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Emerging Issues Under the Federal Defend Trade Secrets Act

The Defend Trade Secrets Act (DTSA) creates a federal civil claim for trade-secret misappropriation. 18 U.S.C. § 1836(b)(1) (2018). To state a DTSA claim, a plaintiff must allege trade-secret misappropriation in that:

1. It has information subject to "reasonable measures" of secrecy, 18 U.S.C. § 1839(3)(A) (2018);
2. That information has or had competitive, economic value from "not being readily ascertainable through proper means," 18 U.S.C. § 1839(3)(B) (2018); and
3. The defendant acquired, used or disclosed that information through "improper means," 18 U.S.C. § 1839(5) (2018).

These elements are familiar because the DTSA was modeled on the Uniform Trade Secrets Act (UTSA), which has been adopted in some form by every state except Massachusetts and New York.

To establish subject matter jurisdiction in federal court for trade-secret misappropriation, a plaintiff must show it has met the requirements for diversity or state a DTSA claim. The DTSA poses its own issues, especially if it is the sole basis for invoking the federal court's jurisdiction. Because the DTSA has been in effect since only 2016, there is a paucity of federal appellate court decisions interpreting it. Here, we explore three questions likely to arise in high-stakes litigation under the DTSA. First, we discuss the DTSA's interstate-commerce requirement. Second, we consider whether before taking discovery on a DTSA defendant's confidential information, a plaintiff must identify the allegedly misappropriated trade secrets with reasonable particularity – a kind

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INSIDE

Karl Stern Named "Litigator of the Week" by *Texas Lawyer* for $622 Million Win Against Petrobras in Arbitration

Karl Stern was named the "Litigator of the Week" by *Texas Lawyer* after winning a $622 million arbitration award for Vantage Deepwater against Petrobras in a claim for breach of contract. Vantage Deepwater and Petrobras entered into an eight-year contract regarding a drilling rig in the Gulf of Mexico in 2009. When Petrobras terminated the contract after only 2.5 years, oil prices had collapsed and there was a glut of rigs on the market. With no replacement contract for the rig, Vantage plunged into bankruptcy. Mr. Stern led the arbitration, with the panel accepting all Vantage's arguments and awarding it the entire claimed amount of $622 million. Q

Global Head of Litigation and Investigations at Major Swiss Bank Joins Firm

Tomislav (Tom) Joksimovic has re-joined the firm as a partner in the Washington, D.C. office. Mr. Joksimovic was formerly the Global Head of Litigation and Investigations at EFG International, a global private bank based in Zurich. Mr. Joksimovic's practice is in the areas of white collar criminal defense, internal investigations and cross-border litigation. He has represented clients across the world in numerous investigations and enforcement proceedings involving the U.S. Department of Justice, the Securities and Exchange Commission, the Office of Foreign Assets Control as well as non-U.S. enforcement agencies and regulators in Europe and Asia. He also advises clients in internal investigations involving allegations of bribery, money laundering, fraud and other corporate misconduct. Mr. Joksimovic is qualified to handle enforcement actions in both the U.S. and Europe. He is a native German speaker and fluent in Serbo-Croatian. He received his J.D. from Fordham University School of Law and his B.A. *magna cum laude* in Political Science from the University of California, Los Angeles. Q of definiteness requirement for trade secrets. Finally, we note potential limits on the federal courts' ability to enjoin defendants under the DTSA. According to experts on legal analytics, from 2016 to 2017, the number of trade-secret cases filed in federal court increased 30%, likely as a result of the DTSA. Because of the DTSA's complexities, parties bringing or facing DTSA claims should consult trial counsel with trade-secrets experience.

Interstate Commerce — An Issue of Subject Matter Jurisdiction or Trade-Secret Validity?

By its terms, the DTSA applies only to trade secrets related to "interstate or foreign commerce" through an actual or intended product or service. Courts to date have varied on how concrete this showing must be. For example, one court rejected a trade secret's putative relationship to interstate commerce because the information was not embodied in a product or service. *Search Partners, Inc. v. MyAlerts, Inc.*, No. 17-1034 (DSD/TNL), slip op. at 3-4 (D. Minn. June 30, 2017). Others generally have considered any evidence of a trade secret's relationship to interstate commerce as sufficient. *E.g., Revolution FMO, LLC v. Mitchell*, No. 4:17CV2220 HEA, 2018 WL 2163651, at *5 (E.D. Mo. May 10, 2018) (inferring interstate commerce from allegations that plaintiff, a California LLC, licensed materials to defendant, a Missouri resident, and reviewed its trade secrets to "ensure compliance with the various State[s']" regulations). An open issue is the status of negative trade-secrets — information about what not to incorporate into a product or service. Still another is whether the trade secret alone or also the misappropriation thereof can properly relate to interstate commerce. *See Yager v. Vignieri*, No. 16CV9367 (DLC), 2017 WL 4574487, at *2 (S.D.N.Y. Oct. 12, 2017) ("Congress specifically crafted the commerce language in the DTSA to reach broadly in protecting against the theft of trade secrets." (internal quotation marks omitted)).

The procedurally more interesting issue is when a defendant can attack a trade secret's relationship to interstate commerce. The jurisdictional view allows defendants to challenge DTSA claims on a 12(b)(1) motion, which cannot be waived and which puts a burden on the plaintiff to prove facts as of filing. *See Gov't Employees Ins. Co. v. Nealey*, 262 F. Supp. 3d 153, 172 (E.D. Pa. 2017) (dismissing for lack of interstate commerce because the "requirement is jurisdictional"). Adopting this view, some courts have questioned a trade secret's relationship to interstate commerce on their own motion. *E.g., Progressive Sols., Inc. v. Stanley*, No. 16-CV-04805-SK, 2018 WL 2585374, at *2 (N.D. Cal. Apr. 24, 2018).

Other courts have ruled that the trade-secret's relationship to interstate commerce "does not implicate subject matter jurisdiction." *Yager*, 2017 WL 4574487, at *2. Still other courts view interstate commerce as an issue for which jurisdiction and merits are intertwined. *E.g., Garfield Beach CVS LLC v. Mollison Pharmacy*, No. 17-CV-00879-AJB-MDD, 2017 WL 3605452, at *3 (S.D. Cal. Aug. 22, 2017). Because of this intertwining, these courts have ruled that "the typical Rule 12(b)(1) standard applicable to factual motions would not be proper." *Id.* But they have invited the issue on an "appropriately timed motion for summary judgment." *Id.* (denying motion to dismiss for lack of jurisdiction without prejudice). Without appellate treatment of the interstate-commerce issue, federal district courts will continue to entertain arguments about how concretely a trade secret needs to be linked to a product or service and about when the court must decide the issue.

Reasonable Particularity—When Is It Required?

One question that has not yet been addressed by any federal appellate court is whether a trade-secrets plaintiff asserting a claim under the DTSA must identify the allegedly misappropriated trade secrets with reasonable particularity before taking discovery on the defendant's confidential information. Such identification is required under the laws of several states, including California. Applying Federal Rule of Civil Procedure 26, a number of district courts have considered this issue in the context of state law trade secret claims and have reached differing conclusions.

For example, in *Vesta Corp. v. Amdocs Mgmt. Ltd.*, No. 3:14-CV-1142-HZ, 2016 WL 8732371, at *2 (D. Or. Apr. 1, 2016), the court denied the plaintiff's motion to compel discovery of the defendant's confidential information under the proportionality requirements of Rule 26 in connection with a trade secrets claim asserted under Oregon law because the plaintiff had failed to identify its alleged trade secrets with reasonable particularity in its own discovery responses. Among other things, the court found that the plaintiff only described "what various systems and strategies are designed to do, not how they do it," when identifying its asserted trade secrets. *Id.* at 6; *see also L3 Commc'n Corp. v. Jaxon Engineering & Maintenance, Inc.*, Case No. 10-cv-02868-MSK-KMT, 2011 WL 10858409, at *2 (D. Colo. Oct. 12, 2011) ("general allegations and generic references to products or information are insufficient to satisfy the reasonable particularity standard").

On the other hand, in *Global Advanced Metals USA, Inc. v. Kemet Blue Powder Corp.*, 2012 WL 3884939, at *7 (D.Nev. Sept. 6, 2012), the court affirmed the magistrate judge's decision not to require the plaintiff to identify its trade secrets "because of their voluminosity" and noting that "a listing of every trade secret would draw an objection from Defendant that they must be narrowed, leading to additional discovery disputes and delays, and that a protective order against disclosure would protect Defendant's interests"). *See also St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 305 F.R.D. 630, 641 (D. Or. 2015) (granting trade-secrets plaintiff's motion to compel compliance with third-party subpoena over objection that it had failed to identify the asserted trade secrets with sufficient particularity even though court in underlying action stated that it was "not clear on what specific trade secrets are at issue" and that it could not "assess whether the information is a trade secret at all.").

Competing rationales have emerged from cases under the DTSA. One court identified various policies that support delaying discovery from a defendant until the plaintiff has identified the asserted trade secrets with reasonable particularity. *E.g., BioD, LLC v. Amnio Technology, LLC*, 2014 WL 3864658, at *4-5 (D. Ariz. Aug. 6, 2014) (citing *DeRubeis v. Witten Technologies, Inc.*, 244 F.R.D. 676, 680-681 (N.D. Ga. 2007)). First, "if discovery of the defendant's trade secrets were automatically permitted, lawsuits might regularly be filed as 'fishing expeditions' to discover trade secrets of the competitor." *Id*. Second, "until the trade secret plaintiff has identified the secrets at issue, there is no way to know whether the information sought [from the defendant] is relevant." *Id*. Third, "it is difficult, if not impossible, for the defendant to mount a defense until it has some indication of the trade secrets allegedly misappropriated." *Id*. Fourth, "requiring the plaintiff to state its claimed secrets prior to engaging in discovery ensures that it will not mold its cause of action around the discovery it receives." *Id*.

Other articulated reasons support allowing a trade secret plaintiff to take discovery from the defendant prior to identifying the assert trade secrets with particularity. *Id*. at *5. First, some courts highlight "a plaintiff's broad right to discovery under the Federal Rules of Civil Procedure." *Id*. Second, "the trade secret plaintiff, particularly if it is a company that has hundreds or thousands of trade secrets, may have no way of knowing what trade secrets have been misappropriated until it receives discovery on how the defendant is operating." *Id*. Third, "if the trade secret plaintiff is forced to identify the trade secrets at issue without knowing which of those trade secrets have been misappropriated, it is placed in somewhat of a 'Catch-22'" – namely, if too general, the list will encompass material that the defendant will be able to show cannot be a trade secret" but if too specific, "it may miss what the defendant is doing." *Id.*; *see also Uni-Sys., LLC v. U.S. Tennis Ass'n*, No. 17 CV 147 (KAM) (CLP), 2017 WL 4081904, at *4 (E.D.N.Y. Sept. 13, 2017) ("Courts have recognized that a very general showing may be sufficient, particularly in the common scenario where the trade secrets plaintiff may not know which parts of its trade secrets have been misappropriated or cannot determine the full scope of its claims until it gains a better understanding of how a defendant operates.").

Some state courts require reasonable particularity. For example, California statute requires a plaintiff asserting a state law claim to identify its trade secrets with reasonable particularity before allowing discovery. Cal. Civ. Proc. Code § 2019.210 (2018). Other states, including New York, Massachusetts, Delaware and Illinois, have adopted similar common law rules. *E.g., MSCI Inc. v. Jacob*, 945 N.Y.S.2d 863, 866 (N.Y. App. Div. 2010). These are popular jurisdictions for trade-secret litigation and, notably, include a number of UTSA states. For some courts, UTSA-style codification, like the DTSA, does not bar common-law reasonable particularity. *Compare, e.g., Engelhard Corp. v. Savin Corp.*, 505 A.2d 30, 33 (Del. Ch. 1986), *approved in SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 447 (Del. 2000), *with* 63 Del. Laws, c. 218 (1982) (Delaware's Uniform Trade Secrets Act). These courts have so held "to assure that there will be no disclosure of an adversary litigant's trade secrets beyond what is necessary." 766 A.2d at 447.

Limits on the Federal Court's Power to Enjoin Misappropriation

A potential trade-secrets plaintiff also should consider the DTSA's specific and the federal courts' general limitations on injunctive relief. A federal injunction can be enforced nationwide. But, even with that prospect, a plaintiff still should consider whether an appropriate state court is more likely to enjoin a liable defendant in the first place.

The DTSA cannot support injunctions that would "prevent a person from entering into an employment relationship" or "otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business." 18 U.S.C. § 1836(b)(3)(A)(i)(I-II). As to the former limitation, courts have differed on what it means. Favoring a defendant employee's mobility, one court vacated a temporary restraining order insofar as it restricted defendant's employment with a competitor with regard to products manufactured and sold by plaintiff because, under the DTSA, an injunction cannot "effectively prevent him from competing as an employee" of plaintiff's competitor. *JJ Plank Co., LLC v. Bowman*, No. CV 18-0798, 2018 WL 3579475, at *4 (W.D. La. July 25, 2018). Other courts have interpreted the pro-employment provision more narrowly. For example, one district court enjoined defendant's employment relationship with plaintiff's competitor because, among other reasons, there was other "employment for which Defendant appears qualified." *Exec. Consulting Grp., LLC v. Baggot*, No. 118-CV-00231CMAMJW, 2018 WL 1942762, at *8 (D. Colo. Apr. 25, 2018). Another court saw fit to enter a preliminary injunction because it did not constitute a "blanket prohibition preventing Defendants from entering into any employment relationships but rather enjoined employment relationships "only" within a particular industry. *T&S Brass & Bronze Works, Inc. v. Slanina*, No. CV 6:16-03687-MGL, 2017 WL 1734362, at *13 (D.S.C. May 4, 2017).

In determining whether state law would bar the injunction as sought, courts have looked to a variety of sources, not just the DTSA's state-law analogs. For example, one court incorporated state law on when non-compete agreements are unenforceable, reasoning that "one may not obtain by way of an injunction what one could not obtain in a contract." *Engility Corp. v. Daniels*, No. 16-CV-2473-WJM-MEH, 2016 WL 7034976, at *10 (D. Colo. Dec. 2, 2016). That particular state law was relevant to the court's determination of whether injunctive relief was available under the DTSA, even though "no actual written covenant not to compete was executed by the parties," because it expressed "Colorado's policy in this circumstance." *Id.*

To enter an injunction, a federal court must also, among other things, find that the plaintiff would suffer irreparable harm. The Tenth Circuit has held that a federal court may not presume irreparable harm under the DTSA or its UTSA analogs. *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1143 (10th Cir. 2017). Those statutes "merely authorize and do not mandate injunctive relief," that decision reasoned, and "thus do not allow a presumption of irreparable harm." *Id.* Some courts have extended it to preliminary injunctions by requiring the plaintiff to show that the irreparable harm will occur "during the pendency of the litigation." *JJ Plank Co., LLC v. Bowman*, No. CV 18-0798, 2018 WL 4291751, at *9 (W.D. La. Sept. 7, 2018). Other federal courts have disagreed and presume irreparable harm from trade-secret misappropriation. *E.g., G.W. Henssler & Assocs., Ltd. v. Marietta Wealth Mgmt., LLC*, No. 1:17-CV-2188-TCB, 2017 WL 6996372, at *6 (N.D. Ga. Oct. 23, 2017) ("Loss of confidential and proprietary information is per se irreparable harm.").

When irreparable harm is not presumed, some courts have considered loss of market share and goodwill to be irreparable. *Id.* at 6. And they have allowed plaintiffs to infer future irreparable harms from evidence of past harm caused by misappropriation. *Heralds of Gospel Found., Inc. v. Varela*, No. 17-22281-CIV, 2017 WL 3868421, at *6 (S.D. Fla. June 23, 2017). Plaintiffs may also be able to prove irreparable harm by proffering future injuries. *Exec. Consulting Grp. at* *8 (finding irreparable harm due to difficulty in quantifying "damages that might accrue years later due to lost follow-on work").

Conclusion

Trial counsel with experience litigating trade-secrets disputes can help parties navigate the DTSA's special questions, particularly when state trade-secrets law or policy is implicated. Trade-secrets plaintiffs should seek their advice not only on those issues, but also where to sue and whether federal court is the superior choice of forum. Careful consideration also should be given to the numerous other potential differences between federal court and state court, including, to name just a few examples, the number of jurors, whether unanimous verdicts at trial are required, time to trial, size of monetary awards, summary judgment success rates and limits on discovery. Q

NOTED WITH INTEREST

What We Learned as Lehman's Bankruptcy Litigators

Ten years ago, Lehman Brothers filed for bankruptcy. The collapse of the legendary bank — a fixture of the U.S. financial system dating to the 1850s — reverberated around the world, unleashing a financial crisis of a magnitude not seen since 1929. Credit markets froze, global trade choked, asset values evaporated and jobs vanished.

The firm has spent nearly 10 years since then fighting in court for the rights of Lehman's creditors, leading the charge against the so-called "big bank" counterparties. This arduous legal journey, wending through tens of millions of documents, hundreds of depositions, and one of the longest trials in the history of the U.S. Bankruptcy Court for the Southern District of New York has allowed Lehman's estate to recover more than $6 billion. It has also yielded insights into weaknesses in our financial system and bankruptcy laws that could allow such catastrophic losses to happen again.

The immediate cause of Lehman's death was a rapid loss of liquidity capped by extraordinary demands for cash collateral by other banks. As Bryan Marsal, the restructuring expert who oversaw Lehman post-bankruptcy, explained, Lehman "was solvent. It just ran out of liquidity." Despite being the fourth largest investment bank in the world, Lehman's life literally depended on the mercy of its clearing banks, the conduits of short-term liquidity. None more so than JPMorgan, which controlled Lehman's tri-party repo, the repurchase agreements akin to collateralized loans essential to broker-dealers' financing their inventory of securities.

The run on Lehman came in various forms, including money market funds scaling back their overnight repo investments and hedge funds transferring out their prime brokerage balances. Some of the big banks sought to improve their position vis-a-vis Lehman on the eve of bankruptcy by obtaining additional collateral, but the players' varying degrees of success were a direct function of their relative leverage. Citibank, for example, used its essential role in clearing Lehman's foreign exchange transactions to extract a $2 billion cash deposit in June 2008. Firms who were merely Lehman's trading counterparties enjoyed more limited success. During the week of Sept. 8, 2008, as rumors swirled that counterparties were reluctant to trade with Lehman, Lehman provided $285 million to Goldman Sachs and $200 million to Deutsche Bank as extra collateral for their derivatives trades. No such luck for Lehman bondholders and other Main Street investors.

The largest single drain on Lehman's liquidity came ultimately from JPMorgan itself. In the week prior to Lehman's bankruptcy, JPMorgan used the explicit threat of ceasing to clear Lehman's tri-party repo to extract $8.6 billion in cash from Lehman. This left Lehman's European broker-dealer with a projected cash shortfall of $4.5 billion, forcing Lehman to file for bankruptcy in the early morning hours of Sept. 15, 2008.

Rather than step in as lender of last resort, the Federal Reserve pronounced Lehman just small enough to fail, offering a lesson in moral hazard that lasted 24 hours until the Fed found it had $85 billion with which to bail out AIG.

To halt the run, the market needed assurance from the Fed that JPMorgan and Lehman's tri-party repo investors would not pull the plug on Lehman's financing. The Fed had begun participating in the tri-party repo market in March 2008. At first, the Fed accepted only the most liquid and easily valued types of securities. But on Sunday, Sept. 14, 2008, it offered expanded repo financing to every dealer except one — Lehman. Not only did the Fed have the authority and ability to extend this liquidity to Lehman using its emergency lending authority under Section 13(3) of the Federal Reserve Act, but it actually did so immediately after Lehman's bankruptcy, which allowed Lehman's broker-dealer business to continue operating long enough to be purchased by Barclays.

Had the Fed offered Lehman this liquidity lifeline just one day earlier, Lehman would have survived long enough to be rescued when the real Wall Street bailout came in the form of programs like the Troubled Asset Relief Program, or TARP, which Congress passed three weeks later. Instead, Lehman plunged into a bankruptcy freefall that destroyed billions of dollars in value — value that belonged to Main Street creditors and shareholders — and turned a credit crisis into a global conflagration.

For Lehman's creditors, a sudden unplanned bankruptcy filing proved extremely costly. Untold value was lost in translation as the once-integrated global enterprise was Balkanized into multiple insolvency proceedings in different jurisdictions and once valuable assets were broken apart and sold at fire-sale prices. Bankruptcy fees, expenses and interest alone reached into the billions. Lehman's U.S. broker-dealer business was sold to Barclays in such a mad rush that an extra $5 billion of securities were mistakenly conveyed as margin to cover overnight loans, a loss to the estate that the bankruptcy judge chalked up to the "fog of Lehman." Lehman suffered a deluge of inflated bankruptcy claims, particularly for derivatives trades where counterparties tried to claim losses bearing no resemblance to the actual value of their trades.

Bankers and regulators were not the lone culprits. Exacerbating the crisis was a legal regime that rewarded the base instincts of fear and greed. The Bankruptcy Code provides a "safe harbor" for securities transactions, emboldening firms to make collateral grabs and, perversely, hasten the collapse of a firm like Lehman. Ordinarily in a bankruptcy, if the debtor pays off a debt on the eve of filing, that preferential payment can be clawed back. But Bankruptcy Code Section 546(e) exempts securities transactions from preference liability, giving financial institutions an incentive to demand that a failing borrower repay its loans prior to a bankruptcy filing. As former Bankruptcy Judge James Peck explained in a later case, 546(e) protects transactions "that the law generally would seek to discourage (ganging up on a vulnerable borrower to obtain clearly preferential treatment in the months leading up to a bankruptcy)." Consequently, once there's a hint of trouble, financial institutions have every incentive to accelerate the downfall by ceasing to lend and demanding payment — precisely what happened to Lehman.

Post-bankruptcy, the legal regime allowed for further abuse of the Lehman estate. The ISDA (International Swaps and Derivatives Association) master agreement gives counterparties the chance to inflate claims and force the bankrupt party to pursue them in court. As one Wall Street trader preyed on a bankrupt Lehman, he quipped, "let them come sue us." With 6,000 counterparties asserting claims arising from over 1 million derivative trades, Lehman was forced to expend vast amounts of time and resources pursuing lawsuits, mediations and settlements to resolve inflated derivatives claims.

As long as faulty rules like these persist, and as long as a handful of colossal firms serving many different functions dominate our financial system, the law of the jungle that toppled Lehman will surely govern the next financial crisis. Q

Asia-Pacific Litigation Update

Cybersecurity and "Cyber Sovereignty" in China. "Without cybersecurity, there is no national security," according to China's President Xi Jinping, who in recent years has asserted the country's "cyber sovereignty" over the operation of the internet within its borders. The Cybersecurity Law of the People's Republic of China ("CSL")—"enacted for the purposes of protecting cybersecurity, safeguarding cyberspace sovereignty, [and] national security"—codifies these principles. The CSL came into force on June 1, 2017, and regulates the operation and use of "the network" along with "the supervision and administration of cybersecurity within" China. It has been described as part of "the nation-state's legislative endeavors to strengthen national security" and "a milestone in China's laws and policies regarding the internet." Jyh-An Lee, *Hacking into China's Cybersecurity Law*, 53 WAKE FOREST L. REV. 57, 63, 103 (2018). This article discusses some of the CSL's key provisions and its historical underpinnings in China's complicated relationship with the West, which are critical to understanding the reach and import of the CSL.

The CSL imposes strict data security and management requirements on various types of businesses operating in China. One of the most important provisions of the CSL is its data localization requirement—itself an extension of China's "cyber sovereignty" over domestic data. The provision states that "[p]ersonal information and important data" collected and generated by "critical information infrastructure" ("CII") operators in China must be stored *in China*. In addition, the CSL and its implementing regulations impose strict limitations on the transmission of such data abroad. The terms "personal information" and "important data" together cover a wide range of information, from basic identifiers such as an individual's name, date of birth and address, to banking information, biometric information and website browsing logs. A CII operator that violates the data localization requirements for the storage or transmission of personal information and important data faces stiff penalties, including fines and the revocation of its business license.

A vast number of businesses operating over the internet in China could be deemed CII operators. CII operators are a subset of "network operators" (broadly defined as network owners, administrators, or service providers) in "important industries and sectors" such as "public communication and information services," finance, energy, transportation and public services, or operators of other infrastructures whose destruction, malfunction or data breaches would "result in serious damage" to national security, the economy, or other "public interests." Draft regulations further indicate that CIIs could include television stations, news agencies, "[i]nformation networks," and entities providing "cloud computing, big-data and other large-scale public information network services." The expansive definition of CIIs and the attendant requirements for data storage and management have prompted divergent responses from international companies operating in China. Apple, for example, now maintains its Chinese users' iCloud data with a state-owned data storage firm and stores the cryptographic keys to those accounts in China to comply with the CSL. By contrast, the Taiwan-based company Asus chose to withdraw entirely from China's cloud storage market in the wake of the CSL, citing an unwillingness to comply with the country's data regulations.

To what extent the data localization requirement will impact international commerce and companies' willingness to do business in China in the long term remains to be seen. In the meantime, given the penalties prescribed for noncompliance, many international companies operating in China will likely choose to conform their operations to the requirements governing CII operators. It is not just the breadth of the law but also the Chinese authorities' recent enforcement actions that should counsel companies' compliance irrespective of their size or national origin. Some of the largest and best-known Chinese companies, as well as international companies doing business in China, have been fined for violating the CSL.

These enforcement actions and the CSL's expansive language are best understood against the cultural, historical and political backdrop of modern China. Cybersecurity and data protection are viewed not merely as implicating economic and privacy interests but as matters of sovereignty and national security. This concept has its roots in the founding narrative of modern China—that the PRC has exorcised the influence of foreign nations that violated Chinese sovereignty during the era spanning from the Opium Wars in the mid-19th Century through World War II and the establishment of the PRC in 1949. That narrative is as important to the modern Chinese state as the American narrative of throwing off the yoke of British rule in the 18th Century. And vigilance against threats to the sovereignty and security of the "homeland" are taken as seriously in China as in the U.S. As one commentator has noted, China's "digital geography . . . is now sacrosanct and will not be violated as was China's geography physically during the beginning of the 19th century" (Bill Hagestad quoted in John Leyden, *China's cybersecurity law grants government 'unprecedented' control over foreign tech,* THE REGISTER, September 1, 2017, https://www.theregister.co.uk/2017/09/01/china_cybersecurity_law_analysis).

When placed in historical and political context, it is easier to understand the importance of cybersecurity in Chinese national policy and the seriousness with which major companies doing business in China, whether foreign or domestic, have taken the CSL, just as companies doing business in the U.S. have taken seriously the security measures of the Patriot Act and other post-9/11 laws and regulations aimed at protecting the physical and digital security of the United States.

Antitrust & Competition Litigation Update

Will* American Express *Reward Antitrust Defendants? On June 25, 2018, the United States Supreme Court ruled in favor of American Express ("AmEx") in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), one of the most significant government antitrust enforcement actions in recent times. In 5-4 decision, the Supreme Court agreed with AmEx that the relevant market for purposes of analyzing the competitive effects of AmEx's anti-steering rules, which contractually prohibit merchants from discouraging customers from using an AmEx card at the point of sale, is a *single* "two-sided" transaction market that simultaneously encompassed both sides of the AmEx payment platform.

The Supreme Court affirmed the Second Circuit, holding that the Department of Justice had failed to prove that AmEx had market power or that its anti-steering rules resulted in higher prices, restricted output, or restricted competition among credit card companies when both sides of its platform (*i.e.*, the cardholder side as well as the merchant side) were considered at once. *AmEx*, 138 S. Ct. at 2287-89. The Court noted that "[t]o the contrary, while these agreements have been in place, the credit-card market experienced expanding output and improved quality." *Id.*

The *AmEx* decision marks the first time that the Supreme Court has held that antitrust plaintiffs must prove their case within a *single* market composed of two sides in an antitrust case. The concept of two-sided platforms or markets is not a new economic concept, but what is new is the requirement that antitrust claimants must prove that the restraints they are challenging led to higher overall (hypothetical) prices, output, and competition in a market composed of two different sides at once. It was not enough, in other words, for the government to prove that the anti-steering restraints harmed merchants in the form of higher prices they paid; the government also needed to prove that an overall hypothetical price paid by both sides of the platform was also inflated.

This requirement of proving overall effects within a single hypothetical market is a potential boon for antitrust defendants who operate two-sided platforms. Plaintiffs will inevitably find challenges in proving that such a defendant has market power or has harmed competition in such a single, two-sided market, in part because it has never been done on those terms before.

The question is, how far will the *AmEx* ruling extend? Many companies certainly operate two-sided platforms that link distinct customers on different sides and in which one side benefits from the participation of those on the other side of the platform. This dynamic is increasingly frequent with the rise of software providers that offer platforms that promote interconnectedness. For example, ride-sharing applications, such as Uber or Lyft, seek riders on one side and drivers on the other. If rates are too high, then the application might be less successful in obtaining ridership. If rates are set too low, then they might not be able to attract enough drivers. Similar dynamics exist in advertisement-based businesses, whether traditional newspaper or magazine business models that cater business from both readers and from advertisers, or new technology, such as search engines (*e.g.*, Google, Yahoo!, Bing) or social media sites (*e.g.*, Facebook, Instagram). In short, many cutting-edge companies potentially in antitrust cross-hairs might invoke two-sided market doctrine.

Yet not every company that could be said to operate a two-sided platform will be able to avail itself of the *AmEx* ruling. A farmer's market could be said to connect buyers and sellers on two different sides of a platform, but if it facilitated a price-fixing agreement among its sellers, it is not clear it could avail itself of the *AmEx* ruling. And Justice Thomas's characteristically concise majority opinion in *AmEx* does little to indicate how the ruling might apply beyond American Express's own platform.

Five months out, early indications are that the decision may have limited reach outside of the payment card industry. To date, not a single lower court has followed the Supreme Court in finding a single relevant market that was composed of two sides. Even before the Supreme Court affirmed the Second Circuit's decision, lower courts applying the Second Circuit's decision applied the two-sided construct narrowly. For example, in *U.S. Airways, Inc. v. Sabre Holdings Corp.*, No. 11-cv-2725 (LGS), 2017 WL 1064709, at *8 (S.D.N.Y. Mar. 21, 2017), defendants made a motion for judgment as a matter of law after a jury found that the relevant market for a Global Distribution System ("GDS") was one-sided. GDS provides services for airlines and travel providers, on one side, to distribute schedule, fare and booking information to travel agents, and allows travel agents, on the other side, to search for, book and manage travel reservations. *Id.* at *1. The District Court denied defendants' motion following the Second Circuit's Amex decision, noting that while "[t]he vocabulary of two-sidedness is new, . . . courts have long addressed claims and developed case law involving businesses now recognized as two-sided platforms by closely examining the competitive realities of the market. . . . The ultimate goal of defining the relevant market remains to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output." *Id.* at *8 (quotations omitted).

Following *AmEx*, defendants in *In re National Collegiate*

Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation, Case No. 14-md-02541-CW, 2018 WL 4241981 (N.D. Cal. Sept. 30, 2018) ("*NCAA*"), moved for reconsideration of the court's adoption of plaintiff's relevant market definition arguing there was a question of fact whether a two-sided market existed for athletic services. *Id.* at *1. But the court reaffirmed its prior determination, distinguishing *AmEx* on the grounds that *NCAA* involved horizontal restraints (rather than the purely vertical restraints at issue in *AmEx*), and finding that defendants failed to provide sufficient evidence of a "two-sided" market for student athletes. *Id.* at *6. These cases indicate that lower courts may be open to arguments about the limited reach of the *AmEx* decision and limit it to the unique facts of that case.

In this regard, *AmEx* may prove to have a similarly limited reach as the last time Justice Thomas wrote the majority opinion in a Section 1 case—*Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). There, the Court rejected a per se analysis of the pricing decisions of a fully integrated joint venture, in which the venture participants maintained no separate identity in the relevant markets. That decision also contained some language suggesting it may sweepingly protect "joint ventures" among competitors, but has been largely limited to its unique facts in the lower courts. See, *e.g., Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 326 (2d Cir. 2010) (distinguishing *Dagher*). The question whether *AmEx* will prove to have large rewards for antitrust defendants thus remains an open one.

International Arbitration Update

USMCA – What Next for ISDS? The agreed draft of the new NAFTA agreement between the U.S., Mexico and Canada, called the United States – Mexico – Canada Agreement (the "USMCA"), contains a number of fundamental changes to the NAFTA regime. One of those changes is to the investor-state dispute settlement ("ISDS") regime.

What is ISDS?

ISDS is a mechanism included in many trade and investment treaties (including NAFTA) that provides foreign investors with a means of resolving disputes with host states. The basis for this is consent – under such treaty provisions sovereign states consent to being held liable directly to investors for violation of treaty obligations. Typically, the method of dispute resolution has been binding international arbitration.

Chapter 11 of NAFTA sets out the treaty's ISDS provisions. It allows investors from NAFTA states (ie, the U.S., Canada and Mexico) that have made investments in another NAFTA state to bring arbitration against the host state for violation of its treaty obligations. Treaty obligations under NAFTA include (amongst other things): (i) the prohibition against expropriation (including indirect expropriation) except where certain criteria are met, and the obligation to pay fair compensation for any permissible expropriation; (ii) the obligation to accord foreign NAFTA investors no less favorable treatment than accorded to the host state's own investors ("national treatment"); (iii) the obligation to accord foreign NAFTA investors no less favorable treatment than accorded to investors of any other state ("most-favored nation treatment" or "MFN treatment"); and (iv) the obligation to accord foreign NAFTA investors the minimum standard of treatment as required under international law, including "fair and equitable treatment" and "full protection and security". Historically, "fair and equitable treatment" has addressed a number of separate aspects, including the protection of foreign investors' legitimate expectations (*See*, *e.g. Tecmed v Mexico, ICSID* Case No. ARB(AF)/00/2, Award, May 29, 2003).

ISDS Under the USMCA

The current, agreed text of the USMCA changes fundamentally the ISDS scheme going forward. Claims based on investments made during the lifetime of NAFTA will not be affected, although they have to be brought within three years of NAFTA's termination.

The USMCA's ISDS provisions (Chapter 14) only allow for investor-state arbitration to be brought by: i) U.S. investors against Mexico; and ii) Mexican investors against the U.S. In other words, investors may no longer bring claims against Canada, and Canadian investors will no longer be able to bring claims against either the U.S. or Mexico. Parties seeking to arbitrate such claims will have to look for alternative grounds of jurisdiction, such as arbitration clauses in the investment contracts themselves or other treaties with ISDS provisions. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership to which Canada and Mexico are parties, contain ISDS provisions, and once it enters into force it is likely that Mexico-Canada investment claims can be brought under it.

Unlike NAFTA, the USMCA now draws a distinction between claims based on "covered government contracts" and all other types of investment claims. "Covered government contracts" are defined as contracts with national authorities in the host state in the following sectors: oil and gas; power generation; telecommunications; transportation services; and infrastructure (Section 6, Annex 14-E). As will be seen, where covered government contracts are involved, the degree of protection accorded by the USMCA's ISDS mechanism is stronger.

Under the USMCA's ISDS provisions, substantive claims that may be brought are limited. They must relate to the following: direct expropriation; national treatment; and MFN treatment (Art 3.1, Annex 14-D). The exception is in the case of covered government contracts; in such cases, claims may also be brought based on indirect expropriation and the international minimum standard of treatment.

Procedurally, except where covered government contracts are concerned, investors seeking to bring an ISDS claim must first file suit and attempt to obtain relief in national courts of the host state before making use of the ISDS mechanism. Article 5 of Annex 14-D provides that disputes may proceed to arbitration only after 30 months have elapsed from the initiation of proceedings in national courts, or after a final national court decision has been rendered. There is an apparent inconsistency with Appendix 3, which provides that U.S. investors may not submit to arbitration claims against Mexico if that claim has been brought before the Mexican courts. It remains to be seen how these provisions will be reconciled.

Finally, the USMCA has sought to clarify the meaning of the various state obligations. Importantly, it has rejected explicitly the "legitimate expectations" understanding of fair and equitable treatment – Article 14.6(4) provides that breach of an investor's legitimate expectations does not constitute a breach of the international minimum standard of treatment. In respect of indirect expropriation, section 3 of Annex 14-B states that such a determination requires a case-by-case, fact-based inquiry considering: (i) the economic impact of the host state's action; (ii) the extent to which the host state's action interferes with the reasonable investment-backed expectations of the investor; and (iii) the character of the government action, including its object, context and intent. Importantly, it also makes clear that non-discriminatory regulatory actions by states designed to protect legitimate public welfare objectives (eg, health, safety and the environment) do not constitute indirect expropriation "except in rare circumstances."

Conclusion – What Next for ISDS?

The USMCA has altered fundamentally the ISDS regime under NAFTA, and in several important respects has pulled-back on investors' rights to bring arbitration against host states. While ISDS continues to survive, the USMCA appears to be part of a global trend narrowing the rights and remedies of investors under investment treaties.

Appellate Practice Update

New Sixth Circuit Precedent on Appellate Jurisdiction in Bankruptcy Cases. On October 16, 2018, the Sixth Circuit decided a case setting forth a new standard for the appealability of bankruptcy court decisions. In *In re Jackson Masonry, LLC*, 906 F.3d 494 (6th Cir. 2018), the Sixth Circuit held that the denial of relief from an automatic stay is immediately appealable, and in doing so, outlined a two-part test for determining the appealability of bankruptcy court orders.

The Sixth Circuit began with the words of the statute: "The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees [and certain interlocutory orders] of bankruptcy judges entered in cases and proceedings ...." 28 U.S.C. § 158(a). The court explained that "[i]nstead of limiting appeals to final judgments in cases, Congress specifically extended the scope of appellate jurisdiction in bankruptcy matters to include 'final judgments, *orders, and decrees*' entered in both '*cases and proceedings*.'" *Jackson Masonry*, 906 F.3d at 499 (quoting *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015) (in turn quoting 28 U.S.C. § 158(a)) (emphasis added in *Jackson Masonry*). This broader language makes sense in the bankruptcy context because "[a] bankruptcy case is an aggregation of individual disputes, many of which could be entire cases on their own," and "a bankruptcy case is like a jigsaw puzzle," such that "[t]o complete the puzzle, one must start by putting some of the pieces firmly in place." *Id*. at 498 (internal quotation marks omitted).

In drawing a test from the statutory language, the Sixth Circuit criticized other courts for taking "the loose finality in bankruptcy as a license for judicial invention," resulting in "a series of vague tests that are impossible to apply consistently." *Id*. In particular, the Sixth Circuit referred to the First Circuit's test, whereby "'[e]verything depends on the circumstances,'" as vague and unpredictable. *Id*. at 499 (quoting *In re Atlas IT Export Corp.*, 761 F.3d 177, 185 (1st Cir. 2014)). Instead, the Sixth Circuit put forward what it deemed "a clear test for courts to apply: a bankruptcy court's order may be immediately appealed if it is (1) 'entered in [a] ... proceeding' and (2) 'final'—terminating that proceeding." *Id*.

Applying that test, the Sixth Circuit held that an order denying relief from an automatic stay is immediately appealable. First, the court explained that it is a proceeding because a proceeding is simply "a discrete dispute within the overall bankruptcy case," and "a stay-relief adjudication fits this description" because "there is a discrete claim for relief, a series of procedural steps, and a concluding decision based on the application of a legal standard." *Id*. at 500. The court also relied in part on the fact that stay-relief motions are referred to as "core proceedings" in 28 U.S.C. § 157. *Id*. at 501. Second, the court explained that an order denying stay relief is final because it "is both procedurally complete and determinative of substantive rights." *Id*. (quotation marks omitted). In *Bullard*, the Supreme Court concluded that a bankruptcy court order denying a debtor's repayment plan with leave to amend is not final. The Sixth Circuit held that a stay-relief denial, in contrast, is procedurally complete because "once entered there are no more 'rights and obligations' at issue in the stay-relief proceeding," *id*., and "[t]he consequences of a stay-relief denial are both significant and irreparable," *id*. at 502.

Jackson Masonry shows the need for litigants to

(continued on page 11)

Fourth Circuit Appellate Victory in Consumer Lawsuit over Elantra Fuel-Economy Estimates

Quinn Emanuel represented Hyundai Motor America, Inc. and Virginia-based Hyundai dealerships in three consolidated putative class and mass actions under Virginia consumer-protection statutes, successfully obtaining affirmance of an order dismissing claims in all three cases.

The consolidated actions arise from facts relating to the U.S. Environmental Protection Agency's imposition of civil fines against Hyundai for asserted Clean Air Act violations involving the method Hyundai used to calculate fuel economy estimates for 2011-2013 Elantra models. In addition to paying the fines, Hyundai revised its estimates for those model years by press release on November 2, 2012. Over 50 consumer class actions were commenced against Hyundai in relation to the company's advertising of the pre-revision mileage estimates. Those actions were consolidated in a multi-district litigation (MDL), which remains pending and in which a class was certified consisting of consumers who purchased the affected models before the November 2012 revision. The three actions here were initially part of the MDL, but were remanded to the Western District of Virginia because they involve claims of consumers (1) who opted out of the national class or (2) who purchased vehicles after the November 2012 revision.

The plaintiffs in the remanded cases allege that Hyundai and Hyundai dealers' fuel-economy advertisements violated Virginia's Lemon Law, Consumer Protection Act, and false advertising statute. The district court had dismissed all but one claim based on pleading deficiencies, and in the alternative based on preemption principles and failure to exhaust procedural prerequisites to suit. The district court dismissed all but one claim in one case and dismissed the two other cases in full. Noting that the complaints features only vague allegations and that plaintiff's counsel had foregone several opportunities to amend their complaints to provide specific allegations of the individual plaintiffs' basis to claim liability and injury, the Court declined to grant leave to amend the complaints to attempt to cure these deficiencies.

On appeal, a panel of the Fourth Circuit dismissed one of the three appeals—in the case brought by opt-outs of the national class—for lack of appellate jurisdiction. The district court had permitted a single claim, concerning the warranted accuracy of the vehicle's on-board mileage calculator, to survive dismissal, meaning that the order of dismissal of other claims was not a "final decision" subject to federal appellate jurisdiction. The appeals court rejected an argument that it should exercise jurisdiction anyway to correct the district court's purported ruling on claims of the national class, explaining that the district court had expressly limited its decision to claims of plaintiffs who had opted out of the class and so were remanded.

As to the remaining two cases, the appeals court affirmed dismissal based on the district court's ruling that the complaints failed to satisfy Rule 8 pleading requirements as set forth in *Twombly* and *Iqbal*. In its appellate briefs, plaintiffs made no defense of their pleading, despite the district court's clear ruling that pleading failures were an independent basis for its dismissal. The appeals court held that plaintiffs thus waived any challenge to the decision, and the court "decline[d] to invent an argument in support of Appellants' complaints." The panel further held that the district court permissibly declined to grant leave to amend the pleadings. It rejected plaintiffs' argument that the district court was categorically barred from denying leave to amend prior to a "definitive ruling" on the initial complaint. And the district court permissibly exercised its discretion to deny leave in this case, the appeals court held, because the district court had repeatedly granted leave and invited plaintiffs to amend their complaints, but plaintiffs did not do that. "Faced with such resolute adherence to deficient complaints," it held the district court was "well within its discretion" in denying leave to amend.

Schenker-Winkler Holding vs. Sika – QE Leads Way to Settle Europe's Nastiest Takeover Battle

Quinn Emanuel represented and facilitated a favorable settlement for the owners of Schenker-Winkler Holding AG (SWH), the majority stakeholder of Swiss construction chemicals maker Sika AG (Sika) – a $20 billion market cap company – in what The Economist described as "Europe's nastiest takeover battle." The New York Times noted that the case was "more than just another activist battle, showing how things in Europe look more and more American," now already reminiscent of the dispute surrounding American broadcaster CBS and its controlling shareholder.

The saga began in December 2014, when the fourth generation of family owners, who bundled their shares in Sika in SWH told the Sika board of directors that they had agreed to sell their shares in SWH, and thus indirectly their controlling stake in Sika, to Saint-Gobain for CHF 2.75 billion. The controlling stake consisted of only approx. 17per cent of the share capital but carried more than 53 per cent of the voting rights because of the special voting power associated with SWH's registered voting shares as provided under Sika's articles of association.

Following the announcement of the planned transaction by SWH, Sika's majority independent board of directors decided to oppose the transaction and restricted SWH's voting rights based on a broad interpretation of a provision in Sika's articles of association, which allowed the board to cap voting rights if a shareholder was to acquire a stake in the company in excess of 5%. The board of directors interpreted this provision such that it not only covers direct sales of Sika shares but also indirect sales like in the given case. With SWH's voting rights restricted to only 5% of their actual share, the family was unable to remove the directors who opposed the transaction and was left unable to close the deal with Saint-Gobain. The question whether the restriction of the voting rights of SWH was lawful became the heart of the ensuing legal dispute, but other legal proceedings were also initiated and pursued aggressively – both sides filed directors' liability actions against their respective representatives, and the shareholder's meeting initiated a special audit proceeding to look into the question whether confidential information was misused by the family holding SWH.

Quinn Emanuel navigated the family through the various legal proceedings. After three and a half years of legal battles, with a final court decision on the legality of the voting rights restriction still years out, the parties agreed to enter into negotiations, which eventually came to a conclusion this June. Under the agreed multi-phase plan, Saint-Gobain acquires SWH and its controlling stake from the family for now CHF 3.2 billion. In order to accommodate the concerns of the majority of the Sika board of directors and certain minority shareholders that opposed the transaction, led by the Bill and Melinda Gates Foundation and its investment vehicle Cascade, announced in December 2014, Saint-Gobain agreed to sell a 7% stake of SWH's approx. 17% stake back to Sika and made a commitment to agree that the special voting rights associated with the registered voting shares held by SWH will be abolished at an extraordinary shareholder meeting. Sika paid Saint-Gobain just over CHF 2 billion for the 7% stake and for the commitment to give up the special voting rights associated with the registered voting rights. That price is a CHF 795 millon premium on the market value of the respective shares per May 4, 2018. The settlement agreement thus allows Saint-Gobain to make a profit on the deal while retaining 10.75% of Sika shares. The companies have agreed a two-year lock-up and some stand-still obligations – Saint-Gobain's stake in Sika will remain at up to 10.75% for four years and up to 12.875% for the following two years, and, in the case of an intended sale, these shares will first be offered to Sika up to 10.75%. At the same time, the deal allows the family to exit the company and to sell its stake taking in an additional CHF 500m above what was offered to the family for their stake in 2014. This, in the end, was a win-win-win situation for the parties involved in this groundbreaking takeover battle.

The case is a forceful reminder that special voting rights are a delicate concept. The concept may appeal to founders who do not want to relinquish control on flotation. But such arrangements are difficult to unwind and can come back to haunt the company and other shareholders when the founders are no longer involved. The episode also highlights the protection of rights of different shareholder categories and serves as a lesson for the many companies with multiple share categories that it is often not enough to merely comply with minimum legal standards when it comes to good corporate governance. Q

PRACTICE AREA NOTES (cont.)

be mindful of the potential appealability of various bankruptcy court orders that would not be considered appealable outside the bankruptcy context. While it is unclear whether other circuits will follow *Jackson Masonry*'s approach, its test provides a potentially low bar for appealability. In particular, its narrow framing of the "proceeding" at issue (there, deemed the "stay-relief proceeding") means that many orders may be considered final that otherwise do not end the proceeding as more broadly construed. In addition, the Sixth Circuit's use of section 157 as a factor (though not dispositive) in deciding what qualifies as a proceeding should make litigants wary of waiting to appeal any arguably final order listed in section 157. More generally, the Sixth Circuit's ruling highlights the need for litigants to appeal immediately any potentially appealable bankruptcy order, or risk having a later appeal ruled untimely. Q

Quinn Emanuel Partners Named 2018 "Rising Stars" by *Law360*

Drew Holmes, Maaren Shah, and Alex Spiro have been recognized by *Law360* as "Rising Stars" in this year's rankings for Intellectual Property, Energy, and White Collar respectively. The annual list highlights top litigators under 40 years old for their outstanding success and levels of expertise typically expected from veteran attorneys. Mr. Holmes, Ms. Shah, and Mr. Spiro were three of only 168 attorneys chosen this year among more than 1,200 submissions. Ms. Shah was cited for her representation of Mercuria Energy Trading Inc. in several disputes, most recently winning a complete dismissal in *Miller v. Mercuria Energy Trading, Inc.*, as well as her representations for FirstEnergy Generation Corp. Mr. Spiro was chosen for his incredible trial victories, most recently being *USA v. Ross Shapiro et al.* and *USA v. David Demos*, as well as his work to dismiss the charges against Charles Oakley. Mr. Holmes was recognized for his work representing high-profile clients such as Samsung, HTC, and Google against Smartflash, as well as his representation of Netflix against Affinity. Q

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business litigation report

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