

## World Class: The International Proliferation of Class Actions

A group expected to number in the millions sues Google for alleged privacy violations. Tourists sue a travel operator for putting them up in accommodations inferior to what was promised. 1700 plaintiffs seek damages for the meltdown of a nuclear power plant. These sound like the everyday stuff of the class action system in the United States, but these actions were brought in the U.K., Italy, and Japan respectively.

Some deem it the democratization of justice globally while others view it as exporting a weapon of mass destruction, but one thing about which there can be no disagreement: class action practice has established a beachhead in virtually every developed nation around the globe. Although most countries are relatively new to this form of litigation and are inching their way towards tailoring it to their cultures, the U.S. model of aggregate actions forms the bedrock from which other nations' procedures are developing. Predictions are that there will be an increase in the adoption of class action

procedures throughout the world in the next decade and that U.S. style class actions will continue to serve as the model for aggregate actions elsewhere.

Already, core principles of U.S. class action practice have taken root in a majority of international jurisdictions. Most nations allow these actions to be prosecuted by private individuals, as opposed to requiring a public official or other public organization to bring them; and most allow for the recovery of money damages. *See Bassett, 2021: International Law Ten Years From Now: International Litigation: The Future Of International Class Actions, 18 Sw. J. Int'l L. 21 (2011).* And although criticisms of the U.S. system abound—for example, objections to contingent fee agreements and binding those who do not opt-out—many components of U.S. procedure, including those, are finding their way into the procedures of other nations. *Id.* This is due, in some part, to active efforts by class action firms in the United States to make alliances

(continued on page 2)

## INSIDE

International Arbitration Road Show Recap: Events in Houston, Chicago, and New York  
Page 4

Inequitable Conduct After *Therasense*: Calling a Knave a Knave  
Page 5

### Practice Area Updates:

Securities Litigation Update  
Page 7

Patent Litigation Update  
Page 7

Entertainment Litigation Update  
Page 9

\$63 Million Trial Judgment for Len Blavatnik Against JPMorgan and Other Victories  
Page 10

## Quinn Emanuel Again Named One of *Law360's* "Fearsome Foursome"

Following interviews with hundreds of general counsel, Quinn Emanuel has been identified by *Law360* as one of four firms that "strike fear in the hearts of corporate counsel." The firm was also named one of the "fearsome foursome" in 2010. Quinn Emanuel stood out as one of the firms "most likely to trigger dread in opposing counsel for their tenacity and their ability to anticipate their legal opposition's strategy."

The firm was recognized for what it termed "jugular litigation"—the ability to focus in on what matters most in a case. So far in 2013, the firm's litigation approach has been very successful, with favorable billion and multimillion dollar outcomes in high-stakes cases for clients such as the Federal Housing Finance Agency and MBIA Insurance Corporation. **Q**

## Charles Verhoeven and Claude Stern Selected as Top Intellectual Property Litigators by the *Daily Journal* *see page 6*

## Sheila Birnbaum Named Lifetime Achievement Award Recipient by the *New York Law Journal*

Sheila Birnbaum was honored by the *New York Law Journal* at its 125<sup>th</sup> Anniversary Lifetime Achievement Awards. Ms. Birnbaum was among 16 judges and lawyers from law firms, public interest groups, academia, and government agencies, who were recognized for challenging and shaping the law. Ms. Birnbaum, who joined Quinn Emanuel from Skadden, Arps, Slate, Meagher & Flom earlier this year, has brought with her a wealth of experience in products liability, toxic torts, and insurance coverage litigation. She has served as counsel in numerous historic litigations. **Q**

with lawyers in other countries in an effort to promote our home-grown procedures to the world. Conferences are conducted annually where class action practitioners and hopefuls from around the world gather to meet each other, share information about burgeoning issues, and strategize.

Class actions did not originate in this country and did not even morph into their current embodiment until 1966 when Federal Rule of Civil Procedure 23 was amended to provide for class actions very much as we know them. And in the last 45 plus years, they have brought about justice on a mass scale in many cases, while also propagating certain injustices that are well-known to lawyers and businesspersons alike. Like any good thing, too much of it can be its own form of abuse, and class action practice has its share of “too much.” Nevertheless, as business has gone global, class actions have followed along in its wake, and those who conduct business or sell products or services abroad need to be aware of what they may face in other jurisdictions.

A complete discussion of the practices of every nation is beyond the scope of this article, but below are highlights from some of the countries where U.S. businesses are more likely to find themselves the target of consumer actions:

### ***The European Union***

Collective actions are comparatively new and historically underutilized in the EU, resulting in piecemeal and repetitive litigation in and across jurisdictions. In order to improve access to justice while simultaneously avoiding abusive litigation, in June 2013 the European Commission adopted a non-binding “recommendation” stating that within two years, all EU Member States should adopt mechanisms for “collective redress” which allow multiple claimants to seek relief on a collective basis and/or through a representative plaintiff. The Commission’s recommendation requests that Member States incorporate the following elements into their collective redress systems:

- Representative standing should be limited to non-profit making entities authorized by Member States to bring such claims. The objectives of these entities should align with the rights claimed to be violated, and they should have sufficient resources to handle the claim.
- The class should include only members who affirmatively opt-in.
- Claimants should be required to declare the source of their funding. Third-party funders should be prohibited from influencing procedural decisions,

including on settlement, and should not be compensated on a contingency fee basis unless third-party funding arrangements are subject to regulation by a public authority.

- Member States should provide for evaluation at the earliest possible stage of litigation (and on the court’s own motion) as to whether conditions for collective actions are satisfied.
- There should also be some cursory early examination of the elements to eliminate manifestly unfounded cases.
- The parties should be encouraged both before and during litigation to settle.
- Member States should ensure that it is possible to disseminate information about the action in a manner that balances freedom of expression with a defendant’s right to protection its reputation, such as via a national public registry.
- Only compensatory damages should be permitted; punitive damages are discouraged.
- Losing parties should reimburse prevailing parties for necessary legal costs.
- A number of EU Member States already had implemented collective litigation procedures prior to the issuance of the Commission’s recommendation. Whether and to what extent those nations may revise their mechanisms (as well as whether additional states will enact class legislation) remains to be seen.

### ***The United Kingdom***

While the English Civil Rules allow a party to represent a class of claimants, that party can represent them only if they share the “same interest.” English courts have construed this requirement very narrowly, thereby limiting the utility of this rule. Aggravated and exemplary damages are rare in the UK; awards are more restrained and largely based on actual losses.

A more common type of collective action is the group litigation order (“GLO”). A GLO is not a representative action procedure; rather, similar to the United States’ Judicial Panel on Multidistrict Litigation, which leads to creation of “MDLs” where multiple parties bring the same claim in at least more than one federal jurisdiction, a GLO is a case management device for handling and coordinating multiple, independent claims. Any party to a claim may request a GLO, which may be granted if the claims presented give rise to common or related issues of fact or law. If granted, a single court will be assigned to manage the GLO and all claims will be transferred to the so-called “management court.” The management court is afforded great discretion and flexibility in managing group litigation, and charged

with implementing a procedure which best serves the specific needs of a particular set of claims.

Where a judgment or order is issued in relation to one or more GLO issues, unless otherwise stated that judgment or order is binding on the parties to all other claims that are on the group register at the time of issuance. The management court may give directions as to the extent to which that judgment or order is binding on subsequently-added claims.

A draft Consumer Rights Bill provides for collective actions to be bought in relation to private competition claims. It reflects most of the requirements of the Commission's recommendations and, importantly, permits opt-out as well as opt-in actions.

### *Germany*

Germany has a number of procedures that allow representative action on claims concerning consumer protection and antitrust law. For example, German law provides for multiple claimants to join an action if their claims arise from the same transaction or occurrence, or if there is a common question of law or fact relating to all claims. Moreover, individuals may pool their interests for legal enforcement and assign those interests to a new entity who acts as the plaintiff in a court proceeding. There are, however, strict limitations on the use of such litigation pools. Finally, there are several organizations that have the authority to enforce consumer protection and unfair competition law.

Following the June 2013 recommendation by the European Commission for member states to adopt collective redress actions, the Green party initiated legislation in the German Bundestag calling for the introduction of broad class action rights for consumers. It was not voted on prior to the end of the term.

There is an important limitation, however, on Germany's ability to adopt formal class action procedures. Germany's constitution prohibits court judgments from having a negative preclusive effect on non-parties—thus raising the question of whether issues can be decided that will affect absent class members, that is, anyone other than what we think of in the United States as class representative. At least some commentators see this as an impediment to expanding class action procedures in Germany in the near future.

### *France*

France's Parliament is currently debating legislation that would allow consumer class actions (permitting non-consumer class actions is not under consideration). Under the proposed law, only nationally representative consumer associations (which excludes law firms)

would have standing to sue any defendant in any line of business. The class action would permit compensation for harms (1) suffered by groups of consumers in similar or identical circumstances; (2) due to breach of contract; (3) in connection with the sale of goods or services; (4) due to anticompetitive practices under French or European law. The proposed law would only compensate consumers for economic losses; non-pecuniary damages fall outside the scope of the proposed bill.

The defendant against whom the action is filed has an obligation to inform and notify potential consumers of the existence of this claim. As currently written, the legislation provides for "opt-in" class actions, where consumers would only be members of the class if they affirmatively expressed their desire to join it. If they do not opt-in, class members may not share in any recovery but retain their right to pursue individual relief.

Under the current proposal, any contractual stipulation that would prohibit a consumer from participating in a class action is deemed null and void.

### *Japan*

There is no robust or widely used formal "class action" mechanism in Japan. Instead, the predominant method for multiparty Japanese litigation is via joinder. Under Japanese law, claims may be joined where the rights or liability are common to more than one person or are based on the same or similar facts or law. Each party may sue or be sued as co-parties, and may appoint joint counsel. Judgments will not necessarily apply uniformly to all members of the group.

Japan's Code of Civil Procedure permits plaintiffs to commence representative actions on behalf of multiple parties (with judgments that bind both the representative and the group of opt-ins he or she represents), but in practice representative actions are rarely used in Japan. Moreover, in certain areas, such as consumer cases under the Consumer Contract Act, the only available remedy—exercised by the "Qualified Consumer Organization," which is certified by the Prime Minister—appears to be injunctive. Thus, there still are incentives to bring representative actions in Japan.

Following the meltdown at the Fukushima nuclear power plant, some 1,700 plaintiffs sought to file four class actions against the Tokyo Electric Power Co. (TEPCO), seeking 5.3bb Yen in damages and an injunction to return radiation to pre-meltdown levels. Those cases are still developing, and their status is uncertain: plaintiffs reportedly are reluctant to pursue lengthy and arduous litigation and are struggling

to estimate and substantiate their losses; at the same time, TEPCO's existence is threatened by litigation and clean-up costs. This uncertainty has revived a long-running debate as to whether to adopt more U.S.-style class action litigation procedures in order to compensate victims while not ruining defendants.

### **Russia**

Russia has permitted formal "class actions" since 2009, under Chapter 28.2 of the Russian Commercial Procedural Code. These are actions brought by a legal entity or an individual, for itself and/or on behalf of a minimum of five other persons in similar legal relationships, to protect a violated or disputed right arising out of those relationships. Class actions may be filed in relation to corporate disputes, capital market disputes or other commercial disputes. Consumer class actions are not yet permitted.

The class action regime set up in 2009 has features of both opt-in and opt-out procedures. Once a claim is classified as a class action, all parties in the same legal relationship as the claimant should be notified. Findings are binding on all of those individuals, but to obtain benefits one must affirmatively join the suit. The number of claims filed pursuant to Chapter 28.2 is not yet significant. The new class action regime has not received much enthusiasm in the country.

Even before 2009, Russian law accepted group actions and representative actions. Group actions may be filed when multiple claimants have similar claims against the same defendant(s). These were essentially independent actions heard in the same proceeding. A representative action is an action filed by the government or a noncommercial organization, generally seeking a declaration that certain conduct is illegal for the benefit of a large group of the general public.

### **Australia**

Class actions have been prevalent in Australia since a 1992 amendment to the Federal Court of Australia Act (FCA). The amendment introduced the notion of "representative actions." Product liability cases dominate the class action landscape in Australia, with some other examples of types of class actions including consumer fraud, securities, and antitrust law. In 2012, PricewaterhouseCoopers (PwC) and other defendants settled an Australian securities class action for \$203,000,000 USD, the biggest class action settlement in Australian history.

Australia is said to be very accommodating of class actions, even more so than the United States. This results from the fact that there is no initial certification procedure nor a requirement that common issues predominate over individual ones; Australian rules allow for the determination of issues common only to subgroups—or even individuals alone—as part of the class action. There is also a growing litigation funding industry. Even so, reformers are currently calling for the adoption of an opt-in system, *cy pres* damages and the reversal of the loser pays principle. The states of Victoria and New South Wales have also now adopted class action procedures nearly identical to the Australian Federal provisions.

There are three threshold requirements to commence a class action:

- seven or more persons must have a claim against the same person;
- the claims must arise out of the same, similar or related circumstances; and
- the claims must give rise to at least one substantial common issue of law or fact.

Suits under the CCA however are opt-in. Once commenced, class actions in Australia continue until resolved or the court orders the discontinuation of the class form. Settlements must be approved by the court. 

## **International Arbitration Road Show Recap: Events in Houston, Chicago, and New York**

The firm recently hosted international arbitration seminars in Houston, Chicago, and New York. In Chicago and New York, the topic was "How to Win Your Arbitration—And Enforce the Award!" and in Houston, the subject was "International Energy Arbitration: Strategies for Winning and Enforcement." The presentations focused on insiders' views on how to frame and execute a winning strategy in international arbitration. Quinn Emanuel's partners who presented included international arbitration specialists Stephen

Jagusch, Ted Greeno, Fred Bennett, David Orta, Peter Calamari, Tai-Heng Cheng, and David Elsberg. Among them, these practitioners have served as advocates or arbitration panelists in more than 500 arbitrations in every major arbitration institution in the world. The seminars were attended by in-house counsel from hundreds of *Fortune* 1000 companies. 

## Inequitable Conduct After *Therasense*: Calling a Knave a Knave

After years of calling the inequitable conduct defense to patent infringement a “scourge” and a “plague,” the Federal Circuit sought to put a stop to the overuse of the defense in *Therasense*. *Ferring B.V. v. Barr Labs., Inc.*, 437 F.3d 1181, 1195 (Fed. Cir. 2006) (J. Newman, dissenting); *Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1422 (Fed. Cir. 1988) (“[T]he habit of charging inequitable conduct in almost every major patent case has become an absolute plague.”). The *Therasense* court was largely successful in its goal of eradicating the plague of weak and perfunctory inequitable conduct counterclaims, and with the Supreme Court’s recent decision not to review the heightened standard, *Therasense* is here to stay for the foreseeable future. See *Sony Computer Entertainment America LLC v. 1<sup>st</sup> Media, LLC*, No. 12-1086 (Mar. 4, 2012) (dismissed October 15, 2013). Although its opponents argue that the new intent framework is nearly impossible to meet, the recent case of *Apotex* makes clear that the defense survives in egregious cases.

Inequitable conduct is an equitable defense that evolved from unclean hands cases, and eventually became a doctrine of its own. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1285 (Fed. Cir. 2011). The doctrine required a showing, by clear and convincing evidence, that the applicant misrepresented or omitted material information with the specific intent to deceive the PTO. *Id.* at 1287. In the past, the intent requirement was met by mere negligence, and the court took a “sliding scale” approach so that a strong showing of materiality would reduce the showing of intent, and vice versa. *Id.* at 1287-88.

If successful on the inequitable conduct defense, the remedy is the “atomic bomb” of patent law, rendering the entire patent unenforceable. *Id.* at 1288. Because of the low standards to prove the defense, and the game-changing result, inequitable conduct was used as a defense in eighty percent of patent infringement cases. *Id.* at 1289.

The overuse of the defense led Judge Newman to remark that “the prevalence of accusations of inequitable conduct in patent cases led judges to suspect that all scientists are knaves and all patent attorneys jackals.” *Hoffman-La Roche, Inc. v. Promega Corp.*, 323 F.3d 1354, 1372 (Fed. Cir. 2003) (J. Newman, dissenting).

Thus came *Therasense*, in which the Federal Circuit heightened the standard of proof on inequitable conduct claims. First, it removed the sliding scale so that both intent and materiality must meet the standard independently. *Therasense*, 649 F.3d at 1290. In addition, the court must find that the specific intent

to deceive was “the single most reasonable inference able to be drawn from the evidence.” *Id.* Finally, the court held that the materiality required to establish inequitable conduct is but-for materiality, that is, the PTO would not have allowed the claim but-for the omission or misrepresentation. *Id.* at 1291. The court left open an exception to the but-for requirement in cases of “affirmative egregious misconduct”. *Id.* at 1292.

After *Therasense*, courts remarked how difficult it was to prevail on inequitable conduct. See, e.g., *Metris U.S.A., Inc. v. Faro Tech., Inc.*, 882 F. Supp. 2d 160, 170 (D. Mass. 2011); *Wyeth Holdings Corp. v. Sandoz, Inc.*, 2012 WL 600715 (D. Del. Feb. 3, 2012) (“[The Defendant] faces a more difficult task of proving inequitable conduct in light of the Federal Circuit’s recent precedent . . .”). Not surprisingly, following *Therasense*, many district courts granted summary judgment of no inequitable conduct, and the Federal Circuit reversed some findings of inequitable conduct that made it through the district courts. See e.g., *Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 695 F.3d 1285, 1292 (Fed. Cir. 2012); *Carl Zeiss Vision Int’l GMBH v. Signet Armorlite, Inc.*, 2011 WL 6372785 (S.D. Cal. Dec. 19, 2011); *Birchwood Labs., Inc. v. Battenfeld Tech., Inc.*, 2012 WL 2045757 (D. Minn. May 21, 2012). Thus, after *Therasense*, it seemed that it would be a rare case indeed where an accused infringer prevailed on an inequitable conduct defense.

Enter Dr. Bernard Charles Sherman, an engineer, pharmaceutical formulator, and the founder and chairman of Apotex, Inc. *Apotex, Inc. v. UCB, Inc.*, 2013 WL 4811231, at \*3 (S.D. Fla. Sept. 9, 2013). Dr. Sherman sued the maker of a popular drug to treat high blood pressure for patent infringement. *Id.* at \*1. But Dr. Sherman invented nothing—he divined the manufacturing process by studying the drug that was on the market, added water to the mix, obtained a patent, then filed suit nearly eight years later. *Id.* at \*1, \*34.

The court immediately noted that Dr. Sherman’s tactics were “illustrative of inventive litigation, as opposed to the scientific discovery that the patent laws were designed to promote.” *Id.* at \*1. Dr. Sherman was no stranger to patent applications or litigation—he had personally written 100 patent applications, and directed all litigation for Apotex. *Id.* at \*4. Indeed, it was Dr. Sherman’s close involvement in a prior litigation that inspired his tactics in the instant case. In 1999, summary judgment was entered against Apotex because the patent at issue there was held to be invalid.

*Id.* On similar facts, the court noted that anyone with a fundamental knowledge of chemistry would have been able to figure out the manufacturing process if they knew the ingredients and knew to add water to the mix. *Id.*

In the instant case, Dr. Sherman again asserted that he invented a drug even though his “invention” consisted of merely adding water to the mix. *Id.* at \*1. But this time, Dr. Sherman knew to be careful to conceal that the drug manufacturer had made its process public. He embarked on a scheme to misrepresent the nature of the prior art to the PTO. Although Dr. Sherman disclosed one prior patent, he did not disclose to the Examiner that if one simply added water to the mix, they would arrive at Dr. Sherman’s “invention.” *Id.* at \*7. Finally, Dr. Sherman hired an expert witness to submit a declaration to the PTO, in which he repeated, under oath, Dr. Sherman’s arguments. *Id.* at \*18-19. Dr. Sherman shielded the expert from the truth by directing the expert to confine his discussion to the documents provided by Apotex. *Id.* at \*23. Additionally, neither party disclosed to the PTO that they had worked together on about 10 other matters, or that the expert was being paid for his work. *Id.* at \*19. Finally, and perhaps most egregiously, Dr. Sherman represented to the PTO that he had conducted experiments that confirmed his arguments, and reported his results with an accuracy to the hundredth of a gram. *Id.* at \*17. In fact, these experiments were never performed at all, but were instead simply made up entirely in Dr. Sherman’s head. *Id.*

In addition to lying to the PTO, Dr. Sherman was less than candid with the court, which admonished

him for his “selective memory.” *Id.* at \*20. It seems that Dr. Sherman was unable to recall crucial information about what he knew during the prosecution of the patent, but, rather conveniently, was able to remember things in meticulous detail when helpful to his case. *Id.*

Therefore, the court found that Dr. Sherman’s conduct met the new heightened standards for inequitable conduct. *Id.* at \*27. The court found that the “single most reasonable inference” to be drawn was that Dr. Sherman intended to deceive the PTO. *Id.* at \*22. The court also found that the Examiner would never have issued the patent had it known of the information withheld by Dr. Sherman. *Id.* at \*25. The court further found that Dr. Sherman engaged in “affirmative egregious misconduct.” *Id.* at \*26. The court stated “the misconduct in this case extended beyond misrepresentations to the patent Examiner and constitutes an abuse of the patent system itself. The practice of targeting a competitor’s existing and widely available product and seeking to obtain a patent for the purpose of suing that competitor through a pattern of lies and deception should not be rewarded.” *Id.* at \*27.

The Federal Circuit had disapproved of less-than-meritorious inequitable conduct claims for years. When it reined in the defense in *Therasense*, many believed that it would be nearly impossible to ever win on this claim again. But as shown with Dr. Sherman in *Apotex*, we know that when the adversary is truly a “jackal” or a “knave,” courts will not enforce patents obtained through deceit. 

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## Charles Verhoeven and Claude Stern Selected as Top Intellectual Property Litigators by the *Daily Journal*

Charles Verhoeven and Claude Stern were named among the Top 75 Intellectual Property Litigators by the *Daily Journal*, California’s most respected provider of legal news. This annual list recognizes litigators for their achievements in impactful intellectual property issues.

Mr. Verhoeven is the head of Quinn Emanuel’s Northern California offices. Since 2009, he has been recognized yearly by the *Daily Journal* as one of California’s Top 75 Intellectual Property Litigators. Mr. Verhoeven’s intellectual property practice has involved a wide range of technologies including Internet, tablet, and computer hardware and software. This year, he is distinguished for his work in the ongoing “smartphone wars” as lead counsel in defending companies that use Google’s Android operating system against Apple and Microsoft. In particular, his widely-publicized fight on behalf of Samsung against Apple continues on multiple

fronts in numerous jurisdictions.

Mr. Stern serves as the Co-Chair of Quinn Emanuel’s National Intellectual Property Litigation Practice. Since 2008, he has been recognized yearly by the *Daily Journal* as one of California’s Top 75 Intellectual Property Litigators. Mr. Stern has been lead trial counsel for a variety of precedent-setting cases within the intellectual property field, including *Broderbund Software, Inc. v. Unison World*, the first reported case to recognize the copyrightability of a non-video game computer program user-interface, and *Planet Bingo LLC v. GameTech Int’l*, in which the Federal Circuit established a new standard for determining infringement under the doctrine of equivalents. This year, he is noted for his high-profile representation of Zynga against gaming giant Electronic Arts, and the successful and case-ending claim construction ruling in the *DDB v. CSTV* patent litigation. 

## Securities Litigation Update

### *Rating Agency S&P's "Puffery" Defense Rejected in U.S.'s Landmark Fraud Case Under FIRREA.*

Credit-rating agencies have successfully asserted several defenses to private investors' fraud claims, including a First Amendment defense and the defense that credit ratings, as "opinions" rather than statements of fact, can be actionable only where the rating agency did not "genuinely believe" the rating was warranted. *See, e.g., Abu Dhabi Comm. Bank v. Morgan Stanley*, 2009 WL 2828018, \*18 (S.D.N.Y. Sept. 2, 2009). More recently, however, in an action brought by the United States against ratings agency S&P under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), the court drew the line at S&P's defense that its public pronouncements about its independence, objectivity and conflict controls were "mere puffery." *United States of America v. McGraw-Hill Companies, Inc. and Standard & Poor's Fin. Serv. LLC*, Case No. 13cv779 (C.D. Cal.).

In that case, the government sued S&P, alleging two fraudulent schemes under the mail, wire, and financial institution fraud statutes. First, the government alleges S&P defrauded investors by proclaiming on its website that its ratings were independent, objective, and uninfluenced by conflicts of interest, when S&P knew that it had altered CDO ratings models, and refrained from collateral downgrades, to preserve market share. *Id.* at 7-9. Second, the government alleges that S&P defrauded investors when it issued ratings for more than 700 CDOs between March and October 2007 that did not reflect its "true credit opinions." *Id.* at 13-16.

"Deeply troubl[ed]" by the puffery argument mounted against the government's first theory of fraud, the court disagreed with S&P that its public representations of independence and objectivity, as well as specific policies and procedures published on S&P's website, were merely "aspirational" in nature. Rather, "they appear designed to induce reliance on current [conflict of interest] policies and practices." *Id.* at 9.

Against the government's second theory of fraud—false ratings on more than 700 CDOs issued between March and October 2007—S&P argued that the government neither pled the ratings' objective falsity nor that S&P subjectively disbelieved them. *Id.* at 13. The court rejected this argument as well, holding that it was sufficient for the government to plead S&P's knowledge that CDOs were backed by deteriorating RMBS collateral and that this should have affected

S&P's ratings, but that S&P failed to adjust those ratings when S&P issued them on the CDOs. *Id.* at 14. More fundamentally, the court held, by pleading that business considerations infected S&P's ratings process overall, the government stated a claim that "none of S&P's credit ratings represented the thing that they were supposed to represent, which was an objective assessment of creditworthiness." *Id.* at 14 (emphasis in original).

Lastly, the court rejected S&P's argument that the government's case should be dismissed because the allegedly deceived parties—CDO investors—were not the parties from whom S&P schemed to obtain money; S&P's fees were paid directly by issuers of CDOs, who the government claims remained undecieved by S&P's schemes. *Id.* at 17. The court reasoned that S&P knew issuers routinely passed the costs of rating agency fees on to CDO investors, and thus these investors were in fact the persons who (indirectly) paid S&P. *Id.* at 18.

It remains to be seen whether the California district court's approach, issued in a case involving the government as plaintiff under FIRREA, will have an impact in cases brought by private investors.

## Patent Litigation Update

***Commil USA, LLC v. Cisco Systems* (expanding evidence that may be used to negate an intent to induce infringement of a patent).** The Federal Circuit recently expanded the scope of evidence that a defendant may introduce to defend against allegations of inducement in *Commil USA, LLC v. Cisco Sys.*, 720 F.3d 1361, (Fed. Cir. 2013). In overruling the trial court's exclusion of evidence at trial, the Court held that evidence of a defendant's good-faith belief that a patent is invalid may negate the requisite intent necessary to prove induced infringement.

Recognizing that "one cannot infringe an invalid patent," a majority of the Court explained that "one could be aware of a patent and induce another to perform the steps of the patent claim, but have a good-faith belief that the patent is not valid," and, consequently, lack the intent to induce infringement. Addressing Judge Newman's dissent—stating that "[t]his change in the law of induced infringement is inappropriate"—a majority of the Court cautioned that evidence of an accused inducer's good-faith belief of invalidity does not *preclude* a finding of induced infringement, but it is evidence that should be considered by the fact-finder in determining whether an accused inducer acted with the requisite intent to

induce infringement.

Going forward, potential defendants assessing inducement liability should consider obtaining an opinion of counsel as to both the invalidity and non-infringement of the patent, preferably soon after the patent is brought to their attention. Under *Commil*, the invalidity portion of such opinions may be introduced at trial as evidence of defendant's good faith belief that no inducement liability would attach, possibly negating any finding of intent to induce infringement. Such opinions should be obtained pre-suit, given the Federal Circuit's prior holding that an opinion of counsel regarding non-infringement obtained after the commencement of litigation is insufficient to rebut an inference of reckless conduct. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1370 (Fed. Cir. 2006). Where a defendant has no prior notice of the plaintiff's induced infringement claims, any post-filing opinions of counsel regarding the invalidity of an asserted patent should be supported with other evidence demonstrating the defendants' belief, at the time of the conduct allegedly constituting "inducement," that the asserted patent was invalid.

***Lighting Ballast Control Inc. v. Philips Electronics North America Corp.* (addressing deference to trial court's claim construction on appeal).** On September 13, 2013, the Federal Circuit sitting *en banc* heard oral arguments as to whether it should overrule its holding in *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) that a trial court's patent claim construction decisions are subject to *de novo* review on appeal, and whether it should afford deference to any aspect of the trial court's interpretation of the patent claims.

Both sides asked the Court to overrule the *Cybor* decision. The plaintiff argued that the Court on appeal should deferentially review the entirety of a trial court's claim construction. The defendant, and the U.S. Patent Office as a "friend of the Court," argued that the Court should only review deferentially the trial court's findings regarding "disputed issues of historical fact," but maintain a *de novo* review of all other trial court claim construction findings.

Many of the Court's questions suggested a reluctance to overturn *Cybor*. In particular, Judge Lourie expressed concern that affording deference would subvert Congress's goal, in establishing the Federal Circuit, of lending uniformity in patent decisions, while Judge Moore cautioned that permitting a deferential review for "issues of historical

fact" may lead to a rush of litigants claiming *all* claim construction issues were factual issues.

The Court's ruling is expected before the end of 2013.

***Status of Legislation Addressing Non-Practicing Entities (NPEs).*** Members of Congress have proposed at least six pending bills intended to curb abusive actions by non-practicing entities ("NPEs") or Patent Assertion Entities ("PAEs").

In the House, the Saving High-Tech Innovators from Egregious Legal Disputes (SHIELD) Act (H.R. 845) would impose a fee shifting provision allowing the prevailing party to recoup costs in appropriate circumstances, including attorneys' fees, and would require the patent owner to post a bond, potentially early in the litigation, to facilitate recovery of such costs. The End Anonymous Patents Act (H.R. 2024) would preclude an entity to which a patent, patent application, or interest is sold, granted, or conveyed from collecting any damages for allegedly infringing conduct that occurred before the entity files a notice of ownership transfer with the U.S. Patent Office. The Patent Litigation and Innovation Act (H.R. 2639) would impose a heightened pleading requirement, allow for intervention by interested parties, require a stay of discovery until after any rulings on claim construction or motions to dismiss or transfer, and require courts to make findings regarding the parties' conduct during discovery. Finally, the Stopping the Offensive Use of Patents (STOP) Act (H.R. 2766) would expand the Transitional Program for Covered Business Method Patents under the AIA beyond "financial products and services," and remove the program's current 2020 expiration date, allowing more parties accused of infringing certain types of patents to petition the Patent Office to review a patent's grant and scope. Each House bill is currently before the House Subcommittee on Courts, Intellectual Property and the Internet.

The Senate has also proposed NPE-directed bills, including the Patent Quality Improvements Act (S 866) which, like the House's STOP Act, would expand the Transitional Program for Covered Business Method Patents under the AIA beyond "financial products and services" and remove the program's 2020 expiration date. The Patent Abuse Reduction Act (S 1013) would impose a fee shifting provision allowing the prevailing party to recoup costs in appropriate circumstances, impose a heightened pleading standard, and limit the type and amount of permissible discovery. Both Senate bills are currently

pending before the Senate Judiciary Committee.

States have also gotten into the act. For example, Vermont recently created a cause of action under its Consumer Fraud statute for “Bad Faith Assertions of Patent Infringement,” listing several non-exhaustive factors that courts may consider as evidence of bad faith by a patent owner, including sending patent demand letters that fail to identify how a party is violating the patent, provide a reasonable estimate of the damages, or provide a reasonable time for a response. And, on May 8, 2013, the Vermont Attorney General filed an action under preexisting Vermont law, accusing MPHJ Technology Investments, LLC of unfair and deceptive trade practices, such as, for example, demanding up to \$1,200 per employee to avoid a patent-infringement lawsuit, and telling companies that they would sue if they didn’t respond within two weeks.

## Entertainment Litigation Update

***Viacom Executive’s Name Not Protected as Trademark Under Web Domain Rules.*** On September 6, 2013, a World Intellectual Property Organization (“WIPO”) arbitrator denied Viacom President and CEO Philippe Dauman’s claim for infringement of unregistered trademark rights in his own name, against a company that had registered the website domain name “philippepierredauman.com.”

The respondent, a company called “Dinner Business,” registered the domain name and then contacted Viacom regarding the respondent’s prospective use of the name. The facts had many of the hallmarks of “cybersquatting,” a practice where someone registers a domain name with the intent to profit from the goodwill of some else’s trademark. Cybersquatting is a serious issue for many corporations owning trademarks.

Dauman brought a complaint before WIPO under the Uniform Domain-Name Dispute Resolution Policy (the “UDRP”), which is binding on all domain name registrars. Dauman argued that he holds common law rights in his name because of his fame in the business and entertainment world and, under U.S. trademark law, his name has acquired secondary meaning. He alleged that the respondent had not previously used the Dauman name and its actions showed that it was merely trying to take advantage of Dauman’s fame and goodwill for commercial gain.

The arbitrator acknowledged that Dauman was famous, recognizing that he has held many corporate directorships and philanthropic positions and has been a subject of hundreds of newspaper and magazine

articles over many years, and that the respondent did not have any legitimate interest in the name. However, relying on the “consensus view” in the WIPO Panel Views on Selected UDRP Questions, the arbitrator concluded that a name “needs to be actually used in trade or commerce as an identifier of goods or services to establish unregistered trademark rights for the purpose of the UDRP.” The arbitrator reasoned that unlike an actor, performer or politician—“whose livelihood turns on personal recognition” —Dauman “does not allege use of his name as the identifier of any particular goods or services, merely that his name is well known in the business and entertainment world.” The arbitrator ruled that this was insufficient to establish common law trademark rights in the name under the UDRP (although Dauman may have claims under, *inter alia*, the Anticybersquatting Consumer Protection Act which expressly provides for protection of personal names).

The case is *Philippe Pierre Dauman v. Dinner Business*, WIPO Case No. D2013-1255. 

# VICTORIES

## **\$63 Million Trial Judgment for Len Blavatnik Against JPMorgan**

The firm obtained a judgment awarding \$63 million in a suit in which American industrialist Len Blavatnik alleged that JPMorgan violated its obligations under agreed-upon investment guidelines, which in turn caused substantial losses. Mr. Blavatnik contended that instead of complying with the conservative guidelines, JPMorgan breached a 20% limit set for mortgage-backed securities by misclassifying securities backed by risky subprime loans as “asset-backed” rather than “mortgage-backed” securities. After a three-week bench trial, the Court rejected JPMorgan’s argument that it should not be liable on grounds that its classification of the risky subprime securities followed “industry practice.”

## **Securities Class Action Victory for VeriSign, Inc.**

The firm recently obtained a voluntary dismissal, with prejudice, of a securities class action complaint against our client, VeriSign, Inc. Lead Plaintiff was represented by Robbins Geller, one of the leading securities class action firms.

The Complaint alleged that VeriSign had made misleading projections concerning key aspects of its business as well as certain financial metrics. When VeriSign announced revised information concerning its business and finances after third-quarter 2012, VeriSign’s share price fell (but has since substantially recovered).

Plaintiff brought suit alleging broadly that VeriSign must have been aware that its projections were misleading when made, since they had not come to pass precisely as VeriSign predicted. Rather than wait for plaintiff’s counsel to find and appoint a lead plaintiff while the lawsuit remained pending, Quinn Emanuel filed a comprehensive motion to dismiss the initial complaint within two weeks of being retained. Rather than respond on the merits, plaintiff asked the Court to stay briefing on the motion to dismiss until appointment of a lead plaintiff. While it granted the requested stay, the court noted that the complaint appeared to be “pretty thin.”

In the hope of filing a less “thin” amended complaint after appointment of lead plaintiff, plaintiff’s counsel attempted to contact various former employees of VeriSign. Quinn Emanuel vigorously defended VeriSign’s rights to maintain confidential information and to refrain from assisting plaintiff’s counsel in its investigation, which quickly led to

motion practice. Based on the affidavit of plaintiff’s investigator, plaintiff obtained the right to depose an individual from the company, but Quinn Emanuel turned plaintiff’s procedural advantage against them by eliciting information at the deposition during cross-examination that helped to hobble plaintiff’s claim.

Shortly after the deposition, plaintiff’s counsel informed Quinn Emanuel that they were willing to consider a voluntary dismissal of the claim. Quinn Emanuel insisted, and plaintiff agreed, that the parties sign a stipulation that the original and lead plaintiff’s claims would be dismissed with prejudice, which the Court entered.

## **Victory for Leading Russian ISP**

The firm secured a favorable settlement for its client Yandex LLC, which operates the leading Internet search engine in Russia and the fourth largest Internet search engine in the world. Yandex was sued by Perfect 10, Inc., a Los Angeles-based adult-entertainment company that publishes a largely-defunct magazine and website. In recent years, Perfect 10 has sued a number of different Internet service providers (ISPs) for copyright infringement, alleging that the widespread availability of Perfect 10’s copyrighted images on the Internet has destroyed its business. In an earlier case brought by Perfect 10, Quinn Emanuel secured a complete victory for its client Google when Perfect 10 voluntarily dismissed its claims after years of hard-fought litigation. Fresh on the heels of that dismissal, Perfect 10 turned its attention to Yandex, and Quinn Emanuel responded again.

As in its case against Google, Perfect 10’s claims against Yandex were premised largely on Yandex’s alleged role in contributing to the copyright infringement of Perfect 10’s images by providing its users “links” to third-party websites that allegedly displayed infringing copies of those images. Perfect 10 alleged tens of thousands of infringements against Yandex. It sought statutory damages for each work allegedly infringed, totaling tens of millions of dollars. Recognizing the significant amount at stake, Quinn Emanuel charted a two-prong course for narrowing the scope of Perfect 10’s claims and the potential damages at issue.

*First*, the firm helped Yandex solidify its policy and practices under the Digital Millennium Copyright Act, 17 U.S.C. § 512, *et seq.* (“DMCA”), thereby ensuring Yandex’s entitlement to DMCA “safe harbor” to avoid monetary liability for copyright infringement.

*Second*, the firm developed evidence showing that the vast majority of the tens of thousands of alleged acts of infringement at issue were “extraterritorial” because they occurred abroad, such that they were not actionable under the U.S. Copyright Act. This process entailed a painstaking analysis of the more than 16,000 pages of DMCA notices that Perfect 10 had sent to Yandex to first decipher the alleged “acts of infringement” identified by Perfect 10, and then identify the geographic location where each of the allegedly-infringing images was hosted. The evidence Quinn Emanuel developed showed that nearly 90% of Perfect 10’s claims against Yandex were premised on allegedly-infringing images that were hosted abroad. Yandex then argued on summary judgment that under the Ninth Circuit’s “server test”—which holds that for purposes of copyright infringement claims against ISPs, the act of infringement is the “hosting” of the image (*see Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007))—the location of an act of infringement on the Internet is likewise the location where the allegedly-infringing content is hosted.

Within 24 hours of the oral argument on Yandex’s summary judgment motion—which was handled primarily by Quinn Emanuel junior associates—the Court granted Yandex’s motion in full, thereby wiping out all of Perfect 10’s direct infringement claims and nearly all its secondary infringement claims. Even though no authority had ever joined the “server test” with the “extraterritoriality doctrine” in the manner Quinn Emanuel had done, the firm convinced the Court that this was the right test for assessing territoriality. Soon after this victory, the case settled on favorable terms for Yandex. While only time will tell if this case will be Perfect 10’s final salvo against ISPs, the firm has ensured that other ISPs operating abroad will have a better understanding of how to avoid liability for infringement under the U.S. Copyright Act.

## Settlement Victories for the Federal Housing Finance Agency

In a truly historic partnership between a regulator and a private firm, Quinn Emanuel represents the Federal Housing Finance Agency, as Conservator for Fannie Mae and Freddie Mac, in connection with its investigation and litigation of residential mortgage-backed securities. The firm filed fourteen complaints, asserting billions in damages, against most major investment banks. Each complaint asserts federal and

state “strict liability” statutory claims arising out of misrepresentations about the securities, and certain complaints assert common law fraud claims. As widely reported, this is one of the most significant court actions taken by any federal regulator since the advent of the mortgage crisis, and the single largest set of actions ever filed by a governmental entity. In 2012, the Honorable Denise L. Cote denied a motion to dismiss the claims in what was designated the “lead case” brought by FHFA, and in 2013 entered a series of rulings to streamline the cases for trial, including orders as to statistical sampling, loan file collection and reunderwriting, the scope of the so-called “actual knowledge” defense, and other significant issues. This year Quinn Emanuel also obtained a unanimous affirmance by the Second Circuit of Judge Cote’s decision as to the timeliness of FHFA’s claims and its standing to sue, as well as a unanimous rejection of defendants’ joint mandamus petition seeking to overturn certain of the Court’s key discovery rulings. With the cases moving toward fixed trial dates in 2014 and 2015, the firm has now settled three of the actions, against J.P. Morgan, UBS, and Citigroup. The second quarter UBS settlement was for \$885 million, and the October 2013 J.P. Morgan settlement, which includes claims as to Bear Stearns and Washington Mutual and also resolves whole loan contract issues, was for \$5.15 billion. **Q**

## 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 David Henri at 213-443-3000.

- We are a business litigation firm of more than 650 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of November 2013, we have tried over 2247 cases, winning 88.5% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over \$27 billion in judgments and settlements.
- We have won four 9-figure jury verdicts.
- We have also obtained thirteen 9-figure settlements and seven 10-figure settlements.

Prior results do not guarantee a similar outcome.

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