No. 19-15899

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUSAN MCSHANNOCK, as Executrix of the Estate of Patricia Blaskower, on behalf of the Estate of Patricia Blaskower and all others similarly situated, *et al*.,
Plaintiffs-Appellees,

v.

JP MORGAN CHASE BANK N.A., dba CHASE BANK,
Defendant-Appellant.

On Interlocutory Appeal from the United States District Court for the Northern District of California, No. 3:18-cv-01873 (Chen, J.)

REPLY TO APPELLANT'S RESPONSE TO MOTION FOR LEAVE TO LATE FILE THE AMICUS CURIAE BRIEF OF PROFESSOR ADAM J. LEVITIN IN SUPPORT OF NEITHER PARTY

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Professor Levitin filed a motion to file an amicus curiae brief out of time in support of neither party. (Dkt. No. 43.) Professor Levitin's brief seeks to address the so-called "valid-when-made" doctrine that was raised in the amicus curiae brief in support of Appellant-Defendant JPMorgan Chase Bank, N.A. ("Chase") by the Bank Policy Institute, the American Bankers Association, and the United States Chamber of Commerce (collectively the "Bank Amici"). Specifically, Professor Levitin seeks in his brief to urge the Court to avoid addressing the doctrine if possible given its far-reaching implications for consumer credit regulation and lack of adequate briefing, but if not, to recognize that the doctrine is a modern invention lacking any historical roots.

Appellant JPMorgan Chase Bank, N.A. ("Chase") has opposed Professor Levitin's motion. (Dkt. No. 46.) Chase does so on two grounds. First, Chase argues that Professor Levitin's brief will not assist the Court because it is not relevant to the disposition of the case. *Response* at 1. Second, Chase argues that Professor Levitin's brief is inexcusably late because Federal Rule of Appellate Procedure 29(a)(6) requires that an amicus curiae brief in support of neither party be filed within a week of the principal brief of the appellant or petitioner. *Id.*

Chase's arguments are internally inconsistent and must fail given the circumstances.

A. Relevance of Professor Levitin's Brief to the Disposition of the Case

If Professor Levitin's brief is truly irrelevant to the disposition of the case, as Chase claims, it is puzzling that Chase would bother objecting the late filing of the brief, which does not take issue with Chase's arguments or support either side on the merits. Chase's own objection suggests that Professor Levitin's brief is far from irrelevant.

As it happens, the Court cannot at this stage possibly determine if the "valid-when-made" doctrine is relevant to the disposition of the case. Unless the Court were to interpret Chase's response as an admission that "valid-when-made" is not relevant to this case, a determination of the relevance of the doctrine can only be made after the Court has reviewed all the briefing and heard argument. Thus, Professor Levitin's brief should, at the very least, be conditionally accepted.

If the Court ultimately believes that the putative "valid-when-made" doctrine raised by the Bank Amici has any bearing on the disposition of this case, then Professor Levitin's brief is unquestionably relevant to the disposition of the case, as it addresses the claimed historicity of the doctrine and whether it could possibly be a background term for the Home Owner Loan Act as Bank Amici claim.

Alternatively, if the Court believes that the supposed doctrine is irrelevant to the disposition of this case, then Professor Levitin will gladly withdraw his motion

and tentatively filed brief, for his purpose in filing was merely to caution the Court against accepting Bank Amici's invitation to wade into the insufficiently briefed doctrinal waters of "valid-when-made" given the doctrine's broad implications for consumer credit policy.

B. Timeliness of Professor Levitin's Brief

Professor Levitin readily acknowledges that he seeks to file his brief out of time. He further acknowledges that Chase is correct in its response that the applicable deadline was August 6, 2019, not October 14, 2019, as Professor Levitin previously believed. Nonetheless, Professor Levitin believes that his late filing is reasonable in the circumstances.

1. Professor Levitin's Brief Could Not Have Been Filed by the August 6 Deadline Because It Responds to an Argument That Had Not Been Raised at That Point

It was not possible, however, for Professor Levitin to file his amicus brief by the August 6, 2019 deadline because the issue to which his brief is addressed, the so-called "valid-when-made" doctrine was not an issue that appeared in the District Court decision nor was it argued in Chase's principal brief. Instead, Chase, merely noted it as an analogy in a footnote to its principal brief. Appellant's Br. at 40, n.12. Instead, the "valid-when-made" doctrine was first raised as an actual argument in

this case by Bank Amici in a brief filed on August 12, 2019. Bank Amici Br. at 10-12. Thus, it was not possible for Professor Levitin to file his brief by the August 6 deadline of Federal Rule of Appellate Procedure Rule 29(a)(6) because there was nothing for him to address at that point.

2. Professor Levitin Is a Full-Time Academic Filing Pro Se, Not a $3 Trillion Bank Represented by Six Litigators at Two AmLaw 100 Firms

As for the delay from August 12 to the service of the brief and motion on Chase on October 16, Professor Levitin notes that the delay was reasonable in the circumstances and did not prejudice Chase.

Unlike Chase, Professor Levitin is not one of the largest global financial institutions with nearly $3 trillion of assets. Nor is Professor Levitin represented by a bevy of attorneys from two AmLaw 100 firms. Instead, he is a full-time academic whose only interest in this matter is assisting the Court.

Professor Levitin does not actively engage in the practice of law nor does he monitor the content of financial services industry amicus briefs as a matter of course. He only learned of the Bank Amici's brief on October 15. That very day, he immediately sought Chase's consent to the filing of the amicus brief, explaining what he planned to argue so as to give Chase the maximum possible notice. He then

conditionally filed his brief (which was written without any assistance whatsoever) with extraordinary promptness—*one day later*.

The tardiness of the brief would indeed be "inexcusable" if filed by full-time litigators at Wilmer Cutler Pickering Hale & Dorr LLP and McGuireWoods LLP on behalf of Chase. Professor Levitin's circumstances, however, are entirely different, such that the late filing of his brief completely reasonable. For Chase to call Professor Levitin's tardiness in these circumstances "inexcusable" is absurd, particularly as Chase has not alleged any prejudice from the late filing.

3. Chase Alleges No Prejudice from the Late Filing Nor Can It Given That It Claims the Brief to Be Irrelevant

Chase does not contend that it has been prejudiced by the late filing of Professor Levitin's brief for a simple reason: it cannot. Chase takes the position in its response that Professor Levitin's brief is irrelevant to the disposition of the case, so Professor Levitin's brief cannot harm Chase. While Professor Levitin disputes Chase's characterization of his brief's relevance, he again emphasizes that his brief does not respond to any argument made by Chase in its principal briefing, but to an issue raised by Bank Amici.

4. ***Chase's Objections Suggest That Professor Levitin's Brief Be Recharacterized as Supporting Appellees, Making It Only Two Days Late***

Finally, Chase's objection to Professor Levitin's brief suggests that Chase views the brief as actually being in support of Appellees, rather than in support of neither party. If Professor Levitin's brief is characterized this way (and Professor Levitin has no objection to such recharacterization, although he takes no view on the ultimate merits of the case), then Professor Levitin late-filed his brief by a mere two days, which is unlikely to have materially prejudiced Chase's ability to respond, particular with the services of multiple attorneys of two AmLaw 100 firms at its beck and call.

Conclusion

Professor Levitin's late filing of his brief is entirely reasonable under the circumstances and has not prejudiced any party.

For the foregoing reasons, Professor Levitin respectfully submits that the Court should grant his motion to late file an amicus curiae brief.

Respectfully submitted this 23rd day of October, 2019.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing RESPONSE TO APPELLANT'S RESPONSE TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PROFESSOR ADAM J. LEVITIN IN SUPPORT OF NEITHER PARTY was served by email upon the following this 23rd day of October, 2019:

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