

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

SIGNATURE SOTHEBY'S INTERNATIONAL
REALTY, INC., EXECUTIVE PROPERTY
MAINTENANCE, INC., INTRACO CORPORATION
INC., CASITE INTRACO LLC, BAHASH &
COMPANY LLC d/b/a HILLSDALE
JEWELERS, WILLIAM A. SHORTT,
D.D.S., & THERESE F. SHORTT, D.D.S, d/b/a
SHORTT DENTAL, and MIDWEST CARWASH
ASSOCIATION,

Plaintiffs,

v.

GRETCHEN E. WHITMER and
ROBERT GORDON,

Defendants.

No. 1:20-cv-00360

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

**REPLY BRIEF IN SUPPORT OF *AMICI CURIAE*
MICHIGAN EPIDEMIOLOGISTS' MOTION FOR LEAVE
TO FILE BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Jennifer L. McManus (P65976)
FAGAN MCMANUS, P.C.
25892 Woodard Avenue
Royal Oak, MI 48067-0910
Telephone: (248) 542-6300
Facsimile: (248) 542-6301
jmcmanus@faganlawpc.com

Joshua Matz
Raymond P. Tolentino
Jonathan R. Kay
Mahrah M. Taufique
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
Telephone: (212) 763-0883
Facsimile: (212) 564-0883
jmatz@kaplanhecker.com
rtolentino@kaplanhecker.com
jkay@kaplanhecker.com
mtaufique@kaplanhecker.com

Attorneys for Amici Curiae

Amid a pandemic that has touched all corners of Michigan, Plaintiffs seek to prevent the Court from even considering a brief submitted by 15 of Michigan’s leading, bipartisan public health experts and epidemiologists. This position is without merit. *Amici* have complied with Local Civil Rule 7.1(d). They are well positioned to serve as “friends of the court” and to aid the Court’s decisional process. And their filing is properly considered at this stage of the case. For these reasons, *amici* respectfully submit that this Court should grant leave to file their brief.

I. *AMICI* COMPLIED WITH LOCAL CIVIL RULE 7.1(d).

On June 10, 2020, counsel for *amici* sought consent from both Plaintiffs and Defendants for their motion for leave to file a brief “on behalf of epidemiologists and public health scholars with professional expertise on the transmission of infectious diseases in Michigan.” The next day, counsel for Plaintiffs offered a categorical response: they declined to offer consent because they did not “see any basis, factual or legal, for outside *Amici* interest.” Plaintiffs also noted that they would not consent because counsel for *amici* had not identified their “group of clients.” Because Plaintiffs had taken a categorical position about the role of *amici*—and because nothing about their e-mail suggested that they would consent if provided with a list of specific epidemiologists and public health scholars—there were obviously irreconcilable differences between the parties. Rather than persist in a futile dialogue, counsel for *amici* formally acknowledged Plaintiffs’ refusal to consent and filed their motion on June 12, 2020.

This course of conduct was perfectly consistent with W.D. Mich. Local Rule 7.1(d). “The importance of the communication required by [Local] rule [7.1(d)] cannot be overstated.” *ECM Converting Co. v. Corrugated Supplies Co., LLC*, No. 1:07 Civ. 386, 2009 WL 385549, at *2 (W.D. Mich. Feb. 13, 2009) (Maloney, C.J.). Recognizing that fact, counsel for *amici* communicated with Plaintiffs’ counsel in good faith and sought their concurrence before filing this

motion. These steps fulfill the requirements of 7.1(d). *See Griffin v. Reznick*, 609 F. Supp. 2d 695, 704–05 (W.D. Mich. 2008) (Maloney, C.J.) (finding Rule 7.1(d) satisfied where counsel sought concurrence by email and opposing counsel responded, “I will object to the motion. I see no basis for a motion for summary [judgment] on your part.”); *Bell-Coker v. City of Lansing*, No. 1:7 Civ. 812, 2009 WL 891722, at *1–3 (W.D. Mich. Apr. 1, 2009) (Maloney, C.J.) (finding Rule 7.1(d) satisfied where counsel had sent email requesting concurrence and received no response).

Plaintiffs’ suggestion that *amici* should have followed up after Plaintiffs articulated their position is misplaced. It was evident that Plaintiffs and *amici* had reached an impasse on June 11, 2020. Further discussion would not have changed the fact that Plaintiffs saw no “basis, factual or legal, for outside *Amici* interest, especially at this early stage of the proceedings.” Under these circumstances, counsel for *amici* were under no obligation under Local Rule 7.1(d) to share their brief with Plaintiffs before filing or to provide them with a detailed list of signatories. Plaintiffs’ Opposition only confirms their categorical position—and thus further confirms that a follow-up phone call would have been an exercise in futility. *Cf. Aslani v. Sparrow Health Sys.*, No. 1:8 Civ. 298, 2008 WL 4642617, at *1 (W.D. Mich. Oct. 20, 2008) (Maloney, C.J.) (“The applicable local rule does not state that the movant may or must use only the telephone to attempt to obtain concurrence, and the court finds no decisions interpreting the rule that way.”).

II. *AMICI* OFFER A USEFUL, NONPARTISAN PERSPECTIVE.

In deciding whether “to allow an appearance as *amicus curiae*” under their inherent authority, district courts consider—among other things—“the usefulness of the brief.” *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, No. 1:15 Civ. 1191, 2017 WL 11454764, at *1 (W.D. Mich. Oct. 30, 2017) (Maloney, C.J.). Here, Plaintiffs suggest that the proposed *amicus* brief is not useful. According to Plaintiffs, *amici* are at once *insufficiently* knowledgeable about the

COVID-19 pandemic in Michigan and yet *too* knowledgeable about the Governor’s response to the pandemic. (*See Opp.* at 1, 3-4). Both of these arguments miss the mark.

First, *amici* include some of Michigan’s leading experts on public health, epidemiology, and infectious disease. They have served as professors and researchers in Michigan; they have worked on the front lines in Michigan hospitals; and they have held senior public health and epidemiological roles in both Democratic and Republican administrations here in Michigan. There is no merit to the claim that they lack a useful perspective on the issues before the Court.¹

Second, as confirmed by their credentials and professional backgrounds, *amici* offer a neutral, scientific, and bipartisan perspective. Plaintiffs claim otherwise by asserting that they might, at some point, designate two *amici* (Dr. Emily Martin and Dr. Marisa Eisenberg) as witnesses. Given the sheer number of experts who have advised policymakers in Michigan—far, far more than could ever reasonably be called as witnesses—this appears to be an effort to use a speculative fact-witness designation as a sword to exclude consideration of *amici*’s entire brief (and to imply a partisan agenda).² That effort should not be validated. Dr. Martin and Dr. Eisenberg stand in the company of many other experts from diverse backgrounds who all agree on the contents of the brief. To the extent this Court’s determination turns on their inclusion, however, they are prepared to withdraw as *amici*, leaving the remaining 13 Michigan scientists.

¹ In addition to their criticism of *amici*, Plaintiffs imply that there is something improper about *amici*’s retention of a “New York law firm.” We are aware of no policy or practice barring a “New York law firm” from representing clients in Michigan or appearing in this Court. The undersigned counsel have all been duly admitted to practice in the Western District of Michigan—and include lawyers with substantial, unique experience representing public health experts. Moreover, *amici* are also represented by well-respected members of the Michigan bar at Fagan McManus, P.C. Plaintiffs’ insinuation of improper out-of-state interference is offensive and mistaken.

² Plaintiffs also state that Dr. Martin and Dr. Eisenberg may be “admitted as expert witnesses in this matter.” (*Opp.* at 7). *Amici* are unaware of any efforts made to retain Dr. Martin or Dr. Eisenberg as expert witnesses here.

III. *AMICI'S* BRIEF MAY PROPERLY BE CONSIDERED AT THIS STAGE.

The Court can and should consider *amici's* submission in evaluating the issues before it. As a threshold matter, courts within the Sixth Circuit routinely welcome contributions from *amici curiae* at the pleadings stage. *See, e.g., Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 680 (6th Cir. 2016) (relying on statistics from *amicus* briefs in appeal of motion to dismiss); *F.H. ex rel. Hall v. Memphis City Sch.*, 764 F.3d 638, 640 (6th Cir. 2014) (considering argument and briefing from *amici curiae* in appeal of motion to dismiss); *Brott v. United States*, No. 1:15 Civ. 38, 2016 WL 5922412, at *1 (W.D. Mich. Mar. 28, 2016), *aff'd*, 858 F.3d 425 (6th Cir. 2017) (accepting *amicus* briefs in considering motion to dismiss). In suggesting otherwise, Plaintiffs rely almost completely on a Seventh Circuit case. (Opp. at 5 (citing *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003))). But the Seventh Circuit maintains a stricter bar on *amici* involvement than this Court. *See, e.g., Kollaritsch*, 2017 WL 11454764, at *1; *see also United States v. Columbus*, No. 2:99 Civ. 1097, 2000 WL 1745293, at *1 (S.D. Ohio Nov. 20, 2000) ("Factors relevant to the determination of amicus status [in the Sixth Circuit] include whether or not the proffered information is timely, useful, or otherwise necessary to the administration of justice." (quotations and citations omitted)).

For the reasons we have already given, *amici's* proposed brief is not only appropriate but also helpful in resolving the issues at hand. (*Amici Mot. For Leave* at 2-3). To start, *amici's* data regarding how the Governor's public health interventions can be refined in highly fact-dependent ways are directly relevant to Defendants' position that Plaintiffs' claims are not ripe in a pre-enforcement setting and provides important context for the Governor's actions affecting Plaintiffs. *See* (MTD Br. at 18-21); *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003) (requiring consideration of "the extent to which the legal analysis would benefit from having a concrete

factual context” and how “the enforcement authority’s legal position is subject to change before enforcement”).

In addition, the data that *amici* summarize are crucial to an assessment of whether and how to apply the deference doctrine articulated in *Jacobson v. Massachusetts*. See *South Bay*, 590 U.S. ___, at ___ (Roberts, C.J., concurring) (slip op. at 2) (“The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States to guard and protect.” (citing *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905))). We are unaware of any case holding that a plaintiff may tactically plead its way around this binding deference rule by ignoring relevant facts and objecting to *amicus* briefs illuminating the issue.

Finally, much of the information set forth in *amici*’s brief is derived from public records, subject to judicial notice, and incorporated by reference into the First Amended Complaint (which discusses various WHO and CDC publications). See, e.g., *Cooper v. Honeywell Int’l, Inc.*, No. 1:16 Civ. 471, 2019 WL 912123, at *4 (W.D. Mich. Feb. 21, 2019). In light of that, the Court can and should account for *amici*’s submission in undertaking the balancing required by many of Plaintiffs’ claims. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (equal protection); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (dormant commerce clause); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216-17 (6th Cir. 1992) (due process).

* * * * *

Although this *amicus* submission complies with all relevant rules and is properly before the Court, Plaintiffs appear eager to deprive the Court of the scientific perspective afforded by *amici*. That is unfortunate. Given Plaintiffs’ professed commitment to a proper understanding of

the threat posed by COVID-19 in Michigan, it is dismaying that they seek to rid these proceedings of a brief authored by Michigan's leading authorities on public health and epidemiology.

CONCLUSION

For the reasons set forth above, *amici* respectfully request that the Court grant their motion for leave to file a brief in support of Defendants' motion to dismiss.

Dated: July 2, 2020

Respectfully submitted,

/s/ Jennifer L. McManus

Jennifer L. McManus (P65976)

FAGAN McMANUS, P.C.
25892 Woodard Avenue
Royal Oak, MI 48067-0910
Telephone: (248) 542-6300
Facsimile: (248) 542-6301
jmcmanus@faganlawpc.com

/s/ Joshua Matz

Joshua Matz
Raymond P. Tolentino
Jonathan R. Kay
Mahrah M. Taufique

KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
Telephone: (212) 763-0883
Facsimile: (212) 564-0883
jmatz@kaplanhecker.com
rtolentino@kaplanhecker.com
jkay@kaplanhecker.com
mtaufique@kaplanhecker.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

Attorney for *amici curiae* certifies that on July 2, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Michigan by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ Joshua A. Matz
Joshua A. Matz
Attorney for *Amici Curiae*
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
Telephone: (212) 763-0883
Facsimile: (212) 564-0883
jmatz@kaplanhecker.com

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