UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JAMES D. KLEIN, ROBERT ZIMMERMAN, RUFUS ORR, KIRK DAHL, HELMUT GOEPPINGER JOSEPH S. FISHER, TRUST JOSEPH S. FISHER, M.D., P.C. NEW PROFIT SHARING TRUST, POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT Plaintiffs,	
v.	Civil Action No. 1:07-cv-12388-EFH
BAIN CAPITAL PARTNERS, LLC, THE BLACKSTONE GROUP, L.P., THE CARLYLE GROUP, GOLDMAN SACHS GROUP, GS CAPITAL PARTNERS, JP MORGAN CHASE & CO., JP MORGAN PARTNERS, LLC, KOHLBERG KRAVIS ROBERTS & COMPANY, L.P., MERRILL LYNCH & CO., INC., MERRILL LYNCH GLOBAL PARTNERS, INC., PERMIRA ADVISERS,LLC, PROVIDENCE EQUITY PARTNERS, INC., SILVER LAKE PARTNERS, TEXAS PACIFIC GROUP, WARBURG PINCUS, LLC, TC GROUP III, L.P., TC GROUP IV, L.P. APOLLO GLOBAL MANAGEMENT, LLC Defendants	

BEFORE THE HONORABLE SENIOR JUDGE EDWARD F. HARRINGTON
UNITED STATES DISTRICT JUDGE

MOTIONS HEARING

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts 02210
Thursday, November 13, 2008
9:50 a.m.

APPEARANCES:

FOR THE PLAINTIFFS:

ROBINS, KAPLAN, MILLER & CIRESI LLP
By: K. Craig Wildfang, Esq.
Stacey P. Slaughter, Esq.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015

SCOTT & SCOTT LLP
By: Christopher M. Burke, Esq.
600 B Street, Suite 1500
San Diego, CA 92101

COUGHLIN, STOIA, GELLER, RUDMAN & ROBINS LLP
By: David W. Mitchell, Esq.
655 West Broadway, Suite 1900
San Diego, CA 92101-8498

FOR THE DEFENDANTS:

SIMPSON THACHER & BARTLETT LLP
By: Joseph F. Tringali, Esq.
425 Lexington Avenue
New York, NY 10017-3954
- and -
By: Hillary Cherry Mintz, Esq.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004

KIRKLAND & ELLIS LLP
By: Craig S. Primis, Esq.
David R. Dempsey, Esq.
655 Fifteenth Street, N.W.
Washington, D.C. 20005

(APPEARANCES CONTINUED ON NEXT PAGE)

LATHAM & WATKINS LLP
By William R. Sherman, Esq.
Edward Marcellus Williamson, Esq.
Amanda P. Reeves, Esq.
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004-1304

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO PC
By: Kevin M. McGinty, Esq.
Steven J. Torres, Esq.
One Financial Center
Boston, MA 02111

O'MELVENY & MYERS LLP
By: Jonathan Rosenberg, Esq.
Time Square Tower
7 Times Square
New York, New York 10036
- and -
By: Ian Simmons, Esq.
1625 Eye Street, NW
Washington, D.C. 20006-4001

SHEARMAN & STERLING LLP
By: Kenneth M. Kramer, Esq.
599 Lexington Avenue
New York, NY 10022-6069

NUTTER M cCLENNEN & FISH LLP
By: Ian D. Roffman, Esq.
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2604

WINSTON & STRAWN LLP
By: Dane A. Drobny, Esq.
35 West Wacker Drive
Chicago IL 60601-9703

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
By: James R. Carroll, Esq.
1 Beacon Street
Boston, MA 02108-3194

(APPEARANCES CONTINUED ON NEXT PAGE)

WILKIE FARR & GALLAGHER LLP
By: Bernard A. Nigro, Jr.
1875 K Street, NW
Washington, DC 20006-1238
- and -
By: Raymond M. Sarola, Esq.
787 Seventh Avenue
New York, NY 10019-6099

WEIL, GOTSHAL & MANGES LLP
By: James C. Egan, Jr., Esq.
Carrie Anderson, Esq.
1300 Eye Street, N.W., Suite 900
Washington, D.C. 20005
- and -
By: Alan J. Weinschel, Esq.
Helene D. Jaffe, Esq.
767 Fifth Avenue
New York, NY 10153-0119

HUNTON & WILLIAMS LLP
By: Wesley R. Powell, Esq.
200 Park Avenue
New York, New York 10166-0136
-and-
By: R. Hewitt Pate, Esq.
Ryan A. Shores, Esq.
1900 K Street, N.W.
Washington, D.C. 20006-1109

ROPES & GRAY LLP
By: John D. Donovan, Jr., Esq.
One International Place
Boston, MA 02210

SULLIVAN & CROMWELL LLP
By: Gandolfo V. Dibalsi, Esq.
125 Broad Street
New York, NY 10004-2498

* * * * *

Brenda Hancock, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way
Boston, Massachusetts 02210
(617)439-3214

Mechanical Steno - Computer-Aided Transcript

(The following proceedings were held in open court before the Honorable Senior Judge Edward F. Harrington, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 13, Boston, Massachusetts, on Thursday, November 13, 2008):

THE DEPUTY CLERK: All rise. Court is in session. Civil Action 07-12388, Klein vs. Bain Capital. Will counsel identify themselves, for the record.

MR. WILDFANG: Good morning, your Honor. Craig Wildfang, Robins, Kaplin, Miller & Ciresi for the class plaintiffs.

MR. BURKE: Good morning, your Honor. Chris Burke, Scott & Scott, for the class plaintiffs.

MR. MITCHELL: Good morning, your Honor. David Mitchell, Coughlin Stoia, on behalf of the class plaintiffs.

MR. SHERMAN: Good morning, your Honor. William Sherman, Latham & Watkins, on behalf of the Carlyle defendants.

MR. McGINTY: Good morning. Kevin McGinty, Mintz Levin, Boston, for defendants Apollo, Blackstone, KKR, Permira and Silver Lake.

MR. PRIMIS: Good morning, your Honor. Craig Primis, from Kirkland & Ellis LLP, for Bain Capital.

MR. TRINGALI: Good morning, your Honor. Joseph Tringali, Simpson, Thacher & Bartlett, for KKR.

THE COURT: More? Go ahead.

MR. ROSENBERG: Good morning, your Honor. Jonathan Rosenberg, O'Melveny & Myers, for Apollo.

MR. DROBNY: Good morning, Judge. Dane Drobny, Winston & Strawn, on behalf of Permira Advisers.

MR. KRAMER: Good morning, your Honor. Ken Kramer, Shearman & Sterling, for Merrill Lynch.

MR. CARROLL: James Carroll, your Honor, for JP Morgan Chase and JP Morgan Partners.

MS. REEVES: Amanda Reeves, on behalf of Latham & Watkins, for the Carlyle defendants.

MR. WILLIAMSON: Good morning, your Honor. Marc Williamson, Latham & Watkins, for Carlyle.

THE COURT: The Motion to Dismiss is going to be argued by the defendants, and have you made arrangements on how you are going to do it? I don't care if everybody speaks or however you feel best to proceed.

MR. SHERMAN: Thank you, your Honor. We have -- I think Mr. McGinty sent a letter to the Court suggesting that I would be arguing on behalf of defendants on the preemption motion, Mr. Primis will be arguing on behalf of the defendants after me on the Twombly motion, Mr. Tringali will be arguing on the releases, and then the individual defendants who have dismissal motions will be arguing on behalf of those motions, and, with the Court's permission, we would do it in that order.

THE COURT: And how best do you wish to proceed after each argument, respond or respond after the defendants have completed their argument?

MR. WILDFANG: Your Honor, our preference would be to respond after the three initial arguments in the main motion. I will do that response, then Mr. Mitchell would do a response on the release motion, then Mr. Burke would respond to the three individual motions. That would be our preference.

MR. SHERMAN: That's fine with us, your Honor.

THE COURT: All right. I'll hear you.

MR. SHERMAN: Thank you, your Honor. As I said, my name is William Sherman. I represent the Carlyle defendants, but on behalf of all defendants today I will be addressing the preemption issue, and just for a little background on that issue, your Honor, what's at issue in this case are LBOs, leveraged buyouts, and leveraged buyouts are generally a transaction where debt is issued to buy the shares of a company. It's a common corporate transaction.

What the plaintiffs allege in this case is that the group of 17 defendant private equity firms and their investment banks, as well as management in the target companies, as well as unnamed and named co-conspirators, a number of which, dozens of which, all conspired over the course of three or four years to fix every LBO in the United States over $2.5 billion.

Now, Mr. Primis, as I said, is going to address on the

Twombly motion the implausibility of that allegation to the extent it's not obvious on its face. For purposes of preemption, the important part about that is that each one of those deals, every one, involved a publicly held corporation being taken private or being purchased, and because --

THE COURT: When you say "each one of those deals," do you mean every deal in the United States or the nine deals specifically alleged?

MR. SHERMAN: The nine deals alleged and all the deals at issue implicated in plaintiffs' complaint. They don't identify all those LBOs, and, frankly, there's some question about whether they're talking about 70 or 90, but what they're alleging all have to do with publicly held corporations being purchased, and because of that, all the deals in question were subject to regulation by the Securities and Exchange Commission, and that leads us to the first question today, which is, does the regulation of those transactions by the SEC and the securities laws preempt plaintiffs' claim, plaintiffs' attempt to get treble damages under the antitrust laws for those acts. The answer to that question is provided by the Supreme Court's decision last year in Credit Suisse v. Billing, and the answer, we submit, is, obviously, yes, those claims are preempted.

Now, what you'll hear from Mr. Wildfang and plaintiffs today is what they did in their briefs. They're going to try to convince the Court that Billing does not apply, or can be distinguished, or for some reason should be ignored by the Court, but it is clearly the authority on point here, the controlling authority, and when you look at the four factors that Billing laid out, we submit to you it's obvious that these claims are preempted.

But before we get to Billing, I do want to say that Billing does not stand alone. Billing is consistent with previous decisions of the Supreme Court in Gordon and NASD. Billing was followed last year by a District Court decision in the Southern District of New York called In re: Short Sale, which examined the same factors, which came to the conclusion that that case required preemption. We put it in our brief, and plaintiffs didn't even respond to it.

And, perhaps, most on point, Billing is completely consistent with the Second Circuit's decision 18 years ago in the Finnegan v. Campeau case. Finnegan v. Campeau is on all fours with the case here today. In that case, the plaintiffs --

THE COURT: Were these two, Gordon and Finnegan, were they cited in Billing?

MR. SHERMAN: Gordon and NASD, absolutely. Billing went through the previous decisions of the Supreme Court, incorporated the standards laid out in Gordon and NASD. I believe the Court also made reference to Finnegan. Finnegan was a Second Circuit case, so it wasn't relied upon to the same extent in the Supreme Court decision as the previous Supreme Court law.

But Finnegan was a case where the plaintiffs alleged that two bidders in control -- in a contest for control for purchase of a company decided midway through the bidding process that it didn't make sense for them to bid against each other. So, one of them stepped out, withdrew its latest bid, and they agreed, allegedly agreed, that the other one would purchase the company and then, after the deal, the one that stepped out would get, in recompense, some shares of the company. Exactly the same sort of thing that plaintiffs are alleging here.

Now, plaintiffs concede that Billing factors applied to Finnegan would require preemption. That's really fatal to their argument here, because we're talking about the same alleged violation, the same sort of conduct at issue in this case. Plaintiffs attempt to distinguish by saying, Well, it's different because there it was only a single transaction, whereas, here we're talking about the conduct over several transactions, but there is absolutely nothing in Finnegan, absolutely nothing in Billing to suggest that doing it in one transaction is anything different than doing it in numerous transactions, and the ruling of Billing clearly applies here and should lead to the same result. I'm sorry, the ruling in

Finnegan.

Now, with your Honor's permission --

THE COURT: Is it the same -- with respect to these three other decisions, is the issue between antitrust law and securities law?

MR. SHERMAN: Absolutely, yes, your Honor.

THE COURT: The same issue?

MR. SHERMAN: Gordon, NASD and Finnegan. Billing, Gordon, NASD, Finnegan, they all follow the same path to preemption, so that the Supreme Court authority is --

THE COURT: Not only preemption but --

MR. SHERMAN: Preemption of secure- -- absolutely.

THE COURT: -- preemption in the conflict between antitrust and securities law.

MR. SHERMAN: Yes, your Honor, yes, absolutely, all of them, and Finnegan and Short Sale. With the Court's permission, I have a chart on the Billing analysis, if I could hand it up.

THE COURT: Surely.

MR. SHERMAN: I have two here, one for your clerk as well.

Your Honor, just some background on the Billing facts. Billing concerned IPOs, initial public offerings, and in the IPO process, underwriters formed groups of syndicates to market and build a book, it's called, of IPO -- interest in IPOs before they come out, and what the syndicates do is, they do things called road shows, where they go and try to gauge interest in the IPOs and meet with potential investors to find out at what price they might be interested and what number of shares they might be interested, and based on that information, the syndicates set the number of shares and the price for when the IPO is issued.

Now, in Billing, the plaintiffs allege that, as part of this process, the underwriter syndicates abused the process by requiring certain things of investors that they say were said were prohibited by the securities laws and the antitrust laws, and these were laddering, where you would be required to buy the additional shares of the IPO later on at a higher price, tying, where, in order to buy the shares of the favorable IPO, you would also have to agree to buy shares of another stock; in general, increased commissions.

The Supreme Court looked at that behavior, and the Supreme Court said, Okay, we're going to analyze whether this is preempted by the securities laws by looking at four questions. This is the four questions I've put on the chart here for you.

The first question the Supreme Court addressed was the question whether the conduct is central to the proper functioning of capital markets. This is sometimes known as the heartland analysis. Is the conduct at issue within the heartland of SEC regulation. In the Billing case, the Supreme Court had no problem saying, yes, IPOs are clearly within the conduct central to the proper functioning of the capital markets. They talk about how IPOs help spread ownerships of new firms, helps new firms that are seeking capital, and the syndicate and book-building behavior directed the market to the proper demand for these IPOs.

The same is true here with respect to the LBO process. The LBOs have been recognized to improve liquidity of stocks. It's a common and well-known-to-the-SEC method of purchasing companies, and other courts have recognized that this process of joining forces by LBO by -- for consortia bids allows companies that might not otherwise be able to participate to participate in these transactions, and it helps to spread the risk in those transactions.

So, as to the first question the Supreme Court asked, clearly the case here satisfies it, as Billing did. The second question the Supreme Court asked is, does the SEC have authority to regulate the conduct at issue?

THE COURT: Is this the heart of the distinction? By that I mean, is the argument on the plaintiffs' side directed primarily towards number 2, meaning, the lack of or the alleged lack of regulation on the part of the SEC?

MR. SHERMAN: I'd say, your Honor, that with respect to -- the plaintiffs make two arguments or two primary types of arguments about why Billing doesn't apply. With respect to both 2 and 3, questions 2 and 3, the plaintiffs do argue that the regulations are different and/or they don't apply, and what plaintiffs focus on is the fact that in the LBO process the regulations require disclosures from not, necessarily, from defendants but from the target companies at times.

Now, let me just step back for a second to give you context on that, because the difference between the regulation in Billing and the regulation here is a minor one. It's simply a question of what the SEC determine to regulate. Here, in the context of LBO transactions, Congress has given SEC the right, and SEC has regulated those through a disclosure regime. In other words, Congress made the determination, and SEC has followed that determination, that the best thing to do is to let the shareholders make the decisions about these transactions, and in order to do that, they want to ensure that the shareholders get sufficient information. So, the regulation is done by requiring disclosures both by the companies being acquired and by the companies who are doing the acquiring, and in this case we've submitted to the Court with our briefs there were extensive disclosures in all of the transactions at issue, and, indeed, because they're public transactions, there would always be a 14A disclosure, which is a disclosure of a proxy solicitation statement by the company being acquired. In addition, because these are going-private transactions, Rule 13e-3 requires disclosures, Rule 13d requires disclosures. So, the way that the SEC regulates in this area is by requiring disclosures from the companies involved in these transactions.

THE COURT: Let me ask you this, and maybe this fits within 3 rather than 2 of the four bases or factors. What action does the SEC take as a result of the disclosures?

MR. SHERMAN: What they do, your Honor, is they'll look over the disclosures. If they feel that it isn't adequate information for the shareholders, or if they have questions about the disclosures, or if they feel that disclosures need to come from another source, they write back to the companies that made the disclosure and they say, We need you to clarify this, or We need you to add this, or We need you to say this, and as attachment to our reply brief we gave the Court just a few examples, but there are hundreds of pages of the SEC going back to these companies and saying, Okay, we need more, Tell us this, Answer this, and this is the active SEC regulation of the LBO process. This is exactly what Congress envisioned when they set up a disclosure regime with respect to these kind of transactions. So, that's 2 and 3, where, as we said --

THE COURT: What happens if there's a failure to abide by the request? Namely, suppose the SEC asked for further disclosures. What is the consequence of a failure to do so?

MR. SHERMAN: The consequence of a failure -- there are two potential consequences. It could lead to an action by the SEC, but it also leads, it gives shareholders -- shareholders, when they make the decision about to go forward with these transactions, if they haven't had adequate disclosure, if a company has refused to disclose something or it turns out that a company didn't, the shareholder has a cause of action under the securities laws. The shareholder can bring a claim under 10b, under Rule 14, under Rule 13. All of those rules allow shareholders to bring actions if there's been inadequate disclosure. That's exactly the regime that the SEC has set up. In addition, I might add that shareholders have options under fiduciary duty laws in the state courts, but they do have a securities law claim if there's inadequate disclosure, absolutely, absolutely.

So, then the Supreme Court said, Well, in view of the three questions we've answered above, the fourth question is, does the SEC's regulation lead to potential conflict with the plaintiffs' suit for treble damages? And there the Court said yes, and in saying yes, the Court looked at a number of factors, and I've listed three of them here, but what the Court was most concerned about and what it emphasized the most was the possibility that allowing nonexpert, lay jurors or courts to look at behavior which the SEC may have determined is allowable, to look at it in terms of is it prohibited by the antitrust laws, and to do that in the context of a potential treble damages suit, the Court said this is too close, this is too much of a possibility of a serious securities-related mistake, and what the Court said, in very practical terms, is, participants in this process, if they don't know -- if they follow the securities regulations without knowing whether that same behavior is going to be subject to suit under the antitrust laws, they're going to stop doing things that the SEC allows them to do or may even encourage them to do.

Now, it's clear that the same concern is implicated here, and the most obvious proof of that is the fact that plaintiffs' complaint, the facts in plaintiffs' complaint, are taken almost entirely, perhaps entirely, from the disclosures that were made with respect to the deals here. I can't think of any better illustration of the very conflict that the Supreme Court was worried about than saying, Okay, we're required to make the disclosures. We make the disclosures, and the plaintiffs take the facts that were in the disclosures and put them into a complaint for treble damages.

THE COURT: Let me ask you this. Is the fact that under IPOs the SEC can initiate a regulatory action on its own behalf, does that make it distinct, whereas, in LBOs any action is taken on the part of stockholders?

MR. SHERMAN: No, your Honor. In fact, the SEC can initiate an action with respect to the LBOs as well. The SEC has that right. If there are inadequate disclosures, the SEC also has a cause of action.

THE COURT: I thought from your argument that you said the consequence of inadequate disclosure is that stockholders can initiate their own cause of action. Are you saying that the SEC can and does also?

MR. SHERMAN: The SEC can. The reason the SEC would do it is if there were inadequate disclosure or if the disclosure somehow violated 10b-5, but the reason that I emphasize the stockholders is because those are the same plaintiffs that are sitting here in front of you, trying to bring an antitrust claim. So, they have a claim; they have a claim under the securities laws. That's the reason that I emphasized them. And the measure of the damage for the violation of the securities laws is the diminution in the value of their stock. The only difference is they're here on an antitrust claim because they want to get the treble damages, and that's exactly what the Supreme Court warned against. That's exactly why the Supreme Court said if the conduct is regulated by the securities laws, we should not risk having plaintiffs be able to come in with an antitrust suit and attack --

THE COURT: So, you're saying that this cause of action could have been brought under the securities laws, but the treble-damage aspect is the reason that they're proceeding under antitrust?

MR. SHERMAN: Well, actually, your Honor, what Mr. Tringali is going to talk about later is the plaintiffs here did bring actions with respect to these deals. They were brought under state law. One of them was brought under the Federal securities laws. They could have been brought under Federal securities laws, yes, absolutely, but they've already brought actions claiming they didn't receive sufficient value for their shares. They're now back trying to bring another action under the antitrust laws, but, absolutely, they had a right to bring one, and in most cases they have.

Your Honor, I'm happy to go through this chart in more detail, if you have more questions.

THE COURT: Just explain factor 4 just a bit, what it means.

MR. SHERMAN: Okay. Well, essentially what this Court said was factor 4 builds on the three factors in front of it. So, if you look at 1, 2 and 3 and the answer is yes, then you've really pretty much answered 4, which is, does that mean that there's a conflict here.

But in explaining the conflict, the Supreme court looked at a couple of things. They said, Well, look, the threat of treble damages might deter activity. They also said the possibility of private antitrust actions being brought around the country could lead to inconsistent results. They emphasize the possibility of having lay jurors opine on delicate matters that the SEC really has the expertise to determine whether there should be actions allowed or disallowed, and I should emphasize that, in doing that, the Court did not say or they noted that the plaintiffs did not attack the very syndicates themselves but, rather, the manner in which the syndicates were used. The complaint said this -- I mean, the Court said this: We read the complaints as attacking the manner in which underwriters jointly seek to collect excessive commissions. Well, that completely mirrors what plaintiffs say here when they say, Well, we're not attacking the club deals per se, but we're saying that they are the means by which the defendants achieve their anticompetitive ends.

So, really, the complaint here, the claims here, fall right into the concerns that the Supreme Court looked at in finding the conflict with respect to IPOs.

THE COURT: Treble damages under antitrust law, I think it's true, are they discretionary or required?

MR. SHERMAN: If you prove the antitrust violation, they're required.

THE COURT: Required. Because, as a matter of practice, my practice has been under other types of statutes.

MR. SHERMAN: I suppose I shouldn't say they're required, since we're here on an antitrust case. I suppose discretionary was the right answer to that.

THE COURT: But those so-called, when they're discretionary, my practice is usually not to impose --

MR. SHERMAN: Well, then, I'm going to change my answer, your Honor. They're definitely discretionary.

THE COURT: We don't have too many antitrust cases. I had one several years ago, but I had forgotten whether it was required, but it is.

MR. SHERMAN: But, your Honor, let me say, I think the concern that the Supreme Court was expressing would be true even if they were discretionary, because the point is that you don't want to disincentive-ize actors from following the SEC regime by the threat of treble damages for the same actions, and I can't think of any clearer conflict. Here, the parties were required to make certain disclosures with these deals. The disclosures were made. The plaintiffs took the disclosures and put the facts of those disclosures into a complaint alleging antitrust violation. I can't think of any greater disincentive for parties to follow the SEC regulations if they have the fear that, by following those regulations, by making the required disclosures, they're putting facts in the plaintiffs' hands that are going to be used in an antitrust case against them. It's exactly the sort of concern the Supreme Court had in saying the securities laws govern this, we're not going to let private plaintiffs come and bring antitrust actions.

THE COURT: So, would you say, with respect to the so-called preemption issue, if you could boil it down to one factor, it's whether -- I'm just thinking off the top of my head, so tell me if I'm wrong -- it's whether the SEC really is in charge of controlling this type of activity?

MR. SHERMAN: Absolutely. If you had to boil it down, your Honor, that's exactly right, are we in the province of the SEC? Now, the Court broke that down into four questions, because there are cases where there are permutations where you need to look at, all right, in fact, I'd say the difference between the way you stated it, the reason that there's a third factor, does the SEC actively regulate, there have been some cases where it's the province of the SEC but they really aren't taking action. Well, there it might be a different case, but you've boiled it down precisely right. Is it the province of the SEC? If it is, then it should not be intruded upon with antitrust claims.

And let me give you probably the easiest way to understand whether we are in that province here. Putting aside the plaintiffs' damages claims, plaintiffs have also put in a claim for injunctive relief. The claim for injunctive relief purports to represent a class of every holder of a security in any exchange in the United States, every holder of a security on any exchange, no limitation of size, no limitation of number of shares, no limitation of whether you're a United States citizen or somewhere else. The plaintiffs want you to enter an injunction that would require you to supervise essentially every corporate transaction made in this country to determine whether it falls under what they call an antitrust claim. Now, if that's not the province of the SEC, I don't know what is.

THE COURT: My wife takes care of my checking account.

(Laughter)

THE COURT: I don't want that job, I'll tell you that.

(Laughter)

MR. SHERMAN: Well, you might need your wife to be in here with you, if we do.

So, your Honor, we've laid out here why Billing applies and really think there's no question that Billing, just from last year, is completely on point. You can -- I invite the Court to look at the other Supreme Court cases, because they all come to the same conclusion. The authority is all to the same conclusion that the claims here are preempted.

Now, as I said, plaintiffs try to avoid this and get around it. Well, how do they do that? They make two claims. The first we've already talked about, which is they say, Well, the regulations don't go exactly to what we think they should go to, we think the SEC should regulate more these actual, these private equity firms. Some of these disclosures aren't required by these private equity firms, they're required by the target company.

Well, two things about that. First of all, since they allege that management was part of the conspiracy, it really doesn't matter in this case whether the disclosures are made by the private equity purchasers or by the management that are allegedly co-conspirators, but the more basic problem with that argument is it's a complaint about the way the SEC handles its business, about the regime that the SEC has set up, and that goes right back to what the Court in Billing said you can't do. You can't try to overrule through a private antitrust suit the expertise of the SEC. As you put it, if it's the province of the SEC, that really answers the question, and it's not for private plaintiffs to come in and say, Well, we don't really like the way the SEC regulates here.

Now, the other thing that the plaintiffs do, and this is with respect to questions 1 and 4 -- and if I could, your Honor, I have one more thing to hand to the Court. Again, your Honor, I have two, one for the clerk as well.

The other thing the plaintiffs do, your Honor, is they say, Well, we understand Billing and all, but Billing doesn't really apply here because we're alleging market division.

THE COURT: Alleging what?

MR. SHERMAN: Market division. They claim -- see, what plaintiffs have done here is, they've taken facts and stuck a label on them of, This constitutes market division in violation of the securities laws, and what the plaintiffs say is, Because we used the term "market division" Billing doesn't apply, and they say several times in their brief that the Billing Court ruled that any allegations of market division are outside the heartland of securities regulation. Your Honor, the Supreme Court did not say that, and I've shown you that here by showing you what exactly the Supreme Court said and what the plaintiffs say they said.

Now, just by way of background on this, in the Billing case, the Solicitor General came in and filed an *amicus* brief, and the Solicitor General said, We think you ought to remand the case to the District Court and let the District Court try to figure out whether it can pull apart behavior which is allowed by the securities laws and behavior which is not allowed by the securities laws. A preemption should only apply to that which is not allowed or inextricably intertwined with that behavior. The Supreme Court rejected it. The Supreme Court said, No, that's too fine a line; we're still concerned that actors won't understand whether the behavior is going to be subjected to a suit or not.

In the course of rejecting that, the Solicitor General said, Well, we're a little concerned that someone could read your decision as preempting all antitrust claims in all cases, for example, if plaintiffs here had alleged a naked market division claim. The Supreme Court said, We reject your argument, and added in a parenthetical, a parenthetical in the penultimate paragraph in the case, sort of as a by-the-way to the Solicitor General, We also note that market divisions appear to fall well outside the heartland of activities related to the underwriting process than the conduct before us here, and we express no view in respect to that kind of activity. In other words, the IPO process at issue here doesn't involve market division, so, SG, we're rejecting your request that we remand, and, by the way, we don't really think that's a concern here, because there's not a claim of market division.

Now, plaintiffs take this and they say, Ah-hah, this parenthetical must mean that the Supreme Court has rejected its Billing analysis if anyone alleges market division, and they do that in their briefs by leaving out the last part of the parenthetical and substituting their own language of securities regulation. It's clear that's not what the Court meant. If the Court had meant that, the Court could have said it, and there's absolutely no indication in Billing to suggest that the Court meant, Gosh, if anyone alleges market division, then you can forget about all these factors we just laid out, it just doesn't apply. In fact, your Honor, I suggest that the plaintiffs' attempt to take that language and turn it into a general exemption for market division just shows how far they're stretching to try to get out from the Billing analysis, because there's no way that this can honestly be read to say what they say it means.

Just one other point on that. Even the Solicitor General wouldn't agree with their interpretation. The Solicitor General's brief said, in asking the Court to do this, The Court should demand specific allegations of forbidden conduct and disallow inferences from authorized conduct, exactly what we have here, your Honor. Whatever label the plaintiffs want to put on, there's nothing to indicate the Supreme Court meant, Well, if you say "market division," or if you say any other kind of claim, we're going to forget about the analysis. The analysis applies. If you go through the four steps, there's no question that the claims here are preempted.

Unless you have any other questions.

THE COURT: The only thing that just bothers me just a little, I don't know which way to go, is, at least through your argument there doesn't appear any time or that you haven't cited that the SEC has taken any action with the failure to adequately disclose. Are there any cases in which they have in this LBO area? Namely, it seems that their regulatory regimen relates to disclosure for notification for private parties or potential stockholders or stockholders, but I haven't heard in your argument that, on failure to disclose, that the SEC takes action or, if they do, what have they done, and are there any cases that reflect such action?

MR. SHERMAN: Well, your Honor, standing here I'm not

-- my colleague may be giving me one.

THE COURT: Not that it's crucial, but at least it's a factor on why there may be a distinction from Billing. I'm not sure that it's significant at all, because maybe the disclosure regimen is regulation enough in this area. But at least it seems that it's a -- it may well be an objective practical distinction --

MR. SHERMAN: Well, your Honor, let me say --

THE COURT: -- again, the legal consequences I'm unsure of.

MR. SHERMAN: Yeah. I think the fact, if, indeed, they haven't, and I'm not aware, standing here today, of actions they've taken in terms of filing cases on the LBO process, but no question what the SEC does is they come back in the comment process and they say, We need more information. The fact of the matter is, when the SEC comes back and says, We need you to give us more information, the companies comply. I mean, the fact is the regulation, the regulatory regime works because that's the way they've set it up, and, honestly, you don't want the SEC to say, Well, you didn't disclose everything we asked you to.

THE COURT: And, as you say, if people don't, then there's a cause of action for the stockholders.

MR. SHERMAN: Absolutely.

THE COURT: So, what you're saying is that the disclosure procedure is their method of regulation.

MR. SHERMAN: Yes, your Honor, absolutely that's their method of regulation, but they retain the right to do more than that. As the Supreme Court noted in Billing, the same is true here in the LBO process. The SEC has the power to define and prevent acts and practices that are fraudulent, deceptive and manipulative, and they have the right to bring the action, but they've been very effective in regulating this through the disclosure regime, because they very carefully look at the disclosures, they come back to the companies making the disclosures and say, We need more, we need more, we need more. I mean, you can look at what we supplied the Court with our briefs. There's a series of back-and-forth on a particular deal, five, six letters, We need more, and the companies complied. I mean, the regulations are very effective in getting the shareholders the disclosure of all the information that the SEC thinks they need.

Now, the SEC has been involved in cases to -- you know, and the SEC has brought cases. In fact, the NASD case, it was not an LBO case, but the SEC has brought cases, and that hasn't affected the Court's decision about this preemption analysis. The Court has looked at those cases in the same way, and even if a case was brought by the SEC, preemption has been found.

So, it's the regulatory regime that they've set up, it's the way that Congress wanted them to regulate, and it's effective, honestly, which is why I can't point you to a case on the LBO side where they've brought a case, but I suggest to the Court that, if anything --

THE COURT: Are there any cases in which there has been a failure and the stockholders have brought private causes of action?

MR. SHERMAN: Absolutely, and, in fact, those are the cases that they've already brought in this case in the state court, sure.

THE COURT: All right.

MR. SHERMAN: Thank you, your Honor.

MR. PRIMIS: Good morning, your Honor. My name is Craig Primis, I'm from Kirkland & Ellis, and with the consent of the rest of the defendants, I'm here to present argument on part two of our Motion to Dismiss, which relates to the Twombly decision.

Before I do that, I just want to add one additional point in response to your Honor's questions on the Billing argument. One additional piece is that the SEC will not sign off on a proxy that's distributed to shareholders unless the target company engages in this give-and-take process of providing more information. So, the SEC takes action by approving or disapproving the disclosures that are made. So, once it goes out, it already has been approved by the SEC, which might explain why there aren't SEC actions against their approved disclosures.

But transitioning now to the second ground relating to Bell Atlantic vs. Twombly, the Supreme Court in Twombly established the standard for pleading an antitrust conspiracy case under Section 1 of the Sherman Act, which is what we have in Count I of the complaint here. The Supreme Court recognized in Twombly that there can be false inferences drawn from conduct that's alleged to be collusive, so to weed out those false inferences, the Court said that plaintiffs must set out facts that at least make it plausible that the defendants entered into an agreement and not that they were merely acting independently. That's the ruling of Twombly.

THE COURT: And that is to be drawn, I guess, from the allegations and reasonable inferences from the allegations in the complaint?

MR. PRIMIS: That is exactly what the Supreme Court directed District Courts to do, look at the allegations in the complaint and assess whether, in light of what the Supreme Court called common economic experience, is it plausible that there was an actual agreement here, or is it just as consistent with parties acting independently? And if it's just as consistent or could just as well be independent action, the Supreme Court said dismiss; that doesn't state a claim anymore under Rule 8.

In this case, we have two principal arguments, two principal points, with regard to why this complaint fails the Twombly test, and I'll go into them in more detail, but I just want to set them out up front. The first problem with the Third Amended Complaint is the nature of the conspiracy that's alleged. As Mr. Sherman indicated to the Court, this is a very ambitious conspiracy. It is a global, overarching conspiracy.

THE COURT: The first question I'd like to know, are we here for an overarching conspiracy, or are we here for the conspiracy between two or more corporations with respect to a specific deal? In my experience in reading the complaint, my understanding is that there are, approximately, nine deals. Let's assume that the nine deals are well-pleaded, for the sake of this question. That's one thing, but what is the Court going to do with a so-called overarching conspiracy? I'm not familiar with that type of pleading.

MR. PRIMIS: Your Honor, that is exactly the defendants' point. The plaintiffs have disclaimed --

THE COURT: So, your position is that you're willing to accept -- I'm sure you're not willing to accept -- but is the purport of your argument relating to the overarching conspiracy, or is it to the nine or maybe five, taking in the releases, five deals actually pled with some specificity?

MR. PRIMIS: We respond on two levels, your Honor, and the pleading is insufficient on both levels. We don't concede that even with regard to the nine transactions where they list a lot of facts that those mean anything significant under a Sherman Section 1 case. There's two points --

THE COURT: But at least they mean more than the overarching conspiracy.

MR. PRIMIS: Absolutely, and the point to underscore is that the plaintiffs have disclaimed pleading a case based on one transaction, two, five or even the nine. They say, That's not our case. They say it clearly at page 55 and 56 of their brief in the <u>Billing</u> section that's not the case they're pleading. They're pleading a case that involves 17 private equity and investment banks, private equity firms and investment banks, the management companies of all of -- the management teams of all of the companies that were acquired over a five-year period, every transaction. By our count there are scores of them, not just the nine, that --

THE COURT: Well, if that's so, why aren't they in the complaint?

MR. PRIMIS: That's an excellent question that I submit the Court should pose to the plaintiffs. They're not there. There's absolutely no notice about what those other claims are. The global overarching conspiracy is the one that they want to proceed with in this case. That is the claim that they have set out, and that's at 55 and 56 of their brief, they say that that's what they're doing.

Now, there's a reason that they're doing that. The reason goes back to the Finnegan case, the Second Circuit case that Mr. Sherman referenced. In Finnegan, you had two companies, two bidders that were bidding like gangbusters against each other to acquire a third company. It was Macy's and Campeau; they were trying to acquire Federated. Halfway through the bidding they said, This is crazy, we're just driving up the price, let's stop doing this. And then they said, Macy's, you go ahead and acquire the Federated at a lower price, Campeau, you can have the pieces of it you want, and they both got what they wanted for a lower price. An antitrust Sherman Act case was brought, and the Second Circuit said, Preempt it; you can't bring an antitrust claim because --

THE COURT: Why?

MR. PRIMIS: Because the SEC regulates --

THE COURT: That was under preemption, correct?

MR. PRIMIS: Correct, correct, but because --

THE COURT: But how does that help your argument on actually the sufficiency of the pleading?

MR. PRIMIS: I can explain. Because my whole point is the Court shouldn't wonder why the plaintiffs ended up with this global, overarching conspiracy. They know that when they take it to the level of a single transaction, the allegations become indistinguishable from the Finnegan case. So, they don't want to plead that; they're worried about preemption.

They have something much more ambitious, Let's bring in every LBO over a five-year period. Now, on that claim --

THE COURT: They may be able to do it if they plead it.

MR. PRIMIS: Correct. There's no allegation that ties any two of these transactions together in the entire complaint; it's bereft of that. Even with the nine transactions that they do allege, take two of them, just any two, SunGard and Neiman Marcus, there is no allegation that ties the two of those transactions together. Nobody who was in the Neiman Marcus transaction is alleged to have gotten any benefit from anything that happened in the SunGard transaction. There's nothing tying any two transactions together, let alone the scores and scores that they allege in the case.

THE COURT: So, what are you saying? Let's assume, for the sake of this question, that there are nine or five -- what's the word you used, transaction or deal?

MR. PRIMIS: Yes.

THE COURT: -- transactions. And let's assume that they're well-pleaded with respect to those specific deals. Should they or should they not be tried in separate cases?

MR. PRIMIS: Well, hard to answer that question, because it involves indulging or accepting the premise. On any one of these individual transactions, there is an explanation for what happened, that you don't need facts, it's just common sense. When you look at the transaction that is entirely consistent with independent conduct, and there's nothing in the complaint to suggest that a certain party's decision not to bid in a transaction was the result of collusion, there's nothing that suggests that.

And on a very similar factual scenario in the Twombly decision, the Supreme Court was looking at a situation where they had regional telephone companies, and Congress sets up a system where they're all supposed to invade each other's territory and compete. That was the Legislative goal. Nobody did it, and the plaintiffs came in and said that must be the result of collusion, they're not competing, they're not going after each other, and the Supreme Court said there's no reason to infer, no reason to interpret from a decision not to compete that there was collusion. It's entirely consistent with companies making independent decisions. So, too, here.

THE COURT: Wouldn't that decision with respect to the sufficiency be better decided at summary judgment?

MR. PRIMIS: I think one of the principal teachings --

THE COURT: Because you've got to admit, on a case of this complexity a motion to dismiss is asking a lot at a real early stage, unless you can show that, from reading all those pages, that there's nothing there.

MR. PRIMIS: Well, two answers. First, and we want, the defendants want to be extremely clear on this, the case that the plaintiffs are alleging is the global, overarching conspiracy. They've committed to that; they say that in their opposition brief. So, they're not -- they haven't alleged that there was a conspiracy to fix any particular transaction. They're saying that all of those transactions are *quid pro quos* for one another. Doesn't exist.

THE COURT: My understanding of conspiracy law is that there has to be a conspiracy to do something, there has to be an object.

MR. PRIMIS: Correct.

THE COURT: Are you saying that the claim here is -- what is the object of the so-called overarching conspiracy?

MR. PRIMIS: If the Court would believe this, it's hard to believe, but the claim is that the 17 companies that are represented by all these lawyers at some point in time unspecified all got together and said for the next four or five years we're going to allocate every going-private transaction over $2.5 billion in the United States of America. That is a --

THE COURT: Is that pled?

MR. PRIMIS: Well, they say that's our conspiracy, and I can tell the Court where that is. That's at paragraph 9 of the complaint. It says, This action arises out of a conspiracy among defendant private equity firms that formed consortia or bidding clubs to rig bids, restrict the supply of private equity financing, fix transaction prices and divide the market for private equity services for LBOs. That's the allegation. In their opposition brief at page 2 -- I'm sorry -- opposition brief, page 2, Plaintiffs' complaint plausibly alleges a conspiracy whereby defendants agreed to allocate participation in Club LBOs of more than $2.5 billion from late 2003 to the present.

So, that is the conspiracy that the plaintiffs have attempted to allege. The defendants submit that there is not a single fact alleged in the complaint. Forget whether -- I mean, it's implausible on its face, but under <u>Twombly</u>, they have to allege some facts that would make it plausible. There's no date when this allegedly occurred, there's no meeting when it might have occurred. How are all these people going to get together and enter into such an agreement, and how would they enforce it over a period of years, and why would one of these defendants sit around and wait two years for their turn to get in on some leveraged buyout transaction for a company they may not want to even own? None of this makes any sense.

THE COURT: Let me ask you this.

MR. PRIMIS: Yes.

THE COURT: Assume that you're correct, I'm not sure you are, with respect to the overarching conspiracy, is there sufficient allegation with respect to the nine transactions?

MR. PRIMIS: There absolutely is not, your Honor, there absolutely is not.

THE COURT: Out of all those pages?

MR. PRIMIS: You've now identified what the game is in a case like this. If they can identify enough material on 20, 30, 40 pages, it looks like there's something to it, but in this case there's not, and there's a very good explanation why. First off, nothing ties together any two of those nine transactions, no allegation of that at all. The allegations with regard to the specific nine transactions come right from the SEC filings that --

THE COURT: Well, let's assume that what you say is right there, that nothing ties the transactions together.

MR. PRIMIS: Yes.

THE COURT: But how about with respect to each transaction?

MR. PRIMIS: Absolutely.

THE COURT: Let's take, well, Michaels Stores. It says that Bain and Blackstone are alleged to have conspired with respect to that transaction.

MR. PRIMIS: That's an excellent example.

THE COURT: Let's say we get rid of the overarching conspiracy. Why isn't that conspiracy at least sufficiently pled to at least require discovery to go forward?

MR. PRIMIS: Well, you have to -- the Court should look at the legal tests that Twombly requires. I can address that in a minute, but just to address the facts of Michaels Stores head on, that's an excellent example. It actually makes --

THE COURT: I don't know one from the other, to tell you the truth.

MR. PRIMIS: I can tell you, in Michaels there was a bidding process, a competitive bidding process, where the acquisition, the price, went from $42 a share through a series of bids up to $44 a share, which was then accepted by management and the Board, and the company was acquired. All the plaintiffs have done is take that set of facts, which, using the Twombly test, could just as well be independent action. In fact, if the Court looks specifically --

THE COURT: Yes, but they allege that there was an agreement.

MR. PRIMIS: Right, and that is the teaching of Twombly. The teaching of Twombly is that the word "agreement," the word "cartel," the word "conspiracy," that's a legal conclusion, it's a label. It doesn't allege any facts. They need to allege facts that give rise to a reasonable, plausible inference of conspiracy.

THE COURT: So, you're saying with respect to Michaels Stores there's no facts alleged showing some type of relationship between Bain and Blackstone.

MR. PRIMIS: That's exactly what we're saying. There is absolutely nothing in the bidding history of the Michaels Stores transaction that suggests that any of these parties behaved collusively. Now, the plaintiffs concede that joint bidding in and of itself is perfectly fine. That's the Finnegan case from the Second Circuit. Companies are allowed, under the SEC rules, it's settled case law, to come together and join together to bid. What the plaintiffs are alleging is that not that that joint bid was improper, but there was somehow an agreement between that bidding group and a different bidding group to suppress the price of the company. With regard to Michaels, there's not a single fact in that very, very long complaint that alleges that or that makes it a plausible inference. We feel very strongly about that. There's just nothing there. What they've done is, and it's inventive, is to go to the SEC disclosures, describe the history of that transaction and then at the end say, "collusion," it's the only explanation. That's exactly what the Supreme Court said in Twombly a party can't do.

THE COURT: What's the difference between a joint bid and collusion as a matter of law?

MR. PRIMIS: That's an excellent question. A joint bid is an entirely permissible, pro-competitive agreement, where two companies decide to come together to jointly bid on a third company together, okay? They're allowed to do that. The

SEC has all sorts of rules.

THE COURT: Joint bidding is permitted?

MR. PRIMIS: Perfectly legal and permissible. The collusion is not within that joint bid, because if it were, it would be indistinguishable from the Finnegan case, which would render --

THE COURT: So, what constitutes the collusion?

MR. PRIMIS: We don't know. The plaintiffs seem to suggest that in each of these transactions that a bidding group would have done or said something to another bidding group or another bidder that would be collusive. The accurate answer is there is no allegation to suggest what that collusive behavior was, because -- and this, again, is page 55 and 56 of the plaintiffs' brief. The phrase I believe they use is they're not challenging joint bidding qua joint bidding. Now, I'm not 1000 percent sure what "qua" means, but I think their point is that they're not challenging joint bidding in and of itself, and they couldn't. The practice is perfectly legitimate and proper.

THE COURT: You mean, two companies can agree to bid a certain amount of money?

MR. PRIMIS: Absolutely.

THE COURT: And that's not collusive?

MR. PRIMIS: Not in an anticompetitive antitrust sense. It's like a joint venture. Joint ventures exist all the time, entirely permissible. Two companies want to come together to make a product, and they decide not to compete to do it, but they work on it productively together.

THE COURT: So, you're saying, other than the joint bidding that is allowed, there's no allegation with facts relating to collusiveness.

MR. PRIMIS: Precisely. That's exactly right. It's a two-step argument. There's nothing inherently wrong or even improper about joint bidding, and if you accept that proposition, there's no other action or activity that could even possibly represent an agreement between any of these defendants.

Now, again, remember, I think we're agreeing, at least for the moment, that the global, overarching conspiracy theory isn't going anywhere, they haven't pled facts to support that, so we want to address any of the nine transactions, because -- and let me just describe what the Supreme Court did and said in Twombly. It's almost identical. The factual scenario is different, but the attempt to state a claim is very much the same. In Twombly, the complaint alleged -- this is straight from the Supreme Court decision. In fact, your Honor, I can provide the Court with a copy of the Slip Opinion. May I approach?

THE COURT: Surely.

MR. PRIMIS: Here's a highlighted version of the

Twombly decision. On page 3 of the Slip Opinion, and I've actually summarized some of these points in highlighted form for the Court -- your Honor, here are some highlighted callouts, and if you look at the slide that's called Allegations in *Twombly*, you can see what the plaintiffs there attempted to do. They charge all the same types of anticompetitive conduct. They say that The ILECs, which are the local phone companies, engaged in parallel conduct in their respective service areas to inhibit the growth of upstart competitive companies, and this is in the top box. Their actions allegedly included making unfair agreements for access to networks, providing inferior connections to networks, overcharging and billing in ways designed to sabotage the CLECs relations with their own customers.

There was a second set of allegations. They charged agreements by the local companies to refrain from competing against one another, which is exactly what the plaintiffs have alleged here. These are to be inferred from the common failure meaningfully to pursue attractive business opportunities in contiguous markets where they possess substantial competitive advantages.

So, in *Twombly*, the Court was presented with a complaint where the plaintiff said all the same types of things here. These parties aren't competing, they have compelling economic motivation to do so, Congress wanted them to compete against each other, and they haven't, and then they use that word at the end "conspiracy."

Now, the Twombly decision says you can't just take a set of facts that's just as consistent with independent conduct and then put that label on it at the end, and I can direct the Court to where Twombly says that. On page 8 of the Twombly decision, and we've highlighted it for the Court, the Court says, A plaintiffs' obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Now, you might say, well, they've done more in this case than just list legal conclusions, they have all these facts, but the Supreme Court addressed that issue too, because there were a lot of allegations in the Twombly case. It was not a two-page conclusory complaint that said "conspiracy," it was 30, 40 pages, described every type of anticompetitive transgression, but if you look at page 18 of the Twombly decision -- and I'll wait for the Court to get there.

On page 18, the Court in Twombly described the allegations and it said, and this is about halfway through that yellow-blocked quote, Although in form a few stray statements speak directly of agreement, there's that term, "agreement," on fair reading, these are merely legal conclusions resting on the prior allegations.

And, so, if the Court is at all inclined to say these nine transactions, there's all these facts and at the end they say "conspiracy," we just ask the Court to read Twombly in this light, which is that, in Twombly, there were all these facts and then at the end they said "conspiracy" and the Supreme Court looked at these allegations just using some common sense and said there are all kinds of reasons why these parties would not be acting together, they had an independent reason for doing exactly what they did, and the Supreme Court said dismiss, and District Courts have applied exactly that analysis. District Courts in the Southern District of New York, we've cited the Digital Music case, the District Court in New Jersey rejected this global overarching concept that the plaintiffs have attempted to allege, and, again, just to bring it back, the plaintiffs haven't tried to plead a conspiracy on the Michaels transaction. They're pleading a global conspiracy of which Michaels is just one part, a very small part of 80-or-so transactions.

Now, your Honor, the other question that the Court asked --

THE COURT: Let me ask you this: I suppose I should ask this to the other side, but is there any authority for so-called overarching conspiracy? Is there any case that so holds?

MR. PRIMIS: There's absolutely none. We haven't been able to find any. What we did find, though, is a case that rejected and dismissed on allegations very similar to the one here. That was a case involving insurance brokers who deal with all kinds of different insurance companies, and the plaintiff said there's a global market allocation system designed to rig bids on insurance premiums. And the Court there found that there was a rimless hub and spoke, okay? The insurance brokers are in the middle, you have the insurers all around the outside, but there was nothing holding it all together, no common scheme in place.

That's exactly what we have here. They're trying to bring in this whole, entire LBO business, all 80 or 90 transactions over five years, but there's nothing that ties it all together. I don't even think it's a hub and spoke, but if it were, there's no rim at all, and the District of New Jersey in the insurance brokerage case said dismiss.

And the other point I think I should emphasize for the Court is that Twombly rejected the old no-set-of-facts standard from Conley vs. Gibson. That used to be --

THE COURT: The old what?

MR. PRIMIS: Conley vs. Gibson is the old Supreme Court case that used to say you don't dismiss a case unless there's no set of facts that could possibly state a claim.

THE COURT: Right.

MR. PRIMIS: The Supreme Court explicitly rejected that test in Twombly, and I can direct the Court to the pages where it did that.

THE COURT: It was always, basically, a rule of prudence that you deny a motion to dismiss and then revisit the issue on summary judgment.

MR. PRIMIS: And the Court has now rejected that and has put more teeth into Rule 8 up front at the motion to dismiss stage, to say, no, no, no, we're no longer going with the test that if there's some set of facts conceivably that they could prove to support their legal theory, then we'll allow it to go forward. It has to now be plausible, and there have to be factual allegations in an antitrust context that would tend to be inconsistent with independent conduct not merely consistent with agreement.

THE COURT: So, are you saying that, even with respect to the nine or five transactions, that there's insufficient pleading with respect to the allegation of agreement?

MR. PRIMIS: Absolutely, because the agreement is not in the formation of the joint bid, which is admittedly proper. The allegation, as far as we can tell, with regard to the specific nine transactions had something to do across the bidders, the competing bidders.

THE COURT: Say that again.

MR. PRIMIS: Well, there's nothing wrong with forming a joint bid, a joint -- and my colleague's reminded me we've cited case law in our brief, where courts acknowledge that joint bidding is proper and pro-competitive, serves a valuable purpose in spreading risk, accumulating capital, all those good things. So, they're not challenging if Bain and Blackstone come together to form a joint bidding group; that's okay, the Courts don't have a problem with that. What they appear to be suggesting is that that joint bidding group may have, in theory, colluded with other potential bidders in that transaction to suppress the bidding. That allegation is --

THE COURT: Others unknown.

MR. PRIMIS: Pardon me?

THE COURT: Others unnamed?

MR. PRIMIS: Others unnamed, some named, some unnamed, the management teams of all these scores of companies. It's very imprecise. But the point is, is that Twombly says you have to at least have some facts that make that link of the agreement you're alleging, and here there's nothing in any -- if you look at each transaction, the Michaels transaction, everything that's described in the complaint is entirely consistent with companies or joint ventures or joint bidding groups acting independent of one another. It's entirely consistent with that, and that is exactly what the Supreme Court looked at in Twombly, because the allegations in Twombly were pretty bad; these companies have intentionally conspired not to compete in one another's areas. The Court said you can't just describe what they've done, label it "conspiracy" and expect to survive a motion to dismiss.

And I want to raise one more point that's critical, because your Honor said why can't we just do this at summary judgment? Well, with regard to the overarching conspiracy, clearly it needs to go out now, but even with regard to the nine tractions, those need to go out now too --

THE COURT: I think four have been released anyway, haven't they?

MR. PRIMIS: Well, certainly, the ones that are released should be out of the case. So, if there's a remaining five, those should be --

THE COURT: Why shouldn't they stay in?

MR. PRIMIS: They should be subject to dismissal now, because the Supreme Court in Twombly did one other thing that was very important. The Supreme Court recognized in cases like --

THE COURT: So, you even want to get rid of these five?

MR. PRIMIS: Absolutely, and the reason why is that, in Twombly, the Court was very practical in Twombly. They said, Look, we know what's involved in discovery in a case like this, okay? I mean, just look at the gallery. One document request just asking for materials relating to one transaction will cost these defendants and society millions of dollars.

The Supreme Court recognized that, and if I can approach one last time, your Honor?

THE COURT: Sure.

MR. PRIMIS: Here's one last set of quotes from the Twombly decision. Because the question your Honor raised was the same, exact point made by Justice Stevens in dissent in Twombly. Justice Stevens said, Well, this is unusual; why are we requiring these allegations now? They've said enough. We'll do very careful phased-in discovery, and we'll look at it at summary judgment. That's how the process worked. That's exactly the point made by the dissent in Twombly.

THE COURT: And it makes it easy for trial judges, too.

MR. PRIMIS: Exactly. I think the Supreme Court sent a message we all need to do a little more work here at the 12 E 6 stage, because the Supreme Court answered Justice Stevens and your question, your Honor, directly in this first box. They say, It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management.

The reason for that comes in at the last box that we've highlighted in this slide. The Court very pragmatically observed, Determining whether some illegal agreement may have taken place between unspecified persons at different companies, each a multibillion-dollar corporation with legions of management-level employees at some point over seven years, is a sprawling, costly and hugely time-consuming undertaking, not easily susceptible to the kind of line drawing and case management that the dissent envisions.

So, the Court realized that there has been some abuse in antitrust Section 1 claims like this, and they said, Before we send this whole group off to try and find out the unnamed people who agreed at some unknown point in time, before we do that, we want allegations plausibly suggesting an entitlement to relief.

And with regard to the five transactions, let's look at what they've alleged. Joint bidding. The plaintiffs' own opposition brief says joint bidding can be consistent with independent conduct. The involvement of investment banks. The plaintiffs concede in their brief that there's nothing unusual, in fact, it's essential to have investment banks involved in these transactions. They allege that there's something nefarious about management teams being involved in LBO transactions. We pointed out in our brief it happens all the time, it's ordinary and customary. The plaintiffs concede that in their brief. They concede that it's entirely consistent with independent conduct to have management teams involved, but when they try and put it all together somehow, and that's the connection that they lack. There's nothing tying any of this together, and there's nothing to suggest that any of this is anything other than independent conduct, and, so, following the Supreme Court's lead, courts are dismissing these at the 12(b)(6) stage so that we don't go through millions of dollars of discovery only to come back and realize, Well, now that we actually look at it more carefully, there's nothing wrong with the Michaels transaction. They described a competitive bidding process and at the end said it's collusive. You can't do that anymore. The Supreme Court says you dismiss those cases.

So, unless the Court has more questions -- but I do want to underscore that the defendants feel very strongly this is not -- the global conspiracy claim, indefensible on its face, no facts at all, but we don't want there to be any ambiguity, and I don't think there is, that with regard to the individual transactions there's just not enough here to justify what it will take for discovery.

THE COURT: Even on those five.

MR. PRIMIS: Even on those five, and we're prepared --

THE COURT: I'll have to review it much more carefully, but, to tell you the truth, I've been worried about the overarching one, because I've never seen or heard anything like it in my career. But with respect to the other five, without reading every line, there must be something here if they've filled that many pages.

MR. PRIMIS: And that is exactly what the Supreme

Court in Twombly said, we can't do that anymore, it's just too expensive. The line that the Supreme Court used in Twombly was on page 11 of the decision. When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, the basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the Court. The Supreme Court said in Twombly root these out early, and, so, we're prepared to address any question on any five of those transactions, and every single one will be just like the conduct in Twombly, just as consistent with independent conduct, and once you pull away that legal conclusion, that label, the ones that the Supreme Court said can't state a claim, once you pull those away, all the plaintiffs have done is, using our own SEC filings, described normal M&A bidding activity. That's all they've done. Thank you, your Honor.

THE COURT: All right. We'll take a 10-minute break.

THE DEPUTY CLERK: All rise. Court is in recess.

(Recess taken from 11:15 a.m. to 11:30 a.m.)

THE CLERK: All rise. Court is back in session. You may be seated.

MR. WILDFANG: Good morning, your Honor. Craig Wildfang for the class plaintiffs. I will be addressing the two issues that were addressed this morning by our opponents.

THE COURT: And those motions relate to all defendants, don't they?

MR. WILDFANG: That's correct, that's correct. Your Honor, I do have an outline that I'd like to go through, but let me start by answering a question that you asked of our adversaries about whether there's some case that is like an overarching case like this one, and there, actually, are many, your Honor, but one we would like to call to your attention, which is referenced in our complaint and in our brief, is a case involving joint investor -- common investigations parallel investigations by the Securities and Exchange Commission and the Department of Justice Antitrust Division. It's commonly referred to as the NASDAQ Market Makers case, and I'll be making reference to it today in my argument. I am intimately familiar with that case, because I was the lead lawyer at the Department of Justice on that case, and it went on for about two years. There was a parallel case brought by the SEC, and I think it illustrates the weaknesses of the defendants' arguments both with respect to preemption and with respect to the Twombly failure-to-plead argument. Let me start by putting this case --

THE COURT: Let me ask you this: As a practical matter, wouldn't it be best or more prudent or less expensive for the Court to rule on something that might be a close question for the defendants and let the Court of Appeals determine both questions, given the definitive decision, prior to requiring something that's going to cost millions and millions of dollars?

MR. WILDFANG: Well, your Honor, I think in this case, in particular, the answer to that question is no, for good reasons, and let me respond. The context of this case is that the defendants have, we believe, illegally conspired, in violation of the Federal antitrust laws, to deprive shareholders of these subject companies of billions of dollars, not millions, billions of dollars of damages, and your Honor mentioned the rule of prudence that many judges have followed for many years, which is to actually err on the side of letting cases develop a factual record so that if there is appellate review, the Court of Appeals has something beyond --

THE COURT: I can see doing so with respect to maybe specific transactions so alleged, but, on the other hand, I have never heard of a conspiracy that's un-pled that just says -- takes in every transaction for five years. I mean, that's what you call kind of general pleading.

MR. WILDFANG: Your Honor, with all due respect, we don't think we've pled general pleading. Let me try to walk the Court through why we think that's true.

THE COURT: So, which issue are you dealing with now?

MR. WILDFANG: I was going to take preemption first, but I'll take it in whatever order you wish.

THE COURT: Okay. Go ahead.

MR. WILDFANG: But the factual background we're going to talk about really relates to both issues, because both issues really are focused on what are the facts of the case, but before I leave the NASDAQ case, let me just show this board, and we have copies for you.

THE COURT: Did this case go to the Supreme Court?

MR. WILDFANG: No, your Honor. The defendants in that case consented to a judgment being entered against them in that case, so there was no appellate review of that case, but the example of NASDAQ, I'll come back to this later, because it's really a little bit out of the sequence I wanted to address, but the argument that defendants have made, which is this is an overarching conspiracy, it's so broad, who could possibly imagine that this is a case where a conspiracy could be alleged and enforced and workable.

The NASDAQ case, and there's a copy of this in what I just handed up to you, of this board. In the NASDAQ case, the Department of Justice alleged, and the SEC also alleged in their parallel investigation, that there was a conspiracy by the NASDAQ Market Makers to fix the price on transactions between buyers and sellers of NASDAQ stocks. Some of the defendants who are in this case were defendants in that case. In that very case, the defendants came in to the Department of Justice and said, This case is impossible, it's implausible, you can't possibly expect to prove it. What we found, though, and what the defendants ended up consenting to a judgment on was --

THE COURT: And in what court was this?

MR. WILDFANG: In the District Court for the Southern District of New York. There was a parallel or companion private case before Judge Sweet as well, involving the same allegations, which ended up settling for about a billion dollars. It turns out there was a conspiracy involving 6,000 stocks and 500 market makers that lasted decades, probably over 30 years. The trade press in that case quoted participants who admitted to the collusion, just like in this case, where we have people in the trade press being quoted as admitting to the anticompetitive effects of this consortium bidding.

As I said, there were parallel investigations by the antitrust division of the SEC, the DOJ opinion consent judgment. The SEC issued an order and report, both of which we've given to your Honor. The civil class action settled for $1.7 billion against 37 defendants.

So, the point of this, your Honor, and then I'll get back to the preemption argument, the point of this is two-fold. It is perfectly consistent with the antitrust laws for them to be enforced in a case where there are also securities law issues, and, secondly, it is not implausible for there to be a market-wide, many, three- or four- or five-year long conspiracy. We've seen it time and time again in antitrust laws.

THE COURT: That may be so, but my problem is, is that only nine have been specifically alleged. So, assume what you say is true, that there is this overarching conspiracy, it may or may not be alleged. The argument made was that it isn't.

MR. WILDFANG: Well, your Honor, we describe in our brief and in the complaint the economic facts that we think support the inference of conspiracy, and I should say that we --

THE COURT: Let me be more precise. You do allege with more particularity nine transactions. Why should you go forward if you haven't alleged with any particularity the thousand other transactions that are not in your complaint?

MR. WILDFANG: Your Honor, you've moved me along a little more quickly than I had planned.

THE COURT: No. I don't want to interfere with your argument. Take your argument however you wish, and I'll just keep quiet, but I just can't -- I see a distinction, at least between the nine, that are at least alleged with some particularity and something that is very, very general, and why should you go forward on that?

MR. WILDFANG: Your Honor, let me address it, and that is more of a Twombly issue than a preemption issue.

THE COURT: That's right. Why don't you go on the Billing case first.

MR. WILDFANG: Well, okay. I'll do it in whatever order your Honor prefers.

THE COURT: Go ahead. However you wish.

MR. WILDFANG: Let me go to Twombly, because I think your Honor has a question that we, certainly, would like to answer before we get further into it, and, again, we have copies of these in the 8 1/2 by 11 sheets we've handed up to you.

We described in our brief and in the complaint the economic evidence. This is a table taken from a report, scholarly study, a paper done by Professor Micah Officer, who's a professor at the University of Southern California who has studied this very issue. This may be more than your Honor really wants to read today, but what we find particularly interesting is that nowhere in the many words that were spoken this morning was there any discussion about the economic evidence.

And let me just summarize what the economic evidence is that underlies our allegations of the overarching conspiracy. Professor Officer looked at LBOs for the period from 1984 to 2007. He found a number of interesting things. One is, during the period from the end of 2003 to 2006, there was a huge spike in the number and frequency of these club deals. These are the deals that are the subject of our overarching complaint. Almost none in prior years. Then, all of a sudden, a big jump during that period of time, unexplained by the defendants as to why in those years all of a sudden there were a huge jump in those kinds of deals. This is a chart based on public information about the returns on these club deals versus other deals. So, the bar chart that shows 27 or 28 percent here on the left are buyouts by strategic buyers, that is, by a company who's in the business or a related business that buys another company. The most recent example, at least that comes to my mind, is Delta Airlines buying Northwest Airlines. Large premiums. For sole-sponsored LBOs, which is where a single, one of these defendants does an LBO on its own, the premium is much -- is slightly smaller.

Now, let me explain what the premiums are. The premiums are the increase in the offer price between the announcement of the initial offer or buyout offer and the end, when the deal is actually consummated, and what this reflects is, in these kinds of deals, what happens is there's bidding rivalry. The first bidder will bid, say, $100, then another bidder will say, Well, I think that company is worth more, and I'll bid $105. That bidding rivalry leads to higher prices. That's what the antitrust laws expect from the participants in these kinds of deals. What happens in Club LBOs is there's very little or no, none of that bidding rivalry, because they engage in not just joint bidding, the collusion that we've talked about in terms of individual bids, but also sham bids, not bidding at all, co-opting management, things like that.

So, here's another reflection of the economic evidence that shows that in Club LBOs, these really large deals over $2.5 billion, they consistently have a smaller return by this bidding process. In their entire brief, all of the ten briefs that they filed and the hour-plus argument this morning, defendants have not addressed this issue, and this is what the case is about.

THE COURT: Let me ask you this: With respect to those references you just made to the assessment by this expert and these other charts, are those specified within the complaint?

MR. WILDFANG: They are referred to in the complaint, your Honor, and the economic evidence is described, and we've put a lot of detail into the complaint. If your Honor would like more detail, we can, but let me emphasize that this academic paper was not sponsored by the plaintiffs. This was an independent effort by a professor, esteemed professor at the University of Southern California who investigated this himself and came up with this conclusion. Let me return, your Honor --

THE COURT: Now, what is his conclusion, that LBOs, the purchase price is less?

MR. WILDFANG: The conclusion is that these club bids, which we think are a reflection of this overarching market conspiracy, consistently offer lower prices to the shareholders, and, in this context, a low price is an anticompetitively set price because of the collusion. Now, the one thing the defendants have said about the economic --

THE COURT: Is there any evidence as to the collusion except the consequence? Is it an inference that you're asking a judge to draw, that if that's the conclusion is the inference collusion?

MR. WILDFANG: Your Honor, again, this is what antitrust cases are all about. They are about economics. The defendants, the one thing they have said about the facts, the economic facts, is that your Honor should ignore things like the paper by Professor Officer. That is not what the law is. The law in antitrust cases is courts are expected to look at the economic facts. In fact, counsel referred this morning in the Twombly case to the economic common sense. Returning, again, to the NASDAQ case, one of the other similarities between this case and the NASDAQ case is, in the NASDAQ case, it was similarly an economic study by two professors, who found, in looking at the trading data on the NASDAQ stock market, this extremely unusual factor, which was there were almost no trading in what they called odd-eighths. It was that study which motivated the Department of Justice and the SEC to look into this market, and what we found was consistent with what the professors had hypothesized, which is no explanation other than collusion. And that is, basically, what Professor Officer has found in his paper. Now, is that enough to win a jury trial? Probably not, but it's certainly enough to get past a Rule 12 motion. It is certainly enough to raise --

THE COURT: Well, let me ask you again. The factors that you refer to, are you saying that, although it's not explicitly alleged, that those factors would warrant an inference that there is collusion? Is that what you're saying, it's an inference?

MR. SHERMAN: Well, your Honor, we alleged directly that there was collusion.

THE COURT: But the facts are this type of material that you've referred to and that, in itself, would require an inference, would it not?

MR. WILDFANG: Yes, and we think the inference -- you know, in Twombly, the Court talked about sort of moving the needle from possible or conceivable to, you know, plausible, and here we think we have moved the needle far beyond plausible. This is more than plausible. It's certainly enough, if you apply the Twombly standard, to say this raises enough questions in the Court's mind that it's worth looking into the facts and, as your Honor said, revisiting at summary judgment. You know, we think we're right. We think the facts will support our allegations. We think the inference that was drawn by the economic facts is that there was, in fact, collusion. Could we be wrong? We might be wrong at the end of the day.

THE COURT: But how much money is going to be spent?

MR. WILDFANG: But, your Honor, that is what judges and juries and trials are about. The antitrust laws represent, as the Supreme Court has said repeatedly, the Magna Carta of this country's economic policy. Courts are obliged to give antitrust plaintiffs the same benefits of the same doubts as any other plaintiff. The fact that these cases are big and can be expensive is a reflection of the fact that there are billions of dollars that have been taken by the defendants from our clients. So, the fact that it's a big and expensive case is, certainly, something the Court should think about in terms of managing the case, planning the case, all of that. The fact that it's a big case doesn't affect the analysis that --

THE COURT: I don't mean big, I mean expensive, not for me but for the parties. I mean, it's going to be millions of dollars, just discovery. You have to admit, there is a distinction in reading the complaint between the nine or five transactions and the overarching conspiracy.

MR. WILDFANG: Your Honor, I think I would not use the word "distinction," and, again, I return to the NASDAQ case, because it's the closest case that I think is helpful for the Court in thinking about this. In the NASDAQ case there were 512 market makers, think of 512 private equity firms, over three decades agreed to fix the price of every stock traded on the NASDAQ Stock Exchange. That would strike one as maybe somewhat implausible, but the economics supported the inference of collusion, and, in fact, the facts turned out to support the allegations.

THE COURT: So, you're saying, in essence, within the complaint there are economic facts sufficiently alleged from which a court can draw the inference that collusion is plausible?

MR. WILDFANG: Exactly, your Honor, and let me refer, specifically, to where those are found in the complaint, and, again, you have in front of you a small example of this board. This summarizes the facts that we've alleged in the complaint, not every fact but the ones that we think are most deserving of your Honor's attention this morning.

First of all, the market participants, just as in the NASDAQ case, the market participants have admitted that there's less competition in these deals. That is not a surprise. So, in terms of the economics, we've referred to the empirical analysis at paragraphs 48 and 58 and 198 to 199 of the complaint. We've referred to the corroborating data from public sources at paragraphs 194 to 197, alternative rationales that we think are implausible that some have offered, diversification, financing, market sector. These are things that some have offered as reasons why one might think that these prices are lower in these deals and those alternative rationales are not plausible.

The sudden increase in club deals, what we showed in the prior board, the fact that the premiums in the club deals are so much lower, the fact that in paragraphs 194 to 197 the price-to-earning ratios in these deals are not what one would expect. The result, the returns on some of these deals are enormous. A 308 percent return in one of these deals in 14 months. That's the PanAmSat deal. Looking, just for a moment, at that PanAmSat, another one of the things about these deals that don't seem to be plausible is, in that deal the winning bidder cut the losing bidder in for 54 percent of the company. Does that strike one as a rational economic decision, that after you've gone to the trouble of winning the bid that you would give away more than half the company to the firm that lost the bid? Our complaint goes through in exhaustive detail and talks about all of these factors, and if you couple all of those factors in the individual nine deals coupled with the market-wide factors, which is the increase in the club deals that seems unexplained, the market-wide average premiums being much less, if you couple the market-wide data, the economic analysis, the lack of plausible justifications for these deals, and marry up those facts with the nine deals that we have specified, that is what gets us over the Twombly hurdle.

This is not a case where we've just slapped labels on allegations. This represents exhaustive analysis of the market facts and the conclusion, the inference and the allegation is that there was a market-wide conspiracy. Now, let me address your Honor's --

THE COURT: Let me ask you this: If a motion to dismiss were denied, would the discovery relate to the nine transactions or to every transaction in which these defendants participated over the last five years or however long the complaint alleges?

MR. WILDFANG: Your Honor, let me answer that question by, first of all, allaying the Court's fears that I think were unduly raised by my adversary about the size or the magnitude of this. There are something like 36 of these deals over a 3 1/2 year period. This is not a thousand.

THE COURT: But if there were 36, why aren't they alleged?

MR. WILDFANG: Your Honor, I spent three years with the Justice Department, and one of the huge advantages of being in the Antitrust Division of the Justice Department is we got to do pre-filing discovery. We could search CIDs, we could get evidence before we had to file a complaint. Private plaintiffs don't have that luxury. We have to file a complaint that we are confident in that we can prove. We have confidence in the overarching conspiracy, we have confidence in the nine deals being a reflection of that conspiracy. It may be that there are other deals where we will get to that level of confidence, I don't know.

THE COURT: But let me ask you, I accept what you're saying, just at least for the sake of this question, but assume you're right. Does that mean that someone can come in and plead, with some particularity, nine transactions and be able to go into 27 others?

MR. WILDFANG: Your Honor --

THE COURT: I mean, you have to say it's unique pleading. In most civil, even in civil cases, you don't see that type of pleading. Definitely you don't see it on the criminal side, but on the civil side it is somewhat extraordinary.

MR. WILDFANG: Your Honor, you indicated earlier that you haven't had a lot of experience with antitrust cases, and I think if you had had more of those cases in front of you --

THE COURT: That's true, but nobody has, because we don't have that many, but I've had some. But I know this. I've had a lot of experience with pleading, and I have to admit I have never seen pleading that is sought here. I'm not saying you're wrong, but I've never seen it in any type of civil case. You have to plead with some specificity --

MR. WILDFANG: Your Honor, we think we have.

THE COURT: -- and that's what bothers me and worries me.

MR. WILDFANG: Well, your Honor, with respect to the overarching conspiracy, I think if you look at the paragraphs of the complaint I just described on that board that talk about the economic evidence, there's an old jury instruction, I looked for it last night and I couldn't find it, but a jury instruction that basically said to the jury, in looking at circumstantial evidence, you know, you can follow the footprints in the sand.

THE COURT: There's no doubt, but I'm not concerned with that, I'm concerned with the pleading.

MR. WILDFANG: Right.

THE COURT: Is there anything in there relating to the other, what is it, 27 transactions?

MR. WILDFANG: Your Honor, we have not pled the individual other transactions at this point. We have alleged what we think is this market-wide conspiracy. We think it is, certainly, possible that we will find, in the course of discovery, evidence that supports an allegation that there are others besides the nine that are a reflection of that conspiracy. That is an issue that we will cross that bridge when we get to it. You know, the Department of Justice --

THE COURT: Hey, I understand that you're sincere about it, and maybe it's true. I'm only concerned with legal pleading, that there has to be some specificity with respect to the other 27 in most cases that I've ever heard. Is there anything relating to the so-called other 27 in the complaint? That's what we're concerned with, the allegations in the complaint, not your evidence.

MR. WILDFANG: One of my colleagues handed me a note reminding me that I should have said this earlier. This economic data includes all those other -- these are averages of all of the LBO deals, all the 36, not just the nine. There is market-wide data that is in the complaint that we referred to that is the data that supports the inference of this market-wide collusion. Another fact -- we have this kind of data in the complaint as well, but another fact that jumps out at you is in 24 years there were 59 club deals. Two-thirds of them, more than two-thirds of them happened in just four years. There's no explanation, and what Twombly says is you look at both the allegations and the reasonable inferences from those allegations, and what are the other reasonable inferences? And here the economic data does not support the inference that this was benign, non-collusive conduct.

THE COURT: Assume what you say is true and there's 36 transactions, but it's not limited to those 36 because those other 27 are not mentioned. Why couldn't it be 500 other transactions? What's going to control this discovery?

MR. WILDFANG: Well, your Honor, your Honor will control the discovery.

THE COURT: No, no. I don't know what the other 27 are. Are they mentioned within the complaint?

MR. WILDFANG: We've not enumerated them all. If that is a defect you think we should remedy, we can do that.

THE COURT: Well, I'm just asking you. You tell me there's 27 transactions that are not alleged but find support by inference in allegations, but I don't know what those 27 are, and since they're not named or set forth anyplace in the complaint, there could be a lot more than those 27, and how is a judge going to rule on questions of discovery?

MR. WILDFANG: Well, your Honor, again, in antitrust cases these issues of line drawing in discovery are always an issue, but here we've proposed a clear line in our complaint, and that is we alleged that these, the deals that we think are subject to the conspiracy are those deals that are above $2.5 billion in size. That is an objectively verifiable set of deals.

THE COURT: Over a certain period of time.

MR. WILDFANG: Over a certain period of time. So, that's the boundary that we have defined of the market for these deals, and, so, it's not going to be 500, it's going to be 30-some at the most, and, again, I don't think at this point your Honor should be concerned that that's going to really change the magnitude of the case. The case is about a market-wide agreement, and the reflections of that agreement, the effect of that agreement may be seen in nine deals, may be seen in twelve deals, may be seen in some other number of deals, but we have an obligation, as lawyers for the class, to seek evidence on deals that we think have impacted the class. We also have an obligation not to expand the case beyond what we think we can prove, and, so, we've started with the nine deals that we have confidence we can prove. It may be that there are others.

THE COURT: So, why shouldn't I let you go forward just on those?

MR. WILDFANG: Well, your Honor, I think that's a question of staging discovery, and it may be, and you've started down that road with the result of the Rule 16 conference, putting some limits on discovery, and it may be that it makes sense to look at some subset of the other deals to see if there's some reason to go down that road. I've been in cases where the Courts have said, Okay, well, there are these other markets over there, and you've said that, you know, those might be comparable markets, you want to do discovery, let's start with one or two and see what this discovery discloses before we open up everything. So, I think these are things that the parties, with the Court's assistance, can manage in a case like this. This is not a matter of opening Pandora's Box and letting everything fly out. These are manageable issues.

But the real question on Twombly is, have we moved that needle from conceivable to plausible? And the detail that we have in our complaint, coupled with the economic evidence and the lack of plausible defenses at this point, and in the fact that the defendants haven't offered any of those in their ten briefs or in their arguments this morning --

THE COURT: Well, we haven't reached the defense. This is a technical argument on motion to dismiss. Defenses need not be raised at this time.

MR. WILDFANG: Right, but they put that in issue by raising the Twombly defense. They are saying that the inference of collusion is outweighed by other inferences. That's what they put in issue when they make a Twombly motion, and other than just saying it could be benign, they haven't offered anything in specific as to why this economic evidence is refuted by some other evidence that undercuts the inference of collusion that is plainly driven by the economic evidence.

If your Honor has other questions about Twombly, I can address those; otherwise, I was planning to go back to where I thought I would start, which was preemption.

THE COURT: All right. Go ahead. You can go back.

MR. WILDFANG: Your Honor, in the argument this morning on preemption, counsel sort of started at the end rather than at the beginning of the analysis. Defendants argue -- first of all, they start by misstating what we think the legal standard is, that at page 3 of their Omnibus Memo they say the law is a plaintiff cannot sue a defendant for antitrust violations based on conduct that is subject to SEC regulation. That is just plainly not the law. The law is set forth in a series of four Supreme Court decisions, beginning with Silver, Gordon, NASD and Billing, and the standard is not if some regulation touches on some conduct that that means the antitrust laws are preempted. If that were the standard, then vast swaths of the economy would be exempt from the antitrust laws, and that's not what the Supreme Court has said.

What the Supreme Court has said, with crystal clarity, in all four of those cases, is that, first, repeals by implication of the antitrust laws are disfavored. The first obligation of a court is to try to determine is there a way to give effect to both the regulatory regime and the antitrust laws, because, by enacting some regulatory regime, presumably, Congress thought that regulatory regime was important, but Congress has also said the antitrust laws are important. The Supreme Court, as I said earlier, has said the antitrust laws are the Magna Carta of our economic policy. So, what the Supreme Court has said now in the four cases that address this issue is, to the Court, it's disfavored. Repeal by implication of the antitrust laws is disfavored. A court is obligated to try to find a way to see if you can enforce both, and the NASDAQ case is a perfect reflection of that policy, where the Antitrust Division and the SEC had parallel investigations. We met weekly with the folks at the SEC in that case, and that's because there was no conflict between the antitrust laws and the SEC regulations. The Supreme Court has said that the only case where a court should find repeal by implication of the antitrust laws is where there is a clear repugnancy between the regulatory regime and the antitrust laws, where the conflict is so serious and so clear that the Court must find that one has to give way to the other. We are not at that point, your Honor.

Let me talk a little bit about the Billing factors, and let me make reference to the chart that my colleague used, the Billing preemption analysis. There's little about this chart that's actually correct, I hate to say, but if you look at question number 1, the standard in Billing is not is the conduct central to the proper functioning of capital markets. The question is, is the conduct squarely in the heartland of SEC regulation? And you don't even have to go beyond that factor, that question, to find that the answer is no. There is no suggestion anywhere in the papers from the defendants or in the regulations they cite that the conduct that we are attacking, which is the market-wide market division, a per se Section 1 violation of the Sherman Act, nowhere is that said in the regulations to be central or at the heartland of the SEC regulations, and, so, you don't get even past that question number 1.

Your Honor asked a question about, well, could the shareholders here, do they have a Federal securities cause of action? And the answer is really not. The cases you will hear about --

THE COURT: The representation was made that your proper cause of action, you're only here under antitrust because of the treble damages.

MR. WILDFANG: Nothing could be further from the truth, your Honor. This is an antitrust case because the antitrust cases provide the only appropriate remedy for this conduct. The securities laws do not provide an appropriate remedy. You will hear in a bit in the release argument from my colleague, Mr. Mitchell, about the cases where some of these deals were challenged at the time. Those cases were brought in state court under state law precisely because the securities laws, the Federal securities laws, do not provide a remedy for the kinds of conduct that we are alleging here. So, it may be that, by some stretch of some regulation, some ethereal argument that the SEC could do something about this, but that's not what the standard is. The standard is, is there such a serious conflict between the securities regulations and the antitrust laws that the Court has to put itself in the shoes of Congress? Because that's really what the defendants are saying. When they say to a court, We want you to say that antitrust laws do not apply, they are saying to the Court, You have to put yourselves in the shoes of Congress and decide would Congress want the antitrust laws to apply here or not.

And the reason the Supreme Court has set the bar so high in implied preemption cases is, the Supreme Court doesn't like putting judges in that position, to have to decide what Congress would do, and, so, the bar is a court has to find clear repugnancy, and we do not have that here.

With respect to the second factor, does the SEC have authority to regulate, the SEC has authority only in the most general sense to regulate the conduct at issue here. Basically, it's disclosure requirements, it's not other kinds of regulation, and, in fact, these defendants have designed their businesses to avoid regulation. The General Accounting Office, now called the Government Accounting Office, recently released a report on activities of LBO firms, and, again, your Honor, I apologize for the bulk of the paper here, we're not going to ask the Court to read all of this, but the Government Accounting Office was asked by Congress to look into this market for LBOs, and one of the observations they made on page 6 of their report in their overview is, they had done their own economic analysis, and they didn't, necessarily, get right to the point where Professor Officer did, but they said, Our results do not rule out the possibility of parties engaging in illegal behavior, such as collusion, in any particular LBO. They then make reference to the fact that the Justice Department Antitrust Division is investigating this conduct, and then here's the paragraph I really want to focus your Honor on, the first full paragraph on page 6.

Because private equity funds and their advisors, private equity firms, typically claim an exemption from registration as an investment company or investment advisor respectively, SEC exercises limited oversight of these entities. Private equity funds generally are structured and operated in a manner that enables the funds and their advisors to qualify for exemptions from some of the Federal statutory restrictions and most SEC regulations. "

Not only are these firms structured to try to avoid regulation. The deals are to try to avoid regulation. These deals are taking publicly traded companies that are subject to extensive SEC regulation, taking them private and, yet, the result of that is even less regulation. So, you've got very lightly or thinly regulated companies taking public companies private, and they are now claiming that somehow regulation should stand as a bar to enforcement of the antitrust laws. Your Honor, that's just not what the Supreme Court has said in these four cases.

With respect to the third question posed by Billing, and, again, the questions posed by Billing were simply for the purpose of helping a court answer this question of is there clear repugnancy between the two regulatory regimes. So, the third question is, does the SEC actively regulate? Well, again, that's, I think, a misleading paraphrase. What the

Supreme Court in Billing found was, in the conduct alleged there, and, again, we have to focus on what is the conduct that's being alleged there the conduct that was alleged to be violative of the antitrust laws was regulated in very fine detail by the SEC. The Supreme Court in Billing said the SEC regulated essentially all of the conduct of the defendant underwriters in that case, and that's why the Court proceeded to the fourth question. If you can't answer the first three questions yes, you never get to the fourth question in a Billing analysis.

So, we've got limited regulation of these entities by the SEC. It's not in the heartland of the SEC regulation. No one has claimed that horizontal per se market division agreements are in the heartland of the SEC regulation of these entities, and the regulatory authority extends only minimally to what these companies do. So, we just don't get to that fourth question, but even if we did get to the fourth question, there is no demonstration by the defendants here of any particular conflict that's going to arise in this case. There's no conflict between the SEC rules and the antitrust laws, because I'm sure, if asked, the SEC would say, We don't favor market division agreements.

And that gets me to another point, your Honor. In this case, we know, from the public record, that the antitrust division is investigating this conduct.

THE COURT: Why should we have parallel -- to use the term "parallel actions," why need there be a private action, if the antitrust division is conducting an investigation into this area?

MR. WILDFANG: Because, your Honor, the antitrust division does not provide a remedy to injured parties.

THE COURT: No, but if a decision is rendered would that not make your job easier?

MR. WILDFANG: It might very well make our job easier, but, just as in the NASDAQ case, there was a third, a parallel civil case at the same time the DOJ and the SEC were investigating. Judge Sweet had a class action representing all the class members who had bought or sold NASDAQ stocks. The Supreme Court has been clear that the private remedy under the antitrust laws is an important deterrent, and, so, courts are very reluctant to stay, for example, private enforcement of the antitrust laws, and the only rare case where that is done, your Honor, is where there's a Grand Jury sitting and a judge wants to sort of wait so there's not the risk of tainting the Grand Jury process. We don't have that here, your Honor.

But the important point is, unlike in Billing, where the SEC filed an *amicus* brief at the District Court in Billing urging preemption, here we don't have that. The SEC is not here asking your Honor to preempt the antitrust laws because they fear that there will be some interference with what they're doing.

THE COURT: Are they aware of the case?

MR. WILDFANG: I'm sure they are, your Honor. I'm sure they are. Our case was mentioned in the GAO report, so I have no doubt that the SEC is aware of this case.

Your Honor, all of these things add up to a finding, we think, that preemption is just not appropriate and probably will never be appropriate in this case, but certainly on the pleadings that are in front of your Honor, the defendants have failed in their stiff burden to show that there is a clear repugnancy between the minimal regulatory regime that's at issue here and the antitrust laws.

Your Honor, let me go back, briefly, to the issue of the overarching conspiracy versus the nine deals, and I want to make sure that we're clear on this.

THE COURT: That issue has given me some pause all the way through, because, just my experience in pleading, to me it's unusual. That's all I'm saying, it's an unusual manner of pleading.

MR. WILDFANG: Well, your Honor, antitrust cases tend to be unique sets of facts. Some are easy, some are hard, some are complex, some are simple. This happens to be a complex one, but we've pled what we think is more than adequate detail about the overarching conspiracy.

THE COURT: Let me ask you this question. Again, assume I accept your argument on Twombly, assume I believe that there are sufficient allegations from which an inference can be drawn that an agreement has been sufficiently alleged, even if I were to go that far, I'm still very, very worried about going beyond the nine transactions in discovery at this stage. This bothers me, because I don't know or the defendants might not know what transactions we're talking about. How can discovery be controlled in a reasonable manner if I were to go in accordance with your argument?

MR. WILDFANG: Your Honor, certainly recognizing that your Honor's concerned about that, I think what would make sense is for the parties to try to work out a discovery plan to try to do the discovery that we think is necessary at this stage. I'm sure there might be some disputes as to the scope of that discovery, but, again, in my experience in these complex cases, it often makes some sense to stage discovery to try to see what's out there, and I don't want to concede too much at this point, but it may be that we do the discovery of the nine deals, look at what that discloses, then pick a few of the other deals, see what that discloses. Your Honor has many tools available to make sure that discovery is managed in a sensible way, and we're willing to abide by whatever the Court decides on that, but the fear of a big case, and I know, sitting on that side of the bench, it can look like what am I getting myself into.

THE COURT: Let me tell you, that doesn't even bother me. I mean, it's the obligation on the parties and the money that's going to be expended. I've got to be here. What difference does it make if it's a big case or a small case?

MR. WILDFANG: And, your Honor, we're hoping to be here with you. It's a fact --

THE COURT: I'm really, in a sense, worried about the parties, especially all of them, even the plaintiffs. I mean, if you come up with nothing after expending that type of money and all the time and effort, it's --

MR. WILDFANG: We're very confident, your Honor, that we're going to be able to show you evidence that is going to get us to a jury, and I've been doing antitrust cases for 30 years. They're all unique, they present various difficulties, but the economic evidence here is so compelling that, just speaking for myself, I would be surprised if we don't find the evidence that we think we're going to find.

THE COURT: No, but my point is how is it limited? At least, if I were to go with the plaintiffs how is it going to be limited, how is discovery going to be limited, at least at the beginning?

MR. WILDFANG: Your Honor, what we would suggest the Court do is deny these motions, order the parties to develop a discovery plan, bring it back to you within 30 days. If we can't agree, your Honor can impose those limits that you think are appropriate on discovery at this stage, and we can take it in steps. That's often done. You know, that, itself, sometimes has some inefficiencies about it, but courts, you know, do that kind of thing. But the modern electronic discovery is, in some ways, a lot more efficient than the old days, where you had to produce boxes and boxes of paper. There are ways to produce information electronically that can be done very quickly, relatively inexpensively, and those things can be utilized very quickly. So, that's what we would think your Honor should do with this case.

THE COURT: I have another question before you leave, that is, with respect to the releases, I know we haven't heard argument on them, but three transactions have been released, and some of the parties named here are only named in those released transactions. What's your rationale for keeping those parties in the case?

MR. WILDFANG: Well, your Honor, I think that question mainly goes to issues that were going to be addressed by my colleagues, but let me answer the --

THE COURT: All right. That's all right.

MR. WILDFANG: But the broad answer is, in antitrust law, all of the conspirators are jointly and severally liable for all of the damages. So, if we prove our overarching conspiracy claim, the fact that one party has been released from one deal, if we can show that they were a conspirator in the broader conspiracy, then they are still liable, and we, certainly, think we can do that, but the more detailed answers to that, the release question, I'll leave to my colleagues.

THE COURT: All right.

MR. WILDFANG: Your Honor, let me conclude, again, by just making clear, if I haven't already, that you asked questions of my adversary about are the plaintiffs challenging the individual deals or only the overarching conspiracy. We challenge the individual deals because they are a reflection, an effectuation of the overarching conspiracy. So, I didn't want your Honor to be confused by what are we saying about those deals. Those deals we think are a part of conspiracy that is larger than the individual --

THE COURT: That it is the overarching conspiracy which is the main cause of action and the deals are reflections or indications tending towards proving it.

MR. WILDFANG: For example, your Honor, in the NASDAQ case, among the 6,000 stocks whose transaction prices were fixed were Microsoft, so the price fix on Microsoft was it wasn't just a price fix on Microsoft, it was this market-wide price fixing agreement, the effect was to fix the price of Microsoft's transaction prices on NASDAQ as well as the other thousands of stocks as well. We only have, you know, a few deals, certainly not thousands of stocks, but that's the way this overarching conspiracy applies.

Another case I'll mention to your Honor, there have been a number of published opinions by Judge Hogan in the District of Columbia involving the vitamins cartel. The vitamins cartel is the largest, most serious cartel ever prosecuted in the United States. It involved 20-some companies, hundreds of products of vitamins over the entire world. It is simply not true that these big conspiracies are implausible. They happen, unfortunately, with some regularity, and this is one that we think deserves to be challenged.

Thank you, your Honor.

MR. PRIMIS: May we have a few moments for rebuttal, your Honor, to respond?

THE COURT: Sure. This is on Twombly?

MR. PRIMIS: I'll address the Twombly issues. Your Honor, as you can hear from the argument that was just presented, plaintiffs have alleged, continue to, want to allege and cannot get away from the overarching conspiracy. Counsel for the plaintiffs couldn't even identify how many transactions would be covered by that, and if the Supreme Court in Twombly --

THE COURT: I thought he said 36.

MR. PRIMIS: Well, he changed the number a couple of times, and, by our count, it's twice that. So, there's no indication, there's no record in the case of even how many transactions the Court would be opening up in allowing this case to go forward on, but the more important issue is, even with regard to the nine or the five, the only thing that the plaintiffs have alleged, what they've tried to allege but failed because there's no facts in the complaint, is something tying them together. There is not an allegation, and none was cited, that ties those nine transactions together.

THE COURT: Well, the only thing I can see is that some of the parties are named in more than one.

MR. PRIMIS: But, your Honor, that hits on a critical point, from our perspective.

THE COURT: Just for an example, let's take -- well, let's take TPG. It's in the Neiman Marcus transaction and it's in SunGard.

MR. PRIMIS: Okay, and there's not an allegation in the complaint that suggests that TPG's involvement in either of those transactions had anything to do with the other. There is no allegation of a *quid pro quo* across transactions, there's no facts to support the notion that TPG won either of those transactions because it had an agreement, the meeting of the minds that has to be alleged under Twombly with any of the other defendants.

THE COURT: His argument, though, was that it's by inference from the economic conditions or events alleged, namely, a court can reasonably draw the inference that there is collusion.

MR. PRIMIS: Let me address the economic evidence.

THE COURT: And I think that was his main --

MR. PRIMIS: Right.

THE COURT: I don't know whether he conceded, but I think it's based on the economic factors alleged from which it can be drawn reasonably that there was collusion, because, otherwise, the events would not have occurred.

MR. PRIMIS: Your Honor, let me address that head-on, because the economic, the so-called economic evidence that the plaintiffs have put up on these charts does not support and doesn't claim to support the allegation that there is collusion across transactions. The only thing the article said, the Officer article that plaintiffs rely on, is that in bids where there were joint bids, in transactions where there were joint bids, we see lower premiums. The article never, ever said, and plaintiffs have not claimed that that article ever said that it's supportive of a theory of overarching conspiracy that ties transactions together. That allegation doesn't exist.

THE COURT: He did say that, but what impinged on my mind was that, when there is joint bidding, the price is lower, and if there had been competitive bidding it should have been higher.

MR. PRIMIS: Your Honor, that may or may not be the case, but if the Court turns to page 36 of the complaint, where the plaintiffs identify the premiums on the nine transactions, in five of the nine transactions, the premiums alleged are higher than the industry average that plaintiffs say set the benchmark. So, in more than half of the nine transactions, there's a higher premium, and when the Supreme Court --

THE COURT: So, what do you say the so-called economic evidence, as alleged, reflects?

MR. PRIMIS: It reflects conflicting information that is not suggestive of any pattern or agreement whatsoever. In fact, the article that the plaintiffs depend on, the authors in that article say explicitly, they stress, that's their word, "we stress," and this is on page 5 of the article, that they lack direct evidence of collusive behavior, that's a quote, and, quote, cannot completely rule out the possibility that unobserved factors explain our findings. So, on the face of the article they say, We don't have evidence, which is what the Supreme Court suggests needs to be alleged to make a plausible agreement. The article that's relied upon doesn't support the overarching conspiracy and, so, what we would be left with are five distinct transactions, and I want to address those in one minute.

One other thing I wanted to alert the Court to, is that in the GAO report that plaintiffs just provided to the Court and to the defendants, the GAO said, this goes to the economic evidence point, In analyzing 325 public-to-private LBOs done from 1988 to 2007, GAO generally found no statistical indication that club deals in the aggregate were associated with lower or higher prices paid for the target companies. This is the first page of the report that you were just handed, right beneath the cover sheet. This is the plaintiffs' economic evidence. No statistical indication.

So, now we've seen in the pleadings, as alleged, even with regard to these nine, we have premiums that are higher than the industry average for the transactions, we have their own government report saying there's no statistical indication, we have an unpublished article by a business professor from the University of Southern California, unpublished, which says on its face, We didn't find any evidence of collusive behavior, and, in any event, doesn't support an overarching theory, and that's what we're going to go forward on discovery on, that slim a read? It's exactly what the Supreme Court said we shouldn't do.

Now, with regard to the -- if we look at the five non-released transactions, your Honor, by our count, those would be SunGard, Neiman Marcus, Kinder Morgan, Michaels Stores and PanAmSat. Let's look at the Neiman Marcus transaction.

THE COURT: What do you have? Kinder Morgan, Michaels Stores, Neiman Marcus, PanAmSat and SunGard.

MR. PRIMIS: Yes. Now, again, we start with the basic point. Whatever complaint the plaintiffs may have about the bidding in these transactions, the complaint is not that bidding in any one of them was affected by any other. They just look at the transaction and say we don't like one aspect of this transaction. Neiman Marcus, the problem with Neiman Marcus, they say, is that the parties joined into these bidding groups and resulted in a lower premium. The GAO report, the one that plaintiffs handed to your Honor a few moments ago, on page 82, for the record, says -- this is how the Neiman Marcus transaction got going -- seven private equity firms responded to management's request for companies that were interested. Given the size of any potential buyout transaction, the Board asked Goldman Sachs to arrange the bidders into teams or clubs, as they are sometimes known, to make joint offers.

In Neiman Marcus, one of the allegedly conspiratorial transactions, in materials that plaintiffs have now provided to the Court on our Motion to Dismiss, the Government of the United States says that the board of directors of Neiman's asked for the joint bids. How could that possibly be consistent with collusion among these 17 different defendants? It doesn't make any sense at all.

And with regard to the nine transactions or even the five non-released ones, there are different groups of buyers and bidders in all of these transactions. So, it's completely implausible to think that in one transaction, if a bidder doesn't show up in another one that they are in any way connected. There's not even parallel conduct across these transactions. So, there's no reason to infer that, because TPG won one auction, that it did anything inappropriate in another one.

THE COURT: Well, couldn't there be, let's say just one transaction, couldn't there be a collusion between Bain and Blackstone in the Michaels Stores transaction?

MR. PRIMIS: Your Honor, if we're down to that --

THE COURT: No, but --

MR. PRIMIS: -- if we've gotten away from the 70 transactions, even the nine they don't link up, is there collusion in one transaction? Then we are right into the Finnegan case, which is the Second Circuit case. During the break I highlighted a copy for your Honor. If I can approach. For the record, Finnegan is a Second Circuit decision from 1990, and on page 826, the Court, the Second Circuit, where most of these mergers and acquisitions take place, describes what happened on the left-hand side of 826.

In March 1988 Federated was put into play, that is, offered for sale to the highest bidder, and a battle for its control between Macy's and Campeau began. At first, the rival bidders pushed up the price of Federated stock. In April 1988 it dawned on the contestants that constantly raising the price of the target company was economically disadvantageous for them. They allegedly reached an understanding under which Macy's agreed to withdraw its latest bid and allow Campeau to acquire Federated. In exchange, Campeau agreed to permit Macy's to purchase two Federated divisions. The difference between the 73.50 a share ultimately paid and the 75.51 withdrawn bid amounted to about $172 million.

Now, in this Finnegan case we have a fact pattern that is just like at least three of the five non-released transactions, okay? In Neiman Marcus the claim is that two companies decided to stop bidding and they've thrown the label "sham" on it. There's no facts to suggest it was a sham, they just say it was a sham. Even if that were true, and even if there were facts to suggest it was a sham, Finnegan holds, the Second Circuit, that that claim is preempted because this is the type of joint bidding activity that the SEC regulates and, in certain instances, allows. So, they can't end up with just looking at one individual transaction and saying there's collusion in that transaction, because we're looking at all public companies, and once bidders come together, for whatever reason, valid or invalid, to buy a public company, it's preempted under this Finnegan decision, because the SEC will control it, and all these facts are disclosed, all the joint bids are all disclosed. So, that's why they don't want to be there. They have to get this global overarching conspiracy, and even with regard to the nine or the five, there's no factual allegation connecting any of them together.

And that's really critical for us, because there are different groups of defendants in different transactions, and if the case goes forward on a handful of them, under plaintiffs' theory we're all still in the case, even though some of the defendants didn't bid on any of them, because we're all part of this overarching conspiracy. So, it's going to create all kinds of problems on plaintiffs' own theory, and I think, for the reasons I've shown your Honor, that the economic evidence is not nearly as compelling. In fact, plaintiffs have given the Court at least three different papers today which suggest that there's absolutely no connection between the bidding, club bidding and outcomes, that it's not justified under <u>Twombly</u> to go and allow all of this massive discovery, which brings me to my final point and then I'll sit down.

In <u>Twombly</u>, I'm going to read a quote from the dissent, because it sounded awfully like what Mr. Wildfang said for the plaintiffs, Justice Stevens' dissent. This is on page 24, for the record. To be clear, if I had been the trial judge in the case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. Okay. Stevens said, I'd let the case go, but I would control discovery the way your Honor was asking, you know, would that be doable.

He said, Respondents proposed a plan of phase discovery limited to the existence of the alleged conspiracy and class certification. Whether or not respondents' proposed plan was sensible, it was an appropriate subject for negotiation. That's exactly what plaintiffs' counsel just suggested, let us negotiate it out, we'll come up with a reasonable plan. On the slide I handed your Honor when I made my opening argument, the majority, 7 to 2, rejected that proposal, saying, Don't do that, we can't control it. In cases like this, the discovery will be massive, even if limited to a few transactions, because they're still going to be searching for this overarching conspiracy, and the more sensible result is the one your Honor, I believe, started with plaintiffs' argument, which is, there's so little here to go on, doesn't it make more sense to dismiss it and let a Court of Appeals take a look at this, if they're going to pursue it, than going through this massive, massive discovery to find out where we are now, which is there's no facts alleged of an overarching conspiracy.

Unless the Court has any more questions, that's all. Thank you.

THE COURT: All right.

MR. SHERMAN: Your Honor, just a few words on the preemption. I know we've been sitting here a long time, so I'll make a promise that a lawyer should never make. I'll try to be brief.

I want to start with where Mr. Primis ended, which is the Court began with Mr. Wildfang with a prudent question. If it's a close call, why shouldn't I dismiss rather than going through all the massive costs? We agree, obviously. We don't think it's a close call. On the preemption, it's clearly the right thing to do, because the vast weight of authority says that in the circumstances you have before you, the claims are preempted, and I listened to Mr. Wildfang, and he brought up the NASDAQ Market Makers case. That was the case that he mentioned with respect to preemption. I was surprised, because, to my knowledge, no claim of preemption was made in that case. As I read the case, there wasn't an SEC regulation involved. In any event, it's not support for the notion of no preemption here, since, to my knowledge, preemption wasn't claimed. Mr. Wildfang mentioned the Supreme Court language about clear repugnancy. I agree it's in the cases. What he didn't tell you about the cases is how they came out. They didn't allow the cases to go forward. They found preemption for the very reason that it should be found here. Mr. Primis gave you -- in fact --

THE COURT: Let me ask you this question with regard to the preemption issue. The SEC has strong jurisdiction over public companies, but its jurisdiction over private transactions is less. You would have to admit that.

MR. SHERMAN: Agreed, but private transactions aren't at issue here, your Honor. That's the point. All the transactions at issue here have to do with publicly held companies. They're all within the SEC's jurisdiction, and they all are regulated by the regime that the SEC has set up.

And, in fact, since Mr. Primis gave you a copy of Finnegan, I wonder if I could ask you to turn to page 831, because in the Finnegan case the Court dealt with I think the very question or the issue that the Court is asking me, and if my copy is the same as Mr. Primis' at the top, Finnegan asserts that, The SEC is without authority to regulate agreements between rival bidders such as Macy's and Campeau, because the SEC is only empowered to regulate in the area of disclosure. This assertion misperceives the scope of that Federal agency's power. The Court goes on to say further down the page, That the SEC has chosen not to prohibit agreements between rival bidders as fraudulent or manipulative practices, once shareholders are properly informed of them --

THE COURT: Where are you reading from now?

MR. PRIMIS: The Court's copy is slightly different from the one you have.

MR. SHERMAN: Oh, okay. I'm sorry, your Honor.

THE COURT: I can find it. Just tell me where it is.

MR. SHERMAN: It's at the bottom of the paragraph that starts, The SEC is able...

THE COURT: Okay. Go ahead.

MR. SHERMAN: That the SEC has chosen not to prohibit agreements between rival bidders as fraudulent or manipulative practices once shareholders are properly informed of them does not reduce the SEC's supervisory authority over such agreements. Consequently, because the SEC has the power to regulate bidders' agreements and has implicitly authorized them by requiring their disclosure under Schedule 14D-1 as part of a takeover battle, to permit an antitrust suit to lie against joint takeover bidders would conflict with the proper functioning of the securities laws.

Now, it's interesting that Mr. Wildfang never mentioned the Finnegan case in his argument, never mentioned it. That's because there's absolutely no way for plaintiffs to get around the holding of Finnegan, and that's especially true, especially true if we're talking about the possibility of proceeding on single transactions as opposed to this joint overarching transaction. There's, certainly, no question that the behavior at issue in Finnegan is the same at issue here if we're whittling this down to a few transactions.

THE COURT: Let me just read this.

MR. SHERMAN: Absolutely, your Honor.

(Pause)

THE COURT: All right. Go ahead.

MR. SHERMAN: Your Honor, in addition, Mr. Wildfang said that, when he got to my Billing chart, he said, Well, gosh, this is all wrong. If the Court would allow, I have actually a version which includes citations to the Supreme Court's language, just so there's no question about whether we got it right or not.

In talking about those factors, Mr. Wildfang started out with the first factor, which is, as I told the Court, sometimes referred to as the heartland analysis, but whether the conduct in question is central to the proper functioning of the capital markets, and he said, No, that's not what the Supreme Court said at all. Well, on page twenty-three ninety-two, the Court says, First, the activities in question here - the underwriters' efforts jointly to promote and sell newly issued securities - is central to the proper functioning of well-regulated capital markets.

I invite the Court to read the Billing decision. We haven't misrepresented what the Court's factors were, and, as I suggested he would do, Mr. Wildfang essentially stood up and said, Gosh, we really don't like the regulations, we don't like the way they regulate, and, surprisingly, he told you that we wanted the Court to step into Congress's shoes. Absolutely not, absolutely not. What we want the Court to do is exactly what Billing and all the other cases have said the Court does in a preemption analysis, determine what Congress has done. Congress has already delegated this responsibility to the SEC. The SEC has already determined it can regulate in this area and has regulated in this area, and that's why, that's why there's a conflict. It's not a question of whether the SEC, as Mr. Wildfang put it, would not favor these antitrust practices. In

Billing the Court assumed that the antitrust violations alleged would also be disapproved by the SEC. Same thing in Gordon. That didn't prevent them from finding preemption, because that's not the conflict. The conflict isn't do we allege something that the SEC doesn't explicitly allow. The conflict is, as you succinctly put it in your question to me, Is this an area of SEC regulation? That's what the four factors go to, and it's clearly the case here.

And if there's any doubt, let me go back to their injunctive relief, which is another thing that Mr. Wildfang didn't mention, on behalf of every owner of a security in any exchange in the United States. There's no question that that is the province of the SEC.

My last point is on the conflict. The Court a couple of times said to Mr. Primis, Well, there are a lot of pages in this complaint. Well, if you want a clearer example of the conflict, the pages all come from the disclosures that the parties made in the transactions. They were cut and pasted. Here's exactly what the Supreme Court was concerned about. Required, approved transactions by the SEC are cut out and put into an antitrust complaint with the threat of treble damages. That's the conflict. That's the conflict in Billing. That's why this case can't go forward.

That's all I have, your Honor. Thank you.

THE COURT: Let me ask the plaintiff, is there any case that you can cite that is close to this one on -- I know Billings and Twombly, but is there anything where the facts are more in line with what is alleged here, even in the District Courts?

MR. WILDFANG: You mean on the preemption issue or on the Twombly issue?

THE COURT: On either. Let me be more precise. Since those cases have been rendered by the Supreme Court, are there any District Court cases on either of the two issues, preemption or Twombly?

MR. WILDFANG: There are, and we discuss in our brief, and I believe we attached to our brief decisions of District Courts on the Twombly issue, yes.

THE COURT: There's so much paper, but what would you say is a case that's supported in the District Court that is close to what is alleged here that supports your position? Because I've heard the Finnegan case spoken of and Billing and Twombly but nothing else, really.

MR. WILDFANG: Well, your Honor, on Twombly, there are a lot of cases that involve allegations of conspiratorial conduct, where the Courts have said, you know, the plaintiffs have easily moved the bar too far, and those cases are cited in our brief and some of them are attached. With respect to this preemption issue, there's a case recently in the Western District of Washington, the Borey case, which, basically, disagreed with Finnegan, said, you know, Finnegan got it wrong, essentially, and so I --

THE COURT: Got it wrong in what way?

MR. WILDFANG: In finding preemption in the context of an individual transaction. But let me address --

THE COURT: The main question I want to ask you is, the first argument made by counsel, the first counsel, namely, that the complaint, especially for the overarching conspiracy, is based on the inferences to be drawn from the so-called economic factors more specifically alleged. He made an argument that it's not as strong as you would lead me to believe.

MR. WILDFANG: Well, your Honor, I had the sense, as I heard that argument, that we must be here on a summary judgment motion, not a Rule 12 motion, because we're arguing about --

THE COURT: I'm not talking about evidence but the --

MR. WILDFANG: Inferences.

THE COURT: -- but the inferences to be drawn from the allegations.

MR. WILDFANG: Let me address that, because I think there was a little bit of smoke and mirrors going on here. With respect to the chart that is found on page 60 of our complaint that counsel made reference to, that chart has two sets of economic information. It has the premiums, and it has the price-to-earnings ratio of these deals. The reason we put that information in the chart is both of those pieces of information are relevant to the economic analysis, and that information, both the premiums offered and the price-to-earnings ratio numbers, strongly support the idea that these deals were less economically attractive and prices were less than comparable deals.

THE COURT: Say that again.

MR. WILDFANG: Do you have the complaint in front of you, your Honor?

THE COURT: No, I don't, but just read it or just mark it.

MR. WILDFANG: This is a chart that shows transactions, premiums, and price to earnings offered, and it is true that in some of these deals, the percentage -- the premium offered was higher than the industry average, but if you look at the price to earnings, they were lower, and that's a reflection of the fact that there was a diminution of competition in these deals, because the prices were less attractive to the shareholders, they were lower than what one would expect if you look at just the economics.

Let me address the question about Professor Officer's article. You know, I try not to criticize my adversaries for being misleading.

THE COURT: Well, he made one statement that it was unpublished.

MR. WILDFANG: Well, it is unpublished. It will be published at some point, that's the way academic articles go, but the weight of the scholarship is not undercut by the fact that it has not yet appeared in a published article.

But let me address what counsel said, which I think is just plainly misleading. He said that Professor Officer says he doesn't have any direct evidence of collusion. He's an economist. He hasn't done an investigation, he hasn't taken depositions. What he says is he sees no explanation other than collusion for what he sees in the economic evidence. You'll recall the NASDAQ case I talked about. The professors who wrote that article said exactly the same thing. We're economists, we're not saying that we have direct evidence of someone colluding. What they said in that article, and what Professor Officer says in his article is the economic evidence all points in one direction.

Now, counsel also made reference to the GAO study. The GAO study did say they did not see the same pattern in what they looked at as Professor Officer did, but they looked at a much larger set of LBOs. We're not alleging that the thousands of LBOs were all fixed. What we're alleging is these very large LBOs, that these defendants are the only ones who really have the resources to do it, that they have carved up that market, not the market for little LBOs that other firms can handle. This market, these really big LBOs have been carved up by these defendants, and collusion is the only explanation that is consistent with the economic evidence, and counsel can stand here all day long and say there are other things out there, but they haven't pointed to any economic evidence of their own, and we have to come back to the fact that this is a Rule 12 motion, not a summary judgment motion. There will be an opportunity at summary judgment for the defendants to offer defenses that they think are persuasive, but at this point, where your Honor is limited to the complaint, the evidence in the complaint that's recited, the economic evidence, the footprints in the sand, lead in only one direction, certainly lead in that direction strongly enough to get over Twombly.

Now, let me address the question or the issue that counsel raised that there's nothing to tie the nine deals together. Your Honor pointed out, well, yeah, what ties the nine deals together is the economics. Again, back to NASDAQ. NASDAQ had 512 market makers and 6,000 stocks. Most of those stocks had 5 or 10 market makers. Only really big stocks like Microsoft would have 30 or 40 or 50 market makers. So, you could make the same argument in NASDAQ, well there's no tie between Microsoft stock and some other stock traded on the NASDAQ. Well, but the tie is the common agreement. The tie is the fact that the defendants came to a common understanding. Yeah, not all 512 came into a room and agreed one afternoon, but if you read the competitive impact statement that I handed up earlier today, your Honor, from the Department of Justice, it describes in detail, and I really urge your Honor to read that competitive impact statement, describes in detail how that conspiracy operated. It operated because there was a meeting of the minds, not necessarily because people got into the same room on the same afternoon, but that meeting of the minds, nonetheless, amounted to an agreement, and that's why the Department of Justice prosecuted that case.

Let me address Finnegan, your Honor. Counsel is right, I didn't mention Finnegan in my argument; I was busy with other topics. I didn't mean to ignore that. Finnegan, first of all, was not mentioned in the Billing case, so one wonders whether or not Finnegan is even good law anymore. Secondly, Finnegan was a cash-tender-offer situation between two rival bidders who were strategic bidders, subject to different regulations than the regulations that are cited now by these defendants. The teaching of Billing and the earlier cases is, and that's why looking at the facts and the regulations of earlier cases are only partially instructive, in a preemption analysis, the Court must look at what is the conduct that is alleged to be violative of the antitrust laws, what do the regulations say, and then decide whether or not, putting those, the conduct and the regulations together, whether or not the antitrust laws are clearly repugnant to the operation of the securities laws, and if your Honor does that analysis, and only if you do that analysis can the Court grant the defendant's motion. The Court must decide and determine and describe how that clear repugnancy exists. We don't think there is any clear repugnancy, and that's why counsel avoided using that term in their argument.

With respect to the argument about the phase-discovery discussion in the dissent in Twombly, I think the point there was simply that tossing a case on a Rule 12 motion is an extreme step. As your Honor said earlier this morning, the rule of prudence has long been let's not throw people out of court at the beginning, let's see what the facts are. And I think that was all that was being discussed there. Federal judges all the time make judgments about how much discovery to do and when, and there's nothing about this case that suggests that your Honor is not going to be well able to manage the case if we get to that point. Your Honor asked about are there cases where -- well, let me go back to an earlier question you had about Twombly cases, the District Court cases. At page 38 of our brief we cite a series of cases, In re: Southeastern Milk Antitrust Litigation, City of Moundridge vs. Exxon Mobil, In re: Pressure Sensitive Labelstock Antitrust Litigation, and other cases stand for the proposition that the Twombly test is easily met in some of these conspiracy cases.

Your Honor also asked about has the Court ever found clear repugnancy or has a court ever not found clear repugnancy and, therefore, not preempted and, yes, there are cases like that. Two Supreme Court cases that applied that standard and came out in favor of applying the antitrust laws are the Silver case and the Otter Tail Power case, which are cited in our briefs. Now, Otter Tail Power was not an SEC case, but the clear-repugnancy standard applies to any kind of preemption analysis. In that case it happened to be the Federal Power Commission, I think was the question.

So, there are cases both at the Supreme Court and the Court of Appeals levels and at District Court level that stand for the proposition that antitrust laws, where they are not clearly repugnant to the regulatory regime, should be enforced.

Your Honor asked the question of counsel about isn't it true that the SEC has less regulatory purview over private companies, and that is certainly true, and it is certainly true that the regulations of the LBO process here are very minimal, and that's why the GAO report says, finds that the SEC exercises limited oversight over these companies, and it's not an accident.

THE COURT: Why is it that they exercise limited supervision?

MR. WILDFANG: Your Honor, because these companies have designed their businesses to avoid regulation. That's why they are structured the way they are.

THE COURT: Well, what is that structure? How would you describe it in one descriptive word?

MR. WILDFANG: They are private equity firms that raise private money from investors in private transactions, not regulated. So, they will compile a pool of money and then use that money to take a public company privately. It's no accident that they've done this. They've done it on purpose.

THE COURT: Well, there's nothing wrong with it.

MR. WILDFANG: No, there's nothing wrong with it, but after they have designed their -- my colleague, Mr. Hudson, who used to work for the SEC, whispered in my ear what I should have said. They are exempt from the Investment advisors Act, which I think is referenced in here, so they don't have to report, they're not subject to these regulations, and it seems odd for companies that have intentionally structured themselves to avoid regulation to now come up and say, Oh, we should be exempt from the antitrust laws too, because there are little pieces of what we do that the SEC has some limited oversight over.

THE COURT: All right. We're going to suspend at this time. Let me ask counsel for the defendant how many more arguers are there going to be on release?

MR. TRINGALI: Your Honor, we have the release motion that's on behalf of all defendants except for two, and then there are the three individual motions.

THE COURT: So, how long will the argument be?

MR. TRINGALI: The release motion on behalf of all defendants I really don't intend to spend more than ten minutes. I think the three individuals are talking about, like, five minutes.

THE COURT: So, then, why don't we take a 15-minute break instead of breaking for an hour, if it's only going to be relatively short. 15 minutes.

THE DEPUTY CLERK: All rise. Court is in recess.

(Recess taken from 1:05 p.m. to 1:30 p.m.)

THE CLERK: All rise. Court is back in session. You may be seated.

THE COURT: I had a telephone call, so I was a little late.

MR. TRINGALI: Thank you, your Honor. Your Honor, Joseph Tringali, for KKR, and I'm going to be speaking on behalf of all defendants on the release motion except for Providence and Silver Lake, who were not parties to any of the releases.

THE COURT: You're representing whom?

MR. TRINGALI: I represent KKR, but I'm speaking on behalf of all defendants except for Providence and Silver Lake, who were not parties to any of the releases so are not part of this motion.

THE COURT: All right.

MR. TRINGALI: But before I begin, I've already handed to the plaintiffs what I'd like to hand to your Honor. This is with regard to the Twombly motion, just a selection of cases with highlighting, and, in addition, let me hand you at this time a demonstrative with regard to the release argument I'll be making.

THE COURT: You're only, basically, talking on Aramark. The other three transactions have already been released, have they not?

MR. TRINGALI: No, your Honor, and let me explain why not. First of all, with regard to what the plaintiffs attempted to do, they filed a Rule 41(a)(1) dismissal, which is a voluntary dismissal. We pointed out to them that that was procedurally defective. The case law is clear, both in the District of Massachusetts as well as in treatises, that if you're going to dismiss less than all claims against a particular defendant, you need to do so through Rule 15 by filing an amended complaint and not Rule 41(a), and the case law is clear on that.

THE COURT: But if you're released, why are you complaining?

MR. TRINGALI: Well, your Honor, the reason we're complaining is that they didn't give us what the release entitles us to, so I don't disagree with your Honor in terms of what difference does it make. The problem is what they filed is not what we're entitled to under the release. First of all, they've put in language in the stipulation that they filed that they can use the facts against the various defendants who were released in other transactions. That's not an issue that's even been before your Honor to rule on one way or the other. So, that's improper.

THE COURT: So, you're arguing not only those three transactions which I thought had been, at least transactions were released, but all four of them.

MR. TRINGALI: Correct, your Honor. There are three issues with what they filed. Number one, they didn't include all parties to the release; number two, they didn't include all claims included in the release, and; number three, they attempted to reserve for themselves the ability to use the facts against the released defendants in the case against these defendants.

So, for example, my client is KKR. We have a release in the HCA transaction, Hospital Corporation of America. They have taken the position, number one, that in the HCA transaction they will only -- they have only released the damages claims as against the entities who are actually defendants in the HCA litigation but not as to the other parties who were included in the release. So, in the case of HCA, for example, Merrill Lynch -- I'm sorry, not Merrill Lynch -- JP Morgan Chase and Merrill Lynch & Company, both of whom were released as bank advisors, they do not include.

Aramark is the more dramatic example, your Honor, because in the Aramark situation, they did not include anyone but their own complaint in paragraph --

THE COURT: Maybe they haven't because they're named in other transactions.

MR. TRINGALI: No, no, absolutely not, your Honor. That's not the reason. They take the position that, in Aramark, because the only defendants in that lawsuit that was settled are not defendants here, the fact that the Aramark release expressly included, and this is based on their allegations, this is page 63, footnote 14 of their third amended complaint, they say GS Capital Partners, JP Morgan Partners, Thomas Lee and Warburg were released as well. That's in the Aramark transaction. Their position is because those entities were not named defendants in the Aramark state court litigation, for some reason the release isn't effective as against them. They cite no law. We gave you cases from the Second Circuit and elsewhere that specifically say you can include in a release, properly, parties who are not named defendants, and there are very good reasons for that, your Honor.

For example, in some of these transactions, you have bank advisors, investment banks or banks providing you financing. Typically the LBO firm will provide indemnification to those people. So, what incentive would KKR, for example, have to provide a -- to settle a case if then the entities that KKR has indemnified, its investment banks and the like, are sued the next day on the very same transaction for the very same claim? There would be absolutely no incentive, and that's what the Second Circuit expressly found in the Wal-Mart case, where Visa and Mastercard were being sued by a class of merchants and the release extended to banks. Banks were not parties to that case, but the Second Circuit said that release is valid as to those banks, even though they are not named as defendants, because what incentive would Visa and Mastercard have to settle a litigation and then to have their members sued by the merchants for the very same conduct that Visa and Mastercard in that case --

THE COURT: But you have said here, even though they weren't defendants, that at the time of the release --

MR. TRINGALI: They were expressly released.

THE COURT: -- they were expressly released.

MR. TRINGALI: Exactly, your Honor.

THE COURT: I see.

MR. TRINGALI: And plaintiffs don't dispute that they were -- that each of these entities that you'll see on the second page of my chart were released, and those entities that we have an asterisk next to the plaintiffs released in that 41(a)(1) dismissal that they filed, but anyone who does not have an asterisk has not been released by the plaintiffs.

So, for example, in AMC, they only release Apollo Global Management. They don't release JP Morgan Chase, even though JP Morgan Chase is expressly named in the AMC release. Similarly, they didn't release Goldman Sachs or JP Morgan Partners, who are both released, and we give you the reasons why they're released, according to the allegations of the complaint and the express language of the releases.

THE COURT: In Aramark?

MR. TRINGALI: In Aramark every one of those entities, your Honor, is expressly mentioned. Either they're named, as in the case of JP Morgan Partners, Thomas Lee or Warburg Pincus, or they are released because they fall under a particular category that's been released. JP Morgan Chase and Goldman Sachs are released as bank advisors and they are alleged by the plaintiffs in the third amended complaint to have served that role in the Aramark transaction.

THE COURT: How about in Freescale?

MR. TRINGALI: In Freescale, your Honor, they released Blackstone, certain of the Carlyle defendants, that's the TC Group, and Permira and TPG. They did not release Goldman Sachs or JP Morgan Chase, both of whom are released either in the case of Goldman Sachs as an advisor and JP Morgan Chase as a bank, again, according to their own allegations in the third amended complaint. And, finally, in the HCA --

THE COURT: Were they expressly released?

MR. TRINGALI: The release, your Honor, expressly includes advisors and banks, and then in the third amended complaint, they allege that Goldman Sachs was an advisor and JP Morgan Chase was a bank.

And then the HCA transaction, they released Bain, KKR and Merrill Lynch, Global Private Equity, but then they didn't release JP Morgan Chase & Company or Merrill Lynch & Company, again, alleged to be, by the plaintiffs, bank advisors in the third amended complaint, and, again, those releases are clear that they have released those parties.

So, the only dispute, your Honor, is the plaintiffs take the position that a release cannot extend to people who were not parties to the prior litigation.

THE COURT: Namely, named defendants.

MR. TRINGALI: Correct, your Honor, and that is simply not the law. The Wal-Mart case expressly applies to that. Number two, the plaintiffs want to limit their release -- sorry -- their dismissal to damages claims. There should be no such limitation. The release is, it's the first page of what we've given you, is any and all claims; it is not limited to damages. So, for example, if the plaintiffs want to bring an injunctive relief claim or any other claim against KKR, for example, in the HCA transaction, with regard to HCA, that has been released. The release didn't say "only damages."

The third point, your Honor, is they make some noise about the fact that antitrust claims weren't expressly mentioned, but you will see that it does say "any and all claims." This was a general release, it's Federal or state law, and the case law is clear that in a state court case, even if the court did not have jurisdiction to hear a Federal antitrust claim, a release of Federal antitrust claims is entirely proper, because, once again, what the Courts recognize in terms of general releases and their enforceability is that what the parties are bargaining for is finality and peace. You're not going to pay somebody, you're not going to give them a settlement of some kind if they can then sue you under another statute, and in this situation, for all four of these transactions, AMC, Aramark, Freescale and HCA, one or more defendants, and we lay out who they are in the second page, were expressly included in the release either because they were named expressly or they were named as a type of person who was released and the plaintiffs do not --

THE COURT: You mean the type of --

MR. TRINGALI: Such as an investment -- the release would extend to banks and advisors to the defendants, and there's no --

THE COURT: So, your position is that with respect to these four transactions, all the defendants in this case set forth should be released --

MR. TRINGALI: That's correct, your Honor.

THE COURT: -- in essence because you say the law is clear, and it would seem to be.

MR. TRINGALI: It is clear, your Honor, number one, that they were released, they were included in the language of the release, and, number two --

THE COURT: And they were expressly released, if at least not by name, by category.

MR. TRINGALI: Absolutely, your Honor, and plaintiffs don't dispute that. They just say a release can't extend to someone who wasn't named in the case, but they don't cite you any case law. We do cite you case law that says expressly the opposite.

And, finally, your Honor, the last point about what they filed with you, the 41(a) dismissal, in addition to it being limited to damages and being limited to only some of the released parties, is they wanted it to be without prejudice. If there's a release, if these claims could not have been brought against these defendants, it should be with prejudice. There's absolutely no reason, and they offer no reason, why it would be without prejudice. Either the release is valid and binding and enforceable, in which case it is with prejudice. They have been enjoined under these settlement agreements from bringing claims against these parties for these transactions. There's nothing that makes it without prejudice. So, those are the distinctions, your Honor, between what they filed with the

Court, the Rule 41(a) dismissal, and what we're entitled to, more parties, all the released parties, all claims and with prejudice.

I have nothing further, unless your Honor has questions.

THE COURT: No.

MR. MITCHELL: Your Honor, good afternoon. David Mitchell on behalf of plaintiffs.

What I'd like to first do, with the Court's permission, is address the scope of the release and the released parties in connection with the transactions that Mr. Tringali just discussed.

THE COURT: Let me ask you this.

MR. MITCHELL: Yes, sir.

THE COURT: Maybe with your voluntary release, but how about the argument made here? Whether you voluntarily released them or not, why should I not release them, if what counsel for the defendant has argued?

MR. MITCHELL: Well, your Honor, I'm going to address that point first. The reason why we did not include these additional entities that counsel has referenced in our Rule 41 document is because none of those entities were either -- and may I approach briefly and give you a copy?

THE COURT: All right.

MR. MITCHELL: In none of these four cases, your

Honor, that's on the chart that I just handed up was the entities that counsel are seeking to have additionally released, in none of those cases were they either a defendant, a signatory to any stipulation of settlement or a settlement, nor did they pay any sort of consideration or offer anything in return for obtaining their release, and it's for those reasons that we did not include those additional entities.

THE COURT: What are the three reasons?

MR. MITCHELL: The three reasons are, for example, your Honor, as counsel mentioned, in HCA, for example, the defendants' proposed order seeks to add JP Morgan as a releasee. I believe their proposed order is attached to one of their briefs. The reason why we did not -- do you see that, your Honor?

THE COURT: On HCA they want to have global.

MR. MITCHELL: They want to have an additional entity to the three that we have voluntarily released --

THE COURT: Right.

MR. MITCHELL: -- that being JP Morgan Chase. We have already released these three from damages claims regarding HCA. They want to add JP Morgan Chase to that list. Our response is, in HCA, in the state case these were state breach of fiduciary duty actions brought by investors in state court. In that case, JP Morgan was neither a defendant, did not sign any release or stipulation -- sorry -- did not sign any settlement or stipulation of settlement with the Court, and, most importantly, they didn't offer any consideration, as far as we can tell, and what's on the record before the Court presently there's no indication that JP Morgan, for example --

THE COURT: Assuming what you say is true, it's been represented to me that they were expressly within the ambit of, say, a counselor or a banker, and that, under the law, that type of entity is released, automatically, as a matter of law.

MR. MITCHELL: Well, we don't think it's as a matter of law that they should be released automatically, your Honor. Counsel referred numerous times to the Wal-Mart case, which he claims indicated that a non-named defendant can obtain release. In the Wal-Mart case, the non-named defendants that obtained release were member banks that owned Visa and Mastercard who offered consideration in exchange for their release.

In addition, the other authority the defendants cite, the Holocaust Survivors case, there were Swiss banks, for example, that were not named defendants in that case. They obtained release as part of the settlement in that case because they paid money, they paid consideration. There's no evidence on the current record that the defendants that Mr. Tringali is referring who should obtain release above and beyond the releasees that we included in our Rule 41 document paid any consideration whatsoever, and, so, what we're asking and we're not saying at the end of the day that perhaps these additional entities, which, admittedly, were referred to and, in some cases, identified in the state settlements, should be released as to these particular cases as to their damage liability. What we're saying is we need discovery, or we need a little bit more time to determine whether they should be, in fact, released.

THE COURT: Let me ask you this. You come in here, you want to plead overreaching conspiracy involving, I've heard, from 36 to 72 transactions involving 3 1/2 to 5 years, and you're fighting at least releases that have encompassed -- well you've complied with at least three of them, and you're fighting whether other people who are expressly noted, although not by name, as being released because they didn't give any money. Do you know they didn't?

MR. MITCHELL: We do not, your Honor, but we would assume that the defendants would have offered that to the Court had they. But if I could just step back very briefly, you know, what we tried to do in our Rule 41 filing was solve a problem and take an issue off the Court's plate. That, obviously, has not occurred. The defendants' reaction to our Rule 41 filing was to say, A, it was improper, procedurally --

THE COURT: Well, to me, I had the idea that those three transactions were gone and everybody involved in it were gone. So, in a way, maybe I wasn't paying that much attention, but my concern is why not the fourth one? Why haven't we got rid of that one?

MR. MITCHELL: Well, in the Aramark state fiduciary duty case, none of the defendants in this case were named as defendants. In that case, the company and certain officers and directors were sued as defendants. None of the defendants in this case, Goldman Sachs, JP Morgan, Warburg or Thomas H. Lee, were named as defendants, didn't sign any documents and didn't pay any consideration.

THE COURT: Have they been released?

MR. MITCHELL: Not in our document, your Honor. Those entities fall under the argument I'm making, that they were not defendants, they didn't sign any settlement, nor did they pay any consideration.

THE COURT: Were they referred to in the release document?

MR. MITCHELL: They were referred to in the state release document, yes, sir. And, so, at the end of the day, we're not saying that we're going to seek or demand to keep these entities in the case. Out of an abundance of caution, we included the obvious parties who were defendants in the state case in our Rule 41 document, but we didn't include the other entities, because it wouldn't be prudent, in our judgment, to not at least briefly explore the reasons why these non-named, non-signatory, non-paying parties obtained a release in a separate state action. That's all. We're not saying --

THE COURT: Let me ask you this.

MR. MITCHELL: Yes.

THE COURT: Have you got authority for your position --

MR. MITCHELL: The authority for our position that --

THE COURT: -- that they shouldn't be released, people who fit within this category? By "authority," I mean have you got a case that so holds?

MR. MITCHELL: Well, your Honor, I don't have a case off the top of my head.

THE COURT: Off the top of your head?

MR. MITCHELL: Yes, sir.

THE COURT: I've got about a ton of papers here. If that's the heart of your argument, you would think you would have one case that so holds.

MR. MITCHELL: Well, your Honor, the cases that the defendants do cite do not support the proposition that non-named defendants should be released, and, obviously, this is the defendants' motion, this is the defendants' burden to show us that they should be, in fact, released. Again, at the end of the day, these entities, perhaps, should be released; we're just saying that we need to make sure. And as to the reference to --

THE COURT: Make certain as to what?

MR. MITCHELL: Make sure that there's no circumstance that caused the non-named defendants to obtain a release in a state case that lead us to indicate that there was any sort of collusive agreement or any sort of agreement that implicates liability in this matter, such that they should not have been released in that case.

I also just want to fold back. The case itself is, at most, 36 deals, and as Mr. Wildfang showed you, the chart that we referred to, the highlighted number of deals are 36 deals. This case will never get more than 36 deals. The market is 2.5-billion-dollar LBOs and above in a defined time period. So, that's the ultimate universe, and we've heard counsel say, even after I believe Mr. Wildfang said that the case was 36 deals, referred to the fact that it might be up to 70 deals. It is 36 deals. The universe is 36 deals.

Your Honor, I want to also address, briefly, what exactly our release covers as well as what the defendants are requesting. What we asked in our Rule 41 filing was that the certain defendants in these certain cases, using, as an example, in HCA, Bain Capital, KKR and Merrill Lynch be released in this action from damage claims for that deal only. In other words, HCA does not leave this case. Rather, the damage liability for Bain Capital, KKR and Merrill Lynch is released from this case. So, the other defendants --

THE COURT: So, who is named and who are the defendants with respect to HCA?

MR. MITCHELL: Your Honor, it's our position, and we've alleged in our complaint that the defendants either submitted sham bids concerning these --

THE COURT: No, but who are they?

MR. MITCHELL: They are the defendants before the Court. This is part of our overarching conspiracy, your Honor. So, other defendants not named as defendants in the state HCA case --

THE COURT: Do you allege that with respect to HCA that other defendants named in this case were involved in that transaction?

MR. MITCHELL: No, your Honor. What we're alleging is that, as part of defendants' overarching conspiracy, in going-private transactions, nine of which we illustrated in our complaint, using HCA as an example, some defendants submitted sham bids, some defendants stepped back and decided not to bid in exchange for, perhaps --

THE COURT: But that's what I'm asking you. What are their names?

MR. MITCHELL: Well, your Honor, that's something that we hope the discovery was going to bear out. As to HCA, and I want to focus back on the Rule 41 filing --

THE COURT: Are you telling me that you want HCA to be in this case, although at this stage there's no allegation against any specific defendant? Is that what you're saying?

MR. MITCHELL: Well, your Honor, we have alleged the wrongdoing with regard to the HCA transaction and we submit that we should be able to use the facts concerning the HCA transaction in proving our case. But another thing that I want to point out to the Court is, even in defendant's proposed order they attach to one of their release documents, they also refer to liability for identified defendants concerning a particular transaction. So, the defendants, even the defendants are not asking the Court to take HCA out of the case. The defendants are asking the Court to release these identified defendants and, in this case, JP Morgan Chase from injunctive release and damage liability concerning HCA. So, it doesn't reference other defendants.

THE COURT: So, you're saying that the -- let me get this straight -- that the defendants' argument only wants those defendants with respect to the particular four transactions out of the case, but the transactions still remain notwithstanding the fact that no specific allegation has been made against any particular defendant at this time?

MR. MITCHELL: Your Honor, the defendants -- as to your first, the first part of your point, the defendants identified in HCA, these three defendants and JP Morgan Chase, said they should not, those four entities should not be liable for injunctive relief or damage liability regarding this case.

THE COURT: Right.

MR. MITCHELL: The defendants now -- the defendants have not said, and nor would we expect them to, at least in their order, to concede that the facts surrounding the HCA transaction can be used in our case. That's certainly a point of --

THE COURT: Well, let me ask you this: If I were to rule with the defendants with respect to the release question, are you saying that they are not seeking HCA and the other three are in the case still, the transaction, or out of it?

MR. MITCHELL: Well, your Honor, the way I read defendants' position, and I believe it's distilled in this proposed order that they attached to their reply motion concerning the release claims, I'll read it verbatim regarding HCA, sir. They ask that plaintiffs' claims including claims for damages, injunctive relief or otherwise against the following defendants, and for HCA it's part 4 of the second page of the proposed order, all claims against, and it lists Bain Capital, KKR, Merrill Lynch and JP Morgan, are released in connection with, based upon and/or related to the HCA transaction.

They're not asking, your Honor, that the HCA transaction be erased from this case. They're saying that these three entities plus JP Morgan Chase should be released from damage and/or injunctive relief liability concerning this case, and that's, at a minimum, our position, your Honor, that we can use the facts in HCA to prove up the defendants -- the other defendants' collusion in this case, and, as the Court knows, the named defendants here are jointly and severally liable for damages flowing from any particular deal, and that's the antitrust law.

If the Court has any further questions, I'd be happy to answer them.

THE COURT: Well, do you have any response?

MR. TRINGALI: Yes, your Honor.

THE COURT: He's indicated that all you wish is for the additional defendants in this case to be released --

MR. TRINGALI: As to all -- I'm sorry.

THE COURT: -- but not the transaction. Is that true?

MR. TRINGALI: That's true, your Honor, but with this qualification, which is an important one, which Mr. Mitchell did not refer to, which is that they cannot use, for example, HCA, where KKR has been released, they cannot use that transaction against KKR or any other defendant who was released in the HCA transaction.

THE COURT: That's understandable, if I were to go with you.

MR. TRINGALI: Right.

THE COURT: However, the transaction itself still lies.

MR. TRINGALI: With regard to the non-released defendants.

THE COURT: If any.

MR. TRINGALI: If any, correct.

THE COURT: All right.

MR. TRINGALI: Now, the only thing I'm going to say, your Honor, just to be very quick on this, is you asked about case law. We gave you a number of cases. Let me just read to you from one of the cases he didn't mention, which was the Lloyd's American Trust Fund case, which is cited in our brief. It says, However, class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against parties to the action being settled. It cites a number of cases, Ninth Circuit, Eight Circuit, Eastern District of Pennsylvania, treatise on class actions. It's also cited in the Second Circuit case, the Second Circuit Wal-Mart case. There is absolutely nothing about those banks making any contribution. It all turned on the fact that they were involved in -- it would be the same factual predicate.

THE COURT: But what you're saying here with respect to the matters pending before me is that, if not named by the defendant's name, but at least there's an express release here.

MR. TRINGALI: And they don't disagree.

THE COURT: But you're arguing that, even if there were not any express release, which is not applicable here, the release would apply if it related to other individuals?

MR. TRINGALI: No, no, no. What I'm saying, your Honor, is that they made the argument before you just now, even though they had no cases for you, that, unless you were a defendant, a named defendant in the prior case, you couldn't have been released, and what I was just reading to you from these cases that are numerous, as well as treatises, is that you absolutely can release parties who are not named defendants in a prior case so long as the transaction -- so long as they're involved in the same transaction.

THE COURT: And they were --

MR. TRINGALI: And they were included in the --

THE COURT: -- their category was enumerated.

MR. TRINGALI: Absolutely, your Honor, and there's no dispute that they were.

THE COURT: Okay.

MR. TRINGALI: Thank you.

THE COURT: Are there other arguers?

MR. ROSENBERG: Yes, your Honor. Good afternoon, your Honor. Jonathan Rosenberg, representing Apollo in this action. You heard this morning, your Honor --

THE COURT: Apollo is in AMC.

MR. ROSENBERG: AMC, and that's it, your Honor, and that's the basis --

THE COURT: Do you have the same argument as previously made?

MR. ROSENBERG: Our separate argument, your Honor, is that, even if your Honor finds sufficient allegations of an overarching conspiracy that's not preempted, which Apollo joins in the motion that that's not the case, and that there is no sufficiently alleged un-preempted overarching conspiracy, but even if you were to find it, there are insufficient allegations that Apollo participated in any such conspiracy. Plaintiffs have the burden of pleading that.

THE COURT: Let me ask you this: Why do you have to argue if you've already been released?

MR. ROSENBERG: Well, I wish I had been released, your Honor, but I haven't --

THE COURT: I understand.

MR. ROSENBERG: -- and we should be.

THE COURT: So, why is your argument any different than was previously made by the other defendant counsel?

MR. ROSENBERG: Here is the thing, your Honor. There's one transaction in which Apollo is named, the AMC transaction, and no others, and Apollo was released from that transaction. You asked Mr. Wildfang, when he was arguing, Why should I leave in the case a defendant who is released? And he said, quote, If we can show they were conspirators in the broader conspiracy, then they're still liable. Well, they have no allegation as to Apollo that it was a conspirator in the broader conspiracy, because all they allege as to Apollo is pages 43 through 45 of the 75-page complaint. All they allege there is that Apollo participated in the AMC transaction, and that's it, no tie to the rest of the other transactions in this case or the rest of the 36 transactions that they say occurred during the three-year period of the conspiracy.

So, that's the basis, that's the main basis for our argument, your Honor, but I want to go even further, because even if Apollo hadn't been released, even if there wasn't an effective release in this case, they still fail to allege plausible allegations that Apollo participated in the conspiracy, because all they allege with respect to the AMC transaction is that there was a joint bid, a joint bid between JP Morgan and Apollo. They admit that joint bids are not illegal per se, and that joint bids can actually be pro-competitive.

There's more, your Honor, and this is all in the proxy statement that we attached to our Motion to Dismiss that they don't disagree that you can consider on a motion to dismiss and that they rely on in their complaint. Apollo was the controlling shareholder of AMC since 2001, long before this conspiracy is ever alleged to have begun. So, it owned 51 percent of AMC, and, therefore, had clear economic interest in maximizing the value of that investment and even in taking over the company. It's not that it was a stranger to AMC; it was already in there.

And, so, JP Morgan teamed up with Apollo, and JP Morgan said, you know, we're actually going to -- we'd pay more if Apollo was involved in the transaction than if it's not involved. And why is that, your Honor? Because AMC had notes outstanding, half-a-billion dollars in bonds outstanding, and those bonds were governed by an indenture, like all bonds, and the indenture provided standard change-of-control provisions. If there's a change of control, AMC would have had to buy back the half-a-billion dollars in bonds at a premium. Well, that would have made the transaction far more expensive. So, JP Morgan said, Let's make Apollo part of the acquisition group and, therefore, there won't be a change of control, and, therefore, AMC won't have to buy back the half-a-billion dollars in bonds and, therefore, we'll pay more to the shareholders.

So, it's completely rational. It's at least as consistent with rational economic behavior than it is with, frankly, the fantasy of plaintiffs' complaint that Apollo's participation in this one AMC transaction suggests in any way that it participated in a market division conspiracy for 36 or even nine LBOs during the period of this transaction.

Thank you, your Honor.

MR. BURKE: Your Honor, Chris Burke for the plaintiffs. We thought that, in light of the similarity of the various individual motions, the defendants would all go first.

THE COURT: Sure.

MR. KRAMER: Good afternoon, your Honor. I'm Ken Kramer. I represent Merrill Lynch.

I wouldn't have to stand up here, because Merrill Lynch has been released from the only transaction mentioned in the complaint, the HCA transaction.

THE COURT: Which one?

MR. KRAMER: The HCA transaction. Merrill Lynch has been released, it bargained for release, and I shouldn't be standing here but for the claim the plaintiffs make that because Merrill Lynch --

THE COURT: Are they named in anything else except the overall --

MR. KRAMER: We're just part of the overall, we're lumped in, and we continue to be lumped in. We're mentioned, presumably, wherever they say "all defendants." That's Merrill Lynch too, because we're one of all defendants, but for specific allegations, your Honor, there's nothing. I have a little chart here that may help you.

THE COURT: You're saying there's nothing in the entire complaint or nothing other than what's in HCA?

MR. KRAMER: Nothing other than what's in HCA. May I approach, please?

THE COURT: Sure.

MR. KRAMER: As you can see, your Honor, I've listed all the mentions of Merrill Lynch. There are six mentions of Merrill Lynch. The only substantive ones have to do with HCA, from which we are released. Other than that, there is nothing. We're just lumped in.

THE COURT: The argument seemed to have been, at least made by the first two counsel, that the HCA, although the defendants in this case are being released, the so-called transaction is still in play.

MR. KRAMER: I think they agree that the transaction is not in play as to Merrill Lynch, who's been released.

THE COURT: No, there's no doubt about that, at least there doesn't seem to be, but the transaction itself is still there.

MR. KRAMER: That may be their position, that they can still try to take evidence relating to the transaction to prove against some of the unnamed defendants, which they haven't said. I don't want to reargue anything that was said by my colleagues.

THE COURT: So, what you're saying is, really, you want to be released from everything, not released but dismissed from everything because you're not named other than in the HCA transaction from which you say you've been fully released.

MR. KRAMER: That's absolutely right, your Honor.

There are no other mentions of Merrill Lynch. We're just lumped in, and they continue to lump us in.

Just a small example from this morning. Mr. Wildfang, waving his hands to all the defendants, said all the defendants are these private companies that are unregulated. Now, it doesn't make any difference that many of the defendants are private equity firms that aren't directly regulated by the SEC, but my client, we're just lumped in. My client, Merrill Lynch, is heavily regulated by the SEC, it's registered under Section 15 of the 1934 Securities Exchange Act. There are regularly SEC inspectors in our building. Now, that doesn't make any substantive difference, your Honor, it's just one more way we are lumped in, and it doesn't make any substantive difference to the preemption argument, because the issue in the preemption argument is not whether the private equity buyers are regulated, the question is whether the process is regulated, and the process is heavily regulated through the disclosure rules under Section 14 and Section 13 of the '34 Act. I'm not going to repeat any of that argument. I only raise it to show you one more way in which we're just lumped in. There are no specific allegations against Merrill Lynch, and in a conspiracy you're supposed to plead what are the overt acts. What overt act has Merrill Lynch participated in, other than being involved in the HCA transaction? The other eight transactions we're not mentioned in. Did we benefit by not participating in those? Did we have an agreement that we wouldn't participate in one, in two, in six, in seven? It's not there. There's nothing there.

And, just finally, your Honor, as a question of fairness, you'll see at the top of my little chart here there's a three-line logic that the plaintiffs have used. Some people smarter than me in my firm said this is a syllogism, which I probably should have learned about in my philosophy class that happened at 8:00 in the morning, but what they have in here is private equity firms colluded, and we find out today, it's pushed today, anyway, we find this out because of the economic evidence from the unpublished report from the University of Southern California, which has a very good football team. I'm not so sure about the economics department. So, we find out that, based on this economic evidence that has nothing to do with Merrill Lynch, Merrill Lynch is not named, that private equity firms have colluded, ah-hah, Merrill Lynch is a private equity firm, therefore, Merrill colluded.

THE COURT: You sound like Aristotle.

(Laughter)

MR. KRAMER: I wish my class had been Language. As a matter of pure fairness, your Honor, based on this complaint, to launch discovery against Merrill Lynch, which will cost millions of dollars, millions of dollars just for Merrill Lynch, would be highly unfair, especially in the markets we have today.

Unless you have any further questions, I have nothing further to add. Thank you.

THE COURT: I'll review it.

MR. DROBNY: Good afternoon, Judge. My name is Dane Drobny, and I represent Permira advisors LLC. Permira was in Freescale. Permira is --

THE COURT: And that's in Freescale?

MR. DROBNY: Yes, Judge.

THE COURT: Is that the only place you were named?

MR. DROBNY: Only one, Judge. We are a European private equity firm. We were named in one transaction. There is a release, a general release that no one disputes, that released us in that transaction, yet for some reason we are still in this case. There are no other allegations against us with respect to any of the other nine transactions in this case. The only allegations against us relate to Freescale, and we are only mentioned in plaintiffs' 70- or 80-page complaint five times. Yet, we are here after they filed a stipulation dismissing damages from the Freescale transaction. For some reason, we are still here, even though we received a release and we were only involved in one deal in a conspiracy, Judge. That deal occurred in 2006. They claim their overarching conspiracy -- your Honor used a word "overreaching." It's an overreaching conspiracy. They claim that conspiracy --

THE COURT: That was a mistake.

(Laughter)

MR. DROBNY: Actually, it wasn't, Judge.

(Laughter)

MR. DROBNY: They claim a conspiracy that started in 2003. My client, a European private equity firm, did one deal in 2006. They, because some expert in California wrote some report, they expect your Honor to draw an inference that in 2003 my client and every other defendant in here formed, hatched some conspiracy in which we waited three years, till 2006, did the Freescale deal, didn't do any other deal, were released, and then somehow we're getting sued today. It makes no sense, Judge. It does not even come close to satisfying Twombly, and Permira is a great example of how their overarching conspiracy is overreaching, and the whole case should be dismissed.

But I'm here just for Permira, Judge. We were released from the only deal that we were involved with, and because of that, we should not -- we shouldn't just be out of that transaction, we should be out of the entire case, because there are no other allegations against Permira. That's all I have to say, Judge.

THE COURT: All right. I guess my question is why shouldn't Apollo, Permira and Merrill Lynch be released fully from the case?

MR. BURKE: Chris Burke, your Honor, Scott & Scott for the plaintiffs. Thank you.

Counsel before mentioned that he thought this was a syllogism and he wasn't sure because he wasn't a philosopher. I'm not a philosopher either, but in a previous life I did write in political economy, and I did write in law in courts, and this isn't a syllogism, it's a syllogism based on false premises.

Let's take the first line, Private equity firms colluded. What are they leaving out? Private equity firms colluded to allocate the market for LBOs $2.5 billion or greater during 2003.

Second line. Merrill Lynch is a private equity firm. Well, what did they leave out? Well, Merrill Lynch is a private equity firm who participated in the relevant market, the large LBO market.

And Merrill Lynch is a repeat player. Merrill Lynch participated in the HCA case. It's an overt act. Merrill Lynch, the bank, funded, was one of the funders of the Kinder Morgan case, and of those other 36 deals that Mr. Mitchell and Mr. Wildfang mentioned that comprise the universe of the case, Merrill Lynch, the private equity arm, took part in three others. They're repeat players.

Now, if Merrill is let out, or Permira is let out or Apollo is let out by virtue of the release, they're still going to be liable for the conduct of their co-conspirators, and this is why. Plaintiffs' case is not a deal-by-deal allegation. We do have an allegation of an overarching market conspiracy. We've made clear that that market is no greater than 36 deals. It comprises 14 or so private equity firms. Why so few? Frankly, because so few had the capital, the know-how, the expertise, the connections to participate in that market. Merrill, Apollo and Permira are three of those firms. They've all taken overt acts, as evidenced by the complaint, to participate in at least one of the nine deals that we've identified Merrill was a funder also in Kinder Morgan, but they've done more than that, and I'll get to it.

It's important, though, to keep the legal standard in mind, and we've cited the Jung vs. Ass'n of American Medical Colleges, and that Court wrote, The individual defendant's motion to dismiss must be viewed through the lens of the larger price-fixing charge. In analyzing defendants' 12(b)(6) motions, the Court will consider the allegations with respect to the individual defendants only in the context of the larger conspiracy alleged. They may not like the fact that we've alleged an overarching conspiracy, it may not be convenient to them that we've alleged an overarching conspiracy, but we've alleged that they're on the hook for the overarching conspiracy. They stay in the case, even if claims for damages against them in the release cases are out.

THE COURT: But let's take Merrill Lynch.

MR. BURKE: Yes.

THE COURT: He cites in the complaint only one, two, three, four, five, six references to Merrill Lynch.

MR. BURKE: I believe he left out Merrill's funding, but the HCA deal --

THE COURT: But what else is there in there?

MR. BURKE: Your Honor, we have compelling economic evidence that describes the results of defendants' participation, and I would direct your Honor to complaint paragraphs 117 and 198, and I'll demonstrate how else Merrill is connected to the case. Now, 119 and 178, in those paragraphs plaintiffs relied on the economic data that is available. This is empirical data that measures the returns in publicly traded buyouts -- buyouts executed by publicly traded companies.

THE COURT: We're getting afield now. The first thing we're here for is should they be released from HCA.

MR. BURKE: And I think we have filed papers releasing them from damages claims in HCA.

THE COURT: No. Should they be released from the HCA transaction, fully released from the HCA transaction?

MR. BURKE: We would have to take a look at what the contours of that would mean.

THE COURT: So, you're saying no.

MR. BURKE: Well, your Honor, let me be clear.

THE COURT: Because there's two things. I thought what you're arguing now is they should be in the overarching conspiracy. But my question to you is should they be involved in HCA, or are they released?

MR. BURKE: We cannot go after them. My understanding is that we have agreed with the defendants we cannot seek damages against them for their conduct in the HCA case, so they're out of the HCA case.

THE COURT: So, if you can't seek damages, which is an essential element of tortious conduct, why are they here?

MR. BURKE: Their conduct in the HCA case and their conduct in the relevant market demonstrates their participation in the conspiracy. That's why they're here.

THE COURT: So, are you saying that they've been released from the so-called substantive act, they're not released from the conspiracy?

MR. BURKE: We released our damages claims, we didn't release conduct, and there are certain conduct in the HCA case and in the Permira case -- I'm sorry -- in the HCA case, in the AMC case and in the Freescale case that is post-release, that it is after what they bargained for in terms of their release. For instance, in what I believe in each of these three deals, there were such things as secondary bond offerings that the defendants used, including Permira, Merrill and Apollo. They used those to pay themselves back after the deal had been consummated. Well, those transactions occurred subsequent to the release, and it's black-letter law that you can't release prospective conduct, just as it's black-letter law that you can't release prospective injunctive relief.

THE COURT: So, in other words, they are not released.

MR. BURKE: They are not released, not completely. They're released from damages. Their conduct stays in the case in order to prove up the overarching conspiracy and to prove --

THE COURT: I always thought that if there's no damages, there's no cause of action.

MR. BURKE: Your Honor, but this isn't a case that's deal by deal by deal; it's a case that encompasses a number of deals.

THE COURT: Have you got authority for the so-called partial release that says that people who have been released are only released as to damages but not as to conduct?

MR. BURKE: We can certainly provide you authority with respect to the release not extending past the settlement or past the release date. We can certainly provide you authority with respect to prospective conduct.

THE COURT: So, do you have allegations in there for these three individual corporations that they were involved in something post-release time?

MR. BURKE: We do in our injunctive relief claim, your

Honor, I believe it's paragraph -- let me find it -- it's where we allege the defendants in paragraphs 215 and 216 derived economic benefit that would have been after the deals had been consummated.

THE COURT: But when? Did you specify?

MR. BURKE: We could certainly make that more specific, your Honor.

THE COURT: I mean to say, it's a very general allegation. When did they do it? With whom?

MR. BURKE: Well, the nature of these deals is after the deal closes. Then the secondary --

THE COURT: I know, but where is your allegation to that effect?

MR. BURKE: Your Honor, if we weren't specific enough, we can certainly try again. This is a 77-page complaint. We tried to do our best to be as specific as possible without being unduly prolix. If we failed to walk that line, we failed to walk that line.

THE COURT: Does anybody want to respond to anything that he said?

MR. BURKE: May I just?

THE COURT: Yes.

MR. BURKE: Your Honor, one thing I did want to address is the Apollo's counsel, and, really, it was each of the defendants, each of the individual defendants, Merrill, Apollo and Permira, essentially argued with the facts and are asking the Court to weigh the inferences based on --

THE COURT: To tell you the truth, I haven't even considered the facts. I've seen that there's three entities here who have been released with respect to certain transactions, but your response is they have only been released as to the damages. I've never heard the argument made before. That's my only point. It's not a question of evidence, it's a question of law. Is the release fully effective or isn't it with respect to those transactions?

MR. BURKE: Well, when the defendants approached us and discussed releasing injunctive conduct, our view on releasing claims for injunctive relief, the way we viewed that, at least, was you're asking us to release conduct that may be in the future, and we, as a matter of public policy, cannot release conduct that's going to occur in the future. Our belief was the only thing we had to release was the damages claims, but the conduct remains.

THE COURT: I'm not talking about your release, I'm talking about the motion to release that I'm going to rule on now. Should they be released or shouldn't they be?

MR. BURKE: I believe they should be released for damages claims in those cases.

THE COURT: Even though it says for any and all claims? It doesn't say just for damages.

MR. BURKE: Injunctive release claims up to the date of the release, sure.

But, your Honor, if I could get back to the issue of whether or not we've adequately pled or tied the defendants to the overarching conspiracy, a similar issue was considered recently in the In re: SRAM case. That's a case out of the Northern District of California. It's in front of Judge Wilken, it's a post-Twombly case. We cited it in our brief on page 42, a February 14, 2008 case, and that was a case involving an alleged ten-year conspiracy to fix and maintain memory, memory chips, and it involved nearly 50 defendants, 47 defendants, and ten of them brought motions similar to those brought by Merrill, Apollo and Permira here, essentially arguing that, even if plaintiffs have adequately alleged the conspiracy, the complaint didn't explain how each individual defendant participated in the conspiracy.

THE COURT: I thought we were arguing release. I didn't know we were going back to Twombly.

MR. BURKE: If we don't need to go back to Twombly, we don't need to. If you would rather I don't go back to Twombley --

THE COURT: Well, I didn't realize that was your purpose, to argue Twombly. I thought we were arguing here release.

MR. BURKE: Maybe it's just a matter of speaking past one another, your Honor, because my understanding was part of their release argument went to whether or not they had any other connection with the case. I mean, if the argument they're making is that because of the releases they're simply out of the case, that's not our position.

THE COURT: I know it's not your position, but they say they're only named in your complaint in this one transaction except for general allegations.

MR. BURKE: General allegations supported by economic data spanning three decades.

THE COURT: With respect to them?

MR. BURKE: Yes.

THE COURT: With respect to Apollo?

MR. BURKE: With respect to the deals that they were involved in, yes.

THE COURT: No. I'm talking about with respect to Apollo.

MR. BURKE: Yes, with respect to Apollo, your Honor.

THE COURT: Where in your complaint do you have any reference to Apollo, Permira and Merrill Lynch other than the transactions of which they've been, at least ostensibly, released?

MR. BURKE: In both paragraphs 117 and 198, I believe, to go back to the storyboard, your Honor, or maybe 198, I apologize, there's a reference to the economic effects on class members of the AMC, HCA and Freescale deals, and we know that Merrill, Apollo and Permira were the private equity firms involved in those deals.

THE COURT: How do we know? Does it say so?

MR. BURKE: We alleged that earlier in the complaint, your Honor, and this economic data shows that, for instance, with respect to the amount of appreciation flowing to class members, that in Club LBOs, shareholders would expect to receive about half that, less than half that they would expect to receive in a publicly traded transaction, and if you look at the AMC, HCA and Freescale deals, which correspond to Merrill, Apollo and Permira, the class members received even less, less than the average club deal, and based on the economic data, that is suggestive of collusion. In fact, the economic data that we pled suggests that the only reasonable economic explanation for the lower premiums is collusion. So, the economic data does, in fact, encompass Merrill, Apollo and Permira.

THE COURT: All right. Any response?

MR. ROSENBERG: Your Honor, what Mr. Burke just said, that the economic data suggests that there was inadequate price in the AMC transaction, for example, the only transaction that Apollo was in, well, the inadequate price allegations is exactly the allegations that were made in the complaint for which Apollo settled and received a full release, and that complaint in Missouri, the allegations were that the AMC transaction involved an inadequate price and the shareholders of AMC did not receive adequate consideration for their shares. There was discovery, there was a settlement, it was approved by the Court, and there was a full release and payment of attorneys' fees of $1.7 million to plaintiffs' counsel, including the firms sitting at that table, and then the release says that Apollo is fully released for anything arising out of, related to or based on the AMC transaction.

THE COURT: I had the idea, and I might have misheard, that other than that transaction there were others that Apollo was mentioned in.

MR. ROSENBERG: Not in this complaint, your Honor, and all your Honor can go by are the four corners of the complaint. All they allege as to Apollo, the only transaction they --

THE COURT: Is AMC?

MR. ROSENBERG: Is AMC. That's it. It's on pages 43 through 45 of the complaint. That's it.

THE COURT: I misheard you. I thought you had reference in your argument to another transaction.

MR. BURKE: The one reference was to Merrill being involved in the Kinder Morgan deal, your Honor, but the point I was trying to make is, of the universe of deals that we believe that are in our case, which is approximately 36 Club LBOs 2.5 billion and above, Apollo's participated in three deals, including the AMC deal.

THE COURT: But are they so alleged in the complaint.

MR. BURKE: The other two deals are not alleged yet, your Honor.

THE COURT: They are not alleged.

MR. BURKE: No.

THE COURT: How about with respect to Permira? Are any of their deals alleged?

MR. BURKE: Other than the Freescale deal, no, your Honor.

THE COURT: And how about Merrill Lynch?

MR. BURKE: Well, Merrill Lynch, we believe we've made the point that it's clear from their complaint that Merrill's also involved in Kinder, at least the Merrill side being Merrill is the investment bank. The other three Merrill deals are not alleged.

THE COURT: Is in?

MR. BURKE: Kinder Morgan.

MR. ROSENBERG: Your Honor, just to sum up, all they have as to Apollo is the AMC transaction and Apollo's status as a private equity firm. That is insufficient, your Honor. Apollo should not be in this case, it should not have the burden of discovery and should be dismissed.

THE COURT: I'll hear from Merrill Lynch, then, again. He made some reference that you're in another transaction as alleged in the complaint.

MR. KRAMER: What he refers to there is, there's a chart in the complaint, which is not a numbered paragraph. In pleading rules, you don't have to respond to allegations that are not in paragraphs, but putting that aside, for a second -- but that's the reason I didn't list it in the chart I gave to you, your Honor -- the only participation that Merrill had, and which is in their chart, is Merrill provided some financing for Kinder Morgan. There's no allegation that --

THE COURT: On what transaction?

MR. KRAMER: On Kinder Morgan.

THE COURT: Which one?

MR. KRAMER: Kinder Morgan. Released in HCA, and there's one chart that mentions that Merrill provided, Merrill Lynch provided some financing, which is the business that Merrill Lynch is generally in, is providing financing. It's an investment bank.

THE COURT: Along with Carlyle and Goldman Capital? Are those the ones?

MR. KRAMER: I think there are other investment banks, yes. That was just the normal part of their business, was providing financing to customers who asked for it.

THE COURT: So, your position is that Merrill should stay in at least with respect to Kinder Morgan or no?

MR. BURKE: Well, Merrill should stay in, the entity

Merrill should stay in the case, and the reason we pointed out to the Court of Merrill's involvement in the Kinder Morgan case, and it's on page 54, I believe, your Honor, it's part of paragraph 170, it's a chart attached to paragraph 170, our position is that Merrill stays in the case, and added evidence that Merrill's involvement in the conspiracy is the fact that it helped fund the Kinder Morgan case.

THE COURT: All right. Anything further?

MR. PRIMIS: Your Honor, one last point, because it's germane to the arguments that took place this morning. I realize it's late in the day, but on two separate occasions counsel for the plaintiffs said, I believe I'm quoting, the record will reflect it, This is not a deal-by-deal conspiracy, and this is not a case that's deal by deal by deal. The Court needs to look at the relevant market that's pleaded. Paragraph 107 of the complaint says this is a global overarching conspiracy claim, and, so, for the purpose of the discussion that your Honor had with me this morning about what kind of case they've pleaded, they've disclaimed the deal-by-deal case now, and that's now clear as a result of all the arguments, and we ask that the Court rule on the basis of the conspiracy that's actually been pleaded, and that's now been confirmed twice on the record, which is the overarching conspiracy.

MR. KRAMER: Can I make just one last point, your Honor, now looking at the chart? The chart about Kinder Morgan lists the financing coming from Goldman Sachs, Citigroup, Deutsche Bank, Lehman Brothers, Merrill and Wachovia, six different banks. Since many of those are my clients, I'm not going to suggest that they ought to be here too, but it seems to be a very, very thin read beyond HCA to try to just keep Merrill Lynch in this case because they are listed with a group of other people who financed, who are not defendants in the case, and when financing is their basic business.

Thank you, your Honor.

MR. WILDFANG: Your Honor, good afternoon, Craig Wildfang. Your Honor has been extraordinarily patient today. I just want to respond briefly.

Our position now, as it was early in the morning and will be tomorrow, is the case involves deals. It's not a deal-by-deal case, but the deals are a reflection, an effectuation of the overarching conspiracy, and, so, I don't think that there's any confusion. Your Honor listened to that very patiently this morning.

Finally, your Honor, to the extent that the Court believes that there is some inadequacy in the detail of the complaint, if you, for example, believe that we should have alleged the other deals --

THE COURT: I'm not telling you how to plead you case.

MR. WILDFANG: No, but we would appreciate, if you do determine that, an opportunity to re-plead to satisfy any deficiencies that you think there might be. That's all I have. Thank you.

THE COURT: Does anybody have anything further to say?

(No response)

THE COURT: All right. I'll take it under advisement. I thought I was going to take tomorrow off.

(Laughter)

THE DEPUTY CLERK: All rise. Court is adjourned.

(Proceedings concluded at 2:40 p.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 157, constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Kelin, et al v. Bain Capital Partners, LLC, et al., No. 1:07-cv-12388-EFH.

/s/ Brenda K. Hancock

Brenda K. Hancock, RMR, CRR

Official Court Reporter