ALERT MEMORANDUM

Supreme Court Argument Preview: November 27-28

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This week the Supreme Court will hear argument in three cases with important commercial implications. In the first, *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, the Court will consider the constitutionality of *inter partes* review by the Patent Trial and Appeal Board under federal patent laws. In *Digital Realty Trust v. Somers*, the Court will decide whether the anti-retaliatory provisions of the Dodd-Frank Act protect employees who internally report possible securities law violations but do not report them to the SEC. And in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, the Court will address whether the Securities Litigation Uniform Standards Act of 1998 made federal courts the exclusive venue for class action litigation under the Securities Act.

We preview these cases below.

***Oil States Energy Services, LLC v. Greene's Energy Group, LLC* – Constitutionality of *Inter Partes* Review of Patents**

Enacted in 2011, the America Invents Act ("AIA") created the Patent Trial and Appeal Board ("PTAB"), an administrative body tasked with adjudicating *inter partes* patent disputes.[1] The AIA gives the PTAB the authority to review existing patents and potentially extinguish patent ownership rights if the patent is anticipated by prior art or is obvious.[2] This update to the procedures for determining the validity of patents shifted a share of patent litigation away from the federal judiciary to the PTAB, which was intended by Congress to be a faster, cheaper forum.

Oil States Energy Services, LLC v. Greene's Energy Group, LLC involves a direct challenge to the *inter partes* review process and the PTAB's authority to invalidate patents. In 2012, Oil States filed a patent infringement suit against Greene's Energy Group for allegedly infringing upon its patent for hydraulic fracturing. Greene's petitioned for *inter partes* review and the PTAB invalidated Oil States' patent.[3] Oil States appealed to the Federal Circuit Court of Appeals, and now to the Supreme Court, arguing that the process of *inter partes* review is unconstitutional because patents are private property rights—which can only be revoked by a federal court under Article III of the U.S. Constitution—and not public rights that can be revoked by a government agency.[4]

A decision that *inter partes* review is unconstitutional would upend the current system for challenging patents, which has invalidated thousands of patents in the six years since the AIA was passed.

The Supreme Court will hear argument in *Oil States Energy* on November 27. On the same day, the Court will hear argument in a second case involving *inter partes* review of patents. In *SAS Institute Inc. v. Matal*,[5] the Supreme Court will decide whether, under Section 318(a) of the AIA,[6] the PTAB must issue a final written decision for every claim challenged by the petitioner in *inter partes* review, or whether the PTAB may elect to only review some claims. Ultimately, the outcome of this case is predicated on finding first that the *inter partes* review process is constitutional, and so it is fitting that oral argument should be held in both *Oil States Energy* and *SAS Institute* on the same day.

***Digital Realty Trust v. Somers* – The Scope of the Whistleblower Anti-Retaliation Protections of the Dodd-Frank Act**

The Sarbanes-Oxley Act ("Sarbanes-Oxley") and the Dodd-Frank Act ("DFA") contain a number of provisions intended to curb violations of federal securities laws, including certain anti-retaliatory provisions for "whistleblowers" (including employees, auditors, and lawyers working for public companies) that report potential Sarbanes-Oxley violations and/or concerns about accounting or auditing matters.[7] Sarbanes-Oxley expressly protects both those who make internal reports to workplace supervisors as well as those who report to federal agencies or Congress.[8] However, Courts of Appeals have split on whether the anti-retaliatory provisions of the DFA likewise protect

[1] 35 U.S.C. §§ 102, 103, 311.
[2] *Id.*
[3] *Greene's Energy Grp., LLC* v. *Oil States Energy Servs., LLC*, No. IPR2014-00216, 2015 WL 2089371, at *1 (P.T.A.B. May 1, 2015).
[4] Brief for Petitioner at 27, 50, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 137 S. Ct. 2239 (2017) (No. 16-712).
[5] No. 16-969, 2017 WL 4506771 (2017).
[6] 35 U.S.C. § 318(a) ("If an inter partes review is instituted and not dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.").
[7] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 746, 18 U.S.C. § 1514A (2002); Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, 15 U.S.C. § 78u-6(a)(6) (2010); *id.* at 15 U.S.C. § 78u-6(h)(1)(A).
[8] 18 U.S.C. § 1514A(1).

employees who internally report possible securities law violations but do not report them to the SEC.[9]

The DFA defines a whistleblower as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC],"[10] and its anti-retaliatory provision states, in relevant part, that "[n]o employer may discharge, demote, suspend . . . or in any manner discriminate against, a whistleblower . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act."[11]

The Fifth Circuit interpreted the DFA's anti-retaliation provisions narrowly, holding that, pursuant to the statutory definition of "whistleblower," parties that do not report to the SEC are not covered under the anti-retaliation provisions and therefore are not protected from companies that retaliate against them.[12] The Second Circuit, on the other hand, held that whistleblowers who only report internally are protected by the DFA's anti-retaliation provision.[13] The Second Circuit reasoned that the DFA provisions are ambiguous, such that *Chevron* deference must be applied to the SEC's regulation interpreting those provisions, which states that the DFA's anti-retaliation provisions apply to internal reporting and reporting to the SEC.[14] In March 2017, the Ninth Circuit, in *Somers v. Digital Realty Trust*, aligned itself with the Second Circuit's broader reading of the DFA's anti-retaliation provisions.[15]

The Supreme Court granted a petition for a writ of certiorari to review the Ninth Circuit's ruling in *Somers*.[16] If the Supreme Court, which will hear argument in *Somers* on November 28, were to affirm the Ninth Circuit's ruling, such a decision could shift whistleblower litigation from Sarbanes-Oxley to the DFA, as there are significant advantages to a plaintiff bringing a whistleblower claim under the DFA (including no prerequisite of an administrative complaint, a much longer statute of limitations and more extensive relief). However the Supreme Court rules, its resolution of the circuit split should result in increased uniformity—at present, employers in different circuits face differing levels of liability for claims brought by their respective employees.

Cyan, Inc. v. Beaver County Employees Retirement Fund – Securities Act Class Actions in State Court

Also on November 28, the Supreme Court will hear argument in *Cyan, Inc. v. Beaver County Employees Retirement Fund*.[17] District courts have been divided on the effect of amendments made by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") to the Securities Act's removal and jurisdictional provisions. While some courts have held that SLUSA deprives state courts of jurisdiction over class actions asserting Securities Act claims and have permitted such actions to be removed to federal court on that basis,[18] others have held that such cases are not removable or that state courts possess jurisdiction over such suits.[19]

In *Cyan*, the defendants moved for judgment on the pleadings for lack of subject matter jurisdiction, arguing that SLUSA removed state courts' jurisdiction

[9] *Compare Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013) *with Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).
[10] 15 U.S.C. § 78u-6(a)(6).
[11] 15 U.S.C. § 78u-6(h)(1)(A).
[12] *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 622-30 (5th Cir. 2013).
[13] *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 149-55 (2d Cir. 2015).
[14] *Id.* at 155.
[15] *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045 (9th Cir. 2017).
[16] Petition granted *sub nom Digital Realty Tr., Inc. v. Somers*, No. 16-1276, 137 S. Ct. 2300 (2017).
[17] 137 S. Ct. 2325 (2017).
[18] *See, e.g., Schwartz v. Concordia Int'l Corp.*, 255 F. Supp. 3d 380(E.D.N.Y. 2017).
[19] *See, e.g., Book v. ProNAi Therapeutics, Inc.*, No. 5:16-CV-07408-EJD, 2017 WL 2533664, at *2 (N.D. Cal. June 12, 2017) (granting plaintiffs' motions to remand to state court and denying defendants' motions to stay litigation pending decision by U.S. Supreme Court on petitions for certiorari raising issue).

over Securities Act class actions.[20] The California Superior Court denied the motion.[21] The defendants appealed to the U.S. Supreme Court after a California appeals court and the California Supreme Court declined to review the decision.

In response to an invitation from the Supreme Court, in May, the Acting Solicitor General filed an amicus brief expressing the federal government's views on the issue, which took a middle-ground position that SLUSA does not strip state courts of jurisdiction over class actions to enforce the Securities Act, but separately allows defendants to remove such actions to federal court.[22] The Supreme Court's decision will provide much needed guidance on SLUSA's effect and resolve the conflict in the district courts. The issue of whether SLUSA made federal courts the exclusive venue for class action litigation under the Securities Act is particularly important because state courts may not strictly apply the procedural protections of the Private Securities Litigation Reform Act of 1995 that apply in federal courts.

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[20] Petition for Writ of Certiorari, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 2016 WL 3040512, at *10 (May 24, 2016) (No. 15-1439).

[21] Order Denying Defendants' Motion for Judgment on the Pleadings, *Beaver Cty. Emps. Ret. Fund v. Cyan, Inc.*, No. CGC-14-538355, 2014 WL 1314117 (Cal. Super. Oct. 23, 2015).

[22] Brief for the United States as Amicus Curiae, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 2017 WL 2333893, at *6 (May 23, 2017) (No. 15-1439).