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Second Circuit: International Comity Precludes Antitrust Liability of Chinese Manufacturers for Conduct Mandated by Chinese Law

On September 30, 2016, the U.S. Court of Appeals for the Second Circuit issued its decision in *In re Vitamin C Antitrust Litigation*, No. 13-4791-cv, reversing a $147 million judgment against Chinese vitamin C manufacturers on international comity grounds. The Second Circuit held that the district court should have given deference to an *amicus* brief filed by the Chinese Government stating that the conduct accused in the complaint was mandated by Chinese law, and that the lower court should have abstained accordingly from asserting jurisdiction over the case. The plaintiffs have since filed a petition for rehearing *en banc*, which is pending as of this writing. The decision has garnered considerable attention in both the U.S. and China (where it was hailed as a victory for Chinese companies over the extraterritorial application of U.S. laws), but its practical import may be tempered by recent developments in Chinese law and policy and the distinction of an unprecedented appearance by the Chinese Government as *amicus curiae* supporting the defense of sovereign compulsion.

The case involved claims brought by U.S. purchasers of vitamin C against Chinese manufacturers pursuant to the Sherman and Clayton Acts, alleging that the defendants conspired to fix prices and limit supplies of vitamin C sold on the international market in 2001 to 2005. Although the defendants were

(continued on page 2)

INSIDE

Quinn Emanuel Recognized for Role in Cutting Edge Copyright and Trademark Cases

The firm's Copyright and Trademark practice areas, have recently been recognized in a series of articles by *Law360*. The firm's victory for Vimeo in *Capitol Records, LLC v. Vimeo, LLC*—establishing that the Digital Millennium Copyright Act's "safe harbor" provisions shield sites like Vimeo from liability when users post videos that include pre-1972 sound recordings—was named one of the "Top Three Copyright Rulings of the Year (to date)." In addition, *Fox News Network, LLC v. TVEyes, Inc.*, in which the firm represents media-monitoring service TVEyes, was named a "Copyright Case to Watch in the Second Half of 2016" and identified as likely to be "the next must-read ruling on the fair use doctrine." Finally, the firm's trademark case *Pro-Football, Inc. v. Blackhorse* was named one of *Law360's* "Trademark Cases to Watch in the Second Half of 2016." The case concerns whether Section 2(a) of the Lanham Act—which prohibits the registration of trademarks that "may disparage"—is unconstitutional under the First Amendment. Q

Leading White Collar Attorney Richard Smith Joins Quinn Emanuel's D.C. Office see page 9

Diane Doolittle and Victoria Maroulis Named Top Women Lawyers

Diane Doolittle and Victoria Maroulis were named 2016 "Women Leaders in Tech Law" by *The Recorder*. This annual award recognizes the achievements of lawyers whose work focuses on technology issues. Ms. Doolittle and Ms. Maroulis were selected from a pool over 120 nominees as lawyers who represent clients in the cases with the highest stakes and most impactful results. In addition, Ms. Doolittle was also named to *The Daily Journal*'s "Top Women Lawyers in California" list, which recognizes women who have demonstrated excellence as both lawyers and leaders in California. Q located in China and sold vitamin C on international markets, and not within the United States, they were subject to liability under U.S. antitrust laws pursuant to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, which permits the application of U.S. antitrust laws to conduct involving foreign trade and commerce where "such conduct has a direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce.

At the district court, the Chinese manufacturers moved to dismiss, under the act of state doctrine, the doctrine of foreign sovereign compulsion, and principles of international comity, on the grounds that Chinese regulations *required* that they coordinate prices and limit supply. Although the Ministry of Commerce of the People's Republic of China ("MOFCOM") filed an *amicus* brief in support of the defendants' position, the district court denied the motion, citing the need for additional discovery as to whether the conduct alleged in the complaint was compelled by the Chinese Government. The district court later denied a motion for summary judgment asserting similar defenses, rejecting the Chinese Government's interpretation of the applicable regulations and concluding that "Chinese law did not compel Defendants' anticompetitive conduct" during the relevant time periods. 810 F. Supp. 2d 522, 525-26 (E.D.N.Y. 2011). The case was subsequently tried to a jury, which returned a verdict in favor of the plaintiffs, ultimately resulting in a $147 million judgment against the defendants.

The Second Circuit took issue with the district court's decision not to defer to the Ministry's interpretation of Chinese law, holding that "the court erred by concluding that Chinese law did not require Defendants to violate U.S. antitrust law and … by not extending adequate deference to the Chinese Government's proffer of the interpretation of its own laws." Slip Op. at 13-14. After an extensive analysis of the standard of deference owed to a foreign government's interpretation of its own laws, the Court of Appeals "reaffirm[ed] the principle that when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." *Id.* at 31. While noting that the "district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate" had the Ministry not appeared in the litigation, the Court of Appeals concluded that analysis was not appropriate in light of the Ministry's "reasonable interpretation" of its laws as requiring the defendants to fix prices and limit supplies. *Id.* at 35 & n.10.

The *Vitamin C* decision has received significant attention in the press, in part because it is the first time the Chinese Government has appeared as *amicus curiae* in U.S. court proceedings, and in part because, until the Second Circuit's reversal, it marked the first time a Chinese manufacturer has been found liable under U.S. antitrust laws. It has also drawn some criticism from those who interpret the decision as providing a free pass to foreign companies to violate U.S. antitrust laws, so long as they can claim their conduct is lawful in their home territory. But the Second Circuit's decision is not nearly so broad, nor is it the only decision recognizing that Chinese manufacturers could be shielded from antitrust liability based on the obligations imposed by Chinese regulations.

For example, in *Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010), the District of New Jersey granted a motion to dismiss antitrust claims brought against Chinese exporters of magnesite. Taking note of MOFCOM's *amicus* brief in the *Vitamin C* case, the court stated, "[A] foreign sovereign's admission of legal compulsion of its subjects might warrant a high—often, nearly binding—degree of deference, even if the admitted compulsion was based on what might be deemed, in American jurisprudence, a form of 'unwritten law.'" *Id.* at 426. However, due to the lack of evidence regarding any actual minimum prices mandated by the Chinese Government, as well as allegations by the plaintiffs that the defendants separately entered into private agreements to fix prices higher than any government-mandated minimum, the court declined to dismiss the case on international comity grounds at that time, and instead dismissed the case on alternate grounds. *See id.* at 463-65. After appellate review, the case was remanded to the district court and dismissed for lack of standing, and the question of international comity was not revisited. *See* 34 F. Supp. 3d 465 (D.N.J. 2014).

More recently, in *Resco Prods., Inc. v. Bosai Minerals Group Co., Ltd.*, 158 F. Supp. 3d 406 (W.D.

Penn. 2016), the Western District of Pennsylvania granted summary judgment dismissing antitrust claims brought against Chinese exporters of bauxite, finding that no reasonable juror could conclude that the defendants had conspired to fix export prices and quotas because the prices and quotas were mandated by MOFCOM. Although the plaintiffs alleged that the defendants had separately conspired to fix prices and limit output, the evidence demonstrated that the defendants lacked the authority to influence prices or quantities, which were mandated by MOFCOM. *Id.* at 422. This case is currently on appeal before the Third Circuit.

The primary distinction between *Vitamin C,* on the one hand, and *Resco* and *Animal Science,* on the other, is the involvement of the Chinese Government. The *Resco* and *Animal Science* courts both determined that the record before them was insufficient to dismiss the case on international comity grounds absent discovery—an approach that the Second Circuit recognized may be "reasonable" where the foreign government does not offer an interpretation of its own laws. *Vitamin C*, slip op. at 44 n.14. The Ministry's *amicus* brief in *Vitamin C*, however, was "sufficient to determine what Chinese law required and whether abstention was appropriate" at the motion to dismiss stage. *Id.*

Despite the Second Circuit's strong statements about deference to foreign governments, the Court's analysis indicates a much narrower applicability that will typically require courts to conduct the type of analysis performed in *Resco* and *Animal Science*. First, the Court noted that principles of international comity require abstention only when there is a "true conflict" between the laws of two nations—in other words, "compliance with the laws of both countries [must have been] impossible." *Id.* at 19-20 (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993)). Second, the Second Circuit's application of comity requires deference only where "a foreign government … *directly participates* in U.S. court proceedings." *Id.* at 30 (emphasis added). Finally, even in the rare instances where a foreign government appears and states that a defendant's conduct was compelled under its laws, principles of international comity only require dismissal if the additional factors articulated in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976) and *Mannington 10 Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) are satisfied. *Vitamin C*, slip op. at 40-41. These factors include relevant conduct in the United States, the ability to enforce a U.S. judgment, the intent and foreseeability of harming American commerce, and the possible effect on foreign relations, among others.

The Second Circuit found the record developed below, following limited discovery, sufficient to conclude that the remaining factors favored dismissal at the motion to dismiss stage. But the court cautioned that "it may not be reasonable in all cases to abstain on comity grounds from asserting jurisdiction at the motion to dismiss stage and that a trial court may need the opportunity to consider the countervailing interests and policies on the record that follows discovery." *Id.* at 44 n.14. The Court of Appeals thus left open the possibility that a district court could reach a contrary conclusion on different facts notwithstanding a foreign government's attestation of legal compulsion.

There are other reasons to believe that the Second Circuit's decision may have limited impact in future cases. The conduct complained of took place over a decade ago (2001-2005). According to MOFCOM's *amicus* brief, the Chinese government's intervention in Vitamin C pricing started in the 1990's, when Chinese exporters needed approval from quasi-governmental industry trade associations to ship products abroad, and continued into the period at issue—when imposing price and supply restrictions was seen as a way to avoid anti-dumping claims by the U.S. and European Union. China's export policies have since evolved, in part due to its admission to the WTO; and, in 2008, China adopted its own antitrust laws, which prohibit price-fixing and other anticompetitive practices. These developments may make it harder for Chinese defendants in future cases to avoid liability by claiming sovereign compulsion of price-fixing or other anticompetitive conduct now prohibited by Chinese law or regulations.

Second Circuit Provides Much-Needed Guidance to ISPs Seeking DMCA Safe Harbors for New Technologies

A recent decision from the U.S. Court of Appeals for the Second Circuit provides ISPs seeking to introduce new technologies much-needed guidance concerning the scope of statutory copyright liability safe harbors. In *Capitol Records, LLC v. Vimeo, LLC*, the Second Circuit unanimously found that Vimeo, a website for sharing user-generated videos, was protected from copyright liability by the "safe harbor" provisions of the Digital Millennium Copyright Act of 1998 ("DMCA"), 17 U.S.C. § 512(c)—even for videos that included sound recordings fixed before February 15, 1972, which are not protected by federal copyright law.

The DMCA

The emergence of the internet in the 1990s led Congress to realize that copyright law was not well suited to the digital era—while the internet made it easier to disseminate copyrighted material by simply posting it on a website; holding websites liable for their users' activities could stifle innovation. Congress thus recognized that "without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet." S. Rep. No. 105-190, at 8 (May 11, 1998).

In an effort to solve this problem, Congress unanimously enacted the DMCA in 1998 to update copyright law for the digital age based upon a broad consensus among technology companies, service providers and content owners. This included providing service providers with statutory "safe harbors" from liability: Section 512(c) of the DMCA established a "notice-and-takedown" regime by which a service provider that meets certain threshold criteria cannot be held liable for "infringement of copyright" if, among other things, it "expeditiously" removes content specifically identified in a copyright holder's takedown notice. 17 U.S.C. § 512(c)(1)(C) & (c)(3).

The DMCA also provides that a service provider cannot avail itself of safe harbor protection, even without receiving a takedown notice, if it fails to remove copyrighted content after it becomes "aware of facts or circumstances from which infringing activity is apparent," 17 U.S.C. § 512(c)(1)(A)(ii), often referred to as *"red flag"* knowledge of infringement. However, service providers are not required to monitor for, or affirmatively seek, facts evidencing infringing activity. 17 U.S.C. § 512(m).

Music Companies' Lawsuits Against Vimeo

Vimeo operates an online video-hosting and video-sharing platform that allows its users to upload, share and watch original, creative videos ranging from family slideshows to professional films. As of 2012, Vimeo hosted more than 31 million videos, with 43,000 new videos uploaded every day. While Vimeo does not prescreen videos before they are uploaded, Vimeo's "Community Team" of employees would sometimes "interact" with videos they came across—for example, by "liking" a video, commenting on a video, or selecting a video in its "Staff Picks" channel.

In December 2009, two sets of plaintiffs—the owners of copyrights in certain musical compositions ("EMI") and sound recordings ("Capitol")—filed lawsuits against Vimeo, alleging that videos located at 199 URLs hosted by Vimeo contained their copyrighted songs and thus infringed their copyrights under federal and state law. Among these 199 videos were: (1) 18 videos that Vimeo employees "interacted" with and included nearly the entirety of the song; and (2) 20 videos that included sound recordings that were fixed before February 15, 1972, which are protected by state rather than federal law. *See* 17 U.S.C. § 301(c) ("With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067"). Neither EMI nor Capitol had sent Vimeo any takedown notices for the 199 videos.

After discovery, the parties filed competing motions for summary judgment in the district court on the limited issue of whether Vimeo was entitled to safe harbor. EMI and Capitol argued that Vimeo was not protected by safe harbor because: (1) Vimeo had "red flag" knowledge of infringement for all of the videos with which its employees interacted; and (2) in any event, the videos containing pre-1972 sound recordings are not eligible for DMCA safe harbor at all because Section 301(c) prohibits courts from limiting any state law rights in pre-1972 sound recordings. Vimeo countered that: (1) it did not have "red flag" knowledge of infringement for videos with which its employees interacted because awareness that a song was used in a video does not necessarily mean awareness of an *infringing* use; and (2) the DMCA's safe-harbor provisions apply to pre-1972 sound recordings because the DMCA applies to all claims of "infringement of copyright," including state law copyright claims.

The Courts and the U.S. Copyright Office Weigh In

At the time the parties filed their motions, no federal appellate court had yet ruled on whether DMCA safe harbor could apply to claims of infringement of pre-1972 sound recordings. A New York state appellate court had held that DMCA safe harbor protections could not apply to pre-1972 sound recordings because such an interpretation would "directly violate" Section 301(c)'s language prohibiting the limitation of state law rights in pre-1972 recordings. *UMG Recordings, Inc. v. Escape Media Grp., Inc.*, 107 A.D.3d 51, 57 (N.Y. App. Div. 2013). But a federal district court in New York had reached the opposite conclusion, holding that "the DMCA applies to sound recordings fixed prior to February 15, 1972" because the DMCA applies to any "infringement of copyright," which includes state law copyright. *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 640-42 (S.D.N.Y. 2011).

In 2011, the Copyright Office published a comprehensive report on the state of pre-1972 sound recordings. United States Copyright Office, *Federal Copyright Protection For Pre-1972 Sound Recordings* (2011), available at http://copyright.gov/docs/sound/pre-72-report.pdf. In that report, the Office argued that, while Congress *should* federalize pre-1972 sound recordings, Section 301(c), as enacted, prohibited any provisions of the Copyright Act to impede state law rights, including though DMCA safe harbor. *Id.* at 132. Criticizing the *MP3tunes* decision, the Copyright Office suggested the court there had misconstrued the statute and argued that any extension of the DMCA was "for Congress, not the courts" to determine. *Id.*

The District Court Issues a Mixed Decision for Vimeo

In a September 2013 ruling, the district court held that Vimeo satisfied the threshold requirements to qualify for safe harbor. *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 510-17 (S.D.N.Y. 2013). The court granted summary judgment to Vimeo on the vast majority of videos at issue on the ground that there was insufficient evidence Vimeo was even aware of their existence, and thus did not have the requisite knowledge for liability. *Id.* at 519-25. But the court carved out two exceptions.

First, as to whether Vimeo had "red flag" knowledge of the 18 videos with which Vimeo employees "interacted," the district court noted that a service provider can claim safe harbor only if it is not aware of facts or circumstances that would make a specific act of infringement "obvious" to a reasonable person. *Id.* at 520, (quoting *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012)). In determining whether Vimeo had "red flag" knowledge, the district court ruled that because 18 of the videos at issue included "popular" songs performed by "well-known" artists in their near "entirety," and because Vimeo staff had "interacted" with, and thus were aware of, the existence of these videos, a question of fact existed as to whether these videos were "obviously" infringing and thus not eligible for safe harbor protection. *Id.* at 521-23. The district court thus ruled that Vimeo would have to go to trial on whether it could claim safe harbor protection for these 18 videos.

Second, in a brief discussion, the district court relied on *UMG Recordings* and the Copyright Office's report in concluding that Section 301(c) of the Copyright Act barred a safe-harbor defense for alleged infringement of pre-1972 sound recordings. *Id.* at 536-37.

Upon Vimeo's request, the court certified its order for interlocutory appeal, and the Court of Appeals for the Second Circuit agreed to address these issues.

The Decision on Appeal

Pre-1972 Sound Recordings. In a 55-page opinion authored by Judge Pierre Leval, the Second Circuit addressed the status of pre-1972 sound recordings and held that liability for state law copyright claims was "indisputably" liability for "infringement of copyright," for which the DMCA provides a safe harbor. *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 89 (2d Cir. 2016). Rather than contort the DMCA into a "strained" reading, the correct conclusion was that "Congress meant exactly what it said" when it crafted the DMCA as the governing standard for the obligations of online service providers toward material uploaded to their services by users. *Id.* Most critically, an alternative interpretation of the statute permitting state law copyright claims against DMCA-compliant services would "substantially defeat" the DMCA's purpose, requiring online services to "incur enormous expenses to monitor all postings" or else face state law liability, despite Congress's express declaration that such a duty was unnecessary. *Id.* at 92-93.

The Second Circuit also specifically addressed the Copyright Office's report on pre-1972 works, stating that the report's conclusion about safe harbor was based on a "misreading" of the statute. *Id.* at 89. The Second Circuit instead clarified its prior holdings (which the Copyright Office had cited) and held that, in light of the DMCA's plain text and the "purposes the text was intended to achieve," there was "no reason to doubt" that DMCA safe harbor extended to pre-1972 sound recordings. *Id.* at 90. Finding the Copyright Office's report not entitled to deference because it was not "reasonably persuasive," the court vacated the district court's ruling on the availability of DMCA safe harbor as a defense for pre-1972 sound recordings, holding that Vimeo could seek safe-harbor protection for videos containing such recordings. *Id.* at 93.

"Red Flag" Knowledge. Pointing out that the DMCA specifically excuses service providers from the duty to "affirmatively seek" signs of infringement, the Second Circuit ruled that merely viewing a video containing a "recognizable" song, even in its entirety, is "insufficient for many reasons" to make infringement "obvious" and create a question of fact as to safe harbor. *Vimeo*, 826 F.3d at 94.

The Second Circuit directed courts to be mindful of the proper allocation of burdens of proof, and while defendants bear the burden of establishing entitlement to safe harbor, disqualification based on knowledge falls on the plaintiff. *Id.* at 95. Otherwise, service providers would be forced to "provid[e] affidavits of every person who was in its employ during the time the video was on its site, attesting that they did not know of the infringement and did not know of the innumerable facts that might make infringement obvious." *Id.* at 94. The approach most consistent with the statute, the court held, was to require copyright owners "to demonstrate that the service provider acquired knowledge of the infringement, or of facts and circumstances from which infringing activity was obvious," in order to defeat a *prima facie* safe harbor defense. *Id.* at 95.

The Second Circuit also rejected the lower court's "recognizable" standard as oblivious to the practical challenges of service providers tasked with hiring employees to evaluate accused infringing content. Because employees of an internet service bring different knowledge and experience to their work, a song's being "recognizable" is insufficient to support liability, as "60-year-olds, 40-year-olds, and 20-year-olds, even those who are music lovers, may know and love entirely different bodies of music." *Id.* at 96. Therefore, the proper test for whether infringement is obvious is from the perspective of "a hypothetical ordinary individual who has no specialized knowledge of the field of music." *Id.* Likewise, employees of services like Vimeo "cannot be assumed to have expertise in the laws of copyright." *Id.* at 96-97. The Second Circuit concluded that "a showing by plaintiffs of no more than that some employee of Vimeo had some contact with a user-posted video that played all, or nearly all, of a recognizable song is not sufficient to satisfy plaintiffs' burden of proof that Vimeo forfeited safe harbor by reason of red flag knowledge with respect to that video." *Id.* at 97.

Current Status. Following the decision, the plaintiffs moved for panel and *en banc* reconsideration, which were denied. Capitol plans to file a petition for certiorari to the Supreme Court on the issue of pre-1972 sound recordings. That petition will likely come before the Court for consideration in early 2017. (On October 25, another Second Circuit panel followed the *Vimeo* decision in affirming the district court's ruling in *MP3tunes* that DMCA safe harbor protection is available for pre-1972 sound recordings. *EMI Christian Music Group, Inc. v. MP3tunes, LLC,* No. 14-4369-cv(L), slip op. at 20 n. 6.)

Conclusion

Safe harbors are not safe unless their boundaries are reasonably clear. While written to provide broad protection to online services, the DMCA does not always draw such precise lines, and courts have had to step in to provide the certainty that online services require to run their businesses and introduce innovative technologies. As the Second Circuit succinctly put it, Congress's "failure to prescribe a roadmap" in analyzing safe harbor has left courts to "muddle through." *Vimeo*, 826 F.3d at 94. In the present political environment, it appears unlikely that the conditions that enabled Congress to unanimously enact the DMCA 20 years ago will arise again any time soon. In the meantime, the Second Circuit's decision in *Vimeo* provides much-needed guidance for courts interpreting the DMCA to ensure that the law effectuates Congress's intent that online companies which play by the rules and take the required statutory steps to combat infringement by users of their sites can rely upon statutory safe harbors in conducting their businesses. As technology continues to evolve, courts will continue to play an important role in defining the meets and bounds of the safe harbors that are vital to our digital economy.

Quinn Emanuel represented Vimeo in the matter detailed above. Q

Asia-Pacific Update

Privacy and Government-Issued Identification in Japan. In this age of proliferate information and increased cyber crime, securing personal information is critical. Even the disclosure of no more than an individual's social security number could lead to complete identity theft. Japan is now struggling with such security concerns as it enacts a new social security system.

Under the "My Number System," which became effective this year, a new "Individual Number" is assigned to every Japanese and foreign resident, as well as to businesses. To address privacy concerns, the Individual Number is supposed to be used only for limited purposes, such as tax, social security and disaster control. The Japanese system prohibits companies from using the Individual Number for any other reason; for example, companies are not allowed to use the Individual Number for routine identification needs. The My Number Act sets forth detailed regulations and severe criminal penalties for violations of the Act, including prison sentences and other austere censure.

Despite these safeguards, critics are concerned that the new Japanese system as a whole still significantly expands the use of government-issued identification, increasing the risk of personal information being made vulnerable to hackers or even inadvertently disclosed. Of particular importance is the issue of companies protecting their employees' personal information. With more sensitive details to defend, and these new strict prohibitions on how that information can and cannot be used, both foreign and domestic companies operating in Japan will need to ensure that their compliance and security protocols sufficiently address both increased risks and regulations. Failure to do so may result in significant liabilities and future litigation. Companies operating in Japan should keep a careful eye on the developing social security law and ways to prevent breaches of their internal security systems.

Protection of Disabled Employees in Japan. In stark contrast to the Americans with Disabilities Act, Japanese law, until recently, did not have enforcement mechanisms aimed at curbing disability discrimination in the workplace. While employers were obligated to employ a certain number of persons with physical or mental disabilities under the Act on Employment Promotion of Persons with Disabilities, the law was considered inadequate. It did not sufficiently prohibit discrimination, nor provide a means to ensure that disabled employees were given accommodations in the workplace. The Act, which took effect in April, addressed these shortfalls by (i) prohibiting employment discrimination on the basis of disability, (ii) making reasonable accommodation a mandatory provision, and (iii) providing a mechanism for processing and resolving complaints. Legal commentators credit the American ADA as a source for prompting the amendments.

With respect to the Act's prohibition of disability discrimination, the law was amended to explicitly prohibit discrimination against an employee with a disability, with respect to any aspect of employment. The Act clarifies that this includes discrimination in any aspect of the employment process, including recruiting, hiring, promoting, training, fringe benefits, job assignments, retirement age, and layoffs. The Act also affirmatively requires employers to provide a person with a disability equal opportunities at the recruiting and hiring stages. This reasonable accommodation requirement further encourages active participation in the workplace from those who previously had limited opportunities to do so. Compliance and acceptance could be an issue for companies facing these requirements for the first time in Japan.

Trial Practice Update

More Judges Are Encouraging the Next Generation of Lawyers to "Stand Up." Former Magistrate Judge Grewal of the Northern District of California recently posed the question: "[W]ho will try the technology cases of the future, when so few opportunities to develop courtroom skills appear?" *GSI Tech., Inc. v. United Memories, Inc.*, Case No. 5:13-cv-01081-PSG, Order Re: Oral Argument, Dkt. No. 1112 (March 9, 2016). Judge Grewal's comments on that question reflect what a growing contingent of judges and practitioners across the country have come to perceive as a systemic problem in the legal profession: a lack of "stand-up" experience for junior lawyers. He elaborated: "[A] curious trend has emerged: the seasoned trial hand appears for far more than trial itself. What once might have been left to a less experienced associate is now also claimed by senior counsel. Motion to compel discovery? Can't risk losing that. Motion to exclude expert testimony? Can't risk losing that, either." *Id.*

There are various explanations for the current state of affairs: a decrease in litigation, more judges deciding motions on the papers, requirements that "lead" counsel attend hearings, and so on. Judge Alsup, also in the Northern District of California, places the blame squarely on Big Law: "At the center of this issue rest our preeminent law firms. Not only do they tend to have the largest number of young lawyers, they also tend, regrettably, to provide the least advocacy experience to young lawyers." Alsup, William J., "Training the Next Generation: Do It! Get Out There – Be an Advocate," ABTL Report, Northern California, Vol. 24, Nos. Fall 2015 (http://www.abtl.org/report/nc/abtlnorcalvol24no2.pdf) ("ABTL Report"). Increasingly, however, judges are taking a more active role in attempt to address this situation head-on.

For the last 17 years, Judge Alsup has guaranteed oral argument on any matter when a lawyer plans to argue. ABTL Report at 2. Judge Alsup's Standing Order in civil cases states that "[i]f a written request for oral argument is filed before a ruling, stating that a lawyer of four or fewer years out of law school will conduct the oral argument or at least the lion's share, then the Court will hear oral argument, believing that young lawyers need more opportunities for appearances than they usually receive." (http://www.cand.uscourts.gov/whaorders). According to Judge Alsup, at least 100 young lawyers have had an opportunity to argue in court or try cases as a result of his encouragement. ABTL Report at 2.

Following Judge Alsup's lead, judges in the Northern District of California have adopted similar policies aimed at giving junior attorneys more "stand-up" opportunities—Judges Donato, Tigar, and Koh, to name a few. But word is spreading. Several judges in other districts have also incorporated these ideals into their standing orders. For example, Judge Guilford (C.D. Cal.) "strongly encourages the parties to give young associate lawyers the chance to examine witnesses and fully participate in trial (and throughout the litigation!)." Scheduling Order Specifying Procedures (https://www.cacd.uscourts.gov/sites/default/files/documents/AG/AD/Scheduling%20Order%20Specifying%20Procedures.pdf). According to one report, at least 17 federal district court judges have issued orders encouraging young attorneys to argue motions in court. "Ninth Circuit Judicial Conference," nextgenlawyers.com (August 16, 2016) (http://nextgenlawyers.com/2016/08/16/ninth-circuit-judicial-conference/).

Nonetheless, these orders do raise concerns. There is a fear—among clients and law firms—that a young attorney may not be prepared to argue against a more experienced litigator; or that the stakes in the case may be too high to risk sending in an associate. Even Judge Alsup acknowledges that, "[w]ithout question, partners may need to handle key dispositive motions." ABTL Report at 2. One way to militate such concerns is to permit more seasoned attorneys to assist their associates during the argument. For example, Judge Saylor (D. Mass.) advises parties that "relatively inexperienced attorneys who seek to participate in evidentiary hearings of substantial complexity, such as examining a witness at trial, should be accompanied and supervised by a more experienced attorney, unless leave of Court is granted otherwise." Standing Order re: Courtroom Opportunities for Relatively Inexperienced Attorneys (http://www.mad.uscourts.gov/boston/pdf/saylor/StandingOrderReCourtroomOppor_Bostonupdate.pdf). Another option is to have the parties pre-negotiate who will argue a given motion so that no junior advocate will be opposing a much more experienced lawyer. *See, e.g.*, *McLellan v. Fitbit, Inc.*, Case No. 3:16-cv-00036, Order, Dkt. No. 65 (N.D. Cal. September 9, 2016) (Donato, J.) ("The Court will hold oral argument on the *Brennan v. Opus Bank* issue if the parties agree that the argument will be handled by lawyers in their first six years of practice.").

For litigators, one particularly worrisome (and common) concern is that permitting a junior attorney to argue is a sign of weakness in the merits of their case. Judge Alsup disagrees with this proposition: "In my experience, young lawyers have performed at least satisfactorily and, more commonly, very well during oral argument because they have typically prepared the papers (and, if the truth be told, may know the record and the case law better than their seniors)." *Id.* at 2. By issuing orders that condition oral augment on junior attorneys' participation, the courts take some of the pressure off litigators to always send in the "top guns." For example, Judge Miller (S.D. Tex.) notes in his standard Court Procedures that "[i]n those instances where the court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing" (http://www.txs.uscourts.gov/page/judge-millers-procedures). Similarly, some judges will give the parties additional time for oral argument if junior attorneys participate. Judge Donato incorporates this policy into his Standing Order for Civil Cases: "The

Court encourages parties and senior attorneys to allow younger practitioners the opportunity to argue in court. The Court will extend motion argument time for those lawyers." (http://www.cand.uscourts.gov/jdorders).

Of course, as with anything in the legal profession, preparation is key. If a judge is not expecting a junior attorney to argue, he or she may be caught off guard. Such was the case recently in *Cohen v. Facebook* in the Eastern District of New York. Judge Garaufis took exception to the appearance of a junior associate—*sans* supervising partner—at a status conference. He told the 2013 graduate that "I don't much like the idea that [your law firm] think[s] so little of this court that they didn't send a partner here." *Rachel Cohen v. Facebook, Inc.*, Case No. 16-cv-4453, transcript of proceedings held Sept. 22, 2016. Judge Garaufis continued, "I think it is outrageous and irresponsible and insulting and you're not the person doing the insulting. It's whoever sent you here." *Id.* At a subsequent conference—this time with partners present—Judge Garaufis clarified: "Any inference that might have been achieved through the media that I was ever upset at [the associate] is totally unfounded and for that, I apologize if that is the impression that was given. I was much more concerned about the fact that the firm, your firm, would take this matter seriously on behalf of [your client]." Transcript of proceedings held Sept. 27, 2016.

Judges and practitioners alike are taking notice of all these developments. For instance, the Chiefs in Intellectual Property ("ChIPs") Next Gen Committee (nextgenlawyers.com) was established in late 2015 to promote and encourage opportunities for junior lawyers. They have drafted a set of best practices for judges and outside counsel to consider in offering junior attorneys oral advocacy opportunities. *See* "Best Practices and Considerations," http://nextgenlawyers.com/best-practices-and-considerations/. Similarly, the Federal Circuit Bar Association recently held a seminar "Transitions: The Profession and the Next Generation," in which Judge Reyna of the Federal Circuit participated, to raise the awareness of the need to provide young and diverse lawyers with courtroom opportunities.

As this trend continues to grow, judges, parties, and practitioners should be mindful of the long-term benefits of affording young attorneys opportunities to "stand up" in court, even with some attendant short-term risk. Q

Leading White Collar Attorney Richard Smith Joins Quinn Emanuel's D.C. Office

White Collar attorney Richard Smith has joined Quinn Emanuel as a partner in the firm's Washington D.C. Office. Mr. Smith was previously a partner at Norton Rose Fulbright, where he was Head of the United States Regulatory and Governmental Investigations Practice, and Chair of the firm's Global White Collar Crime and Government Investigations Practice Group, and the FCPA and International Anti-Corruption Practice Group. Mr. Smith specializes in white collar criminal defense and internal corporate investigations. He also represents corporations and their employees in grand jury investigations, and criminal trials and regulatory hearings, transnational regulatory investigation and enforcement proceedings, federal and state criminal prosecutions, criminal antitrust investigations and prosecutions, and False Claims Act and healthcare fraud investigations. Before entering private practice, Mr. Smith was the former Principal Deputy Chief for Litigation of the Fraud Section of the U.S. Department of Justice (DOJ), Criminal Division, where he supervised the litigation activities of all trial attorneys in the investigation, indictment, and trial of criminal matters involving violations of conspiracy, wire and mail fraud, bank fraud, securities fraud, false books and records, obstruction of justice, money laundering, healthcare fraud, FCPA, and RICO statutes among others. He has been recommended by legal publications such as *Legal 500* and was named a *Fellow* of the Litigation Counsel of America. Q

Victory in International Trade Dispute

The firm recently obtained an important victory for United States Steel Corporation in an administrative proceeding before the U.S. Department of Commerce concerning sales at less than fair value ("dumping") of cold-rolled steel flat products from Brazil. Dumping occurs when a foreign producer sells a good in the United States for less than what it costs the producer to manufacture the good in its home country. To combat this unfair trade practice, the Tariff Act of 1930 authorizes the U.S. Department of Commerce to impose antidumping duties on foreign goods being dumped in the United States. On September 20, 2016, the Department published its amended final determination in this matter, which imposed antidumping duties on cold-rolled steel flat products from Brazil. The Department determined the dumping margins to be 19.58% for Companhia Siderurgica Nacional ("CSN"), 35.43% for Usiminas Siderurgicas de Minas Gerais S.A. ("Usiminas"), and 19.58% for all other Brazilian exporters and producers.

The case began on July 28, 2015, when United States Steel, along with four other domestic steel producers, petitioned the Department of Commerce to investigate cold-rolled steel flat products from eight countries, including Brazil. After the Department initiated the investigation, Quinn Emanuel was retained to oversee the investigation of cold-rolled steel flat products from Brazil. On September 21, 2015, the Department selected CSN and Usiminas to serve as the mandatory Brazilian respondents in the investigation. Over the ensuing months, the Department issued to the Brazilian respondents a series of questionnaires totaling over 200 pages in order to ascertain the data necessary to determine whether they were selling cold-rolled flat steel products in the United States at less than fair value. Many of the Department's questions were taken from the dozens of comments the firm submitted identifying gaps and inconsistencies in the information suppled by the Brazilian companies.

On November 11, 2015, Usiminas announced that it would no longer cooperate with the Department, and it ceased participating in the administrative proceeding. Accordingly, Commerce ultimately calculated Usiminas's dumping margin by using the available facts and drawing an adverse inference.

In April and May 2016, the Department conducted a detailed verification in Brazil and the United States of CSN's data. Following verification, the parties submitted lengthy case briefs and rebuttal briefs. Many issues were in dispute, but perhaps the single most important was whether CSN was entitled to a duty drawback adjustment for four Brazilian taxes.

The Department was ultimately persuaded by the firm's brief and, on July 20, 2016, it issued its final determination, which calculated the dumping margin of CSN and all others to be 14.43%. In issuing this decision, the Department agreed with the firm's argument that three of the four Brazilian taxes for which CSN sought a duty drawback adjustment were not "import duties" within the meaning of the Tariff Act of 1930 and therefore were not eligible for a duty drawback adjustment. This decision will serve as a strong precedent in future international-trade proceedings to limit the ability of foreign producers to claim duty drawback adjustments.

Even after receiving a successful final determination, Quinn Emanuel continued to work towards a total victory. The firm scoured the materials supporting the Department's determination and identified an error in the calculations that caused the Department to understate the dumping margin significantly. The firm accordingly notified the Department, which then issued the amended final determination that raised the dumping margins for CSN and all others to 19.58%. With these high margins in place, this decision will be an important bulwark in ensuring a level playing field in the domestic steel market and in discouraging foreign producers from unfairly dumping goods in the United States.

Quinn Emanuel Strikes Gold

In *In re Commodity Exchange, Inc., Gold Futures and Options Trading Litigation*, the Hon. Valerie E. Caproni recently recognized that "in the era of supercomputers, big data, and sophisticated statistical analyses, it may be very difficult to hide illegal conduct that might otherwise escaped detection." 2016 WL 5794776, at *1 (S.D.N.Y. Oct. 3, 2016). This was in response to a class-action complaint filed by Quinn Emanuel with co-lead counsel Berger & Montague, which contained dozens of statistical analyses demonstrating that prices for gold were consistently behaving in suspicious ways at a particular time of day. It just so happened that, at the same time prices were acting suspiciously, a certain group of dealer banks were meeting, in secret, to purportedly perform an "auction" for gold in a process known as the "London Gold Fixing." The Court held that plaintiffs had persuasively pled that defendants, large banks and the entity that nominally handled the "auction" process, had corrupted the "auction" process and instead were using it as a forum to fix prices in their collective interests instead.

The Court's October 4, 2016 decision, spanning 73 pages, rejected many arguments the defense bar has often tried to use to combat the growing trend of data-driven complaints such as that in *Gold*. For instance, the Court rejected the attempt to have the factual allegations about the anomalous price movements discarded under a *Daubert*-like level of scrutiny. The mere fact that counsel consulted with "experts" to help them analyze the huge amount of data that exists in the world with regard to the "price of gold" did not transform allegations of fact (*i.e.*, that prices moved in a certain way, only at a certain time) into allegations of opinion that should be discarded. The Court also upheld the complaint despite a slew of potentially inculpatory counter-explanations for the price movements, such as that they were the natural result of a surge in liquidity and hedging activity in advance of the important Fixing price announcement, or perhaps an unnatural result of non-conspiratorial efforts by each bank to get out ahead of their customers. Given the expanding role of data analyses in uncovering and pleading huge cases—from RMBS, to LIBOR, to ISDAfix, and now Gold and others—the holding is an important re-affirmance that the rules of pleading apply to all plaintiffs equally. Plaintiffs who serve the public interest by ferreting out wrongdoing through the close study of the mountains of data available in the world today are not to be given extra scrutiny merely because it took complex math to come up with the allegations in their complaints.

Another common theme from the defense bar in the recent string of complex, high-stakes financial cases is that the named plaintiffs do not have standing (antitrust or otherwise) to pursue the claims against their clients. In rejecting those arguments here, the Court reaffirmed that plaintiffs in these cases should also not face extra scrutiny in this area. Plaintiffs needed only allege that they were harmed when they sold gold in a market tainted by Defendants' wrongdoing. It was not their burden to detail, at the pleading stage, exactly when the effects of Defendants' wrongdoing "wore off," versus when Plaintiffs' sold their gold, versus whether they bought their gold at a bargain price to begin with due to prior acts of manipulation. That Plaintiffs alleged they were harmed directly because the Fixing process immediately impacted prices for gold throughout the market, moreover, mooted Defendants' attempts to argue there was no "antitrust standing" merely because the Plaintiffs did not sell their gold to Defendants. This is another in a string of plaintiff-friendly rulings refusing to extend purported "privity" requirements referred to in chain-of-distribution cases (like *Illinois Brick*) to situations where it would make no sense to do so because the plaintiffs' theory of harm has nothing to do with having manipulated prices "passed on" through a chain of distribution to itself. Indeed, Defendants' arguments, if accepted, would have effectively placed *all* transactions done over an exchange outside the reach of the antitrust laws.

The complaint brings claims for violations of the Sherman Act, the Commodity Exchange Act, and unjust enrichment, on behalf of those who transacted in certain gold-related investments. Defendant Deutsche Bank settled prior to the Court's opinion. Remaining Defendants are The Bank of Nova Scotia, Barclays, HSBC, Société Générale, UBS and The London Gold Market Fixing Limited.

Pro Bono Victory

On August 30, 2016, President Obama commuted the life sentence of the firm's *pro bono* client Danielle Metz. After serving almost 24 years (half her life) in federal prison, Ms. Metz will soon be going home. Quinn Emanuel is co-counsel with Los Angeles attorney Jerry Mooney of Weston, Garrou & Mooney.

In 1993, Ms. Metz was convicted by a jury in the United States District Court for the Eastern District of Louisiana of four counts related to a conspiracy to distribute cocaine. Under the then-mandatory Sentencing Guidelines, she received three concurrent sentences of "life" without the possibility of parole, despite her age at the time of arrest (25 years old), her subordinate role in the offense vis-à-vis her husband, who was the unquestioned leader of the conspiracy, and her status as a first-time, non-violent offender.

Ms. Metz does not dispute that she participated in her husband's drug conspiracy and she accepts full responsibility for her criminal activities. Her prosecution, however, was a case study in ineffective assistance of counsel. Her trial and appellate counsel repeatedly failed to raise meritorious issues both to the district court and the Fifth Circuit Court of Appeals. For example, the Fifth Circuit expressly stated, "Danielle Metz was also improperly sentenced on the count one conspiracy for the same reason, however, she did not raise the issue on appeal and we are therefore without appellate jurisdiction to address the issue." Worse yet, none of Ms. Metz's defense attorneys objected to either the probation office, the district court or the Fifth Circuit that she had been erroneously sentenced under the so-called "Super Kingpin" provision. This provision is the primary reason that Ms. Metz received a "life" sentence.

Quinn Emanuel and co-counsel were able to convince the current United States Attorney for the Eastern District of Louisiana, Kenneth Polite, and Ambassador Clint Williamson, who served in 1993 as one of the trial attorneys who prosecuted Ms. Metz, to take a fresh look at her case. In April 2015, U.S. Attorney Polite wrote a letter in support of Ms. Metz's petition, in which he also cited Ambassador Williamson's support of President Obama's granting Ms. Metz's commutation of sentence. Without their strong support, President Obama would never have commuted her sentence.

The commutation of Ms. Metz's sentence illustrates the growing recognition that many individuals have received unduly harsh sentences under outdated mandatory sentencing laws for committing largely nonviolent drug crimes. In fact, to date, President Obama has commuted 673 sentences. It is likely he will commute more before the end of his presidency, especially in cases similar to Ms. Metz's, where the original sentence imposed by the court was disproportionately severe. Q

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