achievement.

Proposed *Amici*’s interest in this matter is that they are public interest advocates who seek to improve the administration of the antitrust laws and ensure that antitrust enforcement best serves the interests of competition and consumers. The Court’s analysis and ultimate decision in this matter affects the Proposed *Amici* because those goals cannot be achieved without appropriate analysis of merging parties’ attempts to litigate the fix.

¹ Individual views of members of AAI’s Board of Directors or Advisory Board may differ from AAI’s positions.

ARGUMENT

I. Proposed *Amici*'s brief is desirable as it embraces a matter essential to the disposition of the case and provides additional insight for the Court not likely to come from the parties' briefing.

Leave to file *amicus* briefs is appropriate when a putative *amicus* has “a sufficient ‘interest’ in the case and [its] brief is ‘desirable’ and discusses matters that are ‘relevant to the disposition of the case.’” *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 128 (3d. Cir. 2002) (Alito, J.); *see* Fed. R. App. P. 29(a)(3)(B); LCvR 7(o) (standards for *amicus* briefs); *see also United States v. Philip Morris USA Inc.*, No. 99-2496, 2005 WL 8160465, at *2 (D.D.C. Sept. 1, 2005) (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)) (granting leave to file *amicus* brief where the proposed *amici* could “provide the [Court] ‘unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide’”).

“[I]t is preferable to err on the side of granting leave.” *Neonatology Associates*, 293 F.3d at 132-33. “District courts frequently welcome *amicus* briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved” *Trunk v. City of San Diego*, No. 06cv1597, 2007 WL 9776582, at *1 (S.D. Cal. Dec. 10, 2007). And federal appellate courts “grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet [the enumerated] criteria as broadly interpreted.” *Neonatology Associates*, 293 F.3d at 133; *see Massachusetts Food Ass’n v. Massachusetts Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 567 (1st Cir. 1999) (Boudin, J.) (“[A] court is usually delighted to hear additional arguments from able *amici* that will help the court toward right answers”).

Here, Proposed *Amici* submit that their brief would be useful and desirable because it lays out the proper legal framework for litigating the fix and emphasizes the problematic consequences for antitrust enforcement if mergers are litigated “as-remedied” by a voluntary “fix” rather than on the basis of the merger agreement. Proposed *Amici*’s brief will put a spotlight on the legal and practical considerations that parties and the Court expressly considered in the December 5, 2022 status conference. *See* Transcript of Status Conference at 17, *United States v. Assa Abloy*, No. 22-cv-2791 (“Do we have to litigate whether, if that merger went through absent a divestiture, whether [the Government] met their prima facie case of showing substantial lessening of competition?”); *id.* at 19 (“I don’t think [Judge Nichols] got rid of the whole [the Government] start[s], [defendants] come back, then the burden sets with [the Government]. You know, the typical *Baker Hughes* structure.”).

Unlike the anticipated briefing from the parties, the proposed *amicus* brief will focus solely on the proper framework for litigating the fix and will not tread into the merits of the present matter. AAI and the Hon. William J. Baer are uniquely qualified to present this perspective as they bring a wealth of experience and expertise in the field and specifically in litigating the fix questions. For example, Proposed *Amici* recently submitted an *amicus* brief in *In the Matter of Illumina, Inc., and GRAIL, Inc.*, FTC Docket No. 9401, on the very issue.

And, as already identified by the parties and the Court, the appropriate application of the litigating the fix framework will be essential to the proper disposition of the case. *See, e.g.*, Tr. of Status Conference at 24, *United States v. Assa Abloy*, No. 22-cv-2791 (“[I]f you can’t agree to how the law is, then you’ll brief it for me and I’ll tell you. I think we need to know earlier rather than later what the scaffolding is that’s going to govern this analysis.”).

II. Proposed *Amici* have conferred with the parties to this litigation.

Proposed *Amici* have conferred with the parties to this matter. Defendants object to Proposed *Amici*'s Motion, while the United States does not oppose the Motion or the filing of a subsequent *amicus* brief.

CONCLUSION

For the foregoing reasons, Proposed *Amici* respectfully request that the court grant their Motion for Leave to File an *Amicus* Brief and order that Proposed *Amici* may file a 12-page *amicus* brief by January 13, 2023.

Respectfully submitted,

/s/ Allen P. Grunes

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Counsel to Proposed Amici Curiae

Dated: December 30, 2022

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2022, I electronically filed a true and correct copy of the foregoing **MOTION OF THE AMERICAN ANTITRUST INSTITUTE AND THE HON. WILLIAM J. BAER FOR LEAVE TO FILE AN *AMICUS* BRIEF** with the Clerk via the CM/ECF system which will send notification of such filing and service upon all counsel of record.

/s/ Paulette M. Chesson

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