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Application of State Anti-SLAPP Laws in Federal Court

I. Introduction

Currently, more than 30 states have adopted laws aimed to protect First Amendment rights from so-called "SLAPP" suits. SLAPP stands for "strategic lawsuits against public participation," and SLAPP suits are lawsuits intended to silence or suppress free speech and other constitutionally protected activities. A classic example of a SLAPP suit would be an oil company suing an environmental non-profit for defamation after the non-profit accused the oil company of being a polluter.

Additionally, several states have recently also passed or introduced legislation seeking to expand protections against SLAPP suits. In New York, a broadened anti-SLAPP statute was enacted on November 11, 2020. Washington state passed a new anti-SLAPP law on May 21, 2021 (SB 5009), with the state legislatures of Missouri (HB 1151), Kentucky

(HB 1321), Indiana (HB 1459), and Iowa (HF 456) also looking to pass new anti-SLAPP legislation.

Conversely, although an increasing number of states have adopted anti-SLAPP laws, federal courts remain split on the issue of whether state anti-SLAPP laws are applicable in federal courts. A number of federal district and appellate courts have reached inconsistent holdings as to whether pleading requirements of state anti-SLAPP laws conflict with those of the Federal Rules of Civil Procedure. Because the implications of these inconsistencies are broad and far-reaching, this article analyzes (i) the background of and recent developments relating to California's anti-SLAPP statute; (ii) the recent adoption and development of anti-SLAPP legislation in other states; and, (iii) the split among federal courts as to the applicability of state anti-SLAPP laws.

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Firm Expands Top Management Ranks with Burck and Carlinsky; Quinn to Continue Leading Firm as Chairman

The firm is pleased to announce that partners William Burck and Michael Carlinsky have been named Co-Managing partners of the firm globally. "By expanding and invigorating the leadership of the firm, we are sending a clear message that Quinn Emanuel is built to last," Quinn said. "Mike and Bill are extraordinary lawyers who have been instrumental in leading our New York and Washington, DC offices to tremendous success. I look forward to working closely with them to take the entire firm to new heights."

Burck and Carlinsky previously served as Co-Managing partners of the firm's Washington, D.C. and New York offices, respectively. [Q](#)

Quinn Emanuel Earns Top Marks in 2022 Corporate Equality Index

The firm is proud once again to have been named a 'Best Place to Work for LGBTQ Equality' by the Human Rights Campaign Foundation (HRC). Quinn Emanuel's commitment to fostering, cultivating, and preserving a culture of diversity and inclusion earned the firm a 100 percent ranking on the HRC's Corporate Equality Index, the nation's premier benchmarking survey and report for measuring corporate policies and practices related to LGBTQ workplace equality. [Q](#)

II. California's Anti-SLAPP Statute and Recent Developments

A. Unique Procedural Mechanisms Available Under California's Anti-SLAPP Statute

As a means to combat nuisance lawsuits that are intended to chill free speech, state legislatures have introduced legislation offering increased protection from those suits. California became the first state to introduce anti-SLAPP legislation in 1992, and by far has the most robust body of anti-SLAPP case law. California's anti-SLAPP law provides for a "screening mechanism" by which the plaintiff who brings an action arising out of protected speech or petition activity, at the outset of the SLAPP suit, must "make a prima facie showing [verified under oath] which would, if proved at trial, support a judgment in [the plaintiff's] favor." *Wilcox v. Super. Ct.*, 27 Cal. App. 4th 809, 823 (1994); Cal. Civ. Proc. Code § 425.16(b)(1). Specifically, once the moving defendant has demonstrated that the plaintiff's cause of action arises from "protected" speech or activity, "the burden shifts to the plaintiff to establish a probability that the plaintiff will prevail on the claim." *Kyle v. Carmon*, 71 Cal. App. 4th 901, 907 (1999).

This screening process, in effect, functions much like a motion for summary judgment, with the defendant being able to challenge the merits of a plaintiff's case. One difference, however, is that the filing of a motion to strike under the anti-SLAPP statute in California automatically stays discovery. See *Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174, 1185 (2015); Cal. Civ. Proc. Code § 425.16(g). Another difference is that, unlike a motion for summary judgment, an anti-SLAPP motion to dismiss places the burden on a *plaintiff* to demonstrate that they possess a "legally sufficient claim which is 'substantiated,' that is, supported by competent, admissible evidence." *College Hospital v. Super. Ct.* 8 Cal. 4th 704, 718-719 (1994). If plaintiff is unable to satisfy their burden, then defendant is entitled to dismissal of the SLAPP suit, and an award of the attorneys' fees and legal costs incurred defending the action. See *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1121-1123 (1999); *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 644 (1996); Cal. Civ. Proc. Code § 425.16(c). This "reverse" standard, which places the burden of proof on the plaintiff is intended to (1) allow defendants to obtain quick dismissals of claims arising out of certain "protected" activities, enumerated in California's anti-SLAPP statute; and (2) discourage lawsuits filed with the intent to chill free speech (i.e. First Amendment-related conduct) by imposing the threat of significant legal fees and costs required to

successfully oppose the motion so early in litigation (as well as the risk of paying for the other party's legal fees and costs).

In addition, unlike with a motion for summary judgment, a defendant is entitled to an automatic right of appeal for the denial of an anti-SLAPP motion, and a stay of all trial court proceedings affected by the motion. *Hewlett-Packard*, 239 Cal. App. 4th at 1185-86. "This means that however unsound an anti-SLAPP motion may be, it will typically stop the entire lawsuit dead in its tracks until an appellate court completes its review." *Id.* at 1185. Because of the heightened protections for defendants bringing motions to strike under the anti-SLAPP statute, these motions are subject to potential abuse. As one appellate court has discussed, the statute provides a "free time-out" from further litigation in Court "by entitling the unsuccessful movant to immediately appeal the denial of such a motion," even a relatively weak motion "which wholly lacks any merit." *Id.* at 1184-85.

B. Elements of a Motion To Strike Under Section 425.16(b)

California courts apply a two-pronged test in evaluating whether to grant an anti-SLAPP motion to strike. Under the first prong, defendant must establish that the activity giving rise to a plaintiff's suit arises from one of the following four specific categories that the California legislature defines as "protected" activity:

1. Any written or oral statement or writing made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law.
2. Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law.
3. Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.
4. Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

If the defendant establishes that a claim arises out of protected activity, then the *burden shifts to the plaintiff* to demonstrate the claim contains minimal merit. If the plaintiff does not, the claim will be dismissed.

California courts have broadly construed these areas of protected activity. For example, in *Wilson v. CNN*, the California Supreme Court recently observed that "to insulate the exercise of free speech rights against chilling litigation, the Legislature has defined protected activity

to include not only the act of speaking, but ‘any other conduct in furtherance of the exercise of constitutional speech rights on matters of public interest.’” *Wilson v. Cable News Network, Inc.*, 7 Cal. 5th 871, 893 (2019). (Interestingly enough, though, on July 29, 2021 the California Supreme Court drew a line between speech, which it considered protected, and actions arising from the speech, which it considered to be unprotected—thereby limiting the scope of § 425.16(b). *Bonni v. St. Joseph Health Sys.*, 11 Cal. 5th § 995, 1026 (2021).) The breadth of anti-SLAPP statutes across states vary, but like California’s statute, most other anti-SLAPP laws provide defendants with protections for speech made in *any* forum, as well as a mandatory award of costs and attorney fees for successful defendants. Most, but not all, states with anti-SLAPP legislation explicitly grant protection for speech made in connection with *any* issue of public interest or concern. Moreover, states are increasingly reforming and broadening the scope of anti-SLAPP legislature; the state of New York, for example, recently updated its anti-SLAPP statute to grant protection for “any communications in a public place open to the public or a public forum in connection with an issue of public interest.”

III. Federal Courts Wrestle with Applicability of Anti-SLAPP Laws

Federal courts are in conflict on whether state anti-SLAPP laws provide primarily substantive, or procedural remedies. If considered procedural, anti-SLAPP laws would conflict with Federal Rules of Civil Procedure and therefore be inapplicable in federal court. For more than two decades, the Ninth Circuit has held that the California anti-SLAPP law is primarily substantive and therefore does apply in federal court. *See, e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (noting that California’s anti-SLAPP statute and the Federal Rules “can exist side by side . . . without conflict.”) (quotation omitted).

Recently, however, the Second Circuit held that California’s anti-SLAPP statute did not apply in federal court. *See La Liberte v. Reid*, 966 F.3d 79, 87-88 (2d Cir. 2020). There, the Court held that California’s anti-SLAPP statute was inapplicable in federal court because it conflicts with Federal Rules of Civil Procedure 12 and 56. *Id.* According to the Second Circuit, the question that federal courts must answer in deciding whether state anti-SLAPP statutes apply in federal courts is “whether ‘a Federal Rule of Civil Procedure answer[s] the same question’ as the [special motion to strike].” *Id.* at 87 (quoting *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (alteration

in original)). If so, the Federal Rule governs, unless it violates the Rules Enabling Act. *Id.*

The Second Circuit *La Liberte* decision heavily relied on the Eleventh Circuit’s recent holding in *Carbone v. Cable News Network, Inc.* that the pleading standard set forth by California’s anti-SLAPP statute “abrogates [the already-established federal court pre-trial pleading] entitlement . . . by requiring the plaintiff to establish that success is not merely plausible but probable.” *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1353 (11th Cir. 2018). The *Carbone* decision court also found that California’s anti-SLAPP statute conflicted with Federal Rule 56, which permits summary judgment only if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.*

The Ninth Circuit, however, remains unpersuaded by the other circuits. In *Clifford v. Trump*, the Ninth Circuit held that Texas’s anti-SLAPP law did in fact apply in federal court. *Clifford v. Trump*, 818 Fed. App’x 746, 747 (9th Cir. 2020). The court held that there was no contradiction with state and federal law. That decision contradicted a recent Fifth Circuit ruling in *Klocke v. Watson*, where the court held “that the TCPA does not apply to diversity cases in federal court.” *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019). Specifically, the Fifth Circuit’s analysis focused on whether the Federal Rules of Civil Procedure [and Texas’s anti-SLAPP statute] “‘answer the same question’ when each specifies requirements for a case to proceed at the same stage of litigation.” *Id.* at 245. The Fifth Circuit opined that Texas’s anti-SLAPP statute and Federal Rules of Civil Procedure Nos. 12 and 56 do in fact answer the same question, namely “the circumstances under which a court must dismiss a case before trial.” *Id.* The court also found that Texas’s anti-SLAPP statute imposed “additional procedural requirements not found in the federal rules.” *Id.* “Because the [Texas anti-SLAPP statute’s] burden-shifting framework imposes additional requirements beyond those found in [the Federal Rules of Civil Procedure] 12 and 56 and answers the same question as those rules, the state law cannot apply in federal court.” *Id.* The court in *Clifford* addressed this contradiction, noting “[T]he reasoning of the Fifth Circuit’s opinion cannot be reconciled with our circuit’s anti-SLAPP precedent, *compare Newsham*, 190 F.3d at 972 (‘[T]here is no indication that [Federal Rules of Civil Procedure] 8, 12, and 56 were intended to ‘occupy the field’ with respect to pretrial procedures aimed at weeding out meritless claims.’) *with Klocke*, 936 F.3d at 247 (‘Rules 8, 12, and 56 provide a comprehensive framework governing pretrial dismissal and judgment.’).” *Clifford*, 818 Fed. App’x at 747. The

court in *Clifford* further reasoned that they were bound to follow their own precedent – which “required [the court] to apply the [The Texas Citizens Participation Act],” commonly referred to as the Texas anti-SLAPP statute. *Id.*

A similar split exists amongst U.S. District Courts, which have, in the past several years, issued a string of inconsistent rulings as to whether state anti-SLAPP statutes apply in federal diversity cases. Compare *Harrington v. Hall Cnty. Bd. of Supervisors*, 2016 WL 1274534 (D. Neb. Mar. 31, 2016) (finding a statute providing for attorneys’ fees and costs under Nebraska’s anti-SLAPP statute substantive, and therefore consistent with the Federal Rules of Civil Procedure, thereby allowing for the filing of a motion for attorneys’ fees under the state anti-SLAPP statute), with *Unity Healthcare, Inc. v. Cnty. of Hennepin*, 308 F.R.D. 537 (D. Minn. 2015) (finding that Minnesota’s anti-SLAPP statute was inapplicable because it conflicted with Federal Rule of Civil Procedure 56), *appeal dismissed*, 2016 WL 11339506 (8th Cir. 2016).

These split decisions within the federal courts have led to further confusion and continued forum shopping – which courts may find objectionable, principally, because such “shopping” between courts may offend traditional notions of justice and, as a practical matter, deference to particular courts over others may result in

a backlog of cases in these same courts, thereby delaying the timely dispensation of justice in non-related cases.

IV. Conclusion

Amid all of this confusion at the federal level, the U.S. Supreme Court has, surprisingly, refused to weigh in on the controversy. Rather, the Supreme Court has persistently refused to hear cases involving state anti-SLAPP laws. See, e.g., *Yagman v. Edmondson*, 723 Fed. App’x 463 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 823 (2019); *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 897 F.3d 1224 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019). As recently as February 2021, the Supreme Court again refused to address the issue, denying review in the *Clifford v. Trump* case, which presented the conflict between the Ninth Circuit and the Fifth Circuit’s holdings on the applicability of Texas’s anti-SLAPP law in federal diversity actions. It should therefore be expected that federal courts will continue to issue inconsistent rulings on the matter, leading to further forum shopping, as state legislatures continue to adopt more and broader anti-SLAPP legislation, thereby giving rise to a greater number of anti-SLAPP motions being brought in federal diversity cases. 

NOTED WITH INTEREST

Ninth Circuit Affirms Dismissal of Securities Fraud and Control Person Liability Claims

On March 23, 2022, the Ninth Circuit affirmed an order from the Northern District of California dismissing securities fraud claims under Section 10(b) of the Securities Exchange Act and Rule 10b-5 against Twitter and two Twitter officers, and under Section 20(a) of the Securities Exchange Act against the two officers. The alleged fraudulent statements concerned bugs in certain privacy features of Twitter’s lucrative Mobile App Promotion (“MAP”) product, and Twitter’s statements that it had “fixed” the “issues.” Reviewing the dismissal de novo, the Ninth Circuit found that plaintiffs failed to plausibly allege a claim under Section 10(b) and Rule 10b-5 given that the challenged statements were not materially false or misleading when made. Instead, reasonably construed, the statements indicated only that Twitter had stopped the sharing of user data for MAP, not that it had fixed the underlying bugs. Because a Section 20(a) claim is derivative of the Section 10(b) and Rule 10b-5 claims, the Section 20(a)

control person liability claims were also dismissed.

Background: On October 24, 2019, Twitter’s quarterly earnings report disclosed software bugs affecting its MAP advertising system and reported a \$25 million revenue shortfall. Some analysts downgraded Twitter stock, and the share price dropped over 20%. Five days after the earnings report, on October 29, investors filed a putative class action against Twitter and two Twitter officers in the Northern District of California alleging that Twitter and the officers violated the Securities Exchange Act through statements and omissions about Twitter’s MAP system between July and September of 2019. The MAP product, which allows advertisers to prompt users to download apps, is most effective when the advertisers have access to user data. The bugs at issue resulted in disclosure of data for users who had opted out of this data-sharing. The allegedly false or misleading statements included:

1. Statements in a July 26, 2019 shareholder letter

and Twitter's July 31, 2019 Form 10-Q that the company was "continuing [its] work to increase the stability, performance, and flexibility of [its] ads platform and [MAP]," but that it is "not there yet" and that this work will "take place over multiple quarters, with a gradual impact on revenue."

2. Individual Defendant Segal's statements that the company was "still in the middle of that work" [relating to MAP improvements], and that it is "still at the state where [he] believe[s] that you would see its impact be gradual in nature."
3. An August 6, 2019 tweet that "We recently discovered and fixed issues related to your settings choices for the way we deliver personalized ads, and when we share certain data with trusted management and advertising partners," and Twitter's Help Center's claim that it "fixed these issues on August 5, 2019."
4. Statements at a September 4, 2019 investor conference that the "MAP work is ongoing" and that Twitter "continued to sell the existing MAP product."

On December 10, 2020, the Northern District of California dismissed the claims with leave to amend by January 15, 2021. Rather than amending their complaint, plaintiffs appealed.

The Ninth Circuit's Decision: In *Weston Family Partnership LLLP v. Twitter, Inc.* 29 F.4th 611 (9th Cir. 2022), the Ninth Circuit affirmed that plaintiffs failed to adequately state a claim.

To begin, the Ninth Circuit acknowledged Twitter's particular role in society, observing that the fact "society may have become accustomed to being instantly in the loop about the latest news (thanks in part to Twitter)" does not mean that the securities laws require instantaneous updates. In rejecting plaintiffs' suggestion that Twitter had an obligation to immediately notify the investing public about setbacks from software bugs in the MAP program, the court noted that creating such an obligation would itself wreak havoc. As the court explained, "companies do not have an obligation to offer an instantaneous update of every internal development, especially when it involves the oft-tortuous path of product development . . . Indeed, to do so would inject instability into the securities market, as stocks may

wildly gyrate based on even fleeting developments." Twitter would, however, have been obligated to disclose the software bugs if the failure to do so made other statements materially misleading.

Plaintiffs attempted to plead an obligation to disclose by asserting that the July 2019 statements left the mistaken impression that development was "on track." The court considered the company's and the officers' actual statements, including that the company was "still in the middle" of the work relating to MAP and that the "MAP work is ongoing," and held that the statements did not suggest that the program was "on track." Rather, they conveyed a "vaguely optimistic assessment" that the MAP development – like almost all product developments – "had its ups and downs" while the company continued to make progress. The court also found that the July statements were "so imprecise and noncommittal that they are incapable of objective verification." Twitter therefore had no legal duty to immediately disclose the software bugs, particularly where its earlier statements were "qualified and vague."

Plaintiffs also failed to adequately allege that defendants knew of the software bugs at the time of the July 2019 statements concerning MAP's progress. Plaintiffs relied upon Twitter's August 6, 2019 tweet that it had "recently discovered and fixed issues," to assert that Twitter must have known of the bugs in July. However, the Ninth Circuit has held that "temporal proximity alone" does not satisfy the requirements for pleading with particularity. Further, to assert that the August 6 statement indicated that defendants must have known about the issues in July, plaintiffs interpreted the August 6 tweet and related blog post to mean that the "issues" that had been fixed were the software bugs. The court again reviewed the challenged statements in context, and found that the August tweet and blog post both addressed users' privacy concerns. Thus, the issues that were "fixed" related to privacy leaks, not bug fixes, and the timing of the fixes did not inform defendants' knowledge about the bugs in July.

Finally, plaintiffs' claims failed for the independent reason that the challenged statements – many of which referred to "ongoing" work – were forward-looking and fell within the safe harbor of the Securities Exchange Act. [Q](#)

Gilead Sciences, Inc. Names Quinn Emanuel 'Legal Counsel of Choice'

The firm is honored to receive the first annual 'Legal Counsel of Choice' award by Gilead Sciences, Inc. for 2022. "Gilead's Litigation & Investigations team frequently turns to Quinn Emanuel to serve as the company's zealous advocate in a variety of matters," said Rachel Gupte, Senior Associate General Counsel, Litigation & Investigations. "Quinn's lawyers exhibit excellence and creativity in their representation of Gilead, and they effectively and persuasively present our position. The Quinn team takes the time to really learn Gilead's products and business, and we appreciate their holistic approach to representing us."

That Quinn Emanuel won this award is a testament not only to the firm's excellence in service and counsel, but also to its commitment to advancing diversity and inclusion within the legal profession. [Q](#)

Asia-Pacific Litigation Update

2022 Australian Open COVID Vaccine Legal Battle

Introduction

In the lead up to the 2022 Australian Open in January, the world was captivated by acclaimed tennis star Novak Djokovic's epic legal saga with the Australian Federal Government over his right to enter the country to compete in the Open, which centered around the fact he was unvaccinated for COVID-19. After a series of urgent court hearings broadcast over the Internet and watched by tens of thousands of people globally, the end result was that the number 1 seed's entry visa was cancelled and he was deported from Australia, deprived of the opportunity to defend his victory at the 2021 Australian Open and to add to his tally of 20 Grand Slam singles titles.

But much like the path to victory at a Grand Slam tennis tournament, the journey to reach that final outcome was one full of twists and turns (and plenty of arguments with the chair umpire). Against the backdrop of the COVID-19 pandemic and debates regarding the legal and social consequences of individuals electing not to get vaccinated, this article considers the very live global issue of State sovereignty to determine who will be granted border entry and any relevant preconditions which must be satisfied, albeit with a focus on the Australian administrative law regime and the common law principle of procedural fairness.

Brief Overview of Administrative Law in Australia

United States Supreme Court Justice Stephen Breyer defines administrative law as “*the legal control of government*,” which consists of four main limbs, namely, legal principles that “*define the authorities and structure of administrative agencies, specify the procedures agencies must follow, determine the validity of administrative decisions, and define the role of review courts and other organs of government in relation to administrative agencies*” (Stephen G. Breyer et al, *Administrative Law and Regulatory Policy* (8th ed., 2017)). The position is much the same in Australia (and most other common law jurisdictions globally).

Focusing on the third and fourth limbs, in Australia, an individual seeking review of a federal administrative decision (i.e., to challenge its legal validity) may generally avail themselves of any one of: the prerogative writs expressly and/or impliedly embedded with the Constitution of the Commonwealth of Australia (namely, *certiorari*, *prohibition*, and *mandamus*); judicial review (by exercise of judicial power conferred upon courts by legislation, such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth)); or, in some

cases, merits review (invariably via the Administrative Appeals Tribunal, a statutory body created by the *Administrative Appeals Tribunal Act 1975* (Cth)). Mr. Djokovic's legal challenges to his visa cancellation focused on the judicial review avenue, meaning that the merits of the two separate decisions purporting to cancel his visa (discussed below) were not in question, with the focus instead being on whether those decisions had been made *according to law*.

'Players Ready? Play!'

According to documents filed in Mr. Djokovic's multiple court proceedings, Mr. Djokovic arrived by plane in Melbourne at around 11:30 p.m. on Wednesday, 5 January 2022 and was interviewed by multiple officers of the Australian Border Force (in their capacity as delegates of the Minister for Home Affairs) for several hours before a decision was made to cancel his visa at around 7:29 a.m. on Thursday, 6 January 2022, on the grounds that his “*presence*” in Australia may be “*a risk to the safety, health or good order of the Australian community*.” He was subsequently transferred to a secure hotel in Melbourne, where he was placed in a form of ‘immigration detention’ pending his removal from the country. Mr. Djokovic (via his legal counsel) subsequently prepared and filed an application in the Federal Circuit and Family Court of Australia for judicial review of the visa cancellation decision (*Novak Djokovic v Minister for Home Affairs – Proceeding No MLG35/2022*). At the initial directions hearing held at 2:15 p.m. on 6 January 2022, an order was issued restraining the Minister for Home Affairs from removing Mr. Djokovic from Australia, pending the determination of his application (which was set down for an urgent final hearing at 10.00 a.m. on Monday, 10 January 2022).

Critically, according to the court documents filed by Mr. Djokovic (including an agreed transcript of the interviews conducted with Mr. Djokovic by officers of the Australian Border Force), at 5:20 a.m. on 6 January 2022, Mr. Djokovic was told that he could have until 8:30 a.m. to provide comments in response to a notice of intention to consider cancellation of his visa under a 116 of the *Migration Act 1958* (Cth) (“Migration Act”). Instead, Mr. Djokovic's comments were sought at about 6:14 a.m. and the decision to cancel his visa was made at 7:42 a.m. In the circumstances, at the hearing of Mr. Djokovic's judicial review application, legal counsel for the Minister for Home Affairs conceded that the process adopted by the Australian Border Force was—as Mr Djokovic had alleged in his application documents—legally unreasonable by reason of him being denied procedural fairness. As a result, the Court

quashed the purported cancellation decision, releasing Mr. Djokovic from immigration detention, and requiring the Minister to pay Mr. Djokovic's legal costs. *First set to Mr. Djokovic.*

'Code Violation: Warning Mr. Djokovic'

At the time of pronouncing its orders, the Court was informed that the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs may consider whether to exercise a personal power of cancellation pursuant to section 133C(3) of the Migration Act. In response, on 12 January 2022, Mr. Djokovic published a statement via his Instagram account seeking to "address the continuing misinformation about [his] activities and attendance in events in December." There, Mr. Djokovic: (i) admitted to having attended an interview with a journalist in Belgrade on 18 December 2021, despite having the day prior received a positive result from a PCR test he had taken on 16 December 2021 (which he conceded was "an error of judgment"); and (ii) conceded that a mistake had been made on his travel declaration. *Second set to the Commonwealth of Australia.*

'New Balls, Please!'

On Friday, 14 January 2022, in a separate and new administrative decision—i.e., one now made independently of the decision made by the Australian Border Force—the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs exercised his personal power conferred by the Migration Act to cancel Mr. Djokovic's visa on the ground that he was "satisfied" that his "presence" in Australia "may be a risk to the health and good order of the Australian community" and that it would be "in the public interest" to do so. Perhaps somewhat ironically for Mr. Djokovic, in arriving at that decision, the Minister placed a degree of weight upon the statement made by Mr. Djokovic via his Instagram account.

On the same day that the Minister's decision was delivered, Mr. Djokovic again turned to the Federal Circuit and Family Court of Australia (*Novak Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs – Proceeding No MLG116/2022*), seeking judicial review of the Minister's decision. Mr. Djokovic would face a tougher battle on this occasion, noting that, by operation of the Migration Act, he was not entitled to procedural fairness with respect to the Minister's arrival at that decision and had no right of merits review to the Administrative Appeals Tribunal. Following an initial directions hearing before Judge Kelly held at 8:45 p.m., the Minister undertook not to remove Mr. Djokovic from Australia pending the

hearing and determination of his application for judicial review and his Honour made an order transferring the proceeding to the Federal Court of Australia (*Novak Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs – Proceeding No VID18/2022*). The proceeding was subsequently fixed for an urgent final hearing at 9:30 a.m. on Sunday, 16 January 2022, with Chief Justice Allsop directing that the original jurisdiction of the Federal Court be exercised by a Full Court panel of three judges.

Being a judicial review application, the focus of Mr. Djokovic's legal arguments was limited to impugning the lawfulness of the Minister's decision and the process / evidence relied upon in reaching his state of "satisfaction." The arguments before the Full Court centered upon three primary grounds, namely that:

1. The Minister adopted an illogical, irrational and/or unreasonable approach to one or more of: (1) Mr. Djokovic's presence constituting a risk to the health and good order of the Australian community; (2) the question of public interest; and/or (3) the exercise of his discretion;
2. It was not open on the evidence relied upon by the Minister to find that the presence of Mr. Djokovic in Australia was (or may be) a risk to the health or good order of the Australian community; and
3. It was not open on the evidence relied upon by the Minister to make any finding concerning Mr. Djokovic's "well-known stance on vaccination."

As we know, shortly following the hearing, the Full Court dismissed Mr. Djokovic's application. In its reasons for judgment (*Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3), the Full Court—perhaps conscious that the reasons would have wider than usual readership—highlighted at the outset (at [19]) that:

"an application for judicial review is one in which the judicial branch of government reviews, by reference to legality or lawfulness, the decision or decisions of the Executive branch of government, here in the form of a decision of the Minister. The Court does not consider the merits or wisdom of the decision; nor does it remake the decision. The task of the Court is to rule upon the lawfulness or legality of the decision by reference to the complaints made about it."

The thrust of Mr. Djokovic's first (and, arguably, most creative) ground centered around the argument that the Minister did not consider whether cancelling Mr. Djokovic's visa may separately—in and of itself—foster anti-vaccination sentiment in Australia. The Full Court dismissed this ground (at [95]-[97]) on the basis that the statutory enquiry was directed to the impact of Mr.

Djokovic’s “*presence*” in (as opposed to absence from) Australia and, as such, the Minister was not obligated to consider (although was not precluded from considering) such a counterfactual vis-à-vis any proposed decision to cancel his visa.

As for Mr. Djokovic’s second ground, the central proposition was that the Minister lacked any evidence (and cited none) that Mr. Djokovic’s presence may “*foster anti-vaccination sentiment*”. However, in dismissing this ground, the Full Court held (at [81]) that it was open to the Minister to infer that it was perceived by the public that Mr. Djokovic was not in favor of vaccinations and the evidence did display an affinity of anti-vaccination groups with his views. In addition, the Full Court held (at [82]) that “*an iconic world tennis star may influence people of all ages, young or old, but perhaps especially the young and the impressionable, to emulate him.*”

Mr. Djokovic’s third ground was similarly dismissed by the Full Court, holding (at [71]-[74]) that it was open to the Minister to conclude that Mr. Djokovic had a stance that was well-known on vaccination (and that he was opposed to it) on the basis of public comments made by Mr. Djokovic, as well as on the basis of the available inference that, because Mr. Djokovic had—as of January 2022—for over a year chosen not to be vaccinated (i.e. since vaccines became available), he was opposed to vaccination or did not wish to be vaccinated.

In all the circumstances—given the breadth of the Minister’s power, the width of the discretionary factors he was able to take into account, and the many available factual inferences open to the Minister with respect to Mr. Djokovic’s stance on vaccination and the Australian public’s perceptions of Mr. Djokovic, coupled with the fact that Mr. Djokovic’s common law right to procedural fairness was expressly ousted by legislation—there were very limited avenues left open to Mr. Djokovic to seek to undo the Minister’s decision to cancel his visa.

In a statement released shortly after the Full Court rendered judgment on his application, Mr. Djokovic indicated that he was “*extremely disappointed*” with the decision but would “*respect the Court’s ruling and...cooperate with the relevant authorities*” in facilitating his deportation. *Game, set, match—Commonwealth of Australia.*

Conclusion

Mr. Djokovic’s legal challenge has drawn global attention to the difficulties applicants for judicial review face in overturning administrative decisions, particularly decisions made in circumstances where the applicant has no right to procedural fairness. Even though the Executive arm of the Australian Federal Government effectively ‘failed’ the first time around, Mr. Djokovic’s

case demonstrates that it is invariably open to the Executive to make the same decision time and time again (often based on the same legislative criteria), until it reaches a decision free from jurisdictional error.

Against the backdrop of the COVID-19 pandemic and the principle of State sovereignty permitting the imposition of a requirement of vaccination as a precondition for border entry, there will no doubt be further cases like Mr. Djokovic’s around the common law world. As the Full Court recognized in passing, if an individual’s potential threat to ‘good order’ is a relevant consideration in reaching an administrative decision, “*there is a question as to the extent to which one can or should characterise lawful, even if robust, rallies and protests in the free expression of political or social views (even if unpopular or held only by a few people) as a threat to good order.*” These are the kinds of considerations that are being evaluated by governments all over the world, as borders are slowly ‘opening up’ once again. Whether strong stances like that taken by the Commonwealth of Australia are replicated in other jurisdictions, and whether doing so impinges on individual rights to freedom of association and freedom of speech—which rights, unlike other countries, are not expressly enshrined in Australia’s Constitution—remains to be seen.

Trademark & Copyright Litigation Update Legal Considerations in Terminating Sublicense Agreements

It is a well-established principle in the United States that a trademark license is terminable at will. *Menendez v. Holt*, 128 U.S. 514, 524 (1888). But what does the law say about termination when a valid licensor has entered into a **sublicense** agreement with a third party to use such a trademark? There is not a coherent body of law that litigants can rely on in such “sublicense” termination suits, as the case law is sparse on this particular issue and spread out over various jurisdictions. Yet understanding the legal considerations surrounding the termination of a trademark sublicense can be of great significance to trademark licensors, licensees, and sublicensees. This article focuses on considerations such parties should take into account when evaluating or considering sublicense agreements, and the potential for termination of the same.

Considerations To Take into Account for Trademark Licensors:

Generally, consent to use a sublicense is terminated when the sublicensee knows or has reason to know that the trademark owner is no longer willing to permit the particular use. See Restatement (Third) of Unfair

Competition § 29(d) (1995). This unwillingness may be manifested in words or conduct that is inconsistent with continued consent of the mark. *Id.* For example, two court-approved ways to terminate a license are: (1) sending the sublicensee a cease-and-desist letter (*Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 2005 WL 8160544, at *6 (N.D. Ga. Mar. 24, 2005)), or (2) initiating a lawsuit against the sublicensee for infringement of the sublicense (*Chicago Mercantile Exch. Inc. v. Ice Clear US, Inc.*, 2021 WL 3630091, at *13 (N.D. Ill. Aug. 17, 2021)). Nothing shows lack of consent like commencing an infringement lawsuit.

Further, there is no legal rule that a sublicense automatically survives the termination of the master license agreement. *In re Weinstein Co. Holdings, LLC*, 2020 WL 6816961, at *3 (Bankr. D. Del. Aug. 17, 2020). In general, if the main agreement is terminated, the licensor no longer has the right to sublicense the agreement (unless expressly provided in the master license agreement that the sublicense survives). *Nemo dat quod non habet* (“no one gives what he doesn’t have”). Accordingly, should a trademark licensor wish to terminate both an existing license **and** any related sublicenses, it should expressly indicate its unwillingness to allow any further use.

Notwithstanding these general principles, even if a licensor seeks to terminate both a trademark license and/or any sublicenses, it is possible that the **master** license agreement pursuant to which a sublicense was granted may not allow it, as the question of whether a sublicensee’s rights may survive termination could depend on interpreting such an agreement. *Fraunhofer-Gesellschaft zur Forderung der Angewandten Forschung E.V. v. Sirius XM Radio Inc.*, 940 F.3d 1372, 1380–82, (Fed. Cir. 2019). Courts that have addressed this issue have considered extrinsic evidence to resolve ambiguities in the master license agreement concerning the survival of a sublicense, for example: (1) whether the sublicensee performed all its obligations under the sublicense agreement at the time of the termination of the master license agreement, (2) the trademark owner’s knowledge of and agreement to the terms of the sublicense agreement and any amendments made to the sublicense agreement, (3) whether the parties discussed the sublicensee’s long-term reliance on the license’s validity, (4) the trademark owner’s role in the alleged infringement and the parties’ assumptions that a license would be required for the sublicensee’s continued use of the mark, (5) other discussions among the parties before and after execution of the relevant agreements that may shed light on the effect of a termination of the master license agreement on the sublicense, and (6) commercial practices and custom. *Id.* at 1382. Trademark licensors

should therefore be cognizant of the importance of the language, and above factors, when preparing or entering into any master license agreements that could impact their future rights.

Considerations To Take into Account for Trademark Sublicensees:

Similarly, it is important for parties that are sublicensing trademarks to carefully consider the contractual terms related to the master license agreements applicable to such trademarks. Indeed, while there are few reported instances of sublicensees winning sublicense termination claims, in those cases where sublicensees have been successful against a master licensor it was for reasons such as: (1) the master license agreement had an express provision that called for specific performance to the sublicensee (*Tarrant Apparel Grp. v. Camuto Consulting Grp., Inc.*, 838 N.Y.S.2d 498, 499 (App. Div. 1st Dep’t 2007)), or (2) the licensor fraudulently misrepresented information that the sublicensee relied on to enter the sublicense (*Ostano Commerzanstalt v. Telewide Sys., Inc.*, 794 F.2d 763, 765–66 (2d Cir. 1986)).

In the event of termination, sublicensees may also have some recourse and success defending against termination if they can show that the licensor did not own the mark or abandoned the mark, or prove laches leading to equitable estoppel. *See Eagle Hosp. Physicians*, 2005 WL 8160544 at *6. Factors courts have considered in such an analysis related to sublicensees include whether the licensor: (1) failed to use its mark anywhere in the nation or for several years, or (2) knew about the alleged trademark misuse and negligently delayed asserting its rights such that it caused prejudice to the sublicensees. *Id.* (citing *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1516–17 (11th Cir. 1984)); *see also* Restatement (Third) of Unfair Competition § 29. These factors should be considered by a party considering sublicensing a trademark.

Given the uncertainty of the applicable law described above, and the fact that multi-factor tests have often been applied by courts considering sublicensee termination claims, licensors, licensees, sublicensees, and their attorneys should be cognizant of this potential issue when negotiating license agreements or otherwise preparing to litigate the issue.

Trial Practice Update

Wading Through the Trial Backlog: Advancing Judicial Economy in 2022

The COVID-19 pandemic has forced courts throughout the country to restrict or limit their operations for significant stretches of time. While many initially thought these restrictions would be short lived, we are

now entering year 3 of the pandemic and the emergence of the omicron variant has led to yet another round of orders restricting, limiting, or otherwise delaying in-person proceedings and trials.

One result of these restrictions on their ordinary operations is that courts throughout the country face an unprecedented backlog of trials. This is particularly true for civil trials, which have, understandably, taken a back seat to criminal trials. This practice update focuses on ways that courts have begun to address the backlog, including through reducing the size of juries, restricting preemptory challenges, requiring jurors to be vaccinated, and holding bench trials with direct testimony by affidavit.

It is important for litigants to consider the ramifications of this backlog and ways in which they can assist courts (and clients) to efficiently press forward—as well as potential adaptations to trial strategy that should be made.

Reducing the Size of Juries

The pandemic has made it very difficult to select and sit juries. Many prospective jurors have legitimate, significant health concerns, prefer to quarantine, and do not want to expose themselves to the possibility of contracting the COVID virus through jury service. One step courts have already begun to implement is reducing the size of juries, either with or without the agreement of the parties. A 6-person jury can be selected from a much smaller pool and can be more easily physically seated in a socially-distanced manner in a courtroom. In Massachusetts, for example, the size of civil juries has been reduced from 12 to 6 irrespective of party consent.

While this has alleviated many of the issues associated with the smaller jury pool, the order has caused many to question the impact smaller juries have on case outcomes. For one, smaller juries can be more homogenous, and there is evidence that this homogeneity can result in more extreme outcomes. One study found that six-person juries are four times more likely to return significantly high or low damage awards. This makes logical sense—in a six-person jury, a single person can have more influence as they simply do not need to convince as many people of their position. Furthermore, a more homogenous jury may lack diversity of thought, which would otherwise moderate its verdict as jurors work to compromise.

Studies employing mock jury exercises have also revealed that smaller juries tend to remember less than larger juries. This is because a larger jury is likely to have at least one juror who recalls a fact that others do not. It is that collective recall of the evidence that is lessened by having smaller juries. In light of these studies, it is

especially important to streamline your presentation to a smaller jury and employ consistent and simple themes.

Preemptory Challenges

With smaller juries, preemptory challenges are also critical because each juror's individual impact and influence is magnified. But making this more challenging, another policy some courts have adopted is to reduce or suspend the number of preemptory challenges. A COVID-19 [working group](#) established by the Supreme Court of the State of Arizona found that “in criminal trials involving a 12-person jury, suspending preemptory challenges would reduce by approximately 46 percent the number of qualified jurors necessary to select a [12-person] jury (depending on the number of alternates involved).” Similarly, a Pennsylvania Jury Trial Working Group found that increased “for cause” dismissals of jurors for COVID-19 reasons could be mitigated by reducing the number of preemptory challenges in criminal and civil cases. In Massachusetts, in tandem with seating 6-person juries, the Supreme Judicial Court ordered that each side be limited to 4 preemptory challenges.

While some courts have now relaxed limits on preemptory challenges that were imposed during the pandemic, depending on the course of future variants, courts may continue to impose, or renew, strict limits on the number of preemptory challenges.

Fully Vaccinated Juries

To better ensure the safety of all court participants, courts are increasingly requiring that jurors be vaccinated. Such orders can promote efficiency insofar as they may help to avoid outbreaks that would result in delays or even a mistrial, but they also reduce the size of the jury pool. Challenges to these orders have had mixed success. In a multidistrict action related to prescription opioids, the judge ordered that all jurors should be vaccinated. *In re Nat'l Prescription Opiate Litig.*, C.A. 1:17-md-02804 (N.D. Ohio 2021) at 3758. After defendants objected, pointing out that at that time, vaccination data suggested that the order would exclude from the jury pool over 40% of the community, including a significant portion of minority groups and those with certain political views, the court reversed itself. *Id.* at 3763 and 3766. In another case, a criminal trial in Brooklyn, New York, the judge ruled, over the objection of defendants, that all jurors must be vaccinated. Perhaps the most high-profile example is the Elizabeth Holmes trial, which, with the consent of the government and defense, was tried before a fully vaccinated jury—nine unvaccinated people were dismissed from the jury pool.

Practitioners should consider unintended ways in which vaccination orders may impact a jury pool. Such a requirement may unintentionally exclude individuals from certain ethnic or racial groups or who have political or religious views regarding vaccination status.

Bench Trials with Virtual or Limited In-Person Testimony

In addition to changes that impact a jury's size and pool, many courts are encouraging litigants to agree to bench trials. One innovation on that front has been to allow litigants to choose virtual bench trials. There are many opportunities presented by virtual trials and court presentations, particularly for attorneys who take the time to learn and master the technology.

It is incredibly important that, in thinking about whether to conduct a trial virtually, the parties fully understand the procedures to be applied and any gaps that could be problematic. For example, will the procedures create circumstances that allow the witness to be coached by their off-camera attorney while "on the stand?" Can you see where the witness is looking and what they are looking at? Will the witness need to appear in an empty space or with a particular virtual background or will they be able to have materials (such as family pictures) in the background? Additionally, will the witnesses be in a place where they have a strong internet connection and fully understand how to use the technology? If not, a virtual proceeding can end up taking longer than an in-person proceeding and be full of frustrating breaks to resolve technical issues.

Helpfully, in February 2021, the New York State Unified Court System issued detailed Virtual Bench Trial Protocols and Procedures, noting that while "Virtual Bench Trials are, in all respects, identical to In-Person Courtroom Bench Trials ... certain modifications are necessary regarding the presentation of testimonial, documentary, and physical evidence in order to safeguard accuracy and ensure reliability." See STATE OF NEW YORK UNIFIED COURT SYSTEM VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES at 3. These detailed procedures address many of the above concerns, such as requiring witnesses to appear without virtual backgrounds and "from quiet and appropriate locations without background distractions." *Id.* at 4. They state that witnesses "must be instructed by Counsel, and should be admonished by the Court, that written or oral communications of any kind ... between a witness or party and Counsel for the witness during the Virtual Bench Trial testimony is strictly prohibited." *Id.* at 9. They further state that "Communications between the witness and Counsel shall be restricted as if the Virtual Bench Trial were being conducted In-Person." *Id.* at

9-10.

If the parties do not want to conduct the bench trial virtually, there are ways that courts can shorten in-person bench trials, such as by admitting direct testimony by affidavit, which reduces the time that witnesses are physically in the courtroom. From a litigant's standpoint, such an approach has advantages and disadvantages. On the one hand, you can work with the witness to ensure their direct testimony is as accurate, clear and concise as possible. On the other, a witness' ability to tell a story may be more powerful when told live. Additionally, if direct testimony is admitted by affidavit, it can be tricky for a witness to begin their in-person testimony with a cross-examination, without having an opportunity to get comfortable while being questioned by a familiar face. And, if the direct testimony is exchanged in advance, as is often the case, attorneys can carefully craft and prepare their cross-examinations.

Gaining Efficiency Through Pretrial Motions

As courts seek to make trials more efficient in order to manage their dockets, litigants should put renewed focus into pursuing pretrial motions, such as motions *in limine*, that potentially will result in a more expeditious trial. Indeed, some states' COVID-19 guidance expressly instructs judges to focus on pretrial motions and look for ways to streamline the issues to be addressed during the trial. For example, the Alaska courts' COVID-19 guidance expressly states that the "most effective way to optimize jury trial time is to address, and resolve, issues that can be anticipated before trial. Accordingly, the focus should be on the pretrial motions and hearings to limit the scope of matters to be considered during the trial, avoid delay, and provide that trials are not unnecessarily lengthened." Similarly, Arizona's COVID-19 guidance states that during pretrial conferences, various matters, including motions *in limine*, should be resolved and judges should focus on "issues that will make trials more efficient, and, as a result, shorter." 

Trademark Victory for Boy Scouts of America

The firm recently secured a historic victory for the Boy Scouts of America (the “BSA”) in an important trademark case, ensuring the BSA’s continued right to use its long-standing “Scout” branding with both male and female members.

For over 100 years, the BSA has used the terms “Scout,” “Scouts” and “Scouting” in connection with its youth-serving programs. Over the years the BSA has had both single-gender and co-ed programs. In 2018, the BSA began welcoming girls into its Cub Scouts and Boy Scouts (renamed as “Scouts BSA”) programs, and launched a national campaign using the slogan “Scout Me In” to promote the inclusion of girls into these programs.

Later that year, the Girl Scouts of the United States of America (“GSUSA”) filed a lawsuit against the BSA in the Southern District of New York, asserting claims of trademark infringement, trademark dilution, unfair competition, and tortious interference with contractual relations. GSUSA alleged that the BSA’s use of the terms “Scout,” “Scouts” and “Scouting” in connection with activities that include both boys and girls infringed GSUSA’s claimed rights in the marks “Scouts” and “Girl Scouts” in connection with its youth program services for girls. GSUSA also alleged that the BSA’s use of the program name “Scouts BSA” and the slogan “Scout Me In” infringed GSUSA’s trademark rights, and that the BSA’s use of scout-related terms diluted GSUSA’s “Girl Scouts” mark. GSUSA sought damages in the form of GSUSA’s costs for claimed “corrective advertising” and disgorgement of the BSA’s alleged profits, as well as an injunction that would largely prohibit the BSA from using the term “Scout” without being preceded by the word “Boy.”

Discovery was extensive, involving dozens of depositions and hundreds of thousands of documents. The BSA moved for summary judgment on GSUSA’s claims, including arguing that GSUSA did not hold valid trademark rights in the term “Scout” alone (particularly in light of the fact that GSUSA’s own brand guidelines expressly forbade any use of “Scout” without being preceded by “Girl” in reference to GSUSA and its members), and that GSUSA had failed to prove likelihood of confusion.

On April 7, 2022, Judge Alvin K. Hellerstein granted the BSA’s motion for summary judgment in its entirety. *See Girl Scouts of the U.S. of Am. v. Boy Scouts of Am.*, 2022 WL 1047583 (S.D.N.Y. Apr. 7, 2022). The Court first held that GSUSA had no protectable trademark rights in the word “Scout” unaccompanied by the word

“Girl,” including because of GSUSA’s public disavowal of any such association. *Id.* at *4-*5. The Court then proceeded to address each of the eight factors that guide the determination as to whether there is a likelihood of confusion, and concluded that each was either neutral or favored the BSA (finding, for example, that any similarity between the marks is undercut by the BSA’s consistent use of other BSA brand indicia when it uses the term “Scout”). *Id.* at *6-*10. The Court concluded: “There is no trademark confusion. Girl Scouts has no trademark rights in ‘Scouts’ alone, and ‘Girl Scouts’ in its full form is distinct from [the BSA’s] Scout Terms.” *Id.* at *10. The Court also found that GSUSA had brought its lawsuit for an improper purpose, holding that “[i]n truth, Girl Scouts’ complaint is based, not on concern for trademark confusion, but on fear for their competitive position in a market with gender neutral options for scouting.” *Id.* Finally, the Court ruled that the BSA was not vicariously liable for the acts of local councils, and that the BSA was not liable for alleged acts of dilution or tortious interference. *Id.* at *11-13. The Court entered judgment for the BSA on all counts.

Texas Jury Awards Client Antero Resources \$11.9 Million in Kickback and Bribery Trial

Quinn Emanuel client Antero Resources Corp. is one of the largest natural gas operators in the country. Since 2010, Antero focused primarily on its natural gas operations in West Virginia. During the relevant time, Defendant John Kawcak had total operational control in West Virginia, including the authority to hire the vendors that Antero used to complete wells, and he was otherwise in charge of the over \$1 billion that Antero was spending on operations.

Between 2012 to 2015, Kawcak took bribes and kickbacks from a vendor named Tommy Robertson. Those bribes and kickbacks included \$729,000 in cash transfers and a free private jet. Shortly after receiving those bribes and kickbacks, Kawcak made Robertson’s companies the sole or preferred vendor for some of Antero’s most important operations, including a particular operation called “frac plug drill outs.” Kawcak pushed out the professional companies that had previously been providing drill outs and installed Robertson’s companies as the drill out providers. The data showed that Robertson’s companies inflated their billings by delaying operations through a combination of intentional misconduct and downright shoddy performance. When comparing the performance of the Robertson companies to the vendors that Kawcak pushed out, the Robertson companies took roughly twice as long to perform operations. These delays ultimately cost Antero roughly \$11 million in inflated

payments to Robertson's companies.

Kawcak and Robertson stonewalled Antero's attempts to uncover the existence of the kickback and bribery scheme, which Antero did not even become aware of until a year into the litigation. Originally, this case began as a simple overbilling case based on the Robertson companies charging Antero a price that exceeded the agreed-upon price on a "price list." Antero suspected Kawcak's corruption after holding interviews with over 20 "wellsite managers," who were the Antero personnel that supervised operations on each individual wellsite. Nearly every person with whom the Quinn Emanuel team spoke advised that the firm should further investigate the relationship between Kawcak and Robertson because they all suspected some type of improper relationship between the two based on the preferential treatment that Robertson's companies received despite their substandard work.

After prevailing on at least six motions to compel and multiple motions to enforce, Antero finally uncovered the scope of Kawcak's corruption. On top of the secret bribes and kickbacks, Antero further learned that Kawcak manipulated Antero's invoice verification system to ensure that invoices from Robertson's companies avoided review from Antero's senior executives. Moreover, Kawcak gave an order that any wellsite manager that questioned or otherwise refused to approve a bill from the Robertson companies would be terminated.

The Quinn Emanuel trial team focused heavily on the bribes and kickbacks as well as Kawcak's shifting explanations for the payments and benefits, which defied all reality. For example, when questioned with evidence that Kawcak never paid any value for the private jet, he responded that he paid for it with \$300,000 in cash that was just sitting around his house. When asked why his financial records never showed any withdrawals that corresponded to the \$300,000, Kawcak claimed that the \$300,000 was the product of weekly \$500 ATM withdrawals that had been going on for 20 years. Because the case largely hinged on his credibility, Kawcak's inability to offer any remotely credible explanation for the payments and benefits was a driving factor in why Antero prevailed and the jury awarded roughly \$12 million against an individual employee.

Pro Bono Victory – Releasing Ukrainian Child Refugee from Government Custody

Thanks to the efforts of a firm associate, a 16-year old Ukrainian refugee—Vasya—has been released from the custody of the federal government and reunited with his older brother, who lives in the U.S. Normally children

in these circumstances are held in custody for about a month; our intervention helped reduce custodial time to just 1.5 weeks.

U.S. law mandates that any unaccompanied minors trying to enter the United States without a lawful immigration status are automatically placed in custody of the U.S. Office of Refugee Resettlement (ORR). The laudable goal of this regulation is to prevent human trafficking and child abuse. However, its implementation is hard-felt by Ukrainian refugees coming to the United States seeking humanitarian parole—which is NOT a lawful immigration status when they approach the border. Many families are sending their children with older siblings, grandmothers, or other extended family members to escape the war. Unfortunately, those children are considered "unaccompanied."

Vasya was one of those children. His father cannot leave Ukraine, and his mother chose to stay with him there. They sent Vasya, their youngest son, to America in the hopes he would find safety with his brother who lives here. Vasya had notarized and translated powers of attorneys from both parents in hand. He crossed multiple state borders to end up in a makeshift refugee camp on the Tijuana-San Diego border where he, along with many other Ukrainians, was seeking entry to the United States based on humanitarian parole. His brother was waiting on the other side of the border.

Vasya did not make it through the border. After several days of transfer through various government agencies, including ICE, he was placed into an ORR shelter. His phone was taken. He did not speak English, and no one at the shelter could find a Ukrainian or Russian translator. (The shelter manager later explained that they were still working on the problem of figuring out what language is spoken in Ukraine). His only solace was the other Ukrainian teenagers, who also ended up in the same shelter.

Vasya's brother started looking for help immediately, hoping there was a simple misunderstanding. Eventually, he reached our associate, who was volunteering at the refugee camp, and the other volunteers knew that the associate was a lawyer. Even though our associate explained to him that, as an IP attorney, the associate did not have any expertise in family reunification proceedings, the brother prevailed upon the associate just to translate for him. They agreed, thinking it could not be too difficult to explain that Vasya was traveling to meet his biological brother, with permission from both of their parents.

The ORR quickly proved them wrong. ORR case managers refused to talk unless the associate filed a notice of appearance. After submitting it, they refused to talk because Vasya had not yet signed it (even though they

controlled when he received it). They also rejected the brother's paperwork because he typed his name instead of writing it by hand (separate from the wet signature requirement); refused to believe that the brother's house exists despite a submitted deed from the State and county records (it was a new development which didn't show up on Google Street View); and other "issues." But our associate persevered and ultimately succeeded in helping reunite Vasya with his brother.

The refugee center estimates that around 50 other Ukrainian children are currently held in ORR custody. More are likely on the way, since the recently-announced United for Ukraine program does not appear to permit these children any other way of entry but through federal custody.

Our associate is currently working with SixFifty, a Wilson Sonsini legal technology subsidiary, to (1) create a tool which will allow Ukrainian refugees to fill out the family reunification packet PDF form online in Ukrainian, and (2) distribute translated ORR materials, obtained through the help of volunteer translators, into the hands of ORR and NGOs.

Landmark Settlement Approved in Shareholder Suits Against Victoria's Secret's Parent, L Brands

Just two years after the New York Times exposed pervasive sexual harassment at Victoria's Secret, Judge Watson in the Southern District of Ohio granted final approval of a landmark settlement between our client and other shareholders, and Victoria's Secret's parent company, L Brands. On May 16, 2022, the Court approved the settlement resolving shareholder claims against the company arising out of the "toxic culture of sexual harassment and misogyny" that had "plagued the company and Victoria's Secret for decades." This groundbreaking settlement requires L Brands to implement significant corporate governance reforms for years to come.

Mere days after the New York Times published its in-depth exposé in February 2020, Quinn Emanuel served a books and records demand on L Brands on behalf of a shareholder client to investigate the wrongdoing. The books and records demand sought evidence of the board's failure to address the hostile work environment at Victoria's Secret that was perpetuated by top executives at the company. Due to the company's failure to produce any documents in response to the fairly routine demand—brought under Section 220 of the Delaware General Corporation Law—Quinn Emanuel's next step was to file a Section 220 action in the Delaware Court of Chancery to compel the production of such documents.

The parties litigated the action for months, including through document discovery and depositions. Only after Quinn Emanuel filed its pre-trial brief did the company agree to produce a subset of the documents requested back in February in order to avoid a trial in the matter. Quinn Emanuel teamed up with lawyers at other firms, including Bernstein Liebhard, Cohen Milstein, and Bernstein Litowitz Berger & Grossmann, which represented additional shareholders, to mediate the global dispute with L Brands. After months of hard-fought negotiations over the corporate governance reforms needed to address past harms and prevent them from continuing in the future, the parties agreed to a groundbreaking settlement.

In the settlement—the first of its kind for a company like L Brands, which counted prominent consumer brands like Victoria's Secret among its main assets—the company agreed to revamp its policies and procedures regarding sexual harassment, retaliation, reporting and investigation of such complaints. L Brands has agreed to commit \$90 million to fund these reforms across L Brands and Victoria's Secret, which has since been spun off into a separate entity. These reforms include enhanced policies and procedures around sexual harassment, anti-retaliation, and reporting and investigating sexual harassment complaints, the elimination of Non-Disclosure Agreements (NDAs) and an agreement not to enforce past NDAs, and greater protection for models on the set of Victoria's Secret photoshoots. The company has also made a commitment to promote diversity, equity, and inclusion in the workplace, and will use data metrics relating to harassment, retaliation, and inclusion to ensure that those goals are being met.

In approving the settlement, Judge Watson found that the shareholders conducted "comprehensive investigations," engaged in "significant discovery"—including reviews of L Brands' policies and protocols, special committee minutes, severance and settlement agreements, and internal complaints—and held "protracted arm's length negotiations" with the Company before reaching the settlement. Judge Watson also found that counsel's extensive experience and the "substantial benefit" the Settlement confers weighed in favor of final approval. In granting final approval of the settlement, Judge Watson agreed that the game-changing settlement is fair and reasonable and would benefit L Brands stockholders and the Company. ^Q

business litigation report

quinn emanuel urquhart & sullivan, llp

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- We are a business litigation firm of more than 900 lawyers — the largest in the world devoted solely to business litigation and arbitration.
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- 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 seven 9-figure jury verdicts and four 10-figure jury verdicts.
- We have also obtained fifty-one 9-figure settlements and nineteen 10-figure settlements.

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