

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. 1:14-CV-00195**

JENEEN BROWN, as an individual and as
a representative of the classes,

Plaintiff,

v.

DELHAIZE AMERICA, LLC and FOOD
LION, LLC,

Defendants.

**NATIONAL CONSUMER LAW
CENTER, DEMOS, NATIONAL
ASSOCIATION OF
CONSUMER ADVOCATES,
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS, NATIONAL
EMPLOYMENT LAW
PROJECT AND SOUTHERN
COALITION FOR SOCIAL
JUSTICE’S MOTION FOR
LEAVE TO FILE AMICUS
BRIEF**

Pursuant to Local Rule 7.5, National Consumer Law Center (“NCLC”), Demos, National Association of Consumer Advocates (“NACA”), National Association Of Criminal Defense Lawyers (“NACDL”), National Employment Law Project (“NELP”), and the Southern Coalition for Social Justice (“SCSJ”) (collectively “proposed *amici*”), by and through undersigned counsel, respectfully move the Court for leave to file the attached *amicus curiae* brief in support of Plaintiff’s Opposition to Defendants’ Motion to Dismiss the First Amended Complaint (ECF No. 48).

Undersigned counsel have contacted counsel for both parties in the above-captioned case. Plaintiff’s Counsel does not oppose this Motion and, at the time of filing, Defendants’ Counsel had not indicated whether it opposed this Motion. In accordance

with Local Rule 7.5(c), this Motion is being filed within the time permitted for Plaintiff's Opposition to Defendants' Motion to Dismiss.

PROPOSED AMICI'S INTEREST IN THIS LITIGATION

1. The proposed *amici* are all not-for-profit organizations that are organized for the purposes of advocating for consumers and job-seekers who otherwise may have no voice when pitted against the interests of corporations such as the Defendants in this case.

The National Consumer Law Center, Inc. ("NCLC") is a non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including fair credit reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series, consisting of twenty practice treatises and annual supplements. One volume, Fair Credit Reporting Act (8th ed. 2013), is a standard resource on privacy and the FCRA. In addition, NCLC has testified before Congress regarding the FCRA, regularly submits comments to regulators in FCRA rulemakings, and has issued special reports on consumer reporting issues, including a report on the FCRA dispute process entitled Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses (April 2012).

NCLC's interest in this case, indeed its purpose and expertise, are to advocate where law and policy intersects with consumer protection, to provide the very best and most accurate information about the subject, which information may be strongly related to the issues the court is considering but not directly raised in the advocacy positions of the parties. The issues presented in this case implicate the interests of millions of American consumers: joblessness caused by inaccurate, derogatory consumer reporting by background check companies and failure of employers to properly inform workers and job seekers of their rights when obtaining a background check. NCLC conducted an extensive analysis of the background screening industry and documented common mistakes and poor practices. The FCRA provides essential protections to current and prospective employees that would be eviscerated by the Defendant's contrary interpretation of what was intended to be a narrow exception to the FCRA. NCLC's interest is to inform the court how it views the history and significance of § 1681a(y) and how it impacts workers and employers.

Demos is a public policy organization working to ensure all people have an equal chance in our economy. Demos has conducted extensive research and advocacy in the area of use of credit reports in employment, and in particular the negative impact on disadvantaged populations, including women and people of color.

The National Association of Consumer Advocates ("NACA") is a non-profit association of attorneys and consumer advocates committed to representing consumers'

interests. Our members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA also has a charitable and educational fund incorporated under §501 (c) (3).

NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers.

NACA was founded in 1994 by 12 pioneering consumer attorneys who saw a need to link advocates working in all disciplines of consumer law to effectively create a fair, honest, and open consumer marketplace. Today, NACA has grown into an organization of more than 1,800 attorneys who represent and have represented hundreds of thousands of consumers victimized by fraudulent, abusive, and predatory business practices. As a national organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. In pursuit of this mission, making certain that corporations comply with state and federal consumer protection laws in general and the FCRA in particular has been a continuing and significant concern of NACA since its inception.

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case as NACDL’s official position is that “employers, landlords, and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited,” as documented in a recently-released, groundbreaking report entitled *Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime – A Roadmap to Restore Rights and Status After Arrest or Conviction*. That report is available at <http://www.nacdl.org/restoration/roadmapreport/>.

The National Employment Law Project’s (“NELP”) interest as an amicus in this case is to bring the perspective of working Americans into the court’s view as it considers whether to accept a corporate employer’s interpretation of a statute designed to protect people from the very harms that effect their ability to get and keep a job. When NELP learned that Food Lion was grossly misinterpreting 28 U.S.C. § 1681a(y), NELP sought counsel to file an amicus. Among NELP’s core commitments to workers is advocacy.

While on the one hand, NELP works from the ground up to build change in law and policy so that the work Americans do will be a ladder to economic opportunity and an anchor of economic security for working families, on the other hand NELP must act to protect workers from further unraveling of protections that have occurred over the past three decades. NELP partners with strong advocacy networks, grounded in the full range of stakeholders - grassroots groups and national organizations, worker centers and unions, policymakers and think tanks. With its staff of lawyers, policy experts and researchers, NELP provides following on behalf of the American workforce:

- *In-depth legal and policy analysis*, developing innovative strategies to create good jobs, improve working conditions and bolster economic security;
- *Rigorous empirical research*, documenting key trends in the economy and spelling out effective solutions;
- *Expert legal advice and technical assistance*, helping advocates craft viable policies in light of legal restrictions;
- *Strategic leadership in coalitions*, bringing together diverse constituencies to pursue common goals;
- *Communications, public education and messaging*, shining a spotlight on the struggles of today's working families and helping to increase understanding of key economic problems and viable policy solutions; and

- *Capacity building* through dissemination of policy and research reports, hosting conferences, and student training.

NELP has offices around the country and programs that touch the lives of workers across the economic spectrum. In NELP's view, adopting Food Lion's interpretation of the FCRA would long-term harm on American workers, from those in the lowest-paying unskilled jobs to those who are highly-skilled or require special clearances for issues such as national security, commodities trading, law enforcement or investment banking. For more information about NELP, visit its website at www.nelp.org.

The Southern Coalition for Social Justice ("SCSJ") is a 501(c)3 nonprofit organization founded in August 2007 in Durham, North Carolina by a multidisciplinary group, predominantly people of color, who believe that families and communities engaged in social justice struggles need a team of lawyers, social scientists, community organizers and media specialists to support them in their efforts to dismantle structural racism and oppression.

Through its Criminal Justice Initiative, the SCSJ tackles racial discrimination at the legal and policy levels to eliminate obstacles facing those with criminal records as they attempt to re-enter the mainstream of society. The crisis that stems from criminal convictions, especially the devastating collateral consequences, is now being called the New Jim Crow, echoing one of the most painful chapters in US history. Collateral consequences of a criminal conviction are formidable—often insurmountable—barriers to

successful reentry. Southern states have more legal barriers to successful reentry than other regions of the country.

SCSJ provides direct reentry legal services and referrals (in the NC Triangle and Triad areas) to clients seeking to expunge their criminal records and obtain certificates of relief. Through this clinic, the SCSJ witnesses, firsthand, how Fair Credit Reporting Act violations undermine its clients' attempts to obtain meaningful employment and a better life for their families.

2. An *amicus* brief is desirable in this matter because American consumers and job-seekers should be heard on an issue that economically impacts them. The question presented in the motion to dismiss concerns law and public policy issues that could have a far-reaching and deleterious effect on all American workers and their families regardless of skill, pay grade, geography, or any other variable. Even though an opinion that alters the status quo and interprets the FCRA to excuse employers from FCRA compliance would hurt all workers, it will likely hurt the lowest-paid and minority workers disproportionately. Not only should American workers have a voice, the court deserves to make its decision with the benefit of the proposed *amici's* expertise on the intersection of the FCRA and employment, where background checks and public records are unreliable and it is important that the FCRA provisions be preserved.

3. The matters discussed in the *amicus* brief are relevant to the disposition of this case because it provides the court with a broader perspective on the discrete issues

raised in the motion to dismiss. It provides the court with empirical and practical information about the history and application of the FCRA provisions at issue, as well as the point of view of American workers who are subjected to background checks that are inaccurate, but widely used to make employment decisions.

ARGUMENT

The court should grant leave to NCLC, Demos, NACA, NACDL, NELP, and SCSJ to file a brief *amici curiae* because the information proffered is both timely and useful. *Bryant v. Better Bus. Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996)(analyzing cases relying on 3A C.J.S. Amicus Curiae § 3 (1973)). The Court has broad discretion in deciding whether to allow a non-party to participate as an *amicus curiae*, and should do so when the information provided may aid the court in its analysis of an issue. *See, e.g., Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982); *Waste Mgmt., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D.Pa.1995). *Amici curiae* have “been allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance.” *Bryant*, 923 F.Supp. at 727 (internal citations omitted); *see also Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903).

The court is poised to decide an issue of national importance that will affect the rights of job-seekers, workers, consumers and their families. The proposed amici brief will address the purpose and history of the FCRA provision challenged by Food Lion, the

current legal and policy issues regarding the background checks for employment purposes, the impact on workers, employers and the economy.

There is no Federal Rule of Civil Procedure that applies to motions for leave to appear as amicus curiae in a federal district court. District courts therefore have discretion whether to grant or deny such leave and often look for guidance to Rule 29 of the Federal Rules of Appellate Procedure, which applies to amicus briefs at the federal appeals level. *See, e.g., Jin v. Ministry of State Sec.*, 557 F.Supp.2d 131, 136 (D.D.C.2008); *Tafas v. Dudas*, 511 F.Supp.2d 652, 660 (E.D.Va.2007); *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F.Supp. 720, 728 (D.Md.1996). Rule 29 indicates that amici should state “the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R.App. P. 29(b)(2).

District Courts in this Circuit have routinely granted motions for leave to participate as *amici* in cases such as this. *See e.g. S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC*, Civ. No. 1:08CV318, 2009 WL 1940048 (W.D.N.C. July 2, 2009); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 730 (E.D.N.C. 2008); *United States v. Ward*, 618 F. Supp. 884, 913-14 (E.D.N.C. 1985); *Ctr. for Constitutional Rights v. Lind*, CIV.A. ELH-13-1504, 2013 WL 2468624 (D. Md. June 6, 2013); *Washington Gas Light Co. v. Prince George's Cnty. Council*, CIV.A. DKC 08-0967, 2012 WL 832756 (D. Md. Mar. 9, 2012) *aff'd*, 711 F.3d 412 (4th Cir. 2013); *Nat'l City Bank of Indiana v. Turnbaugh*, 367 F. Supp. 2d 805, 809 (D. Md. 2005) *aff'd sub nom. Nat'l City*

Bank of IN v. Turnbaugh, 463 F.3d 325 (4th Cir. 2006); *Frank Krasner Enterprises, Ltd. v. Montgomery Cnty., Maryland*, 166 F. Supp. 2d 1058 (D. Md. 2001) *vacated on other grounds*, 60 F. App'x 471 (4th Cir. 2003); *Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348 (E.D. Va. 2009); *Tafas v. Dudas*, 511 F. Supp. 2d 652 (E.D. Va. 2007); *Westfall v. Kendle Int'l*, CIV.A. 1:05-CV-00118, 2007 WL 1289900 (N.D.W. Va. May 1, 2007).

The proposed *amici* have the type of expertise, interest and perspective that courts have found to be helpful in deciding legal issues that may have impact well-beyond this case. *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)(explaining that “[d]istrict courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if 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.” *Cobell v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C.2003) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir.1997)). The proposed *amici* have long, established histories not only as advocates, but as experts in issues raised in this case involving the FCRA, employment, background checks, and how this confluence of issues impacts consumers and workers. Food Lion seeks to be absolved of duties under the FCRA, and the proposed *amici* seek to give a voice to workers who would be impacted by such a result.

Trial courts have permitted *amici curiae* such as NCLC, Demos, NACA, NACDL, NELP, and SCSJ to assist where they can provide helpful analysis of the law and have a special interest in the subject matter of the suit or where existing counsel are in need of assistance. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir.1970); *United States v. Gotti*, 755 F.Supp. 1157, 1158 (E.D.N.Y.1991); *News & Sun–Sentinel Co. v. Cox*, 700 F.Supp. 30, 32 (S.D.Fla.1988) (quoting *Donovan v. Gillmor*, 535 F.Supp. 154, 159 (N.D. Ohio), *appeal dismissed*, 708 F.2d 723 (6th Cir.1982)). However, the aid provided by the *amici* should outweigh any taint that its advocacy for a position may bring to the matter. *Yip v. Pagao*, 606 F.Supp. 1566, 1568 (D.N.J. 1985). The proposed *amici* represent large constituencies of individuals that have a vested interest in how the provisions of the FCRA are construed and applied. They are advocacy organizations, they are not neutral. The proposed *amici* have strong reputations not only for their advocacy, but also for objective expertise. These organizations’ constituencies include nearly every American – consumers, workers, and people with a consumer report or a public record. These constituencies extend beyond the parties in this case.

The proposed *amici*’s participation will not enlarge the issues before the court, but instead will illuminate facts, research, policy, practical, social and economic impact that adopting a new rule under § 1681a(y) would have on workers. *Wyatt by and through Rawlins v. Hanan*, 868 F.Supp. 1356, 1358–59 (M.D.Ala.1994). The proposed *amici* are established advocates for workers and consumers, but each organization is well-known as

an expert in its field such that its perspective will be useful in resolving the issues presented by the parties. *Tafas v. Dudas*, 511 F. Supp. 2d 652, 659 (E.D. Va. 2007)(citing *Harris v. Parnsley*, 820 F.2d 592, 603 (3d Cir.) (“[P]ermitting persons to appear ... as friends of the court ... may be advisable where third parties can contribute to the court's understanding.”), *cert. denied sub nom., Castille v. Harris*, 484 U.S. 947 (1987)).

Rather than frequently turning down amicus briefs on timeliness grounds, courts have accepted them as timely even when filed “on the eve of summary judgment motions.” *Id.* (citing *Community Ass'n for Restoration of the Env't v. DeRuyter Bros. Dairy*, 54 F.Supp.2d 974, 975–976 (E.D.Wash. 1999)).

The proposed *amici* have demonstrated a special interest in the outcome of the suit and their memorandum provides helpful information to the court regarding the impact not only of background checks on individual consumers and workers, that research in this field exists and demonstrates that background checks are frequently inaccurate and that perhaps the only law that would protect a worker is, in fact, the FCRA. *Washington Gas Light Co. v. Prince George's Cnty. Council*, CIV.A. DKC 08-0967, 2012 WL 832756 (D. Md. Mar. 9, 2012) *aff'd*, 711 F.3d 412 (4th Cir. 2013)(granting leave for a municipal government to file an amicus brief where it had special knowledge of the law and policy impacts of the regulations in question).

CONCLUSION

For these reasons, NCLC, Demos, NACA, NACDL, NELP, and SCSJ respectfully request the court find that their motion for leave to file a brief amici curiae is well-taken and should be granted. Consumers and job-seekers should be heard on this important issue.

Dated: August 11, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and have verified that such filing will be sent electronically using the CM/ECF system to all counsel of record for the parties.

Dated: August 11, 2014

Respectfully submitted,

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