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Voir Dire in the Age of Google

With the click of a mouse, trial attorneys may gain much more information about a potential juror than a typical juror questionnaire provides. As social networking sites, blogs and Internet forums become a pervasive part of everyday life, adults are increasingly sharing their personal information online. Such individual-generated content provides a vast array of information regarding its author's social background, education, political views, religious affiliation and life experiences that can lead to valuable insights into how that person might process information and resolve issues. With more than 500 million people on Facebook, 175 million on Twitter, and over 70 million actively using LinkedIn, the Internet has become a powerful tool for jury consultants and trial lawyers to use when selecting a jury and structuring the presentation of evidence.

Courts are now addressing whether Internet research on potential jurors should be allowed. A recent New Jersey appellate court held that counsel can conduct Internet research on potential jurors during voir dire. In *Carino v. Muenzen*, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010), the trial judge barred the plaintiff's counsel from "googling" potential jurors during jury selection. The jury subsequently found for the defendant and the plaintiff appealed, arguing that the court acted unreasonably when it barred plaintiff counsel's Internet use during jury selection. Although the appellate court let the verdict stand due to lack of prejudice, the court did hold that the prohibition on Internet use was unreasonable:

> Despite the deference we normally show a judge's discretion in controlling the courtroom, we are constrained in this case to conclude that the judge acted unreasonably in preventing use of the internet by [plaintiff's] counsel. There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining "a level playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it.

Id. at *10.

In another case, the Missouri Supreme Court not only suggested that Internet searches of jurors should be allowed, but held it was imperative for a party to conduct such searches or be deemed to have waived challenges to the verdict based on a juror's intentional

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Quinn Emanuel Selected as Cisco IP Firm of the Year

Cisco Systems recently selected Quinn Emanuel as its "Intellectual Property Litigation Law Firm of the Year." This is the first year Cisco has chosen to honor and acknowledge its outside counsel. The recognition was based on Quinn Emanuel's successes in: obtaining a dismissal of a patent infringement action brought against Cisco in the Eastern District of Texas; obtaining an affirmance of the same dismissal in the Federal Circuit; and successfully defending various patent false-marking claims against Scientific Atlanta (a Cisco subsidiary) resulting in little or no exposure to the company. Quinn Emanuel is proud to represent Cisco Systems and thanks Cisco for this recognition. Q

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non-disclosure. In *Johnson v. McCullough, M.D.*, 306 S.W.3d 551 (Mo. Sup. Ct. 2010), the plaintiff sought a new trial because one of the jurors failed to disclose he had been a party in prior lawsuits when asked by the plaintiff's counsel about any prior involvement in litigation. The trial court granted a new trial, and the Missouri Supreme Court affirmed, but cautioned that "in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on parties to bring such matters to the court's attention at an earlier stage." *Id.* at 558. The court admonished litigants to "use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present . . . any relevant information prior to trial," and instructed trial courts "to ensure parties have an opportunity to make a timely search prior to the jury being empanelled[.]" *Id.*

As use of the Internet for researching, examining and selecting prospective jurors becomes widespread—owing to the increasing numbers of courtrooms that are equipped with wireless Internet access and the ubiquity of handheld Internet-capable devices—trial attorneys must understand both the ethical implications of accessing individual-generated Internet content and the most effective ways to utilize that content.

Top Social Networking Sites

Facebook

Facebook claims to have more than 500 million active users who share over 5 billion pieces of content, such as links, photos and videos. Facebook states that 50 percent of its users log onto it every day. *http//facebook.com/press/info.php?statistics*. The average user has 130 friends and people spend over 700 billion minutes per month on Facebook. *Id.* More than 200 million users routinely access Facebook on mobile devices to stay connected at all times. *Id.* Each Facebook user has an online profile that includes personal information, photos and links. Users can also become "fans" of businesses, products or people. The average user is connected to 80 community pages, groups and events and creates 90 pieces of content each month. *Id.*

Twitter

Twitter is a "micro-blogging" site that allows users to send "tweets"—short posts (140 characters or less) that are delivered to the user's "followers." Twitter describes itself as "a real-time information network that connects you to the latest information about what you find interesting. Simply find the public streams you find most compelling and follow the conversations." *www.twitter.com/about*.

LinkedIn

Specifically designed to help business people communicate and network, LinkedIn boasts over 85 million members in over 200 countries. *www.linkedin.com/about*. LinkedIn users create profiles that summarize professional expertise and accomplishments, as well as educational background. Users can form networks by inviting others to join and connect to the user.

Effective Use of Juror-Created Internet Content

Social networking sites, of course, are not the only source of personal information available on the Internet. Letters to the editor, campaign contributions, club memberships, and educational and professional profiles can be found in just minutes. In addition to the obvious sources, such as Facebook, Twitter and LinkedIn, attorneys should search the potential juror's employer's website; wink.com, which searches blogs and photo sharing sites; and zoominfo.com, a business information search engine for announcements and business information, among others. In one Milwaukee County court, the judge included a question in a pretrial questionnaire asking whether the potential jurors maintained a blog. Not only did this reveal one potential juror's blog, but it also enabled the attorneys to identify the juror's account on Twitter. This juror had already posted a message to his Twitter account, stating "Still sitting for jury duty crap. Hating it immensely. Plz don't pick me." A Trial Lawyer's Guide to Social Networking Sites, Part I, *available at http://jurylaw.typepad.com/deliberations/2007/10/a-trial-lawyers.html*. In another case, a paralegal noticed that one potential juror had posted on his Facebook account that he was "sitting in hell 'aka jury duty.'" Kimeball Perry, *Juror Booted for Facebook Comment*, Dayton Daily News, Feb. 1, 2009, at A6.

Information acquired from online content can also provide insight into juror biases and other relevant information that potential jurors might fail to reveal during voir dire. Not only have studies shown that jurors frequently harbor unspoken biases, but jurors occasionally conceal highly relevant information that could impact their decision-making. For example, in a recent case involving suspected "dirty bomber" Jose Padilla, defense attorneys relied on Internet searches during jury selection to discover that one juror had lied on her jury questionnaire by concealing her personal experience with the criminal justice system. This discovery resulted in her dismissal. Julie Kay, *Social Networking Sites Help Vet Jurors*, Law Technology

News, Aug. 13, 2008 *available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202423725315*.

The potential benefits of Internet research do not end with jury selection. For example, one attorney discovered from a juror's social networking site that the juror's favorite book was *The Seven Habits of Highly Effective People*, and intentionally included references to the book during closing arguments. *Id.* An attorney can rely on this type of additional data—such as affiliations with specific types of charities or sports clubs—to build in metaphors to help the jurors identify with and better understand the attorney's arguments. While information gleaned from social networking sites can be illuminating, using that information in voir dire is not advisable; jurors likely will not like the investigation and intrusion into their personal lives.

It is also important to continue monitoring a seated juror's online postings during trial. Seated jurors sometimes post comments concerning trial proceedings on their blogs or on Facebook. Data from Reuters Legal shows that since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct. Since January 21, 2009, judges have granted new trials or overturned verdicts in 28 criminal and civil cases on that basis. Over a three-week period in November and December 2010, Reuters Legal monitored Twitter posts by users purporting to be prospective or sitting jurors; such tweets popped up at an astonishing rate of one nearly every three minutes. Brian Grow, *The Internet v. the Courts: First in a Series*, Westlaw News & Insight, *available at http://westlawnews.thomson.com/National_Litigation/News/2010/12_-_December/As_jurors_go_online,_trials_go_off_track*.

Ethical Concerns

State bar ethics committees have only just started addressing the ethical issues that arise when lawyers or their agents use social media to gather information. It should go without saying that even though social networking makes it possible to contact jurors with unprecedented ease and "discretion," the traditional rules prohibiting such contact remain applicable. The Pennsylvania Bar Association recently issued an ethics opinion concluding that it would be unethical for an attorney to ask a third party to contact an adverse witness via a social networking site in an attempt to "friend" the witness—and thus gain access to information on that witness' social network restricted to "friends" within the witness' network. Philadelphia Bar Ass'n, Ethics Opinion 2009-02 (Mar. 2009), *available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2*. The Pennsylvania Bar Association opined that doing so would be a deceptive use of social media if the third party requested access solely to obtain and share information with the lawyer while concealing his or her intent. However, the opinion stated it would be ethical for the attorney to request access directly because such action would be open and transparent, thus permitting the witness to choose not to "friend" the lawyer. *Id.*

Similarly, the New York Bar Association concluded that a lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) to obtain possible impeachment material. N.Y. State Bar Ass'n, Ethics Opinion 843 (Sept. 10, 2010), *available at http://nysba.org/AM/Template.cfm?Section=Ethics_Opinion&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208*. However, the New York Bar specifically noted that a lawyer must not attempt to "friend" or otherwise contact an adverse party to gain access to restricted information because such contact would violate New York's "no contact" rule that prohibits a lawyer from communicating with a party represented by counsel concerning the subject of the representation absent prior consent from the other party's lawyer.

New York's extension of the traditional "no contact" rule to the realm of social networks does not expressly apply to potential jurors, but it does demonstrate a logical extension of traditional ethics rules to regulate contact with potential jurors. For example, California Rule of Professional Conduct 5-320 prohibits any direct or indirect contact with anyone an attorney "knows to be a member of the venire from which the jury will be selected for trial of that case." Cal. Rules of Prof. Conduct 5-320, *available at http://calbar.ca.gov/Rules/Rulesof ProfessionalConduct/CurrentRules/Rule 5320.aspx*. Thus, Rule 5-320 makes it unethical for an attorney to directly "friend" a potential juror.

However, the application of rules such as Rule 5-320 can become murky in practice, where the issue is not direct contact with a potential juror per se. For example, Facebook permits users to customize their privacy settings. These privacy settings provide three options: allow access to everyone; allow access only to the user's "friends;" or allow access to both "friends" and "friends of friends." The "friend of friends" setting permits a user to grant access to "people who

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Quinn Emanuel IP Partner Victoria Maroulis Named One of the Top 45 Women Lawyers Under 45 by *The American Lawyer*

Victoria Maroulis, intellectual property partner and co-chair of the firm's life sciences practice, was recently named one of the top 45 women lawyers under 45 by *The American Lawyer*. Attorneys were selected based on the significance of their recent matters, measured by monetary value and the level of importance to the client's business or litigation strategy. The top 45 demonstrated the ability to solve "specific and difficult legal challenges" in an innovative manner. In naming Maroulis to this prestigious list, *The American Lawyer* recognized her victories for Cisco, Tegic Communications, GE Healthcare, and Genentech, Inc. Maroulis defended Cisco against patent infringement claims involving Voice over Internet Protocol technology and obtained a dismissal later upheld on appeal. Maroulis and her team also secured a $9 million jury verdict for Tegic Communications in a patent infringement case involving text-entry software. Additionally, *The American Lawyer* cited Maroulis's role in obtaining a partial summary judgment limiting GE Healthcare's liability in a MRI technology patent infringement suit filed by the University of Virginia. The publication also noted Maroulis's appellate win for Genentech, Inc., in which she secured a venue transfer from the Eastern District of Texas to the Northern District of California. Maroulis is highly praised for her fierce intelligence, as well as for her strategic and creative thinking. Q

Patent Trial Lawyer Gillian Thackray Joins San Francisco Office

Intellectual property trial lawyer Gillian Thackray has joined Quinn Emanuel as a partner in its San Francisco Office. Ms. Thackray previously practiced with Covington & Burling LLP. Her practice focuses on patent litigation and strategic patent counseling. She has litigated and tried cases concerning a wide array of technologies, including medical devices, telecommunications networking, chemical compounds and semiconductor design. Ms. Thackray has chaired both bench and jury trials, and has helped her clients recover over $100 million for their inventions. She also has substantial experience defending companies against charges of patent infringement and has successfully obtained reexamination of patents or secured the early dismissal of cases through favorable claims-construction rulings. Ms. Thackray was named a "Northern California Rising Star" in Intellectual Property Litigation for 2009-2010 and was recently named to the Board of Directors of the San Francisco Bar Association Foundation. Q

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are friends with [the user's] Facebook friends . . . [and] extends the range of sharing and makes it easier for [the user's] friends to share relevant content with their friends, even if [the user] posted the content . . . without having to set the content to 'Everyone' on the internet." Facebook Privacy: Privacy Settings and Fundamentals, "What does 'Friends of Friends' mean?" at *http://www.facebook.com/help/?page=839#!/help/?faq=12241*. Given this exponential expansion of the universe of contacts available in the "friends of friends" context, the question then arises—is it a violation of California Rules of Professional Conduct 5-320 for an attorney to "friend" a juror's "friend" to attempt to gain access to restricted information? ABA Model Rules of Professional Conduct 8.4 instructs that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *See also* Cal. Bus. & Prof. Code § 6106. "Friending" a "friend" of a potential juror likely could be construed as an improper, prohibited contact because the attorney would be seeking information through a deceitful means.

Conclusion

An increasing number of potential jurors are routinely broadcasting their political views, opinions and habits online, thus providing enterprising and Internet-savvy trial lawyers with an increasing universe of valuable data to use when evaluating jurors. Such resources should not be ignored. Equally important, however, is that trial lawyers must be mindful of the implications of their ethical duties and professional responsibilities in this Age of Google. Q

Bank of America Ordered to Repay More than $500 Million Seized from Lehman Accounts

On November 16, 2010, the Bankruptcy Court in the Southern District of New York decided *Bank of America, N.A. v. Lehman Brothers Holdings, Inc., et al.*, 08-1753 (the "*BofA Proceeding*"). It (i) granted summary judgment for Lehman Brothers Holdings, Inc. ("LBHI"), Lehman Brothers Special Financing ("LBSF," collectively with LBHI and LBHI's other affiliates and subsidiaries, "Lehman") and Quinn Emanuel client, the Official Creditors Committee of LBHI and its affiliated debtors (the "Committee"), (ii) denied Bank of America's cross-motion for summary judgment, and (iii) directed Bank of America to return $501.8 million plus interest to the debtors' estates for the benefit of creditors. The ruling should put all creditors on notice of the inherent risks in taking self-help measures against a debtor after a bankruptcy stay has issued.

Prior to LBHI's Chapter 11 filing, Bank of America served as one of Lehman's clearing banks. Lehman incurred intra-day overdrafts as funds came in and went out of the account. To the extent there were overdrafts during the business day, Bank of America was essentially extending unsecured credit to Lehman with the expectation that any overdrafts would be eliminated by the end of the business day.

In July 2008, one of Lehman's Bank of America accounts recorded a $650 million overnight overdraft. Alarmed, Bank of America pressured LBHI to enter into a security agreement establishing a $500 million fund solely dedicated to satisfying Lehman's overdrafts. LBHI acceded to the request, placing $500 million in a special-purpose account for potential overdrafts. LBHI's $500 million remained in its special-purpose account until November 10, 2008, when Bank of America, without first seeking relief from the Bankruptcy Court, seized the funds (plus accrued interest) and set them off against amounts that Lehman allegedly owed to Bank of America as a result of unrelated derivatives (swap) agreements.

Following the seizure, Bank of America instituted proceedings in the Bankruptcy Court seeking a declaratory judgment that its actions did not violate the stay or, in the alternative, retroactive relief from the automatic stay. LBHI cross-claimed that the setoff was improper, and the Creditor's Committee intervened in support of Lehman.

The court examined the terms of the security agreement that established the account in question and the intentions of the parties in establishing the account. Initially, Bank of America had demanded that LBHI deposit $1 billion into an account pledged as collateral subject to the terms of a security agreement. Lehman responded by asking whether Bank of America would consider treating the account as a "vanilla" account with no specific pledge. Bank of America refused. From this initial position, the parties negotiated for four days, without ever discussing setoffs. In the end, the security agreement required that Lehman deposit $500 million into an account to be used, according to the terms of the agreement, "solely in respect of overdrafts." The funds were not pledged as security against any other debts. In addition, the deposited funds could be withdrawn by Lehman only upon three days' written notice. Once deposited, neither Lehman nor Bank of America ever used the funds for any purpose before the November 10 setoff.

The court found that both the language of the security agreement and the conduct of the parties clearly reflected an intent to establish a special-purpose account. The security agreement expressly permitted the use of the funds "solely in respect of overdrafts." And, in addition to the three-day notice required for any withdrawal by Lehman, Bank of America placed the deposited funds on an "indefinite" hold. As a result, the court concluded that the parties created a special-purpose account thus making the funds ineligible for setoff under New York law. In reaching that conclusion, the court rejected arguments from Bank of America that the common-law setoff rights were preserved by boilerplate contract language reserving "all rights, powers and remedies given to [Bank of America] by virtue of any statute or rule of law." The court also rejected Bank of America's attempt to find refuge in the safe harbor provisions of the Bankruptcy Code, which permit a swap counterparty to exercise any right related to the swap agreement. 11 U.S.C. § 362(b)(7). It held that the right asserted under this provision must be a part of or related to the swap agreement. In this instance, the security agreement providing the right to set the dedicated funds off against overdrafts bore no relation to the terms of the swap agreement against which those funds were applied. In making those findings, the court emphasized the distinct bargaining advantage and "situational leverage" enjoyed by Bank of America throughout the entire episode. *BofA Proceeding*, No. 08-01753 at 34-35. Lehman, the court said, "found itself in [a] coerced position" *Id*. at 9.

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Bankruptcy and Restructuring Litigation Update

***Court Refuses to Approve Debtors' Decision to Assume Plan Support Agreement*:** On December 20, 2010, the Bankruptcy Court for the Southern District of New York refused to approve a debtors' request to assume a prepetition plan support agreement ("PSA") that provided for the issuance of 100 percent of the reorganized debtors' equity to one of the debtors' prepetition secured lenders. Notably, the lender had cut a side deal with the debtors' prepetition equity holder to sell half the equity received under the PSA. Although the court noted that the entire fairness standard was likely applicable, it applied the less stringent business judgment standard in refusing to approve the PSA. It also refused to find that the debtors' decision was disinterested. The debtors had always intended to transfer equity to its former owner whether directly, as a back-stop party, or through the side deal with a secured creditor. Similarly, the court found that the PSA was not entered into with due care because the debtors did not "shop" the deal to potential alternative counterparties. Finally, the court refused to find the debtors had acted in good faith. It noted that "virtually all of the other parties in interest in the debtors' capital structure" complained they had been shut out of the process. It additionally ruled that the fact that the debtors' equity holder would retain 50 percent of the reorganized equity was "at best, downplayed and, at worst, obfuscated" from such parties. Finally, the court viewed as excessive the control over cash collateral afforded to the secured creditor under the PSA, including a prohibition imposed on the debtors precluding them from seeking competitive proposals, reimbursement of the secured lender's costs, and, in certain instances, a requirement that the debtors consent to lifting the stay. The case is *In re Innkeepers USA Trust, et al.*, No. 10-13800 (SCC) (Bankr. S.D.N.Y. Jul. 19, 2010), and is important precedent examining the limitations of prepetition plan arrangements among debtors and stakeholders.

***Second-Lien Lenders Find Way Around Prohibition on Objecting to Sale*:** On September 30, 2010, the Bankruptcy Court for the District of Delaware allowed second-lien lenders to object to the debtor's sale "process," notwithstanding provisions in their inter-creditor agreement with the first-lien lenders purportedly waiving their right to object to or oppose a section 363 sale if the first-lien lenders consented to the sale. The debtor sought to sell its businesses to their first-lien lenders, who submitted a credit bid. Drawing a distinction between the sale transaction itself and the process leading to it, the court allowed the second-lien lenders to argue that the debtor inappropriately ignored the competing bid of Energizer Holdings, Inc., which was valued at $56 million more than the first-lien lenders' bid. The second-lien lenders also protested the debtor's refusal to allow for additional due diligence and challenged as unreasonable the determination that Energizer was not a qualified bidder. The second-lien lenders contended that the debtor exaggerated purported antitrust concerns implicated by the Energizer bid. The court viewed all those complaints as related to the sale "process" and not the putative sale transaction itself. It concluded that such distinction brought the second-lien lenders' objection outside the contractual restrictions in the inter-creditor agreement. Ultimately, the court refused to approve the sale to the first-lien lenders and allowed Energizer to resume due diligence. Shortly thereafter, Energizer consummated a transaction. The case is *In re American Safety Razor, LLC, et al.*, No. 10-12351 (MFW) (Bankr. D. Del.), and may prove useful to contractually-subordinated creditors.

***Creditors of Solvent Debtors Entitled to "Make Whole" Claim*:** On September 3, 2010, the Bankruptcy Court for the Southern District of Mississippi held that the solvent debtors' repayment of notes breached the indenture's "no call" provision prohibiting any refinancing or repayment of the notes for a four-year period following issuance. The indenture further provided for a prepayment premium if the debtors caused an event of default with the intent to avoid the no-call provision. The proceeds of the notes were used to finance the construction of a casino. After Hurricane Katrina destroyed the casino, the debtors filed for bankruptcy to access insurance proceeds. They then sought to repay the notes in full with interest under a plan. The court found that under the indenture, the noteholders were not entitled to the prepayment premium because the debtors caused an event of default (i.e., filing for bankruptcy) to access insurance proceeds, not to side-step the no-call provision. The noteholders did, however, prevail on their alternative claim. Specifically, the court recognized a damages claim arising out of the debtors' breach of the no-call provision, notwithstanding that no-call provisions are generally unenforceable in chapter 11 cases. The court approximated damages based upon the difference between the current market interest rate and the contract interest rate. The difference was approximately 75 percent of the prepayment premium. It is unclear to what extent that holding was based on the court's finding that the debtors were solvent. In such instance, the court reasoned, it would be inequitable to excuse the debtors from their contractual obligations. The case is *Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Ass'n*, 2010 Bankr. LEXIS 2994 (Bankr. S.D. Miss. Sept. 3, 2010).

London Litigation Update

English Court Upholds Forum-Selection Clauses Even When Doing So Results in Proceedings in Multiple Forums: A recent appellate decision further clarifies the extent to which courts in England and Wales will adhere to the parties' forum-selection provisions even when doing so would result in proceedings in multiple jurisdictions pursuant to multiple agreements. In *Sebastian Holdings Inc v. Deutsche Bank AG* (2010) EWCA Civ 998, the parties Sebastian Holdings Inc ("SHI") and Deutsche Bank AG ("DB") entered into a series of agreements for trading in the financial markets. Most of the agreements provided for the jurisdiction of the English courts, although one agreement provided for the jurisdiction of New York courts (the "Brokerage Agreement"). Trading by DB resulted in losses of approximately $750 million to SHI, which consequently commenced proceedings against DB in the Supreme Court of New York to recover damages. DB then commenced proceedings in the Commercial Court in England to recover approximately $250 million in unpaid debts under two agreements from the series, both containing English jurisdiction clauses. SHI challenged the jurisdiction of the English court, arguing that looking at the *series* of agreements, the English court should not have jurisdiction.

At first instance, Mr. Justice Walker (the English trial court) found that DB was entitled to rely on the jurisdiction clauses in the two agreements and thus commence proceedings in England. He looked to the parties' early use of an International Swap Dealers' Association (ISDA) clause that allowed concurrent parallel proceedings in different courts, and found that subsequent agreements between the parties did nothing to change that clause.

The Court of Appeal agreed and dismissed the appeal. In doing so, it rejected SHI's argument that the agreement at the commercial center of the dispute should control, holding that such test would govern only if multiple agreements applicable to the dispute had conflicting jurisdictional provisions. There was no such conflict here.

The court found that SHI's suggested interpretation of the agreements would in fact frustrate the parties' intention: "[T]he wording of the clauses in the agreements shows that the parties plainly intended the Bank to be able to bring a claim under an agreement under which a debt was due in the jurisdiction provided for in that agreement . . . . The language of the agreements plainly envisages [claims being brought under different agreements in different jurisdictions and] it is entirely rational for businessmen to agree to this."

The court also rejected SHI's argument that the parties should allocate jurisdiction to the contract at the center of the parties' dispute, as opposed to the contract at the center of the DB's claim. The court concluded it was not possible to treat all the claims between DB and SHI and the defenses to those claims as giving rise to a *single* dispute that should be allocated to a single contract. Even if the defenses overlapped, the unambiguous language of the agreements plainly envisaged claims being brought under the different agreements for monies owed under different agreements.

English Court Rejects U.S.-Style Class Actions: A recent decision in the Court of Appeal involving British Airways ("BA") demonstrates once again the difficulty of bringing anything resembling a U.S.-style class action in an English court. The claimants, Emerald Supplies Limited and Southern Glass House Produce ("Emerald"), used air freight services from BA and other airlines to import flowers from Colombia and Kenya. The two companies had wanted to serve as claimants in a U.S.-style class action lawsuit on behalf of 200 companies claiming loss resulting from alleged price-fixing, and formulated their claim as a representative action under the Civil Procedure Rule 19.6. That rule permits a person to bring a claim on behalf of others who have "the same interest in a claim." The Court of Appeal ruled that the group proposed by Emerald was insufficiently defined because BA's liability to members of the representative group was the only feature connecting the claiming parties, and that liability remained to be proved. The court also found that the group did not share suitably common interests because BA might have differing defenses to the claims of differing members of the group. Because only the representative element of the suit was struck, the rest of the claim will proceed as normal, but other claims are now likely to be brought individually against BA.

This case serves to underscore the difficulty that consumers and other large groups face in bringing collective actions in the U.K., especially when the liability is not yet quantified. As Lord Justice Mummery acknowledged in the Court of Appeal, the need to remedy the issue of redress for price-fixing is

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"so pressing" that it is currently under review by the E.U. Commission, the U.K. Office of Fair Trading and the Civil Justice Council. Until any reforms are actually implemented, however, this decision emphasizes the difficulty in bringing class actions of this kind in the U.K.

U.K. Court Allows Reporters to Tweet Live Reports of Proceedings: On December 20, 2010, following the hearings of Wiki-Leaks founder Julian Assange in the U.K.'s High Court, England and Wales' most senior judge, the Lord Chief Justice, issued a landmark decision generally allowing journalists to "tweet" live reports of judicial proceedings. He concluded that the use of an "unobtrusive, handheld (and) virtually silent piece of modern equipment for the purposes of reporting proceedings to the outside world as they unfold in court is generally unlikely to interfere with the proper administration of justice."

Requests from the media will be made on a case-by-case basis, but the decision was welcomed by journalists, who will likely heed the stipulations that tweets be in the public interest and not impact witnesses or interfere with the process of conducting fair trials. It is widely acknowledged that this small stride into the 21st century will make legal proceedings more accessible and transparent to the public.

Life Sciences Litigation Update

Federal Circuit Affirms Preliminary Injunction in Pharmaceutical Case: In *AstraZeneca LP v. Apotex, Inc.*, 2010 WL 4286284 (Fed. Cir. Nov. 1, 2010), the Federal Circuit affirmed a preliminary injunction entered by the U.S. District Court for New Jersey to prevent Apotex from launching a generic version of AstraZeneca's budesonide inhalation suspension product, marketed as "PULMICORT RESPULES." Each "respule" is a plastic vial containing a single dose of budesonide suspended in sterile liquid. AstraZeneca owns two patents covering its product: United States Patent Nos. 6,598,603 and 6,899,099. Each patent includes method claims directed to administering a budesonide composition once daily and product claims directed toward a kit containing either a budesonide composition or a suspension and labeled to indicate once-daily administration by nebulization.

Apotex sought approval for a twice-daily generic version of AstraZeneca's drug product. To avoid infringing AstraZeneca's patents, Apotex unsuccessfully attempted to obtain approval for a label that did not explicitly mention the once-daily administration of its generic suspension formulation. The FDA, however, required Apotex to include statements regarding the down titration (causing dosage decreases over time) of its generic drug.

Upon approval of Apotex's ANDA, AstraZeneca sued for infringement. It alleged, among other things, that the down-titration statements of Apotex's label would induce infringement of specific method claims in its patents. AstraZeneca also sought a preliminary injunction, arguing that (1) it was likely to prove its inducement of infringement claim; (2) it was likely to suffer irreparable harm without preliminary relief in the form of layoffs and loss of consumer goodwill; (3) the balance of hardships tilted in its favor; and (4) an injunction was in the public interest. The district court agreed.

On appeal, Apotex challenged the district court's finding of inducement of infringement—and ultimately the issuance of the preliminary injunction—by arguing that its instructions did not demonstrate specific intent to cause the users of its product to engage in once-daily dosing. The Federal Circuit rejected those arguments and agreed that the downward-titration instructions would necessarily result in some users engaging in once-daily dosing. Most significantly, the Federal Circuit noted that even though Apotex was well aware of the infringement problems raised by once-daily dosing, it chose to proceed with the filing of its ANDA application.

Obviousness-Type Double Patenting in the Pharmaceutical Context: The Federal Circuit recently revisited the doctrine of obviousness-type double patenting in *Sun Pharmaceutical Indus., Ltd. v. Eli Lilly and Co.*, 611 F.3d 1381 (Fed. Cir. 2010). Eli Lilly obtained U.S. Patent No. 4,808,614 covering the drug gemcitabine, the active ingredient in Lilly's Gemzar® product, as well as a method of using it to treat viral infections. The specification of the '614 patent also disclosed using gemcitabine to treat cancer, but the patent did not claim such use. The '614 patent resulted from a divisional application, filed December 4, 1984, as a continuation-in-part of U.S. Patent Application No. 473,883 ("original '883 application"), filed March 10, 1983. Later, Eli Lilly received U.S. Patent No. 5,464,826, which claimed the method of treating cancer with gemcitabine. Although the '614 and '826 patents were filed as applications on the same day in 1984, the '826 patent issued approximately two-and-a-half years after the '614 patent. Owing to the difference in their dates of issuance, the '614 patent expired in 2010, while the '826 patent was not due to expire until 2012.

After filing its ANDA for approval of a generic version of Gemzar®, Sun Pharmaceuticals sought a declaratory judgment that the '826 patent was invalid and not infringed. Lilly counterclaimed for infringement of the '826 and '614 patents. The district court granted summary judgment that the claims of Lilly's '826 patent were invalid for obviousness-type double patenting in light of the '614 patent. The Federal Circuit affirmed, relying principally on two earlier decisions that addressed double patenting in the context of claims claiming different uses of the same drug compound, *Geneva Pharmaceuticals, Inc. v. GlaxoSmithKline, PLC*, 349 F.3d 1373 (Fed. Cir. 2003), and *Pfizer, Inc. v. Teva Pharmaceuticals USA, Inc.*, 518 F.3d 1353 (Fed. Cir. 2008). In *Geneva*, the earlier patent claimed a compound, potassium clavulanate, and the specification disclosed its effectiveness for inhibiting beta-lactamase in humans. The later patent claimed a method of using potassium clavulanate to affect beta-lactamase inhibition in humans or animals. Similarly, in *Pfizer*, the earlier patent claimed several compounds, and the specification disclosed their use in treating inflammation and inflammation-associated disorders. The later patent claimed a method of using the earlier-claimed compounds to treat inflammation. In each case, the claims filed in the two applications were not "patentably distinct," and thus the latter claims were held invalid for obviousness-type double patenting.

Lilly attempted to distinguish them by arguing that the district court should have evaluated the compound claims directed to gemcitabine in the '614 patent based on the original '883 application. The '883 application disclosed only gemcitabine's antiviral use, not its anticancer use. Lilly had added a description of gemcitabine's anticancer use to the specification in a continuation-in-part application that eventually resulted in the '614 patent. Lilly asked the court to ignore the '614 patent's description of gemcitabine's use in cancer treatment because that disclosure was not part of the original '883 application. The Federal Circuit rejected its argument, reasoning that the scope of the claims at issue must be understood in light of the entire issued patent, and not be limited to the disclosure in an early version of the specification that may have been substantially altered during prosecution.

Trademark and Copyright Litigation Update

Supreme Court Evenly Split on Copyright First-Sale Case: On December 13, 2010, an equally-divided Supreme Court issued its decision in *Costco v. Omega*, 131 S. Ct. 565 (2010), thereby affirming the Ninth Circuit's decision in *U.S. Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008), that the copyright first-sale doctrine does not apply to imported goods manufactured abroad. Justice Kagan did not participate in the decision.

Under the first-sale doctrine of the Copyright Act, 17 U.S.C. §109(a), a copyright holder has exclusive control over an item's first sale. After the first sale, any subsequent owner may resell the item without interference. Costco purchased Swiss-made Omega watches manufactured and sold to authorized distributors abroad. Following their importation into the U.S., they were resold at prices that undercut Omega's U.S. dealers. The question was whether Omega could rely on the first-sale doctrine to prevent resale in the United States. As we wrote in our June 2010 edition, the Ninth Circuit held it could because the Copyright Act does not recognize foreign sale of an item manufactured abroad. It concluded that for purposes of the Copyright Act, an item's first sale in the United States is its first sale. The Supreme Court affirmed, but no precedent was set because the Court was evenly split. At least in the Ninth Circuit, however, the decision strengthens copyright owners' control over sales of their products and undermines U.S. resellers' ability to sell imported goods bearing logos or designs protected in the U.S.

Second Circuit Expands Personal Jurisdiction in Internet Commerce: Under the traditional minimum contacts analysis, a commercial website alone or a single shipment into a state, especially if arranged by the plaintiff, is ordinarily insufficient to give courts in that state personal jurisdiction over the defendant. *See Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F. 3d 446, 454 (3d Cir. 2003) ("[T]he mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world."); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 112 (D. Conn. 1998) (holding that sale initiated by plaintiff did not support jurisdiction because "under such circumstances a defendant cannot be said to have purposefully availed itself of the forum"). This has created a substantial burden for trademark owners chasing internet distributors of counterfeit goods.

The Second Circuit recently took steps to alleviate that burden. In *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010), a maker of designer handbags sued a distributor of counterfeit merchandise based in Beverly Hills for trademark infringement after a counterfeit bag was shipped to Chlóe's lawyers in New York. The Southern District of New York held that a commercial web site, together with a single arranged shipment, was insufficient to give New York jurisdiction over the defendants under New York's long-arm statute. The Second Circuit reversed, concluding that, "the

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Victory for Investment Fund

The firm recently obtained a complete defense victory for a private investment fund created to manage real estate assets. The Central District of California dismissed with prejudice all claims asserted by the fund's investors. Seventy of the 211 investors brought suit against the fund and its managers, asserting direct claims for securities fraud and derivative claims for breach of fiduciary duty. The plaintiffs' securities fraud claims alleged misrepresentations regarding the fund's business plan, the valuation of assets contributed to the fund by the managers, and the experience of the managers. The plaintiffs' breach of fiduciary duty claim alleged mismanagement of the fund. The plaintiffs sought $13.8 million, in addition to punitive damages.

In an opinion adopting virtually all the arguments advanced by Quinn Emanuel, the district court dismissed all claims with prejudice. With respect to the securities fraud claims, it ruled that the plaintiffs had failed to allege (i) any materially false or misleading statement; (ii) facts raising a strong inference of any defendant's scienter; (iii) each plaintiff's reliance on any of the alleged misrepresentations, as required for direct claims by investors in a private offering; and (iv) loss causation. As to the breach of fiduciary duty claim, the court ruled that the fund's operating agreement and applicable Delaware law precluded liability for any breaches of fiduciary duty other than those constituting bad faith or intentional wrongdoing to the substantial detriment of the fund, and that the plaintiffs had failed to allege conduct that demonstrated bad faith or intentional wrongdoing. The court dismissed the suit with prejudice because the plaintiffs had already amended their complaint twice and allowing them to do so again would be futile.

$30 Million Verdict Upheld on Appeal

On December 30, 2010, the California Court of Appeal handed the firm its final victory of 2010, affirming a $30 million jury verdict. Quinn Emanuel obtained the verdict in April 2008 after a two-week jury trial in Mono County, California. The firm sued the Town of Mammoth Lakes, located in Mono County, on behalf of Mammoth Lakes Land Acquisition, LLC, a group of real estate developers, for breach of a 1997 Development Agreement. Under the agreement, which was accepted by the Town pursuant to California's Development Agreement Statute, our client agreed to improve the Mammoth Yosemite Airport in exchange for the right to develop a hotel/condominium complex on airport-owned land, including an option to purchase the land in 2027 at a very low price. After the developers completed the airport improvements at their own expense, the Town (in an attempt to circumvent its contractual obligations) requested and received from the Federal Aviation Administration a letter objecting that the purchase option violated assurances that the Town had made in accepting FAA grant money. The Town then informed the developers that it would not honor the purchase option unless the FAA's objections were resolved. Because the Development Agreement did not contain any such condition, the developers sued the Town for anticipatory breach. The jury of Mono County residents rendered a $30 million verdict against the Town, the largest jury verdict in Mono County history.

On appeal, the Town contended that the developers' only remedy was to petition for a writ of administrative mandate and thus the developers could not recover damages for breach of the Development Agreement. In addition, because the Development Agreement was adopted by legislation, the Town argued that the Agreement should be construed like a statute and the Town's statements during negotiations concerning the scope of the provisions it asserted on appeal should be ignored.

The Third District Court of the California Court of Appeal heard the argument in mid-October. Before an opinion could be issued, one of the justices sitting on the panel retired. Because California requires that all three justices deciding a case attend oral argument, the case was reargued on December 20 with a new justice sitting on the panel. Ten days later, the Third Circuit issued a 66-page decision unanimously affirming the jury's verdict.

It held that the Town had breached the Development Agreement and that the proper remedy for such a breach was damages, not administrative mandate. In addition, it held that aspects of a development agreement not dictated by development agreement statutes should be interpreted as ordinary contracts, according to the intent of the parties. The Court of Appeal also upheld the trial court's approximately $2.36 million award of attorneys' fees. With post-judgment interest and attorneys' fees, the amount owed on the judgment is now approaching $40 million.

Internet Music Streaming Victory

Quinn Emanuel recently won summary judgment of non-infringement for RealNetworks and Rhapsody in the Southern District of Florida. Zamora Radio (a defunct company formerly known as Click Radio) sued all major online internet radio providers, including Rhapsody, Pandora, Last.FM, Yahoo! and CBS Radio. It sought $20 million in damages for defendants' alleged infringement of a patent on downloading songs in a predetermined order over the internet. After songs are downloaded and stored on a local computer, the user cannot alter the order in which the songs are played.

Zamora sought a claim construction to expand its patent to cover streaming internet radio systems, encompassing RealNetworks and Rhapsody's products. Unlike Zamora's patent, RealNetworks and Rhapsody stream music over the internet; nothing is stored. In March 2010, the court issued a claim construction order rejecting all of Zamora's proposed constructions and adopting the constructions proposed by Quinn Emanuel's clients. Quinn Emanuel then sought summary judgment on non-infringement based on at least five different constructions it obtained. In November 2010, the court issued an order granting summary judgment of non-infringement in favor of Quinn Emanuel's clients on every ground requested in their motion—a complete defense victory.

Preliminary Injunction Victory

In the span of two months, Quinn Emanuel secured two important victories for MHR Fund Management, its founder, Dr. Mark Rachesky, and its affiliated funds arising from Carl Icahn's hostile bid for Lions Gate Entertainment Corp. MHR is a longstanding significant investor in Lions Gate, and Dr. Rachesky is a member of Lions Gate's board.

Icahn brought actions in New York and British Columbia arising out of transactions closed July 20, 2010 that allowed the company to exchange convertible notes held by Kornitzer Capital Management. These notes were later sold to MHR. On November 1, 2010, the Supreme Court of British Columbia rejected Icahn's attempt to rescind the transactions or sterilize MHR's votes under Canada's shareholder oppression law.

In New York, Icahn claimed the challenged transactions violated a standstill agreement he had entered with the company, and that Dr. Rachesky and MHR had tortiously interfered with that agreement. On December 9, 2010, just days before Lions Gate's annual general meeting at which Icahn was running a proxy contest, New York Supreme Court Justice James Yates denied Icahn's request for a preliminary injunction to bar Rachesky's fund, MHR, from voting 16 million shares of Lions Gate stock at the annual meeting.

Following that ruling, Icahn did not close his then-outstanding tender offer and his slate of directors was defeated in the proxy fight. Q

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single act of an out-of-state defendant employee shipping an item into New York," combined with the operation of a commercial web site and sales of unrelated goods to consumers in New York, "gives rise to personal jurisdiction over the employee." *Id.* at 165. The court referred to its ruling as an "update to our jurisprudence on personal jurisdiction in the age of internet commerce," *id.* at 165, and held that the "single act of shipping a counterfeit Chloé bag might well be sufficient, *by itself*, to subject [the defendant] to the jurisdiction of a New York court." *Id.* at 170 (emphasis added).

Although the decision interpreted only New York's long-arm statute, C.P.L.R. § 302, its reasoning applies more generally because the court found that "assertion of personal jurisdiction over [the defendant] comports with due process for the same reasons that it satisfies New York's long-arm statute." *Id.* at 171.

Ninth Circuit Confirms that the Use of Artistic Works Can Constitute a Breach of an Implied Contract Even Absent Copyright Infringement: In *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620 (9th Cir. 2010), the Ninth Circuit considered whether the Warner Brothers/Bedford Falls' film "The Last Samurai" infringed the copyright in an eponymous screenplay written by Aaron and Matthew Benay. The Benay brothers had pitched the screenplay to Bedford. The district court granted summary judgment for the defendants, finding that the Benay brothers could not prove "substantial similarity" under the Ninth Circuit's "extrinsic" test for infringement. The Ninth Circuit affirmed that ruling, but reversed the dismissal of the breach of implied-in-fact contract claim, holding that a different analysis of "substantial similarity" applied to it. The "invocation of the copyright term 'substantial similarity'" in idea-theft cases "does not [require] . . . that plaintiffs in idea-submission cases must prove substantial similarity of copyright-protected elements." *Id.* at 631. Instead, because the claim is based in contract, unauthorized use can be shown by the use of substantially similar elements that are not themselves protected under copyright law.

This important decision appears to further tighten the requirements in the Ninth Circuit to prevail on a copyright infringement claim. At the same time, by confirming that copyright infringement need not be shown to prevail on another theory, such as breach of contract, the court reaffirmed the importance of state law protections, particularly to writers in idea submission cases. Q

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business litigation report

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The court reserved its most censorious language for Bank of America's "deliberately aggressive and calculated strategy" to circumvent the stay. *Id.* at 7. The opinion expressed the court's dismay that Bank of America "could have thought that taking the money was the right thing to do without first seeking permission from the Court." *Id.* at 44. Bank of America's actions "were surprising and, quite frankly, disappointing." *Id.* at 45. The court is still considering what sanctions Bank of America should face for its "calculated violation of the bankruptcy stay." *Id.* Q

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