IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

Oneida Nation,

Plaintiff,

v.

Case No. 16-CV-1217

Village of Hobart, Wisconsin,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER GRANTING THE UNITED STATES' MOTION TO FILE AN AMICUS CURIAE BRIEF BY OCTOBER 12, 2018

The Oneida Nation ("Nation") commenced this litigation against the Village of Hobart ("Village") on September 9, 2016. The scope and perimeters of this litigation were well spelled out in the original Complaint, as well as in the Village's Answer and Counterclaim. Despite this fact, the United States chose to sit silent, and not participate in any manner, until counsel for the Village was contacted by attorneys for the United States Department of Justice ("DOJ") on September 21, 2018. Counsel for the United States indicated that they were considering filing of an amicus curiae brief or otherwise becoming involved in this case.

The very next business day on September 24, 2018, the United States filed its Motion for leave to file an amicus curiae brief. The Village objects to this Motion being filed only five days from the final briefing in this case.

Federal courts have discretion to permit a non-party to participate as an amicus curiae in a case. *See U.S. v. State of Mich.*, 116 F.R.D. 655, 660 (W.D. Mich. 1987). "A motion for leave to file an *amicus curiae* brief … should not be granted unless the court deems the proffered

information timely and useful." *Bryant v. Better Business Bureau of Greater Maryland*, 923 F. Supp. 720, 728 (D. Md. 1996).

If a proposed amicus brief "comes from an individual with a partisan, rather than impartial view, the motion for leave to file an amicus brief is to be denied, in keeping with the principle that an amicus must be a friend of the court and not a friend of a party to the cause." *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982) citing C. Rembar, *The Law of The Land 330* (1980). "[T]he privilege of being heard amicus rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise." *Id*. at 420 citing 3A C.J.S. Amicus Curiae s 3. "[A]bsent a statute to the contrary, no distinction is made between the request of a private person for leave to appear amicus curiae, and one by an agent of the government. *Id*. (internal citations omitted).

Albeit at the appellate court level, Judge Posner has provided further guidance on this issue:

> After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed fashion.
>
> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party. We are beyond the original meaning now; an adversary role of an amicus curiae has become accepted. But there are, or at least there should be limits. An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case, or when 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. Otherwise, leave to file an amicus curiae brief should be denied.

Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (internal citations omitted).

THE UNITED STATES' REQUEST IS NOT TIMELY

The DOJ could have expressed an interest in participating in this case more than two years ago but strategically decided to wait until only five days before final briefs on motions for summary judgment were due. Additionally, the Nation made a strategic decision not to involve the United States and this case, and discovery within this case, proceeded accordingly. The United States now desires to extend the briefing schedule to allow it to file its amicus curiae brief which will then necessitate a response by the Village, all further delaying the decision on summary judgment.

The United States also decided to express a desire to participate long after discovery in this case has closed. This is of particular importance because in its Motion, the United States tries to support its argument that it should be allowed to file an amicus curiae brief by stating "[i]nformation regarding the federal government's treatment of the Nation's reservation may provide some information regarding the questions before the Court that have been raised by the parties." (ECF 109, p. 2.) This statement confirms the United States intends to submit additional factual information into the record. Specifically, facts shedding light on "the federal government's treatment of the Nation's reservation." Supplementing the factual record after discovery has closed and after the briefing has been completed would significantly prejudice the Village. The Village should have the opportunity to engage in further discovery to attach the accuracy of those claimed facts and the credibility of the sources. If additional discovery is allowed, the delay will be even greater.

THE NATION IS COMPETENTLY REPRESENTED AND NOT ENTITLED TO PARTISAN ASSISTANCE FROM A NON-PARTY

The Nation has been represented for over two years by multiple attorneys including those with renowned expertise in the area of the law which is the subject matter of this litigation. Moreover, the Nation has retained three separate nationally recognized expert witnesses who have scoured thousands of pages of documentation all with the goal of advancing the Nation's arguments. As the Seventh Circuit has indicated, an amicus curiae brief should not be allowed when the parties are competently represented.

THE UNITED STATES HAS MADE NO INDICATION WHY ITS REQUESTED AMICUS PARTICIPATION WOULD BE USEFUL

The United States has provided no indication of what "unique information" it could bring to the Court's attention, other than an unfair advantage to the Nation by allowing it indirectly to file yet another brief. Without expressly identifying how its participation would be useful to the Court, the United States should not be allowed to file an amicus curiae brief. It has failed to even suggest, let alone confirm it is in possession of any unique information the Nation could not have already provided.

The Village will be unduly prejudiced if the Nation, through the United States, is allowed to introduce new facts or legal arguments the Nation failed to raise in its previous briefing. The purpose of an amicus curiae brief is not to provide one party with a significant advantage, by giving it one last opportunity through a partisan third party, to address the opposing party's arguments.

Dated: September 26, 2018.

Respectfully submitted,

By: *s/* Frank W. Kowalkowski

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