

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA

Plaintiff,

v.

WALMART INC. AND WAL-MART
STORES EAST, LP,

Defendants.

C.A. No. 20-1744-CFC

**BRIEF OF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, THE NATIONAL RETAIL
FEDERATION, AND THE WASHINGTON LEGAL FOUNDATION IN
SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Stephanie A. Martz
NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW
Suite 1200
Washington, DC 20005

Cory L. Andrews
John M. Masslon II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

Christopher Kelly (DE Bar No. 2754)
Megan L. Brown
Stephen J. Obermeier
Wesley E. Weeks
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
ckelly@wiley.law

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
I. INTERESTS OF <i>AMICI CURIAE</i>	1
II. SUMMARY OF THE ARGUMENT.....	2
III. ARGUMENT.....	3
A. DOJ’s “Collective Knowledge” Theory Runs Counter to Traditional Principles of Agency and Scierter.	3
1. Knowledge cannot be imputed from principal to agent.....	5
2. Even if knowledge could be imputed to a company’s agent, scierter must be shown in a specific employee and cannot be imputed under any circumstances.....	6
3. These core principles have been applied in numerous contexts to reject a “collective” approach to scierter.	7
B. DOJ’s Collective Scierter Theory Threatens to Harm American Business and the Public	9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Alparma Inc. Sec. Litig.</i> , 372 F.3d 137 (3d Cir. 2004).....	4,5, 7
<i>In re Apple Computs., Inc.</i> , 127 F. App'x 296 (9th Cir. 2005)	8
<i>In re Cerner Corp. Sec. Litig.</i> , 425 F.3d 1079 (8th Cir. 2005).....	13
<i>Chaney v. Dreyfus Serv. Corp.</i> , 595 F.3d 219 (5th Cir. 2010).....	6
<i>Ezra Charitable Tr. v. Tyco Int'l Ltd.</i> , 466 F.3d 1 (1st Cir. 2006).....	8
<i>FCC v. Fox Television Stations, Inc.</i> , 567 U.S. 239 (2012)	15
<i>First Equity Corp. v. Standard & Poor's Corp.</i> , 690 F. Supp. 256 (S.D.N.Y. 1988).....	5, 13
<i>Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.</i> , 561 U.S. 477 (2010)	10, 11
<i>Garfield v. NDC Health Corp.</i> , 466 F.3d 1255 (11th Cir. 2006).....	8
<i>U.S. ex rel. Harrison v. Westinghouse Savannah River Co.</i> , 352 F.3d 908 (4th Cir. 2003).....	9
<i>Higgins v. Shenango Pottery Co.</i> , 256 F.2d 504 (3d Cir. 1958).....	5
<i>Kushner v. Beverly Enters., Inc.</i> , 317 F.3d 820 (8th Cir. 2003).....	8
<i>Lilley v. Charren</i> , 17 F. App'x 603 (9th Cir. 2001).....	13

Mizzaro v. Home Depot, Inc.,
544 F.3d 1230 (11th Cir. 2008) 6

Nat’l Mining Ass’n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014)..... 16

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 9

Nolte v. Capital One Fin. Corp.,
390 F.3d 311 (4th Cir. 2004)..... 8, 14

PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.,
139 S. Ct. 2051 (2019)..... 11, 12

In re Radian Sec. Litig.,
612 F. Supp. 2d 594 (E.D. Pa. 2009)..... 4

Saba v. Compagnie Nationale Air France,
78 F.3d 664 (D.C. Cir. 1996) 7

Southland Sec. Corp. v. Inspire Ins. Sols., Inc.,
365 F.3d 353 (5th Cir. 2004)..... 8

Staub v. Proctor Hosp.,
562 U.S. 411 (2011) 6

Suez Equity Inv., L.P. v. Toronto-Dominion Bank,
250 F.3d 87 (2d Cir. 2001) 8

United States v. Harra,
985 F.3d 196 (3d Cir. 2021)..... 15

United States v. Philip Morris USA Inc.,
566 F.3d 1095 (D.C. Cir. 2009)..... 6

United States v. Sci. Applications Int’l Corp.,
626 F.3d 1257 (D.C. Cir. 2010)..... 6, 8, 14

Woodmont, Inc. v. Daniels,
274 F.2d 132 (10th Cir. 1959)..... 6

Statutes

21 U.S.C. § 821..... 15

Other Authorities

21 C.F.R. § 1301.74(b)..... 15

28 C.F.R. § 0.100(b)..... 15

Restatement (Second) of Agency § 275 (Am. L. Inst. 1958)5, 6, 7

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.