UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JENNIFER SWEDA, *et al.*, *Plaintiffs-Appellants*, v. UNIVERSITY OF PENNSYLVANIA, *et al.*, *Defendants-Appellees*.	No. 17-3244

PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO MOTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

Defendants' proposed amici seek to supplement Defendants' 48-page, 11,592-word brief with a combined total of 75 additional pages containing *16,187* additional words.[1] These briefs, if accepted, would greatly expand the scope of the factual and legal arguments that Plaintiffs must address within the 6,500-word limit allowed for their reply brief. Instead of responding to a single 11,592-word brief, Plaintiffs would have to respond to four briefs totaling nearly *28,000* words. Typically, the option of filing a reply brief provides the appellant more total words than the appellee. Fed.R.App.P. 28(c), 32(a)(7)(B). The proposed amicus briefs would reverse that dynamic, providing Defendants-Appellees an unwarranted

[1] The Chamber of Commerce of the Unites States of America and the American Benefits Council submitted a proposed 28-page, 6,456-word brief ("Chamber Br."); TIAA submitted a proposed 27-page, 5,920-word brief ("TIAA Br."), and a group of higher education associations submitted a proposed 20-page, 3,802-word brief ("Am. Council Br.").

8,000-word advantage.[2] Although Plaintiffs recognize that then-Judge Alito's opinion in *Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 133 (3d Cir. 2002), disapproved a "restrictive" approach to granting leave to file amicus briefs, at issue there was a motion for leave to file a single amicus brief. *Id*. at 129–30. That opinion did not address the potential prejudice to the opponent of allowing numerous amicus filings which effectively multiply the arguments on one side of an appeal while diluting the opponent's ability to adequately respond.

Moreover, the matters asserted in the proposed briefs are not "relevant to the disposition of the case." Fed.R.App.P. 29(a)(3)(B); *see Neonatology*, 293 F.3d at 131 (noting that "a motion for leave to file should be denied" if movant does not meet the requirements of Rule 29). This appeal presents a pure legal question: whether Plaintiffs' amended complaint contains sufficient facts to state a plausible claim for relief. *See* Pla. Br. 5, 22. TIAA's proposed filing simply disputes the truth of Plaintiffs' allegations regarding TIAA's products and services, and thus is irrelevant to the legal sufficiency of Plaintiffs' allegations. And all three proposed briefs seek to inject irrelevant issues that are not before the Court because they were not raised in Defendants' opening brief. *See United States v. Wahchumwah*, 710 F.3d 862, 868 n.2 (9th Cir. 2013)(declining to consider argument raised only

[2] Plaintiffs are limited to a combined total of 19,500 words for their opening and reply briefs, Fed.R.App.P. 32(a)(7)(B), while Defendants' 11,592-word brief plus the 16,187 words in the proposed amicus filings would result in a total of 27,779.

by amicus); *Genova v. Banner Health*, 734 F.3d 1095, 1102–03 (10th Cir. 2013).

A. TIAA's factual disputes are not relevant at this stage, and the issue of "objective prudence" has not been raised in this appeal.

In reviewing the district court's dismissal of Plaintiffs' amended complaint, the Court must "accept all factual allegations as true" and "construe the complaint in the light most favorable to" Plaintiffs. *Byers v. Intuit, Inc.*, 600 F.3d 286, 291 (3d Cir. 2010); Pla. Br. 22. The Court's review is limited to the complaint, any incorporated documents, and matters of public record. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). TIAA's proposed brief ignores these standards, relying on its own marketing materials and *ipse dixit* to argue that Plaintiffs' allegations are "incorrect" and not "accurate," while urging the Court to accept TIAA's version of the facts which is "contrary to Plaintiffs' allegations." TIAA Mot. 2–3; TIAA Br. 1–2, 4.

Among Plaintiffs' claims is an allegation that Defendants allowed TIAA to receive payments from Plaintiffs' retirement plan ("Plan") in an amount six times greater than the market value of the services that TIAA provided, resulting in Penn employees losing $26 million of their retirement savings due to excessive fees. Pla. Br. 45. TIAA simply disputes the truth of those allegations, asserting that Plaintiffs fail to appreciate the purportedly "distinctive value" of TIAA's services. TIAA Br. 4, 6, 17–22. TIAA similarly disputes the truth of Plaintiffs' allegations that two of its affiliated investment accounts consistently underperformed comparable funds

that charged much lower fees (*see* Pla. Br. 50–52), asserting that the funds had "strong" performance and "reasonable" fees compared to TIAA's hand-picked benchmarks. TIAA Br. 3–4, 11–16, 24–25. While these arguments may be relevant at summary judgment or trial, they are not relevant to the disposition of this appeal.

Although TIAA claims that the facts in its brief are judicially noticeable (*id*. at 6 n.5), that is wrong. TIAA is not merely presenting facts that are "not subject to reasonable dispute[.]" Fed.R.Evid. 201(b). Instead, TIAA largely presents its *opinion* about the purported "value" of its own business (TIAA Br. 4, 6, 8, 19, 22, 27), while making various unsupported assertions. For example, TIAA claims that many of its "largest 200 clients" included the CREF Stock Account in their plans. TIAA Br. 6, 17. Yet TIAA cites no source for this assertion (*see id*.), let alone "sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b)(2).

Moreover, the issue of "objective prudence" that TIAA addresses throughout its proposed brief (TIAA Br. 2, 7–8, 15, 21–22, 26–27), is not relevant to the disposition of this case because Defendants did not raise an objective prudence argument in their brief. Because "arguments not raised in a party's opening brief" are generally deemed waived, courts decline to "consider arguments raised only in amicus briefs." *Wahchumwah*, 710 F.3d at 868 n.2; *Genova*, 734 F.3d at 1102–03 ("an argument developed only by an amicus" is generally disregarded); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir.

1991)(amicus "cannot raise an issue raised by neither of the parties absent exceptional circumstances.").

Here, Defendants do not even refer to the concept of objective prudence until page 41 of its brief, and then only in passing. Def. Br. 41; *see United States v. Penn*, 870 F.3d 164, 169 (3d Cir. 2017)("[A]rguments raised in passing . . . , but not squarely argued, are considered waived.")(quoting *John Wyeth & Brother Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997)). Because Defendants have not developed the issue, TIAA's objective prudence arguments are not relevant to the disposition of this case. *Cf.* Fed.R.App.P. 29(a)(3)(B).

B. The proposed Chamber brief and American Council on Education brief are not relevant to the disposition of this case.

The remaining briefs are similarly irrelevant because they seek to inject additional issues not developed by Defendants.

1. The proposed brief of the American Council on Education argues for a fiduciary standard that is inconsistent with the standard advocated by Defendants. According to the Council, in light of historical differences between 403(b) plans commonly offered by universities and 401(k) plans commonly offered by for-profit companies, courts should apply a different ERISA fiduciary standard to fiduciaries of 403(b) plans. Am. Council Br. 14–18. Defendants, however, make no such argument. Defendants instead argue that their conduct in managing the University of Pennsylvania 403(b) Plan should be assessed under the same standard applied to

the *401(k) plan* fiduciaries in *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011). *E.g.*, Def. Br. 1–3. The Council's brief should thus be rejected as irrelevant.

2. Finally, the proposed Chamber of Commerce brief urges the Court to extend to ERISA fiduciary breach claims the "same approach to pleading" adopted in the context of "antitrust, retaliation, supervisory liability, RICO, and securities" claims. Chamber Br. 18–23. Defendants do not advocate for the adoption of pleading standards developed in disparate areas of law. *Cf*. Def. Br. 15–16. The proposed brief is thus irrelevant.

CONCLUSION

The Court should deny the motions for leave to file amicus curiae briefs.

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Respectfully submitted,

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s/ Jerome J. Schlichter
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April 23, 2018

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