

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 13-2050

**SOUTHERN APPALACHIAN MOUNTAIN
STEWARDS, et al.,**

Plaintiffs-Appellees,

v.

A & G COAL CORPORATION,

Defendant-Appellant.

**PLAINTIFFS-APPELLEES' BRIEF IN OPPOSITION TO MOTION BY AMERICAN
PETROLEUM INSTITUTE, ET AL., FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
AND BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION FOR PAGE
LIMIT EXTENSION**

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Pursuant to this Court's January 8, 2014 request for a response (Doc. 35), Appellees Southern Appalachian Mountain Stewards, Sierra Club and Appalachian Voices (collectively "SAMS") submit this response in opposition.

Introduction

Five industry groups seek leave to file a brief as amici curiae, seeking to add new arguments solely in favor of Appellant A&G Coal Corporation ("A&G"). These five groups are in addition to the three industry groups who have already filed a complete brief as amici curiae (Doc. 23). New amici are unnecessary and their admission would create an unfair opportunity for Appellees' opponents to submit additional, one-sided arguments beyond the applicable page limits.

Argument and Authority

I. The proposed amici would be an unnecessary and inequitable addition to this action.

Federal Rule of Appellate Procedure 29 provides that non-parties may file a brief as amicus curiae only with leave of court. F.R.A.P. 29(a). The rule does not provide a standard for granting such leave but cases hold that amicus curiae, as non-parties to litigation, participate only to assist the court, and their participation lies solely within the discretion of the Court. *E.g., U.S. v. Gotti*, 755 F. Supp. 1157 (E.D.N.Y. 1991).

Although many amicus curiae briefs are no doubt helpful to the Court, the Rule 29 provisions are nonetheless subject to misuse. As the Sixth Circuit Court of Appeals has noted:

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.

United States v. Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991). The Seventh Circuit Court of Appeals has held that leave to file amicus curiae brief should be denied unless a party is not represented competently or 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 (though not enough affected to entitle the amicus to intervene and become a party 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. *Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Further, where it appears that the existing parties are well represented, and where joint consent of the parties is lacking, acceptance of an amicus is “particularly questionable.” *U.S. v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (quoting *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970)). *See also Ferguson v. Brick*, 649 S.W.2d 397, 397-98 (Ark. 1983) (“A form of judicial lobbying is now regularly practiced [by organizations]. . . . Clearly, amicus briefs are merely the most formal of a number of lobbying tactics.”).

This action meets the criteria for denial of the proposed amici’s request. There is no question that Appellant A&G is already ably represented. It has fully briefed the pertinent issues. (Doc. 28). Further, Appellees previously consented to the amicus brief filed on behalf of industry interests. (Doc 23). The existing amici are the Virginia Coal and Energy Alliance, Inc., the Virginia Mining Association, Inc., and the Virginia Mining Issues Group. The existing amici groups represent their numerous member entities. The existing amici are themselves ably represented and have likewise submitted a full brief. Thus, the record of this case already fully reflects an industry perspective on this appeal.

Now, however, a new set of industry groups seeks to file an amicus brief as a separate group of industry amici. The proposed new amici are not appreciably distinct from the existing

amici. For example, the proposed amici include the National Mining Association, a group whose interests are fully represented by the existing amici mining associations. The remaining proposed amici are only remotely related to this action, which pertains to pollutant discharges from coal mining operations. Further, the arguments of the proposed amici are largely policy arguments divorced from the facts of this action.

The proposed amici could have easily joined the existing amici and together drafted an appropriately concise statement of the industry point of view. It would have been sufficient for the Court and fair to the parties. The proposed amici decline that option, however, and insist that each new subset of industry associations be granted leave to file a separate brief. In doing so, the collective amici seek to effectively double the applicable page limit for amicus briefs. F.R.A.P. 29(d). (specifying page limits for amicus briefs). By the reasoning of proposed amici, any additional industry groups should likewise be granted leave to file a new brief, without Appellees' consent, for no other reason than to add to the volume of policy arguments. This is unnecessary, inequitable and it erodes the well-placed limits of Rule 29.

If the Court grants the motion of the proposed amici, Appellees respectfully request an extension of the applicable page limitations. If Appellees must respond to the Appellant and to multiple amici briefs, the length of the Appellees' brief should be expanded accordingly. As stated in a separate motion filed this day, Appellees request that the applicable page limitations of F.R.A.P. 32(a)(7)(A) be increased from 30 to 45, representing an increase of fifty percent.

Conclusion

For the reasons stated above, the Plaintiffs-Appellees respectfully ask that the motion by the proposed amici be denied.

Respectfully Submitted,

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Certificate of Service

I certify that on this day the 22nd of January, 2014, I filed the foregoing with the Court's CM/ECF system, which will send notification to all counsel of record, including:

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