UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ARTHUR PROVENCHER, MICHAEL MCGUIRE, and RONALD MARTEL, individually and on behalf of all similarly situated individuals, Plaintiffs, and MARTIN J. WALSH, Secretary of Labor, United States Department of Labor, [Proposed] Intervenor, v. BIMBO BAKERIES USA, INC. and BIMBO FOODS BAKERIES DISTRIBUTION LLC, Defendants.	Civil Action No. 2:22-cv-00198-wks

MEMORANDUM IN SUPPORT OF SECRETARY OF LABOR'S MOTION TO INTERVENE OR, IN THE ALTERNATIVE, FOR TIME TO FILE AMICUS BRIEF

In this case brought to recover overtime compensation allegedly owed to Plaintiffs under the Fair Labor Standards Act (the "FLSA"), Defendants Bimbo Bakeries USA, Inc. and Bimbo Foods Bakeries Distribution LLC have filed an unjust enrichment counterclaim seeking restitution from their own workers. However, the FLSA does not allow liable employers to raise counterclaims like the one Defendants have brought against Plaintiffs. Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Proposed Intervenor Martin J. Walsh, Secretary of Labor, United States Department of Labor (the "Secretary"), therefore respectfully moves to intervene

in this case for the limited purpose of seeking to dismiss the counterclaim filed by Defendants in this FLSA case.

The Secretary is tasked with enforcing the FLSA on behalf of the public and, to do so, depends on workers feeling comfortable reporting potential violations to the Secretary's representatives. Should Defendants be allowed to proceed with their counterclaim that is foreclosed by the FLSA, workers may well be chilled from asserting their workplace rights under the FLSA. Specifically, workers may be deterred from cooperating in the Secretary's FLSA investigations and litigation, and the Secretary's enforcement efforts may suffer as a result. In seeking to intervene, the Secretary endeavors to protect the public's significant interest in FLSA compliance and enforcement, which is implicated by Defendants' counterclaim in this private litigation.

Accordingly, the Secretary moves to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, or under Rule 24(b) of the Federal Rules of Civil Procedure, which governs permissive intervention. Alternatively, in the event that the Court denies the Secretary's motion to intervene, the Secretary intends to assert the public's interest in this litigation through an amicus brief in support of any motion to dismiss Defendants' counterclaim that is filed by Plaintiffs. The Secretary requests a period of seven days to file such an amicus brief.

BACKGROUND

Plaintiffs allegedly have worked in sales and distribution for Defendants and their predecessors for more than 18 years. *See* Counterclaim (ECF No. 18) ¶¶ 13, 21, 29. In their Complaint, Plaintiffs allege that they and all others similarly situated are Defendants' employees and not independent contractors. *See* Compl. (ECF No. 1) ¶¶ 5, 17–30. Plaintiffs further allege

that they regularly worked more than 40 hours per workweek, but Defendants willfully failed to pay them the required overtime premium under the FLSA. *See id.* ¶¶ 32, 53, 55. Accordingly, Plaintiffs seek the unpaid FLSA overtime compensation that Defendants allegedly owe them. *See id.* ¶¶ 53–57.

Defendants' position, on the other hand, is that Plaintiffs were properly classified as independent contractors. *See, e.g.*, Counterclaim ¶¶ 11–13, 19–21, 27–29, 47, 49. However, if the Court determines that Plaintiffs should have been classified as employees and awards Plaintiffs some or all of the back wages or damages they seek in this case, Defendants assert an unjust enrichment counterclaim against Plaintiffs. *See id.* ¶¶ 51–52. If the Court concludes that Defendants violated the FLSA, Defendants demand "restitution" from Plaintiffs of any amounts Plaintiffs earned "to offset, reduce, or nullify" Defendants' liability for unpaid overtime compensation and liquidated damages. *Id.* at p.34 & ¶ 52. Specifically, Defendants ask that the Court order Plaintiffs to pay to Defendants: (1) any revenue from Plaintiffs' sale of products to customers; (2) any amounts paid to Plaintiffs under advertising agreements; and (3) any revenue from Plaintiffs' sale of all or a portion of their distribution rights. *See id.* at p.34.

LEGAL STANDARD

Rule 24 of the Federal Rules of Civil Procedure governs both intervention as of right and permissive intervention, *see* Fed. R. Civ. P. 24(a)–(b), and should be construed liberally, *see* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1904 (3d ed. 2022); *see also Davis v. Smith*, 431 F. Supp. 1206, 1209 (S.D.N.Y. 1977) (noting liberal construction is appropriate with respect to Rule 24(b)), *aff'd*, 607 F.2d 535 (2d Cir. 1978). In considering a motion to intervene, a court "must accept as true non-conclusory allegations of the motion." *SEC v. Callahan*, 2 F. Supp. 3d 427, 436 (E.D.N.Y. 2014). A district court's decision on a motion to

intervene is reviewable only for an abuse of discretion. *In re N.Y.C. Policing During Summer 2020 Demonstrations*, 27 F.4th 792, 799, 804 (2d Cir. 2022).

ARGUMENT

As set forth below, the Secretary has established that he is entitled to intervene both as of right and on a permissive basis. Pursuant to the Federal Rules of Civil Procedure, the Secretary also has attached a proposed motion to dismiss Defendants' counterclaim that he will file if the Court grants his request to intervene. *See* Fed. R. Civ. P. 24(c); Fed. R. Civ. P. 12(b) (stating that a motion asserting the defense of failure to state a claim upon which relief can be granted "must be made before pleading if a responsive pleading is allowed"). The Court therefore should allow the Secretary to intervene for purposes of moving to dismiss Defendants' counterclaim.

I. The Secretary May Intervene as a Matter of Right Under Rule 24(a)(2)

The Federal Rules of Civil Procedure mandate intervention where a party files a timely motion, the party "claims an interest relating to the property or transaction that is the subject of the action," and "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). To establish the right to intervene under this provision, a party must "(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action." *In re N.Y.C. Policing*, 27 F.4th at 799 (quoting "*R" Best Produce, Inc. v. Shulman-Rabin Marketing Corp.*, 467 F.3d 238, 240 (2d Cir. 2006)). The Secretary meets all four requirements for intervention under Rule 24(a)(2) and, therefore, may intervene as of right.

A. The Secretary's Motion to Intervene Is Timely

This Court has "broad discretion" when assessing the timeliness of a motion to intervene—an inquiry that does not lend itself to "precise definition[s]." *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 198 (2d Cir. 2000) (quoting *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994)). Rather, the timeliness inquiry depends on an examination of the "totality of the circumstances." *Id.* The United States Court of Appeals for the Second Circuit has counseled that district courts may take into account factors including: (1) the length of time the movant had notice of its interest in the action before moving to intervene; (2) the prejudice to the existing parties resulting from any delay by the movant; (3) the prejudice to the movant resulting from a denial of the motion; "and (4) any unusual circumstance militating in favor of or against intervention." *Id.*

Here, the Secretary has moved to intervene approximately six weeks after receiving notice that Defendants had filed their counterclaim against Plaintiffs—the point at which the public's interest in this case first arose. No discovery or motion practice concerning Defendants' counterclaim has taken place. In fact, Plaintiffs have not even responded to Defendants' counterclaim yet. Thus, there would be no prejudice to the existing parties at this early juncture if the Secretary is allowed to intervene.

The Secretary, on the other hand, would be significantly prejudiced if the Court were to deny his motion to intervene. The Secretary would lose the opportunity to challenge Defendants' counterclaim at the motion to dismiss stage and, as set forth below, enforcement of the FLSA may be impeded if Defendants' counterclaim is allowed to proceed. The Secretary's motion to intervene is therefore timely under the governing factors. *See, e.g.*, *Conn. Fine Wine & Spirits, LLC v. Harris*, No. 16-cv-1434 (JCH), 2016 WL 9967919, at *4 (D. Conn. Nov. 8, 2016)

(finding that a motion to intervene was timely when it was filed roughly seven weeks after the complaint and there would be no prejudice to the existing parties).

B. The Secretary Has Substantial Interests in Effectively Enforcing and Ensuring Compliance with the FLSA, Which May Be Impaired by Defendants' Counterclaim

The Second Circuit has held that a prospective intervenor must show a "direct, substantial, and legally protectable" interest in the underlying action. *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010) (quoting *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990)). Broadly, the government's interest in defending and upholding laws has been held to satisfy this standard. *See, e.g.*, *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2201–03 (2022) (holding that interest requirement was met by North Carolina legislators who sought to intervene in lawsuit challenging the state's election law); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (affirming district court's decision to allow United States to intervene as of right where government had an interest in upholding executive agreement, which "would be impaired if plaintiffs obtained a judgment in violation of the" executive agreement). More specifically, the government's interest in the effective enforcement of federal statutes that are at issue in private litigation has been acknowledged as a direct, substantial, and legally protectable interest. *See AB ex rel. CD v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144, 156–57 (S.D.N.Y. 2004) (allowing United States to intervene as of right in litigation brought by private plaintiffs under Title IX, where government's interests were articulated as "the proper enforcement of Title IX" and "ensuring that federal funds are not given to entities that fail to comply with the federal anti-discrimination laws").

This case implicates the Secretary's essential interests in maintaining strong and effective enforcement of the FLSA, as well as in ensuring compliance with its provisions. Congress gave

the Department of Labor the responsibility to administer the FLSA. *See* 29 U.S.C. §§ 204, 211(a), 216(c). The Secretary investigates potential violations of the FLSA, including those related to payment of the minimum wage and the overtime premium, *see id.* § 211(a), and brings litigation to enforce the statute, *see id.* §§ 216(c), 217. Importantly, the Secretary has the *exclusive* authority to seek restitutionary and prospective injunctive relief against employers who violate the statute. *See id.* §§ 211(a), 217; *Roberg v. Henry Phipps Estate*, 156 F.2d 958, 963 (2d Cir. 1946); *N.Y. State Court Clerks Ass'n v. Unified Court Sys. of the State of N.Y.*, 25 F. Supp. 3d 459, 466 (S.D.N.Y. 2014). Prospective injunctions are especially powerful tools for ensuring that employers comply with the FLSA while also allocating the public's resources in the most efficient manner. *See Martin v. Funtime, Inc.*, 963 F.2d 110, 113–14 (6th Cir. 1992) (explaining that the purpose of a prospective injunction is "to effectuate general compliance with the Congressional policy of abolishing substandard labor conditions by preventing recurring future violations," and also noting that these injunctions are "essential" to "lessen[] the responsibility of the Wage and Hour Division in investigating instances of noncompliance"); *see also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (describing the central role of Section 17 of the FLSA in ensuring compliance with substantive provisions of the statute).

However, the Secretary cannot enforce the FLSA without assistance from workers. To investigate possible violations of the FLSA and pursue enforcement litigation, the Secretary depends on workers feeling able to speak freely with his representatives and serving as witnesses. *See Robert DeMario Jewelry, Inc.*, 361 U.S. at 292 ("Plainly, effective enforcement [of the FLSA] could . . . only be expected if employees felt free to approach officials with their grievances."); *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 113 (2d Cir. 2015) ("Because the

government cannot directly monitor every employer's payroll, [the] FLSA also creates an enforcement mechanism that relies in significant part on employees' complaints.").

Since the statute's public enforcement mechanism depends on workers' participation and cooperation, if Defendants' counterclaim in this case is allowed to proceed, that disposition could have the effect of impairing the Secretary's ability to enforce and ensure compliance with the FLSA. Courts have acknowledged that employers' counterclaims against employees may well chill workers from asserting their workplace rights under the FLSA. *See Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 473 (S.D.N.Y. 2008) (describing groundless counterclaims as having an *in terrorem* effect); *see also Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 740 (1983) ("[B]y suing an employee who files charges with the [National Labor Relations] Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit."); *Mode v. S-L Distrib. Co.*, No. 3:18-CV-00150-KDB-DSC, 2021 WL 3921344, at *17 (W.D.N.C. Aug. 31, 2021) (recognizing that an indemnification claim by defendant-employer "would inevitably chill the right of a putative FLSA plaintiff in these circumstances to pursue a FLSA claim"). Thus, if the Secretary is not allowed to intervene for purposes of moving to dismiss Defendants' counterclaim, a decision by the Court allowing the counterclaim to go forward could deter workers from participating in the Secretary's investigations and litigation and make it more difficult for the Secretary to enforce the FLSA on behalf of the public. *See Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. at 157 (finding that impairment of interest requirement was met where "an adverse judgment could interfere with the Government's ability to enforce Title IX").

C. The Private Plaintiffs Cannot Adequately Protect the Secretary's Interests

Intervention as of right is warranted where representation by the existing parties "'may be' inadequate." *In re N.Y.C. Policing*, 27 F.4th at 803 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). The Secretary carries only a "minimal" burden to show that the private parties may not adequately protect the public's interest. *Berger*, 142 S. Ct. at 2203. Although Plaintiffs seek to hold Defendants liable for alleged violations of the FLSA's overtime provisions, *see, e.g.*, Compl. (ECF No. 1) ¶¶ 50–57, Plaintiffs cannot represent adequately the Secretary's interests in this case.

First, the FLSA's dual public and private enforcement schemes set out by Congress demonstrate that public and private interests under the statute are not coextensive. *See* 29 U.S.C. §§ 211(a), 216(b)–(c). For example, in this case Plaintiffs seek money damages for themselves and those that are similarly situated. Through continued and effective enforcement of the FLSA, the Secretary seeks to vindicate the public's interest in ensuring the "minimum standard of living necessary for health, efficiency, and general well-being" of all workers covered by the statute. *Id.* § 202(a); *see also Marshall v. Chala Enters., Inc.*, 645 F.2d 799, 804 (9th Cir. 1981) (in pursuing injunctive relief under the FLSA, "the Secretary seeks to vindicate a public, and not a private, right."). Second, only the Secretary can speak to the negative effects that employers' counterclaims prosecuted against their employees may have on the Secretary's ability to enforce the FLSA. *See Robert DeMario Jewelry, Inc.*, 361 U.S. at 292; *Greathouse*, 784 F.3d at 113. Finally, as discussed above, while there is a risk that Defendants' unjust enrichment counterclaim could chill these Plaintiffs from continuing to litigate this case, the Secretary will not be deterred from protecting the public's interest in FLSA compliance and enforcement. For

at least these three reasons, the Secretary has met his minimal burden of showing that the existing parties may not adequately represent his interests in this case.

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Accordingly, the Secretary is entitled to intervene as of right.

II. The Secretary Also Meets the Standards for Permissive Intervention Under Rule 24(b)

If the Court determines that the Secretary does not meet the standard for intervention as of right, the Secretary's motion to intervene undoubtedly should be allowed under Rule 24(b) of the Federal Rules of Civil Procedure, which governs permissive intervention. There are two provisions of Rule 24(b) relevant to the Secretary's motion to intervene here. Upon a timely motion, "the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2). Alternatively, if a timely motion is filed, a court may permit to intervene "anyone" who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). This Court has acknowledged its "very broad" discretion to grant a party's request to intervene on a permissive basis. *Corren v. Sorrell*, 151 F. Supp. 3d 479, 495 (D. Vt. 2015) (Sessions, J.) (quoting *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 192 (2d Cir. 1978)); *see also Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022) ("Resolution of a motion for permissive intervention is committed to the discretion of the court before which intervention is sought.").

First, this case meets the special requirements of Rule 24(b)(2) for permissive intervention by federal officers and agencies. Federal courts at all levels have consistently recognized the importance of allowing government agencies to intervene in cases implicating

issues in their regulatory or enforcement purview. *See SEC v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 460 (1940) (permitting SEC to intervene in bankruptcy proceeding to prevent a corporate reorganization based on the Commission's "sufficient interest in the maintenance of its statutory authority and the performance of its public duties"); *All Am Airways v. Vill. of Cedarhurst*, 201 F.2d 273, 274 (2d Cir. 1953) (allowing intervention by Administrator of Civil Aeronautics and Civil Aeronautics Board in case brought by airlines, pilots, and Port of New York Authority to enjoin enforcement of village ordinance concerning aircraft flying altitudes, and recognizing that to hold otherwise would be "clearly contrary to the express provisions and intent" of Rule 24(b)); *Comcast of Conn./Ga./Mass./N.H./N.Y./N.C./Va./Vt., LLC v. Vt. Pub. Util. Comm'n*, No. 5:17-cv-161, 2018 WL 11469513, at *3 (D. Vt. Feb. 8, 2018) (Crawford, C.J.) ("Upholding the right of a public agency to intervene in a case clearly lying within its sphere of regulatory concern is uncontroversial."); *see also Nuesse v. Camp*, 385 F.2d 694, 705 (D.C. Cir. 1967) ("[I]ntervention to promote a relevant public interest is permissible when the public official charged with primary responsibility for vindicating that interest seeks to defend it.").

At issue in this case is the FLSA, *see* Compl. ¶¶ 50–57; Counterclaim ¶ 52, which Congress tasked the Secretary and the Department of Labor with administering, *see* 29 U.S.C. §§ 204, 211(a), 216(c). Moreover, the Secretary is responsible for investigating potential violations of the FLSA's provisions, enforcing the statute through litigation, and promulgating relevant regulations. *See id.* §§ 211(a), 211(c), 216(c), 217. As explained above, a decision on the cognizability of Defendants' counterclaim in this FLSA case may negatively impact the Secretary's ability to conduct necessary investigations and enforce the statute. Plainly, permitting the Secretary to intervene in this case implicating the FLSA—the statute that he is responsible for enforcing in the public interest—is appropriate under Rule 24(b)(2).

Second, the Secretary also has met the general standards for permissive intervention under Rule 24(b)(1). As compared to intervention as of right, the "legal requirements are relaxed" for permissive intervention under Rule 24(b)(1). *Vt. All. for Ethical Healthcare, Inc. v. Hoser*, No. 5:16-cv-205, 2016 WL 7015717, at *2 (D. Vt. Dec. 1, 2016) (Crawford, C.J.). The factors considered by a court are "substantially the same" under the standards for intervention as of right and permissive intervention, and the court may also look to "whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal questions presented." *Corren*, 151 F. Supp. 3d at 495 (quoting "*R" Best Produce, Inc.*, 467 F.3d at 240 and *H.L. Hayden Co. of N.Y. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir.1986)). In his appended motion to dismiss, the Secretary has set out his proposed contributions to assist the Court in answering the question of whether Defendants' counterclaim is foreclosed in an FLSA case such as this one. Based on the same reasons discussed in section I above, as well as the important contributions that the Secretary would make to the disposition of Defendants' counterclaim in this case, the Secretary satisfies the requirements for permissive intervention under Rule 24(b)(1).

Finally, in exercising its broad discretion under Rule 24(b), a district court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Neither delay nor prejudice to the existing parties would result from the Secretary's intervention, as the case is in the earliest stages of litigation. *See* section I(a), *supra*. The Court should accordingly permit the Secretary to intervene.

III. Alternatively, the Secretary Intends to File an Amicus Brief to Protect the Public's Interest in this Litigation

If the Court does not allow the Secretary to intervene either as of right or on a permissive basis, the Secretary intends to file an amicus brief setting forth the reasons why Defendants'

counterclaim may not be asserted in an FLSA case like this one. As a federal officer and as the head of a federal agency, the Secretary need not seek leave of court to submit an amicus brief. *See* Fed. R. App. P. 29(a)(2) ("The United States or its officer or agency . . . may file an amicus brief without the consent of the parties or leave of court."); *In re Terrorist Attacks on Sept. 11, 2001*, No. 03 MDL 1570 (GBD) (SN), 2022 WL 17326181, at *2 (S.D.N.Y. Nov. 29, 2022) (noting that federal officer or agency "does not require leave of the court to file an *amicus* brief"); *see also United States v. Hunter*, No. 2:97-CR-059, 1998 WL 372552, at *1 (D. Vt. June 10, 1998) (Sessions, J.) (referring to Rule 29 of Federal Rules of Appellate Procedure in considering an organization's motion for leave to file amicus brief).

However, even if leave for the Secretary to file such an amicus brief were necessary, the Court would be justified in granting the Secretary such leave. District courts have broad inherent authority and discretion to allow the participation of amici curiae in the cases over which they preside. *See Kistler v. Stanley Black & Decker, Inc.*, No. 3:22-cv-966 (SRU), 2023 WL 1827734, at *1 (D. Conn. Jan. 25, 2023); *Given v. Rosette*, No. 15-cv-101-jgm, 2015 WL 5177820, at *2 (D. Vt. Sept. 4, 2015) (Murtha, J.); *Brod v. Omya, Inc.*, No. 2:05-CV-182, 2006 WL 8426529, at *1 (D. Vt. Sept. 5, 2006) (Niedermeier, M.J.). Prospective amici need not be impartial or present arguments that are wholly distinct from those raised by the existing parties. *See Kistler*, 2023 WL 1827734, at *1. Rather, as long as the information provided by the prospective amicus is "timely and useful," a court may allow the amicus to participate. *In re Terrorist Attacks on Sept. 11, 2001*, 2022 WL 17326181, at *1 (quoting *Lehman XS Trust, Series 2006-GP2 v. Greenpoint Mortg. Funding, Inc.*, Nos. 12 Civ. 7935(ALC)(HBP), 12 Civ. 7942(ALC)(HBP), 12 Civ. 7943(ALC)(HBP), 2014 WL 265784, at *2 (S.D.N.Y. Jan. 23, 2014)). Notably, this Court has stated that an amicus brief "should normally be allowed" in circumstances 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." *Hunter*, 1998 WL 372552, at *1 (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)).

The Secretary uniquely represents the public's interest in enforcement of the FLSA. As the Secretary alone can speak about the detrimental effects that counterclaims like the one Defendants have raised in this case may have on his efforts to enforce the FLSA, the information that the Secretary would provide to the Court in an amicus brief could not be provided by the existing parties.[1] Therefore, in the event his intervention is not allowed, the Secretary respectfully requests that the Court recognize the Secretary's ability to file an amicus brief as of right or use the Court's broad discretion and inherent authority to grant the Secretary leave to file an amicus brief concerning Defendants' counterclaim. The Secretary requests seven days from the date of any order on this motion to file his amicus brief.

CONCLUSION

For the foregoing reasons, the Court should allow the Secretary to intervene for the limited purpose of seeking the dismissal of Defendants' counterclaim. Alternatively, the Court should grant the Secretary seven days from the date of any order denying intervention to file an amicus brief in support of any motion to dismiss Defendants' counterclaim that is filed by Plaintiffs.

[1] The Secretary submits that any amicus brief he will file in this case will be substantively similar to the proposed motion to dismiss and supporting memorandum that accompany this motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the CM/ECF system on March 8, 2023, shall be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

/s/ Emily V. Wilkinson
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