

No. 08-3837

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRANCIS J. PULEO, et al.,
Plaintiffs-Appellants,

v.

CHASE BANK USA, N.A.,
Defendant-Appellee.

On Appeal From the Order of the United States District Court
for the Eastern District of Pennsylvania, No. 07-4800

**BRIEF OF *AMICUS CURIAE* CTIA—THE WIRELESS ASSOCIATION® IN
SUPPORT OF APPELLEE CHASE BANK USA, N.A.**

Michael F. Altschul
CTIA—THE WIRELESS ASSOCIATION®
1400 16th Street, NW
Washington, DC 20036
Telephone: (202) 785-0081

Evan M. Tager
Archis A. Parasharami
Richard Pianka
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

Attorneys for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit Rule 26.1, *amicus curiae* CTIA—THE WIRELESS ASSOCIATION[®] certifies that it has no parent corporation and that no publicly-held company owns 10% or more of its stock.

INTEREST OF THE *AMICUS CURIAE*

CTIA—THE WIRELESS ASSOCIATION[®] represents all sectors of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, as well as other contributors to the wireless industry.

Many members of CTIA have adopted as standard features of their business contracts provisions that require the parties to pursue disputes in arbitration rather than courts of general jurisdiction. CTIA members use arbitration because—in its traditional, individual form—it is a quick, fair, inexpensive, and less adversarial method of resolving disputes. Those advantages, however, would be lost if class-action procedures were superimposed on arbitration. In fact, in the experience of CTIA's members, class arbitration is a nightmarish procedure that combines the expense, delay, and enormous stakes of class-action litigation with arbitration's exceptionally narrow standard of review. CTIA accordingly has a strong interest in explaining why, under the Federal Arbitration Act ("FAA"), courts must enforce such agreements as written. CTIA is, moreover, deeply concerned that the rule

proposed by Appellants may cause its members to abandon arbitration in the vast area of ordinary consumer contracts, driving up costs—and hence prices. All parties have consented to the filing of this *amicus curiae* brief.

ARGUMENT

Recognizing that their arbitration agreement expressly prohibits class arbitration, plaintiffs argue that the district court should have compelled arbitration—but *not* under the express terms of their arbitration agreement with Chase. Instead, they say, the district court should have ordered an arbitrator to determine whether the core term of the arbitration clause—that arbitration take place on an individual basis—is enforceable.

But the FAA mandates that a “written provision ... to settle [a controversy] by arbitration ... shall be valid, irrevocable, and enforceable.” 9 U.S.C. § 2. “Congress’ principal purpose” in enacting the FAA was to “ensur[e] that private arbitration agreements are enforced *according to their terms*.” *Volt Info. Scis. v. Bd. of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989) (emphasis added). Because, under the FAA, “arbitration is simply a matter of contract between the parties” (*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)), “parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that

arbitration will be conducted.” *Volt*, 489 U.S. at 479. What plaintiffs request here runs directly counter to these principles: Rather than having district courts determine whether, consistent with the FAA, arbitration agreements may be enforced “according to their terms,” plaintiffs would have the courts enforce arbitration agreements in name only—stripped bare of even their most central and essential terms. The Court should reject that contention.

I. IT WOULD DEFEAT PARTIES’ REASONABLE EXPECTATIONS TO TREAT PROHIBITIONS OF CLASS ARBITRATION AS INCIDENTAL TO ARBITRATION AGREEMENTS

Plaintiffs do not dispute that the question whether an arbitration agreement is enforceable is a “gateway” issue that the court—not the arbitrator—must decide. Appellants’ Supp. Br. 3-4. Indeed, the Supreme Court has so stated on many occasions. *E.g.*, *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 445-456 (2006) (a “challenge ... to the arbitration clause itself” is for a court, not an arbitrator); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002). To circumvent this principle, however, plaintiffs essentially contend that a court should treat key terms about how the arbitration is to be conducted—here, that arbitration take place on an individual basis—as merely incidental to whether the parties have agreed to arbitrate at all. Yet that requirement is at the core of the parties’ arbitration agreement, and cannot simply be cast aside. To conclude otherwise would defy the

parties' reasonable expectations, because, to put it bluntly, no rational business would agree to class-wide arbitration.

For almost all of the 20th century, class arbitration was entirely unheard of. One academic reported in 2000 that, despite “an extensive effort” to locate attorneys who had participated in class arbitrations, her research “found just a handful,” indicating that “very few arbitrations have been handled as class actions.” Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38-41 & n.148 (2000). Indeed, it was not until 2003, in the wake of the plurality decision in *Bazzele*—which raised the possibility that an arbitration agreement not expressly requiring parties to proceed on an individual basis might be construed to permit class arbitrations—that the major arbitration providers first promulgated rules for class arbitrations. David Clancy & Matthew Stein, *An Uninvited Guest: Class Arbitrations and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 56 & n.1 (2007). At the same time, businesses began including language in their consumer arbitration clauses that expressly prohibits class arbitration.

The reason for this response is simple. As we discuss in greater detail below, class arbitration is an ill-conceived hybrid of arbitration and litigation. On the one hand, it eliminates all of the benefits of traditional, individual arbitration—speed, simplicity, cost savings, and reduced adversariality. On the other hand, it

does not allow for comprehensive judicial review of class-certification determinations, evidentiary rulings, or damages awards in what easily could morph into a financially ruinous case. Moreover, it does not provide defendants the finality that class *litigation* can provide, because absent class members can be expected to contend that they were not afforded the due process protections necessary to make a class-wide award binding on them.

A. The Traditional Benefits Of Arbitration Are Lost In Class Arbitration

Parties enter into arbitration agreements because, as Congress has repeatedly found, arbitration avoids the “delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation.” Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 106 Stat. 185, 186; *see also* H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982) (arbitration is “cheaper and faster than litigation,” has “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling”). The Supreme Court, too, has recognized the “simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). As this Court has noted, “[t]he concern underlying a federal right to enforcement of arbitration agreements is a party’s entitlement to a proceeding and a forum that are ... speedy, efficient, and simpler than litigation in the courts or before agencies.” *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 213 (3d Cir. 1993)

In its traditional, individual form, arbitration benefits companies and their customers alike. As the Supreme Court has explained, without arbitration, “the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). Moreover, to the extent that arbitration permits a business to resolve disputes more cheaply, those “cost-saving benefits ... in competition are passed along to customers.” *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (internal quotation marks omitted); *see also* Stephen Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-255 (2006) (arbitration “lower[s] [businesses’] dispute-resolution costs,” and this “benefit to businesses is also a benefit to consumers” because “whatever lowers costs to businesses tends over time to lower prices to consumers”).

When class-action procedures are superimposed upon arbitration, however, the expedition, informality, and cost savings of individual arbitration are lost. For example, the AAA’s class arbitration procedures largely duplicate the Federal Rules of Civil Procedure—with the exception that they provide that, once the arbitrator issues a “class determination award,” the parties may move to vacate or

confirm that interim award in the district court. *See* AAA, Supplementary Rules for Class Arbitrations, at <http://www.adr.org/sp.asp?id=21936>. As one commentator has observed, class arbitration “brings the burdens of litigation into the arbitral forum” and “lessens the distinction between the two processes.” Jonathan Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 272. In short, class arbitration is the quintessential example of alternative dispute resolution “mutat[ing] into a private judicial system that looks and costs like the litigation it’s supposed to prevent.” Todd Carver & Albert Vondra, *Alternative Dispute Resolution: Why It Doesn’t Work and Why It Does*, Harv. Bus. Rev. 120, 120 (May 1994).

B. Class Arbitration Lacks The Safeguards Of Class-Action Litigation

At the same time, class arbitration fails to provide many of the key protections offered to defendants who litigate a class action in court.

First, unlike in court—where appellate review of class-certification and merits determinations is robust—the standard for vacating an arbitrator’s decision on such issues is “among the narrowest known to law.” *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Although the FAA authorizes courts to vacate arbitral awards for such reasons as fraud or bias (9 U.S.C. § 10), parties may not

contractually expand those very limited grounds for review. Rather, the substance of an arbitral award may be reviewed only for “manifest disregard of law.” *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008). Most courts, including this one, have construed the “manifest disregard” standard to be “extremely deferential,” permitting vacatur “only under exceedingly narrow circumstances.” *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003). Accordingly, an arbitrator’s decisions regarding class certification, the scope of any class, the admissibility of expert testimony or other important evidence, whether or not the claim was proven, and the amount of damages can be disturbed by a court only if they are so egregiously wrong as to constitute a manifest disregard of the law. Many businesses are willing to forgo meaningful judicial review in an *individual* arbitration because of the benefits of a less costly and less adversarial method of resolving disputes. But in the context of class arbitration, the risks associated with limited review skyrocket dramatically. The stakes of a class arbitration are exponentially higher than those of an individual arbitration. No business would rationally expose itself to the possibility of ruinous liability without the availability of robust judicial review.

Beyond the lack of effective judicial review, defendants in a class arbitration are also deprived of the certainty that, if they win or settle the case, substantially all of the absent class members would be bound by the result. That is because the *res*

judicata effect of class arbitration is unsettled at best. Arbitration “is a matter of consent, not coercion.” *Volt*, 489 U.S. at 479. Particularly when an arbitration agreement expressly prohibits class arbitration, the absent class members would have a powerful argument that they did not agree to be bound by an award resulting from an arbitration proceeding in which they did not participate.

Class actions “implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (internal quotation marks omitted). Judicial class actions are able to comport with due process because the court ensures that the named plaintiff serves as a fiduciary for the members of the class whom he or she represents. True, the major arbitration providers’ rules for class arbitrations purport to require the arbitrator to inquire into the adequacy of the claimant as a representative of the class, to probe the eventual settlement for fairness to absent class members, and to ensure the efficacy of notice to the class. *See, e.g.*, AAA, Class Arbitration Rules 4-8. But those procedures do not hold the same promise in class arbitration as they do in a judicial class action. Unlike in court, in a class arbitration, the parties select the arbitrator. That distinction makes no difference when arbitration involves a small number of parties—as it traditionally always has—because, under the rules of leading arbitration providers, each party may veto

the selection of an undesirable arbitrator, and arbitrators are subject to strict requirements to disclose potential conflicts of interest to the parties.¹ But this distinction may make a difference in a class arbitration because the absent class members have no say in the selection of the arbitrator. As one commentator has observed, “it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing.” *Sternlight*, 42 WM. & MARY L. REV. at 113.

Even *judicial* class actions have been criticized for the way in which absent class members are treated. In the consumer context, for example, class members often receive only coupons or pennies on the dollar for their claims, while class counsel recover millions (and sometimes far more than the class itself).² For such reasons, Congress has found that “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed.” Class Action Fairness Act of 2005, PUB. L. NO. 109-2 § 2(a)(3), 119 Stat 4. These criticisms apply with still

¹ See, e.g., AAA, Commercial Arbitration Rules and Mediation Procedures, Rules 11 and 16, at <http://www.adr.org/sp.asp?id=22440> (effective June 1, 2009).

² See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F. 3d 768, 807-810 (3d Cir. 1995) (criticizing class-action settlement in light of the likelihood that few class members would redeem the \$1,000 coupons they were to receive, while class lawyers were to receive \$9.5 million); Paul Elias, “Lawyers emerge as the winner in Ford settlement,” Associated Press, Aug. 3, 2009 (only 75 out of nearly 1,000,000 class members used coupons and thereby received direct benefits from the settlement valued at a total of \$37,500, while class-action lawyers received \$25,000,000 in fees and expenses).

greater force to class arbitration. Given the lack of effective judicial review of class arbitration, any proceeding that does not adequately address the rights of absent class members or does not provide adequate notice to the class may escape correction. Thus, even if it is theoretically possible to overcome these concerns and for a defendant to obtain true finality after a class arbitration, the risk that a court or arbitrator will refuse to give a class-wide arbitral award or settlement *res judicata* effect would remain real.

* * *

Given the risks entailed by class arbitration and the absence of any offsetting benefits, it is inconceivable that the parties to an arbitration agreement that (as here) expressly prohibits class-wide arbitration could have contemplated—much less intended—that their agreement would be transformed by fiat into such a monstrous hybrid.

II. THE FAA REQUIRES A COURT TO DECIDE WHETHER THE REQUIREMENT THAT ARBITRATION PROCEED ON AN INDIVIDUAL BASIS IS VALID AND ENFORCEABLE.

A. In Analyzing The Enforceability Of An Arbitration Agreement, A Court Must Consider The Core Terms According To Which The Parties Agreed To Arbitrate Their Disputes.

As noted above, the FAA generally requires that “private arbitration agreements [be] enforced according to their terms.” *Volt Info. Scis.*, 489 U.S. at 478. Thus, Section 4 of the FAA provides that “[a] party aggrieved by the alleged

... refusal of another to arbitrate under a written agreement” may seek “an order directing that such arbitration proceed *in the manner provided for in such agreement*” (emphasis added).

When, as here, a party challenges the enforceability of an arbitration agreement as written, the validity of that arbitration agreement is a “a gateway dispute about whether the parties are bound by a *given* arbitration clause” that “raises a ‘question of arbitrability’ for a court to decide.” *Howsam*, 537 U.S. at 84 (emphasis added). That is, “[u]nder the FAA the district court must be satisfied that the parties entered into a valid arbitration agreement.” *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 228 (3d Cir. 1997).

Plaintiffs contend that the district court should be required to compel arbitration without ascertaining the validity of the terms on which arbitration is supposed to proceed. But that puts the cart before the horse: A court cannot evaluate the validity of an arbitration agreement without looking to the terms of that agreement.

To avoid this self-evident proposition, plaintiffs seek to attack in isolation a central term of their arbitration agreement—the requirement that they arbitrate on an individual basis—before an arbitrator that (they hope) will be more favorable to them than the district court. Yet that runs contrary to general principles of unconscionability law: In the vast majority of jurisdictions, a court must look to

the substantive features of the arbitration agreement as a whole in evaluating an unconscionability challenge to an arbitration agreement. For example, this Court has observed that, under Pennsylvania law, a finding of unconscionability “requires a ... determination *that the contractual terms are unreasonably favorable to the drafter*[.]” *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (emphasis added) (internal quotation marks and citations omitted). In other words, Pennsylvania law expressly *requires* that courts look to the terms of an arbitration agreement in evaluating an unconscionability challenge. Yet plaintiffs’ approach would disregard this requirement. Plaintiffs claim that, because they are willing to arbitrate in the abstract—albeit on completely different terms than those to which they agreed—the district court should have compelled arbitration without regard to how the arbitration should be conducted, instead leaving it to an arbitrator to approve or reject the terms that the parties actually accepted. This approach would eviscerate the court’s role as the gatekeeper on questions of unconscionability, and would nullify Chase’s right to request that the district court issue “an order directing that ... arbitration proceed *in the manner provided for in* [the arbitration] *agreement.*” 9 U.S.C § 4 (emphasis added).

In arguing that their challenge to the prohibition of class arbitration is outside the scope of the court’s gatekeeping role, plaintiffs rely heavily on what they characterize as the “holding” of *Bazzle*. Appellants’ Supp. Br. 1, 6-8. But

they mischaracterize what Justice Breyer’s plurality opinion in *Bazzle* actually says. In *Bazzle*, the arbitration agreement at issue did not expressly address whether it permitted or precluded class arbitration. As Justice Breyer explained, “[w]e are faced at the outset with a problem concerning the contracts’ silence. Are the contracts in fact silent, or do they forbid class arbitration ...?” 539 U.S. at 447. The issue, therefore, was not a “gateway matter” involving “whether the parties have a valid arbitration agreement at all.” *Id.* at 452. Instead, the fact that the contract in *Bazzle* did not address class-arbitration procedures one way or another presented a “matter of contract interpretation” about “whether the contracts forbid class arbitration.” *Id.* at 453. Put differently, “the relevant question is *what kind of arbitration proceeding* the parties agreed to.” *Id.* (emphasis in original). The *Bazzle* plurality concluded that the arbitrator should decide whether the arbitration agreement was in fact silent on the question of class proceedings, so as to enable “enforcing the parties’ arbitration agreements according to their terms.” *Id.* at 454.

Unlike in *Bazzle*, where the arbitrator was charged with interpreting the arbitration agreement’s meaning, here there is no ambiguity over whether the arbitration agreement forbids class arbitration. Rather, Chase’s arbitration clause expressly prohibits class arbitration. The dispute here is whether that prohibition

renders the agreement invalid, and under *Howsam* the validity of an arbitration agreement is unquestionably for the court to decide.³

B. An Arbitration Agreement’s Prohibition Of Class Arbitration Cannot Be Severed From The Remainder Of The Arbitration Clause Without Doing Impermissible Violence To The Parties’ Arbitration Agreement.

Seeking to avoid application of these basic principles, plaintiffs attempt to extract and isolate the class-arbitration prohibition from the remainder of their arbitration agreement, contending that their “challenge to this class action waiver’s validity does not implicate the entire arbitration clause’s validity.” Appellants’ Supp. Br. 10. But for the reasons we have explained, such radical surgery is inappropriate, because an arbitration agreement’s prohibition of class arbitration goes to the very heart of whether the parties agreed to arbitrate at all. It is true that, under certain circumstances, ancillary provisions of a contract that are deemed unenforceable may be severed to give effect to an agreement’s broader purpose. For example, this Court has stated that “[a] bargain that is illegal only because of a promise or a provision for a condition, disregard of which will not defeat the *primary purpose* of the bargain, can be enforced with the omission of the” offending provision. *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 219 (3d Cir. 2003)

³ An issue that *Bazzle* did not address—whether an arbitration agreement that is truly silent as to class arbitration can, consistent with the FAA, be construed to permit it—is currently pending before the Supreme Court in *Stolt-Nielsen N.A. v. Animalfeeds Int’l Corp.*, No. 08-1198 (argued Dec. 9, 2009). The decision in *Stolt-Nielsen* may help resolve the issues presented here.

(quoting RESTATEMENT (FIRST) OF CONTRACTS § 603 (1932)) (emphasis in original).

Although plaintiffs cite *Spinetti*, it does not support their view. The “primary purpose” of the parties’ arbitration agreement is *not* that arbitration must take place no matter what. Rather, the arbitration agreement mandates a particular set of procedures, the most critical of which is the express instruction that arbitration take place on an individual, rather than class-wide, basis. Moreover, other aspects of the provision make clear that only *individual* arbitration is contemplated. For example, the agreement requires Chase to provide a consumer with subsidized arbitration, in which Chase pays all of the costs of arbitration for the first two days of a hearing, and further fees if the arbitrator determines that “there is good reason for requiring” Chase to do so. A89. Chase’s assumption of such costs would not make sense outside the context of individual arbitration. Likewise, the agreement provides that arbitration take place in the federal judicial district in which the customer resides. A88. Again, such a provision is undoubtedly tailored to provide *individual* consumers with a convenient forum for arbitration.⁴

⁴ The same is true of the arbitration agreements between CTIA members and their customers. For example, AT&T’s agreement (available at <http://www.att.com/disputeresolution>) generally requires AT&T to pay all of a customer’s arbitration costs, as well as a premium and double attorneys’ fees if the arbitrator awards the customer more than AT&T’s last settlement offer. Verizon

In addition, requiring individual arbitration is consistent with “[a] prime objective of an agreement to arbitrate,” which “is to achieve ‘streamlined proceedings and expeditious results.’” *Preston v. Ferrer*, 128 S. Ct. 978, 986 (2008) (quoting *Mitsubishi*, 473 U. S. at 633). To compel arbitration without enforcing the restriction on class proceedings is simply inconsistent with this “prime objective.” Indeed, it would defeat the very purpose of the agreement, thereby contravening the FAA’s objective “to ensure that commercial arbitration agreements ... are enforced according to their terms, and according to the intentions of the parties.” *First Options*, 514 U.S. at 947 (internal quotation marks and citations omitted).

Wireless’s arbitration agreement (available at http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp) provides for free mediation, and, for customers who remain unsatisfied, requires the company to pay all the costs of arbitration, plus a premium and attorneys’ fees if the arbitrator award’s the customer more than the company’s settlement offer.

CONCLUSION

This Court should affirm the district court's order compelling the parties to arbitrate on an individual basis.

Respectfully submitted,

MAYER BROWN LLP

Michael F. Altschul
CTIA—THE WIRELESS ASSOCIATION®
1400 16th Street, NW
Washington, DC 20036
Telephone: (202) 785-0081

/s Archis A. Parasharami
Evan M. Tager
Archis A. Parasharami
Richard Pianka
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

Attorneys for Amicus Curiae

December 31, 2009

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3(d), I, Archis A. Parasharami, hereby certify that I am a member of the bar of this Court.

DATED: December 31, 2009

MAYER BROWN LLP

/s Archis A. Parasharami

Archis A. Parasharami

Attorney for *Amicus Curiae*

MAYER BROWN LLP

1999 K Street, N.W.

Washington, DC 20006

Telephone: (202) 263-3000

Facsimile: (202) 263-3300

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

**Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because:
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DATED: December 31, 2009

MAYER BROWN LLP

/s Archis A. Parasharami
Archis A. Parasharami
Attorney for *Amicus Curiae*
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 31st day of December 2009, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case will be served by the appellate CM/ECF system. I also deposited ten copies of the brief with a third-party commercial carrier for delivery to the Clerk of the Court.

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MAYER BROWN LLP

/s Archis A. Parasharami
Archis A. Parasharami
Attorney for *Amicus Curiae*
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

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MAYER BROWN LLP

/s Archis A. Parasharami
Archis A. Parasharami
Attorney for *Amicus Curiae*
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300