THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Amazon Services, LLC, ...Appellant,

v.

South Carolina Department of Revenue, ...Respondent.

RESPONDENT'S RETURN IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF OF THE SOUTH CAROLINA MANUFACTURERS ALLIANCE

SOUTH CAROLINA DEPARTMENT OF REVENUE
Jason P. Luther (Bar No. 78021)
P.O. Box 12265
Columbia, SC 29211
(803) 898-5131

WILLOUGHBY & HOEFER, P.A.
John M.S. Hoefer (Bar No. 2549)
Tracey C. Green (Bar No. 9342)
Chad N. Johnston (Bar No. 73752)
John W. Roberts (Bar No. 78889)
Andrew R. Hand (Bar No. 101633)
P.O. Box 8416
Columbia, SC 29202
(803) 252-3300

THE ACQUAVIVA LAW FIRM, LLC
Lauren Acquaviva (Bar No. 100528)
672 Marina Drive, Suite 101
Charleston, SC 29492
(843) 216-7728

Attorneys for Respondent

Pursuant to Rules 213 and 240(e) of the South Carolina Appellate Court Rules ("SCACR"), Respondent South Carolina Department of Revenue (the "Department") respectfully submits this return in opposition to the Motion for Leave to File an *Amicus Curiae* Brief of the South Carolina Manufacturers Alliance ("SCMA") filed on June 1, 2021 (the "Motion").

PROCEDURAL POSTURE

This is an appeal from the final agency decision of the Administrative Law Court ("ALC") as to the Department's determination and assessment of sales and use tax, penalties, and interest (the "Determination") against Appellant Amazon Services, LLC ("Amazon"). The Department had determined that Amazon was not collecting and remitting sales and use tax in accordance with South Carolina law. Amazon filed a request for contested case hearing with the ALC challenging the Determination on July 21, 2017. An evidentiary hearing was held on February 4–6, 2019, and on September 10, 2019, the ALC issued its Final Order affirming the Department's Determination. Neither the SCMA nor any other *amici* sought to intervene or file briefs with the ALC during the contested case proceedings. On October 10, 2019, Amazon filed its Notice of Appeal in this matter. Briefing of the appeal is complete, with the parties having filed their respective final briefs on June 11, 2020. The SCMA filed the instant Motion seeking leave to file an *amicus curiae* brief pursuant to Rule 213, SCACR on June 1, 2021. SCMA's Motion is the sixth such motion to be filed by various *amici* seeking to support Amazon in this appeal.

STANDARD

Rule 213, SCACR requires a moving party to "identify the interest of the applicant" and also to "state the reasons why a brief of an amicus curiae is desirable." "A brief of an amicus curiae (literally 'friend of the court') may be filed only after obtaining leave of the appellate court via motion or at the appellate court's request." Jean Hoefer Toal, et al., Appellate Practice in South

Carolina 439 (3d ed. 2016). The determination of whether to grant leave to file a brief as an *amicus curiae* under Rule 213, SCACR, is within this Court's discretion. *See, e.g.*, *Cook v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 179, 184, 420 S.E.2d 847, 850 (1992) (finding no abuse of discretion in the granting of leave to file an *amicus curiae* brief). "An amicus brief should normally be allowed when a party is not represented competently or is 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 Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J.).

ARGUMENT

In what has become a bromidic refrain by various Amazon-aligned trade and advocacy groups that have sought to prop up Amazon's position in this appeal, SCMA's stated reason for seeking leave to file an *amicus curiae* brief in this case is that, if the ALC's Final Order appealed from is allowed to stand, SCMA's members are going to be so confused about their tax obligations under South Carolina law that it will be "difficult, if not impossible, to make sound investment decisions that are critical to business success." (Motion at 2). This sensational and unfounded argument is now familiar to the Court, having been advanced by other Amazon-aligned *amici* several times, and also responded to and refuted by the Department in each instance.

Rather than respond in full for the purposes of this Motion, the Department respectfully refers the Court to its prior responses to this argument. In short, there was nothing unfair or unpredictable about the Department's assessment of Amazon for sales and use tax in this case—particularly where Amazon lobbied for and received a moratorium against the collection of these

taxes for five years as a part of the incentive package it received to locate its distribution facility in Lexington County—nor was there anything unfair or unpredictable about the ALC's thorough and well-reasoned order in this case. Both applied the plain language of the South Carolina Sales and Use Tax Act (the "Act") as it existed for the period in question to the particularities of Amazon's business model to determine Amazon's liability for those taxes. This is evident from the legal arguments and evidence advanced by the parties in the case below and considered by the ALC, as well as the text of the ALC's order itself, all of which appear to evade the attention of Amazon's *amici*. Moreover, there is abundant evidence that Amazon itself was neither prejudiced nor surprised by the Department's assessment in this case, rendering this argument even more hollow. Thus, the stated interest of SCMA is a non-existent one, and the arguments offered in its brief will not assist the Court in this matter, rendering the brief undesirable for the purposes of Rule 213, SCACR.

Further compounding the undesirability of its brief, SCMA asserts arguments that are contrary to the undisputed facts and the record below. Notably, SCMA's brief asserts throughout that the Department's assessment of Amazon in this case somehow violated a "longstanding interpretation" of the Act held by the Department. However, neither the Department nor Amazon has ever asserted that the Department possessed a long-standing interpretation of the Act that would be entitled to deference in this case. The ALC specifically found in its Final Order that there was no such long-standing interpretation for the purposes of this case. (*See* **R. pp. 16–17 n.22** ("In this case, the Department admitted it has no-longstanding [sic] interpretation of the Sales and Use Tax Act as applied to third-party sellers or marketplace facilitators in an online marketplace. Therefore, the Court finds the Department has no long-standing interpretation that is entitled to deference in this case.")). Amazon did not appeal from this finding, and in fact called attention to

it in its Opening Brief in this appeal. (*See* Final Opening Brief of Appellant at 16 ("The Department admitted that, as of the first quarter of 2016, there was no . . . long-standing Department policy . . . relating to the sales-tax implications of third-party sales in online marketplaces.")). So SCMA's assertion that the Department in fact did possess a long-standing interpretation applicable to this case, and that the interpretation actually favors Amazon's position in this case, is both totally unsupported by the record and directly contrary to the Appellant's own position in this appeal, which SCMA nakedly claims to support.

Why SCMA would assert this argument, which is plainly erroneous and out-of-place in this appeal, is revealed later in its brief when SCMA cites to another case pending before this Court, *Duke Energy Corp. v. S.C. Department of Revenue*, Appellate Case No. 2020-001542 (filed Nov. 24, 2020). In that case, the appellant, Duke Energy, which is represented by the same counsel as SCMA in this case, has asserted that the Department held a long-standing interpretation of a statute that ought to be viewed in favor of Duke Energy. SCMA's *amicus* brief spends some time discussing the *Duke Energy* case[1] and attempting to draw a crude analogy to this case, essentially arguing that the Department is in the practice of tricking unsuspecting taxpayers by assessing them for taxes they never owed and could not have known that they owed. This is a ridiculous assertion that has no place in either case, and SCMA's strained attempt to link these two cases—which concern different facts, circumstances, and tax statutes altogether—is simply nonsense and plainly inappropriate.

[1] SCMA even cites to Duke Energy's initial brief filed in the other pending appeal and inappropriately frames arguments made by Duke Energy in that case as factual assertions and absolute truths. Of course, in addition to not disclosing that its counsel also represents Duke Energy in that case, SCMA fails to disclose that Duke Energy's arguments were rejected by the Administrative Law Court in that case and are far from the truths that SCMA presents them to be in its *amicus* brief.

In fact, the only conclusion the Department can draw from this perplexing discussion in SCMA's brief is that counsel for SCMA (who, again, also are counsel for Duke Energy) has attempted, at least collaterally, to use this *amicus* brief as a vehicle to present additional briefing in support of Duke Energy's position in another case. That is not only improper, but it is directly contrary to the appropriate role of an *amicus curiae*. *See Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (describing an *amicus curiae* brief as a "'friend of the court' as distinguished from an advocate before the court"); *see also* 3B C.J.S. Amicus Curiae § 1 (2020) ("An amicus is one who, not as party but just as any stranger might, gives information for the assistance of the court on some matter of law in regard to which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.").

Indeed, and as the Department has pointed out with respect to the other *amicus* briefs that have been submitted, it is bad enough that Rule 213 has been used to generate support from friends of Amazon to bolster its position in this appeal rather than to meaningfully assist the Court with the issues in this case. Now, it appears that Rule 213 is being used to bolster the position of another party in a different contested appeal involving the Department that is pending before the Court. Respectfully, the Court should reject this conduct which abuses, rather than serves, the purpose of an *amicus curiae*.

CONCLUSION

For the reasons explained above, the Court should deny SCMA's Motion for Leave to File an *Amicus Curiae* Brief in this case.

Respectfully submitted,

s/Andrew R. Hand
WILLOUGHBY & HOEFER, P.A.
John M. S. Hoefer (Bar No. 2549)
Tracey C. Green (Bar No. 9342)
Chad N. Johnston (Bar No. 73752)
John W. Roberts (Bar No. 78889)
Andrew R. Hand (Bar No. 101633)
P.O. Box 8416
Columbia, South Carolina 29202-8416
803-252-3300
jhoefer@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com
jroberts@willoughbyhoefer.com
ahand@willoughbyhoefer.com

S.C. DEPARTMENT OF REVENUE
Jason P. Luther (Bar No. 78021)
General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
803-898-5110 (Telephone)
803-896-0171 (Fax)
Jason.Luther@dor.sc.gov
courtorders@dor.sc.gov

THE ACQUAVIVA LAW FIRM, LLC
Lauren Acquaviva (Bar No. 100528)
672 Marina Drive, Suite 101
Charleston, SC 29492
843-216-7728 (Telephone)
843-614-6423 (Fax)
Lauren@vivalawsc.com

Attorneys for S.C. Department of Revenue

Columbia, South Carolina
June 11, 2021