

10-16070

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LEAH A. BILYEU  
*Plaintiff-Appellant*

v.

MORGAN STANLEY LONG TERM DISABILITY PLAN; MORGAN STANLEY  
LONG TERM DISABILITY PLAN ADMINISTRATOR  
*Defendants-Appellees*

FIRST UNUM LIFE INSURANCE COMPANY  
*Defendant-Counter Claimant-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
No. CV 08-2071-PHX-SRB

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**BRIEF OF AMICI CURIAE  
IN SUPPORT OF THE PETITION FOR REHEARING EN BANC**

AMICI CURIAE  
STANDARD INSURANCE COMPANY  
SUN LIFE ASSURANCE COMPANY OF CANADA  
METROPOLITAN LIFE INSURANCE COMPANY

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Warren von Schleicher - IL 6197189  
SMITH | VON SCHLEICHER + ASSOCIATES  
180 North LaSalle St. Suite 3130  
Chicago, Illinois 60601  
P 312-541-0300  
warren.vonschleicher@svs-law.com  
Attorney for Amici Curiae

## CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Amici Curiae state that Standard Insurance Company is a wholly owned subsidiary of StanCorp Financial Group, Inc. No other publicly owned entity owns ten percent or more of Standard Insurance Company's stock.

Sun Life Assurance Company of Canada is a wholly owned indirect subsidiary of Sun Life Financial Inc. No other publicly owned entity owns ten percent or more of Sun Life Assurance Company of Canada's stock.

Metropolitan Life Insurance Company is a wholly owned subsidiary of MetLife, Inc. No other publicly owned entity owns ten percent or more of Metropolitan Life Insurance Company's stock.

By: /s/ Warren von Schleicher  
Attorney for Amici Curiae

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	5
I.    The Panel’s Decision Dramatically Curtails the Ability of Plan Fiduciaries to Recover Overpayments, Harms Participants, and Creates a Divide among the Circuits .....	5
II.   The Panel’s Decision Diverges from Well Established Principles of Equity.....	10
CONCLUSION .....	16
CERTIFICATE OF COMPLIANCE .....	i
CERTIFICATE OF SERVICE .....	ii

## TABLE OF AUTHORITIES

### CASES

<i>Barnes v. Alexander</i> , 232 U.S. 117 (1914).....	11
<i>Central Nat. Bank v. Conn. Mut. Life Ins. Co.</i> , 104 U.S. 54 (1881) .....	14
<i>Clark v. Smith</i> , 13 Pet. 195, 10 L.Ed. 123 (1839) .....	9
<i>Cusson v. Liberty Life Ins. Co.</i> , 592 F.3d 215 (1st Cir. 2010).....	7
<i>Dillard’s, Inc. v. Liberty Life Assur. Co.</i> , 456 F.3d 894 (8th Cir. 2006).....	7
<i>Funk v. Cigna Group Ins.</i> , 648 F.3d 182 (3rd Cir. 2011).....	7
<i>Gilchrest v. Unum Life Ins. Co. of Am.</i> , 255 Fed. Appx. 38 (6th Cir. 2007) .....	7
<i>Great-West Life &amp; Ann. Ins. Co. v. Knudson</i> , 534 U.S. 204 (2002).....	10
<i>Gutta v. Standard Select Trust Ins. Plans</i> , 530 F.3d 614 (7th Cir. 2008).....	7
<i>Holmberg v. Armbrecht</i> , 327 U.S. 392 (1946).....	9

<i>Jennings v. U.S. Fidelity &amp; Guaranty Co.</i> , 294 U.S. 216 (1935).....	14, 15
<i>Knatchbull v. Hallett, In re Hallett's Estate</i> , 13 Ch. D. 696 .....	14
<i>Mertens v. Hewitt Assoc's</i> , 508 U.S. 248 (1993).....	10
<i>Mitchell v. Robert DeMario Jewelry, Inc.</i> , 361 U.S. 288 (1960).....	9
<i>Moragne v. States Marine Lines, Inc.</i> , 398 U.S. 375 (1970).....	5
<i>Sereboff v. Mid-Atl. Med. Serv's, Inc.</i> , 547 U.S. 356 (2006).....	7, 8, 9, 10, 11, 12, 15
<i>Varsity Corp. v. Howe</i> , 516 U.S. 489 (1996).....	13

## STATUTES AND REGULATIONS

29 U.S.C. §1001 <i>et seq</i> .....	1
29 U.S.C. §1132(a)(3).....	passim

## ADDITIONAL AUTHORITIES

<a href="http://www.socialsecurity.gov/planners/benefitcalculators.htm">http://www.socialsecurity.gov/planners/benefitcalculators.htm</a> .....	6
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## STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae, Standard Insurance Company, Sun Life Assurance Company of Canada, and Metropolitan Life Insurance Company fund disability benefits by issuing group insurance policies to employers who voluntarily provide disability coverage to their employees through employee welfare benefit plans. These benefits plans are governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, as amended (“ERISA”). Disability benefit plans typically provide for the reduction of monthly disability payments by other sources of income, including Social Security disability income. These plans also typically contain reimbursement provisions, which require that participants repay to the plan or plan fiduciary any overpayment of plan benefits.

In the course of administering disability claims under these ERISA plans, Amici Curiae fulfill an important social purpose by providing unreduced monthly disability benefits while plan participants’ claims for Social Security disability income benefits are pending. Amici Curiae rely on the participants’ obligation and promise to repay any overpaid benefits resulting from the receipt of Social Security disability income. Moreover, Amici Curiae rely on ERISA’s provision allowing “appropriate equitable

relief” in §502(a)(3), 29 U.S.C. §1132(a)(3), to recover overpaid benefits in litigation when participants renege on their obligation and promise to repay.

As payors of benefits and claims administrators of ERISA disability plans throughout the country, Amici Curiae possess special knowledge and experience of the social utility served by the enforcement of plan reimbursement provisions.

The decision of the Panel majority substantially alters the rights of plan fiduciaries to recover these overpayments through litigation, which significantly impacts the administration of ERISA-governed disability plans insured by group insurance policies issued by Amici Curiae and other plan fiduciaries within the Ninth Circuit and throughout the country. Amici Curiae strive to provide cost-effective group coverage and to encourage employers to provide long-term disability coverage to their employees as a benefit of employment. Amici Curiae, therefore, strongly support First Unum Life Insurance Company’s Petition for Rehearing En Banc.

Pursuant to FRAP 29 and Circuit Rules 29-1 and 29-3, Amici Curiae requested the consent of all parties to file this Brief of Amici Curiae in support of the First Unum Life Insurance Company’s Petition for Rehearing En Banc. First Unum Life Insurance Company has consented to the filing of this Brief; however, not all parties have consented.

The Brief of Amici Curiae was authored by their undersigned counsel and no party's counsel authored the Brief in whole or in part. No party and no party's counsel contributed money that was intended to fund the preparation or submission of the Brief of Amici Curiae. No person or entity, other than Amici Curiae or their counsel, contributed money that was intended to fund the preparation or submission of the Brief of Amici Curiae.

### SUMMARY OF THE ARGUMENT

Congress, in enacting ERISA, sought to encourage employers to offer voluntary disability benefit plans to their employees. Congress sought to ensure that disability benefit plans are administered equitably and that no party, not even plan participants, should be unjustly enriched. Congress sought to promote the financial security of disability plans by reducing administrative costs and permitting flexibility in plan design, which keeps premiums affordable. By requiring participants to repay overpaid disability benefits, plan reimbursement provisions achieve these congressional goals so that these voluntary benefit plans remain a sustainable safety net for millions of American workers and their families.

Judicial enforcement of plan reimbursement provisions—through the mechanism of equitable relief under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3)—serves an important

social utility and advances ERISA's goals. Most ERISA disability plans provide that monthly disability benefits are to be reduced by the amount of Social Security disability benefits a participant is entitled to receive. Plan fiduciaries give participants the option of receiving unreduced monthly disability benefits while their Social Security applications remain pending, in exchange for the participants' promise to repay the overpayment when they receive an award of Social Security disability benefits. Plan fiduciaries provide this unreduced payment option to ensure that participants have additional money at a critical time, sometimes spanning years.

For those who ultimately receive Social Security disability benefits, only to renege on their promise to repay, ERISA §502(a)(3) provides plan fiduciaries with an equitable avenue to recover the overpayment. Decisions of the First, Third, Sixth, Seventh, and Eighth Circuits enforce plan reimbursement provisions through equitable relief under §502(a)(3).

The majority decision of the Ninth Circuit Panel dramatically alters the rights of plan fiduciaries by foreclosing equitable relief in most cases, leaving plan fiduciaries without a remedy under ERISA to recover overpaid disability benefits. The Panel's majority decision creates a series of unintended consequences not only for plan fiduciaries, but also for plan participants. The Panel decision discourages plans from

offering unreduced disability benefits, leaving a void in the social welfare safety net. The Panel's majority decision rewards participants who dissipate and spend overpaid disability benefits by releasing them from their promises to repay. But the Panel decision punishes participants who save all or part of the overpaid benefits by judicially enforcing their promises to repay.

Amici Curiae respectfully request that the Ninth Circuit consider *en banc* this "rule unjustified in reason, which produce[s] different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970). The vigorous inquiry of *en banc* review is appropriate before dramatically altering the legal rights and remedies available to plan fiduciaries who seek to recover overpaid benefits, dissuading plans from offering unreduced disability benefits to participants during the gridlock of Social Security, and tilting the careful balance of interests that serves as a cornerstone of ERISA.

## ARGUMENT

### **I. The Panel's Decision Dramatically Curtails the Ability of Plan Fiduciaries to Recover Overpayments, Harms Participants, and Creates a Divide among the Circuits.**

Plan fiduciaries should be encouraged to provide unreduced monthly disability payments while a participant's application for Social Security disability benefits is

pending, secure that a participant's promise to repay will be enforced in court under ERISA §502(a)(3). Plan fiduciaries provides these unreduced monthly disability payments in reliance on the participants' obligation and express agreement to repay any overpayment of disability benefits that may arise due to a retroactive award of Social Security disability income.

Given ERISA's curtailed timetable for deciding disability claims, ERISA disability benefit approvals frequently outpace Social Security disability decisions, sometimes by years. To bridge the gap, plan fiduciaries give participants the option of receiving monthly benefits unreduced by estimated Social Security disability income, relying on the participant's promise to repay any resulting overpayment.<sup>1</sup> If a participant receives a retroactive award of Social Security disability income that results in an overpayment, disability plans typically require that the participant repay the overpayment. If participants refuse to repay, plan fiduciaries rely on the federal judiciary to enforce the plan's reimbursement provisions by providing "appropriate equitable relief" under §502(a)(3).

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<sup>1</sup> The Social Security Administration publishes a formula for estimating monthly Social Security disability income based on earnings, work credits, and other information. *See* <http://www.socialsecurity.gov/planners/benefitcalculators.htm> (viewed Aug. 20, 2012). Plan fiduciaries utilize this information to obtain a reasonably accurate estimate of a participant's anticipated monthly Social Security monthly disability income.

Under *Sereboff v. Mid-Atl. Med. Serv's, Inc.*, 547 U.S. 356 (2006), plan reimbursement provisions create an equitable lien by agreement on the amount of overpaid benefits received by the participant. A lien imposed by agreement cannot be defeated by dissipating or spending the funds, because strict tracing rules do not apply. The First, Third, Sixth, Seventh, and Eighth Circuits enforce the participant's promise to repay by enforcing an equitable lien by agreement on the amount of the overpayment, without imposing anachronistic asset tracing and other rigid requirements that are nearly impossible to satisfy in contemporary society. See *Cusson v. Liberty Life Ins. Co.*, 592 F.3d 215 (1st Cir. 2010); *Funk v. Cigna Group Ins.*, 648 F.3d 182 (3rd Cir. 2011); *Gilchrest v. Unum Life Ins. Co. of Am.*, 255 Fed. Appx. 38 (6th Cir. 2007); *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614 (7th Cir. 2008); *Dillard's, Inc. v. Liberty Life Assur. Co.*, 456 F.3d 894 (8th Cir. 2006).

Like most disability plans, the Morgan Stanley Long Term Disability Plan (“Morgan Stanley Plan” or “Plan”) provides for the reduction of monthly disability payments by other sources of income, including Social Security disability income.<sup>2</sup> Like most

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<sup>2</sup> By offsetting other sources of income, disability plans maintain a careful balance between providing a sufficient level of disability benefits and preventing a system of perverse incentives in which remaining out of the work force is as remunerative as working.

disability plans, the Morgan Stanley Plan will pay unreduced benefits subject to the participant's promise and obligation to repay the overpayment arising from a retroactive Social Security disability award. First Unum Life Insurance Company ("Unum"), in paying unreduced benefits in reliance on Bilyeu's promise to repay, served an important social utility by bridging the financial gap until Social Security benefits were granted. When Bilyeu reneged on her promise, Unum relied on the federal judiciary to enforce an equitable lien by agreement on the amount of the overpayment under §502(a)(3) consistent with *Sereboff* and its progeny.<sup>3</sup>

But the Panel majority imposes new requirements for creating and enforcing equitable liens by agreement, in conflict with its sister circuits' interpretation of *Sereboff* and well established rules of equity. The Panel majority foreclosed Unum from recovering the overpayment and permitted Bilyeu to retain a higher level of benefits than authorized by the terms of the Plan.

By requiring strict tracing principles rejected by *Sereboff* and the First, Third, Sixth, Seventh, and Eight Circuits, the Panel majority renders plan reimbursement provisions

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<sup>3</sup> ERISA §502(a)(3) authorizes suits "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]"

virtually meaningless, deprives plan fiduciaries of a remedy to recover overpaid disability benefits, and creates a circuit split. The unjust enrichment of some participants will increase premiums, which reduces the incentives for employers to offer these voluntary welfare benefit plans.<sup>4</sup> The Panel decision discourages plans from offering unreduced benefits lest any overpayment be deemed unrecoverable, and creates a financial gap in the social welfare safety net while participants navigate the gridlock of Social Security.

Principles of equity should be applied to promote ERISA's goals and enforce plan terms, not to thwart them. "[T]here is inherent in the Courts of Equity a jurisdiction to ... give effect to the policy of the legislature." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960) (quoting *Clark v. Smith*, 13 Pet. 195, 203, 10 L.Ed. 123 (1839)). "Equity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

A rehearing *en banc* is critical given the importance of permitting equitable relief authorized by *Sereboff* in furtherance of Congress's goals of encouraging plan formation

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<sup>4</sup> The American Council of Life Insurers (ACLI) estimates that without offsets for Social Security disability income, premiums for long-term disability insurance would increase by at least 30% and potentially as much as 50%.

and fostering predictable results by confining the amount of benefits payable to the plan's written terms. Amici Curiae firmly support Unum's Petition for Rehearing En Banc.

## II. The Panel's Decision Diverges from Well Established Principles of Equity.

The Supreme Court established that the equitable relief available under ERISA §502(a)(3) encompasses the type of relief "typically available in equity." *Mertens v. Hewitt Assoc's*, 508 U.S. 248, 256 (1993). To determine whether relief lies in equity, *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204 (2002) directs courts to look for guidance to "the days of the divided bench." *Id.* at 713-716. *Knudson* denominates restitution as equitable when it seeks "to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214 (citation omitted). *Knudson* interpreted §502(a)(3) as authorizing equitable restitution only when particular funds properly belonging to the plan can be traced to specific funds in the participant's possession.

The Supreme Court clarified *Knudson's* holding in *Sereboff*. The Court in *Sereboff* emphasized that the scope of equitable relief available under §502(a)(3) is broader than the narrow species of equitable restitution addressed by the Court in *Knudson*. The ERISA plan in *Sereboff* contained an Acts of Third Parties provision that required participants to reimburse the plan for payment of medical expenses that are subsequently

obtained from third parties. That provision prevented unjust enrichment by precluding participants from retaining a double recovery for the same medical expenses. The Court held that the plan's reimbursement provision imposed an equitable lien by agreement on money received by the Sereboffs from a third-party tort recovery. The Court recited "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Sereboff*, 547 U.S. at 363-364 (quoting *Barnes v. Alexander*, 232 U.S. 117, 121 (1914)).

Applying *Sereboff*, when a participant agrees to reimburse funds upon the occurrence of an event, an equitable lien by agreement attaches to the funds and becomes enforceable upon the event's occurrence. Unum paid unreduced monthly disability benefits to Bilyeu subject to her agreement to reimburse Unum for any overpaid disability benefits resulting from an award of Social Security benefits. Bilyeu obtained an additional sum of money from Unum with each disability payment subject to her agreement to repay, and then refused to repay when she received a retroactive lump sum award of Social Security benefits. As a result, Bilyeu obtained greater benefits than she was entitled to receive under the terms of the ERISA plan. Bilyeu's obligation to reimburse created an equitable lien by agreement that attached to the benefits she

received from Unum the moment she received them. Under *Sereboff*, the equitable lien became enforceable upon her receipt of Social Security disability benefits.

The Panel majority grafted two requirements onto equitable liens by agreement that are incompatible with *Sereboff*, deviate from fundamental principles of equity, and undermine ERISA's goals. First, the Panel created a "specific fund" requirement—more aptly described as an "entire fund" requirement—that limits the creation of an equitable lien by agreement only to an *entire* fund, and precludes the creation of an equitable lien on specific money within a fund. According to the Panel majority, an entire fund assumes the characteristics of specific "property" (like chattel subject to a lien), whereas money within a fund is merely "undifferentiated" money. Slip Op. at 7262. The Panel majority determined that the overpaid benefits received by Bilyeu was never a specific "fund" and therefore did not acquire the status of "property." "As an amount of money, the overpayment is specific. As property or as a fund, however, the overpayment is lacking in specificity because it is an undifferentiated component of a larger fund." Slip Op. at 7262.

Second, the Panel majority imposed a "tracing" requirement that limits the imposition of an equitable lien by agreement only to a "specific fund" in the possession or

control of the participant. Slip Op. at 7261. Because Bilyeu claimed she spent the unreduced disability benefits that constituted the overpayment, the Panel found that the overpayment could not be traced to a fund in Bilyeu's possession.

Section 502(a)(3) is ERISA's statutory "safety net, offering appropriate equitable relief" when ERISA affords no other remedy. *Varsity Corp. v. Howe*, 516 U.S. 489, 512 (1996). The "specific fund" and "tracing" requirements grafted by the Panel majority onto §502(a)(3) deprive plan fiduciaries of any remedy under ERISA for recovering overpaid benefits through litigation.

The Panel majority's creation of "specific fund" and "tracing" requirements conflict with the flexible principles of equity that promote recovery of overpayments. Equitable liens by agreement do not distinguish between an entire fund and specific money within a larger fund, somehow deeming the former "property" and the latter merely undifferentiated money. And tracing requirements that apply to claims based on equitable restitution do not apply to claims based on equitable liens by agreement. Money is fungible, and if the dollars representing the overpaid benefits have been depleted, a fiduciary must still be able to enforce an equitable lien by agreement and the participant must pay with substitute dollars:

Currency paid over the counter and deposited in a vault is a thing that can be identified and so subjected to a trust whenever in equity and conscience a trust should be implied. Not only that, but a trust so created will not fail though other dollars may have taken the place of those originally received, *for dollars are fungibles and any one of them will be accepted as a substitute for another.*

*Jennings v. U.S. Fidelity & Guaranty Co.*, 294 U.S. 216, 223-224 (1935) (emphasis added).

If a participant commingles money subject to an equitable lien with her general assets, equity deems all the money to be subject to the lien. “[E]quity will follow the money, even if put into a bag or an undistinguishable mass, by taking out the same quantity.” *Central Nat. Bank v. Conn. Mut. Life Ins. Co.*, 104 U.S. 54, 69 (1881). If a participant spends the money, as Bilyeu claims, equity deems the money spent to be taken from personal assets and not from money that is subject to the lien. *Id.* at 68 (noting that the rule “attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money.”) (citing *Knatchbull v. Hallett, In re Hallett’s Estate*, 13 Ch. D. 696).

The ERISA Plan’s reimbursement provision, in addition to Bilyeu’s express agreement to repay overpaid benefits, created an equitable lien by agreement on the overpaid benefits paid to Bilyeu every month. Tracing rules do not apply to equitable liens by

agreement, so Bilyeu cannot defeat the lien by spending the overpaid benefits. *See, e.g., Sereboff*, 547 U.S. at 364-365; *Jennings*, 294 U.S. at 223-224. Bilyeu's claim that she spent all her disability benefits, and presumably has no substitute money, may be a defense in a collection proceeding, but her claim does not defeat the equitable lien by agreement.

Money is more mobile in modern society than in the nineteenth century, and as the decisions of the First, Third, Sixth, Seventh, and Eight Circuits applying *Sereboff* reflect, principles of equity must adapt. Rarely will a participant hold a distinct fund containing only money that can be traced to the plan fiduciary.<sup>5</sup> The practical effect of the Panel majority's interpretation of *Sereboff* is to defeat equitable liens by agreement in all but the rarest cases, leaving plan fiduciaries without any remedy to recover overpaid benefits.

The Panel decision prevents the equitable administration of disability plans by allowing participants to retain an unjust enrichment simply by agreeing to repay and then spending the overpaid plan benefits. The Panel decision discourages disability plans from providing unreduced benefits while participants' Social Security claims are pending. As a

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<sup>5</sup> The ERISA cases in which a distinct fund was intact and traceable involved subrogation claims to recover money obtained by participants from third-party tort recoveries. The Panel's majority decision limits the universe of equitable restitution available under ERISA §502(a)(3) to only equitable subrogation claims, and even then only when the fiduciary is notified and acts promptly before the funds are dissipated.

consequence, the Panel decision ultimately places a greater burden on the government to provide a suitable social safety net.

## CONCLUSION

The vigorous inquiry of *en banc* review is appropriate before dramatically altering the legal rights and remedies available to plan fiduciaries who seek to recover overpaid benefits through litigation, and to evaluate the social impact of such a rule of law. Amici Curiae respectfully request that the Court grant Unum's Petition for Rehearing En Banc.

Respectfully Submitted,

/s/ Warren von Schleicher

Attorney for Amici Curiae

SMITH | VON SCHLEICHER + ASSOCIATES

180 North LaSalle St. Suite 3130

Chicago, Illinois 60601

P 312-541-0300

F 312-541-0933

warren.vonschleicher@svs-law.com

## CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Amici Curiae certifies pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 that the Brief of Amici Curiae complies with the typeface, style, and volume requirements because the Brief is prepared using proportionally spaced typeface in Roman style Garamond Premier Pro font at 14 point, with footnotes in Roman style Garamond Premier Pro font at 14 point, and the Brief contains 3,325 words including headings and footnotes.

By: /s/ Warren von Schleicher  
Attorney for Amici Curiae

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of August 2012, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all parties and participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Warren von Schleicher  
Attorney for Amici Curiae