08-0459-cv(L)

08-0538-cv(XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE CITIGROUP PENSION PLAN ERISA LITIGATION

BRIEF *AMICUS CURIAE* OF
THE AMERICAN BENEFITS COUNCIL
IN SUPPORT OF APPELLANTS AND REVERSAL

On Appeal from the United States District Court for the Southern District of New York, Civil Action No. 05-Civ. 5296

E. Duncan Getchell*
James P. McElligott, Jr.
Regina J. Elbert
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804) 775-1000

Robert G. Chambers
McGuireWoods LLP
201 North Tryon Street
Charlotte, NC 28202-4011
(704) 373-8999

**Admission to the United States Court of Appeals for the Second Circuit Pending*

CORPORATE DISCLOSURE STATEMENT

The following disclosures are made pursuant to Federal Rule of Appellate Procedure 26:1:

1) McGuireWoods LLP is the sole law firm appearing for the *Amicus.*

2) *Amicus Curiae* American Benefits Council (the "Council") is a non-profit organization described in section 501(c)(6) of the Internal Revenue Code and has no parent corporations.

3) Because the Council is a non-profit organization with no shareholders, no publicly held company owns 10 percent or more of the stock of the Council.

4) The Council has more than 250 members, all of whom are listed on the portion of the Council's website that is publicly available.[1] Appellant Citigroup Inc. is one of the Council's 250 members, and one of 115 members of the Council's Board of Directors, but Citigroup is not a member of the Council's Executive Committee.

5) The Council is unaware of any publicly held corporation that is not a party to the proceeding before this Court having a direct financial interest in the outcome of the proceeding.

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[1] *See* http://www.americanbenefitscouncil.org/about/memberlist.cfm.

6) This is not a bankruptcy appeal.

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E. Duncan Getchell*
May 30, 2008

**Admission to the United States Court of Appeals for the Second Circuit pending*

STATEMENT REGARDING CONSENT TO FILE *AMICUS* BRIEF

Counsel for Defendants-Appellants has consented to the filing of this *amicus* brief. Counsel for Plaintiffs-Appellees has not consented to the filing of this *amicus* brief. A motion for leave to file this *amicus* brief is filed herewith.

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STATEMENT OF INTEREST

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 250 members include primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefits plans covering more than 100 million Americans.

The Council has a special interest in providing a sound, predictable regulatory framework in which employers can continue to offer defined benefit pension plans. In cases of exceptional importance, with the potential for widespread effects on employee benefit plans, the Council participates as *amicus curiae*.[2] The Council bases its decision to seek to file an *amicus* brief upon criteria that limit participation to significant cases in which the Council believes its discussion of the issues will advance arguments that will not be fully developed from the same broad perspective by the parties or by

[2] *See, e.g., General Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007); *Tatum v. R.J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004).

other *amici*. Issues in the Citigroup Pension Plan ERISA Litigation are of critical importance to the Council because affirmance of the District Court's decision would have a serious adverse impact on America's defined benefit pension system and those members of the Council that sponsor such plans.

ARGUMENT

I. THE DISTRICT COURT'S INCORRECT APPLICATION OF THE ANTI-BACKLOADING TESTS OF SECTION 204(b) OF ERISA CONFLICTS WITH ERISA, THE CODE, AND IRS GUIDANCE AND CREATES NEEDLESS UNCERTAINTY AND RISK IN DESIGNING DEFINED BENEFIT PENSION PLANS.

The Council vigorously disputes the District Court's erroneous conclusion that the only permitted method for a cash balance plan to satisfy the anti-backloading rules of the Employee Retirement Income Security Act ("ERISA") is the "133 1/3 percent method." *In re Citigroup Pension Plan ERISA Litigation*, 470 F.Supp. 2d 323, 337 (S.D.N.Y. 2006). The District Court's error is readily apparent from the unambiguous text of ERISA at section 204(b) and the parallel provisions of the Internal Revenue Code (the Code") at § 411(b),[3] which expressly state that all defined benefit plans may

[3] For ease of discussion and because the District Court and the parties have generally addressed these issues by referring to sections 204(b) and 204(h) of ERISA rather than the parallel U.S. Code citations, our brief also refers to these sections of ERISA and frequently uses the shorthand term, "section 204(h) notice." The parallel U.S. Code citations for ERISA sections 204(b) and 204(h) are 29 U.S.C. § 1054(b) and 29 U.S.C. § 1054(h), respectively.

use *any* of the three tests to comply with the anti-backloading rules.[4]

Consistent with ERISA and the Code, IRS regulations[5] 26 C.F.R. §1.411(b)-1(a)(1) and (b), as well as other agency guidance, demonstrate that defined benefit plans, including cash balance plans, may use any of the three tests to comply. Both IRS regulations and Revenue Ruling 2008-7 contain an example of a defined benefit plan tested under the fractional rule, even though the plan's benefit formula takes into account more than 10 years of compensation. *See* 26 C.F.R. § 1.411(b)-1(b)(3)(iii) (Example 2); Revenue Ruling 2008-7, 2008-7 I.R.B. 419 (Feb. 1, 2008). Likewise, Notice 96-8, states that cash balance plans may comply using any one of the three tests. *See* Notice 96-8, 1996-1 C.B. 359 (Jan. 18, 1996).

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[4] *See* 26 U.S.C. § 411(b)(1)(A), (B), and (C); 29 U.S.C. § 1054(b)(1)(A), (B), and (C).

[5] Congress has authorized the IRS to issue binding regulations under ERISA section 204, as described in the preamble to the 204(h) regulations:

> "The Secretary of the Treasury has authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA, including section 204(h) of ERISA. Under section 104 of the Reorganization Plan No. 4, the Secretary of Labor retains enforcement authority with respect to parts 2 and 3 of subtitle B of title 1 of ERISA, but, in exercising that authority, is bound by the regulations issued by the Secretary of Treasury."

68 Fed. Reg. 17277 (April 9, 2003).

Under 26 U.S.C. § 411(b)(1)(C) and 29 U.S.C. § 1054(b)(1)(C), compliance with the fractional rule is tested "upon [the employee's] separation from [the employer's] service," not, as the District Court erroneously concluded, on a "year-by-year basis." *In re Citigroup Pension Plan Litigation*, 470 F. Supp. 2d 323, 338 (2006).

The IRS evaluates anti-backloading issues in a variety of contexts, as discussed in section II of this brief. To ensure tax-qualified status, pension plans must apply to the IRS for a determination of the plan's status. Anti-backloading issues are addressed in this determination letter process. Also, the IRS maintains the Employee Plans Compliance Resolution System ("EPCRS") as a formal correction procedure for technical violations, including anti-backloading issues. The IRS also issues public guidance on the proper application of these rules.

Revenue Ruling 2008-7 is illustrative in that it follows § 411(b)(1)(A), (B) and (C) of the Code in applying the anti-backloading rules in measuring pension accruals of a plan converted from a traditional benefit formula to a cash balance formula. The Revenue Ruling first tests the plan using the 133 1/3% method and finds that this test is satisfied for some, but not all, participants. *See* Rev. Rul. 2008-7 at 10. The Revenue Ruling then

applies the fractional rule to those participants for whom the plan did not satisfy the 133 1/3% test. *See id.* at 14-15.

The District Court's characterization of the Citibuilder Plan's Article 4.1(e) as an "unorthodox" or "radical departure" in anti-backloading compliance is contradicted by the Revenue Ruling's illustrative statement that a plan can use a provision, analogous to Article 4.1(e), to comply with anti-backloading tests:

> It may be possible that Plan A could be changed to adjust the hypothetical pay credits to ensure compliance with the accrual rules of § 411(b)(1)(A), (B), and (C) for future years. Such a provision would need to provide that if the interest crediting rate at the beginning of any plan year is less than 1.58%, *the hypothetical pay credits are adjusted so that the resulting pattern of pay credits satisfies the 133 1/3% rule using the interest crediting rate for the year.* Any such possible provision would need to include specific rules on how the adjustment is made, which would typically be dependent on the extent to which the interest crediting rate is less than 1.58%. Furthermore, the provision would need to be clear as to what happens in future years should the interest crediting rate again change.

Id. at 19. (Emphasis added).[6]

The anti-backloading provisions of the Internal Revenue Code and ERISA are clear, and applicable regulations issued by the IRS confirm the

[6] The Second Circuit has found that Revenue Rulings that are reasonable and consistent with the Code are entitled to "great deference." *Gillespie v. United States*, 23 F.3d 36, 39 (2d Cir. 1994).

language in the statutes. The District Court's reading of section 204(b) of ERISA is plainly incorrect.

The Council respectfully submits that the District Court has misapprehended the language and proper application of the backloading rules, and its decision will create great confusion and expense in an area where certainty, predictability, and consistency are essential. If affirmed, the District Court's decision will set a dangerous precedent, in which defined benefit plan accrual testing will be the subject of unpredictable federal court litigation, in place of the existing technical, actuarial backloading tests currently performed by plan actuaries, subject to IRS regulation. The Court of Appeals should reverse the District Court's judgment and clearly state that the District Court misinterpreted section 204(b) of ERISA.

II. THE DISTRICT COURT'S FAULTY READING OF THE NOTICE PROVISIONS OF SECTION 204(h) CONFLICTS WITH CURRENT LAW, INFRINGES ON LONG-STANDING AGENCY PROGRAMS FOR RETROACTIVE RELIEF, AND THREATENS TO DISCOURAGE EMPLOYERS FROM ADOPTING OR MAINTAINING DEFINED BENEFIT PENSION PLANS.

If the Court of Appeals concludes that the District Court erred in its interpretation of section 204(b), that alone would be grounds to reverse the District Court on the notice claim under section 204(h). However, because

the District Court's error with respect to section 204(h) is so potentially damaging to defined benefit pension plans, the Council requests the Court of Appeals to specifically reject the District Court's conclusions in this area, despite the sufficiency of other, independent grounds for reversal.

A. Neither ERISA section 204(h) nor the Code requires that participants be given notice of the Plan's method of compliance with the minimum accrual rules.

The District Court concluded that the Plan administrator violated the notice provisions of section 204(h) of ERISA solely because the notice of the cash balance conversion failed to adequately describe the method by which the Plan would satisfy the minimum accrual tests of section 204(b) of ERISA and § 411(b) of Code. The District Court's section 204(h) ruling that an alleged accrual defect can void an entire defined benefit pension amendment is both erroneous and destructive of the existing defined benefit compliance system.

The Council respectfully submits that the District Court's analysis is flawed. The minimum accrual tests create a floor, beneath which pension plan accrual rates cannot fall. The computation of this floor is highly technical and fact-specific, involving the application of three alternative tests as well as actuarial projections. Furthermore, the calculation of this floor is a moving target, because certain variables used in the calculation, such as a

participant's age, compensation, and length of service, vary from year to year. A failure of the accrual test, for a single participant in a single plan year, must be corrected with respect to that participant, but a technical failure should not invalidate a plan amendment.

Citigroup's 1999 and 2001 section 204(h) notices alerted participants that, depending on the circumstances, the Plan amendments could result in a reduction in their rates of accrual. In the Council's experience, it would be extremely unusual for any communication to participants to attempt to explain how the mathematical anti-backloading tests might apply to increase a participant's benefit in particular circumstances. Any attempt to do so would be complicated by the fact that the IRS permits pension plans to satisfy the minimum accrual tests in different ways, for different participants, at different times, and further permits pension plans to be amended to avoid a compliance issue.

Because Article 4.1(e) of the Citibuilder Plan does not *reduce* benefits, nothing in the letter or spirit of section 204(h) suggests that participants must receive notice of its operation.[7] The Department of Labor regulates the contents of the summary plan description, which must be distributed annually and written in a manner calculated to be understood by

[7] *Hirt v. Equitable Retirement Plan for Employees, Managers & Agents*, 441 F. Supp. 2d 516 (S.D.N.Y. 2006).

participants, but those regulations do not require any discussion of the minimum accrual rules.[8] The District Court not only misconstrues the anti-backloading rules, but also creates new notice requirements for defined benefit plan administrators not contemplated by the letter or the intent of ERISA or the Code.

B. The District Court's ruling creates uncertainty and confusion over what is required in a section 204(h) notice.

In relevant part, section 204(h) of ERISA provides that:

> A [defined benefit plan] may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date . . . [to all plan participants].

The Citibuilder Plan administrator complied with this requirement by providing timely notices that adequately described the operation of the cash balance plan formula. As discussed in the Brief of the Appellant, the omission of the Plan's "top-up benefit" from the section 204(h) notice made the reduction in future rate of accrual appear more, not less, significant. Nonetheless, the district court concluded that the alleged minimum accrual failure was, necessarily, also a section 204(h) notice failure:

[8] *See* 29 C.F.R. § 2520.102-3.

> Because it was ultimately revealed that the formula included an unlawful application of the [anti-backloading rules], which had the effect of keeping accrual rates below the minimum rate prescribed by statute, defendants' failure to either include or summarize [the Plan's anti-backloading provisions] in the notices violated section 204(h).[9]

Perhaps recognizing the potential confusion caused by its section 204(h) notice ruling, the District Court reinterpreted its opinion, which initially had stated that "defendants' failure to either include or summarize Article 4.1(e) in the notices violated section 204(h)." 470 F. Supp. 2d at 339. In a subsequent order, the District Court stated that "had the notices merely identified the Plan's novel compliance mechanism, those words would likely have been adequate." 2007 U.S. Dist. LEXIS 27004, at *19 (April 4, 2007). Employers need greater certainty in drafting employee communications than the shifting, unhelpful standard proposed by the District Court. The defined benefit pension community requires precision in legal guidance and relies on detailed ERISA and Code provisions, regulations, and agency interpretations and illustrations of those rules. The District Court's unclear "novel compliance mechanism" standard is of no assistance.

The Treasury Department has issued comprehensive regulations regarding the information that must be included in section 204(h) notices.

[9] *In re Citigroup Pension Plan ERISA Litigation*, 470 F.Supp. 2d at 339.

The regulations contain several illustrative examples of satisfactory disclosure language and specifically describe the assumptions and factors that must be mentioned in the notice. Those regulations, including the illustrative examples, fail to mention, let alone require, references to the anti-backloading rules. There are even specific rules relating to plan amendments which may not have a uniform impact on all participants. 26 C.F.R. § 54.4980F-1, Q/A 11. For example, subsection (a)(4)(ii)(B) of those regulations provides:

> Amendments for which the maximum reduction occurs under identifiable circumstances, with proportionately smaller reductions in other cases, may be illustrated by one example illustrating the maximum reduction, with a statement that smaller reductions also occur.

Example 4 in those regulations describes a section 204(h) notice that is issued in connection with the conversion of a defined benefit plan's traditional benefit formula to a cash balance formula. In concluding that the notice was satisfactory, the regulation points out that "the notice describes the old formula and describes the *estimated* future accruals under the new formula in terms that can be readily compared to the old formula, ..." . [*Emphasis added*.]

Employers should be able to rely on these specific rules relating to section 204(h), issued by the federal government, applicable to all plans,

requiring only information relating to maximum reductions and estimated future accruals. The District Court has no basis for insisting that section 204(h) of ERISA requires either a specific or vague reference to a possible benefit improvement that might apply to some participants, based on the timing of their departure. The District Court's conclusion is not only misguided, it provides none of the certainty needed by those who draft pension plan amendments and section 204(h) notices. In the experience of the Council and its members, it would be both extraordinary and confusing for a plan to include a description of its method of satisfying the anti-backloading requirements in a section 204(h) notice or, for that matter, in any communication to participants regarding the plan.

The District Court's opinion confuses two independent requirements. Section 204(h) requires notice of a plan amendment that significantly reduces benefits. Section 204(b) requires that the plan design satisfy the anti-backloading rules. Whether the new plan design satisfies all of the technical requirements of the Code or ERISA is relevant to the ongoing tax-qualified status of the plan, but not to whether the plan satisfies section 204(h). By confusing these two independent issues, the District Court transformed an alleged substantive defect into a section 204(h) notice failure.

A potential remedy for a section 204(h) notice violation – invalidation of the pension amendment – based on an anti-backloading violation would impose massive potential liability and subject a pension plan amendment to attack years after its implementation. Such a result is unwarranted for a technical violation that might apply to a few individuals in a few years and ordinarily be corrected through the IRS-supervised correction procedures.

C. The District Court's interpretation of section 204(h) is unworkable for plan sponsors and controverts two long-standing established IRS remedial programs.

Because of the unavoidable complexity in complying with qualified pension plan tax and ERISA requirements, the retirement plan compliance system contemplates that plans will commonly be designed or amended with technical flaws (such as a backloading violation). That system provides structured opportunities for correction of those flaws. The District Court's opinion would undermine the carefully structured correction system in the case of any plan to which section 204(h) applies because, in practice, section 204(h) notices rarely, if ever, advise participants of such potential technical violations.

The Code permits plans to be amended retroactively in certain circumstances, including as part of the IRS determination letter process. Under the determination letter process, sponsors submit their plans to the

IRS for a determination that the form of the plan, including its method for complying with the anti-backloading requirements, satisfies the applicable rules. *See* Rev. Proc. 2004-6, 2004-1 I.R.B. 197 (Jan. 7, 2004). If the IRS determines that there is a flaw, the sponsor is entitled to amend the plan on a retroactive basis to maintain its tax-qualified status. *See* 26 U.S.C. 401(b).

Similarly, the IRS maintains the Employee Plans Compliance Resolution System ("EPCRS") to correct technical defects, including anti-backloading problems. Under EPCRS, plan administrators are entitled to correct defects (with or without IRS involvement, depending on the defect), and EPCRS lists specific methods of correction for specific technical defects, without invalidating the amendment.[10]

As these programs illustrate, technical defects are common. The district court's decision would attach devastating consequences to such defects in the form of voided amendments, which is entirely inconsistent with Congressional intent and the existing pension compliance regime.

D. If affirmed, the District Court's decision would further undermine the fragile defined benefit pension system.

In response to a changing workforce and longer life expectancies, employers have redesigned their defined benefit pension plans. Nearly one-

[10] Rev. Proc. 2006-27, 2006-22 I.R.B. 945 (May 15, 2006) (most recent update to EPCRS).

third of large employers have converted their traditional plans to cash balance or pension equity plans, and virtually every conversion necessitates a section 204(h) notice.[11] As of the year 2005 (the most recent year for which official government data is available), more than 30 percent of all private single-employer defined benefit plan participants were covered by hybrid plans,[12] covering more than 10 million Americans.[13]

The District Court's decision would also have a devastating impact on defined benefit pension plans that fail or might potentially fail the anti-backloading rules or other technical requirements of qualified pension plans. In appropriate circumstances, the remedy for a failure to satisfy section 204(h) can void the amendment to which the notice relates.[14] In the Economic Growth and Tax Reconciliation Relief Act of 2001 ("EGTRRA"), Congress clarified that this remedy should apply in only very limited circumstances. *See* Pub. L. No. 107-16, § 659(b), 115 Stat. 38, 140 (codified as amended at 29 U.S.C. § 1054(h)) (clarifying section 204(h) to provide that an amendment should be disregarded only if the notice failure was

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[11] Pension Benefit Guaranty Corp., *Pension Insurance Data Book 2006*, at 83-84 (2007), *available at* http://www.pbgc.gov/docs/2006databook.pdf.

[12] *Id.*

[13] *Id.*

[14] *See, e.g.*, *Hirt*, 441 F. Supp. 2d at 538-39. *See also Suozzo v. Bergreen*, No. 00 Civ. 9649(JGK), 01 Civ. 7258(JGK), 2002WL 1402316, at *7 (S.D.N.Y. June 27, 2002).

egregious). Although the district court's opinion addresses two amendments – one under pre-EGTRRA section 204(h) and the other under post-EGTRRA section 204(h) – the district court either assumed that a notice failure attributable to a technical violation is per se egregious or simply failed to consider the issue.

Plaintiffs seek an unwarranted and unearned windfall: an award of the greater of (i) benefits under the pre-amendment formula and (ii) benefits under the post-amendment formula. Depending on the particular benefit formula, this could massively increase liabilities for many pension plans. As noted previously, an anti-backloading failure would ordinarily be rectified under an IRS-sponsored corrections procedure by providing the affected participants with a benefit large enough to satisfy the anti-backloading rules.

The nullification of cash balance conversion amendments could impose unexpected liabilities of millions or hundreds of millions of dollars for each affected pension plan. That additional liability – even substantial risk of such liability – could preclude companies from investing in their business and from providing jobs and other employment benefits. In tandem with other factors, an unexpected escalation in pension liabilities could even drive some companies into bankruptcy. These concerns apply not only to

large corporations, but also to non-profit organizations and small to mid-size businesses offering cash balance plans.

Because of these risks, the District Court's decision, if left standing, will accelerate the trend away from defined benefit pension plans.[15] The total number of defined benefit plans insured by the federal government through the Pension Benefit Guaranty Corporation ("PBGC") has dramatically decreased from a high of more than 112,000 in 1985 to fewer than 29,000 in 2006.[16] The PBGC reported that the number of defined benefit plans it insures has decreased by almost 7,000 (or 20%) from 2000 to 2006.[17] Employers will be even more reluctant to maintain defined benefit plans if they fear that pension plan amendments made in compliance with regulatory guidance will be litigated for years in court.

CONCLUSION

For the reasons stated above, *Amicus Curiae* respectfully submits that this Court should reverse the District Court and enter judgment for defendants on counts I, III, and VII.[18]

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[15] The Council previously released a white paper discussing in detail the multiple threats to the defined benefit system. *See Pensions at the Precipice: The Multiple Threats Facing Our Nation's Defined Benefit Pension System* (May 2004).

[16] PBGC *Pension Insurance Data Book 2006, supra* note 11, at 80.

[17] *See id.*

[18] In this brief, the Council has not addressed plaintiffs' counts II, IV and V.

Respectfully submitted,

Dated: May 30, 2008

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E. Duncan Getchell*

**Admission to the United States Court of Appeals for the Second Circuit pending*

ANTI-VIRUS CERTIFICATION

In accordance with Local Rule 32, I certify that on May 30, 2008, the PDF version of this Brief *Amicus Curiae*, which will be submitted as an email attachment to civilcases@ca2.uscourts.gov, was scanned for viruses, using Symantec Anti-Virus version 10, and that no viruses were detected.

Dated: May 30, 2008

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E. Duncan Getchell*

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

I hereby certify based upon word counting software that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,728 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman font, size 14 point.

Dated: May 30, 2008

E. Duncan Getchell*

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CERTIFICATE OF SERVICE

I certify that on May 30, 2008, I caused two (2) copies of these Brief *Amicus Curiae* to be served via Federal Express on the following counsel:

Counsel for Appellees-Plaintiffs

Kent Andrew Bronson
Bernstein Litowitz Berger
& Grossmann LLP
1285 Avenue of the Americas
New York, NY 10019

Brad Nelson Friedman
Shannon Lee Hopkins
Milberg Weiss & Bershad LLP
One Pennsylvania Plaza
New York, NY 10119

William David Frumkin
Sapir & Frumkin LLP
399 Knollwood Road, Suite 310
White Plains, NY 10603

Derek W. Loeser
Erin M. Riley
Lynn Lincoln Sarko
Keller Rohrback LLP
1201 3rd Avenue, Suite 3200
Seattle, WA 98101

Edgar Pauk
144 E. 44th Street
Suite 600
New York, NY 10017

Curtis Victor Trinko
Law Offices of Curtis V. Trinko, LLP
16 West 46th Street, Seventh Floor
New York, NY 10036

Counsel for Appellants-Defendants

Myron D. Rumeld
Howard Shapiro
Proskauer Rose LLP
1585 Broadway
New York, NY 10036

Dated: May 30, 2008

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E. Duncan Getchell*

**Admission to the United States Court of Appeals for the Second Circuit pending*