No. 13-40692

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BILL HENDRICKS and AUBREY B. STACY,
Plaintiffs-Appellees,

v.

UBS FINANCIAL SERVICES INC.,
Defendant-Appellant.

Consolidated with No. 13-40693

MARK T. EDDINGSTON, JEFFERY M. DAVIS,
ELRIDGE NICHOLAS BOLLICH, and RAY A. COX,
Plaintiffs-Appellees,

v.

UBS FINANCIAL SERVICES INC.,
Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District Of Texas
Civ. No. 2:12-CV-00606

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Hendricks v. UBS Financial Services Inc., No. 13-40692

(Consolidated with *Eddingston v. UBS Financial Services Inc.*, No. 13-40693)

The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees:

Hendricks v. UBS Financial Services Inc. is brought by two plaintiffs: Bill Hendricks and Aubrey B. Stacy. Plaintiffs seek to represent a putative class comprised of all individuals employed by UBS Financial Services, Inc. as branch managers in the United States who left its employment before January 1, 2011 and who forfeited some portion of their PartnerPlus account due to the vesting provisions of the Plan.

Eddingston v. UBS Financial Services Inc. is brought by four plaintiffs: Mark T. Eddingston, Jeffrey M. Davis, Elridge Nicholas Bollich, and Ray A. Cox. Plaintiffs seek to represent a putative class comprised of all individuals employed by UBS Financial Services, Inc. as registered representatives in the United States who left its employment before January 1, 2011 and who forfeited some portion of their PartnerPlus account due to the vesting provisions of the Plan.

Plaintiffs in both cases are represented by the same counsel.

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Defendant-Appellant:

UBS Financial Services Inc. is a wholly owned subsidiary of UBS Americas Inc., which is a wholly owned subsidiary of UBS AG. Shares of UBS Financial Services Inc. are not publicly traded. UBS AG is a publicly owned Swiss banking corporation and does not have a parent company. There are no publicly held corporations that own ten percent or more of UBS AG stock.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.3, Plaintiffs-Appellees respectfully submit that oral argument will assist the Court in resolving the issues presented in these consolidated appeals.

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INTRODUCTION

Did the parties agree to arbitrate this dispute? As the district court properly held on two separate occasions, the answer is no. In fact, they agreed not to.

This dispute is over one thing: an employee benefit plan called PartnerPlus. According to Plaintiffs, PartnerPlus is a retirement plan regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"). According to UBS, PartnerPlus is an ERISA-exempt "bonus arrangement" that should be treated like a plain old contract. The stakes are enormous. When Plaintiffs retired from UBS, the company seized $200+ million of their benefits. If PartnerPlus is an ERISA-covered retirement plan, such forfeitures are illegal.

PartnerPlus has always been governed by a formal plan document written by UBS. For the fifteen years relevant to this case (1995-2010), that document contained a materially unchanged arbitration provision (the "PartnerPlus Arbitration Provision"). The PartnerPlus Arbitration Provision unquestionably authorizes class action litigation. ROA 13-40693 971 (the district court holding that "the arbitration clause in the PartnerPlus Plan clearly does not extend to arbitration of class claims.").

UBS has never seriously denied that the PartnerPlus Arbitration Provision, standing alone, authorizes this litigation. That is not surprising because the plain meaning of that provision is undeniable. Indeed, when the Seventh Circuit held

that a materially identical provision exempted all class actions, it felt moved to remark that the matter did not present a "difficult interpretive question[]." *Nielsen v. Piper, Jaffray & Hopwood, Inc*., 66 F.3d 145, 148 (7th Cir. 1995) ("*Nielsen*").

Afflicted with an incurable case of drafter's remorse, UBS nonetheless seeks to compel arbitration. In a nutshell, UBS argues that the PartnerPlus Arbitration Provision (which consistently authorized class action litigation from 1995 until 2011) was revoked by a different arbitration provision (written in 2007) that is found in a pair of summary brochures.

UBS's position is untenable. As the district court properly held, the arbitration provision in the summary brochures has no application to this PartnerPlus litigation whatsoever. ROA 13-40693 2109 (concluding that "the text of the documents clearly requires that the arbitration clause from the PartnerPlus plan document controls."). That holding is hardly controversial. The summary brochures themselves provide that "[i]f there is any difference between this summary and the Plan Document, the Plan Document will govern."). ROA 13-40693 2738. In other words, they revoke nothing. And they *say* that they revoke nothing.

Supreme Court opinions come with a syllabus. The syllabus is for convenience; it is a useful précis for busy lawyers. It does not alter the holding of the case. Attorneys attaching legal force to a syllabus would lose every single time. So it should be here. A summary is useful for busy employees. But it cannot change

PartnerPlus, whether it is an ERISA plan (which Plaintiffs rightly say it is) or a plain old contract (which Defendants wrongly say it is). Either way, UBS is not entitled to arbitration. Affirmance is warranted.

STATEMENT OF FACTS

In order to articulate their legal position clearly and in its proper context, Plaintiffs must first provide a detailed statement of facts. This is essential because UBS has offered in its brief a fundamentally misleading treatment of the salient facts and procedural history of this case.

A. The Underlying Dispute: Is PartnerPlus an ERISA Retirement Plan?

This is a putative class action brought by participants in PartnerPlus, an employee benefit plan operated by UBS or its predecessor company since 1995. Plaintiffs allege that, for many years, UBS operated PartnerPlus as a *de facto* retirement plan in order to seize more than $200 million of their money in clear violation of the Employee Retirement Income Security Act of 1974 ("ERISA"). In order to answer the question presented by this appeal, it is first necessary to have a basic understanding of PartnerPlus as well as the relevant ERISA rules pertaining to the definition and operation of retirement plans.

1. Structure and Operation of PartnerPlus

PartnerPlus is a large employee benefit plan that was established in 1995 by a predecessor company of UBS called PaineWebber Inc. ("PaineWebber"). ROA

13-40693 2664 (excerpt from the Plan Document that established PartnerPlus). As required by ERISA, the rights and obligations of all participants in PartnerPlus are set forth in a formal written document (the "PartnerPlus Plan"). *See* 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument."). The PartnerPlus Plan was created in 1995. ROA 13-40693 2664 (excerpt from the 1995 PartnerPlus Plan).

Over the years, the PartnerPlus Plan was formally updated on several occasions. It was first amended and restated in 1998. ROA 13-40693 2666 (excerpt from the 1998 PartnerPlus Plan). In 2004, it was amended and restated again, and bifurcated into two separate plans, one for financial advisors and another for branch managers. ROA 13-40693 2879-99 (the complete 21 page 2004 PartnerPlus Plan for Financial Advisors); ROA 13-40692 144 (excerpt from the 2004 PartnerPlus Plan for Branch Managers).[1] The PartnerPlus Plan was again amended and restated in 2006, 2008, 2009, and 2011. ROA 13-40693 2426-59 (the complete 34 page 2006 PartnerPlus Plan), 2672 (excerpt from the 2008

[1] In later years, the PartnerPlus Plan for Branch Managers was itself separated into multiple plans. For purposes of this appeal, there are no material differences between the PartnerPlus Plan for Financial Advisors and any of the PartnerPlus Plans for Branch Managers. Accordingly, the remainder of this brief will only refer to and cite versions of the PartnerPlus Plan for Financial Advisors. And, for simplicity, it will refer to all such plans as the PartnerPlus Plan.

PartnerPlus Plan), 2674-716 (the complete 43 page 2009 PartnerPlus Plan), 2718 (excerpt from the 2011 PartnerPlus Plan).

In all years relevant to this litigation, PartnerPlus worked roughly as follows. Participants held an "account" in the plan that would be credited with employer contributions (called "Firm Contributions") and/or employee contributions (called "Voluntary Contributions"). ROA 13-40693 2679-81 (the 2009 PartnerPlus Plan's description of contribution rules). For four years, a participant's account balance was appreciated at an interest rate equal to four times the applicable market rate (called the "Turbo Interest" benefit). ROA 13-40693 2681-82 ("Turbo Interest applicable to Contributions . . . shall be . . . four times the Applicable [market] Rate . . . ."). After four years, that account balance was then appreciated at the applicable market rate (called the "Market Interest" benefit). ROA 13-40693 2682 ("Market Interest shall be credited . . . on Turbo Interest . . . the day after Turbo Interest ceases to be credited . . . ."). Thus, at any time, a participant's account balance consisted of (1) Firm Contributions, (2) Voluntary Contributions, (3) accumulated Turbo Interest, and (4) accumulated Market Interest.

The PartnerPlus Plan is clear (as ERISA requires) that all Voluntary Contributions were immediately vested and non-forfeitable. ROA 13-40693 2682 ("A Voluntary Contribution shall at all times be fully Vested."). *See also* 29 U.S.C. § 1053(a)(1). The dispute in this case applies to treatment of (1) Firm

Contributions and (2) the accumulated Turbo and Market Interest earned on *both* Firm and Voluntary Contributions. Those monies – according to UBS and the PartnerPlus Plan – will be seized from plan participants unless (1) they remain employed at UBS for longer than ERISA requires for vesting purposes, and (2) they sign non-competition agreements, which ERISA bars as a condition for receiving pension monies. ROA 13-40693 2682-83 (the 2009 PartnerPlus Plan's description of the Plan's vesting (Section 6.1(b)(i)-(ii)) and non-competition (Section 6.2(b)) requirements).

2. ERISA Status of PartnerPlus

When PartnerPlus was established in 1995, and again in 2011, UBS expressly recognized that it was governed by ERISA. ROA 13-40693 86 (Plaintiffs' amended complaint discussing the 1995 PartnerPlus Plan's recognition of its ERISA status), 2647 (deposition testimony of UBS executive, Matthew Levitan, admitting that the 1995 and 2011 PartnerPlus Plans are covered by ERISA), 2718 (the 2011 PartnerPlus Plan providing that "the Plan is intended to constitute an unfunded deferred compensation plan . . . within the meaning of ERISA.").

From 1998 through 2010, however, UBS took the position that the PartnerPlus Plan ceased to be subject to ERISA. ROA 13-40693 382 (the 1998 PartnerPlus Plan providing that the Plan shall be governed exclusively by New York law), 2668 (the 2004 PartnerPlus Plan providing that "[t]o the extent that any term or

provision of the Plan could be read in a manner that would subject the Plan to ERISA, that term or provision shall be read and applied in a manner that causes the Plan not to be subject to ERISA"), 2670 (the 2006 PartnerPlus Plan providing same), 2672 (the 2008 PartnerPlus Plan providing same), 2674 (the 2009 PartnerPlus Plan providing same).

To this day, UBS maintains that – from 1998 through 2010 – the PartnerPlus Plan was not covered by ERISA. Appellant's Opening Brief at 44-49. *See also* ROA 13-40693 2647 (deposition testimony of executive, Matthew Levitan, confirming UBS's position that "from 1998 until December 31, 2010 . . . all versions of the PartnerPlus Plan were not covered by ERISA"). The primary basis for UBS's position is the fact that, in its words, "[t]he relevant versions of PartnerPlus state expressly that it is *not* an ERISA plan . . . ." Appellant's Opening Brief at 45 (emphasis in original).

Congress no doubt foresaw that some sponsors – either as a result of confusion or in an attempt to evade the statute's carefully-crafted protections – would disclaim ERISA coverage. As a result, the statute provides two *alternative* bases for identifying a retirement plan. To be sure: a plan's express terms can render it an ERISA-covered "pension plan." 29 U.S.C. § 1002(2)(A)(1). But something is *also* a "pension plan . . . to the extent that *as a result of surrounding circumstances* such plan . . . (i) provides retirement income to employees or (ii) results in a

deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A)(2) (emphasis added).

The surrounding circumstances test is a fact-intensive inquiry that turns on the operation of the plan as a whole. *See* ERISA Op. 98-02A, 1998 WL 103654 (giving examples of actions that may establish a pension plan by surrounding circumstances and observing that the test is "inherently factual in nature"). It is the application of that test which will determine the outcome of this case on the merits. (Of course, this appeal is another story. As explained in this brief, UBS is not entitled to arbitration *regardless* of whether PartnerPlus is an ERISA plan or not.)

Plaintiffs have alleged (and the evidence uncovered to date has confirmed) that PartnerPlus has functioned as an ERISA retirement plan since its inception. This can be quickly illustrated with three simple examples:

1. The official operating manual (prepared and used by UBS to administer PartnerPlus) clearly indicates that the plan was designed for retirement savings. Indeed, the PartnerPlus operating manual defines what it calls the plan's "standard retirement rules" under which any participant who leaves UBS is deemed "retired" if the participant meets one of three criteria:

	Age of Participant Upon Leaving UBS	Minimum Length of Participation	Minimum Length of Employment
65+ Retiree	65 or older	5 years	Not applicable
55-64 Retiree	55 to 64 years old	10 years	Not applicable
45-54 Retiree	45 to 54 years old	10 years	15 years

ROA 13-40693 2640 (deposition testimony of UBS executive, Matthew Levitan, explaining the retirement criteria for participants described in the official PartnerPlus internal procedures manual), 2642 (Levitan deposition testimony further discussing the PartnerPlus Plan's "standard retirement rules").

2. The overwhelming majority of PartnerPlus has always been comprised of the account balances of *retirees*. Indeed, UBS's own expert concedes that 67% of all withdrawals from PartnerPlus were made by participants who had reached the age of 55. ROA 13-40693 2750 (UBS expert report). And that is merely *withdrawals. Id.* The relevant percentage would move much closer to 100% if UBS's expert had included in her calculations *the $200+ million seized from retirees.* ROA 13-40693 1268 (email from counsel for UBS conceding that at least $200 million was forfeited by class members in these two consolidated cases).

3. For years, participants were encouraged by UBS to use PartnerPlus as a retirement plan. ROA 13-40693 2651-54, 2658-60 (deposition testimony of former UBS branch managers). Indeed, UBS made clear to participants – in

writing – that it was attractive to continue deferring PartnerPlus benefits until retirement. ROA 13-40693 2752 (the PaineWebber PartnerPlus Power of Voluntary Contributions chart, showing the "Accumulation of Voluntary Contribution Amount Deferred Each Year to Age 65").[2]

3. ERISA Violations of PartnerPlus

While there is much disagreement between the parties about whether PartnerPlus is an ERISA retirement plan, there is no dispute about whether the Plan's terms comply with ERISA. They do not. ERISA requires that employer contributions to a retirement plan vest and become nonforfeitable according to terms no less favorable than those provided by the statute. UBS, however, took the vesting schedule provided by ERISA *and doubled it*.[3] PartnerPlus unquestionably violates ERISA's basic rules pertaining to vesting and forfeiture.

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[2] Each participant's interest in PartnerPlus vested after 10 years and was then scheduled to be distributed. ROA 13-40693 2707 (the 2009 PartnerPlus Plan defining in-service distribution). At the same time, however, participants whose account balances were not trivial were permitted to "roll over" their account balance into another plan called the Executive Capital Accumulation Plan. ROA 13-40693 2641 (deposition testimony of UBS executive, Matthew Levitan, conceding that PartnerPlus participants were allowed to roll over all or part of their PartnerPlus distributions into the Executive Capital Accumulation Plan).

[3] *Compare* 29 U.S.C. § 1053(a)(2)(B)(ii) (providing that the right to 100 percent of employer contributions must be nonforfeitable after 3 years of service) *with* ROA 13-40693 2682-83 (the 2009 PartnerPlus Plan providing that the right to 100 percent of employer contributions is nonforfeitable only after 10 years of service); *compare also* 29 U.S.C. § 1053(a)(2)(B)(iii) (providing that employer contributions must vest according to the following table: 2 years/20 percent; 3

The result: a vast number of PartnerPlus participants were deemed by UBS to have forfeited their Firm Contributions when they left its employment, resulting in aggregate losses of at least $200 million. ROA 13-40693 1268 (email from counsel for UBS). As a remedy for UBS's unlawful withholding of those benefits, Plaintiffs seek injunctive and other equitable relief pursuant to 29 U.S.C. § 1132(a)(3). ROA 13-40693 95 (Plaintiffs' amended complaint). The injunctive relief Plaintiffs are seeking is straightforward: they have requested an order enjoining UBS from enforcing the illegal provisions of PartnerPlus. ROA 13-40693 95 (Plaintiffs' amended complaint seeking "an injunction against any act or practice which violates ERISA"). The other equitable relief is similarly straightforward: Plaintiffs seek to "reform" PartnerPlus to strike the illegal provisions on which UBS is relying to deny Plaintiffs their benefits. ROA 13-40693 95 (Plaintiffs' amended complaint seeking "any other appropriate equitable relief to redress [violations of ERISA] or to enforce any provisions of ERISA"). *See also CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1869 (2011) ("*Amara*") (holding that reformation is appropriate equitable relief authorized by 29 U.S.C. § 1132(a)(3)).

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years/40 percent; 4 years/60 percent; 5 years/80 percent; 6 years or more/100 percent) *with* ROA 13-40693 2682-83 (the 2009 PartnerPlus Plan providing for vesting according to the following table: 6 years/20 percent; 7 years/40 percent; 8 years/60 percent; 9 years/80 percent; 10 years/100 percent).

B. The PartnerPlus Arbitration Provision

This appeal presents one question: did the parties agree to arbitrate this dispute? The answer ("no") must begin with a careful examination of the PartnerPlus Plan, which – as explained below – contained a materially unchanged arbitration clause from 1995 (its creation) until 2011 (the end of the class period). Although the PartnerPlus Plan was amended and restated five times before 2011, never was the PartnerPlus Arbitration Provision altered in *any* material respect. Indeed, it specifically and unambiguously authorized class action litigation until 2011.

1. Class Action Preservation: 1995 Through 2010

For 16 years, the PartnerPlus Plan contained a materially unchanged arbitration provision: the PartnerPlus Arbitration Provision. ROA 13-40693 322-23 (Plaintiffs' opposition to UBS's motion to compel; quoting and discussing the PartnerPlus Arbitration Provision as restated and amended over the years). The relevant language provided as follows:

> [I]n the event of any dispute, claim or controversy involving a Participant or any other claimant and the Plan, or Paine Webber or any Sponsor, arising out of the Plan, any such controversy shall be resolved before a NASD arbitration panel in accordance with the arbitration rules of the NASD.

ROA 13-40693 184-85 (the PartnerPlus Arbitration Provision in 1998).

When the PartnerPlus Plan was amended and restated in 2004, the PartnerPlus Arbitration Provision was effectively untouched:

> [I]n the event of any dispute, claim or controversy involving a Participant or any other claimant and the Plan, or UBS Financial Services or any Sponsor, arising out of the Plan, any such controversy shall be resolved before an NASD arbitration panel in accordance with the arbitration rules of the NASD.

ROA 13-40693 188 (the PartnerPlus Arbitration Provision in 2004).[4]

When the PartnerPlus Plan was amended and restated in 2006, the essential language of the PartnerPlus Arbitration Provision remained the same:

> [I]n the event of any dispute, claim or controversy involving a Participant or any other claimant and the Plan and a Sponsor, arising out of the Plan, any such controversy shall be resolved before an NASD arbitration panel in accordance with the arbitration rules of the NASD.

ROA 13-40693 192 (the PartnerPlus Arbitration Provision in 2006).[5]

When the PartnerPlus Plan was amended and restated in 2008, the PartnerPlus Arbitration Provision was not altered in any relevant way:

> [I]n the event of any dispute, claim or controversy involving a Claimant and the Plan and a Sponsor, arising out of the Plan, any such controversy shall be resolved before a FINRA arbitration panel in accordance with the arbitration rules of FINRA.

ROA 13-40693 197 (the PartnerPlus Arbitration Provision in 2008).[6]

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[4] There was one ministerial change to the provision: the name UBS Financial Services was substituted for that of its predecessor, PaineWebber.

[5] There was one ministerial change to the provision: the specific reference to UBS Financial Services was excised from the provision.

[6] There was one ministerial change to the provision: the phrase "Participant or any other claimant" was changed to "Claimaint."

In 2007, the NASD and the New York Stock Exchange consolidated to form the Financial Industry Regulatory Authority ("FINRA"). *See Empire Fin. Group, Inc. v. Peson Fin. Services, Inc.*, No. 3:09-CV-2155D, 2010 WL 742579, at *1 n.1 (N.D. Tex. Mar. 3, 2010). As a result, UBS substituted FINRA for NASD as the designated arbitral forum. The parties agree that the FINRA rules relevant to this action are identical to those of its predecessor NASD.

And when the PartnerPlus Plan was amended and restated in 2009, there was literally no change to the PartnerPlus Arbitration Provision:

> [I]n the event of any dispute, claim or controversy involving a Claimant and the Plan and a Sponsor, arising out of the Plan, any such controversy shall be resolved before a FINRA arbitration panel in accordance with the arbitration rules of FINRA.

ROA 13-40693 202 (the PartnerPlus Arbitration Provision in 2009).

As UBS has never denied, the PartnerPlus Arbitration Provision was designed to permit class action litigation about PartnerPlus to proceed in federal court. The reason is simple: in writing the PartnerPlus Arbitration Provision, UBS specifically chose to incorporate the rules of NASD and FINRA. And it is widely acknowledged that those rules specifically preserve the right of a claimant to participate in a class action in court. *See, e.g.*, FINRA Code of Arbitration Procedure for Industry Disputes Rule 13204(a)(2), *available at* http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbiono/docum

ents/arbmed/p117547.pdf ("FINRA Code") (declaring FINRA arbiters to be without jurisdiction over claims that are the subject of a putative class action); NASD Code of Arbitration Procedure Rule 10301(d)(2), available at http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/arbmed/p018653.pdf ("NASD Code") (same); FINRA Code Rule 13204(a)(4) (barring a party from enforcing an arbitration agreement against any member of a putative class action); NASD Code Rule 10301(d)(3) (same).

2. Class Action Waiver: 2011

In 2011, UBS decided that it no longer wanted to carve putative class action lawsuits out of the PartnerPlus Arbitration Provision. As such, it amended and restated the PartnerPlus Plan on January 1, 2011. ROA 13-40693 2718 (excerpt from the 2011 PartnerPlus Plan). The pertinent clause from the 2011 PartnerPlus Plan reads as follows:

> By participating in the Plan, to the fullest extent permitted by law, whether in court or in arbitration, Claimants waive any right to commence, be a party to in any way, or be an actual or putative class member of any class, collective, or representative action arising out of or relating to any Dispute, and Claimants agree that any Dispute may only be initiated or maintained and decided on an individual basis.

ROA 13-40693 2719 (the PartnerPlus class action waiver added in 2011).

The 2011 version of the PartnerPlus Plan is the first – *and only* – PartnerPlus document that contains a purported "class action waiver." And to make the effect

of this extraordinarily important change perfectly clear, a second clause from the 2011 version of the PartnerPlus Plan provides as follows:

> Any Dispute that is subject to arbitration pursuant to the Plan, but which is *ineligible* for arbitration before FINRA, including but not limited to *any Dispute that is the subject of a certified or putative class action*, will be conducted before JAMS . . . ."

ROA 13-40693 2719 (the PartnerPlus alternative forum clause added in 2011) (emphasis added). This second clause explicitly acknowledges that class actions are "ineligible" for arbitration under FINRA rules. And, as UBS well knows, PartnerPlus provided that FINRA arbitration rules governed Plaintiffs' rights to participate in class action litigation from 1995 through the end of 2010.

The problem for UBS is that the 2011 version of the PartnerPlus Plan does not apply to Plaintiffs, or any member of the class they seek to represent, all of whom left UBS prior to January 1, 2011. ROA 13-40693 96 (Plaintiffs' amended complaint seeking to represent a class of individuals who left UBS's employment prior to January 1, 2011). Plaintiffs, instead, are governed by the previous PartnerPlus Plans that do authorize class action litigation. As such, UBS seeks arbitration salvation elsewhere.

C. The Compensation Plans: Two Self-Described Summary Brochures

UBS cannot avoid class action litigation under the PartnerPlus Arbitration Provision and knows it. So UBS pins its arbitral hopes on two self-described

summary brochures called the Financial Advisor and Branch Manager Compensation Plans. UBS brazenly mislabels these two brochures as "[t]he primary agreements" at issue in this appeal. Appellant's Opening Brief at 6. They are not. In order to evaluate meaningfully the position taken by UBS, it is necessary to provide some information about the basic purpose and function of the summary brochures and the context in which an arbitration clause (with a class action waiver) was eventually added to the summary brochures in 2007.

1. Summary Brochures: Basic Purpose and Function

In or before 2000, UBS began to circulate annually to its financial advisors and branch managers two summary brochures: the Financial Advisor and Branch Manager Compensation Plans (the "Summary Brochures").[7] *See* ROA 13-40693 2643-65 (deposition testimony of UBS executive, Matthew Levitan, during which every version of the Financial Advisor Compensation Plan from 2000 through 2010 was authenticated). *See also* ROA 13-40693 2573-602 (the complete 2007 Summary Brochure), 2461-90 (the complete 2008 Summary Brochure), 222-26 (excerpts from the 2009 Summary Brochure), 2722-47 (the complete 2010 Summary Brochure).

[7] UBS prepared and distributed different versions of the Branch Manager Compensation Plan to each category of Branch Manager. For purposes of this appeal, there are no material differences between the Financial Advisor Compensation Plan and any of the Branch Manager Compensation Plans. Accordingly, this brief will refer to all such plans as the Summary Brochures.

The terms "summary" and "brochure" were not coined by Plaintiffs. They are the *precise* words inserted by UBS into the Compensation Plans. *See, e.g.*, ROA 13-40693 2593 ("In the event of a conflict between the summary of the plans set forth in this brochure and the Plan Documents, the Plan Documents will control.") (2007 Summary Brochure) (emphasis added). UBS's choice of words is hardly surprising. As the conclusion of every version of the Summary Brochures makes clear, their purpose *is to summarize*. *See, e.g.*, ROA 13-40693 2744 ("The Financial Advisor Compensation Plan, effective 1/1/10, summarizes many, but not all, of the elements of your compensation.") (the 2010 Summary Brochure).

Several parts of the Summary Brochures unquestionably function as a *pure summary* of a contractual relationship that is governed exclusively by a separate formal document. *See, e.g.*, ROA 13-40693 2740 (summarizing the "Financial Advisor Survivor Benefit" which is governed by the "Financial Advisor Survivor Benefit Plan document."), 2741 (summarizing the "Pacesetter Expense Allowance Program" and the "Business Builder Program" which are governed by "the Pacesetter and Business Builder Plan Documents"). One such part is the summary of PartnerPlus, which makes clear that nothing in the Summary Brochure is intended to modify or revoke any substantive provision in the PartnerPlus Plan. ROA 13-40693 2596 (the 2007 Summary Brochure referring to the PartnerPlus Plans and providing that "If there is any difference between this summary and the

Plan Document, the Plan Document will govern." (emphasis added)), 2484 (the 2008 Summary Brochure referring to the PartnerPlus Plans and providing same), 2738 (the 2010 Summary Brochure referring to the PartnerPlus Plans and providing same). *See also* ROA 13-40693 2593 (the 2007 Summary Brochure referring to the PartnerPlus Plans and providing that "In the event of a conflict between the summary of the Plans set forth in this document and the Plan Document, the Plan Documents will control."), 2481 (the 2008 Summary Brochure referring to the PartnerPlus Plans and providing same), 2737 (the 2010 Summary Brochure referring to the PartnerPlus Plans and providing same).

2. Summary Brochures: the 2007 Addition of an Arbitration Clause

Until 2007, the Summary Brochures did not contain an arbitration provision of any kind. That necessarily meant two things: (i) any dispute arising out of the Summary Brochures would be resolved through litigation, and more importantly for purposes of this appeal, (ii) any class action arising out of the PartnerPlus Plan would be resolved through litigation. That is true because, standing alone, the PartnerPlus Arbitration Provision (from 1995 until 2011) unquestionably permitted class litigation. *See supra* pp. 12-15. UBS has already conceded as much.

In 2007, an arbitration provision with a class action waiver was added to the Summary Brochures (the "Summary Brochure Arbitration Provision"). ROA 13-40693 2600 (the 2007 Summary Brochure Arbitration Provision). To say that the

Summary Brochure Arbitration Provision in different from the PartnerPlus Arbitration Provision is the epitome of understatement. To be clear: any application of the Summary Brochure Arbitration Provision to PartnerPlus litigation would necessarily treat the Summary Brochures as revoking the core promise made by the PartnerPlus Arbitration Provision – i.e., that class action litigation was not subject to arbitration.

As the district court held, such a conclusion cannot possibly be reconciled with the plain meaning of the Summary Brochures themselves, which expressly defer to any terms in the PartnerPlus Plan that are different. And any lingering doubts are easily resolved by UBS's own behavior. Not only did UBS fail to provide any notification to its employees that the PartnerPlus Arbitration Provision's class action promise had been revoked, it did precisely the opposite. As explained above, UBS chose to expressly reaffirm the class action preserving language of the PartnerPlus Arbitration Provision in 2008 and 2009. *See supra* pp. 13-14 (discussing the PartnerPlus Arbitration Provision as restated in 2008 and 2009).

D. Relevant Procedural History

On November 15, 2011, UBS moved to compel arbitration of Plaintiffs' claims. ROA 13-40693 148. After extensive briefing and a three hour oral argument, the magistrate judge first concluded: "[T]he arbitration clause in the PartnerPlus Plan clearly does not extend to arbitration of class claims." ROA 13-40693 971. Next,

the magistrate judge held that "the Financial Advisor Compensation Plan will not be allowed to modify the arbitration clause in the PartnerPlus Plan under ERISA. [T]o give it the effect that the Defendant, UBS, is arguing for in this case would be to modify that plan." ROA 13-40693 972. *See also Amara,* 131 S.Ct. at 1878 ("[S]ummary documents, important as they are, provide communication with beneficiaries about the plan, but [they] do not themselves constitute the *terms* of the plan . . . ."). UBS then moved for reconsideration, but the magistrate judge's conclusion withstood the scrutiny of the district court. ROA 13-40693 1984.

Plaintiffs then applied for certification of the class. Unable to move past the arbitration issue, however, UBS attempted to transform Plaintiffs' application for class certification into yet another dispute over whether it could rely on the Summary Brochures to stop Plaintiffs from continuing in court. ROA 13-40693 2382-84. Because Plaintiffs carried the burden of proof at the class certification stage, UBS argued that "[i]f PartnerPlus is not an ERISA plan, the class waiver in the Compensation Plan cannot be an illegal amendment, and must be enforced." ROA 13-40693 2383. The magistrate judge explained the error in UBS's position:

> The Financial Advisor Compensation Plan brochure contains a mere summary of the Partner Plus Plan, which makes clear that "[i]f there is any difference between this summary and the Plan Document, the Plan Document will govern." The PartnerPlus plan document has it own arbitration provision that covers "any dispute, claim, or controversy involving the Claimant and the Plan and a Sponsor, arising out of the Plan," but differs in a number of important ways from the arbitration provision

> contained in the Financial Advisor Compensation Plan – most notably, the arbitration provision in the PartnerPlus plan document contains no waiver of class actions. Given the differences between the arbitration provision in the Financial Advisor Compensation Plan summary and the PartnerPlus plan document, the text of the documents clearly requires that the arbitration clause from the PartnerPlus plan document controls. In the alternative, even if the terms of the document were found to be ambiguous, it is axiomatic in contract law that such an ambiguity is to be construed against the drafter (UBS). Furthermore, as the Court has already ruled, the Partner Plus Plan incorporates the FINRA rules in its arbitration clause, which have repeatedly been found to expressly accommodate class action claims. Thus, the Court finds that the Plaintiffs have not waived their right to a class action.

ROA 13-40693 2109 (citations omitted). Amazingly, UBS omitted any discussion of (or reference to) this ruling from its brief. And *shockingly*, UBS falsely claims that the "magistrate judge . . . reject[ed] plaintiff's 'summary brochure' argument out of hand . . . ." Appellant's Opening Brief at 35 (quoting a statement made by the magistrate judge at an earlier hearing where this issue was neither briefed nor decided). This claim by UBS, while particularly egregious, is sadly characteristic of the type of gross misrepresentation that pervades its entire opening brief.

As the true record and procedural history of this litigation make clear: regardless of whether PartnerPlus is governed by ERISA, the answer to whether UBS's Summary Brochure can be applied over the terms of PartnerPlus is an unequivocal *no*. Undeterred, UBS has appealed to this Court to assert precisely the same (meritless) arguments that were rejected below.

SUMMARY OF ARGUMENT

UBS claims that Plaintiffs are party to an agreement that mandates non-class arbitration of this lawsuit about PartnerPlus. But the PartnerPlus Plan says *exactly the opposite*: all class claims are explicitly exempted from arbitration. Specifically, the PartnerPlus Arbitration Provision requires arbitration in accordance with rules of FINRA. And those rules explicitly exempt from mandatory arbitration all claims that are the subject of a putative class action. Indeed, when the Seventh Circuit held that a materially identical arbitration provision exempted all putative class actions, it felt moved to remark that the matter did not present a "difficult interpretive question[]." *Nielsen*, 66 F.3d at 148.

The arbitration language in the PartnerPlus Plan could not be clearer. UBS knows this. Accordingly, in a quixotic effort to circumvent its own plan, UBS attempts to manipulate language that appears elsewhere – i.e., in a pair of brochures that summarize the PartnerPlus Plan. There is no dispute whatsoever that the documents on which UBS relies are summaries. They say, explicitly, that they are summary brochures. They also say, explicitly, that if there is *any difference* from the PartnerPlus Plan they summarize, the plan language governs.

The reason UBS wants to enforce the summaries over the terms of the PartnerPlus Plan is because the summaries, according to UBS, include the very class action waiver that the plan abjures. But as the United State Supreme Court

recently made clear, summary documents cannot under any circumstances modify federally-regulated pension plans. *Amara*, 131 S.Ct. at 1878 (explaining that summaries cannot, as a matter of law, alter the terms of a plan). Nor, as a matter of simple contract and logic, could a summary that defers to the terms of an operative legal instrument modify that same instrument.

ARGUMENT

It is axiomatic that "[a] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute." *Granite Rock Co. v. Int'l Broth. of Teamsters*, 130 S.Ct. 2847, 2856 (2010). As explained below, the PartnerPlus Arbitration Provision unquestionably exempted from arbitration any putative class action regarding PartnerPlus from 1995 until 2011 (the entire class period of this case). *See infra* pp. 26-30 (Section I). Indeed, the language drafted by UBS presents a paradigmatic circumstance where "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union Local No. 4-2001 v. Exxon Mobil Ref. & Supply Co.*, 449 F.3d 616, 620 (5th Cir. 2006) (internal quotation marks omitted).

To avoid its undeniable promise to exempt PartnerPlus class actions from arbitration, UBS now argues that its promise was revoked by language inserted into the Summary Brochures in 2007. In a desperate attempt to justify an

indefensible position, UBS spends much of its brief focused on "the strong federal policy in favor of arbitration . . . ," Appellant's Opening Brief at 17; the "limited role [of judges] when deciding a motion to compel arbitration," *id.*; and presumptions in favor of arbitration, *id.* at 20-22. But none of these abstract concepts are of any help to UBS. As the district court properly concluded, the Summary Brochure Arbitration Provision cannot possibly revoke the class action preservation promise in PartnerPlus for two simple and independent reasons. First, it is black-letter law that an ERISA Plan like PartnerPlus cannot be modified by a summary document. *See infra* pp. 35-42 (Section III.A). And, second, it is beyond dispute – as a matter of basic contract law – that the Summary Brochures were not intended to revoke any promise made in the PartnerPlus Plan. *See infra* pp. 42-48 (Section III.B).

In any event, the plain language of the Summary Brochure Arbitration Provision dictates that this lawsuit continue in court. It expressly provides that claims for injunctive relief are not subject to arbitration. *See infra* pp. 48-50 (Section IV). And such relief is precisely what Plaintiffs seek. *See supra* pp. 10-12 (summarizing the claims asserted and the relief sought by Plaintiffs).

I. The PartnerPlus Arbitration Provision Unquestionably Permits Class Action Litigation Over PartnerPlus to Proceed in Federal Court.

This dispute is about PartnerPlus. Thus, whether the parties agreed to arbitrate this dispute is obviously governed by the PartnerPlus Arbitration Provision. And that provision was materially unchanged from 1995 until January 1, 2011 – i.e., the entire class period. *See supra* pp. 12-14 (discussing the history of the PartnerPlus Arbitration Provision). After reviewing extensive briefing and holding a lengthy oral argument, the district court reached an unassailable conclusion: "[T]he arbitration clause in the PartnerPlus Plan clearly does not extend to arbitration of class claims." ROA 13-40693 971. The basis for that holding is quite simple:

1. In drafting the PartnerPlus Arbitration Provision, UBS chose to specifically incorporate the arbitration rules of NASD/FINRA. In the words of UBS: "[s]ince its inception, PartnerPlus has . . . provid[ed] that 'any dispute, claim or controversy involving a Participant . . . and the Plan . . . arising out of the Plan and a Sponsor . . . shall be resolved before [a FINRA] arbitration panel in accordance with the arbitration rules of [FINRA].'" Appellant's Opening Brief at 11 (citing ROA 13-40693 2445) (brackets in original) (emphasis added).

Those NASD/FINRA rules exempt from arbitration any claim that is the subject of a putative class action. *See supra* pp. 14-15 (discussing FINRA Code Rules 13204(a)(2) & 13204(a)(4) and NASD Code Rules 10301(d)(2) & 10301(d)(3)).

Put simply, the PartnerPlus Plan effectively provides that "all claims must be resolved per FINRA's arbitration rules, which preserve for litigation class action claims."

2. In response, UBS grossly mischaracterizes both Plaintiffs' position and the holding of the district court. For example, UBS falsely claims that Plaintiffs' "argue that they do not have to abide by [their] agreements because a FINRA rule does not permit class claims to be arbitrated." Appellant's Opening Brief at 28-29. UBS falsely claims that the parties disagree as to whether "FINRA procedural rules can[] invalidate an arbitration agreement." *Id*. at 40. And UBS falsely claims that "plaintiffs bear the burden of showing the existence of a clear congressional command that could justify allowing FINRA rules to trump the FAA." *Id*. at 41.

No one has ever suggested that FINRA rules *trump* the parties' agreement to arbitrate this dispute. To the contrary, the district court held (correctly) that the PartnerPlus Arbitration Provision – which expressly incorporates FINRA's preservation of class action litigation – *does not constitute an agreement by the parties to arbitrate this dispute*. ROA 13-40693 971-72 (holding that "the arbitration clause in the PartnerPlus Plan clearly does not extend to arbitration of class claims" and that "the PartnerPlus arbitration clause does not provide for arbitration of the claims that the Plaintiffs are making in this case.").

The district court's interpretation of the PartnerPlus Arbitration Provision is

hardly controversial. Indeed, the Seventh Circuit found the interpretive exercise to be a particularly easy one when it confronted an arbitration clause materially identical to the PartnerPlus Arbitration Provision. *See Nielsen*, 66 F.3d at 148. In *Nielsen*, the contractual language provided that "all controversies which may arise . . . shall be determined by arbitration . . . in accordance with the rules . . . of the New York Stock Exchange or the National Association of Securities Dealers, Inc. as [the plaintiff] may elect." *Id.* at 146 (quoting the arbitration provision in that case). The NASD and NYSE rules regarding arbitration were essentially identical to the FINRA rules today. *See supra* pp. 14-15.

In determining whether such a provision could compel arbitration of the plaintiff's claim while a class action was pending, the Seventh Circuit said:

> This case does not present us with difficult interpretive questions. [The defendant] specifically agreed that arbitration shall be conducted according to the rules in effect at the chosen arbitration forum . . . . Both the NASD and the NYSE, the two forums in which arbitration could be pursued under this agreement, adopted rules prohibiting arbitration of an individual's claim that has been filed as a putative or certified class action. . . . [w]hich is to say that the contract expressly prohibited [the defendant] from compelling arbitration of this claim.

Nielsen, 66 F.3d at 148. *See also In re Citigroup, Inc.*, 376 F.3d 23, 25 (1st Cir. 2004) (where arbitration was to be held in accordance with NASD rules, "neither [the plaintiff] himself or those class members subject to NASD rules could be compelled to arbitrate"). *Cf. Galey v. World Marketing Alliance*, 510 F.3d 529,

532-33 (5th Cir. 2007) (holding that an arbitration agreement providing for "arbitration in accordance with the rules then in effect of the National Association of Securities Dealers, Inc." incorporated such rules into the arbitration agreement).

3. The point of judicial oversight of arbitration agreements is "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." *First Options of Chicago, Inc. v. Kaplan*, 513 U.S. 938, 947 (1995). In drafting the PartnerPlus Arbitration Provision, UBS chose to specifically incorporate the arbitration rules of NASD/FINRA. And those rules have content.

For example: as the Securities and Exchange Commission ("SEC") explained when it approved the predecessor version of FINRA Code Rule 13204: the purpose of that rule was to ensure that class claims would proceed *in court* and avoid the "wasteful, duplicative litigation" of seriatim individual claims *in arbitration*. *See* Order Approving Proposed Rule Change Relating to Exclusion of Class Actions from Arbitration Proceedings, 57 Fed. Reg. 52659-02, 52661 (Nov. 4, 1992). The whole point of the rule at issue – and its predecessor rules – is to ensure that class actions are handled by courts because of the burdens of multiple FINRA arbitrations. *Cf*. SEC Approves Amendments to Rule 13204 of the Industry Code to Preclude Collective Action Claims from Being Arbitrated Under the Code, at 1 (July 9, 2012), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p126870.pdf (clarifying that FINRA Code Rule 13204,

which declines jurisdiction over class claims, applies not only to class actions, but also to collective actions under the Fair Labor Standards Act, Age Discrimination in Employment Act, and Equal Pay Act of 1963).

It would not have been difficult for UBS to write an arbitration provision that purported to extinguish the right of Plaintiffs to bring a putative class action lawsuit in federal court. Indeed, UBS did precisely that in 2011. *See supra* pp. 15-16 (describing the dramatic changes made to the PartnerPlus Arbitration Provision on January 1, 2011). Prior to 2011, however, the PartnerPlus Arbitration Provision unquestionably preserved the right of former employees to bring a putative class action in federal court. That provision must be enforced. Indeed, the language drafted by UBS and included in PartnerPlus for thirteen years presents a paradigmatic circumstance where "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Paper Allied*, 449 F.3d at 620 (internal quotation marks omitted).[8]

[8] To be fair: UBS does make one half-hearted attempt to argue that the PartnerPlus Arbitration Provision, standing alone, requires bilateral arbitration here. *See* Appellant's Opening Brief at 30-32 (arguing that the opt-out exception in the last sentence of FINRA Code Rule 13204(a)(4) applies to Plaintiffs' claims). This argument is hard to take seriously. The language on which it relies states:

> A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

II. To Avoid the PartnerPlus Arbitration Provision Promise, UBS Argues That It Was Revoked by the Summary Brochure Arbitration Provision.

UBS effectively admits that it cannot win if this appeal turns on the application of the PartnerPlus Arbitration Provision standing alone. *See, e.g.*, Appellant's Opening Brief at 32 (conceding the existence of "FINRA's default rule against arbitrating class claims . . . ."). To overcome that fatal problem, UBS argues that the FINRA "default" rule – *which it chose to incorporate in the PartnerPlus Arbitration Agreement for over fifteen years* – can be altered by a separate agreement (here, the Summary Brochure Arbitration Provision). *See, e.g.*, Appellant's Opening Brief at 32-34 (arguing that the "savings clause" in FINRA Code Rule 13204 allows UBS "to enforce another agreement modifying this default rule.").

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* * *

> The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

FINRA Code Rule 13204(a)(4). As the district court noted, the phrase "elects not to participate in the class" clearly refers to a plaintiff's post-filing decision. ROA 13-40693 791-92. Indeed, Rule 13204(a)(4) specifically permits only a certain class of person – *"a member of a certified or putative class"* – to elect not to participate in a class. A "putative class," by definition, does not exist until a lawsuit is filed, and a "certified class," by definition, does not exist until a putative class is certified. Accordingly, one cannot be a member of either such class prior to the filing of a lawsuit. Put another way, a person lacks the necessary legal status to effectuate an election under Rule 13204(a)(4) until a putative class action has been filed. Here, Plaintiffs' putative class action was not filed until August of 2012, and there is no allegation by UBS of any post-suit waiver. ROA 13-40693 8.

UBS's interpretation of Rule 13204 is indefesible. *See* Appellant's Opening Brief at 32. Indeed, it is not even plausible, which UBS concedes is the only standard of review under which its interpretation might be adopted by this Court. Appellant's Opening Brief at 34 ("These decisions show that this is a plausible interpretation of [FINRA Code Rule 13204] . . . .").[9]

The savings clause explicitly provides that it "do[es] not *otherwise* affect the enforceability of . . . any other agreement." (emphasis added). Thus, the clause, by incorporating the rest of Rule 13204 through the use of the term "otherwise," provides that "Rule 13204 does not [*other than preserving the right of Plaintiffs to proceed as a class*] affect the enforceability of . . . any other agreement." *See supra* pp. 14-15, 27-30 (discussing the meaning of relevant provisions of FINRA Code Rule 13204). To give this language UBS's interpretation would be to treat the term "otherwise" as surplusage and adopt an interpretation that makes no sense

[9] And, even if it were plausiable, that would not be enough. No court has ever suggested that legislative or regulatory content should be construed in favor of arbitration. Rather, such content, if unclear, must be construed by the court using standard principles of interpretation. That is unnecessary in this case because Rule 13204 is unambiguous. To be clear, however, even if UBS's interpretation of Rule 13204's savings clause were adopted, it would make no difference here. As discussed below, see *infra* pp. 42-48, the Summary Brochure Arbitration Provision is inapplicable and unenforcable under both ERISA and contract law, by its own terms. Those bars on the modification of the PartnerPlus Plan's preservation of class actions operate independently of the savings clause of Rule 13204. And, in any event, the Summary Brochures expressly carve out claims for injunctive relief. *See infra* pp. 48-50.

given the SEC's stated intent in promulgating Rule 13204, which was to ensure that class claims proceed in court and that "wasteful, duplicative litigation" of serial individual claims does not occur in arbitration. *See supra* pp. 29-30 (discussing the SEC's regulatory history).

In any event, the core promise of the PartnerPlus Arbitration Provision – that participants may pursue class action litigation about PartnerPlus in court – was not revoked by the Summary Brochure Arbitration Provision. *See infra* pp. 35-48 (Section III). Before explaining that point, three important observations bear mention:

1. The Summary Brochure Arbitration Provision was drafted in 2007. *See supra* pp. 19-20 (discussing the history of the Summary Brochure Arbitration Provision). Thus, by UBS's own admission, the PartnerPlus Arbitration Provision unquestionably permitted class action litigation prior to 2007. Here is why: PartnerPlus incorporated FINRA's "default" rule, with no side agreement of any kind containing a class action waiver. That period lasted thirteen years. *See supra* pp. 12-14 (discussing the history of the PartnerPlus Plan Arbitration Provision beginning in 1995).

2. The *identical* text of the PartnerPlus Plan Arbitration Provision – which UBS concedes authorized class action litigation from 1995 until 2007 – was restated in formal amendments to the PartnerPlus Plan in 2008 and 2009. *See*

supra pp. 13-14 (discussing the 2008 and 2009 PartnerPlus Plans). Nonetheless, UBS maintains that Plaintiffs should have understood that the PartnerPlus Arbitration Provision was fundamentally changed (in essence, revoked) by the Summary Brochure Arbitration Provision. And, contrary to both logic and traditional use of the English language, Plaintiffs somehow should have had such an understanding even though the Summary Brochure expressly states that "[i]f there is any difference between this summary and the [PartnerPlus] Plan Document, the Plan Document will govern." ROA 13-40693 2738.

3. In 2011, UBS fundamentally restructured PartnerPlus. ROA 13-40693 2637-39 (deposition testimony of UBS executive, Matthew Levitan, explaining that PartnerPlus was amended to qualify as an ERISA top-hat plan by drastically reducing the number of eligible participants). As part of that process, it completely rewrote the PartnerPlus Arbitration Provision to, *inter alia*, prohibit class action lawsuits about PartnerPlus. *See supra* pp. 15-16 (discussing the 2011 changes to the PartnerPlus Plan). Nonetheless, UBS maintains that the text of the 2008 and 2009 PartnerPlus Arbitration Provision (which was materially identical to the text of the 1995, 1998, 2004, and 2006 PartnerPlus Arbitration Provision) should instead be ascribed the meaning of the 2011 PartnerPlus Arbitration Provision (which was starkly and fundamentally different). As explained below, the position taken by UBS strains credulity.

III. The PartnerPlus Arbitration Provision Promise Was Not Revoked by the Summary Brochure Arbitration Provision.

To win this appeal, UBS must convince this Court that the 2007 Summary Brochure Arbitration Provision revoked the promise to permit class action litigation that was made in the PartnerPlus Arbitration Provision – a promise that had existed unbroken for thirteen years. For two independent reasons, each recognized by the district court, UBS cannot possibly prevail.

A. UBS's Position Is Foreclosed by ERISA.

This is an ERISA case. As Plaintiffs alleged (and will prove), PartnerPlus is an ERISA plan. *See supra* pp. 6-10 (explaining why PartnerPlus has always been an ERISA plan). The PartnerPlus ERISA Plan has an arbitration provision that unquestionably authorizes this lawsuit to proceed. *See supra* pp. 26-30 (Section I). UBS's sole argument in favor of arbitration is that the relevant arbitration provision in the PartnerPlus ERISA Plan was modified by a separate arbitration provision in the Summary Brochures. As the district court recognized, such an argument is foreclosed by ERISA.

In the words of the United States Supreme Court: "summary documents, important as they are, provide communications with beneficiaries *about* the plan, but [they] do not themselves constitute the *terms* of the plan . . . ." *Amara*, 131 S.Ct. at 1878. And the language of summary documents – unlike that of an ERISA

Plan – is not binding. As the Court explained: "[t]o make the language of a plan summary legally binding could well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers." *Id.* at 1877-78. *See also Paulson v. Paul Revere Life Ins. Co.*, 323 F.Supp. 2d 919, 940 (S.D. Iowa 2004) ("[I]n its commonly understood meaning, a summary may well be expected to leave out some terms and detail, but cannot be expected to add terms not appearing in the document being summarized.").

Indeed, it is well settled that no provision disfavoring a participant in a summary is binding against the participant unless that provision is also contained in the ERISA Plan itself. *See, e.g., Spain v. Prudential Ins. Co. of Am.*, 2010 WL 669866, at *6 (S.D. Ill. Feb. 22, 2010) (holding that a provision contained in a summary plan description – but not in the Plan – cannot be enforced unless (i) it advantages the participant and (ii) she or he relied on it); *Springs Valley, Bank & Trust Co v. Carpenter,* 855 F.Supp. 1131, 1141-42 (S.D. Ind. 1993) (when terms of a summary plan description and policy conflict, the terms that favor the participant will govern, regardless of disclaimers).

The irrelevance of language in a summary is particularly obvious in cases – like this one – where the summary explicitly states that plan language takes precedence. *See, e.g., Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 541-43 (4th Cir. 1992) (refusing to find binding language in a summary stating that private-duty nursing

would be covered only if approved by the plan administrator and noting that "where the [summary] handbook favors the employer, the employer cannot disavow a disclaimer in the handbook representing that the Plan controls. . . ."); *Sturges v. Hy-Vee Employee Benefit Plan and Trust*, 991 F.3d 479, 480-81 (8th Cir. 1993) (adopting Fourth Circuit's holding in *Glocker*, 974 F.3d at 542-43, that "when summary favors employer, employer cannot disavow a disclaimer in the summary stating the plan controls."); *Sanders v. Scheideler*, 816 F.Supp. 1338, 1344 (W.D. Wis 1993), *aff'd* 25 F.3d 1053 (7th Cir. 1994) (refusing to find binding language in a summary stating that "the plan shall have a priority right to recover all benefits paid from the third party and the third party's insurer" and noting that "[n]o court has ever [set aside the conflict clause and enforced the terms of the Summary Plan Description] in favor of a plan.").

Plan language matters. The central aim of ERISA is that participants can know with certainty that whatever the plan says, they can be no worse off. Here, the PartnerPlus Plan repeatedly, explicitly, and without qualification provided for a class action exemption from arbitration. UBS was not obligated to include such a provision in its plan. But it did. And, under ERISA, the only way to change such a provision is through formal amendment of the plan (as UBS did in 2011). Informal brochures and summaries will not do. If ERISA plan terms could be modified or altered by peripheral documents that operated to make participants

worse off, no promise in any ERISA plan would be safe. UBS's suggestion otherwise would undermine the fundamental purpose of the statute.

UBS knows that its position is foreclosed by ERISA. So it attacks the district court's holding from another direction. According to UBS, the district court erred in assuming that PartnerPlus was an ERISA Plan for purposes of deciding the motion to compel arbitration. Appellant's Opening Brief at 42-44. UBS is wrong.

UBS filed a motion to dismiss and compel arbitration. It is black-letter law that, on a motion to dismiss, the Court must accept Plaintiffs' factual allegations as true. *See, e.g., Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) ("When considering a motion to dismiss, the court accepts as true the well-pled factual allegations in the complaint, and construes them in the light most favorable to the plaintiff.").[10] That is precisely what the district court did. ROA 13-40693 972 ("The Court will accept the Partner Plus Plan as a covered ERISA plan at this time, based upon the allegations of the complaint and the first amended complaint and also based on the fact that it appears, based on a reading of those plans, to meet

[10] A motion to dismiss on arbitration grounds is subject to the same standard. *See, e.g., Amegy Bank Nat. Ass'n v. monarch Flight II, LLC*, 2012 WL 1494340, at *1 n.2 (S.D. Tex., April 27, 2012) (on motion to dismiss and compel arbitration, court must accept as true the fact allegations in the complaint).

the definition of a pension plan . . . covered by ERISA.").[11]

In the district court, UBS argued that a "summary judgment" standard should be applied. ROA 13-40693 859 (citing *Aviles v. Russell Stover Candies, Inc.*, 3:12-CV-01409-BF, 2012 U.S. Dist. LEXIS 165369, at *9-10 (N.D. Tex. Nov 13, 2012), for the proposition that when "deciding whether to grant a motion to compel arbitration pursuant to the FAA, courts apply a summary judgment standard."). But UBS fares no better under such a standard.

To prevail on a motion for summary judgment, the moving party (i.e., UBS) must demonstrate the absence of a genuine issue of material fact. *See Little v. Liquid Air Corp*., 37 F.3d 1069, 1076 (5th Cir. 1994). Accordingly, insofar as UBS seeks compelled arbitration, it must show the lack of a genuine issue of fact as to "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *See Aviles*, 2012 WL 5508378, at *3.

Undoubtedly, the ERISA status of PartnerPlus is a genuine issue of material fact. For example, the question of ERISA status potentially affects whether the Summary Brochure may be considered a binding document, whether the Court

[11] ERISA status is clearly a question of fact. *See McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 235 (5th Cir. 1995) (the "existence vel non of a plan is a question of fact"). And UBS has never contended that Plaintiffs have inadequately pleaded the existence of an ERISA plan.

may enforce its terms that disfavor Plaintiffs, whether *any* arbitration agreement between the parties may be enforced regardless of its terms, and whether UBS was obligated to comply with ERISA's notice requirements. *See* ROA 13-40693 873 (making this argument and cross-referencing four argument sections that expand on each of these issues, ROA 13-40693 866-71). It is beyond dispute that UBS cannot establish that, *as a matter of law*, PartnerPlus is not covered by ERISA. As such, the district court properly assumed – for purposes of deciding the motion to compel arbitration – that PartnerPlus is an ERISA plan.

In this Court, UBS argues that the district court's assumption was wrong for two reasons. First, UBS argues that court should not have addressed whether PartnerPlus is an ERISA plan at all because that is a "merits" question. Appellant's Opening Brief 42-43. Alternatively, UBS argues that – in deciding the question – the district court "should have assumed that PartnerPlus is *not* an ERISA plan if doing so would have favored arbitration." *Id*. at 44. Again, UBS is wrong on both counts.

First, the district court was required to decide whether PartnerPlus is covered by ERISA. As UBS concedes, the proper judicial inquiry in this case requires adjudication of "whether there is a valid arbitration agreement . . . ." Appellant's Opening Brief at 43. And, as explained above, the ERISA status of PartnerPlus bears *directly* on that question. Put simply: if PartnerPlus is an ERISA Plan then

there are several reasons why the Summary Brochure Arbitration Provision would be invalid. Unsurprisingly, the cases cited by UBS are totally off point. Appellant's Opening Brief at 43 (citing cases).

Second, UBS attempts to argue that this Court should assume PartnerPlus is not an ERISA plan because, in effect, the Court is obligated to favor arbitration, and treating PartnerPlus as an ERISA plan would block arbitration of the instant claims. Appellant's Opening Brief at 44. But whether PartnerPlus should be treated as an ERISA plan is antecedent to, and has nothing whatsoever to do with, any presumption regarding arbitration. Plaintiffs have pleaded, and have evidence showing, that PartnerPlus is an ERISA plan. That *this* particular ERISA plan has an arbitration provision specifically authorizing class actions in court does not alter the presumption plaintiffs are generally entitled to regarding properly alleged facts: namely, that they are taken as true. To hold otherwise would mean the matter of ERISA coverage somehow depends on finding coverage would lead, or not lead, to arbitration. That is not, and could not possibly be, the case.

Indeed, the United States Supreme Court has made this point clear on numerous occasions. *See, e.g.*, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (explaining that the FAA does not "purport to alter background principles of state contract law regarding the scope of agreements" and quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987), for the proposition that "state law . . . is applicable to

determine which contracts are binding under § 2 and enforceable under § 3 [of the FAA] . . . ."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasizing that, in enacting the FAA, "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."). The position advanced by UBS would be akin to arguing that a Court is required to assume that an arbitration provision was not procured by fraud if such an assumption would "favor arbitration." Such is not, and has never been, the law.

B. UBS's Position Is Foreclosed by Basic Contract Law.

As discussed above, the PartnerPlus Plan sets forth all of the terms that govern its administration. *See supra* pp. 3-6 (discussing the structure and operation of PartnerPlus). For example, it establishes who is eligible to enroll, what contributions the employer must make, and how participants receive distributions. ROA 13-40693 2676-78 (eligibility), 2679-81 (contributions), 2685-99 (distributions). It also contains an express dispute resolution clause. ROA 13-40693 2702. As with the Summary Brochures, the PartnerPlus dispute resolution procedures are included in a section under the heading "Arbitration." ROA 13-40693 2702. Unlike the Summary Brochures, this section has been included in the PartnerPlus Plan every year since its creation in 1995. *See supra* pp. 12-14 (quoting and discussing the PartnerPlus Arbitration Provision for each year). The

language of that provision has varied slightly over the years but has remained identical in all material aspects. *Id.*

Although the dispute resolution sections of the Summary Brochures and the PartnerPlus Plan have the same heading, "Arbitration," they are different:

1. The PartnerPlus Arbitration Provision is narrowly limited to "any dispute, claim or controversy involving a Claimant and the Plan and a Sponsor, arising out of the Plan" – such as this lawsuit. ROA 13-40693 2702. By contrast, the Summary Brochure's Arbitration Provision provision – subject to a few exceptions – applies to "any disputes between you and UBS including claims concerning compensation, benefits or other terms or conditions of employment and termination of employment, or any claims for discrimination, retaliation or harassment, or any other claims" and makes clear that such is true "whether they arise by statute or otherwise, including but not limit to claims arising under [10 enumerated statutes] or any other federal, state or local employment or discrimination law, rules or regulations, including wage and hour laws . . . ." ROA 13-40693 2743.

2. The PartnerPlus Arbitration Provision states that covered disputes "shall be resolved before a FINRA arbitration panel in accordance with the arbitration rules of FINRA." ROA 13-40693 2702. In a separate section, PartnerPlus makes clear that all provisions are governed by New York law. ROA 13-40693 2712. By

contrast, the Summary Brochure's Arbitration Provision states that covered disputes "will be determined by arbitration as authorized and governed by the arbitration law of the state of New Jersey [and] heard, as set forth above, by FINRA or JAMS . . . ." ROA 13-40693 2743.

3. The PartnerPlus Arbitration Provision – by expressly incorporating the arbitration rules of FINRA – preserves the right of a plaintiff to participate in class action litigation in court. *See supra* pp. 14-15, 27-30 (discussing the meaning of relevant provisions of FINRA Code Rule 13204). Other than this class action exception, the PartnerPlus provision requires that all other claims be resolved via arbitration. *See supra* pp. 12-14. By contrast, the Summary Brochure's Arbitration Provision expressly preserves for litigation in court "claims for injunctive relief or the denial of benefits under the firm's disability or medical plans." ROA 13-40693 2743. It also includes a class action waiver. ROA 13-40693 2743.

To say that the relevant sections of these documents are different is gross understatement. And these differences matter. To avoid precisely the type of argument that UBS has repeatedly advanced in this litigation – that summary terms should be applied over plan terms – the Summary Brochures explicitly state that "[i]f there is *any difference* between this summary and the Plan Document, the Plan Document will govern" (the "any difference" clause). ROA 13-40693 2738

(emphasis added). That clause makes the Summary Brochure Arbitration Provision irrelevant to this dispute. *See* ROA 13-40693 2109 (June 12, 2013 decision explaining that "[t]he PartnerPlus plan document has it own arbitration provision that . . . differs in a number of important ways from the arbitration provision contained in the Financial Advisor Compensation Plan – most notably, the arbitration provision in the PartnerPlus plan document contains no waiver of class actions.").

UBS is unable to seriously dispute this point. Indeed, it provides only three (unpersuasive) responses. First, UBS simply asserts that the phrase "any difference" means "a conflict." *See* Appellant's Opening Brief at 37 (asserting that the phrase "any difference . . . refer[s] only to a conflict"). It ostensibly believes this because the Summary Brochures contain a similar clause that states, "[i]n the event of a conflict between the summary of the Plans set forth in this document and the Plan Documents, the Plan Documents will control." ROA 13-40693 2593. As UBS points out in its brief, however, where drafters "'include[] particular language in one . . . provision, and exclude[] it in another,' courts generally assume they 'did so intentionally.'" Appellant's Opening Brief at 31 (quoting *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 244 n.9 (5th Cir. 1998)). As this canon of interpretation makes clear, the phrase "any difference" must have its own meaning. And since many things can be different without being in conflict, the phrase "any

difference" is necessarily broader. The cases cited by UBS involving language requiring a conflict are thus inapposite. Appellant's Opening Brief at 38-39 (citing cases). As explained above, see *supra* pp. 43-44, the Summary Brochure Arbitration Provision is clearly different from the PartnerPlus Arbitration Provision under the plain meaning of the term.

Second, UBS argues that the "any difference" clause refers only to a "conflict between the 'summary' of PartnerPlus in the Compensation Plans and the actual text of PartnerPlus." Appellant's Opening Brief at 37. But the Summary Brochures are clear about when they are referring to a plan summary and when they are referring to the entire Summary Brochure.

Take, for example, the 2010 Summary Brochure. It summarizes at least four separate plans, each of which is governed by an independent "Plan Document": (1) the Financial Advisor Survivor Benefit Plan Document, ROA 13-40693 2740; (2) the Business Builder Plan Document, ROA 13-40693 2741; (3) the Pacesetter Plan Document, ROA 13-40693 2741; and (4) the PartnerPlus Plan Document, ROA 13-40693 2737-38. With respect to the Business Builder, Pacesetter, and PartnerPlus Plan Documents, UBS provided in broad language that "[i]f there is any difference between *this summary* and the Plan Document, the Plan Document will govern." ROA 13-40693 2737-38, 41 (emphasis added). In contrast, with respect to the Financial Advisor Survivor Benefit Plan Document, UBS provided

in specific, carefully circumscribed language that "[i]n the event of a conflict between *the above summary of the Financial Advisor Survivor Benefit Plan document* and the plan document itself, the plan document will control." ROA 13-40693 2740 (emphasis added).

To reiterate the point made by UBS, where drafters "'include[] particular language in one . . . provision, and exclude[] it in another,' courts generally assume they 'did so intentionally.'" Appellant's Opening Brief at 31 (quoting *Uniroyal*, 160 F.3d at 244 n.9. As the above contrasting clauses make clear, when the Brochures intend to refer to a particular plan summary, they explicitly do so. And when they do not, when they instead intend to refer to the entire Summary Brochure, they refer to "this summary." Indeed, for this very reason, the Summary Brochures' conflicts clauses, which refer specifically to "a conflict between *the summary of the Plans* set forth in this document and the Plan Documents," have no relevance to this dispute. ROA 13-40693 2738 (emphasis added).[12]

[12] In any event, even if there were any ambiguity regarding the meaning of the phrase "this summary," such ambiguity – as a matter of black-letter contract law – must be construed against UBS. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (in the arbitration context, applying "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it" and emphasizing that "Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt."); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996) ("When deciding whether the parties agreed to arbitrate the dispute in question, 'courts generally . . . should apply ordinary state-law principles that govern the formation

Finally, UBS suggests that the Court must "harmonize" the PartnerPlus Plan and the Summary Brochures. As discussed above, however, there is nothing here to harmonize. *See supra* pp. 45-47 (discussing the plain meaning of the "any difference" clause). That is precisely what one would expect when discussing a plan and its summary. And, in any event, UBS provides no authority for the notion that a plan that existed independently for 13 years would need to be harmonized with a summary document that was not contemporaneously drafted or executed, is different and contradictory to the plan in material respects, and is by its own terms not intended to make any change to the plan, including its arbitration provision.

IV. In Any Event, the Summary Brochure Arbitration Provision *Itself* Authorizes This Litigation to Proceed in Federal Court.

In the unlikely event that this Court accepts the position advanced by UBS, then it must address any alternative arguments made by Plaintiffs in the district court. Specifically, Plaintiffs argued that the Summary Brochure Arbitration Provision *itself* exempts the type of claims asserted by Plaintiffs in this lawsuit. ROA 13-40693 607-11.

In its opening brief, UBS repeatedly asserts that, by accepting the Summary Brochures, Plaintiffs agreed to arbitrate "all disputes." *See, e.g.*, Appellant's Opening Brief at 16 ("the named plaintiffs agreed . . . to arbitrate *any* disputes with

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of contracts.'" (quoting *First Options*, 514 U.S. at 944, and citing *Perry*, 482 U.S. at 492). *See also* Restatement (Second) of Contracts § 206 (1981).

UBSFS. . . .") (emphasis by UBS); *id*. at 25 ("The Compensation Plans state that '*any* dispute[]' with UBSFS must be resolved through arbitration. . . .") (emphasis by UBS). That assertion is spectacularly false.

The Summary Brochure Arbitration Provision expressly carves out all claims for injunctive relief. Indeed, every version of the provision begins with the phrase: "*With the exception of claims for injunctive relief . . . .*" *See* ROA 13-40693 2600 (the 2007 Summary Brochure Arbitration Provision), 2488 (the 2008 Summary Brochure Arbitration Provision), 225 (the 2009 Summary Brochure Arbitration Provision), 2743 (the 2010 Summary Brochure Arbitration Provision).

Such language is fatal to UBS because every claim asserted by Plaintiffs in this litigation seeks injunctive relief. *See, e.g.*, ROA 13-40693 95 (Plaintiff's amended complaint seeking "an injunction against any act or practice which violates ERISA"). *See also supra* pp. 10-12 (summarizing the claims asserted and the relief sought by Plaintiffs in a section entitled "ERISA Violations of PartnerPlus"). And it is well settled that such injunctive relief is available under ERISA. *See* 29 U.S.C. § 1132(a)(3)(A) (expressly permitting a lawsuit by a participant "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan . . . ."). *See also North American Coal Corp. Retirement Savings Plan v.*

Roth, 395 F.3d 916 (8th Cir. 2005) (affirming, in part, an opinion granting an injunction under section 502(a)(3) of ERISA).[13]

CONCLUSION

This lawsuit is about PartnerPlus. From 1995 until 2011 (the entire class period), UBS reaffirmed its promise to litigate class action claims about PartnerPlus five times. Now, it seeks to deprive Plaintiffs of the benefit of their bargain by relying on an irrelevant arbitration provision found in pair of a summary brochures. Indeed, that provision is so clearly not intended to apply to PartnerPlus that when PartnerPlus was amended and restated in 2008 and 2009 (the years following the addition of arbitration language to the Summary Brochures in 2007) UBS did not change the relevant language *at all*. The district court properly recognized and rejected UBS's attempt to compel arbitration for what it is: an endeavor to enforce an inapplicable and unenforceable summary document

[13] One final point requires mention. As the entirety of this brief makes clear, the parties did not agree to bilateral arbitration of the claims asserted in this lawsuit. Plaintiffs took that position in the district court and prevailed. In an abundance of caution, however, Plaintiffs also engaged UBS on its own terms. In other words, Plaintiffs argued that even if there had been an agreement to arbitrate 29 U.S.C. § 1132(a)(3) claims, such an agreement would be barred by the clear congressional command of ERISA. ROA 13-40693 611-14. Whether Congress intended to prohibit the arbitration of *section 1132(a)(3) claims* is indisputably an open question in this Circuit. *See id.* Thus, in the unlikely event that this Court finds that the parties agreed to arbitrate section 1132(a)(3) claims, it must reach the question of whether such an agreement is prohibited by ERISA.

because the plain terms of PartnerPlus unquestionably preserve Plaintiffs' right to proceed in court. Affirmance is warranted.

Dated: September 5, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2013, an electronic copy of the foregoing Brief of Appellees was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon registered CM/ECF participants.

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,370 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 for Mac 2011 (version 14) in Times New Roman 14-point font.

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