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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Ralph King Anderson, III, Chief Judge

Case No. 2017-ALJ-17-0418-CC
Appellate Case No. 2020-000999

Synovus Bank,

Appellant,

v.

South Carolina Department of Revenue,

Respondent.

**FIRST CITIZENS BANK & TRUST COMPANY'S REPLY
TO RESPONDENT'S OPPOSITION TO FIRST CITIZENS BANK & TRUST COMPANY'S
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

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I. PROCEDURAL BACKGROUND

On March 13, 2023, under Rule 213 of the South Carolina Appellate Court Rules (SCACR), First Citizens Bank & Trust Company (“First Citizens”) filed with this Court a Motion for Leave to File an Amicus Brief in the instant case of Synovus Bank v. the South Carolina Department of Revenue. Under SCACR 240(e) the Respondent (“SCDOR”) filed its opposition on March 23, 2023 and listed three reasons this Court should deny the motion.

II. ANALYSIS AND RESPONSE TO SCDOR’S OPPOSITION TO AMICUS STATUS

First, SCDOR says the motion “should be considered untimely”. (SCDOR Opposition, p. 2). Second, First Citizens is an “interested party and biased advocate for [Synovus]”. (SCDOR

Opposition, p. 2). Third, First Citizens “reargues points already raised by [Synovus]” while providing no “unique information or perspective that will assist the Court”. (SCDOR Opposition, p. 2). While the three reasons warrant no denial of First Citizens’ motion, before addressing each reason, First Citizens presents for the Court’s consideration a review of SCDOR’s incorrect statement of the Legal Standard for Granting Leave to File an Amicus Brief.

A. SCDOR Proposes an Inappropriate Legal Standard for Granting or Denying a Motion for Leave to File an Amicus Brief

SCACR 213 sets a two-criteria standard for granting or denying a request for amicus status: (i) evaluate “the interest of the applicant” relative to the dispute before the Court and (ii) identify “the reasons why a brief of an amicus curiae is desirable”. Those criteria decide First Citizens’ amicus status. However, SCDOR abandons Rule 213’s two-criteria standard by urging the Court to review First Citizens’ amicus request under federal law interpreting federal procedural rules.

SCDOR tells the Court:

[A]n amicus brief **should only be permitted** if the ‘proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice.’” [*United States v. State of Mich.*, 940 F.2d [143] at 165 [(6th Cir. 1991); see also *Ryan [v. Commodity Futures Trading Com’n]*, 125 F.3d [1062] at 1063 [(7th Cir. 1997)] (identifying limited circumstances when amicus should be allowed, including “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”). (Emphasis added.)

SCDOR Opposition p. 3.

The above Sixth Circuit and Seventh Circuit standards urged upon the Court by SCDOR apply to a South Carolina matter a litany of federal standards derived from federal rules applied in federal amicus disputes.¹ And surprisingly, given that the dispute is before the South Carolina Court of

¹ SCDOR’s Opposition relies extensively on amicus disputes controlled by federal law, not South Carolina law. SCDOR urges the Court to adopt *United States v. State of Mich.*, 940 F.2d 143 (6th Cir. 1991); *Ryan v. Commodity Futures Trading Com’n*, 125 F.3d 1062 (7th Cir. 1997), *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177 (D. Nev. 1999); *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.* 149 F.R.D.

Appeals, SCDOR cites to only one South Carolina amicus case and does so for the unremarkable conclusion no duty exists to grant an amicus request.² SCDOR Opposition p. 2.

First Citizens does not intend to be flippant but must state the obvious. The motion here is before South Carolina's Court of Appeals, not before a federal court. What our South Carolina appellate courts have to say about amicus briefs is more compelling than what a federal court interpreting federal rules may think. First Citizens suggests South Carolina law is the more appropriate source for applying Rule 213 than are federal cases construing federal rules. *State v. Austin*, 306 S.C. 9, 16, 409 S.E.2d 811, 815 (Ct. App. 1991) (“[T]wo separate and independent judicial systems [exist]: federal courts, which construe federal law, and state courts, which construe state law.”) Hence, South Carolina law is applied to each of the three reasons SCDOR relies upon to oppose First Citizens' request of amicus status.

B. The Three Reasons Raised by SCDOR Relative to First Citizens' Request for Amicus Status Are Insufficient to Deny First Citizens' Motion

SCDOR provides three reasons this Court should deny First Citizens' amicus request. SCDOR Opposition p. 2. Each is addressed here.

1. First Citizens' Motion for Amicus Status Is Timely

The facts of the dispute between First Citizens and SCDOR show the request for amicus status was timely. The dispute between First Citizens and SCDOR arises from a disagreement on

65 (D.N.J. 1993); *Alexander v. Hall*, 64 F.R.D. 152 (D.S.C. 1974); and *Yip v. Pagano*, 606 F. Supp. 1566 (D.N.J. 1985), aff'd, 782 F.2d 1033 (3d Cir. 1986).

² But even the cited South Carolina amicus-case is unhelpful. *Cook v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 179, 420 S.E.2d 847 (1992) addresses an appellate review of a denial by a lower court of a request for amicus status. In that case, the Court held an appellate court reviews a lower court's denial of amicus status by applying an abuse of discretion standard. *Cook* is unhelpful here since First Citizens' request in the instant case is an original request with the appellate court for an amicus status, not an appeal of a denial of an amicus request by a lower court. Thus, *Cook's* abuse of discretion holding is irrelevant to First Citizens' request for amicus status.

whether First Citizens is entitled to a refund of bank taxes. SCDOR believes no refund is due and that belief required First Citizens to pursue its administrative remedies within the internal structure at SCDOR. At each SCDOR stage from the Audit Division to the Appeals Section to General Counsel, First Citizens engaged in good-faith resolution negotiations. During those discussion stages, filing a motion for amicus status with the Court of Appeals would have been inconsistent and detrimental to the good-faith deliberations of the parties. In fact, both parties were discussing settlement possibilities in February 2023. However, once SCDOR and First Citizens conclusively determined in mid-February 2023 that settlement was impossible, First Citizens promptly moved for amicus status on March 13, 2023. Under the circumstances of the refund dispute between First Citizens and SCDOR, First Citizens filed its request for amicus status timely.³

Beyond the facts showing a timely request for amicus status, as a matter of law, the request is not time-barred. Rule 213 sets no time limit within which to seek an amicus status. In promulgating Rule 213, the enacting body shows it knows how to set time limits for amicus briefs. Rule 213 (“If leave to file an amicus curiae brief is granted, the appellate court will specify the period in which a response to the brief may be filed.”). (Emphasis added.) The promulgating authority creating limiting periods for certain aspects of amicus briefs but setting no limiting period for seeking an amicus status means the enacting body intended no limiting period for requesting the status of amicus. *See e.g., Pee Dee Health Care, P.A. v. Est. of Thompson*, 424 S.C. 520, 531, 818 S.E.2d 758, 764 (2018) (“In respect to timing, therefore, the plain meaning of Rule 11's lack

³ In all events, the earliest any request for amicus status can be filed is after the parties have filed their initial briefs since “[t]he [amicus] brief [is] limited to argument of the issues on appeal as presented by the parties.” Rule 213. Thus, knowing what issues the parties have presented cannot arise until initial briefs are filed. From that perspective, the earliest an amicus brief could have been filed in the instant case was January 2021. However, as addressed in the body of this Reply, filing in January 2021 was not realistic since First Citizens continued to work toward resolution of its dispute with SCDOR as late as February 2023.

of [a] specific time limit is . . . there is no specific time limit.”). Thus, both under the facts of this request and under the law governing the period in which to file a request for amicus status, First Citizens filed its request timely.

2. First Citizens Is Not Precluded from Obtaining Amicus Status by SCDOR’s Labeling of First Citizens as a “Biased Advocate for Synovus”

Rule 213 controls a request for amicus status and sets no criteria excluding an applicant based on the applicant holding a view favorable to one party to the dispute. In fact, under Rule 213, having an interest (rather than being “disinterested” as suggested by SCDOR) is required since Rule 213 demands the moving party “identify the interest of the applicant” in the dispute.

First Citizens’ motion explains its interest in the Synovus case is a belief a decision in Synovus will affect First Citizen’s dispute with SCDOR since First Citizens has essentially the same issue in its dispute with SCDOR as Synovus has in its dispute pending at the Court of Appeal. Thus, First Citizens demonstrates a strong interest in the Synovus case.

SCDOR does not dispute First Citizens has a strong interest in the Synovus case. Instead, SCDOR claims “First Citizens is not an impartial friend of the court.” SCDOR Opposition p. 4. And, more pointedly, SCDOR asserts “First Citizens is an interested, partisan, advocate for [Synovus].” SCDOR Opposition p. 4. Thus, the deciding question asks what is the law on granting amicus status to a “partisan” as SCDOR labels First Citizens.

South Carolina case law does not deny an applicant amicus status just because the applicant may hold a view favorable to one party to the dispute. *See e.g. S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 403 S.C. 366, 367, 744 S.E.2d 500 (2013) (“the State Retirees Association of South Carolina moves to be allowed to file a response as an amicus curiae in support of the position taken by the petitioner. This motion is granted.”); *see e.g. Bone v. U.S. Food Serv.*, 404 S.C. 67, 83, 744 S.E.2d 552, 561 (2013) (“The [South Carolina Defense Trial Attorneys’] Association has filed an Amicus

Curiae Brief in support of Petitioners, [U.S. Food Service.]”); *State v. Osborne*, 335 S.C. 172, 174, 516 S.E.2d 201, 202 (1999) (“The Office of the Attorney General has filed an amicus curiae brief essentially supporting [the South Carolina Department of Public Safety’s] argument.”); *Ex parte Dibble*, 279 S.C. 592, 594, 310 S.E.2d 440, 442 (Ct. App. 1983) (“The Richland County Bar appears Amicus Curiae and joins generally in [the] argument [of Appellants Dibble and Dial].”).

Here, the “partisan” nature of First Citizens’ circumstances arises only from First Citizens’ being a member of the banking community and conducting a banking business in South Carolina. Motion p. 2. First Citizens assures the Court the issue in Synovus “affects every bank doing a banking business in South Carolina, whether foreign or domestic.” Motion p. 2. First Citizens further assures the Court the disputed Synovus “deductions [do not raise] an isolated controversy focused on a single bank.” Motion p. 2. And, First Citizens’ motion makes clear “the controversies in Synovus and First Citizens both raise similar issues and create a likelihood this Court’s decision in Synovus will have a significant—if not controlling—impact on First Citizens’ dispute with SCDOR.” Motion p. 2.

While South Carolina law controls the meaning and application of Rule 213, even federal law—the mainstay of SCDOR’s opposition authority—grants First Citizens’ request for amicus status. The standard rule under federal law, oddly enough, is articulated by the very case SCDOR presents to this Court as a basis for denying First Citizens’ request for amicus status: *Ryan v. Commodity Futures Trading Com’n*, 125 F.3d 1062 (7th Cir. 1997).

SCDOR cites *Ryan* as holding “briefs . . . filed by allies of litigants . . . duplicate the arguments made in the litigants’ briefs, [which,] in effect[,] merely extend[] the length of the litigant’s brief . . . [and such amicus briefs] should not be allowed [since t]hey are an abuse.” *Ryan v. Commodity Futures Trading Com’n*, 125 F.3d 1062, 1063 (7th Cir. 1997). However, SCDOR’s

normally skillful scholarship falters in failing to inform the Court the *Ryan* case has a second more affirmative holding, one that identifies circumstances in which amicus status is granted. *Ryan* declares “[a]n amicus brief should normally be allowed . . . when the amicus has an interest in some other case that may be affected by the decision in the present case.” *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). All agree First Citizens “has an interest in some other case that may be affected by the decision in the [Synovus] case” since First Citizens has the same NOL issue in dispute at the SCALC that Synovus has in dispute at the SC Court of Appeals.⁴

Accordingly, based on all the above, First Citizens has a strong interest in the dispute before the Court. Further, South Carolina’s appellate Courts historically and routinely allow applicants to achieve amicus status even if the “interest of the applicant” coincides with the views of one party

⁴ SCDOR’s affinity for federal law dissipates in the face of *Ryan*’s granting amicus status if the applicant has an “interest in some other case”. First Citizens assumes SCDOR’s research revealed *Ryan*’s holding of granting amicus status when an “interest in some other case” exist and that realization forced SCDOR to a decision: (i) cite the Court to *Ryan*’s holding granting amicus status if the applicant has an “interest in some other case” followed by an explanation of why that holding should not apply to First Citizens or (ii) remain silent on *Ryan*’s “interest in some other case” holding while continuing to champion federal law as a basis for denying First Citizens’ amicus request. SCDOR opted not to cite *Ryan*’s holding of an “interest in some other case” followed by an explanation of why that holding should not apply to First Citizens. Instead, with no mention of *Ryan*, SCDOR points the Court to Louisiana law through *Barfield v. Bolotte*, 185 So. 3d 781, 784 (La. App. 1 Cir. 12/23/15). SCDOR presents that case as evidence amicus status can be denied even when the amicus applicant has similar claims pending in other cases at a judicial or administrative tribunals. SCDOR Opposition p. 4. But that is not what *Barfield* says. A reasoned reading of the case shows the amicus status was denied primarily because “the . . . amicus curiae brief raises issues and theories of law . . . not considered by the BTA or district court and . . . not . . . raised by the parties involved in this appeal. The law is well settled that issues not raised by the parties cannot be raised by amicus curiae on appeal.” Accordingly, regardless of whether the *Ryan*’s holding granting amicus status if the applicant has an “interest in some other case” is cited or no cited to the Court by SCDOR, First Citizens cites *Ryan* to the Court for that proposition to the extent federal law is of any relevance to Rule 213. Thus, neither federal law nor Louisiana law prevents this Court from granting amicus status to First Citizens since First Citizens falls within *Ryan*’s “interest in some other case” holding.

to the controversy. Plus, even under federal law, an applicant for amicus status will be approved “when the amicus has an interest in some other case that may be affected by the decision in the present case. *Id.* Thus, First Citizens should not be denied amicus status.

3. First Citizens Does Not Reargue Points Already Raised by Synovus or SCDOR But Instead Presents Unique Information and Perspectives

Rule 213 asks the amicus applicant to explain why an amicus brief is desirable for the Court. In its motion, First Citizens first states an amicus brief is desirable because it “offers insight establishing SCDOR’s action on NOL carryforward deductions is not an isolated controversy focused on a single bank but affects every bank doing a banking business in South Carolina.”⁵ First Citizens’ Motion p. 2. Second, First Citizen tells the Court “First Citizens’ brief seeks to place “‘entire net income’ in its historical context clarifying the application of the term to banks operating in South Carolina.” First Citizens’ Motion p. 2

Thus, the issue at the Motions stage is whether an amicus brief is desirable for the Court. In reviewing SCDOR’s objection to First Citizens’ request for amicus status, the Court is invited to observe SCDOR’s emphasis on rhetoric instead of analysis:

Because the amicus brief’s entire argument is premised on a logical fallacy built on the mischaracterization of a 100 year old case interpreting an Act that was subsequently repealed and completely replaced, [First Citizens amicus brief] offers no useful information to the Court and should be rejected.

SCDOR Opposition p. 8.

⁵ SCDOR’s Opposition does not challenge First Citizens’ offering that an amicus brief is desirable to the Court by providing insight showing SCDOR’s action on NOL carryforward deductions is not an isolated controversy focused on a single bank but instead SCDOR’s action affects every bank doing a banking business in South Carolina. Hence, at least one desirable benefit provided by an amicus brief from First Citizens is not objected to and is apparently acceptable to SCDOR as a viable basis for desirability of an amicus brief. Hence, no further discussion of that benefit is addressed here.

Whether an amicus brief is desirable is not solved by characterizing First Citizens’ “entire argument” presents logical fallacies or making blanket conclusions First Citizens’ amicus brief “offers no useful information.” Rather, examining what “useful information” First Citizens presents is a more promising approach.

As to useful information relative to the historical context of “entire net income”, SCDOR summarily finds no useful information can exist since its short review of the dates covered by the Appellate Briefs filed by Synovus causes SCDOR to conclude “[i]t is hard to imagine a more historical analysis than Appellant’s decade-by-decade survey.” SCDOR Opposition, p. 5. By the following, First Citizens hopes to expand SCDOR’s imagination.

The proposed amicus brief assists this Court by addressing the heart of the Synovus dispute. What is the meaning of “entire net income”? That meaning is found in the historical context as that term was understood in 1937, the year the term was first applied to the taxation of banks.

In that context, useful information results from an amicus brief since no party to the Synovus dispute, whether SCDOR or Synovus, presents the Court an analysis of the meaning of the term in 1937 as used on a regional basis by South Carolina’s neighboring states. The term “entire net income” in 1937 was not unique to South Carolina. The term’s use by neighboring states and the meaning given by those states assists this Court in interpreting the meaning in South Carolina as applied to banks.

Further useful information results since no party, whether SCDOR or Synovus, presents to the Court an analysis of the meaning of the term “entire net income” on a nationwide basis. The term is still in use today in South Carolina and remains in use in several states across the United States. An analysis of how the term is employed in South Carolina’s sister states will assist the Court in deciding the meaning of the term in South Carolina.

In addition, no party, whether SCDOR or Synovus, presents to the Court an analysis of how our General Assembly imposes a tax when it wishes to base a tax on financial accounting. The information on how the General Assembly accomplishes that goal is provided in the amicus brief's analysis of the corporate license tax in Chapter 20 of Title 12. The method for setting financial accounting concepts as a tax base can be compared to the method the General Assembly used to set the basis for the bank tax. Such a comparison is desirable information for the Court's review.

III. CONCLUSION

Based on all the above, First Citizens' motion for amicus status should be granted. The objections raised by SCDOR do not prevent First Citizens from achieving amicus status. First, First Citizens filed its motion timely within the scope of Rule 213. Second, First Citizens is not precluded from receiving amicus status simply due to its position being favorable to one party to the Synovus dispute. And third, First Citizens is not rearguing points already raised by the parties but instead provides useful information desirable to the Court. The motion seeking amicus status by First Citizens should be granted since the amicus brief presents new insights and fresh approaches to issues already raised by the parties without raising new issues beyond the scope of an amicus.

s/ Rick Reames III

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Columbia, South Carolina

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CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above **Reply to Respondent's Opposition to First Citizens Bank & Trust Company's Motion for Leave to File an Amicus Curiae Brief** was served this 27th day of March, 2023 via Electronic Mail to the following counsel of record:

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Subject: Synovus Bank v. SCDOR, Appellate Case No. 2020-00099
Date: Monday, March 27, 2023 4:17:00 PM
Attachments: [2023.03.27 - Ltr to SC Ct. App. filing First Citizen's Reply to SCDOR Opposition to Motion to File Amicus Brief.pdf](#)
[2023.03.27 - First Citizen's Reply to SCDOR's Opposition to Motion to File Amicus Brief \(Synovus Bank v. SCDOR\).pdf](#)
[2023.03.27 - Certificate of Service \(Reply to SCDOR's Opposition to Amicus Brief\) \(Synovus Bank v. SCDOR\).pdf](#)

All,

Please see attached First Citizens Bank & Trust Company's Reply to Respondent's Opposition to First Citizens Bank & Trust Company's Motion for Leave to File an Amicus Curiae Brief. We are serving this Reply on you in accordance with SCACR Rule 240, and Supreme Court of South Carolina Order 2022-05-06-03.

Do not hesitate to contact me if you have any questions or comments.

Thanks,

Andrew Saleeby

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Nexsen Pruet has agreed to merge with Maynard Cooper & Gale on April 1, 2023.

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VIA ELECTRONIC MAIL (CTAPPFILINGS@SCCOURTS.ORG)

The Honorable Jenny Abbot Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Synovus Bank v. SC Department of Revenue***
Appellate Case No. 2020-000999

Dear Ms. Kitchings:

Please find enclosed for filing First Citizens Bank & Trust Company's Reply to Respondent's Return in Opposition to the Motion for Leave to File an *Amicus Brief* of First Citizens Bank & Trust Company in the matter referenced above. Pursuant to Rule 262(a)(3), SCACR, and Supreme Court Order 2022-05-06-03 section (b), the attached filing is being made to the email address of the Court of Appeals. As also permitted by Supreme Court Order 2021-08-25-03, we are not enclosing any additional copies; however, we are happy to provide additional copies upon the Court's request.

By copy of this letter, and also pursuant to Rule 240, SCACR, we are serving a copy of our Reply on all parties of record.

Thank you for your assistance.

Sincerely,

s/ Andrew W. Saleeby

Andrew W. Saleeby
Special Counsel

cc: Ashley P. Cuttino, Esq. (*all via e-mail only*)
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