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ECONOMISTS INK

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Secretariat Economists

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FROM THE FOUNDING EDITOR

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

As you no doubt see, we have revived our preeminent publication with a stylistic new design and a healthy splash of color. It is an exciting change that reflects the dynamic nature of who we are today. We continue to seek new ways to connect with our clients while maintaining a consistent emphasis on generating thoughtful content from our premier analysts.

Economist Ink's evolution is a part of other significant developments we have enjoyed since Economists Incorporated joined the Secretariat family in 2021 to become Secretariat Economists. As a combined team, we have expanded our reach globally and broadened the talent and solutions we can leverage to address challenging dispute, regulatory, and economic challenges.

In the same way this edition has a fresh design, the articles and insights included are timely. Dr. Su Sun explores a recent ruling by China's Supreme People's Court that indicates the potential for larger damages awards for the holders of trade secrets and other intellectual capital. Dr. Stuart Gurrea examines how plaintiffs are increasingly using statistical evidence to prove liability in a range of different cases. Additionally, Dr. Pablo Varas looks at the growing scrutiny internet service providers are likely to face as they pursue mergers and acquisitions in the future.

Our goal with *Economists Ink* remains the same as it was when we started the publication more than 30 years ago — provide our clients with the fresh thinking and insightful analysis that helps them understand the ever-changing world of law, economics, and public policy. We are proud to continue this tradition in this and future editions of *Economists Ink*. Enjoy.

Warm regards,

Dr. David Argue
Managing Director

ECONOMISTS INK

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Secretariat Economists

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NEWS & NOTES

Clearance for Energy Transfer's acquisition of Enable Midstream Partners

On December 2, 2021, Energy Transfer LP ("ET") and Enable Midstream Partners, LP ("ENBL") completed their previously announced merger, in which ET acquired ENBL. The Federal Trade Commission had issued a Second Request for additional information and documentary material, which extended the Hart-Scott-Rodino waiting period. Managing Director **Dr. John R. Morris** and his SE team worked with Latham & Watkins, LLP, and Vinson & Elkins LLP to secure clearance for this transaction.

Dr. Jéssica Dutra presents on Vertical Integration at 2021 Southern Economic Association Conference

Associate Director **Dr. Jéssica Dutra** presented her joint research with Dr. Gregory Leung on Applied Law & Economics of Marijuana at the 2021 Southern Economic Association Conference in Houston, TX. Dr. Dutra and her co-author's research studies the impact of distinct vertical integration laws between wholesalers and retailers in adult-use legalized states.

Dr. Robert Arons appointed Economics Editor with ABA Section of Antitrust Law

Associated Director **Dr. Robert Arons** was appointed as the newest editor of the American Bar Association's (ABA) Media and Technology E-Bulletin. Dr. Arons is the economics editor for this bi-weekly update published by the ABA Section of Antitrust Law.

Dr. Keith Waehrer addresses loss of privacy and free online services in recently published paper

A paper by Managing Director **Dr. Keith Waehrer** titled *Is Loss of Privacy the Price that Consumers Pay for Otherwise Free Online Services?* was published in the CRESSE Special Edition of the January 2022 Competition Policy International (CPI) Antitrust Chronicle.

Commentators point to the loss of privacy as one of the consumer harms from monopoly online platforms. However, some view serious difficulties in bringing actions when the anticompetitive effect relates to quality instead of price. In the article, Dr. Waehrer argues the difficulties in analyzing competition over quality are likely easier to overcome than most think.

The January 2022 CPI Antitrust Chronicle includes articles based on presentations from the Special Policy Sessions ("SPS") organized by CRESSE in collaboration with CPI in September 3-5, 2021. The contributions include articles by several prominent economists and legal experts. Read the paper at *https://bit.ly/3tVyf1d*

Antitrust Writing Awards 2022

Dr. Su Sun's article selected for Concurrences Antitrust Writing Awards 2022

Managing Director **Dr. Su Sun's** co-authored article *The Draft Fining Guidelines and the Future of Antitrust Fines in China,* published in the *Journal of Antitrust Enforcement* in 2021, has been selected for the Concurrences Antitrust Writing Awards 2022 for the Academic Articles category in the "Procedure" subcategory.

In the article, Dr. Sun and Dr. Chenying Zhang of Tsingua University apply the formula for calculating fines proposed in China's draft antitrust fining guidelines to data on historical non-merger case decisions issued by China's antitrust agencies.

Read the article at *https://bit.ly/3tDVCMr*

AT&T

AT&T leads bidders in $22.5B US spectrum auction

Secretariat Economists Managing Director **Dr. Allan Ingraham,** Associate Directors **Shreyas Ravi** and **Chris Sojourner,** and Senior Associates **Gabriel Perez** and **Katherine Senseman** provided strategic advice to AT&T for its participation in Auction 110, which offered 100 MHz of mid-band 5G licenses in the 3.45-3.55 GHz band.

AT&T won the most spectrum in the auction, acquiring the maximum allowable portfolio of 40 MHz in every market across the continental U.S. Furthermore, AT&T was the only bidder to acquire a uniform nationwide portfolio.

This auction allowed AT&T to improve its already strong mid-band position, and at prices significantly lower than last year's C-band auction. AT&T is well positioned for 5G deployment, with the most consistent nationwide portfolio across all 5G bands.

The Secretariat Economists auction team has advised AT&T in all major spectrum auctions since 2014, including all the mid-band and mmWave auctions for 5G.

The official results files from the auction and the announcement of winning bidders and prices are provided by the US Federal Communications Commission's auction site here: *https://lnkd.in/d2fzmuZh*

DAMAGES AWARDS for TRADE SECRETS INCREASING IN CHINA

BY DR. SU SUN

In February 2021, China's Supreme People's Court ("SPC") awarded the country's largest damages in a trade secrets case, RMB 159 million, or close to $25 MILLION.

This ruling was an appellate decision in *Zhonghua Chemical et al v. Wanglong Group et al*, a trade secrets case that concerned the manufacture of vanillin. This decision, along with other recent decisions in China, indicate the potential for holders of trade secrets and other intellectual property ("IP") rights to win larger damages.

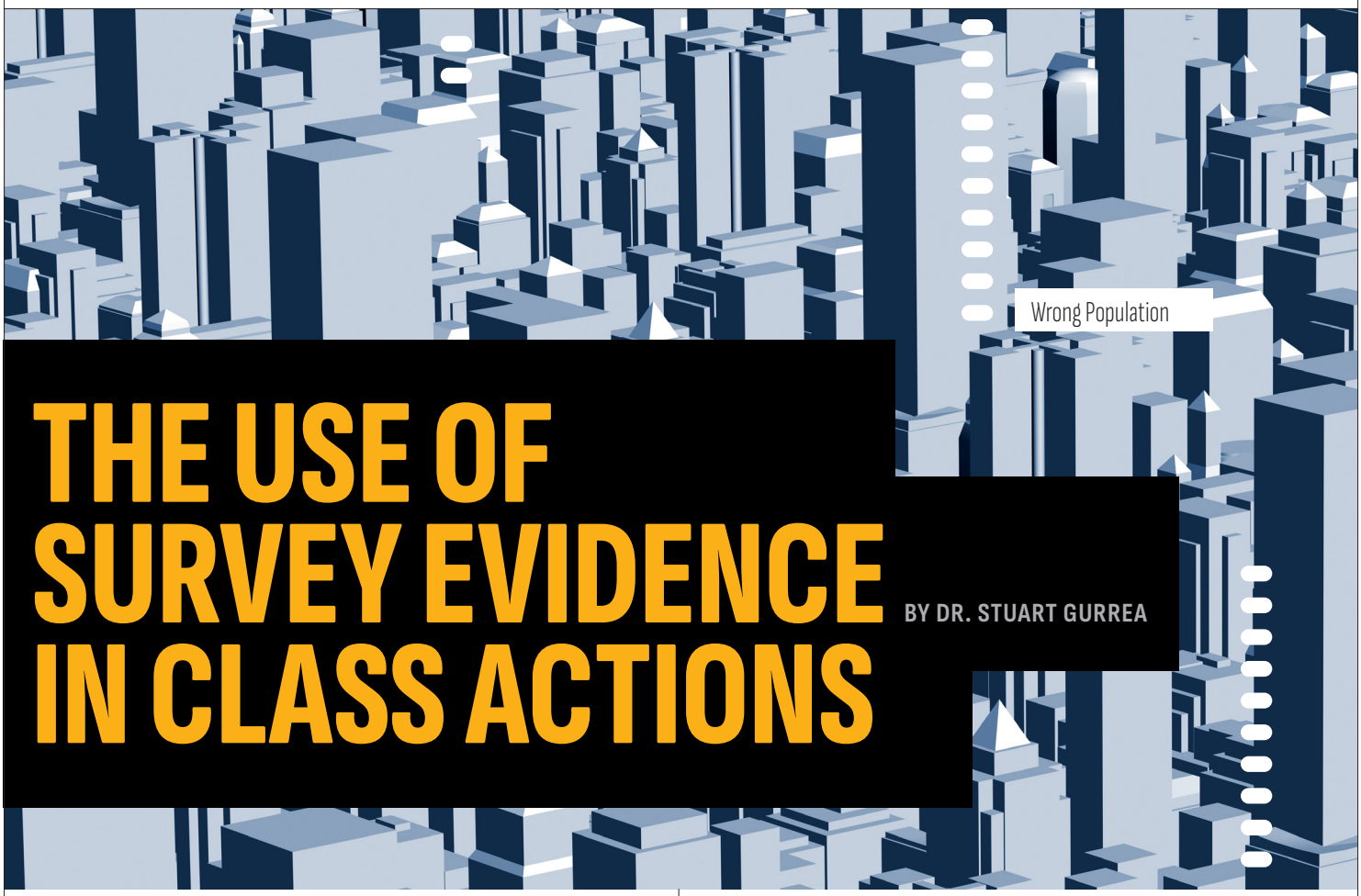
The main plaintiff Jiaxing Zhonghua Chemical Co., Ltd. ("Zhonghua") was China's largest vanillin supplier. In a 2018 lawsuit filed at the Zhejiang High People's Court, plaintiffs alleged that the main defendant Wanglong Group Co., Ltd. ("Wanglong"), in 2010, used improper means to obtain plaintiffs' technical secrets concerning the production of vanillin. Further, plaintiffs alleged that Wanglong used these technical secrets to construct an almost identical production line with large capacity and began production in 2011. Following Wanglong's entry into the vanillin market, Zhonghua's market share dropped, and it lowered its prices to compete with Wanglong's lower prices. Plaintiffs requested that Wanglong and other defendants stop infringement and pay damages. The Court issued an injunction order and the maximum statutory damages of RMB 3 million plus expenses. Both sides appealed.

In their appellate arguments, plaintiffs proposed three different damages amounts: (1) the defendants' illegal profits from selling infringing products calculated based on Zhonghua's operating profit margin; (2) the defendants' illegal profits from selling infringing products calculated based on Zhonghua's sales profit margin; and (3) plaintiffs' loss due to price erosion. The SPC's decision supported the second damages amount proposed by plaintiffs. The SPC indicated that the use of Zhonghua's sales profit margin is justified mainly for the following reasons: the defendants' refusal to turn over their vanillin sales records and the seriousness of the defendants' infringement. Additionally, the SPC noted the loss to the plaintiffs could be significantly larger due to price erosion.

These recent developments in China indicate the potential for rights holders to obtain larger damages awards in IP infringement cases.

The SPC's decision follows an earlier decision by the SPC that awarded punitive damages in another trade secrets case (*Guangzhou Tinci Materials Technology Co., Ltd. and Jiujiang Tinci Materials Technology Co., Ltd. v. Anhui Newman Fine Chemicals et al*). These recent developments in China indicate the potential for rights holders to obtain larger damages awards in IP infringement cases. Solid damages analyses and effective testimony in trial from economic experts may provide useful evidence for the Chinese courts to consider in such cases.

MANAGING DIRECTOR DR. SU SUN *has testified before various Chinese courts in IP infringement cases. Dr. Sun submitted an economic report on behalf of the plaintiffs and testified in the first instance of the vanillin trade secrets case discussed in the article.* ssun@secretariat-intl.com



THE USE OF SURVEY EVIDENCE IN CLASS ACTIONS

BY DR. STUART GURREA

Since the 2016 Supreme Court decision in *Tyson Foods, Inc. v. Bouaphakeo*, plaintiffs in class action lawsuits have increasingly relied on statistical evidence to prove liability on a class-wide basis.

Consistent with this trend, reliance on statistical evidence collected through surveys has become more common in class action litigation. While survey-based evidence can offer a valid approach to address class-wide questions, for this evidence to be reliable, the collection and interpretation of the data must conform to statistical standards.

In some class action litigation, surveys are used to support claims that a class of consumers was misled by certain representations. For example, in cases brought under the Fair Debt Collection Practices Act, communications between financial institutions and borrowers may be called into question.

A survey may be undertaken to assess the impact of the communications at issue, and this survey may be used as an empirical tool to assess perceptions and attitudes for a sample of relevant consumers.

An initial step in the survey process is identifying the correct population of interest (i.e., relevant consumers) to sample. Sampling involves selecting a subset of individuals from this population of interest. One common error in the development of survey-based evidence is population misspecification. Population misspecification occurs when a sample is drawn from the wrong population. For example, the relevant consumers are homeowners, but the sample is drawn from a population of renters. This type of error may result from a failure to understand the question at issue, or when the question is well understood, from targeting the wrong group of individuals to address the question of interest.

Population misspecification is of particular concern when the population of interest cannot be surveyed directly or the perception of interest is defined based on a legal construct. For example, cases brought under the Fair Debt Collection Practices Act may claim communications between a lender and borrowers are misleading. The legal standard in these cases is the potential to deceive the "least sophisticated consumer"—a figurative individual who has some basic context, information, and understanding. In these cases, a random sample of consumers is unlikely to

Validity of Responses

Close-ended Questions

Sampling Errors

match the profile defined by the least sophisticated consumer. To bridge the information gap between what respondents know and what a least sophisticated consumer is assumed to know according to the applicable legal standards, background information related to the communications at issue may be provided to survey respondents. Providing respondents background information, however, may be insufficient to generate reliable survey data. The effectiveness of this approach is dependent on the accuracy and completeness of the information provided to respondents as well as the survey's ability to educate the respondents.

Additionally, there is the risk of potential selection error. The goal of sampling is to select a subset of the population of interest that is representative. If only individuals with a specific profile respond to the survey, any analyses based on the survey may have biased results, as responses will be not representative of the entire population of interest. Hence, it is important to understand whether those surveyed are representative of the entire population of interest.

"ONE COMMON ERROR IN THE DEVELOPMENT OF SURVEY-BASED EVIDENCE IS POPULATION MISSPECIFICATION."

A next step in the survey process is designing and implementing a questionnaire aimed at collecting the information of interest. To ensure the validity of survey responses, the questionnaire may include questions aimed at assessing response quality. For example, questions can be introduced to assess respondents' level of understanding of background information and to determine whether it is reasonable to assume that respondents have a basic understanding of the relevant context. If the background information is too lengthy or complex, it may be determined that the survey design is not effective for putting the survey respondent in the situation of a consumer in the population of interest.

The reliability of survey responses also is directly dependent on the design of both open- and close-ended survey questions. Open-ended questions may be broad or interpreted broadly, which may increase response time and result in a wide range of views and opinions. Processing these responses can be challenging. Typically, verbatim responses can be processed and coded into data that can be analyzed. The reliability of coded data, however, may be compromised if processing verbatim responses requires a subjective evaluation by an analyst. Close-ended questions, on the other hand, restrict responses to a limited number of options, which narrows the breadth of the responses to the alternatives offered in the questionnaire. This helps avoid the bias associated with a subjective evaluation of survey responses by an analyst. Bias, however, may be introduced in the choice of the limited number of response options. Further, if response options are not exhaustive, survey respondents that are forced to choose among limited alternatives may choose an option that does not reveal accurately their perceptions.

Once the survey data are collected, statistics based on the sample survey responses can be developed to draw conclusions about the population of interest. By construction, a sample is a subset of the population of interest, and therefore subject to sampling error. Sampling error is the difference between the value of the parameter of interest in the population (for example, the mean) and the sample analog we calculate using data from the sample (for example, the sample mean). The size of this error can be quantified if probability sampling methods are employed, such as simple random sampling, stratified sampling, and clustered sampling.

Further, even rigorous design, implementation and analysis of survey data is not sufficient to conclude that the reported results derived from a survey are reliable. Tractability and quality of the survey design define the boundaries of the information collected by the survey. These boundaries also constrain the breadth of the conclusions that can be drawn from the survey analysis. In some instances, a technically valid and sound survey simply may not provide the empirical basis to support a proposition.

In sum, the reliability of survey evidence is dependent on its conformance with rigorous statistical standards, as well as boundaries inherent in the information collected by the survey.

MANAGING DIRECTOR DR. STUART GURREA *specializes in survey evidence, having worked on dozens of cases where such evidence has been integral to the outcome of the case.*
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Competition IN THE BROADBAND INTERNET MARKET

Number of Internet Providers and Quality of Service Gains Scrutiny

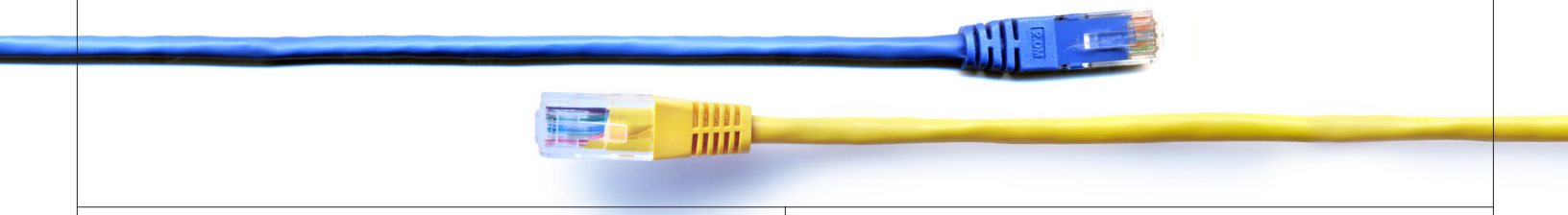
BY DR. PABLO I. VARAS

The Covid-19 Epidemic caused a massive adoption of virtual learning, work-from-home, streaming, and e-commerce. Availability of reliable internet service is a necessary condition for all these activities.

With this transformation seemingly permanent rather than temporal, policymakers, regulators, and consumers have focused significant attention on the internet industry. For example, President Biden included internet service as one of the industries in his *Executive Order on Promoting Competition in the American Economy* last July. The *Executive Order* indicates there are four issues of concern for internet service, including a lack of competition among broadband providers. In this environment, new merger and acquisition proposals among internet providers likely will face increased scrutiny. Recent research suggests that case-specific facts concerning the potential for entry, expansion, and technological improvements should be important considerations.

The Executive Order states that "[m]ore than 200 million U.S. residents live in an area with only one or two reliable high-speed internet providers, leading to prices as much as five times higher in these markets than in markets with more options." Data available at the Federal Communication Commission ("FCC") Broadband Map indicates that as of 2020, 40 percent of the U.S. population has access to only one high-speed internet provider and only 16 percent of the U.S. population has three or more high-speed internet providers available in their area. Additionally, in a study of the U.S. broadband industry, Kenneth Flamm and I find that there has been limited entry by new competitors into local broadband markets. For example, between 2014 and 2018, the average number of internet providers increased by 0.07 in urban census blocks and by 0.18 in rural census blocks. (See Flamm, Kenneth, and Pablo Varas. "Revising the Record: Six Stylized Economic Facts About Pre-Covid U.S. Residential Broadband Markets." *Journal of Information Policy* 11.)

In this study, Kenneth Flamm and I also find that broadband service plan prices, after adjusting for quality, have not varied significantly over the previous fifteen years. However, there is



substantial evidence of continuing quality improvement in broadband services across local U.S. markets, evidence that suggests that the primary dimension for residential broadband competition is not service plan price, but service plan quality (primarily download and upload speeds). We also note that internet providers may be highly motivated to introduce new, higher quality speed tiers as technology improves.

In additional recent research, Kenneth Flamm and I study quality competition in the U.S. broadband industry and empirically assess the relationship between service quality and competition. (Flamm, Kenneth and Pablo Varas, "Effects of Market Structure on Broadband Quality in Local U.S. Residential Service Markets," working paper.) Specifically, we ask how does increased competition, measured as number of competing internet providers in a census block, affect quality of service, measured as the highest speed offered by legacy service providers in a census block.

Using broadband deployment data from the FCC containing information on residential internet services from 2014 through 2018, we analyze how the offered internet speed changes when there are changes in the number of competitors in a local market. Our analysis focuses on urban markets with only two available broadband internet providers (using cable or DSL technology) in 2014. We compare the maximum download speed offered by cable or DSL providers in markets which experienced entry or exit of providers to those which did not experience changes in the number of competitors during this time period.

> "The results from our regression analyses suggest that entry may lead to higher quality service."

The results from our regression analyses suggest that entry may lead to higher quality service. For example, moving from two to three cable or DSL broadband providers increases internet speed by about 60 Mbps (and is statistically significant). Similarly, a decrease in the number of cable and DSL competitors leads to a reduction of service speed. We also considered entry by providers using fiber technology. We find that the entry of one fiber provider does not have a significant impact on internet speed, but the entry of two fiber providers increases internet speed by almost 90 Mbps for cable and DSL services. However, we find that the entry of any number of fixed-wireless providers has a negligible impact on the internet speeds offered by providers using cable or DSL technologies.

Our analysis highlights that service expansion (entry into new markets) may lead to higher quality service by increasing the internet speed. Our findings suggest that regulators should consider, in addition to other factors, whether a given merger of broadband internet providers would result in service expansion by the merging parties, and whether the merger may accelerate service improvements and technology investments by the merging parties.

A review of past mergers also may provide guidance on whether certain conditions, such as expansion or technology investment conditions, were sufficient for maintaining or improving internet service to consumers. For example, a review of Charter Communications' ("Charter") acquisition of Time Warner Cable ("TWC") and Brighthouse Networks ("BHN") may be illustrative. In the Charter/TWC/BHN merger, the FCC and Department of Justice ("DOJ") imposed a residential build-out condition: the merged entity would have to deploy and offer internet service to two million new residential customers within five years after closing. Additionally, the combined Charter/TWC/BHN was required to make available an affordable, low-price standalone broadband service to certain low-income consumers in its service areas. A retrospective review could analyze the number of new residential locations where Charter is offering internet service and the download speed of those services.

Given the significant public attention on the provision of internet services, new merger and acquisition proposals among internet providers likely will face increased scrutiny. Our recent research suggests that the potential for entry, expansion, and technological improvements and investments should be important considerations in any merger review.

ASSOCIATE DIRECTOR DR. PABLO VARAS *has conducted economic analyses in a wide range of industries, including broadband internet services. This article is based on two papers co-authored with Kenneth Flamm.*
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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**.

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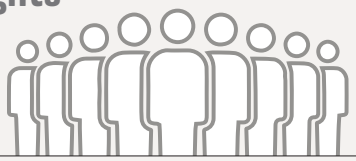

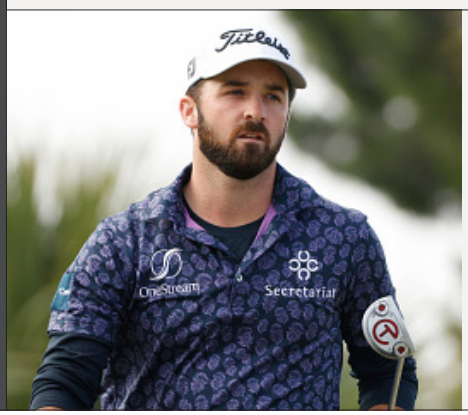

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