UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FuboTV, Inc., and FuboTV Media, Inc., Plaintiffs, v. The Walt Disney Company, et al., Defendants.	1:24-cv-01363-MMG

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION FILED BY SPORTS FAN COALITION, AMERICAN ECONOMIC LIBERTIES PROJECT, ELECTRONIC FRONTIER FOUNDATION, OPEN MARKETS INSTITUTE AND PUBLIC KNOWLEDGE

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The Walt Disney Company, ESPN, Inc., ESPN Enterprises, Inc. and Hulu, LLC, Fox Corporation and Warner Bros. Discovery, Inc. (collectively, "Defendants") oppose the motion filed on August 2, 2024 by the Sports Fan Coalition, American Economic Liberties Project, Electronic Frontier Foundation, Open Markets Institute and Public Knowledge ("Movants") seeking leave to file a brief as amici curiae in support of fuboTV, Inc. and fuboTV Media, Inc. (together, "Fubo") in the above-captioned matter (the "Motion"). This Court should deny them the opportunity to file their late-breaking, prejudicial and unhelpful brief.

PROCEDURAL BACKGROUND

On April 8, 2024, Fubo filed its motion for a preliminary injunction ("PI Motion"). (Dkts. 74-75.) On April 19, 2024, the Court set the date of the preliminary injunction hearing for August 7, 2024. (Dkt. 140.) On July 25, 2024, per the scheduling order, Defendants filed their opposition to Fubo's PI Motion (the "Opposition"). (Dkt. 238.) Just four days ago, on July 29, 2024, the Movants sought Defendants' consent to file on August 2, 2024, a brief as amici curiae in support of Fubo's PI Motion. Movants' July 29 correspondence was the first time Defendants learned of Movants' plan to file a brief as amici curiae. On July 31, 2024, Defendants indicated to Movants that they oppose Movants' proposed motion as both untimely and prejudicial.

ARGUMENT

Courts have discretion to deny leave when the proposed amicus brief is neither "timely" nor "useful." *Lehman XS Tr., Series 2006-GP2 v. Greenpoint Mortg. Funding, Inc.*, No. 12 CIV. 7935, 2014 WL 265784, at *2 (S.D.N.Y. Jan. 23, 2014) (internal citation omitted). To decide whether a motion to file an amicus brief is timely, district courts consider (among other things) "(1) the length of time the applicant knew or should have known of his interest before making the motion; (2) prejudice to existing parties resulting from the applicant's delay; (3) prejudice to the applicant if the motion is denied; and (4) the presence of unusual circumstances militating for or against a finding of timeliness." *Esther Sadowsky Testamentary Tr. Derivatively ex rel. Home Loan Mortg. Corp. v. Syron*, 2009 WL 1285982, at *2 (S.D.N.Y. May 6, 2009), *aff'd sub nom*.

Esther Sadowsky Testamentary Tr. v. Fed. Hous. Fin. Agency, 412 F. App'x 361 (2d Cir. 2011) (internal citation omitted).

Here, the proposed amicus brief will be neither timely nor useful. Movants' motion should be denied.

I. Movants' Untimely Motion Would Prejudice Defendants.

To start, Movants waited until the eleventh hour to seek leave and offer no excuse why. Because no federal rule dictates when *amici* must seek leave to file a brief in federal district court, those courts have looked to the Federal Rules of Appellate Procedure to guide their assessment of a motion's timeliness. *See, e.g.*, *Lehman XS Tr.* 2009 WL 1285982, at *1 (looking to Federal Rule of Appellate Procedure 29 for guidance to deny a request to file an amicus brief); *In re Terrorist Attacks on Sept. 11, 2001*, No. 01CV10132GBDSN, 2022 WL 17326181, at *1 (S.D.N.Y. Nov. 29, 2022) (same). And FRAP 29(a)(6) requires *amici* to seek leave "no later than 7 days after the principal brief of the party being supported."

Here, there was extensive media coverage of Fubo's filing of its PI motion, and that coverage has continued as the case has progressed. *See, e.g.*, L. Manfredi, DirecTV, Dish Network Back Fubo in Disney-Fox-WBD Sports Streaming Legal Fight, Yahoo! News (April 11, 2024), https://yhoo.it/4fwgmva. Movants' reliance on *Andersen v. Leavitt* (Mot. at 4) is disingenuous. In *Andersen*, the Court held that it could not "fault the [amicus] for its relatively 'late' discovery" of the case, and held the amicus brief was not untimely because there was "no indication that [the case] was well-publicized, thereby warranting a conclusion that the [amicus] should have acted sooner". No. 03-CV-6115 DRHARL, 2007 WL 2343672, at *6 (E.D.N.Y. Aug. 13, 2007). Movants do **not** assert that they were not aware of this matter until recently despite its well-publicized nature, and they could not plausibly say that. And *Andersen* also based its decision on the fact that "the Defendants have not articulated any prejudice they will suffer if the County is permitted to file its amicus brief", *id.* at 5, but the prejudice *amici*'s late filing would pose to Defendants here is significant and clear. There is thus no excuse for

Movants' failure to seek leave within the seven days suggested by FRAP 29(a)(6)—or the *16 weeks* between then and when Defendants' filed their opposition brief. Yet they instead waited until mere days remained before the PI hearing, and only *after* Defendants had filed their opposition brief. Simply put, Movants have moved too late.

Movants' delay prejudices Defendants, who have already filed their Opposition, are preparing for an expedited hearing, and would have no realistic opportunity to respond to a new set of arguments injected into this case by non-parties at the eleventh hour. "It is firmly established that the most significant criterion in determining timeliness is whether the delay in moving for intervention has prejudiced any of the existing parties." *Hartford Fire Ins. Co. v. Mitlof*, 193 F.R.D. 154, 160 (S.D.N.Y. 2000) (internal citation omitted). The analysis can hinge on whether the party against whom the amicus brief is directed has already filed its primary briefing. In this district, courts "routinely reject untimely filed amicus briefs" because "the parties to the case or controversy before the Court should have the opportunity to engage with the arguments and perspectives of amici without resorting to supplemental briefing, which might unduly delay the proceedings or unduly prejudice one or more of the parties." *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, No. 15 CIV. 2739 (LAP), 2022 WL 3536117, at *1 (S.D.N.Y. Aug. 18, 2022) (internal citation omitted).

Here, Movants' delay has denied Defendants the opportunity to consider and respond to the brief in their Opposition. The expedited schedule that Fubo requested leaves no time for supplemental briefing before or after the PI hearing, and any attempt to shoehorn such briefing into the expedited schedule would prejudice Defendants as they prepare for the main event.[1] *Id.* at 2. ("[A]ccepting [Movants'] amicus brief without supplemental briefing would be unfair both to Plaintiffs and to the Court".) And Defendants would plainly be unduly prejudiced by any adverse amicus brief to which they could not even respond. By contrast, a denial of the Motion

[1] The Court has set an expedited schedule for this proceeding, with no post-trial briefing, specifically due to "the time restraints at-issue in this case relating to the potential launch of the Defendants' business combination in late August". (Dkt. 140 at 2.)

would not unduly prejudice the Movants because any prejudice to Movants is of their own making. As non-parties, Movants did not have to await discovery to prepare their brief; they could have filed the Motion months ago, but chose not to. The Court should therefore deny the Motion.

II. Movants' Motion Will Not Be Helpful To The Court.

Movants' request should also be denied because their brief cannot assist the Court at this fact-intensive stage of the proceeding. As courts have observed, "[a]t 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." *United States v. Alkaabi*, 223 F. Supp. 2d 583, 592 n.16 (D.N.J. 2002) (quoting *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985)); *see also Wildearth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 10028647, at *3 (D.N.M. June 20, 2012); *Accordius Health at Asheville, LLC v. United States Small Bus. Admin.*, No. 1:23-CV-00129-MR, 2024 WL 2151707, at *1 (W.D.N.C. May 1, 2024). Here, the resolution of the PI Motion will turn on the law as applied to the evidence presented in the Parties' submissions and at the hearing, which is scheduled to begin in three days. Having played no part in the expedited discovery process, *amici* have no knowledge of the facts to which they can apply the law in aid of this Court's decision-making.

Movants' proposed brief can thus have only limited use to the Court, which will in any event be ably assisted by counsel on both sides of the controversy who have actual knowledge of the relevant facts. *Lehman XS Tr.*, 2009 WL 1285982, at *1–2 (amici are helpful if they have "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide"); *see also United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (denying leave to file an amicus brief where the amicus had not considered all relevant evidence because it had "only the facts of one side" and therefore allowing its brief would do "the court, itself and fundamental notions of fairness a disservice".); *Kearns v. Cuomo*, No. 1:19-CV-00902 EAW, 2019 WL 5060623, at *8 (W.D.N.Y. Oct. 9, 2019) (amicus brief not

helpful if it merely "repeat[s] in a cursory fashion the more robust arguments already advanced by" a party). Further, Movants rely on *United States v. Yaroshenko* (Mot. at 2), but that case only proves Defendants' point, as it held that *amici*'s delay was "reason alone to deny the application". 86 F. Supp. 3d 289, 290 (S.D.N.Y. 2015). And any brief would be improper to the extent that it seeks to "initiate, create, extend, or enlarge issues" or "address wholly new issues not raised by the parties." *Lehman XS Tr.*, 2009 WL 1285982 at *2 (internal quotation marks and citation omitted).

If the Court were inclined to grant the Motion nonetheless, Defendants should at a minimum have the opportunity to respond to the amicus curiae brief after the hearing on the PI Motion.

CONCLUSION

For the reasons stated above, Defendants respectfully request the Movants' motion to file a brief as amici curiae in support of Fubo's PI Motion be denied.

August 2, 2024

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