UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL BASKETBALL ASSOCIATION, et al.,	:	
Plaintiffs,	:	ECF Case
vs.	:	Civil Action No. 11-CV-5369 (PGG) (KNF)
NATIONAL BASKETBALL PLAYERS ASSOCIATION, et al.,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, New York 10019
Telephone: (212) 259-8000
Facsimile: (212) 649-9361

STEPTOE & JOHNSON LLP
750 Seventh Avenue, Suite 1800
New York, New York 10019
Telephone: (212) 506-3900
Facsimile: (212) 506-3950

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PRELIMINARY STATEMENT

The NBA's Opposition is an exercise in obfuscation. It offers no response to defendants' showing that the Complaint is not justiciable because the proffered dispute – whether the NBA's lockout would be lawful under the antitrust laws if the NBPA someday disclaimed interest in representing NBA players – is one that could unfold in an infinite number of ways or not at all. This uncertainty makes it impossible for the NBA to satisfy its burden to establish a concrete case or controversy that the Court can adjudicate without engaging in speculation and guesswork. That the parties may have "different views" on a multitude of hypothetical legal issues is of no moment; the justiciability test is whether the declaratory judgment plaintiff has met its burden to plead or prove a sufficiently "*real*" and "*immediate*" controversy as of the filing of the complaint. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).

The NBA's Opposition flat out ignores the myriad ways in which the requested declaratory judgments turn upon unknown and uncertain events. For example, the NBA does not explain how the Court could declare a disclaimer to be invalid and of insufficient "distance in time and circumstances from the collective bargaining process" to end the labor exemption when it is unknown whether, how or when any such disclaimer would ever occur. (Compl. ¶¶ 54, 57.) The NBA also is silent in response to the fact that an antitrust challenge to the lockout could not plausibly have been "imminent" when the Complaint was filed given that the lockout had already been in place for an extended period with no such challenge. (*Id.* ¶ 44.) Rather than try to address these fundamental ripeness problems, the NBA avoids them by mischaracterizing its own Complaint, making straw man arguments, and misstating the law.

The NBA's evidentiary submissions similarly miss the point. In addition to the fact that not one court that has considered litigation threats in the "circumstances" of collective bargaining has ever found them sufficient to create a justiciable dispute, the NBA's supposed

evidence of purported "threats" turn out to be, on their face, mere discussions of what NBA executives (and "the average eight-year-old sports fan") already knew: de-unionization and antitrust litigation are legal ***options*** available to professional athletes. The NBA's declarations also underscore the lack of any concrete disclaimer or litigation threat by confirming that (i) the NBPA has not once in its history disclaimed or decertified despite prior alleged "threats" to do so, (ii) the only time de-unionization was attempted by NBA players, the NBPA itself defeated it, and (iii) a few NBA players – but not the NBPA or these NBA player defendants – have previously commenced antitrust litigation against the NBA over player restraints just *four* times in *forty years*, and not in *sixteen* years. Finally, and tellingly, the NBA has yet again ignored the fact that the NBPA currently *opposes* de-unionization, which would be contrary to its vigorous pursuit of its labor – not antitrust – law rights before the NLRB in the unfair labor practice case the NBPA filed seeking to end the NBA's lockout. (*See* Mot. at 2-3; Declaration of NBPA Deputy General Counsel Ronald Klempner ¶¶ 12, 29-30.) For these and additional reasons, the NBA has not met its burden to prove subject matter jurisdiction either as a matter of law or fact.[1]

ARGUMENT

I. THE NBA HAS FAILED TO PLEAD A JUSTICIABLE CASE

A. The Alleged Dispute Is Not Sufficiently Immediate Or Real

It is uncontroverted that *MedImmune* and *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), provide the controlling justiciability test: considering "all the circumstances," the purported "controversy" must be sufficiently "real" and "immediate." Nor

[1] The Complaint must be dismissed if the NBA has not met *its* burden to establish "either the facial sufficiency of the pleadings" or "the existence of subject matter jurisdiction in fact." (Mot. at 5.) In this regard, defendants wish to clarify their response to a question asked by the Court at the Rule 16 conference: even if the Court should find it necessary to go beyond the four corners of the Complaint, "[a] Rule 12(b)(1) motion cannot be converted into a Rule 56 motion," and the burden would remain on the NBA to prove justiciability. *Aretakis v. Comm. On Prof'l Standards*, No. 08 Civ. 9712, 2009 WL 1905077, at *4 (S.D.N.Y. July 1, 2009).

does the NBA dispute that when resolution of a dispute turns on nebulous, future events so contingent there is no certainty they will ever occur, the case is not ripe. *Jenkins v. United States*, 386 F.3d 415, 417-18 (2d. Cir. 2004).[2]

Recognizing that if the Complaint is found to be based on the "legality or effectiveness of *the Union's future* acts" it would not be justiciable, the NBA denies this reality and claims "[t]he case or controversy here is on the antitrust lawfulness of the *ongoing* lockout." (Opp'n at 2.) But there is no "controversy" about the antitrust lawfulness of the "ongoing" lockout (or, more precisely, the antitrust lawfulness of the lockout when the Complaint was filed). Rather, the dispute the NBA seeks to resolve (and actually pled) concerns the antitrust lawfulness of the lockout *in the future*, *if* the NBPA disclaims. In the words of NBA Deputy Commissioner Silver:

> I understand that the NBPA and the player defendants contend that, at any moment of their choosing, they may 'decertify' or 'disclaim' interest in having the Union continue to serve as the players' collective bargaining representative and that such action would *convert* the lockout into a violation of the antitrust laws….

(Silver Decl. ¶ 3; Opp'n at 1 (same); Compl. ¶ 9 ("because the NBPA's threatened disclaimer *would* not be a good faith, permanent relinquishment of the right to bargain with the NBA," it "*would* not be effective as a matter of federal labor law") (emphases added throughout).)[3]

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[2] *See also Auerbach v. Bd. of Educ.,* 136 F.3d 104, 108-09 (2d Cir. 1998) (no subject matter jurisdiction "[w]hen the events alleged in a plaintiff's cause of action have not yet occurred"); *United States* v. *Santana,* 761 F. Supp. 2d 131, 138-39 (S.D.N.Y. 2011) (immediacy lacking if adjudication may "later turn out to be unnecessary or may require premature examination of issues . . . that time may make easier or less controversial") (alteration in original) (citation omitted); *Alloush v. Nationwide Mut. Fire Ins. Co.*, No. 1:05-CV-1173 (FJS/DHR), 2008 WL 544698, at *5 (N.D.N.Y. Feb 26, 2008) ("future event that may or may not occur" not sufficiently immediate to be justiciable); *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 408 (S.D.N.Y. 2002) ("premature concerns about contingencies that may or may not come to pass" are not justiciable); *Indus. Maritime Carriers (Bahamas) Inc. v. UT Freight Service (U.S.A.) Ltd.*, No. 99 Civ. 2226 BSJ, 2000 WL 145342, at *2 (S.D.N.Y., Feb. 7, 2000) (where "the factual events forming the basis of a claim have not yet occurred" the case is not ripe).

[3] Whereas the Complaint alleges "imminent" union "disclaim[er]" (Compl. ¶ 44), there are *no* allegations about "decertification," a distinct path to de-unionization that requires submitting to the NLRB a decertification petition which involves different factual and legal issues. (*See, e.g.,* Opp'n at 1 (discussing "decertification" but citing complaint allegations that actually refer to

But this Court cannot assess the good faith and effectiveness of a disclaimer that has not and may never occur. Using an NFL example relied upon by the NBA, in 1990-91, the NFL argued that a disclaimer by NFL players was ineffective to end the non-statutory labor exemption because "the [union] [was] still function[ing] as a labor union," the disclaimer was a "tactical maneuver," and the [union] did not disclaim with proper "motive, credibility and good faith" – the same arguments the NBA makes here. *Powell v. NFL*, 764 F. Supp. 1351, 1354-55 (D. Minn. 1991). The court resolved these questions by considering the evidence of the players' disclaimer. *Id.* No such assessment, however, is even remotely possible in this case. Rather, the "facts" underlying a possible future disclaimer by the NBPA would be pure conjecture.

Defendants' Motion identifies multiple, additional illustrations of why the issues presented by the NBA's Complaint are not susceptible or appropriate for adjudication. (Mot. at 15-17.) The NBA, however, ignores this entire section of defendants' brief because it cannot credibly dispute that the requested declaratory judgments seek purely advisory opinions based on theoretical facts and academic disagreements. The NBA's silence speaks for itself.

Not only could any NBPA disclaimer (the first in its history) and subsequent antitrust litigation by NBA players transpire in any number of ways or not at all, the NBA has also failed to show that such events were sufficiently "immediate" at the time its Complaint was filed. The NBA has, rightly, deserted its allegation that a disclaimer and antitrust challenge to the lockout were "imminent."[4] (Compl. ¶ 44.) Instead, the NBA now argues that disclaimer will occur when the players are "dissatisfied with the course of collective bargaining." (Opp'n at 4.) It is fair to say that the players have been "dissatisfied" since they were locked out of their jobs on July 1,

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"disclaimer"); Klempner Decl. ¶¶ 11-12.) The NBA's newly asserted, and never pled, claims about potential "decertification" thus introduce further uncertainty into this hypothetical case.

[4] The only time the word "imminent" appears in the Opposition is to argue that "threats of imminent litigation are *not* necessary" for justiciability. (Opp'n at 6 (emphasis added).)

but they have nevertheless remained fully engaged in collective bargaining and not disclaimed or sued under the antitrust laws. And, in any event, "dissatisfaction" is an impossibly amorphous triggering event that cannot satisfy *MedImmune*'s requirement of a sufficiently "immediate" controversy. As discussed below and in the Motion (*e.g.*, p. 13 n.6), the NBA has not identified (nor could it) an even remotely analogous case in which a court exercised jurisdiction over a future dispute without any imminent or concrete triggering event.

B. The NBA's Straw Man Legal Arguments

The NBA has dramatically back-tracked from its former position that it filed this case "because the NBPA [] threatened to use antitrust litigation." (Pre-Mot. Ltr. at 1.) Now, it stresses that litigation threats are *not* necessary for a case to be justiciable. (Opp'n at 5.) But the NBA made its complaint allegations of litigation threats the *sine qua non* of its position on justiciability: "This action arises from the Union's threatened use of antitrust litigation . . . ." (Compl. ¶ 1.) The NBA's about-face reflects its inability to identify a single case in which a court considering litigation threats in the context of collective bargaining has found those threats to be sufficient to create subject matter jurisdiction.[5]

In this regard, defendants do not advocate a "special" justiciability test – *i.e.*, other than the *MedImmune* "all circumstances" test – in the context of collective bargaining.[6] (Opp'n at 10.) Rather, defendants' point is that every court to evaluate *that* "circumstance" has concluded that, whether alleged or substantiated, such threats do not create a justiciable claim because

[5] The NBA also has no response to the fact that its conclusory allegations of litigation threats do not meet the pleading requirements of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), as confirmed by the NBA's submission of 30 pages of declarations asserting facts that its Complaint does not allege.

[6] The facts of *MedImmune* do not help the NBA. The crux of that case was whether a patent suit can ripen despite the plaintiff making coerced royalty payments under threat of a lawsuit. 549 U.S. at 130. The NBA is not being coerced or threatened with a lawsuit, and has *already* imposed its lockout.

posturing litigation as leverage is a routine part of collective bargaining that rarely leads to litigation. (Mot. at 9-15.) The NBA does not once challenge the soundness of that conclusion, instead trying unsuccessfully to distinguish each of defendants' cases on unrelated grounds.[7]

Yet another straw man is the NBA's contention that the declarations of the NBPA Executive Director and player-defendants that they have no present intent to disclaim or sue cannot, standing alone, defeat subject matter jurisdiction. (Opp'n at 6.) For starters, defendants' position is that the Complaint is not justiciable because the proffered dispute is neither "real" nor "immediate" as a matter of law (and fact, *see* Point II, *infra*); the declarations principally serve to rebut as an evidentiary matter the NBA's rank speculation about "imminent" litigation or threats of litigation (Compl. ¶ 44), an allegation it has now apparently abandoned.

Further, the NBA's cases do not stand for the asserted proposition. For example, in *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 562 (2d Cir. 1991), the court held that the plaintiff had properly commenced a declaratory judgment action because it had received a memorandum from the defendants detailing the claims they would assert after the expiration of a certain time period. The court concluded that this specific threat could not be mooted by a subsequent about-face by the defendants that they no longer intended to sue. *Id.* at 562-63. Similarly, in *Wells Fargo Bank, N.A. v. Sharma*, 642 F. Supp. 2d 242, 245-46 (S.D.N.Y. 2009),

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[7] In *North American Airlines, Inc. v. International Brotherhood of Teamsters*, No. 04 Civ. 9949, 2005 WL 646350 (S.D.N.Y. Mar. 21, 2005), the court rejected each of plaintiff's three arguments why the dispute was ripe. The NBA's Opposition misleadingly focuses on the first argument only, ignoring the court's *independent* holding, relevant here, that "in the circumstance of heated collective bargaining," "courts discount threats to take 'all appropriate action' as typical posturing" and do not create "an Article III case or controversy." *Id.* at *13. The NBA similarly tries to distinguish *Atlas Air, Inc. v. Air Line Pilots Ass'n*, 232 F.3d 218, 227 (D.C. Cir. 2000), and *Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 964-65 (D.C. Cir. 1995), on the purported ground that those cases hold only that, "absent specific proposed changes," disputes about possible future working conditions are not ripe. (Opp'n at 7.) But the NBA does not challenge that these decisions *also* hold that threats of litigation made during collective bargaining cannot create a justiciable claim.

the declaratory judgment defendant only declared its purported indecision *after* it had already threatened litigation within 14 days and *filed a lawsuit* in state court.[8]

As for *NHL v. NHLPA*, 789 F. Supp. 288 (D. Minn. 1992), the NBA has discarded its meritless attacks that (i) the decision carries no weight because it was decided pre-*MedImmune* and (ii) that the players there had "foresworn bringing the allegedly threatened action."[9] And, as with defendants other collective bargaining cases, the NBA does not take on the district court's conclusion that the litigation threats at issue were "nothing more than typical collective bargaining posturing." *Id.* at 295. Rather, the NBA now challenges *NHL v. NHLPA* on the narrow ground that it "erroneous[ly] view[ed] that the union lacked standing to bring a coercive antitrust action." (Opp'n at 11.) The NBA is again wrong; the NBPA does not participate in any market for player services, and therefore would lack antitrust standing to sue the NBA on its own behalf for either damages (which the NBA does not dispute) *or* injunctive relief.[10]

The NBA's heavy reliance on *Wells Fargo* is emblematic of it misstating the law to contrive an illusory justiciability test by which federal courts may adjudicate any and every disagreement among parties regarding the legal consequences of hypothetical events. (Opp'n at

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[8] (*See also* Opp'n at 6, 13 (citing *Cosa Instrument Corp. v. Hobré Instruments BV*, 698 F. Supp. 2d 345, 349 (E.D.N.Y. 2010) (declaratory judgment plaintiff received cease and desist letters from defendant stating an intent to bring suit "within a reasonable period of ten business days" and requesting a litigation hold); *Carlin Equities Corp. v. Offman*, No. 07 Civ. 359, 2007 WL 2388909, at *1 (S.D.N.Y. Aug. 21, 2007) (declaratory judgment defendant threatened to sue and then *actually sued twice* – once before and once after the declaratory judgment action was filed).)

[9] The NBA now concedes that the *MedImmune* "all circumstances" test originated seventy years ago in *Maryland Casualty Co.* and was applied by the district court in *NHL v. NHLPA* (*Compare* NBA Pre-Mot. Ltr. at 3-4 *with* Opp'n at 3), and does not respond at all to the fact that the players expressly preserved their right to bring antitrust litigation (Mot. at 14-15).

[10] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-544 (1983) (plaintiff must be a participant in the relevant market to have standing to seek antitrust damages); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122-23 (1986) (same regarding antitrust injunctive relief). As far as the NBPA suing in a representational capacity, there is no basis to argue it would do so in the absence of any threats by its player members imminently to assert an antitrust claim.

6-7.) In that case, Sharma threatened that unless Wells Fargo refunded all monies paid under the parties' contract or agreed to rescission, Sharma would sue the bank within 14 days. *Wells Fargo*, 642 F. Supp. 2d at 245. In the face of this imminent and concrete threat, and based on a definitive set of facts (the status of an already formed contract), Wells Fargo filed a declaratory judgment action, and Sharma, immediately thereafter, filed his own lawsuit in state court. *Id.* at 245-246. Judge Rakoff rejected Sharma's arguments that the case was not justiciable and that, alternatively, the federal court should abstain from hearing the case in deference to Sharma's state court action. *Id.* at 245-48. Here, by contrast, the NBA's requested declaratory judgments rest on unknowable events that may never come to pass; there are no allegations of imminent or even inevitable litigation (nor is there any such evidence (Point II, *infra*)); the purported litigation "threats" were made in the context of collective bargaining; and any litigation would have to follow the unprecedented step of the NBPA disclaiming its rights as a union and reconstituting itself as a new entity. Defendants respectfully submit that for the Court to exercise subject matter jurisdiction over this case would be a departure from settled law and would subject parties in collective bargaining relationships to the perpetual specter of disruptive litigation that would severely impede the collective bargaining process.

II. THE NBA'S EVIDENCE ALSO FAILS TO ESTABLISH A CASE OR CONTROVERSY THAT IS SUFFICIENTLY IMMEDIATE OR REAL

The NBA's declarations confirm the reality – evident from the face of the Complaint – that the supposed controversy is not justiciable. Even if concrete litigation threats made in connection with collective bargaining could render a dispute justiciable as a matter of law, there is not a single alleged statement by a representative or member of the NBPA that is anything more than a statement of what was already well-known to NBA executives and even lay observers: de-unionization and antitrust litigation are always *options* available to professional

athletes.[11] (Klempner Decl. ¶¶ 15-18; 20-24); *NHL v. NHLPA*, 789 F. Supp. at 295 ("It is certainly no secret to these parties, to this Court, or to the average eight-year-old sports fan that antitrust issues exist in professional sports.")). Statements of the mere existence of an obvious legal right cannot turn hypothetical disputes into Article III cases. This would be true even if many of the alleged statements were not made by non-parties to this litigation and did not post-date the filing of the Complaint.[12]

Moreover, none of the proffered evidence supports the claim that de-unionization or antitrust litigation will ever happen, let alone soon. Whereas the Complaint alleges threats only in the "weeks and months" leading up to the expiration of the CBA (Compl. ¶ 38), the NBA's declarations are a grab bag of newspaper and industry articles containing alleged statements made as far back as two and a half years ago. (*E.g.*, Silver Decl. ¶¶ 5, 6, 9.) These stale statements not only contradict the NBA's complaint allegations, they are not probative evidence of a sufficiently immediate controversy when the Complaint was filed in August 2011.

More NBA evidence demonstrating the hypothetical tenor of the dispute is the Buchanan Declaration (¶¶ 3, 9-14), which confirms that the NBPA has never disclaimed and that the only time decertification was attempted, it was defeated by the *NBPA*. (*See also* Klempner Decl. ¶¶ 3, 7, 10, 12, 27.) This declaration also puts into perspective the NBPA's collection of authorization

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[11] (Silver Decl. ¶¶ 6, 9, 23 (Mr. Kessler discussing the "*option* to decertify" and stating disclaimer is "an *option*"); ¶ 10 (Mr. Hunter stating that "[d]ecertifiation is just one of the *options* that the union [has]" and "[w]hen you look at what your *options* are, you've got to look at everything"); ¶¶ 10, 12 (NBPA Secretary-Treasurer Jones stating decertification is "one of the *options*" and referring to disclaimer as an "*option*"); ¶ 12 (NBPA player representative Hawes stating that decertification "is an *option*"); ¶¶ 16, 18 (NBPA player representative Tolliver referring to disclaimer as "an *option*") (emphases added throughout).)

[12] Only two of the thirteen named player-defendants are mentioned in the NBA's declarations (Messrs. Fisher and Jones), and the statements attributed to them also explain that disclaimer is merely a "potential realit[y]" or, in other words, an "option." (Silver Decl. ¶¶ 5, 10, 12.) And, the NBA's "evidence" regarding post-filing statements (*id.* ¶¶ 26-28) is irrelevant. *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace & Agric. Implement Workers of Am.,* 523 U.S. 653, 660 (1998).

forms, which it has done before without disclaimer or antitrust litigation ensuing (Mot. at 20), and that the NBA's characterizations of the litigation history between the parties is vastly overblown. (Buchanan Decl. ¶¶ 5-8 (attesting to just *five* antitrust lawsuits between the NBA and NBA players in *over forty years* – one commenced by the *NBA*, *none* commenced by the NBPA, only *one* supported by the NBPA, and *no* antitrust litigation at all in *sixteen* years); Klempner Decl. ¶¶ 5-7.)[13] The NBA is so lacking in evidence of a justiciable case between *these* parties that it relies on the litigation history of *other* parties – the NFL and NFL players. (Buchanan Decl. ¶¶ 21-23.) This desperate argument fails both as a matter of law and fact. *See Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1341 (Fed. Cir. 2008) (case cited by NBA holding that "the prior suit has no relevance" to justiciability because "[defendant] was not a party to" it); (Klempner Decl. ¶ 34) (NFL players disclaimed and sued *before* the lockout even began).)

CONCLUSION

The NBA has not met its burden to establish subject matter jurisdiction and the Complaint should be dismissed either as a matter of law or fact under Rule 12 (b)(1).

Dated: October 19, 2011
New York, New York

/s/ Jeffrey L. Kessler
Jeffrey L. Kessler
David G. Feher
David L. Greenspan

Evan Glassman
Alexis A. Hunter
750 Seventh Avenue, Suite 1800
New York, New York 10019

[13] The NBA's authorities concerning the significance of parties' litigation histories are also grossly inapposite. (*See, e.g.*, Opp'n at 13-14 (citing, *e.g.*, *Kos Pharms., Inc. v. Barr Labs., Inc.*, 242 F. Supp. 2d 311, 315 (S.D.N.Y. 2003) (plaintiff brought three related patent actions against defendant in eight months); *In re Casino de Monaco Trademark Litig.*, No. 07 Civ. 4802, 2010 WL 1375395, at *9 (S.D.N.Y. Mar. 31, 2010) ("aggressive litigation strategy" demonstrated in parties' three year *ongoing* litigation); *D2L Ltd. v. Blackboard, Inc.*, 671 F. Supp. 2d 768, 773 (D. Md. 2009) (defendant filed three lawsuits and one complaint against plaintiff over three year period regarding same patent technology).)

Telephone: (212) 506-3900
Facsimile: (212) 506-3950
eglassman@steptoe.com
ahunter@steptoe.com

Lawrence A. Katz (admitted *pro hac vice*)
Steven D. Wheeless (admitted *pro hac vice*)
201 E. Washington Street, Suite 1600
Phoenix, AZ 85004
Telephone: (602) 257-5200
Facsimile: (602) 257-5299
lkatz@steptoe.com
swheeless@steptoe.com

James F. Hibey (admitted *pro hac vice*)
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
jhibey@steptoe.com

STEPTOE & JOHNSON LLP

DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, New York 10019
Telephone: (212) 259-8050
Facsimile: (212) 259-6333
jkessler@dl.com
dfeher@dl.com
dgreenspan@dl.com