UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL BASKETBALL ASSOCIATION, ATLANTA HAWKS, LP, BANNER SEVENTEEN LLC, BOBCATS BASKETBALL, LLC, CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP, CAVALIERS OPERATING COMPANY, LLC, DALLAS BASKETBALL LIMITED, THE DENVER NUGGETS LIMITED PARTNERSHIP, DETROIT PISTONS BASKETBALL COMPANY, GOLDEN STATE WARRIORS, LLC, ROCKET BALL, LTD., PACERS BASKETBALL LLC, LAC BASKETBALL CLUB, INC., THE LOS ANGELES LAKERS, INC., HOOPS, L.P., MIAMI HEAT LIMITED PARTNERSHIP, MILWAUKEE BUCKS, INC., MINNESOTA TIMBERWOLVES BASKETBALL LIMITED PARTNERSHIP, NEW JERSEY BASKETBALL, LLC, NEW ORLEANS HORNETS NBA LIMITED PARTNERSHIP, MADISON SQUARE GARDEN, L.P., THE PROFESSIONAL BASKETBALL CLUB, LLC, ORLANDO MAGIC, LTD., PHILADELPHIA 76ERS L.P., SUNS LEGACY PARTNERS, L.L.C., TRAIL BLAZERS, INC., SACRAMENTO KINGS LIMITED PARTNERSHIP, LP, SAN ANTONIO SPURS, L.L.C., MAPLE LEAF SPORTS & ENTERTAINMENT LTD., JAZZ BASKETBALL INVESTORS, INC., and WASHINGTON BULLETS, L.P.,

Plaintiffs,

vs.

NATIONAL BASKETBALL PLAYERS ASSOCIATION, DEREK FISHER, KEYON DOOLING, JAMES JONES, MATT BONNER, MAURICE EVANS, ROGER MASON, JR., CHRIS PAUL, THEO RATLIFF, ETAN THOMAS, AMAR'E STOUDEMIRE, MIKE DUNLEAVY, JAMES FREDETTE, CHARLES JENKINS, and all those similarly situated,

Defendants.

DECLARATION OF ADAM SILVER IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

11 Civ. 5369 (PGG)

Adam Silver declares, under penalty of perjury, as follows:

I. PRELIMINARY STATEMENT

1. I am the Deputy Commissioner of the National Basketball Association ("NBA" or the "League"), having served in that capacity since July 1, 2006. I joined the NBA in 1992 as Special Assistant to the Commissioner of the NBA. Before becoming Deputy Commissioner, I served as NBA Chief of Staff; Senior Vice President and Chief Operating Officer, NBA Entertainment; and President and Chief Operating Officer, NBA Entertainment. I submit this declaration in opposition to defendants' motion to dismiss for lack of subject matter jurisdiction. The facts set forth herein are based either on my personal knowledge or on information I have received and believe to be true and correct.

2. The NBA and the National Basketball Players Association (the "NBPA" or "Union") have had a continuous collective bargaining relationship for more than forty years. During this period, the parties have entered into fourteen collective bargaining agreements, the most recent of which was entered into in 2005 (the "2005 CBA"). The 2005 CBA expired by its terms on June 30, 2011, with no successor agreement having been reached. On July 1, 2011, the NBA exercised its right under federal labor law to lock out the NBA players. The lockout has remained in effect continuously since July 1, 2011.

3. The NBA and the NBPA take diametrically opposed legal positions with respect to the lawfulness of the lockout. The NBA contends that the lockout is in all respects lawful and does not violate the antitrust laws. 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, entitling

defendants to an injunction against the lockout and a claim for treble damages. As I explain in greater detail below:

> (a) The NBPA has, throughout the parties' current negotiations, threatened to employ the disclaimer tactic. (*See infra* ¶¶ 4–28.)
>
> (b) The NBPA's threats to disclaim and commence antitrust litigation, and its preparedness and ability to do so, are confirmed by the collection of authorization cards that enable the NBPA, in its view, to disclaim and launch an antitrust attack against the NBA's lockout at any time the Union itself decides that such an attack would serve its bargaining interests. (*See infra* ¶¶ 12, 18.)
>
> (c) Earlier this year, the NBPA's counsel, Mr. Jeffrey Kessler, employed precisely the same disclaimer strategy on behalf of his other client, the NFL Players Association ("NFLPA"), and, in order to ensure that the NBA understood that it faced the same threat, reported during the current bargaining sessions on the "chaos" that had befallen the NFL by reason of the antitrust litigation brought by the NFL players. (*See infra* ¶¶ 14–17.)
>
> (d) The threats of disclaimer and antitrust litigation have had and are having a direct, immediate, and harmful effect on the ability of the parties to reach a new collective bargaining agreement because the players have taken the position that if they do not succeed in getting what they want in collective bargaining negotiations, they can disclaim interest and challenge the NBA lockout in an antitrust complaint. This Court can remove this collective bargaining impediment by clarifying and resolving the controversy that now exists between the parties over the legality of the NBA's lockout. (*See infra* ¶¶ 4, 15–17, 21, 27.)

II. THE REPEATED THREATS OF DISCLAIMER AND ANTITRUST LITIGATION THAT HAVE BEEN MADE IN THE CURRENT ROUND OF BARGAINING

4. On October 29, 2009, the NBA informed the NBPA that it had chosen not to exercise its option to extend the 2005 CBA for the 2011–12 NBA season, with the result that the 2005 CBA would expire on June 30, 2011. The NBA wanted to reach a successor agreement at the earliest possible date so, on January 29, 2010, it made its first collective bargaining proposal to the NBPA for a new CBA. As set forth in detail below, throughout the bargaining process, defendants and their counsel have, on numerous occasions, expressly or by clear

implication, threatened to disclaim or decertify and bring antitrust litigation against the NBA if defendants did not get their way at the bargaining table.

A. February 2010–May 2010: Negotiations for the New CBA Open with Mr. Kessler Explicitly Threatening Disclaimer or Decertification

5. On February 12, 2010, the NBA and NBPA met to discuss the NBA's first proposal. During that session, NBPA counsel Mr. Kessler stated expressly that the NBA's proposal had "radicalized" the players, that "decertification is very much on their minds," and that, if the NBA did not alter its bargaining position, "in the future, there may not be a union with whom to negotiate." In response, NBA Commissioner Stern expressed concern over the Union's bargaining tactics, "particularly the threat made by Mr. Kessler to decertify." After the meeting, defendant Derek Fisher, President of the NBPA, explained the significance and reality of Mr. Kessler's threat, saying: "That wasn't the plan going in to create fear . . . . (That) was just something that Jeffrey felt that he wanted to say. He's a very experienced attorney. . . . I don't think it was as a scare tactic. It was as much to express to us what the potential realities are." Chris Tomasson, *Union President Fisher: Premature to Say NBA Salaries Too High*, AOL Fanhouse, (Mar. 1, 2010, 4:45 PM), attached hereto as Exhibit 1.

6. On May 24, 2010, Mr. Kessler again reiterated his view that decertification and antitrust litigation were potential weapons that could at any time be wielded against the NBA. In discussing the Supreme Court's decision in *American Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010), Mr. Kessler was quoted in *Sports Business Daily*, a leading national trade publication: "[T]he fact that [this verdict] is unanimous means the single entity argument for sports leagues is basically dead. It means that the option to decertify and assert antitrust rights is as strong as it has ever been." Liz Mullen, *U.S. Supreme Court Overturns Ruling in American Needle Case*, Sports Business Daily, (May 24, 2010), attached hereto as Exhibit 2.

7. In my experience, statements to the news media during collective bargaining negotiations are used as a means of communicating positions both to the speaker's own constituents as well as to the other party to the negotiations. Thus, when Mr. Kessler or NBPA leaders or members state to the press that their de-unionization/antitrust litigation strategy is "as strong as it has ever been," or that such a strategy is an "option" the Union can always pursue, they know and intend that the statement will be read and considered by their bargaining counterparts at the NBA.

B. June 2010–November 2010: Negotiations for the New CBA Continue with Additional Threats from the Union and Its Counsel

8. Throughout the summer of 2010 the parties continued to exchange information and hold staff-level meetings in New York, and the NBPA provided the NBA with the Union's first bargaining proposal. The principal negotiators met for one meeting each on August 12, September 22, and October 19, at the Omni Hotel in Manhattan.

9. During this period, Mr. Kessler again sought to convey the Union's position that it possessed the ability, at any moment of its choosing, to render the lockout illegal through disclaimer or decertification. Referring to that strategy in another interview with the *Sports Business Journal*, Mr. Kessler stated, "It is absolutely an option . . . . During the negotiation, there was a discussion of a lockout and it was discussed, if there was a lockout, one of the options we had was decertifying, *which would make a lockout illegal*." Liz Mullen, *With NFL players taking decertification vote, will NBPA be next?*, Sports Business Journal, (Oct. 4, 2010), attached hereto as Exhibit 3. In the same article, player agent David Falk (who currently represents NBA players Mike Bibby, Elton Brand, Toney Douglas, Patrick Ewing Jr., Jeff Green, Roy Hibbert, Juwan Howard, Greg Monroe, and Evan Turner) described decertification as "an

arrow in the quiver of the players" and asserted that "[a]s a matter of law, most of the restrictions in professional sports . . . are generally considered to be illegal under the antitrust laws." *Id.*

C. December 2010–January 2011: The NBA Players Make Further Public Statements As to Their Ability to Challenge the Lawfulness of the Lockout

10. In December 2010, Union executive director Hunter explained that "[d]ecertification is just one of the options that the union would have in the event of a protracted lockout . . . . When you look at what your options are, you've got to look at everything. It's just one of the thing we may have to contemplate . . . ." Jonathan Abrams, *Union Chief Pays a Visit to the Knicks*, N.Y. Times N.B.A. Blog, (Dec. 14, 2010, 3:00 PM), attached hereto as Exhibit 4. On the same day, *USA Today* quoted defendant James Jones, the Secretary-Treasurer of the NBPA, as stating that decertification is "one of the options for us. This is a very serious time for us in these negotiations. You have to be prepared to use all available means to get something done." Michael McCarthy, *Decertification looming for NBA players union?*, USA Today, Dec. 15, 2010, attached hereto as Exhibit 5. Another article reported that NBA player agent Mark Bartelstein (who represents forty-five NBA players, including Mo Williams) was "advising his clients to vote in favor of decertification." Howard Beck, *N.B.A. Players Voting on Step Toward Dissolving Union*, N.Y. Times, Dec. 13, 2010, attached hereto as Exhibit 6.

11. Two days later, NBPA President Fisher reportedly said that although he was "staying focused on what we're trying to get accomplished in terms of a collective bargaining agreement," he was "still recognizing that decertification is something is real and it's tangible." Broderick Turner, *Derek Fisher says NBA players won't rule out decertification*, L.A. Times, Dec. 16, 2010, attached hereto as Exhibit 7. Mr. Fisher was also quoted as saying that "it's more about preparing ourselves for what may come. There hasn't been any final decision

made on our part as far as that being something we are definitely going to do. We're preparing ourselves for whatever happens as this process unfolds." *Id.*

12. During the same week, additional NBA players offered similar statements. NBA player Spencer Hawes was quoted on decertification, stating that "[t]here has been no vote, but *it's something we talked about . . . . It is an option that is being weighed heavily*." Marc Narducci, *Sixers Notes: Report: Union ponders decertification*, Phila. Enquirer, Dec. 16, 2010 (emphasis added), attached hereto as Exhibit 8. Mr. Jones was again quoted on decertification in an article that described Jones as stating that "*the team has been briefed on the [decertification] option*." Ira Winderman, *NBA Extra*, Sun-Sentinel (Fort Lauderdale, Fla.), Dec. 19, 2010, at 3C (emphasis added), attached hereto as Exhibit 9. The article quoted Jones as stating that "[g]uys understand what [decertification] means . . . . If it comes to it, that's what we'll do. This is a very serious time. You have to be prepared and willing to do whatever it takes." *Id.*

13. Immediately following a collective bargaining session in February 2011, Mr. Hunter confirmed that the NBPA had taken concrete steps to further its disclaimer/antitrust strategy. Mr. Hunter said, "What we've been doing is, *during the team meetings over the first half of the season, we have gone around and collected decert forms*. Because if it becomes an issue, *we want to make sure have done the preliminary steps that we would have to do* in order to present the matter to the National Labor Relations Board." Sean Deveney, *'Nuclear option' not currently in play, but may be in the future*, Sporting News, (Feb. 19, 2011, 12:29 AM) (emphasis added), attached hereto as Exhibit 10. Based on my long experience in the sports industry, including my previous involvement in collective bargaining for the NBA, it is my understanding that these "decert forms" collected by the Union authorize the NBPA to disclaim its status as the

players' exclusive bargaining representative, enabling NBA players to bring antitrust litigation against the NBA at the moment of the NBPA's choosing.

D. February 2011–April 2011: Mr. Kessler Directs the NFLPA's Disclaimer and NFL Players' Antitrust Litigation Against the NFL, Which the NBA Defendants Cited as a Model for the NBA Players

14. The NFL CBA expired in March 2011, and the NFL players threatened and eventually filed an antitrust class action (*Brady v. NFL*) after the players' union disclaimed interest in serving as their collective bargaining representative. The NFLPA had collected renunciation cards ahead of time – as the NBPA has done here – and filed an antitrust class action within minutes of disclaiming and concluding a formal collective bargaining session.

15. Shortly after *Brady* was filed, defendant Etan Thomas, Vice President of the NBPA, discussed the case on his blog: "I was granted permission by Billy Hunter to speak for the union, so I wanted to say that the NBPA is in full support of our NFL brothers and their stance against the NFL. We are convinced that an NFLPA decision to litigate will help our cause since any decision will be applicable to our situation, and we thank them for setting a precedent. How seriously should the NBPA consider decertifying the union in order to keep the NBA from legally locking out the players? Should the NBPA and NBA follow the decision of the NFLPA and NFL by hiring a mediator to facilitate discussions and postponing a lockout deadline?" Etan Thomas, *My New 21 Questions*, HoopsHype, (Mar. 21, 2011, 11:20 AM), attached hereto as Exhibit 11.

16. Similarly supportive statements of the NFLPA's litigation strategy continued throughout March and April 2011. In March, the Minnesota Timberwolves' players' union representative, Anthony Tolliver, was quoted as stating that decertification was "*something that's looming as an option . . . . It's been talked about*, but we're not sure we're going to do it. We're just keeping our options open." Ray Richardson, *Union following NFL*

brethren, St. Paul Pioneer Press, Mar. 12, 2011, at B5 (emphasis added), attached hereto as Exhibit 12. In April, Mr. Hunter was quoted as follows: "I think the owners are waiting to see what happens with the NFL case, just as we are . . . . *We've talked about decertifying*, like the NFL players have. We might want to go that route, too, but let's see what happens in Minneapolis first." Mitch Lawrence, *NBA Union May Tackle NFL Players' Strategy*, N.Y. Daily News, Apr. 6, 2011, at 62 (emphasis added), attached hereto as Exhibit 13. Mr. Fisher was similarly quoted on the NFL situation as stating, "I don't think there's any question that how some of the things on the NFL side are playing out are going to impact the way our NBA labor situation plays out. . . . [T]here are also some similarities that I think will give us as players as well as our owners a little bit of an indication of how things would play out if we went down certain paths. So I'm sure both sides will continue to watch the NFL situation closely." J.A. Adande, *Fisher reaction to NFL lockout ruling*, ESPN.com: TrueHoop, (Apr. 25, 2011, 11:16 PM), attached hereto as Exhibit 14.

17. Mr. Hunter expressly acknowledged that *Brady* was affecting the NBA's bargaining. In an interview in late-March, CBS Sports quoted Hunter as follows: "'What we've done is, we're now reviewing it in view of the decision that happened with football,' Hunter said." Ken Berger, *Post-Ups: NBPA looks to learn from NFLPA's decertification tactics*, (Mar. 29, 2011), attached hereto as Exhibit 15.

18. In an interview in March, union representative Tolliver acknowledged that because the NBPA had already collected the "decert forms," the strategy of disclaimer and antitrust litigation could be pursued at any moment it suited the bargaining tactics of the Union. Answering a question about decertification, Mr. Tolliver explained, "*It's something that is looming*. . . . It's something that's been talked about. But it's not like we are for sure doing it,

it's just something that is an option. *We've taken the necessary steps to make it to where if it does come down to that, it's a quick transition. We don't have to do too much but make it happen*." Dana Wessel, *NBPA, Owners are 'way further apart' than NFL, Tolliver says*, 1500ESPN.com SportsWire, (Mar. 11, 2011, 9:24 PM) (emphasis added), attached hereto as Exhibit 16.

E. May 2011–June 2011: The Last Pre-Lockout Bargaining Sessions

19. Against this backdrop of repeated statements from the NBA players that they were "considering" the "option" of decertification because it was "real" and "tangible," as well as their statements that the Union's collection of "decert forms" had provided the Union with the ability to disclaim and litigate at a moment's notice, the parties held another collective bargaining session on May 5, 2011. It was at this meeting that Mr. Kessler offered his first "update" on the litigation in *Brady*. In providing this update, Mr. Kessler described what he termed the "chaotic" situation that antitrust litigation had created for the NFL and explained that, if the Eighth Circuit did not disturb the ruling of the district court (which had granted a preliminary injunction against the NFL's lockout), the NFL was exposed to treble antitrust damages during the period of adjudication over the ultimate antitrust legality of the lockout. To those of us on the NBA's negotiating team, the clear implication of Mr. Kessler's "update" was that the NBA players could employ the same strategy and cause the same chaos in the NBA if they did not get what they wanted in the collective bargaining negotiations.

20. Following this session, prominent NBA player agents continued to predict that the NBA players would in fact decertify the Union. Two days after the bargaining session, Arn Tellem, a player agent who currently represents forty-six NBA players, including NBPA Executive Committee member and defendant Etan Thomas and players Pau Gasol, Derrick Rose and Kendrick Perkins, authored an op-ed piece in the *New York Times*, in which he stated: "Pro

football players voted to decertify their union in March immediately before the owners imposed a long-expected lockout. Faced with a similar situation, pro basketball players will almost certainly follow suit. . . . Decertification has allowed N.F.L. players to sue the league on antitrust grounds . . . . At the very least decertification allowed the players to get an injunction from a federal judge to stop the lockout, pending an appeal. Sure, the N.F.L. could attempt to impose whatever salary and free-agency restrictions it wishes, but it will have to tread carefully. If the league loses an antitrust suit, it will have to pay each player affected three times his actual economic loss." Arn Tellem, Op-Ed, *When a Player's Union Doesn't Help the Players*, N.Y. Times, May 7, 2011, attached hereto as Exhibit 17. Two days later, player agent David Falk said on WTEM radio that he "would predict that based on the success so far that the football players have had, even though the injunction's been stayed, I suspect the [NBA] players will decertify." Transcript of *Lunch With A Legend: NBA v. NBPA*, WTEM radio, Washington, D.C., May 5, 2011, at 45:25-46:4, attached hereto as Exhibit 18.

21. Subsequent collective bargaining sessions produced similar threats. At a May 13 collective bargaining session, Mr. Kessler provided another "update" on the NFL litigation, adding that, regardless of whether the Eighth Circuit affirmed or reversed the district court's decision (it eventually reversed), the NFL would be subject to "continued chaos" wrought by the antitrust litigation the NFL players had commenced. Similarly, at a June 23 bargaining session, Mr. Hunter stated that the runway for making a deal had shortened and that he would have to choose between "rallying the players to war" or working to convince them to make a deal. The NBA understood these statements as yet another threat of antitrust litigation.

22. With less than a month before the expiration of the CBA, Mr. Hunter and Mr. Kessler continued to acknowledge that the Union's antitrust position – that decertification or

disclaimer and an antitrust lawsuit was an "option" available to the NBPA at the moment of their strategic choosing – was affecting the parties' collective bargaining. After a June 8 collective bargaining session, Mr. Hunter and Mr. Kessler gave an interview in which they explicitly recognized that the viability of the Union's antitrust claims was having this effect: Mr. Hunter said that the outcome of *Brady* could "have some impact on our respected positions," and Mr. Kessler again acknowledged the value in bargaining leverage to the NBPA of a looming antitrust threat, stating that "[t]here is uncertainty in the air and *sometimes uncertainty is a helpful fact*. So I think everyone in basketball is aware of what is going on in football and *as Billy said it[']s going to have some influence* and we'll just have to see how that plays out." NBPA, Post-Meeting Scrum Transcript, June 8, 2011, at 2-3 (emphasis added), attached hereto as Exhibit 19.

F. June 2011–August 1, 2011: Expiration of the Collective Bargaining Agreement and Imposition of the Lockout

23. At midnight on June 30, 2011, the 2005 CBA expired by its terms and the NBA lockout began. On July 9, an article in the *New York Times* described the lockout and the potential likelihood of decertification, noting that "the path the N.F.L. Players Association chose — decertification, coupled with an antitrust lawsuit — remains a weapon in the basketball players' arsenal should negotiations fail. *'It's not off the table in any way,' said Jeffrey Kessler*, the outside counsel for the N.B.P.A. 'There's no immediate urgency to that issue. *It's an option the players are actively considering*.'" Howard Beck, *Two Lockouts, Each With a Different Playbook*, N.Y. Times, July 9, 2011 (emphasis added), attached hereto as Exhibit 20.

24. In late July, pressure intensified on the Union to disclaim or decertify and bring antitrust litigation. On July 23, 2011, a group of NBA agents representing scores of NBA players met with the NBPA, including Mr. Hunter, to urge the immediate implementation of the decertification/antitrust litigation strategy. Yahoo! Sports quoted an unnamed NBA player agent,

"We have one weapon left, and that's decertification. . . . We need to use it." Adrian Wojnarowski, *NBA agents want union to decertify*, Yahoo Sports, (July 23, 2011, 12:42 PM), attached hereto as Exhibit 21. *The Business Insider* reported that prominent NBA agents "Arn Tellem of Wasserman Media Group, Mark Bartelstein of Priority Sports, and many other prominent basketball agents met with [NBPA] Executive Director Billy Hunter on Friday [July 23] to talk about the NBA lockout (which began on July 1, 2011), including the possibility of decertification of the union." *Powerful NBA Agents Are Thinking About Decertifying The NBPA*, Business Insider Sports Agent Blog, (July 25, 2011, 4:44 PM), attached hereto as Exhibit 22. Describing the meeting, *Sports Illustrated* noted that the Union "is hoping to receive a ruling from the National Labor Relations Board that could result in an injunction against the lockout. If that complaint should fail and no headway can be made in negotiations, the executive director says the union will strongly consider decertification. *He says the union may reach that decision before January . . . and that it may also encourage a group of players to file a lawsuit against the NBA, even though such a move could take time to be resolved in the courts*." Ian Thomsen, *Derek Fisher Wants The Ball*, Sports Illustrated Vault, July 25, 2011, attached hereto as Exhibit 23.

G. August 2, 2011–Present: Defendants Statements Since the NBA Filed This Declaratory Judgment Action Confirms That Defendants' Position Is That They Can De-Unionize and File Antitrust at Any Moment of Their Choosing

25. On August 2, 2011, faced with defendants' continued threats of antitrust litigation over the legality of the lockout, and the resulting damage to the bargaining process, the NBA commenced this action seeking a declaration that the lockout is lawful and does not violate the antitrust laws, whether or not defendants choose to disclaim or decertify the Union.

26. Since the filing of this action, NBA player agents representing more than 200 players have continued to make it clear that antitrust litigation is not only increasingly likely, but is also the course of action they have strongly urged the Union to pursue. For example, on September 14, 2011 – just two days before defendants filed their papers on this motion – at least five NBA player agents, who collectively represent 190 players, held a conference call to discuss the decertification/antitrust litigation strategy. As reported by *Sports Business Daily*, "NBA player agents Arn Tellem, Bill Duffy, Mark Bartelstein, Jeff Schwartz and Dan Fegan held a conference call Monday to discuss 'how they can help the players union in its stalemate with the league's owners,' and their answer was to 'blow the union up' . . . . The agents' view 'is that the owners currently have most, if not all, of the leverage in these talks and that something needs to be done to turn the tide.' They believe that 'decertification will do the trick,' and spoke Monday 'about the process of decertifying the union.'" *NBA Lockout Watch, Day 76: Agents May Try To Force NBPA Decertification*, Sports Business Daily, (Sept. 14, 2011) (citation omitted), attached hereto as Exhibit 24. Because these agents, who are publicly advocating decertification, represent more than forty percent of the players on NBA rosters during the 2010–11 season, they represent well more than the percentage needed under federal labor law (i.e., 30%) to bring about a decertification election, even over the Union's and Mr. Hunter's objection. Moreover, a sixth prominent NBA agent, Leon Rose, who represents more than six percent of players on NBA rosters during the 2010–11 season, including Chris Bosh, LeBron James, Dwayne Wade, and defendant Chris Paul, has reportedly joined the decertification movement. *See* Sam Amick, *NBA Agents Growing in Favor of Players' Union Decertification*, Sports Illustrated.com, (Sept. 17, 2011, 1:57 AM), attached here to as Exhibit 25. Support for decertification and antitrust

litigation by agents representing hundreds of players adds greater immediacy to the instant antitrust dispute and its impact on bargaining.

27. Recently, Mr. Hunter has said in an interview, "I refuse to treat decertification as a game . . . . I won't take it off the table because it's still a last resort." Mike Wise, *NBA lockout: Union chief Billy Hunter knows how to fight fairly*, Wash. Post, Sept. 21, 2011, attached hereto as Exhibit 26. And following the October 4, 2011, bargaining session, Mr. Hunter responded as follows when asked whether the parties' failure to reach a negotiated solution in the day's session made decertification the next step: "Clearly that's something we may have to give some thought to." Cindy Boren, *NBA players, officials end talks with season opener at risk*, Wash. Post. The Early Lead Blog, (Oct. 4, 2011, 6:14 PM), attached here to as Exhibit 27.

28. The Union's antitrust position – that at any moment of its choosing, it can render the lockout a per se antitrust violation by decertifying or disclaiming – is having a current impact on the parties' ability to reach a new CBA. In Mr. Hunter's words, the NBPA's "last resort" bargaining positions on a number of difficult "blood issues" is to disclaim and file an antitrust suit. Thus, when the Union says it will "never" agree to a particular proposal (or characterizes a proposal as a "blood issue"), it is clear to the NBA that the Union is implying that it would never agree to such a proposal without first engaging in the de-unionization/antitrust litigation strategy. If the Court were to declare, as the NBA requests in this declaratory judgment action, that such a strategy is based on the Union's incorrect understanding of the antitrust laws, it is much more likely that the parties would reach a new collective agreement.

I declare under penalty of perjury that the forgoing is true and correct.

Executed this 10th day of October, 2011, in New York, New York.

Adam Silver