

CORNERSTONE RESEARCH

ERISA CAPABILITIES

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Cornerstone Research has consulted on a variety of Employee Retirement Income Security Act (ERISA) matters, addressing the prudence of company stock as an investment option in a retirement plan, the reasonableness of fees of investment options in retirement plans, investment managers' compliance with pension fund investment guidelines, Employee Stock Ownership Plan (ESOP) valuation issues, and "whip-saw" calculation issues in cash balance retirement plans. Although our involvement in many of these cases is ongoing, notable matters that have been recently resolved include stock drop cases against Delphi Corporation and W. R. Grace & Co. and an excessive fee case against Deere & Company.

In 2006 a new type of ERISA litigation emerged: suits filed on behalf of participants in company-sponsored retirement plans that allege excessive plan fees. In these cases, our work has included the analysis of damage theories and a review of the specific features of the plans at issue, placing both in the context of the 401(k) plan industry as a whole. We also have addressed ERISA claims involving allegedly improper option grants.

Cornerstone Research works with affiliated faculty and industry experts in a distinctive "partnership" that combines our experience in securities and financial institution litigation with specialized academic and industry knowledge. Several of our senior staff also serve as testifying experts in ERISA matters. Our network of in-house, academic, and industry experts enables us to provide specific expertise across a broad array of relevant areas.

The following pages highlight common analytical issues that arise in ERISA litigation and describe some of the cases on which Cornerstone Research has worked.

DON BRIEGER et al. v. TELLABS, INC., et al.

Retained by Morgan, Lewis & Bockius

In only the second post-Enron ERISA company stock drop case to go to trial, counsel for Tellabs, Inc., retained Cornerstone Research to support multiple experts, including Professor Laura Starks of the University of Texas at Austin, and to provide consulting support to counsel. The plaintiffs contended that the defendants breached their fiduciary duty by allowing and holding investments in the Tellabs stock fund when investment in Tellabs' stock was allegedly imprudent due to the company's worsening financial situation. The plaintiffs also alleged that the defendants failed to disclose material information concerning the efficacy of and demand for Tellabs' products.

Professor Starks filed a report and testified at trial regarding whether the defendants engaged in a proper process to evaluate the continued inclusion of the Tellabs stock fund as part of the company's profit-sharing and savings plan, and rebutted the arguments of the plaintiffs' expert as "form over substance." In her report and trial testimony, Professor Starks showed the strong financial position and solvency of Tellabs and concluded that Tellabs' stock was a prudent investment for the plan.

Following a two-week bench trial Judge Matthew F. Kennelly of the U.S. District Court for the Northern District of Illinois, Eastern Division, ruled on June 1, 2009, in favor of the defendants. He determined that "plaintiffs have not established that defendants failed to exercise their discretion or were procedurally imprudent." Judge Kennelly found the testimony of the plaintiffs' expert to be unpersuasive and agreed with Professor Starks' assessment that the plaintiffs' expert "elevated form over substance." Further, he found that there was no threat that Tellabs faced bankruptcy due to its "strong cash position, positive cash flow, and low amounts of debt." Judge Kennelly also ruled that the defendants did not make any material misrepresentations to the plaintiffs, nor did they withhold material information from the plaintiffs.

IN RE COMPUTER SCIENCES CORPORATION ERISA LITIGATION

Retained by Gibson, Dunn & Crutcher and by Morgan, Lewis & Bockius

The plaintiffs alleged that Computer Sciences Corporation (CSC) common stock was an imprudent investment option for the CSC Matched Asset Plan due to CSC's option backdating practices and other tax-related accounting adjustments and restatements.

In this case three experts filed reports with support from Cornerstone Research. Professor John Peavy of Texas Christian University established that CSC was a viable ongoing company throughout the class period and that the monitoring process that the defendants followed with respect to the plan's investment options was appropriate. Professor Gordon Klein of UCLA's Anderson School of Management analyzed CSC's accounting adjustments and internal controls and concluded that CSC's accounting adjustments were not material and that CSC's disclosures were timely and appropriate. Finally, Dr. Allan Kleidon, a senior vice president of Cornerstone Research, showed that alleged false and misleading statements made to plan participants did not cause artificial inflation in CSC's stock price and that there was no evidence that disclosures related to CSC's option dating practices or other tax accounting adjustments were alone associated with statistically significant price declines.

On July 13, 2009, the case was dismissed on summary judgment by U.S. District Judge S. James Otero. The court found that "Plaintiffs offer no evidence that a prudent investor under the circumstances would have acted any differently than Defendants." In addition, the court concluded that "Plaintiffs have also failed to raise genuine issues of material fact regarding whether the decline was caused by Defendants' alleged imprudence."

IN RE DELPHI CORPORATION SECURITIES, DERIVATIVE AND ERISA LITIGATION

Retained by McDermott Will & Emery

In a decision issued on March 18, 2009, the U.S. District Court of the Eastern District of Michigan, Southern District, granted summary judgment in favor of our client State Street Bank and Trust Company (State Street) in an employer stock drop case involving Delphi Corporation (Delphi). State Street, which served as the trustee and investment manager of the Delphi Common Stock Fund, initiated the sale of the 401(k) plan's holdings of Delphi stock on October 5, 2005, after monitoring the bankruptcy possibility for several months. On October 8, 2005, Delphi filed for Chapter 11 bankruptcy. The plaintiffs alleged that State Street should have sold the Delphi stock earlier than it did.

Cornerstone Research was retained by counsel for State Street. Our expert's analysis showed that the market for Delphi stock was efficient, i.e., that all public information was reflected in Delphi's stock, and that therefore a recovery in Delphi's stock price was just as likely as a further decline in its stock price. With our support, the testifying expert also analyzed the evaluation of the possibility of Delphi's bankruptcy by market participants, finding that equity research analysts upgraded Delphi stock in the months leading up to the bankruptcy and that many institutional investors, including pension funds and mutual funds, continued to buy or hold Delphi stock until the bankruptcy announcement.

The court accepted the analysis of our expert and refused to consider the reports of the plaintiffs' experts. Judge Gerald E. Rosen noted that "[p]laintiffs have presented a panoply of experts who have opined that State Street should have taken action sooner than it did. These experts. . . have done nothing more than opine on their own interpretations of the applicable law. . . . Therefore, the Court will not consider these experts' reports." Judge Rosen concluded that Delphi's viability as a going concern was not called into serious question until right before State Street decided to divest the plan's holdings of Delphi stock and that State Street did not breach its fiduciary duties by not initiating the sale of Delphi stock earlier than it did.

LAWRENCE W. BUNCH et al. v. W. R. GRACE & CO. et al.

Retained by Paul, Hastings, Janofsky & Walker and by Arent Fox

In contrast to most employer stock price drop ERISA lawsuits that allege the imprudence of maintaining company stock as an investment option, the plaintiffs in this matter alleged a breach of fiduciary duty when W.R. Grace fiduciaries and State Street Bank and Trust Company (State Street), acting as an independent fiduciary, divested the 401(k) plan of the W.R. Grace stock. The plaintiffs contended that fiduciaries sold the plan's holdings in the W.R. Grace stock at an imprudently low price while W.R. Grace was in bankruptcy reorganization.

With support from Cornerstone Research, Professor Christopher James of the University of Florida demonstrated that W.R. Grace stock traded in an efficient market and, as a result, plan participants received at least the fair value for their W.R. Grace stock holdings when these shares were liquidated. Professor James also determined that the valuation analysis that contributed to the decision to divest the plan's holdings of the W.R. Grace stock was reasonable.

On January 29, 2009, the U.S. Court of Appeals for the First Circuit, upholding a lower court decision, ruled that State Street engaged in a substantively sound, reasonable analysis of all relevant circumstances appropriate to the decision to sell the plan's holdings of the W.R. Grace stock and did not breach its ERISA fiduciary duties.

ERISA LITIGATION

VINCENT D. DIFELICE et al. v. US AIRWAYS, INC., et al.

Retained by Morgan, Lewis & Bockius

Defense counsel achieved a complete victory for US Airways, Inc., in the first post-Enron ERISA company stock case to go to judgment following trial. The plaintiffs alleged that US Airways and the fiduciaries of the US Airways, Inc. 401(k) Savings Plan should have intervened to eliminate US Airways stock as an investment option and liquidate existing company stock holdings. Assisting the defense counsel, Cornerstone Research supported analysis and expert testimony by Professor John Peavy of Texas Christian University and Dr. Lassaad Adel Turki, a vice president of Cornerstone Research.

Professor Peavy analyzed US Airways' viability prior to its bankruptcy and explained the importance of considering the implications of modern portfolio theory in assessing the prudence of including employer stock as one among a set of diversified investment options. He testified that at no point during the relevant period did the available information indicate that the stock was an imprudent investment option for the plan. Dr. Turki provided testimony demonstrating that an analysis of the plan's transaction and holdings data, using reasonable assumptions, implied a damages amount far lower than the amount calculated by plaintiffs' experts.

Following a six-day bench trial in the U.S. District Court for the Eastern District of Virginia, Judge T.S. Ellis III concluded that "there is no question the Company Stock Fund was a viable investment option throughout the class period" and "the continued offering of the Company Stock Fund as an investment option in the Plan was not a breach of US Airways' ERISA fiduciary duty. . . ." Moreover, in this precedent-setting decision, the court both accepted and cited modern portfolio theory. On August 1, 2007, the U.S. Court of Appeals for the Fourth Circuit affirmed the trial judgment in favor of the defendants.

IN RE WORLDCOM, INC. ERISA LITIGATION

Retained by Gibson, Dunn & Crutcher

In a precedent-setting decision regarding the role of a directed trustee, our client, Merrill Lynch Trust Company, FSB (Merrill Lynch), won summary judgment. Cornerstone Research worked with Professor John Peavy of Texas Christian University, who testified regarding the viability of WorldCom prior to its bankruptcy filing in July 2002. Judge Denise Cote of the U.S. District Court for the Southern District of New York ruled in favor of Merrill Lynch, concluding that "[t]he publicly available information regarding WorldCom did not create at any time before June 25, 2002, a reliable picture of serious concerns regarding the short-term viability of WorldCom." The court's opinion was the first to adopt the guidance provided by a Department of Labor December 2004 Field Assistance Bulletin that a directed trustee has a fiduciary duty of inquiry "when it knows or should know of reliable public information that calls into serious questions the company's short-term viability as a going concern." This decision has been cited in several subsequent cases.

DENNIS HECKER et al. v. DEERE & COMPANY et al.

Retained by Morgan, Lewis & Bockius

The plaintiffs alleged that Deere & Company (Deere) and the fiduciaries of the Deere Savings & Investment Plan and Tax Deferred Savings Plan breached their duties to plan members and caused the Deere plans to pay excessive fees and expenses. On June 21, 2007, U.S. District Judge John C. Shabaz of the Western District of Wisconsin dismissed the complaint. Judge Shabaz ruled that Deere's fee disclosures were fully compliant with ERISA requirements and that any claim based on the amount of the total fees is foreclosed by ERISA's safe harbor provision. On February 12, 2009, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of all claims. On June 24, 2009, the court reaffirmed its decision and denied the plaintiffs' petition for rehearing the case.

Working with Professor Laura Starks of the University of Texas at Austin, Cornerstone Research assisted counsel for Deere by analyzing the plaintiffs' liability and damages claims. Our work included providing an overview of the relevant features of the 401(k) plan industry and analyzing the structure and fees of the Deere plans. We also analyzed the damages methodology used by the plaintiffs' experts and assisted counsel in understanding the ways in which the method was not appropriate.

DISPUTE BETWEEN A PENSION PLAN AND AN INVESTMENT MANAGER

In a suit brought by a pension plan and its trustees against the investment manager of one of the plan's portfolios, plaintiffs alleged that the investment manager did not comply with the pension plan's investment guidelines. Specifically, the plaintiffs alleged that the investment manager's portfolio failed to target the volatility of its designated benchmark.

Working closely with Cornerstone Research staff, Professor René Stulz of The Ohio State University demonstrated that the volatility of the portfolio in question was not statistically different than its benchmark index's volatility. Further, Professor Stulz showed that, had the investment manager targeted its benchmark index's volatility, the returns it would have achieved would not have been statistically different from its actual returns.

Cornerstone Research also worked with Professor John Peavy of Texas Christian University who concluded that the investment manager provided more than sufficient disclosures regarding the nature and practice of its investment strategy and that a reasonable trustee would have understood the nature, return/risk, and the volatility of this strategy based on these disclosures. The case settled.

DEPARTMENT OF LABOR INVESTIGATION

Cornerstone Research was retained by the outside counsel of an electronics manufacturing company to assist with a Department of Labor investigation of potential breaches of fiduciary duty under ERISA. The issue under investigation was whether the fiduciaries violated their duties under ERISA when they maintained the employer's stock as an investment option in the company's 401(k) plan in light of the company's alleged option backdating practices, and the potential implications for the appropriateness of the company's stock as an investment.

Cornerstone Research conducted an event study to investigate the stock price movements associated with disclosures related to the company's alleged option backdating practices. Our analysis indicated that the disclosures of the option backdating practices did not have a material impact on the stock price. In addition, Cornerstone Research demonstrated that equity analysts believed the impact of these disclosures on the company's financials to be marginal.

Cornerstone Research presented its findings to the Department of Labor. The case settled.

COMPANY STOCK CASES

Cornerstone Research maintains an extensive database of ERISA company stock drop cases, allowing us to provide relevant historical data on cases and settlements to our clients. Our database currently contains 211 cases filed since 1997. Most (194) of the cases were filed after the Enron ERISA case filing in November 2001. Figure 1 reports the number of ERISA company stock filings, by quarter, from 1997 through July 2010.

Using a broad range of data sources, we have collected detailed information for each of the cases, including docket information, size and composition of the retirement plans involved, company stock price performance, and case status.

Almost half of the cases in the database were filed in one of three federal court circuits: the Second Circuit (New York, Connecticut, and Vermont), the Third Circuit (Pennsylvania, New Jersey, and Delaware), and the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee). The two district courts with the largest number of filings are the Southern District of New York and the District of New Jersey. Around 80 percent of ERISA company stock drop cases accompany securities class actions.

The sizes of the firms and the retirement plans involved in these cases vary substantially. The proportion of company stock in the retirement plan at the beginning of the class period is, on average, 35 percent. Statistics on the companies, their retirement plans, and company stock performance are reported in Figure 2.

Of the 211 cases in our database, seventy-seven are still active, thirty-five have been dismissed, ninety-seven have settled, and two (*DiFelice et al. v. US Airways, Inc.*, and *Don Brieger et al. v. Tel-labs, Inc., et al.*) had judgments entered

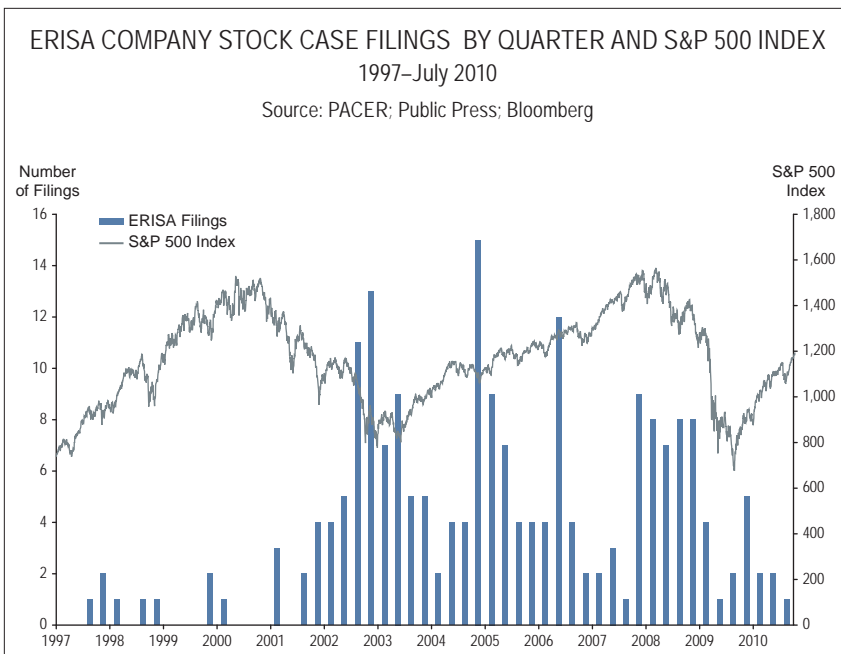


Figure 1

SUMMARY STATISTICS			
Dollars in Millions			
	Mean	Median	Maximum
Market Capitalization of Plan Sponsor	\$28,878	\$10,182	\$396,253
Value of Company Stock in Retirement Plan	\$735	\$190	\$23,095
Percentage of Plan in Company Stock	35%	28%	100%
Stock Price Decline in Class Period	65%	66%	100%
Maximum One-Day Stock Price Decline	30%	24%	93%

Note: Market capitalization as well as the value and percentage of company stock holdings are measured as of the beginning of the class period. Cases for which certain data were unavailable are excluded from the above summary statistics.

Figure 2

for the defendants upon the conclusion of trial (Figure 3). Cornerstone Research was retained by the defendants in both trials.

For the ninety-seven settled cases, the mean (i.e., average) settlement amount is \$20.8 million, and the median (i.e., midpoint) settlement amount is \$8.7 million. The average time elapsed between the filing date and the settlement announcement date is three years. For the sixty-four settled cases that have an accompanying settled securities fraud case, the ERISA settlements are, on average, approximately 5 percent of the amount of the securities case settlement. Figure 4 provides information on the distribution of ERISA settlement amounts.

EXCESSIVE FEE CASES

Cornerstone Research is also developing a database of recent ERISA excessive fee cases. Currently the database contains twenty-six case filings, half of which were filed during the third and fourth quarters of 2006. We have collected information for each of the cases, including allegations in each case, the value of the retirement plan, and the number of participants.

According to our current data, the average size of the retirement plans involved in these suits is \$7.1 billion, with a median size of \$4.1 billion. The average number of participants per plan is 118,665, and the median number is 47,250. Twenty of the plans offer company stock as an investment option in the plan. In twenty-five of the twenty-six cases, the plaintiffs allege that fees paid to investment managers were excessive; in over half the cases, the plaintiffs allege that excessive fees were paid to both the plan's investment managers and its record keeper. Fifteen of the twenty-six excessive fee cases were filed by Schlichter Bogard & Denton.

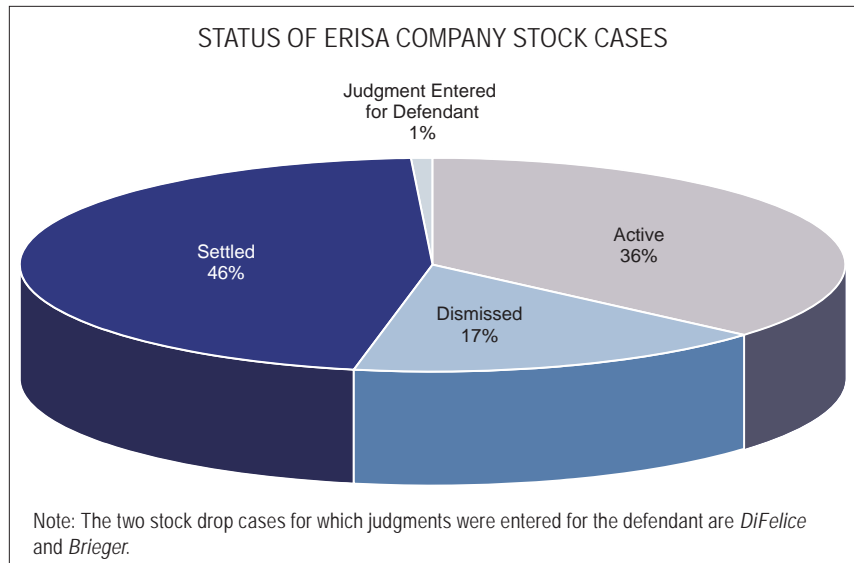


Figure 3

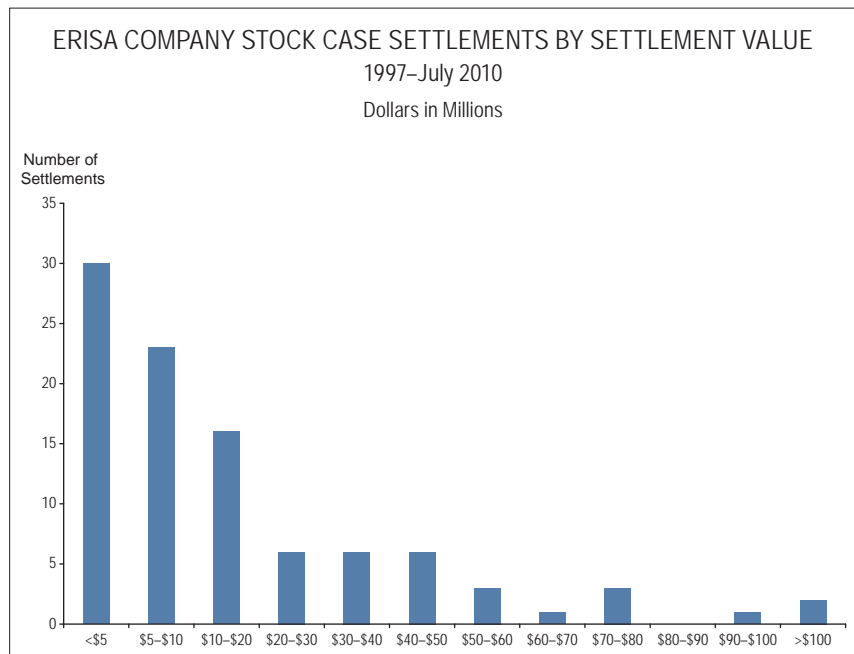


Figure 4

Selected ERISA Experts

Steven R. Grenadier

William F. Sharpe Professor of Financial Economics, Graduate School of Business, Stanford University

Christopher M. James

William H. Dial/SunBank Eminent Scholar in Finance and Economics, Warrington College of Business, University of Florida; Senior Advisor, Cornerstone Research

Allan W. Kleidon

Senior Vice President, Cornerstone Research; Honorary Professor, School of Business, University of Queensland

John W. Peavy III

Professor of Professional Practices in Finance, M.J. Neeley School of Business, Texas Christian University

William F. Sharpe

STANCO 25 Professor of Finance, Emeritus, Graduate School of Business, Stanford University

Laura T. Starks

Charles E. and Sarah M. Seay Regents Chair in Finance, McCombs School of Business, University of Texas at Austin

René M. Stulz

Everett D. Reese Chair of Banking and Monetary Economics, Professor of Finance, Fisher College of Business, The Ohio State University

Lassaad Adel Turki

Senior Vice President, Cornerstone Research

Selected Client Law Firms

Akin Gump Strauss Hauer & Feld

Alston & Bird

Arnold & Porter

Axinn, Veltrop & Harkrider

Baker Botts

Baker & Hostetler

Baker & McKenzie

Barflit Beck Herman Palenchar & Scott

Bingham McCutchen

Boies, Schiller & Flexner

Cadwalader, Wickersham & Taft

Cahill Gordon & Reindel

Chadbourne & Parke

Choate Hall & Stewart

Cleary Gottlieb Steen & Hamilton

Clifford Chance

Cooley Godward Kronish

Covington & Burling

Cravath, Swaine & Moore

Davis Polk & Wardwell

Debevoise & Plimpton

Dechert

Dewey & LeBoeuf

Dickstein Shapiro

DLA Piper

Dorsey & Whitney

Drinker Biddle & Reath

Farella Braun + Martel

Fenwick & West

Finnegan, Henderson, Farabow, Garrett & Dunner

Fitzpatrick, Cella, Harper & Scinto

Folger Levin & Kahn

Fried, Frank, Harris, Shriver & Jacobson

Fulbright & Jaworski

Gibson, Dunn & Crutcher

Goodwin Procter

Harkins Cunningham

Haynes and Boone

Hogan & Hartson

Holland & Hart

Howrey

Hunton & Williams

Husch Blackwell Sanders

Irell & Manella

Jenner & Block

Jones Day

Katten Muchin Rosenman

Kaye Scholer

Kelley Drye & Warren

Kilpatrick Stockton

King & Spalding

Kirkland & Ellis

K&L Gates

Latham & Watkins

Manatt, Phelps & Phillips

Mayer Brown

McDermott Will & Emery

McKenna Long & Aldridge

Milbank, Tweed, Hadley & McCloy

Mintz Levin Cohn Ferris Glovsky and Popeo

Mitchell Silberberg & Knupp

Montgomery, McCracken, Walker & Rhoads

Morgan, Lewis & Bockius

Morris, Nichols, Arsht & Tunnell

Morrison & Foerster

Munger, Tolles & Olson

O'Melveny & Myers

Orrick, Herrington & Sutcliffe

Patton Boggs

Paul, Hastings, Janofsky & Walker

Paul, Weiss, Rifkind, Wharton & Garrison

Pepper Hamilton

Perkins Coie

Pillsbury Winthrop Shaw Pittman

Proskauer Rose

Quinn Emanuel Urquhart Oliver & Hedges

Reed Smith

Richards, Layton & Finger

Robins, Kaplan, Miller & Ciresi

Schulte Roth & Zabel

Shartsis Friese

Shearman & Sterling

Sheppard Mullin Richter & Hampton

Sidley Austin

Simpson Thacher & Bartlett

Skadden, Arps, Slate, Meagher & Flom

Snell & Wilmer

Sonnenschein Nath & Rosenthal

Stroock & Stroock & Lavan

Sullivan & Cromwell

Thompson & Knight

Vinson & Elkins

Vorys, Sater, Seymour and Pease

Wachtell, Lipton, Rosen & Katz

Weil, Gotshal & Manges

Wiley Rein

Williams & Connolly

Willkie Farr & Gallagher

Wilmer Cutler Pickering Hale and Dorr

Wilson Sonsini Goodrich & Rosati

Winston & Strawn

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