UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KIRK DAHL, et al., Plaintiffs, v. BAIN CAPITAL PARTNERS LLC, et al., Defendants.	CIVIL ACTION NO.: 07-12388-EFH (Consolidated) **PLAINTIFFS' RESPONSE TO DEFENDANTS' JOINT OPPOSITION TO THE NEW YORK TIMES' MOTION TO INTERVENE AND UNSEAL THE FIFTH AMENDED COMPLAINT AND ASSOCIATED EXHIBITS** **Leave to File Granted on September 10, 2012**

The New York Times Company (the "Times") requests that the Court unseal the Fifth Amended Complaint and its associated exhibits. (ECF Nos. 672-73). Defendants have jointly opposed the motion, arguing the unsealing of the Fifth Amended Complaint and its associated exhibits would reveal so-called "competitively-sensitive information" ("Defs.' Opp. to Times' Mot. Intervene") (ECF No. 698). Plaintiffs respectfully submit this response because the Fifth Amended Complaint and its associated exhibits − which are unavailable to the Times to use in its arguments − do not support Defendants' claim that unsealing the Fifth Amended Complaint would actually reveal competitively-sensitive information.

Unsealing the Fifth Amended Complaint and its associated exhibits will neither reveal any competitively sensitive information nor reveal any information legitimately protected from disclosure under Rule 26(c). First, contrary to Defendants' representations, the text of the Fifth Amended Complaint does not contain any meaningful competitively-sensitive information. Second, while Defendants blanketed the Fifth Amended Complaint's associated exhibits with "confidential" or "highly confidential" designations, Defendants have not provided any actual evidence, such as a Declaration, to support their conclusory position that information within the

associated exhibits is, in fact, "critical to defendants' competitive position." (Defs.' Opp. to Times' Mot. Intervene at 10).

Instead, the Fifth Amended Complaint and the vast majority of its associated exhibits concern transactions that occurred years ago and do not contain any information that if disclosed today would put any Defendant at a competitive disadvantage. Defendants, who have the burden of establishing protection under Rule 26(c), have failed to set forth actual evidence, as opposed to pure argument, showing how the unsealing of the Fifth Amended Complaint's associated exhibits would put any Defendant at a competitive disadvantage. Further, Defendants often exchanged so-called competitively-sensitive information, such as valuations, with each other, thereby undermining any claim of prejudice.

The Court should grant the Times' motion to intervene and unseal the Fifth Amended Complaint and its associated exhibits. Alternatively, the Court should require Defendants to set forth actual and specific evidence that the text of the Fifth Amended Complaint and its associated exhibits warrants protection under Rule 26(c).

ARGUMENT

I. THE FIFTH AMENDED COMPLAINT DOES NOT CONTAIN TRADE SECRETS OR PROPRIETARY INFORMATION THAT COULD WARRANT KEEPING IT UNDER SEAL

The presumption favoring public access, while not absolute, is "strong and sturdy"; only the most compelling reasons can justify non-disclosure of judicial records. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 70 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012). "[I]t is the party seeking to keep documents sealed who must make a showing sufficient to overcome the presumption of public access." *Id*. at 71. When a party asks to keep records under seal because of confidential or proprietary information, the danger must be extremely serious. The ordinary showing of good cause for a protective order under Fed. R. Civ. P. 26 is not adequate to deny public access to court records. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993). The *Poliquin* court decided against sealing a videotape admitted into evidence because the videotape "contain[ed] nothing remotely comparable to, say, the formula for Coca Cola or

even an important trade secret. Garden Way's business methods are discussed but there are no startling revelations." *Id*. at 534.[1]

The party asking to keep records under seal must make a detailed showing of what protection is necessary and legally permissible. In *Baxter Int'l, Inc. v. Abbott Labs*., 297 F.3d 544, 545-46 (7th Cir. 2002), the parties jointly moved to place records under seal "mostly on the basis of [a secrecy] agreement but partly on the ground that these are commercial documents." The court stated, "That won't do. The motion did not analyze the applicable legal criteria or contend that any document contains a protectable trade secret or otherwise legitimately may be kept from public inspection despite its importance to the resolution of the litigation." *Id*. at 547 (citation omitted). The court denied a renewed joint motion for the same reasons:

> Beyond asserting that the document must be kept confidential because we say so (the "agreement is, by its terms, confidential"), this contends only that disclosure "could . . . harm Abbott's competitive position." How? Not explained. Why is this sort of harm (whatever it may be) a legal justification for secrecy in litigation? Not explained. Why is the fact that some other document contains ***references*** to a license sufficient to conceal the referring document? Not explained. If it were, then the district court's opinion, which includes not only references to the licenses but also extended quotations from them, would have to be blotted from the books.

Id. at 547 (citation omitted) (emphasis in original).

Defendants' claims of commercial secrecy fall well short for multiple reasons.

First, Defendants make no effort to explain why the categories of information they say are included in the Fifth Amended Complaint are legally protectable. *See* Defs.' Opp. to Times' Mot. Intervene at 9. On their face, categories like "[t]he identity of investors in defendant

[1] Defendants liken their interest in confidentiality to the interest in preserving the attorney-client privilege. Defs.' Opp. to Times' Mot. Intervene at 7 (citing *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7 (1st Cir. 1998)). To be clear, the Fifth Amended Complaint does not contain privileged information. A demonstrated breach of attorney-client privilege is far more serious than a generic claim of commercial secrecy. *Compare Siedle*, 147 F.3d at 11 (where information appeared on its face to be privileged, "the interest in preserving a durable barrier against disclosure of privileged attorney-client information is shared both by particular litigants and by the public and it is an interest of considerable magnitude") *with Poliquin*, 989 F.2d at 533-34 (information about business methods insufficient without an "important trade secret" or "startling revelations").

funds," "[p]otential investment opportunities", "Defendants' business, investment, and bidding strategies," and "details regarding negotiations with targets" do not warrant keeping a record under seal. *See Baxter*, 297 F.3d at 547 ("[M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.").

Defendants' failure to provide any explanation for why such information should be given sweeping protection from public view is particularly inexplicable when considered in light of the actual documents Defendants cite as "critical to [their] competitive position." Defs.' Opp. to Times' Mot. Intervene at 10. For instance, Defendants cite, as an example of a document containing "Defendants' business, investment, and bidding strategies," an email in which, as detailed in the portion of the Fifth Amended Complaint cited by Defendants, an executive of a Defendant describes his collusive pre-bid discussions with a "competing" Defendant which led to the rigging of the bidding for PanAmSat Corporation. *Id.* at 7. This email is clearly of public import – indeed, it directly confirms one *New York Times* columnist's contemporaneous speculation that the PanAmSat bidding reflected collusion. Andrew Ross Sorkin, "One Word Nobody Dares Speak," *New York Times*, October 16, 2005. Yet nowhere do Defendants explain – much less provide any declaration or other actual evidence showing - how an eight-year old email regarding a company Defendants have long since sold contains information that would benefit Defendants' competitors today. Nor have Defendants explained how any other cited documents or categories of information would, as they claim "give competitors unearned insight." (Defs.' Opp. to Times Mot. Intervene at 9.) Defendants have entirely failed to meet their burden.

Second, in many instances, Defendants appear to be describing information in the discovery documents cited by the Fifth Amended Complaint, not in the pleading itself. The paragraphs that supposedly reveal "[v]aluations of acquisition companies and methods, and internal rates of return on investments" state final dollars figures with no calculation or description of methodology. *See* Fifth Amend. Compl., ¶¶240, 327, 362. The paragraph and

footnote that supposedly reveal "[t]he investment breakdown of particular funds by portfolio company" states no such thing. *See id*., ¶268 n.277. Instead, it shows how Defendants monitored their conspiracy.

Third, the documents show that "Defendants' business, investment, and bidding strategies" are unlawful, market allocation, and bid-rigging. *See*, *e.g.*, *id*., ¶¶ 87, 139, 161, 173, 182, 195, 211, 237, 238, 281, 290, 434, 463, 529. This is hardly the stuff of trade secrets. "Deceptive, illegal or fraudulent activity simply cannot qualify for protection as a trade secret." *Goodman v. Genworth Fin. Wealth Mgmt*., No. CV 09-5603, 2012 WL 214172, at *7 (E.D.N.Y. Jan. 24, 2012) (citing *Restatement (Third) of Unfair Competition* §40 cmt. c (1995)).

Fourth, the deals and events discussed in the Fifth Amended Complaint are in many cases nearly six or seven years old. *See* Fifth Amend. Compl., ¶1. Defendants do not indicate how outdated information about "[t]he identity of investors in defendant funds," "[p]otential investment opportunities," and the like would jeopardize their current business.

Fifth, Defendants shared their allegedly confidential business practices with each other on a regular basis, exchanging bidding strategies, valuations, and investment committee/due diligence memos, and potential investments. *See*, *e.g.*, *id*., ¶¶ 139, 181, 296, 327, 402; Memo. Supp. Pltfs.' Opp. MSJ on Overarching Conspiracy Claim at 179-80, 182.

Sixth, the Fifth Amended Complaint and its associated exhibits does not "include information regarding the business practices of the portfolio companies that defendants operate." *See* Defs.' Opp. to Times' Mot. Intervene at 4. And Defendants do not point to any such information.

Seventh, Defendants' opposition confuses the millions of pages produced in discovery with the limited number of documents associated with the Fifth Amended Complaint. The associated exhibits provide compelling evidence of Defendants' violations of the federal antitrust laws. Such violations are no doubt embarrassing to Defendants, but they do not merit protection from disclosure under Rule 26(c).

In sum, Defendants have not made the strong showing necessary to keep the Fifth Amended Complaint secreted from the public. While Defendants claim it is littered with trade secrets and other highly sensitive information, an inspection of the pleading shows this to be false. The Fifth Amended Complaint does not reveal proprietary valuation methods. It reveals how, starting in 2003 and continuing to at least 2007, Defendants conspired with one another to allocate takeover targets and make artificially low, anticompetitive bids for those companies. Defendants routinely shared with each other over the course of the conspiracy what they now claim is "competitively sensitive" information with each other in the ordinary course. Given Defendants' constant sharing of information among themselves, nothing in the Fifth Amended Complaint would put Defendants at a competitive disadvantage today.

II. THE COURT'S PRIOR ORDERS DO NOT WEIGH AGAINST THE TIMES' REQUEST TO UNSEAL THE FIFTH AMENDED COMPLAINT

Defendants are incorrect in asserting that the Times' motion "asks for the same basic relief that plaintiffs requested and the Court denied over a year ago." *See* Defs.' Opp. to Times' Mot. Intervene at 1. Plaintiffs' previous motion sought an order from this Court de-classifying and making publicly available pleadings filed with the Court in this case, or, in the alternative, an order modifying the Protective Order (1) to permit the Class Plaintiffs to provide to the DOJ and any State Attorneys General pleadings and other materials filed with the Court in this case, even if filed under seal; (2) to permit the Class Plaintiffs to provide the fruits of discovery, along with any work product, to the DOJ if served a Civil Investigatory Demand ("CID"), without waiving any otherwise applicable privilege; and (3) to allow Class Plaintiffs to take a position on a request by the DOJ, should it become necessary. (ECF No. 414 at 2). Thus, the thrust of Plaintiffs' Motion was a request to turn over documents to an entity, the Department of Justice, which for whatever reason did not intervene to make its case for obtaining the documents directly.

The Times' Motion is different. The Times' Motion presents an independent demand for access and is also more limited than Plaintiffs' earlier request to modify the Protective Order.

The Times has limited the scope of its motion to "the Fifth Amended Complaint and its Associated Exhibits." Times' Mot. Intervene (ECF No. 672). As Defendants recognize, the Fifth Amended Complaint does not have any exhibits so the motion really only pertains to the pleading. *See* Defs.' Opp. to Times' Mot. Intervene at 5. Thus, the earlier motion relating to Plaintiffs' effort to respond to the Department of Justice simply does not speak to the Times' Motion to Intervene.

Moreover, in allowing the Fifth Amended Complaint to be filed under seal, the Court did not determine, and the parties did not ask it to determine, whether any of the documents or testimony referenced in the Fifth Amended Complaint constituted confidential or proprietary information, nor did the Court address the public's right of access to judicial records. The filing under seal was a temporary protective measure and not meant to pre-dispose of a request from the public to obtain the Fifth Amended Complaint.

III. CONCLUSION

For the foregoing reasons, the Court should allow the Times to intervene in this action and grant its request to unseal the Fifth Amended Complaint.

Dated: September 10, 2012

Respectfully submitted,

SCOTT+SCOTT LLP

/s/ Walter W. Noss

CHRISTOPHER M. BURKE (admitted *pro hac vice*)
WALTER W. NOSS (admitted *pro hac vice*)
KRISTEN M. ANDERSON (admitted *pro hac vice*)
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: 619/233-4565

SCOTT+SCOTT LLP
DAVID R. SCOTT (admitted *pro hac vice*)
156 South Main Street
P.O. Box 192
Colchester, CT 06415
Telephone: 860/537-5537

ROBINS, KAPLAN, MILLER &
CIRESI L.L.P
K. CRAIG WILDFANG (admitted *pro hac vice*)
THOMAS J. UNDLIN (admitted *pro hac vice*)
STACEY P. SLAUGHTER (admitted *pro hac vice*)
2800 LaSalle Plaza
800 LaSalle Avenue South
Minneapolis, MN 55402-2015
Telephone: 612/349-8500

ROBINS, KAPLAN, MILLER &
CIRESI L.L.P
LISA A. FURNALD (BBO #631059)
800 Boylston Street, 25th Floor
Boston, MA 02199
Telephone: 617/267-2300

ROBBINS GELLER RUDMAN
& DOWD LLP
PATRICK J. COUGHLIN (Of Counsel)
SUSAN G. TAYLOR (admitted *pro hac vice*)
DAVID W. MITCHELL (admitted *pro hac vice*)
PHONG L. TRAN (admitted *pro hac vice*)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058

LANDSKRONER • GRIECO • MADDEN, LLC
JACK LANDSKRONER (admitted *pro hac vice*)
PAUL GRIECO (admitted *pro hac vice*)
1360 West 9th Street, Suite 200
Cleveland, OH 44113
Telephone: 216/522-9000

ROBBINS UMEDA LLP
BRIAN J. ROBBINS (admitted *pro hac vice*)
GEORGE AGUILAR (admitted *pro hac vice*)
600 B Street, Suite 1900
San Diego, CA 92101
Telephone: 619/525-3990

LOCKRIDGE GRINDAL NAUEN P.L.L.P.
RICHARD A. LOCKRIDGE (admitted *pro hac vice*)
CHARLES N. NAUEN (admitted *pro hac vice*)
KAREN HANSON RIEBEL (admitted *pro hac vice*)
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401-2159
Telephone: 612/339-6900

HULETT HARPER STEWART, LLP
DENNIS STEWART (Of Counsel)
525 B Street, Suite 760
San Diego, CA 92101
Telephone: 619/338-1133

BRANSTETTER, STRANCH
& JENNINGS, PLLC
J. GERARD STRANCH IV (admitted *pro hac vice*)
227 Second Avenue, North – 4th Floor
Nashville, TN 37201-1631
Telephone: 615/254-8801

MURRAY, FRANK & SAILER LLP
BRIAN P. MURRAY (Of Counsel)
275 Madison Avenue, Suite 801
New York, NY 10016
Telephone: 212/682-1818

REINHARDT WENDORF & BLANCHFIELD
MARK REINHARDT (admitted *pro hac vice*)
2201 Atlantic Avenue
Sullivan's Island, SC 29482
Telephone: 651/287-2100

REINHARDT WENDORF & BLANCHFIELD
ROBERTA A. YARD (admitted *pro hac vice*)
E-1250 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
Telephone: 651/287-2100

FARUQI & FARUQI, LLP
NADEEM FARUQI (Of Counsel)
369 Lexington Avenue, 10th Floor
New York, NY 10017-6531
Telephone: 212/983-9330

SHEPHERD FINKELMAN MILLER
& SHAH, LLP
JAYNE A. GOLDSTEIN (admitted *pro hac vice*)
1640 Town Center Circle, Suite 216
Weston, FL 33326
Telephone: 954/515-0123

WAGSTAFF & CARTMELL LLP
TYLER W. HUDSON
4740 Grand Avenue, Suite 300
Kansas City, MO 64112
Telephone: 816/701-1177

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

/s/ Walter W. Noss

WALTER W. NOSS
SCOTT+SCOTT LLP
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: 619/233-4565