Nos. 06-2136, 06-2180

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

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**JOSEPH SKIRCHAK AND BARRY L. ALDRICH, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED**

PLAINTIFFS-APPELLEES / CROSS-APPELLANTS,

v.

**DYNAMICS RESEARCH CORPORATION**

DEFENDANT-APPELLANT / CROSS-APPELLEE.

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APPEAL FROM AN ORDER COMPELLING ARBITRATION ISSUED BY
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

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# BRIEF OF AMICUS CURIAE PUBLIC JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES

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May 7, 2007

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Public Justice, P.C. ("Public Justice") hereby states that it does not have any parent corporation, nor does it issue stock to the public, and that no publicly held company owns any stock in Public Justice.

## INTEREST OF AMICUS CURIAE

Public Justice, P.C. ("Public Justice") hereby submits this *Amicus Curiae* brief in support of Plaintiffs-Appellees and in support of affirmance of the District Court's decision finding that the purported waiver of class action rights in Appellant, Dynamics Research Corporation, Inc.'s Dispute Resolution Program is unconscionable and unenforceable, and allowing Plaintiffs' claims to proceed on a class basis before an arbitrator.

Public Justice[1] is a national public interest law firm dedicated to fighting for justice through precedent-setting and socially-significant individual and class action litigation designed to enhance consumers' and workers' rights, environmental protection and safety, civil rights and civil liberties, America's civil justice system, and the protection of the poor and powerless. Public Justice is committed to ensuring that all Americans have meaningful access to justice in their dealings with large corporations.

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[1] Public Justice recently shortened its name from Trial Lawyers for Public Justice.

Through our Class Action Preservation Project, Public Justice has been lead counsel in several appellate cases—including the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 113 P.3d 1100 (Cal. 2005)—in which courts have held that class action bans in contracts of adhesion are unconscionable where they would effectively immunize the corporate drafter from liability under state remedial laws protecting individuals. *See also Muhammad v. County Bank of Rehoboth Beach, Delaware* 189 N.J. 1, 912 A.2d 88 (N.J. 2006); *Ting v. AT&T,* 319 F.3d 1126 (9th Cir. 2003).

Much of Public Justice's work involves civil rights claims, and we represent plaintiffs in employment discrimination and other civil rights actions throughout the country, often serving clients who cannot secure representation from the private bar because their cases are novel and/or too expensive to litigate. For example, Public Justice achieved a landmark settlement guaranteeing equal pay and promotional opportunities for women at Lawrence Livermore National Laboratory in *Singleton v. Regents of the University of California* (Case No. 807233-1, Alameda County Superior Court). Public Justice's Title IX litigation has successfully battled sex discrimination at Brown University and numerous other schools, preserved women's opportunities to participate in intercollegiate athletics, and made

new law to advance women's rights. *See, e.g., Cohen v. Brown University* (1st Cir. 1996) 101 F.3d 155, *cert. denied* (1997) 520 U.S. 1186.

Public Justice has also previously appeared as *amicus curiae* on numerous occasions, including in *Graham v. DaimlerChrysler Corp.,* 101 P.3d 140 (2004), and *Broughton v. Cigna Healthplans of California,* 988 P.2d 67 (1999).

All parties have consented to the filing of this brief.

## INTRODUCTION

Increasingly, employers, creditors, and other institutions are using broad class action bans in the employment and consumer contracts they draft. These contract clauses "waive not only the right to participate in class actions, but also the right to participate in classwide arbitrations or to aggregate claims with others in any form of judicial or arbitral proceeding." Myriam Gilles, *Opting Out of Liability*: *The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 376, n. 15 (2005). The widespread use of such bans by employers and retail sellers has been characterized by one scholar as part of a "stampede in fashioning pre-dispute binding arbitration agreements drafted to cover every imaginable cause of action arising out of employment or arising under consumer law." Sandra F. Gavin, *Unconscionability Found*: *A*

*Look At Pre-Dispute Mandatory Arbitration Agreeements 10 Years After Doctor's Associates v. Casarotto*, 54 Clev. State L. Rev. 249, 258 (2006).

Where these bans effectively disenfranchise employees and consumers, by creating a "*de facto* liability shield"[2] for the drafter, the courts have found them unconscionable, in a line of decisions exemplified by this Court's holding in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) and by the District Court's application of *Kristian's* principles to the employment context here. *Skirchak, et al. v. Dynamics Research Corp.*, 432 F. Supp. 2d 175, 181 (D. Mass. 2006 (App. 129).

These cases recognize, as *Kristian* and *Skirchak* do, that in particular circumstances like those present here, the real-world effect of class action bans is to insulate the drafter from any systemic challenge to illegal conduct, much less any liability. In effect "the class action prohibitions in these arbitration agreements have been used as a sword to strike down access to justice instead of as a shield against prohibitive costs'." *Luna v. Household Finance Co*., 236 F.Supp.2d 1166, 1179 (W.D.Wash. 2002), *quoting Mendez v. Palm Harbor Homes, Inc*., 111 Wash.App. 446, 465, 45 P.3d 594 (2002). This use of a class action ban,

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[2] *Kristian* used this term to describe the class action ban it invalidated in that case. *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006).

which deprives employees of an effective means to enforce their rights and removes one incentive for employers to comply with wage and hour laws, is unconscionable. *Skirchak*, 432 F. Supp. 2d at 181.

DRC's hasty and unconventional means of implementing its class action ban form part of the District Court's procedural unconscionability analysis. *Skirchak*, 432 F. Supp. 2d at 180. Amicus curiae, however, limit their discussion of the *Skirchak* decision to the substantive unconscionability aspects of the equation. As DRC's class action ban serves as a *de facto* liability shield which has the practical effect of insulating it from any effective employee challenge to its practices, *Skirchak* used an unconscionability analysis which mirrors the reasoning of *Kristian* to properly find the ban invalid.

## I. DRC'S CLASS ACTION BAN OPERATES AS A *DE FACTO* LIABILITY SHIELD

### A. The Unconscionable Use Of Class Action Bans

As the District Court observed, "[a]n arbitration agreement that eliminates the right to a class-wide proceeding may have 'the substantial effect of contravening the principle behind class action policies and chilling the effective protection of interests common to a group'." *Skirchak*, 432 F. Supp. 2d at 181 (*quoting Ingle v. Circuit City Stores, Inc*., 328 F.3d 1165, 1176 n.13 (9th Cir. 2003)). This *de facto* liability shield is not

merely the effect of the class action ban, but its intent as well. As one of the seminal class action ban decisions bluntly puts it:

> [T]he manifest one-sidedness of the no class action provision at issue here is blindingly obvious … This provision is clearly meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress….

*Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1100-01, 118 Cal.Rptr.2d 262 (2002).

Class action bans like DRC's are simply the latest attempt to contract away potential liability in an effort that began with arbitration agreements generally. "[D]espite the potential disadvantages to employers who require arbitration, the primary question asked by companies considering arbitration is 'Can we cut off class and class actions by requiring arbitration?' " Gilles, *supra*, at 397, n. 123 (discussing from a historical perspective the evolution of mandatory arbitration clauses as a way to avoid class actions). One critic has termed this effort "do it yourself" law reform.

> One might call this the 'do it yourself' approach to law reform: the company need not convince any legislature to pass revised laws, nor persuade any judicial body to change court rules, but rather merely *choose to eliminate the pesky class action on its own*... .

Jean R. Sternlight & Elizabeth J. Jensen, As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive? Efficient Business Practice or Unconscionable Abuse? 42 Wm. & Mary L. Rev. 1, 11 (2000)(emphases added). The use of an explicit class prohibition, like DRC's, is merely another evolutionary step in this progression. See Jean R. Sternlight & Elizabeth J. Jensen, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse? 67-SPG Law & Contemp. Probs. 75 (2004).

### B. *Skirchak*, Like *Kristian*, Uses An Effect-Based Analysis To Find DRC's Ban Exculpatory

Both *Kristian* and *Skirchak* hold that where a class action is the only effective vehicle for a group of people to vindicate their rights, the use of a class action ban is an unconscionable abuse. Such is the case with DRC's ban. The *Skirchak* court reached this conclusion by applying an unconscionability analysis. While *Kristian* relied to a large extent on the vindication of statutory rights analysis in finding the class action ban

there unenforceable, it acknowledges that the vindication and unconscionability analyses are two sides of the same coin: "the unconscionability analysis always includes an element that is the essence of the vindication of statutory rights analysis - the frustration of the right to pursue claims granted by statute." *Kristian,* 446 F.3d at 60, n. 22.

Underscoring the similarity of both approaches, *Kristian* relies on six consumer cases which invalidate class action bans on unconscionability grounds, and emphasizes that "these decisions *contain reasoning that mirrors our own." Id*. (emphasis added). *Kristian*'s vindication of rights emphasis and *Skirchak's* focus on the unconscionability analysis are alternative, related, and equally valid bases for denying effect to the DRC class action ban. Both have the focal point of examining the real world effect of an ostensibly mutual term that effectively insulates the drafter from liability.

## II. MIRRORING *KRISTIAN* - PRE- AND POST- *KRISTIAN* CASELAW NEGATE UNCONSCIONABLE ATTEMPTS AT "OPTING OUT OF LIABILITY"

While class action bans are not *per se* unconscionable, the majority of recent decisions find them unconscionable where, as in *Kristian* and *Skirchak*, the ban is unfairly one-sided and its effect is to provide a *de facto* liability shield for the drafter, or, as Professor Gilles

phrases it, "opting out of liability". A recent Wisconsin decision describes the arc of this trend. Acknowledging that a majority of courts had upheld class action bans until very recently, the Wisconsin Court of Appeals nevertheless said " [w]e are, however, persuaded by what appears to be a growing minority of courts that a ban of class-wide relief is a significant factor (and in at least one instance a determinative factor) in invalidating an arbitration provision as unconscionable". *Coady v. Cross Country Bank, Inc*., 2007 WL 188993 (Jan. 25, 2007, Wis.App.).[3] The cases which *Coady* refers to use analyses which, like *Skirchak*, mirror *Kristian's*. In fact, *Kristian* cited three of the same cases on that score.[4]

### A. *Kristian* And The Cases Which Mirror It Focus Primarily On Exculpatory Effect

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[3] Earlier decisions, upon which DRC relies, did not address the issue of the exculpatory effect of class action bans, but instead focused primarily on whether the statute at issue prohibited the ban of the ability to proceed as a class. *See, e.g., Adkins v. Labor Ready,* 303 F. 3d 496 (4th Cir. 2002); *Carter v. Countrywide Credit Indus.,* 362 F. 3d 294 (5th Cir. 2004); *Horenstein v. Mortgage Market, Inc.,* 9 Fed. Appx. 619 (9th Cir. 2001).

[4] Both courts cite *Discover Bank v. Superior Court*, 36 Cal.4th 148, 113 P.3d 1100 (Cal. 2005); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (W.Va. 2002); *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla.App. 1 Dist. 1999).

*Skirchak's* focus on the class action ban's chilling, unfair effect on the individual employee's ability to vindicate workplace rights parallels *Kristian's* recognition that the practical effect of a class action ban affects its validity. So too, do the courts which mirror this approach.

This effect-based analysis looks beyond the literal provisions of the ban, as typically (as with the DRC provision) those provisions technically allow individual consumers or employees to bring their claims individually in some forum. *See Skirchak,* at 178 (discussing terms of DRC dispute resolution program); *Kristian,* 446 F.3d at 31-32 (arbitration agreement allows arbitration of individual claims). In reality, however, the *effect* of these provisions make it difficult or impossible to challenge widespread practices. *Kristian,* 446 F.3d at 59-60.

For this reason *Kristian* emphasizes the need for courts to recognize the real world effect of the ban: "[w]e are not required to close our eyes to the … [reality of the circumstances]. … We see no reason to ignore the obvious." *Kristian,* 446 F. 3d at 52. *Kristian* noted the similarities in the ban's effect to that in *Ting v. AT&T,* 319 F.3d 1126, 1130 (9th Cir. 2003), which also struck down an exculpatory class ban:

> The parallels between the effect of the class action ban in *Ting* and the class mechanism bar in the Policies & Practices is impossible to ignore. If the class mechanism prohibition here is enforced, Comcast

> will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law. Plaintiffs will be unable to vindicate their statutory rights. Finally, the social goals of federal and state antitrust laws will be frustrated because of the "enforcement gap" created by the *de facto* liability shield.

446 F. 3d at 61.

Here, the District Court's assessment of the effect of DRC's ban is the same: "The class action provision thereby circumscribes the legal options of these employees, who may be unable to incur the expense of individually pursuing their claims." *Skirchak*, at 181.

*Kristian's* reference to decisions which mirror its own analysis invoked consumer cases which found that prohibiting class actions made it economically unfeasible to bring claims challenging unfair business practices. 446 F.3d at 60, *citing Ting,* 319 F.3d at 1130; *Luna v. Household Finance Co*., 236 F.Supp.2d 1166 (W.D.Wash. 2002); *Lozada v. Dale Baker Oldsmobile, Inc.,* 91 F.Supp.2d 1087, 1105 (W.D.Mich. 2000); *Discover Bank v. Superior Court*, 36 Cal.4th 148, 113 P.3d 1100 (Cal. 2005); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (W.Va. 2002); *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla.App. 1 Dist. 1999).

While consumer cases focus on the small size of the potential recovery as one factor in making a class ban exculpatory, as discussed in section 3, *infra*, other factors may make class action bans in the employment context exculpatory. Public agencies frequently do not have the resources to fully enforce employee protection laws. Many employees whose rights have been violated may not, absent a class action, be aware of their rights or realize that they have been violated. Further, assuming an individual employee is aware that her rights have been violated, she may well be unable to find competent counsel to bring the case on an individual basis. Finally, assuming such an employee has the resources to bring her case on an individual basis, she may well be deterred from doing so by fear of retaliation by her employer. Thus, significant obstacles exist that may discourage employees from bringing individual claims. When these factors are present, a class action would be the only effective means of holding an employer responsible for violating the law, and a contractual class action ban, if enforced, would be just as exculpatory as a ban in a consumer case bringing small damages claims.

Each of the decisions *Kristian* cites are based on the same premise: "that a class mechanism bar can *impermissibly frustrate* the prosecution of

claims in *any* forum, arbitral or judicial," serving to shield the business from liability even where it has violated the law. *Kristian,* 446 F.3d at 60-61, *quoting Ting v. AT & T,* 182 F.Supp.2d 902, 918 (N.D.Cal. 2002)("the prohibition on class action litigation *functions as an effective deterrent to litigating many* types of claims involving rates, services or billing practices and, ultimately, would serve to *shield AT & T from liability* even in cases where it has violated the law.") (emphasis added).

While acknowledging that courts generally favor arbitration in appropriate cases, these decisions hold that using class action bans that inappropriately fashion the do-it-yourself tort reform that Prof. Sternlight warns against are unconscionable. In *Luna, supra*, the court struck down a class action ban in a consumer finance contract, noting that it "was likely to bar actions involving practices applicable to all potential class members, but for which an individual consumer has so little at stake that she is unlikely to pursue her claim." 236 F. Supp. 2d at 1179. The court cited an earlier Washington state case, *Mendez v. Palm Harbor Homes, Inc*., 111 Wash. App. 446, 465, 45 P.3d 594 (2002), which refused to compel arbitration on similar grounds, while acknowledging the general enforceability of arbitration provisions:

> Avoiding the public court system to save time and money is a laudable societal goal. But avoiding the public court system in a way

> that effectively denies citizens access to resolving everyday societal disputes is unconscionable. Goals favoring arbitration of civil disputes must not be used to work oppression.

The common theme, that recurs throughout the caselaw, is that class bans which operate to exempt businesses from responsibility for their own illegal actions are unconscionable because "the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." *Discover Bank v. Superior Court*, 36 Cal.4th 148, 162-163, 113 P.3d 1100 (Cal. 2005).

In a similar vein, *Powertel, Inc. v. Bexley*, 743 So.2d 570, 575 (Fla.App. 1 Dist. 1999) held that the class action ban insulated *Powertel* from any liability, removing a potentially powerful deterrent against over-reaching:

> The arbitration clause also effectively removes Powertel's exposure to any remedy that could be pursued on behalf of a class of consumers. .... The prospect of class litigation ordinarily has some deterrent effect on a manufacturer or service provider, but that is absent here.

Likewise, in *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 562-563, 567 S.E.2d 265, 278-79 (W.Va. 2002) the West Virginia Supreme Court cited the loss of an incentive to comply with the law when class proceedings were unavailable, and the harm this causes both the individual consumer and the public at large:

> Class action relief-including the remedies of damages, rescission, restitution, penalties, and injunction-is often at the core of the effective prosecution of consumer, employment, housing, environmental, and similar cases.

*Id., citing Riverside v. Rivera,* 477 U.S. 561, 575, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466, 480 (1986) ("'If the citizen does not have the resources, his day in court is denied him; the ... policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.' 122 Cong.Rec. 33313 (1976) (remarks of Sen. Tunney).") Thus, the court noted, allowing class bans in employment and consumer contracts "would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable." *Id.* Where this is the result, as it is here, the class ban is unenforceable.

The District Court's decision is completely consistent with these cases. As did prior decisions, *Skirchak* cites the deterrent effect of class actions, noting that the class action ban does not unfairly prejudice the rights of just the named plaintiffs, but of employees all across the spectrum at DRC:

> In this respect, the class action ban is not only unfair to DRC employees, but also removes any incentive for DRC to avoid the type of conduct that might lead to class action litigation in the first instance. The class action clause is therefore substantively unconscionable.

*Skirchak*, at 181.

The one-sided nature of the class ban contributes to its unconscionability as well. As *Skirchak* recognized, DRC's class action ban has only the guise of reciprocity, in reality it is "patently one-sided," because the benefit of the ban flows only to DRC. *Id.*, *quoting Ingle v. Circuit City Stores, Inc*., 328 F.3d 1165, 1177 (9th Cir. 2003). Such a contract provision, "so one-sided as to be oppressive," is substantively unconscionable. *Id*. The Ninth Circuit, in *Ingle*, spoke plainly about this transparent device and its underlying motive:

> Circuit City, through its bar on class-wide arbitration, *seeks to insulate itself* from class proceedings while conferring *no corresponding benefit to its employees* in return. This one-sided provision proscribing an employee's ability to initiate class-wide arbitration *operates solely to the advantage of Circuit City*. Therefore, because Circuit City's prohibition of class action proceedings in its arbitral forum is manifestly and shockingly one-sided, it is substantively unconscionable.

*Id.*, at 1176 (emphases added). *See also Luna v. Household Finance Co*., 236 F.Supp.2d 1166 (W.D.Wash. 2002).

### B. Following *Kristian*, Other Courts Have Applied The Same Reasoning, Continuing The Trend Towards Invalidating Exculpatory Class Action Bans

A number of recent state court cases decided after *Kristian* apply the same principles to invalidate similar bans, again focusing on exculpatory effect. In *Muhammad v. County Bank of Rehoboth Beach*, 189 N.J. 1, 912 A.2d 88 (N.J. 2006), the New Jersey Supreme Court struck down a class

action ban in a payday loan contract. The court noted that its analysis of "the public interests affected by the contract," required it "to determine whether the effect of the class-arbitration bar is to prevent plaintiff from pursuing her statutory consumer protection rights and thus to shield defendants from compliance with the laws of this State." 189 N.J. at 19. While noting that the class action ban was not exculpatory in the strictest sense, the court found that because the individual damages at issue were minimal, its effect was to render individual enforcement of the plaintiff's and other consumers' statutory rights "difficult if not impossible" and that "[i]n such circumstances a class-action ban can act effectively as an exculpatory clause." 189 N.J. at 19. As the court observed:

> To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.

189 N.J. at 20.

In *Vasquez-Lopez v. Beneficial Oregon, Inc.,* 210 Or.App. 553, 152 P.3d 940 (Or.App. 2007), the Oregon appellate found that a class action ban in a mortgage loan contract was unconscionable. The court first acknowledged the importance of class actions: "the opportunity that the class action ban denies to borrowers is, in many instances, a crucial one, without

which many meritorious claims would simply not be filed." 210 Or.App at 570. The court quoted an earlier decision of the California Supreme Court, which it found was directly applicable to the case before it:

> Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all.

*Id. quoting Vasquez v. Superior Court of San Joaquin County,* 4 Cal.3d 800, 808, 94 Cal.Rptr. 796, 484 P.2d 964, 968-69 (1971).

### C. The Reasoning Of These Cases Applies Equally To Class Action Bans In Employment Contracts

Although small individual damages, one of the factors that makes class action bans exculpatory in the consumer setting is not always present in the employment context, another more powerful disincentive supplants this factor – the threat of retaliation by the employer. "[B]eing fired is widely perceived to be a consequence of exercising certain workplace rights." Weil & Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace* (Fall 2005) 27 Comp. Lab. L & Policy J. 59, 83. And as the Supreme Court recognized: "[n]ot only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases can be held up, and other more subtle forms of influence

exerted." *NLRB v. Robbins Tire and Rubber Co*., 437 U.S. 214, 240 (1978).

Courts have repeatedly recognized that without the class action or class arbitration, it is much more likely that actions challenging employment practices and raising wage and hour claims will not be brought. *Ste. Marie v. Eastern Railroad Assn*., 72 F.R.D. 443, 449 (S.D.N.Y. 1976). *See also Does I v. GAP, Inc.,* 2002 WL 1000073, *8 (D.N.J. May 10, 2002)("the putative class members'… alleged fear of retaliation by the defendants make it improbable that the putative class members would even pursue individual actions"); *Ingram v Coca-Cola Co*., 200 F.R.D. 685, 701 (N.D. Ga. 2001)(noting, in certifying settlement class of workers, that many employees could not risk individual litigation because of fear of retaliation).

In fact, the class action mechanism is often the only effective means of counteracting the individual employee's understandable reluctance to stand alone in opposition to workplace unfairness. A. Conte & H. Newberg, *Newberg on Class Actions* (4th Ed. 2002), § 24:61 (noting that class actions in employment context "can protect the rights of those reluctant to pursue individual actions against a defendant with whom they must continue a necessary relationship. Additionally, representative

actions provide a forum and relief for claims which otherwise would not be enforced, because potential class members may be ignorant of rights, incompetent to undertake such a challenge, or fearful of retaliation.")

Under these circumstances, given the strong disincentives for workers to bring individual actions, and the presence of the other factors cited by recent caselaw, the District Court was correct in finding DRC's class action ban unenforceable.

## CONCLUSION

For all the reasons discussed herein, the decision of the District Court should be upheld.

Respectfully submitted,
On behalf of Amicus Curiae Public Justice,

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Date: May 7, 2007

## CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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. 29(d) and Fed. R. App. P. 32(a)(7)(B), because this brief contains 4,144 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 2004 for Mac with Times New Roman, 14-point type space.

_____
John Roddy

## CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2007, I caused two copies of this document to be served via first class mail, postage prepaid, on David S. Rosenthal and Jeffrey B. Gilbreth, Nixon Peabody LLP, 100 Summer Street, Boston, MA 02110.

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John Roddy