Litigation Wins Report

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When crisis strikes, industry leaders turn to Weil to develop solutions to complex, multifaceted legal challenges, including business disputes, regulatory actions, financial distress, and other enterprise-changing circumstances in jurisdictions throughout the world. For more than eight decades, we have partnered with our clients not only to address immediate concerns but also to integrate legal strategy into the wider framework of their current and future business objectives. With approximately 1,200 lawyers located in 20 offices around the world, Weil operates under a one-firm principle that allows us to bring the best mix of firmwide skills and local market expertise to help clients manage risk and take advantage of opportunities in each of our major practice areas:

- Litigation
- Business Finance & Restructuring
- Corporate
- Tax, Benefits & Executive Compensation

Game-Changing Innovation

In our eleventh annual *Litigation Wins Report*, we are proud to share with you some of the significant victories Weil litigators secured this past year for our clients. As with past reports, we believe it will be clear again this year that few, if any, litigation practices in the world enjoy the level of success our litigators have achieved.

Working with our clients, we get to provide the most vigorous, strategic, and efficient representations, and showcase our position at the forefront of cutting-edge legal and business trends. We thank our clients for giving us those opportunities. Winning these cases often requires creative new strategies that can alter the landscape of whole industries and areas of litigation.

This past year, for example, we took on hot-button issues concerning the employment status of interns; book publishers' expansion into electronic media; government enforcement theories in labor and employee discrimination disputes; and competition in the market for leveraged buyouts. We ensured that Hoak Media, Meredith, and Scripps local television stations could challenge before a jury the music licensing practices of SESAC, one of the three major performing rights organizations (PROs). In doing so, we employed creative strategies that we honed in a number of disputes involving the other two PROs, BMI and ASCAP, and that are transforming the music industry's competitive landscape. In a never-before-seen situation arising from the financial crisis, we crafted a unique board process for AIG to respond to Hank Greenberg's demand that it join in a shareholder derivative action against the US Government.

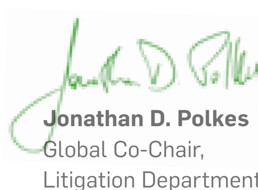
These results, among many others, demonstrate why Weil was ranked among the Top Innovative US Law Firms in the *Financial Times'* US Innovative Lawyers Report 2013 and why our attorneys were recognized by the same publication as among the top-ranked "Lawyers to the Innovators" for the second consecutive year.

Another of Weil's major strengths is that time and again our attorneys have proved themselves capable of taking any matter to trial when it is in our clients' best interests to do so. This year again we successfully took complex matters to trial, prevailing on virtually all claims brought against ESPN by a satellite-TV operator in a $152 million-plus contract dispute; enabling companies associated with Sir David and Sir Frederick Barclay to confirm their investments in iconic London hotels such as Claridge's after multiple trials and appeals; and securing a judgment that Lehman Brothers Holdings' Archstone did not breach a tax protection agreement with limited partners in a $22 billion leveraged buyout.

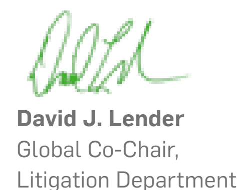
Some of our most significant victories this year included helping Marvel Entertainment and The Walt Disney Company win two separate cases confirming their copyrights in iconic comic book superheroes such as Thor and The X-Men; freeing Thomas H. Lee Partners and Providence Equity Partners from an industry-wide antitrust class action relating to "club" leveraged buyout transactions; and winning recognition for FILMM, the French insulation manufacturers' trade association, that government seizure of its electronic files had violated attorney-client privilege.

Yet, as always, our attorneys' "finest hours" are those spent on pro bono and local community matters. These matters included winning the release of a Rhode Island woman imprisoned under highly rigid mandatory sentencing guidelines; securing longer-term shelter for New Yorkers displaced by Hurricane Sandy; and obtaining asylum for Gambian immigrants living with HIV/AIDS and facing persecution in their native land. On these and many other matters in 2013, our attorneys collectively performed more than 80,000 hours of pro bono service. Without question, the work of our dedicated attorneys had a profound effect on many thousands of lives around the world.

We continue to receive accolades from the media for our litigation work – acclaim for which we are most grateful. Above all, though, we value the recognition of our clients, who entrust us year after year with their most difficult, sensitive, and significant matters. Sometimes these matters simply clear a significant obstacle to a client's business goal; often they are game-changers that transform an entire industry's landscape. This coming year and for years to come, we look forward to helping our clients achieve continued success.



Jonathan D. Polkes
Global Co-Chair,
Litigation Department



David J. Lender
Global Co-Chair,
Litigation Department

Winning for Our Clients

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prevailed against Dish's largest claim of more than

130

million dollars

"Weil partners … set about making their client's position easy-to-understand for a jury [and] came up with an analogy … that Dish's lawsuit was akin to going to the movies with your family, buying popcorn and candy, and then asking the manager for your money back after watching the film."

– *Law360, March 25, 2013*

ESPN, Inc.

Weil achieved a significant victory on behalf of ESPN, Inc. in a lawsuit involving the terms of distribution agreements the sports program provider had negotiated with satellite-TV operator Dish Network L.L.C. and its competitors. A jury in the US District Court for the Southern District of New York returned a verdict rejecting all but one of the breach-of-contract claims Dish had asserted in its complaint and the vast majority of the monetary damages it had requested. ESPN completely prevailed on Dish's largest claim of more than $130 million. Indeed, in total Dish had claimed damages of more than $152 million, but was awarded a small fraction of that amount, $4.86 million.

Filed in 2009, the suit claimed that, among other things, ESPN had violated a most-favored-nation (MFN) provision of its 2005 licensing agreement with Dish that required ESPN to offer the satellite-TV operator the same licensing rates and program packaging opportunities offered to competitors. Dish claimed that ESPN had instead offered competitors better rates for the ESPN Classic network, which telecasts older sports events, and the Spanish-language ESPN Deportes network and had offered other operators the opportunity to distribute networks on an "à la carte" basis, an arrangement that Dish claimed it had not been offered. Dish later amended its complaint to include, among other things, an allegation that ESPN violated a separate provision of the parties' contract by allowing Time Warner Cable to distribute the ESPN Network over the Internet via the popular "WatchESPN" app without charging a separate fee.

After a three-week jury trial, Weil litigators prevailed on virtually every claim brought by Dish. The jury rejected Dish's largest claims, including the one for $130 million where Dish alleged that ESPN owed Dish an MFN offer with respect to the ESPN Classic network based on ESPN's 2006 deal with Comcast; found in ESPN's favor regarding the claims concerning Time Warner Cable's Internet distribution rights; and rejected Dish's claims that ESPN violated the MFN by providing other distributors "à la carte" offerings.

As to one smaller claim, concerning the ESPN Deportes network, the jury awarded Dish a mere $4.86 million, a fraction of the total amount sought. Weil had previously won a related jury trial and counterclaim in New York State Court for ESPN and other affiliates of The Walt Disney Company totaling more than a hundred million dollars (see page 44 for an update on that case).

Date: February 28, 2013

Case & Venue: *Dish Network L.L.C. v. ESPN, Inc., et al.*, No. 1:09-cv-06875 (S.D.N.Y.)

Practice Group: Complex Commercial Litigation

Weil Team: Partners Diane Sullivan in Princeton and David Yohai in New York, counsel David Singh in Silicon Valley, and associates David Yolkut, John Gerba, and Jennifer Oliver in New York and Adam Tolin in Princeton. Partners James Quinn and Theodore Tsekerides assisted in the pretrial work.

Weil recognized in *Law360's* monthly "How They Won It" feature for a trial victory on behalf of ESPN

– "Weil Curbs Dish Win in ESPN Licensing Row" – Law360, March 25, 2013

McGraw Hill Financial, Inc. and S&P Dow Jones Indices LLC

Dates: May 13, 2013; December 18, 2013

Case & Venue: *International Securities Exchange, LLC v. Chicago Board Options Exchange, Inc., et al.*, No. 12-940 (U.S. Supreme Court); *International Securities Exchange, LLC, et al., v. S&P Dow Jones Indices, LLC*, No. 06-cv-12878 (S.D.N.Y.)

Practice Group: Intellectual Property/Media

Weil Team: Partners R. Bruce Rich and Benjamin Marks and associates Reed Collins, Kami Lizarraga, and Pooja Viswanath in New York

Weil was victorious in a watershed misappropriation case involving McGraw Hill Financial subsidiary S&P Dow Jones Indices LLC (SPDJI) and its world-famous S&P 500 index and Dow Jones Industrial Average (DJIA) – the premier benchmarks for measuring US stock market performance. When The International Securities Exchange (ISE) attempted to list option contracts based on the S&P 500 and the DJIA without a license, and filed a declaratory judgment action in the US District Court for the Southern District of New York, Weil was called into action by McGraw Hill. Working together with fellow plaintiff the Chicago Board Options Exchange, the exclusive licensee of the rights to offer options on the S&P 500 and on the DJIA, McGraw Hill brought suit in Illinois state court. To enjoin ISE from listing the unlicensed options and Options Clearing Corp. (OCC) from issuing, clearing, or settling them, McGraw Hill asserted misappropriation and unfair competition claims under Illinois state law. In deference to this state court suit, the Second Circuit affirmed a stay of ISE's action obtained by our client.

Following nearly four years of pretrial proceedings in state and federal courts in Illinois and in federal court in New York, an Illinois court granted summary judgment for our client in full, permanently enjoining ISE from listing or providing an exchange market for the trading of S&P 500 and DJIA options and OCC from facilitating such trading. The court also rejected ISE's argument that the Copyright Act preempted the state law claims. The Illinois Appellate Court affirmed the summary judgment and the argument behind it, and the Illinois Supreme Court denied ISE's petition for leave to appeal. In May 2013, the US Supreme Court declined ISE's petition for a writ of *certiorari*.

Seeking to re-litigate the issues and asserting that the final judgment in Illinois is void for lack of subject matter jurisdiction, ISE filed a motion in the Southern District of New York for leave to amend its declaratory judgment complaint against SPDJI and to add new parties. SPDJI cross-moved to dismiss the declaratory judgment action as barred by *res judicata*, among other grounds. On December 18, 2013, the district court granted SPDJI's motion to dismiss and denied ISE's motion for leave to amend its complaint and to add new parties. ISE did not appeal the dismissal.

Weil named a "Leading" Firm for "Intellectual Property: Nationwide"

– Chambers USA 2013

Syndicat National des Fabricants d'Isolants en Laines Minérales Manufacturées (FILMM)

Weil represented a French trade association of insulation products manufacturers, one of the parties involved in a landmark case related to seizures of email boxes and their entire contents during surprise antitrust inspections. Our client, the Syndicat National des Fabricants d'Isolants en Laines Minérales Manufacturées (FILMM), along with other organizations and companies, is under investigation for alleged anticompetitive conduct. Although it has yet to rule on the merits of the case, in 2009 the French Competition Authority (*Autorité de la Concurrence*) raided FILMM's offices. FILMM, as well as other parties, challenged the legality of the raid, arguing that the seizure of thousands of emails protected by attorney-client privilege violated its rights as a defendant. The Paris Court of Appeal rejected FILMM's challenge, and that of the other parties, in several decisions rendered in the fall of 2011. In these decisions, the court held that the challenged seizures were unintentional and simply took note of the Competition Authority's willingness to return the privileged documents to the concerned parties (including FILMM).

On April 24, 2013, the *Cour de Cassation*, or Supreme Court of Appeal, partially quashed the Paris Court of Appeal decisions. The Supreme Court said that the Court of Appeal erred by not verifying whether the files were covered by attorney-client privilege. It also ruled that it was insufficient to merely acknowledge the Authority's willingness to return the privileged documents and that a violation of attorney-client privilege occurs at the time the documents are seized. This is a very strong warning issued to the French Competition Authority.

Date: April 24, 2013

Case & Venue: French Supreme Court No. 12-80336 (Cass.)

Practice Group: Antitrust/ Competition

Weil Team: Partner Romain Ferla and associate Stefanie Quiles in Paris

Weil named a "Leading" Firm for "Dispute Resolution: Litigation" in France

– Chambers Global 2014

Pro Bono Spotlight

Harshly Sentenced Defendant

Date: February 13, 2013

Case & Venue: Motion to vacate a long mandatory federal prison sentence (D.R.I.)

Weil Team: Partners Jonathan D. Polkes in New York and David Duffell in Providence and associates Kevin Meade, Teresa Brady, and Alison Bain-Lucey in New York

A special victory in Rhode Island federal court for a Weil pro bono client resulted in the vacating of a long mandatory federal prison sentence and quick release of our client on February 13, 2013. Weil's client was serving a sentence of almost 16 years in prison for a relatively minor offense under the previously mandatory Federal Sentencing Guidelines. The harsh sentence was mandated because of two minor prior convictions, including a bar fight that had occurred when she was in college.

Weil took this case at the personal request of a New York federal district court judge, who learned of the matter through a course on sentencing he teaches at New York University Law School. The judge cautioned that the chances of victory were slim. Even the Rhode Island judge who originally sentenced our client had noted that this "was one case where the guidelines work an injustice" that the court was unable to counteract.

When the Weil team took the case, our client had already served nearly ten years of her sentence and had completed a remarkable transformation. While in prison, she dedicated her time to improving both her own life and the lives of her fellow inmates, including organizing a program through which they made thousands of craft items for the children's ward of a local hospital. She had been given highly responsible jobs in prison, and even the prison staff was supportive of Weil's efforts to lighten her sentence.

The Weil attorneys initially prepared an executive commutation request to President Obama. In researching other options they found that all appeals and habeas relief options had been exhausted, and the Weil team instead developed a novel approach using seldom-used Federal Rules and habeas procedure to move the court to reopen the case. Weil also negotiated with the United States Attorney's Office to lessen any opposition it would assert.

Shortly after our motion for relief was filed, the federal court in Rhode Island held a hearing, with our client present, at which the judge acknowledged mistakes in this case and expressed happiness that our motion allowed them to be corrected. The court vacated the 16-year sentence and resentenced our client to time served. This allowed our client to spend the last 11 days of her mother's life at her side. *The New York Times* highlighted the victory in a story published on March 28, 2013.

lululemon athletica inc.

Weil won a major victory for lululemon athletica inc. in a shareholder class action arising from the discovery of product issues in the company's signature yoga pants. The US District Court for the Southern District of New York dismissed all claims against our client, holding that the plaintiffs had not pleaded that any of the company's and its officers' statements were false and misleading, that any of the defendants had any fraudulent intent, or that any declines in the company's stock price were causally related to the plaintiffs' theory of fraud.

In March 2013, lululemon discovered that certain black yoga pants made of a proprietary nylon-lycra fabric called "luon" suffered from unacceptable levels of sheerness. Upon learning of the problem, the company pulled the product from stores and offered a full refund to customers who had purchased them. In the ensuing securities class action, the plaintiffs claimed that the company's many previous statements promoting the high quality of lululemon products were knowingly false. The court concluded, however, that the plaintiffs did not show that lululemon and its officers had knowingly or recklessly misled the market and that there was no connection between the CEO's resignation and the disclosed product issues. The same court also dismissed two related shareholder derivative actions stemming from the same issues.

Date: April 18, 2014

Case & Venue: *In re Lululemon Securities Litigation*, No. 1:13-cv-04596-KBF (S.D.N.Y.)

Practice Group: Securities Litigation

Weil Team: Partners Joseph Allerhand and Stephen Radin and associates Caroline Hickey Zalka, Layne Behrens, Robert Ruff, and Larkin Kittel in New York and Melanie Conroy in Boston

amid intense media scrutiny, Weil crafted an

unprecedented board process

to consider Starr's demand

> "AIG, its Board of Directors, and its advising counsel conducted the demand process in an informed, transparent, rational and exemplary fashion."
>
> *– US Court of Federal Claims, June 26, 2013*

American International Group, Inc.

Weil scored a major victory for American International Group, Inc. (AIG) in connection with the lawsuit by Starr International against the United States for more than $50 billion arising out of the financial assistance provided to AIG during the financial crisis. Starr, which is controlled by former AIG Chairman/CEO Maurice "Hank" Greenberg, asserted both direct and derivative claims on behalf of AIG, alleging that the Government improperly "took" almost 80 percent of AIG's equity without fair compensation in violation of the Fifth Amendment of the United States Constitution. Starr sought to sue derivatively on behalf of AIG and demanded that AIG's board direct the company to pursue claims against the United States or authorize Starr to continue to pursue the derivative claims in AIG's name. A media firestorm erupted after the news leaked that AIG's board would consider Starr's demand. While this is something that the board was required to do under Delaware law, the media and certain public officials characterized the decision as AIG biting the hand that fed it by potentially joining a suit against the US for billions of dollars.

Weil counseled AIG in response to Starr's demand to the board and helped craft an unprecedented process that gave Starr and the Government the opportunity to submit briefs and make oral presentations to the board. After a full and deliberative process, the board unanimously voted to refuse the demand and not to permit Starr to pursue the derivative claims in AIG's name. Starr then amended its complaint, arguing that AIG had wrongfully refused the demand and asking the US Court of Federal Claims to override the board's decision. In granting AIG's motion to dismiss the derivative claims, the court upheld the board's decision-making process, stating that "AIG, its Board of Directors, and its advising counsel conducted the demand process in an informed, transparent, rational and exemplary fashion."

Date: June 26, 2013

Case & Venue: *Starr International Co. Inc. v. U.S.*, No. 1:11-cv-00779 (Fed. Cl.)

Practice Group: Securities Litigation

Weil Team: Partners Joseph Allerhand, Stephen Radin, and Robert Carangelo and associates Jamie Hoxie, Chris Gismondi, and Agustina Berro in New York

Weil named a "Leading" Firm for "Securities: Litigation" in the US

– Chambers USA 2013

Archstone and Lehman Brothers Holdings Inc.

Dates: April 4, 2013 (arbitration win); November 8, 2013

Case & Venue: *Stender Arbitration* (Philadelphia); *Stender, et al., v. Archstone-Smith Operating Trust, et al.*, No. 07-cv-02503 (D. Col.)

Practice Group: Securities Litigation

Weil Team: Partners Jonathan D. Polkes and Elizabeth Weiswasser, counsel Ashish Gandhi, and associates Caroline Zalka, Melanie Conroy, Matthew Howatt, Jared Foley, and Raquel Kellert in New York

Weil won another significant arbitration victory for Archstone (formerly Archstone-Smith Operating Trust) and Lehman Brothers Holdings Inc. (Lehman) in April 2013, when, for the second time, an arbitrator rejected claims that Archstone had breached its tax protection agreement. Under that agreement, Archstone was required to offer its limited partners a market-priced, tax-deferred security in connection with Archstone's 2007 leveraged buyout (LBO). The arbitrator also denied the claimants' request for millions of dollars of tax indemnification payments. In November 2013, the US District Court for the District of Colorado granted Archstone's motion to confirm the arbitrator's ruling.

This arbitration arose in 2007 from the second-largest LBO in real estate investment trust history – the $22 billion take-private of Archstone-Smith Trust by a partnership of affiliates of Tishman Speyer and Lehman. As part of this transaction, A-1 unitholders in Archstone were given a choice either to cash out their A-1 units at a 22.7 percent premium over the pre-LBO announcement value of those units and pay taxes on this cash, or exchange their A-1 units for a tax-deferred, preferred security interest in post-merger Archstone called "Series O Units." After the LBO closed, former A-1 unitholders – including the arbitration claimants who elected cash consideration – initiated a class action against Archstone in the District of Colorado. They alleged, among other things, that the terms of the Series O Units were so undesirable that Archstone effectively "forced" A-1 unitholders to take cash and incur taxes, thereby breaching the tax protection agreement. The district court dismissed all claims in the class action, except the tax protection claim, which was sent to arbitration.

After a two-and-a-half week trial in Philadelphia in October 2012 and January 2013, the arbitrator ruled in favor of Archstone, concluding that because the Series O Unit was a tax-deferred security and "bona fide investment alternative" to the cash consideration, claimants were not forced to recognize taxable gain in connection with the LBO. Because the arbitrator found that Archstone had not breached the tax protection agreement, no damages were awarded to the claimants. Archstone subsequently moved to confirm the award in the District of Colorado – where the class action is pending – and in November 2013, the court entered an order granting the motion. Archstone has since moved to dismiss the remaining claims in the class action.

This arbitration was the second in a series of actions brought by former A-1 unitholders in connection with the LBO, and the second matter that was favorably resolved by Weil on Archstone's behalf following trial. This recent victory will deal another blow to the plaintiffs in the class action litigation and serve as a bellwether case that will favorably impact all remaining unitholder matters.

Česká spořitelna, a.s.

Weil represents Česká spořitelna, a.s. (CSAS), one of the largest Czech banks and a member of the ERSTE group, in litigation commenced by OS TEST (Občanské sdružení spotřebitelů TEST), a Czech consumer protection organization. Pursuant to Czech consumer protection regulation and relying on European Directive 2009/22/EC, OS TEST requested a Prague District Court judgment ordering CSAS to cease and desist from certain loan fee collection practices and to restructure its loan and mortgage fee pricing.

OS TEST filed the action as part of a nationwide campaign against various fees charged by Czech banks, allegedly on the basis of the collective interests of consumers. Specifically in this action, OS TEST claimed that the loan and mortgage administration fees charged by CSAS in addition to interest were unfair, invalid, and disproportionately high, to the detriment of consumers within the meaning of European Directive 93/13/EEC on unfair terms in consumer contracts. OS TEST also relied on recent decisions of the German Federal Court holding that the fairness of a fee charged by a bank for the maintenance of a loan account was subject to review and subsequently declaring the fee in question unfair, since no corresponding services had been provided.

This was a case of first impression in the Czech Republic. Granting such wholesale claims would have had an immediate and significant impact on CSAS. Based on Weil's defense, the Prague District Court dismissed all of OS TEST's claims and arguments in their entirety and held that the loan and mortgage administration fees are a valid part of the agreements between CSAS and its clients. The court also upheld specific CSAS fees, confirming that by charging them, CSAS is not in violation of any applicable law or regulation. The court also emphasized that OS TEST cannot conclusively rely on decisions of the German Federal Court in cases before Czech courts. Given existing differences in Czech and German law on consumer protection, the court concluded, the freedom of parties to enter into contracts must always be respected when applying European Directive 93/13/EEC.

Date: December 3, 2013

Case & Venue: No. 56 C 102/2013 (District Court for Prague 4, Prague, Czech Republic)

Weil Team: Partners Karel Muzikar, Karel Drevinek, and Roman Vojta and associate Jan Urbanec in Prague

Weil named a "Leading" Firm for "Dispute Resolution" in the Czech Republic

– Chambers Global 2014

a major

victory

in what may be
the largest case on the
EEOC's active docket

Sterling Jewelers Inc.

In March 2014, Weil, along with co-counsel Seyfarth Shaw LLP, secured a major victory for longtime client Sterling Jewelers Inc. in litigation initiated by the Equal Employment Opportunity Commission (EEOC). Among cases currently on the EEOC's active docket, the Sterling matter is believed to be the largest.

Adopting a January 2, 2014 Report, Recommendation and Order by the magistrate judge, the US District Court for the Western District of New York granted Sterling's motion for summary judgment and dismissed with prejudice the EEOC's pending nationwide pattern or practice lawsuit against the company. The EEOC's suit, initiated in 2008, alleged that Sterling discriminated against its female employees in pay and/or promotion, based on their sex. Following discovery, Sterling moved for summary judgment on the basis that the EEOC had not complied with its Title VII pre-suit obligation to conduct a nationwide investigation of Sterling's employment practices.

In his Report, the magistrate judge rejected the EEOC's contention that a court may not inquire into the scope of the EEOC's pre-suit investigation. The magistrate judge also agreed with Sterling's position that the EEOC had produced no evidence that it had conducted a nationwide investigation before commencing litigation. The Report cited two main reasons for this conclusion. The first was that the EEOC's alleged review of the purported charges did not satisfy the EEOC's pre-suit obligation to conduct a nationwide investigation. The second was that the EEOC's receipt of nationwide statistical information from counsel for the charging parties, absent any evidence of an independent EEOC analysis, did not satisfy that obligation either. Indeed, the magistrate judge determined that "[w]here, as here, the EEOC completely abdicates its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief ... and dismiss the EEOC's Complaint." On March 10, 2014, the district court overruled the EEOC's objections to the Report and dismissed the EEOC's claim with prejudice.

This case establishes important precedent by reaffirming the EEOC's pre-suit statutory obligations under Title VII and underscoring the principle that courts are willing to examine the EEOC's compliance and hold the federal agency to its statutory obligations.

Date: March 10, 2014

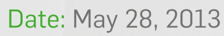
Case & Venue: *Equal Employment Opportunity Commission v. Sterling Jewelers Inc.*, No. 08-cv-00706 (W.D.N.Y.)

Practice Group: Employment Litigation

Weil Team: Partner Jeffrey Klein and associate Celine Chan in New York

Weil named a "Leading" Firm for "Labor and Employment Litigation" in the US

– The Legal 500 USA 2013



Date: May 28, 2013

Case & Venue: *General Electric Co. v. Mitsubishi Heavy Industries, Ltd., et al.*, No. 3:10-cv-00276 (N.D. Tex.)

Practice Group: Patent Litigation

Weil Team: Partner David Lender in New York and associate Anish Desai in Washington, DC

General Electric Co.

In March 2012, Weil won a highly publicized $170 million jury verdict for General Electric Co. (GE) against Mitsubishi Heavy Industries, Ltd. After a seven-day trial, the jury ruled that Mitsubishi infringed a GE patent that covers technology vital to the operation of wind turbines. The jury's verdict, which also held that the patent-in-suit is valid, is an important victory for GE in its long-running multi-forum dispute with Mitsubishi over several patents related to wind-turbine technology, a multibillion-dollar US industry.

In May 2013, in the inequitable conduct portion of the proceedings, the court issued a decision denying Mitsubishi's inequitable conduct claim following several days of a bench trial. The court entered final judgment in favor of GE, awarding our client $166.75 million in lost profits and $3.45 million in reasonable royalty damages, plus prejudgment interest. *The American Lawyer* named partner David Lender as one of its "Litigators of the Week" for his role as co-lead trial counsel for GE.

Weil named a "Leading" Firm for "Patent Law" in the US

– US News – Best Lawyers "Best Law Firms" Ranking 2014

General Electric Co. and the GE Board of Directors

Weil successfully represented General Electric Co. and its board of directors in four shareholder derivative actions in federal and state courts arising out of the financial crisis of 2008. The actions asserted wrongdoing concerning GE earnings projections, GE's dividend, alleged unduly risky financial transactions involving GE's financial services subsidiaries, and alleged improper accounting practices and policies. The actions asserted claims for, among other things, breach of fiduciary duty, contribution and indemnification, abuse of control, gross mismanagement, waste, unjust enrichment, and insider trading.

In three cases before the US District Court for the Southern District of New York and two before the US Court of Appeals for the Second Circuit, Weil prevailed on behalf of GE and its directors, convincing the courts that the shareholder-plaintiff in each case lacked standing. In the *Stein* and *Bresalier* cases, GE shareholders alleged that a pre-suit demand on GE's board was not required, but the courts found that the shareholders lacked standing because they had not made a demand. In the *Lerner* case, a third shareholder made a demand, which GE's board refused. Both courts ruled that the demand she made had been refused in a manner protected by the business judgment rule.

Finally, in the *Kenney and Raul* case, two more shareholders made demands, which GE's board refused. Weil again prevailed, this time in the Commercial Division of the New York Supreme Court, New York County, convincing the court that the shareholders lacked standing because, as in the *Lerner* case, GE's board had refused their demands in a manner protected by the business judgment rule.

These six decisions make clear that the demand requirement will be enforced and will play an important role in shareholder litigation involving New York corporations – an issue on which reported case law is surprisingly sparse – just as it is enforced in cases involving Delaware corporations.

Dates: May 3, 2013; November 7, 2013

Case & Venue: *Bresalier v. Immelt, et al.*, No. 10-cv-4200 (S.D.N.Y.) (September 2011); *Stein v. Immelt, et al.*, No. 10-cv-1973 (S.D.N.Y.) (May 2011), *aff'd* No. 11-2236 (2d Cir.) (July 2012); *Lerner v. Immelt, et al.*, No. 10-cv-1807 (S.D.N.Y.) (September 2011 and June 2012), *aff'd* No. 12-2787 (2d Cir.) (May 2013); and *Kenney and Raul v. Immelt, et al.*, No. 650542/2012 (N.Y. Sup. Ct.) (November 2013)

Practice Group: Securities Litigation

Weil Team: Partners Greg Danilow and Stephen Radin and associate Evert Christensen in New York

Pro Bono Spotlight

Special Education Student and the New York Lawyers for the Public Interest

Date: January 7, 2014

Case & Venue: Representation of a special education student requiring a one-to-one nurse to attend school, New York City Department of Education, Impartial Hearing Office

Weil Team: Partner David Lender and associates Jared Friedmann and Alea Mitchell in New York

Weil, in partnership with the New York Lawyers for the Public Interest (NYLPI), secured a victory on behalf of a New York City special education student, following a multi-day hearing including testimony from five witnesses. The student, a non-verbal, 11-year-old boy diagnosed with diabetes, adrenal insufficiency, hypothyroidism, and Down syndrome, had been able to attend public school only when accompanied by a "one-to-one" nurse who monitored his condition and administered medications as necessary.

For the 2013-2014 school year, the New York City Department of Education (DOE) sought to replace this one-to-one nurse with a non-medically trained "health paraprofessional" coupled with the school's two nurses – directly contravening the recommendations of the student's doctors. Weil challenged this decision as one that would not allow the student to safely attend school and would force the student's parents to home-school him.

In a written decision, the impartial hearing officer held that the DOE failed to meet its burden of demonstrating that the proposed accommodations were reasonably calculated to enable the student to receive educational benefits and, further, that the parents had demonstrated that the DOE must provide the student with one-to-one nursing services for him to remain in school.

The case is representative of the many New York City special education matters that Weil has successfully handled over the last several years in partnership with NYLPI.

Houghton Mifflin Harcourt Publishing Co.

Weil successfully represented Houghton Mifflin Harcourt Publishing Co. (HMH) in a recent arbitration arising out of the 2008 sale of its college textbook business. The complainants, Larson Texts, Inc. and Ronald E. Larson (collectively, Larson), were the authors of assorted college mathematics textbooks that were transferred from HMH to Cengage Learning Inc. in the sale. Larson alleged that prior to the sale, HMH purposefully sold Larson textbooks to foreign customers "known to resell" books back into the United States through the "gray market" and that this influx of gray market books displaced legitimate domestic sales. The result, the complaint alleged, was to deprive Larson of the domestic royalties associated with those sales, as HMH's contracts with Larson provided different royalty structures for domestic and foreign sales.

Larson claimed that this increase in foreign sales violated the implied covenant of good faith and fair dealing inherent in every contract in Massachusetts and therefore also violated Massachusetts' Chapter 93A deceptive trade practices law. HMH argued that there were no efforts to inappropriately increase sales and that, even if such increased sales occurred, HMH was well within its rights under the applicable contracts because they gave HMH the right to sell the Larson textbooks "throughout the world" without any geographic or quantitative restrictions. The arbitrator ruled entirely for HMH, concluding that Larson failed to prove that HMH breached the covenant of good faith and fair dealing or that it violated Chapter 93A.

Date: September 20, 2013

Case & Venue: *In the Matter of Larson Texts, Inc. v. Houghton Mifflin Harcourt Publishing Company*, International Arbitration Tribunal of the International Centre for Dispute Resolution, Arbitration No. 50 143 T 00040 12

Practice Group: Complex Commercial Litigation

Weil Team: Partner David Lender and associate Jessica Costa in New York

Brigade Capital Management, LLC and Brigade Leveraged Capital Structures Fund Ltd.

Date: September 11, 2013

Case & Venue: *Brigade Leveraged Capital Structures Fund Ltd., et al. v. PIMCO Income Strategy Fund, et al.,* No. SJC-11289, Supreme Judicial Court (Mass.)

Practice Group: Securities Litigation

Weil Team: Partners Joseph Allerhand in New York and Patrick O'Toole, Jr., in Boston and associate Matthew Connors in New York

Weil represented Brigade Capital Management, LLC and Brigade Leveraged Capital Structures Fund Ltd. (Brigade) in their victory before the Supreme Judicial Court of Massachusetts over PIMCO Income Strategy Fund and PIMCO Income Strategy Fund II (together, the Funds).

The Funds are Massachusetts business trusts. From 2005 through 2010, the Funds held annual shareholders meetings to allow their shareholders to elect members of their boards of trustees in December of each calendar year. In November 2010, the Funds announced that their next annual meetings would take place in December 2011. Shortly thereafter, Brigade notified the Funds that it intended to nominate one of its partners for election as a preferred shares trustee at the December 2011 meeting. After learning of Brigade's intention to nominate a trustee, the Funds rescheduled their December 2011 annual meetings to July 31, 2012.

On December 1, 2011, Brigade filed a complaint in the Massachusetts Superior Court for Suffolk County seeking declaratory relief, injunctive relief, and specific performance against the Funds on the grounds that they had violated their bylaws by impermissibly delaying the annual meetings of shareholders. The parties filed cross-motions for summary judgment. After a hearing, the Superior Court granted summary judgment to Brigade, declaring that the Funds had violated their bylaws when they postponed the annual meetings. The Superior Court ordered the Funds to "schedule, notice, and hold the annual shareholder meeting for the year 2011 as soon as practicable." The court also ordered the Funds to hold future annual meetings of shareholders within 12 months of each previous meeting. The Funds filed an appeal with the Massachusetts Appeals Court. The Supreme Judicial Court *sua sponte* transferred the matter from the Massachusetts Appeals Court to itself. After oral argument, the Supreme Judicial Court unanimously affirmed the Superior Court's decision. In its decision, the Supreme Judicial Court explained that "[t]he right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership," and that delaying such an election "diminishes electoral rights by allowing these trustees to become deeply entrenched and to continue to harm the interests of the shareholders."

Weil named a "Leading" Firm for "Securities" Litigation in the US

– Benchmark Litigation 2014

Credit Suisse

Weil achieved a significant victory for Credit Suisse in September 2013, defeating a motion for class certification in the US District Court for the District of Idaho. The plaintiffs are purchasers of properties at luxury resort developments in Idaho, Montana, Nevada, and the Bahamas; Credit Suisse was the agent bank for syndicated loans to developers of the resorts. The plaintiffs allege that Credit Suisse and co-defendant Cushman & Wakefield caused homeowners to lose their resort amenities by virtue of loans in excess of the resorts' values, supported by inflated appraisals, that the developers were unable to repay. The plaintiffs moved the court to certify a class of 3,000 homeowners with themselves as representatives and sought $8 billion in actual damages in addition to punitive damages. On behalf of Credit Suisse, Weil opposed class certification. Earlier, ruling on motions to dismiss filed by Weil on behalf of Credit Suisse and by Cushman's counsel, the court dismissed most of the plaintiffs' claims.

In September 2013, the court denied the motion for certification, accepting the recommendation of the magistrate judge. The court concluded, among other things, that a class action was not superior to other methods for adjudicating the dispute and that class issues did not predominate over individual issues. The case will continue with the named individual plaintiffs asserting for themselves, and not for a supposed class, the claims that have not been dismissed by the court. Weil anticipates filing one or more further dispositive motions.

Date: September 24, 2013

Case & Venue: *Gibson, et al. v. Credit Suisse Securities USA LLC, et al.*, No. 1:10-cv-00001 (D. Idaho)

Practice Group: Complex Commercial Litigation

Weil Team: Partners David Lender in New York and Ray Guy in Dallas and associates Kevin Meade and Jennifer Oliver in New York and John O'Connor, Olivia Miller, Jason Wright, Sandra Fusco, and Matthew Leung in Dallas

Weil named a "Leading" Firm for "General Commercial" Litigation in the US

– Benchmark Litigation 2014

included

17

multibillion-dollar LBOs

and

10

multibillion-dollar buyouts

Providence Equity Partners and Thomas H. Lee Partners

After more than five years of litigation, two separate Weil teams achieved impressive victories on behalf of Providence Equity Partners and Thomas H. Lee Partners (THL) in a much-publicized, nationwide federal antitrust class action. In the summer of 2013, the US District Court for the District of Massachusetts ordered the complete dismissal of all claims against Providence and THL.

The litigation began in December 2007 on behalf of a putative class consisting of all shareholders who sold securities in a number of large leveraged buyouts (LBOs) occurring from 2003 to 2007. The plaintiffs initially sought injunctive relief on behalf of shareholders in every publicly traded company in the US, as well as treble damages on behalf of shareholders who sold their shares to defendants in specific "club" LBO deals. The lawsuit ultimately included 17 multibillion-dollar LBOs of public companies and 10 multibillion-dollar buyouts of other companies. Five complaints were filed over the course of the litigation, and they generally alleged that Providence, THL, ten of the other largest private equity firms in the world, and several of the world's largest investment banks engaged in a broad-ranging, industry-wide antitrust conspiracy facilitated by the formation and use of bidding "clubs." Through them, the class plaintiffs alleged, the defendants conspired to allocate the market for, and to artificially fix the share prices paid to shareholders in, each of these multibillion-dollar "club" buyouts in violation of Section 1 of the Sherman Act. The plaintiffs claimed damages in the billions of dollars – before trebling, which they asserted they were entitled to under the antitrust laws – on the theory that the amounts paid to shareholders in the buyouts at issue had been artificially depressed.

Following the filing of an individual summary judgment motion by the Weil Providence team, the court dismissed all claims against Providence on July 18, 2013, ruling that the evidence failed to show Providence's connection to any of the plaintiffs' numerous alleged conspiracies. Just over a month later, on August 29, 2013, the Weil THL team achieved a remarkable result: The team persuaded the court to grant reconsideration of THL's individual motion for summary judgment, and the court then reversed itself, dismissing the complaint against THL even after previously denying summary judgment for our client. The court ultimately accepted Weil's argument that there was absolutely no evidence that "tends to exclude the possibility" that either Providence or THL acted independently in each of the remaining LBOs at issue – something that is required to allow the case to go to a jury under the controlling legal standard articulated by the US Supreme Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Our clients were two of only a few defendants to be dismissed from the lengthy litigation at summary judgment. For numerous other defendants, the case is set to proceed through class certification, another round of summary judgment, and subsequent trial.

A putative class action complaint making similar allegations was filed in the US District Court for the Southern District of New York in 2006, and a voluntary dismissal of that complaint was successfully negotiated in 2007.

Date: July 18, 2013 (Providence Equity Partners)

Case & Venue: *Dahl, et al. v. Bain Capital Partners, LLC, et al.*, No. 1:07-cv-12388 (D. Mass.)

Practice Group: Antitrust/ Competition

Weil Team: Partners Steven Newborn, Carrie Anderson, Jim Egan, Jr., and Jeff White and associates Alexis Brown-Reilly and Daniel Antalics in Washington, DC

Date: August 29, 2013 (Thomas H. Lee Partners)

Case & Venue: *Dahl, et al. v. Bain Capital Partners, LLC, et al.*, No. 1:07-cv-12388 (D. Mass.)

Practice Groups: Antitrust/ Competition, Complex Commercial Litigation

Weil Team: Partners James Quinn, David Fertig, and Eric Hochstadt in New York and Patrick O'Toole, Jr., in Boston and associates Reed Collins, Kevin Meade, Melissa Whitney, Alison Bain-Lucey, Joseph Adamson, and Luna Ngan in New York

Weil named a "Leading" Firm for "Competition/Antitrust" in the US

– Chambers Global 2013

Panasonic Corp.

Date: July 2, 2013

Case & Venue: *Innovus Prime LLC v. Panasonic Corporation, et al.*, No. 5:12-cv-00660 (N.D. Cal.)

Practice Groups: Antitrust/ Competition, Complex Commercial Litigation

Weil Team: Partners David Yohai and Adam Hemlock in New York, Christopher Cox in Silicon Valley, and Jamie Maples and Hannah Field-Lowes in London and associate Jodi Barrow in New York

Weil won a significant victory for long-standing clients Panasonic Corporation and Panasonic Corporation of North America (Panasonic) on July 2, 2013, when the US District Court for the Northern District of California granted Panasonic's motion for summary judgment against Innovus Prime, LLC (Innovus) on all of its claims. Panasonic defended the case based on a 30-year-old cross-license agreement with Philips in which the two electronics companies agreed not to assert patent claims against each other generally in the field of "audio and video" products. The court rejected Innovus' claims that Panasonic infringed US Patent No. 5,280,350 (the '350 patent) relating to high-definition TVs, including Viera TVs, one of Panasonic's biggest-selling products. The court held that the agreement between Panasonic and Philips, the original owner of the '350 patent, provided Panasonic with the equivalent of a license to practice the patent and accordingly that "Innovus d[id] not possess the right to sue Panasonic for infringement of the '350 Patent."

Innovus, which obtained rights relating to the '350 patent through an assignment in April 2011, alleged that Panasonic infringed the '350 patent and that Innovus could sue as a bona fide purchaser without knowledge of the original cross-license. The court disagreed with this contention. The plaintiff also attempted to make certain claims under English law relating to a subsequent agreement executed in 2007 that it argued affected this license. Attorneys in Weil's London office assisted the team with this portion of the briefing, and the district court rejected these contentions as well, finding that "[n]othing in the 2007 Agreement explicitly alters or is inconsistent with the scope of the rights defined in the 1982 Agreement." The court also reaffirmed well-established law that an assignee such as Innovus takes a patent subject to prior licenses.

CBS Corp. and Simon & Schuster, Inc.

Date: December 9, 2013

Case & Venue: *The Book House of Stuyvesant Plaza, Inc., et al. v. Amazon.com, Inc., et al.*, No. 13-cv-1111, (S.D.N.Y.)

Practice Groups: Complex Commercial Litigation, Antitrust/Competition

Weil Team: Partners James Quinn and Yehudah Buchweitz in New York and Jeff White in Washington, DC, and associate Joseph Adamson in New York

Weil achieved a significant victory for CBS Corporation's publishing division, Simon & Schuster, Inc. (S&S), in a putative antitrust class action filed by a group of independent bricks-and-mortar bookstores against S&S, other major e-book publishers, and Amazon.com. The bookstores made claims of unlawful agreements among the defendant publishers and Amazon in violation of the Sherman Antitrust Act. Ruling on motions to dismiss filed by S&S and the other defendants, the US District Court for the Southern District of New York found that the plaintiffs' complaint was insufficient to support their antitrust claims and dismissed it with prejudice.

In February 2013, the plaintiffs filed the complaint on behalf of a putative class of independent bricks-and-mortar bookstores that sell e-books, alleging that the defendant publishers, including S&S, entered into agreements with Amazon providing for the use of digital rights management (DRM) software, and that Amazon's DRM was purposely designed so that only e-books purchased from Amazon could be read on Amazon devices. The plaintiffs alleged that these restrictions favored Amazon unlawfully by creating an environment in which traditional independent bookstores could not sell e-books to Amazon Kindle owners. The bookstores specifically alleged that S&S and the other publishers "confirmed, affirmed, and/or condoned" the restrictive DRMs used by Amazon and thus unlawfully restrained trade in the alleged market in violation of federal antitrust laws.

In granting the motions to dismiss in December 2013, the court agreed with the defendants' argument that the complaint failed to show either that there was concerted action between the publishers and Amazon, or that any agreements constituted an unreasonable restraint of trade. Rather, the complaint only plausibly alleged an independent agreement between each publisher and Amazon to provide for DRM software to protect the publishers' copyrights.

The court also noted that the plaintiffs were not shut out from the e-book market and were able to sell e-books through an arrangement with another e-book distributor, Kobo. Thus, according to the court, the plaintiffs' complaint essentially argued that any agreement only affected the market for e-books on Amazon devices and apps, and the plaintiffs had not shown that to be a relevant product market.

The court also found that the plaintiffs had not offered enough support for their claim that the alleged e-book market was sufficiently distinct from the sale of print books. For instance, alleging that the publishers had market power in e-books based on their market share in print books, the court observed, undermined the plaintiffs' alleged distinction between print books and e-books.

Weil named a Media & Entertainment Practice Group of the Year in 2013

– Law360, December 2013

Former Independent Directors of Satyam

Date: January 2, 2013

Case & Venue: *In re Satyam Computer Services Ltd. Securities Litigation*, No. 09-MD-2027 (S.D.N.Y.)

Practice Group: Securities Litigation

Weil Team: Partners Irwin Warren and Miranda Schiller and associates Margarita Platkov, Evert Christensen, and Stacey Harkey in New York

On January 2, 2013, Weil obtained a significant victory on behalf of its clients, former independent directors of Satyam Computer Services Ltd., when the US District Court for the Southern District of New York dismissed all claims against them in a shareholder class action. Weil represented five of the seven former directors and has acted as lead counsel for all the defendant directors named in the suit.

The shareholder class action arose out of a massive, multi-year fraud, known as "India's Enron," in which senior management at Satyam, India's fourth-largest outsourcing firm, inflated the company's revenue, income, and cash balances by more than $1 billion. In their complaint, the class plaintiffs alleged that the former independent directors recklessly failed to prevent or discover this securities fraud. In 2011, Satyam and its auditor, PricewaterhouseCoopers LLP, agreed to pay $125 million and $25.5 million, respectively, to settle all claims filed by the US shareholders. The 2011 settlements did not include claims against the former directors.

Weil moved to dismiss the claims against the directors for failure to state a claim and also moved to dismiss certain plaintiffs' claims based on the US Supreme Court decision in *Morrison v. National Australian Bank, Ltd.*, defining the territorial reach of the US securities laws.

The court dismissed all claims against the former independent directors, holding that the plaintiffs failed to adequately plead fraud. To the contrary, the court stated that the assertions in the complaint "concern an intricate and well concealed fraud perpetrated by a very small group of insiders and only reinforce the inference" that the former board members "were themselves victims of the fraud."

In addition, claims against the former independent directors were dismissed pursuant to *Morrison*, which allows a claim under the US securities laws only if that claim arises out of the purchase of securities either on a US exchange or in another domestic transaction. Because Satyam's common stock was only traded in India, the court held, the plaintiffs could not bring claims based on the purchase of those securities. Likewise, the plaintiffs could not bring US securities claims based on the purchase of Satyam American Depository Shares (which are traded on the NYSE) under the Satyam stock option plan, because those purchases were directly from Satyam, and based on the terms of the option plan, employees should be deemed to have purchased these shares in India. The decision appears to be the first instance in which *Morrison* has been applied in connection with purchases made pursuant to foreign-issued employee stock plans. The plaintiffs did not appeal any aspect of the dismissal.

Weil recognized for obtaining the complete dismissal of securities law claims brought against the Outside Directors of Satyam Computer

– "Weil's Paper Trail to India Saves Satyam" – Law360, "How They Won It" feature, February 21, 2013

Brynwood Partners and SDBC Holdings, Inc. (Stella D'oro)

Weil won a major appellate victory for private equity client Brynwood Partners and one of its portfolio companies, SDBC Holdings, Inc., when the US Court of Appeals for the Second Circuit reversed a ruling against SDBC by the National Labor Relations Board (NLRB). The court concluded that SDBC (formerly Stella D'oro Biscuit Co., Inc.) had not engaged in unfair labor practices during collective bargaining negotiations with Local 50 of the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union.

While negotiating the renewal of a collective bargaining agreement with Local 50 in 2008, Stella D'oro, a manufacturer of baked goods, proposed wage and benefit reductions to the union following a 2007 operating loss. Local 50 requested financial documentation of the loss, and Stella D'oro made its 2007 Financial Statement available for review at multiple bargaining sessions, at the bakery, and at Weil's offices. A Local 50 representative initially agreed to the arrangement, but after speaking with counsel requested a photocopy of the document instead. Stella D'oro declined to provide a photocopy because of confidentiality concerns.

Stella D'oro explained during negotiations that while its owner, Brynwood Partners, was prepared to make significant investments in the company, Stella D'oro needed to lower its cost structure. The parties were unable to come to an agreement, and Local 50 went on strike. In response, Stella D'oro unilaterally implemented elements of its last best bargaining proposal. When the Local 50 workers expressed their willingness to return to work under the terms of the old collective bargaining agreement, Stella D'oro refused.

Local 50 filed unfair labor practice charges against Stella D'oro under the National Labor Relations Act. Ruling in Local 50's favor, the NLRB administrative law judge determined that Stella D'oro sought to cut labor costs due to its "inability" to pay then-current wages, not because of its "unwillingness" to do so. Based on this critical distinction, the NLRB determined that Local 50 was entitled to a photocopy of the 2007 Financial Statement and that Stella D'oro's unilateral changes to the terms of employment and refusal to reinstate the union workers were unfair labor practices.

In a complete victory for our clients, the Second Circuit reversed on all counts. The court concluded that Stella D'oro was "unwilling," rather than "unable," to maintain or increase wage levels, citing ample evidence that Stella D'oro's parent, Brynwood, was willing to invest money in the bakery and prepared to fund losses, but was unwilling to do so without a change in cost structure. As a result, the court ruled, the 2007 Financial Statement lacked the required relevance to the bargaining, which did not hinge on the company's inability to pay, and Stella D'oro was not even obligated to present the document to the union. Even if it had been, the court ruled that the company offered to show it to the union in a reasonable manner. The local's demand for a copy of the document was "'a tactic to strengthen the union's hand in negotiations' and an attempt to bolster a possible unfair labor practices charge, rather than a good faith effort to obtain information relevant to bargaining." In addition, because Stella D'oro had acted lawfully with regard to the 2007 Financial Statement, the Second Circuit determined that Stella D'oro was entitled to unilaterally change the conditions of employment and to refuse to reinstate the Local 50 workers.

Date: March 28, 2013

Case & Venue: *SDBC Holdings, Inc., f/k/a/ Stella D'oro Biscuit Co., Inc. v. National Labor Relations Board.*, Nos. 10-3709 and 10-4230 (2d Cir.)

Practice Group: Employment Litigation

Weil Team: Partner Mark Jacoby and counsel Lawrence Baer in New York

Weil secured a major appellate victory for Marvel Entertainment LLC when the client "won a showdown … in its long-running dispute with the children of comic-book artist Jack Kirby over the copyrights to more than a dozen of its superheroes …

The Second U.S. Circuit Court of Appeals in New York found that Mr. Kirby's creation, along with Stan Lee, of characters such as the Incredible Hulk, the X-Men and the Fantastic Four was 'work for hire' under U.S. copyright law and, as a result Marvel owns the rights to those characters."

– The Wall Street Journal, "Judge Rules for Marvel in Comics Dispute," August 8, 2013

The Walt Disney Company and Marvel Entertainment, LLC

In a matter closely watched in the entertainment world, Weil, along with co-counsel Haynes & Boone LLP, represented Marvel Entertainment, LLC and several of its subsidiaries in their victory in the US Court of Appeals for the Second Circuit over the heirs of Jack Kirby, a noted comic book artist. The Kirby heirs, whose father had worked for Marvel during the late 1950s and early 1960s, when Marvel created many of its iconic comic book superheroes, claimed ownership rights in the copyrights under termination provisions of US copyright law to some of Marvel's most iconic and enduring comic book characters. These included The Fantastic Four, The Incredible Hulk, Iron Man, The X-Men, Thor, and The Avengers. The appeals court held unanimously that the Kirby heirs could not avail themselves of such termination provisions because the works at issue had all been created for Marvel as "works made for hire."

After The Walt Disney Company announced a deal to purchase Marvel for $4.2 billion in 2009, the defendants served purported copyright termination notices on Marvel, Disney, and various other entities. They claimed that Kirby alone had "created" these and other classic Marvel comic book characters and that there existed a valid termination claim, since the works had not been created as works made for hire within the meaning of the governing 1909 Copyright Act. After a federal district court in New York ruled that Kirby's contributions were made, as a matter of law, as works for hire, thereby rendering the termination notices invalid, the Kirby heirs appealed to the Second Circuit.

In a closely followed opinion handed down on August 8, 2013, a unanimous panel of the Second Circuit rejected all of the Kirby heirs' arguments concerning copyright ownership. The court concurred with the district court in finding that the undisputed evidence established that the works at issue were created for Marvel as works made for hire as a matter of law. The Second Circuit also found that jurisdictional issues related to two of the four Kirby heirs being residents of California rather than New York did not prevent Marvel from bringing its action, and it affirmed the district court's summary judgment in Marvel's favor.

Date: August 8, 2013

Case & Venue: *Marvel Characters Inc., et al. v. Lisa R. Kirby, et al.*, No. 11-3333 (2d Cir.)

Practice Groups: Intellectual Property/Media, Complex Commercial Litigation

Weil Team: Partners James Quinn, R. Bruce Rich, Randi Singer, and Gregory Silbert and associates Sabrina Perelman and Jessica Costa in New York

The Walt Disney Company

Immediately following the Second Circuit decision in *Kirby*, Weil secured another important victory for The Walt Disney Company in a matter involving a copyright infringement claim based on many of the same characters at issue in *Kirby*. The claim arose from allegations that Stan Lee, former editor-in-chief at Marvel, transferred certain rights that he allegedly had in various Marvel iconic comic book stories and characters to Stan Lee Media Inc. (SLMI) in 1998. Accordingly, SLMI (an entity with which Mr. Lee is not associated) alleged that it is the rightful owner of the subject copyrights and that Disney's exploitation of such copyrights in motion pictures and related productions and merchandise constitutes infringement of SLMI's copyrights. In September 2013, a Colorado federal court granted Disney's motion to dismiss with prejudice.

Date: September 5, 2013

Case & Venue: *Stan Lee Media, Inc. v. The Walt Disney Co.*, No. 1:12-cv-02663 (D. Col.)

Practice Groups: Intellectual Property/Media, Complex Commercial Litigation

Weil Team: Partners James Quinn, R. Bruce Rich, and Randi Singer and associates Sabrina Perelman and Jessica Costa in New York

Weil named a "Leading" Firm for "Copyright Law" in the US

– US News – Best Lawyers "Best Law Firms" Ranking 2014

Date: October 3, 2013

Case & Venue: *In re Agnico-Eagle Mines Ltd. Securities Litigation*, No. 11-cv-07968 (S.D.N.Y.); No. 13-0511 (2d Cir.)

Practice Group: Securities Litigation

Weil Team: Partners Irwin Warren and Miranda Schiller and associates Evert Christensen and Stacey Harkey in New York

Agnico Eagle Mines Ltd.

Weil secured an important victory for Agnico Eagle Mines Ltd., a Canadian corporation, when the US Court of Appeals for the Second Circuit affirmed the judgment of a federal district court dismissing a securities fraud class action against the company and two of its executives. The US District Court for the Southern District of New York had granted Weil's motion to dismiss the complaint in January 2013, and the Second Circuit affirmed in October 2013.

The case arose after Agnico Eagle announced that it would cease mining at one of its most important gold mines because it had received expert advice indicating a risk of instability in the mine following two blasts that had been conducted there many months earlier. As a result of the shutdown, the company announced that it would write off its $260 million investment in the mine. Class actions were filed in Canada and New York, in which the plaintiffs alleged that the defendants fraudulently misrepresented or concealed the risk and scope of the damage arising from the blasts and the failure of remediation efforts, and that the announcement caused the company's market cap to decline by $2.2 billion.

Agreeing with the conclusions of the district court, the Second Circuit rejected all of the plaintiffs' claims. "Having conducted an independent and de novo review of the record," wrote the appellate panel, "we affirm the judgment of the district court substantially for the reasons articulated in its thorough opinion." The court "found the remainder of appellant's arguments ... to be without merit."

The district court had ruled that the company's disclosures were neither fraudulent nor reckless. Emphasizing that, as Weil had argued, the company and its executives were "entitled to devote a reasonable amount of time to investigation and remediation before disclosing an assessment of the ... situation," the court stated: "The facts alleged in [this] case most strongly support the inference that defendants reasonably weighed the level of risk entailed by available information and believed that it did not rise to the level ... they were obliged to disclose to the investing public" prior to the time that they made their disclosures. The Second Circuit's opinion therefore underscored that our clients had exercised reasonable judgment in the operation of the mine, in engaging in remediation and expert monitoring, and in announcing the closing of the mine when they did.

Weil named a "Leading" Firm for "Litigation: Securities" in New York

– Chambers USA 2013

StubHub, Inc.

Weil scored a complete dismissal of a putative class action alleging that StubHub had misled consumers about the authenticity and validity of tickets sold by third-party sellers on StubHub's website. In a decision issued on January 11, 2013, the US District Court for the Northern District of California rejected the plaintiff's six causes of action and granted StubHub's motion to dismiss the case in its entirety with prejudice.

The dispute arose from the plaintiff's alleged purchase of two tickets to a December 2011 San Francisco 49ers home football game against the Pittsburgh Steelers from a third-party seller on StubHub's website. The plaintiff claimed that though initially admitted to the game, she was later informed by security that her tickets were invalid and was removed from the stadium. She further alleged that after the game, she contacted StubHub and received a full refund for the price of the tickets and all service and delivery fees provided for in StubHub's FanProtect™ Guarantee.

The plaintiff filed suit in federal court early in 2012 on behalf of two putative classes alleging violations of four California laws – the state's ticket seller statute, unfair competition law, false advertising law, and consumer legal remedies act – as well as fraud, negligent misrepresentation, and breach of contract. The plaintiff's core allegation was her claim that StubHub makes misrepresentations on its website and charges a service fee, all of which allegedly mislead consumers into believing that all tickets sold on StubHub's website "will be authentic and valid for entry." The plaintiff sought various forms of monetary relief, including twice the amount of her ticket price under the ticket statute and recovery of her travel expenses to attend the game, as well as injunctive relief. Weil secured a dismissal without prejudice of her initial complaint on September 4, 2012.

The district court also dismissed the plaintiff's amended complaint, rejecting the claim under California's ticket seller statute because "StubHub is a virtual marketplace allowing users to purchase tickets from ... third-parties" and is "not a ticket seller." The district court dismissed the various consumer protection, fraud, and negligent misrepresentation claims because StubHub's website "makes clear" the terms of StubHub's FanProtect™ Guarantee, including the possibility of receiving invalid tickets, and discloses that, if a user receives invalid tickets from a third-party seller, then StubHub will try to secure comparable replacement tickets or issue a full refund. The district court further concluded there were no misrepresentations and no breach of contract because StubHub honored its FanProtect™ Guarantee by issuing a full refund.

Weil has successfully represented StubHub in several putative consumer class actions, including cases challenging the resale prices set by third-party sellers for tickets to Philadelphia Phillies and New York Yankees baseball games – each of which was also dismissed with prejudice at the pleading stage – and a case regarding tickets to a Hannah Montana concert that was dismissed on immunity grounds under Section 230 of the Communications Decency Act by the North Carolina Court of Appeals.

Date: January 11, 2013

Case & Venue: *Porras v. StubHub, Inc.*, No. 12-cv-01225 (N.D. Cal.)

Practice Groups: Complex Commercial Litigation, Antitrust/Competition

Weil Team: Partners David Lender and Eric Hochstadt in New York, and Christopher Cox in Silicon Valley and associates Kristen Murphy in Washington, DC, and Liani Kotcher in Silicon Valley

Pro Bono Spotlight

Gambian Immigrants

Date: November 5, 2013

Case & Venue: Gambian immigrant asylum case, New York Immigration Court

Weil Team: Partner Adam Hemlock and associates Matthew Howatt and Melanie Conroy in New York

A Gambian couple living with HIV/AIDS, ordered deported 17 years ago, was granted asylum to remain in the US. A Weil pro bono team represented the couple and was assisted by the HIV Law Project, the referring organization, and its supervising immigration attorney, Cristina Velez.

In addition to living with HIV/AIDS, the wife suffered female genital mutilation (FGM) in The Gambia, which is a basis for seeking asylum in the US. The couple feared a similar fate for their four daughters, who were born in the US, if they were forced to return to The Gambia.

When Weil was first brought on to the case in 2008, the couple was effectively ineligible for asylum relief due to the procedural posture of the case. The Weil team persuaded the US Immigration and Customs Enforcement's (ICE) Office of Chief Counsel to join its motion to the Board of Immigration Appeals to reopen the case, a significant victory in itself because it is the US Government's policy to join a motion "only under exceptional and compelling circumstances." The Board of Immigration Appeals granted the joint motion to reopen *sua sponte* and remanded the case to Immigration Court in New York.

In preparation for the hearing on the merits of the couple's case, the Weil team gathered evidence on The Gambia, FGM, and HIV/AIDS from healthcare providers and experts, and submitted pre-hearing briefs, affidavits, and exhibits. At the merits hearing, the team conducted direct and redirect examinations of the couple and defended them during ICE counsel's cross-examination.

On November 5, 2013, the Immigration Court granted the couple's asylum application, and ICE counsel waived the right to appeal. The granting of asylum provides the couple with a path to citizenship, allows them to remain in the US to receive the care they need to control their HIV/AIDS, and prevents the endangerment of their four US-born daughters.

West Publishing Corp.

Date: February 8, 2013

Case & Venue: *White, et al. v. West Publishing Corp., et al.*, No. 1:12-cv-0134 (S.D.N.Y.)

Practice Group: Intellectual Property/Media

Weil Team: Partners R. Bruce Rich and Benjamin Marks, counsel Jonathan Bloom, and associate John Gerba in New York

Weil achieved a significant victory for West Publishing Corp. (West) in a copyright infringement suit brought by Edward L. White P.C. against legal research providers West and Reed Elsevier, Inc., owner of LexisNexis. The plaintiff alleged that West, through its unit Westlaw, and LexisNexis infringed purported copyrights in two legal briefs that the plaintiff claims to have authored by including those documents in their respective legal research databases. On February 8, 2013, a judge in the US District Court for the Southern District of New York issued an order denying the plaintiff's summary judgment motion, granting the defendants' summary judgment motions, and indicating that an opinion explaining the court's reasoning would follow "in due course."

In February 2012, the plaintiff, along with a co-plaintiff, Kenneth Elan, brought this case as a putative class action seeking to represent a class that included both lawyers that had and had not registered copyrights in their works. West moved to dismiss any claims brought on behalf of authors of unregistered works, because copyright registration is a statutory prerequisite to bringing an action for infringement. The court granted this motion and dismissed all claims premised on unregistered works, including those brought by Mr. Elan. LexisNexis brought a similar motion, which was also granted.

Subsequent to the court's decision on the motions to dismiss, the remaining plaintiff formally withdrew any remaining class claims and decided to proceed solely on an individual claim for infringement of two works. Following discovery, the parties cross-moved for summary judgment. The court heard oral argument in November 2012 and issued its decision in our client's favor in February 2013.

A similar copyright infringement case against West was brought by David A. Heinlein in the US District Court for the District of Connecticut in 2012. Following the decision in *White*, Mr. Heinlein decided not to pursue his action further, and the case was dismissed with prejudice on February 15, 2013.

Weil named a "Leading" Firm for "Copyright" in the US

– The Legal 500 USA 2013

Elite Model Management Corp.

Date: May 12, 2014

Case & Venue: *Dajia Davenport v. Elite Model Management Corp.*, No. 13-cv-01061 (S.D.N.Y.)

Practice Group: Employment Litigation

Weil Team: Partner Gary Friedman and associates Daniel J. Venditti and Kendra Okposo in New York

Weil is representing Elite Model Management Corp. (Elite), one of the world's most renowned modeling agencies, in a nationwide collective and New York class action involving an issue of widespread importance in numerous industries across the country: whether unpaid interns are "non-employees" exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) and state labor laws. In advising Elite, Weil is at the forefront of firms providing representation in the recent proliferation of intern lawsuits, which have garnered significant media attention. The suit against Elite was one of the earliest of its kind, and there are now more than 20 similar lawsuits in various jurisdictions around the United States involving a multitude of industries.

Without filing a motion to dismiss, Weil persuaded the plaintiffs in the Elite intern lawsuit to voluntarily dismiss various causes of action alleging a variety of recordkeeping violations under the FLSA and New York law and to file an amended complaint that yielded strategically critical information at an early stage regarding, among other things, hours worked and task performed. That information was important to Elite's defense and litigation strategy, and usually is not disclosed by plaintiffs, if at all, until the discovery phase of the case. Armed with that information, Weil employed a novel litigation strategy, using the US Supreme Court decision last term in *Genesis Healthcare Corp. v. Symczyk* (April 2013) to its advantage. The innovative strategy led the plaintiffs' counsel to seek an early resolution of the case and resulted in a reversionary settlement that involved an extremely low settlement at the floor.

Micron Technology, Inc.

Weil helped to secure a victory in the US District Court for the District of Delaware for Micron Technology in its patent dispute with Rambus Inc. The case was the latest in the ongoing battle over Micron's alleged infringement of 12 Rambus patents dating back to 2000. Rambus asserted that all of Micron's synchronous DRAMs infringe Rambus' patents. In 2009, following a bench trial and post-trial briefing on the issues of Rambus' alleged spoliation of evidence and "unclean hands," the court held that Rambus had engaged in unlawful destruction of discoverable documents and that the patents-in-suit were unenforceable against Micron as a result. Rambus subsequently appealed, and the US Court of Appeals for the Federal Circuit affirmed the finding of spoliation, but vacated and remanded on the issue of remedy.

Considering the case on remand, the District of Delaware found that Rambus' destruction of documents was done in bad faith and caused prejudice to Micron and that the patents-in-suit are unenforceable against Micron. The court noted that the sanction was justified because Rambus' "destruction of evidence was of the worst type: intentional, widespread, advantage-seeking and concealed." This result is all the more important because a Micron competitor, Hynix, litigated this same issue in a different court, which refused to find the Rambus patents unenforceable.

Date: January 2, 2013

Case & Venue: *Micron Technology, Inc. v. Rambus Inc.*, No. 00-cv-00792 (D. Del.)

Practice Group: Patent Litigation

Weil Team: Partner Jared Bobrow in Silicon Valley

Weil named a "Leading" Firm for "Patent"

– IAM Patent 1000 – The World's Leading Patent Practitioners

to SESAC's licensing practices by local television stations

Meredith Corp., E.W. Scripps & Co., and Hoak Media LLC

On March 3, 2014, Weil obtained a major victory for groups of Meredith, Scripps, and Hoak local television stations as plaintiffs in their antitrust class action lawsuit against SESAC, one of three US music performing rights organizations (PROs). The US District Court for the Southern District of New York denied SESAC's motion for summary judgment, which gives the plaintiffs the right to a jury trial in this important antitrust lawsuit challenging SESAC's licensing practices.

This private antitrust class action was filed in late 2009 and alleges that SESAC has wielded its monopoly power over the copyrighted works in its repertory to extract supra-competitive licensing fees and deny television licensees any meaningful option to an all-or-nothing blanket license. Unlike SESAC, the other two PROs, ASCAP and BMI, are subject to consent decrees with the Antitrust Division of the US Department of Justice. Our clients challenged the anticompetitive conduct of SESAC and its affiliates as an unlawful restraint of trade and an unlawful monopoly, in violation of Sections 1 and 2 of the Sherman Antitrust Act. The Television Music License Committee, an industry trade association, is funding this suit on behalf of a putative class of nearly all local commercial television stations nationwide.

After more than four years of litigation and the completion of fact and expert discovery, SESAC's effort to prevent a trial was unsuccessful. In its decision, the court stated "that the record evidence is sufficient to support a verdict in plaintiff's favor." The plaintiffs are seeking treble damages for licensee fee overcharges since 2008, structural injunctive relief to prevent the continuation of SESAC's ongoing antitrust violations, and attorneys' fees and costs.

Date: March 3, 2014

Case & Venue: *Meredith Corp., et al. v. SESAC LLC, et al.*, No. 09-cv-9177 (S.D.N.Y.)

Practice Groups: Antitrust/Competition, Intellectual Property/Media, Complex Commercial Litigation

Weil Team: Partners Steven Reiss, R. Bruce Rich, Benjamin Marks, and Eric Hochstadt in New York and Carrie Anderson in Washington, DC, and associates Meaghan Thomas-Kennedy, Cheri Bessellieu, Jacob Ebin, Erick Flores, Kaj Rozga, and Wendy Fu in New York and Kristen Murphy in Washington, DC

Weil named a "Leading" Firm for "Antitrust Law" in the US

– US News – Best Lawyers "Best Law Firms" Ranking 2014

Farmers Insurance Exchange and Mid-Century Insurance Company

Date: November 18, 2013

Case & Venue: *Countryman, et al. v. Farmers, et al.*, No. 12-1456 (10th Cir.)

Practice Group: Complex Commercial Litigation

Weil Team: Partners David Yohai and John P. Mastando III and associates Jodi Barrow and Luna Ngan in New York

Weil secured a significant victory for Farmers Insurance Exchange and Mid-Century Insurance Company (Farmers) on November 18, 2013, when the US Court of Appeals for the Tenth Circuit affirmed the District Court of Colorado's decision dismissing breach-of-contract and related claims asserted in a putative class action. The plaintiff, Lawrence Countryman, had challenged a provision of Farmers' automobile insurance policies providing for medical payment (Med-pay) benefits for "reasonable and customary expense[s] for necessary medical services furnished within two years from the date of the accident." He alleged that the two-year time period violated Colorado's insurance statute, C.R.S. § 10-4-635, which as of 2009 requires car insurance policies to cover medical expenses arising from auto accidents, and Colorado public policy. Weil defended the case based on the statute's silence as to any required time limit, the legislative history underlying the statute, and clear Colorado case law establishing that an insurer "may impose any terms and conditions consistent with public policy which it may see fit."

The court agreed with Farmers that C.R.S. § 10-4-635 is silent as to any required time limitations and that "the legislature could have forbidden them expressly if it had chosen to do so." It found that the minimum of only $5,000 of coverage in Colorado's Med-pay statute and "the prioritization of payment to trauma care providers point to allowing time limits sufficient to cover trauma care services and leaving any remaining coverage amount for follow up medical care." Agreeing with Farmers' arguments, the court held that "[n]othing in the legislative history indicates that Med-pay was intended to provide coverage for indefinite care." The court further found that the two-year time period on Med-pay coverage was not inconsistent with any of Colorado's public policy goals.

Weil named a "Leading" Firm for "Insurance Law" in the US

– US News – Best Lawyers "Best Law Firms" Ranking 2014

Microsoft Corp.

Weil obtained an important victory for Microsoft Corp. on December 23, 2013, when the US District Court for the Western District of Washington granted summary judgment of noninfringement on claims by AllVoice Developments US, LLC. AllVoice alleged that Microsoft had infringed its patent on software that creates an interface between speech-recognition and word processing programs and that Microsoft Word and the Windows XP, Windows Vista, and Windows 7 operating systems infringed the asserted patent. The complaint sought an injunction and treble damages for alleged willful infringement.

AllVoice originally filed the complaint in 2009 in the Eastern District of Texas, claiming that Microsoft's accused products infringed US Patent No. 5,799,273 (the '273 patent), entitled "Automated proofreading using interface linking recognized words to their audio data while text is being changed." Weil filed a motion to transfer the case to the Western District of Washington, where Microsoft is headquartered, but the district court in Texas denied the transfer. The Weil team then petitioned the US Court of Appeals for the Federal Circuit, seeking a writ of mandamus ordering transfer of the case – a form of relief that is available only in "extraordinary situations." In a precedential opinion, the Federal Circuit ordered the transfer of the case on January 5, 2011. After the case was transferred, Weil successfully argued before the Washington district court that Microsoft's accused products do not employ several required features of the '273 patent, including "link data," "audio identifiers," and "selectively disabling" the speech-recognition engine to store audio messages. As a result, the court ruled in our client's favor, granting summary judgment of noninfringement.

Date: December 23, 2013

Case & Venue: *Allvoice Developments US, LLC v. Microsoft Corp.*, No. 2:10-cv-02102 (W.D. Wash.)

Practice Group: Patent Litigation

Weil Team: Partners David Lender in New York and Doug McClellan in Houston and associate Melissa Hotze in Houston

Weil named a "Highly Recommended" Firm for "Patent Contentious" in New York

– Managing Intellectual Property's IP Stars 2013

Pro Bono Spotlight

Hurricane Sandy Evacuees

Date: May 15, 2013

Case & Venue: *Sapp, et al. v. City of New York*, No. 450677/13 (N.Y. Sup. Ct.)

Weil Team: Partner Konrad Cailteux and associates Isabella Lacayo, Jesse Morris, and Emily Pincow in New York

A Weil pro bono team, in partnership with The Legal Aid Society, succeeded in halting an attempt by the City of New York to cut off hotel rental assistance payments to 488 households displaced by Superstorm Sandy. As a result of the suit, the City was required to continue the hotel payments for five additional months, sparing the households from imminent homelessness.

Weil and The Legal Aid Society obtained a temporary restraining order against the City on April 29, 2013, and the New York Supreme Court directed the City to continue to pay the hotel rental assistance for the evacuee households. The lawsuit maintained that the City created the hotel rental assistance program to provide shelter until permanent, safe, and sustainable housing was obtained for the evacuees, but that the City failed to provide the promised help in securing alternative housing. The City challenged the temporary restraining order, but after a hearing, the court ruled that the stay would remain in effect, requiring the City to continue payments. The court set a briefing schedule and hearing for Weil and The Legal Aid Society's request for a preliminary injunction. On May 15, 2013, the court granted a preliminary injunction in favor of the Sandy evacuees.

On September 27, 2013, the court vacated the order, finding that the City did not have budgeted funds to continue the program because the Federal Emergency Management Agency had agreed to reimburse the City for the program only through September. By this time, the majority of the evacuee households had successfully relocated to permanent housing. Of the approximately 100 households remaining in the program at the time the City terminated payments, most were in the process of securing permanent housing. With the number of households in hotels significantly reduced, a faith-based not-for-profit organization was able to step in and provide additional assistance to the remaining households.

Weil named to *National Law Journal*'s 2013 Pro Bono Hot List

> "One thousand Superstorm Sandy evacuees were facing eviction to the streets when Weil stepped in – in partnership with The Legal Aid Society – and forced government officials to let them stay put until they could get on their feet. If not for the swift work and brilliant lawyering of Konrad Cailteux and his team, these families would have lost whatever stability they had regained in the months after the storm and suffered another tragedy on top of their losses from the storm."
>
> – *Adriene L. Holder, Attorney in Charge, The Legal Aid Society, Civil Practice*

Elite Model Management Corp.

Date: September 12, 2013

Case & Venue: *Louisa Raske, et al. v. Elite Model Management Corporation, et al.*, No. 653619/2012 (N.Y. Sup. Ct.)

Practice Groups: Complex Commercial Litigation, Employment Litigation

Weil Team: Partners David Fertig and Gary Friedman and associate Pooja Viswanath in New York

Weil secured the dismissal with prejudice of a putative industry-wide class action lawsuit brought against Elite Model Management Corp. (Elite) and more than 20 other model management firms, such as Next, Wilhelmina, and Ford, as well as eight of the world's most prominent advertising agencies and their clients. The plaintiff, a former professional model, alleged that Elite and virtually every other model management firm in New York engaged in a "common," "systemic," and "willful" scheme to withhold funds properly payable to the models formerly under their management. The New York Supreme Court dismissed the action in its entirety on September 12, 2013, ruling that the plaintiff lacked standing to sue our client in a "representative" capacity and that the causes of action pled in the complaint were unsustainable as a matter of law.

The complaint was filed in mid-November 2012, purportedly on behalf of "all models who are, and have been, represented by New York modeling agencies over the course of at least the last ten years." The plaintiff claimed that, over at least the last ten years, Elite and other modeling agencies wrongfully continued to exercise powers of attorney on behalf of models no longer under their management, secretly negotiated and executed contracts with advertising agencies and clients for the continued, unauthorized use of such models' images, and concealed these facts, as well as the payments they allegedly received in respect of such usages, in order to unjustly enrich themselves. The complaint thus asserted claims for breach of contract, breach of fiduciary duty, fraud, conversion, and unjust enrichment against each of the defendant model management firms, and sought an accounting of the models' rightful share of the payments received by those firms as well as damages.

In addition, contending that the allegedly unauthorized use of the models' images violated the models' rights of privacy and publicity, the complaint asserted claims against eight renowned advertising agencies – such as McCann-Erickson and Ogilvy & Mather – and several of their marquee clients, such as L'Oréal and Revlon, for violation of Sections 50 and 51 of the New York Civil Rights Law.

On behalf of Elite, Weil immediately moved to dismiss the complaint, challenging both the plaintiff's standing to sue and the legal sufficiency of every claim asserted against Elite and the other model management firms. From the start Weil took the lead role among the defendants' counsel, many of whom filed virtually identical "me too" motions, and the Weil team successfully thwarted various efforts by the plaintiff, including one to file an amended complaint that would have added additional named plaintiffs in an effort to cure the standing problems identified in Elite's motion to dismiss. When the court instructed the defendants to name a single representative motion and a single law firm to present and argue the various motions to dismiss, the other model management defendants unanimously nominated both Elite's motion and Weil. Significantly, in dismissing the action, the court not only agreed that the original named plaintiff lacked standing but further accepted Weil's arguments that the causes of action pled in both the original complaint and the proposed amended complaint failed as a matter of law. The court therefore dismissed the plaintiff's original complaint as to *all* of the model management company defendants – and "with prejudice" as to Elite – and denied the plaintiff's request to file the proposed amended complaint.

MBIA Insurance

Weil obtained a significant victory for client MBIA on March 12, 2013, when the US District Court for the Southern District of New York granted summary judgment in favor of MBIA in an interpleader action brought by the trustee of a collateralized debt obligation (CDO) transaction.

The action was brought by U.S. Bank as the trustee of Cedarwoods CRE CDO II. The senior noteholder had asserted that three "events of default" had occurred, two based on alleged missed principal payments and the third based on an alleged "material adverse effect" on the secured noteholders, all as a result of alleged mistakes by the Collateral Manager. The senior noteholder claimed, among other things, that the Collateral Manager mistakenly failed to classify certain securities owned by the CDO as defaulted, resulting in a miscalculation of principal coverage ratios and a consequential failure by the CDO to make certain early principal payments to the senior noteholder. The senior noteholder asserted that these supposed events of default allowed it to direct the liquidation of the entire transaction at a time when the value of the CDO's investments would not return sufficient proceeds to pay off the more junior notes, including the note insured by MBIA. The Collateral Manager and MBIA disputed that any alleged events of default had occurred.

After fairly expedited fact and expert discovery, the court granted MBIA's motion for summary judgment and denied the senior noteholder's motion for summary judgment with respect to the first two alleged events of default. In holding that no such events of default had occurred, the court essentially enforced the intent of the parties as reflected in the overall contractual agreement. The court denied MBIA's motion for partial summary judgment on a limited issue with respect to the third alleged event of default, requiring further proceedings on that issue. The senior noteholder then stipulated to the dismissal of the claim relating to that third alleged event of default so as to allow for an immediate appeal to the US Court of Appeals for the Second Circuit. The senior noteholder recently withdrew such appeal (after briefing and on the eve of oral argument).

Date: March 12, 2013

Case & Venue: *U.S. Bank National Association v. Barclays Bank, PLC, et al.*, No. 11-cv-9199 (S.D.N.Y.)

Practice Groups: Securities Litigation, Structured Finance

Weil Team: Partners Richard Levine, Frank Nocco, and Robert Chiperfield and associates Layne Behrens, Adam Bookman, Ondrej Staviscak Diaz, Jay Park Jr., and Alexander Swartz in New York

“Dish Network Corp. suffered yet another setback in its licensing battle with ESPN ... when an appeals court shut the door on Dish’s claims that it overpaid by $56 million for rights to four ESPN-owned HD channels ... The ruling is a win for longtime ESPN counsel David Yohai of Weil, Gotshal & Manges [for whom] the case went perfectly.”

– The Am Law Litigation Daily, April 2, 2013

ESPN, Inc.

Date: April 2, 2013

Case & Venue: *EchoStar Satellite L.L.C. v. ESPN, Inc., et al.*, No. 9682 600282/08, 9684 (N.Y. Sup. Ct. App. Div. 1st Dept.)

Practice Group: Complex Commercial Litigation

Weil Team: Partners David Yohai, James Quinn, and Gregory Silbert and associates David Yolkut and John Gerba in New York

In a dispute with Dish worth more than $130 million, Weil secured a favorable ruling from the Appellate Division of the New York Supreme Court that upheld a 2011 state court jury verdict. The April 2013 victory followed Weil's separate federal court win on behalf of ESPN in February 2013 (see page 4).

Dish had first sought a preliminary injunction – going to court on one day's notice – to force several Disney affiliates, including ESPN, to provide Dish with four new high-definition (HD) networks at "no additional charge" under our clients' existing licensing agreements. Dish claimed that its existing agreements clearly gave it the rights to these channels. The Disney affiliates contended that these HD networks were new and valuable and that their prior agreements had not granted Dish the rights to them. The New York Supreme Court denied Dish's request for a preliminary injunction.

After being sued, our clients brought a counterclaim against Dish for its continuous late payments under its contracts with our clients – on which the court later awarded ESPN $65 million and affirmed in a separate appeal. At trial the jury found that Disney did not breach the agreements and that Dish was not entitled to any of the HD channels – a complete verdict for the defense. Dish's appeal rested on claims that one juror committed misconduct by taking notes at night, after having been instructed by the judge not to do so, and that the judge failed to appropriately answer a question posed by a jury member. The Appellate Division held that there was no evidence that the notes taken by the juror had improperly swayed any of the other jurors and no merit to the claim that the judge did not properly address a jury question.

Weil named a "Leading" Firm for "Litigation – Supreme Court and Appellate" in the US

– The Legal 500 USA 2013

Dates: February 8, 2013; December 6, 2013

Case & Venue: *U.S. v. Apple Inc., et al.*, No. 1:12-cv-02826 (S.D.N.Y.) and *In re: Electronic Books Antitrust Litigation*, No. 1:11-md-02293 (S.D.N.Y.)

Practice Groups: Complex Commercial Litigation, Antitrust/Competition

Weil Team: Partners James Quinn and Yehudah Buchweitz in New York and Jeff White in Washington, DC, and associate Joseph Adamson in New York

CBS Corp. and Simon & Schuster, Inc.

Weil has served as lead counsel to CBS Corporation's publishing division, Simon & Schuster, Inc. (S&S), in a series of investigations and private litigations regarding an alleged antitrust conspiracy to fix the prices of electronic books. The plaintiffs included the Antitrust Division of the US Department of Justice; the attorneys general of 49 states, the District of Columbia, and five US territories; and a putative nationwide class of electronic book consumers. The US District Court for the Southern District of New York gave final approval to a settlement agreement and entered final judgment against S&S in both the DOJ's civil antitrust case (September 2012) and the attorneys general *parens patriae* action (February 2013). In December 2013, the court gave final approval to a settlement agreement with a class of e-book purchasers from the state of Minnesota, resolving the remaining claims against S&S in these actions. Weil also represents S&S in a pending appeal before the US Court of Appeals for the Second Circuit regarding an injunction imposed on Apple in connection with the DOJ and plaintiff states actions against Apple in these matters.

Weil named "Highly Recommended" for "Government Antitrust" in the US

– Global Competition Review's 2013 GCR 100

Newegg Inc.

Weil secured a significant victory on behalf of Newegg Inc. on January 13, 2014, when the US Supreme Court left standing an appellate decision that had invalidated three e-commerce patents held by Soverain Software LLC and reversed a lower court patent infringement award. The Court denied Soverain's petition for a writ of *certiorari* to review a Federal Circuit ruling vacating a $2.5 million verdict against Newegg and invalidating as obvious the Soverain patents at issue.

This dispute centered on the validity of three US patents – numbers 5,715,314, 5,909,492, and 7,272,639 – that covered concepts including online shopping carts, Internet receipts, and product identifiers, among others. Following its acquisition of the patents at issue, Soverain filed patent infringement lawsuits against seven online retailers, including Newegg. All the online retailer-defendants except Newegg settled out of the suits, taking paid-up licenses to the patents at issue.

At trial, a jury in the US District Court for the Eastern District of Texas found that Newegg had infringed upon two of the three patents at issue ('314 and '492) and awarded damages in the amount of $2.5 million. The district court granted Soverain's motion for judgment as a matter of law with regard to the remaining patent ('639). Following the verdict, Newegg moved for judgment as a matter of law or for a new trial, arguing that the court's earlier removal of the obviousness issue constituted reversible error, but the motion was denied.

After the district court decision, Newegg retained Weil to join its legal team and appealed the decision to the US Court of Appeals for the Federal Circuit. In a unanimous decision reversing the district court ruling, the Federal Circuit in January 2013 found that all three patents at issue were invalid based on their obviousness and vacated the $2.5 million award for damages. The court explained: "The district court's conclusion that a *prima facie* case of obviousness was not met is not explained by the court or by Soverain, and does not accord with the record." In October 2013, Soverain filed a petition for a writ of *certiorari* in the Supreme Court. The Court denied that request in January 2014.

This decision has far-reaching implications, as Soverain had been awarded significant damages in other patent infringement cases concerning the three patents, including an $18 million verdict against Avon Products Inc. and Victoria's Secret Stores LLC. Weil's major appellate victory in this patent dispute on behalf of Newegg means that companies that had lost millions to Soverain at trial, including Avon and Victoria's Secret, are no longer required to pay those damages.

Date: January 13, 2014

Case & Venue: *Soverain Software LLC v. Newegg Inc.*, No. 11-1009 (Fed. Cir.), No. 13-477 (U.S. Supreme Court)

Practice Group: Patent Litigation

Weil Team: Partner Edward Reines and associate Chris Geyer in Silicon Valley

Weil named a "Leading" Firm for "Intellectual Property: Patent" in the US

– Chambers Global 2013

Date: May 21, 2013

Case & Venue: *Griffith Suisse Luxury Group v. eBay, Inc.*, No. 1-08-CV-124107 (Superior Court of California, County of Santa Clara)

Practice Group: Complex Commercial Litigation

Weil Team: Partner Christopher Cox in Silicon Valley and associates Jevechius Bernardoni and Bambo Obaro in Silicon Valley and Sabrina Perelman, Jessica Costa, and Robert Jerry in New York

eBay, Inc.

After nearly five years of litigation, Weil won an important victory for eBay, Inc. in a case involving the termination of sellers' accounts due to fraudulent activities.

In a complete endorsement of eBay's right under its User Agreement to protect its website from sellers' fraudulent activities, a California state trial court granted summary judgment in favor of the online marketplace. The court dismissed all claims against eBay brought by a former seller on the website, Griffith Suisse Luxury Group, after eBay suspended the seller amid reports that Griffith was infringing the intellectual property rights of numerous brand owners and for numerous other violations of the eBay User Agreement.

Granting eBay's motion, the court held that Griffith "was bound by the User Agreement at all times" and its suspension was in accord with that agreement. The court emphasized that various provisions of the User Agreement "make clear that eBay may indefinitely suspend or terminate a membership if it suspects or believes that a user has breached any portion of the User Agreement." The court added: "The complaints from intellectual property rights holders about Plaintiff's account as well as Plaintiff's violation of eBay policies were sufficient to establish such suspicion and belief and justify the indefinite suspension and/or termination of Plaintiff's account."

Weil named a "Leading" Firm for "Commercial Litigation" in the US

– US News – Best Lawyers "Best Law Firms" Ranking 2014

Aéropostale, Inc.

Weil secured a significant victory for Aéropostale, Inc. and the members of its board of directors when the New York Supreme Court dismissed a shareholder derivative suit claiming that the board had mismanaged the company and misled investors about the apparel retailer's growth prospects.

Shareholders alleged that when Aéropostale announced earnings projections, it knew or should have known, in part through inventory build-up, that those earnings projections could not be met. The shareholders alleged breaches of fiduciary duty by Aéropostale's board of directors, including a lack of internal controls at the company that permitted materially false and misleading information to be released and that led to a federal securities class action against the company. These alleged breaches of fiduciary duty, the complaint maintained, led to investor losses.

The court dismissed the suit on January 7, 2014, concluding that the plaintiff had failed to bring this issue before the board in a pre-suit demand that would have allowed the directors to make a business judgment concerning the wisdom of the suit. The court rejected the plaintiff's argument that most of the directors faced substantial liability in connection with the release of earnings information and would not have fairly considered a pre-suit demand.

Date: January 7, 2014

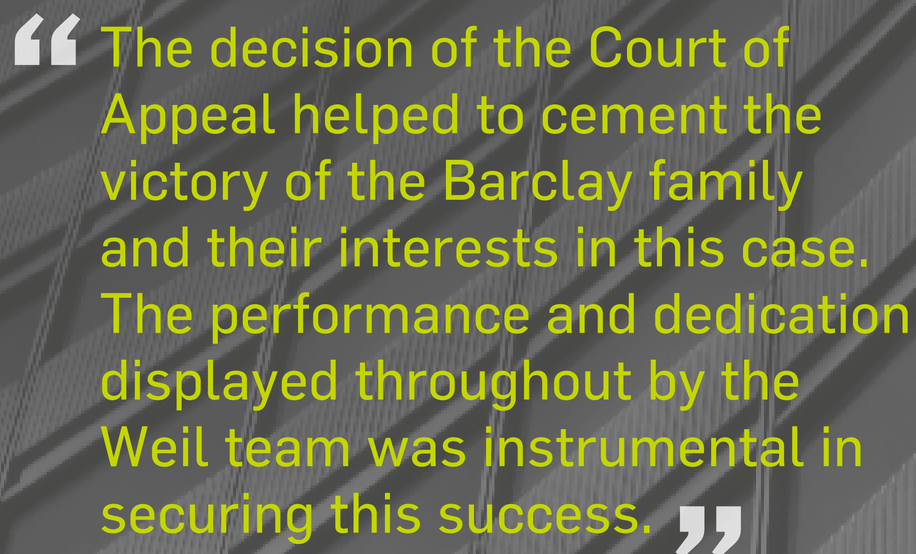
Case & Venue: *Bell v. Geiger, et al.*, No. 652931/2011 (N.Y. Sup. Ct.)

Practice Group: Securities Litigation

Weil Team: Partners Joseph Allerhand and Stephen Radin and associate Amy Suehnholz in New York

Weil named a "Leading" Firm for "Litigation – Securities" in New York

– US News – Best Lawyers "Best Law Firms" Ranking 2014



> The decision of the Court of Appeal helped to cement the victory of the Barclay family and their interests in this case. The performance and dedication displayed throughout by the Weil team was instrumental in securing this success.

– Richard Faber, Director of Ellerman Investments Limited

Misland (Cyprus) Investments Limited, Ellerman Corporation Limited, and B Overseas Limited

In one of the most significant and complex company cases in the English court in recent years and unquestionably one of the most high-profile, in July 2013 Weil's London Litigation team secured a victory in the Court of Appeal for companies associated with Sir David and Sir Frederick Barclay. The companies were respondents in the latest appeal in the hard-fought and highly complex unfair prejudice petition action brought by Irish developer Patrick McKillen. The multi-million-pound action, which consisted of three trials in the High Court (one of which lasted for 30 days), three appeals to the Court of Appeal, interim applications, a five-day pretrial review, and more than 90,000 documents produced in disclosure, concerned the ownership and control of the Maybourne Hotels Group, which owns iconic London hotels Claridge's, the Berkeley, and the Connaught. The complexity of the task faced was even greater because the trial was heard on an expedited basis. The case involved a total of 12 parties, including the Irish National Asset Management Agency; Weil represented six of the parties.

A High Court judgment handed down in August 2012 dismissed all of Mr. McKillen's claims as being without any basis in fact or law. Mr. McKillen appealed certain aspects of this decision to the Court of Appeal at a hearing in February 2013. In a comprehensive victory, the Court of Appeal, on July 3, 2013, decided unanimously in favor of the Barclay interests, and Mr. McKillen's appeal was dismissed.

A number of legal issues arose in this case resulting in judgments that are now the leading authorities on issues such as pre-emption rights, the obligations of directors, open justice when dealing with commercially sensitive issues, the limitations of contractual obligations of good faith, and a variety of litigation procedural matters.

Date: July 3, 2013

Case & Venue: *Patrick Gerard McKillen v. Misland (Cyprus) Investments Limited, Derek Quinlan, Ellerman Corporation Limited, B Overseas Limited, Richard Faber, Michael Seal, Rigel Mowatt and Coroin Limited* [2013] EWCA Civ 781, England/Court of Appeal

Weil Team: Partners Hannah Field-Lowes and Jamie Maples, associate Victoria Burton, and legal executive Christine Howard in London

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