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Patent Practice in Western District of Texas

This year, the Western District of Texas has become the most popular jurisdiction in the U.S. for patent cases. According to Docket Navigator, as of mid-December 2020, more than 800 cases have been filed in the Western District of Texas. This is significantly more than were filed last year, and over eight times the number of cases filed in the Western District of Texas in all of 2018. *See* https://search.docketnavigator.com/patent/court/225/0 (90 cases filed in the Western District of Texas in 2018 compared to 808 in 2020 as of December 15, 2020). In comparison, just under 700 cases have been filed in the district of Delaware, and 400 cases have been filed in the Eastern District of Texas. *See* https://search.docketnavigator.com/patent/court/13/0 (District of Delaware); https://search.docketnavigator.com/patent/court/222/0 (Eastern District of Texas).

The rise in the case count in the Western District of Texas coincides with Judge Albright's appointment to the bench on September 18, 2018. Judge Albright has set out to establish the Western District of Texas as a "serious venue for sophisticated patent litigation," publicly stating: "There is nothing I enjoy more than working on patent cases. I think, by and large, the lawyers are exceptional and the issues before me are always intellectually challenging. I couldn't imagine a better docket than what I've got. I feel unbelievably lucky." Timothy Witherspoon, *Waco Becoming Hotbed for Intellectual Property Cases with New Federal Judge*, Waco Tribune (Jan. 18, 2020), https://wacotrib.com/news/local/waco-becoming-hotbed-for-intellectual-property-cases-with-new-federal-judge/article_0bcd75b0-07c5-5e70-b371-b20e059a3717.html.

Given the current landscape, it is important for both patent plaintiffs and defendants alike to consider how to navigate cases in the Western District of Texas. As explained below, there are several strategic issues to consider.

Venue Considerations

Judge Albright is the only Judge assigned to the Waco Division in the Western District of Texas, and, therefore, plaintiffs can effectively choose Judge

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INSIDE

Former Federal Prosecutor John Bash Joins Quinn Emanuel's Texas Team

John Bash, the former United States Attorney for the Western District of Texas and an experienced U.S. Supreme Court advocate, will join the firm as a partner. During his tenure as U.S. Attorney, John served on the Attorney General's Advisory Committee, as well as its subcommittees for white-collar crime, national security, and the border. He has previously served in the White House as an Associate Counsel to the President and in the U.S. Solicitor General's office as an Assistant to the Solicitor General. He will be affiliated with the firm's offices in Houston and Washington, D.C. John's practice will focus on appellate matters, internal investigations, patent law, and energy regulation. Q

Quinn Emanuel Recently Named Germany's 2020 JUVE Awards' "IP Firm of the Year"

The firm was recently named Germany's "IP Firm of the Year" at the 2020 JUVE Awards. Quinn Emanuel is the only firm to have won the prestigious award twice in the last decade, having also won it in 2012. Every year, JUVE awards the title "IP Firm of the Year" to the firm with the most dynamic development of its IP practice, including participation in the most prominent IP cases of the last 12 months. Q

Albright by filing their cases in the Waco Division. Whether venue is proper is governed by the Supreme Court's 2014 decision in *TC Heartland, LLC v. Kraft Foods Group Brands LLC*, which held that venue in patent cases is governed by 28 U.S.C. § 1400(b) and not the general personal jurisdiction statute 28 U.S.C. § 1391. 137 S.Ct. 1514, 1521 (2017). Under the patent venue statute,"[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b). Part of the reason that the Western District of Texas has likely gained in popularity is that many companies have at least some connection to the Western District of Texas (for example, as compared to Marshall, Texas in the Eastern District of Texas, which remain another popular venue for patent plaintiffs). Indeed, some have dubbed the Austin metropolitan area "Silicon Hills" after large high-tech companies like Amazon, Apple, Oracle, and many others have established offices in or near Austin.

However, even if venue is proper in the Western District of Texas, defendants may wish to attempt to move the case out of Waco pursuant to 28 U.S.C. § 1404(a). Prior to July 2020, Judge Albright had not granted any motion to transfer a case out of the Western District of Texas, but he had granted several motions for ***intradistrict*** transfer from the Waco Division to the Austin Division while retaining the cases on his docket. *See, e.g.*, *Voxer, Inc. v. Facebook, Inc.*, No. 6:20-CV-00011-ADA, 2020 WL 3416012, at *1 (W.D. Tex. June 22, 2020); *STC.UNM v. Apple Inc.*, No. 6:19-CV-00428-ADA, 2020 WL 4559706, at *9 (W.D. Tex. Apr. 1, 2020); *VLSI Tech. LLC v. Intel Corp.*, No. 6:19-CV-00254-ADA, 2019 WL 8013949, at *5 (W.D. Tex. Oct. 7, 2019); *Datascape, Ltd. V. Dell Techs., Inc.*, No. 6:19-CV-00129-ADA, 2019 WL 4254069, at *3 (W.D. Tex. June 7, 2019). In granting intradistrict transfer, Judge Albright has focused on sources of proof being located in Austin as opposed to Waco. *See, e.g.*, *Voxer, Inc.*, 2020 WL 3416012, at *7 ("[T]he Austin Division is clearly more convenient, by its offices, employees, and sources of proof that is readily available in Austin, and none of those factors favor the Waco Division.").

Additionally, with respect to transfer to outside the Western District of Texas, the Federal Circuit has recently granted mandamus in two separate cases—both involving large technology companies with offices in the Western District of Texas. In *In re Adobe Inc.*, the Federal Circuit found that Judge Albright had abused his discretion in denying Adobe's motion to transfer the case to the Northern District of California. 823 F. App'x 929, 931 (Fed. Cir. 2020). In so holding, the Federal Circuit applied Fifth Circuit law and relied on earlier cases ordering judges in the Eastern District of Texas to transfer cases to more convenient jurisdictions. *Id.* (citing *In re Genentech, Inc.*, 566 F.3d 1338, 1348 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1318–19 (Fed. Cir. 2008)). Ultimately, the Federal Circuit held that the district court's denial of transfer was a clear abuse of discretion, finding that the convenience of the witnesses favored transfer and that Judge Albright had given too much weight to his ability to more quickly schedule a trial. *Id.* At 931-32.

Similarly, in *In re Apple*, the Federal Circuit found that Judge Albright placed too much emphasis on the location of the New York-based inventors when he found that the Western District of Texas would be more convenient for them because the inventors would have to travel a significant distance no matter whether they testify in Texas or California. 979 F.3d 1332, 1341 (Fed. Cir. 2020). The Federal Circuit also discounted the "significant activities," including claim construction proceedings, that had occurred in the case because "a district court's decision to give undue priority to the merits of a case over a party's transfer motion should not be counted against that party in the venue transfer analysis." *Id.* at 1343. The Federal Circuit also emphasized that Judge Albright erred by focusing on Apple's connections with the forum generally because the transfer factors require a connection between the venue and the events that gave rise to the lawsuit. *Id.* at 1345.

Adobe and *Apple*, therefore, provide guidance regarding transfer. First, witness location should be afforded significant weight, and the locations of all likely witnesses are important, including third-party witnesses. Further, court issues, such as court congestion should be considered, including whether a case is likely to be resolved more quickly in another court because of a less crowded docket. Finally, a general contacts with the forum may be insufficient where events giving rise to the lawsuit happened elsewhere.

Petitions for Inter Partes Review and Stays

Another important consideration for patent defendants is that Judge Albright tends to set a fast schedule, with a trial date less than two years from filing of the Complaint, and in many cases within 15 to 18 months from filing. This timeline may impact a defendant's ability to get a petition for *inter partes* review instituted, particularly in light of the Patent Trial and Appeal Board's ("PTAB") recent guidance in its precedential decision, *Apple Inc. v. Fintiv, Inc.*, Case IPR2020-00019, 2020 WL 2126495 (Mar. 20, 2020).

In *Fintiv*, the Patent Trial and Appeal Board included a list of factors that it would consider to determine whether in its discretion it would deny institution under 35 U.S.C. § 314(a):

1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
2. proximity of the court's trial date to the Board's projected statutory deadline for a final written decision;
3. investment in the parallel proceeding by the court and the parties;
4. overlap between issues raised in the petition and in the parallel proceeding;
5. whether the petitioner and the defendant in the parallel proceeding are the same party; and
6. other circumstances that impact the Board's exercise of discretion, including the merits.

Fintiv, 2020 WL 2126495, at *2.

The PTAB has applied the *Fintiv* factors in two decisions that it recently designated as informative. First, in *Apple Inc. v. Fintiv, Inc.*, Case IPR2020-00019, Paper 15 (May 13, 2020), after requesting further briefing from the parties, the PTAB denied institution in part because the Western District of Texas had already invested significant resources in the case and trial was "scheduled to begin two months before we would reach a final decision in [the IPR] proceeding." *Id.* at 12-13. On the other hand, in *Sand Revolution II v. Continental Intermodal Group – Trucking LLC*, IPR2019-01393, Paper 24 (PTAB June 16, 2020), the PTAB reconsidered whether Sand Revolution II's petition should be granted. The PTAB granted institution, relying in part on the fact that the trial date had been moved several times and noting that, "barring exceptional circumstances, the Board adheres to a one-year statutory deadline prescribed by 35 U.S.C. § 316(a)(11) for entry of final decisions in instituted inter partes reviews." *Id.* at 9. It further noted that, even during the COVID-19 pandemic, "[t]he Board's judges and staff continue to operate on their normal schedules, albeit remotely, and Board oral hearings continue to be conducted on schedule." *Id.*

Notably, Judge Albright has also indicated that he is not inclined to stay cases because parties have a Constitutional right to assert their patent and he believes that parties ought to have a jury trial. To date, he has not granted an opposed motion to stay pending resolution of an *inter partes* review. As such, defendants in Judge Albright's court generally must prepare to file a petition for *inter partes* review early in the case to have the best chance of avoiding a discretionary denial under 35 U.S.C. § 314(a). Indeed, if defendants wait until after preliminary invalidity contentions are due in the litigation, it is very likely that the case will have advanced to the point that a potential final written decision would come after the trial date, which is a significant factor under *Fintiv*.

Section 101 Motions

In 2014, the Supreme Court issued its opinion in *Alice Corporation v. CLS Bank International*, 573 U.S. 208, 217-18 (2014), reciting a two-part test for determining whether claims are patent-eligible under Section 101. Post-*Alice*, the number of Section 101 invalidity motions and patent ineligibility findings have increased significantly. *See, e.g.*, Robert Sachs, *Alice: Benevolent Despot or Tyrant? Analyzing Five Years of Case Law Since Alice v. CLS Bank: Part I*, IP Watchdog (August 29, 2019), https://www.ipwatchdog.com/2019/08/29/alice-benevolent-despot-or-tyrant-analyzing-five-years-of-case-law-since-alice-v-cls-bank-part-i/id=112722/. Given the rise of invalidity findings under Section 101, it has become common for defendants to file motions to dismiss for patent ineligibility. *Id.* However, Judge Albright has indicated that in a typical case he will not consider subject-matter eligibility under Section 101 until after the *Markman* hearing.

True to his word, as of August 2020, Judge Albright has denied all motions to dismiss under Section 101. For example, Judge Albright denied the defendants' motion to dismiss in *Aeritas LLC v. Sonic Corporation*, issuing a text order holding that "the Court does not believe this is one of the rare cases where it is appropriate to resolve the Section 101 eligibility of the patents-in-suit as a Rule 12(b) motion to dismiss. It is therefore ORDERED that Defendants' motion is dismissed WITHOUT PREJUDICE. Defendants may refile their motion after the opening of fact discovery. Should Defendants elect to refile their motion at that time, the Court orders Defendants to brief the patent ineligibility of each asserted claim, *i.e.* , not just representative claims." 6:20-CV-00103-ADA (W.D. Tex. Mar. 14, 2020).

In an earlier case, Judge Albright denied a motion to dismiss under Section 101 noting "because a patent is presumed valid and requires clear and convincing evidence to prove its invalidity, a Rule 12(b) motion to dismiss is a procedurally awkward place for a court resolve a patent's § 101 eligibility." *Slyce Acquisition Inc. v. Syte-Visual Conception Ltd.*, No. 6:19-cv-257-ADA, 2020 WL 278481, at *5 (W.D. Tex. Jan. 10, 2020). Further, Judge Albright explained, "because claim construction can affect—and perhaps, in most cases, will affect—a court's § 101 eligibility analysis, the Court believes that it is generally wiser—and more efficient—to wait to determine a patent's § 101 eligibility until after issuing its claim construction order." *Id.* He also stated, "because resolving § 101 eligibility of all asserted claims almost certainly requires fact discovery and because fact discovery does not begin until after claim construction under the Court's default Order Governing Proceedings, the Court believes it is wiser and more efficient to wait to determine a patent's § 101 eligibility until after fact discovery has opened." *Id.* at *6. Finally, Judge Albright also held that the difficulty in applying *Alice* favored waiting until later in the case to make decisions under Section 101: "a court stands a better chance of making the correct § 101 eligibility decision by delaying that decision in order to spend more time understanding the patents and its nuances, as well as technology in general, and what was 'well-understood, routine, and conventional activities previously known to the industry.'" *Id.* at *7 (citations omitted).

Judge Albright has yet to consider a motion for summary judgment under Section 101 post-*Markman*, but patent plaintiffs and defendants will be interested to see how Judge Albright handles such motions.

Procedures and Trials in Judge Albright's Court

In order to manage the influx of patent cases that have been filed in the Western District of Texas, Judge Albright has issued a number of standing orders. In the last several months, Judge Albright has revised his "Sample Order Governing Proceedings," several times with the most recent order issuing on November 5, 2020. *See* OGP Version 3 (Albright, J.), https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/Waco/Albright/Sample%20Order%20Governing%20Proceedings%20-%20Patent%20Cases%20110520.pdf. Judge Albright has changed some of his earlier procedures; for example, he added "presumed limits on the number of claim terms to be construed." *Id.* at 4. Judge Albright requires parties to contact the Court to arrange a teleconference with the Court before filing a Motion to Compel discovery. *Id.* at 3. Perhaps most interesting, Judge Albright continues to limit discovery before the *Markman* hearing with the stated goal of limiting costs while the parties await their claim constructions. *See, e.g.*, *Waco Federal Judge Alan Albright*, Dunham & Danham Law, https://dunnamlaw.com/alan-albright-united-states-judge-for-the-waco-division-in-the-western-district-of-texas/.

After several patent trials had been held in other jurisdictions, including the Eastern District of Texas—in August, Judge Gilstrap presided over a jury trial in *Optis Wireless Technology v. Apple Inc.*, Case No. 6:19-cv-00066 (E.D. Tex.), where the jury awarded the plaintiff over $500 million—Judge Albright announced that he was prepared to go forward with trials starting in September. *See* Daniel Siegal, *WDTX Judge Says Virus Case Drop Means Trials Start Soon*, Law360 (Aug. 19, 2020), https://www.law360.com/texas/articles/1302606. Judge Albright has indicated that trials can be conducted safely despite the pandemic given the Court's large courtroom and jury box.

In mid-October 2020, Judge Albright conducted his first patent jury trial since taking the bench, in a case that had been scheduled and delayed several times due to the pandemic. *MV3 Partners v. Roku*, No. 6:18-cv-00308-ADA. The jury returned a verdict for the defense, finding that plaintiff had failed to prove by a preponderance of the evidence that defendant infringed the patents at issue. *Id.* at Dkt. No. 387. Plaintiff filed a motion for a new trial on October 26, 2020. *Id.* at Dkt. No. 395.

Conclusion

The Western District of Texas is likely to remain a popular venue for patent cases. As Judge Albright's case load continues to increase, it will be interesting to follow whether Judge Albright can fast-track case schedules. Further, as more cases advance to summary judgment and trial, parties will be watching closely to see whether Judge Albright is inclined to grant motions for summary judgment and whether juries in Waco or Austin will award large verdicts. In the meantime, plaintiffs will likely continue to file cases in Waco. Defendants may decide to seek transfer, but must also make early strategic decisions, such as whether to file a petition for *inter partes* review. Q

NOTED WITH INTEREST

Federal Securities Class Actions Against Non-U.S. Companies Listed on U.S. Exchanges on Track for Record High

The number of securities class actions filed against non-U.S. companies in the first half of 2020 outpaced the number of such filings in prior years. According to a recent AIG report, of the 111 total core filings commenced in the first half of 2020, 35 were against non-U.S. companies, constituting a filing rate of 31.5%, which is significantly higher than the rate of filings in the first half of 2019. AIG, US Securities Class Actions: International US-Listed Companies, H1 2020, at 1 (June 26, 2020), https://www.aig.co.uk/content/dam/

aig/emea/united-kingdom/documents/Financial-lines/class-actions/class-actions-q2-2020.pdf. In fact, these are the highest rates "observed since the wave of filings related to reverse mergers in 2011," Cornerstone Research, Securities Class Action Filings: 2020 Midyear Assessment, at 1 (2020), and are significantly higher than "the five-year average annual foreign filer litigation rate of 16%," Kevin LaCroix, *First Half of 2020 Securities Suits Against Foreign Issuers Outpaced Overall Filing Levels*, The D&O Diary (Sept. 13, 2020), https://www.dandodiary.com/2020/09/articles/international-d-o/first-half-2019-securities-suits-against-foreign-issuers-outpaced-overall-filing-levels/#more-20570. Notably, the majority of these filings were asserted against companies located in Asia, particularly in China. AIG, at 1.

As a consequence, total class action securities filings against non-U.S. companies are on track to become the highest in recorded history. The impact is even more striking when put into context. Non-U.S. companies represent only 16% of all companies listed on U.S. exchanges. That securities suits filed against non-U.S. companies, which represent a small fraction of companies listed on U.S. exchanges, make up 31.5% of the total filings suggests that non-U.S. companies are more likely to be sued under U.S. securities laws than domestic companies. In fact, core filings against S&P 500 firms appear to be slowing. *See* Cornerstone, at 2 (such filings "occurred at an annualized rate of 4.8%, the lowest since 2015").

Legal Backdrop

Section 10(b) of the Exchange Act, the most litigated provision of the U.S. securities laws, makes it "unlawful for any person, directly or indirectly … [t]o use or employ … any manipulative or deceptive device or contrivance in contravention" of Securities and Exchange Commission rules and regulations "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 USC. § 78j(b). In *Morrison v. National Australia Bank, Ltd.*, the Supreme Court considered the scope of the Exchange Act as foreign companies and held that "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and … therefore conclude[d] that it does not." 561 US 247, 265 (2010). The Court thus affirmatively limited the scope of the Exchange Act to "only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Id.* at 266.

In light of *Morrison*, publicly-traded non-U.S. companies avoided selling their securities on U.S. exchanges to limit exposure to liability under the Exchange Act. Instead, many would only trade their securities as American Depository Receipts ("ADRs") on U.S. over-the-counter markets, believing this would insulate them from liability under U.S. securities laws. This understanding has been turned on its head due to the Ninth Circuit's 2018 decision in *Stoyas v. Toshia Corp.*, 896 F.3d 933 (9th Cir. 2018), *cert. denied* 139 S.Ct. 2766 (2019).

In *Stoyas*, the Ninth Circuit considered whether Toshiba's ADR transactions on the over-the-counter market, "as opposed to direct purchases of Toshiba common stock" traded on the Tokyo Stock Exchange, were subject to the Exchange Act. *Id.* at 939. In determining that they were, the Ninth Circuit held that ADRs are securities for purposes of the Exchange Act, *id.* at 943, and that *Morrison* prescribed a "transaction test," which details the two categories of transactions subject to the Exchange Act: those that (1) "involve[] a security listed on a domestic exchange"; or (2) "take[] place in the United States." *Id.* at 944. As to the first category of transactions, the Ninth Circuit held that although the Exchange Act regulates over-the-counter markets, the OTC Link (the market at issue) could not be considered an "exchange" under the Exchange Act. Turning to the second category, noting that the Supreme Court did not articulate a test to determine whether a transaction was "domestic," the Ninth Circuit adopted an "irrevocable liability" test from the Second Circuit's decision in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), which dictates that "a securities transaction occurs when the parties incur irrevocable liability," which would determine both the timing and location of the transaction. *Id.* at 948 (quoting *Activist Value*, 677 F.3d at 67). The test requires a plaintiff to plausibly allege "that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security," to be considered a domestic transaction for purposes of *Morrison*. *Id.* Thus, the Ninth Circuit held that, if properly pled, the sale of the ADRs at issue could fall into the second category of transactions subject to the Exchange Act under *Morrison*. *Id.* at 949.

Causes and Implications of The Trend

Although the implication of *Morrison* is that non-U.S. companies' securities transactions on U.S. exchanges are subject to the Exchange Act, that holding does not appear to account for the steady rise in such claims since. Some commentators have argued that the impact of cases like *Stoyas* may have a role to play in the global trend of increased litigation against all non-U.S. companies because such cases are expanding the scope of claims against non-U.S. companies, even when they are not listed on U.S. exchanges.

Though the statistics demonstrate that non-U.S. companies listed on U.S. exchanges are more likely than domestic companies to be sued for U.S. securities violations, some have argued that the increase has little to do with the companies' locations, and more to do with the industries in which they operate. For example, many conduct business in high litigation risk industries, such as pharmaceuticals and technology. Nevertheless, because U.S.-listed Chinese and other Asian companies continue to be sued more frequently than other foreign companies, U.S.-listed Asian companies may constitute their own category of litigation risk.

Aside from the implications of increased litigation, *i.e.* greater exposure to financial liability to settle or otherwise dispose of such claims, the trend has also resulted in significant changes in insurance pricing. Until recently, insurance carriers provided insurance to directors and officers ("D&O insurance") of non-U.S. companies at a significant discount to their domestic counterparts. However, to account for the increased frequency and severity of securities litigation against non-U.S. companies, insurance carriers are now charging steeper premiums for D&O insurance to non-U.S. companies.

Takeaway

The trend of increased securities class actions filed against non-U.S. companies shows no indications of slowing. Such companies should continue to monitor U.S. securities litigation against other non-U.S. companies, assess their D&O insurance options, and understand that certain industries are generally subject to greater litigation risk than others. Q

PRACTICE AREA NOTES

International Trade Update

New Ruling on Section 232 Steel Tariffs

A major component of President Trump's trade agenda has been imposing tariffs on steel imports under Section 232 of the Trade Expansion Act of 1962. Those tariffs have engendered many legal challenges; few have had any success. That changed on July 14, 2020, when a three-judge panel of the U.S. Court of International Trade ruled that President Trump's Proclamation 9772, which imposed a 50% tariff on certain steel products from the Republic of Turkey under Section 232, is unlawful and void. *Transpacific Steel LLC v. United States*, --- F. Supp. 3d ----, 2020 WL 3979838 (CIT July 14, 2020). The ruling emphasizes certain procedural and substantive limits on a President's powers under Section 232 that will likely limit future actions under Section 232.

Section 232 of The Trade Expansion Act of 1962

Section 232 of the Trade Expansion Act of 1962 empowers the President to "adjust the imports" of an article if the Secretary of Commerce finds that importation of the article threatens to impair national security. 19 U.S.C. § 1862. In 1976, the Supreme Court ruled that Section 232 permits the President to "adjust" the imports of an article by imposing fees, tariffs, and other monetary exactions on the article (which raises the article's price and thereby lowers demand and imports of it). *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 538 (1976).

Although Section 232 is a potent tool, Presidents have rarely used it. Before President Trump, the last President to take action under Section 232 was President Reagan in the early 1980s.

A three-step process governs adjustment of imports under Section 232. First, the Secretary of Commerce, in consultation with the Secretary of Defense, investigates the effects on national security of imports of the article and, within 270 days of initiating the investigation, the Secretary of Commerce must submit a report to the President advising whether imports of the article threaten national security and recommending appropriate action. § 1862(b)(1)(A), (b)(3)(A). Second, within 90 days of receiving the Secretary's report, the President must determine the nature and duration of any action to adjust the imports of the article so that it no longer threatens national security, and, within 15 days of that determination, the President must implement the action. § 1862(c)(1)(A), (c)(1)(B). (If the action is to negotiate an agreement limiting importation into, or exportation to, the United States, then the President has additional time. § 1862(c)(3)(A).) Third, within 30 days of making the determination, the President must submit to Congress a written statement of reasons for taking the action. § 1862(c)(2).

President Trump's Steel Tariffs

Wilbur Ross was sworn in as President Trump's Secretary of Commerce on February 28, 2017. Within two months, he initiated an investigation into the effect of imported steel on national security. 82 Fed. Reg. 19205 (Apr. 26, 2017). On January 11, 2018, Secretary Ross issued a report advising the President that current steel imports from countries around the world, when considered in the aggregate, threaten to impair national security and recommending that the President impose a quota or tariff on all imported steel products. 85 Fed. Reg. 40202 (July 6, 2020).

In response, President Trump issued Proclamation 9705 of March 8, 2018, which imposed a 25% *ad valorem* tariff on steel imports from all countries except Canada and Mexico. 83 Fed. Reg. 11625 (Mar. 15, 2018). Five months later, President Trump issued Proclamation 9772 of August 10, 2018, which increased the tariff on steel imports from Turkey—and only Turkey—to 50%. 83 Fed. Reg. 40429 (Aug. 15, 2018).

The tariffs on Turkish steel remained at 50% until President Trump issued Proclamation 9886 of May 16, 2019, which eliminated the enhanced tariff and reinstated the 25% tariff applicable to steel imports from all countries (other than Canada and Mexico). 84 Fed. Reg. 23421 (May 21, 2019).

Transpacific Steel LLC v. United States

On January 17, 2019, Transpacific Steel LLC, a U.S. importer of steel from Turkey, filed a lawsuit in the U.S. Court of International Trade challenging the legality of Proclamation 9772. A three-judge panel of the Court (Kelly, Katzmann, and Restani, JJ.), agreed that Proclamation 9772 is unlawful. *Transpacific Steel LLC v. United States*, --- F. Supp. 3d ----, 2020 WL 3979838 (CIT July 14, 2020).

First, the Court held that Proclamation 9772 violated Section 232's timing requirements. *Id.* at *3–4. Under Section 232, President Trump had only 90 days from receipt of Secretary Ross's report to determine what action to take, followed by an addition 15 days to implement that action. The President followed those timing requirements for Proclamation 9705, which imposed the initial 25% tariff on steel from countries around the world. But Proclamation 9772 came too late. President Trump did not issue it until August 10, 2018, nearly seven months after he received Secretary Ross's report. The U.S. Government argued that Proclamation 9772 was permissible because it merely modified Proclamation 9705, but the Court held that "'modifications' of existing Proclamations under the current statutory scheme, without following the procedures in the statute, are not permitted." *Id.* at 4.

Next, the Court held that Proclamation 9772 violated Section 232's report requirement. *Id.* at 5. Secretary Ross's report in January 2018 assessed steel imports in the aggregate from all countries; it did not make any "finding regarding Turkey specifically." *Id.* Proclamation 9772 mentions "informal discussions" between President Trump and Secretary Ross, but the Court concluded that the President "is not authorized to act under Section 232 based on any off-handed suggestion by the Secretary; the statute requires a formal investigation and report." *Id.*

Finally, the Court held that Proclamation 9772 violated the Fifth Amendment. *Id.* at *6–8. Although the Court found no due process violation, *id.* at *8, it ruled that Proclamation 9772 violated equal protection by arbitrarily and irrationally singling out steel from Turkey—and only Turkey—for enhanced tariffs, when there is "no apparent reason to treat importers of Turkish steel products differently from importers of similar products from any other country listed in [Secretary Ross's] Report." *Id.* Accordingly, the Court deemed Proclamation 9772 to be "unlawful and void." *Id.* at *1.

Ramifications

On August 13, 2020, the United States noticed its appeal to the Federal Circuit, and on October 30, 2020, it filed its opening brief on appeal. Should the decision be affirmed, it may have far-reaching consequences on the use of Section 232. By barring the President from modifying Section 232 Proclamations without going through the full three-step process, and by ruling it unconstitutional to single out Turkey for steel tariffs, the Court of International Trade's ruling makes it significantly harder and more time-consuming for Presidents to modify tariffs and other trade regulations under Section 232. That, in turn, will likely discourage future Presidents from using Section 232 in the first place. The main theme of the U.S. Government's opening brief in the Federal Circuit is that Section 232 bestows "flexibility" on the President to determine the nature and duration of measures taken under Section 232—and thus to modify those measures when the President sees fit. That kind of flexibility is prized because it enables the President to quickly adjust tariffs up or down for particular goods or countries in response to changes in trade relations and national security. If, instead, every modification requires a new multi-month or even year-long process of investigation, report, determination, and implementation, then actions under Section 232 become much more sticky and therefore less attractive to Presidents that want to use them as bargaining chips in trade relations. In the coming months, the Federal Circuit will wrestle with these issues. Stay tuned.

Complete Defense Jury Trial Victory of No Infringement Across Four Patents in a $183 Million Patent Case in Marshall, Texas

On November 6, 2020, Quinn Emanuel won a complete defense verdict in Marshall, Texas, for its client Google in the *PMC v. Google* case. PMC went to trial against Google on four patents asserted against YouTube and Google's Content Delivery Network. PMC chose patents to read on four broad technological areas (delivery and display of multimedia presentations, signals for controlling transmissions through a content delivery network, Digital Rights Management software, and Media Source Extensions software). PMC sought a running royalty that worked out to a claim of $185 million up to trial, and an uncertain amount into the future.

The jury got the case at around 6:00 pm on November 6. They deliberated for less than an hour before Quinn Emanuel got the note that there was a verdict. The jury came back with a complete defense verdict—no infringement of any of the asserted patents. (This stands in contrast to the previous trial Judge Gilstrap conducted last month—where Apple lost a $500 million verdict in the same courtroom.)

PMC is an infamous "licensing company." It filed over 300 applications just before the GAAT cutoff in 1995. The law currently gives a patent holder a monopoly for 20 years from filing the patent. Before 1995, however, there was no 20-year limit—just 17 years after issuance. Thus, by filing over 300 continuation patent applications, PMC was able to continue the practice that was directly contrary to the GAAT reform law. PMC worked its 300 applications through the system and still has approximately 100 issued patents that claim 1981 or 1987 as the "invention" date but that have terms continuing well into the 2020s! PMC's litigation efforts over the years have resulted in licenses with the TV, cable, and satellite broadcast industries. This case was important not just to Google, but to an entire market segment, because PMC was now trying to stretch its inventions to cover the internet streaming and content delivery marketplace (Netflix, Prime, Disney+, Hulu, YouTube, Apple+, etc.) for yet another cycle of litigation/licensing.

Quinn Emanuel elected to go to trial on just the issues of non-infringement and a license defense. Quinn Emanuel's trial theme was that the inventions from the 1980s were for old, obsolete technology that is not used anymore. Quinn Emanuel showed the jury that, back in this 1980 time period, consumers used old fashioned TVs with "rabbit ear" antennas. The most advanced personal computer in 1981 was the IBM PC machine, which had 5.25-inch floppy disks and a green, cathode-ray screen. Quinn Emanuel then contrasted that with the technology that was accused from the 2010s—smartphones, laptops, the internet, etc. Quinn Emanuel showed that the detailed specifications of the 1980s inventions did not mention the internet, streaming, HTML, the internet's TCP/IP protocol, DRM [Digital Rights Management], or any of the modern technology that PMC was now accusing of infringement.

Quinn Emanuel then wove these themes into a technical non-infringement case. For instance, three of the four asserted patents required "television programming" as part of the claims. Quinn Emanuel argued that the broadcast TV that existed at the time was passive. Users could not chose what they wanted to watch. A user would have to schedule their time to be available when shows were broadcast, or else they would miss the show. Quinn Emanuel showed that the internet, in contrast, was a user initiated experience (*i.e.*, TV is push, the internet is pull). In modern technology, the user is in control. The user can choose what content to watch, when to watch it, and they can pause, fast forward, and save for later. They can use "search" on YouTube to explore YouTube's vast library of video content, and then peruse a results page to select exactly what content they want to watch. In doing so, the user of YouTube has a bevy of information provided by YouTube to help the user make a choice—for example, the length of the video, how long ago it was posted, the running time, the number of thumbs-up and thumbs-down, a moving pre-view thumbnail so a user can watch an excerpt in deciding, etc.

Another example of such a technical argument for one of the patents—the '344 patent—was that the claims required two types of operating instructions, one of which was "permanently stored in the receiver station" (*i.e.*, the phone/laptop). Quinn Emanuel showed that this claim limitation made sense in 1981 because computers of that day always had a Read Only Memory (ROM) that was physically hard-coded so as to be permanent and read only. Quinn Emanuel showed that, in contrast, modern computers no longer have ROM. The "BIOS" boot program in modern computers is stored in "flash memory." It is designed to be updated periodically. On update, some of the code is deleted, some code is added, and some code is changed. Plaintiff failed to point to any operating system code on modern phones/computers that is permanent. Accordingly, the old invention set forth in the '344 patent was not practiced by any modern computers, much less Google's.

This strategy worked. The jury deliberated for less than an hour before finding non-infringement on all four patents. This may be a record for the shortest deliberation time for a defense verdict in Marshall.

German Automotive Antitrust Class Action MDL Knocked Out at Pleading Stage

Quinn Emanuel recently obtained dismissal with prejudice for Daimler AG and Mercedes-Benz USA, LLC in an antitrust class action in which consumers and auto dealers alleged that the five leading German car manufacturers (Audi, BMW, Daimler, Porsche, and Volkswagen) conspired to reduce innovation and fix prices.

In the summer of 2017, German magazine *Der Spiegel* published reports of confidential proffers to, and investigations by, the European Commission into alleged anticompetitive conduct involving technical working groups and supposed agreement between the "German Five" regarding various aspects of their vehicles. Drawing on those reports, U.S. consumers and auto dealers filed class actions throughout the country, which were eventually consolidated in the Northern District of California before Judge Breyer, who previously oversaw the VW Diesel class actions. The plaintiffs alleged that the German car manufacturers violated US federal and state antitrust laws for over two decades by using the supposed secret working groups to slow "the pace of innovation" and reduce the quality of their cars. Plaintiffs asserted that these working groups evinced a "whole car conspiracy" extending to vehicle development, suppliers, and costs, and represented that their claims involved billions of dollars in damages.

In May 2018, Quinn Emanuel and its co-defense counsel moved to dismiss the consumer and auto dealer complaints, arguing, among other things, that the plaintiffs failed to plausibly plead a whole car conspiracy, and that reports of proffers to the European Commission did not support an agreement to reduce innovation. In particular, Quinn Emanuel pointed out that the allegations, even taken at face value, did not constitute a *per se* violation of the antitrust laws, and that the plaintiffs' failure to allege such a conspiracy meant that their claims failed because they did not plausibly allege a relevant market in which the defendants had or could have market power. The court agreed. Plaintiffs amended their complaints to focus on allegations of agreements on AdBlue technical standards and steel prices. In October 2019, Quinn Emanuel and its co-defense counsel once again jointly moved to dismiss, arguing that the alleged agreement was not an unreasonable restraint on competition because the AdBlue technical standards could benefit consumers and the steel price allegations were not plausible. The court once again agreed. Finally, Plaintiffs amended their complaints a third time in an effort to resuscitate their claims, this time introducing survey and other empirical data to support their market allegations, and asserting that the defendants fixed the price of steel for their vehicles and passed on those costs to consumers. Following a third motion to dismiss on these issues, including Quinn Emanuel taking the lead on rebutting the new "empirical" evidence the plaintiffs alleged, the court once again dismissed the complaints, this time with prejudice.

Firm Wins Rare Victory for Buyer in Delaware Busted Deal Case

On November 30, 2020, Quinn Emanuel obtained a complete victory in the Delaware Court of Chancery for its client Mirae Asset in *AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC, C.A. No. 2020-0310-JTL*, the first terminated takeover case of the COVID-19 era to go to trial. The Court denied all relief sought by the seller, including specific performance, and awarded Mirae Asset with the return of its $581.7 million deposit with interest, $3.685 million in damages (including legal and other transaction costs), and attorneys' fees and costs as the prevailing party.

The case concerned a failed transaction in which Anbang Insurance Group, Ltd. attempted to sell Strategic Hotels & Resorts LLC and its portfolio of 15 ultra-luxury hotels to affiliates of Mirae Asset for $5.8 billion.

Mirae entered an agreement with Anbang to purchase Strategic in September 2019. Shortly before that, Anbang disclosed that someone had recorded grant deeds purporting to transfer ownership of six of the hotels to entities that were not owned by Strategic. Anbang and its counsel said that they had just learned about the deeds, but assured Mirae that they were nothing to worry about as they claimed the grant deeds were the work of a 20-something-year-old Uber driver with a criminal record. Still, Mirae insisted that the transaction be reworked to account for the deeds, including a closing condition requiring a title insurance policy that did not take any exception for the deeds.

Once the parties signed the purchase agreement, Anbang and its counsel engaged in litigation that they told Mirae would resolve the grant deeds issue. But the grant deeds issue was never resolved; it got much worse. As the parties moved towards closing in February 2020, Mirae Asset learned for the first time that Anbang had known the parties who had recorded the deeds for years, and that those parties were attempting to enforce multi-billion dollar arbitration awards related to the deeds in courts in Delaware and California. Anbang and its counsel had never mentioned their knowledge of these parties, let alone the lawsuits, to Mirae Asset or its counsel even though they had been providing Mirae Asset with regular updates about their efforts to clear the deeds for months after the purchase agreement was signed. The belated revelations that Anbang and its counsel had withheld this information immediately put Mirae Asset's attempts to obtain financing for the transaction on hold as the prospective lenders conducted due diligence on the issue. A few weeks later, there was yet another deal-halting discovery: a filing in one of the previously undisclosed Delaware litigations revealed that the parties who had filed the deeds were asserting ownership to the hotels pursuant to a "DRAA Blanket Agreement." This development caused even further concern for Mirae Asset's lenders and prompted the title insurance companies to take a broad exception for all matters related to or arising from the DRAA Blanket Agreement, including the grant deeds.

At the same time Mirae Asset was learning about these issues with the title to the hotels, Strategic began to implement drastic changes to the hotels' operations amidst the COVID-19 pandemic. Strategic completely closed two of its hotels, severely reduced its offerings and amenities at its other properties, and relieved 5,200 employees. Needless to say, Strategic had never taken such drastic steps before.

Given the lingering title issues and the severe operational cutbacks at the hotels, Mirae provided Anbang with a notice of breach in mid-April 2019. Anbang responded by suing Mirae in late April 2020, seeking to compel Mirae to close the transaction.

Soon after it was filed, the case was put on an extremely expedited schedule, at which point Quinn Emanuel was brought in to represent Mirae. While the case had initially been framed as a narrow one involving mostly legal issues and requiring little discovery, Quinn Emanuel quickly developed a counter narrative and filed counterclaims that detailed Anbang's deception and serial breaches of the sale agreement and set forth more than a dozen independent bases on which Mirae was entitled to terminate the agreement and receive its deposit back. Over the course of the ensuing three months, in what the Court's opinion described as "Herculean efforts," Quinn Emanuel reviewed and exchanged hundreds of thousands of documents, prepared and responded to dozens of expert reports, and conducted forty-nine depositions (all of which took place over the course of a few weeks).

Through that process, Quinn Emanuel methodically built a record showing not only that Anbang had breached the sale agreement, but that Anbang and its counsel had actually withheld material information from Mirae throughout the sale process in an effort to force the deal through. In particular, Quinn Emanuel uncovered overwhelming evidence showing that Anbang and its counsel had known about the deeds since December 2018 but chose not to disclose them until mid-August 2019, right as Anbang and Mirae Asset were close to finalizing a deal. Moreover, Anbang and its counsel had known all along that the deeds were not the work of a lone Uber driver. In fact, Anbang had been engaged in a years-long, international legal battle with the people and entities behind the grant deeds and were well-acquainted with them. Finally, Anbang and its counsel were aware that the parties who had filed the deeds had also sued Anbang in Delaware in August 2019 before the purchase agreement was signed, but withheld that information from Mirae Asset until it ultimately discovered that fact in February 2020.

Quinn Emanuel put this evidence on display in a week-long trial before Vice Chancellor J Travis Laster in late August 2020. Quinn Emanuel's core trial theme was that the delay occasioned by Anbang's repeated concealment of key information ultimately ran out the clock on the transaction and relieved Mirae Asset of its obligation to close.

The Delaware Court of Chancery agreed. In its 242-page opinion, the Court largely adopted Quinn Emanuel and Mirae Asset's account of the facts, concluding that Anbang and its counsel had "committed fraud about fraud" in their dealings with Mirae and its counsel regarding the grant deeds and related issues. The Court ruled that because the title insurance companies had taken a broad exception for the grant deeds in their draft policy, the condition precedent in the purchase agreement requiring that Mirae obtain clean title insurance had failed and Mirae Asset was therefore relieved from its obligation to close.

In perhaps the most broadly applicable aspect of its opinion, the Court further held that the drastic operational changes Strategic implemented at the hotels constituted a violation of the purchase agreement's ordinary course covenant. The court reasoned that a seller's promise to operate in the ordinary course is meant to ensure "that 'the business of the target will be substantially the same at closing as it was on the date the purchase agreement was signed.'" Where the ordinary course covenant is unqualified, as it was in this case, it places an unconditional obligation on the seller. By making sweeping operational changes at the hotels in response to COVID-19, the seller failed to fulfill this obligation. This aspect of the ruling will likely have a significant impact on future M&A deals and litigation.

Biggest Case Ever Brought in the English Courts Scores a Historic Victory in the UK Supreme Court on Class Certification – *Merricks v Mastercard*

On Friday 11 December 2020, the UK Supreme Court handed down a historic and landmark judgment, delivering a decisive victory to Quinn Emanuel client Walter Merricks CBE in his efforts to bring a claim on behalf of a class of 46 million UK consumers seeking in excess of £14 billion in damages from Mastercard. The highest court in the UK agreed with the Court of Appeal that the first instance court (the Competition Appeal Tribunal or "**CAT**") made numerous errors of law in refusing to certify Mr. Merricks' mass consumer collective action (*Mastercard Incorporated and others v Merricks* [2020] UKSC 51).

The claim was brought under the UK's new collective action regime, introduced by the *Consumer Rights Act 2015*. The intention of the new regime was to enable principally end-consumers to obtain redress for breaches of competition law by allowing such claims (that individually are economically unviable due to their size) to be brought by a "class representative" on an "opt-out" basis. Such claims are only permitted if the CAT is satisfied that the claim is suitable to proceed on a collective basis, and grants a collective proceedings order ("**CPO**" or "**certification**").

Mr. Merricks made an application in September 2016 for a CPO to continue opt-out collective proceedings seeking £14 billion in damages for a class of 46 million UK consumers against Mastercard for breach of competition law. The claim follows on from the finding by the European Commission in 2007 that Mastercard's intra-EEA multilateral interchange fees ("**MIFs**") infringed EU competition law in the period 1992 to 2007. This follow-on consumer claim should have been the archetypal case for the new regime. However, despite the scale of losses suffered, the CAT refused certification, on the grounds that: (1) while Mr. Merricks' experts had a sound methodology for determining the degree to which the anticompetitive MIFs were passed on by merchants to consumers across all sectors of the economy, the CAT was not persuaded that data would be available to generate a sufficiently reliable result; and (2) the method proposed for distributing the aggregate award of damages to the class was not sufficiently "compensatory,"in that it did not take account of the actual loss suffered by each of the class members. This left 46 million UK consumers effectively without redress, and the CAT's reasoning risked making mass consumer class actions unviable from the very outset.

The prospects of a successful appeal against the refusal to certify were particularly challenging for two reasons. First, the statutory wording made doubtful whether a refusal to certify could be appealed. Indeed, the Tribunal's Guide to Proceedings expressly excluded an appeal, other than by way of judicial review. Second, the legal test for certification affords the CAT wide discretion, raising doubts as to whether there was an appealable point of law.

Having persuaded the Court of Appeal that there is a right of appeal against a refusal to certify, Quinn Emanuel secured a unanimous decision in the Court of Appeal that the CAT had erroneously applied the legal test for certification.

Mastercard appealed to the Supreme Court

Key Findings of the Supreme Court

The Supreme Court upheld the Court of Appeal's decision, and, in doing so, identified numerous errors in the CAT's decision. In doing so, the Supreme Court has given much-needed guidance on the test for certification.

The key findings of the Supreme Court decision are as follows:

- certification is not about and does not involve a merits test. To demonstrate that claims are eligible for a CPO, the proposed class representative need only show that the claims (i) are brought on behalf of an identifiable class, (ii) raise common issues (which are the same, similar, or related) and (iii) are suitable to be brought in collective proceedings;
- the Court of Appeal had already concluded that the CAT was wrong to find that pass-on to consumers was not a common issue. The Supreme Court noted that this point had not been appealed by Mastercard and stated that had the CAT properly concluded that pass on was a common issue, *"this would, or should, have been a powerful factor in favour of certification"*;
- the CAT wrongly treated the suitability of claims for aggregate damages as a "hurdle" rather than a factor to be weighed in the balance;
- the CAT failed to construe suitability in a relative sense (as compared to individual proceedings) and therefore failed to take account of the need to consider whether individual proceedings were a relevant alternative, *"which they plainly were not,"* and whether the same challenges affecting quantification in a collective claim would also be faced by individual claimants, so this is not a reason to shut out a collective claim;
- the CAT failed to consider the general principle that courts must do what they can with the available evidence, and instead allowed issues regarding the likely availability of data to effectively deny the class a trial, through the only procedure available to them, in respect of claims "*with a real prospect of (some) success*"; and
- the CAT was wrong to consider respect for the compensatory principle as an essential element in the distribution of aggregate damages. The Supreme Court ruled that a *"central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss."* It further held that there will be some cases where approximating individual loss may be difficult and disproportionate, such as where individuals are likely to recover only modest amounts, and that *"some other method may be more reasonable, fair and therefore more just,"* as in the proceedings brought by Mr. Merricks.

Implications of the Decision

The ruling of the Supreme Court, dismissing Mastercard's appeal, provides crucial clarification from the UK's highest court on the test to be applied, and the evidentiary standard required, at the certification stage in collective proceedings.

Mr. Merricks' application for a CPO is now remitted to the CAT for reconsideration. Given the rulings of the Supreme Court and the Court of Appeal, certification of the class seems inevitable. If a CPO is granted, this will mean that the damages claims of 46 million UK consumers will be entitled to proceed against Mastercard on a collective basis. The issue will be how much damages Mastercard needs to pay to those consumers by way of redress.

For the seven other collective actions currently awaiting the outcome of Mastercard's appeal, the wait is over and those claims can now progress to be considered for certification by the CAT. Q

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