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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

FEDERAL TRADE COMMISSION, ET AL.,

Case No. 3:24-cv-00347-AN

Plaintiffs,

v.

THE KROGER COMPANY, ET AL.,

Defendants.

UNOPPOSED MOTION OF THE
NATIONAL LABOR RELATIONS
BOARD FOR LEAVE TO FILE BRIEF
AS *AMICUS CURIAE*

LR 7-1 CERTIFICATION

Pursuant to Local Rule 7-1, undersigned counsel certifies that counsel for the National Labor Relations Board conferred in good faith with the parties on the relief sought herein. No party opposes the motion.

MOTION

The National Labor Relations Board (Board or NLRB) respectfully moves this Court for leave to file the accompanying brief as an *amicus curiae* in response to Defendants' opposition to Plaintiffs' motion for preliminary injunction and in support of the Plaintiff's motion. The NLRB is an independent federal agency created by Congress to enforce and administer the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* For the reasons described below, the proposed *amicus* brief contains relevant material that may aid the Court in resolving the issues raised by Defendants' opposition.

MEMORANDUM

On July 30, 2024, Plaintiffs filed their motion for a preliminary injunction that seeks to block Defendants' merger under the antitrust laws. ECF Doc. 205. On August 12, 2024, Defendants filed their opposition thereto. ECF Doc. 236. In their opposition, Defendants suggest that labor law is a defense to its proposed merger and that the NLRB is the proper agency to regulate bargaining power between unions and employers, rather than the Federal Trade Commission (FTC). *Id.* at 11, 48-50.

The Board seeks to file an *amicus* brief that is intended to provide the Court with information as to what the NLRB does and does not do, as well as to address caselaw cited by Defendants regarding the narrow matter of multiemployer bargaining – a practice that is wholly distinct from merger transactions and that is permitted for collective-bargaining purposes only to

the extent that organized labor consents to the formation of a multiemployer bargaining unit.

Retail Assocs., Inc., 120 NLRB 388, 393 (1958); *Van Eerden Co.*, 154 NLRB 496, 499 (1965).

This Court enjoys broad discretion to allow for participation by *amici curiae*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), overruled on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995); *Greater Hells Canyon Council v. Stein*, No. 2:17-CV-00843-SU, 2018 WL 438924, at *1 (D. Or. Jan. 16, 2018) (quoting *Hoptowit* and granting nonparty’s motion for leave to file *amicus* brief); *Earth Island Inst. v. Nash*, No. 19CV01420DADSAB, 2019 WL 6790682, at *1 (E.D. Cal. Dec. 12, 2019) (same); *Washington v. United States Food & Drug Admin.*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash.) (“The Court has broad discretion to grant or refuse a prospective *amicus* participation.”), opinion clarified on other grounds, 669 F. Supp. 3d 1057 (E.D. Wash. 2023). And “[d]istrict courts frequently welcome *amicus* briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved or if 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.” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (internal quotation marks and citations omitted); *see also Hoptowit*, 682 F.2d at 1260. An *amicus* brief should normally be allowed when it would be helpful to the court, and “there is no rule that *amici* must be totally disinterested.” *Funbus Systems, Inc. v. Cal. Public Utilities Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986).

While Rule 29 of the Federal Rules of Appellate Procedure does not govern the instant motion, it may nevertheless guide this Court in determining whether to grant the Board’s motion for leave to file as *amicus curiae*. *See Ctr. for Biological Diversity v. United States EPA*, No. 4:20-cv-555, 2023 WL 4542990, *1 (D. Ariz. June 27, 2023) (since the Federal Rules of Civil

Procedure do not cover *amicus curiae* procedures, “[t]he Court has, accordingly, reviewed Rule 29 in considering whether the *amicus* briefs will be of assistance to the Court”). That rule recognizes the importance of federal agencies in assisting courts as nonparties by permitting the filing of an amicus brief without the consent of those parties or leave of court. Fed. R. App. P. 29(a)(2) (“The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court.”).

As the federal agency charged with regulating labor relations between most private-sector employers in the United States, their employees, and the authorized representatives of their employees, the Board is particularly well positioned to speak as to the scope of its expertise and jurisdiction and to respond to claims raised by Defendants in their opposition. And because district courts only rarely have cause to consider a dispute involving the Board or the NLRA, the Board’s insight into its statutory structure and federal labor law may be of unique value. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938) (the Board is empowered with exclusive jurisdiction to prevent unfair labor practices, subject to direct circuit court review); *Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No. 776*, 346 U.S. 485, 491 (1953) (“federal courts [are prohibited] from intervening in such cases, except by way of review or on application of the federal Board”); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 673 (5th Cir. 1966) (“District Courts ... have a very very minor role to play in this statutory structure”).

The accompanying brief succinctly explains the federal policy to “encourag[e] the practice and procedure of collective bargaining” that is enshrined in Section 1 of the Act and the interplay between NLRA Sections 7 through 10, particularly as they relate to the duty to bargain in good faith. 29 U.S.C. § 151, 157-60. In addressing three cases cited by Defendants at page 50 of their opposition, the proposed amicus brief also defines multiemployer bargaining, addresses

its role as a temporary and consensual association among collective-bargaining partners that is specific to the collective-bargaining process, and distinguishes this practice from the matter of whether two business may enter into a merger transaction for purposes well beyond collective bargaining.

Accordingly, the Board seeks leave to submit an amicus brief to clarify its role in the collective-bargaining process and to provide the Court with information that otherwise may not be brought to the Court's attention by the parties to this case. For the reasons explained above, the Board respectfully requests that the Court grant such leave.

Respectfully submitted,

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Date: August 21, 2024.

CERTIFICATE OF SERVICE

In accordance with Fed. R. Civ. P. 5(b)(2)(E) and LR 5-1, I hereby certify that on August 21, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

Dated: August 21, 2024

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 1,047 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

Dated: August 21, 2024

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