UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Matthew T. Zilhaver and Sascha Linn, Plaintiffs, v. UnitedHealth Group Incorporated, L. Robert Dapper, James A. Johnson, William G. Spears, Mary O. Mundinger, William W. McGuire, and Stephen J. Hemsley, Defendants.	Civil File No. 06-CV-02237 (JMR/FLN) **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WILLIAM W. MCGUIRE'S MOTION (i) FOR SUMMARY JUDGMENT ON CLAIMS OF PLAINTIFF SASCHA LINN; (ii) TO DISMISS ALL CLAIMS OF PLAINTIFF MATTHEW T. ZILHAVER FOR LACK OF SUBJECT MATTER JURISDICTION UNDER RULE 12(b)(1); AND (iii) TO DISMISS THE SECOND AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER RULE 12(b)(6)**

Dr. William W. McGuire respectfully submits this Memorandum of Law in Support of his Motion (i) for summary judgment dismissing all claims of Plaintiff Sascha Linn pursuant to Federal Rule of Civil Procedure 56(b); (ii) to dismiss all claims of Plaintiff Matthew T. Zilhaver for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1); and (iii) to dismiss the Second Amended Complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dr. McGuire adopts and incorporates by reference the arguments and authorities of Defendants UnitedHealth Group Incorporated, Stephen J. Hemsley, L. Robert Dapper, James A. Johnson, William G. Spears, and Mary O. Mundinger,

in their Memorandum of Law in Support of the Motion for Summary Judgment against Plaintiff Linn based on his Severance Agreement and Release.

I. INTRODUCTION

Mr. Zilhaver's third (Second Amended) Complaint alleges that UnitedHealth Group's company-sponsored 401(k) Plan's continued holding of United stock during the alleged "Class Period" violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1] This claims is typical of the many "stock-drop" lawsuits filed in federal court since the early 2000s. These cases piggyback on and assert claims identical to those in parallel federal securities fraud actions and name the same defendants, including executives, like Dr. McGuire, who have no role in the administration or management of the Company's ERISA plan.

Before turning to the substantive defects in the allegations against Dr. McGuire, however, this Court should dismiss Mr. Zilhaver's third Complaint because he has no standing. The Eighth Circuit has held that under Sections 502(a)(2) and (3) of ERISA, a plaintiff does not have standing unless he is a "participant, beneficiary or fiduciary" of the plan in question *at the time the Complaint is filed*. Mr. Zilhaver does not allege that he is a beneficiary or fiduciary. Nor does he allege that, at the time the third Complaint was filed, he was a current participant in the plan. Instead, he alleges only that "Plaintiffs …

[1] Dr. McGuire adopts and incorporates by reference the introduction and statement of background facts by Defendants UnitedHealth Group, Incorporated, et al.

were Participants in the Plan during time periods relevant to this Complaint." Second Am. Compl. ¶ 1 ("Am. Compl."). But any past relationship is irrelevant. Mr. Zilhaver does not allege that he is a current participant, he lacks standing, and that is the end of the matter.

In any event, the third Complaint would have to be dismissed under Rule 12(b)(6). The Supreme Court, the Eighth Circuit, and other federal circuits have consistently affirmed dismissals under Rule 12(b)(6) where, as here, plaintiffs fail to allege facts that, if true, establish both (1) that a defendant is a fiduciary and (2) that he acted in a fiduciary capacity when he took the actions that are the subject of the complaint. Plaintiff concedes that Dr. McGuire is not a named fiduciary, Am. Compl. ¶ 11, and can only be held liable as a "*de facto*" or functional fiduciary and only "to the extent" that "he exercises any discretionary authority or control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or "he has any discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

In one short sentence of the 53-page, 114-paragraph Complaint Plaintiff attempts to allege that Dr. McGuire specifically was a *de facto* plan fiduciary: "Defendant McGuire was a fiduciary of the Plan during the Class Period." Am. Compl. ¶ 17. Plaintiff does not allege anywhere in the Complaint that Dr. McGuire specifically exercised any discretionary authority or control with respect to management of the plan, disposition of the assets, or discretionary administrative responsibility. The only allegedly wrongful conduct described

relates to the timing of stock-option grants used to compensate United's executives and employees. In other words, this Complaint describes only *business decisions* that have nothing to do with Plan administration or management. Plaintiff's conclusory legal assertions are not sufficient to survive Dr. McGuire's motion to dismiss.

II. ARGUMENT

A. Mr. Zilhaver Lacks Standing And Must Be Dismissed From This Case

"[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Each plaintiff in an lawsuit therefore must have standing for each claim asserted. "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphases added). Therefore, this Court must independently determine whether Mr. Zilhaver has standing to bring this claim. Mr. Zilhaver does not and he must be dismissed from the case.

A plaintiff does not have standing unless he is a "participant, beneficiary or fiduciary" of the Plan in question at the time his Complaint is filed. 29 U.S.C. §§ 1132(a)(2)-(3). Mr. Zilhaver does not allege that he is a beneficiary or fiduciary or that he is a current participant. Along with Mr. Linn, he alleges only that they "were Participants in the Plain during time periods relevant to this Complaint." Am. Compl. ¶ 1. However, the Eighth Circuit has held: "[T]hat

[plaintiffs] were plan participants in the past *is irrelevant.* 'The statute by its terms does not permit a civil action by someone who was a participant at the time of the alleged ERISA violation. Rather, it is written in the present tense, indicating that current participant status is the relevant test.'" *Adamson v. Armco, Inc.*, 44 F.3d 650, 654 (8th Cir. 1995) (emphasis added) (quoting *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir. 1993)); *see also Crawford v. Lamantia*, 34 F.3d 28, 32 (1st Cir. 1994) ("[A]lthough plaintiff may have had standing as a current employee when he brought this action, by the time he filed his amended complaint, he lost this standing on account of having terminated his employment … and having collected all vested benefits then due him from the ESOP.").[2]

Consistent with the Eighth Circuit's binding decision in *Adamson v. Armco*, Judge Doty recently held that a plaintiff who had filed her amended complaint in an ERISA class action after cashing out of the plan "is not a plan 'participant' and does not have standing to pursue this litigation under 29 U.S.C. § 1132 on behalf of the [] Plan." *In re Patterson Co., Inc. Securities, Derivative & ERISA Litig.*, 479 F. Supp. 2d 1014, 1045 (D. Minn. 2007). Judge Doty explained that a plaintiff does not have standing to pursue an ERISA claim under § 1132(a)(2) or (a)(3), unless she is a *current* plan participant. *Id.* at 1043. The court explained

[2] Although the Seventh Circuit recently held that whether a plaintiff is a current participant should be treated not as a standing determination, but rather as going to the merits, *see Harzewski v. Guidant Corp.*, --F.3d--, 2007 WL 1598097, at *3 (7th Cir. June 5, 2007), the law in the Eighth Circuit is well-established to the contrary.

that if Congress intended for past participants to have standing under (a)(2) or (a)(3), it easily could have said so, as it did in (a)(9). Under § 1132(a)(9)—which is not implicated in this case—claims may be brought "by the Secretary, by an individual *who was a participant or beneficiary at the time of the alleged violation*, or by a fiduciary." (emphasis added). But (a)(2) and (a)(3), pursuant to which this case is brought, are written in the present tense and those claims can only be brought "by the Secretary, or by a participant, beneficiary or fiduciary," § 1132(a)(2), or "by a participant, beneficiary or fiduciary," § 1132(a)(3). Judge Doty's reasoning and adherence to *Adamson* applies with equal force here because it is indisputable that Mr. Zilhaver was *not* a participant when his Complaint was filed.

Furthermore, the Supreme Court has interpreted 29 U.S.C. § 1002(7), which defines "participant," to mean: (1) a current employee; (2) a former employee with a reasonable expectation of returning to employment; or (3) a former employee with a colorable claim to vested benefits. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (citations omitted). Mr. Zilhaver does not allege that he falls within any of these categories:

First, Mr. Zilhaver is not a current employee of United. In fact, he was never employed by United. He was only employed by PacifiCare Health Systems, but terminated his employment at PacifiCare on September 23, 2005, *see* Am. Compl. ¶ 9, three months *before* PacifiCare and United merged, three months

before the alleged Class Period commenced, and nine months *before* he filed his Complaint.

Second, Mr. Zilhaver does not allege that he has any right to return to work and therefore has no reasonable expectation of returning to covered employment. *See Raymond*, 983 F.2d at 1537 (citation omitted).

Third, Mr. Zilhaver does not allege that he has a claim for vested benefits. Mr. Zilhaver received a lump-sum distribution of his entire account balance on May 17, 2006. In *Adamson*, the Eighth Circuit cited *Gilquist v. Becklin*, 675 F. Supp. 1168 (D. Minn. 1987), *aff'd mem.*, 871 F.2d 1093 (8th Cir. 1988), as "the law in this circuit" for the holding that "former employees who received lump-sum vested benefits are not participants." 44 F.3d at 655. Mr. Zilhaver's claim is for damages, not vested benefits, and he is not a participant entitled to bring suit. *See also Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) ("[P]laintiffs are not participants because, as former employees whose vested benefits under the plan have already been distributed in a lump sum, the Kuntz plaintiffs were not 'eligible to receive a benefit' …. Because, if successful, the plaintiffs' claim would result in a damage award, not in an increase in vested benefits, they are not plan participants."); *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 78 (3d Cir. 2001) ("[D]amages stemming from [an] alleged breach of fiduciary duty … does not constitute a 'benefit' within the meaning of [ERISA].") (citing *Kuntz v. Reese*); *Raymond*, 983 F.2d at 1535 (former employees who received lump-sum

payment of vested benefits seek "'a damage award, not vested benefits improperly withheld'") (citation omitted).

In *Adamson*, the Eighth Circuit also made clear that there is no exception to the requirement of current participant status for "claimants whose loss of participant status resulted from their own actions." 44 F.3d at 655 (citing *Gilquist*). Mr. Zilhaver voluntarily took a lump-sum distribution of his benefits before filing the Complaint and seeks damages based on a speculative amount he claims he might have earned had he sold his United stock. Accordingly, he has no colorable claim to vested benefits, and he must be dismissed as a plaintiff for lack of standing.

B. The Complaint Fails To Allege Facts That, If True, Would Establish That Dr. McGuire Was A Plan Fiduciary Or Exercised Fiduciary Duties Within The Meaning Of ERISA

In the entire 53-page, 117-paragraph Complaint, there is only one specific allegation that Dr. McGuire was a Plan fiduciary or exercised fiduciary duties in the administration or management of the Plan. In paragraph 17, Mr. Zilhaver alleges that: "Defendant McGuire was a fiduciary of the Plan during the Class Period." That does not state a claim upon which relief can be granted. "[A] plaintiff's 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." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Although the Court is required to accept well-pleaded factual allegations as true, "the court is free to ignore legal conclusions, unsupported conclusions,

unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemn. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002).[3]

A defendant "does not become a fiduciary simply by a litigant's assertion that this is the case." *Akers v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995). Conclusory legal assertions are insufficient because "[a] fiduciary within the meaning of ERISA must be someone *acting in the capacity* of manager, administrator, or financial advisor *to a* '*plan*.'" *Pegram v. Herdrich*, 530 U.S. 211, 222 (2000) (emphasis added). Even named fiduciaries and those hired specifically to administer plans do *not* always act in a fiduciary capacity. "In every case charging breach of ERISA fiduciary duty, then, the *threshold question* is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, *but* whether that person was *acting* as a fiduciary (that is, performing a fiduciary function) when taking *the action* subject to complaint." *Id.* at 226 (emphases added). *See also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 263 (1993) (ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan."). The Complaint does not allege that Dr. McGuire is a named fiduciary, nor does it allege that he took any specific action in the capacity of a manager, administrator, or financial advisor to the Plan.

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[3] This Court may also rely on the documents, such as the Plan and SPD, "necessarily embraced by the complaint." *Enervations, Inc. v. Minn. Mining & Mfg. Co.*, 380 F.3d 1066, 1067 (8th Cir. 2004) (citation omitted).

Accordingly, these allegations fail to state a claim upon which relief could be granted. In similar circumstances, the Supreme Court has approved 12(b)(6) dismissals. For example, in *Pegram*, 530 U.S. 217, the Court affirmed the district court's Rule 12(b)(6) dismissal of an ERISA suit because the allegations failed to identify a fiduciary decision and therefore did not state an ERISA claim. The Supreme Court has also upheld two other Rule 12(b)(6) dismissals in ERISA cases where the plaintiff's allegations did not implicate fiduciary duties. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) (reinstating district court's dismissal pursuant to Rule 12(b)(6) in ERISA case where allegations did not implicate fiduciary duties); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (same). Courts of appeals, including the Eighth Circuit, have also affirmed Rule 12(b)(6) dismissals where the complaint failed to state a claim against the defendants "for violation of a fiduciary duty owed to the plan," *S. Council of Indus. Workers v. Ford*, 83 F.3d 966, 968 (8th Cir. 1996), or where the plaintiff "allege[d] not one fact tending to show that [the defendant] exercised control or authority specifically over the decisions" challenged, *Custer v. Sweeney*, 89 F.3d 1156, 1162 (4th Cir. 1996).[4]

[4] *See also Pipefitters Local 636 v. Blue Cross & Blue Shield*, 2007 WL 128773, at *3 (6th Cir. 2007) (affirming 12(b)(6) dismissal and stating that "[i]n reviewing the motion to dismiss, the question is not whether [the defendant] actually breached a fiduciary duty under ERISA, but whether the plaintiff has set forth sufficient allegations that such a duty existed and that it was breached").

1. Dr. McGuire is not a named fiduciary

The Complaint concedes that Dr. McGuire is not a named fiduciary under the Plan. *See* Am. Compl. ¶ 11-12 (acknowledging that only United and Defendant Dapper are "named fiduciaries" under the Plan). Thus, Dr. McGuire can only be held responsible for a violation of ERISA if he voluntarily assumed responsibility for managing or administering the Plan. However, the Complaint contains no allegation that he did so.

2. The allegations of the Complaint are insufficient as a matter of law to establish that Dr. McGuire is a *de facto* or functional fiduciary under the Plan

Dr. McGuire can only qualify as a *de facto* or functional "fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). The observation in paragraph 17 of the Complaint that Dr. McGuire "has been a director of UnitedHealth since 1989" or even the allegation that he "authorized, approved and ratified the backdating of executive stock options" speaks to none of these predicates.

A company official does not qualify as a *de facto* fiduciary merely by holding a senior position. Dep't of Labor, Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (questions D-4 and D-5) (officers and "directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A)[, 29 U.S.C. § 1002(21)(A)] of the Act.").[5] And, as the Supreme Court has emphasized, a fiduciary "must be someone acting in the capacity of a manager, administrator, or financial advisor to a 'plan.'" *Pegram*, 530 U.S. at 222. Therefore, a plaintiff must allege not only that a person "was *acting* as a fiduciary" *id.* at 226 (emphasis added), but also that the person was "fulfilling *certain defined functions*, including the exercise of discretionary authority or control over plan management or administration," *Lockheed Corp.*, 517 U.S. at 890 (citation omitted and emphasis added).

[5] *See also Confer v. Custom Eng'g Co.*, 952 F.2d 34, 37 (3d Cir. 1991) ("[W]hen an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of the corporation are not fiduciaries … unless it can be shown that these officers have *individual* discretionary roles as to plan administration."); *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 217 (8th Cir. 1993) ("Fiduciary status under § 1002(21)(A) is not 'an all-or-nothing concept.'"); *Am. Fed'n of Unions Local 102 v. Equitable Life Assurance Soc'y*, 841 F.2d 658, 662 (5th Cir. 1988) ("A person is a fiduciary only with respect to those portions of a plan over which he exercises discretionary authority or control."); *Beddall v. State Street Bank & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998) ("Because one's fiduciary responsibility under ERISA is directly and solely attributable to his possession or exercise of discretionary authority, fiduciary liability arises in specific increments correlated to the vesting or performance of particular fiduciary functions in service of the plan, not in broad general terms.").

The Complaint does not identify any specific action taken by Dr. McGuire in a fiduciary capacity with respect to plan administration or management. The "complaint does not specify how [Dr. McGuire] was exercising discretionary authority in [any specific action taken], and offers only the conclusion that [Dr. McGuire] is a fiduciary under ERISA." *Pipefitters Local 636*, 2007 WL 128773, at *6. Even the allegation that "Dr. McGuire authorized, approved and ratified the backdating of executive stock options," Am. Compl. ¶ 17, taken as true, falls well short of establishing that when doing so, Dr. McGuire was "*acting in the capacity of manager, administrator, or financial advisor to a 'plan*.'" *Pegram*, 530 U.S. at 222 (emphasis added). The law does not permit the conclusion that whenever a company executive makes decisions regarding executive stock options or compensation he is acting as an ERISA fiduciary. "[L]ack[ing] any specific allegations capable of demonstrating that [Dr. McGuire] transcended his role" as corporate CEO and became an ERISA fiduciary, the Complaint is insufficient to withstand a motion to dismiss. *Custer*, 89 F.3d at 1162. *See also Pegram*, 530 U.S. at 226 (holding complaint insufficient because "Herdrich does not point to *a particular act* by any [defendant] as a breach [of a fiduciary duty]") (emphasis added).

3. Normal Business Decisions Having Some Effect On Plan Assets Are Not Fiduciary Decisions

The Eighth Circuit and other courts have rejected a "sweeping" and "broad brush" approach, in which every decision that "affects" the value of company

stock is deemed a fiduciary decision. *Martin v. Feilen*, 965 F.2d 660, 665 (8th Cir. 1992). Even transactions that benefit executives and adversely affect a company's financial health do not qualify as fiduciary actions unless they involve *plan* management or administration. The Eighth Circuit very recently reiterated this well-established law, holding that "normal business decisions with potential collateral effects on prospective, contingent benefits need not be made in the interest of plan participants." *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 646 (8th Cir. 2007). Similarly, in *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988), the Eighth Circuit affirmed the district court's dismissal of the Complaint pursuant to Rule 12(b)(6). The court explained that "ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets," *id.* (citation omitted), and it "held that defendants were not subject to ERISA's fiduciary duty requirements because their action was a 'day-to-day corporate business transaction' made in their capacity as corporate officers, not as plan administrators," *Martin*, 965 F.2d at 666 (quoting and describing *Hickman*). And in *Martin*, the Eighth Circuit held that fiduciary duties were not implicated by an executive's corporate action of acquiring control of company and causing it to declare dividends even though those decisions adversely affected the company's long-term financial health, and resulted in the loss of the plaintiffs' jobs and the entire value of their retirement accounts in the plan. *Id.* at 664, 668.

Likewise, the Tenth Circuit recently explained that "[b]ecause virtually every business decision an employer makes can have an adverse impact on an employee benefit plan, courts must examine the conduct at issue to determine whether it constitutes management or administration of the plan, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary duties. This is so even where some of the decisions personally benefited the employer." *Holdeman v. Devine*, 474 F.3d 770, 778 (10th Cir. 2007) (citations omitted). Otherwise, every corporate decision could lead to ERISA liability; and although "ERISA is designed to accomplish many worthwhile objectives, … the regulation of purely corporate behavior is not one of them." *Akers*, 71 F.3d at 229. Therefore, "ERISA's fiduciary duties … attach only to transactions that involve investing the [Plan's] assets or administering the plan." *Martin*, 965 F.2d at 666. *See also Eckelkamp v. Beste*, 201 F. Supp. 2d 1012, 1023 (E.D. Mo.) ("The discretion required to invoke ERISA's fiduciary obligations must relate to fiduciary functions such as plan management or administration. A business decision regarding salary levels does not meet this requirement. … Thus, the Executive Defendants were not acting in their fiduciary capacities when compensation levels were determined for themselves …."), *aff'd on other grounds*, 315 F.3d 863 (8th Cir. 2002)).

Accordingly, a plaintiff must allege facts to demonstrate that the defendant took a specific action to manage or administer the *Plan*, sufficient to "distinguish transactions that are subject to ERISA's fiduciary provisions from those

transactions that are not." *Kalda*, 481 F.3d at 646. Authorizing, approving, or ratifying executive stock option grants is simply a business decision that can in no way be described as the administration or management of an ERISA plan. And allegations that the business decision was poor, reckless, or wrongful, cannot transform it into a fiduciary decision with respect to plan administration or management. The dispositive question is whether the Complaint alleges any facts that would establish that Dr. McGuire took fiduciary actions in a fiduciary capacity. It does not. The claims against Dr. McGuire must be dismissed.

III. CONCLUSION

For the foregoing reasons, Dr. McGuire is entitled to summary judgment against Mr. Linn. Mr. Zilhaver's claim must be dismissed for lack of standing pursuant to Rule 12(b)(1). Because neither Mr. Linn's claim nor Mr. Zilhaver's survives, the entire Second Amended Complaint should be dismissed. In addition, the Second Amended Complaint must be dismissed in its entirety for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

Respectfully submitted this 22nd day of June, 2007,

s/Steve W. Gaskins

FLYNN, GASKINS & BENNETT, LLP
Steve W. Gaskins (#147643)
Eric W. Hageman (#258180)
Kelly A. Moffitt (#341009)
Jodi Furr Colton (#386395)
333 South Seventh Street, Suite 2900
Minneapolis, MN 55402
Tel: (612) 333-9500
Fax: (612) 333-9579

LATHAM & WATKINS LLP
David M. Brodsky
Alexandra A.E. Shapiro
Blair Connelly
(admitted *pro hac vice*)
885 Third Avenue
New York, NY 10022-4834
Tel: (212) 906-1200
Fax: (212) 751-4864

Attorneys for Defendant William McGuire