

## Litigators of the Week: The Paul Weiss Team That Kept a Top IBM Cloud Computing Exec from Moving to Microsoft

Bob Atkins and Liza Velazquez obtained a rare injunction based on a noncompete agreement when U.S. District Judge Philip Halpern blocked a former IBM executive from taking the position as Microsoft's corporate vice president, Latin America through May 18, 2021.

By Ross Todd  
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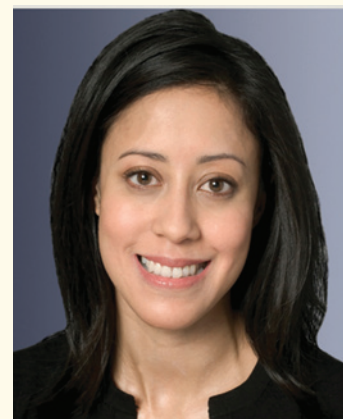
Health checks at the door. Hand sanitizer everywhere. Three people in the elevator at a time.

That should give you an idea of what this week's Litigators of the Week, **Bob Atkins** and **Liza Velazquez** and their team from **Paul, Weiss, Rifkind, Wharton & Garrison** navigated back in July when they went to court in the Southern District of New York seeking an injunction barring former IBM cloud computing executive Rodrigo Lima from taking a new position with rival Microsoft.

On September 3 the team scored a rare injunction based on a noncompete agreement when U.S. District Judge Philip Halpern blocked Lima from taking the position as Microsoft's corporate vice president, Latin America through May 18, 2021. The pair recently answered the Litigation Daily's questions about the significance of the case and how they navigated questioning witnesses and presenting evidence in the confines of a COVID-era courtroom.

**Lit Daily: Who was your client and what was at stake?**

**Liza Velazquez:** Our client is International Business Machines Corporation, a global leader in information technology products and services, including cloud computing for the world's largest businesses. At stake is the protection of some of the company's most valuable and competitively sensitive trade secrets and



Courtesy Photos

**Paul Weiss partners Bob Atkins and Liza Velazquez.**

confidential business strategies for competing against rivals like Microsoft.

In violation of his noncompetition agreement, a senior IBM executive named Rodrigo Lima accepted an offer from Microsoft to switch sides in that competition without first honoring his 12-month waiting period. Mr. Lima was among the top 1% of IBM's highest-ranking executives, responsible over the years for overseeing IBM's Latin America operations, running IBM's Global Technology Services business in North America, and managing IBM's Global Integrated Accounts—IBM's largest clients around the world. He was privy to trade secrets across all of IBM's businesses, including product development

plans, client targets, and competitive strategies in every region of the globe.

To protect those trade secrets, and in exchange for millions of dollars in compensation, Mr. Lima agreed to wait 12 months before joining a competitor in a position where he might use or disclose those IBM secrets to compete against IBM. Mr. Lima breached that agreement and risked the disclosure of the IBM's trade secrets when, in May 2020, he agreed to immediately become Microsoft's corporate vice president for Latin America, in direct competition with IBM.

**Lit Daily: What does it take to win an injunction in a noncompete case like this?**

Bob Atkins: To enjoin a former executive like Mr. Lima for breaching a noncompetition agreement, a court must be persuaded that the former employer's trade secrets are at risk of disclosure at the new employer. That requires evidence that the former employee had access to confidential information, intends to work for a competitor, and has accepted a position in which it is likely that those business secrets will inevitably, even if inadvertently, be used. The former employer bears the burden of proving all of those facts, which is a particular challenge when the evidence is not clear whether the former employee departed with documents or files in hand. Courts are very demanding of parties seeking injunctive relief in these cases and, as a result, frequently decline to enforce noncompetition agreements.

**How did you assemble your trial team and how did you divvy up the work?**

Velazquez: Given the importance to IBM and to us that the trial team reflect the diversity of our firm, we assembled a group of diverse and talented lawyers at every seniority level. The team was led by Bob and me, as IBM's regular trial counsel in noncompete litigation. We divided the witnesses between us, both in court and by video. The trial culminated with Bob's cross-examination of Mr. Lima, whose admissions figured prominently in the court's decision. The hard labor of preparing the case on a super-expedited schedule—roughly 30 days from the TRO to trial, with depositions sandwiched in between—was done by associates **Pietro Signoracci** and **Crystal Parker**.

Pietro is the firm's master of noncompetition law and skillfully presented IBM's lead-off witness. Crystal is a seasoned trial lawyer and constructed the most significant direct examinations and cross-examination.

Atkins: We were also fortunate to have the close collaboration of IBM's in-house litigators, led by IBM's Global Head of Litigation **Ed Sebold**. Collaboration is the key to a winning trial strategy, and for IBM that means the full participation and support of the company, from General Counsel **Michelle Browdy** on down.

**What got you over the hump at the TRO stage?**

Atkins: Evidence. Rather than holding back our proof for trial, or keeping our witnesses under wraps, we gave the court substantial evidence—including the testimony of IBM's lead witness—of Mr. Lima's access to highly confidential and valuable trade secrets, including his participation in corporate leadership teams with the CEO and in the board of directors' annual strategy sessions. Given the burden of proof required in noncompete cases, we have learned that it is crucial to show the court from day one that we have the evidence not only for a TRO, but also for the ultimate injunctive relief.

**What was Judge Halpern's reasoning for wanting to conduct the preliminary injunction hearing in-person?**

Velazquez: The TRO hearing was held by phone on June 19, about 2 weeks before the district court in the Southern District of New York planned to reopen its courthouses. Anticipating that the court would be open to the public in July, Judge Halpern expressed his preference to observe and hear from Mr. Lima and the IBM witnesses in person.

**What was being back in the courthouse for proceedings like? How was the courtroom set up and what sorts of precautions were taken to keep the parties and participants safe?**

Atkins: This was the first in-person trial in the Southern District. After sheltering for four months, it was exhilarating to be back in the courtroom and back on our feet. But it was in many respects surreal. With no jury trials and other cases proceeding remotely, the cavernous courthouse was all but empty. Like our upended daily lives, virtually every aspect

of the experience was impacted by the pandemic, from the first steps into the courthouse to examining witnesses. We could go no farther than the front door without passing health-screening questions and having our temperature taken. Rather than racing to the courtroom with our litigation bags and exhibit boxes, all personal items had to be placed in plastic bags to get through security.

Velazquez: The experience in the courtroom was also jarring. The doors were left open to circulate the air and everyone—counsel, witnesses, law clerks, court reporters and court personnel—wore face masks at all times. Only three persons were permitted in each elevator car, with one person required to stand in the rear and face the back—even with clients present. The large courtroom was empty save for nine people, including the lawyers, permitted per side. Accustomed to having our colleagues nearby to pass notes and pass up exhibits, it was particularly disorienting to be ordered to stay six-plus feet apart. Of course, hand sanitizers were in abundance, and the podium was disinfected with each change of counsel.

**What was it like to examine witnesses and present evidence in that environment?**

Atkins: Examining witnesses was somewhat comical, but also a sobering reminder of the devastating outbreak. The lawyers and witnesses were masked. Some wore full face shields, looking more like welders than attorneys. The witnesses who were able to come to the courtroom sat far back and alone in the jury box. Other witnesses were even further removed, prohibited from attending in person because of travel restrictions and quarantine requirements. They appeared, maskless, by video conference.

Velazquez: Also, it impacted how we presented our case. Until this extraordinary moment, we did not

appreciate how often we use—and need—our facial expressions to connect with witnesses and the judge, and to confront witnesses on cross.

**This wasn't a cut-and-dry case involving a thumb drive or a cache of IBM documents walking out the door. How did you make the case that the position at Microsoft fell within the bounds of Mr. Lima's non-compete agreement with IBM and put the company's trade secrets at risk?**

Velazquez: This was the hill we had to climb. The key was the evidence, principally the direct testimony of IBM executives and the admissions from Mr. Lima on cross, that Microsoft and IBM are head-to-head competitors, that Mr. Lima would be changing sides in that competition if not enjoined, and that the trade secrets he learned at IBM relate directly to that competition. We found evidence that Mr. Lima himself authorized IBM's confidential strategies for combating Microsoft in the world's largest enterprises, including in Latin America where Microsoft wanted to put him in charge of competing against IBM.

**What will you remember most about this experience?**

Atkins: While tragic for far too many, the pandemic left us with a courtroom memory that we're sure never to forget. Part of that were the odd conditions of lawyering amidst a historic public health crisis. Another part was the exceptional esprit de corps, both on the Paul, Weiss team and with the client, fostered by these unusual and previously unimaginable challenges.

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