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SECURITIES AND FIDUCIARY DUTY CASES IN TEXAS

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This quarterly newsletter summarizes recent federal and state court decisions of interest to practitioners litigating securities and fiduciary duty claims in Texas. Decisions of note this quarter include:

- SEC Enforcement Actions – Federal courts in Texas continue to scrutinize the use of ALJs in agency enforcement actions. The Fifth Circuit denied en banc review of the decision in *Jarkesy* that (1) respondents in an SEC administrative enforcement proceeding were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II. In *Burgess v. FDIC*, Judge O'Connor held that FDIC ALJs are likely unconstitutionally insulated from removal, but plaintiff failed to show sufficient harm to warrant an injunction because he couldn't show that the President had sought to remove the ALJ who handled the case. Following *Jarkesy*, however, he found that plaintiff had been denied his Seventh Amendment right to a trial by jury. In *SEC v. Morris*, Judge Boyle approved an award of "legal" disgorgement in a recent enforcement action. And, in *SEC v. Offill, w*ith the SEC's consent, Magistrate Judge Ramirez granted the DOJ's motion to stay a civil SEC enforcement action pending the conclusion of a criminal case, over the objection of one of the defendants.

- Securities Fraud Class Actions – Applying the Supreme Court's decision in *Goldman Sachs*, Judge Eskridge certified a class in the *Anadarko* securities litigation. He found that Plaintiffs adequately demonstrated the price impact of the alleged misrepresentations and corrective disclosures. He also rejected Defendants' argument that Plaintiffs were pursuing a "materialization of risk" damages model, which the Fifth Circuit has found is insufficient to demonstrate reliance on a class-wide basis.

- Other Cases – In *Mogollon v. Bank of New York Mellon*, the Fifth Circuit found that claims arising from the Stanford Ponzi scheme asserted against a bank were not time barred because the applicable New Jersey discovery rule applied. The Court held that New Jersey law allows causes of action to accrue against different defendants at different times.

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When we started our quarterly reports, we hoped to fill a gap in regional reporting on securities fraud and breach of fiduciary duty cases in the Fifth Circuit and Texas. Given our experience litigating cases and defending enforcement actions throughout the United States, we knew that many large firms and other organizations regularly reported on national trends, so we chose not to duplicate their efforts. One of these organizations we had in mind was Cornerstone Research, which has been reporting on trends in securities fraud class actions and enforcement matters for decades. With gratitude for their continuing work, we share some highlights from their recent report on SEC enforcement activity from October 1, 2021 to September 30, 2022 (FY22).[1]

SEC Enforcement Trends – Fiscal Year 2022

During FY22, the SEC brought 760 enforcement actions (a 9% increase over FY21) and recovered a record $6.4B in penalties and disgorgement. These included 462 stand-alone actions, 129 actions against delinquent filers, and 169 "follow on" administrative proceedings seeking bars or suspensions based on convictions, civil injunctions, and other orders.[2] Focusing on the most frequent actions against public companies and their subsidiaries reveals the following breakdown:

- 38% alleged issuer reporting and disclosure violations (most common in 8 of last 10 years);
- 24% alleged violations by broker dealers;
- 15% alleged violation by investment advisers and investment companies;
- 9% involved alleged Foreign Corrupt Practices Act violations (a substantial decline from prior years); and
- 6% involved allegations about securities offerings.

The vast majority of actions against public companies and their subsidiaries (93%) were filed and settled concurrently, continuing the trend of prior years. We will see if the number of litigated cases increases in FY23 as the government focuses on individual accountability and deterrence through meaningful sanctions.[3]

The SEC considers four factors when negotiating settlements with cooperating defendants: self-policing, self-reporting, remediation, and cooperation. In its settled actions, the SEC noted cooperation by 63% of public company and subsidiary defendants in FY22; however, 97% of the settlements still involved a monetary payment (the highest percentage of any fiscal year since 2009).

The monetary settlements in FY22 actions brought against public companies and their subsidiaries reached $2.8 billion ($921MM more than FY21). This is consistent with the SEC's public statements that "robust remedies" are an enforcement priority, yet much of the increase is

[1] Cornerstone Research, SEC Enforcement Activity: Public Companies and Subsidiaries (FY2022 Update, Nov. 16, 2022), available at https://www.cornerstone.com/insights/press-releases/sec-ramps-up-enforcement-against-public-companies-and-subsidiaries-in-fy-2022/.

[2] SEC Announces Enforcement Results for FY22, Rel. 2022-206 (Nov. 15, 2022).

[3] *See* Memorandum from Deputy Attorney General Lisa Monaco, at 2-4, 10 (Sept. 15, 2022) (discussing individual accountability and deterrence); SEC Deputy Director of Enforcement, Sanjay Wadhwa, Remarks at SEC Speaks (Sept. 9, 2022) (same).

due to cases against broker dealers. In non-broker dealer actions, the average monetary settlement in non-broker dealer actions fell from $41MM in FY21 to $30MM in FY22.

Despite Congressional expansion of the SEC's ability to pursue disgorgement in civil actions by extending statute of limitations from 5 years to 10 years,[4] there was a decrease in disgorgement and prejudgment interest imposed in FY22. It decreased to $507MM – a decline from $839MM imposed in FY21 and an average of $925MM imposed from FY13-FY21.

And, despite legal challenges to the use of administrative law judges (see, e.g., the Fifth Circuit's recent ruling in the *Jarkesy* case, discussed below), the SEC continued to bring 88% of its actions as administrative proceedings. It is worth noting, however, that all the public company actions involving reporting and disclosure allegations were brought as civil actions (not administrative proceedings).

Case Summaries

I. FEDERAL CASES

A. Fifth Circuit

1. *Jarkesy v. SEC*, 51 F. 4th 644 (5th Cir. 2022)

As reported in our 2Q22 newsletter, the Fifth Circuit in *Jarkesy* held that "(1) [respondents in an SEC administrative enforcement proceeding] were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II." *Jarkesy v. SEC*, 34 F. 4th 446, 447 (5th Cir. 2022). In October 2022, the Fifth Circuit denied the SEC's petition for rehearing en banc and allowed that ruling to stand. The SEC is expected to file a certiorari petition with the U.S. Supreme Court.

2. *Mogollon v. Bank of New York Mellon*, 2022 WL 17716332 (5th Cir. 2022)

The Fifth Circuit resuscitated claims arising from the Stanford Ponzi scheme against Bank of New York Mellon (BNYM), which the district court had dismissed as time barred. The opinion focuses on the application of New Jersey's discovery rule, which the Court described as "a work in progress, oft requiring lawyers and judges to grapple with its application." *Id.* at *3. The district court concluded that Plaintiffs' lawsuit was not timely filed, and that the discovery rule did not apply or did not extend the limitations period long enough to make a difference. The Fifth Circuit disagreed, concluding that New Jersey law allows causes of action to accrue against different defendants at different times. Based on the Plaintiffs' allegation that they did not discover the factual allegations against BNYM until the summer of 2014, the Court ruled it was improper to dismiss the action at the pleading stage.

[4] *See* 15 U.S.C. § 78u(d) (7-8), Exchange Act § 21(d) (7-8) (applicable to actions pending on or commenced after Jan. 1, 2021).

Factual and Procedural Background

The case against BNYM arose out of the Stanford Ponzi scheme in which Allen Stanford and a network of entities sold certificates of deposit (CDs) to investors with the promise of extraordinarily high return rates. One of the Stanford entities had a securities agreement with Pershing LLC, a clearing agent and subsidiary of BNYM. Pershing was named a defendant in putative class action lawsuits as early as November 2009, and the Plaintiffs initiated a FINRA arbitration against Pershing. In the summer of 2014, Plaintiffs obtained documents in their Pershing arbitration that they claimed showed BNYM's complicity in the Stanford fraud.

Approximately five years after receiving the documents, on March 8, 2019, Plaintiffs filed this putative class action against BNYM for aiding and abetting fraud and breach of fiduciary duty. Plaintiffs alleged that BNYM was generally aware of Stanford's underlying fraud and had actual knowledge based on its due diligence. Plaintiffs' complaint quoted a February 3, 2009 email from a senior counsel in BNYM's legal department who stated:

> I met with the Independent Examiner this morning, and they had some follow up questions on the Stanford International Bank matter that was presented to [the sensitive issues oversight committee (SIOC)] last week. Basically, they are asking why the issue was not escalated to SIOC in January 2008 when Pershing first had concerns about a lack of transparency by Stanford. Also, they want to better understand what triggered our concerns in 2008. Finally, they asked whether any extra monitoring was being done on the questionable CD rates.

Plaintiffs further alleged that BNYM recruited investors for Stanford and that its substantial assistance gave a false sense of legitimacy to Stanford's illicit activities.

BNYM moved to dismiss the putative class action, arguing that the claims were barred by New Jersey's six-year statute of limitations. Plaintiffs agreed that New Jersey's limitations period applied but argued it was tolled by the discovery rule until the summer of 2014 when they first obtained the BNYM documents. The district court disagreed, concluding that Plaintiffs possessed – or reasonably should have possessed – facts alerting them to the existence of a financial injury caused by the unlawful conduct of *some third party* before March 2013 and did not file suit until more than six years later.

Fifth Circuit Analysis

The Fifth Circuit's *per curiam* opinion was not designated for publication, but it focuses on two issues with the district court's ruling.

First, the Court was concerned the district court may have misapplied New Jersey's discovery rule by applying the same limitations period to BNYM and Pershing. The Court identified a sub-category of New Jersey discovery-rule cases in which "a plaintiff knows she has been injured and knows the injury was the fault of another[] but does not know that an additional party was also responsible for her plight." *Id.* at *3. In those cases, according to the Fifth Circuit, the accrual clock does not begin ticking against the third party until the plaintiff has evidence that reveals the third party's possible complicity. *Id.*, at *4 (discussing New Jersey cases). In other

words, a cause of action may accrue against different defendants at different times: "To the extent that the district court was insinuating that the clock against BNYM began to run at the same time as the clock against Pershing, i.e., sometime in 2009, our reading of [New Jersey law] is not the same as the district court's …." *Id*. at *4.

Second, the Fifth Circuit concluded that the district court did not properly credit the Plaintiffs' allegations at the motion to dismiss stage. Specifically, Plaintiffs claimed they did not discover BNYM's complicity in the Ponzi scheme until the summer of 2014 when they received documents in the Pershing FINRA arbitration. The Court concluded the Plaintiffs' allegation about when they discovered facts was sufficient to avoid dismissal on limitations grounds but noted that "[o]ur holding in no way precludes an eventual finding by the district court that this action is time barred based on facts developed through discovery, via summary judgment or otherwise." *Id.* at *5.

B. District Courts

1. Securities Class Actions

(a) *In re Anadarko Petroleum Corporation*, 2022 WL 4544235 (S.D. Tex. Sept. 28, 2022) (Eskridge, J.)

Judge Eskridge granted Plaintiffs' motion for class certification in this securities fraud action against Anardarko and several of its executive officers.[5] Defendants argued common questions of fact or law did not predominate because (1) plaintiffs failed to establish reliance on the alleged misstatements; and (2) plaintiffs' damages theory was too vague to support its liability claims. The district court rejected both arguments and certified a class of common stock purchasers.

Allegations Relevant to Class Certification

The operative complaint alleged that Defendants misrepresented the viability and profitability of Anadarko's deepwater asset in the Shenandoah oil field and concealed negative information about the field from its business partners and investors. On May 2, 2017, after the stock market closed, Anardarko announced that it was suspending appraisal activity in the Shenandoah field, resulting in $435 million in suspended exploratory well costs and a $467 million impairment. Within the hour, news broke about Anadarko's involvement in a fatal explosion in Firestone, Colorado. The next day, Anadarko's stock price dropped almost eight percent.

Price Impact Evidence

Defendants did not challenge the prerequisites for certification under Rule 23(a) – numerosity, commonality, typicality, and adequacy – all of which the Court found were present. Rather, Defendants argued that Plaintiffs failed to satisfy Rule 23(b)(3)'s predominance

[5] We previously reported on this case when the district court (Atlas, J.) denied the defendants' motion to dismiss. *See* 1Q21 Newsletter, at 4-6. The case was reassigned to Judge Gilmore and then Judge Eskridge after Judge Atlas retired.

requirement because the evidence did not show any price impact on Anadarko stock when the alleged truth about the Shenandoah field was revealed after trading hours on May 2, 2017.

First, defendants noted that ConocoPhillips – Anadarko's development partner in the Shenandoah field – disclosed similar information about the field *before* the market opened on May 2, yet neither company's stock price declined during the trading day. The Court rejected this argument because the ConocoPhillips pre-trading day disclosure was quite limited compared to Anadarko's post-closing trading day disclosure. ConocoPhillips did not disclose the suspension of appraisal activity, did not write-down any assets, and did not disclose sidetrack well results.

Second, Defendants argued that ConocoPhillips stock did not decline after Anadarko's disclosures were made, despite ConocoPhillips' $101 million stake in the project. The Court was not persuaded by the comparison to ConocoPhillips because (1) the project was a minor expenditure compared to its massive market cap, and (2) its $101 million stake paled in comparison to Anadarko's $902 million stake. The Court also noted that other development partners in the Shenandoah field with high stake-to-market-cap ratios suffered major price drops on May 3.

Third, Defendants argued the potential $140 million in regulatory costs that Anadarko was expected to incur because of the Firestone explosion actually drove the drop in Anadarko's stock price. While the Court acknowledged the Firestone incident had some impact on price, it noted that Anadarko's price dropped 4.1% in after-hours trading *before* the Firestone news broke, which Plaintiffs' expert found to be statistically significant. Noting the Supreme Court's admonition in the *Goldman Sachs* case for courts to remain open to all probative evidence on the price impact issue and use their common sense, the Court stated: "Common sense suggests here that, when news broke on the same day of both *actual* $900 million write-off as well as *potential* $140 million in new regulatory costs, an eight percent decline in the company's stock price the following day isn't *solely* attributable to the latter, lesser regulatory costs." *Id.* at *6.

Plaintiffs' Damages Theory

In securities fraud class actions, Plaintiffs bear the burden of demonstrating that damages may be measured using a common methodology that is consistent with their theory of liability. *Id.* at *6 (citing *Comcast Corp. v. Behrend.*, 569 U.S. 27, 35 (2013)). Defendants first argued the *stock price inflation theory* presented by Plaintiffs' expert was "so vague and imprecise that it is impossible to assess whether Plaintiffs have presented a damages methodology consistent with their theory of liability." *Id.* at *7. The Court rejected this challenge based on the Fifth Circuit's approval of a "nearly identical damages theory" in *Ludlow v. BP PLC*. *Id.* at *7 (citing *Ludlow v. BP PLC*, 800 F.3d 674, 683 (5th Cir. 2015)).

Defendants next argued that Plaintiffs' damages theory was based on a "materialization of the risk model." Under this model, investors are harmed by corrective events that represent materializations of the risk that was improperly disclosed. The Fifth Circuit has rejected the materialization of risk model in class actions because it cannot "be applied uniformly across the class, as *Comcast* requires, because it lumps together those who would have bought stock at the heightened risk with those who would not have. It also presumes substantial reliance on factors other than price, a theory not supported by *Basic* and the rationale for the fraud-on-the-market theory." *Id.* at *7 (*quoting Ludlow*, 800 F.3d at 691).

The district court rejected the argument that Plaintiffs' damages theory was based on a materialization of the risk model. It ruled the Plaintiffs' theory was that certain risks had *in fact* materialized and Defendants misled investors about them. By contrast, the theory rejected by the Fifth Circuit in *Ludlow* was based on the allegation that defendants underrepresented an *unrealized* risk and left individual investors to rely on their own risk assessment.

The Court certified a class of Anardarko common stock purchasers for the period including February 20, 2015 to May 2, 2017.

2. SEC and Other Enforcement Actions

(a) *SEC v. Morris*, 2022 WL 9497046 (N.D. Tex. Oct. 14, 2022) (Boyle, J.)

The SEC sued an investment advisor, Oscar Morris, under the Investment Advisers Act of 1940 for misappropriating $65,000 in investment returns from one of its investors. Morris consented to entry of judgment, and the Court ordered "legal" disgorgement as authorized by the 2021 amendments to the remedial provisions of the securities laws that Congress passed in response to the limitations on equitable disgorgement announced by the Supreme Court in *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020). *See* 15 U.S.C. § 78u(d)(3) and (7). Applying *SEC v. Hallam*, 42 F.4th 316, 335 (5th Cir. 2022), Judge Boyle held that the statutory amendments apply retroactively to any action that is pending on the date of enactment.

The Court granted the parties' request that the disgorgement and prejudgment interest be deemed satisfied by the Defendants' post-suit arrangement with the investor to compensate him by providing warrants in another company owned by one of the Defendants. The Court declined to award additional civil penalties requested by the SEC because the conduct was isolated and not recurrent, Defendants had repaid the investor, and Morris filed for bankruptcy and suffered from various health issues.

(b) *Burgess v. FDIC*, 2022 WL 17173893 (N.D. Tex. Nov. 6, 2022) (O'Connor, J.)

Federal courts in Texas continue to scrutinize the use of ALJs in agency enforcement actions. The FDIC instituted an administrative enforcement action against former bank CEO Cornelius Burgess, asserting that he used bank funds to renovate his house by submitting false expense claims. The ALJ issued a recommended decision that Burgess be removed from his bank-related offices, be prohibited from further participation in the banking industry, and assessed a $200,000 penalty. Burgess sued the FDIC in federal district court to enjoin the administrative proceedings because: (1) the FDIC Board is unconstitutionally structured, (2) the ALJ's are unconstitutionally shielded from removal, and (3) he was deprived of his Seventh Amendment right to a jury trial.

As a threshold matter, Judge O'Connor found that the district court had jurisdiction to hear constitutional challenges to the FDIC proceedings. He held that 12 U.S.C. § 1818(i)(1)[6] does not divest the court of jurisdiction "to hear structural constitutional claims that are exogenous to the enforcement proceeding." 2022 WL 17173893, at * 4.[7]

Next, Judge O'Connor found that Burgess' claims regarding the FDIC Board and its ALJs raise unconstitutional removal provisions. However, the Court found that to obtain a remedy, "the challenging party must demonstrate not only that the removal restriction violates the Constitution, but also that 'the unconstitutional removal provision inflicted harm.'" 2022 WL 17173893, at * 9 (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1788–89, (2021)). There are "three requisites for proving a potentially unconstitutional removal provision caused harm: '(1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor.'" 2022 WL 17173893, at * 9 (quoting *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022)). Because Burgess could not show that the President wanted to remove any FDIC board members or the ALJ, the Court denied Burgess' claim regarding ALJs removability.[8]

Applying *Jarkesy*, however, Judge O'Connor held that Burgess was entitled to a jury trial under the Seventh Amendment because (1) claims for fiduciary duty exist under common law and, therefore, do not involve "public rights" and (2) requiring the FDIC to prosecute such claims before a jury would not "dismantle the statutory scheme or impede the swift resolution of the claims created by statute." 2022 WL 17173893, at * 10-11. The Court, therefore, enjoined the FDIC enforcement proceedings.

(c) *SEC v. Offill*, 2022 WL 17742624 (N.D. Tex. Dec. 16, 2022) (Ramirez, M.J.)

Magistrate Judge Ramirez granted the government's (DOJ's) motion to intervene and stay this SEC civil enforcement action. The motion to stay was opposed by one of the defendants, Phillip Offill, but not by the SEC or the other defendant (Justin Herman). While the Court's decision to grant the DOJ's motion is not surprising, the opinion provides a useful summary of reasons why civil proceedings are typically stayed until parallel criminal proceedings are resolved.

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[6] 12 U.S.C. § 1818(i)(1) provides: "[E]xcept as otherwise provided[,] ... no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order."

[7] A Missouri federal district court recently reached the opposite conclusion: "12 U.S.C. § 1818(i)(1) explicitly divests this Court of jurisdiction to grant the injunctive and declaratory relief sought." *Bonan v. FDIC*, No. 4:23CV8 HEA, 2023 WL 156852, at *3–4 (E.D. Mo. Jan. 11, 2023) (citing *Board of Governors v. MCorp Fin. Inc.*, 502 U.S. 32, 38 (1991) and rejecting *Burgess*).

[8] Interestingly, the Fifth Circuit in *Jarkesy* found that the SEC ALJ removal provisions were unconstitutional but did not address whether the Plaintiff had shown any harm sufficient to sustain the claim as required by *Collins*. Instead, the Court relied on Seventh Amendment and other grounds to vacate the SEC's decision, noting "we do not address whether vacating would be appropriate based on that defect alone." *Jarkesy v. SEC*, 34 F. 4th 446, 465-66 (5th Cir. 2022).

The SEC filed its civil action against Herman and Offill on January 19, 2022 and alleged that defendants orchestrated a fraudulent scheme to misappropriate and sell millions of shares in a penny-stock company called Mansfield-Martin Exploration Mining, Inc. (Mansfield). Defendants allegedly forged documents and entered sham transactions to give the appearance that the penny-stock transfers they directed were authorized and legitimate, even though the legal owner of the shares never authorized their sale or transfer.

On August 24, 2022, a Virginia federal grand jury returned a multiple count indictment charging Herman and Offill with securities fraud, conspiracy, and wire fraud. The indictment was based primarily on the same facts alleged in the SEC's civil complaint, but it also alleged other fraudulent conduct. On September 15, 2022, the DOJ moved to intervene and stay the SEC's civil action against the defendants until the criminal case was resolved.

DOJ Motion to Intervene

The Court granted the DOJ's unopposed motion to intervene as of right under Rule 24(a)(2). An applicant to intervene as of right must satisfy four requirements: (1) file a timely application; (2) claim an interest in the subject matter of the action; (3) show that disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) show that the applicant's interest will not be adequately represented by existing parties in the litigation. *Id.* at *2 (citing *Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 422 (5th Cir. 2002) (quoting *United States v. Franklin Parish Sch. Bd.*, 47 F.3d 755, 756 (5th Cir. 1995))). Finding the DOJ met those requirements, the Court granted the motion to intervene.

DOJ Motion to Stay

A civil action may be stayed during the pendency of a parallel criminal proceeding when "special circumstances" are present and there is a need to avoid "substantial and irreparable prejudice." *Id.* at *2 (citing *United States v. Little*, 712 F.2d 133, 136 (5th Cir. 1983)). The Fifth Circuit has instructed that "[j]udicial discretion and procedural flexibility should be utilized …. In some situations, it may be appropriate to stay the civil proceeding. In others it may be preferable for the civil suit to proceed unstayed." *Id.* (quoting *United States v. Gieger Transfer Serv., Inc.*, 174 F.R.D. 382, 385 (S.D. Miss. 1997) (quoting *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962))). When appropriate, courts may "narrow the range of discovery rather than staying the entire case." *Id.* (citing *Campbell*, 307 F.2d at 487).

In determining whether special circumstances warrant a stay, courts have considered six factors:

> (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest.

*Id. at *3* (quoting *Walker v. Witburn*, No. 3:12-CV-4896-D, 2015 WL 5873392, at *5 (N.D. Tex. Oct. 5, 2015) (citing cases)). The movant bears the burden to show that a stay is warranted.

The Court found the first two factors weighed in favor of a stay because the issues in the civil and criminal actions overlapped and the defendants were indicted based on the same conduct alleged in the civil action. The Court considered the third factor (SEC interest) and sixth factor (public interest) together and found they supported a stay because the SEC, which represents the public interest, had consented to the stay.

Turning to the fourth factor (defendants' interests and burden), the Court identified several reasons why it was in *all* Defendants' interests to stay the civil action. Absent a stay, Defendants would be forced into an unfair choice between asserting their Fifth Amendment privilege and fulfilling their legal obligation as witnesses. By contrast, if a stay were imposed, defendants could avoid exposing their criminal defense to prosecutors before the criminal trial. Defendants would also be relieved of the burden of defending against civil and criminal proceedings simultaneously.

Defendant Offill argued that abating discovery in the civil action would provide an "unnecessary and improper advantage" to the civil plaintiff. He claimed that while the SEC would be able to work in tandem with the DOJ to conduct discovery for use in both civil and criminal proceedings, he would be prohibited from conducting any investigation. The Court rejected that argument, noting that Offill failed to explain how he would be harmed. "Even if the Government coordinates and shares information with the SEC during the criminal case, Offill, unlike the SEC, is a party in the criminal case and has direct access to the discovery materials produced in that case." *Id.* at *4 (citing *SEC v. Mutuals.com, Inc.*, 2004 WL 1629929, at *4 (N.D. Tex. July 20, 2004) (noting how the stay would only marginally impede defendants' ability to gather the facts of the transactions because the government would provide them to the criminal defendants).

Finally, the Court considered the fifth factor (interests of the Court). Noting that courts favor moving matters expeditiously, it nonetheless concluded that judicial economy favored a stay. Resolution of the criminal case could increase the prospects for a civil settlement, and the outcome of the criminal action could have a collateral estoppel or res judicata effect on the civil claims.

Since all the factors weighed in favor of a stay, the Court granted the DOJ's motion and stayed the civil action until the resolution of the parallel criminal matter.

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