

STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA FARM
BUREAU MUTUAL INSURANCE
COMPANY, INC.,

Petitioner,

v.

NORTH CAROLINA
DEPARTMENT OF REVENUE,

Respondent.

GENERAL COURT OF
JUSTICE SUPERIOR
COURT DIVISION
20 CVS 10244

RESPONSE OF NORTH
CAROLINA SUSTAINABLE
ENERGY ASSOCIATION TO
MOTION TO STRIKE

NOW COMES the North Carolina Sustainable Energy Association (“NCSEA”), pursuant to Rules 7 and 12 of the North Carolina Rules of Civil Procedure and Business Court Rule 7, and hereby submits this response to the North Carolina Department of Revenue’s (“NCDOR”) Motion to Strike Portions of Amicus Brief of North Carolina Sustainable Energy Association (“Motion to Strike”).

For the reasons set forth below, NCSEA believes that NCDOR’s Motion to Strike should be denied. NCDOR asks the Court to “strike all portions of the Brief of Amicus Curiae North Carolina Sustainable Energy Association that include allegations or attempts to offer factual accounts of the North Carolina General Assembly’s discussions,

deliberations, and/or intent when enacting the North Carolina renewable energy credit statutes.” *Motion to Strike*, p. 1. This request goes against the nature of an amicus curiae, or a “friend of the Court” and seeks to have this Court parse through the Amicus Brief of North Carolina Sustainable Energy Association (“Amicus Brief”) and strike portions of volunteered recollection in an unnecessary fashion.

As an initial matter, NCSEA does not seek to enlarge its role beyond the scope of what an Amicus Curiae is:

Amicus curiae is a Latin phrase for ‘friend of the court’ as distinguished from an advocate before the court. It serves only for the benefit of the court, assisting the court in cases of general public interest, by making suggestions to the court, . . . and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision. *M.E. v. T.J.*, 854 S.E.2d 74, 112 (N.C. Ct. App. 2020).

NCSEA only seeks to be a friend of the court and offer firsthand information. NCSEA does not wish to provide anything beyond this scope but believes it falls within the Court’s discretion what should and should not be considered within an amicus brief. “Since an amicus does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus.” *Id.*

As amicus, NCSEA sees the underlying renewable energy credit statutes as a success story and is concerned as a matter of public policy about the outcome of this proceeding. Therefore, NCSEA comes here to provide the Court with NCSEA's firsthand knowledge on the matter. As this is within the Court's discretion to determine anyway, there is simply no need for a motion to strike, especially since NCSEA is not even a formal party to this matter. The Court decides how much weight to give an amicus brief. There is no need to strike it as the Court can decide the weight of the brief without striking it.

While NCDOR did not cite Rule 12(f) of the North Carolina Rules of Civil Procedure, it is the rule outlining a motion to strike. Rule 12(f) states, in pertinent part, that a trial court "may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C.G.S. § 1A-1, Rule 12(f). Whether to grant or deny a Rule 12(f) motion to strike is within the trial court's sound discretion. Reese v. City of Charlotte, 196 N.C. App. 557, 567, 676 S.E.2d 493, 499 (2009). Merrell v. Smith, 2020 NCBC LEXIS 126, *5, 2020 NCBC 77, 2020 WL 6261537.

Most often, a motion to strike is used as “a device to test the legal sufficiency of an affirmative defense.” *Faulconer v. Wysong and Miles Co.*, 155 N.C. App. 598, 601, 574 S.E.2d 688, 691 (2002) (citing *First-Citizens Bank & Tr. Co. v. Akelaitis*, 25 N.C. App. 522, 525, 214 S.E.2d 281, 284 (1975)). Notably, Rule 12(f) motions are infrequently granted and often result in a party seeking leave to amend an affirmative defense. “When a court strikes a defense, the general practice is to grant the defendant leave to amend.” *Merrell v. Smith*, 2020 NCBC LEXIS 126, *1, 2020 NCBC 77, 2020 WL 6261537.

Here, NCDOR seeks to strike broadly portions of NCSEA’s Amicus Brief that it sees as offering “factual accounts of the North Carolina General Assembly’s discussions, deliberations, and/or intent when enacting the North Carolina renewable energy credit statutes.” *Motion to Strike*, p. 1. NCDOR, in both its Motion to Strike and its Brief¹ filed in support of its Motion to Strike, is inexact about what portions of the Amicus Brief it believes the Court should strike and instead leaves it to

¹ NCDOR’s Brief calls out certain instances as being “contains conclusory allegations of the intent of legislators” but does not specifically state whether only these instances should be stricken or if the Court should seek out others.

the Court to deem which portions should be struck. NCDOR's Motion falls outside the typical usage of a motion to strike.

Furthermore, and most importantly, NCDOR does not even allege that NCSEA's Amicus Brief includes redundant, irrelevant, immaterial, impertinent, or scandalous matter as outlined in Rule 12(f). Instead, NCDOR seems most concerned with having the Court strike portions of NCSEA's Amicus Brief which it sees as improperly adding to the factual record. As detailed herein, NCSEA believes that such factual oversight is implicit to the Court's review of any amicus filing.

CONCLUSION

The Motion to Strike is unnecessary. NCSEA only seeks to be a friend to the Court and provide its unique perspective. The Court's review of the Amicus Brief and choosing which portions of the brief are pertinent to the action and disregarding the rest is implicit to the relationship of an amicus curiae and the Court. The discretion and action that NCDOR seeks from the Court in the Motion to Strike is redundant to the discretion the Court has when reviewing an amicus brief to determine what should be properly considered.

For all these reasons, NCSEA believes that the Court should deny the NCDOR's Motion to Strike and for any such further relief that this Court deems just and necessary.

Respectfully submitted, this the 10th day of May, 2021.

/s/ Peter H. Ledford
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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Rule 7.8 of the North Carolina Business Court Rules in that it (excluding the caption, any index, table of contents, or table of authorities, signature blocks, and required certificates) contains no more than 7,500 words, as determined by the word count feature of Microsoft Word

This the 10th day of May, 2021

/s/ Benjamin W. Smith
Benjamin W. Smith

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing document has been filed with the North Carolina Business Court's electronic filing system, which will effect service to all parties and counsel of record in accordance with BCR 3.9(a).

This the 10th day of May, 2021.

/s/ Peter H. Ledford
Peter H. Ledford