Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

SUMMER 2010

Litigation Wire

Client Victories

New York Federal Judge Grants Summary Judgment for Google/YouTube

On June 23, 2010, Judge Louis Stanton of the U.S. District Court for the Southern District of New York granted Google's motion for summary judgment in a $1 billion copyright lawsuit filed by Viacom and a group of putative class action plaintiffs, including the Premier League (the top English soccer league) and the National Music Publishers Association. Wilson Sonsini Goodrich & Rosati represented Google and YouTube throughout these high-profile matters.

> The court concluded that YouTube's conduct demonstrated "that the DMCA notification regime works efficiently."

The plaintiffs brought claims against Google and YouTube for direct and secondary copyright infringement based on YouTube's hosting of content posted to the service by its users. YouTube argued that it is immune from infringement liability because it qualifies for the protection of the § 512(c) safe harbor of the Digital Millennium Copyright Act (DMCA). The parties cross-moved for summary judgment. In his decision, Judge Stanton agreed with YouTube and granted summary judgment "against all of plaintiffs' claims for direct and secondary copyright infringement."

Of particular significance to the court was YouTube's responsiveness to copyright holders' notices of alleged infringement sent pursuant

Continued on page 3...

Predatory Innovation: Ninth Circuit Rejects *Microsoft* Balancing Test in *Allied Orthopedic v. Tyco*

By Jonathan Jacobson, Partner (New York), Scott Sher, Partner (Washington, D.C.), and Edward Holman, Associate (Washington, D.C.)

In a recent decision from the Ninth Circuit, *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group*,[1] the Court of Appeals rejected the balancing test articulated by the D.C. Circuit in *United States v. Microsoft Corp.*[2] as a means to determine whether product changes violate the antitrust laws. The Ninth Circuit affirmed the district court's ruling that Tyco's redesign of its pulse oximetry monitors and sensors did not violate

[1] 592 F.3d 991 (9th Cir. 2010).
[2] 253 F.3d 34 (D.C. Cir. 2001).

Continued on page 7...

Why Everyone's Talking about Under-the-Table Payments

A New Era of Anti-bribery Enforcement

By Leo Cunningham, Partner, and Lee-Anne Mulholland and Nema Milaninia, Associates (Palo Alto)

Anti-bribery enforcement is once again a hot topic. From Big Pharma to the technology industry, multinational investigations to individual prosecutions, Assistant Attorney General for the Criminal Division Lanny Breuer recently told the Council on Foreign Relations that the U.S. government has upped the ante in its anti-bribery investigations and prosecutions. Breuer's Criminal Division has, in fact, taken the lead in recent Foreign Corrupt Practices Act (FCPA) and other anti-bribery (such as Travel Act) enforcement. Since 2005, the Fraud Section has achieved 36 corporate FCPA and foreign-related resolutions, with fines totaling in excess of $1.5 billion, including a $450 million charge levied against Siemens AG in 2009. The Criminal Division also has increased its focus on individuals, seeking, as Breuer put it, to make "every corporate executive, every board member and every sales agent . . . personally accountable for FCPA violations."

Continued on page 8...

In This Issue

Client Victories . . . . **Page 1, 3-7**

Predatory Innovation: Ninth Circuit Rejects *Microsoft* Balancing Test in *Allied Orthopedic v. Tyco* . . . . **Page 1, 7**

Why Everyone's Talking about Under-the-Table Payments: A New Era of Anti-bribery Enforcement . . . . . . **Page 1, 8**

Secondary Market Trading Presents Pitfalls for Employers and Employees . . . . **Page 2**

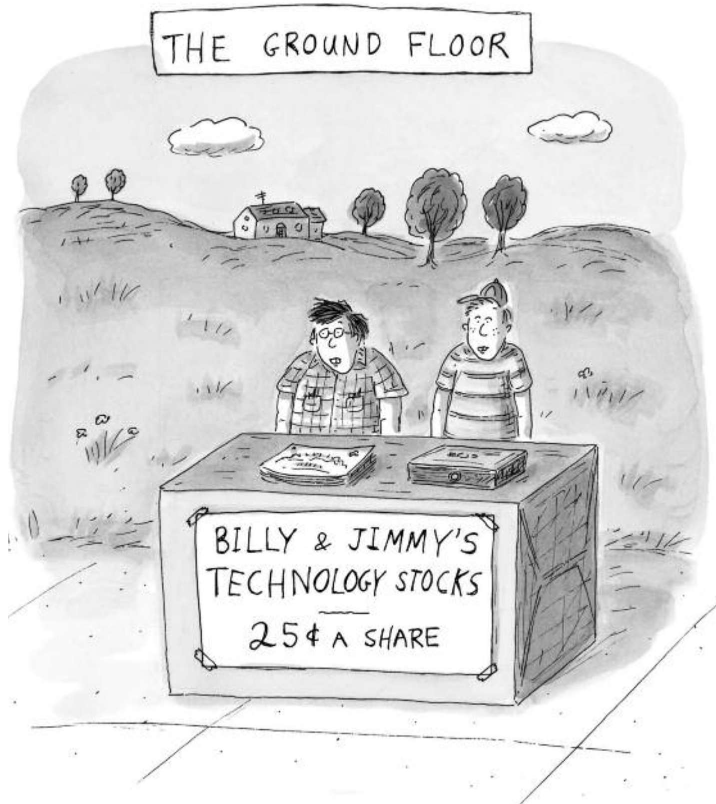
Divided Patent Infringement: Have All Necessary Defendants Been Accused? . . . . **Page 3**

Secondary Market Trading Presents Pitfalls for Employers and Employees

By Bahram Seyedin-Noor, Partner (Palo Alto), and Bryan Ketroser, Associate (San Francisco)

It may come as a surprise to some that securities issued by private companies—often thought of as illiquid—can and are being sold by employees. Although such secondary market trading is not new, the growth of the Internet, and in particular the advent of websites such as www.secondmarket.com and www.sharespost.com, have made the process easier than ever. But while secondary market trading presents employees of private companies with an opportunity to lock in a return on their labor without waiting for an IPO or other liquidation event, it also presents serious risks, both to the employees engaging in the trading and to the entity itself.

The Securities and Exchange Commission (SEC) regulates the sale of private securities, just as it does the sale of public securities. Because private securities typically are not registered with the SEC, transactions involving such securities are subject to certain unique restrictions. First, an employee usually must wait one year after acquiring his or her securities before selling. Second, the employee may sell only to an accredited investor, which, in the case of an individual, the SEC defines as a person whose net worth exceeds $1 million, or whose net income has exceeded $200,000 (or $300,000 with spouse) for each of the past two years and is expected to do so in the current year as well. Even after satisfying the above requirements, an employee selling private securities in the secondary market must be wary of potential civil or criminal liability for the manner in which he or she sells the shares. For instance, federal securities laws barring insider trading



© Roz Chast/The New Yorker Collection/www.cartoonbank.com

(i.e., trading on the basis of material, non-public information) are fully applicable to transactions in private company stock. More generally, Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 prohibit the making of material misstatements or omissions detrimentally relied upon by a counterparty to a stock transaction. State laws may impose additional liability.

Secondary market transactions also pose significant risks to the company whose stock is being traded. On the legal side, private companies with more than $10 million in assets must be mindful that, under Section 12(g) and Rule 12g-1 of the Exchange Act, they could become subject to onerous registration and reporting requirements if they have any class of equity security outstanding that is held by 500 or more persons. Business concerns include decreased long-term performance incentives among employees, as well as the danger of substantial stakes in the company being acquired by current or potential competitors, as was the case with Craigslist in 2004, when a shareholder sold a 28.5 percent stake in the company to eBay.

Private companies have several tools to mitigate these risks. Trading windows, such as those recently instituted by Facebook, reduce the risk of employee liability, as does education regarding insider-trading laws. Restrictions on the volume or percentage of shares that a particular employee may sell also can reduce the business risks associated with secondary market trading. In addition, incorporating a right of first refusal into stock option agreements with employees can make it less likely that the company will be forced to register its stock before it is ready to go public.

Divided Patent Infringement: Have All Necessary Defendants Been Accused?

By Julie Holloway, Partner (San Francisco), Abraham DeLaO, Associate (Austin), and Ryan Smith, Associate (Palo Alto)

Two recent Federal Circuit opinions have breathed new life into the divided infringement doctrine. In doing so, the Federal Circuit has raised important issues at both the pleadings stage and beyond.

This doctrine typically arises in the context of method claims, a particular type of patent claim that spells out a series of specific steps. To infringe such a claim, each step recited in the method must be performed. The divided infringement doctrine addresses circumstances where no single actor performs all the method steps—instead, one actor performs some steps of the method while one or more other actors perform the remaining steps.

In *BMC Resources, Inc. v. Paymentech*,[1] the Federal Circuit explained that to directly infringe a patent claim a single actor must either (1) commit the entire act of direct infringement or (2) act as a "mastermind" by directing or controlling the actions of all the parties that, together, commit the entire act of infringement. Thus, in the case of the latter, unless a mastermind entity controls the actions of all the necessary actors, no party can be liable for direct infringement or even indirect infringement (which requires an underlying act of direct infringement).

The Federal Circuit provided additional guidance in *Muniauction Inc. v. Thomson Corp.*, holding that an arms-length transaction between one party performing some steps of the method claim and another party performing other steps of the method would not suffice to give rise to direct infringement.[2]

Together, these two holdings opened the door for defendants to assert divided infringement defenses when a single actor did not practice the patent claims at issue and there was no mastermind entity. At the pleading stage, defendants successfully have moved for dismissal for failure to state a claim on which relief can be granted.[3] Some courts, however, have expressed reluctance to grant such dismissals prior to discovery and claim construction.[4]

In addition to evaluating procedural questions, courts have issued rulings on many substantive issues. For instance, courts have construed the meaning of claim terms to decide whether multiple parties actually are required to practice the claims.[5] Another commonly disputed issue is whether contractual business agreements provide an accused defendant with the power to exercise control over other participants in the asserted method sufficient to satisfy the mastermind test and establish vicarious liability.[6] The court in *Paymentech* recognized that the necessity of limiting the reach of vicarious liability creates opportunity for parties to escape direct infringement by crafting arms-length agreements that steer clear of the thresholds for creating control relationships. Although of little comfort to those with already issued patents that can no longer be corrected, the *Paymentech* court recommended that this risk be mitigated by pursuing "proper claim drafting" that would capture infringement by a single party.[7] As method claims continue to be asserted, these boundaries will continue to be tested in the courts.

[1] 498 F.3d 1373 (Fed. Circ. 2007).
[2] 87 USPQ2d 1350, 1358 (Fed. Cir. 2008).
[3] See, e.g., *Global Patent Holdings, LLC v. Panther BRHC LLC.* 586 F.Supp. 2d 1331 (S.D. Fla. 2008); *In re Ricoh Company Ltd. Patent Litigation*, No. C 03-02289-JW (N.D. Cal. Apr. 15, 2010).
[4] See, e.g., *Actus, LLC v. Bank of America Corp.*, No. 2-09-cv-102-TJW (E.D. Tex. Feb. 10, 2010).
[5] See, e.g., *SiRF Tech. Inc. v. Int'l Trade Comm'n*, 94 USPQ2d 1607, 1614-15 (Fed. Cir. 2010).
[6] See, e.g., *Golden Hour Data Sys. Inc. v. emsCharts Inc.*, 91 USPQ2d 1565, 1567-68 (E.D. Tex. 2009).
[7] 498 F.3d at 1381.

Client Victories

(Continued from page 1)

to the DMCA. The court concluded that YouTube's conduct demonstrated "that the DMCA notification regime works efficiently." The court also held that "[g]eneral knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements" and affirmed that copyright owners are best positioned to identify allegedly infringing content online. In addition, the court distinguished the U.S. Supreme Court's 2005 *Grokster* decision, noting that YouTube's DMCA compliance was antithetical to *Grokster*-style inducement liability.

Judge Stanton's opinion validates the operations of many leading Internet companies that provide access to materials uploaded by users. The court's order establishes that an online service that works cooperatively with copyright owners, installs a rigorous DMCA compliance regime, and removes specific content identified as allegedly infringing is entitled to a safe harbor from copyright liability.

The Wilson Sonsini Goodrich & Rosati team representing Google in this matter is led by partners David Kramer, Maura Rees, and Michael Rubin, and associate Bart Volkmer. The cases are *Viacom International, Inc., et al. v. YouTube, Inc., et al.* and *The Football Association Premier League Limited, et al. v. YouTube, Inc., et al.*

Continued on page 4...

Client Victories *(Continued from page 3)*

Taleo Triumphs with Securities Litigation Victory

On February 17, 2010, Wilson Sonsini Goodrich & Rosati obtained a significant victory for Taleo, a leading provider of talent-management software applications and consulting services, in *Brett Johnson v. Taleo Corp. et al.* Following a restatement of its financial results in connection with complex accounting rules, Taleo was hit with a securities class action lawsuit in federal court in San Francisco. The firm successfully argued on behalf of Taleo that the complaint did not sufficiently allege fraud, particularly because the provisions of the Generally Accepted Accounting Principles (GAAP) that led to the restatement were complex, requiring judgment in their application. The court held that the allegations regarding the magnitude of restatement, insider stock sales, and the defendants' knowledge of core operations and the significance of the GAAP violations were insufficient to state a claim. In dismissing the complaint, Judge Jeffrey S. White of the U.S. District Court for the Northern District of California observed, "Indeed, the fact that Defendants applied [the relevant accounting guidance] in such a consistent and transparent manner raises a plausible inference that Defendants' error was innocent." Although the plaintiffs were granted leave to file an amended complaint, they declined, and judgment was entered in favor of Taleo and its officers.

The Wilson Sonsini Goodrich & Rosati team representing Taleo was led by litigation partners Boris Feldman and Caz Hashemi and included Of Counsel Cheryl Foung and associates Katherine Henderson, Brian Danitz, and Maulik Shah.

Firm Obtains Stinging Dismissal of Securities and Antitrust Complaint against Vector Capital

In *Pennsylvania Avenue Funds v. Borey, et al.*, Wilson Sonsini Goodrich & Rosati recently obtained a resounding victory for San Francisco-based private equity firm Vector Capital. The plaintiff, Pennsylvania Avenue Funds, had filed a securities and antitrust action accusing Vector Capital of insider trading and colluding with Francisco Partners, another private equity firm, to take WatchGuard Technologies private. Representing Vector, the firm argued that the complaint's securities and antitrust claims should be dismissed with prejudice, citing many deficiencies in the complaint. In a strongly worded decision, Judge Richard A. Jones of the U.S. District Court for the Western District of Washington dismissed the complaint with prejudice and admonished the plaintiffs' counsel for filing a complaint with baseless allegations.

The Wilson Sonsini Goodrich & Rosati team representing Vector Capital in the matter included securities litigators Barry Kaplan and Bahram Seyedin-Noor and antitrust litigators Jonathan Jacobson and Scott Sher.

Crocs Stomps Adversaries in Patent Infringement Case

On February 24, 2010, a three-judge panel of the U.S. Court of Appeals for the Federal Circuit (CAFC) ruled in favor of Crocs in a long-running patent infringement case, reversing an earlier judgment by the International Trade Commission (ITC). Wilson Sonsini Goodrich & Rosati represented Crocs, the maker of the famous comfort shoes.

In 2006, Crocs filed a complaint before the ITC against several competitors, asserting that the competitors' products infringed two of Crocs' patents, one utility patent and one design patent. Ultimately, the ITC ruled that some of the competitors had infringed the utility patent, but that the utility patent was invalid for obviousness. The ITC further ruled the design patent valid but not infringed, and determined that Crocs had not satisfied the technical prong of the domestic industry requirement under Section 337 for the design patent. Crocs appealed to the CAFC, which heard oral arguments in July 2009.

In its February 2010 opinion, the CAFC reversed the ITC's finding that the Crocs patents were obvious. The CAFC also found infringement as to Croc's design patent based on a comparison of the shoes in question. In making this finding, the CAFC reasoned that "[t]hese side-by-side comparisons of the '789 patent design and the accused products suggest that an ordinary observer, familiar with the prior art designs, would be deceived into believing the accused products are the same as the patented design. In one comparison after another, the shoes appear nearly identical." Applying the same test to Croc's own shoes, the CAFC reversed the ITC's finding of no domestic industry on the design patent. The CAFC remanded the case to the ITC for a determination of infringement of the utility patent and remedies.

The case *(Crocs, Inc., v. International Trade Commission, Double Diamond Distribution, Ltd., and Holey Soles Holdings, Ltd., and Effervescent, Inc.)* is not only significant to Crocs, but also to the area of design patents, as it clarifies in very strong terms the standard that a trial court must use in assessing design patent infringement.

The Wilson Sonsini Goodrich & Rosati team representing Crocs in the matter included partners Mike Berta and Mike Ladra, former partner Jim Otteson, and associates Ariana Chung-Han, T.O. Kong, and Tom Carmack.

AU Optronics Awarded Major Patent Win

Wilson Sonsini Goodrich & Rosati scored a trial victory for AU Optronics of Taiwan against rival LG Display of Korea, two of the world's largest manufacturers of liquid crystal displays (LCDs). Following a one-week bench trial, on February 16, 2010, Judge Joseph J. Farnan of the U.S. District Court in Delaware held that all four patents asserted by AU Optronics were both valid and infringed by LG Display's LCDs. Later, on April 30, 2010, Judge Farnan held that none of the four patents asserted by LG

Continued on page 5...

Display were infringed by AU Optronics' LCDs, completing the victory.

The first phase of the case, involving AU Optronics' patents, was tried last summer by Wilson Sonsini Goodrich & Rosati. The second phase, involving LG Display's patents, was tried by co-counsel at Paul, Hastings, Janofsky & Walker LLP. The cases are *AU Optronics Corp. v. LG Display Co., Ltd. and LG Display America, Inc.*, and *LG Display Co., Ltd. v. AU Optronics et al*.

The Wilson Sonsini Goodrich & Rosati team representing AU Optronics in the matter included IP litigation partners Ron Shulman, Julie Holloway, and Craig Tyler.

Gold Type Victorious in IP Case

The firm's New York office secured a significant victory in an intellectual property case before the U.S. District Court for the District of New Jersey. In *Fastware LLC v. Gold Type Business Machines Corp.*, Wilson Sonsini Goodrich & Rosati represented Gold Type Business Machines Corp., a company specializing in on-board computer systems for police cars. Through these computer systems, police officers can access national criminal databases instantly in the field. In 2001, Gold Type contracted with Fastware to create the software necessary to implement these on-board systems. As part of this relationship, the parties agreed to share all maintenance and support fees from the sale of the systems, along with all obligations to provide technical support to their customers. After a tumultuous relationship spanning approximately eight years, Fastware claimed that Gold Type failed to remit its share of the support fees, while Gold Type claimed that Fastware did not live up to its promise to provide necessary technical support.

Fastware sued Gold Type, alleging that it owned the copyright to the software. In addition, Fastware claimed that Gold Type violated the Digital Millennium Copyright Act (DMCA) by extending its customers' software licenses without Fastware's consent by using old license keys provided by Fastware. In its complaint, Fastware sought a preliminary injunction barring Gold Type from selling or distributing the software.

In a highly favorable decision, United States District Judge Jose Linares denied Fastware's request for the preliminary injunction. Judge Linares noted that Fastware was unlikely to succeed on the merits of the dispute because Gold Type likely possessed a perpetual license to the software, which is a complete defense to a copyright lawsuit. In addition, he held that the presence of the license likely precluded a finding of relief on Fastware's claims under the DMCA. Moreover, Judge Linares found that the public interest weighed in favor of denying Fastware's preliminary injunction request.

Working on the matter in New York were partner Tonia Ouellette Klausner and associate Michael Marando. Associate Brian Mendonca assisted with the matter from the firm's Palo Alto office.

Go Daddy Helps Keep Litigation on Home Turf

On November 5, 2009, Wilson Sonsini Goodrich & Rosati partners Tonia Ouellette Klausner and John Slafsky struck a blow for all Internet businesses by successfully defending an Arizona-based client from a lawsuit filed in Illinois. The win in *uBID, Inc. v. The Go Daddy Group, Inc. and GoDaddy.com, Inc.* further bolstered the trend toward limiting where such companies can be forced to defend themselves in federal court.

Illinois-based uBID sued Arizona-based domain-name registrar The Go Daddy Group in federal court in Illinois, alleging violations of the Anticybersquatting Consumer Protection Act. The complaint alleged that third parties used Go Daddy's website to register domain names confusingly similar to uBID's protected marks, and that Go Daddy thereafter unlawfully trafficked in the deceptive domain names by automatically placing advertising on temporary Web pages associated with those domain names.

More problematic than uBID's novel theory of liability—which primarily would impact Internet domain-name registrars—was its expansive theory of personal jurisdiction, which posed a threat to all Internet-based businesses. The complaint alleged that because Go Daddy sold services to Illinois residents through a website that was available to any person with an Internet connection anywhere in the world, Go Daddy could be forced to defend itself in Illinois. Under that theory, any entity that sells products or services through a website could be subject to jurisdiction in any state where any of its Web customers reside, regardless of the fact that its website is not aimed at the state and the company has no other contacts with the state.

The Wilson Sonsini Goodrich & Rosati team moved to dismiss the action for lack of personal jurisdiction, arguing that uBID's expansive theory of personal jurisdiction eviscerated traditional notions of due process. In a reported decision (which uBID is appealing), the district court rejected all of uBID's arguments and dismissed the action, finding that Go Daddy was subject to neither specific nor general jurisdiction in Illinois.

The Wilson Sonsini Goodrich & Rosati attorneys representing uBID in the case were partners John Slafsky and Tonia Ouellette Klausner, and associates Hollis Hire and Craig Bolton.

Wilson Sonsini Goodrich & Rosati Scores for Expedia

On June 2, 2010, Chief Judge Robert S. Lasnik of the U.S. District Court for the Western District of Washington dismissed a consumer class action lawsuit against leading travel-services provider Expedia. In *Simonoff v. Expedia, Inc.*, the plaintiff alleged that Expedia willfully had violated a federal statute

Continued on page 6...

intended to protect consumer privacy, the Fair and Accurate Credit Transactions Act (FACTA), by sending certain receipts to consumers that allegedly contained the expiration date of the consumers' credit cards. As a result, the plaintiff claimed that the class was entitled to substantial statutory damages as compensation.

On behalf of Expedia, Wilson Sonsini Goodrich & Rosati argued that FACTA does not apply to receipts that are provided to consumers by electronic mail. Whether FACTA applies to emailed receipts was a statutory interpretation question of first impression in Washington. No appellate court has considered the issue, and federal district courts in other jurisdictions have issued conflicting opinions on the issue. The U.S. District Court for the Western District of Washington agreed with the firm's interpretation, finding that FACTA's plain language, its statutory scheme, and its legislative history all required dismissal. Accordingly, the court dismissed the plaintiff's class action lawsuit with prejudice.

The Wilson Sonsini Goodrich & Rosati team representing Expedia in the matter included partner Rod Strickland, Of Counsel Laura Grant, and associate Britton Davis.

Firm Secures Series of Victories for Client Robert Cohen in High-Profile Perelman Case

On June 9, 2010, Judge Ellen L. Koblitz, the Presiding Judge of the Chancery Division of the New Jersey Superior Court for Bergen County, held that Ronald O. Perelman's attorneys violated their ethical obligations in making "frivolous" allegations against Wilson Sonsini Goodrich & Rosati client Robert Cohen, the chairman and former CEO of the Hudson Group and Perelman's former father-in-law. The March 20, 2009, amended complaint that Perelman's attorneys filed on behalf of Perelman (as the executor of the estate of Claudia Cohen) and Samantha Perelman (Claudia's daughter) alleged that Robert Cohen had promised his late daughter—Claudia Cohen—that she and her brother James would receive equal shares of Robert's eventual estate, which Perelman claimed was worth hundreds of millions of dollars.

In her June 9 decision, Judge Koblitz held that "no competent attorney could have missed the frivolous nature of this promise claim" when the amended complaint was filed. In her opinion, Judge Koblitz found the promise allegation in the amended complaint to be "ridiculous." Judge Koblitz also found that "there was no legal or factual basis for the plaintiffs to proceed with their amended complaint given the evidence they had and the state of the law in New Jersey." In addition, the judge found that the opposing counsel's examination of Robert Cohen, an 84-year-old man who has been paralyzed by a "particularly insidious form of Parkinson's Disease," was "harsh and painful."

Judge Koblitz's June 9 ruling was her sixth in the litigation *Estate of Claudia Cohen, by its Executor Ronald O. Perelman, and Ronald O. Perelman, as Natural Guardian of his minor child Samantha Perelman v. Robert Cohen and James Cohen*. In its five prior rulings in favor of Robert Cohen, the court: (1) held on June 1, 2009, that Robert Cohen was competent and denied Perelman's motion for a guardian ad litem; (2) dismissed on June 15, 2009, Perelman's promissory estoppel claims after two days of trial on that issue, finding that he had "no evidence" of a promise (a roughly $450 million issue); (3) denied on June 26, 2009, Perelman's application for a general guardian over Robert Cohen; (4) dismissed on August 19, 2009, the balance of Perelman's claims against Robert Cohen, finding that they all hinged on the dismissed promissory estoppel claim; and (5) awarded judgment on April 8, 2010, in favor of Robert Cohen on his counterclaim on a $10 million note, plus interest and attorneys' fees.

Wilson Sonsini Goodrich & Rosati, along with co-counsel Christopher Weiss of Ferro, Labella & Zucker, represented Robert Cohen in the matter. The team was led by partner Robert Gold and included Of Counsel Mitchell Epner and associates Michael Marando and Scott Tenley.

Client 3Com Wins Securities Litigation Case

In a significant victory, the firm recently obtained the dismissal of all claims against 3Com Corporation and the company's board of directors in a series of purported stockholder class actions involving the then-proposed acquisition of 3Com by Hewlett-Packard (HP).

On November 11, 2009, 3Com and HP jointly announced that they had entered into a merger agreement under which HP would acquire 3Com for a price of $7.90 per share. This represented a premium of approximately 46 percent to the closing share price of 3Com common stock the day before the announcement of the merger. Following this announcement, eight purported stockholder class action complaints were filed in the Court of Chancery of the State of Delaware. The Chancery Court consolidated these actions and the plaintiffs filed a consolidated complaint.

On December 11, 2009, the plaintiffs moved for expedited proceedings and to preliminarily enjoin the proposed merger. Wilson Sonsini Goodrich & Rosati partners Boris Feldman and Gideon Schor, representing 3Com and the company's directors, immediately filed an opposition to the plaintiffs' motion for expedited proceedings. On December 18, the Chancery Court denied the plaintiffs' motion for expedited proceedings on the grounds that, among other things, the plaintiffs had failed to state a colorable claim for relief. With respect to the plaintiffs' allegations that the directors had breached their fiduciary duties by failing to disclose sufficient detail about the financial analysis conducted by 3Com's financial advisor, Goldman Sachs, the court found that the directors had included in the preliminary proxy statement for the merger "an adequate and fair summary of the work performed by Goldman [Sachs]," which is all that Delaware law requires.[1] With respect to the plaintiffs'

Continued on page 7...

[1] *See In re 3Com Shareholders Litigation*, No. 5067-CC, 2009 WL 5173804, at *3 (Del. Ch. Dec. 18, 2009).

allegations that the directors had breached their fiduciary duties by agreeing to certain deal-protection devices, including a no-solicitation clause, matching rights, and a $99 million termination fee, the court explained: "[T]his Court has repeatedly held that provisions such as these are standard merger terms, are not per se unreasonable, and do not alone constitute breaches of fiduciary duty."[2]

Notwithstanding the court's order denying their motion for expedited proceedings, the plaintiffs requested that the court schedule a hearing on their motion for preliminary injunction, which the court denied. The plaintiffs then stipulated to the dismissal of the consolidated complaint with prejudice, which the court ordered on March 22, 2010.

The HP-3Com merger closed approximately three weeks later, on April 12, 2010.

The Wilson Sonsini Goodrich & Rosati litigation team representing 3Com in the matter was led by partners Boris Feldman and Gideon Schor, and included associates Clay Basser-Wall, Dominique Alepin, and Craig Bolton.

[2] *Id.* at *7.

Predatory Innovation: Ninth Circuit Rejects Microsoft *Balancing Test . . .* *(Continued from page 1)*

Section 2, holding that the redesign was an undisputed improvement and Tyco did not use its monopoly power to force its new product on consumers.[3] In considering the appropriate test to apply, the court held that "[t]here is no room in th[e] analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects."[4] The court reasoned that "[i]f a monopolist's design change is an improvement, it is 'necessarily tolerated by the antitrust laws,'" per se.[5]

The *Allied Orthopedic* test is problematic. Although in that case the facts may not have supported a finding of predation because the redesign could be seen as a legitimate improvement, the Ninth Circuit articulated a test that shields all redesign under the guise of "innovation," no matter how minimal its benefits may be, no matter whether it is predatory in design and effect, and no matter what its ultimate impact may be on market prices, output, or quality. However, as the *Microsoft* case demonstrated, predatory and exclusionary redesign exists, and such activity cannot be presumptively shielded from antitrust review simply because it concerns innovation.[6]

"Predatory redesign" occurs when a company changes the nature of its product in an effort to exclude its competitors. In the broadest sense, there are two types of predatory redesign. One type is where the defendant intentionally creates an incompatibility to make it more difficult for competitors to interoperate with its products, in order to gain a competitive edge in the market. In such instances, the justification for the redesign is pretextual. The other type of redesign is exclusionary, but not necessarily predatory—the redesign's *ancillary* effect is to make it more difficult for competitors to compete. In such instances, the justification for the redesign is not pretextual. This distinction is important: Purely predatory redesigns are likely anticompetitive, whereas exclusionary redesigns usually are not. However, merely offering a product improvement does not end the inquiry. The magnitude of that improvement must be weighed against its effect on consumer welfare by measuring the exclusionary impact.[7] Where the exclusion is sufficiently large, and the improvement is minimal, the exclusion should be condemned, even if not entirely predatory.[8]

The relevant inquiry in determining whether predatory conduct violates antitrust law is whether, on balance, the redesign at issue is likely to result in harm to consumers, through reduced output, lower-quality products, or higher prices (or higher quality-adjusted prices[9]). Although it is appropriate to presume that innovation is procompetitive in the first instance, it is not appropriate to shield redesign (claimed to be "innovation") that is, on balance, exclusionary from the ambit of the antitrust laws. On the other hand, the Ninth Circuit's decision in *Allied Orthopedic v. Tyco*—which establishes a per se rule protecting redesign—is a significant departure from the normal standards employed to determine whether a product redesign is predatory, is wrong, and may encourage anticompetitive behavior.

[3] 592 F.3d at 998-1002.
[4] *Id.* at 1000.
[5] *Id.* [quoting *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983)].
[6] *See* 253 F.3d 34.
[7] Steven C. Salop, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard," 73 *Antitrust Law Journal* 311, 331 (2006) (advocating a test focused on consumer welfare).
[8] *Id.*
[9] Quality-adjusted prices incorporate the quality of a product into the price of the product. For example, if a new version of an existing product is arbitrarily superior to the previous version but costs the same, the new version has a lower quality-adjusted price.

Why Everyone's Talking about Under-the-Table Payments *(Continued from page 1)*

Indeed, the Criminal Division has charged 77 individuals with FCPA and related violations; 46 of those charges were brought since the beginning of 2009 under Breuer's supervision. Those charged have included CEOs, CFOs, and other senior corporate, sales, marketing, and finance executives.

Besides charging individuals, the Criminal Division is changing the way it conducts FCPA investigations, bringing the tools of organized-crime investigations to anti-corruption efforts, as demonstrated by its recent use of a sting operation in Las Vegas. Similarly, the Securities and Exchange Commission (SEC) is reassessing how it approaches its own anti-corruption efforts. It has reorganized its Division of Enforcement to develop a specialized team focused on FCPA violations in particular areas and industries (such as Big Pharma), rather than one-off cases. The newly elected head of this FCPA unit, Cheryl Scarboro, intends to have "people on the ground [who] will be focusing exclusively [on FCPA investigations] . . . making them smarter about industry practices problem areas."

Those "people on the ground" include a dedicated team for FCPA enforcement in the SEC's local branch in San Francisco, to be headed by Assistant Regional Director Tracy L. Davis. She recently spoke of the SEC's intention to focus its anti-corruption efforts on Silicon Valley's technology sector, particularly on companies that do business in Asia.

Increased enforcement could happen soon because probes of technology companies in other countries are resulting in parallel investigations in the U.S.

In fact, the U.S. certainly is not the only government focused on anti-corruption. Assistant Attorney General Breuer also spoke to the Council of Foreign Relations about a "rise of a universal anti-corruption principle." One well-publicized version, the United Kingdom Bribery Act of 2010, could have direct consequences for U.S. companies and individuals that have close ties to the UK (including conducting business there). That act subjects individuals and corporations to an unlimited fine (and possible 10-year imprisonment) for: (1) giving bribes to either local government or private actors, (2) receiving bribes, (3) bribing a foreign public official, or (4) a corporation's failure to prevent bribery.

The UK's law goes beyond the FCPA in imposing risk on corporations. It includes a new strict liability offense for corporations or partnerships, regardless of where a company is headquartered or incorporated, if they fail to prevent bribery by an "associated person," such as an employee, agent, or subsidiary. The only defense for this offense is the demonstration by the company that it had "adequate procedures in place to prevent bribery." While those "adequate procedures" have not yet been defined, the UK agency responsible for enforcing anti-bribery laws has suggested that they at least include: (1) clear policies for employees, agents, and other third parties, including those that address a code of ethics, anti-corruption principles, and gift and entertainment expenses; (2) adequate training on those policies; (3) disciplinary programs for violating the policies and incentive programs for adhering to them; and (4) adequate reporting mechanisms for potential violations. In other words, the law provides a powerful new incentive for companies to ensure that they have effective compliance programs.

Besides charging individuals, the Criminal Division is changing the way it conducts FCPA investigations, bringing the tools of organized-crime investigations to anti-corruption efforts.

Clearly, this recent push by many quarters of the U.S. government and other governments worldwide makes it more important than ever for companies—and individuals—to know and understand the anti-bribery laws that may apply to them.

Wilson Sonsini Goodrich & Rosati

PROFESSIONAL CORPORATION

***Editorial Staff:* Bahram Seyedin-Noor (editor in chief), Julie Holloway, Bryan Ketroser, and Ryan Smith**

***Special thanks to our authors, as well as to the following contributors:* Clay Basser-Wall, Craig Bolton, Brian Danitz, Mitchell Epner, David Kramer, Michael Marando, Michael Rubin, Ignacio Salceda, Maulik Shah, and Rod Strickland**

650 Page Mill Road, Palo Alto, California 94304-1050 | Phone 650-493-9300 | Fax 650-493-6811 | www.wsgr.com

Austin New York Palo Alto San Diego San Francisco Seattle Shanghai Washington, D.C.

For more information on this newsletter or if you would like to be included on the email subscription list, please contact Marketing (megusa@wsgr.com). There is no subscription fee.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. Please note that the opinions expressed in this newsletter are the authors' own and do not necessarily reflect the views of the firm or other Wilson Sonsini Goodrich & Rosati attorneys.

© 2010 Wilson Sonsini Goodrich & Rosati, Professional Corporation. All rights reserved.