18-153

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LARYSSA JOCK, CHRISTY CHADWICK, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA SMITH, MARIE WOLF, DAWN SOUTO-COONS,
Plaintiffs-Counter Defendants-Appellants,

JACQUELYN BOYLE, LISA FOLLETT, KHRISTINA RODRIGUEZ, KELLY CONTRERAS,
Plaintiffs-Counter-Defendants,

v.

STERLING JEWELERS, INC.,
Defendant-Counter Claimant-Appellee.

On appeal from the United States District Court for the
Southern District of New York, No. 08-cv-2875, Hon. Jed S. Rakoff

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/COUNTER-CLAIMANT/APPELLEE

Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Andrew J. Pincus
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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MISCELLANEOUS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their relationships with employees. Arbitration allows them to resolve employment-related disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Consequently, the Chamber regularly submits *amicus* briefs in cases presenting issues regarding the interpretation or

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

application of the Federal Arbitration Act. *See* http://www.chamberlitigation.com/arbitration.

The Chamber has a strong interest in affirmance of the order below. Class arbitration is not arbitration as envisioned by the FAA, and, accordingly, an arbitrator may not employ class procedures without the consent of the parties. Moreover, an arbitrator lacks the power to bind non-parties who never consented to the arbitrator's authority, including the arbitrator's decision to impose class-wide procedures. The district court properly recognized these principles in concluding that the arbitrator exceeded her powers in certifying a class that extended beyond the named parties and the individuals who affirmatively opted in to the arbitration proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court has made clear that class arbitration is "not arbitration as envisioned by the FAA" and "lacks its benefits." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). Rather, class arbitration is an unwieldy hybrid proceeding that sacrifices the informality and expediency of traditional arbitration and instead imposes onto arbitration the procedural complexity and high stakes of class litigation.

Because of the "fundamental" differences between bilateral and class arbitration, the Supreme Court has held that an arbitration provision must reflect an

actual agreement by the parties to authorize class procedures before such procedures may be imposed upon a party objecting to class arbitration. *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684-86 (2010). That follows from the FAA's "fundamental" rule that "arbitration is a matter of consent, not coercion." *Id.* at 680 (quotation marks omitted). The same principle applies to the threshold question of an arbitrator's authority to decide whether the parties' agreement authorizes class arbitration.

Here, in the course of litigating this case, the *named parties* acquiesced in the arbitrator's determination that the arbitration agreement authorizes class procedures. That decision stands as to the named parties themselves, regardless of whether it is correct as a matter of contractual interpretation: that result flows from both the Supreme Court's decision in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), and this Court's prior opinion in *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d Cir. 2011) ("*Jock I*").

But in certifying a class, the arbitrator swept far beyond the named parties who had arguably consented to the arbitrator's authority by opting in to the arbitration proceedings. Instead, the arbitrator certified a much larger class of approximately 70,000 individuals—the vast majority of whom, as this Court previously noted, "never consented to the arbitrator determining whether class

arbitration was permissible under the agreement in [the] first place." *Jock v. Sterling Jewelers, Inc.*, 703 F. App'x 15, 17 (2d Cir. 2017) ("*Jock II*").

The district court correctly concluded that an arbitrator's power cannot extend that far. As Justice Alito pointed out in his *Oxford Health* concurrence, in language equally applicable here, "absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration," and therefore "it is far from clear that they will be bound to the arbitrator's ultimate resolution of this dispute," including the "arbitrator's decision to conduct class proceedings." 569 U.S. at 574 (Alito, J., concurring); *see* SA:7-8.

Indeed, absent "class members" cannot be bound to the arbitrator's decision because of the powerful due process arguments they could raise to collaterally attack the arbitrator's award. *See* SA:8-9. A "class determination" by the arbitrator therefore would place defendants in the palpably "unfair[]" situation where absent non-parties included in the class could "claim the benefit from a favorable judgment" by the arbitrator "without subjecting themselves to the binding effect of an unfavorable one" (569 U.S. at 575 (Alito, J., concurring) (quotation marks omitted)). This one-way intervention problem has long been recognized as unfair in the class action context and the district court properly refused to allow it here.

Finally, the policy argument raised by plaintiffs' *amicus*—asserting that class arbitration is the only way to effectively adjudicate claims of absent non-

parties—is misplaced. The Supreme Court has repeatedly emphasized that the benefits of traditional, bilateral arbitration, including its informality and expediency, are particularly significant in the employment context. As the Supreme Court put it nearly thirty years ago in confirming that age discrimination claims under the Age Discrimination in Employment Act may be arbitrated, "generalized attacks on arbitration" as a means for resolving statutory employment claims "'are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 481 (1989)). And the Supreme Court's holding is supported by the empirical data demonstrating that employees are more likely to obtain redress for the vast majority of their employment disputes (which are usually individualized) in arbitration than they would be in court.

ARGUMENT

I. Because Class Arbitration Is Not Arbitration As Envisioned By The FAA, The FAA Requires Robust Consent To Class-Wide Procedures And To Resolution Of That Issue By The Arbitrator.

The FAA "imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 559 U.S. at 681 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *accord Oxford Health Plans*, 569 U.S. at

565 ("Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them.").

Accordingly, an arbitrator has power to decide a particular question only if the parties have authorized him or her to do so. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 682 ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

Applying these principles rigorously to questions surrounding class arbitration is critical because "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *Concepcion*, 563 U.S. at 347 (quoting *Stolt-Nielsen*, 559 U.S. at 686). "[B]ilateral arbitration"—that is, arbitration on an individual basis—is the form of arbitration "envisioned by the FAA." *Id.* at 348. As the Supreme Court has explained on multiple occasions, in bilateral arbitration the "'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 685); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of

dispute resolution."); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted).

By contrast, "class arbitration" is "*not* arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51 (emphasis added). That is because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. In addition, "class arbitration greatly increases risks to defendants," because "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *Id.* at 350.

Because "the relative benefits of class-action arbitration are much less assured," the Supreme Court held in *Stolt-Nielsen* that before "a party may * * * be compelled under the FAA to submit to class arbitration," there must be a "contractual basis for concluding" that the parties have "*agreed* to" that procedure. 559 U.S. at 684, 686. The Court further made clear that courts or arbitrators may *not* "presume" such consent from "mere silence on the issue of class-arbitration" or infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687.

These principles are no less important when applied to the antecedent question whether an arbitrator (rather than a court) can decide whether parties have agreed to authorize class-wide procedures. This Court has already concluded in *Jock II* that the "absent class members, *i.e.*, employees other than the named plaintiffs and those who have opted into the class," unlike the named parties, "never consented to the arbitrator determining whether class arbitration was permissible under the agreement." 703 F. App'x at 17. As Sterling persuasively explains in its brief (at 18-19), that conclusion is controlling in this litigation, which is reason enough to reject plaintiffs' attempt to relitigate it.

In addition, although the Supreme Court has never squarely decided whether the availability of classwide arbitration is presumptively for a court to decide, the Supreme Court has "given every indication, short of an outright holding," that it is. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013); *see also, e.g.*, *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 971-72 (8th Cir. 2017); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 875 (4th Cir. 2016); *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326 (3d Cir. 2014). Indeed, in *Jock II*, this Court cited the Supreme Court's acknowledgment in *Oxford Health* that "the availability of class arbitration may be a 'question of arbitrability' that is 'presumptively for courts to decide.'" 703 F. App'x at 17 (citing 569 U.S. at 569 n.2).

To be sure, here, as in *Oxford Health*, the *named* parties submitted to the arbitrator for decision the issue of whether the arbitration agreement permits class-wide arbitration. But the decision by the named parties (and perhaps the opt-in claimants) here to submit to the arbitrator's authority did not extend to absent non-parties, and therefore the arbitrator could not purport to bind those non-parties as members of a certified class.

II. The District Court Correctly Concluded That The Arbitrator Cannot Bind Non-Parties Who Never Agreed To Have The Arbitrator Decide Whether The Arbitration Agreement Authorizes Class-Wide Procedures.

The district court's conclusion that the arbitrator lacked authority to bind absent non-parties follows naturally from the principles just discussed.

Unlike an Article III court, an arbitrator derives her power solely from contract. *See* pages 5-6, *supra*. For that reason, "[a]n arbitration panel may not determine the rights or obligations of non-parties to the arbitration." *Jock II*, 703 F. App'x at 17 (quoting *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003)). Thus, when absent class members (i) have not agreed to arbitrate at all; or, as here, (ii) have not been involved in selecting the particular arbitrator who is hearing the dispute or have not affirmatively consented to that arbitrator's authority, those absent class members would have strong grounds to collaterally attack any resulting award as inconsistent with their due process rights. And the strength of those arguments is greatly magnified when, as here, there is no

clear contractual agreement to submit to class rather than bilateral arbitration. *See* SA:6; Sterling Br. 31-34.

These due process rights of absent non-parties—including their potential ability to collaterally attack an arbitration award—highlight why an arbitrator cannot bootstrap the *named parties'* submission to her authority, including her authority to decide the question of classwide arbitrability, to bind absent *non-parties*.

The *res judicata* effect of a class arbitration on "class members" other than opt-in claimants is doubtful at best. Because arbitration "is a matter of consent, not coercion" (*Volt*, 489 U.S. at 479), when an arbitration agreement does not clearly authorize class arbitration, absent non-party class members would have a powerful due process argument that they could not be bound by an award resulting from an arbitration proceeding in which they did not participate. As Justice Alito put it in his *Oxford Health* concurrence, "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute." 569 U.S. at 574 (Alito, J., concurring). That is true even when each non-party "signed contracts with arbitration clauses materially identical to those signed by the plaintiff[s] who brought this suit," because "an arbitrator's erroneous interpretation of contracts

that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination." *Id.*

Moreover, the notice and opt-out procedures employed in class-action litigation in court cannot cure this problem. "[A]t least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings *could* bind absent class members" who "have not submitted themselves to th[e] arbitrator's authority in any way." *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring) (second emphasis added); *accord Jock II*, 703 F. App'x at 18. That is because absent non-parties' "silence" as to the arbitrator's authority—*i.e.*, a mere failure to affirmatively opt out—is not the same as the contractual consent that is required for an arbitrator to have authority over those non-parties. *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring) (citing 1 Restatement (Second) of Contracts § 69(1) (1979)); *accord* SA:9 & n.3.

That means absent class members in such a situation could "unfairly 'claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Id.* at 575 (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546-47 (1974)). That heads-I-win, tails-you-lose result is palpably "unfair[]" to defendants. *Id.*; *see also* Sterling Br. 34-36.

Indeed, the problem of "one-way intervention" has long been recognized as unfair in the class action context as a matter of due process, and a "principal

purpose of the 1966 revision of Rule 23 was to end" the practice, "which had few supporters." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 362 (7th Cir. 1987) (citing Fed. R. Civ. P. 23(c)(3), advisory committee note to 1966 amendment). As the Supreme Court noted in *American Pipe* in describing the pre-1966 version of Rule 23, the situation where "members of the claimed class could in some situations await developments in the trial or even final judgment in order to determine whether participation would be favorable to their interests . . . aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." 414 U.S. at 547.

In particular, the pre-1966 version of Rule 23 "contained no mechanism for determining at any point in advance of final judgment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment." *Id.* at 546. "Rather, when a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted." *Id.* (quotation marks omitted).

The interpretation of the arbitrator's authority offered by plaintiffs and their *amicus* presents the very one-way intervention "defect" that the revised Rule 23 was designed "to mend." *Id.*; *see also* Fed. R. Civ. P. 23(c)(3), advisory committee

note to 1966 amendment ("Under [Rule 23](c)(3), one-way intervention is excluded.") An absent "class member" would be able to recover under a favorable decision by the arbitrator, but invoke due process principles to avoid being bound by an unfavorable decision.

The principal response by plaintiffs and their *amicus* to this problem of collateral attacks is simply to deny that the problem exists. *See* Pls.' Br. 37-39; NWLC Br. 22-25. The *amicus* assumes that the "class [will] prevail[]on its disparate impact claim" (NWLC Br. 24), but that is, of course, not the only possibility. If the class does *not* prevail in arbitration, the defendant runs the risk that the absent non-parties can avoid "the binding effect of [that] unfavorable" decision (569 U.S. at 575) and relitigate the issue in a separate arbitration. Neither plaintiffs nor their *amicus* have any real answer to this due process problem: *amicus* simply concludes that "the absent class members would be bound by that result" too (NWLC Br. 24), with no further explanation why that would be the case—including no discussion of the due process arguments that absent class members could, and undoubtedly would, raise.

In short, the district court correctly concluded that the arbitrator exceeded her powers by certifying a class composed almost entirely of absent non-parties who never consented to having that arbitrator decide whether class arbitration is permissible at all.

III. Policy Arguments Based On The Employment-Discrimination Claims At Issue Here Do Not Warrant Reversal.

Plaintiffs' *amicus* separately argues that the decision below should be reversed because the sweeping class arbitration certified by the arbitrator is the only effective way to adjudicate the Title VII claims of the absent non-party class members. NWLC Br. 6-22.

But the Supreme Court has long rejected similar policy arguments, beginning nearly three decades ago in *Gilmer*, which makes clear that statutory employment discrimination claims, including under Title VII, can be effectively resolved through bilateral arbitration. *Gilmer* held that an age-discrimination claim under the ADEA was arbitrable, explicitly *rejecting* the employee's argument that arbitration should be denied because the agreement did not provide for class procedures. 500 U.S. at 30-32. The Court also rejected the assertion that any "unequal bargaining power between employers and employees" provides grounds for invalidating agreements to arbitrate employment claims. *Id.* at 33. Applying *Gilmer*, this Court has repeatedly enforced agreements to resolve Title VII claims through bilateral arbitration. *See, e.g.*, *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 120 (2d Cir. 2010); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 147 (2d Cir. 2004).

Moreover, plaintiffs' *amicus* all but concedes that their argument that class proceedings are necessary to adjudicate Title VII disparate impact claims is

foreclosed by the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013). *See* NWLC Br. 18. In *Italian Colors*, the Court held that a plaintiff could not avoid its agreement to arbitrate on an individual basis by asserting that the costs of litigating an antitrust claim were excessive. And, as in *Concepcion*, the Court "specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'" 570 U.S. at 238 (quoting *Concepcion*, 563 U.S. at 351). In any event, as in *Gilmer*, the plaintiffs have made "no showing" that the applicable arbitral rules (here, the American Arbitration Association's Employment Rules) are insufficient for an individual claimant to have a fair opportunity to pursue her claim. *Gilmer*, 500 U.S. at 31.

Finally, the Supreme Court has recognized that "there are real benefits to the enforcement of arbitration provisions" calling for traditional, bilateral arbitration, including "allow[ing] parties to avoid the costs of litigation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001); *see also* pages 6-7, *supra*. Indeed, the Court in *Circuit City*, which involved a state-law "employment discrimination" claim, was "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City*, 532 U.S. at 109, 123 (citing *Gilmer*, 500 U.S. at 30-32). On the contrary, the Court emphasized that the lower costs of arbitration compared to litigation "may

be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.*

Likely for these reasons, employees tend to fare better in arbitration: Studies have shown that those who arbitrate their claims are more likely to prevail than those who go to court. *See, e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. *See id.* Another study examined American Arbitration Association awards and determined that, for higher-income employees' claims, there was no statistically significant difference in win rates or amounts between arbitration and litigation. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment*

Claims: An Empirical Comparison, 58 Disp. Resol. J. 44, 45-50 (Nov. 2003/Jan. 2004).[2]

CONCLUSION

The district court's order should be affirmed.

[2] Studies of consumer arbitrations reach the same conclusion: consumers do as well or better in arbitration than in court. *See, e.g.*, Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010).

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Respectfully submitted.

Of Counsel:

Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

s/ *Andrew J. Pincus*

Andrew J. Pincus
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Attorneys for Amicus Curiae *The Chamber of Commerce of the United States of America*

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Local Rule 29.1(c) because it is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 3,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

s/ *Andrew J. Pincus*
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

s/ *Andrew J. Pincus*
Andrew J. Pincus