

MOTION INFORMATION STATEMENT

Docket Number(s): 06-1871-cv Caption [use short title] _____

Motion for: Leave to File Brief Amicus Curiae In re American Express Merchants' Litigation

Set forth below precise, complete statement of relief sought:

The Chamber of Commerce of the United States of
America seeks leave to file a Brief Amicus Curiae in
Support of the Petition for Rehearing En Banc filed by
American Express Company.

MOVING PARTY: The Chamber of Commerce of the U.S.A. OPPOSING PARTY: Plaintiffs-Appellants

- Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Andrew G. McBride OPPOSING ATTORNEY: Gary B. Friedman
[name of attorney, with firm, address, phone number and e-mail]

Andrew G. McBride Gary B. Friedman
Wiley Rein LLP Friedman Law Group LLP
1776 K Street NW, Washington DC 20006 270 Lafayette Street, 14th Floor, New York, NY 10012
(202) 719-7000 amcbride@wileyrein.com (212) 680-5150 gfriedman@flgllp.com

Court-Judge/Agency appealed from: U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney: /s/ Andrew G. McBride Date: 2/15/2012 Has service been effected? Yes No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____ By: _____

06-1871-CV

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, CASE NO. 03-CV-9592

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF PETITION FOR REHEARING EN BANC**

Robin S. Conrad
Kate Comerford Todd
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Andrew G. McBride
Thomas R. McCarthy
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

Counsel for Amicus Curiae

February 15, 2012

The Chamber of Commerce of the United States of America, by and through its undersigned counsel, hereby files this Motion for Leave to File Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America in Support of Petition for Rehearing En Banc. Counsel for the Chamber conferred with counsel for Plaintiffs regarding the filing of the *amicus curiae* brief. Plaintiffs object on timeliness grounds to any *amicus* brief that was not filed on the same day as the petition. Plaintiffs cite *Thomas Fry v. Exelon Corporation Cash Balance Pension Plan*, 576 F.3d 723 (7th Cir. 2009). But this out-of-circuit precedent actually supports the Chamber because it states that any “*amicus curiae* in support of a petition for rehearing, or rehearing en banc, must use the same schedule as the petitioner.” *Id.* at 725. The panel issued its opinion on February 1, 2012, making the deadline for a petition for rehearing en banc February 15, 2012. See Fed. R. App. P. 35(c), 40(a)(1). By filing on February 15, 2012, the Chamber has complied with “the same schedule as the petitioner”—the schedule set by the Federal Rules of Appellate Procedure. The Chamber respectfully submits that given the importance of arbitration clauses to the business community in the Second Circuit and the importance of proper interpretation and application of Supreme Court precedent, this Court should accept this *amicus* brief for filing.

The Chamber of Commerce of the United States of America is the world’s largest federation of businesses and associations. The Chamber represents three

hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving arbitration agreements. Indeed, the Chamber filed *amicus* briefs in the U.S. Supreme Court in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

Many of the Chamber's members and affiliates regularly employ agreements to arbitrate in their business contracts with their customers and employees. By agreeing to arbitrate with their counterparties, they avoid costly and time-consuming litigation when disputes arise. In its place, they adopt a dispute resolution mechanism that is speedy, fair, inexpensive, and effective. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA") and the Supreme Court's consistent endorsement of arbitration over the past several decades, Chamber members have structured millions of contractual relationships around arbitration agreements.

This is a case of great national importance. It concerns an area of the law—the enforceability of arbitration agreements—that impacts both consumers and businesses, as well as employers and employees. Dealing as it does with the proper interpretation and application of two recent Supreme Court decisions regarding arbitration and class action waivers, it has potentially far-reaching consequences.¹

The panel expresses one view on the interaction between the Court’s holding in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and the “vindication of federal statutory rights” theory with roots in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). In fact, the district courts in this Circuit have come to different conclusions regarding the interplay of these two decisions. Compare *D’Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 332 (D. Conn. 2011) (opining that *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), “arguably cast doubt” on the breadth this Court afforded *Green Tree* in this litigation and that *Concepcion* called it “into further doubt”) with *Raniere v. Citigroup Inc.*, ___ F. Supp. 2d ___, No. 11 Civ. 2448, 2011 WL 5881926, at *13 (S.D.N.Y. Nov. 22, 2011) (stating that *Concepcion* “in no way alters the

¹ Litigants have already begun seizing on the panel’s rationale as the basis for an exception that could effectively swallow the rule of *Concepcion*. E.g., Notice Supp. Auth. at 1-2, Dkt. No. 86, *Kilgore v. KeyBank Nat’l Ass’n*, No. 09-16703 (9th Cir. filed Feb. 8, 2012); Notice Supp. Auth. at 1, Dkt. No. 57, *Cardenas v. Americredit Fin. Servs. Inc.*, No. 10-17292 (9th Cir. filed Feb. 7, 2012); Notice Supp. Auth. at 1, Dkt. No. 50, *Aggarao v. Mol Ship Mgmt. Co.*, No. 10-2211 (4th Cir. filed Feb. 6, 2012).

relevance” of this Court’s decision in *Amex II*). Moreover, the Supreme Court’s vacatur and remand of the panel’s original decision in light of *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), indicates that the Supreme Court foresaw a “reasonable probability” that *Stolt-Nielsen* would persuade the panel to reverse course, *Lawrence v. Chater*, 516 U.S. 163, 171-72 (1996).

Given the national importance of this case and the diverging views on the viability of the panel’s reasoning after both *Stolt-Nielsen* and *Concepcion*, this case should not be resolved by a two-member panel of this Court without full briefing and oral argument. For the same reasons, this case is appropriate for *amicus* participation. Indeed, in both *Amex I* and *Amex II*, the panel had the assistance of *amici* in support of one or both of the parties. But in *Amex III*, there was no opportunity for *amicus* participation because the panel simply requested letter briefs from the parties on the effect of *Concepcion* and then re-affirmed its previous ruling without argument. The Court has previously acknowledged the Chamber’s helpful assistance as an *amicus curiae*, see *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 27 (2d Cir. 2001) (noting that the Court “received five helpful *amicus* briefs,” one of which was filed by the Chamber), and the Chamber respectfully requests that the Court allow it to offer such assistance in this case.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court grant this Motion and accept for filing the Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America In Support of Petition for Rehearing En Banc.

Respectfully submitted,

Robin S. Conrad
Kate Comerford Todd
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

/s/ Andrew G. McBride
Andrew G. McBride
Thomas R. McCarthy
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

Counsel for Amicus Curiae

February 15, 2012

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25 and Local Rule 25.2, I hereby certify that the foregoing motion was filed on February 15, 2012 by delivering the original and 15 paper copies of the motion by hand to the Clerk's office and by sending a digital version of the motion by electronic mail to civilcases@ca2.uscourts.gov on February 15, 2012.

I further certify that, on February 15, 2012, two paper copies of the motion were served by overnight mail on the parties on the attached service list, and a digital version of the motion was served by electronic mail on the parties on the service list below.

Clifford B. Storms,
Earnest T. Patrikis,
Hayward D. Fisk, Robert A.
Lonergan, William B. Lytton

Briscoe R. Smith
Atlantic Legal Foundation
2039 Palmer Avenue
Larchmont, NY 10583
brsmith@atlanticlegal.org

Business Roundtable

Catherine E. Stetson
Hogan Lovells
555 13th Street, N.W.
Washington, D.C. 20004
cate.stetson@hoganlovells.com

American Antitrust Institute

Daniel E. Gustafson
Gustafson Gluek PLLC
608 Second Avenue South
NorthStar East, Suite 650
Minneapolis, MN 55402
dgustafson@gustafsongluek.com

Public Justice, P.C.

Edith M. Kallas
Whatley Drake & Kallas LLC
380 Madison Avenue, 23rd Floor
New York, NY 10017
ekallas@wdklaw.com

492 Supermarket Corp.,
Bunda Starr Corp., Italian Colors
Restaurant, National Supermarkets
Association, Phuong Corp.

Gary B. Friedman
Friedman Law Group LLP
270 Lafayette Street, 14th Floor
New York, NY 10012
gfriedman@flgllp.com

American Express Company

Michael K. Kellogg
Derek T. Ho
Kellogg, Huber, Hansen, Todd, Evans &
Figel, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036
(202) 326-7900
mkellogg@khhte.com

/s/ Andrew G. McBride