APPEAL NO. 10-2081

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DENISE BURGESS,

Appellant

v.

STUART G. BOWEN, JR.,
Special Inspector General for Iraq Reconstruction,

Appellee.

On appeal from the United States District Court
for the Eastern District of Virginia, Alexandria Division
(Honorable James C. Cacheris)

Metropolitan Washington Employment Lawyers Association
Amicus Brief in Support of Appellant
Seeking Reversal of District Court

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Disclosure of Corporate Affiliations and Interests

Pursuant to Rule 26.1, Fed. R. App. P., Amicus Curiae Metropolitan Washington Employment Lawyers Association states as follows:

No publicly held corporation has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement. There are no similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. No trade association is a party in the litigation.

/s/ Alan R. Kabat

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February 14, 2011

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Statement of Interest

The Metropolitan Washington Employment Lawyers Association ("MWELA") is a local affiliate of the National Employment Lawyers Association. MWELA is comprised of over 300 members who represent employees in employment and civil rights litigation in Virginia, Washington, D.C. and Maryland, including litigation within this Circuit. MWELA's purpose is to bring into close association employment lawyers in order to promote the efficiency of the legal system, elevate the practice of employment law, and promote fair and equal treatment under the law. MWELA has participated in numerous cases as *amicus curiae* before this Court, the Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia and Maryland.

MWELA has an interest in the disposition of this case because the case involves an issue that is central to nearly every case involving discrimination or retaliation in which its members are involved, namely what is the correct application of the summary judgment standard to cases involving unlawful discrimination and retaliation, and whether the existence of pretext evidence is sufficient to survive summary judgment

MWELA has submitted a Motion for Leave to File this Brief. Appellee takes no position with respect to the Motion for Leave to File.

MWELA hereby declares that: no party or party's counsel: (a) authored any

portion of this Brief, (b) contributed money that was intended to fund preparing or submitting this brief, and (c) no person other than MWELA or its members or the undersigned counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The summary judgment standard is easy to write but far more difficult to apply. This is particularly so when courts are applying the burden-shifting regime prescribed by *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), and its progeny. Much of the case law that has developed subsequent to *McDonnell-Douglas* can be interpreted to result in somewhat contradictory or inconsistent results.

In this case the district court misapplied Supreme Court precedent, and the precedent of this Court, by requiring Ms. Burgess to demonstrate evidence of discrimination, in addition to evidence that the employer's nondiscriminatory justification was unworthy of credence. This resulted from a misinterpretation of *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), which was cited by many courts for the proposition that employees had to demonstrate "pretext plus," *i.e.*, independent evidence of discrimination, and a failure to abide by *Reeves v. Sanderson Plumbing Prods*, 530 U.S. 133 (2000), which rejected the "pretext plus" requirement, and *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001) (recognizing the rejection of "pretext plus" per *Reeves*). Consequently, amicus

respectfully submits that the grant of summary judgment should be reversed, and this Court should confirm that "pretext plus" is not a requirement for defeating summary judgment in employment discrimination and retaliation cases.

ARGUMENT

The Supreme Court's decision in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993), has been cited by this Court for the proposition that in order to survive summary judgment, an employee must come forward with evidence of discrimination -- in addition to simply demonstrating that the employer's justification was false. *See Vaughan v. MetraHealth Cos.*, 145 F.3d 197, 202 (4th Cir. 1998) ("*St. Mary's* thus teaches that to survive a motion for summary judgment . . . the plaintiff must do more than merely raise a jury question about the veracity of the employer's proffered justification. The plaintiff must have developed some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action.").

We refer to this as imposing a "pretext plus" requirement on an employee in order to avoid summary judgment. As discussed *infra*, even though the Supreme Court expressly rejected the "pretext plus" requirement in *Reeves v. Sanderson Plumbing Prods*, 530 U.S. 133 (2000), "pretext plus" is an unspoken obstacle that the lower courts are improperly requiring employees to surmount in order to survive summary judgment.

Misapplication of the burden of proof at the summary judgment phase in the employment law setting may be – at least in part – responsible for the historical poor performance of employees on summary judgment decisions in discrimination and retaliation cases. The Federal Judicial Center recently analyzed nearly 180,000 cases filed in 78 federal district courts, and found that summary judgment was granted in 73 percent of the employment discrimination cases in which the employer sought summary judgment. *See* Federal Judicial Center, "Estimates of Summary Judgment Activity in Fiscal Year 2006," at 1, 6 (2007).[1] The Federal Judicial Center found that some judicial districts were granting summary judgment in over 80 percent of the cases (including one or more judicial districts in the Fourth Circuit), with at least one (unnamed) judicial district in the Eleventh Circuit granting summary judgment in 95 percent of the cases. *Id.* at 9-10. In contrast, summary judgment was only granted for 53 percent of the contract cases, and 54 percent of the tort cases in which a summary judgment motion was filed. *Id.* at 6.

For example, Professor Miller discusses the fact that courts have "ignored the restraining passages in the Court's [decisions in *Anderson, Celotex and Matsushita*] and overstepped the boundaries set by the trilogy itself, transforming summary judgment from a limited purpose procedural tool designed to screen out cases not worthy of trial to the 'trial on affidavits' that the Court itself warned

[1] This report is online at: http://ftp.resource.org/courts.gov/fjc/sujufy06.pdf (viewed Feb. 11, 2011).

against." Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. Rev. 982, 1062-63, 1093 (2003). Miller also addresses the confusion created by the Supreme Court's failure to specify the "standard by which the moving party discharges its burden of showing the absence of a genuine issue of material fact" and the tension between the prohibition against judges weighing evidence and their obligation to both draw reasonable inferences in favor of the nonmoving party and to evaluate the nonmovant's evidence in light of the entire record. Lastly, Miller addresses the courts' habit of encroaching on the factfinder's role. *Id.* at 1064.

Similar criticisms of the application of the summary judgment standards can be found elsewhere. *See, e.g.*, Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 709 (2007); John Bronseen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev. 522, 540-43 (2007) (discussing the artificial pressure on courts to grant summary judgment motions); Kevin Clermont and Stewart Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429 (2004) (statistical studies comparing civil rights litigants with all other civil litigants); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141, 181–205 (2000) (criticizing applications of summary judgment that

"press against tolerable constitutional limits"); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 162–70 (1988).

I. The Summary Judgment Standard.

Summary judgment is only appropriate when "there is no genuine issue as to any material fact." *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 295 (4th Cir. 2010). As this Court has repeatedly explained, the district courts "must construe the facts in the light most favorable to [the nonmoving party], and [] may not make credibility determinations or weigh the evidence." *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 213 (4th Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Hence, "there must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'" *Id*. (quoting *Anderson*, 477 U.S. at 249-50).

As the Supreme Court, several decades ago clearly explained, "the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 248-49.

The Supreme Court's decision in *Reeves* explains how the lower courts are to do this *without* making credibility determinations, weighing evidence or drawing inferences from the facts, all of which "are jury functions, not those of a judge," and instead recognizing the merits of the employee's contrary evidence:

> [I]t must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Reeves, 530 U.S. at 151 (internal citations omitted).

II. The Title VII Burden Shifting Analysis.

Under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), an employee must first make out a *prima facie* case of discrimination. *Id*. at 792-93. This can be done, for instance, by demonstrating that (1) the employee is a member of a protected class, (2) the employee suffered an adverse employment action, and (3) facts exist that give rise to an inference of discrimination, such as showing that the employer has treated similarly situated persons outside of the employee's protected class more favorably.

The burden of production then shifts to the employer to articulate a legitimate, non-discriminatory justification for its action. The employer's burden is "one of production, not persuasion; it can involve no credibility assessment." *Reeves*, 530 U.S. at 142. When the employer makes this production, the

presumption of discrimination drops out of the picture and the "sole remaining issue [is] discrimination *vel non*." *Id.* (internal citations omitted).

In order to survive summary judgment, after the employer puts forward its alleged non-discriminatory justification, the employee's burden "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). The employee succeeds in this effort "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.*

Hence, when it comes to demonstrating that a triable issue exists as to whether discrimination occurred, "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, no additional proof of discrimination is required." *St. Mary's Honor Ctr.* 509 U.S. at 511; *see also Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 258-59 (4th Cir. 2001) ("once a plaintiff has established a prima facie case and shown the defendant's explanation to be false, the plaintiff need not submit additional evidence of discrimination unless no rational factfinder could conclude that the action was discriminatory"). Similarly, in the context of discriminatory jury selections, the Supreme Court has held that pretext evidence

alone allows an inference of discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) ("The prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent.").

The Supreme Court's *St. Mary's Honor Center* decision may have caused some confusion in the lower courts, because that case dealt with the question of whether disbelief of the employer's justification *mandated* judgment in the *employee's* favor. This is not a question that often arises in the summary judgment context, because in most employment cases the employee does not seek summary judgment (since the issues of intent and motivation underlying an employee's claims are not appropriate for resolution at the summary judgment stage), and the employee is instead only seeking to defeat the employer's motion.

The Supreme Court explained that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason," *St. Mary's Honor Ctr.*, 509 U.S. at 515 (emphasis in original), and that "it is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519 (emphasis in original). This language was misinterpreted by courts to mean that employees could not survive summary judgment unless they also presented evidence of discrimination, in addition to evidence that the employer's justification was unworthy of credence. *See, e.g.*, *Vaughan*, 145 F.3d at 202.

However, in *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001), this Court correctly recognized that *Reeves* clarified *St. Mary's Honor Center*, and rejected the "pretext plus" requirement:

> [T]he *Reeves* Court made plain that, under the appropriate circumstances, a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Id. at 852;[2] *see also Leake v. Ryan's Family Steakhouse*, 5 Fed. Appx. 228, 232 (4th Cir. 2000) ("the Supreme Court has rejected the pretext-plus standard. Under *Reeves*, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.") (internal citations omitted).

Thus, the true question on summary judgment is whether there is a triable question as to whether the employer discriminated against the employee. *See Anderson*, 477 U.S. at 248-49 ("all that is required is that sufficient evidence

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[2] *Reeves* referenced two exceptions to the rule that a *prima facie* case, combined with the disbelief of the employer's reasons would be insufficient to survive summary judgment. The first is where "no rational factfinder could conclude that the action was discriminatory [such as where] ... the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148 (emphasis added). Amicus submits that this heightened requirement is seldom met in employment discrimination cases.

supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."); *St. Mary's Honor Center*, 509 U.S. at 524 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. *That remains a question for the factfinder to answer*.") (emphasis added); *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 295 (4th Cir. 2010) ("the issue boils down to whether the plaintiff has presented a triable question of intentional discrimination"); *id.* at 301 ("[W]e do not hold that Merritt's evidence *must* be believed or that, if believed, *must* yield an inference that Old Dominion unlawfully discriminated against her. But because Merritt's evidence *may* well be believed and *may* well yield such an inference, Old Dominion is not entitled to summary judgment.").

It is critical that, in applying *St. Mary's Honor Court* and *Reeves*, the district courts recognize that these cases hold that while evidence of pretext alone does not mandate a judgment in the employee's favor, it does make such a judgment possible:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative

> evidence of guilt. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Reeves, 530 U.S. at 147.

Consequently, when an employee is armed with nothing more than a *prima facie* case and evidence that the employer's justification is false, it is possible to sustain a judgment in favor of a plaintiff. Even though ultimate victory for the employee is not guaranteed, summary judgment is inappropriate, and the employee should be able to present her case to the jury. *Anderson*, 477 U.S. at 249-50 (summary judgment inappropriate when there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"); *see also Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1280 (10th Cir. 2010) ("once a plaintiff presents evidence sufficient to create a genuine factual dispute regarding the veracity of a defendant's nondiscriminatory reason, we presume the jury could infer that the employer acted for a discriminatory reason and must deny summary judgment"). Judge Posner summarized the appropriate analysis on summary judgment in a discrimination case:

> [T]he question in a discrimination case is not whether the employer's stated nondiscriminatory ground . . . is correct but whether it is the true ground of the employer's action . . . . If it is not the true ground, the employer may still be innocent of discrimination; he may for example have lied to conceal a reason that was discreditable but not discriminatory. *But the case could not be resolved on summary judgment*, because a trier of fact (judge or jury) would be entitled to

> infer a discriminatory motive from the pretextual character of the employer's ground.

Forester v. Rauland-Borg Corp., 453 F.3d 416, 417 (7th Cir. 2006) (emphasis added) (Posner, J.).

When the employee produces evidence that puts the employer's explanation into doubt, this Court has stated that the question then becomes whether the employer "had presented evidence such that 'no rational factfinder' could conclude that [the employer's action] was motivated by . . . discrimination. *Sears Roebuck & Co.*, 243 F.3d at 854 (quoting and relying on *Reeves*, 530 U.S. at 148); *id.* (also discussing the requirement that the employer make its showing "conclusively" with "abundant and uncontroverted independent evidence").

Other appellate courts are in accord. *See, e.g., Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc.*, 482 F.3d 408, 416 (5th Cir. 2007) (explaining that "where plaintiff had made out both a *prima facie* case and a sufficient showing of pretext, and where none of the rare circumstances identified in *Reeves* applied, plaintiff had produced sufficient evidence to withstand a motion for judgment as a matter of law") (emphasis added); *Jones*, 617 F.3d at 1282 (reversing summary judgment where "the rare conditions necessary to satisfy the *Reeves* exception are not present") (emphasis added).

This Court's decision in *Merritt*, 601 F.3d 289, provides an interesting example of how a "pretext plus" standard improperly lingers, even after being

rejected in *Reeves*, and in cases in which summary judgment was properly denied.

The employee in *Merritt* was a female truck driver who had been terminated from her position after suffering a temporary ankle injury. The employer's justification for terminating the employee was that she had failed a total-body strength and fitness test that the employer applied, on occasion, only in the pre-employment context, but which it used to assess Ms. Merritt's ability to return to work. The district court granted summary judgment to the employer because, although evidence had been presented that put the asserted justification into doubt, it concluded that the employee had not demonstrated any evidence of discriminatory motive. *Id*. at 294.

This Court, however, concluded that the employer's justification was "unworthy of credence." *Id*. at 295. This conclusion was based on two factors: first, it was undisputed that the injury was temporary in nature and that Ms. Merritt had recovered at the time she returned to work; and, second, the strength and fitness test was not designed to test the recovery from the ankle injury, so was pretextual. *Id*. at 296. Based on these two factors, this Court determined that "a jury could find that Old Dominion's contention--that Merritt's minor and temporary injury necessitated her passing the [fitness test] --is specious." *Id.*

This conclusion should have ended the matter, pursuant to *Reeves* and *St. Mary's Honor Center*. Unfortunately, in what was likely simply a desire to

provide as much justification as possible for reversing the grant of summary judgment, this Court continued its analysis and examined the question of whether there was evidence of discriminatory animus. Fortunately for the employee in *Merritt*, in her case there was ample evidence of gender-based discrimination, and the Court ultimately reversed the district court's grant of summary judgment. *Id.* at 297-302. Even though the *Merritt* Court reached the correct conclusion, the Court's analysis makes it appear that the additional evidence of discrimination was required and gives credence to the incorrect argument that, contrary to *St. Mary's* and *Reeves*, an employee must show "pretext plus" evidence of discriminatory animus in order to survive summary judgment.

In the case at bar, it is clear that the district court applied just such a "pretext plus" standard and granted summary judgment because Ms. Burgess did not present separate evidence of race discrimination in addition to her evidence of pretext. The district court's decision is peppered with references to the supposed requirement that the employee had to present evidence of discrimination at the summary judgment phase, *in addition to* (or instead of) showing that the employer's proffered explanation was pretextual. For example, the court posited that, in order to fulfill her obligation to demonstrate pretext at the summary judgment phase, "the Plaintiff must now show, that the proffered reason was not the true reason for the employment decision, *and that race was*." Decision at 25,

Joint Appendix (JA) at 2114 (emphasis added). The court also opined that Ms. Burgess needed "to show that she was terminated *because of* her race, not that she was a member of the black race *and* was terminated." Decision at 27, JA at 2116 (emphasis added).

These citations demonstrate that the lower court was fixated on whether Ms. Burgess presented *other* evidence of discrimination, in addition to her evidence that the employer's explanation lacked credence – a burden that was improper under *Reeves* and *Sears & Roebuck Co.*, since evidence that the employer's explanation was pretextual *is* evidence of discriminatory intent or motivation.

Indeed, the district court ultimately concluded that summary judgment was appropriate to dispose of Ms. Burgess's discriminatory termination claim, because "Plaintiff has not set forth specific facts showing that there is a genuine issue for trial. . . . Plaintiff has not come forward with *evidence that these acts were motivated by race discrimination*. Accordingly . . . Plaintiff fails to show facts sufficient to defeat a motion for summary judgment." Decision at 28, JA at 2117 (emphasis added).

Similarly, the district court granted summary judgment on Ms. Burgess's failure to reassign claim, because: "What Plaintiff does not do is present any *evidence of a connection between her race and the denial of her ability to transfer to the new position*. It is not enough for Plaintiff to believe that race was the basis

for her termination and [the] decision not to offer her a new position; there must be a sufficient record of proof for a reasonable jury to agree." Decision at 31, JA at 2120 (emphasis added).

The foregoing makes clear that the district court improperly applied the now-discarded "pretext plus" analysis, in direct contravention of *Reeves*, as well as *Sears Roebuck & Co.*, 243 F.3d at 852 (an employee's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated).

Because Ms. Burgess did, in fact, produce evidence that demonstrated that the employer's proffered justifications lacked credibility (as discussed in Parts III-V of her appellate brief),[3] according to *Reeves*, it would have been possible to uphold a jury's conclusion that the employer's actions were motivated by unlawful discrimination. Consequently, the district court improperly deprived Ms. Burgess of the right to have a jury determine the ultimate triable issue. *Anderson*, 477 U.S. at 248-49 ("all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing

[3] It is significant that the district court never indicated that Ms. Burgess's evidence of pretext was insufficient to cast doubt upon the employer's proffered justification. That alone should have been sufficient to deny the employer's motion for summary judgment.

versions of the truth at trial"); *Merritt*, 601 F.3d at 295 ("we do not hold that Merritt's evidence *must* be believed or that, if believed, *must* yield an inference that Old Dominion unlawfully discriminated against her. But because Merritt's evidence *may* well be believed and *may* well yield such an inference, Old Dominion is not entitled to summary judgment.").

CONCLUSION

Amicus MWELA respectfully submits that, under *Reeves*, *Merritt*, and *Sears & Roebuck Co.*, this Court should confirm that an employee's presentation of sufficient evidence to show that the employer's proffered non-discriminatory explanation(s) lacked credibility is sufficient to deny summary judgment to the employer.

Hence, Amicus MWELA respectfully requests that this Court reverse the district court's grant of summary judgment, and remand so that Ms. Burgess may proceed to a trial on the merits of her claims.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 because the brief contains 4,310 words, less than half the length permissible for the principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

/s/ Alan R. Kabat
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February 2011, the foregoing was served on counsel of record by this Court's Electronic Case Filing system, and by first class mail, postage prepaid, to:

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