

No. 16-1345

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE VALSPAR CORPORATION AND VALSPAR SOURCING, INC.,

Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,

Defendant-Appellee.

**MOTION OF THE AMERICAN ANTITRUST INSTITUTE
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

The American Antitrust Institute (AAI) respectfully moves this Court for leave to file the accompanying brief as amicus curiae in support of plaintiffs-appellants. Pursuant to Fed. R. App. P. 29(a), amicus sought the consent of all parties to the filing of this brief. Plaintiffs-appellants consent to this filing; defendant-appellee does not consent.

AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through

education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders.¹ AAI frequently appears as amicus curiae in important antitrust cases in the Supreme Court² and lower federal courts.

AAI has filed numerous amicus briefs in this Court, including in several cases in which the Court largely followed the position advanced by AAI. *See King Drug Co. of Florence v. Smithkline Beecham Corp.*, 791 F.3d 388 (3d Cir. 2015); *In re K-Dur Antitrust Litig.*, 686 F.3d 197 (3d Cir. 2012); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007). *But see ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 274 n.11 (3d Cir. 2012) (noting, but rejecting, AAI's argument). AAI has also filed amicus briefs in three recent cases that are pending. *See* Brief in Support of Appellants, *In re Lipitor Antitrust Litig.*, 14-4202 (3d Cir. filed Dec. 28, 2015);

¹ For more information about AAI's activities, publications, and personnel, see <http://www.antitrustinstitute.org>. Individual views of members of the Advisory Board or Board of Directors may differ from AAI's positions. One of AAI's directors was recused from this matter because her law firm is involved in a related pending class action.

² In *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009), AAI was allowed to participate in oral argument before the Court in addition to serving as amicus curiae.

Brief in Support of Appellants, *In Re Effexor XR Antitrust Litig.*, 15-1184 (3d Cir. filed Nov. 17, 2015); Brief in Support of Plaintiff-Appellant, *Mylan Pharm., Inc. v. Warner Chilcott Pub. Co.*, No. 15-2236 (3d Cir. filed Sept. 28, 2015).

I. THE AAI BRIEF SATISFIES THE COURT’S CRITERIA FOR PERMITTING AN AMICUS BRIEF UNDER RULE 29

The criteria set out in Rule 29(b) are met if a putative amicus has “a sufficient ‘interest’ in the case and [its] brief is ‘desirable’ and discusses matters that are ‘relevant to the disposition of the case.’” *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 129 (3d Cir. 2002) (Alito, J.) (quoting rule). In applying the criteria, “a broad reading is prudent” and “it is preferable to err on the side of granting leave.” *Id.* at 132-33. “Even when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.” Micael E. Tigar & Jane B. Tigar, *Federal Appeals—Jurisdiction and Practice* 181 (3d ed. 1999) (quoted approvingly in *Neonatology Associates*, 293 F.3d at 133).

The AAI’s interest is to advance a consumer-oriented legal and policy perspective, which is not represented by the parties, on the development of antitrust conspiracy doctrine in the Third Circuit. *See Neonatology Associates*, 293 F.3d at 132 (where amicus’s interest is to “argue points deemed too far-reaching for emphasis by a party intent on winning a particular case” or to “explain the impact a potential holding might have on an industry or other group,” amicus “may provide

important assistance to the court”). In particular, the AAI brief points to how the district court’s decision, if upheld, would undermine antitrust enforcement and deterrence of price fixing by adopting an unduly restrictive standard for inferring a price-fixing agreement from circumstantial evidence. The AAI brief explains that the rule that merely interdependent oligopoly pricing is not illegal has been stretched to the point of incoherence, and it argues that the threatened harms from oligopoly behavior that is not procompetitive or implausible should inform the standards for inferring an agreement from circumstantial evidence.

AAI also submits that the accompanying brief is “‘relevant’ and ‘desirable’” because its argument regarding the impact of the district court’s holding on consumers injured by future price-fixing agreements “alerts the merits panel to possible implications of the appeal.” *Id.* at 133; *see also id.* (encouraging courts to “grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted”).

For the foregoing reasons, AAI's motion for leave to file the accompanying brief as amicus curiae should be granted.

Respectfully submitted,

s/ Richard M. Brunell

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

s/ Richard M. Brunell