Before we begin

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Audio

The audio will remain quiet until we begin at 9:30 AM PT/12:30 PM ET.

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SILICON VALLEY FIRST CUP OF COFFEE SEMINAR SERIES

UPCOMING SEMINARS:

2022 Artificial Intelligence (AI) Boot Camp

December 8	Patent and Trade Secret Protection for Inventions that Use AI
December 13	Patenting of AI Inventions in Europe
December 14	Hot Topics in AI Under Consideration by the Executive Branch
January 11	Digital Health
January 12	CFIUS Focus on Transactions Involving AI and AI Companies
January 17	Artificial Intelligence in the Securities and Commodities Industry: A Primer

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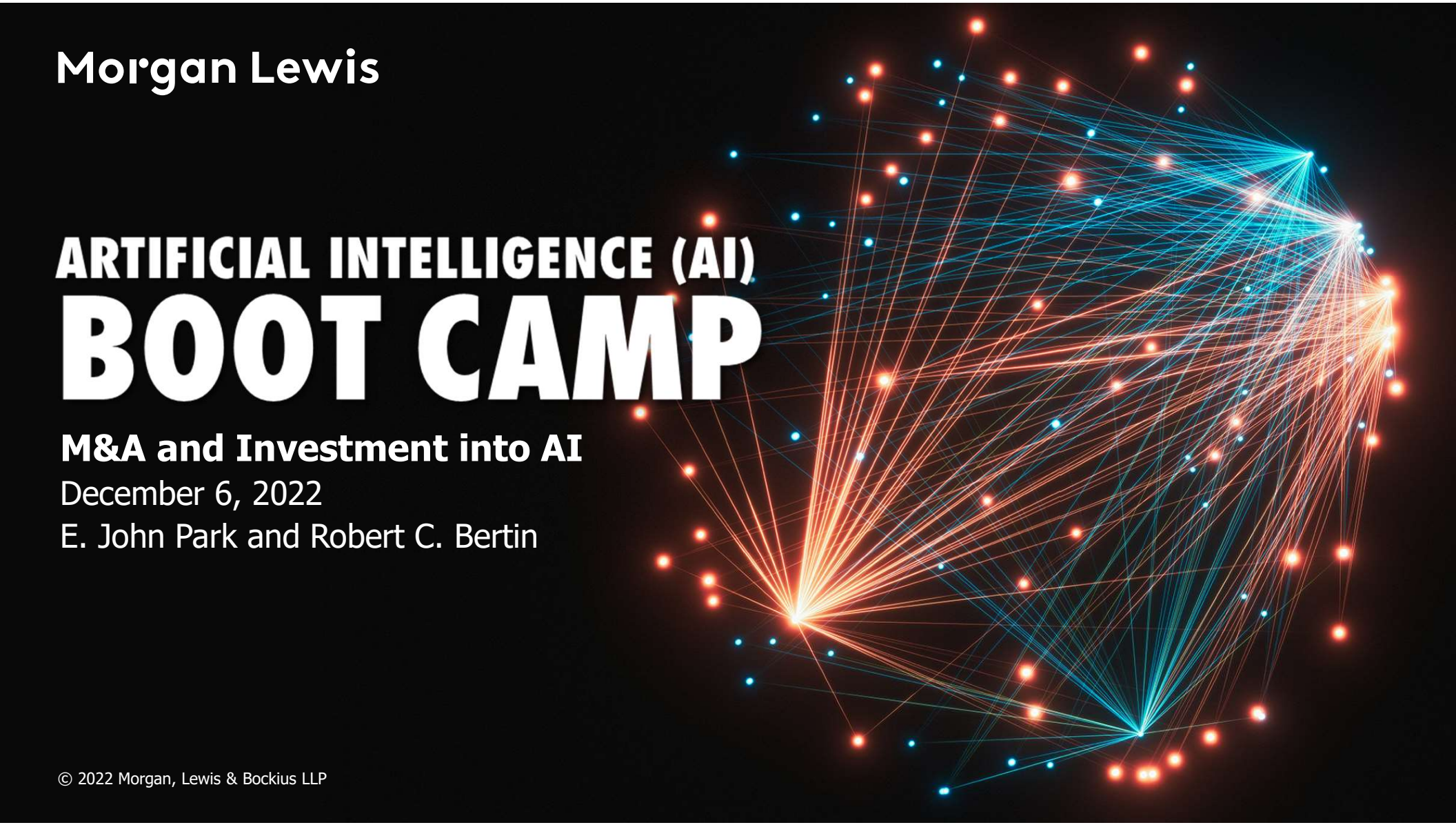


ARTIFICIAL INTELLIGENCE (AI) BOOT CAMP

M&A and Investment into AI

December 6, 2022

E. John Park and Robert C. Bertin

Host

Andrew J. Gray IV

Presenters

E. John Park

Robert C. Bertin

Morgan Lewis

What is AI?

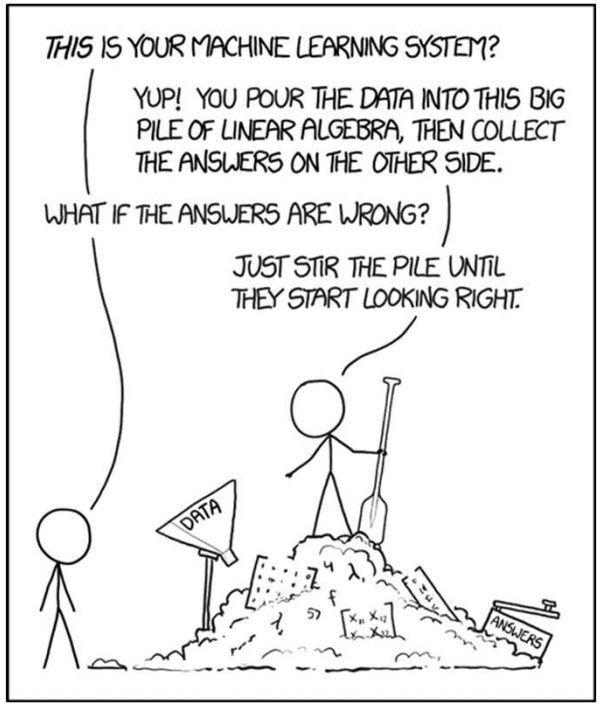
- Technology that simulates human intelligence
  - Analyze data to reach conclusions about it, find patterns, and predict future behavior.
  - Learn from data and adapt to perform certain tasks better over time.
- Algorithms (sets of code with instructions to perform specific tasks) that makes predictions

Executive Order on AI

- On February 11, 2019, President Trump announced the "American AI Initiative" which is "a concerted effort to promote and protect national AI technology and innovation."
- It directs Federal agencies to "pursue a multipronged approach to advance AI, including: promoting sustained AI R&D investment, enhancing access to high quality cyberinfrastucture and data, removing regulatory barriers, ensuring that American\ leads in the development of technical standards for AI, providing education and training opportunities to prepare the American workforce for AI and implementing an action plan to protect our technological advantage in AI."

How does AI Work?

- AI works by combining large amounts of data with fast, iterative processing and intelligent algorithms, allowing the software to learn automatically from patterns or features in the data.
- Not "AGI"
- Based on data and training
- Many different varieties



Types of AI

- Algorithm and data driven
- Computer Vision
- NLP
- Neural Networks
- Machine Learning
- Supervised Learning
- Unsupervised Learning
- Reinforcement Learning
- Deep Learning

How is it different?

- Auditability/Transparency ("Black Box")
- Bias/Discrimination
- Vaporware
- Regulatory Compliance
- Reputational Risk
- IP Ownership
- Data Privacy/Training Data
- Cybersecurity
- Liability

FTC Guidance

- On April 8, 2020, the FTC issued guidance in its Tips and Advice blog on how organizations can manage consumer protection risks that arise from artificial intelligence use, emphasizing that AI algorithms should be:
  - Transparent;
  - Explainable;
  - Fair;
  - Empirically sound; and
  - Foster accountability.

Fairness

- The blog post focused on fairness and accountability and stressed the following items:
  - Don’t discriminate based on protected classes.
  - Focus on inputs, but also on outcomes.
  - Give consumers access and an opportunity to correct information used to make decisions about them.
  - Ask questions before you use the algorithm.
  - Protect your algorithm from unauthorized use.
  - Consider your accountability mechanism.

How is AI used?

- How does the target utilize AI?
  - Offer as a standalone product, service or license
  - Offer as part of a larger offering, including integrated with hardware
  - Internal Uses
    - Part of product or service development
    - Compliance
    - Other functions (Sales, Marketing, Analytics, Customer Support, HR, etc.)
- "Off-the-Shelf" solutions
- Need to understand scope in order to develop diligence plan, representations and warranties and gauge risks.

AI Companies

- Cloud Providers
  - AWS
  - Google Cloud
  - IBM Cloud
  - MSFT Azure
- Robotics and Hardware
  - Tesla
  - Pony.ai
  - Nvidia
  - Amazon
  - Apple

AI Companies

- SaaS Model
  - Sift
  - Salesforce
  - HyperScience
- Healthcare
  - Flatiron Health
  - Watson
- Research
  - OpenAi
  - Deepmind

Types of Transactions

- Investments
  - Minority
  - Majority
- Licenses
  - Exclusive
  - Non-exclusive
- Partnerships and JV's
- M&A

Applicable Laws

- Regulated Industries (Banking, Financial Services, Healthcare, etc.)
- Data Protection and Privacy, GDPR/HIPAA
- Consumer Protection Laws
  - Fair credit reporting
  - Equal opportunity
  - Fair trade practices
- Anti-Discrimination
- Anti-Competition Laws
- IP and Copyright Laws
- Trade Secrets Act
- Local Laws (e.g., Facial Recognition Restrictions)
- CFIUS
- Export Controls

Diligence

- Code Audit/Open Source
- IT Audit
- IP/Ownership
- Training Data
- Licenses
- Warranties
- Product Liability
- Data Protection and Privacy
- Compliance with Laws
- Insurance

Representations and Warranties

- Definition of AI
- Scope of AI Usage (Products, Services, etc.)
- IT Systems and Cybersecurity
- Data Protection and Privacy
- Ownership of IP and Improvements
- Licenses
- Compliance with Laws
- Training Data
- Transparency
- Accountability/Bias

IP

- IP Diligence In AI is largely driven by the reasons for the Transaction:

    1. To acquire innovative technology.

    2. To access or use proprietary data that may not be available through licensing.

    3. To acquire talent that may be difficult to grow internally or bring in on a piecemail basis.

- Use an integrated technical and commercial diligence team.
- Might need product managers, data scientists, technologists, and IT experts on the team for AI diligence.
- Diligence checklists are a good idea.

IP – Acquiring Innovative AI Technology

- How material is IP to the target company's business/AI Technology?
    - Determines the level of detail for the diligence and areas of focus.
    - Does the IP provide a competitive advantage?
        - Identify the IP assets (patents, copyrights, software, data)
        - Are there commercially available alternatives?
        - Does the company own or license its IP, what is its provenance?
        - Review IP – related agreements, including out-licenses, in-licenses, R&D agreements, employment and consulting agreements.

IP – Acquiring Innovative AI Technology

- Has or will a University be involved in the transaction?
  - Look at role of the University or professor involved in the development of the technology.
    - Get a copy of the University's IP policy.
    - Was any federal funding used to develop the IP?
  - Will the University or professors continue to be involved?
  - What steps can be taken to clarify IP rights from future collaboration?
    - Might need a three way agreement with target and University
- Is Detailed Software or Patent Diligence Required?
  - Open source vs proprietary software.
  - Patent coverage of target's products and competitor's products.

IP – Acquiring Innovative AI Technology

- Does the technology operate in an ethical manner?
  - Consider IEEE and European Commission guidance on AI ethics.
    - Consider:
      - Compliance with privacy laws and regulations
      - Interpretability, transparency and accountability of the AI system
      - Biases, diversity, fairness
      - Well being of people that will interact with the AI from legal, policy and health and wellness perspectives
      - Embedded values within autonomous and intelligent systems
      - Societal and environmental well-being
- Reps and warranties covering ethical considerations tailored to the AI system should be included in addition to more routine reps and warranties.

IP – Acquiring Data Used in AI Transactions

- Often the value of an AI Player has more to do with the data used to train the AI system than the AI technology itself.
  - Do not underestimate the value of the data in AI systems.
  - Consider the sources of the data.
    - Does the target have lawful access to or ownership of the data?
    - Does the target have any necessary licenses or consents to use the data?
    - Are there any embedded privacy issues associated with using the data by the company now, after the transaction is completed, or given the way in which the data or AI system may be used in the future?
    - Copyrights in images, audio, and text can potentially be implicated depending on the AI system
- Robust reps may be needed with respect to the data if the value of the data is high and verification of its provenance is difficult to ascertain.

IP – Acquiring Talent in AI Transactions

- Who are the key players at the AI Target?
  - Get them involved in the diligence process to answer technical and ethical questions.
  - Did they have prior employers?
    - Look at prior employment and non-compete agreements.
    - Do they have any prior confidentiality agreements that may limit the scope of their activities after the acquisition?
    - Are there any restrictions that will prevent them from being productive on the acquiring company's team?
- Are any key players not part of the deal?
- Do any founders or third parties own IP that is essential for the company outside of the target being acquired?

Post-Closing

- Integration
- Retention of Key Employees
- Transparency/Interpretability
- Assistance with Regulatory Inquiries
- Documentation
- Confidentiality
- Non-Compete
- Protection of Code/Models

Conclusion

- Raises many of the same issues as software and Saas companies, but some notable differences
- Proliferation of AI "enabled" or "enhanced" products/services
- Imperfect fit as existing legal paradigms are applied to novel technologies
- Investors and advisors to understand the legal issues implicated, especially as:
  - Underlying technology continues to develop;
  - Lawmakers and Regulators seek to address issues raised by the technology;
  - Companies continue to deploy or implement AI solutions

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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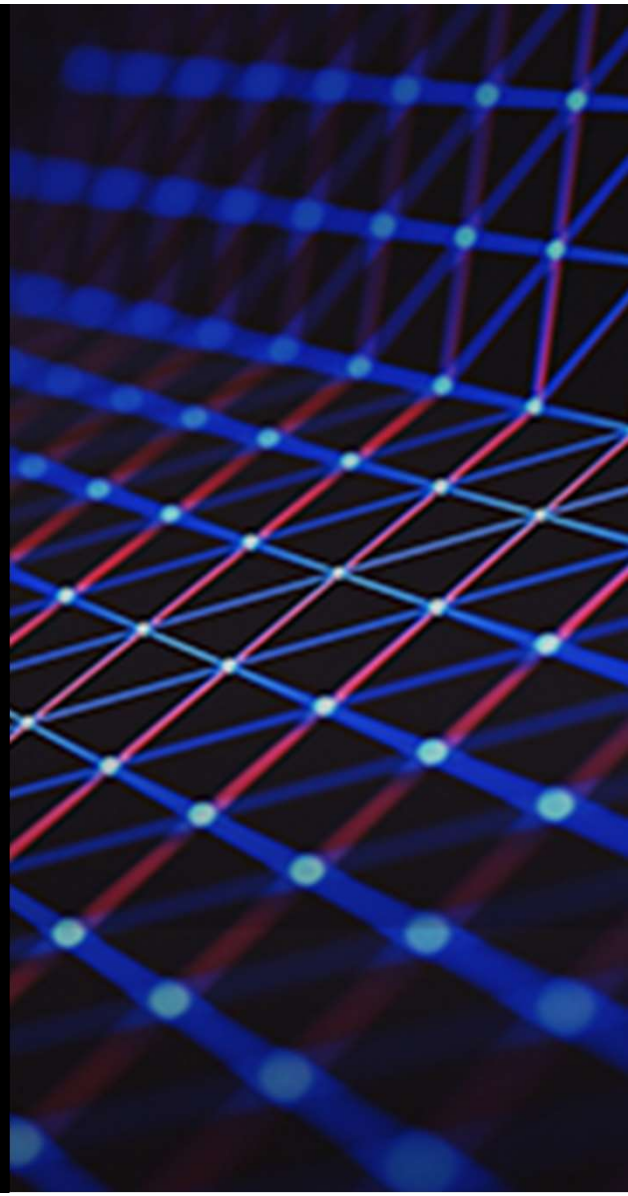
To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.



Biography

E. John Park
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E. John Park focuses his practice on debt and equity offerings, public securities offerings, recapitalizations, and mergers and acquisitions (M&A). He assists clients at every stage of the business cycle, from initial company formation, venture capital financings, and M&A, to initial public offerings (IPOs), public company reporting, and general corporate counseling. In addition, John represents acquirers and targets in public-private and private-private business combination transactions. John focuses on primarily technology companies in multiple sectors including artificial intelligence, automotive and mobility, cybersecurity, fintech, semiconductor and software, as well as biotechnology companies.

Biography

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Rob Bertin has more than 20 years of experience representing clients in patent, trademark, trade secret and copyright litigation throughout the United States, counseling clients on intellectual property (IP) matters and negotiating transactions involving IP. He has represented clients at the center of some of the largest patent portfolio sale and licensing events in the high-tech industry, including the Nortel and Kodak transactions. Rob leverages a technical background to represent large and small companies in a range of industries, including technology, telecommunications, media, financial services, and automotive.

Biography

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Serving as the leader of the firm's semiconductor practice and as a member of the firm's fintech and technology industry teams, Andrew J. Gray IV concentrates his practice on intellectual property litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on AI, machine learning, Blockchain, cryptocurrency, computer, and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, before the US Patent and Trademark Office's Patent Trial and Appeal Board, and before the US International Trade Commission.

Our Global Reach

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Asia Pacific
Europe
Latin America
Middle East
North America

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Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
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London
Los Angeles
Miami
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
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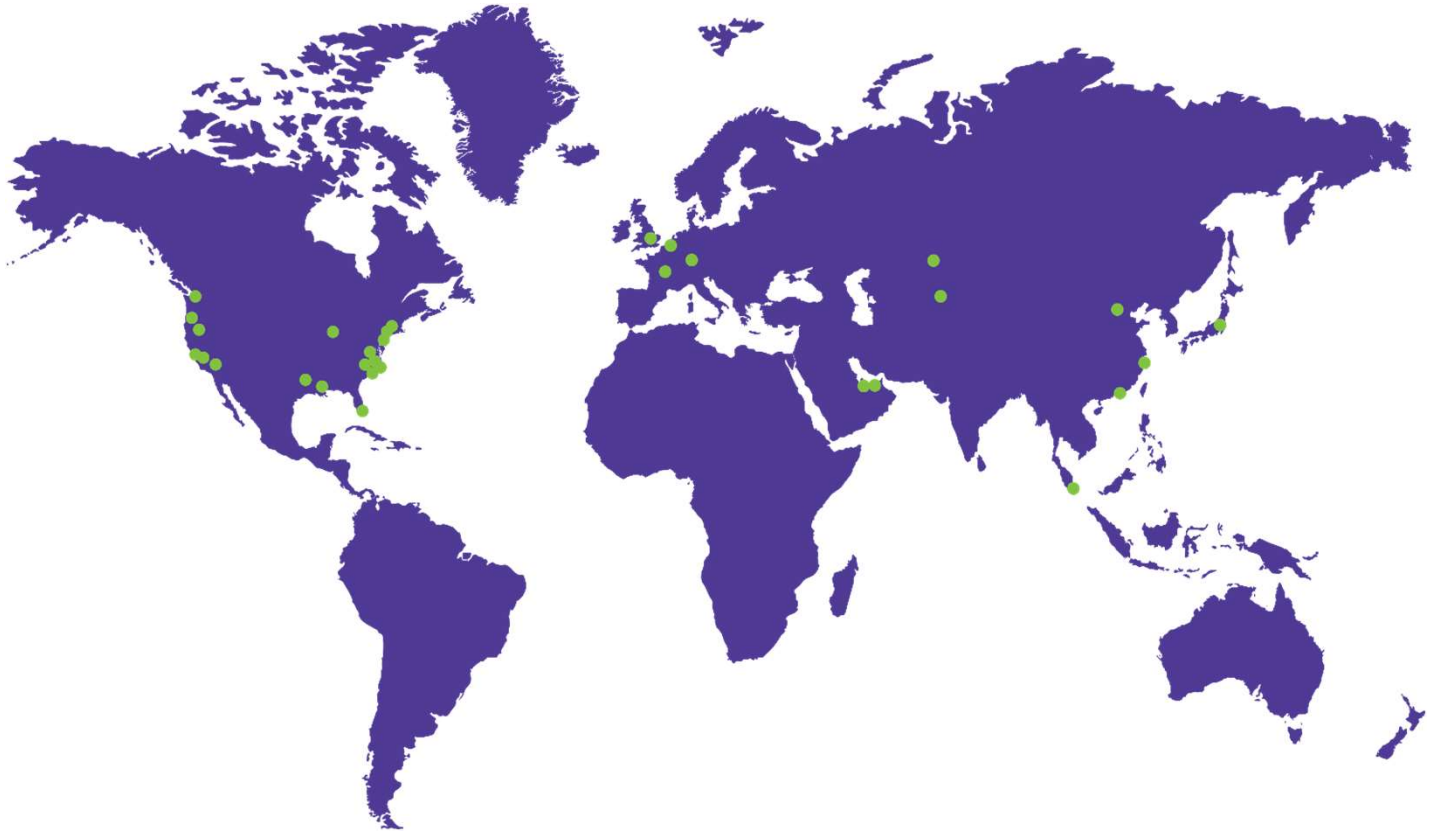

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THANK YOU