SECRETARIAT 4Q 2022

ECONOMISTS INK

DEPARTMENT OF JUSTICE GETS FIRST GUILTY PLEA IN CRIMINAL NO-POACH ANTITRUST CASE

A Review of the McDonald's & Burger King No-Poach Class Action Cases

Information, Bias, and Revenues in Sponsored Search Auctions

Secretariat Economists

FROM THE EDITOR-IN-CHIEF

To our readers, I am excited to share the latest edition of *Economists Ink* with you.

The first article discusses the Department of Justice's ("DOJ") first guilty plea in a criminal no-poach antitrust case. The second article also addresses no-poach antitrust issues, with a discussion of recent decisions regarding the McDonald's and Burger King class action cases. The third article pertains to sponsored search auctions ("SSA") and analyzes the importance of seller and bidder information in online advertising auctions.

In the first article, Erica Greulich discusses the recent case in which VDA OC LLC ("VDA") plead guilty to claims that it violated antitrust law by participating in an alleged scheme to limit the wages of nurses. Dr. Greulich discusses how the guilty plea, along with other efforts by the DOJ, may further increase the likelihood that the DOJ will pursue more labor-side antitrust investigations.

In the second article, Jonathan Walker considers two recent no-poach class action cases. Dr. Walker highlights how the District Court decisions in the McDonald's and Burger King class action cases differed and discusses the Eleventh Circuit's recent overturning of the District Court ruling in the Burger King case. Dr. Walker indicates that how the two cases will resolve is not yet clear, but economic analyses concerning market definition and market power likely will be important in the resolution of both cases.

In the third article, Panos Dimitrellos investigates whether an online platform could increase its revenues by providing advertisers who are bidding for slots with accurate information about the click through rate ("CTR"), and, if so, by how much. Dr. Dimitrellos analyzes Tripadvisor SSA data and finds that revealing the CTR would raise platform revenues by an average of seven percent.

Enjoy!

Dr. Stephanie Mirrow
Director

ECONOMISTS INK

PUBLISHED BY SECRETARIAT ECONOMISTS, LLC
INFO@SECRETARIAT-INTL.COM
+1.877.732.4685

EDITOR-IN-CHIEF Dr. Stephanie Mirrow

CONTRIBUTORS Dr. Erica E. Greulich
Dr. Jonathan L. Walker
Dr. Panos Dimitrellos

DESIGN McCarter Design
MCCARTERDESIGN.COM

ECONOMISTS INK IS A QUARTERLY PUBLICATION OF SECRETARIAT ECONOMISTS, TRACKING DEVELOPMENTS IN THE FIELDS OF LAW AND ECONOMICS, PUBLIC POLICY, AND BUSINESS STRATEGY.

Secretariat Economists

TABLE OF CONTENTS

4Q 2022

FEATURED ARTICLES

NEWS & NOTES

NEWS & NOTES

Managing Director Allan Ingraham Speaks at the 11th Spectrum Management Conference

Managing Director **Dr. Allan Ingraham** recently participated in "Cracking the Rural Broadband Challenge — Delivering Connectivity and Affordability" at the 11th Spectrum Management Conference in Washington, DC. Fellow speakers included leading industry luminaries Giulia McHenry (Chief, Office of Economics and Analytics, Federal Communications Commission), Campbell Massie (Director of Regulatory Policy, North America, GSMA), and Fernando Carrillo (Global Spectrum & Regulatory Policy, GSOA). The session examined the connectivity needs of citizens and businesses in unserved and underserved areas, and the programs that are being established at federal and state levels to deliver broadband connectivity at affordable prices.

Our San Francisco Office has a New Address

Secretariat Economists has moved to a new office in San Francisco and while the location has changed, our talented team remains the same. Our new address is:

135 Main Street
Suite 1850
San Francisco CA 94105
+1 415 975 5510

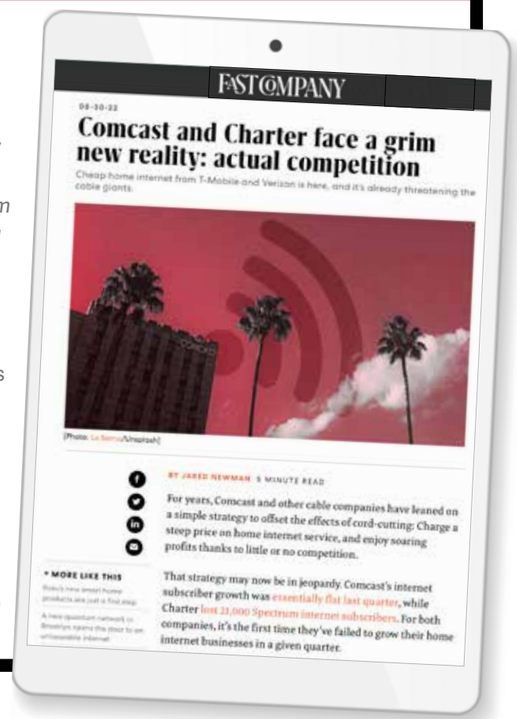
Cagatay Koc Joins American Health Law Association Podcast

Managing Director **Cagatay Koc**, along with Leslie Overton of Axinn Veltrop & Harkrider LLP, and Peter Mucchetti of Clifford Chance LLP spoke on AHLA's *Speaking of Health Law* podcast about the Biden Administration's changing approaches to antitrust in health care since the release of its July 2021 executive order on antitrust competition. They discussed the administration's "all of government" policy approach to antitrust, recommendations for navigating merger reviews and antitrust investigations in the health care sector, considerations related to labor theories in the antitrust framework, and what to expect from revisions to the merger guidelines. Sponsored by Axinn.

AHLA's *Speaking of Health Law* podcasts offer thoughtful analysis and insightful commentary on the legal and policy issues affecting the American health care system.

Study by Secretariat Economist's Pablo Varas Featured in Fast Company Article

Associate Director **Pablo Varas** features in Fast Company's article, *Comcast and Charter face a grim new reality: actual competition* where he comments on the impact to internet speeds and service costs when wireless providers enter cable dominated markets. The Fast Company article draws upon Dr. Varas' study, "How Does Low-end Entry Affect High-end Service Quality in the U.S. Residential Broadband Service Markets?"



DEPARTMENT OF JUSTICE GETS FIRST GUILTY PLEA IN CRIMINAL NO-POACH ANTITRUST CASE

BY DR. ERICA E. GREULICH

Healthcare staffing company VDA OC LLC ("VDA") recently pleaded guilty to claims that it violated antitrust law by participating in an alleged scheme to limit the wages of nurses. In March 2021, the United States Department of Justice ("DOJ") filed criminal charges against VDA and a competing contractor. VDA is a healthcare staffing company that provides nurses to the Clark County (Nevada) School District. The DOJ alleged that VDA and its competitor conspired to suppress and eliminate competition by agreeing to allocate nurses and fix nurses' wages. This guilty plea represents DOJ's first success in criminal prosecutions of so-called "no-poach" and "no-hire" labor antitrust violations where two or more employers agree not to solicit or hire each other's employees.

"THIS GUILTY PLEA REPRESENTS DOJ'S FIRST SUCCESS IN CRIMINAL PROSECUTIONS OF SO-CALLED "NO-POACH" AND "NO-HIRE" LABOR ANTITRUST VIOLATIONS..."

DOJ first filed criminal labor-side antitrust charges in United States v. Jindal in 2020. This followed joint guidance issued in 2016 by DOJ and the Federal Trade Commission ("FTC"). In this joint guidance, DOJ and FTC signaled their intent to pursue potential criminal charges against employers engaging in naked wage-fixing or no-poaching agreements, as they perceived such agreements to restrict competition when not tied to a broader collaboration.

Additionally, the U.S. Department of Labor ("DOL") entered into a memorandum of understanding ("MOU") with DOJ earlier this year. The MOU notes DOL's and DOJ's shared interests in protecting competition in labor markets and protecting workers who have been or are at risk of being harmed by anticompetitive conduct. The MOU allows DOL to refer to DOJ potential antitrust violations that it uncovers during DOL's enforcement actions.

To date, DOJ has succeeded in getting courts to acknowledge that no-poach and wage-fixing agreements can be per se violations of the Sherman Act. However, juries in the first two criminal labor antitrust cases, United States v. Jindal and United States v. DaVita, both of which went to trial earlier this year, acquitted defendants of criminal violations.

DOJ continues to pursue criminal charges against companies perceived to engage in no-poach or wage-fixing agreements and to intervene in private litigation to encourage courts to apply antitrust laws to labor markets. The DOL referrals and the guilty plea from VDA may further increase the likelihood that DOJ will pursue more labor-side antitrust investigations.

DIRECTOR DR. ERICA E. GREULICH *is an empirical microeconomist who frequently consults on employment and antitrust matters.*
egreulich@secretariat-intl.com

A REVIEW OF THE MCDONALD'S & BURGER KING NO-POACH CLASS ACTION CASES

BY DR. JONATHAN L. WALKER

In two separate class action litigations, former employees sued McDonald's USA, LLC and McDonald's Corporation ("McDonald's") and Burger King World-wide, Inc., Burger King Corporation, Restaurant Brands International, Inc., and Restaurant Brands International Limited Partnership ("Burger King").

Plaintiffs in both litigations claim that McDonald's and Burger King violated antitrust law by including "no-poach" provisions in their franchise agreements. These provisions purportedly limited franchisees' discretion to hire employees away from other restaurants within the respective franchise systems and thus, plaintiffs allege, unlawfully suppressed wages. In June, the United States District Court for the Northern District of Illinois entered a judgment on the pleadings against the McDonald's plaintiffs. On the other hand, in August, the Eleventh Circuit Court of Appeals overturned a seemingly similar District Court order dismissing the class action in the Burger King case. How the two cases will resolve is not yet clear, but economic analyses concerning market definition and market power likely will be important in the resolution of both cases.

In both cases, the plaintiffs allege that the courts should analyze their claims either under the "*per se*" rule or the "quick look" mode of analysis. Neither mode requires plaintiffs to allege relevant markets or market power or to prove harm to competition. The rule of reason is the third mode of analyzing allegedly anticompetitive restraints. Under the rule of reason, the plaintiff bears the initial burden of showing that the challenged practice or conduct has an anticompetitive effect. This generally involves proof that the defendant has market power in a relevant antitrust market and that the challenged conduct could have anticompetitive effects. Alternatively, plaintiffs can directly show anticompetitive effects in a relevant antitrust market — for example, lower market wage levels caused by the challenged conduct.

In the context of its denial of plaintiffs' motion for class certification in the McDonald's case, the District Court found that the appropriate mode of analysis was rule of reason. The Court noted that a) the rule of reason was the presumptive mode of analysis according to the U.S. Supreme Court's decision in *National Collegiate Athletic Association v. Alston* and b) McDonald's had put forth plausible procompetitive justifications for the restraints, including enhanced output in the end market for fast food. Having ruled against class certification, the Court's June order concerned the named plaintiffs' claims. The Court ruled against the named plaintiffs, because they had not defined a relevant antitrust market in which McDonald's allegedly had market power.

How the two cases will resolve is not yet clear, but economic analyses concerning market definition and market power likely will be important in the resolution of both cases.

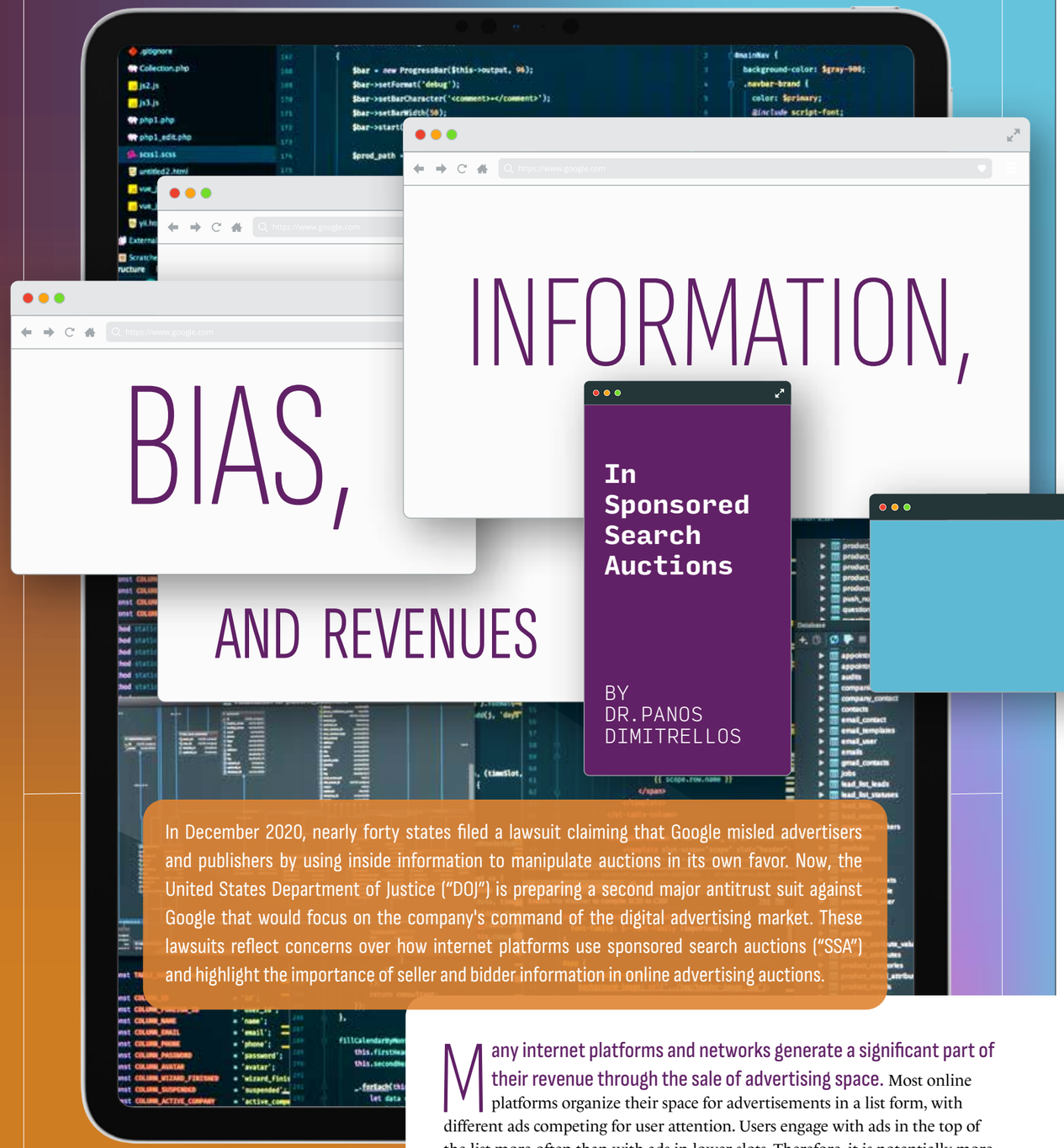
The dismissal decision in the Burger King case was different. In that case, the United States District Court for the Southern District of Florida ruled, in March 2020, that Burger King was legally incapable of conspiring with its franchisees. The District Court in this case did not address the proper mode of analysis or whether the plaintiffs had properly pled a conspiracy under the rule of reason.

The Eleventh Circuit Court of Appeals overturned the District Court's decision that as a matter of law Burger King was incapable of conspiring with its franchisees. Burger King argued in its appellate briefs that even if the Eleventh Circuit disagreed with the District Court regarding whether Burger King and its franchisees were legally capable of conspiring with each other, the Eleventh Circuit should still affirm the dismissal order for failure to plead sufficient facts to support a plaintiff verdict under the rule of reason. According to Burger King, plaintiffs had not alleged a relevant market or market power in a relevant market, just as the plaintiffs in the McDonald's case had failed to do. The Eleventh Circuit declined to rule on this issue, directing the District Court to address it first.

Whether the rule of reason is the appropriate mode of analysis and whether it is necessary to plead a relevant market under the rule of reason are key issues. A requirement to plead relevant antitrust markets may be fatal to class certification in both cases. First, an economic analysis of the relevant geographic markets for workers at a McDonald's or Burger King location is likely to indicate that such relevant markets are local. Second, while it is theoretically plausible that some workers may have acquired McDonald's-specific or Burger-King specific skills so that they might earn more at McDonald's brand or Burger King brand restaurants, it is not likely that this is true for all employees within the two systems. Many new hires have no prior McDonald's or Burger King experience. Some have no work experience at all. Thus, each potential class member's claims involve individualized questions about the degree of competition for the class members' services in the class member's local area from all potential employers, not just McDonald's- or Burger King-branded restaurants. There also would be a host of other individualized, market-specific, and time-specific questions to address in order to prove harm to competition and individual injury.

Plaintiffs in the McDonald's case have not yet filed any appeals briefs. However, the plaintiffs in the Burger King case argued on appeal that they had pled sufficient facts to support a rule of reason claim. They argued that it was not necessary to define a relevant market under the rule of reason, saying that it was sufficient to plead that wages were suppressed. Plaintiffs in the McDonald's case may also make similar claims on appeal. However, it may be impossible as an economic matter to prove that wage levels were suppressed in a relevant market without determining the bounds of that market, thereby determining the pertinent set of wages to analyze. Thus, market definition may be a key point of contention and a key factor in the resolution of these cases.

MANAGING DIRECTOR DR. JONATHAN WALKER
has consulted and testified in court regarding class certification, market definition, market power, and competitive effects.
jwalker@secretariat-intl.com



BIAS, INFORMATION, AND REVENUES

In Sponsored Search Auctions

BY DR. PANOS DIMITRELLOS

In December 2020, nearly forty states filed a lawsuit claiming that Google misled advertisers and publishers by using inside information to manipulate auctions in its own favor. Now, the United States Department of Justice ("DOJ") is preparing a second major antitrust suit against Google that would focus on the company's command of the digital advertising market. These lawsuits reflect concerns over how internet platforms use sponsored search auctions ("SSA") and highlight the importance of seller and bidder information in online advertising auctions.

Many internet platforms and networks generate a significant part of their revenue through the sale of advertising space. Most online platforms organize their space for advertisements in a list form, with different ads competing for user attention. Users engage with ads in the top of the list more often than with ads in lower slots. Therefore, it is potentially more valuable for an advertiser to place her ad in a slot in the top of the list, because the ad will receive more clicks from platform users. In platforms such as Google, Tripadvisor, and Yahoo, the advertisement slots are allocated with the help of an auction mechanism (an SSA). In such an SSA, the advertisers become bidders and submit bids that reflect their valuation of advertisement. A common form of these SSAs is for advertisers to submit a single bid which is then used to determine which advertisers are allocated to which slots and the prices paid when an advertisement in a particular slot receives a click.

The economic literature studying SSAs typically assumes that the click through rate ("CTR") of each slot and the probability that a click will convert to a sale ("conversion rate") is known to all advertisers bidding for a slot. However, this assumption may not be realistic. For example, on Tripadvisor, the CTR and conversion rate for the top advertising slot on a hotel listing page can vary quite dramatically over time. This variation is in part a result of how many viewers come to the page by clicking on Tripadvisor's paid search advertising compared to how many viewers come to the page as Tripadvisor's own members. Viewers who come to a hotel listing page through clicking on Tripadvisor's paid search advertising tend to have quite different click and conversion patterns compared to Tripadvisor's own members, who arrive at the hotel listing page by performing searches directly on Tripadvisor's platform.

> "Estimates from the **Tripadvisor data** indicate that **advertisers are biased** in their beliefs about the expected number of clicks that their listing will receive."

Anecdotal evidence suggests that different advertisers, such as online travel agencies, may differ in their ability to predict the CTR for the top slot and may believe, systematically, that the average number of clicks for a given slot on a hotel listing page is higher or lower than it really is. This raises the question of whether the platform could increase its revenues by providing advertisers who are bidding for slots with accurate information about the CTR, and, if so, by how much.

I investigated this question by estimating a structural model of bidding behavior for Tripadvisor SSAs. In my model, I allow advertisers to have asymmetric information about the CTR of the top slot in the auction. The auction operates as a Generalized Second Price Auction ("GSPA"). Before the auction takes place, each advertiser receives a signal about the top slot's CTR, which she updates, based on what happens as the auction plays out. I also allow advertisers to have different prior beliefs about the CTR in order to capture their biases, if any. A prior belief centered close to the true number of clicks of the top slot reflects an advertiser with the ability to predict the CTR well. Respectively, a prior belief centered further away from the true number of clicks of the top slot shows an advertiser that often fails to predict the platform's CTR.

I use data from Tripadvisor to address whether a platform such as Tripadvisor could increase its revenues by providing more information to advertisers who are bidding for slots. The Tripadvisor data include information on the bids, auction results, user clicks, and conversion data for more than 150,000 auctions. I also observe the margin that each bidder extracts from each hotel when a room is booked through its advertised slot. Estimates from the Tripadvisor data indicate that advertisers are biased in their beliefs about the expected number of clicks that their listing will receive.

I also consider a counterfactual analysis in which Tripadvisor reveals its information about the CTR. I find that revealing the CTR for each auction erases bidder bias. This results in higher revenues for two main reasons. First, advertisers who had a downward bias bid higher when they realize that the expected number of clicks in an auction exceed their expectations. Second, advertisers who had an upward bias no longer interpret low bids from their pessimistic counterparts as an indication of a low CTR and thus increase their bids.

If there is asymmetric information and biased beliefs about CTRs in the SSA, platforms may be able to increase their revenues by revealing information about the CTR. An analysis of Tripadvisor SSA data indicates that revealing the CTR would raise platform revenues by an average of seven percent. This analysis also indicates that revealing CTR-related information benefits advertisers with biased beliefs. Thus, these findings suggest that increasing the transparency of CTRs may benefit both advertisers who are bidding for slots and the platforms, such as Tripadvisor, on which they are bidding for these slots.

ASSOCIATE DIRECTOR DR. PANOS DIMITRELLOS
specializes in online auctions and econometric analyses of competition issues in a number of industries, including online platforms. This article is based on two papers in cooperation with Tripadvisor.
pdimitrellos@secretariat-intl.com

ABOUT SECRETARIAT

SECRETARIAT IS AN EXPERT SERVICES, LITIGATION CONSULTING, AND ECONOMIC ADVISORY FIRM working with the world's leading law firms, corporations, and governmental agencies to **RESOLVE CONFLICTS** and **MITIGATE COMPLEX RISKS**.

Our bright minds and passionate problem-solvers put their financial, analytical, and strategic insights to work in the fast-paced sectors we serve—from construction and energy to healthcare, technology, and natural resources.

Quality, integrity, and independence are woven into every aspect of our work. But, most importantly, when the stakes are high, our globally integrated teams thrive on working through the most daunting problems in ways that remove uncertainty and instill confidence.

OUR LOCATIONS

OFFICES IN THE WORLD'S KEY FINANCIAL AND ARBITRATION CENTERS

EXPERIENCE IN
100+
COUNTRIES GLOBALLY

SERVICES

- → ANTITRUST & COMPETITION
- → CONSTRUCTION DAMAGES
- → CONSTRUCTION DELAY
- → ECONOMIC DAMAGES & VALUATIONS
- → ECONOMIC REGULATION
- → FORENSIC INVESTIGATIONS
- → GOVERNMENT CONTRACTS
- → INTELLECTUAL PROPERTY DISPUTES
- → LABOR & EMPLOYMENT
- → STANDARD OF CARE

5,000
Engagements Completed on 6 Continents

Engaged by
80%+
of the Top 100 Global Law Firms

90%
OF TESTIFYING EXPERTS RECOGNIZED BY *WHO'S WHO LEGAL*

COMBINED DEAL VALUE OF MATTERS WORKED
$500B+

300+
Experts and Advisors Delivering Independent Insights

Denny McCarthy Team Secretariat

Secretariat is proud to sponsor emerging PGA star, Denny McCarthy. Denny exemplifies the same commitment and tenacity we bring to every client issue, no matter what the challenge requires.

PERMIT STD
U.S. POSTAGE **PAID**
CAROL STREAM, IL
PERMIT NO. 101

Secretariat

SECRETARIAT ECONOMISTS
2121 K STREET NW
SUITE 1100
WASHINGTON, DC 20037

+1.877.732.4685
INFO@SECRETARIAT-INTL.COM
SECRETARIAT-INTL.COM

Economists Incorporated is now

Secretariat Economists

Secretariat Economists.

Our name may be new, but the economists you know and trust remain the same.

As part of the Secretariat team, we deliver an expanded range of expert witness, litigation consulting, and economic advisory services to resolve conflicts and mitigate complex risks.