

# LABOR AND EMPLOYMENT Update

Summer '07

## Editor's Notepad

This edition of our ALFA Labor & Employment Update is distributed to ALFA's support network. We strive to provide useful, timely, and informative articles that will assist you and your management team with your employee relations and human resources issues.

In May, ALFA's Labor & Employment Practice Group conducted an extremely successful and well attended seminar in Chicago, focusing on employment practices liability insurance. The presentations were excellent, primarily due to outstanding support and assistance from our client speakers. The interactive nature of the program, including several break-out sessions allowed those in attendance the opportunity to discuss practical solutions to the problems facing our international client base. Congratulations should be extended to our co-chairs, Chad Reis, of our St. Louis member firm, and Shaun Henry of our Harrisburg, Pennsylvania firm, for their excellent work in organizing and planning the seminar.

It's now time to place on your calendar our Group's next Labor & Employment seminar to be held October 3 through 5, 2007, at the Ritz Carlton Half Moon Bay Resort in Northern California. The program Chair, Michael Murphy of our Albany, New York member firm, has put together another excellent program with a phenomenal panel of client and ALFA member speakers. The program will be entitled "Employer of the Year" or "The Office": Which One Are You? and will again involve group and break out sessions to promote interaction among those in attendance. We will also be distributing the invaluable 50-state compendium of employment-related case law and statutes, as well as a federal case law compendium. This effort will be spearheaded by our compendia editor, Sarah Lamar of our Savannah, Georgia member firm.

We hope that you find our newsletter useful, but if at any time you want to stop receiving it, please let us know.



**James M. Peterson, Editor**  
HIGGS, FLETCHER & MACK, L.L.P.  
401 West A Street  
Suite 2600  
San Diego, California 92101-7913  
Tel: (619) 236-1551  
Fax: (619) 696-1410  
Email: peterson@higgslaw.com  
www.higgslaw.com

James M. Peterson is a partner with the San Diego ALFA International member firm of Higgs, Fletcher & Mack LLP. Mr. Peterson is the Chair Emeritus of ALFA International's Labor and Employment Practice Group. He currently serves as the Chair of Higgs, Fletcher & Mack's Business Litigation Department and the Labor and Employment Practice Group. He counsels and represents businesses of all sizes with respect to business issues and disputes with special emphasis on employment matters including protection of trade secrets and confidential information, wage and hour compliance, separations of employment, discrimination, retaliation and harassment. He obtained his JD/MBA from the University of Utah College of Law and Graduate School of Business and has extensive experience with class actions and administrative proceedings as well as complex litigation in both state and federal court.

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For more information call  
ALFA International at (312) 642-2532 or visit our  
web site at [www.alfainternational.com](http://www.alfainternational.com)



**William M. Trott, Assistant Editor**  
YOUNG MOORE AND HENDERSON, PA.  
3101 Glenwood Avenue  
Suite 200  
Raleigh, North Carolina 27612  
Tel: (919) 782-6860  
Fax: (919) 782-6753  
Email: wmt@ymh.com  
www.ymh.com

William M. Trott is a shareholder in Young Moore and Henderson, PA. in Raleigh, North Carolina. He received his A.B. and J.D. from the University of North Carolina and an LLM with highest honors from George Washington University. He has practiced labor and employment law for over 20 years and has been recognized by Business North Carolina as one of the "legal elite" in labor and employment.

# Punitive Damages, Philip Morris USA vs. Williams

By William M. Trott

YOUNG MOORE AND HENDERSON, PA.  
3101 Glenwood Avenue, Suite 200  
Raleigh, North Carolina 27612  
Tel: (919) 782-6860  
Fax: (919) 782-6753  
[wmt@ymh.com](mailto:wmt@ymh.com)  
[www.ymh.com](http://www.ymh.com)



William M. Trott is a shareholder in Young Moore and Henderson, PA. in Raleigh, North Carolina. He received his A.B. and J.D. from the University of North Carolina and an LLM with highest honors from George Washington University. He has practiced labor and employment law for over 20 years and has been recognized by Business North Carolina as one of the "legal elite" in labor and employment.

For a number of years the Supreme Court has been struggling to place limits on punitive damage awards in many contexts, including the employment context. Recently, the Court handed down another decision that may be of benefit to employers faced with claims of punitive damages. In *Philip Morris USA v. Williams*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1057 (Feb. 20, 2007) the Court held that a punitive damages award based in part on a jury's desire to punish a defendant for harming nonparties, amounts to a taking of property without due process. The Court stated that to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. The jury would be left to speculate, and the fundamental due process concerns over arbitrariness, uncertainty and lack of notice would be magnified. Justice Breyer wrote the majority opinion of the Court, in which Chief Justice Roberts, and Justices Kennedy, Souter and Alito joined.

The jury had found that defendant's cigarettes caused a death and awarded \$821,000.00 in compensatory damages and \$79.5 million in punitive damages. The Court vacated and remanded the case because jury instructions had not made it clear that the jury could not award punitive damages for harm to others. The Court quoted from the closing argument of plaintiff's attorney in which he told the jury to

"think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [i.e., Philip Morris] is one-third [i.e., one of every three killed]."

The Court emphasized its prior cases holding that the Constitution imposes limits both on the procedure for awarding punitive damages and on amounts that are "grossly excessive." In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court held that unless courts impose proper standards to "cabin" the jury's discretionary authority, punitive damages may deprive a defendant of fair notice of the severity of the penalty, may threaten arbitrary punishments and may impose one state's or one jury's policy choice upon neighboring states with different public policies. The Court in *Gore* emphasized the constitutional need for punitive damages awards to reflect (1) the "reprehensibility" of the defendant's conduct, (2) a "reasonable relationship" to the harm the plaintiff suffered, and (3) the presence (or absence) of sanctions for comparable conduct.

Then, in *State Farm Mutual Auto Ins. Co. v. Campbell*, 1538 U.S. 408 (2003), the Court held that a jury could not base a punitive damages award on acts dissimilar to those of a defendant. Otherwise, such punishment would involve a near standardless dimension to punitive damages that would implicate fundamental due process concerns over arbitrariness, uncertainty, and lack of notice. The Court in *State Farm* further noted the longstanding historical practice of setting punitive damages at two to four times the size of compensatory damages, and stated that such ratios, while not binding, are instructive. It emphasized that single-digit multipliers are more likely to comport with due process. In *Philip Morris*, however, even though the multiplier was huge, the Court declined to rule whether the punitive damage award was grossly excessive because of the likelihood of a new trial, limiting its holding to the nonparty aspect.

In holding in *Philip Morris* that due process clause prohibits inflicting punishment for harm to nonparties, the Court acknowledged that juries may consider such harm in determining the first *Gore* factor of reprehensibility. While a jury can hear evidence of harm to nonparties to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public and therefore was reprehensible, a jury may not go further and use a punitive damages verdict actually to punish a defendant for harm to those nonparties. This distinction raises the practical problem of how to know whether a jury impermissibly punished the defendant for causing injury to others, or permissibly took such conduct into account under the rubric of reprehensibility. The Court did not address exactly how to resolve this difficulty and left it for lower courts to work out

the issues, emphasizing that lower courts cannot employ procedures that create an unreasonable and unnecessary risk of confusion. Although lower courts have some flexibility in determining what kind of procedures to implement to protect against that risk, the Constitution obligates them to provide some form of protection where the risk of misunderstanding is a significant one.

In the specific context of lawsuits against employers, the Court has likewise given guidance as to punitive damages. In *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), the Court discussed the standards for awarding punitive damages in Title VII cases, noting that punitive damages are permissible only in a subset of intentional discrimination cases where there is a showing of malice or reckless indifference. The Court further discussed the vicarious liability issue of employers for the acts of their employees and stated that employers can escape liability where they have made good faith efforts to comply with Title VII. Taking actions to show such good faith – and preserving evidence of such actions – has therefore become essential to employers.

The prospect of punitive damages awards affects employers in many ways. An employer's willingness to settle cases and the amounts of such settlements are influenced by the long shadow of potentially ruinous punitive damages awards. The willingness of plaintiffs' attorneys to file suit often depends on the potential for such awards. The fear is greatest in actions for race discrimination under § 1981 and in actions under various state statutory and common law theories, where, unlike Title VII, caps are not applicable. (Title VII contains a sliding scale of caps on punitive and compensatory damages ranging from \$50,000 to \$300,000 depending on the number of employees.) *Philip Morris* may nevertheless assist large, target-defendant employers that constantly face numerous employment discrimination cases under Title VII. Defense counsel should be alert to incorporate the principles of *Philip Morris* into motions in limine, evidentiary objections at trial and jury instructions.

# Could “Staying Connected” Mean Staying On The Clock?

By Jerae Carlson

STRASBURGER & PRICE, L.L.P.  
1401 McKinney, Suite 2200  
Houston, Texas 77010  
Tel: (713) 951-5610  
[jerae.carlson@strasburger.com](mailto:jerae.carlson@strasburger.com)  
[www.strasburger.com](http://www.strasburger.com)



Jerae Carlson is a trial attorney who assists clients with respect to commercial litigation, including insurance coverage disputes, and employment litigation. Ms. Carlson has represented businesses and individuals in cases involving claims of minority shareholder oppression, breach of contract, breach of fiduciary duty, fraud, misrepresentation, discrimination, harassment, and retaliation. She represents employers as plaintiffs

in suits to enforce noncompete and nondisclosure agreements, as well as counsels and advises employers on a variety of employment issues.

Personal digital assistants (“PDAs”) enable us, like it or not, to stay connected with our clients, customers, colleagues, and employees from most any place and at most any time of the day. They can also provide us with quick access to valuable information. For these reasons, PDAs have become commonplace in workplaces across many industries. In fact, many employers now equip employees with PDAs, just as they do other tools of the trade. Other employers simply permit employees to use personal PDAs to perform work-related activities. These realities raise the issue of whether the employer may be required to compensate employees for work performed via PDAs when the employee would otherwise be considered “off the clock.” The answer to this question will depend on a variety of factors, including whether the employee is covered by the Fair Labor Standards Act (“FLSA”)<sup>1</sup> or a similar state law and the nature of the work performed on the PDA.

The FLSA regulates the national minimum hourly wage that covered, nonexempt employees must be paid, as well as the maximum number of hours those employees may work before becoming entitled to overtime compensation.<sup>2</sup> Generally, overtime compensation must be paid to an employee for each hour worked in excess of forty hours in

a workweek at a rate of not less than one and one-half times the employee’s regular rate of pay.<sup>3</sup> However, the FLSA contains exemptions from its overtime pay provisions for several types of employees, including “any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman” and employees in certain computer-related occupations.<sup>4</sup> In recent years, there has been an increase in actions instituted against employers to recover unpaid overtime compensation for classes of employees on the grounds that the employer misclassified them as exempt employees.

While it seems probable that many employees who are required or permitted to use PDAs during off-hours to stay connected to their jobs will meet an exemption for either “bona fide executive, administrative, or professional” employees or computer employees, it is increasingly likely that nonexempt employees will also be required or permitted to use PDAs as those devices become more prevalent across the national workforce. Moreover, the risk remains that some “exempt” PDA users will have been misclassified and thus, entitled to overtime compensation. The cost of noncompliance with the FLSA can be staggering.

In 2006, the Department of Labor’s Wage and Hour Division, which enforces the FLSA, recovered more than \$120.5 million in back wages for FLSA overtime violations.<sup>5</sup> That amount represented approximately 89 percent of all FLSA back wages collected and the number of employees due overtime back wages accounted for approximately 87 percent of all employees due back wages.<sup>6</sup> Federal regulations and the DOL caution:

It is the duty of management to exercise control and see that work is not performed if the employer does not want it to be performed. An employer cannot sit back and accept the benefits of an employee’s work without considering the time spent to be hours worked. Merely making a rule against such work is not enough. The employer has the power to enforce the rule and must make every effort to do so. Employees generally may not volunteer to perform work without the employer having to count the time as hours worked.<sup>7</sup>

At this time, there is no reported case addressing whether time spent off-the-clock on work-related activities performed via a PDA is compensable overtime under the FLSA. However, in evaluating whether any off-the-clock employment-related activity constitutes time worked for purposes of the FLSA, the following factors must be considered:

1. whether the employer controls or requires the hours spent in the particular activity;
2. whether the employee has any freedom to leave the premises during those hours;

3. whether the employer is aware of and approves of the activity;<sup>8</sup>
4. whether the activity is primarily for the employer’s benefit; and
5. whether the employee is free to engage in the employee’s own activities during the hours in question.

The determination of whether “time worked” is compensable requires a very fact specific inquiry. It would not seem that the device or medium used to perform the activity at issue should significantly impact the inquiry. However, to the extent an employer provides a PDA to its employee or reimburses an employee, in whole or in part, for use of a PDA, the employer could more likely be found to be “aware of and approve of the activity” and possibly to “control or require” the additional work. And as a practical matter, an employer who provides PDAs or permits their use to perform work-related activities probably considers the practice to be in the employer’s interest and for its benefit. In such situations, the work-related activity at issue could be found to be compensable.

All indications are that the use of PDAs will continue to increase and may do so at all levels of an organization. If you either require or permit employees to use PDAs in connection with their jobs beyond their normal workday, heed the warning. Be particularly mindful of how those employees are classified for purposes of the FLSA and consider instituting and enforcing company policies that either restrict the use of PDAs by non-exempt employees outside the workday or require those employees to properly report the time worked so that they can be paid. Alternatively, you might consider using employment contracts to define if, and to what extent, overtime work is permitted. No employment contract, however, can contravene the FLSA overtime provisions. In determining your approach, weigh the value and importance of additional work performed via PDAs (or any other medium) to your company against its projected cost to the company and potential liability exposure for FLSA violations.

<sup>1</sup> 29 U.S.C. §§ 201-219; 29 U.S.C. §§ 251-262.

<sup>2</sup> The current federal minimum wage is \$5.15 per hour. 29 U.S.C. § 206. The Texas minimum wage law incorporates the federal minimum wage. TEX. LABOR CODE ANN. § 62.051.

<sup>3</sup> 29 U.S.C. § 207(a).

<sup>4</sup> 29 U.S.C. §§ 213(a)(1), (17).

<sup>5</sup> 2006 Statistics Fact Sheet, *Wage and Hour Collects \$172 Million in Back Wages for over 246,000 Employees in Fiscal Year 2006*, <http://www.dol.gov/esa/whd/statistics/200631.htm>. A significant amount of the back wages collected were for workers in low-wage industries. It is unclear how much of the overtime back wages collected were due to misclassification of employees.

<sup>6</sup> *Id.*

<sup>7</sup> 29 C.F.R. §§ 785.13, 778.316; *elaws Advisors, FLSA Hours Worked Advisor* at <http://www.dol.gov/elaws/esa/flsa/hoursworked/screen1d.asp>

<sup>8</sup> Work that is not requested by the employer, but is “suffered or permitted” by the employer is work time, even if performed away from the employer’s premises, the jobsite, or at home. 29 C.F.R. §§ 778.223, 785.11, 785.12.

# Employers Must Use Care In Posting Job Requirements

By David W. Garland

SILLS, CUMMIS, EPSTEIN AND GROSS, P.C.  
One Riverfront Plaza  
Newark, NJ 07102  
Tel: (973) 643-7000  
Fax: (973) 643-6500  
[dgarland@sillscummis.com](mailto:dgarland@sillscummis.com)  
[www.sillscummis.com](http://www.sillscummis.com)



David W. Garland is a partner in the Newark, New Jersey firm of Silks, Cummis, Epstein and Gross, P.C. He received a B.A. from William and Mary and a J.D. from George Washington University. He devotes his practice to defending corporate clients and public entities in employment discrimination, wrongful discharge and other employment-related litigation including cases involving allegations of sexual

harassment, age, disability, gender, pregnancy, race, retaliation, and other discrimination. Mr. Garland has defended lawsuits in courts throughout the United States. In 1997, U.S. Business Litigation featured Mr. Garland as one of the country's leading employment litigators. Mr. Garland has published numerous articles on employment law in the United States and is a frequent lecturer on employment law. He is a member of the faculty of the American Law Institute—American Bar Association program on "Employment Discrimination Litigation in Federal and State Courts," and teaches at trial advocacy programs sponsored by the National Institute of Trial Advocacy.

It is not unusual for an employer to hire an individual for a position even though he or she does not possess every one of the posted required qualifications. A recent decision of the U.S. Court of Appeals for the Third Circuit, however, reveals that doing so may increase the employer's risk of liability for discrimination. In *Scheidemantle v. Slippery Rock University*, the court held that a plaintiff asserting a Title VII failure to promote or hire claim need not prove that he or she was qualified for the position where the employee selected for that position also lacked the required qualifications.

## The Facts

Judy Scheidemantle worked for Slippery Rock University ("Slippery Rock") as a labor foreman. In March 2003, Slippery Rock posted a vacancy for a locksmith position. The posting reflected that the candidates must have two years of locksmithing experience. Scheidemantle did not have that required ex-

perience, but she nevertheless applied for the position along with three male applicants who also did not possess the required two years' experience. Slippery Rock selected one of the male applicants, Calvin Rippey, who had more relevant experience than Scheidemantle.

Scheidemantle filed a claim with the Equal Employment Opportunity Commission ("EEOC") alleging age and gender discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and Pennsylvania state law. The EEOC dismissed the claims on the grounds that Scheidemantle could not substantiate her claims of discrimination because Slippery Rock had selected the candidate with the most relevant experience or training. Scheidemantle then filed a lawsuit in the district court.

Thereafter, in April 2004, Slippery Rock promoted Rippey, leaving the locksmith position vacant once again. When Slippery Rock posted the position, the posting reflected that three years' experience in locksmithing was required. Scheidemantle applied despite the fact that she again did not meet the experience qualification. On this occasion, Slippery Rock did not select an applicant to fill the position on a permanent basis, but instead informally assigned the job to another male employee, Bradley Winrader, who also did not meet the experience qualification.

Scheidemantle filed another complaint with the EEOC in October 2004, and the EEOC again dismissed the complaint. Scheidemantle then amended her federal court Complaint to assert age and gender discrimination claims against Slippery Rock for the 2004 failure to promote, and she also added a claim that the 2004 failure to promote was retaliation for her 2003 EEOC complaint.

## The District Court Decision

The district court granted Slippery Rock's motion for summary judgment and dismissed Scheidemantle's Complaint. The court concluded that because Scheidemantle was not qualified for the position according to the "objective criteria listed in the position announcements," she could not establish a prima facie case of discrimination under Title VII. Scheidemantle then appealed the dismissal of her gender discrimination claims to the Third Circuit.

## The Third Circuit Opinion

In its opinion reversing the decision of the district court, the Third Circuit identified two guiding principles. First, the court observed that "Title VII is a remedial statute, so it must be interpreted broadly." Second, the court concluded that "there is a low bar for establishing a prima facie case of employment discrimination."

The court explained that to establish a gender discrimination claim for failure to promote under Title VII, a plaintiff must satisfy the

three-step inquiry from the U.S. Supreme Court's decision in *McDonnell Douglas Corp. v. Green*. The court further explained that if a plaintiff successfully establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the failure to promote. If the employer articulates such a reason, the burden then shifts back to the plaintiff to demonstrate that the reason is merely a pretext for discrimination.

Slippery Rock argued that Scheidemantle did not satisfy the second prong of the prima facie case because she lacked the required objective qualifications for the position in question (two or three years of experience). Scheidemantle argued that she was not required to meet the objective qualifications of the job postings because she was at least as qualified as the male employees who were selected for the positions.

In finding for Scheidemantle, the court began its analysis by looking at its 2005 decision in *Hugh v. Butler County Family YMCA* for guidance. In *Hugh*, the employer promoted a woman despite the fact that she lacked the objective posted qualifications for the job. When the employer subsequently terminated her employment and she sued for gender discrimination, the employer argued that she could not establish a prima facie case because she failed to establish that she was qualified for the job in question. The Third Circuit rejected that argument, holding instead that the employee's failure to meet the requirements under those circumstances did not preclude her from establishing a prima facie case because the fact that she had been promoted despite her lack of qualifications was sufficient to establish that she was "qualified" for the job in the employer's eyes.

Applying its holding in *Hugh*, the court observed in *Scheidemantle* that "Hugh stands for the proposition that, by departing from a job posting's objective criteria in making an employment decision, an employer establishes different qualifications against which an employee or applicant should be measured for the position." According to the court, "[i]f an employer could, with impunity, appeal to objective qualifications to defeat any female job applicant's challenge to its hire of an objectively unqualified male in her place, discrimination law would be reduced to bark with no bite."

The court then looked to the qualifications of the employees selected over Scheidemantle "to determine whether Slippery Rock created the inference that something other than the posted objective qualifications was sufficient" to qualify for the position. Because both of the candidates selected for the job lacked the objective qualifications listed in the job postings, the court determined "that something other than the

job postings' two or three years of locksmithing experience" had satisfied the experience requirement. The court found that "by departing from the objective requirements in its hiring decisions, Slippery Rock thereby established different qualifications by which Scheidemantle – as a protected applicant who suffered an adverse employment decision – met the qualifications prong and completed her prima facie case of discrimination." The court therefore reversed the judgment of the district court and remanded the case for further proceedings.

## Conclusion

As the Scheidemantle decision makes clear, employers must critically assess the qualifications which they identify in job postings. Employers should carefully analyze the position in question in terms of the qualifications needed, and should include in the official job posting only those qualifications which they intend to rely upon in making their selections. It is also of critical importance for employers to recognize that selecting a candidate who does not satisfy each of the listed requirements may result in a waiver of the defense in a subsequent lawsuit that the complaining employee was not "qualified" for the position in question, as the opinion in Scheidemantle can be read to support an inference that the employer did not pay credence to the posting requirements in its selection process.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

# Outsourcing & Transfer of Undertaking Protection of Employees (TUPE)

By Bruno Blanpain

Marx Van Ranst Vermeersch & Partners  
Tervurenlaan 270  
1150 Brussels  
Belgium  
Tel: +32/2/285.01.00  
Fax: +32/2/230.33.39  
[bruno.blanpain@mvvp.be](mailto:bruno.blanpain@mvvp.be)  
[www.mvvp.be](http://www.mvvp.be)



Bruno Blanpain is a lawyer in Brussels and he has specialized in Employment Law and Industrial Relations since 1984. He is a former president of the young bar association in Brussels, was a member of the Bar's board for 3 years, and was an alternate judge in the Brussels Labour Court for 11 years.

## Introduction

In the EU employees are protected against the transfer of their undertaking or the outsourcing of the activity in which they are involved.

## What Is TUPE?

Directive 2001/23/EC is a consolidation Directive consisting of Directive 77/187/EEC as amended by Directive 98/50/EC. The Directive is concerned with the protection of an employee's contract of employment in the circumstances of a transfer of an undertaking, when a fully functioning business is taken over as a going concern.

The 1977 Directive has been the subject of much litigation, both in the national courts and in the European Court of Justice. One of the areas of controversy in some Member States has been its applicability to outsourcing. There were problems with the meaning of what is a transfer of an undertaking. The 1998 Directive amended the 1977 one, partly with the intention of bringing it into accord with decisions of the European Court of Justice.

When TUPE applies the only difference as far as employees are concerned should be a change in their employer's identity. Their

terms and conditions remain exactly the same (except in relation to occupational pension rights) and their continuity of service is preserved).

## When Does TUPE Apply?

One of the most challenging aspects of TUPE is determining when the Regulations apply as there are no hard and fast rules as to when the Regulations apply and each case must be assessed on its facts.

Only an Employment Tribunal can determine definitively whether TUPE applies. The parties can assess all of the factors against the backdrop of the case law and take a view on the likelihood of TUPE applying.

TUPE applies where there is a legal transfer of a business, or a part of a business, as an economic entity (ie a fully functioning business). A decisive factor in establishing whether TUPE applies is whether the "entity" retains its identity after the transfer. "Entity" means an organised group of people and assets which are essential to the running of a long-term, stable, economic activity which has specific business objectives.

It is not possible for the parties to contract out of TUPE. The fact that the new contractor already has sufficient staff to undertake the work without needing additional staff is irrelevant, as are the financial implications of TUPE applying.

## The Application Of TUPE In Outsourcing Situations:

TUPE can apply to first and subsequent generation outsourcings. In a re-tendering situation the fact that there is no privity of contract between the outgoing and incoming contractors does not prevent TUPE from applying;

TUPE can also apply when a customer brings the provision of outsourced services back in-house;

TUPE may not apply if the undertaking is not readily identifiable e.g. it is spread over a number of departments and is an ancillary part of a wider function;

It is not necessary for any or a significant number of assets to transfer for TUPE to apply e.g. in labour intensive undertakings.

The Courts have taken a multi-factorial approach to determine whether an entity is transferred in that all the factors involved in the transfer need to be considered<sup>1</sup>:

- The type of the undertaking or business;

<sup>1</sup> ECJ, 24 January 2002, Case 51/00 Temco /v. Service Industries SA v Samir Imzilyen and Others

- Whether or not tangible assets such as buildings and movable property are transferred;
- The value of intangible assets at the time of transfer;
- Whether or not the majority of employees are taken over by the new employer;
- Whether or not the customers are transferred;
- The degree of similarity between the activities carried on before and after the transfer;
- The period, if any, for which those activities were suspended.

All of these factors will be taken “in the round” in order to determine whether TUPE applies.

### Public Sector Outsourcings

The EU Directive applies to all contracting-out exercises with the public sector, for both first and subsequent generation transfers. It provides that contracting-out exercises should be conducted on the basis that the staff will transfer and TUPE applies unless there are genuinely exceptional reasons to the contrary.

### Effect of TUPE

Where TUPE applies those employees who are assigned wholly or mainly to the undertaking which is transferring (ie to the services) will transfer to the contractor on their existing terms and conditions (save in relation to occupational pension rights). This includes those employees who are absent from work immediately prior to the transfer due to holiday, sickness, maternity, paternity or parental leave. Employees' continuity of service will be preserved following the transfer.

All pre-transfer liabilities in relation to the employees (except in relation to occupational pensions and criminal liability) transfer to the new contractor.

Employees can object to the transfer of their employment. If they do in most EU member states their employment will come to an end at the point of transfer and they will not be entitled to notice pay or a redundancy payment.

Any dismissals which take effect before or after the transfer and are “transfer connected” will be automatically unfair, unless the employer can show that there is an “economic, technical or organisational reason entailing changes in the workforce” (“ETO”). An example would be where the new contrac-

tor intends to provide the services from a different location many miles from where the employees are currently based - any redundancies due to the change in location would be potentially fair (provided it went through a fair redundancy process).

### Consultation With Staff

Where TUPE applies there is an obligation on the customer/outgoing contractor to carry out collective consultation with employee representatives “in good time before the transfer”. In most member states there is no fixed period in advance of the transfer for which the transferor must consult with the employee representatives.

The new contractor is obliged to communicate details of any “measures” which it proposes post-transfer as part of the pre-transfer collective consultation process. These might include a change to the pay roll date, the application of new employment policies or proposed redundancies post-transfer.

Where redundancies are contemplated post transfer there is a separate obligation to carry out collective consultation on the proposed redundancies if these redundancies qualify in that particular member state as a collective dismissal or mass lay-off.

Liability for failure to carry out TUPE consultation transfers to the new contractor and may give rise in certain member states to an additional indemnity or damages.

### “Offshoring” and TUPE

“Offshoring” is the operation of services outside the jurisdiction of the customer and is an increasingly common element in many outsourcing scenarios, particularly to India, Sri Lanka and Eastern Europe.

Although Directive 2001/23 is only applicable to transfers within the remit of the EU, some member states have implemented TUPE to apply to offshoring scenarios, and theoretically the relevant obligations may transfer to the new contractor. This means that in reality employees can insist on transferring to the new operation overseas and it would be very difficult to enforce this liability against the transferee.

The key issue for the customer at the end of a contract is usually the retention of key skills, and a stable workforce generally, in the lead-up to termination, and post-termination in the hands of a new contractor (or, if the work is taken in-house, the customer). The customer cannot rely on TUPE to ensure that it, or a successor contractor, receives the bulk of assigned employees. The parties, for example, may agree a secondment arrangement whereby overseas key staff will be seconded by the contractor to the customer and/or the

successor contractor for the period immediately following termination.

In any event, local labour law needs to be borne in mind at the time of termination, perhaps with indemnity protection to ensure that the customer does not get drawn into claims by the contractor's employees.

### Conclusion

The application of TUPE in relation to outsourcing is complex and guidance should always be obtained to determine whether TUPE applies in respect of a particular project as well as to ensure the customer is sufficiently protected in an outsourcing contract from potential liabilities created by the outsourcing (and offshoring). The customer will need to consider a range of HR issues relating to the outsourcing including:

- What are the services?
- How are staff currently organised - are they assigned wholly/mainly to the services?
- If the parties believe TUPE doesn't apply, on what basis have they come to this conclusion?
- Has due diligence been carried out to establish numbers of staff transferring?
- Are redundancies envisaged pre/post transfer?
- Is this a first or subsequent generation outsourcing?
- Is this a public sector outsourcing (first or subsequent generation)?
- Transitional arrangements - will there be a period of transition/knowledge transfer?
- Exit plan - what is proposed?
- If the services are to be provided offshore, will the transfer of responsibility offshore occur immediately post-transfer, or will there be a transition period?

# ALFA Newsletter Update

By Michael W. Hawkins  
& Daniel J. Greenberg

DINSMORE & SHOHL LLP  
255 East Fifth Street  
Suite 1900  
Cincinnati, OH 45202  
Tel: (513) 977-8200  
Fax: (513) 977-8141  
[michael.hawkins@dinslaw.com](mailto:michael.hawkins@dinslaw.com)  
[daniel.greenberg@dinslaw.com](mailto:daniel.greenberg@dinslaw.com)  
[www.dinslaw.com](http://www.dinslaw.com)



Mike Hawkins is a partner in the Labor & Employment practice group of Dinsmore & Shohl, LLP in Cincinnati, Ohio.



Dan Greenberg is an associate in Dinsmore's Labor & Employment practice group. Dinsmore's Labor & Employment practice group counsels employers on all aspects of employment-related matters.

On October 24, 2006, the U.S. Court of Appeals for the Sixth Cir-

cuit held that the inclusion of a "charge-filing waiver" provision in a severance agreement was not "in and of itself retaliatory." *Equal Employment Opportunity Commission v. Sundance Rehabilitation Corp.*, No. 04-4178, 2006 U.S. App. LEXIS 26278 (6th Cir. Oct. 24, 2006).

The Court's opinion reversed the decision of the district court, which had held that a ban on filing charges with the EEOC constituted facial retaliation in violation of the various federal anti-discrimination statutes. The release at issue contained a charge-filing waiver provision that read as follows: "Releasor on behalf of herself and other releasors expressly agrees that she will not institute, commence, prosecute or otherwise pursue any proceeding, action, complaint, claim or charge against the Company in any administrative forum whatsoever." One of the employees who was let go refused to sign the release and was, therefore, not given the severance. She thereafter filed a charge with the EEOC alleging, among other things, that the release "violates the Laws administered by the EEOC." In addition to holding that the

release was not facially retaliatory, the Court further held that that the refusal to pay severance under these circumstances does not, as a matter of law, constitute an adverse employment action. Accordingly, the EEOC could not make out a prima facie case of retaliation.

The Court's decision in *Sundance Rehabilitation* seemingly clears up the issue of charge-filing waivers in the 6<sup>th</sup> Circuit, but the issue remains murky across the country. On August 8, 2006, the U.S. District Court for the District of Maryland held that an employer's conditioning of the receipt of severance benefits on an employee's withdrawal of an EEOC discrimination charge constitutes unlawful retaliation. The Maryland District Court relied primarily on the Northern District of Ohio's decision in *Sundance Rehabilitation*, which, as described above, recently was reversed. Other Circuits have yet to address the issue and it remains to be seen whether the U.S. Supreme Court will resolve the issue.

## Sexual Harassment In The Workplace

**When Does Sexually Explicit Banter Directed To a Member of The Same Sex Support a Claim For Sexual Harassment?**

By James M. Peterson

HIGGS, FLETCHER & MACK, L.L.P.  
401 West A Street  
Suite 2600  
San Diego, CA 92101  
Tel: (619) 236-1551  
Fax: (619) 696-1410  
[peterston@higgslaw.com](mailto:peterston@higgslaw.com)  
[www.higgslaw.com](http://www.higgslaw.com)



James M. Peterson is the chair of Higgs, Fletcher & Mack LLP's Business Litigation Department and Labor and Employment Practice Group. He has practiced labor and employment law in San Diego since 1988, and counsels businesses of all size and all aspects of the employment relationship. Mr. Peterson also represents management in administrative claims and litigation in the employment area.

Claims for sexual harassment find their validity and basis in the anti-discrimination statutes under state and federal law. That is because courts have held that sexual harassment is a

form of gender discrimination. In California, the Fair Employment and Housing Act makes it an unlawful employment practice for an employer, "because of the . . . sex . . . of any person, . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." Calif. Gov. Code § 12940(a). Similarly, it is an unlawful employment practice for an employer, "because of . . . sex, . . . to harass an employee." *Id.* at subd. (j)(1). Under this statutory scheme, harassment "because of sex" includes sexual harassment and gender harassment . . ." *Id.* at subd. (j)(4) (C). According to regulations interpreting and implementing this statute, the prohibition against discrimination of employment "because of sex" is intended to guarantee that members of both sexes will enjoy equal employment benefits. Calif. Code Regs., Title 2, § 7290.6(b).

Like the Fair Employment and Housing Act, Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.) prohibits sexual harassment, making it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ."

In April of 2006, the California Supreme Court issued its decision in *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264. In the *Lyle* case, a former writer's assistant for the *Friends* television show sued producers and writers of the show for race and gender discrimination, racial and sexual harassment and retaliation. The trial court granted defendant's motion for summary judgment (dismissing the claims) but an intermediate court of appeal reversed the sexual harassment allegations. The California Supreme Court then reviewed the case and reversed and remanded the decision of the court of appeal, finding the plaintiff failed to establish a sexually objectionable work environment that was sufficiently severe and pervasive to support a hostile work environment sexual harassment claim. *Id.* In the decision, the California Supreme Court analyzed the United States Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201, and in particular its focus on what type of verbal or physical harassment, constitutes "discrimination because of sex." As the California Supreme Court explained: "This means a plaintiff in a sexual harassment suit must show the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of . . . sex,'" citing *Oncale*, supra, 523 U.S. at 81. In most of the cases analyzing this issue, the facts have involved members of the opposite gender being subjected to sexually explicit harassment and/or banter. The California Supreme Court summed it up as follows: "Accordingly, it is

the disparate treatment of an employee on the basis of sex -- not the mere discussion of sex or use of vulgar language -- that is the essence of a sexual harassment claim." Lyle, *supra*, at 280.

In *Singleton v. United States Gypsum Co.*, 140 Cal. App. 4th 1547 (2006) the California Court of Appeal in Los Angeles analyzed this guidance in the context of a sexual harassment claim by a male worker based on sexually-harassing comments directed at him by two male co workers. The case involved comments by two heterosexual male co-workers to another heterosexual male that "challenged his manhood." The trial court granted summary judgment for the employer finding that the comments were not "sexually suggestive" and not sufficiently severe to alter the terms and conditions of plaintiff's employment.

What is significant about the Singleton decision is the court's focus on whether the evidence showed that the alleged harassers treated plaintiff differently than they did women. The court held that since the alleged harassers had targeted Singleton's identity as a heterosexual male, "it is axiomatic that they would treat women 'differently,' i.e., not attack them for the same reason." The court then concluded that the harassment was "because of sex," i.e., "it employed attacks on plaintiff's identity as a heterosexual male as a tool of harassment".

The facts of the Singleton case warrant some explanation to place the impact of this decision in context. Singleton was hired by defendant United States Gypsum Company (USG) in the engineering department as a maintenance mechanic to repair production equipment. Singleton worked the graveyard shift and was the only mechanic on duty during the shift. Singleton was eventually terminated based on an employee report that he had stated "if we work on Christmas, he was going to come in here with a gun and shoot everybody except Sandy." Singleton was suspended by his supervisor prior to the termination, and on the same date of his suspension he submitted a written statement to USG accusing two co-workers of repeatedly calling him "sing-a-ling" which, according to plaintiff, was a reference to a homosexual character played by actor Bernie Mac in the movie "Life." Singleton also claimed that the co-workers made a series of other statements that constituted harassment based on sex which he generally described as "things that I would say challenge me as a man, for one thing." Plaintiff claimed that the co-workers made comments about him performing oral sex on his supervisor and other sexually-explicit comments "continuously, every night," and claimed this conduct was the only reason he was still employed by the company. The employees disputed the comments described by Singleton. The trial court granted summary judgment finding that the "undisputed evidence demonstrates

as a matter of law that none of the harassing behavior about which plaintiff complained is sex discrimination or sex harassment." The court found that while the behavior by the non supervisory employees was hostile and abusive, there was no triable issue of fact that the hostility or abuse was related to plaintiff's gender or sexual orientation and that it was thus not protected by California's Fair Employment and Housing Act.

The Court of Appeal reversed the trial court's decision and remanded the case back to the trial court. The court analyzed the California Supreme Court decision in *Lyle* and focused on whether the facts demonstrated that the vulgar comments by Singleton's co-workers were directed at him "because of his sex." The court spent a great deal of time analyzing the United States Supreme Court's decision in *Oncale*, *supra*, and quoted that portion of the opinion describing the factual and social context in which same-gender sexual harassment cases must be decided. The United States Supreme Court had cautioned that the courts must ensure that fact finders do not mistake ordinary socializing in the workplace -- such as male-on-male horseplay or intersexual flirtation -- for discriminatory "conditions of employment" . . . in same-sex (as in all) harassment cases. "That inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive; for example, if the coach smacks him on the buttocks as he heads onto the field -- even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a consolation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."

In analyzing this language, the Court of Appeal in *Singleton* held that the social context within which the employees acted, made it clear that what the two men intended to do was to harass Singleton. One employee was angry with Singleton for having reported him and for having spoken disparagingly of his skills. The other employee appeared to have been a follower. The court found that what took place between these three employees was not "male-on-male horseplay," but the acting out, on the part of the employees, of their anger and rage at Singleton. The court also placed great emphasis on the fact that the employer submitted no evidence that the employees treated women the same way they treated Singleton [in fact, there was no evidence that any women were present during the referenced conduct].

This case broadly expands the circumstances under which vulgar and sexually-explicit attacks by a male co-worker against another male co-worker can give rise to statutory

liability under California's Fair Employment and Housing Act and Title VII. There are many workplace environments where this type of banter is routinely prevalent and many believe it to lighten the atmosphere and expect it as a part of their environment. Obviously, such action cannot be tolerated -- and as part of any sexual harassment training program, the facts of the Singleton case will serve as a good lesson of how sexually-explicit comments directed to a same-sex co-worker are just as actionable as words directed to persons of the opposite sex. While those of us who defend management in labor and employment disputes may not agree with the Singleton facts and analysis unless and until the California Supreme Court deems otherwise, it is the most recent authority in California on this area.

# Directory of Member Firms

## ALABAMA

### BIRMINGHAM

Bradley Arant Rose & White LLP  
One Federal Place  
1819 Fifth Avenue North  
Birmingham, Alabama 35203  
Tel: (205) 521-8000  
Fax: (205) 521-8800  
www.bradleyarant.com

James P. Alexander  
[jalexander@bradleyarant.com](mailto:jalexander@bradleyarant.com)  
Jay D. St. Clair  
[jstclair@bradleyarant.com](mailto:jstclair@bradleyarant.com)  
Donald B. Sweeney, Jr.  
[dsweeney@bradleyarant.com](mailto:dsweeney@bradleyarant.com)

### HUNTSVILLE

Bradley Arant Rose & White LLP  
200 Clinton Avenue West  
Suite 900  
Huntsville, Alabama 35801-4900  
Tel: (256) 517-5100  
Fax: (256) 517-5200  
www.bradleyarant.com

Warne S. Heath  
[wheath@bradleyarant.com](mailto:wheath@bradleyarant.com)

### MOBILE

Bowron, Latta & Wasden, P.C.  
Colonial Bank Center, #400  
41 West I-65 Service Road North  
Mobile, Alabama 36608  
Tel: (251) 344-5151  
Fax: (251) 344-9696  
www.bowronlatta.com

H. William Wasden  
[hww@bowronlatta.com](mailto:hww@bowronlatta.com)

### MONTGOMERY

Bradley Arant Rose & White LLP  
Alabama Center for Commerce  
401 Adams Avenue, Suite 780  
Montgomery, Alabama 36104  
Tel: (334)-956-7608  
Fax: (334) 956-7808  
www.bradleyarant.com

Charles A. Stewart III  
[cstewart@bradleyarant.com](mailto:cstewart@bradleyarant.com)

## ARIZONA

### PHOENIX

Renaud Cook Drury Mesaros, PA  
Phelps Dodge Tower  
One North Central Avenue  
Suite 900  
Phoenix, Arizona 85004  
Tel: (602) 307-9900  
Fax: (602) 307-5853  
www.rcdmlaw.com

James L. Blair  
[jblair@rcdmlaw.com](mailto:jblair@rcdmlaw.com)  
William W. Drury, Jr.  
[wdrury@rcdmlaw.com](mailto:wdrury@rcdmlaw.com)

## ARKANSAS

### LITTLE ROCK

Wright, Lindsey & Jennings LLP  
200 West Capitol Avenue  
Suite 2300  
Little Rock, Arkansas 72201-3699  
Tel: (501) 371-0808  
Fax: (501) 376-9442  
www.wlj.com

Bettina Brownstein  
[bbrownstein@wlj.com](mailto:bbrownstein@wlj.com)  
John D. Davis  
[jddavis@wlj.com](mailto:jddavis@wlj.com)  
William Stuart Jackson  
[wjackson@wlj.com](mailto:wjackson@wlj.com)  
Michelle Kaemmerling  
[mkaemmerling@wlj.com](mailto:mkaemmerling@wlj.com)  
John G. Lile  
[jlile@wlj.com](mailto:jlile@wlj.com)  
P. Delanna Padilla  
[dpadilla@wlj.com](mailto:dpadilla@wlj.com)  
Troy Price  
[tprice@wlj.com](mailto:tprice@wlj.com)  
Judy Robinson Wilber  
[jwilber@wlj.com](mailto:jwilber@wlj.com)

## CALIFORNIA

### LOS ANGELES

Haight, Brown  
& Bonesteel, L.L.P.  
6080 Center Drive, Suite 800  
Los Angeles, California 90045-1574  
Tel: (310) 215-7100  
Fax: (310) 215-7300  
www.hbblaw.com

Kenneth G. Anderson  
[andersok@hbblaw.com](mailto:andersok@hbblaw.com)  
Margaret J. Grover  
[mgrover@hbblaw.com](mailto:mgrover@hbblaw.com)

## CALIFORNIA (CONT.)

### SAN DIEGO

Higgs, Fletcher & Mack, L.L.P.  
401 West "A" Street, Suite 2600  
San Diego, California 92101-7913  
Tel: (619) 236-1551  
Fax: (619) 696-1410  
www.higgslaw.com

Alexis S. Gutierrez  
[agutierrez@higgslaw.com](mailto:agutierrez@higgslaw.com)  
James M. Peterson  
[peterson@higgslaw.com](mailto:peterson@higgslaw.com)

### SANTA ANA

Haight, Brown  
& Bonesteel, L.L.P.  
5 Hutton Center Drive  
Santa Ana, California 92707  
Tel: 714-754-1100  
Fax: 714-754-0826  
www.hbblaw.com

Yvette C. Davis  
[ydavis@hbblaw.com](mailto:ydavis@hbblaw.com)

## COLORADO

### DENVER

Hall & Evans, L.L.C.  
1125 17th Street, Suite 600  
Denver, Colorado 80202-5800  
Tel: (303) 628-3300  
Fax: (303) 628-3368  
www.hallelevans.com

John E. Bolmer  
[bolmerj@hallelevans.com](mailto:bolmerj@hallelevans.com)  
Thomas Lyons  
[lyonst@hallelevans.com](mailto:lyonst@hallelevans.com)  
Andrew Ringel  
[ringela@hallelevans.com](mailto:ringela@hallelevans.com)

## CONNECTICUT

### WESTPORT

Halloran & Sage LLP  
315 Post Road West  
Westport, Connecticut 06880-4739  
Tel: (203) 227-2855  
Fax: (203) 227-6992  
www.halloran-sage.com

Stephen P. Fogerty  
[fogerty@halloran-sage.com](mailto:fogerty@halloran-sage.com)  
Thomas P. O'Dea, Jr.  
[odea@halloran-sage.com](mailto:odea@halloran-sage.com)

**FLORIDA****FORT LAUDERDALE**

Fowler White Burnett P A  
Bank of America Tower  
100 Southeast Third Avenue  
Suite 1100  
Fort Lauderdale, Florida 33394  
Tel: (954) 377-8100  
Fax: (954) 377-8101  
www.fowler-white.com

Christopher E. Knight  
[cknight@fowler-white.com](mailto:cknight@fowler-white.com)

**JACKSONVILLE**

Taylor, Day, Currie, Boyd  
& Johnson  
Bank of America Tower  
50 North Laura Street  
Suite 3500  
Jacksonville, Florida 32202  
Tel: (904) 356-0700  
Fax: (904) 356-3224  
www.tdclaw.com

Bradley Johnson  
[brj@tdclaw.com](mailto:brj@tdclaw.com)

**MIAMI**

Fowler White Burnett P A  
Espirito Santo Plaza  
1395 Brickell Avenue, 14th Floor  
Miami, Florida 33131  
Tel: (305) 789-9200  
Fax: (305) 789-9201  
www.fowler-white.com

Elizabeth P. Johnson  
[ejohnson@fowler-white.com](mailto:ejohnson@fowler-white.com)  
Christopher E. Knight  
[cknight@fowler-white.com](mailto:cknight@fowler-white.com)

**PENSACOLA / MOBILE**

Bowron, Latta & Wasden, P.C.  
Colonial Bank Centre  
Suite 400  
41 West I-65 Service Road North  
Mobile, Alabama 36608  
Tel: 850-435-8901  
Fax: 850-435-8902  
www.bowronlatta.com

H. William Wasden  
[hww@bowronlatta.com](mailto:hww@bowronlatta.com)

**FLORIDA (CONT.)****ORLANDO**

Dean, Mead, Egerton, Bloodworth, Capouano  
& Bozarth  
800 North Magnolia Avenue  
Suite 1500  
Orlando, Florida 32803  
Tel: (407) 841-1200  
Fax: (407) 423-1831  
www.deanmead.com

Nichole M. Mooney  
[nmooney@deanmead.com](mailto:nmooney@deanmead.com)

**WEST PALM BEACH**

Fowler White Burnett P A  
Phillips Point - West Tower  
777 South Flagler Drive  
Suite 901  
West Palm Beach, Florida 33401  
Tel: (561) 802-9044  
Fax: (561) 802-9976  
www.fowler-white.com

Christopher E. Knight  
[cknight@fowler-white.com](mailto:cknight@fowler-white.com)

**GEORGIA****ATLANTA**

Hawkins & Parnell, LLP  
4000 SunTrust Plaza  
303 Peachtree St., NE  
Atlanta, Georgia 30308-3243  
Tel: (404) 614-7400  
Fax: (404) 614-7500  
www.hawkinsparnell.com

Ronald G. Polly, Jr.  
[rpolly@hplegal.com](mailto:rpolly@hplegal.com)

**SAVANNAH**

Hunter, MacLean, Exley  
& Dunn, P.C.  
200 E. St. Julian Street  
Savannah, Georgia 31401  
Tel: (912) 236-0261  
Fax: (912) 236-4936  
www.huntermaclean.com

Wade W. Herring, II  
[wherring@huntermaclean.com](mailto:wherring@huntermaclean.com)  
Shawn A. Kachmar  
[skachmar@huntermaclean.com](mailto:skachmar@huntermaclean.com)  
Sarah H. Lamar  
[slamar@huntermaclean.com](mailto:slamar@huntermaclean.com)

**ILLINOIS****BELLEVILLE**

Brown & James, P.C.  
Richland Plaza 1  
525 West Main Street, Suite 200  
Belleville, Illinois 62220-1547  
Tel: (618) 235-5590  
Fax: (618) 235-5591  
www.brownjames.com

Charles (Chad) E. Reis, IV  
[CReis@bjpc.com](mailto:CReis@bjpc.com)

**CHICAGO**

Johnson & Bell, Ltd.  
33 West Monroe Street  
Suite 2700  
Chicago, Illinois 60603  
Tel: (312) 372-0770  
Fax: (312) 372-9818  
www.johnsonandbell.com

Kathryn R. Hoying  
[hoyingk@jbltd.com](mailto:hoyingk@jbltd.com)  
Joseph R. Marconi  
[marconij@jbltd.com](mailto:marconij@jbltd.com)

**INDIANA****HAMMOND**

Beckman, Kelly & Smith  
5920 Hohman Avenue  
Hammond, Indiana 46320-2423  
Tel: (219) 933-6200  
Fax: (219) 933-6201  
www.bkslegal.com

Melanie M. Dunajeski  
[mdunajeski@bkslegal.com](mailto:mdunajeski@bkslegal.com)

**KANSAS****OVERLAND PARK**

Baker Sterchi Cowden  
& Rice L.L.C.  
51 Corporate Woods  
9393 West 110th Street, Suite 500  
Overland Park, Kansas 66210  
Tel: (913) 451-6752  
Fax: (816) 472-0288  
www.bscr-law.com

David M. Eisenberg  
[eisenberg@bscr-law.com](mailto:eisenberg@bscr-law.com)  
Thomas E. Rice  
[rice@bscr-law.com](mailto:rice@bscr-law.com)  
Kara Trouslot Stubbs  
[stubbs@bscr-law.com](mailto:stubbs@bscr-law.com)

**KANSAS (CONT.)****WICHITA**

Hinkle Elkouri Law Firm L.L.C.  
2000 Epic Center  
301 North Main Street  
Wichita, Kansas 67202  
Tel: (316) 267-2000  
Fax: (316) 264-1518  
www.hinklaw.com

David M. Rapp  
[drapp@hinklaw.com](mailto:drapp@hinklaw.com)

**KENTUCKY****LOUISVILLE**

Woodward, Hobson  
& Fulton, L.L.P.  
2500 National City Tower  
Louisville, Kentucky 40202  
Tel: (502) 581-8000  
Fax: (502) 581-8111  
www.whf-law.com

Kathryn A. Quesenberry  
[kquesenberry@whf-law.com](mailto:kquesenberry@whf-law.com)

**LOUISIANA****NEW ORLEANS**

Leake & Andersson, L.L.P.  
1100 Poydras Street  
Suite 1700  
New Orleans, Louisiana 70163  
Tel: (504) 585-7500  
Fax: (504) 585-7775  
www.leakeandersson.com

George D. Fagan  
[gafagan@leakeandersson.com](mailto:gafagan@leakeandersson.com)

**MAINE****PORTLAND**

Norman, Hanson & Detroy, LLC  
415 Congress Street  
P.O. Box 4600  
Portland, Maine 04112  
Tel: (207) 774-7000  
Fax: (207) 775-0806  
www.nhdlaw.com

Robert W. Bower  
[rbower@nhdlaw.com](mailto:rbower@nhdlaw.com)

**MASSACHUSETTS****BOSTON**

Morrison Mahoney LLP  
250 Summer Street  
Boston, Massachusetts 02210  
Tel: (617) 439-7500  
Fax: (617) 439-7590  
www.morrisonmahoney.com

Edwin F. Landers, Jr.  
[elanders@morrisonmahoney.com](mailto:elanders@morrisonmahoney.com)  
Lee Stephen MacPhee  
[lmacphee@morrisonmahoney.com](mailto:lmacphee@morrisonmahoney.com)

**FALL RIVER**

Morrison Mahoney LLP  
10 North Main Street  
Fall River, Massachusetts 02720  
Tel: 508-677-3100  
Fax: 508-672-3840  
www.morrisonmahoney.com

Lee Stephen MacPhee  
[lmacphee@morrisonmahoney.com](mailto:lmacphee@morrisonmahoney.com)

**SPRINGFIELD**

Morrison Mahoney LLP  
Tower Square  
1500 Main Street, Suite 2400  
Springfield, Massachusetts 01115  
Tel: (413) 737-4373  
Fax: (413) 739-3125  
www.morrisonmahoney.com

Lee Stephen MacPhee  
[lmacphee@morrisonmahoney.com](mailto:lmacphee@morrisonmahoney.com)

**WORCESTER**

Morrison Mahoney LLP  
446 Main Street, Suite 1010  
Worcester, Massachusetts 01608  
Tel: (508) 757-7777  
Fax: (508) 752-6224  
www.morrisonmahoney.com

Lee Stephen MacPhee  
[lmacphee@morrisonmahoney.com](mailto:lmacphee@morrisonmahoney.com)

**MICHIGAN****DETROIT**

Plunkett Cooney  
535 Griswold Street, Suite 2400  
Detroit, Michigan 48226  
Tel: (313) 965-3900  
Fax: (313) 983-4350  
www.plunkettcooney.com

Carolyn Jereck  
[cjereck@plunkettcooney.com](mailto:cjereck@plunkettcooney.com)  
Theresa Smith Lloyd  
[tlloyd@plunkettcooney.com](mailto:tlloyd@plunkettcooney.com)

**MISSISSIPPI****JACKSON**

Daniel Coker Horton & Bell, P.A.  
4400 Old Canton Road  
Suite 400  
Jackson, Mississippi 39211  
Tel: (601) 969-7607  
Fax: (601) 969-1116  
www.danielcoker.com

Silas McCharen  
[smcharen@danielcoker.com](mailto:smcharen@danielcoker.com)

**MISSOURI****KANSAS CITY**

Baker Sterchi Cowden  
& Rice L.L.C.  
Crown Center  
2400 Pershing Road, Suite 500  
Kansas City, Missouri 64108-2533  
Tel: (816) 471-2121  
Fax: (816) 472-0288  
www.bscr-law.com

David M. Eisenberg  
[eisenberg@bscr-law.com](mailto:eisenberg@bscr-law.com)  
Thomas E. Rice  
[rice@bscr-law.com](mailto:rice@bscr-law.com)  
Kara Trouslot Stubbs  
[stubbs@bscr-law.com](mailto:stubbs@bscr-law.com)

**ST. LOUIS**

Brown & James, P.C.  
1010 Market Street, 20th Floor  
St. Louis, Missouri 63101  
Tel: (314) 421-3400  
Fax: (314) 421-3128  
www.brownjames.com

Charles (Chad) E. Reis, IV  
[CReis@bjpc.com](mailto:CReis@bjpc.com)

**NEBRASKA****LINCOLN**

Baylor, Evnen, Curtiss, Gruit & Witt, LLP  
1248 "O" Street, Suite 600  
Lincoln, Nebraska 68508  
Tel: (402) 475-1075  
Fax: (402) 475-9515  
[www.baylorevnen.com](http://www.baylorevnen.com)

Randall L. Goyette  
[rgoyette@baylorevnen.com](mailto:rgoyette@baylorevnen.com)  
Dallas D. Jones  
[djones@baylorevnen.com](mailto:djones@baylorevnen.com)  
Gail S. Perry  
[gperry@baylorevnen.com](mailto:gperry@baylorevnen.com)  
Walter E. Zink II  
[wzink@baylorevnen.com](mailto:wzink@baylorevnen.com)

**NEW JERSEY****NEWARK**

Sills Cummis Epstein & Gross P.C.  
One Riverfront Plaza  
Newark, New Jersey 07102  
Tel: (973) 643-7000  
Fax: (973) 643-6500  
[www.sillscummis.com](http://www.sillscummis.com)

David W. Garland  
[dgarland@sillscummis.com](mailto:dgarland@sillscummis.com)

**NEW MEXICO****ALBUQUERQUE**

Butt Thornton & Baehr PC  
4101 Indian School Road, NE  
Suite 300 South  
Albuquerque, New Mexico 87110  
Tel: (505) 884-0777  
Fax: (505) 889-8870  
[www.btblaw.com](http://www.btblaw.com)

Agnes Fuentes Padilla  
[afpadilla@btblaw.com](mailto:afpadilla@btblaw.com)

**NEW YORK****ALBANY**

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C.  
20 Corporate Woods Blvd.  
Albany, New York 12211-2350  
Tel: (518) 465-3484  
Fax: (518) 465-1843  
[www.carterconboy.com](http://www.carterconboy.com)

Michael J. Murphy  
[mmurphy@carterconboy.com](mailto:mmurphy@carterconboy.com)

**NEW YORK CITY**

Lester Schwab Katz & Dwyer, LLP  
120 Broadway  
New York, New York 10271-0071  
Tel: (212) 341-4320  
Fax: (212) 267-5916  
[www.lskdnylaw.com](http://www.lskdnylaw.com)

Richard Granofsky  
[rgranofsky@lskdnylaw.com](mailto:rgranofsky@lskdnylaw.com)

**SYRACUSE**

Smith, Sovik, Kendrick & Sugnet, P.C.  
250 S. Clinton St.  
Suite 600  
Syracuse, New York 13202-1252  
Tel: (315) 474-2911  
Fax: (315) 474-6015  
[www.smithsovik.com](http://www.smithsovik.com)

Steven W. Williams  
[swilliams@smithsovik.com](mailto:swilliams@smithsovik.com)

**NORTH CAROLINA****CHARLOTTE**

Helms Mulliss & Wicker, PLLC  
201 North Tryon Street  
Charlotte, North Carolina 28202  
Tel: (704) 343-2000  
Fax: (704) 343-2300  
[www.hmw.com](http://www.hmw.com)

John G. McDonald  
[john.mcdonald@hmw.com](mailto:john.mcdonald@hmw.com)  
Makila Sands  
[makila.sands@hmw.com](mailto:makila.sands@hmw.com)  
H. Landis Wade  
[landis.wade@hmw.com](mailto:landis.wade@hmw.com)

**NORTH CAROLINA (CONT.)****RALEIGH**

Young Moore and Henderson P.A.  
3101 Glenwood Ave., Suite 200  
Raleigh, North Carolina 27612  
Tel: (919) 782-6860  
Fax: (919) 782-6753  
[www.youngmoorelaw.com](http://www.youngmoorelaw.com)

William M. Trott  
[wmt@youngmoorelaw.com](mailto:wmt@youngmoorelaw.com)

**NORTH DAKOTA****BISMARCK**

Vogel Law Firm  
200 North 3rd Street, Suite 201  
P.O. Box 2097  
Bismarck, North Dakota 58501  
Tel: (701) 258-7899  
Fax: (701) 258-9705  
[www.vogellaw.com](http://www.vogellaw.com)

Leslie Bakken Oliver  
[loliver@vogellaw.com](mailto:loliver@vogellaw.com)

**FARGO**

Vogel Law Firm  
218 NP Avenue  
Fargo, North Dakota 58107-1389  
Tel: (701) 237-6983  
Fax: (701) 356-6395  
[www.vogellaw.com](http://www.vogellaw.com)

Lisa Edison-Smith  
[ledison-smith@vogellaw.com](mailto:ledison-smith@vogellaw.com)

**OHIO****CINCINNATI**

Dinsmore & Shohl LLP  
Suite 1900  
255 East Fifth St.  
Cincinnati, Ohio 45202-3172  
Tel: (513) 977-8200  
Fax: (513) 977-8141  
[www.dinslaw.com](http://www.dinslaw.com)

Michael W. Hawkins  
[michael.hawkins@dinslaw.com](mailto:michael.hawkins@dinslaw.com)  
Charles M. Roesch  
[chuck.roesch@dinslaw.com](mailto:chuck.roesch@dinslaw.com)

**OHIO (CONT.)****DAYTON**

Dinsmore & Shohl LLP  
One Dayton Centre  
One South Main Street  
Suite 1300  
Dayton, Ohio 45402  
Tel: (937) 449-6400  
Fax: (937) 449-6405  
www.dinslaw.com

Michael W. Hawkins  
[michael.hawkins@dinslaw.com](mailto:michael.hawkins@dinslaw.com)

**OKLAHOMA****OKLAHOMA CITY**

Whitten, Nelson, McGuire, Terry & Roselius  
P. O. Box 138800  
Oklahoma City, Oklahoma 73113  
Tel: (405) 705-3600  
Fax: (405) 705-2573  
www.whitten-nelson.com

Philip Anderson  
[panderson@whitten-nelson.com](mailto:panderson@whitten-nelson.com)  
Kathryn D. Terry  
[kterry@whitten-nelson.com](mailto:kterry@whitten-nelson.com)

**OREGON****PORTLAND**

Cosgrave Vergeer Kester LLP  
805 SW Broadway, 8th Floor  
Portland, Oregon 97205  
Tel: (503) 323-9000  
Fax: (503) 323-9019  
www.cvklaw.com

Susan Eggum  
[eggum@cvk-law.com](mailto:eggum@cvk-law.com)  
Shari Lane  
[slane@cvk-law.com](mailto:slane@cvk-law.com)

**PENNSYLVANIA****HARRISBURG**

McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, Pennsylvania 17108  
Tel: (717) 232-8000  
Fax: (717) 237-5300  
www.mwn.com

Schaun D. Henry  
[shenry@mwn.com](mailto:shenry@mwn.com)  
Brian F. Jackson  
[bjackson@mwn.com](mailto:bjackson@mwn.com)  
Andrew L. Levy  
[alevy@mwn.com](mailto:alevy@mwn.com)

**PHILADELPHIA**

German, Gallagher & Murtagh  
The Bellevue  
200 S. Broad Street, Suite 500  
Philadelphia, Pennsylvania 19102  
Tel: (215) 545-7700  
Fax: (215) 732-4182  
www.ggmfirm.com

Gary H. Hunter  
[hunterg@ggmfirm.com](mailto:hunterg@ggmfirm.com)  
Jeffrey D. Laudenbach  
[laudenbachj@ggmfirm.com](mailto:laudenbachj@ggmfirm.com)

**PITTSBURGH**

Meyer, Darragh, Buckler,  
Bebenek & Eck, P.L.L.C.  
U.S. Steel Tower  
Suite 4850  
600 Grant Street  
Pittsburgh, Pennsylvania 15219  
Tel: (412) 261-6600  
Fax: (412) 471-2754  
www.mdbbe.com

Marie Milie Jones  
[mjones@mdbbe.com](mailto:mjones@mdbbe.com)  
Harlan S. Stone  
[hstone@mdbbe.com](mailto:hstone@mdbbe.com)

**RHODE ISLAND****PROVIDENCE**

Higgins, Cavanagh  
& Cooney LLP  
The Hay Building  
123 Dyer Street  
Providence, Rhode Island 02903  
Tel: (401) 272-3500  
Fax: (401) 273-8780  
www.hcc-law.com

James A. Ruggieri  
[jruggieri@hcc-law.com](mailto:jruggieri@hcc-law.com)

**SOUTH CAROLINA****CHARLESTON**

Young Clement Rivers LLP  
28 Broad Street  
Charleston, South Carolina 29401  
Tel: (843) 577-4000  
Fax: (843) 724-6600  
www.ycrlaw.com

Carol B. Ervin  
[cevin@ycrlaw.com](mailto:cevin@ycrlaw.com)  
Shawn D. Wallace  
[swallace@ycrlaw.com](mailto:swallace@ycrlaw.com)

**COLUMBIA**

Nelson Mullins Riley  
& Scarborough LLP  
1320 Main Street, Suite 1700  
Columbia, South Carolina 29201  
Tel: (803) 799-2000  
Fax: (803) 256-7500  
www.nelsonmullins.com

Deborah Whittle Durban  
[Debbie.Durban@nelsonmullins.com](mailto:Debbie.Durban@nelsonmullins.com)  
Sue Erwin Harper  
[corky.harper@nelsonmullins.com](mailto:corky.harper@nelsonmullins.com)  
Sheryl Blenis Ortmann  
[sheryl.ortmann@nelsonmullins.com](mailto:sheryl.ortmann@nelsonmullins.com)

**GREENVILLE**

Nelson Mullins Riley  
& Scarborough LLP  
104 S. Main Street, Suite 900  
Greenville, South Carolina 29601  
Tel: (864) 250-2300  
Fax: (864) 232-2925  
www.nelsonmullins.com

William H. Foster  
[bill.foster@nelsonmullins.com](mailto:bill.foster@nelsonmullins.com)  
Kenneth E. Young  
[ken.young@nelsonmullins.com](mailto:ken.young@nelsonmullins.com)

**SOUTH CAROLINA (CONT.)****MYRTLE BEACH**

Nelson Mullins Riley  
& Scarborough LLP  
Beach First Center, 3rd Floor  
3751 Robert M. Grissom Parkway  
Myrtle Beach, South Carolina 29577  
Tel: (843) 448-3500  
Fax: (843) 448-3437  
www.nelsonmullins.com

Amy Y. Jenkins  
[amy.jenkins@nelsonmullins.com](mailto:amy.jenkins@nelsonmullins.com)

**TENNESSEE****CHATTANOOGA**

Leitner, Williams, Dooley  
& Napolitan, PLLC  
801 Broad Street  
Third Floor, Pioneer Building  
Chattanooga, Tennessee 37402  
Tel: (423) 265-0214  
Fax: (423) 267-6625  
www.leitnerfirm.com

Scott Bennett  
[scott.bennett@leitnerfirm.com](mailto:scott.bennett@leitnerfirm.com)  
C. Douglas Dooley  
[doug.dooley@leitnerfirm.com](mailto:doug.dooley@leitnerfirm.com)  
Alan B. Easterly  
[alan.easterly@leitnerfirm.com](mailto:alan.easterly@leitnerfirm.com)  
Marc H. Harwell  
[marc.harwell@leitnerfirm.com](mailto:marc.harwell@leitnerfirm.com)  
Steven W. Keyt  
[steven.keyt@leitnerfirm.com](mailto:steven.keyt@leitnerfirm.com)  
Kelly P. Kirkland  
[kelly.kirkland@leitnerfirm.com](mailto:kelly.kirkland@leitnerfirm.com)  
David W. Noblit  
[david.noblit@leitnerfirm.com](mailto:david.noblit@leitnerfirm.com)

**KNOXVILLE**

Lewis, King, Krieg  
& Waldrop, P.C.  
One Centre Square, Fifth Floor  
620 Market Street  
Knoxville, Tennessee 37902  
Tel: (865) 546-4646  
Fax: (865) 523-6529  
www.lewisking.com

Janet Hayes  
[jhayes@lewisking.com](mailto:jhayes@lewisking.com)  
Richard W. Krieg  
[dkrieg@lewisking.com](mailto:dkrieg@lewisking.com)

**TENNESSEE (CONT.)****NASHVILLE**

Leitner, Williams, Dooley  
& Napolitan, PLLC  
414 Union Street  
Suite 1900  
Bank of America Building  
Nashville, Tennessee 37219  
Tel: (615) 255-7722  
Fax: (615) 780-2210  
www.leitnerfirm.com

George H. Rieger, II  
[chip.rieger@leitnerfirm.com](mailto:chip.rieger@leitnerfirm.com)

**TEXAS****DALLAS**

Strasburger & Price, L.L.P.  
901 Main Street, Suite 4400  
Dallas, Texas 75202  
Tel: (214) 651-4300  
Fax: (214) 651-4330  
www.strasburger.com

Kimberly Moore  
[kim.moore@strasburger.com](mailto:kim.moore@strasburger.com)  
Paul L. Myers  
[paul.myers@strasburger.com](mailto:paul.myers@strasburger.com)

**EL PASO**

Mounce, Green, Myers, Safi,  
Paxson & Galatzan, P.C.  
100 N. Stanton  
Suite 1700  
El Paso, Texas 79901-1334  
Tel: (915) 532-2000  
Fax: (915) 541-1597  
www.mgmsg.com

Mark D. Dore  
[dore@mgmsg.com](mailto:dore@mgmsg.com)

**HOUSTON**

Lorance & Thompson, P.C.  
2900 North Loop West  
Suite 500  
Houston, Texas 77092  
Tel: (713) 868-5560  
Fax: (713) 864-4671  
www.lorancethompson.com

Brian T. Coolidge  
[btc@lorancethompson.com](mailto:btc@lorancethompson.com)  
David J. Escobar  
[dje@lorancethompson.com](mailto:dje@lorancethompson.com)

**TEXAS (CONT.)****LUBBOCK**

Mullin Hoard & Brown, L.L.P.  
1500 Broadway  
Suite 700  
Lubbock, Texas 79401  
Tel: (806) 765-7491  
Fax: (806) 765-0553  
www.mullinhoard.com

Molly Manning  
[mmanning@mhba.com](mailto:mmanning@mhba.com)

**SAN ANTONIO**

Ball & Weed, P.C.  
10001 Reunion Place  
Suite 600  
San Antonio, Texas 78216  
Tel: (210) 731-6300  
Fax: (210) 731-6499  
www.ballandweed.com

Robert D. Kilgore  
[rdk@ballandweed.com](mailto:rdk@ballandweed.com)  
Larry Gee  
[leg@ballandweed.com](mailto:leg@ballandweed.com)  
J.K. Leonard  
[jkl@ballandweed.com](mailto:jkl@ballandweed.com)

**VERMONT****RUTLAND**

Ryan Smith & Carbine, Ltd.  
Mead Building  
98 Merchants Row  
PO Box 310  
Rutland, Vermont 05702-0310  
Tel: (802) 786-1000  
Fax: (802) 786-1100  
www.rsclaw.com

Andrew H. Maass  
[ahm@rsclaw.com](mailto:ahm@rsclaw.com)

**VIRGINIA****RICHMOND**

Morris & Morris, P.C.  
1200 WyteStone Plaza  
801 East Main Street  
P.O. Box 30  
Richmond, Virginia 23218-0030  
Tel: (804) 344-8300  
Fax: (804) 344-8359  
www.morrismorris.com

Lauren Ebersole Hutcheson  
[lhutcheson@morrismorris.com](mailto:lhutcheson@morrismorris.com)  
Philip B. Morris  
[pmorris@morrismorris.com](mailto:pmorris@morrismorris.com)

**ROANOKE**

Gentry Locke Rakes  
& Moore LLP  
10 Franklin Road, S.E.  
Roanoke, Virginia 24011  
Tel: (540) 983-9300  
Fax: (540) 983-9400  
www.gentrylocke.com

Paul G. Klockenbrink  
[paul\\_klockenbrink@gentrylocke.com](mailto:paul_klockenbrink@gentrylocke.com)  
Todd A. Leeson  
[todd\\_leeson@gentrylocke.com](mailto:todd_leeson@gentrylocke.com)  
W. David Paxton  
[david\\_paxton@gentrylocke.com](mailto:david_paxton@gentrylocke.com)

**WASHINGTON****SEATTLE**

Merrick, Hofstedt & Lindsey, P.S.  
3101 Western Avenue, Suite 200  
Seattle, Washington 98121-1024  
Tel: (206) 682-0610  
Fax: (206) 467-2689  
www.mhlseattle.com

Erin H. Hammond  
[ehammond@mhlseattle.com](mailto:ehammond@mhlseattle.com)

**SPOKANE**

Paine Hamblen LLP  
1200 Washington Trust  
717 West Sprague  
Spokane, Washington 99201-3505  
Tel: (509) 455-6000  
Fax: (509) 838-0007  
www.painehamblen.com

Jim Kalamon  
[james.kalamon@painehamblen.com](mailto:james.kalamon@painehamblen.com)

**WEST VIRGINIA****CHARLESTON**

Robinson & McElwee PLLC  
700 Virginia Street East  
400 Fifth Third Center  
Charleston, West Virginia 25301  
Tel: (304) 344-5800  
Fax: (304) 344-9566  
www.ramlaw.com

Joseph M. Price  
[jmp@ramlaw.com](mailto:jmp@ramlaw.com)  
William E. Robinson  
[wer@ramlaw.com](mailto:wer@ramlaw.com)  
David S. Russo  
[dsr@ramlaw.com](mailto:dsr@ramlaw.com)

**CLARKSBURG**

Robinson & McElwee PLLC  
140 West Main Street  
Suite 300  
Clarksburg, West Virginia 26301  
Tel: (304) 622-5022  
Fax: (304) 622-5065  
www.ramlaw.com

Richard W. Gallagher  
[rwg@ramlaw.com](mailto:rwg@ramlaw.com)

**WISCONSIN****MILWAUKEE**

Whyte Hirschboeck Dudek S.C.  
555 East Wells Street  
Suite 1900  
Milwaukee, Wisconsin 53202-3819  
Tel: (414) 273-2100  
Fax: (414) 223-5000  
www.whdlaw.com

Nathan A. Fishbach  
[nfishbach@whdlaw.com](mailto:nfishbach@whdlaw.com)  
William E. Hughes III  
[whughes@whdlaw.com](mailto:whughes@whdlaw.com)

**International Firms****AUSTRALIA****ADELAIDE**

Cowell Clarke  
Level 5  
63 Pirie Street  
Adelaide, SA 05000  
Tel: 61-8-8228-1111  
Fax: 61-8-8228-1100  
www.cowellclarke.com.au

Sam McGrath  
[smcgrath@cowellclarke.com.au](mailto:smcgrath@cowellclarke.com.au)

**MELBOURNE**

Cornwall Stodart  
Level 10  
114 William Street  
Melbourne, Victoria 03000  
Tel: 61-3-9608-2000  
Fax: 61-3-9608-2222  
www.cornwalls.com.au

Louise Houlihan  
[lhoulihan@cornwalls.com.au](mailto:lhoulihan@cornwalls.com.au)  
Clare Hudson  
[c.hudson@cornwalls.com.au](mailto:c.hudson@cornwalls.com.au)

**SYDNEY**

TressCox Lawyers, Australia  
Level 20  
135 King Street  
Sydney, New South Wales 2000  
Tel: 61-2-9228-9200  
Fax: 61-2-9228-9299  
www.tresscox.com.au

Timothy Unsworth  
[tim\\_unsworth@tresscox.com.au](mailto:tim_unsworth@tresscox.com.au)

**BELGIUM****BRUSSELS**

Marx, Van Ranst, Vermeersch  
& Partners  
Avenue de Tervueren 270  
B-1150 Brussels  
Tel: 32-2-285-01-00  
Fax: 32-2-230-33-39  
www.mvvp.be

Bruno Blanpain  
[bruno.blanpain@mvvp.be](mailto:bruno.blanpain@mvvp.be)  
Rafael Claes  
[rafael.claes@mvvp.be](mailto:rafael.claes@mvvp.be)

**CANADA****CALGARY**

Parlee McLaws LLP  
3400 Petro-Canada Centre  
150 - 6th Avenue S.W.  
Calgary, Alberta T2P 3Y7  
Tel: (403) 294-7000  
Fax: (403) 265-8263  
www.parlee.com

Gregory D. Stirling  
[gstirling@parlee.com](mailto:gstirling@parlee.com)

**EDMONTON**

Parlee McLaws LLP  
15th Floor Manulife Place  
10180 101st Street  
Edmonton, Alberta T5J 4K1  
Tel: (780) 423-8500  
Fax: (780) 423-2870  
www.parlee.com

Robert P. James  
[rjames@parlee.com](mailto:rjames@parlee.com)  
Walter J. Pavlic  
[wpavlic@parlee.com](mailto:wpavlic@parlee.com)

**TORONTO**

Fasken Martineau Dumoulin LLP  
Toronto Dominion Bank Tower  
66 Wellington St. West, Suite 4200  
P.O. Box 20  
Toronto, Ontario M5K 1N6  
Tel: (416) 865-4364  
Fax: (416) 364-7813  
www.fasken.com

Martin Denyes  
[mdenyas@tor.fasken.com](mailto:mdenyas@tor.fasken.com)

**ENGLAND****LONDON**

Charles Russell  
8 - 10 New Fetter Lane  
London  
EC4A 1RS  
Tel: 44-20-7203-5000  
Fax: 44-20-7203-0200  
www.charlesrussell.co.uk

David Green  
[david.green@charlesrussell.co.uk](mailto:david.green@charlesrussell.co.uk)  
Brian Palmer  
[brian.palmer@charlesrussell.co.uk](mailto:brian.palmer@charlesrussell.co.uk)  
Michael Powner  
[michael.powner@charlesrussell.co.uk](mailto:michael.powner@charlesrussell.co.uk)

**FRANCE****PARIS**

Courtois Lebel  
43-47 avenue de la Grande Armee  
Paris 75116  
Tel: 33 158 44 9292  
Fax: 33 158 44 9258  
www.courtois-lebel.com

Nicolas Sauvage  
[nsauvage@courtois-lebel.com](mailto:nsauvage@courtois-lebel.com)

**INDIA****MUMBAI**

Kochhar & Co.  
17th Floor, Nirmal Building  
Nariman Point  
Mumbai, Maharashtra 400 021  
Tel: +91-22-66559701 / 66370031  
Fax: +91-22-66559705  
www.mumbai.kochhar.com

Ajit Anekar  
[ajit@mumbai.kochhar.com](mailto:ajit@mumbai.kochhar.com)

**ITALY****ROME**

Sinisi Ceschini Mancini  
& Partners  
Via Pasquale S. Mancini 2  
Rome 00196  
Tel: 39-06-322-1485  
Fax: 39-06-361-3266  
www.scm-partners.it

Roberta Ceschini  
[RCeschini@scm-partners.it](mailto:RCeschini@scm-partners.it)

**MEXICO****MEXICO CITY**

Von Wobeser Y Sierra, S.C.  
Guillermo González Camarena 1100 - 7 Piso  
Santa Fe, Centro De Ciudad  
01210 Mexico, D.F.  
Tel: 52-55-5258-1000  
Fax: 52-55-5258-1098  
www.vwys.com.mx

Javier Lizardi  
[jlizardi@vwys.com.mx](mailto:jlizardi@vwys.com.mx)

**PERU****SAN ISIDRO, LIMA**

Berninzon, Loret de Mola  
& Benavides, Abogados  
Camino Real 390  
Torre Central, Oficina 801  
San Isidro, Lima  
Lima 27  
Tel: 011-511-222-5252  
Fax: 011-511-421-4816  
www.blmblegal.com

Daniel Ulloa  
[danielulloa@blmblegal.com](mailto:danielulloa@blmblegal.com)

**PUERTO RICO****SAN JUAN**

Reichard & Escalera  
MCS Plaza 10th Floor  
255 Ponce de Leon Avenue  
San Juan, Puerto Rico 00917-1913  
Tel: (787) 758-8888  
Fax: (787) 765-4225  
www.recounsel.com

Ineabelle Santiago  
[santiago@reichardescalera.com](mailto:santiago@reichardescalera.com)