No. 09-14107-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RENATO CAPPUCCITTI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioners-Plaintiffs-Appellees,

v.

DIRECTV, INC.,

Petitioner-Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia
Case No. 1:09-cv-627-CAP, Judge Charles A. Pannell, Jr.

BRIEF OF *AMICUS CURIAE* FLORIDA DEFENSE LAWYERS ASSOCIATION, INC., IN SUPPORT OF DUAL PETITIONS FOR PANEL REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Florida Defense Lawyers Association, Inc. ("FDLA") is a Florida nonprofit corporation that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock. FDLA hereby incorporates by reference the Certificates Of Interested Parties filed by Petitioner DirecTV, Inc., and Petitioners Renato Cappuccitti and David Ward in their dual petitions for panel rehearing or rehearing *en banc*.

In addition, FDLA certifies pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-3 that the following are additional persons or entities that have or may claim an interest in the outcome of these petitions:

1. Bellus, Caryn L., Kubicki Draper, P.A. – Counsel for FDLA;
2. Burns, Thomas A., Hill, Ward & Henderson, P.A. – Counsel for FDLA;
3. Florida Defense Lawyers Association, Inc. – *Amicus Curiae*;
4. Murphy, J. Logan, Hill, Ward & Henderson, P.A. – Counsel for FDLA.

_____
Thomas A. Burns

RULE 35 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.*, __ U.S. __, 130 S. Ct. 1431 (2010); *Vega* v. *T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009); *Miedema* v. *Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006); *Evans* v. *Walter Industries, Inc.*, 449 F.3d 1159 (11th Cir. 2006).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Whether CAFA provides federal district courts with subject-matter jurisdiction over original actions filed by class action plaintiffs who meet CAFA's minimal-diversity and $5 million aggregate-amount-in-controversy requirements, but none of whom individually has a claim exceeding $75,000.

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FDLA	*Amicus Curiae* Florida Defense Lawyers Association, Inc.
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STATEMENT OF IDENTITY OF *AMICUS CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

Florida Defense Lawyers Association, Inc. ("FDLA"), formed in 1967, is a statewide organization of defense attorneys in Florida with over 1,000 members. FDLA strives to promote a level playing field in civil litigation by "impro[ving] the adversary system of jurisprudence and . . . the administration of justice." By-Laws of the FDLA, http://www.fdla.org/ByLaws.asp.

To this end, FDLA maintains an active *amicus curiae* program in which FDLA members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts. FDLA screens those cases for their content of significant legal issues that affect the interests of the defense trial bar or the fair administration of justice. *See* FDLA *Amicus* Committee, http://www.fdla.org/amicus.asp. As such, FDLA regularly and actively participates in *amicus* briefing in cases with a statewide impact involving civil litigation. In doing so, FDLA brings a great wealth of actual, practical experience in the defense of civil litigation matters—including class actions and mass actions—in state and federal court within and beyond the State of Florida.

FDLA believes that this case involves an issue of exceptional importance with potentially national impact and certainly statewide impact throughout the State of Florida. As Petitioners have already explained, the Court should grant the dual petitions for panel rehearing or rehearing *en banc* because the panel decision

(1) conflicts with binding precedent, Def.'s Pet'n iv, 11-13; Pls.' Pet'n iv, 8-11, and (2) presents a jurisdictional question of exceptional importance, Def.'s Pet'n 13-15; Pls.' Pet'n 13-15; *see also* Fed. R. App. P. 35(b)(1)(A)-(B).

With both Petitioners' consent, FDLA submits this *Amicus* Brief—not to reiterate Petitioners' textual interpretive arguments—but rather to show what mischief will likely result from the panel decision's interpretation of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), in light of the significant procedural differences between state and federal class action practice that animated CAFA's intent.

Contemporaneously, FDLA has filed a Motion For Leave To Appear As *Amicus Curiae*, which, if granted, will authorize FDLA to file this *Amicus* Brief pursuant to Federal Rule of Appellate Procedure 29.

STATEMENT OF THE ISSUE ASSERTED TO MERIT *EN BANC* CONSIDERATION

Whether CAFA provides federal district courts with subject-matter jurisdiction over original actions filed by class action plaintiffs who meet CAFA's minimal-diversity and $5 million aggregate-amount-in-controversy requirements, but none of whom individually has a claim exceeding $75,000.

STATEMENT OF FACTS AND THE COURSE OF PROCEEDINGS

FDLA incorporates by reference Petitioner-Defendant-Appellant DirecTV's Statement Of Facts And The Course Of Proceedings. *See* Def.'s Pet'n 3.

ARGUMENT

This appeal involves a class action, not a mass action. Contrary to CAFA's plain text and legislative history regarding class actions, the panel decision apparently mistook this class action for a mass action—which CAFA expressly subjects to different jurisdictional requirements. In doing so, the panel's mistaken decision portends consequences so severe that Congress could not possibly have intended them to result. Most notably, were the panel decision to become the law of the land, class actions that otherwise meet CAFA's minimal-diversity and $5 million aggregate amount-in-controversy thresholds yet lack any individual plaintiff who meets the panel's new $75,000 amount-in-controversy threshold would (in those jurisdictions that forbid class action claim aggregation to satisfy state amount-in-controversy requirements) be banished—not to state trial courts of general jurisdiction—but rather to state ***small claims courts***. Similarly, other procedural differences show CAFA never intended to incorporate *sub silentio* a $75,000 class action amount-in-controversy threshold.

I. CONGRESS CLEARLY INTENDED CAFA TO EXPAND FEDERAL JURISDICTION OVER CLASS ACTIONS

This Court has repeatedly recognized it was Congress' plain and overarching intention to expand federal jurisdiction over class actions. *E.g.*, *Miedema* v. *Maytag Corp.*, 450 F.3d 1322, 1329 (11th Cir. 2006) ("CAFA plainly expands federal jurisdiction over class actions and facilitates their removal"); *see also*

Def.'s Pet'n 8-11 (collecting legislative history). In fact, Congress enacted CAFA to ensure class action litigation was not subject to abusive practices in state courts.

Before Congress enacted CAFA, several Supreme Court precedents had made it exceedingly difficult to obtain a federal forum for class actions. Specifically, in *Snyder* v. *Harris*, the Supreme Court held that there must be complete diversity—not just minimal diversity—between all named class action plaintiffs and defendants. 394 U.S. 332, 340, 89 S. Ct. 1053, 1059 (1969). Further, the *Snyder* Court held that class action plaintiffs cannot aggregate their claims to meet the amount-in-controversy requirement for federal diversity jurisdiction. *Id.* at 336, 89 S. Ct. at 1056-57. A few years later, the Supreme Court extended these principles in *Zahn* v. *International Paper Co.* by holding that every member of the class—not just the named plaintiffs—must meet the amount-in-controversy threshold. 414 U.S. 291, 301, 94 S. Ct. 505, 512 (1973).

Taken together, this legal framework incentivized much pleading mischief. First, class action plaintiffs' counsel would "frequently and purposely evade federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity." S. Rep. No. 109-14 at 10 (2005). Second, class action plaintiffs' counsel would "typically misuse the jurisdictional threshold to keep their cases out of federal court" by "often" pleading "that no class member will seek more than $75,000 in relief, even though they can

simply amend their complaints after the removal to seek more relief and even though the class action seeks millions of dollars in the aggregate." *Id.*[1] It should go without saying that Congress was not only well aware of—but principally animated by—the twin problems caused by the stringent complete-diversity and amount-in-controversy-nonaggregation requirements.

Through CAFA, Congress attempted to address these shortcomings by amending the diversity statute, 28 U.S.C. § 1332. Petitioners have already explained how CAFA's statutory structure, properly understood, was intended to work in practice. *See* Def.'s Pet'n 4-8; Pls.' Pet'n 3-8; *see also* 14B Charles A. Wright & Arthur Miller, *Federal Practice and Procedure* § 3704 (2010) (CAFA "provides for aggregation even if no individual class member asserts a claim that exceeds $75,000").

As Petitioners explained at length (Def.'s Pet'n 6-8; Pls.' Pet'n 6-8), Congress expressly defined class actions as ***completely distinct*** from mass actions

[1] When Congress was considering and enacting CAFA, the Supreme Court had not yet decided *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, so it was laboring under then-current law that required ***each and every*** plaintiff in a class action to satisfy the amount-in-controversy threshold. 545 U.S. 546, 559, 125 S. Ct. 2611, 2620 (2005) (holding 28 U.S.C. § 1367 authorizes supplemental diversity jurisdiction over additional class members who fail to satisfy the minimum amount-in-controversy requirement if their claims are part of the same Article III case or controversy as at least one named plaintiff whose claims satisfy the minimum amount). As such, Congress had no reason at the time to consider requiring ***at least one***—as opposed to ***every***—class action plaintiff to meet § 1332(a)'s $75,000 amount-in-controversy threshold.

because CAFA openly defines mass actions to ***exclude*** class actions. 28 U.S.C. § 1332(d)(11)(B)(i) ("the term 'mass action' means any civil action (***except a [class action]***) in which monetary relief claims of 100 or more persons are proposed to be tried jointly" (emphasis added)). In simple terms, a class action is an action in which one or more named plaintiffs seek to represent a putative class of unknown but similarly situated plaintiffs pursuant to Federal Rule of Civil Procedure 23. In contrast, a mass action is an action that ***cannot*** be certified pursuant to Rule 23, but instead includes 100 or more named parties.

II. THE PANEL DECISION INADVERTENTLY CONFUSED CAFA'S OTHERWISE CLEAR CLASS ACTION JURISDICTIONAL MANDATE

Although CAFA's class action jurisdictional framework is quite clear, the panel's interpretive confusion appears to have stemmed from the admittedly awkward clause in which Congress provided "a ***mass action shall be deemed to be a class action*** removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs," 28 U.S.C. § 1332(d)(11)(A) (emphasis added)—even though it is ***impossible*** for a class action ever to be a mass action.

In reliance on this provision, the panel apparently misconceived mass actions as a subset of class actions. *See* Slip Op. 6, 10-11 & n.12. This was mistaken. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (segregating mass actions from class actions). The panel then inverted its misconception into the proposition that all

class actions must therefore be subject to the jurisdictional requirements imposed on mass actions. *See* Slip Op. 9 n.10 (relying on ***mass action*** decisions *Abrego Abrego* v. *Dow Chem. Co.*, 443 F.3d 676, 689 (9th Cir. 2006), and *Lowery* v. *Ala. Power Co.*, 483 F.3d 1184, 1206 n.51 (11th Cir. 2007), for ***class action*** propositions). This too was mistaken. The panel then accurately applied mass action jurisdictional law, which requires remand to state court of all individual mass action plaintiffs who do not satisfy the $75,000 amount-in-controversy threshold, to the instant class action. But because the panel was already comparing apples (mass actions) to oranges (class actions), its flawed premises rendered its conclusion unreliable. Had the panel properly applied traditional canons of statutory construction instead, it would have recognized CAFA's awkward ***mass action*** language was inapplicable and reached a jurisdictional ruling consistent with Congress' intent as understood by precedent from the Supreme Court, this Court, and sister circuits. *See* Def.'s Pet'n 4-13; Pls.' Pet'n 3-11.

A. Federal Courts Must Give Effect To Congressional Intent, Avoid Unreasonable Results, And Give Meaning To All Words In A Statute

The primary—if not sole—object of statutory interpretation is to divine legislative intent. 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 45:5 (2007) (collecting authorities). As such, the overarching legislative "intention prevails over the letter, and the letter must if

possible be read to conform to the spirit of the act." *Id.* § 46:7; *see also Miedema*, 450 F.3d at 1326 (interpreting phrase "not less than 7 days" to mean "not more than 7 days," consistent with CAFA's overall spirit). Here, Congress intended CAFA to expand—not to restrict—federal jurisdiction over class actions. As such, the panel should have considered canons of statutory construction that forbid rendering entire swaths of CAFA meaningless or portending nonsensical results.

For instance, "it is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be construed to agree with the intention of the legislature." 2A Singer & Singer, *supra*, § 46:7. Indeed, it is a "golden rule of statutory interpretation" that "when one of several possible interpretations produces an unreasonable result, that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Id.* § 45:12; *see also APA Excelsior III L.P.* v. *Premiere Techs., Inc.*, 476 F.3d 1261, 1272 (11th Cir. 2007) (rejecting plain language statutory interpretation that led to "nonsensical" result).

Likewise, it is a venerable and elementary rule of construction that courts must "'give effect, if possible, to every clause and word of a statute.'" *United States* v. *Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 520 (1995) (quoting *Inhabitants of Montclair Twp.* v. *Ramsdell*, 107 U.S. 147, 152, 25 S. Ct. 391, 395

(1883)). As such, statutes like CAFA "should be construed so that effect is given to all [their] provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A Singer & Singer, *supra*, § 46:6.

B. The Panel Decision's Interpretation Rejected Congressional Intent, Led To Unreasonable Results, And Rendered Half Of CAFA Meaningless

It is evident how the panel decision incorrectly interpreted CAFA unreasonably to narrow federal jurisdiction over class actions. In plain terms, the panel's logical error in conflating class actions with mass actions is this: CAFA's unusual ***mass action*** terminology ***superficially appears*** to define mass actions as class actions for certain jurisdictional purposes, even though they are separate and distinct procedural vehicles. In reality, it does not. Nevertheless, the panel moved from its inaccurate observation that because all mass actions are class actions under CAFA for certain jurisdictional purposes, that must also mean that all class actions are likewise mass actions under CAFA for jurisdictional purposes.

A simple hypothetical, however, exposes this logical Fallacy of the Consequent: Few would quarrel with the proposition that all volleyball players are tall athletes. But that does not necessarily mean that all tall athletes are volleyball players—after all, tall athletes might play any number of sports, including basketball, tennis, swimming, etc. This, however, is precisely the interpretive error

the panel made when conflating mass actions with class actions: the panel mistakenly reasoned that because CAFA treats mass actions like class actions (itself a mistaken premise), class actions should be treated like mass actions.

Moreover, the panel decision has incorrectly rendered meaningless Congress' attempt to resolve the amount-in-controversy-nonaggregation problem for class actions—one of the two principal issues CAFA explicitly set out to address. As a practical matter, the panel decision leaves all of CAFA for dead, save its minimal-diversity threshold.

III. THE PANEL DECISION PORTENDS SERIOUS CONSEQUENCES IN LIGHT OF SIGNIFICANT DIFFERENCES BETWEEN STATE AND FEDERAL PROCEDURES

Should class actions be sent *en masse* to state court per the panel decision, many problems would arise—many of which Congress envisioned, but none of which it intended. By way of example, FDLA highlights some illustrative differences between federal and state practice in Florida and elsewhere.

A. Procedural Standards Are Significantly Different—Sometimes By Rule, Sometimes In Practice—In State Court From Those In Federal Court

As it happens, Florida is a jurisdiction that permits aggregation of class action claims to meet the jurisdictional threshold for circuit court (currently $15,000) as opposed to county court (which is akin to a small claims court). *Johnson* v. *Plantation Gen. Hosp. Ltd. P'ship*, 641 So. 2d 58, 60 (Fla. 1994). But

some jurisdictions—such as the States of Maryland and Wyoming and the Commonwealth of Kentucky—follow *Zahn* and *Snyder* and reject class action aggregation. *Mut. of Omaha Ins. Co.* v. *Blury-Losolla*, 952 P.2d 1117, 1121 (Wyo. 1998); *Lamar* v. *Office of Sheriff of Daviess County*, 669 S.W.2d 27, 31 (Ky. Ct. App. 1984); *Pollokoff* v. *Md. Nat'l Bank*, 418 A.2d 1201, 1210 (Md. 1980). In effect, no matter how large the class or aggregate damages sought, unless at least one plaintiff meets the pertinent amount-in-controversy threshold (none of which, incidentally, the case at bar would satisfy), these jurisdictions would literally require multi-million or -billion dollar class actions to proceed in state small claims courts. It should go without saying that it is exceedingly unlikely that Congress intended CAFA to banish class actions from sophisticated federal forums to instead wallow in outmanned state small claims courts. *Contra* Slip Op. 10 (Congress "surely" could not have intended to "essentially transform federal courts hearing originally-filed CAFA cases into small claims courts").

Although Florida has for all practical purposes adopted federal standards for class certification and settlement oversight, *Broin* v. *Philip Morris Cos., Inc.*, 641 So. 2d 888, 889 n.1 (Fla. 3d DCA 1994); *Fung* v. *Fla. Joint Underwriters Ass'n*, 840 So. 2d 1101, 1101-02 (Fla. 3d DCA 2003), in practice they are applied much differently. For instance, unlike federal district judges, who typically have two law clerks and a judicial assistant, Florida circuit court judges (trial judges) do not

usually have any law clerk assistance. Moreover, their dockets literally contain thousands of cases at any given time. As such, Florida circuit court judges—like many state trial judges—simply lack the resources and the time to conduct effective oversight of exceedingly complex class action litigations.

Also, although Florida courts now permit interlocutory appeal of class action decisions by rule much like federal courts per Federal Rule of Civil Procedure 23(f), *compare Holiday Pines Property Owners Ass'n* v. *Wetherington*, 557 So. 2d 243, 243-44 (Fla. 4th DCA 1990), *with* Fla. R. App. P. 9.130(a)(3)(vi), the Court should nevertheless be aware that "[m]any states do not permit appellate review of an order granting or denying class certification until there is a final judgment." 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 13:61 (4th ed. 2002). As class certification is perhaps the most significant settlement tipping point, the availability of interlocutory appeal is an incredibly important distinction between state and federal practice. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995) (Posner, C.J.) (discussing "sheer ***magnitude*** of the risk" to which class action certification exposes defendants).

Additionally, the pleading standards in federal court are vastly different from those in Florida state court. Federal courts apply a notice-pleading standard per Federal Rule of Civil Procedure 8(a)(2), which now requires a short and plain statement of the claim that is "plausible on its face." *Bell Atl. Corp.* v. *Twombly*,

550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007); *see also Ashcroft* v. *Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009) (plausibility requirement "asks for more than a sheer possibility that a defendant has acted unlawfully"). In contrast, Florida state courts apply an ultimate-fact pleading standard per Florida Rule of Civil Procedure 1.110(b)(2), by which a plaintiff can survive dismissal by reciting the elements of a cause of action and—in more-or-less conclusory fashion—simply alleging they are satisfied. *E.g.*, *Gandy* v. *Trans World Computer Tech. Group*, 787 So. 2d 116, 118 (Fla. 2d DCA 2001) (complaints survive dismissal "unless it appears ***beyond doubt*** that the plaintiff could prove no set of facts that would entitle him to relief" (emphasis added)). The upshot of this distinction is that a class action plaintiff in Florida state court, for instance, could plead a much more conclusory complaint—one that would not be sufficiently "plausible on its face" to survive dismissal in federal court per *Twombly* and *Iqbal*—yet survive a motion to dismiss, obtain extraordinarily expensive and burdensome discovery, and potentially strong-arm a settlement out of an otherwise innocent defendant. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1297-98.

Federal and Florida state summary judgment standards are different as well. Indeed, the federal standard is ***vastly*** more permissive than the Florida standard. Under the federal standard, district courts may grant summary judgment whenever a nonmovant fails to identify evidence concerning an essential element of its case.

E.g., *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). But Florida courts reject this standard. Instead of shifting the burden of production to the nonmovant, Florida trial courts require the movant to "clearly establish[] what the true factual picture is, and thereby remove[] any serious doubt as to the existence of any genuine issue of material fact." *Suggs* v. *Allen*, 563 So. 2d 1132, 1133 (Fla. 1st DCA 1990). Essentially, the movant cannot claim victory when the nonmovant fails to present any evidence; rather, the movant must "conclusively" prove a negative: the nonexistence of a genuine issue of material fact. *Holl* v. *Talcott*, 191 So. 2d 40, 43 (Fla. 1966). This strict standard severely curtails the use of summary judgment in Florida.

B. Overlooking These Procedural Differences, The Panel Decision Threatens To Usher In A New Era Of Abusive Class Action Practices In State Court—Contrary To Congressional Intent

In light of these significant procedural differences, the panel decision threatens to re-incentivize much of the pleading mischief that led to the enactment of CAFA in the first place. Given the panel decision, plaintiffs' class counsel should now be expected to target class actions for (1) all *Zahn/Snyder* jurisdictions that forbid claim aggregation in class actions and thereby banish class actions to small claims courts, (2) all jurisdictions that lack sufficient resources for adequate oversight of class certification or settlement, (3) all jurisdictions that forbid interlocutory appeal of class certification decisions, (4) all jurisdictions that apply

traditionally lenient pleading standards instead of searching plausibility tests, and (5) all jurisdictions that apply summary judgment standards requiring movants to prove a negative conclusively. Given these metrics, the plaintiff-friendly procedures of jurisdictions like the State of Florida would likely render them plaintiffs' venues of choice for many such class actions. Congress, however, could not have intended CAFA to prevent cases of such significant national importance from being heard in sophisticated federal forums that—unlike many state courts—have the expertise, resources, and procedures best equipped to deal with complex class action litigation.

CONCLUSION

FDLA urges the Court to grant the dual petitions for panel rehearing or rehearing *en banc*.

August 19, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the original and fifteen copies of the foregoing Brief Of *Amicus Curiae* Florida Defense Lawyers Association, Inc., In Support Of Dual Petitions For Panel Rehearing Or Rehearing *En Banc* to be filed with the Clerk of Court by overnight commercial carrier on this 19th day of August, 2010, to:

John Ley
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I FURTHER CERTIFY that I caused a true and correct copy of the foregoing Brief Of *Amicus Curiae* Florida Defense Lawyers Association, Inc., In Support Of Dual Petitions For Panel Rehearing Or Rehearing *En Banc* to be furnished by overnight commercial carrier on this 19th day of August, 2010, to:

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