Johnson & Weaver LLP

THE MONITOR

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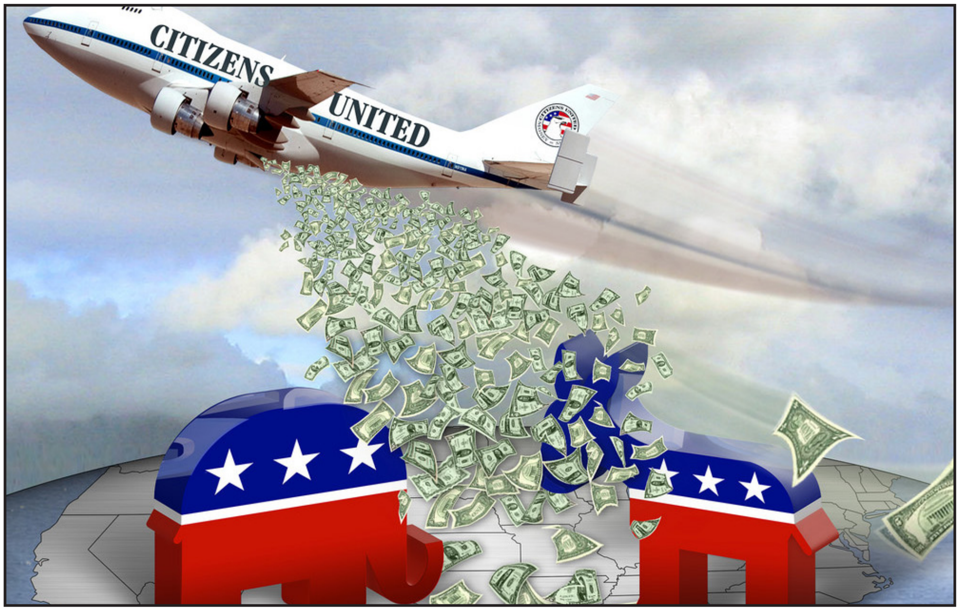

Developments in Political Spending Disclosures

Shareholder interest in corporate political spending tends to significantly increase in an election year. Since the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*—which declared unconstitutional certain limits on corporate political spending—the U.S. Securities and Exchange Commission continues to face mounting pressure to develop a rule governing disclosure of corporate political contributions.

But a number of competing policy and legislative positions obfuscate the enforceability of such a rule.

Under *Citizens United*, prohibitions on independent corporate expenditures (*i.e.*, those not given directly to a party or candidate) abridge the freedom of speech provisions enshrined in the First Amendment of the U.S. Constitution. As a result, corporations must be allowed to use treasury funds for electioneering communications notwithstanding the potential for misalignment of corporate expression with shareholders' views.

In 2011, a bipartisan committee of 10 leading corporate and securities law professors submitted a formal petition to the SEC, urging it to engage in rulemaking which would require issuers to disclose how corporate funds are used to influence politics.

The preamble of the petition indicated that its signatories unanimously agreed that "information about corporate spending on politics is important to shareholders—and that the Commission's rules should require this information to be disclosed." The petition implored the SEC to "promptly initiate a rulemaking project to require disclosure of corporate political spending to public-company shareholders."

The SEC received more than 1.2 mil-

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lion public comments in response, although no rulemaking proposals eventuated. In December 2015, Congress limited the SEC's capacity to adopt disclosure rules by issuing an omnibus spending bill that barred the SEC from using funds to finalize or implement a rule governing the disclosure of political contributions in 2016. Importantly, the bill does not restrict the SEC from proposing such a rule.

By mid-June 2016, shareholders had voted on 37 shareholder proposals requiring corporate reports on lobbying activities, with 24 percent average support. Similarly, shareholders had voted on another 22 proposals requiring corporate reports on political contributions, with 33 percent average support.

On Nov. 8, 2016, The California Overturn of Citizens United Act Advisory Question (Senate Bill 254), also known as Proposition 59, was approved. Proposition 59 supports advising the state's elected officials to "use their authority to overturn the *Citizens United v. Federal Election Commission* decision, potentially through an amendment to the U.S. Constitution."

Whether California will, in fact, propose an amendment to the federal Constitution overturning *Citizens United* remains to be seen. And while the approved 2016 budget prohibits the SEC from issuing any rule governing corporate political spending disclosures, it is clear from the robustness of the public and shareholder roundtable that—should *Citizens United* stand—an SEC rule is imminent.

Recent Noteworthy Decisions

- ***IATSE Local No. One Pension Fund v. General Electric Co.*, C.A. No. 11893-VCG (Del. Ch. Dec. 6, 2016):** In a case challenging a squeeze-out merger where the plaintiff's stock was involuntarily exchanged for stock in another entity, the Court of Chancery held that the plaintiff's breach of fiduciary duty claims did not pass with shares, but instead vested with the plaintiff.

- ***Sandys v. Pincus*, No. 157, 2016 (Del. Dec. 5, 2016):** This derivative case involved claims against Zynga's controlling shareholder, Mark Pincus, and fellow board members for allegedly allowing leaders of the social gaming company to act on inside information and dump stock before it crashed in 2012. The case was initially dismissed by the Delaware Court of Chancery, but the Delaware Supreme Court reversed the earlier decision and reinstated the case. Supreme Court Chief Justice Leo Strine said in the opinion that the relationships present made it impossible for a majority of directors to impartially consider suing Pincus. "Causing a lawsuit to be brought against another person is no small matter, and is the sort of thing that might plausibly endanger a relationship."

- ***ChinaCast Education Corp. v. Chan*, C.A. No. 10063-VCL (Del. Ch. Oct. 12, 2016):** The Court of Chancery upheld derivative claims against the company's board where every asset the company owned was stolen by the company's highest level executives, and evidence that director defendant was aligned with those executives, knew of their theft, and failed to disclose it.

- ***SEC v. Jenson*, No. 14-55221 (9th Cir. Aug. 31, 2016):** The U.S. Court of Appeals for the Ninth Circuit held that the Sarbanes-Oxley Act's disgorgement provision—which requires disgorgement of certain CEO and CFO compensation when an issuer restates its financial statements "as a result of misconduct"—applies even if the CEO and CFO were not personally involved in the misconduct. Although several district courts had previously reached that conclusion, the Ninth Circuit's decision in *SEC v. Jensen* appears to be the first appellate ruling on the issue.

- ***Salman v. United States*, No. 15-628 (U.S. Dec. 6, 2016)**: The U.S. Supreme Court confirmed that the "personal benefit" required to establish a claim for insider trading can consist of making a gift of material, nonpublic information to a family member or friend and that an exchange of "something of a pecuniary or similarly valuable nature" is not required.

- ***Robert Corwin v. British American Tobacco, PLC*, No. COA15-1334, opinion (N.C. Ct. App. Dec. 20, 2016):** The North Carolina Court of Appeals recently overturned a trial court decision and held that a 42 percent stockholder could be a "controlling stockholder" that owes other stockholders fiduciary duties. Upon finding that the 42 percent stockholder could owe fiduciary duties to other common stockholders, the N.C. Court of Appeals concluded that the plaintiff's claims could be asserted directly, and were dismissed in error.

Class Action Litigation Focus: Cost of Insurance Rate Increases in Universal Life Policies

During the late '80s and '90s, millions of Americans purchased "universal life insurance" policies, which featured the death benefit component of basic life insurance combined with a tax-deferred savings component.

These policies were attractive because they offered a higher rate of return than other traditional life insurance products, such as whole life insurance. For example, under a typical universal life insurance contract, a policyholder who paid a relatively low monthly premium could earn a minimum guaranteed rate of interest as high as 4 to 5 percent. Thus, universal life policies presented a safe and affordable way to invest for retirement.

Insurance companies were highly motivated to sell universal life policies in the '80s and '90s, when interest rates were relatively high. When the 10-Year Treasury yield peaked at 15 percent during the the '80s, insurers could pay policyholders the guaranteed rate of interest under the policies, as well as generate a healthy profit for themselves. This began to change once interest rates began their inevitable, long-term decline, which made it more expensive for insurers to cover their obligations under the policies.

As Treasury yields have plummeted to single-digit lows in recent years, a number of insurance companies have taken concerted action to shift a higher portion of the costs associated with universal life policies to the policyholders themselves. Certain insurers have dramatically raised the "cost of insurance" on these policies—the portion of the premium used to cover the insurer's obligations and expenses under the policies (including the guaranteed rate of interest). Policyholders affected by these unilateral cost of insurance increases must now pay much higher premium rates (in some cases, double-digit percent increases) just to maintain the same level of coverage and receive the same interest rate.

The impact of these cost of insurance rate increases has been particularly severe to the many policyholders who purchased universal life policies decades ago and are now retired and living on a fixed income. Despite paying their premiums for many years, these policyholders now face the bleak prospect of losing all of their policy benefits, including the policy's accumulated cash value and death benefit,

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Upcoming Lead Plaintiff Deadlines

Johnson & Weaver is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

COMPANY	DEADLINE
Cempra, Inc. (NASDAQ:CEMP)	January 3, 2017
Teva Pharmaceuticals Ind. (NYSE:TEVA)	January 5, 2017
Exxon Mobil Corporation (NYSE:XOM)	January 6, 2017
InfuSystem Holdings, Inc. (NYSEMKT:INFU)	January 7, 2017
ProNAi Therapeutics Inc. (NASDAQ:DNAI)	January 8, 2017
The Allstate Corp. (NYSE:ALL)	January 9, 2017
Pattern Energy Group, Inc. (NASDAQ:PEGI)	January 10, 2017
Centene Corp. (NASDAQ:CEMP)	January 13, 2017
Alere Inc. (NYSE:ALR)	January 13, 2017
Arrowhead Pharmaceuticals (NASDAQ:ALXN)	January 14, 2017
GoPro, Inc. (NASDAQ:GOPRO)	January 15, 2017
Ligand Pharmaceuticals (NASDAQ:LGND)	January 16, 2017
Alexion Pharmaceuticals, Inc (NASDAQ:ALXN)	January 16, 2017
Dynavax Technologies Corp. (NASDAQ:DVAX))	January 17, 2017
Interactive Intelligence Group, (NASDAQ:ININ)	January 17, 2017
Avid Technology, Inc. (NASDAQ:AVID)	January 20, 2017
StoneMore Partners, L.P. (NYSE:STON)	January 20, 2017
Zimmer Biomet Holdings, Inc. (NYSE:ZBH)	January 31, 2017
Rio Tinto, Inc. (NYSE:RIO)	February 10, 2017

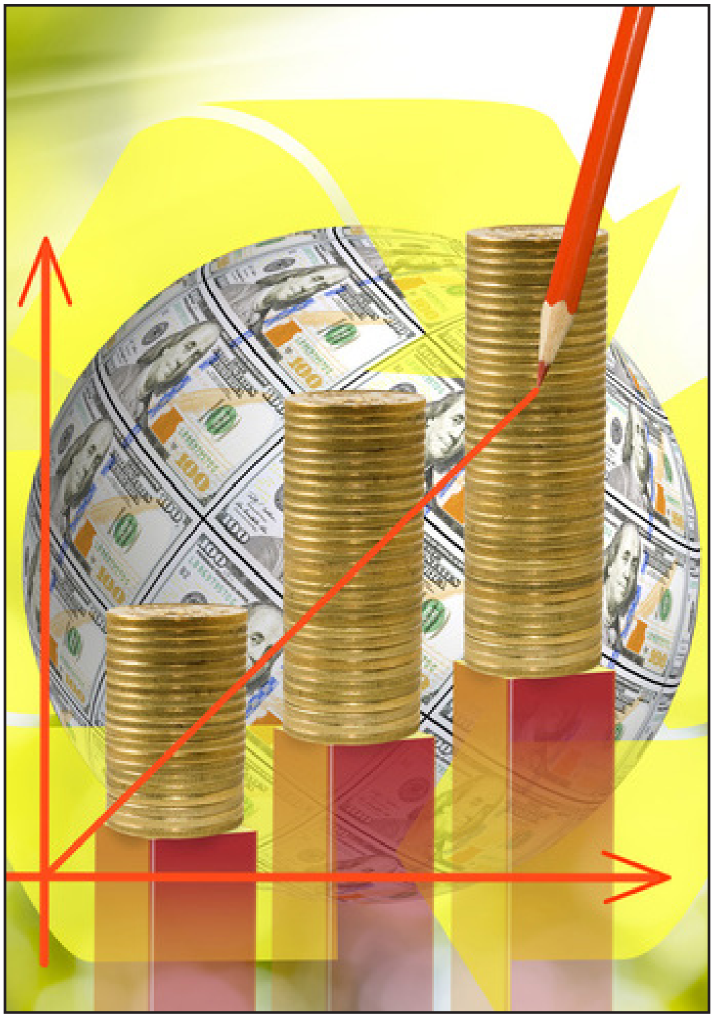
because they cannot afford to pay the increased premium rates. These universal life policies, which were once marketed as a stable source of retirement income, are now draining the limited resources of those in the retirement phase of their life. Left with no other option, many policyholders are simply abandoning or terminating their policies because they are too expensive to maintain.

Questions have been raised as to the real motivations behind these cost of insurance rate increases and whether these increases were specifically implemented to cause policyholders to abandon their policies. Indeed, a number of industry analysts have suggested that it is the very intention of insurers to force the lapse or surrender of large blocks of universal life policies because the policies are too costly to maintain and are no longer profitable for insurers in the current low interest rate environment.

Not surprisingly, the move by insurers to increase the cost of insurance on universal life policies has spurred a considerable amount of class action litigation in recent years. The focus of these lawsuits has largely been on whether the particular insurer has acted appropriately under the terms of the universal life insurance contract in increasing the cost of insurance to policyholders.

These cost of insurance cases have been met with mixed success, but there have been a few recent legal developments in favor of policyholders that bear highlighting. Most notably, in May of this year, an Indiana state court granted final approval of a $2.25 billion class action settlement involving approximately 77,000 policyholders of universal life policies administered by Lincoln National Life Insurance Company. This lawsuit, styled *Bezich v. Lincoln National Life Insurance Company*, alleged that Lincoln National had improperly increased the cost of insurance charges on certain variable universal life insurance policies based on factors unrelated to "mortality expectations" that were specified under the policies. After the court denied the motion to dismiss the complaint in favor of the plaintiff, the parties negotiated a class-wide settlement, pursuant to which policyholders are entitled submit claims for term life insurance certificates issued by Lincoln National with death benefits worth $2.25 billion and a market value of $171.8 million.

Also, in *Feller v. Transamerica Life Ins. Co.*, Judge Snyder of the Central District of California recently denied Transamerica's motion to dismiss, which challenged the complaint brought by a group of universal life policyholders. The complaint alleges that Transamerica improperly increased the "Monthly Deduction Rate," or "MDR" on certain of its universal life insurance policies, which was based in large part on the insurer's cost of insurance. According to the plaintiffs, Transamerica dramatically increased the applicable MDRs in 2015, in order to circumvent its obligation to pay the interest rates guaranteed under the policies, recoup its



past losses, and induce policy terminations by elderly policyholders. The court found the plaintiffs had sufficiently alleged that the MDR increases were based on an "impermissible motive" that was contrary to the terms of the policies. The court therefore allowed the plaintiffs' claims for breach of contract, breach of covenant of good faith and fair dealing, and violations of California's Unfair Competition Law to move forward.

These and other cases highlight the potential viability of legal claims brought by universal life policyholders against insurance companies that have increased the cost of insurance or other related charges in an improper manner. The attorneys at Johnson & Weaver are currently investigating cost of insurance rate increases in universal life policies issued or administered by Voya Retirement Insurance and Annuity Company, Aetna Life Insurance and Annuity Company, Jefferson Pilot, and Lincoln Financial Group.

If you have information that could assist in this investigation, or if you own a universal life policy and are interested in learning more about the invesitigation or your legal rights and remedies, please contact Phong L. Tran, Esq. at Johnson & Weaver by email phongt@johnsonandweaver.com or phone at (619-230-0063).

Johnson & Weaver's Recent Accomplishments

Many of the firm's attorneys have received acclaim for their expertise and high ethical standards, and the firm has also recently secured major victories in pending litigation and been involved in numerous cases that have yielded substantial settlements. The following is a sample of Johnson & Weaver's recent accolades and achievements.

- **Settlement Receives Final Approval In re *Intercept Pharmaceuticals, Inc.* Securities Litigation, No 14-cv-03878-AKH (S.D.N.Y)**: In a securities fraud case pending in New York federal court, the plaintiffs succeeded in securing a $55 million settlement on behalf of shareholders that purchased Intercept stock between January 9, 2014 and January 10, 2014. This represents one of the largest—if not the largest—settlements for a class period of such short duration. The court recently granted final approval of the settlement. Johnson & Weaver represents one of the two plaintiffs, who is also a proposed class representative, and is assisting the plaintiffs' lead counsel in prosecuting the case.

- **Johnson & Weaver Appointed Lead Counsel in *Hendley v. Flowers Foods, Inc.*, et al., Master File No. 7:16-cv-00222-WLS (M.D. Ga.):** In a case alleging violations of the Securities Exchange Act of 1934 for the issuance of false and misleading statements, Johnson & Weaver's client was appointed as lead plaintiff and the firm was appointed co-lead counsel under the Private Securities Litigation Reform Act of 1995. Specifically, defendants are charged with making false and/or misleading statements and/or failing to disclose that the company was improperly classifying employees as independent contractors, that the misclassification exposed the company to legal liability and/or negative regulatory action, that proper classification would have a negative impact on the company's operations, and that as a result, defendants' statements about Flowers Foods' business, operations, and prospects were false and misleading and/or lacked a reasonable basis when made.

- **Johnson & Weaver Appointed Lead Counsel in *LifeVantage Corp. Derivative Litigation*, Lead Case No. 160906320 MI (Third Judicial District, Salt Lake County, State of Utah):** Johnson & Weaver was recently appointed as lead counsel in a shareholder derivative action alleging violations of state law against certain current and former officers and directors of the company for breaches of fiduciary duties, unjust enrichment, and corporate waste. Specifically, the plaintiffs allege, among other things, that the defendants caused the company to issue false and misleading statements concerning the company's business, operational, and compliance policies, including false and misleading statements regarding the costs and expected sales of the company's products in international markets.

- **Court Approves Class Action Settlement of $8 million for Covisint Shareholders, *Desrocher v. Covisint Corporation*, et al., Case No. 1:14-CV-03878-AKH (S.D.N.Y.):** In a case alleging violations of §§11 and 15 of the Securities Act of 1933, the Court appointed Johnson & Weaver Co-Lead Counsel and certified the firm as Co-Lead Class Counsel. The class action complaint alleged that there were misrepresentations or omissions in securities offering documents filed with the SEC by Covisint. Under the settlement, defendants agreed to create an $8 million common fund to compensate Covisint stockholders who were harmed by the alleged misrepresentations or omissions, which amount represented a substantial percentage of the maximum potential recovery. The Court approved the settlement in its entirety on Dec. 13, 2016.

- J**ohnson & Weaver Appointed Lead Counsel in *Gerneth v. Chiasma, Inc.*, et al., Case No. 1:16-cv-11082-DJC (Dist. Mass.):** In a case alleging violations of §§11 and 15 of the Securities Act of 1933 and §§10(b) and 20(a) of the Securities Exchange Act of 1934 for the issuance of false and misleading statements, Johnson & Weaver's client was appointed lead plaintiff and the firm was appointed Co-Lead Counsel under the Private Securities Litigation Reform Act of 1995. The complaint filed in the action alleges that defendants made false and misleading statements in connection with the Company's IPO and following the IPO regarding the Company's business and the prospects for approval of a pharmaceutical drug. As a result of these false statements, Chiasma stock traded at artificially inflated prices during the Class Period.

Spokeo v. Robins: Where There is No Harm, There May Still Be A Foul

Over the years, Congress has enacted an alphabet soup of laws to protect consumers, including the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA), Telephone Consumer Protection Act (TCPA), and Truth in Lending Act (TILA), to name just a few. Congress made consumers the primary enforcers of these laws by authorizing them to bring a federal lawsuit, and recover statutory damages, even if the consumer did not suffer any harm as a result of the violation.

Last term, in *Spokeo v. Robins*, the U.S. Supreme Court considered whether a statutory violation that does not cause an actual injury is sufficient to create "Article III standing" (*i.e.,* the provision in the U.S. Constitution requiring a plaintiff to have "an injury in fact" in order to bring a federal lawsuit). In a 6-2 decision, the Supreme Court held that a statutory violation does not, by itself, automatically allow a plaintiff to bring a lawsuit.

Writing for the majority, Justice Alito explained that "a bare procedural violation" of a statute, "divorced from any concrete harm," does not "satisfy the injury-in-fact requirement of Article III." Justice Alito made clear, however, that an "intangible" harm can be sufficiently concrete. Further, "[i]n determining whether an intangible harm constitutes injury-in-fact, both history and the judgment of Congress play important roles." Specifically, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." Also, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."

At the same time, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." Justice Alito was quick to reiterate, however, that "the risk of real harm can satisfy the concreteness requirement." Thus, "a plaintiff in such a case need not allege additional harm beyond the one Congress has identified."

Unsurprisingly, businesses and their lawyers claimed complete victory immediately after the Court handed down its decision. In the days that followed, articles started appearing on defense-oriented legal blogs with titles such as "The Supreme Court Hates Your No Damage Class Action" and made bold claims like *Spokeo* was going to be "[a] monstrous, Great-Wall-of-China-sort of barrier to no-damage class action practitioners." In the nearly six months since *Spokeo* was decided, however, it has not been nearly the roadblock that defendants predicted.

For the most part, the Courts of Appeal and district courts that have dealt with the issue have continued to allow no-damage, statutory-violation cases to proceed after *Spokeo*. For example, courts have generally held that a violation of the FDCPA (which prohibits debt collectors from engaging in certain abusive debt-collection practices) is the type of de facto harm that gives rise to Article III standing. After all, if the goal of the FDCPA is to protect consumers from certain harmful practices; it logically follows that those practices would themselves constitute a concrete injury. Likewise, a violation of the TCPA (which prevents junk faxes and robo-calls to cellular phones) is the type of invasion of privacy that Congress has long had the ability to protect against.

On the other hand, courts have found certain statutory violations to be so trivial that they could not possibly result in any material risk of harm. For example, in one case, a driver sued Lyft for running a background check without giving him notice of his rights under the FCRA. The background check did not reveal any problems and Lyft hired the driver. The district court found this was the type of non-concrete harm the Supreme Court had in mind when it held that not every bare procedural statutory violation will give rise to a federal claim.

Johnson & Weaver will continue to monitor how lower courts apply *Spokeo* in statutory violation cases. But for now, one thing is clear — businesses did not get what they were hoping for: an unfettered ability to violate important consumer protection statutes with impunity.

ABOUT THE FIRM

Johnson & Weaver is a firm built on foundational principles of trust,hard work, determination and integrity. We embrace and embody those ideals in everything we do. Whether we're pursuing damages against a billion-dollar corporation or we're challenging a small transaction, Johnson & Weaver devotes every resource necessary to secure the best result possible. As a result, we have developed the reputation of delivering big-firm results with the personal touch that only a small firm can offer.

Johnson & Weaver's practice areas include securities class actions, shareholder derivative litigation, mergers & acquisitions litigation, labor & employment litigation, and consumer class actions. These cases are handled on a contingency fee basis. Johnson & Weaver also handles complex business and commercial matters on an hourly fee basis.

We believe we are only as good as our people, and Johnson & Weaver is determined to recruit only the best and brightest and most determined candidates possible. Our team includes:

Partners
Frank J. Johnson
Brett M. weaver
Michael I. Fistel, Jr.

Analysts & Staff
James M. Baker
Margaret E. Barbera
Emily F. Bigelow
Matthew T. Ostman
Chrystal Fortt

Associates & Counsel
W. Scott Holleman
Richard A. Nervig
Kristen L. O'Connor
Cecilia E. Rutherford
William W. Stone
Phong L. Tran

CONTACT INFORMATION

SAN DIEGO OFFICE
600 West Broadway, Suite 1540
San Diego, California 92101
T: (619) 230-0063
F: (619) 255-1856

NEW YORK OFFICE
99 Madison Avenue, 5th Floor
New York, NY 10016
T: (212) 802-1486
F: (212) 602-1592

GEORGIA OFFICE
40 Powder Springs Street
Marietta, Georgia 30064
T: (770) 200-3104
F: (770) 200-3101

http://www.johnsonandweaver.com
contactus@johnsonandweaver.com

Follow us on social media:
@JW_LLP
facebook.com/johnsonandweaver
linkedin.com/company/johnson-&-weaver-llp