Securities Law Alert

In This Edition:

May/June 2019

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Supreme Court: Grants Certiorari to Consider Whether Plaintiffs Can Satisfy *Fifth Third*'s "More Harm Than Good" Pleading Standard by Alleging That Delaying an Inevitable Disclosure Results in Greater Stock Price Harm

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), the Supreme Court held that in order "[t]o state a claim for breach of the duty of prudence" against the fiduciaries of an employee stock ownership plan ("ESOP") "on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[1] On June 3, 2019, the Supreme Court granted certiorari to decide whether *Fifth Third*'s "'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time." *Ret. Plans Comm. of IBM v. Jander*, No. 18-1165.

1. Please click here to read our discussion of the Supreme Court's decision in *Fifth Third*.

In *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2018), the Second Circuit held that *Fifth Third*'s "more harm than good" pleading standard was met where plaintiffs alleged that the disclosure of the overvaluation of one of the company's business divisions was "inevitable, because [the company] was likely to sell the business and would be unable to hide its overvaluation from the public at that point." The Second Circuit reasoned that "[i]n the normal case, when the prudent fiduciary asks whether disclosure would do more harm than good, the fiduciary is making a comparison only to the status quo of non-disclosure." In the case before it, "however, the prudent fiduciary would have to compare the benefits and costs of earlier disclosure to those of later disclosure—non-disclosure is no longer a realistic point of comparison."

The Second Circuit found plaintiffs adequately alleged that "the eventual disclosure of a purported fraud causes reputational damage that increases the longer the fraud goes on." The court explained that "[a] reasonable business executive could plausibly foresee that the inevitable disclosure of longstanding corporate fraud would reflect badly on the company and undermine faith in its future pronouncements." Moreover, the court found it significant that plaintiffs cited economic analyses in support of this proposition. The court noted that "[w]hile these economic analyses will usually not be enough on their own to plead a duty-of-prudence violation, they may be considered as part of the overall picture." The Second Circuit concluded that "when a drop in the value of the stock already held by the fund is inevitable, it is far more plausible that a prudent fiduciary would prefer to limit the effects of the stock's artificial inflation on the ESOP's beneficiaries through prompt disclosure."

In contrast to the Second Circuit, the Fifth and Sixth Circuits have held that plaintiffs cannot satisfy *Fifth Third*'s "more harm than good" standard by alleging that delaying disclosure always results in greater stock price harm. In *Martone v. Robb*, 902 F.3d 519 (5th Cir. 2018), the Fifth Circuit found insufficient allegations that "the longer a fraud goes on, the more damage it does to investors." The Fifth Circuit agreed with the district court that such a "generalized allegation" that arguably "applies in virtually every fraud case" does not meet *Fifth Third*'s pleading standard under governing circuit precedent. In *Graham v. Fearon*, 721 F. App'x. 429 (6th Cir. 2018), the Sixth Circuit reached the same conclusion with respect to nearly identical allegations. The court observed that the United States made the same argument in its amicus brief in *Fifth Third*. The United States contended that "[i]t better serves the interests of the plan participants if the fiduciaries take immediate actions to . . . disclos[e] the material nonpublic information" since a "greater drop might well occur if correction of the misrepresentations were delayed." The Sixth Circuit found that the *Fifth Third* Court "rejected that argument, albeit implicitly." The Sixth Circuit further reasoned that the case in favor of early disclosure of negative nonpublic information "does not account for the risk of market overreaction to such a disclosure, resulting in a decline worse than actually warranted."

The Court will hear oral arguments and issue a decision in *Jander* in October Term 2019.

Fifth Circuit: (1) Grant of Stock Options Pursuant to an Employee Stock Option Plan Is Not a "Sale" of Securities, and (2) Plaintiffs Cannot Impute One Corporation's Knowledge to Another Through Unsubstantiated Allegations of a Joint Venture

On May 24, 2019, the Fifth Circuit affirmed dismissal of an Enron-related securities fraud action brought against the independently–incorporated retail brokerage and investment banking arms of a major bank. [*Lampkin v. UBS Fin. Servs.*, 2019 WL 2240568 (5th Cir. 2019) (Higginbotham, J.)]. The brokerage managed Enron's employee stock option plan, while the investment bank advised Enron on a number of transactions. The Fifth Circuit held that the grant of stock options pursuant to the employee stock option plan was not a "sale" of securities, as required to state a claim under Sections 11 and 12 of the Securities Act of 1933 (the "Securities Act"). The court reasoned that "[t]he employees did not bargain for the options and they were granted for no cash consideration." With respect to plaintiffs' claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, the Fifth Circuit found plaintiffs failed to allege a joint venture between the brokerage and the investment bank, and therefore the brokerage had no duty to disclose to its clients the investment bank's alleged knowledge of Enron's financial fraud.

Grant of Stock Options Pursuant to a Compulsory Employee Stock Option Plan Is Not a "Sale"

The Fifth Circuit explained that a sale of securities is a prerequisite for a claim under Sections 11 and 12 of the Securities Act, as both provisions "expressly limit liability to purchasers or sellers of securities." The court noted that in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel*, 439 U.S. 551 (1979), the Supreme Court held that "'participation in a noncontributory, compulsory pension plan' is not the equivalent of purchasing a security" because "the 'purported investment is a relatively insignificant part' of the employee's total compensation, and the decision to accept and retain employment likely had only an attenuated relationship to the investment." *Lampkin*, 2019 WL 2240568 (quoting *Daniel*, 439 U.S. 551). Following the Court's ruling in *Daniel*, the SEC issued a release clarifying that "plans under which an employer awards shares of its stock to covered employees at no direct cost to the employees" do not result in "sales" within the meaning of the Securities Act.[2]

The Fifth Circuit recognized that, "[c]onsistent with the interpretations of the SEC, courts have extended *Daniel* to compulsory and involuntary employee stock option plans." The court explained that "[a] hallmark of a voluntary plan is the ability of the employee to make an investment decision to acquire the stock options." The court noted that the key inquiry under *Daniel* is "whether employees made an investment decision that could be influenced by fraud or manipulation."

Applying *Daniel*, the Fifth Circuit held that plaintiffs "failed to demonstrate that the grant of Enron options amounted to the sale of a security," as required for a Securities Act claim. The court reasoned that "participation in the [plan] was compulsory and employees furnished no value, or tangible and definable consideration in exchange for the option grants." The court found that it was "of no consequence" that plaintiffs "would eventually make an affirmative investment decision—whether to exercise the option or let it expire," since plaintiffs' claims were "based explicitly on the grant of the option, not the exercise of that option."

Plaintiffs Failed to Allege the Existence of a Joint Venture Between the Brokerage and the Investment Bank

Plaintiffs alleged that the brokerage and the investment bank "united in a joint venture" that "owed a duty to its retail brokerage clients . . . to disclose information that Enron manipulated and materially misstated its financial results to the public." According to plaintiffs, "any material, nonpublic information known to [the investment bank] had to be disclosed by [the brokerage]" because the bank "operated as a single, fully integrated entity."

The Fifth Circuit rejected plaintiffs' joint venture theory of liability. In so holding, the court found "persuasive" the reasoning in *Giancarlo v. UBS Financial Services*, 725 F. App'x. 278 (5th Cir. 2018), an unpublished decision involving the same defendants in a different Enron-related case. As in *Giancarlo*, the Fifth Circuit found that "'vague corporate platitudes about integration as a firm' are insufficient to support a finding of joint venture liability." *Id.* (quoting *Giancarlo*, 725 F. App'x. 278). The Fifth Circuit emphasized that plaintiffs did not allege "that defendants shared profits or losses" or "that defendants had joint control or right of

2. SEC Release No. 33–6188, 45 F.R. 8960 (Feb. 11, 1980). The SEC later expressed its view that "the determination of whether a plan is a voluntary contributory one rests solely on whether participating employees can decide at some point whether or not to contribute their own funds to the plan." SEC Release No. 33–6281, 1981 WL 36298 (February 3, 1981).

control over the joint venture," as required to establish the existence of a joint venture under governing Delaware law. The court further found that plaintiffs did not assert any other theory pursuant to which it could "aggregate the actions and knowledge of the defendant entities for purposes of assessing liability." The Fifth Circuit concluded that plaintiffs failed to state a claim under Section 10(b) and Rule 10b-5 since there were no allegations that either the brokerage or the investment bank had both material nonpublic information and a duty to disclose that information.

Fifth Circuit: Plaintiffs Can Rely on Post-Statement Events to Demonstrate That a Statement Was False When Made

On May 15, 2019, the Fifth Circuit revived in part a securities fraud action against a company that allegedly made misrepresentations concerning its algorithm for predicting and collecting insurance reimbursements for medical procedures. *Masel v. Villareal*, 2019 WL 2120536 (5th Cir. 2019) (King, J.). The court found plaintiffs adequately pled the falsity of these statements by alleging that the company "was ultimately unable to collect on the overwhelming majority of claims it billed." The court determined that "evidence of later events can provide useful circumstantial evidence that a given representation was false when made."

The Fifth Circuit rejected defendants' contention that plaintiffs were "attempting to prove fraud by hindsight by pointing to later events in order to shed light on the truth or falsehood of earlier statements." The court noted that "fraud–by–hindsight issues arise in the context of the scienter factor, not the misrepresentation factor." The court explained that "[w]here, as here, the representation in question concerned an asset or skill possessed by the defendant (here, an algorithm), the defendant's failure to perform as promised casts doubt on whether he possessed that skill in the first place." The court offered the example of a pianist who "represents that he is well-trained and commits to perform Gershwin's Rhapsody in Blue at a concert some time in the future," but then "arrives unable to play even Chopsticks." The court noted that in that hypothetical, it is "highly unlikely that he was a talented piano player to begin with." Similarly here, the court found the company's eventual inability to collect insurance reimbursements "allow[ed] for the plausible inference that . . . [the company's owner] had no algorithm and therefore misrepresented her capabilities when she pitched her investment."

The Fifth Circuit also deemed actionable the company owner's representations that she had the ability to generate $50,000 or more per insurance claim, and that she typically collects 50% or more of accounts receivable. The court determined that these statements were not "nonactionable future predictions," as the district court had found, but instead "relate[d] to the present capabilities of [the company's] algorithm." The court explained that the statements "concern[ed] how the algorithm could perform at the time the statement was made" and "how the algorithm had previously performed."

The Fifth Circuit found plaintiffs adequately alleged the company owner's scienter with respect to the algorithm–related statements because these representations "were based on metrics and information within her own control." The court explained that the company owner "had [allegedly] developed this algorithm and used its previously," and therefore "knew how and whether it would work."

Although the Fifth Circuit reversed dismissal of claims based on the algorithm-related statements, the court affirmed dismissal of claims concerning the company's representations that it had "superior" billing procedures and "could generate the highest payouts" for the relevant insurance claims. The court found plaintiffs did not allege "that the statements were false when made." The court explained that "although the payouts generated by [the company] fell short of what [the company's owner] represented, this does not mean that these payouts were not 'the highest' or that the billing procedures were not 'superior.'" The court found instructive its prior decision in *Employees Retirement System v. Whole Foods*, 905 F.3d 892 (5th Cir. 2018).[3] There, plaintiffs asserted securities fraud claims based on a grocery

3. Please click here to read our discussion of the Fifth Circuit's decision in *Whole Foods*.

retailer's representation that its prices were "competitive." The *Whole Foods* court found that even if the "prices were not as competitive as advertised, it need not follow that they were not competitive."

Southern District of New York: *Affiliated Ute* Presumption of Reliance Applies to Market Manipulation Cases

On May 28, 2019, the Southern District of New York held that plaintiffs asserting market manipulation claims were entitled to the presumption of reliance for omissions established in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), because plaintiffs' claims primarily involved the alleged failure of stock exchanges (the "Exchanges") to disclose certain services they provided to high-frequency trading ("HFT") firms. [*In re Barclays Liquidity Cross and High Frequency Trading Litig.*, 2019 WL 2269929 (S.D.N.Y. 2019) (Furman, J.)].

Defendants relied on the Ninth Circuit's decision in *Desai v. Deutsche Bank Securities*, 573 F.3d 931 (9th Cir. 2009), to argue that the *Affiliated Ute* presumption does not reach market manipulation claims. In *Desai*, the Ninth Circuit found that "manipulative conduct has always been distinct from actionable omissions." The Ninth Circuit reasoned that if "nondisclosure of a defendant's fraud was an actionable omission, then every manipulative conduct case would become an omissions case." The Ninth Circuit held that "the *Affiliated Ute* presumption of reliance does not apply" if plaintiffs allege only manipulative conduct.

The *Barclays* court "decline[d] to follow" the Ninth Circuit's decision in *Desai*. 2019 WL 2269929. The court noted that two other courts in the Southern District of New York have held that the *Affiliated Ute* presumption applies to market manipulation claims.[4] The court stated that "what is important in this context is . . . the rationale for" the *Affiliated Ute* presumption, which was designed for cases in which "no positive statements exist" and "reliance as a practical matter is impossible to prove." The court explained that when deciding whether the *Affiliated Ute* presumption applies, courts must "engage in a context-specific inquiry" by "analyzing the complaint to determine whether the offenses it alleges can be characterized primarily as omissions or misrepresentations."[5]

The *Barclays* court found this analysis "straightforward" in the case before it, "as the Second Circuit has already held that [p]laintiffs' claim is premised on the Exchanges' failure to fully disclose how HFT firms could use certain products and services on the Exchanges' trading platforms." *Id.* (quoting *City of Providence, Rhode Island v. Bats Global Mkts.*, 878 F.3d 36 (2d Cir. 2017)). The court determined that the Second Circuit had therefore "resolved the question [of] whether this case involves primarily omissions in the affirmative." The *Barclays* court concluded that plaintiffs' market manipulation claims fell "within the category of cases to which the *Affiliated Ute* presumption may apply at this stage of the litigation."

Delaware Chancery Court: Minority Stockholders Who Allegedly Attempted to Disrupt the Company's Operations to Gain Control or Force a Sale Were Not Controllers with Fiduciary Duties to the Company

On May 29, 2019, the Delaware Chancery Court dismissed breach of fiduciary duty claims brought by a company against two minority stockholders who allegedly embarked on "a bad faith campaign intended solely to disrupt [the company's] business operations with the hopes that [they] could gain control of [the company] or force a buy-out of their interest in [the company]." [*Klein v. Wasserman*, 2019 WL 2296027 (Del. Ch. 2019) (McCormick, V.C.)]. The court found

4. *In re UBS Auction Rate Sec. Litig.*, 2010 WL 2541166 (S.D.N.Y. 2010) (finding the *Affiliated Ute* presumption applied to plaintiffs' "market manipulation claim" because "in large part, their claim consists of omissions"); *In re IPO Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (reasoning that "*Affiliated Ute* itself was a case based on manipulative conduct").

5. In *Waggoner v. Barclays*, 875 F.3d 79 (2d Cir. 2017), the Second Circuit held that the *Affiliated Ute* presumption applies only "in cases involving primarily omissions," and does not reach cases where plaintiffs' claims "are primarily based on misstatements." Please click here to read our discussion of the Second Circuit's decision in *Waggoner*.

the complaint "does not adequately allege facts sufficient to impose fiduciary duties on the [minority stockholders] as controllers." The court recognized that "[s]ome theories posit that chronic disruption could rise to the level of control," but held that the allegations in the case before it did "not support such a holding." The court found it significant that the complaint "describes [the minority stockholders] as on a 'quest' for control, not wielding control."

The court explained that even if a stockholder does not own a majority of the company's shares, the stockholder may nevertheless be considered a controller if the stockholder "exercises actual control . . . over the business and affairs of the corporation." Such actual control can be shown to exist through pleadings that a minority shareholder controlled (i) the board generally or (ii) the decision-makers with regard to a particular transaction or decision. The court found the complaint did not allege that the minority stockholders had general control over the company, as they "own a 20% voting interest, do not hold any office or management position at [the company], are not [company] directors, and, at most, control one of three Board members."

With respect to the "decision-specific control theory," the court explained that, "at a minimum, a plaintiff must identify a decision or transaction." The court found the complaint was "vague as to the decision or particular outcome that the [minority stockholders] *successfully* achieved." The court observed that the minority stockholders "never achieved" their alleged "sole goal," which was "to monetize their individual investment as soon as possible and obtain a buyout of their interests."

The court noted that "[t]heoretically, actions implementing aspects of a larger strategy could themselves supply the particular outcomes to support a theory of decision-specific control." Here, the company argued that the minority stockholders exercised control by, *inter alia*, influencing one of the board members to "wield[ ] his contractual blocking rights to foreclose capital infusions." The court found this allegation insufficient to demonstrate control because the company did not identify "any specific transactions presented to or rejected by the Board."

However, the court declined to dismiss a breach of fiduciary duty claim against the director who allegedly "acted in bad faith by placing the interests of the [minority stockholders] above the interests of [the company]." The court found the complaint stated a claim against the director even though "the Board did not consummate any transaction that [the director] demanded." The court found the complaint "pled harm" to the company by alleging that the director's actions led to the resignation of company employees and filing delays, and "caused internal disruption and corporate instability."

The court also declined to dismiss a claim against the minority stockholders for aiding and abetting the director's breach of fiduciary duty. The sole argument made by defendants with respect to that claim was the failure to allege an underlying breach of fiduciary duty. As discussed above, the court held that a breach of fiduciary duty claim had been pled against one director.

Connecticut Superior Court: Discovery Stay Pending a Motion to Dismiss Applies to State Court Actions Brought Under the Securities Act of 1933

On May 15, 2019, the Connecticut Superior Court held that the Private Securities Litigation Reform Act's discovery stay pending a motion to dismiss applies to state court actions asserting Securities Act claims. *City of Livonia Retiree Health and Disability Benefits Plan v. Pitney Bowes*, 2019 WL 2293924 (Conn. Super. Ct. 2019) (Lee, J.). The court found that the relevant statute, 15 U.S.C. § 77z-1(b)(1), "is not ambiguous" and "its plain meaning compels the conclusion that [it] . . . applies to actions commenced in state court under the Securities Act, as well as such actions commenced in federal court."

Section 77z-1(b)(1) provides that "[i]n any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss . . . ." The court found that the phrase "[t]his subchapter" refers to the Securities Act, which "confers concurrent jurisdiction on state and federal courts." The court further determined that the phrase "any private action arising under this subchapter" encompasses actions commenced in state court as well as federal court. The court found it significant that a different provision of the same statute—§ 77z-1(a)(1)—specifically states that it "shall apply to each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." The court reasoned that "[b]ecause 77z-1(b)(1) does not contain the same language, the inference is strong that it is not limited to actions . . . in federal court."

The court also pointed out that in *Cyan v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), the Supreme Court observed that the safe harbor provisions set forth in 15 U.S.C. § 77z-2 "applied even when a [Securities] Act suit was brought in state court."[6] The *City of Livonia* court noted that one provision of that statute, § 77z-2(c)(1), also uses the phrase "in any private action arising under this subchapter." The court found that "[b]ecause the Supreme Court held that language identical to that at issue here applies to both state and federal actions commenced under the Securities Act, the inference is strong that Section 77-1(b)(1) was meant to apply to actions pending in state court as well as in federal court." The court also considered it noteworthy that § 77z-2, "which the Supreme Court expressly held applies to state as well as federal actions, also contains [a provision providing for] a stay of discovery during the pendency of a motion relevant to a determination of the merits of the action." *See* 15 U.S.C. § 77z-2(f) (providing for a discovery stay pending a motion for summary judgment).

Finally, the court rejected plaintiffs' contention that "state law should govern whether a stay of discovery is to be granted because it is a procedural issue and not a substantive one." The court explained that it is "bound by the decision in *Cyan* approving the application to a state court action of a provision of the Securities Act that stays discovery during the pendency of a substantive pretrial motion."

6. Please click here to read our discussion of the Supreme Court's decision in *Cyan*.

This edition of the
Securities Law Alert was edited by
Alexis S. Coll-Very
acoll-very@stblaw.com / +1-650-251-5201,
Lynn K. Neuner
lneuner@stblaw.com / +1-212-455-2696,
Cheryl J. Scarboro
cscarboro@stblaw.com / +1-202-636-5529,
and George S. Wang
gwang@stblaw.com / +1-212-455-2228.

New York

Brooke E. Cucinella
+1-212-455-3070
brooke.cucinella@stblaw.com

Paul C. Curnin
+1-212-455-2519
pcurnin@stblaw.com

Stephen M. Cutler
+1-212-455-2773
stephen.cutler@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Susannah S. Geltman
+1-212-455-2762
sgeltman@stblaw.com

Paul C. Gluckow
+1-212-455-2653
pgluckow@stblaw.com

Nicholas S. Goldin
+1-212-455-3685
ngoldin@stblaw.com

Peter E. Kazanoff
+1-212-455-3525
pkazanoff@stblaw.com

Joshua A. Levine
+1-212-455-7694
jlevine@stblaw.com

Linton Mann III
+1-212-455-2654
lmann@stblaw.com

Joseph M. McLaughlin
+1-212-455-3242
jmclaughlin@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Michael J. Osnato, Jr.
+1-212-455-3252
michael.osnato@stblaw.com

Mark J. Stein
+1-212-455-2310
mstein@stblaw.com

Alan C. Turner
+1-212-455-2472
aturner@stblaw.com

Craig S. Waldman
+1-212-455-2881
cwaldman@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Jonathan K. Youngwood
+1-212-455-3539
jyoungwood@stblaw.com

David Elbaum
Senior Counsel
+1-212-455-2861
david.elbaum@stblaw.com

Janet A. Gochman
Senior Counsel
+1-212-455-2815
jgochman@stblaw.com

Los Angeles

Michael D. Kibler
+1-310-407-7515
mkibler@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Palo Alto

Stephen P. Blake
+1-650-251-5153
sblake@stblaw.com

Alexis S. Coll-Very
+1-650-251-5201
acoll-very@stblaw.com

James G. Kreissman
+1-650-251-5080
jkreissman@stblaw.com

Simona G. Strauss
Senior Counsel
+1-650-251-5203
sstrauss@stblaw.com

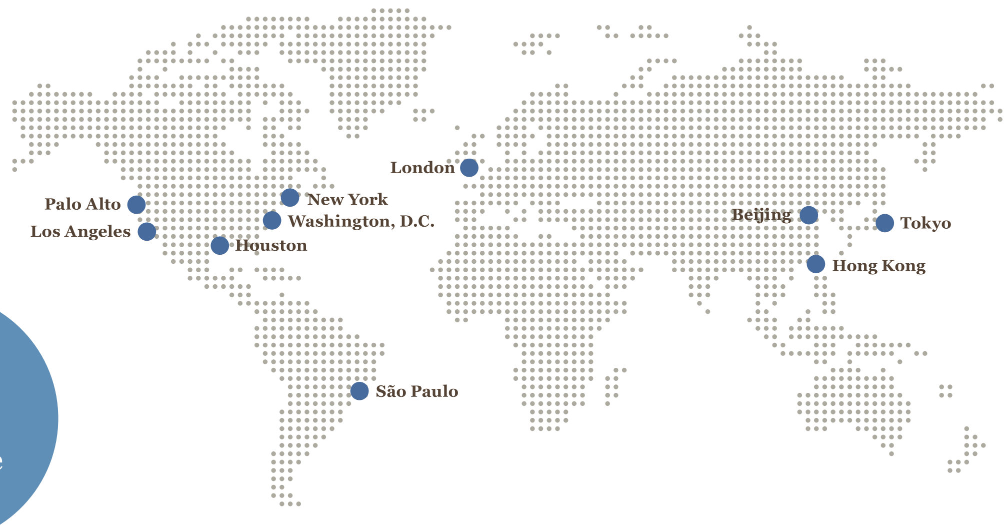
Washington, D.C.

Jeffrey H. Knox
+1-202-636-5532
jeffrey.knox@stblaw.com

Cheryl J. Scarboro
+1-202-636-5529
cscarboro@stblaw.com

Peter C. Thomas
+1-202-636-5535
pthomas@stblaw.com

Simpson
Thacher



Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower A
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000