UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* *
KIRK DAHL, ET AL., Individually and
on Behalf of All Others Similarly Situated,

Plaintiffs

v. CIVIL ACTION NO.: 07-12388-EFH

BAIN CAPITAL PARTNERS, LLC, ET AL.,

Defendants.
* *

MEMORANDUM AND ORDER

December 15, 2008

HARRINGTON, S.D.J.

This case comes before the court on Defendants' Joint Motion to Dismiss the Third Amended Complaint (Docket No. 127) pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants provide two (2) grounds on which the complaint should be dismissed. First, they argue that since the conduct at issue is regulated by the Securities and Exchange Commission ("SEC"), the plaintiffs claims are pre-empted from consideration under the antitrust laws. Second, the defendants argue that the plaintiffs have failed to properly plead a Sherman Act § 1 claim. The court rules that both of these arguments are without merit and for the reasons set forth below denies the motion on both grounds.

Background

Plaintiffs bring this action claiming that the defendants illegally colluded in their purchase

of companies (the "Target Companies") as part of leveraged buyouts ("LBOs"). The plaintiffs identify this illegal collusion as the "Overarching Conspiracy." The plaintiffs (the "Shareholders") include a trust, a public retirement trust fund, and a group of five (5) individuals that owned shares in companies that the defendants purchased. The Shareholders bring this action on behalf of a class, which includes all persons who have an ownership interest in securities in any publicly listed company traded on any United States securities market or exchange. Additionally, the Shareholders include a group of sub-classes that sold their shares in connection with five (5) transactions. The defendants (the "PE Firms") are 17 firms, most of which are private equity firms and the rest of which are affiliated with certain of these private equity firms.[1]

This is an antitrust case under § 1 of the Sherman Act, and §§ 4 and 16 of the Clayton Act. The Shareholders allege that the PE Firms conspired to pay less than fair value for the Target Companies, which in turn deprived the Target Companies' Shareholders of the true value of their shares upon sale of the Target Companies. The Shareholders' claim of conspiracy is quite expansive; this suit includes all LBOs involving the PE Firms that totaled more than $2.5 billion and occurred between 2003 and 2008.[2] The transactions at issue here were "club deals," whereby two or more PE Firms join together to conduct an LBO. The Shareholders do not contest the legality of club deals, but instead contest what they characterize as illegal agreements between the PE Firms to allocate the LBO market on a wide scale.

The Shareholders' complaint alleges, with specificity, nine (9) transactions, which the

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[1] Pursuant to an Order of Dismissal issued by this court on November 20, 2008, this case presently includes 13 defendants.

[2] The Shareholders represented in the November 13, 2008 motion hearing that this case could include up to, but no more than, 36 transactions. Transcript of Oral Argument, 126.

Shareholders claim illustrate the Overarching Conspiracy. The nine (9) companies purchased as a part of these transactions are a diverse group. The group includes a department store company, a cinema operator and an energy company. The Shareholders plead that the PE Firms carried out the Overarching Conspiracy by, *inter alia,* (1) submitting sham bids, (2) agreeing not to submit bids, (3) granting management certain incentives, and (4) including "losing" bidders in the final transaction.

Decision

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") is used to dismiss actions in which the plaintiff has failed to state a claim upon which relief can be granted. Dismissal by this rule eliminates lawsuits that lack the most basic and necessary element of a lawsuit: a legal remedy. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989). Given that a Rule 12(b)(6) decision concerns only legal remedies, the court must accept as true all factual allegations contained in the complaint in reviewing a Rule 12(b)(6) motion to dismiss. United States v. Gaubert, 499 U.S. 315, 327 (1991).

The PE Firms claim that there are two (2) viable grounds for dismissing this action under Rule 12(b)(6). First, they claim that the Shareholders lack a legal remedy because the SEC supervises the transactions at issue here, thereby pre-empting regulation under the antitrust laws. Second, the PE Firms claim that the Shareholders lack a legal remedy because they have failed to properly plead a claim under § 1 of the Sherman Act.

The PE Firms argue that the Shareholders have no legal remedy to pursue an antitrust claim under Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007). Billing stands for SEC pre-emption of the antitrust laws when the questioned behavior is regulated by the

SEC. Billing follows a long line of cases dealing with SEC pre-emption and this precedent shows that pre-emption is met with caution by the United States Supreme Court (the "Supreme Court" or "Court"). Billing, 127 S. Ct. at 2389-90.

For instance, the Court noted in Billing its warning in the earlier case of Silver v. New York Stock Exchange that pre-emption should be used minimally in order to allow simultaneous operation of the securities and antitrust laws as much as possible. Id. (quoting Silver, 373 U.S. 341, 357 (1963)). Billing involved the sale of securities by syndicates of underwriters as part of initial public offerings ("IPOs"). Id. at 2388. The Supreme Court ruled that pre-emption applied because the securities and antitrust laws were "clearly incompatible" with one another. Id. at 2397. To define "clear incompatibility," the Supreme Court enunciated four (4) factors: (1) whether the challenged practices lie squarely within an area of financial market activity that the securities laws seek to regulate; (2) the existence of regulatory authority under the securities laws to supervise the activities in question; (3) evidence that the responsible regulatory entities exercise that authority; and (4) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. Id. at 2392.

Billing resulted in pre-emption because all four of these factors were satisfied. Under the first factor, the court evaluates whether the activities in question are those sought to be regulated by the securities laws. Id. The securities laws regulate the nation's securities exchanges. Silver, 373 U.S. at 349. Securities exchanges are a vital element of the United States economy; they serve as the channel through which securities are bought and sold. Id. Thus, the securities laws directly regulate the sale of securities. The securities laws unquestionably regulated the activities

in question in Billing because IPOs consist of the sale of securities. Billing, 127 S. Ct. at 2392. IPOs occur when a company is first established and securities are offered for sale to the general public. More specifically, the Supreme Court found that underwriters' efforts jointly to promote and sell newly issued securities clearly constituted financial market activity that the securities laws sought to regulate. Id. Therefore, the first factor was met.

Under the second factor, the court determines whether a regulatory authority exists to supervise the activities in question. The Supreme Court concluded that the SEC was a regulatory body charged with regulating the underwriters' activities. The Court came to this decision based on the SEC's visible regulation of the IPOs. Id. The Court highlighted the SEC's oversight of book-building, solicitations of "indications of interests," and communications between underwriting participants and their customers as evidence of the agency's regulation. Id. at 2393. The second factor also was satisfied.

The third factor assesses whether the regulatory body exercises its authority. Id. at 2392. The Supreme Court found that the SEC had continuously regulated the IPO process by passing its own regulations and bringing actions against parties for violating these regulations. Id. at 2393. Thus, the third factor also was met. The fourth and final factor considers whether application of both the securities and antitrust laws would create a conflict. Id. at 2392. After thoroughly reviewing this factor, the Supreme Court found that a conflict would exist here. The Court reasoned that (1) the need for securities-related expertise here, (2) the fine lines between what is permissible versus what is impermissible in the eyes of the SEC, (3) the different inferences that could be drawn from evaluating the same facts under the securities and antitrust laws, and (4) the inconsistent judgments that could result between courts, together, created too

large a conflict between the antitrust and securities laws. Id. at 2395. Therefore, a conflict existed here and SEC pre-emption was necessary.

Unlike Billing, this is not a case of pre-emption. All four factors of Billing are not satisfied applying the facts at hand. First, the securities laws do not govern the conduct at issue. Billing's first factor requires that the challenged practice lie squarely within an area of financial market activity that the securities laws seek to regulate. Id. at 2392. Private equity LBOs do not lie within an area of the financial market that the securities laws seek to regulate as their *private*, as opposed to public, nature leaves them untouched by the securities laws. This is different from Billing, in which the SEC enjoyed wide latitude over transactions occurring on the nation's securities exchanges. Here, the Shareholders maintain that the PE Firms carefully avoided SEC oversight. For instance, the Shareholders allege that both the PE Firms are exempt from regulation under the Investment Company Act, and the PE Firms' partners and employees are exempt from registration under the Investment Advisers Act. These two acts are prominent laws under which the SEC regulates the securities market. Therefore, the first Billing factor is not met.

Second, no regulatory authority exists to oversee these private equity transactions, as required under the second Billing factor. Id. In Billing, the SEC regulated the activities of the underwriters as part of IPOs, but no such regulatory authority operates here. The PE Firms assert that the many filings that a Target Company must make in conjunction with an LBO represents regulation by the SEC. This argument is unconvincing. The SEC does not substantively regulate

the PE Firms, it merely requires certain disclosures be filed as part of an LBO transaction.[3] Requiring disclosures is not nearly as substantial and invasive as the regulations practiced in Billing. Indeed, Billing was decided as it was because of the breadth of the SEC's jurisdiction over the activities in question. Id. Therefore, seeing that the SEC only required certain disclosures here, and that it did not substantively regulate the behavior in question, the second factor is not met. As understood under Billing, private equity transactions remain unregulated.[4]

The third factor considers whether the regulatory body exercises its authority. Billing, 127 S. Ct. at 2392. The court has already made clear that the SEC has no regulatory authority here, rendering the third factor inapplicable and ultimately unsatisfied. The court can quickly analyze the fourth factor, as well. The fourth factor calls for an evaluation of any conflict that may arise between the securities and antitrust laws if both were to be applied. Id. There can be no conflict here because the securities laws, as explained in the analysis of the first factor, are absent *vis-a-vis* private equity LBOs. Antitrust laws can be applied without any of the securities-related concerns raised by the Supreme Court in Billing; the fourth factor fails.

In sum, in finding pre-emption, the Supreme Court in Billing said that pre-emption was appropriate given that the SEC had authority to regulate IPOs extensively. Id. at 2393, 2397. In contrast, pre-emption does not apply here as the private nature of the LBOs at issue prevents the

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[3] In a chart ("Billing Preemption Analysis") the PE Firms presented to the court during the motion hearing on November 13, 2008, they state themselves that in Billing, the SEC regulated "underwriters' practices," while here the SEC only requires disclosures. This makes it very clear that the SEC had substantive regulatory authority in Billing, while here it does not.

[4] The court notes that the District Court for the Western District of Washington also determined that pre-emption under Billing would not apply when the SEC does not regulate the substantive conduct at issue. See Pa. Ave. Funds v. Borey, 569 F. Supp. 2d 1126, 1130 (W.D. Wash. 2008).

SEC from regulating these transactions. The securities and antitrust laws therefore are not "incompatible," and this case can proceed under the antitrust laws.

In addition to their argument that pre-emption bars this case from moving forward, the PE Firms also argue that the Shareholders have failed to properly plead a claim under § 1 of the Sherman Act. Insufficient pleading would leave the Shareholders without a legal remedy, which would mandate dismissal under Rule 12(b)(6). Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). Federal Rule of Civil Procedure 8(a) ("Rule 8(a)") dictates what a plaintiff must plead in his complaint. Rule 8(a) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Meanwhile, § 1 forbids a "contract, combination . . ., or a conspiracy in restraint of trade or commerce." 15 U.S.C. § 1 (2008).

In Twombly, the Supreme Court interpreted what is required under Rule 8(a) in the context of a § 1 claim. Twombly held that there must be "enough facts to state a claim to relief that is plausible on its face." Twombly, 127 S. Ct. at 1974. Put more concisely, the Supreme Court said for a § 1 claim, Rule 8(a) requires "allegations plausibly suggesting agreement." Id. at 1966. Although the Supreme Court found the pleadings at issue in Twombly to be insufficient, the Court stressed that it was not increasing the pleading standard under Rule 8(a). Id. at 1974. Rather, the Court pointed out that a judge could let a case proceed beyond a motion to dismiss even if proof of the facts is improbable and the plaintiff is unlikely to prevail. Id. at 1965.

The Court granted the motion to dismiss in Twombly because the plaintiffs did not plead facts that the defendants came to an illegal agreement in violation of § 1. Id. at 1970. The plaintiffs in Twombly were two individuals who sued on a behalf of a putative class. This class consisted of all subscribers of local telephone and/or high speed internet services from February 8,

1996 to the time the suit was filed. The two individual plaintiffs in Twombly sued the four (4) major local telephone providers in the United States (referred to in the case as the Incumbent Local Exchange Carriers ("ILECs")), claiming that the ILECs conspired to prevent competition by newer local phone companies (Competitive Local Exchange Carriers ("CLECs")). Id. at 1962 n.1. The ILECs resisted the entry of CLECs into the marketplace, but were under intense pressure from Congress to make room for them. Id. at 1961. Congress had enacted the Telecommunications Act of 1996 (the "1996 Act") with the goal of both easing access to the telecommunications market for CLECs, and generally promoting competition between the ILECs and CLECs. See id. Even as they mightily resisted it, the ILECs had no choice but to compete fairly with CLECs under the 1996 Act. It required the ILECs to give CLECs access to the ILECs' networks. Id.

The plaintiffs' complaint in Twombly rested on two grounds. First, they argued that the ILECs engaged in "parallel" anti-competitive conduct in their respective markets to prevent growth by CLECs. Id. at 1962. Parallel meant similar business practices. See id. The ILECs' parallel conduct included: (1) making unfair agreements with CLECs for access to the ILEC networks; (2) providing CLECs with inferior connections to the ILEC networks; (3) overcharging CLECs; and (4) billing CLECs in ways as to sabotage CLECs' relationships with their own customers. Second, the plaintiffs argued that the ILECs formed illegal agreements not to compete with one another. Id.

The Supreme Court found both grounds unpersuasive. First, it rejected the allegations of parallel conduct because there was nothing tying the parallel conduct of one ILEC to the parallel conduct of another ILEC; therefore, there was nothing "plausibly suggesting" an illegal agreement

between the ILECs as § 1 requires. Id. at 1971. Second, the Court rejected the claim of an agreement between the ILECs not to compete on the lack of any specific allegation of such an agreement. See id. at 1972. The only specific facts alleged dealt with the first claim of parallel conduct. Id. at 1970-71. Having furnished no facts of an illegal agreement, the plaintiffs insufficiently pled their claims and the Supreme Court dismissed the case under Rule 12(b)(6). Id. at 1974.

This case is different. The Shareholders have pled enough facts for a § 1 claim that they meet the requirements under Rule 8(a), which in turn gives them a legal remedy. With a legal remedy in place, the Rule 12(b)(6) motion to dismiss must be denied. Twombly requires that a § 1 claim have enough facts "plausibly suggesting" an illegal agreement for a claim to be pled properly under Rule 8(a). Id. Twombly was dismissed under Rule 12(b)(6) because the plaintiffs proffered no allegation of an illegal agreement and thus were left with no legal remedy. Id. at 1970. The heart of the complaint rested on parallel conduct by each defendant and included no allegation of any illegal agreement tying the defendants' individual parallel conduct together. Id. at 1970-71. In contrast with Twombly, the circumstances here "plausibly suggest" that an illegal agreement existed in violation of § 1. The court comes to this conclusion based on the nine (9) specifically pled transactions. The presence of the same PE Firms in multiple transactions ties the PE Firms together in a way that the Twombly defendants were not. This overlap in firms, coupled with the Shareholders' allegations that the PE Firms conspired to prevent open, competitive bidding for the Target Companies, "plausibly suggests" an illegal agreement here.

To illustrate that enough facts "plausibly suggest" an illegal agreement here, the court provides a few examples. For instance, Bain and Blackstone were the purchasers in the Michael's

transaction and they also were among the consortium that purchased SunGuard. KKR and TPG were also purchasers in the SunGuard deal, while they both bid on the sale of Michael's. Goldman Capital was a purchaser in SunGuard, while its related entity, Goldman Sachs, served as an advisor in Michael's and SunGuard. Meanwhile, in the Neiman Marcus deal, KKR, Bain, and Blackstone were bidders, while TPG was one of the two ultimate purchasers. Goldman Sachs also served as an advisor in Neiman Marcus.

The court emphasizes that it makes no judgment on the merits of the Shareholders' case. In other words, it does not decide whether or not an illegal agreement in fact existed. Rather, the court observes its duty at the pleading stage to accept all facts pleaded as true, and to ascertain only whether the Shareholders have stated a legal remedy. Gaubert, 499 U.S. at 327. Unlike Twombly, in which the plaintiffs presented no facts of an illegal agreement, the Shareholders have provided enough facts to "plausibly suggest" an illegal agreement. Their proper pleading under Rule 8(a) provides the Shareholders with a legal remedy under which to pursue their antitrust claims. The motion to dismiss on the grounds of improper pleading must be denied.

Contrary to the claims put forth by the PE Firms, no grounds exist to dismiss this case on the basis of (1) pre-emption or (2) improper pleading. Accordingly, Defendants' Joint Motion to Dismiss the Third Amended Complaint (Docket No. 127) is DENIED.[5]

Discovery

The court orders that the first stage of discovery shall be directed solely and exclusively to the nine (9) specified transactions alleged in the complaint, which transactions the Shareholders

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[5] At this time, the court abstains from ruling on the motion to dismiss the unjust enrichment claim.

claim constitute indicia of the Overarching Conspiracy.

At the conclusion of the first stage of discovery, the court shall determine whether further discovery as to additional transactions is warranted. This determination shall be based on whether or not the first stage of discovery raises sufficient evidence of collusion on the part of the PE Firms.

If a second stage of discovery is warranted, the Shareholders shall move to amend the complaint in order to add additional transactions and defendants.

The parties shall agree upon a plan for the first stage of discovery and submit the discovery schedule to the court on or before 30 days from the date of this order.

The first stage of discovery shall be concluded within 12 months from the date of this order.

Defendants' Joint Motion to Dismiss the Third Amended Complaint (Docket No. 127) is DENIED. Discovery shall proceed as detailed in this order.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States Senior District Judge

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Cause: 15:1 Antitrust Litigation
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Nature of Suit: 430 Banks and Banking
Jurisdiction: Federal Question

Plaintiff
Michael M Davidson
TERMINATED: 03/17/2008
represented by
Arthur L. Shingler , III
Scott & Scott LLP
600 B Street
Suite 1500
San Diego , CA 92101
619-233-4565
Fax: 619-233-0508
Email: ashingler@scott-scott.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles N. Nauen
Lockridge Grindal Nauen P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis , MN 55401
612-339-6900
Fax: 612-339-0981
Email: cnnauen@locklaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

David E. Marder
Robins, Kaplan, Miller & Ciresi L.L.P.
800 Boylston Street
25th Floor
Boston , MA 02199
617-267-2300
Fax: 617-267-8288
Email: DEMARDER@RKMC.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David R. Scott

Scott & Scott LLP
P.O. Box 192
108 Norwich Avenue
Colchester , CT 06415
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

George C. Aguilar
Robbins Umeda & Fink LLP
610 West Ash Street
Suite 1800
San Diego , CA 92101
619-525-3990
Email: notice@ruflaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Hal Cunningham
Scott & Scott LLP
600 B Street
Suite 1500
San Diego , CA 92101
619-233-4565
Fax: 619-233-0508
Email: hcunningham@scott-scott.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jack Landskroner
Landskroner Grieco Madden, Ltd.
1360 West 9th St.
Suite 200
Cleveland , OH 44113
216-522-9000
Fax: 216-522-9007
Email: jack@lgmlegal.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

K. Craig Wildfang
Robins, Kaplan, Miller & Ciresi LLP.
2800 LaSalle Plaza
800 LaSalle Avenue South
Minneapolis , MN 55402-2015
612-349-8500
Fax: 612-339-4181
Email: kcwildfang@rkmc.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Karen H. Riebel
Lockridge Grindal Nauen P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis , MN 55401
612-339-6900
Fax: 612-339-0981
Email: khriebel@locklaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan E. Walt
Robins, Kaplan, Miller & Ciresi LLP
800 Boylston Street
Suite 2500
Boston , MA 02199
617-859-2746
Fax: 617-267-8288
Email: mewalt@rkmc.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard A. Lockridge
Lockridge Grindal Nauen P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis , MN 55401
612-339-6900
Fax: 612-339-0981
Email: ralockridge@locklaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Stacey Slaughter
Robins, Kaplan, Miller & Ciresi L.L.P.
800 LaSalle Avenue
Suite 2800
Minneapolis , MN 55402
612-349-8554
Email: spslaughter@rkmc.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff
James D Klein
represented by
Arthur L. Shingler , III
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles N. Nauen
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

David E. Marder
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David R. Scott
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

George C. Aguilar
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Hal Cunningham
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

J. Gerard Stranch , IV
Branstetter, Stranch & Jennings, PLLC
227 Second Avenue North
4th Floor
Nashville , TN 37201
615-254-8801
Fax: 615-250-3937
Email: gstranch@branstetterlaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jack Landskroner
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

K. Craig Wildfang
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Karen H. Riebel

(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Mary K. Blasy
Coughlin Stoia Gellar Rudman & Robbins LLP
655 West Broadway
Suite 1900
San Diego , CA 92101
619-231-1058
Email: maryb@csgrr.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan E. Walt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul Grieco
Landskroner Grieco Madden, Ltd.
1360 West 9th St.
Suite 200
Cleveland , OH 44113
216-522-9000
Fax: 216-522-9007
Email: Paul@lgmlegal.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Richard A. Lockridge
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Stacey Slaughter
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Thomas B. Hatch
Robins, Kaplan, Miller & Ciresi LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis , MN 55402
612-349-8500
Fax: 612-339-4181
Email: tbhatch@rkmc.com
LEAD ATTORNEY

PRO HAC VICE
ATTORNEY TO BE NOTICED

W. Joseph Bruckner
Lockridge Grindal Nauen P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis , MN 55401
612-339-6900
Fax: 612-339-0981
Email: wjbruckner@locklaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian J. Robbins
Robbins Umeda & Fink LLP
610 West Ash Street
Suite 1800
San Diego , CA 92101
619-525-3990
Fax: 619-525-3991
Email: notice@ruflaw.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Christopher M. Burke
Scott & Scott LLP
600 B Street
Suite 1500
San Diego , CA 92101
619-233-4565
Fax: 619-233-0508
Email: cburke@scott-scott.com
ATTORNEY TO BE NOTICED

David W. Mitchell
Coughlin Stoia Geller Rudman & Robbins LLP
655 West Broadway
Suite 1900
San Diego , CA 92101-8498
619-231-1058
Fax: 619-231-7423
Email: davidm@csgrr.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elisabeth A. Bowman
Coughlin Stoia Geller Rudman & Robbins
655 West Broadway
Suite 1900
San Diego , CA 92101
619-231-1058

Fax: 619-231-7423
Email: LisaB@csgrr.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kristen M. Anderson
Scott & Scott LLP
600 B Street
Suite 1500
San Diego , CA 92101
619-233-4565
Fax: 619-233-0508
Email: kanderson@scott-scott.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Samantha A. Smith
Coughlin Stoia Geller Rudman & Robbins
655 West Broadway
Suite 1900
San Diego , CA 92101
619-231-1058
Fax: 619-231-7423
Email: SSmith@csgrr.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Susan G. Taylor
Coughlin Stoia Geller Rudman & Robbins
655 West Broadway
Suite 1900
San Diego , CA 92101
619-231-1058
Fax: 619-231-7423
Email: SusanT@csgrr.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff
Robert Zimmerman
represented by
Arthur L. Shingler , III
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles N. Nauen
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

David E. Marder

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David R. Scott
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

George C. Aguilar
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Hal Cunningham
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

J. Gerard Stranch , IV
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jack Landskroner
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

K. Craig Wildfang
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Karen H. Riebel
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Mary K. Blasy
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan E. Walt
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul Grieco
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Richard A. Lockridge
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Stacey Slaughter
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Thomas B. Hatch
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

W. Joseph Bruckner
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian J. Robbins
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Christopher M. Burke
(See above for address)
ATTORNEY TO BE NOTICED

David W. Mitchell
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elisabeth A. Bowman
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kristen M. Anderson
(See above for address)

PRO HAC VICE
ATTORNEY TO BE NOTICED

Samantha A. Smith
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Susan G. Taylor
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff
Rufus Orr
represented by
Arthur L. Shingler , III
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles N. Nauen
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

David R. Scott
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

George C. Aguilar
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Hal Cunningham
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

J. Gerard Stranch , IV
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jack Landskroner
(See above for address)

LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

K. Craig Wildfang
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Karen H. Riebel
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Mary K. Blasy
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan E. Walt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul Grieco
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Richard A. Lockridge
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Stacey Slaughter
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Thomas B. Hatch
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

W. Joseph Bruckner
(See above for address)
LEAD ATTORNEY
PRO HAC VICE

ATTORNEY TO BE NOTICED

Brian J. Robbins
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Christopher M. Burke
(See above for address)
ATTORNEY TO BE NOTICED

David W. Mitchell
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elisabeth A. Bowman
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kristen M. Anderson
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Samantha A. Smith
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Susan G. Taylor
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff
Kirk Dahl
represented by
Mary K. Blasy
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan E. Walt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David W. Mitchell
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff
Helmut Goeppinger
represented by
Mary K. Blasy
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan E. Walt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David W. Mitchell
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff
Joseph S. Fisher, Trust
represented by
Mary K. Blasy
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

David W. Mitchell
(See above for address)
ATTORNEY TO BE NOTICED

Meghan E. Walt
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff
Police and Fire Retirement System of the City of Detroit
represented by
Mary K. Blasy
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan E. Walt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff
Joseph S. Fisher, M.D., P.C. New Profit Sharing Trust
represented by
Mary K. Blasy

(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan E. Walt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant
Bain Capital Partners, LLC
represented by
Craig S. Primis
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington , DC 20005
202-879-5921
Email: cprimis@kirkland.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

James H. Mutchnik
Kirkland & Ellis LLP
200 East Randolph Drive
Chicago , IL 60601
312-861-2350
Fax: 312-861-2200
Email: jmutchnik@kirkland.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

John D. Hanify
Hanify & King
One Beacon Street
Boston , MA 02108
617-423-0400
Fax: 617-423-0498
Email: jdh@hanify.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Thomas Marcucci
Hanify & King, P.C.
One Beacon Street
Boston , MA 02108
617-226-3429
Fax: 617-305-0629
Email: mtm@hanify.com

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael F. Williams
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington , DC 20005
202-879-5921
Fax: 202-879-5200
Email: mwilliams@kirkland.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Thomas D. Yannucci
Kirkland & Ellis
655 Fifteenth St., N.W.
Suite 1200
Washington , DC 20005
202-879-5056
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant
The Blackstone Group L.P.
represented by
Hillary C. Mintz
Simpson Thacher & Bartlett LLP
601 Pennsylvania Avenue NW
North Building
Washington , DC 20004
202-220-7700
Fax: 202-220-7701
Email: hmintz@stblaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kevin J. Arquit
Simpson, Thacher & Bartlett LLP
425 Lexington Avenue
New York , NY 10017
212-455-2000
Fax: 212-455-2502
Email: karquit@stblaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kevin M. McGinty
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC
One Financial Center
Boston , MA 02111

617-542-6000
Fax: 617-542-2241
Email: kmcginty@mintz.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Peter C. Thomas
Simpson Thacher & Bartlett LLP
601 Pennsylvania Avenue, N.W.
10th Floor
North Building
Washington , DC 20004
202-220-7735
Fax: 202-220-7702
Email: pthomas@stblaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Reynelle Brown Staley
Simpson, Thacher & Bartlett LLP
601 Pennsylvania Avenue, N.W.
North Building
Washington , DC 20004
202-220-7782
Fax: 202-220-7792
Email: rbrown@stblaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meredith M. Leary
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC
One Financial Center
Boston , MA 02111
617-542-6000
Fax: 617-542-2241
Email: mleary@mintz.com
ATTORNEY TO BE NOTICED

Steven J. Torres
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC
One Financial Center
Boston , MA 02111
617-832-6952
Fax: 617-542-2241
Email: storres@mintz.com
ATTORNEY TO BE NOTICED

Defendant
The Carlyle Group

Defendant

Goldman Sachs Group, Inc.
represented by
Austin F. McCullough
Sullivan & Cromwell LLP
125 Broad Street
New York , NY 10004-2498
212-558-4000
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Gandolfo V. Diblasi
Sullivan & Cromwell LLP
125 Broad Street
New York , NY 10004-2498
212-558-4000
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

John D. Donovan , Jr.
Ropes & Gray LLP
One International Place
Boston , MA 02110
617-951-7566
Fax: 617-951-7050
Email: jdonovan@ropesgray.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Julia M. Guaragna
Sullivan & Cromwell LLP
125 Broad Street
New York , NY 10004-2498
212-558-4000
Email: guaragnaj@sullcrom.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Stephanie G. Wheeler
Sullivan & Cromwell LLP
125 Broad Street
New York , NY 10004-2498
212-558-4000
Fax: 212-558-3588
Email: wheelers@sullcrom.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant
GS Capital Partners

Defendant
JP Morgan Chase & Co.
represented by
James R. Carroll
Skadden, Arps, Slate, Meagher & Flom
One Beacon Street
31st Floor
Boston , MA 02108
617-573-4800
Fax: 617-573-4822
Email: jcarroll@skadden.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kurt W. Hemr
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston , MA 02108
617-573-4800
Fax: 617-573-4822
Email: khemr@skadden.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant
JP Morgan Partners, LLC
represented by
James R. Carroll
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kurt W. Hemr
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant
Kohlberg Kravis Roberts & Company, L.P.
represented by
Joseph F. Tringali
Simpson, Thacher & Bartlett LLP
425 Lexington Avenue
New York , NY 10017
212-455-2000
Fax: 212-455-2502
Email: jtringali@stblaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kevin M. McGinty
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul C. Gluckow
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York , NY 10017
212-455-2653
Fax: 212-455-2502
Email: pgluckow@stblaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meredith M. Leary
(See above for address)
ATTORNEY TO BE NOTICED

Steven J. Torres
(See above for address)
ATTORNEY TO BE NOTICED

Defendant
Merrill Lynch & Co., Inc.
represented by
Daniel M. Segal
Shearman & Sterling LLP
599 Lexington Avenue
New York , NY 10022
212-848-8177
Fax: 646-848-8177
Email: dan.segal@shearman.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jerome S. Fortinsky
Shearman and Sterling LLP
599 Lexington Avenue
New York , NY 10022
212-848-4900
Fax: 646-848-4900
Email: jfortinsky@shearman.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kenneth M. Kramer
Shearman & Sterling LLP
599 Lexington Avenue
New York , NY 10022-6069
212-848-4000
Fax: 212-848-4172

Email: kkramer@shearman.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wayne Dale Collins
Shearman and Sterling LLP
599 Lexington Avenue
New York , NY 10022
212-848-4127
Fax: 646-848-4127
Email: wcollins@shearman.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Ian D. Roffman
Nutter, McClennen & Fish, LLP
World Trade Center West
155 Seaport Boulevard
Boston , MA 02210-2604
617-439-2421
Fax: 617-310-9421
Email: iroffman@nutter.com
ATTORNEY TO BE NOTICED

Jonathan L. Kotlier
Nutter, McClennen & Fish, LLP
World Trade Center West
155 Seaport Boulevard
Boston , MA 02210-2604
617-439-2000
Fax: 617-310-9683
Email: jkotlier@nutter.com
ATTORNEY TO BE NOTICED

Defendant
Merrill Lynch Global Partners, Inc.
represented by
Daniel M. Segal
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jerome S. Fortinsky
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kenneth M. Kramer
(See above for address)

LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wayne Dale Collins
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Ian D. Roffman
(See above for address)
ATTORNEY TO BE NOTICED

Jonathan L. Kotlier
(See above for address)
ATTORNEY TO BE NOTICED

Defendant
Permira Advisors LLC
represented by
Dane A. Drobny
Winston and Strawn LLP
35 West Wacker Drive
Chicago , IL 60601
312-558-5600
Fax: 312-558-5700
Email: ddrobny@winston.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Douglas H. Flaum
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York , NY 10004
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kevin M. McGinty
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael P. Mayer
Winston and Strawn LLP
35 West Wacker Drive
Chicago , IL 60601
312-558-5600
Fax: 312-558-5700
Email: mmayer@winston.com
LEAD ATTORNEY

PRO HAC VICE
ATTORNEY TO BE NOTICED

Michael B. deLeeuw
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York , NY 10004
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Peter S. Guryan
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York , NY 10004
212-859-8477
Email: peter.guryan@friedfrank.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meredith M. Leary
(See above for address)
ATTORNEY TO BE NOTICED

Steven J. Torres
(See above for address)
ATTORNEY TO BE NOTICED

Defendant
Providence Equity Partners, Inc.
represented by
James C. Egan , Jr.
Weil Gotshal & Manges
1300 Eye Street, NW
Suite 900
Wsahington , DC 20005-2018
202-682-7000
Fax: 202-857-0949
Email: jim.egan@weil.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

John E. Scribner
Weil, Gotshal & Manges LLP
1300 Eye Street, N.W.
Suite 900
Washington , DC 20005
202-682-7000
Fax: 202-857-0940
Email: john.scribner@weil.com
LEAD ATTORNEY

PRO HAC VICE
ATTORNEY TO BE NOTICED

Steven A. Newborn
Weil, Gotshal & Manges LLP
1300 Eye Street, N.W.
Suite 900
Washington , DC 20005
202-682-7000
Fax: 202-857-0940
Email: steven.newborn@weil.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Carrie M. Anderson
Weil, Gotshal & Manges LLP
1300 Eye Street NW
Suite 900
Washington , DC 20005
202-682-7231
Fax: 202-857-0939
Email: carrie.anderson@weil.com
ATTORNEY TO BE NOTICED

Defendant
Silver Lake Partners
represented by
Kevin M. McGinty
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

R. Hewitt Pate
Hunton & Williams LLP
1900 K Street, N.W.
Suite 1200
Washington , DC 20006-1109
202-855-1921
Fax: 202-857-3894
Email: hpate@hunton.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Ryan Shores
Hunton & Williams LLP
1900 K Street, N.W.
Suite 1200
Washington , DC 20006-1109
202-955-1521
Fax: 202-862-3609
Email: rshores@hunton.com

LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wesley R. Powell
Hunton & Williams LLP
200 Park Avenue
43rd Floor
New York , NY 10166-0091
212-309-1013
Fax: 212-309-1100
Email: wpowell@hunton.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meredith M. Leary
(See above for address)
ATTORNEY TO BE NOTICED

Steven J. Torres
(See above for address)
ATTORNEY TO BE NOTICED

Defendant
Texas Pacific Group
represented by
Arun S. Subramanian
Susman Godfrey L.L.P.
654 Madison Avenue
New York , NY 10065
212-336-8330
Fax: 212-336-8340
Email: asubramanian@susmangodfrey.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Franklin R. Liss
Arnold & Porter LLP
555 Twelfth Street, NW
Washington , DC 20004-1206
202-942-5796
Fax: 202-942-5999
Email: Frank.Liss@aporter.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

H. Lee Godfrey
Susman Godfrey LLP
Suite 5100
1000 Louisiana Street
Houston , TX 77002

713-653-7857
Fax: 713-654-3366
Email: lgodfrey@susmangodfrey.com
ATTORNEY TO BE NOTICED

Harry P. Susman
Susman Godfrey LLP
1000 Louisiana
Suite 5100
Houston , TX 77002-5096
713-653-7875
Fax: 713-654-6686
Email: hsusman@susmangodfrey.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

John A. Freedman
Arnold & Porter, LLP
555 Twelfth Street, NW
Washington , DC 20004
202-942-5316
Fax: 202-942-5999
Email: John_Freedman@aporter.com
ATTORNEY TO BE NOTICED

Sarah A. Friedman
Arnold & Porter LLP
555 Twelfth Streeet, NW
Washington , DC 20004-1206
202-942-5796
Fax: 202-942-5999
Email: Sarah.Friedman@aporter.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

William J. Baer
Arnold & Porter LLP
555 Twelfth Street, NW
Washington , DC 20004-1206
202-942-5936
Fax: 202-942-5999
Email: William.Baer@aporter.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant
Thomas H. Lee Partners, L.P.
represented by
Alan J. Weinschel
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York , NY 10153
212-310-8000

Fax: 212-310-8007
Email: alan.weinschel@weil.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Claire L.M. Webb
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York , NY 10153
212-310-8000
Fax: 212-310-8007
Email: claire.webb@weil.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Eric S. Hochstadt
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York , NY 10153
212-310-8000
Fax: 212-310-8007
Email: eric.hochstadt@weil.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Fiona Schaeffer
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York , NY 10153
212-310-8000
Fax: 212-310-8007
Email: fiona.schaeffer@weil.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Helene D. Jaffe
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York , NY 10153
212-310-8000
Fax: 212-310-8007
Email: helene.jaffe@weil.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Thomas C. Frongillo
Weil, Gotshal & Manges LLP
100 Federal Street
34th Floor
Boston , MA 02110
617-772-8300
Email: thomas.frongillo@weil.com
ATTORNEY TO BE NOTICED

Defendant
Warburg Pincus LLC
represented by
Bernard A, Nigro , Jr.
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington , DC 20006
202-303-1125
Fax: 202-303-2125
Email: bnigro@willkie.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Courtney Amber Clark
Sherin and Lodgen LLP
101 Federal Street
Boston , MA 02110
617-646-2000
Fax: 617-646-2222
Email: caclark@sherin.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

James W. Matthews
Sherin and Lodgen LLP
101 Federal Street
Boston , MA 02110
617-646-2000
Fax: 617-646-2222
Email: jwmatthews@sherin.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Raymond M. Sarola
Wilkie Farr & Gallagher LLP
787 Seventh Avenue
New York , NY 10019
212-728-8982
Email: rsarola@willkie.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Robert J. Muldoon , Jr.
Sherin & Lodgen LLP
101 Federal Street
Boston , MA 02110-2104
617-646-2000
Fax: 617-646-2222
Email: rjmuldoon@sherin.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Roger Netzer
Wilkie Farr & Gallagher LLP
787 Seventh Avenue
New York , NY 10019
212-728-8249
Email: rnetzer@willkie.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant
TC Group III, L.P.
TC Group III, L.P.
represented by
Amanda Reeves
Latham & Watkins LLP (DC)
555 11th Street, N.W.
Suite 1000
Washington , DC 20004-1304
202-637-2200
Fax: 202-637-2201
Email: Amanda.Reeves@lw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

James C. Burling
Wilmer Hale LLP
60 State Street
Boston , MA 02109
617-526-6416
Fax: 617-526-5000
Email: james.burling@wilmerhale.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kenneth Conboy
Latham & Watkins (NY)
885 Third Avenue
Suite 1000
New York , NY 10022
212-906-1200
Email: Kenneth.Conboy@lw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Marcellus Williamson
Latham & Watkins LLP (DC)
555 11th Street, N.W.
Suite 1000
Washington , DC 20004-1304
202-637-2200

Fax: 202-637-2201
Email: Marc.Williamson@lw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

William Sherman
Latham & Watkins LLP (DC)
555 11th Street, N.W.
Suite 1000
Washington , DC 20004-1304
202-637-2200
Fax: 202-637-2201
Email: William.Sherman@lw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wyley S. Proctor
Wilmer Hale LLP
60 State Street
Boston , MA 02109
617-526-6789
Fax: 617-526-5000
Email: wyley.proctor@wilmerhale.com
ATTORNEY TO BE NOTICED

Defendant
TC Group IV, L.P.
represented by
Amanda Reeves
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

James C. Burling
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kenneth Conboy
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Marcellus Williamson
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

William Sherman
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wyley S. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

Defendant
Apollo Global Management, LLC
represented by
Abby F. Rudzin
O'Melveny & Myers, LLP
Times Square Tower
7 Times Square
New York , NY 10036
212-326-2000
Fax: 212-326-2061
Email: arudzin@omm.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Ian Simmons
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington , DC 20006-4001
202-383-5106
Fax: 202-283-5414
Email: isimmons@omm.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jonathan Rosenberg
O'Melveny & Myers, LLP
Times Square Tower
7 Times Square
New York , NY 10036
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Richard Parker
O'Melveny & Myers, LLP
1625 Eye Street N.W.
Washington , DC 20006-4001
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kevin M. McGinty
(See above for address)
ATTORNEY TO BE NOTICED

Steven J. Torres
(See above for address)
ATTORNEY TO BE NOTICED