No. 07-16527

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA PROCTOR, et al.,

Plaintiffs-Appellants,

v.

VISHAY INTERTECHNOLOGY, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF DEFENDANT-APPELLEE ERNST & YOUNG LLP

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases (cont.): *Page(s):*

Statutes and Rules:

STATEMENT OF JURISDICTION

Ernst & Young agrees with the statement of jurisdiction in the Opening Brief of Appellants ("Pl. Br."), with the addition that the district court not only "posited" federal question jurisdiction based upon the Securities Litigation Uniform Standards Act, 15 U.S.C. § 78bb, but in fact had such jurisdiction.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court's denial of plaintiffs' motion to remand the case to state court should be affirmed?

2. Whether the district court correctly concluded that plaintiffs' claims are precluded by the judgment of a Delaware state court in a related proceeding?

3. Whether the judgment in favor of Ernst & Young should be affirmed on other grounds argued to, but not reached by, the district court?

COUNTERSTATEMENT OF THE CASE AND FACTS

This is a lawsuit by former minority shareholders of Siliconix, Inc., a manufacturer of semiconductors. The gist of their claim is that defendant Vishay Intertechnology and related parties (together, "Vishay") purchased a majority interest in Siliconix at a bargain price and then engaged in a scheme to loot the company at the minority's expense.

Vishay ultimately bought out the minority shareholders through a tender offer and "short-form" merger under the law of Delaware, where Siliconix was incorporated. As a result of this transaction, Vishay is now the sole owner of Siliconix. Plaintiffs no longer have any ownership interest in the company.

The procedural nature of the issues presented in this appeal make it difficult to separate the "facts" from the "case history." The relevant procedural history, including the development of plaintiffs' allegations over time, is set forth below.

August 2002: Original Complaint

This lawsuit originated in California state court in August 2002. The original Complaint stated two causes of action: a derivative claim on behalf of Siliconix, and a class action claim on behalf of the company's minority shareholders, alleging a breach of fiduciary duty owed directly to the shareholders. ER 0003-07. The Complaint alleged that Vishay looted Siliconix by causing it to transfer a subsidiary to another entity for less than market value. ER 0004.

Ernst & Young was also named as a defendant (ER 0002), but the Complaint did not explain why the firm was made a defendant or what it had supposedly done wrong. Indeed, other than identifying Ernst & Young as a limited liability partner-

ship doing business in California, the Complaint said nothing about Ernst & Young at all. Ernst & Young was never served with the original Complaint.

January 2005: First Amended Complaint

For the next two and a half years, nothing happened in the litigation other than a transfer of the case to a different county. Eventually, in January 2005, plaintiffs filed and served a First Amended Complaint. This new complaint set forth the same causes of action as the original Complaint and was based on a similar, though expanded, theory of looting. Plaintiffs summarized their claim as follows:

> [T]he unifying wrong that underlies this first amended complaint is that Vishay and the other defendants have engaged in conduct by which Vishay essentially treats Siliconix as a 100% owned subsidiary of Vishay, misappropriating, at will, its assets and financial resources.

ER 0094. The new complaint alleged eight specific ways that Vishay had misappropriated Siliconix assets. *See* ER 0095-102 ("Vishay Misappropriated Siliconix Sales Subsidiaries"; "Vishay Took Siliconix's SAP Software System"; "Vishay Used Siliconix's Assets as Security for Vishay's Loans"; "Vishay Misappropriated Siliconix's Identity"; "Vishay Misappropriated Siliconix Testing Equipment"; "Vishay Used Siliconix to Save Vishay's Israeli Credits"; "Vishay Misused Siliconix Patents"; "Vishay's CEO Zandman Misappropriated Siliconix's Patents").

With respect to Ernst & Young, however, the First Amended Complaint said little more than the original Complaint. It noted that Ernst & Young served as auditor for Vishay and Siliconix. ER 0071. But like the original Complaint, the First Amended Complaint did not explain why Ernst & Young was made a defen-

dant, or how it allegedly breached a fiduciary duty. The only substantive allegation directed at Ernst & Young was that the firm was somehow negligent because a Vishay line of credit backed by Siliconix assets was not disclosed in Siliconix's financial statements. ER 0097-98, 0105. But the complaint went on to acknowledge that this obligation *had* been disclosed in public filings Vishay had made with the SEC. ER 0105. The complaint did not explain how the fact that Siliconix's financials (which Ernst & Young audited, but Siliconix itself prepared) did not repeat a fact that was already disclosed in public filings by its parent company could have helped Vishay to loot Siliconix, or otherwise constituted a breach of fiduciary duty by Ernst & Young.

All defendants demurred to the First Amended Complaint, and in September 2005 the demurrers were sustained. ER 0788-90. The court found that the complaint failed to allege facts showing that Ernst & Young owed a fiduciary duty, had breached such a duty, or had joined a conspiracy. The court told plaintiffs:

> The allegations that Ernst & Young breached a fiduciary duty . . . isn't [sic] set forth adequately . . . . You've alleged that they failed to report that there was a loan made but you've not shown they had an obligation to report that the loan was made. And there are allegations in the complaint that it was reported in other places. . . . If you're going to show a breach of fiduciary obligation you're going to have to show exactly what the duty was and what they failed to do . . . .

ER 0784. The court also sustained the demurrer to the derivative claim because plaintiffs had not made a demand on Siliconix's board that it bring an action against Ernst & Young, and the complaint did not allege facts showing that such a demand would have been futile. ER 0789.

March-October 2005: Short Form Merger and Delaware Release

In March 2005, Vishay began the process of acquiring 100% ownership of Siliconix by making a tender offer and initiating the short-form merger process. ER 0809-10. This prompted class action litigation in Delaware Chancery Court on behalf of minority shareholders (including plaintiffs here) seeking to block the transaction. In April 2005, the parties agreed to settle the Delaware lawsuit when Vishay agreed to raise the buyout price. ER 0810. The merger was completed in May. *Id.*

As former minority shareholders in Siliconix, plaintiffs were members of the class in the Delaware litigation.[1] They could have objected to the settlement in Delaware, but they did not. ER 1572.

In October 2005, the Delaware court issued an "Order and Final Judgment" disposing of the Delaware litigation. ER 0923-26. In this order, the court certified the case as a class action, found the settlement to be "fair, reasonable and adequate and in the best interests of the class," and dismissed the action "with prejudice as to all defendants." ER 0924-25.

Importantly, the Delaware order also included broad language providing that all claims against "Released Persons" that "relate in any manner," either "directly or indirectly," to the matters at issue in the Delaware case were "released, discharged and settled" by the order. ER 0925-26.[2] "Released Persons" specifically included

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[1] The certified class generally consisted of all owners of Siliconix common stock during the period from March 3, 2005 to May 16, 2005. ER 0924. Plaintiffs do not dispute that they are members of this class.

[2] "Any known or unknown claims . . . by or on behalf of any member of the class . . . against defendants or any of their . . . consultants, accountants, . . . advisors or agents . . . (collectively, the 'Released Persons') which have arisen, arise now or

the defendants in the Delaware proceeding (including Vishay) and various related parties, including their "accountants," "consultants," "advisors" and "agents." *Id.*

November 2005: Second Amended Complaint

In November 2005, plaintiffs filed a Second Amended Complaint. This new pleading added a claim for "quasi-appraisal" under Delaware law (ER 0808) and some further details about looting by Vishay. *See* ER 0799-801 (draining assets), ER 0801-02 (depressing cash flow and profits; inflicting damage by self-dealing), ER 0807 (listing ten key looting issues).[3] Otherwise, as to Ernst & Young, the Second Amended Complaint was virtually identical to the previous version.

Both Ernst & Young and Vishay filed demurrers to the Second Amended Complaint. ER 0879-99, 1011-18. As one basis for their demurrers, the defendants asserted that the California lawsuit was barred by the Delaware judgment entered the previous month. ER 0880, 1016. The court declined to sustain the demurrers on that basis. ER 1180. However, the court sustained Ernst & Young's demurrer

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hereafter may arise out of or relate in any manner to the allegations, facts, events, transactions, acts, occurrences, statements, representations, omissions or any other matter whatsoever set forth in or otherwise related, directly or indirectly to (i) the allegations in the complaints in the Action, (ii) the Tender Offer . . . , (iii) the Short-Form Merger, or (iv) the fiduciary obligations or disclosure duties of any of the Released Persons in connection with the Tender Offer or Short-Form Merger . . . are hereby released, discharged and settled . . . ." ER 0925-26. Claims to enforce the settlement or for appraisal pursuant to Delaware law were excluded.

[3] Like the First Amended Complaint, the Second Amended Complaint alleged that Vishay engaged in transactions that were not reported in Siliconix's financial statements (ER 0801-02, 0804), but did not allege that the non-reporting constituted a misrepresentation or breach of duty.

as to the claims for breach of fiduciary duty for the same reason that it had sustained Ernst & Young's demurrer to the First Amended Complaint. ER 1157, 1180. In argument on the demurrers, the court again emphasized the lack of detail regarding Ernst & Young's alleged role:

> I have a real problem with your pleadings with regard to Ernst & Young. . . . *You've not alleged they withheld anything. You've not alleged they had a duty to do any particular thing.* [You] haven't said anything about what their real role was, how they did that, what their obligations were, what their duties were and how they violated or breached any of those duties.

ER 1175-76 (emphasis added). The court also sustained Ernst & Young's demurrer as to the new cause of action for quasi-appraisal without leave to amend. ER 1157.

May 2006: Amendment to Second Amended Complaint

After their third attempt at pleading a cause of action against Ernst & Young failed, plaintiffs did not file another full complaint. Instead, on May 31, 2006, they filed a document styled "Amendment to Second Amended Complaint Re Ernst & Young." ER 1141-55. In this pleading (the "SAC Amendment"), plaintiffs attempted for the first time to explain what Ernst & Young had allegedly done wrong.

As it turned out, what Ernst & Young had allegedly done wrong was to make repeated false and/or misleading statements concerning the financial condition of Siliconix. Specifically, the SAC Amendment alleged that Ernst & Young misrepresented or omitted material facts in Siliconix's audited financial statements, including allegations that Ernst & Young repeatedly:

(i) falsely opined in its annual Report of Independent Registered Public Accounting Firm that the financial statements of Siliconix presented fairly, in all material respects, [the] financial position of Siliconix . . .,

(ii) made false, or intentionally incomplete and misleading, statements at shareholder meetings concerning matters material to Siliconix, its Board of Directors and its shareholders, and

(iii) concealed from Siliconix's Board of Directors and/or shareholders that Vishay and the other defendants were (a) breaching their respective fiduciary duties to Siliconix and its shareholders, (b) looting Siliconix for the benefit of Vishay, and (c) . . . intentionally driving the price of Siliconix down so that Vishay could acquire the stock . . . below [its] true value.

ER 1143. These allegations — that Ernst & Young had, among other things, falsified audited financial statements and covered up efforts to drive down the price of Siliconix stock — appeared for the first time in the SAC Amendment. No previous version of the complaint (or any other pleading filed by plaintiffs) had included anything of the sort.

June 13, 2006: Discussion of Delaware Judgment at Case Management Conference

After the California court declined to dismiss the lawsuit based on the October 2005 Delaware order, Vishay returned to the Delaware Chancery Court to seek a further order that the California court might recognize as having preclusive effect. ER 1195-96. Plaintiffs received notice of Vishay's motion but chose not to oppose it. ER 1341. In June 2006, the Delaware court issued a new order. ER 1338. This new order explicitly stated that the October 2005 order "encompasse[d], among other claims, all the claims asserted by the representative plaintiffs" in the California case and that plaintiffs had "settled and released . . . all the claims" in that case. ER

1339. The order also permanently enjoined plaintiffs from proceeding with the California lawsuit. ER 1339-40.

The new Delaware order was discussed at a case management conference held by the California court on June 13, 2006. ER 1207-14. Most of the discussion centered around how plaintiffs would proceed in light of the order. To give plaintiffs time to determine their strategy, the court set another conference for August 15. ER 1214. Ernst & Young asked the court whether it could postpone its response to the SAC Amendment until after the next conference, but the court denied this request. ER 1214-16. Neither Vishay nor Ernst & Young asked the court to dismiss the case or take any other action based on the new order.

June 30, 2006: Removal To Federal Court

On June 30, 2006 — thirty days after plaintiffs filed the SAC Amendment — Ernst & Young filed a Notice of Removal based on the allegations pleaded for the first time in the SAC Amendment. ER 1218-59. The Notice stated in plain terms that "[a]ll defendants consented to the removal of this action." ER 1258.

The removal was based on the federal Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which provides that a lawsuit pending in state court may be removed to federal court — and should thereafter be dismissed — if the lawsuit includes a class action claim that is "based on the statutory or common law of any State" and that alleges "a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f); ER 1256-57.

July 2006 to February 2007: Plaintiffs' Unsuccessful Effort to Remand

On July 31, 2006, plaintiffs moved to remand the case to state court. ER 1260-92. In support of their motion, plaintiffs offered three arguments. First, plaintiffs contended that the removal was untimely because earlier versions of the complaint had already provided a basis for removal long before the SAC Amendment was filed. ER 1281-82. Second, plaintiffs argued that the removal was procedurally improper because Vishay had not filed a formal joinder in the motion. ER 1279-81. Finally, plaintiffs asserted that defendants had waived any right to remove by voluntarily litigating the case in state court. ER 1284-86.

On February 13, 2007, the district court denied plaintiffs' motion. ER 1431-44. The court rejected each of plaintiffs' arguments. First, the court held that "Defendants had adequately cured any procedural defect in the Notice of Removal" by filing formal joinders once plaintiffs had raised the issue. ER 1436. Second, the court rejected the notion that removal was untimely, specifically finding that "Defendants could not have argued for removal on the basis of complete preemption under SLUSA until the [SAC] Amendment." ER 1437. It noted that Ernst & Young could not have been put on notice of removable claims by claims that were so poorly pleaded that demurrers to them were twice sustained. *Id.* Finally, the court held that defendants' motion practice in state court in response to prior, non-removable versions of the complaint did not waive their right to remove based on the SAC Amendment. ER 1437-38.

July 2007: Dismissal Of Case Based On Res Judicata

In March 2007, defendants formally moved for judgment in their favor based on the revised judgment of the Delaware Chancery Court. Ernst & Young, which had not filed an answer to the complaint, moved to dismiss under Rule 12(b)(6); Vishay, which had answered, moved for summary judgment on the same ground. ER 1445-71, 1542-65.

In an order issued July 19, 2007, the district court granted defendants' motions. ER 1714-19. The court delayed the effective date of its order for 90 days to give plaintiffs time to seek relief from the Delaware Chancery Court if they so wished. ER 1718. Plaintiffs declined to pursue such relief. Pl. Br. at 33. This appeal followed.

SUMMARY OF ARGUMENT

Plaintiffs are in the position they are in today because of two basic choices they made in litigating this case.

First, nearly four years after initiating this lawsuit, plaintiffs made the decision to transform what had been a garden-variety looting claim by minority shareholders into a securities fraud action subject to federal law. They made this choice in a last-ditch attempt to state a claim against Ernst & Young, which audited Siliconix but had no involvement in the alleged looting. When these new allegations resulted in their lawsuit being removed to federal court, they cried foul.

Second, plaintiffs sought to get two bites at the apple by participating in two separate proceedings concerning the same basic dispute. They took part in the Delaware settlement, reaping the benefits of the higher buyout price negotiated there, while still claiming the right to proceed with their lawsuit in California. When the district court held that they could not do so, they cried foul again.

Despite plaintiffs' protestations, both the removal to the district court and that court's subsequent dismissal were appropriate. On appeal, plaintiffs challenge the removal on three grounds: it came too late; it was defective because all defendants did not formally join in the removal; and defendants waived removal by litigating in state court. Each of these arguments is meritless.

- *Timing.* This case did not become removable until the filing of the SAC Amendment, which alleged misrepresentations in connection with Siliconix securities for the first time — thereby triggering the removal provisions of the Securities Litigation Uniform Standards Act ("SLUSA").

- *Joinder.* It is undisputed that all defendants consented to the removal. Nothing more is required in this Circuit. Moreover, any possible defect was cured when the defendants filed formal joinders in responding to the motion to remand. This Court has squarely held that even a defective removal should be affirmed where, as here, the defect was cured before entry of judgment.
- *Waiver.* Defendants could not have waived the right to remove by litigating prior versions of the complaint that were not removable. After the case became removable, defendants' only activity in the state court was to attend a status conference and request an extension of time to answer. A waiver of the right to remove must be clear and unequivocal. There was not even a hint of a waiver here.

The district court's dismissal of the complaint was also proper. For reasons discussed in detail in Vishay's brief, the district court correctly determined that this entire lawsuit is precluded by the judgment entered in the Delaware case, in which plaintiffs participated as class members and which plainly released all claims in this case, including those against Ernst & Young. Dismissal of the claims against Ernst & Young would also have been proper on other grounds presented to, but not reached by, the district court: their claims are preempted by SLUSA; they lack standing to pursue the derivative claim because they are no longer shareholders and did not make a proper demand on Siliconix's board of directors; and they have not properly pleaded a claim for breach of fiduciary duty.

For all of these reasons, the district court's judgment should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION TO REMAND THIS CASE TO STATE COURT.

A. The Removal Was Timely Because It Occurred Within 30 Days Of The First Pleading That Provided A Basis For Removal.

A defendant removing a case to federal court must file a notice of removal within one of two deadlines: either (1) within 30 days of receiving "a copy of the initial pleading setting forth the claim for relief" *or* (2) within 30 days of receiving "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). The second of these time periods — which plaintiffs seem to have overlooked in their brief (*see* Pl. Br. at 46) — allows defendants to effect a timely removal in circumstances where the initial pleading did not provide a basis for removal, but a later pleading does. That is precisely what happened here.

Removal in this case was based on the Securities Litigation Uniform Standards Act ("SLUSA"), which provides for the removal of cases involving class action claims that allege misrepresentations in connection with the purchase, sale, or holding of certain securities. 15 U.S.C. § 78bb(f); *Patenaude v. Equitable Life Assurance Soc'y*, 290 F.3d 1020, 1023-1024 (9th Cir. 2002); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87-88 (2006). On appeal, plaintiffs do not deny that this case is covered by SLUSA.[4] They contend, however,

[4] SLUSA provides for certain exceptions, none of which are applicable to the class action claim against Ernst & Young. *See* 15 U.S.C. § 78bb(f)(3) (providing exemptions for state law claims concerning issuers' dealings with their stockholders, actions by states, and contract claims against indenture trustees).

that the 30-day time limit was triggered by service of the First Amended Complaint in January 2005.[5] Pl. Br. at 46. Under their theory, the Notice of Removal filed in June 2006 was nearly a year and a half late.

But in fact, as the district court held, the First Amended Complaint did not provide a basis for removal. As is set forth in detail above, the claims in that complaint were based on allegations of looting by Vishay, not securities fraud, and indeed did not allege *any* actionable misconduct by Ernst & Young. *See* pp. 3-4, *supra*.

Nor, contrary to plaintiffs' suggestion (Pl. Br. at 48 n.22), did the Second Amended Complaint contain anything that would have made the case removable. That complaint, too, was based on claims of looting, as opposed to misrepresentations in connection with a security.[6] *See* pp. 6-7, *supra*. And, like the First Amended Complaint, the Second Amended Complaint failed to state any kind of claim against Ernst & Young. As the state court told plaintiffs: "I have a real problem with your pleadings with regard to Ernst & Young. . . . *You've not alleged they withheld anything.*" ER 1175 (emphasis added).

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[5] The original Complaint, which was not served on Ernst & Young, was purely a derivative action and did not include class action allegations. Derivative claims do not provide a basis for removal under SLUSA. *See* 15 U.S.C. § 78bb(f)(2)(B).

[6] The Complaint alleged that Vishay failed to give proper notice of appraisal rights. ER 0810. This allegation related to plaintiffs' claim for quasi-appraisal, which was covered by the "Delaware carve-out" to SLUSA and therefore was not separately removable. *See* 15 U.S.C. § 78bb(f)(3)(A)(ii). It was, however, properly removed as ancillary to plaintiffs' class action claim. *See* 28 U.S.C. § 1441(c) (providing for removal of the "entire case").

It was not until the SAC Amendment that plaintiffs alleged any securities-related misstatements supporting removal under SLUSA. In contrast to the previous pleadings, the SAC Amendment plainly alleged that Ernst & Young misrepresented or omitted material facts relevant to Siliconix shareholders. Specifically, the SAC Amendment alleged for the first time that Ernst & Young (i) issued false audit reports, (ii) made materially false statements to shareholders concerning material matters, and (iii) concealed (and thereby aided) Vishay's efforts to drive down the price of Siliconix stock so Vishay could buy it on the cheap. *See* pp. 7-8, *supra*. These are precisely the type of securities fraud allegations that SLUSA was intended to address. *Prof'l Mgmt. Assocs., Inc. Employees Profit Sharing Plan v. KPMG LLP*, 335 F.3d 800, 802-803 (8th Cir. 2003) (allegations of false statements and omissions in auditor's reports "place [the complaint] squarely within SLUSA's parameters"); *see also Dabit*, 547 U.S. at 89 ("The misconduct of which respondent complains here — fraudulent manipulation of stock prices — unquestionably qualifies as fraud 'in connection with the purchase or sale' of securities" under SLUSA). But no such allegations were included in the First or Second Amended Complaints.

Plaintiffs might argue that the detailed allegations of misrepresentation in the SAC Amendment are what they had in mind all along. But this Court has made clear that in determining when the time for removal begins to run, what matters is not what the plaintiff meant to say or what the defendant could have guessed, but what is "revealed affirmatively" by the words actually used in the relevant pleading. *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 695 (9th Cir. 2005). As the *Harris* Court explained:

> [N]otice of removability under § 1446(b) is determined through examination of the four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry. Thus, the first thirty-day requirement is triggered by defendant's receipt of an "initial pleading" that reveals a basis for removal. If no ground for removal is evident in that pleading, the case is "not removable" at that stage. In such case, the notice of removal may be filed within thirty days after the defendant receives "an amended pleading, motion, order or other paper" from which it can be ascertained from the face of the document that removal is proper.

Id. at 694; *accord Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) ("After *Harris* . . . we don't charge defendants with notice of removability until they've received a paper that gives them enough information to remove.").

Here, the basis for removal under SLUSA was not evident from the First or Second Amended Complaints, but instead could first be ascertained from the SAC Amendment. It is undisputed that the SAC Amendment was an "amended pleading, motion, order, or other paper" under Section 1446(b). *Cf. Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 779 (9th Cir. 1994) (holding that a reply brief constituted "other paper" for purposes of removal). Accordingly, this case became removable only after Ernst & Young received the SAC Amendment on May 31, 2006. Ernst & Young filed its Notice of Removal on June 30, 2006 — within the 30-day time limit.

B. The Notice Of Removal Properly Documented The Consent Of All Defendants; No Special Filing Was Required.

In a line of cases more than 100 years ago, the Supreme Court held that removal of a case to federal court requires all defendants to join in or consent to the removal. *See, e.g., Chicago, R.I. & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900). This "unanimity rule" finds no support in the text of the removal statute

itself.[7] Under modern principles of statutory interpretation, the text should control, and the fact that one defendant (here, Ernst & Young) filed a Notice of Removal should be sufficient. However, courts to date — including this Court — have continued to apply the unanimity rule. *See., e.g., Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999) ("Section 1446 requires all proper defendants to join or consent to the removal notice.").[8]

Here, it is undisputed that all defendants consented to the removal. Indeed, plaintiffs expressly acknowledge that the Notice of Removal stated that "[a]ll defendants consent to the removal of this action." Pl. Br. at 43 (quoting ER 1258.) Moreover, each of the other defendants filed a formal joinder in response to plaintiffs' motion to remand. Nonetheless, plaintiffs contend that the removal was defective because each defendant did not file a joinder or submit a separate written consent during the 30-day removal period. *Id.* at 45. In support of this argument, they cite a civil procedure hornbook, which in turn cites cases from the Fifth and Seventh Circuits and one from the Eastern District of Pennsylvania. *Id.*

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[7] The statute governing the process for removal merely states in relevant part that "*[a] defendant or defendants* desiring to remove any civil action . . . shall file in the district court . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." 28 U.S.C. § 1446(a) (emphasis added). There is no hint of any requirement that all defendants join or consent to the removal.

[8] Notably, when Congress recently addressed removal requirements for certain class actions in the Class Action Fairness Act of 2005 ("CAFA"), it specifically rejected the unanimity rule. *See* 28 U.S.C. § 1453(b) (noting that a class action subject to CAFA "may be removed by any defendant without the consent of all defendants"). The class action claim here is not among those subject to CAFA.

Conspicuously absent from plaintiffs' argument is any reference to the law of *this* circuit — and for good reason: there is no Ninth Circuit case law holding that consent to removal must be in writing to be effective. Although this Court has required that all defendants "join" or "consent to" removal, it has not held that this must be accomplished in a particular way. *See Dubon v. HSBC Bank Nevada, N.A.*, No. 05-2799 SC, 2005 U.S. Dist. LEXIS 37290, at *6-7 (N.D. Cal. Sept. 15, 2005) (noting that Ninth Circuit "has not yet addressed . . . the precise form a co-defendant's consent to join in removal must assume").

Moreover, plaintiffs conveniently ignore the decision of the Sixth Circuit in *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195 (6th Cir. 2004), which is directly on point here and squarely rejects their argument. In *Harper*, three defendants jointly filed a notice of removal. The notice stated that a fourth defendant, Kelly, had consented to the removal. The plaintiff moved to remand, arguing that the mere statement of Kelly's consent was insufficient. The Sixth Circuit flatly disagreed, holding that nothing required Kelly "to submit a pleading, written motion, or other paper directly expressing [his] concurrence or prohibited counsel for the other defendants from making such a representation on Kelly's behalf." *Id.* at 201-202. The Court concluded that the same method at issue in this case — a statement in the Notice of Removal that all defendants had consented — was fully sufficient to support removal. *Id.* at 202.[9] *Accord Sicinski v. Reliance Funding Corp.*, 461 F.

[9] The *Harper* court also noted another ground for affirmance: Kelly had filed an answer within the removal period in which he stated that the case should be in federal court. However, this was a secondary, alternative ground. *See* 392 F.3d at 202.

Supp. 649, 652 (S.D.N.Y. 1978) (holding that statement in notice of removal of co-defendant's consent was sufficient, and adding that a later-filed affidavit from the co-defendant "cure[d] any defect in the original petition").

It is true that some courts elsewhere have required consent to be stated by each defendant directly, although these courts do not even agree among themselves as to how that consent must be expressed.[10] But there is no good reason in either law or policy for such a requirement. The removal statute itself requires no specific form of consent. Nor is there any reason to demand a particular manifestation of consent as a matter of policy. Courts routinely rely on representations of counsel concerning the position of another party in connection with motions for extension of time and other administrative matters. Ethics rules and Fed. R. Civ. P. 11 create a strong disincentive for an attorney to lie about another party's consent — especially where, as with removal, the lie would be quickly revealed and punished. As the Sixth Circuit noted in *Harper*, "[h]ad counsel ... misrepresented Kelly's concurrence in the removal, no doubt Kelly would have brought this misrepresentation to the court's attention and it would have been within the district court's power to impose appropriate sanctions, including a remand to state court." 392 F.2d at 202.[11]

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[10] *See, e.g., Pritchett v. Cottrell, Inc.*, 512 F.3d 1057, 1062 (8th Cir. 2008) (requiring "some timely filed written indication" but not actual joinder in the removal); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988) (each defendant must actually join petition for removal); *Colin K. v. Schmidt*, 528 F. Supp. 355, 358-359 (D.R.I. 1981) (consent stated orally in court was sufficient).

[11] For this reason, the argument that a direct expression of consent from each defendant is needed to "bind" the defendant (*see, e.g., Ogletree v. Barnes*, 851 F. Supp. 184, 190 (E.D. Pa. 1994)) carries little weight. There is no reason to believe

Far from advancing any important policy concern, a judicially-created rule requiring a particular type of consent would merely constitute a procedural trap for the unwary. Imposing such a requirement retroactively, to govern a removal that occurred at a time when no such requirement existed in the law of this Circuit, would be especially unfair. Here, Ernst & Young correctly represented in its Notice of Removal that all defendants consented. Nothing further was or should be required.

C. Any Arguable Defect In Documenting Consent Is Irrelevant Because It Was Cured Before Judgment Was Entered.

Even assuming *arguendo* that the Notice of Removal was defective because the other defendants did not consent in writing, this "defect" was cured when the other defendants subsequently filed a formal joinder in support of the Notice of Removal. ER 1406-08. Under the law of this Circuit, the fact that defendants cured any defect makes the sufficiency of the Notice irrelevant on appeal.

This Court faced exactly this situation in *Parrino v. FHP, Inc.*, 146 F.3d 699 (9th Cir. 1998). In that case, defendant FHP removed the case to federal court. Plaintiff Parrino moved to remand because a co-defendant, Friendly Hills, had not joined in the removal. Friendly Hills later filed a written joinder, but not until after the time to remove had expired. The district court denied the motion to remand and then dismissed the case for failure to state a claim. *Id.* at 702.

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that defendants would be likely to make false claims of consent, but even if that did happen, little harm would result since the case would be promptly remanded.

On appeal, Parrino once again argued that the case should be remanded because of Friendly Hills' failure to file a timely joinder. This Court declined to order a remand, noting that any defect in removal had been cured in the district court. The Court stated that:

> a procedural defect existing at the time of removal but cured prior to entry of judgment does not warrant reversal and remand of the matter to state court. *See* [*Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 77 (1996)] ("To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice."). Because Friendly Hills' initial failure to join in the notice of removal was cured when Friendly Hills later joined in the notice, remand on procedural grounds would be an empty formality.

Parrino, 146 F.3d at 703. *Accord Prize Frize*, 167 F.3d at 1265-1266 (noting rule that "the existence of subject matter jurisdiction at time of judgment cures any defects in removal procedure").[12]

Plaintiffs' attempt to distinguish *Parrino* (Pl. Br. at 45) is unavailing. They note that in *Caterpillar*, the Supreme Court case cited in *Parrino*, the appeal came after a trial, while the appeal here follows a dismissal on the pleadings. But *Parrino* itself was an appeal from a dismissal on the pleadings. *See* 146 F.3d at 702. *Parrino* is on all fours with this case. *See also Prize Frize*, 167 F.3d at 1266 (applying *Parrino*-type analysis to case dismissed on motion).

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[12] This rule does not apply where the appellate court reverses a judgment on the merits. *Prize Frize*, 167 F.3d at 1266. As noted below, however, the dismissal of the complaint here was proper. *See* pp. 25-27, *infra*.

Accordingly, the fact that all defendants had consented in writing before the district court properly entered judgment in defendants' favor cures any potential issue with the original Notice of Removal.

D. The Argument That Defendants Waived Removal By Litigating Prior, Non-Removable Pleadings Is Frivolous.

Plaintiffs' final argument in support of remand is that "E&Y again and again waived the right to remove" by "indicating a willingness to litigate in [state court] before filing a notice of removal." Pl. Br. at 48. This argument is frivolous.

Ernst & Young supposedly indicated its "willingness to litigate" in state court by engaging in motion practice relating to plaintiffs' First and Second Amended Complaints. *See* Pl. Br. at 48. But as noted above, these versions of the complaint were not removable. The defendants could hardly refuse to respond to them in the hope that some future version would provide a basis for removal: they had to play the hand they were dealt at the time. Where "a party takes necessary defensive action to avoid a judgment being entered automatically against him, such action . . . does not waive the right to remove." *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994); *see also Pease v. Medtronic, Inc.*, 6 F. Supp. 2d 1354, 1359 (S.D. Fla. 1998) (moving to dismiss before the complaint supported removal did not waive right to remove).

After plaintiffs filed a removable pleading — the SAC Amendment — no defendant made any further motion in state court. Faced with this inconvenient fact, plaintiffs resort to grossly distorting what happened at the June 13, 2006 case management conference, which was the only event to occur in the state court after the

SAC Amendment was filed. Plaintiffs contend that Ernst & Young "requested Judge Komar to dismiss the action based on the Delaware Settlement . . . in open court on June 13, 2006." Pl. Br. at 48; *see also id.* at 30. But a review of the transcript of the June 13 conference makes clear that nothing of the sort occurred. Neither Ernst & Young nor Vishay asked the court to dismiss the action based on the Delaware order. Vishay's counsel indicated that Vishay *might, in the future*, file a dispositive motion based on the order, depending on what plaintiffs chose to do, and Ernst & Young's counsel asked for additional time to respond to the SAC Amendment. ER 1213-15. But neither party asked for a dismissal. Ernst & Young is aware of no support for the notion that a defendant waives a right to remove by asking the court for an extension of time. To the contrary, this Court has made clear that "[a] waiver of the right of removal must be clear and unequivocal." *Bayside*, 43 F.3d at 1240 (citation omitted).

In sum, there is no basis in fact or law for plaintiffs' notion that defendants waived their right to remove. Their argument is not just wrong, but frivolous.

II. THE DISTRICT COURT CORRECTLY GRANTED ERNST & YOUNG'S MOTION TO DISMISS THE COMPLAINT.

A. The District Court Correctly Held That All Of Plaintiffs' Claims Are Barred By The Delaware Judgment.

For the reasons noted at length in the brief of the Vishay defendants, the district court correctly determined that plaintiffs' entire case is precluded by the judgment against plaintiffs in the Delaware Action.[13]

There can be no doubt that the claims asserted here against Ernst & Young are among those released in Delaware. The broad release in the October 2005 Delaware order specifically covered claims against Vishay's accountants, as well as consultants, agents and others. *See* pp. 5-6, *supra* (citing ER 0925-26.) Moreover, the Delaware court's subsequent June 2006 order expressly provided that its previous order encompassed "*all the claims* asserted by the representative plaintiffs" in the present litigation and that plaintiffs had "settled and released . . . *all the claims*" in this case. *See* pp. 8-9, *supra* (citing ER 1339) (emphasis added).

B. Dismissal Was Also Proper On Other Grounds Not Reached By The District Court.

Although the district court dismissed the action solely on the basis of the Delaware judgment, dismissal of all claims against Ernst & Young would also have been proper on other grounds presented to, but not reached by, the district court.

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[13] Although federal jurisdiction under SLUSA was based on the class action claim against Ernst & Young, the district court properly exercised its supplemental jurisdiction in disposing of the entire case. *See* 28 U.S.C. § 1367; *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131-1132 (9th Cir. 2002) (affirming district court's dismissal of a securities claim under SLUSA and a pendent state labor law claim).

This Court "may affirm the decision of the district court on any basis which the record supports." *Branson v. Nott*, 62 F.3d 287, 291 (9th Cir. 1995).

SLUSA Preemption. As discussed above, the class action claim is covered by SLUSA, which provides not only for the removal, but also the dismissal, of covered class actions. *See* pp. 14-15, *supra*; *Patenaude*, 290 F.3d at 1023-1024. Accordingly, the class claim must be dismissed. *Kircher v. Putman Funds Trust*, 547 U.S. 633, 644 (2006) ("If the action is precluded, neither the District Court nor the state court may entertain it, and the proper course is to dismiss").

Lack of Standing. Additionally, as the Vishay defendants explain in their brief, plaintiffs lack standing to pursue their derivative claim on behalf of Siliconix because they are no longer shareholders.[14] They also lack standing because they have not pleaded facts indicating that they made a proper demand on Siliconix's board as to the claims against Ernst & Young (*see, e.g., Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204, 1210 (9th Cir. 1980) (applying demand requirement to claims against auditors); *Khanna v. McMinn*, C.A. No. 20545-NC, 2006 Del. Ch. LEXIS 86, at *42 (Del. Ch. May 9, 2006) (noting that demand must specifically state the legal action the shareholder wants the board to take)), and have not pleaded with particularly that demand would have been futile (*Rales v. Blasband*, 634 A.2d 927,

[14] The "merger exception" to the continuous ownership requirement does not help plaintiffs here. That exception applies where plaintiffs "contend they had lost their stock due to the same wrongful conduct that was the subject of the derivative suit they were trying to bring." *Kona Enters. v. Estate of Bishop*, 179 F.3d 767, 770 (9th Cir. 1999). But here, plaintiffs contend (as they must to attempt to avoid the preclusive effect of the Delaware judgment) that their claims in this case are unrelated to the merger in which they relinquished their stock ownership. *See, e.g.*, Pl. Br. at 57. They cannot have it both ways.

934 (Del. 1993) (stating that court "must determine whether or not the particularized factual allegations . . . create a reasonable doubt that . . . the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand")).

No Fiduciary Duty. Plaintiffs also have not stated a claim against Ernst & Young for breach of fiduciary duty. An independent auditor does not normally owe a fiduciary duty to its client, and there are no facts pleaded that would establish an unusual relationship. *See, e.g., Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1065 (9th Cir. 1971); *In re SmartTalk Teleservices, Inc.*, 487 F. Supp. 2d 928, 931-932 (S.D. Ohio 2007) (discussing cases). Indeed, the duty of loyalty at the heart of a fiduciary relationship is flatly inconsistent with the independence required of an auditor. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984) (contrasting "attorney's role as the client's confidential adviser and advocate" with auditor's role that requires "total independence from the client at all times"). Further, no facts are alleged that would support a claim that Ernst & Young knowingly participated, or even had reason to participate, in any breach of fiduciary duty by the other defendants. *See Trenwick Am. Litig. Trust v. Ernst & Young*, 906 A.2d 168, 215 (Del. Ch. 2006) (dismissing claims that professional advisors aided or conspired in client's breach of fiduciary duty where complaint was "devoid of facts suggesting that any of the defendant advisors had any reason to believe they were assisting in a breach of fiduciary duty").

CONCLUSION

For the foregoing reasons, the district court's dismissal of the Second Amended Complaint, as further amended by the SAC Amendment, should be affirmed.

Dated: April 8, 2008

Respectfully submitted,

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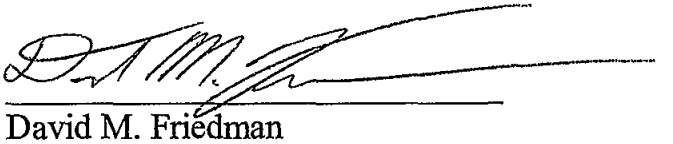
CERTIFICATION OF COMPLIANCE
WITH CIRCUIT RULE 32

Pursuant to Circuit Rule 32(e)(4), I certify that the text of this brief is double-spaced (28 points), uses Times New Roman, 14 point, proportionately-spaced type-face and contains 7,518 words.

Dated: April 8, 2008

Respectfully submitted,



David M. Friedman
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ADDENDUM OF STATUTES

15 U.S.C. 78bb(f):

(f) Limitations on remedies

(1) Class action limitations
No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) Removal of covered class actions
Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) Preservation of certain actions

(A) Actions under State law of State of incorporation

(i) Actions preserved. Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(ii) Permissible actions. A covered class action is described in this clause if it involves—
(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that—

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and
(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(B) State actions

(i) In general. Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

* * *

(C) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

* * *

(5) Definitions

For purposes of this subsection, the following definitions shall apply:

* * *

(B) Covered class action

The term "covered class action" means—

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged

misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and
(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) Exception for derivative actions
Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

* * *

(E) Covered security
The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 U.S.C. 77r (b)], at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 [15 U.S.C. 77a et seq.] pursuant to rules issued by the Commission under section 4(2) of that Act [15 U.S.C. 77d (2)].

* * *

28 U.S.C. 1367(a) and (b):

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other

claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. 1441(c):

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title [federal question] is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. 1446(a) and (b):

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. If the case stated by the

initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. 1453(b) and (d):

(b) In General.— A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446 (b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(d) Exception.— This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p (f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb (f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b (a)(1)) and the regulations issued thereunder).

* * *

NOTE: Section applicable to any civil action commenced on or after Feb. 18, 2005, see section 9 of Pub. L. 109–2, set out as an Effective Date of 2005 Amendment note under section 1332 of this title.

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111-2562.

On **April 8, 2008**, I served the following document described as:

BRIEF OF DEFENDANT-APPELLEE ERNST & YOUNG LLP

by serving two copies of the above-described document in the following manner:

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I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server. Under that practice, documents are deposited to the Latham & Watkins LLP personnel responsible for dispatching a messenger courier service or registered process server for the delivery of documents by hand in accordance with the instructions provided to the messenger courier service or registered process server; such documents are delivered to a messenger courier service or registered process server on that same day in the ordinary course of business. I caused a sealed envelope or package containing the above-described documents and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server.

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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 8, 2008**, at San Francisco, California.

Caroline Yu