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California Voters Approve Proposition 22, Approving “Independent Contractor” Status for “App-Based” Drivers

On November 3, 2020, California voters approved Proposition 22, a ballot initiative defining app-based transportation and delivery drivers as independent contractors and adopting specific labor and wage policies for these industries. The adoption of Proposition 22 presents a remarkable example of a voter initiative overruling both the California legislature and the California Supreme Court. Proposition 22 is not just a big deal in California. It is already seen as a potential blueprint for changing labor and employment laws across the country. So what is Proposition 22 and how did it come about?

What Triggered Proposition 22?

The genesis of Proposition 22 is a case called *Dynamex*

Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018), *reh'g denied* (June 20, 2018). Dynamex is an on-demand, same-day courier and delivery service. In 2004, Dynamex converted all of its drivers from “employees” to “independent contractors,” in an effort to avoid withholding and paying employment tax, as well as complying with certain state and federal labor and employment laws including minimum wage, overtime, expenses reimbursed, paid sick days, paid family leave, unemployment insurance, and an employer healthcare option. In response to this reclassification, one of Dynamex’s drivers filed a class action lawsuit claiming that Dynamex’s alleged misclassification of its drivers as “independent contractors” violated California law and state wage

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New Austin Office and Partner Hires

Scott L. Cole and Asher B. Griffin have joined the firm as partners in Austin, Texas's capital and a burgeoning tech hub. The firm welcomes the two lateral hires as the newest members of its recently opened Austin office, wrapping up a year that extended its reputation as the world's top business litigation firm. Cole and Griffin join John Bash and Matthew Scheck as the partners resident in the firm's new Austin office.

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Tax Litigation Star Stéphane Chaouat and PNF Prosecutor Eric Russo Join in Groundbreaking Moves for French Legal Market

The firm welcomes Stéphane Chaouat and Eric Russo as new partners who will both be based in France. Stéphane Chaouat, a top tax litigator, has joined the firm as partner and head of its Paris tax disputes practice. He is a renowned trial litigator known for resolving high-stakes, complex tax contingencies, disputes, and negotiations. His client base includes financial institutions, private equity funds, public and private companies, and individuals. Chaouat joined Quinn Emanuel's Paris office in January 2021 along with Counsel Alexandre Groult and Associate Victoire Heriard Dubreuil.

Prominent prosecutor Eric Russo has also joined the firm as a partner, further boosting Quinn Emanuel's presence in France. A leading prosecutor at the French National Financial Prosecutors Office (PNF), Russo is the first PNF prosecutor to

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orders. The trial court ultimately certified the class action, relying on the California Supreme Court’s three-part definition of “employ” under *Martinez v. Combs*, 49 Cal. 4th 35, 64 (2010) (“*Martinez*”).

Dynamex filed a writ petition in the California Court of Appeal challenging the trial court’s decision, arguing that the definitions of “employ” under *Martinez* were inapplicable outside of the joint employer context and that the proper standard for determining whether a worker is an employee or independent contractor under California law is the standard set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989) (“*Borello*”). Under the *Borello* standard, Dynamex argued that its drivers were properly classified as independent contractors. The Court of Appeal rejected this argument, and Dynamex petitioned for review to the California Supreme Court.

The California Supreme Court also found against Dynamex, but clarified that the appropriate test for determining whether drivers were employees or independent contractors was the “ABC test.” *Dynamex*, 4 Cal. 5th 903 at 956–57. Under the ABC test, a driver would be an independent contractor only if the hiring company could show:

- (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
- (B) that the worker performs work that is outside the usual course of the hiring entity’s business; *and*
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Id. at 957. The California Supreme Court has recently reaffirmed the important California public policy animating the ABC test, ruling that the test applies retroactively to all cases not yet final as of the effective date of *Dynamex*. *Vazquez v. Jan-Pro Franchising Intern., Inc.*, --- P.3d ---, 2021 WL 127201, at *2-3 (Cal. Jan. 14, 2021). The Supreme Court noted that retroactive application was justified to protect important worker benefits, while depriving businesses of the unwarranted advantages of worker misclassification. *Id.* at *6.

The practical implication of *Dynamex* was that app-based drivers could not be classified as “independent contractors,” requiring the companies employing them to comply with state and federal labor and employment laws. Supporters of the *Dynamex* decision moved quickly to codify the decision through legislation. On September 18, 2019, California Assembly Bill 5 (“AB 5”) was signed into law. AB 5 added Section 2750.3 to the Labor Code, adopting and expanding the

ABC Test not only for purposes of wage orders, but also for purposes of the Labor Code and Unemployment Insurance Codes, subject to certain defined exemptions that did not include transportation and delivery companies. Not surprisingly, many rideshare and delivery companies were not pleased with this new law and started a campaign to overrule both *Dynamex* and AB 5 through a ballot initiative.

The Proposition 22 Campaign

Even before the passage of AB 5, app-based transportation and delivery companies prepared to appeal directly to voters in California if they could not convince the California state legislature to exempt them from the proposed law. As Bloomberg reports, on August 30, 2019—almost three weeks before the passage of AB 5—Uber, Lyft, and DoorDash each pledged \$30 million to fund a ballot initiative that would maintain the status of their drivers as independent contractors. After AB 5 became law without any exemptions for app-based transportation and delivery companies, the companies unveiled the “Protect App-Based Drivers and Services Act.” The act was later designated Proposition 22, which is a ballot initiative that sought to override AB 5 with respect to the companies’ drivers by defining them as independent contractors.

Proposition 22 defines an “app-based driver” as an independent contractor and not an employee or agent of a delivery or transportation company that maintains an online-enabled application or platform to deliver its services. In order to be considered an “app-based driver” the driver must work for a company that does not (1) “unilaterally prescribe specific dates, times of day, or a minimum number of hours” during which the driver must be logged into the company’s app or platform, (2) require the driver to accept any specific rideshare or delivery service request as a condition of maintaining access to the company’s app or platform, (3) prohibit drivers from performing rideshare or delivery services for other companies on their own time, and (4) prohibit drivers from working in any other lawful occupation or business.

In addition to classifying app-based drivers as independent contractors, Proposition 22 also provides labor and wage policies specific to the app-based transportation and delivery companies and their drivers. Such policies include prohibiting companies from taking, receiving, or retaining any tips given to drivers. They require that the companies make payments to the drivers for the difference between a driver’s net earnings, excluding tips, and a “net earnings floor” that takes into account a minimum wage and mileage consumption. They limit drivers from working

more than 12 hours during a typical 24-hour period. They require companies to provide certain healthcare subsidies for drivers who average between 15 and 25 hours and additional subsidies for drivers who average at least 25 hours per week. Companies must also carry occupational accident insurance with certain required criteria and accidental death insurance for certain situations.

Proposition 22 further requires companies to develop anti-discrimination and sexual harassment policies, provide safety training for drivers, conduct criminal background checks of all drivers, and mandate the suspension of a drivers reasonably suspected of providing rideshare or delivery services while under the influence of drugs or alcohol.

According to the California Secretary of State Voter Guide website, supporters of Proposition 22 argued by a 4:1 margin that drivers preferred to work as independent contractors. The site further explains how app-based transportation and delivery companies argued that prohibiting drivers from being independent contractors would eliminate hundreds of thousands of jobs because the companies could not afford to hire that many drivers as employees, with the end result being longer wait times, higher prices, and a permanent shutdown of services in many areas. The companies also touted that Proposition 22 provided drivers with the aforementioned benefits. Opponents of Proposition 22 countered that Proposition 22 would legally deny drivers' basic workers' rights and protections such as paid sick leave, workers' compensation, or unemployment benefits.

The campaign surrounding Proposition 22 was one of the most expensive in California history. According to California's Secretary of State website, from January 1, 2020 through October 17, 2020, the main political action committee supporting Proposition 22 received over \$190 million, and spent \$184 million, in contributions. Almost all of those contributions came from five industry companies—Uber, Lyft, DoorDash, Instacart, and Postmates.

In the run up to Election Day, supporters of Proposition 22 also used their respective apps as a tool to communicate with riders and drivers urging them to vote for the ballot measure. This direct advocacy did not go unchallenged by opponents. Less than two weeks before the election, a group of Uber drivers opposed to Proposition 22 filed suit in San Francisco Superior Court accusing the company of pressuring drivers to support Proposition 22. The suit alleged that drivers were prompted with a message reading "Prop 22 is progress," and forced drivers to click through the prompt, answering either "Yes On Prop 22" or "OK"

to proceed. The lawsuit was quickly dismissed by the court as "moot" and lacking evidence of any improper "political coercion."

Ultimately, California voters approved Proposition 22 by a margin of 58.6% to 41.4%, as reported on California's Secretary of State Statewide Election Results website. The battle over Proposition 22, however, may be just beginning. On January 22, 2021, a group of app-based drivers, joined by the Service Employees International Union, filed an Emergency Petition for Writ of Mandate directly with the California Supreme Court. *See Castellanos, et al. v. State of California*, Case No. S266551. The Petition argues that Proposition 22 improperly usurps the Legislature's "plenary" power to establish a complete system of workers' compensation under Article XIV of the State Constitution, and also invades the authority of the judiciary by pre-classifying any legislative effort to authorize organizations to bargain collectively on behalf of app-based drives as an "amendment," which can only be enacted through a seven-eighths supermajority vote. The Petition further argues that Proposition 22 improperly violated California's "single subject" rule for ballot initiatives. The California Supreme Court will have to decide whether to exercise original jurisdiction over these issues, or require the case to be refiled in the lower courts, potentially setting up years of further litigation.

Will Proposition 22 Become a Blueprint?

While legal challenges persist, Proposition 22 appears for the time being to have been a big win for gig-economy companies. In the wake of this victory, Bloomberg reports that proponents are now eyeing similar measures elsewhere. For example, Uber CEO Dara Khosrowshahi said on a November 5, 2020 earnings call that the company will "more loudly advocate for new laws like Prop 22." Similarly, DoorDash CEO Tony Xu said in a recent statement that the company is "looking ahead and across the country, ready to champion new benefits structures that are portable, proportional, and flexible."

As gig-economy companies push to use Proposition 22 as a blueprint for other jurisdictions, many labor unions and worker advocacy groups are gearing up for fights in states such as New York, New Jersey, and Massachusetts, while others are suggesting that a compromise brokered deal is the better approach. Whether the parties can reach a compromise solution or will battle the "independent contractor" status on a state-by-state basis will have long-lasting implications for the gig-economy and other industries in which workers have traditionally been classified as "independent contractors."

It also remains to be seen what impact Proposition

22 might have on employment law generally. While Proposition 22 itself is limited to “app-based” drivers, it may portend a more general trend towards expanding independent contractor status, which could have ramifications on employee rights and protections in a wide range of industries and across jurisdictions throughout the country.

Finally, the Proposition 22 campaign may well be a precursor for how technology can influence future laws both inside and outside the United States. Proposition 22 successfully overturned the will of both the California Supreme Court and the California legislature based in part on direct advocacy to voters through the very

same app-based, technology platforms that were used to justify the new employment categorization in the first place. Going forward, it stands to reason that a similar ability to influence ballot initiatives, elections, and rulemaking, will only increase as Artificial intelligence (AI), the Internet of Things (IoT), 5G, and quantum computing, among other technologies, collectively reshape the world economy and the ways information is shared. Potential voters can be reached in ways never before imagined. Time will tell the extent to which these resources will help shape future campaigns and influence future disputes. 

NOTED WITH INTEREST

Federal Circuit Provides Further Guidance on Section 1404 Transfer Analysis

The U.S. Court of Appeals for the Federal Circuit recently provided important new guidance regarding the proper analysis for a 28 U.S.C. § 1404(a) motion to transfer venue in patent cases. Specifically, in *In re Apple Inc.*, 979 F.3d 1332 (Fed. Cir. 2020), a divided panel of the Federal Circuit granted Apple’s petition for a writ of mandamus, ordering the district court to transfer a patent-infringement lawsuit from the Western District of Texas (WDTX) to the Northern District of California (NDCA). This decision clarifies many aspects of the § 1404 analysis, and appears to continue a recent trend towards a more stringent venue framework in patent cases.

The underlying patent infringement case (No. 6:19-cv-00532) was filed by Uniloc LLC against Apple in September 2019 in the Waco division of WDTX before Judge Alan Albright. In November 2019, Apple moved to transfer, arguing that NDCA was a clearly more convenient forum to litigate. The district court held a hearing on Apple’s motion on May 12, 2020, during which it denied the motion and indicated that a written order would follow as soon as possible. The district court subsequently held a claim construction hearing and issued a claim construction order. On June 15, Apple filed its petition for a writ of mandamus, and the district court entered its written order denying transfer one-week later, on June 22.

The first significant aspect of the Federal Circuit’s ruling was an apparent criticism of the district court’s delay in issuing an order on the motion to transfer. Because the district court’s order denying transfer was issued only *after* the filing of the petition, Uniloc argued that the petition failed to address many bases for the

district court’s order, and Apple waived arguments raised for the first time in its reply brief. The Federal Circuit disagreed, holding that Apple was justified in filing its petition prior to the district court’s written order, given the “rapid progression” of the case. *In re Apple*, 979 F.3d at 1337-38. In so holding, the Federal Circuit faulted the district court for “barrel[ing] ahead on the merits in significant respects,” including by considering and resolving claim construction issues while the written order on the motion to transfer remained outstanding. *Id.* at 1338. Notably, the Federal Circuit clarified that “once a party files a transfer motion, disposing of that motion should unquestionably take top priority.” *Id.* at 1337. Going forward, this ruling may foster a renewed focus by district courts in promptly deciding motions to transfer venue in patent cases.

The Federal Circuit’s decision is also notable on the merits. As Judge Moore pointed out in her dissent, there were many reasons suggesting that the issue before the district court was a close one, including the fact that Apple maintained a large campus in WDTX employing thousands of people, Apple manufactured one of the accused products in WDTX, and both third-party and party witnesses were located in WDTX. *Id.* at 1347 (dissenting opinion). Nevertheless, the majority opinion held that the district court clearly abused its discretion in denying transfer, and granted the extraordinary remedy of mandamus. *Id.* at 1347. In the process, the Court provided significant new guidance in the application of the public and private factors governing the § 1404 transfer analysis.

“*Relative Ease of Access to Sources of Proof*”—First, the Federal Circuit found that the district court

failed to “meaningfully compare” Apple’s sources of proof in NDCA to that in or near WDTX. *In re Apple*, 979 F.3d at 1340. Specifically, the Court found that the district court may have erred in “overemphasizing” sources of proof in WDTX. *Id.* at 1340-41. While the Court did not question that *some* relevant documentation was located in WDTX, the Court suggested that this may not have been sufficient to outweigh “wealth of important information” that Apple stored at its headquarters in NDCA. *Id.* at 1340. The Court reiterated prior holdings that “[i]n patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer.” *Id.* at 1340, quoting *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009). Despite making these observations, however, the Court declined to disturb the district court’s finding that this factor was “neutral,” given its finding that the additional factors were sufficient to warrant transfer. *In re Apple*, 979 F.3d at 1340-41.

“Cost of Attendance for Willing Witnesses”—Next, the Federal Circuit addressed the district court’s conclusion that third-party witnesses in New York weighed against transfer. Under Fifth Circuit law, “the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.” *Id.* at 1341, quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (en banc). Yet, the Federal Circuit held, the district court erred in applying this principle too “rigidly.” *In re Apple*, 979 F.3d at 1342. Although NDCA was technically farther than WDTX from the New York witnesses, the Federal Circuit observed that “in either instance these individuals will likely have to leave home for an extended period of time and incur travel, lodging, and related costs.” *Id.* Thus, the district court should have given greater weight to the presence of party witnesses in NDCA, rendering this factor clearly in favor of transfer. *Id.*

“All Other Practical Problems That Make Trial Easy, Expeditious, and Inexpensive”—The Federal Circuit also found several problems with the district court’s analysis of the “other practical problems” factor. First, while the district court found that “significant steps” had been taken towards resolution of the case, the Federal Circuit discounted these steps because “[a] district court’s decision to give undue priority to the merits of a case over a party’s transfer motion should not be counted against that party in the venue transfer analysis.” *Id.* at 1343. The Court also rejected the district court’s finding that NDCA had more pending cases than WDTX. To the extent a comparison of the sheer number of cases in the respective venues was even properly considered under this factor, *id.* at 1343 n.4, the Court held that it was too “tenuously related” to

the issue of time to trial, particularly given that the respective venues historically had comparable times to trial in civil cases, and NDCA actually had a *shorter* average time to trial in patent cases. *Id.* at 1343-44. Finally, the Court held that the district court erred in failing to assign at least some weight to pending cases in NDCA with at least some “overlapping issues.” *Id.* at 1344. Accordingly, the Federal Circuit held, this factor weighed at least slightly in favor of transfer. *Id.*

“Administrative Difficulties Flowing from Court Congestion”—Regarding court congestion, the Federal Circuit rejected the district court’s reliance on its own aggressive case scheduling order. According to the Federal Circuit, “a district court cannot merely set an aggressive trial date and subsequently conclude, on that basis alone, that other forums that historically do not resolve cases at such an aggressive pace are more congested for venue transfer purposes.” *Id.* at 1344. The district court therefore erred in finding that this factor favored transfer.

“The Local Interest in Having Localized Interests Decided at Home”—Lastly, the Federal Circuit found that the district court had placed too much emphasis on Apple’s “general contacts with the forum that are untethered to the lawsuit.” *Id.* at 1345. Per the Federal Circuit, this factor properly “regards not merely the parties’ significant connections to each forum writ large, but rather the ‘significant connections between a particular venue and *the events that gave rise to a suit.*’” *Id.*, quoting *In re Acer Am. Corp.*, 626 F.3d 1252, 1256 (Fed. Cir. 2010). Noting the significant connections between NDCA and the specific events giving rise to the suit (*e.g.*, the presence of the plaintiff in NDCA and the fact that the accused products were designed, developed, and tested in NDCA), the Federal Circuit held this factor should have weighed in favor of transfer. *In re Apple*, 979 F.3d at 1345.

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In re Apple is notable not only for the new guidance it provides on the § 1404 transfer factors, but also for the close scrutiny applied to a district court’s order denying transfer. Going forward, the decision may signal increased scrutiny of venue in patent cases, and may provide defendants with increased opportunity to transfer to the venue of their principle place of business. [Q](#)

Asia-Pacific Litigation Update

Promising Results Shown in First Year in Which Hong Kong-Seated Arbitrations Granted the Power to Seek Interim Measures in Mainland China Shows Promising Results

Last year, the Hong Kong Government and China's Supreme Court agreed to an arrangement which makes it possible for parties to arbitral proceedings in Hong Kong to obtain interim orders (akin to interim injunctions) from courts in Mainland China. The formal name of the policy is "The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region."

This arrangement makes Hong Kong the only foreign seat of arbitration where parties can seek interim relief directly from Mainland Chinese courts. As such, it gives Hong Kong a unique competitive edge over other arbitral seats where one party is based in Mainland China. Before the arrangement was implemented, no formal mechanism existed to allow Mainland Chinese courts to grant interim relief in support of a foreign-seated arbitration. The reverse situation—a party to an arbitral proceeding in mainland China applying to the Hong Kong courts for interim relief—has been allowed for some time.

For Mainland Chinese courts to grant an interim measure, there are two requirements: (1) the arbitration must be administered by a qualified Hong Kong arbitral institution, which at present includes HKIAC, ICC, CIETAC, and three other bodies; and (2) the seat of the arbitration must be Hong Kong.

Recent statistics suggest that the arrangement is working well. The HKIAC has reported that, since its adoption on October 1, 2019, there have been 17 decisions by Mainland Chinese courts granting HKIAC-processed applications, which on average have been issued within 14 days of receipt of the application. These decisions have preserved approximately USD 1.3 billion in assets..

Mainland Chinese Courts Are Becoming More Receptive to Arbitrations Administered by Foreign Institutions

A quirk of Mainland Chinese arbitration law has long been that parties should not agree to a Mainland China-seated arbitration administered by a foreign arbitration institution. The reason for this is that "arbitration commission" in Chinese Arbitration Law was considered to only include Chinese arbitration institutions. Four recent decisions, however, are seen as positive developments for foreign arbitration

institutions hoping to pick up China-seated disputes.

In June, a Shanghai court held that an arbitration clause providing for a Shanghai-seated arbitration administered by the Singapore International Arbitration Centre was valid, based on 2013 authority from Mainland China's highest court. In August, the Guangzhou Intermediate People's Court ruled that an ICC arbitral award in a Guangzhou-seated arbitration was enforceable. And in September, the State Council of China published a policy paper announcing that foreign arbitration institutions will be permitted to establish themselves in Beijing. This decision followed a similar announcement made in 2019 to allow such institutions to conduct arbitration business in the Shanghai free trade zone.

While these developments show that Mainland China is becoming more receptive to foreign arbitration institutions, more development is necessary before parties should agree to China-seated arbitrations administered by foreign institutions.

Video Conferencing in International Arbitrations in Korea

The Seoul Protocol on Video Conferencing in International Arbitration, released in March 2020, provides new guidance for addressing the conduct of remote hearings in Korean-based international arbitrations. Remote hearings, by video or other electronic means, can raise interesting legal issues in the arbitration context, such as whether it is consistent with the parties' arbitration agreement to conduct the hearing remotely. Such issues also invariably raise a host of logistical issues, such as the location and time zone of the parties and their witnesses, introduction of evidence, and technology used for the hearing. To address these issues, the Seoul Protocol covers topics such as the venue for video conferencing, the regulation of observers of witnesses' testimony, standards for documentary evidence presentation, technical requirements and testing, and remote interpretation services. It is widely referenced in international arbitration in the region, and is contributing to the development of standardised practices for video hearings.

Although the protocol was developed to address issues existing long before the outbreak of COVID-19, its guidance has taken on special significance in the wake of the pandemic. Restrictions on international travel and in-personal gatherings have made it difficult for live international arbitration hearings to take place in many Asian countries. Parties have therefore moved to conduct hearings by video conference, which has rendered the guidance in the Seoul Protocol all the more important.

Trial Practice Update

Top 10 Tips for Destroying an Expert at Trial

Cross-examining an expert at trial can be very challenging. The expert will almost always have more substantive knowledge of the topic they are testifying about than the questioning attorney, and will often be a professional witness. Here we provide our top ten tips for destroying an expert witness during cross-examination at trial:

1. **Consider your tone.** You will want to carefully consider the tone that you take when you begin your cross-examination. If the witness and their counsel have already built up a rapport and some amount of trust with the jury—and particularly if the jury has not yet had an opportunity to get to know you—a jury may not appreciate you immediately taking an aggressive or indignant tone with the expert. While a jury may be less likely to feel connected to an expert witness than they are to a fact witness, you should still consider whether the expert had a particularly likable demeanor, such that you will need to earn the jury's trust during cross examination before building up to more aggressive questioning.

2. **Limit questions to yes or no questions.** An expert will almost always be more experienced and comfortable in the subject matter than you are, and may be able to avoid providing clear answers to open-ended questions, or may use terms of art or language that can be difficult to understand, or ask follow up questions about. Open-ended questions may also provide an expert with an opportunity to put his or her expertise on display for the jury. So it is often to your advantage to ask questions in a form that will limit the expert to a “yes” or “no” response. And limit each question to eliciting a single point from the witness. Even with perfectly worded questions, an expert will likely try to avoid answering with a simple “yes” or “no” so it will be critical to maintain tight control of the witness and call the witness out when he or she is not answering the question asked.

3. **Focus on 2-3 key issues.** You need not cross examine the expert on all areas of their opinions. Instead, you may want to limit your questioning to a few key areas in which the expert is factually mistaken, ill-prepared, or lacks credibility. You can more effectively undercut the expert's credibility by focusing on a few issues where the witness is truly weak, rather than attempting to attack all of their opinions with less persuasive angles. And this has the added benefit of keeping jurors from becoming bored and inattentive through a lengthy, technical examination.

4. **Develop a theory.** Consider the story you want

to tell with your cross examination. Is your theory that the expert is a hired gun who will say anything for his or her client? Or that the expert based their opinions on a fundamental misunderstanding of the facts? You should craft your questioning to tell your story to the jury through a progression of short and simple questions.

5. **Lock the expert into “value propositions.”** At the beginning of the examination, it can be helpful to lock the expert into certain “value propositions.” For example, questions like “You approached this assignment in an unbiased manner, without any preconceived notions, right?” “You did not ignore evidence that was unfavorable to your client?” Then when it comes time to question the witness on the substance of his or her report, you can identify for the jury instances where the expert violated those value propositions—such as where the expert did not consider documents or testimony from the opposing party which undermined the expert's opinions.

6. **Highlight any unreasonable assumptions made by the expert.** One potential ripe area for cross examination is the assumptions that an expert made. It is common, and often necessary, for an expert to make assumptions in order to complete his or her analysis. The expert must often work with imperfect or incomplete information. You may want to highlight for the jury if any assumptions that were inconsistent with the facts or academic literature in the field. You may want to highlight any assumptions that were unreasonable or did not make common sense. It is also important in your questioning to highlight the impact of any such unsupported or unreasonable assumptions on the outcome. If you can demonstrate to the jury that the assumptions are unreasonable or inaccurate, then you may be able persuade the jury that the ultimate conclusions are not credible or reliable either.

7. **Call out work the expert did not perform.** Another area ripe for cross examination are all the analyses that the expert did *not* perform. It may not even be necessary to ask if additional tests or analyses, or review of additional documents may have caused them to change their conclusions. If you are able to bring out enough tests or analyses that the expert did not bother to conduct, you may be able to convince the jury that the expert did a shoddy analysis.

8. **Call out work completed but omitted from the expert report.** In addition to cross examining on work the expert did *not* perform, you may also wish to question the expert on work he or she *did* perform, but omitted from the report. Many sophisticated testifying experts will be careful to have their staff shield them from any unfavorable analyses that they do not wish to include in their report. Nevertheless, in some

circumstances you may be able to identify particular analyses that they performed, but abandoned because the results were not beneficial to their client. This line of questioning could have the benefit of both revealing analyses that are beneficial to your client, while also making the opposing expert appear untrustworthy before the jury.

9. **Highlight sources not considered by the expert.** Another potential area for cross-examination are sources that the expert chose not to consider. These sources can include treatises and other reference materials, as well as evidence in the case. As to the former, at deposition, ask questions about what materials they view as reliable in their field. For example, what books or articles do they use to teach their courses? What books do they look to themselves when doing research in their field? Then if you are able to identify something in those materials that is inconsistent with the expert's opinions, you can admit the material under FRE 803(18) (Statements in Learned Treatises, Periodicals, or Pamphlets). On cross-examination at trial, remind the expert that they had testified that the material at issue was reliable, and then read the selection into the record, closing by asking if you read the statement correctly. You do not need to ask the expert if they agree with the quoted statement—opposing counsel can do so on redirect. Similarly, as to evidence, you may be able to establish that the expert reviewed only documents or deposition testimony from their own client, or did not review some particular categories of documents or data you believe to be significant. If they did not even review the materials,

they cannot reliably say whether those materials could have had an impact on their conclusions.

10. **Establish bias.** After laying the groundwork at deposition, you may also be able to persuade the jury that the expert is biased and therefore unreliable. Have they exclusively represented clients on one side of the “V”? How much is he or she paid per hour? You may point out how many times the defendant's class certification expert has submitted a report on class certification, and the fact that he or she has never opined that a class should be certified. You may point out that the antitrust defendant's economic expert has submitted reports in 35 antitrust cases, but never opined that a defendant's conduct was anticompetitive. You may learn that the expert has a history of testifying on behalf of the opposing party, or having research funded by that party. All of these facts can undermine the expert's credibility in the jury's eyes.

In addition to applying these ten principles, the key to a successful cross is ensuring that the jury understands the significance of the points elicited on cross. Whenever possible, you want the jury to understand the point of your cross-examination by the time the cross examination is completed. Although there is certainly an opportunity to bring the points together in a closing argument, many jurors will have already made up their minds by the time you get to closing arguments. At the conclusion of a good cross examination, the jury should understand the significance of each “admission” obtained during the examination, and their impact on the larger case. 

(New Austin Office and Partner Hires continued from cover)

Cole joins Quinn Emanuel as a partner from McKool Smith, a commercial and intellectual property litigation firm where he was a principal specializing in patent litigation. He has tried over 25 cases to verdict and won four nine-figure verdicts/judgments. He has been recognized since 2014 in the *Best Lawyers in America* and the *IAM Patent 1000*. He won *Texas Lawyer's* “Litigator of the Week” for the \$391 million judgment in *Versata v. SAP* and later won the *American Lawyer's* “Litigator of the Week” for the affirmance of that judgment at the Federal Circuit, believed to be the largest judgment ever affirmed by the Federal Circuit at that time. About \$100 million of the *Versata* judgment was derived entirely from Cole's cross-examination of SAP's damages expert, and the Federal Circuit quoted directly from that cross-examination in affirming the judgment.

Griffin joins from Scott Douglass & McConnico, a commercial litigation boutique firm, where he practiced as a partner. He handles litigation across industries and practices, including pharmaceutical litigation, oil and gas disputes, private equity/hedge fund litigation, and intellectual property disputes. Most recently, Griffin has served as the lead Manufacturers' Liaison Counsel in the Texas Opioid MDL, playing a central role in shaping the defense of the multi-billion dollar claims. He represents defendants and plaintiffs in complex litigation matters, including breach of contract, non-competition, breach of fiduciary duty, fraud, usurpation of corporate opportunity and trade secrets cases. He was named a “Texas Rising Star” by Thomson Reuters in 2010 and 2011 and served on the Steering Committee of the Texas Minority Counsel Program from 2011 through 2017. 

Victory for SoundCloud and Streaming Music

Quinn Emanuel recently secured the dismissal of all claims against SoundCloud Inc. (“SoundCloud”)—a groundbreaking music streaming service—in a sprawling antitrust lawsuit in the District of Connecticut.

In March 2020, a performing rights organization (“PRO”) called Pro Music Rights (“PMR”) filed an antitrust complaint against SoundCloud and numerous other companies, including Amazon, Apple, Google, Pandora, Spotify, and YouTube. PMR alleged that Defendants had conspired to drive PMR out of business by refusing to license any works to which PMR held the copyrights, and instead had agreed to do business only with incumbent PROs such as ASCAP and BMI. According to PMR, the conspiracy was hatched at a series of trade meetings and industry events, and propped up an anticompetitive market structure that harmed both consumers and new-entrant PROs like PMR. Based on these allegations, PMR brought three sets of claims: (i) conspiracy claims under Section 1 of the Sherman Act; (ii) monopsonization and attempted monopsonization claims under Section 2 of the Sherman Act; and (iii) state-law claims for unfair competition.

Although several Defendants agreed to settle PMR’s claims, SoundCloud did not. Instead, Quinn Emanuel and counsel for the other non-settling Defendants pursued a two-fold strategy.

First, the firm successfully obtained a stay of discovery pending a motion to dismiss, which staved off the threat of costly antitrust discovery, and prevented PMR from garnering additional materials to support its claims. *Second*, the firm moved to dismiss on the grounds that all of PMR’s claims were conclusory, implausible, and suffered from myriad other pleading defects.

On December 16, 2020, the Court issued a detailed opinion granting Defendants’ motion to dismiss. *See Pro Music Rights, LLC v. Apple, Inc.*, 2020 WL 7406062, at *1 (D. Conn. Dec. 16, 2020). Regarding PMR’s Section 1 conspiracy claims, the Court found that, among other problems, PMR’s own complaint

“suggest[ed] wholly innocent reasons for defendants to decline to do business with PMR,” negating any inference of a conspiracy. *Id.* at *4. Regarding PMR’s Section 2 monopsonization claims, the Court found that PMR both relied on a legally invalid “shared monopsony theory” and had failed to plead a plausible relevant product market, as required under the antitrust laws. *Id.* at *9. The Court then found that the state-law claims, which were largely derivative of PMR’s federal antitrust claims, failed for essentially the same reasons. *Id.* at *10-11. Although the Court declined to dismiss PMR’s claims with prejudice, the Court warned PMR to file an amended complaint only if it had “good faith grounds” to do so. *Id.* at *11.

The Court’s decision in *Pro Music Rights* is an important reminder that federal courts will not hesitate to dismiss antitrust claims at the pleading stage unless the plaintiff provides sufficiently detailed allegations supporting an inference of unlawful conduct. Buzzwords and innuendo about secret meetings are not enough, even if packaged in a lengthy complaint. The Court’s decision also underscores the tradeoffs antitrust defendants face in determining whether to pursue early settlements. In this case, several Defendants settled early—presumably due to the potential risks of becoming embroiled in protracted antitrust discovery—only to have the case dismissed shortly afterwards. Defense-side antitrust lawyers should thus carefully consider whether pursuing a pre-motion-to-dismiss settlement is truly worth the risk of subsidizing weak antitrust claims, as appears to have been the case here. [Q](#)

(Tax Litigation Star Stéphane Chaouat and PNF Prosecutor Eric Russo Join in Groundbreaking Move for French Legal Market continued from cover)

move to a private practice law firm. During his five years at the PNF, Russo ran some of the largest international corruption and tax fraud investigations. He was the first prosecutor to conclude a CJIP (Deferred Prosecution Agreement) in France and the CJIP settlement agreements he concluded on behalf of the PNF (against HSBC, Societe Generale and Airbus respectively) represent a total amount of €2.7 billion. He also led the PNF prosecuting team during the trial against UBS which resulted in the unprecedented € 3.7 billion fine sentenced against the bank. He has extensive experience and knowledge of complex litigation in economic and financial criminal law. [Q](#)

Quinn Emanuel Congratulates Eleven New Partners

The firm has elected eleven new partners. Five of the partners are women and four are from diverse backgrounds. The new partners include two from the firm's London office.

The newly elected partners are as follows:

Kimberly E. Carson

Kimberly is based in the firm's New York office. She is a litigator with experience representing both plaintiffs and defendants in a wide variety of complex commercial disputes. Her experience includes litigating cases involving breach of contract, business torts, fraud, securities, trade secrets, employment law, corporate raids, and mergers and acquisitions. Kimberly has an active trial practice, and has appeared and argued in a variety of forums, including in state and federal courts and in arbitrations.

Lindsay Cooper

Lindsay is based in the firm's San Francisco office. She joined the firm in 2012. Her practice focuses on complex, high-stakes intellectual property and antitrust litigation. Prior to joining the firm, Lindsay worked as a clerk for the U.S. Attorney's Office in the Northern District of California. While there, she worked on a number of cases in the Economic Crimes division, including several large-scale trade secret theft and financial fraud investigations.

Jomaire A. Crawford

Jomaire is based in the firm's New York office. She joined the firm in 2012. Her practice focuses on complex commercial litigation in state and federal court where she represents clients in a wide range of high-stakes cases, including contract disputes, securities actions, business-related torts, professional responsibility, and white collar defense and investigations.

David M. Elihu

David is based in the firm's Los Angeles office. He joined the firm in 2011. David has experience with a broad range of complex commercial litigation, and has an emphasis on high-stakes patent, antitrust, and other technical disputes. David has a law degree from Harvard, where he was the Co-President of the *Harvard Journal on Legislation*, and two engineering degrees from MIT. David has used his technical background to work on cases involving technologies such as chemicals, pharmaceuticals, cosmetics, flat panel displays, wireless and cellular

communications, Internet-based transactions, and computer architecture and software.

Dawn Yamane Hewett

Dawn is based in the firm's Washington, D.C. office. Dawn is a multi-lingual arbitration and litigation advocate with over a decade of experience successfully representing clients in complex investment treaty and commercial arbitrations, multi-jurisdiction litigations, and high-stakes government investigations. She represents and advises sovereign governments, state-owned enterprises, and private parties with disputes from all around the world, including Latin America, Asia, Europe, and Africa. She has particularly deep experience in investor-state arbitrations, including those administered by the International Centre for Settlement of Investment Disputes (ICSID) and under other international arbitration rules.

Marc L. Kaplan

Marc is based in the firm's Chicago office. His practice focuses on high-stakes patent litigation and licensing. He has a bachelor's degree in Computer Engineering and master's degree in Biomedical Engineering from the University of Michigan. He has applied his technical training to patent litigation matters involving radio receiver architectures, automotive, secure digital communications, backup and recovery software, virtual machines, computer networking, computer architecture, semiconductor layout and design, mobile user experience, and 3G and 4G wireless telecommunications including standards compliance.

Iman Lordgooei

Iman is based in the firm's San Francisco office. He joined the firm in 2013. He practices intellectual property law with a focus on patent litigation and has also handled matters involving unfair competition and trade secret misappropriation. He has a degree in Electrical Engineering and has applied his technical training to patent litigation matters involving such technologies as enterprise software, microprocessor design, semiconductor fabrication,

Internet infrastructure, telecommunications, computer networking, signal processing and satellite positioning. He has also represented clients in the medical device industry.

Alexander J. Merton

Alexander (“AJ”) is based in the firm’s Washington, D.C. office. AJ’s practice focuses on white collar/government investigations, tax controversies/tax allocation agreement disputes, and complex commercial litigation. AJ’s notable representations include representing companies, high-level executives, and individuals in domestic and cross-border criminal investigations; representing clients in multi-billion and multi-million dollar tax disputes against the IRS/DOJ and private companies; representing clients in parallel criminal and civil enforcement proceedings; defending a celebrity in several highly-publicized defamation actions brought throughout the United States; and representing companies seeking to redress damages arising from RICO allegations, theft of trade secrets, breaches of fiduciary duties, and fraud.

Victor Noskov

Victor is based in the firm’s New York office. His practice focuses on complex commercial litigation, with an emphasis on bankruptcy and restructuring. Victor advises a wide range of clients, including investment funds, bankruptcy trustees, companies, individuals, and creditor groups in and outside of Chapter 11, with key representations related to the following Chapter 11 bankruptcies: LATAM Airlines (S.D.N.Y.); McDermott International (S.D. Tex.); Ditech Holding Corporation (S.D.N.Y.); Toys “R” Us (E.D. Va.); iHeartMedia (S.D. Tex.); GenOn (S.D. Tex.); Berry Petroleum Co. (S.D. Tex.); Petters Company (D. Minn.); and Lyondell Basell (S.D.N.Y.). In August 2020, Victor also received a 2021 *Best Lawyers: Ones To Watch* recognition for Litigation - Bankruptcy.

Gregory Pantlin

Gregory is based in the firm’s London office. He specialises in complex multi-jurisdictional commercial dispute resolution and international arbitration, across a broad spectrum of sectors.

Additionally, he has experience of regulatory and competition law matters. Gregory has experience of arbitrations under the LCIA, ICC and SCC Rules. He also has experience of High Court, cross border and multi-jurisdictional litigation.

Elizabeth Wilson

Elizabeth is based in the firm’s London office. She specialises in engineering and construction disputes arising out of complex high value major projects around the world. She has spent over 12 years acting for owners, contractors and designers in projects spanning across the oil & gas, power, infrastructure, mining, IT and defence sectors. Elizabeth has been recognised by *Chambers UK* 2016 as “Elizabeth is a first-class senior associate; unflappable, efficient and very sharp.” Elizabeth has regularly conducted litigation in the UK Courts (in particular the Technology and Construction Court in London) and Australia; and arbitrations both ad hoc and governed by various major international rules. 

business litigation report

quinn emanuel urquhart & sullivan, llp

Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact Elizabeth Urquhart at +44 20 7653 2311.

- We are a business litigation firm of more than 800 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of January 2021, we have tried over 2,300 cases, winning 88% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over \$70 billion in judgments and settlements.
- We have won five 9-figure jury verdicts and one 10-figure jury verdict.
- We have also obtained forty-three 9-figure settlements and nineteen 10-figure settlements.

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