

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

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**No. 08-3837**

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**FRANCIS J. PULEO, TRISH C. PULEO, ON BEHALF  
OF THEMSELVES AND ALL OTHER PENNSYLVANIA  
RESIDENTS SIMILARLY SITUATED,**

*Plaintiffs-Appellants,*

vs.

**CHASE BANK USA, N.A.,**

*Defendant-Appellee.*

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On Appeal From The United States District Court  
For The Eastern District Of Pennsylvania  
Civil Action No. 07-4800

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**SUPPLEMENTAL BRIEF OF APPELLEE**

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## INTRODUCTION

As Judge Fuentes recognized during oral argument, Plaintiffs ask the Court to “break new ground” in arguing that a challenge to the enforceability of a class arbitration waiver is a question for the arbitrator. Courts that have considered the issue have held enforceability of the class arbitration waiver is a “gateway question” for the court because, given the significance of the clause, an unconscionability challenge to a class arbitration waiver is a challenge to the enforceability of the entire arbitration agreement. *See, e.g., Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merch. Litig.)*, 554 F.3d 300, 311 (2d Cir. 2009), *petition for cert. filed*, (U.S. May 29, 2009) (No. 08-1473); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006). This Court has routinely considered challenges to the enforceability of the class arbitration waiver rather than sending those challenges to the arbitrator. *See, e.g., Kaneff v. Delaware Title Loans, Inc.*, \_\_\_ F.3d \_\_\_, No. 08-1007, 2009 WL 4042926 (3d Cir. Nov. 24, 2009); *Homa v. Am. Express Co.*, 558 F.3d 225 (3d Cir. 2009); *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007). The District Court correctly did so here, finding the class arbitration waiver is enforceable and ordering Plaintiffs to arbitrate their disputes in accordance with the express terms of their arbitration agreement.

Severability does not change this result. The court must rule on a challenge to a provision in an arbitration agreement unless there is settled law holding the challenged provision is severable. Here, the case law indicates the class waiver is not severable. No Delaware court has held such a clause severable; rather, a provision is severable only if the court finds the parties would have entered into the agreement in the absence of the clause. As Chase argued below (A125-27), it would not have done so. The District Court therefore could not have concluded from the outset that the parties ultimately would be submitting the underlying dispute to arbitration regardless of the outcome of the challenge to the disputed clause, so Plaintiffs' challenge was a "gateway issue" for the court to decide.

Finally, there is no "clear and unmistakable evidence" that the parties intended the arbitrator to decide the enforceability of the class arbitration waiver or the arbitration agreement itself. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The agreement only authorizes the arbitrator to decide whether a particular dispute is arbitrable and whether Plaintiffs' Cardmember Agreement itself is enforceable. As Chase explained in its Appellee's Brief (at 23-24 & n.7), by limiting arbitrable "validity" questions to those challenging the Cardmember Agreement as a whole, this provision makes clear the parties did not intend the arbitrator to decide the validity of the arbitration agreement.

For all these reasons, Chase respectfully urges the Court to affirm the judgment in its favor.

**SHORT RESPONSE TO QUESTIONS RAISED BY THE COURT**

**1. Is an unconscionability challenge to an arbitration agreement's class action waiver provision to be decided by the court or the arbitrator?**

The District Court correctly ruled Plaintiffs' unconscionability challenge to the class action waiver in their arbitration agreement is a question for the court because the challenge implicates the enforceability of the agreement as a whole.

**2. Does the answer to Question 1 turn on whether the waiver provision, if invalid, would render the arbitration clause as a whole unenforceable?**

No. As long as the validity of the class waiver *could* impact the enforceability of the arbitration agreement, the validity of the waiver provision is a question of arbitrability for the court. The court would not determine whether the invalidity of the challenged clause actually *would* render the entire arbitration agreement unenforceable unless it first determined the waiver invalid. Here, such a determination would render the entire arbitration agreement unenforceable because it is such a central part of that agreement. However, the District Court did not have to reach this issue because it held the class waiver is valid and enforceable.

**3(a). In deciding whether the validity of the waiver provision is a question for the arbitrator or the court, is it relevant whether all parties agree that the case is arbitrable?**

Yes. If all parties agree the case is arbitrable even if the challenged provision is found unenforceable, there is no possibility that the arbitration agreement as a whole could be found unenforceable, so the arbitrator would decide the enforceability of the challenged provision. That is not the case here because Chase

contends the agreement would be unenforceable if the class arbitration waiver had been found unenforceable.

**3(b). In deciding whether the validity of the waiver provision is a question for the arbitrator or the court, is it relevant whether the contract contains a severability clause that would leave the remainder of the arbitration clause unenforceable if the waiver provision is held invalid?**

Yes. The severability clause is relevant if it is “clear beyond any doubt” that the parties intended and the case law would require that the arbitration agreement be enforced without the challenged provision. *Terminix Int’l Co. v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). That was not the parties’ mutual intent here, and no Delaware law holds a class arbitration waiver is severable.

**ARGUMENT**

**I. THE DISTRICT COURT CORRECTLY HELD THAT THE COURT MUST DECIDE THE ENFORCEABILITY OF PLAINTIFFS’ AGREEMENT TO ARBITRATE THEIR DISPUTES ON AN INDIVIDUAL BASIS.**

**A. A Challenge to the Enforceability of a Class Arbitration Waiver Is a Challenge to the Arbitration Agreement Itself.**

The question whether the class arbitration waiver is unconscionable was for the District Court to decide. Plaintiffs’ challenge to that clause required an assessment of the agreement as a whole. In analyzing Plaintiffs’ claim of unconscionability, the District Court had to decide whether the class arbitration waiver was unconscionable, and if so, to determine whether: (a) the

unconscionable term was essential to the agreement, in which case the agreement as a whole is unenforceable; or (b) the term could be severed, leaving the remaining parts of the agreement enforceable. (*See* cases cited in Appellee’s Brief at 9-11 & n.4.)

Chase contended below that a finding of unconscionability by the court would invalidate the entire agreement because the class arbitration waiver was an integral, essential component of the arbitration agreement, without which Chase would not have agreed to give up the heightened review procedures available in judicial proceedings. (A125-27.) If the District Court had determined the waiver was unconscionable, it therefore would have had to evaluate Chase’s contention and make a determination about the validity of the entire arbitration agreement. In other words, the court would have had to decide a “dispute[] over whether the parties should be arbitrating at all[.]” (Brief of the Appellants at 18.) Such a determination falls squarely within the “questions of arbitrability” for a court to decide. (*See* Appellee’s Br. at 8-13.)

**B. Decisions by Courts That Have Considered the Issue Confirm that Plaintiffs’ Challenge to the Class Arbitration Waiver Is a Threshold Matter for the Court to Decide.**

Courts in other jurisdictions agree that the court must rule on a challenge to the class waiver because a challenge to the enforceability of the class action waiver is, “by extension [a challenge to the] validity of the parties’ agreement to

arbitrate,” which ““raises a question of arbitrability for a court to decide.”” *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merch. Litig.)*, 554 F.3d 300, 311 (2d Cir. 2009) (“*American Express*”) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002));<sup>1</sup> accord *Kristian v. Comcast Corp.*, 446 F.3d 25, 53-54 (1st Cir. 2006) (recognizing the class waiver “has substantial implications for the enforceability of the arbitration agreements”); *Shubert v. Wells Fargo Auto Fin., Inc.*, No. 08-3754 (NLH), 2008 WL 5451021, at \*4 (D.N.J. Dec. 31, 2008); *Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1285-86 (M.D. Ala. 2005); cf. *Terminix Int’l Co. v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1331-32 (11th Cir. 2005) (finding determination of validity of provision in arbitration agreement is “ordinarily a matter for the court to decide” unless it is “clear beyond any doubt that the parties’ dispute would eventually wind up in arbitration” or the parties agreed the arbitrator will answer the question).<sup>2</sup>

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<sup>1</sup> Although a petition for certiorari is pending in *American Express*, the questions presented concern the court’s holding that the class waiver was not enforceable due to plaintiffs’ showing of prohibitive costs of arbitrating an antitrust claim on an individual basis. *Cases Recently Filed*, U.S. Law Week Supreme Court Today (BNA) Vol. 09, No. 114 (June 17, 2009) (LEXIS, BNA Library, BNA U.S. Law Week Supreme Court Today File, Archive Version, search term “08-1473”).

<sup>2</sup> The Seventh Circuit’s rulings on whether the court or the arbitrator decides the validity of the class waiver are conflicting and lack analysis. *Compare Livingston v. Assocs. Fin. Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (enforcing class waiver and ordering parties to arbitrate in accordance with express agreement

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These courts reached the same result regardless of whether the plaintiff contended its challenge to the class waiver invalidated the agreement itself. *Compare American Express*, 554 F.3d at 310 (explaining plaintiffs “expressly aver that they ‘are not averse to proceeding in a class-wide arbitration’”), *with Kristian*, 446 F.3d at 37 (explaining plaintiffs contend the arbitration agreements “should be invalidated”).<sup>3</sup>

The First Circuit and the Second Circuit considered and rejected Plaintiffs’ argument that *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), applies here. (Brief of the Appellants at 13-16.) Both courts found the Supreme Court’s decision in *Bazzle* does not apply where the arbitration agreement “is unambiguous in forbidding arbitration to proceed on a class basis.” *American Express*, 554 F.3d

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terms), *with Hawkins v. Aid Ass’n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003) (finding arbitrator should rule on plaintiff’s challenge to class waiver). District courts in the circuit have consistently ruled on challenges to the enforceability of the class waiver rather than referring them to the arbitrators. *Harris v. DirectTV Group, Inc.*, No. 07 C 3650, 2008 WL 342973, at \*5 (N.D. Ill. Feb. 5, 2008); *Crandall v. AT&T Mobility, LLC*, No. 07-750-GPM, 2008 WL 2796752, at \*4-5 (S.D. Ill. July 18, 2008); *Pivoris v. TCF Fin. Corp.*, No. 07 C 2673, 2007 WL 4355040, at \*6 (N.D. Ill. Dec. 7, 2007).

<sup>3</sup> As discussed further below, if *both* parties agree the enforceability of the class waiver does not invalidate the agreement itself, the enforceability of the class waiver is for the arbitrator to decide. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 56, 63, (1st Cir. 2007) (suggesting dispute over enforceability of class waiver that both parties agreed was severable would be a question for the arbitrator, but declining to reach the question because the parties agreed the court should decide the issue).

at 311 n.10; *accord Kristian v. Comcast Corp.*, 446 F.3d at 53-54 (1st Cir. 2006) (“Unlike the arbitration agreement in *Bazzle*, the [arbitration agreements at issue] unmistakably forbid the use of class procedures in arbitration.... *Bazzle* does not apply here because of the clarity of the prohibition against class arbitration.”).

Here too, the class arbitration waiver is express and clear, and Plaintiffs’ challenge to the waiver implicates the enforceability of the agreement as a whole. As such, enforceability of the class arbitration waiver is a “gateway issue” for the court to decide. *Bazzle*, 539 U.S. at 452; *accord American Express*, 554 F.3d at 311; *Kristian*, 446 F.3d at 54-55; *Gipson*, 354 F. Supp. 2d at 1289.

**II. AS LONG AS THERE IS DOUBT AS TO WHETHER THE CLASS WAIVER IS SEVERABLE, THE CHALLENGE TO THAT CLAUSE MUST BE RESOLVED BY THE COURT NOTWITHSTANDING THE SEVERABILITY CLAUSE IN PLAINTIFFS’ AGREEMENT.**

**A. The Existence of a Severability Clause Mandates Submission of the Class Waiver Dispute to the Arbitrator Only if It Is Clear the Entire Case Will End Up There Regardless Whether the Class Waiver Is Enforced.**

The potential severability of a challenged provision of an arbitration agreement is a basis for submitting the challenge to the arbitrator, rather than the court, only if it is “beyond any doubt that the parties’ dispute would eventually wind up in arbitration” because the challenged clause is severable. *Terminix Int’l Co. v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1032 (11th Cir. 2003) (finding

“severability determination decides the arbitration question” because “[w]ith or without [the challenged] provisions, the case goes to arbitration”).

In *Anders*, for example, plaintiff opposed defendant’s motion to compel arbitration on several grounds, including that the agreement prohibited remedies authorized by the statutes underlying plaintiff’s claims. 346 F.3d at 1030. The agreement included a severability provision. The court found the enforceability of the remedial limitations was a question for the arbitrator because the applicable state law “favors severability,” the Alabama Supreme Court had twice held invalid remedial provisions in arbitration agreements were severable, and courts in four other circuits had also held challenges to remedial limitations were a question for the arbitrator because they did not implicate whether the parties agreed to arbitrate their dispute. *Id.* at 1030-32.

The Eleventh Circuit confirmed this result in *Terminix*, 432 F.3d at 1329, in which plaintiff also challenged the remedial limitations in an arbitration agreement. The court applied the same two-step unconscionability analysis that applies under Delaware law, *id.* at 1331, and explained:

The reason that a challenge such as the one advanced by [plaintiff] is ordinarily a matter for the court to decide is that it ultimately goes to the validity of the parties’ agreement to arbitrate. That is, [plaintiff] argues that the whole arbitration clause is unenforceable because it contains unenforceable remedial restrictions that are not severable from the remainder. The Supreme Court has recently reaffirmed that the question “whether the parties

have a valid arbitration agreement at all” is for the court, not the arbitrator, to decide.

*Id.* (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)). The court then explained that, in *Anders*, the court did not follow this “usual procedure” because it was “clear beyond any doubt that the parties’ dispute would eventually wind up in arbitration.” *Id.* at 1332. The court in *Terminix* held it need not follow the “usual process” because the arbitration agreement provided “clear and unmistakable evidence” authorizing the arbitrator to decide the validity of the arbitration agreement. *Id.*

Here, unlike *Anders*: 1) no Delaware court has ruled the class arbitration waiver is unconscionable, much less severable; 2) there is not one case in which a Delaware court has held Delaware law *favors* enforceability of severability clauses; and 3) the majority of circuits that have considered the issue have not held that the enforceability of the class arbitration waiver is a question for the arbitrator. Rather, as shown below and in Appellee’s Brief, an unenforceable class arbitration waiver is *not* severable, and courts that have considered the issue have ruled the court decides the enforceability of the class arbitration waiver. (A125-27; Appellee’s Br. at 18-19.) Plaintiffs’ challenge therefore is a “gateway issue” for the court to decide because it could affect the enforceability of the arbitration agreement itself.

**B. At a Minimum, It Is Doubtful the Class Waiver Is Severable Here Because Enforcing the Arbitration Agreement Without It Would Undermine Chase’s Intent in Entering into the Arbitration Agreement.**

As indicated above, Chase would not have entered into the arbitration agreement if that would have exposed it to classwide arbitration. Given the scope of a classwide claim, Chase would not have been willing to give up the procedural protections of a court proceeding. (A125-27.) Under Delaware law, which governs here (A52, 68, 82), “[w]hether or not the terms of a contract are severable is purely a question of the intent of the parties. Here the acid test is whether or not the parties would have entered into the . . . agreement at all faced with the knowledge that [the challenged provision] was invalid.” *Tracey v. Franklin*, 67 A.2d 56, 61 (Del. 1949) (internal citation omitted).

The same standard applies under Pennsylvania law: whether a provision is severable “turns on the parties’ *intent* at the time the agreement was executed as determined from the language of the contract and the surrounding circumstances.” *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 288 (3d Cir. 2004) (citation omitted) (emphasis in original). The party urging enforcement without the unconscionable provision “must show that the essence, the essential term, of the bargain was to arbitrate, while the [unconscionable provision was] merely a minor consideration.” *Id.* (citation omitted); *accord Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 214, 219 (3d Cir. 2003) (explaining a provision is severable only if

the unenforceable term is not “an essential part of the agreed exchange” and “can be severed without disturbing the primary intent of the parties to arbitrate their disputes”).

Delaware courts have not yet ruled on the impact of a severability clause on the severability analysis. However, under Pennsylvania law, the presence of a severability clause is not dispositive and does not change the severability analysis. *See, e.g., Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1091-92 (3d Cir. 1988) (rejecting attempt to sever purportedly invalid fee provisions in agreement including severability clause); *cf. Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410, 423 (M.D. Pa. 2003) (explaining that severability clause in statute was “not dispositive” and evaluating whether challenged provision could be severed “without mutilating the Ordinance’s intended purpose”); *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 270-71 (3d Cir. 2003) (applying Virgin Islands law, which the court found was the same as Pennsylvania law, and refusing to sever unconscionable provisions despite inclusion of severability clause).

For example, this Court applied the same severability analysis in *Spinetti* and *Parilla*, even though the *Parilla* agreement included a severability clause and the *Spinetti* agreement did not. In both cases, the Court looked to the intent of the parties in evaluating whether the unenforceable provisions were severable.

*Parilla*, 368 F.3d at 289. The presence of the severability clause was “relevant” to the determination of severability, *id.* at 288; it was not dispositive.

Moreover, there is nothing suspect about Chase taking the position that the arbitration agreement as a whole is unenforceable if a provision that is a “fundamental element” of that agreement is found to be unenforceable. *Kristian*, 446 F.3d at 62. Rather, Chase’s right to challenge Plaintiffs’ proposed “drastic rewriting” of the parties’ express agreement (*id.*) flows directly from the “primary purpose” of the Federal Arbitration Act, 9 U.S.C. §§ 1-14: “ensuring that private agreements to arbitrate are enforced according to their terms.” *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). *See also Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir.) (finding an unconscionable class arbitration waiver was not severable where defendant challenged enforceability of the agreement without the waiver), *cert. denied*, 129 S. Ct. 45 (2008).

**C. Courts Have Refused to Sever Class Arbitration Waivers Despite the Presence of Severability Clauses.**

Decisions from other jurisdictions also hold that, even when there is a severability clause, an unenforceable class arbitration waiver is not severable because of its centrality to the arbitration agreement. *See, e.g., Lowden*, 512 F.3d at 1219 (refusing to sever class waiver despite inclusion of severability clause; “T-Mobile has expressly stated that it does not consent to class action arbitration and

that, as a result, if we deem the class action waiver clause unconscionable under Washington law, the entire arbitration provision should be rendered unenforceable”); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008) (finding class arbitration waiver “is central to the mechanism for resolving the dispute between the parties; therefore, it cannot be severed” even though agreement included severability clause).

The First Circuit’s analysis in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), is instructive. The challenged agreement included both a general severability clause and language in the class arbitration waiver itself indicating the waiver applied “unless your state’s laws provide otherwise.” 446 F.3d at 61. The court explained the class arbitration waiver was not severable under the general severability clause:

The class arbitration [waiver] comprises the second full paragraph of the section in the Policies & Practices describing the terms of the mandatory, binding arbitration regime. It establishes an arbitration regime that handles individual claims only. Typically, courts prefer declaring an arbitration agreement unenforceable rather than using severance as a remedy when ***fundamental elements of the arbitration regime are at issue***. Since the premise of arbitration is the contractual agreement of the parties to the arbitral forum, drastic rewriting is particularly inappropriate.

*Id.* at 62 (internal citation omitted) (emphasis added). Instead, the court found the class arbitration waiver was severable only because the class arbitration waiver

itself contained a savings clause that specifically anticipated the severance of the class arbitration waiver if it were found unenforceable. *Id.* at 62-63.<sup>4</sup>

As these decisions indicate, it is anything but “free from doubt” that an unenforceable class arbitration waiver is severable. To be clear, the court need not consider all evidence of severability and rule on whether the challenged provision actually is severable before deciding whether the question presented is a “gateway issue” for the court. Rather, absent the type of conclusive case law cited by the court in *Anders*, the possible impact of a finding that the challenged provision is invalid on the enforceability of the agreement as a whole requires the court to treat the challenge as a “gateway issue” and resolve it. As was the case in *Kristian*, this initial determination does not prevent the court from ultimately concluding the clause is severable if it is found to be unenforceable.

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<sup>4</sup> This discussion makes clear that a Florida court erred in ruling the class arbitration waiver in Chase’s agreement is severable based on a citation to *Kristian*. *Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1372 (S.D. Fla. 2009). Chase’s cardmember agreements, including the agreement at issue here, do not include a savings clause in the class arbitration waiver. They include only a general severability provision that the First Circuit found would not authorize severance of the class arbitration waiver. *Kristian*, 446 F.3d at 62. The other support for the district court’s ruling in *Caban* is the assertion that Delaware law favors severability clauses; this was based solely on a citation to the Delaware UCC provision authorizing courts *either* to refuse to enforce the contract or to enforce the remainder of the contract. *Caban*, 606 F. Supp. 2d at 1372 (citing Del. Code tit. 6, § 2-302).

The procedural history of this case illustrates why it would not be efficient to put the cart before the horse by requiring the District Court to make a severability determination in order to decide whether the challenge presents a “gateway issue.” The District Court did not have to reach the severability question here because it found the class arbitration waiver is enforceable. To avoid a rule that would require a court to make factual findings on an issue it might not have to reach, the better approach, adopted by the Eleventh Circuit, is to treat a challenge to a clause in the arbitration agreement as a “gateway issue” for the court to decide absent settled law holding the provision is severable. No such law exists here, so the District Court properly ruled the enforceability of the class arbitration waiver was a question for the court.

**D. The Parties Did Not Agree to Allow an Arbitrator to Decide the Validity of the Class Arbitration Waiver.**

As discussed fully in Chase’s Appellee’s Brief (at 20-24), there is no “clear and unmistakable evidence” that the parties intended the arbitrator to decide the enforceability of the class arbitration waiver or the arbitration agreement itself.

*Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 221 (3d Cir. 2007) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

This Court has already rejected Plaintiffs’ argument that the language in their agreement broadly defining the scope of underlying disputes subject to arbitration constitutes evidence the parties intended an arbitrator to decide the

validity of the agreement itself. (Appellee’s Brief at 21 (citing *Ehleiter*, 482 F.3d at 221-22).) The Second Circuit authority Plaintiffs cite, *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005), is similarly unhelpful as the AAA rules specifically “require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement.” (A108.) Unlike in *Contec* and *Terminix*, then, the incorporation of the rules and procedures of the arbitration administrator in Plaintiffs’ Agreement (A78) does not provide “clear and unmistakable evidence” that the parties intended the arbitrator to decide the validity of the class arbitration waiver, and in fact provides evidence of just the opposite.<sup>5</sup>

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<sup>5</sup> Chase notes, too, that if the Court were to find otherwise, plaintiffs in future suits who sought to challenge the enforceability of the class waiver would have to do so in arbitration, even if those plaintiffs contended the class waiver rendered the entire arbitration agreement invalid.

**CONCLUSION**

For the above reasons, Chase respectfully requests that the Court affirm the judgment of the District Court.

Dated: December 24, 2009

Respectfully submitted,

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**COMBINED CERTIFICATIONS**

**BAR MEMBERSHIP**

Pursuant to Third Circuit L.A.R. 28.3(d), I, Robert S. Stern, hereby certify that I am a member of the Bar of this Court, having been admitted on October 1, 2008.

**WORD COUNT AND TYPEFACE**

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I hereby certify as follows:

1. This brief complies with the type-volume limitation set by the Court's December 3, 2009 Order because it contains 3,737 words.

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

**IDENTICAL COMPLIANCE OF BRIEFS AND VIRUS CHECK**

Pursuant to Third Circuit L.A.R. 31.1(c), I hereby certify that the foregoing E-Brief and the hard copies of the brief have identical text. I also certify that a virus detection program — Symantec EndPoint Protection version 11.0.5002.333 — was run on the file and that no virus was detected.

Dated: December 24, 2009 MORRISON & FOERSTER LLP

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 24, 2009, I electronically filed the foregoing SUPPLEMENTAL BRIEF OF APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that 25 hard copies of the foregoing SUPPLEMENTAL BRIEF OF APPELLEE were sent by UPS Overnight Delivery to the Office of the Clerk, United States Court of Appeals for the Third Circuit, on December 24, 2009, the same day the electronic copy was filed.

Dated: December 24, 2009

/s/ Robert S. Stern

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