UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUAN RAMON TORRES; EUGENE ROBISON, *Plaintiffs-Respondents*,	)	
v.	)	Case No. 14-90004
SGE MANAGEMENT, LLC, *et al.*, *Defendants-Petitioners*.	)	

MOTION OF DIRECT SELLING ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ENERGY MARKETERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Pursuant to Federal Rule of Appellate Procedure 29, the Direct Selling Association ("DSA"), the Chamber of Commerce of the United States of America ("the Chamber"), and the National Energy Marketers Association ("NEM") respectfully request leave from this Court to file a brief *amicus curiae* in support of Defendants' petition under Federal Rule of Civil Procedure 23(f) for permission to appeal the district court's January 13, 2014 class-certification order. Defendants consent to this motion. Plaintiffs oppose it.

1. DSA is a 103-year-old national trade association that represents companies that sell products to customers through independent salespeople who personally demonstrate and explain the products, usually in the customer's home or workplace. In 2012, over 15.9 million individuals were involved in direct

selling in the United States, resulting in retail sales of over $31 billion. *See* DSA, 2012 Direct Selling Statistics, http://goo.gl/Bnw17 (last visited Feb. 1, 2014). DSA estimates that its 169 member companies, which include some of the country's most well-known and respected businesses, *see* DSA Membership Directory, http://goo.gl/STSXQ (last visited Feb. 1, 2014), account for more than 90% of the industry's annual sales.

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than 3,000,000 U.S. businesses and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing *amicus curiae* briefs in cases implicating issues of concern to the nation's business community.

NEM is a nonprofit trade association representing leading retail and wholesale suppliers and major consumers of natural gas and electricity, as well as energy-related products, services, information, and advanced technologies, throughout the United States, Canada, and the European Union. NEM's membership includes suppliers that sell energy and related products, services, and technologies to millions of consumers. NEM, together with its members, has developed National Marketing Standards of Conduct and a Consumer Bill of Rights.

2. *Amici* have a substantial interest in this case. *See* Fed. R. App. P. 29(b)(1). The district court's decision below poses a serious threat to the business community by permitting certification of a class action under the Racketeer Influenced and Corrupt Organizations Act outside of Rule 23's strictures, as recently, repeatedly, and clearly established by this Court and the Supreme Court. In particular, it purports to find that questions about the putative class members' reliance upon and knowledge of allegedly fraudulent statements—questions that by their nature are inherently individualized inquiries—can be resolved on a classwide basis. Furthermore, it authorizes class treatment of those issues based on a mere *allegation*, rather than actual proof, that Defendants' method of direct selling constitutes an unlawful pyramid scheme. Order 15-17.

The district court's decision charts a clear—and clearly erroneous—path by which plaintiffs can threaten businesses with the risk of extorted settlements. The threat to direct selling companies is obvious. Many direct selling companies compensate salespeople not only for their own sales, but also for the sales of individuals they recruit. But as noted in Defendants' petition, Pet. 17, companies using such a compensation model are vulnerable to false accusations of being illegal pyramid schemes. *See, e.g.*, *In re Amway Corp.*, 93 F.T.C. 618, 715-17 (1979); Anne T. Coughlan & Kent Grayson, *Network Marketing Organizations: Compensation Plans, Retail Network Growth, and Profitability*, 15 Int'l J. Res.

Marketing 401, 425 (1998) ("[Certain forms of direct selling are] often incorrectly associated with deceptive 'pyramid schemes' . . . ."). Under the district court's decision, the mere allegation that such a scheme exists could subject a direct selling company and its executives to massive liability for the aggregated treble-damages claims of hundreds of thousands of class members.

The district court's decision thus negatively affects all DSA members by threatening them with potentially backbreaking liability for classwide claims. The decision also directly affects DSA itself. If the district court's decision is allowed to stand, some companies may reconsider their use of direct selling, concluding that the liability risk outweighs the practice's benefits. Therefore, the decision may cause DSA to lose members, undermining the organization's ability to fulfill its mission.[*]

The implications of the district court's decision also extend far beyond the direct selling industry. Certifying for class treatment claims that turn on individualized questions of knowledge and reliance vastly increases litigation costs for all businesses disproportionate to any underlying merits of the claims. This harms the entire economy—most recognizably by increasing prices for consumers,

[*] Demonstrating DSA's significant interest in this case, DSA's President, Joseph Mariano, submitted an expert report and provided deposition testimony at Defendants' request in the district-court proceedings below. President Mariano has provided similar expert testimony regarding the direct selling industry in other cases. *See Mary Kay, Inc. v. Wolf*, No. 00-05612-J (Tex., 191st Judicial Dist. Ct.); *Kaiser v. The Pampered Chef, Ltd.*, No. BC 288124 (Cal., Los Angeles Cnty. Superior Ct.).

but also by raising the risk that businesses may need to reduce operations and capital investments. And if mere allegations of fraud sufficed to obtain class certification, a wide-range of businesses, from mortgage lenders to for-profit colleges, would face the risk of being coerced into extortionate settlements without having a meaningful opportunity to exercise their due-process right to "present every available defense" to the class members' claims. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (internal quotation marks omitted).

3. *Amici*'s submission of their brief is "desirable," and the matters addressed in the brief are "relevant to the disposition of th[is] case." Fed. R. App. P. 29(b)(2). *Amici*'s brief not only describes the legal errors committed by the district court, but also explains the serious threat that the court's decision poses to the direct selling industry and the broader business community. *See Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (noting that *amicus* briefs may be able to provide "unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do"); *see also Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (recognizing that *amici* may be able to assist the court by "explain[ing] the impact a potential holding might have on an industry" (internal quotation marks omitted)).

4. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored their brief in whole or in part; no party or

party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amici*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

5. *Amici*'s brief is timely because *amici* are filing the brief within seven days of the January 27, 2014 filing of Defendants' Rule 23(f) petition. Fed. R. App. P. 29(e); 5th Cir. R. 29.1. *Amici*'s brief complies with Federal Rule of Appellate Procedure 29(d) because it is no more than half the maximum length of 20 pages authorized for Defendants' petition. *See* Fed. R. App. P. 5(c).

* * *

Courts routinely permit *amici* to file briefs in support of petitions for permission to appeal class-certification orders pursuant to Federal Rule of Civil Procedure 23(f). *See, e.g.*, *Reyes v. NetDeposit, LLC*, No. 13-8086 (3d Cir. Nov. 1, 2013) (granting opposed motions to file *amicus* briefs in support of Rule 23(f) petition); *In re ComScore, Inc.*, No. 13-8007 (7th Cir. May 28, 2013) (also granting leave to file *amicus* brief in support of Rule 23(f) petition despite opposition); *see also In re High-Tech Emp. Antitrust Litig.*, No. 13-80223 (9th Cir. Jan. 14, 2014) (granting leave to file Rule 23(f) *amicus* brief to which all parties consented). Given their substantial interest in this case, DSA, the Chamber, and NEM respectfully request that the Court take the same approach here and grant them leave to file their *amicus* brief.

Dated: February 3, 2014

Respectfully submitted,

/s/ Harry M. Reasoner

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* Joshua S. Johnson is an active member in good standing of the Texas Bar but has yet to be admitted to practice in the District of Columbia. His work on this case has been supervised by an enrolled, active member of the District of Columbia Bar in accordance with D.C. App. R. 49(c)(8).

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Dated: February 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on February 3, 2014.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: February 3, 2014

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