No. 07-4588

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARK HOHIDER and ROBERT DIPAOLO
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,
v.
UNITED PARCEL SERVICE, INC.,
Defendant-Appellant.

PRESTON EUGENE BRANUM
on behalf of himself and all others similarly situated,
Plaintiff-Appellee,
v.
UNITED PARCEL SERVICE, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Pennsylvania
Case No. 04 363 JFC

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT UNITED PARCEL SERVICE, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The **Chamber of Commerce of the United States of America** has no parent corporation and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing briefs in cases implicating issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and other equal employment statutes and regulations. The Chamber's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and establishment of compensation rates and structures. These member companies devote extensive resources to developing employment practices and procedures, and instituting compliance programs designed to ensure that all of their employment actions are consistent with the ADA and other applicable legal requirements.

Despite these efforts, the Chamber's members are likely to face enormous exposure in new claims certified for class treatment if the district court's approach to class certification is upheld by this Court. The Order's numerous errors

undermine traditional class certification standards as well as defendants' due process rights, and in the process encourage employers to forego defending their rights in court in favor of settlement. The Chamber's interest in this case stems from the Order's potentially disruptive and destructive effect on the Chamber's members. All parties have consented to the filing of this brief.

ARGUMENT

Amicus curiae Chamber agrees with the arguments set forth in United Parcel Service, Inc's Opening Brief; namely, that the district court erred in 1) improperly applying the analytical framework of a Title VII case, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), to this ADA failure-to-accommodate case; and 2) failing to conduct a rigorous analysis of the Rule 23 requirements before certifying a class. *See* UPS Br. 17. The Chamber submits this brief to highlight additional problems with the court's decision. Specifically, the district court failed to require a trial plan or otherwise to assess whether plaintiffs' claims can manageably be tried on a classwide basis. *See* UPS Br. 47-48.

Plaintiffs' claims require individualized proof that they are entitled to the protections of the ADA, and even under *Teamsters*, UPS is entitled to present rebuttal evidence demonstrating the lawful basis for its employment decisions as to each putative class member. *See* UPS Br. 22-26, 50-51. But because that evidence

can only be considered in countless individual hearings, it is clear that aggregate litigation of these claims is not manageable. And while the district court might be tempted to adopt procedural shortcuts in order to try these claims to judgment, any alteration of the substantive elements of plaintiffs' claims, or of UPS's rebuttal rights, would violate Supreme Court precedent, the Due Process Clause, and the Rules Enabling Act. Moreover, if left unchecked, the court's numerous departures from Rule 23 – including the failure to ensure that class treatment is manageable – would have deeply destructive effects on American employers by encouraging sweeping lawsuits like this one that threaten massive liability while foregoing the statutory requirement of individualized proof.

The implications of the decision are overwhelming. Absent reversal, it would: provide strong incentives for filing discrimination class actions that are dramatically overbroad; force employers to settle huge claims no matter what their merit, effectively depriving them of their right to trial; and render meaningless the statutory requirements for obtaining relief imposed by the ADA. For these reasons, the district court's erroneous and destructive Order should be vacated.

I. THE DISTRICT COURT'S ORDER SANCTIONS CERTIFICATION OF IMPROPER, UNMANAGEABLE CLASS ACTIONS.

The district court's certification of a nationwide class under Rule 23(b)(2) – the largest ADA class ever certified, *see* UPS Br. 10 – allows plaintiffs to seek

injunctive relief, and likely back pay[1], on a classwide basis. As UPS explains in its Opening Brief, this decision is flatly contrary to Rule 23(b)(2) and controlling case law: the *Teamsters* framework for analyzing pattern-or-practice claims under Title VII does not apply to ADA claims; the named plaintiffs in this case are not adequate class representatives because they are neither qualified nor disabled; the class is not cohesive because resolution of each class member's claim depends upon highly individualized inquiries; and the requests for monetary relief plainly predominate.

But even assuming the district court's order did not suffer from these errors, certification of this nationwide class is problematic for another reason as well. Specifically, the district court in this case certified a nationwide class of current and former employees of UPS seeking injunctive or declaratory relief – and potentially back pay – *without determining whether en masse litigation would even be manageable*. The court's failure to recognize the inherent unmanageability of

[1] Although the district court did not include back pay in its certification order, plaintiffs will inevitably seek its recovery if they prevail in the truncated "liability" phase of the trial. *See Hohider v. United Parcel Serv., Inc.*, 243 F.R.D. 147, 245 n.106 (W.D. Pa. 2007) ("Plaintiffs may be allowed to seek back pay or other individual equitable relief on behalf of individual class members as part of this class action. The court will not decide this issue at this time. The court will address whether plaintiffs can pursue back pay or other individual equitable relief as part of this class action after the court and the parties address the issue of bifurcation."). As UPS explained, the district court erred in deferring this issue for later resolution. *See* UPS Br. 52-54.

class treatment of plaintiffs' claims provides yet another reason this Court should reverse the class certification order.

A. Class Certification Is Inappropriate Where Trial Of The Class Claims Would Be Unmanageable.

Under Rule 23(b)(2), a class cannot be certified if trial of the putative class claims would not be manageable. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 164 (2d Cir. 2001) (a Rule 23(b)(2) class can be certified only if "class treatment would be efficient and manageable"); *Shook v. El Paso County*, 386 F.3d 963, 972-73 (10th Cir. 2004) (manageability is a relevant consideration in deciding whether to certify 23(b)(2) class); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759 n.5 (4th Cir. 1998) (because "efficiency is one of the primary purposes of class action procedure" under both 23(b)(2) and (b)(3), "a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome"), *vacated on other grounds*, 527 U.S. 1031 (1999); *Cohen v. Chi. Title Ins. Co.*, 242 F.R.D. 295, 299 (E.D. Pa. 2007) ("parties seeking class certification must establish the class is manageable under one of the Rule 23(b) categories"); *Seidel v. Gen. Motors Acceptance Corp.*, 93 F.R.D. 122, 126 (W.D. Wash. 1981) ("manageability is and must be of fundamental concern in assessing adequacy of representation and the broader question of class certification in general").

The best – and perhaps the only – way a district court can assess manageability is to require that plaintiffs present a workable trial plan. Thus, it is well-established that a trial plan is a necessary tool for evaluating whether the class members' claims can be efficiently tried in a single proceeding. As the most recent amendments to Rule 23 explain, in considering certification of a proposed class, a "critical need is to determine how the case will be tried" based on a "'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." Fed. R. Civ. P. 23 advisory committee's note (2003 Amendments). *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (plaintiff bears responsibility of demonstrating a workable trial plan); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (abuse of discretion to certify where "[t]here has been no showing by Plaintiffs of how the class trial could be conducted"); *In re Paxil Litig.*, 212 F.R.D. 539, 548 (C.D. Cal. 2003) ("the presentation of a preliminary, unworkable trial plan, does not suffice for class certification"); *Colindres v. Quietflex Mfg.*, 235 F.R.D. 347, 380 (S.D. Tex. 2006) (denying certification under Rule 23(b)(2) in part because "the plaintiffs have not proposed a trial plan"); *Burrell v. Crown Cent. Petroleum, Inc.*, 197 F.R.D. 284, 292 (E.D. Tex. 2000) (plaintiff's trial "plan does not pass muster under either 23(b)(2) or (b)(3)").

Plaintiffs here offered no trial plan, and the district court did not require them to present one. Indeed, despite its length, the district court's order contains few clues as to how it plans to try plaintiffs' claims, other than a vague statement that it "likely would need to conduct additional proceedings with respect to the propriety and scope of individual relief." *Hohider*, 243 F.R.D. at 204. Plaintiffs did propose that the trial be bifurcated, which UPS opposed, but the court did not address that proposal and instead put the issue off to another day. *See id*. at 245 ("If necessary, the court will set a briefing schedule for the filing of a renewed motion for bifurcation of proceedings at trial."). But that is not the proper way to proceed when determining whether a putative class is properly certifiable – the court must address manageability ***before*** certifying a class, not after. *See* Fed. R. Civ. P. 23 advisory committee's note (2003 amendments) ("A court that is not satisfied the requirements of Rule 23 have been met should refuse certification until they have been met."). As discussed below, if the district court had properly considered a trial plan, it would have recognized that the claims here cannot manageably be tried in a class action.

B. *En Masse* Litigation Of Plaintiffs' Claims Is Not Manageable Because Individualized Hearings Would Be Necessary To Resolve Each Class Member's Claim.

Because of the individualized nature of ADA claims, this case is not manageable no matter how it is tried. Regardless of whether the analytical framework of *Teamsters* applies, the district court will be required to conduct individualized hearings to receive evidence on the elements of plaintiffs' *prima facie* ADA claims, as well as UPS's rebuttal evidence and any affirmative defenses. *Teamsters* does not relieve the court of that burden – at most, it might shift some of that evidence-gathering to a later stage of the proceedings. Thus, ***any*** proper resolution of plaintiffs' claims will require the district court to proceed with thousands of individual mini-trials to establish each plaintiff's entitlement to an accommodation and to any relief, including any back pay. Anything less would run afoul of controlling Supreme Court precedent, deprive UPS of its due process right to defend itself, and violate the Rules Enabling Act. On the other hand, conducting thousands of individualized hearings on liability and damages would create an administrative nightmare for the parties and the court, would produce no efficiency over the use of individual lawsuits, and plainly does not provide a manageable alternative.

Whether each class member can establish entitlement to the protection of the ADA in the first place by virtue of being a "qualified individual with a disability" is a highly individualized inquiry. *See, e.g.*, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (noting "the statutory obligation to determine the existence of disabilities on a case-by-case basis"); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) ("whether a person has a disability under the ADA is an individualized inquiry"). Whether a particular plaintiff is both "qualified" and "disabled" is often hotly contested, and ADA disputes are frequently resolved on the basis of these threshold questions. *See* UPS Br. 22-23 (citing Supreme Court and Third Circuit cases turning on whether plaintiff was disabled or qualified). For the reasons explained by UPS, *see* UPS Br. Part I, these and other individualized elements of plaintiffs' ADA claims must be resolved at the outset, as part of plaintiffs' *prima facie* case, and may not properly be deferred until Phase II in an ADA case.

Moreover, even under *Teamsters*, the employer is entitled to put on evidence showing that particular plaintiffs who claim they suffered from discrimination are in fact not entitled to relief, because those particular employees were "denied an employment opportunity for lawful reasons." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *see also Reeves v. Sanderson Plumbing Prods.*

Inc., 530 U.S. 133, 148 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision"). The opportunity to present case-specific rebuttal evidence that the employee suffered from no discrimination has played a decisive role in myriad ADA cases. *See, e.g.*, *Williams v. Motorola, Inc*., 303 F.3d 1284, 1290 (11th Cir. 2002) (employee not qualified because there was "overwhelming evidence of [her] inability to work with others, not to mention engaging in threats of violence, and insubordination"); *Ammons v. Aramark Unif. Servs*., 368 F.3d 809, 819 (7th Cir. 2004) (employer's requested accommodations were unreasonable because they "would amount to a significant change in the essential functions of his job"); *Mole v. Buckhorn Rubber Prods., Inc*., 165 F.3d 1212, 1217-18 (8th Cir. 1999) (failure-to-accommodate claim failed because plaintiffs had never informed employer prior to her termination that she required additional accommodation, and some of her later requests were unreasonable); *Clayborne v. Potter*, 448 F. Supp. 2d 185, 191 (D.D.C. 2006) (employee was not qualified because she could not perform the essential functions of her job and she posed direct threat to her own safety); *Soone v. Kyo-Ya Co*., 353 F. Supp. 1107, 1112-14 (D. Haw. 2005) (employee's requested accommodation was unreasonable and would have created undue hardship for employer).

The Supreme Court has confirmed that individualized hearings are an integral part of both individual employment discrimination cases and class actions because they provide the employer with an opportunity to offer individualized substantive defenses to liability. In *Teamsters*, the Court explained that if plaintiffs prove that an employer has "engaged in a pattern of racial discrimination," the burden "shift[s] to the employer to prove that individuals who reapply were not in fact victims of previous hiring discrimination." *Teamsters*, 431 U.S. at 359 (internal quotation omitted). But evidence of such a pattern "d[oes] not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice." *Id*. at 359 n.45. Thus, in cases where plaintiffs seek individual monetary relief, "a district court must usually conduct additional proceedings" – *i.e*., individualized hearings – at which the employer can "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id*. at 361-62. For example, in the ADA context, the rebuttal evidence might include evidence that the employee was a direct threat to himself or others, or that the requested accommodation was unreasonable or created an undue burden. In short, the trial court "will have to make a substantial number of *individual determinations* in deciding which of the … employees were actual victims of the company's discriminatory practices." *Id*. at 371-72 (emphasis

added). *See also Reid v. Lockheed Martin Aeronautics Co*., 205 F.R.D. 655, 687 n.35 (N.D. Ga. 2001) (employer has "the right to rebut the presumption that the adverse employment action was due to discrimination and to show that individual members of the class are not entitled to back pay").

The conclusion that individualized relief requires individualized hearings is firmly in keeping with a defendant's due process right to present evidence in its own defense. As the Supreme Court explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-30 (1982), the Due Process Clause is implicated when a party seeks to protect its property as a defendant in civil litigation. Specifically, a defendant has a due process right to "a hearing on the merits of [its] cause," *id.* at 429 (quotation and citation omitted) – *i.e.*, to present evidence on the merits of their defense. "If parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them. Such a serious deprivation of property without due process of law cannot be countenanced in our constitutional system." *Nat'l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994).

Neither plaintiffs' obligation to prove each element of their claims nor defendants' substantive right to present evidence in their own defense may be altered in order to facilitate class treatment. The Rules Enabling Act provides that "general rules of practice and procedure," like Rule 23, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b). *See also Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 345 (4th Cir. 1998) ("It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members."). Thus, the court is not at liberty to adopt any sort of trial procedure that allows plaintiffs any evidentiary shortcuts or denies UPS the right to present individualized rebuttal evidence in order to avoid the necessity of conducting countless individual hearings. Anything less than would force UPS to face liability for employment decisions that would readily be dismissed or defended if the claims were brought in the context of an individual action and would therefore deprive UPS of a "substantive right."

In this case, the district court improperly intends to defer all individualized proof to the remedial phase of the class proceedings, long after so-called "liability" has already been decided. *See Hohider*, 243 F.R.D. at 208 n.69 ("The court notes that the individual elements of a reasonable accommodation claim may be relevant at the second, remedial stage of proceedings if plaintiffs seek individual relief on

behalf of individual class members."). That approach, however, does nothing to resolve the manageability problem – it merely postpones dealing with it. Although the district court refused to address how it planned to try plaintiffs' claims in light of the highly individualized nature of the ADA failure-to-accommodate inquiry, it is clear that the court still would eventually be left to preside over thousands of mini-trials to resolve whether each employee was protected by the ADA and entitled to a specific requested accommodation or to back pay. Such a procedure plainly is not manageable. Where, as here, the issues of liability and back pay would require "separate mini-trial(s) of an overwhelming large number of individual claimants," courts have found that the class device provides no benefits and instead leads to "staggering problems of logistics . . . render[ing] the case unmanageable as a class action." *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (internal quotation marks and footnotes omitted).

Simply bifurcating the case and holding those hearings in a separate phase does nothing to alleviate these problems. *See id.* at 72 ("[w]hether dealt with in a unitary trial or in a severed trial, the problem of proof of the individual claims and of the essential elements of individual injury and damage will remain and severance could only postpone the difficulty of such proof"). *Cf. Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421 (5th Cir. 1998) (upholding district court's

denial of bifurcated class certification in racial discrimination suit because there is "no legal basis for the district court to certify a class action on the first stage of the plaintiffs' pattern or practice claim when there is no foreseeable likelihood that the claims for compensatory and punitive damages could be certified in the class action sought by the plaintiffs"); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323, 352-53 (S.D.N.Y. 2002) (rejecting bifurcated trial plan where "countless individual trials" would still have to be conducted). Thus, even if plaintiffs could somehow prove on a classwide basis that UPS maintained company-wide discriminatory policies, that determination would do nothing to advance the litigation on the crucial, fact-specific question of individual discrimination, leaving the trial court to grapple with thousands of individual trials.

In sum, the district court's order fails to come to terms with the need to conduct individualized hearings for each member of this nationwide class – a need that defeats the efficiencies sought by Rule 23 and renders class treatment completely unmanageable. And any shortcuts the court might seek to adopt in order to make litigation of these claims more convenient would deprive UPS of its fundamental rights – guaranteed by the ADA, the Due Process Clause, and the Rules Enabling Act – to demand that plaintiffs prove all of the elements of their claims and to present individualized rebuttal evidence in its defense.

II. IF ALLOWED TO STAND, THE DISTRICT COURT'S ORDER WOULD COERCE SETTLEMENTS AND RENDER IRRELEVANT THE STATUTORY REQUIREMENTS OF THE ADA.

If permitted to stand, the district court's Order would have two insidious effects. First, it would substantially raise the stakes of proposed discrimination class actions, creating strong pressures on employers to settle such suits regardless of their merit. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."); *Dotson v. United States*, 87 F.3d 682, 686 (5th Cir. 1996). This pressure is intensified when an employer cannot count on having a full opportunity to present rebuttal evidence in its own defense. The kinds of class lawsuits permitted by the Order – massive, company-wide discriminatory treatment actions – are a paradigm case of potentially coercive class actions because of the potential for enormous exposure. This is all the more so because the inclusion of massive monetary claims in a 23(b)(2) class means that the plaintiffs in these cases would be permitted to seek such relief without having to meet the requirements of Rule 23(b)(3).

Second, the district court's sweeping expansion of the standards for class certification directly undermines the balance Congress struck in enacting the ADA – providing qualified disabled individuals with a generous slate of entitlements and remedies, but only upon a showing that they first meet the strict standards for

invoking the protections of the statute at all. As UPS has explained, Title VII requires no more than that a plaintiff be female or an ethnic minority, for example, in order to be covered by that statute. *See* UPS Br. 22 (explaining there rarely is any dispute over whether Title VII plaintiffs fall within a protected class such that they are entitled to the protection of the statute). In sharp contrast, however, an ADA plaintiff must prove that he or she is both "qualified" and "disabled" as those term are defined by statute and in the implementing regulations – questions on which the employee ***always*** retains the burden of proof. *See* UPS Br. 49; 42 U.S.C. § 12112(a) (barring "discrimination against a qualified individual with a disability because of the disability of such individual"). These requirements impose a high bar and have been taken seriously by the courts, as demonstrated by the sheer number of claims that are resolved on the basis of these threshold questions alone. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (the ADA's text must "be interpreted strictly to create a demanding standard for qualifying as disabled"); *Singh v. George Washington Univ. Sch. Of Med. & Health Scis.*, 508 F.3d 1097, 1102 (D.C. Cir. 2007) ("The ADA promotes equal opportunity for the disabled, but only after *Toyota Motor*'s 'demanding standard' is met."). *See also* UPS Br. 22-23.

The district court's certification order, however, turns the statute on its head, disregarding these essential elements of an ADA claim in its haste to certify a class. *See Hohider*, 243 F.R.D. at 191 (under the *Teamsters* framework, plaintiffs need not "make out the elements of an individual claim of failure to make a reasonable accommodation"). The upshot is that instead of actually proving that ***any*** class member is a qualified person with a disability who has suffered from discrimination on that basis, plaintiffs will be permitted to maintain these sweeping lawsuits, complete with the coercive power of a nationwide class certification, merely by alleging that their employer follows a de facto policy that violates the ADA. That is not what Congress intended, and it should not be countenanced by this Court. *See, e.g.*, *Sutton*, 527 U.S. at 483-83 (failure to evaluate ADA plaintiffs' individual circumstances "is contrary to both the letter and the spirit of the ADA").

In sum, the district court's approach here – *i.e.*, its willingness to certify broad, unmanageable class actions under Rule 23(b)(2) with no apparent regard for the inherent unmanageability of plaintiffs' claims – would force defendants to settle massive class actions regardless of their merit and, at the same time, dramatically undermine the high standards for individual relief that were mandated by Congress in enacting the ADA. For these reasons too, the Court should

reaffirm the important limits placed on employment class actions by both Rule 23 and the ADA.

CONCLUSION

For the reasons stated, this Court should vacate the district court's certification order.

Respectfully submitted,

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Dated: March 17, 2008

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CERTIFICATE OF COMPLIANCE

I, Shannon M. Pazur, hereby certify that pursuant to Fed. R. App. P. 29(d), the attached Brief Of *Amicus Curiae* Chamber Of Commerce Of The United States Of America In Support Of Defendant/Appellant United Parcel Service, Inc. is proportionally spaced (in Times New Roman type style), has a typeface of 14 points, and contains 4,177 actual words (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

I further certify that the text of the electronic brief is identical to the text of the hard copies of the brief filed in this Court and served on the parties on March 17, 2008. In addition, I certify that a virus check has been performed on this electronic brief using Symantec AntiVirus, and that this electronic brief is free of viruses.

Dated: March 17, 2008

_/s/ Shannon M. Pazur_____

PROOF OF SERVICE

I hereby certify that on this 17th day of March 2008, the undersigned filed one (1) electronic and ten (10) hard copies of the foregoing brief via U.S. Express Mail, postage prepaid, with the Clerk of the Court, and served two (2) copies of the foregoing brief via U.S. Express Mail, postage prepaid, upon the following counsel:

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RULE 46.1 CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), the undersigned hereby certifies that he is a member of the bar of the United States Court of Appeals for the Third Circuit.

_/s/ John H. Beisner_____

Dated: March 17, 2008