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Implementing 10b5-1 Trading Plans After SEC Amendments and *Peizer*

10b5-1 plans can be useful tools to facilitate permissible stock trading and financial planning for corporate insiders who are regularly in possession of material, nonpublic information (MNPI). A properly designed 10b5-1 plan can rebut the presumption that an insider is selling shares in reaction to adverse corporate news that has yet to be publicly disclosed. However, as a result of recent developments—namely, amendments to U.S. Securities and Exchange Commission (SEC) rules; increased scrutiny via a data-driven initiative led by the Fraud Section of the U.S. Department of Justice (DOJ) to root out abuses of 10b5-1 plans; a landmark trial conviction of a CEO on insider trading charges earlier this summer in *United States v. Terren Peizer*; and a Third Circuit decision last month affirming an asset freeze in *SEC v. Dale Chappell, et al.,* while the SEC pursues disgorgement and civil penalties against an executive for alleged insider trading—companies should take a careful look at their insider trading policies, and executives should ensure they are complying fully with their 10b5-1 plans.

Below, we describe the SEC's new rules regarding 10b5-1 plans and summarize the *Chappell* case and the *Peizer* case, which the acting head of the DOJ's Criminal Division described as "the Justice Department's first insider trading prosecution based exclusively on the use of a trading plan, but it will not be our last." DOJ Press Release (June 21, 2024), *available at* https://www.justice.gov/opa/pr/chairman-publicly-traded-health-care-company-convicted-insider-trading. We also offer key takeaways for constructing future 10b5-1 plans.

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John B. Quinn Receives Honorary Doctor of Laws Degree from Busan University

Busan University in Busan, Korea awarded firm founder John B. Quinn an honorary Doctor of Laws degree. This award recognized his contributions to the legal profession and his global impact on business litigation. President Chang Soon-heung of Busan University stated, "John Quinn's leadership and dedication to justice and innovation reflect our university's goals and values. His contributions to legal practice and influence on international arbitration align well with the direction of our university, making this award ceremony even more meaningful."

JBS Chief Legal Officer, Kevin Arquit, Joins the Firm

The Firm welcomed Kevin Arquit this month as a Partner in our DC and New York offices. Kevin was previously at JBS as the Chief Legal Officer. Before that he was General Counsel of the US Federal Trade Commission (FTC) and Director of the FTC's Bureau of Competition before going into private practice.

Sean Pak and Kevin Johnson Honored by the *Daily Journal*

San Francisco Partner Sean Pak and Silicon Valley Partner Kevin Johnson have been honored as Top Intellectual Property Lawyers for 2024 by the *Daily Journal*. Sean is Co-Chair of the firm's National Intellectual Property Litigation Practice and a founding member of its AI Practice Group; and Kevin Johnson is one of the country's premier IP trial lawyers and a founder of the firm's IP practice. The Firm congratulates them both.

Attorney Advertising

December 2022: SEC Amends the 10b5-1 Plan Safe Harbor

In August 2000, the SEC adopted Rule 10b5-1 under the Securities Exchange Act of 1934, which provided a safe harbor for a corporate insider to trade while in possession of material nonpublic information (MNPI) if the trading was executed under a prearranged written plan that was adopted in good faith at a time when the corporate insider was not in knowing possession of MNPI. *See* SEC Fact Sheet Rule 10b5-1: Insider Trading Arrangements and Related Disclosures, *available at* https://www.sec.gov/files/33-11138-fact-sheet.pdf. 10b5-1 plans must be written to operate on autopilot by specifying the formula, algorithm, or predetermined price, quantity, and dates of future securities transactions; these cannot be subject to future discretion.

In response to comments from "courts, commenters, and members of Congress that insiders have sought to benefit from the rule's liability protections while trading securities opportunistically," on December 14, 2022, the SEC adopted amendments to Rule 10b5-1 to promote confidence in the markets and strengthen protections for investors against insider trading. *See* SEC Press Release (Dec. 14, 2022), *available at* https://www.sec.gov/news/press-release/2022-222. The modifications require, among other things: (1) waiting periods (commonly referred to as "cooling-off" periods), for directors, officers, and persons other than issuers, before trading can begin under a 10b5-1 plan; (2) annual disclosures concerning the company's insider trading policies and procedures or an explanation for why the policies and procedures have not been adopted; (3) quarterly disclosures concerning the use of 10b5-1 plans; (4) updates to Forms 4 and 5 (required filings for certain securities transactions) that require certification that the subject transaction was executed under a 10b5-1 plan along with identification of the date of the plan's adoption; (5) representations by directors and officers that such plans were adopted in good faith and at a time when the directors and officers were not in possession of MNPI; and (6) a condition that all persons entering the 10b5-1 plan will act in good faith under that plan. *See id.*; *see also* SEC Fact Sheet Rule 10b5-1: Insider Trading Arrangements and Related Disclosures, *available at* https://www.sec.gov/files/33-11138-fact-sheet.pdf. The amendments also limit the use of multiple, concurrent 10b5-1 plans by persons other than the issuer and limit anyone other than an issuer to a single 10b5-1 plan per twelve-month period. *Id.* The foregoing requirements, which went into effect in 2023, post-date the 10b5-1 plans at issue in *Peizer* and *Chappell* discussed below.

June 2024: Peizer Convicted for Insider Trading Under 10b5-1 Plan

On June 21, 2024, in the first-ever criminal prosecution of insider trading based entirely on the use of a 10b5-1 plan, a federal jury in Los Angeles, California convicted Terren Peizer on one count of securities fraud and two counts of insider trading. *See* DOJ Press Release (June 21, 2024), *available at* https://www.justice.gov/opa/pr/chairman-publicly-traded-health-care-company-convicted-insider-trading. Peizer was the former CEO, executive chair, and chair of the board of directors of a publicly traded health care company, Ontrak Inc.

The prosecution presented evidence that Peizer sold Ontrak shares under two 10b5-1 plans that were adopted when Peizer was aware of MNPI—specifically, that Ontrak's largest client, Cigna, was poised to terminate a $90 million deal for Ontrak to provide services to certain of Cigna's plan customers. *See* Craig Clough, *Ontrak Founder Convicted in Novel Insider Trading Case,* Law360 (June 21, 2024), *available at* https://www.law360.com/articles/1850416. In May 2021, Peizer adopted a 10b5-1 plan to sell shares shortly after learning that the relationship between Ontrak and Cigna was deteriorating, and that Cigna had expressed serious reservations about continuing its contract with Ontrak. *See* DOJ Press Release (June 21, 2024), *available at* https://www.justice.gov/opa/pr/chairman-publicly-traded-health-care-company-convicted-insider-trading. In August 2021, Peizer adopted a second 10b5-1 plan to sell shares within minutes of being informed by an Ontrak employee engaged in the contract negotiations that Cigna would likely terminate the deal. *See id.* Against the advice of brokers, a compliance officer, and attorneys, Peizer decided against any cooling-off period and instead commenced selling Ontrak shares the day after each plan was adopted. *See id.* Six days after the second 10b5-1 plan was adopted, the company publicly announced the contract's termination and the share price dropped by over 44%. *See id.* By selling prior to the announcement, Peizer avoided over $12.5 million in losses. *See id.*

At trial, Peizer's defense counsel argued that Peizer had relied on his management team's determination that he did not possess MNPI before he had entered the trading plans and that, by engaging in the transactions, "Peizer simply wanted to exercise warrants about to expire, pay off some loans and purchase a house." *See* Craig Clough, *Ontrak Founder Convicted in Novel Insider Trading Case,* Law360 (June 21, 2024), *available at* https://www.law360.com/articles/1850416. In particular, Peizer's defense said that Ontrak's chief financial officer had signed off on his use of the plans. The jury rejected that defense, finding that the prosecution's evidence conclusively established Peizer's intent to trade unlawfully.

Peizer now faces a maximum prison sentence of 20

years for each count of insider trading and 25 years for the securities fraud count. His sentencing is scheduled for October 2024.

July 2024: Third Circuit Affirms Asset Freeze for Trading Under 10b5-1 Plan

On July 9, 2024, the Third Circuit affirmed a district court's ruling freezing the assets of Dale Chappell, the Chief Scientific Officer and a board member of Humanigen Inc., a public company, to prevent Chappell from concealing or transferring assets that could be subject to disgorgement or civil penalties for insider trading under a 10b5-1 plan. *Sec. & Exch. Comm'n v. Chappell*, No. 23-2776, 2024 WL 3335652, at *5 (3d Cir. July 9, 2024). In the wake of COVID-19, Humanigen applied for emergency use authorization (EUA) from the U.S. Food and Drug Administration (FDA) to launch its only drug with near-term revenue potential for treating inflammation in COVID-19 patients. *See id.* at 4-5, 14. While Humanigen awaited a decision on the EUA application, Chappell adopted two 10b5-1 trading plans: the first, in March 2021, set limit prices *higher* than the current market price of Humanigen stock; the second, in June 2021—at a time when the SEC argued Chappell was in possession of MNPI that the FDA would not grant an EUA unless Humanigen performed an additional confirmatory study that the company resolved not to undertake—set limit prices that were *lower* than the current market price of Humanigen stock. *See id.* at 2-3 & n.6. The June 2021 plan was approved by the CFO, but the record did not reflect the basis for approval. *See id.* at *3. In September 2021, Humanigen announced the FDA's EUA denial, and the stock fell by nearly 50%. *See id.* at *4-5. Chappell's trades prior to the announcement, including under the June 2021 trading plan, allowed him to avoid $38 million in losses. *See id.* The SEC commenced an investigation, and upon its application, the district court issued an order freezing Chappell's assets.

In affirming the asset freeze, the Third Circuit upheld the district court's determination that the SEC had shown a likelihood of success on the merits. In particular, the SEC had established a likelihood that the interim FDA feedback was tantamount to a final agency decision and was material because the subject drug of the EUA request was a "bet-the-company product," the FDA made clear that the drug would not get an EUA without a confirmatory study, Humanigen submitted the EUA request before it planned for or completed the requisite study, and Humanigen's CFO and compliance officer thought the FDA feedback warranted disclosure. *Id.* at *12, 14. The Third Circuit also found that the district court did not err in finding that the SEC had established Chappell's scienter. Chappell had "no good answer for the damning evidence of a sudden shift in pricing and volume between his March and June plans, a change that came after the FDA provided its feedback." *Id.* at *15. Chappell's rejoinder that he had spoken with brokers about selling shares before the FDA discussions did not "explain why, especially if he believed that [the drug] was about to get EUA approval, he decided to sell shares at a discount after the FDA feedback, when he was previously willing to sell them only at a premium." *Id.* at *16. Nor was the Third Circuit persuaded by Chappell's argument that the March 2021 premium was based on a bullish forecast, because that argument failed to explain why he would not also be bullish in June 2021 unless he viewed the FDA feedback as negative. *Id.*

With the freeze affirmed, the SEC will continue its efforts to seek disgorgement of ill-gotten gains, interest, civil penalties, and an order barring Chappell from serving as an officer or director of any publicly traded company. *See id.* at *5.

Key Takeaways in Constructing Future 10b5-1 Plans

1. *Continued and Increased Scrutiny.* Perhaps the most important takeaway from these recent decisions is that pre-set trading plans under 10b5-1 can provide an affirmative defense but are not an absolute shield from insider trading liability. The DOJ has said publicly that the *Peizer* case was "part of a data-driven initiative led by the Criminal Division's Fraud Section to identify executive abuses of 10b5-1 trading plans." DOJ Press Release (June 21, 2024), *available at* https://www.justice.gov/opa/pr/chairman-publicly-traded-health-care-company-convicted-insider-trading. It is inevitable that more cases will be brought under this initiative. The DOJ (and the Fraud Section in particular) for years has been proactive about using securities and commodities trading data to identify suspicious trading patterns for investigation and possible prosecution. In light of the *Peizer* conviction and the *Chappell* case, we can expect to see other investigations, civil enforcement actions, and potentially criminal prosecutions of insider trading pursuant to 10b5-1 plans.

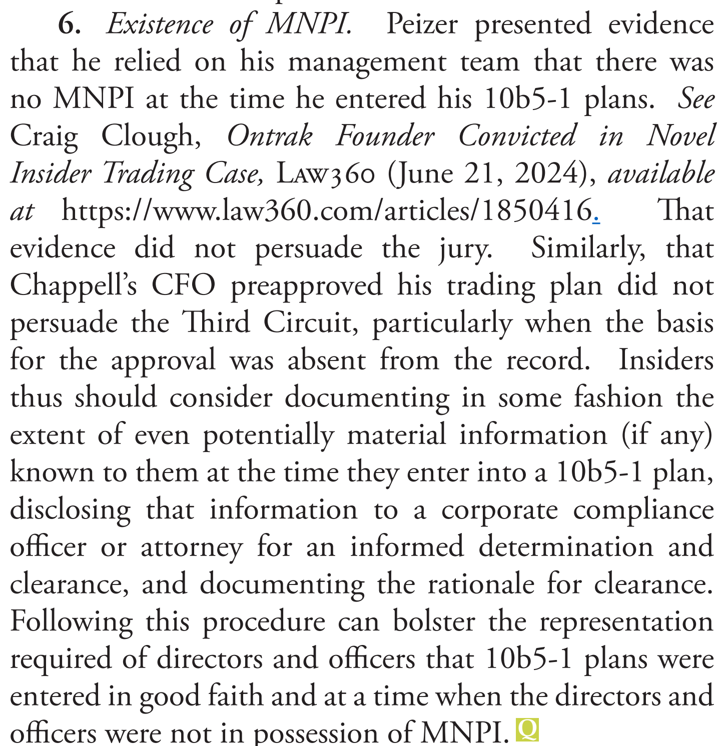
2. *Insider Trader Policies.* Given the heightened scrutiny, public companies and corporate insiders should consult with counsel to evaluate insider trading policies and 10b5-1 plans and update their policies and plans as necessary to comply with the SEC's amendments to Rule 10b5-1. Adopting and strengthening insider trading policies is recommended, particularly in light of the now-mandatory annual disclosures. One way to strengthen insider trading policies would be to require and specify a 10b5-1 preclearance process that involves internal counsel and compliance officers. It can also be helpful to set predetermined periods when 10b5-1

plans can be adopted. The window should be set for a time when corporate insiders are least likely to possess MNPI. Alternatively, the insider trading policies can specify blackout periods—*e.g.*, beginning before the quarter ends and extending until the quarter's earnings announcement when corporate insiders are most likely to possess MNPI—when plans cannot be entered.

3. *Volume Limitations.* Consider including a volume maximum in 10b5-1 plans. Peizer sold hundreds of thousands of shares on a daily basis under his 10b5-1 plan. *See* Craig Clough, *Ontrak Founder Convicted in Novel Insider Trading Case,* Law360 (June 21, 2024), *available at* https://www.law360.com/articles/1850416/print?section=corporate. And Chappell sold 3,835,000 shares in a roughly two-month span under his 10b5-1 plan. *Sec. & Exch. Comm'n v. Chappell*, No. 23-2776, 2024 WL 3335652, at *4. Now that the DOJ is using data analytics to monitor 10b5-1 trading, large-volume transactions in a short time period will likely be flagged. Setting relatively modest volume restrictions that limit sales to a specified daily percentage can help combat suspicion of opportunistic trading and avoid signaling to the market that the insider is selling because of negative news or to a lack of confidence in the issuer.

4. *Simplicity.* Because the SEC now requires quarterly disclosures regarding the use of 10b5-1 plans, it will be helpful to design simple 10b5-1 plans. Any plan should make clear that the covered transactions' date, quantity, and price are set by formula, algorithm, or some other predetermined mechanism and are not subject to future discretion. Note that, as in *Chappell,* any dramatic shifts in volume and/or pricing between consecutive trading plans can lead to suspicion or increased scrutiny.

5. *Plan Length.* The SEC now limits persons other than the issuer to one 10b5-1 plan per 12-month period. Accordingly, when constructing a plan, consider what needs to be accomplished during the full 12 months as the plan cannot be modified until the close of that period. Financial goals, vesting periods, expiration dates, and other factors should be considered not only for the 12-month period of the subject trading plan but also for the time period before the next plan can take effect. Generally, longer plans are less likely to raise suspicion than shorter plans. However, corporate insiders will need to plan around the new mandated cooling-off periods. Unlike the situation in *Peizer,* cooling-off periods are no longer optional. Before trading under a plan, directors and officers must wait either 90 days after a plan is adopted or two business days after disclosure of the issuer's financial results for the quarter in which the plan was adopted or modified (but not to exceed 120 days), whichever is later. *See* SEC Fact Sheet Rule 10b5-1: Insider Trading Arrangements and Related Disclosures, *available at* https://www.sec.gov/files/33-11138-fact-sheet.pdf. Persons other than directors, officers, or the issuer must wait 30 days before trading under a plan. *Id.* Although cooling-off periods are helpful to rebut the notion of opportunistic trading, a 90- to 120-day cooling-off period can be up to four times the 30-day length that typically was recommended prior to the new rules. Accordingly, this lengthy mandated cooling-off period for directors and officers may decrease the utility derived from 10b5-1 plans.



6. *Existence of MNPI.* Peizer presented evidence that he relied on his management team that there was no MNPI at the time he entered his 10b5-1 plans. *See* Craig Clough, *Ontrak Founder Convicted in Novel Insider Trading Case,* Law360 (June 21, 2024), *available at* https://www.law360.com/articles/1850416. That evidence did not persuade the jury. Similarly, that Chappell's CFO preapproved his trading plan did not persuade the Third Circuit, particularly when the basis for the approval was absent from the record. Insiders thus should consider documenting in some fashion the extent of even potentially material information (if any) known to them at the time they enter into a 10b5-1 plan, disclosing that information to a corporate compliance officer or attorney for an informed determination and clearance, and documenting the rationale for clearance. Following this procedure can bolster the representation required of directors and officers that 10b5-1 plans were entered in good faith and at a time when the directors and officers were not in possession of MNPI. Q

NOTED WITH INTEREST

Amendment to Federal Rule of Evidence 702, a Year in Review

Federal Rule of Evidence 702 governs admissibility of expert witness testimony in federal courts. In April 2023, the Supreme Court ordered that Rule 702 be amended in two respects. First, it was amended "to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is *more likely than not* that the proffered testimony meets the admissibility requirements set forth in the rule." Advisory

Committee Notes to 2023 Amendment to Fed. R. Evid. 702. Second, it was amended "to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." *Id.*

To effectuate these dual goals, the language of Rule 702 was revised as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise <u>if the proponent demonstrates to the court that it is more likely than not that:</u>

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied <u>expert's opinion reflects a reliable application of</u> the principles and methods to the facts of the case.

The committee notes were explicit that the amendments were not intended to change the law but merely to clarify the correct Rule 702 analysis that courts should have—but unfortunately often had not—applied all along. Advisory Committee Notes to 2023 Amendment to Fed. R. Evid. 702.

So now, a year later, what has the clarification done? The short answer is that the practical effect of these amendments has been subtle. *See McCoy v. Depuy Orthapedics, Inc.*, No. 22-CV-2075 JLS, 2024 WL 1705952, at *9 (S.D. Cal. Apr. 19, 2024) ("Rule 702's 2023 amendments do not represent the sea change Defendants contend."). With that said, a review of Rule 702 cases from the past year reveals a noteworthy change in at least two areas: admission of testimony from non-scientific industry experts and the related admission of expert testimony on "toolmarks," *i.e.*, what tools made a particular mark, which is often an aspect of forensic analysis. In sum, courts are setting a slightly higher bar for the admission of such testimony than had applied before, and this is in keeping with the Advisory Committee's note that the 2023 amendment "is especially pertinent to the testimony of forensic experts in both criminal and civil cases." Advisory Committee Notes to 2023 Amendment to Fed. R. Evid. 702. Below are several examples of cases excluding evidence under Rule 702 in reliance on the 2023 amendments:

Non-Scientific Industry Experts:

In *Skaggs v. Ferrellgas, Inc.*, 2023 WL 8711898 (S.D. Ind. Dec. 18, 2023), an expert prepared a report with several opinions on propane dispensers "based upon his '45 plus years of experience within the safety and health profession.'" *Id.* at *3. The Court excluded that report because, "[i]mportantly, Rule 702(d) has been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology" and "[a]n expert who is addressing non-scientific issues must still employ reliable methods and principles in forming their opinions, and [this expert] has not done so." *Id.*

Similarly, in *Farmers Ins. Co. v. DNS Auto Glass Shop LLC*, 2024 WL 1256042 (D. Ariz. Mar. 25, 2024), the defendants sought to have an expert testify to certain "prevailing competitive price ranges for windshield replacement service components," such as glass and labor. *Id.* at *10. After explicitly calling out the 2023 amendments to Rule 702, the court held that because the expert offered only his "general experience in the industry, coupled with vague references to conversations he's had over years" to support his opinions—in other words, nothing more than his own *ipse dixit*—the defendants had "not shown by a preponderance of the evidence that [the expert's] opinion me[t] the requirements of Rule 702." *Id.*

In *United States v. Diaz*, No. 24-CR-0032 MV, 2024 WL 758395, (D.N.M. Feb. 23, 2024), the court relied on the new Rule 702 amendments to prohibit law enforcement officers from providing expert testimony based on their industry experience that a certain "amount of cocaine … exceeds personal use and is instead consistent with distribution," about "the value of the cocaine seized in this case," and "that drug traffickers frequently carry firearms and do so in order to protect themselves and their proceeds." *Id.* at *11; *see also Austin v. Brown*, No. 2024 WL 1602968, at *24 (D. Colo. Feb. 22, 2024) (recommending based on Rule 702's 2023 amendments that certain testimony of a self-proclaimed "false-confession expert" be excluded because it was not sufficiently verifiable).

Last, in *Post v. Hanchett*, 2024 WL 474484, (D. Kan. Feb. 7, 2024), a plaintiff tried to admit expert testimony about the cause of truck-tire blowouts from a witness who was "a second-generation trucking expert with over 15 years of combined experience as a truck driver, truck-driving instructor, truck-driving consultant, accident investigator, [and] forklift and heavy equipment operator." *Id.* at *5. The court again pointed to the 2023 Rule 702 amendments and found that the plaintiff failed to demonstrate that her expert was duly qualified merely by his industry experience. *Id.*

Toolmark Testimony:

In *United States v. Graham*, No. 4:23-CR-00006, 2024 WL 688256, (W.D. Va. Feb. 20, 2024), a criminal defendant argued "that the field of firearm and toolmark analysis is inherently flawed," and thus an expert's opinion that was "based on [the] application of the prevailing methodology

in that field, [wa]s unreliable under *Daubert*, and … should be excluded." *Id.* at *1. The court disagreed with that far-reaching conclusion but determined nonetheless that "based on Rule 702's recent [2023] amendments" the toolmark testimony had to be limited to conform with the U.S. Department of Justice's uniform standards. *Id.* This was because the DOJ's standards ensured that the jury would not take the expert's "word for absolute truth" and that the testimony would thus satisfy the amended Rule 702's concern that "that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Advisory Committee Notes to 2023 Amendment to Fed. R. Evid. 702.

Finally, in *United States v. Briscoe*, 2023 WL 8096886, at *12 (D.N.M. Nov. 21, 2023), the court similarly noted the "tension between the long history of routine admission of toolmark identification evidence, and a rising tide of criticism regarding forensic evidence in general." *Id.* at *12 (quoting *United States v. Johnson*, 2019 WL 1130258, at *12 (S.D.N.Y. Mar. 11, 2019), *aff'd*, 861 F. App'x 483 (2d Cir. 2021). Because the "proposed amendments to Rule 702 reflect the Advisory Committee's intention to limit the routine admission of forensic expert testimony and empower courts to fulfill their gatekeeping obligation," the court substantially limited a toolmark expert's testimony. *Id.*

* * *

These cases do not represent a large shift in Rule 702 and *Daubert* precedents—and they should not, given that Rule 702's amendments explicitly sought to clarify rather than change the law. But they do show that, moving forward, courts may point to the 2023 amendments to justify slightly more scrutiny towards the admissibility of expert testimony, particularly in the identified areas of nonscientific industry experts and toolmark evidence (and in analogous fields). Q

PRACTICE AREA NOTES

EU Litigation Update:

Legal Professional Privilege in the US and EU: Lacunae and the Case for Convergence.

Introduction

It is common ground on both sides of the Atlantic that communications covered by Legal Professional Privilege (LLP) are, in principle, excluded from disclosure, cannot be seized, and cannot be used as evidence in regulatory or Court proceedings. It is also common ground that the application and scope of LPP varies significantly between countries and legal systems which, in turn, results in inconsistencies and different treatment of a single piece of evidence depending on where it is physically located or electronically stored, who has seen it, and the agency/litigant attempting to seize it. In the context of European competition law enforcement, the question arises whether the European Commission can require corporations under investigation to disclose material that is protected by LPP in a non-EU jurisdiction. The issue is of obvious importance to international corporations and legal practitioners involved in cross-border transactions and investigations.

Current State of EU LPP

There are no pan-European rules governing the notion and application of LPP across the EU, including in the context of competition law enforcement, meaning that each Member State is left to decide the scope and application of LLP within its own domestic jurisdiction. Therefore, developing the notion of LPP at EU level has been left up to the EU Courts (including the European Court of Human Rights (ECtHR)).

In the leading case C-155/79- *AM&S v Commission (AM&S)* the Court of Justice of European Union (CJEU) held that the predecessor of Regulation 1/2003 (Regulation 17/62) should be interpreted as granting confidentiality to written communications between an independent, EEA-qualified external lawyer and their client(s) if such correspondence was sent to the client for purposes of exercising its rights of defence in relation to a European Commission investigation. Therefore, *AM&S* established a two-pronged test for the protection of written communications between lawyers and their clients which provides that the communication must: (i) be made "for the purposes and in the interests of the client's rights of defence" (the "first *AM&S* condition"); and (ii) "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment" (the "second *AM&S* condition").

It bears emphasizing that the recognition of LPP in *AM&S* was at the time novel to many Member States and the EU itself; and one must remember that it was also before the Lisbon Treaty entered into force, before the resulting accession to the European Convention on Human Rights (ECHR), and before the recognition of the Charter of Fundamental Rights of the European Union (Charter) as primary EU law. Notably, in delivering her Opinion in *AM&S*, Advocate General Kokott considered the scope of LPP protection in individual Member States and identified only six which, at that time, recognized LPP protection for in-house counsel who were registered

with a Bar of a Member State (namely Ireland, Greece, the Netherlands, Poland, Portugal, and the United Kingdom—at the time a Member State).

Three decades years later, in Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals a.o. v Commission* (*Akzo*), the CJEU endorsed the proposition that in-house counsel are not independent if bound by an employment relationship with the client, even if the lawyer in question is enrolled with a Bar of a Member State and therefore subject to stringent professional and ethical obligations. Although both *AMS* and *Akzo* deal with the respective specific, narrow circumstances before the Court, today they are still considered the leading precedents for defining the application of LPP in EU competition proceedings.

However, important developments over the last 14 years have possibly rendered *AM&S* and *Akzo* outdated. The protection afforded to attorney-client communications is now enshrined in Article 7 of the Charter and the jurisprudence of the ECtHR. Article 8(2) ECHR makes clear that there can be no interference by a public authority with the exercise of the right to privacy (and other rights deriving from it, including the LPP protection) with very limited exceptions such as in the interests of national security, public safety or the economic well-being of the country and any such limitations must be compatible with the rule of law. It is also settled ECtHR case law that individuals who consult a lawyer can reasonably expect that their communication is private and confidential.

Recently, in the landmark Case C-694/20 *Orde van Vlaamse Balies and Others*, (*OVB*) the CJEU took account of the ECtHR's case law and went a step further than the earlier case law to find that LPP applies to all communications between EEA-qualified external lawyers and their clients without it being limited to advice relating to the exercise of the rights of defense. In other words, *OVB* clarified the first *AM&S* condition (see above) but did not make any reference to the second *AM&S* condition relating to in-house counsel.

The recognition of LPP amongst EU Member States has also evolved significantly over recent years. Of the Member States identified by AG Kokott in *AM&S* as offering at that time no LPP protection to in-house counsel communications, several have since reconsidered and are now extending LPP protection to such communications, especially when they are duly qualified under the laws of the state where they practice, including Hungary, Spain, Belgium, and France, whereas in others (such as Italy), there are ongoing debates on the issue.

Current State of LPP in the US and the Legal Lacuna

In the US, LPP is broader than in the EU and extends to in-house counsel communications, and to in-house counsel work product prepared for a corporate client. The LPP protection originates from the 1947 Supreme Court case, *Hickman v. Taylor.* The extended protection is recognized throughout the US, by the federal courts and the courts of all US states alike.

Further, under US law, LPP must be strictly safeguarded to prevent or reduce the risk of "waiver of privilege." If a communication protected by LLP is disclosed *voluntarily* to a third party, LPP can no longer be relied upon to protect that communication from discovery/disclosure from *e.g.*, antitrust agencies or other parties in litigation, as parties may not pick and choose what information protected by LPP will be disclosed and to whom. US case law generally requires a court order to compel the production of privileged material to avoid the severe consequences of a waiver of privilege.

The severe consequences that can flow from a waiver of privilege in the US becomes apparent when one considers the divergence between US and EU on the scope of LPP protection which, as detailed above, is significantly more limited in the EU. For example, if an undertaking disclosed to the European Commission communications that are protected by LPP in the US (*e.g.*, communications with in-house counsel) in order to respond, for example, to a request for information, the undertaking in question could be exposed, for example, to the risk of a potential waiver of legal privilege should a US court find that those communications covered by US LPP were *voluntarily* disclosed in the EU. Voluntary disclosure of US LLP communications would in turn mean that communications that would normally be off-limits to US competition authorities and private plaintiffs, could be subject to discovery by any litigants/adverse parties in pending and future U.S. litigation which would seek to obtain the disclosure of the now non-privileged documents.

Consideration must therefore be given to whether the disclosure of documents and communications to the European Commission in response to a request for information or during a dawn raid could be held to be "voluntary." However, U.S. case law on point is particularly limited. One significant and instructive opinion is in *re Vitamins Antitrust Litigation* No. MC 99-197 (TFH), 2002 WL 35021999 (*Vitamins*). *Vitamins* adopted the principle that, absent true and demonstrable compulsion, disclosure likely will result in waiver. *Vitamins* also illustrates the risk that the production of US LPP material specifically to the European Commission, despite the contention that failure to comply would result in serious consequences, including fines, could still result in a waiver of privilege.

Following the reasoning in *Vitamins*, it would seem that disclosing material protected by LPP in the U.S.

in response to a European Commission's simple or even mandatory request for information (i.e., one adopted under Article 18(3) of Regulation 1/2003) would in all likelihood be considered as a voluntary disclosure under US law. *Vitamins* also suggests that the mere risk of potential of future penalties for failure to comply with the Article 18(3) mandatory request may not be sufficient to meet the requisite level of "compulsion" to protect against being held by a US court to have waived privilege voluntarily.

Practice, Further Challenges, and Considerations

For the time-being, in practice, it is not uncommon that parties subject to EU merger control proceedings take the risk and disclose documents covered by US LPP (sometimes in a restricted manner) in the interest of expediting the clearance of the proposed transaction which could otherwise be blocked. Also, within the context of antitrust investigations and in response to requests for information, the European Commission often will not require the disclosure of communications protected by LPP with external non-EEA-qualified lawyers (*e.g.*, US-qualified external counsel), but will not recognize LLP protection for in-house communications, even where another country recognizes that such communications are protected by LPP in its jurisdiction.

There is also no precedent from the EU Courts directly on-point; the only cases that directly addressed the issue were ultimately withdrawn. It is worth noting in the context of the ongoing review of Regulation 1/2003 the subject of extension of LPP to in-house counsel has been raised. It remains to be seen whether the European Commission is ready to provide clarity on the matter given the recent developments in Member States and increasing pressure from stakeholders, though it is unlikely that it will alter its established practice without solid precedent from the EU Courts.

The issue of whether the European Commission – an EU institution – can compel the production of an international corporation's US LPP communications has additional important implications as it ultimately pertains to whether a foreign agency can interfere with the sovereignty of another country by seeking to obtain documents that are legally privileged under the laws of the country in question. In the absence of case law addressing that question, there is no answer as a matter of Union law on whether the privileged status of the pertinent material should be determined by reference to the laws of the *requested* state (i.e., the state where the documents are located,) or the laws of the *requesting* state.

The issue becomes yet more complicated in light of the extensive use of electronic communications and the data storage location which may also affect the assessment of which law is applicable (*e.g.*, how would communications that are only located in and accessible from the US and considered privileged under US law should be treated in case the European Commission requested their disclosure?).

Another aspect of the issue that requires further consideration is whether, in the case of international group of companies, the European Commission can indeed compel their EU subsidiaries to produce documents under the sole custody and control of subsidiaries located outside the EU.

In light of the foregoing considerations, the development of human and fundamental rights legislation, the growing trend among EU Member States to extend LPP protection to communications between in-house counsel and their clients and the sweeping consequences that a potential waiver of privilege could entail for U.S. and/or multinational organizations, it is perhaps time for the EU Courts to reconsider and extend the application of *Akzo* and *AM&S* to in-house counsel communications, when the opportunity arises.

Antitrust Litigation Update:

Bad Blood: DOJ seeks to break up Live Nation/ Ticketmaster

On May 23, 2024, the U.S. Department of Justice, along with 29 state attorneys general and the District of Columbia, sent shockwaves through the live entertainment industry by filing suit against Live Nation and its wholly-owned subsidiary, Ticketmaster, seeking to break-up a merger that the DOJ originally approved back in 2010. The company is no stranger to controversy, and recently faced intense criticism from Taylor Swift and her fans arising from Ticketmaster's failure to effectively manage sales of *Eras tour* tickets. Asserting claims under the Sherman Antitrust Act and various state antitrust statutes, they allege that Live Nation-Ticketmaster unlawfully wields its dominant position in the live music ticketing and promotion markets to the detriment of concert-goers who are forced to pay inflated "service fees," musical artists who have less options for promoters, large venues and amphitheaters which are essentially forced to use Ticketmaster's ticketing services, and independent promoters that are driven from the market. This is sure to be a closely-watched lawsuit that will have broad implications for the live music industry in America going forward.

From the moment that Live Nation, the largest concert promoter in the U.S., announced in February 2009 that it would be acquiring Ticketmaster, the largest ticketing company in the U.S., there was skepticism and debate around the potential effect on competition in the live entertainment industry. Indeed, over the 15 years preceding the merger, Ticketmaster maintained a market

share of over 80% of the primary ticketing market in the United States. However, one year later, the deal was greenlighted by the DOJ, but with conditions and restrictions.

Recognizing that this merger posed a threat to competition in the live entertainment ticketing and promotion markets, the DOJ imposed a consent decree that required Ticketmaster and Live Nation to adhere to certain structural and behavioral restrictions. Structural restrictions included requiring Ticketmaster to (i) license its ticketing platform to AEG (a rival promoter and venue owner) and (ii) divest a line of business that, at least in theory, could compete with Ticketmaster. Behavioral restrictions were aimed at preventing the post-merger company from engaging in various forms of anticompetitive conduct, and included prohibiting retaliation against venues that chose not to work with Live Nation-Ticketmaster, and not allowing the merged company to force venues to purchase bundled promotion and primary ticketing services.

In late 2019, the DOJ and Live Nation/Ticketmaster agreed to extend the consent decree until 2025 and to modify some of its terms and restrictions, with the DOJ noting at that time that Live Nation had "repeatedly" violated the behavioral restrictions included in the original agreement. The amended decree, among other things, included additional provisions (i) prohibiting Live Nation from retaliating against venues that did not use Ticketmaster's services, (ii) mandating the appointment of an independent monitor to investigate and report on Live Nation's compliance with the consent decree, and (iii) ordering Live Nation to appoint an internal antitrust compliance officer. Despite these measures, on May 23, 2024, the DOJ filed suit against Live Nation and Ticketmaster alleging anticompetitive and predatory conduct that surpass the bounds of the consent decree.

The case is now before the Honorable Judge Arun Subramanian in the Southern District of New York. Unsurprisingly, the complaint includes allegations that Live Nation-Ticketmaster violated the consent decree by using its dominant market position to coerce venues into purchasing its ticketing services using multiyear exclusivity contracts, and the threat of retaliation if the venue refused. There are also allegations that in recent years, Live Nation-Ticketmaster has harmed competition throughout the live music industry by acquiring nascent potential competitors and expanding its "flywheel" business model which "captures fees and revenue from concert fans and sponsorship, uses that revenue to lock up artists to exclusive promotion deals, and then uses its powerful cache of live content to sign venues into long-term exclusive ticketing deals, thereby starting the cycle all over again."

Indeed, the complaint goes far beyond the conduct that was intended to be reined in by the consent decree, alleging anticompetitive conduct affecting nearly every aspect of the live music industry in America. For instance, it's alleged that Live Nation-Ticketmaster has for years prevented musical artists from performing at its network of amphitheaters unless they use Live Nation's promotional services, which the DOJ argues constitutes an unlawful tying arrangement that limits the ability of artists to choose promoters when performing at amphitheaters. Further, being the dominant primary ticketer for venues hosting the most popular musical acts allows the company to charge exorbitant "service fees" on each ticket sold, as most concert-goers have likely experienced.

This case is a further indication of the DOJ's willingness to aggressively pursue monopolization cases, and not only against tech giants like Apple and Google. At the same time, the government has recently suffered high-profile loses in its antitrust actions, with *Microsoft-Activision* as a prime example. A DOJ loss could lead to further industry consolidation under the Live Nation-Ticketmaster umbrella, and a DOJ win could reshape how musical artists promote their shows and how concert-goers attend live performances. The stakes have never been higher, as the outcome of this case will have ripple effects throughout the live music industry. Are you ready for it?

White Collar Litigation Update:

Practical Considerations Relating to the Conclusion of Corporate DPA-Related Obligations

On May 14, 2024, the U.S. Department of Justice (DOJ) made global headlines when it apprised the U.S. District Court for the Northern District of Texas that it had notified The Boeing Company (Boeing) of its determination that Boeing had breached the deferred prosecution agreement (DPA) executed by the DOJ and Boeing. Approximately 40 months earlier, on January 7, 2021, the DOJ had filed the DPA – which had a term of 36 months – with the Court. This was an agreement resolving Boeing's violations of U.S. law stemming from certain of its non-disclosures and misrepresentations to the Federal Aviation Administration (FAA) in connection with the agency's evaluation of Boeing's 737 MAX aircraft.

The DOJ over the past decade has increasingly relied upon DPAs as a tool to sanction companies (and individuals) for U.S. criminal law violations in lieu of guilty pleas or prosecutions that go to trial. In practice, DPAs work generally as follows: the DOJ prepares and files criminal charges against the company (typically in the form of a criminal information, as opposed to an indictment) but requests that the court defer further action on the matter for a specific period of time (referred

to generally as the "term"), at the conclusion of which and if certain conditions are met by the company, the DOJ will move to dismiss the charges. These conditions are set forth in the DPA and typically comprise, for example, a combination of the following: (1) the payment of a monetary penalty (*e.g.*, criminal fine, disgorgement, restitution); (2) ongoing cooperation with the DOJ, including by, as requested by the DOJ, producing information and documents and making employees available for interviews and/or testimony at trials of third parties; (3) not committing any U.S. federal law violations; (4) disclosures of any allegation or evidence of conduct that may constitute a violation of the U.S. laws that were the basis for the DPA; (5) disclosures of any findings by local enforcement authorities or regulators concerning deficiencies in the company's compliance program; (6) submission of reports to the DOJ, on a regular basis (*e.g.* annual), regarding the company's compliance program, including the implementation of remedial measures; (7) certifications by senior management about the company's compliance with its disclosure obligations; and (8) retention of an independent monitor (by the company) to evaluate and submit a report to the DOJ regarding the company's compliance program.

In several high-profile cases in recent years, the DOJ determined that the company in question violated the DPA during its term and, as a result, undertook remedies afforded to it in the case of a breach. These include, for instance, abrogating the DPA and requiring that the company plead guilty (*e.g.*, Ericsson and UBS), imposing an additional monetary penalty (*e.g.*, Barclays), extending the term of the DPA (*e.g.*, Moneygram and Standard Chartered), and extending the term of the independent monitor (*e.g.*, Deutsche Bank).

Therefore, although noteworthy, it was not unprecedented for the DOJ to have concluded Boeing breached the DPA. Nor was it entirely unexpected given the public reports in the preceding months that the DOJ was evaluating the possibility of such a breach. That the DOJ was assessing whether Boeing had fully complied with the DPA was ongoing even prior to the January 5, 2024 incident involving a 737 MAX aircraft operated by Alaska Airlines where a panel became loose and was ripped off during a flight. Notably, however, another key point of interest in the notification was the fact that the DOJ referred specifically to its rights, pursuant to explicit language in the DPA, to what it called a six-month "evaluation period" following the conclusion of the 36-month term. Specifically, on May 14, 2024, the DOJ wrote as follows to the Court:

> Nothing in the notification to Boeing limits the Department's ability to determine, during the remainder of the six-month evaluation period following the end of the term of the DPA, that Boeing breached any other obligations set forth in the DPA, should the facts so warrant. Nor does the government's breach notice to Boeing limit the Department's *ability to continue investigating potential misconduct by Boeing either during the remainder of the six-month evaluation period* or thereafter.

(Government Letter to the Honorable Reed O'Connor, *United States* v. *The Boeing Company*, Case No. 4:21-cr-00005 (May 14, 2024) (Dkt. No. 199).) (Emphasis added).

In particular, the provision in the Boeing DPA referring to this six-month period appears in paragraph 25, which states as follows:

> The Fraud Section further agrees that if the Company fully complies with all of its obligations under this Agreement, the Fraud Section will not continue the criminal prosecution against the Company described in Paragraph 1 and, at the conclusion of the Term, this Agreement shall expire. *Six months after the Agreement's expiration*, the Fraud Section shall seek dismissal with prejudice of the Information filed against the Company described in Paragraph 1 and agree not to file charges in the future against the Company based on the conduct described in this Agreement, the attached Statement of Facts, or the Information. *If, however, the Fraud Section determines during this six-month period that the Company breached the Agreement during the Term*, as described in Paragraphs 26-30, *the Fraud Section's ability to extend the Term, as described in Paragraph 3, or to pursue other remedies, including those described in Paragraphs 26-30, remains in full effect*.

(Emphasis added). Of particular interest is that this language is unequivocal regarding the preservation of the DOJ's rights and remedies in the event it determines a DPA breach at any point during the six-month period following the end of the term. Furthermore, although the language does not refer specifically to the DOJ's investigatory powers during these six months, such authority is inherent. This is because the DOJ could conceivably only "determine [that a breach took place during the term] during this six-month period" through additional investigation that takes place after the end of the term.

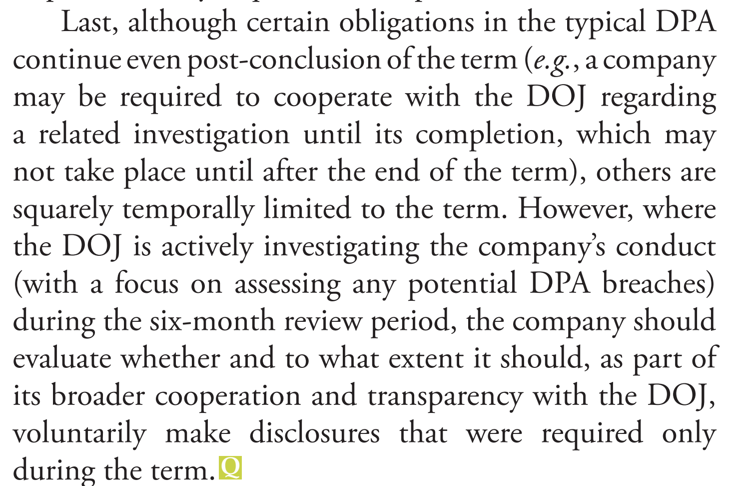
Based upon a sample review of corporate resolutions dating back to 2013, the DOJ—in particular, the Fraud Section of the Criminal Division—has used the aforementioned provision (paragraph 25 of the Boeing DPA) in the vast majority of DPAs since no later than October 2020. Beginning in mid-2015, and with certain exceptions, the DOJ had already begun affording itself up to six months to move to dismiss the charges following the end of the DPA term as compared to precedents that

provided timeframes of 10 or 30 days only. These earlier DPAs did not also, however, contain express language regarding the DOJ's rights and remedies in the event it determined a breach of the agreement during that six-month period. Rather, these earlier DPAs set forth that, in the event the DOJ identified a breach—"regardless of whether [it] become[s] aware of such a breach after the [t]erm is complete"—the company would be "subject to prosecution for any federal criminal violation of which [the DOJ] ha[s] knowledge." As this particular clause appeared in a separate provision from that pertaining to dismissal of the charges and was neither specifically tied to the six-month period nor made clear that all of the DOJ's remedies remained intact (including the ability to extend the term), it arguably afforded the DOJ weaker protections than the phrasing that has been used since Fall 2020.

The more robust language pertaining to the DOJ's rights and remedies during the six months following the end of the DPA term has important ramifications for companies:

First, even assuming a company has fully complied with all of its obligations, it should expect the DOJ to take the full six months to move to dismiss the charges. There were over 35 DPAs in the review sample that included the provision (including those executed as recently as August 2023) and, in nearly all those instances where the DPA term is complete, the DOJ moved to dismiss at or around the expiration of the six-month period. Indeed, over the past several years, at the hearing during which the Court consider entry of the DPA, the Court has typically agreed to deferring both the entirety of the DPA term (*e.g.*, 36 months) plus an additional six months (in view of the aforementioned provision) for Speedy Trial Act purposes and, in certain cases, set status conferences at the conclusion of those 42 months. Accordingly, in connection with any internal and external communications, it is important to make clear that the charges very likely will not be dismissed right at the end of the term (commonly three years) or otherwise not convey specific expectations as to the timing of dismissal.

Second, a company should be prepared to receive potential requests for cooperation from the DOJ during the post-term six-month review period. These requests could range possibly from those relating to disclosures that the company made during the term pursuant to its obligations under the DPA (such as those pertaining to compliance enhancements) or issues about which the DOJ has obtained information from third parties (for example, as a result of separate investigations). A non-U.S. company that must comply with any local blocking, data protection or other statutes limiting the scope of direct deliveries of information and documents to the DOJ (as opposed to having to rely on the mutual legal assistance channel) should evaluate how to navigate such restrictions within the six-month period in order to provide timely responses to any requests for cooperation.



Last, although certain obligations in the typical DPA continue even post-conclusion of the term (*e.g.*, a company may be required to cooperate with the DOJ regarding a related investigation until its completion, which may not take place until after the end of the term), others are squarely temporally limited to the term. However, where the DOJ is actively investigating the company's conduct (with a focus on assessing any potential DPA breaches) during the six-month review period, the company should evaluate whether and to what extent it should, as part of its broader cooperation and transparency with the DOJ, voluntarily make disclosures that were required only during the term. Q

VICTORIES

Landmark Victory for International Arbitration Practice

Quinn Emanuel recently won over USD 14 billion for Uniper Global Commodities in an arbitration against Gazprom Export. The Tribunal also confirmed Uniper's right to terminate a series of long-term gas supply contracts immediately.

This Award – which constitutes one of the largest reported awards in international arbitration – resulted in European gas prices jumping within hours of Uniper publishing the result of the award.

Uniper suffered substantial losses due to the Russian gas supply restrictions in 2022. From June 2022, Gazprom Export initially supplied less natural gas to Germany and then stopped completely. Uniper had to procure gas for its customers by other means, in some cases at extremely high market prices, which at times led to additional costs for Uniper in the hundreds of millions of euros every day. Uniper was only able to bear these additional costs with support from the German State. This is when they called Quinn Emanuel for support.

Quinn Emanuel commenced arbitration proceedings against Gazprom Export on Uniper's behalf at the end of 2022. The tribunal was seated in Stockholm and applied Swiss law. The dispute turned on the question whether Gazprom Export's under deliveries constituted a breach of the contracts between Uniper and Gazprom Export. The multi-office Quinn Emanuel team composed of

lawyers from Geneva, Zurich, London, New York, and Paris ensured that the required expertise for this complex, high-value arbitration was available at all times.

On 7 June 2024, the Tribunal issued its award, adopting all positions we argued in our submissions and at the hearing. We obtained USD 14 billion in damages for our client in addition to a right to terminate the long-term delivery contracts. The win represents a landmark victory for Quinn Emanuel's international arbitration practice. The client is, of course, overjoyed with the result.

Defense Victory in Los Angeles Employment Litigation Jury Trial

On April 10, a downtown Los Angeles jury returned a complete defense verdict in less than two hours for Quinn Emanuel client Menzies Aviation in a racial harassment employment case.

Given Quinn Emanuel's proven track record and demonstrated success in defending companies in sensitive matters, Menzies enlisted Quinn Emanuel for its defense just a few months before the original trial date. Quinn Emanuel hit the ground running, obtaining discovery that proved critical in revealing the lack of credibility of Plaintiff's claims at trial.

Plaintiff was employed as a ramp agent for Menzies Aviation, loading and unloading luggage at LAX airport from 2016 to 2019. He alleged that he had been subjected to serious and routine harassment throughout his 38 months until he was terminated in 2019. Plaintiff sought nearly USD 10 million in economic damages and exponentially more in punitive damages.

Critical for the defense was illustrating that Plaintiff's claims were not credible, and instead had been manufactured (and enhanced over time) for litigation purposes only when he knew that his job was threatened due to his inability to obtain documentation required for airport employees. During cross examination, Quinn Emanuel caught Plaintiff in multiple inconsistencies and untruths where Plaintiff even conceded he had "misspoken" about crucial facts. In sharp contrast to Plaintiff and his witnesses, Menzies witnesses credibly explained the Company's zero tolerance policy, process for submitting complaints, and that Menzies never had been made aware of any purported complaint by Plaintiff.

In closing, Quinn Emanuel emphasized Plaintiff's admissions, other witness testimony that failed to support the claims and that Plaintiff's damages demand was akin to seeking the "legal lottery." The jury quickly agreed and returned a complete defense verdict that afternoon.

Enhanced Damages Award for Chinese Client in Texas Federal Court

Following a patent trial victory on behalf of Ningde Amperex Technology Limited ("ATL") earlier this year against Zhuhai CosMX Battery Co., Ltd. ("CosMX"), Quinn Emanuel secured a rare, enhanced damages award in the Eastern District of Texas in April. To our knowledge, this marks the first-ever enhanced damages awarded to a Chinese plaintiff in this popular patent venue.

In February 2024, a team of Quinn Emanuel lawyers across eight offices globally—many fully bilingual in English and Mandarin—convinced a federal jury that a main competitor of ATL willfully infringed three ATL patents directed to key components used in industry-leading lithium-ion batteries—including the electrolyte, the electrodes, and the separator. It was ATL's separator patent that carried the day, and presently CosMX has no viable alternatives to ATL's patented separator technology. Not long after returning for a second day of deliberation, the jury returned a verdict finding that ATL was entitled to a running royalty of $3.7 million in compensatory damages for two-and-half years of past infringement, leaving open the prospect of the Court awarding ongoing royalties for the remainder of the patent's 20-year life.

From the outset, Quinn Emanuel zeroed in on the defendant's reputation as an imitator rather than an innovator. Throughout the five-day trial, the team exposed the defendant's go-to-market strategies as a self-proclaimed low-cost provider, such as hiring-away key ATL engineers, filing copycat patent applications directed to ATL's inventions, and switching to ATL's suppliers who knew the secret ingredients of its prized innovation.

After the jury found willful infringement, Quinn Emanuel chronicled the defendant's transgressions in a bid to convince the court to award enhanced damages. Such motions are fraught with risks, as the court had in previous cases refused to award enhancement or even nullified the jury finding entirely when infringing sales occurred outside of the U.S. Here, CosMX itself helped tip the scales in favor of enhancement when following the jury's verdict against CosMX its in-house counsel blamed the court and the jury for purported prejudice on Chinse social media—publishing untrue statements concerning what transpired during the voir dire process that the court and parties engaged in when picking the jury. The absurdity of CosMX's post-verdict aspersions is of course underscored by the fact that both companies are based in the Peoples Republic of China. On April 26, the court entered final judgment in the case, finding the defendant's willful infringement warranted a 27% enhancement of the compensatory damages owed. To date, no other Chinese plaintiff had been successful in seeking enhanced damages in this venue.

This win is a testament to the strength and diversity of Quinn Emanuel's global patent practice. Q

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business litigation report

quinn emanuel urquhart & sullivan, llp

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- As of July 2024, we have tried over 2,500 cases, winning 86% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over $80 billion in judgments and settlements.
- We have won eight 9-figure jury verdicts and five 10-figure jury verdicts.
- We have also obtained fifty-one 9-figure settlements and twenty 10-figure settlements.

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