15-1009-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION; STATE OF CONNECTICUT,

Plaintiffs - Appellees,

v.

LEADCLICK MEDIA, INC.; LEADCLICK MEDIA, LLC; CORELOGIC, INC.,

Defendants - Appellants,

LEANSPA, LLC; NUTRASLIM, LLC; NUTRASLIM U.K. LIMITED, DBA LEANSPA U.K. LTD; BORIS MIZHEN, INDIVIDUALLY AND AS AN OFFICER OF LEANSPA, LLC, NUTRASLIM, LLC, AND NUTRASLIM U.K. LTD, RICHARD CHIANG, INDIVIDUALLY AND AS AN OFFICER OF LEADCLICK MEDIA, INC., ANGELINA STRANO, RELIEF DEFENDANT,

Defendants.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CONSUMER DATA INDUSTRY ASSOCIATION, CONSUMER MORTGAGE COALITION, INDEPENDENT COMMUNITY BANKERS OF AMERICA®, MORTGAGE BANKERS ASSOCIATION, NATIONAL CONSUMER REPORTING ASSOCIATION, AND REAL ESTATE SERVICES PROVIDERS COUNCIL (RESPRO®) AS *AMICI CURIAE* SUPPORTING DEFENDANT-APPELLANT CORELOGIC, INC.

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Dated: July 27, 2015

CORPORATE DISCLOSURE STATEMENT

As required by Fed. R. App. P. 26.1(a), the undersigned counsel states that that *amici curiae* the Chamber of Commerce of the United States of America, the Consumer Data Industry Association, the Consumer Mortgage Coalition, the Independent Community Bankers of America®, the Mortgage Bankers Association, the National Consumer Reporting Association, and Real Estate Services Providers Council (RESPRO®) have no parent companies and have not issued any stock.

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Dated: July 27, 2015

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INTEREST OF THE *AMICI CURIAE*[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), the Chamber of Commerce of the United States of America ("Chamber"), the Consumer Data Industry Association ("CDIA"), the Consumer Mortgage Coalition ("CMC"), the Independent Community Bankers of America® ("ICBA"), the Mortgage Bankers Association ("MBA"), the National Consumer Reporting Association ("NCRA"), and Real Estate Services Providers Council ("RESPRO®") hereby file this brief as *amici curiae* supporting Defendant-Appellant CoreLogic, Inc. ("CoreLogic"), urging reversal of the district court's judgment as to CoreLogic.[2]

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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[1] No party's counsel authored any portion of this brief. No party or party's counsel contributed money intending to fund preparing or submitting the brief. No person other an *amicus curiae*, its members, or its counsel made such a contribution.

[2] Undersigned counsel for the *amici* parties requested and received the consent of all parties to this action to the filing of this brief.

The CDIA is an international trade association of more than 120 corporate members. Its mission is to enable consumers, media, legislators and regulators to understand the benefits of the responsible use of consumer data which creates opportunities for consumers and the economy. CDIA members provide businesses with the data and analytical tools necessary to manage risk. They help ensure fair and safe transactions for consumers, facilitate competition and expand consumers' access to a market which is innovative and focused on their needs. CDIA-member products are used in more than nine billion transactions each year.

The CMC is a non-profit trade association of national residential mortgage lenders, servicers, and service providers. Among its areas of focus, the CMC has been active in issues concerning the mortgage loan origination and servicing process, as well as general matters of corporate law.

The ICBA®, the nation's voice for 6,400 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. ICBA members operate 24,000 locations nationwide, employ 300,000 Americans and hold $1.4 trillion in assets, $1.1 trillion in deposits, and $900 billion in loans to consumers, small businesses and the agricultural community.

The MBA, with a membership of over 2,200 companies, is the national association representing the real estate finance industry. The association works, *inter alia*, to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, to extend access to affordable housing to all Americans, to promote fair and ethical lending practices, and to foster professional excellence among real estate finance employees.

The NCRA is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes seventy percent of the mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.

RESPRO® is a national non-profit trade association that unites providers from across the home buying and financing industry towards one common goal: a business and regulatory environment that better enables all of our members to efficiently offer affiliated services through subsidiaries, joint ventures, and strategy partnerships. Their members are cutting edge real estate broker-owners, real estate franchisers, mortgage lenders/brokers, title insurers/agents, home builders, home warranty companies, and other settlement service providers throughout North America. They represent their affiliated businesses before federal and state

policymakers, help them manage their confusing and changing regulatory environment under the Real Estate Settlement Procedures Act (RESPA), Dodd-Frank and state laws, and enable them to develop and operate successful and legally-compliant affiliated businesses, joint ventures, and marketing agreements.

Amici offer this brief for two reasons. First, many members of the *amici* use "shared services" programs akin to the shared services program used by CoreLogic. *Amici*'s members have an interest in maintaining and promoting expense-saving, efficient functions like shared services, ultimately to provide cost savings to their customers. *Amici* therefore seek to apprise the Court of the value of shared services programs. Second, many members of the *amici* are parent corporations that provide shared services for their subsidiaries. The district court's decision below unsettled foundational principles of limited liability and corporate separateness between parents and subsidiaries. *Amici* ask the Court to restore clarity to the law and to avoid confusion, administrative inconvenience, and costly litigation so that parent companies may pursue innovations in efficiently administering back-office functions for their subsidiaries while still preserving corporate formalities.

ARGUMENT

Companies make and provide goods and services to others, but at the same time need to support those operations with so-called "back-office" functions such

as accounting, legal and compliance, human resources, and information technology. Rather than operating each corporate division or subsidiary of the same parent as an autonomous unit responsible for providing its own back-office support services, many corporations consolidate those services through a "shared services" program, in which a single operating unit provides core back-office functions for all corporate divisions and subsidiaries. A shared services unit might, for example, provide information technology, human resources, and finance and accounting support for an entire corporate family. By concentrating these functions, companies become more efficient, save money, and direct greater focus to their core competencies. These efficiencies also benefit consumers in the form of lower costs, better quality products, and more attentive customer service.

Shared services programs have been widely embraced, and are now a standard feature of the modern-day corporation. It is estimated that more than eighty percent of Fortune 500 companies have implemented some form of shared services in their domestic operations.

In the present case, the district court held CoreLogic, Inc. ("CoreLogic") liable as a relief defendant based on the use by the LeadClick defendants of a shared services function provided by CoreLogic. In so doing, the district court disregarded the strictly observed corporate separateness between CoreLogic and LeadClick and ordered CoreLogic to disgorge to the plaintiffs a routine cash

transfer from LeadClick that repaid CoreLogic for prior advances.[3] This transfer was effected by CoreLogic's shared services program. Relying on out-of-circuit bankruptcy law, the district court concluded that because CoreLogic's shared services cash management system did not include written loan agreements and interest payments, CoreLogic did not have a "bona-fide creditor-debtor relationship" with LeadClick, and its routine payment of LeadClick's invoices—also managed by the shared services cash management system—was instead an equity investment in LeadClick.[4]

The formality the district court insisted upon—promissory notes, with interest—is incompatible with the very purpose of shared services: streamlining operations and increasing efficiency by reducing excess paperwork. CoreLogic did nothing more than manage its subsidiary's accounting functions, paying LeadClick's approved obligations and automatically transferring, or "sweeping," its cash revenue collections, while maintaining corporate separateness at all times.

If affirmed, the district court's holding would substantially increase the risk associated with the operation of any standard shared services system and substantially reduce—or altogether eliminate—the benefits that shared services systems provide to consumers. The law governing relief defendants should not be

[3] Summ. J. Op. at 38.

[4] *Id.*

interpreted to impose inefficiencies on companies who adopt these expense-saving procedures. This Court should reverse the district court's judgment holding CoreLogic liable as a relief defendant and, in so doing, clarify that the foundational principles of corporate separateness and limited liability still apply as companies pursue innovations in their back-office functions. Rather than adopting a legal rule that could stifle shared services programs, this Court should make clear that these useful programs are lawful and normal.

I. SHARED SERVICES SYSTEMS ARE VALUABLE AND WIDELY USED

The traditional model of corporate back-office organization, in which each division was responsible for providing its own support services is, as one commentator put it as early as 1991, an "organizational fossil[]."[5] Today, the use of "shared services" has all but replaced the traditional model. Shared services is

> a collaborative business strategy in which a subset of existing business functions are concentrated into a new, semi-autonomous business unit that has a management structure designed to promote efficiency, value generation, cost savings, and improved service for the internal customers of the parent corporation, like a business competing in the open market.[6]

Shared services programs follow the same model of specialized production that has long been used by corporations:

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[5] Richard A. Bettis, Strategic Management and the Straightjacket: An Editorial Essay, 2 J. of Organizational Sci. 315, 316 (1991).

[6] Brian Bergeron, Essentials of Shared Services 3 (2003).

> The basic idea of shared services is simple. It copies what has been common practice in other parts of a company, an example being in production. Decades ago, companies would have produced a range of goods at the same production site to serve the market geographically located around that production site. Later, companies discovered that it made more sense to produce a limited number of goods in large volumes in one production facility and then to deliver to several markets. Shared services uses the same basic logic: provide services in one location to be used by several recipients in several other locations. Hence the name "shared services" . . . .[7]

There are many benefits to shared services programs. Companies can reduce costs, increase efficiency by eliminating duplication of efforts, and reduce distractions from core competency activities.[8] Standardization of technology across a corporation provides better quality of service at comparable or lower costs.[9] By concentrating purchasing and other formerly dispersed activities, companies benefit from improved economies of scale in their buying power.[10] Companies which engage in mergers and acquisitions can support integration and improve chances of realizing valuable synergies by using a shared services platform.[11] Shared services, however, is not simply about efficiency gains. It is a fundamental change in organizational coordination, and it changes "the way that the organization learns and captures knowledge and potentially even the way in

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[7] Tom Olavi Bangemann, Shared Services in Finance and Accounting 15 (2005).

[8] Bergeron, supra, at 6.

[9] *Id.* at 6-7.

[10] *Id.* at 7.

[11] Bangemann, supra, at 11.

which the organization thinks about its work and its identity."[12]

Companies understand the value of shared services and have widely embraced its use.[13] It is now estimated that over eighty percent of Fortune 500 companies use shared services in their U.S. operations.[14, 15] Shared services is the primary service delivery model for human resources, finance, procurement, and

[12] Will Seal & Ian Herbert, Shared Service Centres and the Role of the Finance Function, 9 J. Acct. & Organizational Change 188, 189 (2013).

[13] *See* Kristin Purtell, Shared Service: A Benchmark Study, The Johnsson Group 3 (March 28, 2005), http://www.cfoclub.cz/data/1132664833/shared services.pdf ("The shared services model has proven itself over the last decade and is moving into a mature phase of development.").

[14] Deloitte, Shared Services Handbook 3, http://www2.deloitte.com/content/dam/Deloitte/dk/Documents/finance/SSC-Handbook-%20Hit-the-Road.pdf.

[15] The federal government has also implemented shared services. In 2013, the Office of Management and Budget ("OMB") recognized "that [t]he traditional approach to agency-specific, large-scale financial systems modernization projects in the Federal Government has often led to poor results in terms of cost, quality, performance, and reporting." Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, Improving Financial Systems Through Shared Services 1 (Mar. 25, 2013), https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-08.pdf. The OMB has therefore mandated that, with limited exceptions, all executive agencies use a shared services solution for future modernizations of their accounting and financial systems. *Id.* The Departments of Agriculture, Interior, Treasury, and Transportation currently provide core accounting and related services to other federal executive agencies. *See* Beth Cobert & Dick Gregg, Reducing Costs and Improving Efficiency Through Federal Shared Service Providers for Financial Management, Office of Management and Budget Blog (May 2, 2014, 1:02 PM), https://www.whitehouse.gov/blog/2014/05/02/reducing-costs-and-improving-efficiency-through-federal-shared-service-providers-fin.

customer service, and its use extends across all industries.[16]

In short, in both the public and private sectors, shared services programs are no longer a novelty—they are the norm. The district court's opinion, while ultimately misapplying the law, expressly recognized this development.

> Shared services refers to a program of consolidated back-office functions across related companies. In a shared services program, a single team handles administrative functions for all the other companies[.] These shared service programs are common among large companies with subsidiaries because of the advantages they provide, such as allowing subsidiaries to focus on their business operations without having to duplicate administrative functions, decreasing subsidiaries' expenses due to efficiencies and economies of scale, and enhancing the consistencies of operations and recordkeeping.[17]

II. THE DISTRICT COURT'S DECISION CREATES A DANGEROUS PRECEDENT WHICH COULD DISCOURAGE COMPANIES FROM PURSUING EFFICIENCY-ENHANCING SHARED SERVICES PROGRAMS

In holding CoreLogic liable as a relief defendant, the district court effectively found that the mere operation of a cash management, shared services program between a parent and its subsidiary could be the basis for invoking the principle that "'[f]ederal courts may order equitable relief against a person who is not accused of wrongdoing . . . where that person: (1) has received ill-gotten funds;

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[16] PricewaterhouseCoopers, The Future of Global Business Services 12-13 (2012), https://www.pwc.com/en_US/us/outsourcing-shared services-centers/assets/pwc-future-global-business-services-summary.pdf.

[17] Summ. J. Op. at 13-14 (quotations and citations omitted).

and (2) does not have a legitimate claim to those funds.'"[18] Applying that principle, and the countervailing principle that "'[r]elief defendants who have provided some form of valuable consideration in good faith'" cannot be required to disgorge funds,[19] the district court relied on the contrast between an equity investment and a loan, treating the former as a potential grounds for equitable relief with no other indicia of fraud or inequity:

> if CoreLogic's advances to LeadClick were essentially investments made in the hopes of future returns . . . then CoreLogic does not have a legitimate claim to the $4 million transfer of funds from LeadClick. Conversely, if CoreLogic's advances were bona fide loans, then CoreLogic does have such a legitimate claim.[20]

The district court concluded that because there was no agreed-upon repayment schedule, promissory notes, or interest payments made in connection with CoreLogic's shared services, cash-management program, "no reasonable jury could find that CoreLogic's advances were bona fide loans extended to LeadClick."[21] Rather, the court concluded, the $4.1 million transfer at issue must have been part of an equity investment and CoreLogic therefore lacked a legitimate

[18] *Id.* at 34 (quoting *S.E.C. v. Cavanaugh*, 155 F.3d 129, 136 (2d Cir. 1998)).

[19] *Id.* (quoting *Commodity Futures Trading Comm'n v. Walsh*, 618 F.3d 218, 226 (2d Cir. 2010)).

[20] *Id.* at 36-37.

[21] *Id.* at 37.

claim to retain the funds.[22] It ordered CoreLogic to disgorge the funds it had received from LeadClick as part of that shared services program, without piercing the corporate veil or finding that CoreLogic was LeadClick's alter-ego.[23]

The district court's conclusion ultimately suggests that a shared services program, standing alone, might be enough to require disgorgement from a corporate parent that is merely attempting to efficiently run its business. But so far as appears from the opinion of the court, there was no evidence that CoreLogic and LeadClick did not maintain proper corporate separateness at all times.[24] And CoreLogic itself was never accused of wrongdoing. Yet the district court treated CoreLogic as if it were a passive transferee holding LeadClick's profits for no legitimate reason. The court in effect found that cash-management services provided to LeadClick constituted misapplication of LeadClick's funds rather than

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[22] In so doing, the Court disregarded the concession by the Federal Trade Commission's expert that the use of promissory notes and interest payments in intercompany cash transfers made pursuant to a shared services program is not customary. Van Wazer Dep. 48:10-22; *see also id.* 95:15-16 (stating that the use of a promissory note by a parent company which pays its subsidiary's bills would be "the equivalent of writing an agreement with yourself").

[23] Summ. J. Op. at 38.

[24] *See Applied Biosys., Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1463 (D. Del. 1991) ("Under the alter ego or piercing the corporate veil doctrine, courts will ignore the corporate boundaries between parent and subsidiary if fraud or inequity is shown."); *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, No. 3184-VCP, 2008 WL 4057745, at *12 (Del. Ch. Sept. 2, 2008) (declining to pierce corporate veil where plaintiff made an insufficient "showing of fraud or other inequity to justify a departure from the usual rule recognizing the corporate form").

a proper corporate operation by which its parent, CoreLogic, performed an ordinary corporate function untainted by any judicial finding of fraud or inequity.

As discussed at length above, shared services programs are commonplace. A feature of many parent-subsidiarity relationships, shared services arrangements historically have fit quite comfortably within the larger body of law that recognizes corporate separateness with very few, well-defined exceptions (such as veil piercing). To this point, shared services programs have not yielded litigation difficulties, and for good reason: they are business operations that pose no unfairness to consumers, creditors, or the public, and they should be allowed to work without interference. If affirmed and the result generally applied, however, the district court's holding would present a brand new challenge to these sensible programs. This Court should take this opportunity to prevent the law from developing in this dangerous direction, and instead affirm that these types of programs are legal and proper.[25]

The court's ruling holding a parent liable as a relief defendant for doing nothing other than managing cash and bills for its subsidiary also exposes parent companies to dramatically greater liability for legal violations committed by its

[25] Indeed, the district court's analysis suggests a significant expansion in Federal Trade Commission authority. The FTC is tasked with preventing anticompetitive and deceptive business practices, not with intruding upon basic corporate governance matters or seeking a remedy in disregard to state corporate law principles. This Court should not sanction such a deviation.

subsidiaries than is generally permitted under existing law. Under the district court's holding, the parent companies who increasingly employ shared services programs could face vicarious liability for offering to provide efficient cash management, accounting, or other back-office functions that the subsidiary otherwise would have to provide itself. The result would likely be far fewer shared services programs, which in turn would increase costs to consumers.

The court's holding also is fundamentally inconsistent with the core principle of limited liability—the hallmark of corporate law for decades.[26] Just today, this Court stated that "well-settled principles of corporate law . . . treat parent corporations and their subsidiaries as legally distinct entities" and that courts will "pierce the corporate veil" only in "extraordinary circumstances."[27] The principle of limited liability has endured past corporate innovations; shared services programs, which are commonplace rather than extraordinary, should not be treated differently. If a shared services program is in fact a sham and is being

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[26] *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003); *see also id.* at 474 ("'Separate legal personality has been described as an almost indispensable aspect of the public corporation.'" (quoting *First Nat'l Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983))). "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)).

[27] *Balintulo v. Ford Motor Co.*, No. 14-4104, slip op. at 15 (2d Cir. July 27, 2015).

used unlawfully, then traditional veil-piercing analysis and other recognized exceptions to intercorporate liability are available to courts to avoid inequity. But absent such an analysis, this Court should not reach a conclusion that imposes costly inefficiencies on companies who pursue common shared services programs.

Amici further suggest that the court's holding should not be affirmed on the alternate theory that shared services functions must adhere to particular documentation requirements. The court should not tax corporate productivity by requiring corporations to consider and implement formalities—like excessive documentation of routine bill-paying—that shared services programs were designed and implemented to avoid.

CONCLUSION

For the reasons set forth above, the judgment of the district court holding CoreLogic liable as a relief defendant should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* the Chamber of Commerce of the United States of America, the Consumer Data Industry Association, the Consumer Mortgage Coalition, the Independent Community Bankers of America®, the Mortgage Bankers Association, the National Consumer Reporting Association, and Real Estate Services Providers Council (RESPRO®) hereby certifies under Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C) that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,423 words (based on Microsoft Word's word-count function) excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P 32(a)(6) because this brief has been prepared using Microsoft Word in Times New Roman, 14-point type.

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CERTIFICATE OF SERVICE

The undersigned counsel for *amici curiae* the Chamber of Commerce of the United States of America, the Consumer Data Industry Association, the Consumer Mortgage Coalition, the Independent Community Bankers of America®, the Mortgage Bankers Association, the National Consumer Reporting Association, and Real Estate Services Providers Council (RESPRO®) hereby certifies under Local Rule 25.1(h)(2) that the foregoing Brief of the Consumer Mortgage Coalition as *Amicus Curiae* Supporting Defendant-Appellant CoreLogic, Inc., was filed with the United States Court of Appeals for the Second Circuit through the CM/ECF system on July 27, 2015, and thus was served on all parties or their counsel of record by operation of the ECF system.

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