No. 09-16703 (Consolidated with No. 10-15934)
Published Opinion Filed March 7, 2012
(Trott, Bea, Pallmeyer)

United States Court of Appeals for the Ninth Circuit

MATTHEW C. KILGORE, individually and on behalf of all others similarly situated; WILLIAM BRUCE FULLER, individually and on behalf of all others similarly situated; KEVIN WILHELMY, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

KEYBANK, NATIONAL ASSOCIATION, successor in interest to KEYBANK USA, N.A.; KEY EDUCATION RESOURCES, a division of KEYBANK, NATIONAL ASSOCIATION; GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., a Wisconsin corporation,

Defendants-Appellants.

RESPONSE TO PETITION FOR REHEARING *EN BANC*

On Appeal from the United States District Court for the Northern District of California, San Francisco Division – The Honorable Thelton E. Henderson
D. Ct. No. 3:08-cv-02958-TEH

W. SCOTT O'CONNELL
W. DANIEL DEANE
NIXON PEABODY LLP
900 Elm Street
Manchester, NH 03101
Telephone: (603) 628-4000

SARAH E. ANDRE, SBN 236145
NIXON PEABODY LLP
555 West Fifth Street, 46th Floor
Los Angeles, CA 90013-1010
Telephone: (213) 629-6000

Attorneys for Defendants-Appellants

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INTRODUCTION

Plaintiffs' Petition for Rehearing En Banc ("Petition") seeks rehearing of the Panel Decision issued March 7, 2012. The Petition should be denied because the Panel properly applied the preemption principles under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*., as recently explicated by the Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The operative rule of preemption is simply stated and simply applied in this case: state laws that "prohibit outright the arbitration of a particular type of claim" – in this case, so-called "public injunction" claims – are displaced by the FAA's national policy of enforcing agreements to arbitrate in accordance with their terms. *See id*. at 1747.

Plaintiffs' Petition, and the briefs of *Amici Curiae* submitted in support thereof, all suffer from the same fundamental flaw: they depend upon the premise that, because California state law would otherwise authorize each Plaintiff to bring a so-called "public injunction" action in court, that rule of state public policy trumps the FAA's requirement that Plaintiffs' agreement to arbitrate their own disputes privately be enforced according to its terms. That premise is mistaken. As the Supreme Court reiterated earlier this year, "a categorical rule prohibiting arbitration of a particular type of claim . . . is contrary to the terms and coverage of the FAA." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012)

(citing *Concepcion*). Because the Panel's decision follows directly from *Concepcion* and *Marmet*, Plaintiffs' petition for en banc review should be denied.

BACKGROUND

Plaintiffs, on behalf of themselves and a putative class of just over 100 student loan borrowers who attended a vocational flight school, sued lenders KeyBank, National Association, and Great Lakes Educational Loan Services, Inc. (collectively "KeyBank") to prohibit enforcement of student loan promissory notes after the flight school closed its doors and filed for bankruptcy. Each class member had borrowed between $50,000 and $60,000 from KeyBank to finance flight training. The Plaintiffs' theories evolved over time, but in the Third Amended Complaint, Plaintiffs settled on the contention that KeyBank should be held derivatively liable for the flight school's alleged fraudulent course of conduct because KeyBank had allegedly violated California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, by failing to include the holder in due course notice required by the Federal Trade Commission's Holder Rule, 16 C.F.R. § 433.2.[1] Plaintiffs sought an order enjoining KeyBank from (i) making adverse reports concerning class members to the credit reporting agencies, (ii)

[1] After denying KeyBank's motion to compel arbitration, the District Court dismissed Plaintiffs' Third Amended Complaint with prejudice, ruling that Plaintiffs could not prove a direct violation of the Holder Rule and that Plaintiffs' proposed application of the UCL to imply the Holder notice into the promissory notes is preempted by the National Bank Act and its implementing regulations.

enforcing collection under the promissory notes, and (iii) engaging in false and deceptive acts and practices with respect to consumer credit contracts.

The promissory note for each class member contained an identical arbitration clause, which provided, *inter alia*, that any claims between the lender and the borrower would be subject to binding arbitration upon election of either party, unless the borrower had first elected to opt-out of the arbitration provision. There is no dispute that the plaintiffs did not opt out of the arbitration provision, and KeyBank properly invoked the arbitration clause.[2]

I. THE PANEL OPINION CORRECTLY APPLIED SUPREME COURT PRECEDENT AND SHOULD NOT BE DISTURBED

The Panel astutely declined to apply California's "public injunction rule." That rule was created by California's Supreme Court in *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999), and *Cruz v. PacifiCare Health Sys.*, 66 P.3d 1157 (Cal. 2003). Although an earlier panel of the Ninth Circuit acknowledged the *Broughton/Cruz* rule in *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007), that decision did not control the Panel's consideration here.

As a threshold matter, the *Davis* panel did not squarely address the argument presented here, that the public injunction rule is preempted by the FAA. The *Davis* panel was asked to consider whether an arbitration agreement was unenforceable

[2] For purposes of their Petition, Plaintiffs dropped their argument, which was also rejected by the Panel, that KeyBank's arbitration clause is unconscionable. [*See* Petition, p. 4, n.1] Thus, Plaintiffs do not challenge that they agreed to arbitration.

as procedurally and substantively unconscionable. *See* 485 F.3d at 1070. After finding that the agreement was unconscionable in three respects, the panel then acknowledged *Broughton* and *Cruz*, noting in passing that the arbitration agreement's prohibition against administrative actions would be unenforceable under California law insofar as it bars "public injunctive relief." *Id*. at 1082. The panel went on, however, and specifically struck that clause of the agreement, not based on the public injunction rule, but rather based on state and federal Supreme Court precedent barring enforcement of arbitration agreements that purport to interfere with an independent regulatory agency's authority to vindicate public rights. *See id*. at 1082-83 (citing, *inter alia*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *EEOC v. Waffle House, Inc*., 534 U.S. 279, 295-96 (2002) (discussed *infra*, pp. 13-14)). Because the public injunction rule was not squarely at issue, the *Davis* panel never considered whether the *Broughton* and *Cruz* rulings are preempted by the FAA.[3] Accordingly, the Panel in this case was not bound by the panel's statements in *Davis*.

In any event, the Panel in this case correctly applied the Supreme Court's FAA precedent to hold that California's public injunction rule is no longer good law following Supreme Court's recent FAA preemption holdings in *Concepcion*

[3] Indeed, neither of the parties in the *Davis* appeal so much as mentioned *Broughton* or *Cruz*. *See* Appellant's Opening Brief, 2004 WL 2416113 (Sept. 22, 2004); Appellee's Response Brief, 2004 WL 5469534 (Oct. 21, 2004).

and *Marmet*. *See Kilgore v. KeyBank, N.A.*, 673 F.3d 647, 960 (9th Cir. 2012). The Panel's decision is mandated by the plain language of the FAA,[4] the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and the Supreme Court's consistent application of those dual federal mandates. As the Supreme Court has stated time and time again, Congress enacted the FAA to displace the historic "judicial hostility to arbitration agreements" with a "'liberal federal policy favoring arbitration.'" *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also, e.g., Preston v. Ferrer*, 552 U.S. 346, 349 (2008); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995).

That national policy imposes on courts a duty to "rigorously enforce agreements to arbitrate," and that duty "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Moreover, the national policy "'appli[es] in state

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[4] The relevant provision of the FAA provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such contract [or] transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.'" *Preston*, 552 U.S. at 353 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)); *see also id*. ("The FAA's displacement of conflicting state law is now well-established . . . and has been repeatedly reaffirmed [by the Supreme Court].") (internal quotations omitted).

There is only one narrow exception to this national policy. The FAA's savings clause provides that all agreements to arbitrate should be enforced, *except* "upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). "This savings clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (internal quotations omitted).

As the Panel correctly recognized here, this case falls squarely within the rule, not the exception to Section 2 of the FAA. The Supreme Court clarified this principle in *Concepcion*: "[w]hen a state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id*. at 1747 (citing *Preston*, 552 U.S. at 353). During the current term (just weeks before the Panel decision in this case), the Supreme Court applied this principle to preempt a West Virginia rule that prohibited pre-dispute

agreements to arbitrate personal-injury and wrongful-death claims against nursing homes because such a prohibition is "a categorical rule prohibiting arbitration of a particular type of claim, and that is contrary to the terms and coverage of the FAA." *Marmet*, 132 S. Ct. at 1203-04 (citing to a line of cases where the Supreme Court found the FAA preempted a state law). Inasmuch as California's public injunction rule purports to prohibit the arbitration of a particular type of claim – public injunctions – it must yield to the FAA. While this rule of preemption existed before *Concepcion* and *Marmet*, the Supreme Court's clear and unequivocal application of the rule in those cases so undermined the Ninth Circuit's previous reliance on the *Broughton/Cruz* public injunction rule that the Panel in this case correctly concluded that *Davis* no longer constitutes good law.

Plaintiffs nevertheless argue that the Supreme Court's FAA precedent carves out another exception to the FAA's pro-arbitration policy. According to Plaintiffs, these cases hold that arbitration agreements will not be enforced where the arbitral forum would prevent a party from effectively vindicating his or her substantive statutory rights. [*See* Petition, pp. 6-7.] Plaintiffs concede that all of the Supreme Court cases stating this exception have done so in the context of a *federal* statutory right, but argue that the same logic applies to *state* statutory rights. Because the Supremacy Clause creates a critical distinction between federal and state legislation, however, Plaintiffs' argument is simply wrong.

The cases cited by Plaintiffs all concern instances where the Supreme Court was asked to resolve a perceived conflict between two competing *federal* policies. The focal point of Plaintiffs' argument, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), is illustrative. The question presented in that case was whether claims under the federal antitrust statutes could be submitted to arbitration pursuant to the parties' agreement. *See id.* at 616. At the outset, the Supreme Court rejected the notion that federal statutory claims should be any less susceptible to arbitration than other types of claims. *See id.* at 627 (stating that the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability"). At the same time, the Court recognized Congress's prerogative to choose to make certain *federal* claims non-arbitrable:

> Just as it is the *congressional* policy manifested in the [FAA] that requires courts to liberally construe the scope of arbitration agreements covered by that Act, it is the *congressional* intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Id. (emphasis added).

In short, *Congress* retains the power to override the FAA's mandate. *See id*. at 628. But short of a showing of such congressional intent, the parties to an arbitration agreement must be held to their bargain. *See id*. As the Supreme Court recently put it, Section 2 of the FAA "requires courts to enforce agreements to

arbitrate according to their terms . . . . That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *McMahon*, 482 U.S. at 226). Accordingly, any party opposing arbitration bears the burden to "show that *Congress* intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227 (emphasis added); *see also Gilmer*, 500 U.S. at 27 (1991). Analyzing the FAA and the Sherman Act, the Supreme Court ultimately concluded that the two federal statutes could be harmonized inasmuch as the antitrust litigant is able to "vindicate its statutory cause of action in the arbitral forum," and, thus, the FAA's pro-arbitration policy will not frustrate the remedial and deterrent functions of the Sherman Act. *Mitsubishi Motors*, 473 U.S. at 636. The Supreme Court came to similar conclusions in the other cases cited by Plaintiffs.[5]

Thus, the *Mitsubishi Motors* precedent upon which Plaintiffs rely, stands only for the unremarkable proposition that another *federal* statute can potentially trump the FAA's mandate. Because of the Supremacy Clause, the same cannot be

[5] *See, e.g.*, *CompuCredit*, 132 S. Ct. at 671-72 (holding that civil-liability provision of the Credit Repair Organizations Act does not override the FAA's mandate); *Gilmer*, 500 U.S. at 35 (concluding that claims under the ADEA are arbitrable); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995) (holding that Carriage of Goods by Sea Act does not forbid selection of a foreign arbitral forum); *McMahon*, 482 U.S. at 238, 240 (finding that claims under § 10(b) of the Securities Exchange Act of 1934 and the civil provisions of the RICO Act are subject to arbitration).

said of a state statute. Both the Panel in this case and a subsequent panel of this Court have come to the same conclusion: "Plaintiffs assert primarily state statutory rights, but *Mitsubishi, Gilmer, Green Tree* [*Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000)] and similar decisions are limited to federal statutory rights." *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) (citing panel decision in this case); *accord Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011); *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006) (noting that the Supreme Court decisions regarding the vindication of statutory rights "are limited by their plain language to the question of whether an arbitration clause is enforceable where federal statutorily provided rights are affected"); *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 873 (8th Cir. 2004) ("In [*Randolph*], the Supreme Court addressed arbitration of federal statutory claims, and did not analyze the unconscionability of an arbitration agreement under state law."); *see also, e.g., S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1525-26 (7th Cir. 1993) ("The Supreme Court has rejected the argument that a state statute can void the choice of private parties to arbitrate a dispute."); *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1121-24 (1st Cir. 1989) ("[O]nly Congress, not the states, may create exceptions to [the FAA.]").

II. PLAINTIFFS HAVE MADE NO SHOWING THAT THEY ARE UNABLE TO VINDICATE THEIR SUBSTANTIVE STATUTORY RIGHTS IN ARBITRATION

Even if Plaintiffs could invoke the "vindication of federal statutory rights" theory to resist arbitration of their state-law claims, their argument would fail. Despite their characterization of the arbitration clause as a liability waiver (rather than simply a forum selection), Plaintiffs cannot establish that they confront any obstacle to vindicating their substantive statutory rights because Plaintiffs *can* pursue the relief they seek in arbitration. It is well established that by "agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Thus, the Supreme Court has "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit Corp.*, 132 S. Ct. at 671 (citing *Gilmer*, 500 U.S. at 28; *McMahon*, 482 U.S. at 240).

Plaintiffs acknowledge that the proposition that a prospective litigant will be unable to vindicate its statutory rights in arbitration is ordinarily a factual issue that the opponent of arbitration bears the burden of establishing. [*See* Petition, pp. 3, 8 ("The answer lies in whether the party claiming that enforcement of the arbitration clause would bar the vindication of substantive statutory rights is able to prove that fact.")] Plaintiffs further concede that in *Randolph*, the Supreme Court enforced

the parties' arbitration clause because the plaintiff failed to make any factual showing that the existence of large arbitration costs precluded the plaintiff from effectively vindicating her rights. [*See* Petition, p. 8 (citing 531 U.S. at 91 & n.6).]

So too here. Other than the conclusory assertion that arbitrators cannot effectively administer the kind of "public injunctions" envisioned by *Broughton* and *Cruz*, Plaintiffs have not presented any evidence to establish that the arbitrator or arbitrators of Plaintiffs' individual claims will be unable to grant the relief they seek. Indeed, even the California Supreme Court in *Broughton* conceded that courts have "generally affirmed the ability of arbitrators to issue injunctions." 21 988 P.2d at 77; *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003) (parties can grant equitable powers to arbitrator); *Gilmer*, 500 U.S. at 32 ("arbitrators do have the power to fashion equitable relief"). As in *Concepcion*, 131 S. Ct. at 1753, the class members here have plenty of incentive to pursue their individual arbitrations as each member seeks relief on a loan exceeding $50,000.

Finally, the fact that Plaintiffs purport to seek a "public injunction"[6] does not change the analysis. In *Mitsubishi Motors*, the Supreme Court rejected the notion that the "pervasive public interest in enforcement of the antitrust laws" made antitrust claims inappropriate for arbitration. 473 U.S. at 629 (internal quotations

[6] KeyBank disputes this characterization as well. [*See* KeyBank's Initial Appellate Brief, Dkt. No. 7, pp. 19-25 (arguing that Plaintiffs' lawsuit is nothing more than an ordinary putative class action seeking private remedies (i.e., debt relief).]

omitted). The Court recognized that the treble-damages remedy of the antitrust laws served a deterrent function for the broader public interest. But the Court concluded that "[n]othwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable an injured competitor to gain compensation for that injury." *Id*. at 635. Thus, the Court ruled that so long as the prospective litigant can vindicate its own individual cause of action, *both* the remedial *and* deterrent functions of the law will be served. *See id*. at 637; *see also Gilmer*, 500 U.S. at 27-28 (finding the arbitral forum just as capable of serving the public interest as the courts in the context of an ADEA claim); *McMahon*, 482 U.S. at 240 (applying same reasoning in the context of a RICO claim). As argued above, Plaintiffs have made no showing that they will be unable to vindicate their own individual claims in arbitration.

The Supreme Court's decision in *Equal Employment Opportunity Commission v. Waffle House, Inc.* underscores this point in the context of an injunction claim. In that case, the Supreme Court analyzed a potential conflict between the FAA's pro-arbitration policy and the public remedy provisions of Title VII of the Civil Rights Act of 1964. The question presented was whether an agreement to arbitrate between an employee and his employer would preclude the EEOC from bringing its own "victim-specific" enforcement action seeking damages and injunctive relief in federal court. *Waffle House*, 534 U.S. at 282.

Trying to balance the statutory priorities, the Fourth Circuit split the difference and ruled that the EEOC could not seek victim-specific relief (e.g., damages, back pay), but could seek broad injunctive relief in court because the EEOC's public function outweighed the FAA's pro-arbitration policy. *See id*. at 290.

The Supreme Court rejected that approach for the simple reason that the EEOC was not a party to the arbitration agreement and brought its enforcement action independently from the employee. *See id*. at 294-96. The Court paused to observe, however, that, to the extent "the federal policy favoring arbitration trumps the plain language of Title VII[,]" then "the EEOC [would] be barred from pursuing *any* claim outside the arbitral forum." *Id*. at 295. In other words, if the EEOC were a party to the arbitration agreement, it would have been barred from bringing *any* claim, including a public injunction claim, outside the arbitral forum.

III. RESPONSE TO *AMICI CURIAE* BRIEFS

The arguments presented in the *Amici* briefs in support of Plaintiffs' Petition are largely redundant, and, therefore, a separate response is largely unnecessary. KeyBank does, however, wish to set the record straight with regard to the "parade of horribles" argument advanced by the *Amici* "Arbitration Professors." [*See* Brief of *Amici Curiae* Arbitration Professors (Dkt. No. 103), pp. 6-9 (stating that the Panel's interpretation of the FAA "has no sensible limits" and "knows no bounds").] The Arbitration Professors' argument grossly overreaches. They

would have this Court believe that the Panel opinion will open the door to the arbitration of virtually any dispute, including criminal and child custody proceedings. These fears ignore a threshold limit on the FAA's scope: the FAA's enforcement provision is only triggered with respect to contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2; *see also Preston*, 552 U.S. at 349 (holding that the FAA rests on Congress' authority under the Commerce Clause); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (finding that Section 2 applies to agreements to arbitrate "so long as their subject involves 'commerce'"). Accordingly, the Panel's decision will only apply to agreements to arbitrate in a commercial setting.

CONCLUSION

The flawed theme that runs throughout all the briefs filed in support of the Petition is the unsupported premise that prospective litigants may evade arbitration by simply styling their claims as actions for a public injunction. *Concepcion*, and the Supreme Court precedent upon which it relies, makes clear that plaintiffs cannot avoid their agreements to arbitrate by artful drafting. Plaintiffs have a remedy for their alleged injuries: they can seek injunctive relief against KeyBank in arbitration. But state law cannot create a new doctrine that frustrates the national policy of enforcing agreements to arbitrate in accordance with their terms. For these reasons, Plaintiffs' Petition for Rehearing En Banc should be denied.

Date: May 16, 2012

Respectfully submitted,

NIXON PEABODY LLP

/s/ W. Daniel Deane
W. Scott O'Connell
W. Daniel Deane
Sarah E. André

Attorneys for Defendants-Appellants KeyBank, National Association and Great Lakes Educational Loan Services, Inc.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellants hereby state that they are not aware of any related cases pending or previously heard in by Court involving the same or closely related issues or the same transaction or event, beyond the two cases identified by Plaintiffs/Appellees in their Statement of Related Cases.

Date: May 16, 2012

Respectfully submitted,

NIXON PEABODY LLP

/s/ W. Daniel Deane
W. Scott O'Connell
W. Daniel Deane
Sarah E. André

Attorneys for Defendants-Appellants KeyBank, National Association and Great Lakes Educational Loan Services, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 35-4 or 40-1, the attached Response to the Petition for Rehearing *En Banc*:

(1) was prepared using 14-point Time New Roman font;

(2) is proportionally spaced; and

(3) consists of 3,756 words and 15 pages, excluding portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consistent with this Court's order of April 4, 2012 (ECF No. 118).

Date: May 16, 2012

Respectfully submitted,

NIXON PEABODY LLP

/s/ W. Daniel Deane
W. Scott O'Connell
W. Daniel Deane
Sarah E. André

Attorneys for Defendants-Appellants KeyBank, National Association and Great Lakes Educational Loan Services, Inc.